

Note

The Executive Reports, We Decide: The Constitutionality of an Executive Branch Question and Report Period

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The attacks of September 11, 2001 exposed arguably the largest intelligence failure in U.S. history. Mere weeks after the rubble stopped smoldering—and before Americans had an opportunity to ask their leaders questions about that day—Congress enacted, and the President authorized, military action¹ and sweeping changes in the nation’s surveillance and anti-terrorism laws.² In September 2002, after nearly a year of opposition, President Bush reluctantly signed legislation authorizing an independent investigation of the attacks.³ President Bush’s signature charged the National Commission on Terrorist Attacks upon the United States (9/11 Commission) with answering some of the basic questions about the events preceding the attacks.⁴ But despite a sweeping legislative mandate⁵ and assurances of “unprecedented”⁶ cooperation from the

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1. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

3. David Firestone & James Risen, *White House, in Shift, Backs Inquiry on 9/11*, N.Y. TIMES, Sept. 21, 2002, at A1.

4. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, tit. VI, § 602, 116 Stat. 2383, 2408 (2002) (describing the purposes of the 9/11 Commission).

5. Congress empowered the 9/11 Commission to:
[I]nvestigate[] relevant facts and circumstances relating to the terrorist attacks of September 11, 2001, including any relevant legislation,

executive branch, Congress would not be able to ask the President directly and publicly about the events leading up to September 11.⁷ After initially refusing,⁸ President Bush eventually acceded to the 9/11 Commission's request for an interview—but not without conditions. The meeting was to last no longer than three hours, include Vice President Cheney, and neither the President nor the Vice President would take an oath.⁹ Perhaps more ominous for advocates of greater government transparency, the meeting would take place behind the closed doors of the Oval Office and no formal record would memorialize the proceedings.¹⁰

The events of September 11, 2001 exposed the failures of not only the U.S. intelligence apparatus, but also of the institutional mechanisms meant to ensure government transparency and accountability. The President's initial refusal and subse-

Executive order, regulation, plan, policy, practice, or procedure . . . [and to] identify, review, and evaluate the lessons learned from the terrorist attacks of September 11, 2001, regarding the structure, coordination, management policies, and procedures of the Federal Government, and, if appropriate, State and local governments and non-governmental entities, relative to detecting, preventing, and responding to such terrorist attacks.

Id. § 604, 116 Stat. at 2409–10.

6. Letter from Alberto R. Gonzales, Counsel to the President, to Thomas H. Kean, Chairman, 9/11 Comm'n, and Lee H. Hamilton, Vice Chairman, 9/11 Comm'n (Mar. 30, 2004) [hereinafter Letter from Alberto R. Gonzales], *available at* <http://www.whitehouse.gov/news/releases/2004/03/print/20040330-3.html>.

7. It is not unprecedented for a President to appear before Congress. Presidents Lincoln and Ford voluntarily appeared to discuss the loyalty of Mary Todd's brothers and the pardon of President Nixon, respectively. Benton Becker, *The History of the Nixon Pardon*, 30 CUMB. L. REV. 31, 46 (2000). Nor is it unprecedented for a President to appear before an independent commission. See PRESIDENT'S SPECIAL REVIEW BD., REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD IV-12 to IV-13 (1987) (President Reagan); Tim Harper, "We Answered All Their Questions"; *Bush and Cheney Testify About 9/11 but No Recording Kept*, TORONTO STAR, Apr. 30, 2004, at A1 (President George W. Bush).

8. Philip Shenon, *9/11 Panel to Seek Testimony from Bush*, N.Y. TIMES, Feb. 13, 2004, at A28 (noting that President Bush, when asked if he would submit to questioning, responded "[p]erhaps, perhaps").

9. Brian Knowlton, *In Rare Step, Bush Goes to 9/11 Panel*, INT'L HERALD TRIB. (Paris), Apr. 30, 2004, at 1; *see also* Harper, *supra* note 7.

10. Knowlton, *supra* note 9. Although public, National Security Advisor Condoleezza Rice's testimony before the Commission contained similar restrictions. The White House required the Commission to agree that Ms. Rice's testimony would not set precedent for future testimony of executive officials and that the Commission would not request further public testimony from any White House official. *See* Letter from Alberto R. Gonzales, *supra* note 6.

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quent qualified acquiescence to the 9/11 Commission demonstrates the need for a congressional oversight mechanism milder than the subpoena, but with more force than the present congressional “invitation” to executive officials. This Note analyzes the constitutionality of a procedure used in many foreign parliamentary systems: the executive branch question and report period. Part I briefly describes the question and report period in foreign parliamentary systems and reviews previous efforts in the United States to mandate such a system. Part II describes the possible constitutional sources for a question and report period, and identifies the most likely arguments against it: separation of powers and executive privilege. Part III analyzes how Congress could devise a question and report period that is grounded in the Constitution and that avoids relevant countervailing considerations. Part IV broadly outlines the constitutionally permissible characteristics of a question and report period involving the President and Cabinet officials. Finally, this Note concludes by calling for Congress to enact an executive branch question and report period to increase government accountability, and in so doing, to help restore Congress’s status as “first among equals”¹¹ in the U.S. constitutional structure.

I. A BRIEF HISTORY OF QUESTION AND REPORT PERIODS

A. QUESTION AND REPORT PERIODS ABROAD

Virtually all parliamentary systems provide a method for Members of Parliament (MPs) to question the Prime Minister and cabinet officials, either in oral or written form.¹² Although no two parliamentary systems are identical,¹³ the most recognizable (and widely emulated) question and report period is the British House of Commons’ “Prime Minister’s Questions” and

11. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 110–11 (2005).

12. See Matti Wiberg, *Parliamentary Questioning: Control by Communication?*, in *PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE* 179, 180 (Herbert Döring ed., 1995) (“Questions to ministers as a means of eliciting information about matters within their official responsibility is a common practice in all parliaments, and one of the celebrated functions of parliament.”).

13. *Id.* at 184 (“[N]o two [of the eighteen parliaments studied possessed] exactly identical questioning forms.”).

“Question Time.”¹⁴ First developed in the late eighteenth or early nineteenth century,¹⁵ the British practice has evolved only procedurally in the last half century.¹⁶

The principal distinctions between Question Time and Prime Minister’s Questions are the frequency of questioning periods and the individuals who are asked the questions. In Question Time, MPs propound oral or written questions on each of the first four days of the week at designated times.¹⁷ In a typical Question Time, the minister of each department is obliged to come to Parliament and be available to answer MP’s questions for a fixed period—typically thirty to seventy minutes.¹⁸ Oral questions may be answered directly or not at all; written questions are answered—if at all—by way of publication in Hansard.¹⁹ Prime Minister’s Questions—as the name suggests—permits MPs to question the Prime Minister directly. As the Prime Minister does not receive the questions in advance and is available for at least thirty minutes, this event is often viewed as the highlight of the parliamentary week.²⁰ In both Prime Minister’s Questions and Question Time, the

14. GEOFFREY SMITH & NELSON W. POLSBY, *BRITISH GOVERNMENT AND ITS DISCONTENTS* 126 (1981) (“[A]mong the few things that most foreigners know about the parliamentary system is that there is a question hour.”). The regular broadcast of Prime Minister’s Questions on C-SPAN in the United States is one example of this recognition.

15. PATRICK HOWARTH, *QUESTIONS IN THE HOUSE* 56 (1956) (placing the accidental genesis of Question Time at November 28, 1803); Philip Norton, *Introduction: Parliament Since 1960*, in *PARLIAMENTARY QUESTIONS* 1, 2 (Mark Franklin & Philip Norton eds., 1993) (asserting that “Question Time in the House dates back . . . to shortly before the nineteenth century”).

16. See U.K. HOUSE OF COMMONS INFO. OFFICE, *PARLIAMENTARY QUESTIONS FACTSHEET P1*, at 3 (2005), available at <http://www.parliament.uk/documents/upload/p01.pdf>. For a brief summary of these changes during the period 1832 through 1990, see Helen Irwin et al., *Evolving Rules*, in *PARLIAMENTARY QUESTIONS*, *supra* note 15, at 23, 24–27.

17. See R.L. Borthwick, *On the Floor of the House*, in *PARLIAMENTARY QUESTIONS*, *supra* note 15, at 73, 75; *STANDING ORDERS OF THE HOUSE OF COMMONS*, RULE 21 (2002), available at <http://www.publications.parliament.uk/pa/cm200102/cmstords/27508.htm>;

18. Borthwick, *supra* note 17, at 86.

19. See Irwin et al., *supra* note 16, at 30–31. Hansard is the traditional name for the transcripts of debate in parliamentary systems. See *ERSKINE MAY’S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGE OF PARLIAMENT* 210 (C.J. Boulton et al. eds., 21st ed. 1989) It is roughly equivalent to the Congressional Record in the United States. J.A. Weir, *Human Rights and Damages*, 40 *WASHBURN L.J.* 412, 419 (2001).

20. BBC.com, Prime Minister’s Questions, http://news.bbc.co.uk/2/hi/uk_news/politics/82556.stm (last visited Mar. 7, 2007).

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Speaker of Parliament enforces time limits and the number and propriety of questions.²¹

In both Prime Minister's Questions and Question Time, the allowable subject matter of the questions is broad, but not unlimited.²² In most European parliaments, "the question must fall under the responsibilities of the government or some of its ministers."²³ In the Canadian Parliament, questions are in order as long as they are: "[1] in fact, questions . . . , [2] asked about something for which the minister is responsible and answerable, and [3] in parliamentary language."²⁴ Answers by the minister are acceptable as long as they "are relevant, in order, and in parliamentary language."²⁵ A minister has the option of refusing to reply to a question,²⁶ as there is no formal sanction for refusing to answer.²⁷ However, refusing to answer a question may generate political repercussions.²⁸

B. PROPOSED QUESTION AND REPORT PERIODS IN THE UNITED STATES

Despite its European pedigree and the inherent differences between parliamentary and presidential systems, an executive branch question and report period is not a wholly foreign concept in the United States. Not long after the practice developed in England, Justice Story recognized the viability of allowing the "heads of departments . . . a seat . . . in the House of Representatives, where they might freely debate without a title to vote."²⁹ As early as 1864, a select committee of the House of

21. Borthwick, *supra* note 17, at 75; Wiberg, *supra* note 12, at 204–05.

22. For a comprehensive digest of limitations on parliamentary questions in the British Parliament, see generally ERSKINE MAY'S TREATISE ON THE LAW, *supra* note 19, at 287–94.

23. Wiberg, *supra* note 12, at 204.

24. C.E.S. Franks, *The "Problem" of Debate and Question Period, in THE CANADIAN HOUSE OF COMMONS: ESSAYS IN HONOUR OF NORMAN WARD* 1, 3 (John C. Courtney ed., 1985); see also Wiberg, *supra* note 12, at 205 (noting only three questions have been denied in Iceland's parliament since World War II).

25. Franks, *supra* note 24, at 3.

26. *Id.*

27. *Cf. id.* (noting that a minister can choose to "sit and ignore the question"); Wiberg, *supra* note 12, at 199 (noting that a minister may decide not to answer, although this happens rarely).

28. Wiberg, *supra* note 12, at 199 ("It is politically intolerable to refuse to answer.").

29. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 869, at 605 (3d ed. Boston, Little Brown & Co. 1858) (1833);

Representatives recommended that cabinet officers be granted the right to answer questions and participate in floor debates.³⁰ In 1881, a select committee of the Senate recommended a similar question and report period with cabinet officials.³¹ Over the next sixty years, Presidents Wilson and Taft each advocated some form of question and report period.³²

Of these proposals, President (and later Chief Justice) Taft's was perhaps the most noteworthy. Taft's proposal was unique because it was the only proposal made by a sitting President, and because Taft extended the invitation in his 1912 State of the Union message.³³ Taft advocated that "members of the President's cabinet, should be given access to the floor of each House to introduce measures, to advocate their passage, to answer questions, and to enter into the debate as if they were members."³⁴ All of these measures could be accomplished, Taft opined, "[w]ithout any change in the Constitution."³⁵

Although Congress declined to take up Taft's offer, the idea of a question and report period resurfaced later in the twentieth century. Senator Estes Kefauver of Tennessee introduced a proposal in the 1940s which was also not adopted.³⁶ Thirty years later, the concept received renewed support in response to executive abuses and legislative branch failures related to Watergate and the Vietnam War.³⁷ Minnesota Senator Walter Mondale's 1973 bill, which would have required "heads of executive departments and agencies" to answer questions before

see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 296 (1957) ("[F]ar from raising any constitutional difficulties, [a cabinet official question and report period] has the countenance of early practice under the Constitution.").

30. H.R. REP. NO. 38-214, at 1-7 (1864).

31. S. REP. NO. 46-837, at 1-8 (1881).

32. WILLIAM H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 31 (1938); WOODROW WILSON, *COMMITTEE OR CABINET GOVERNMENT?* (1884), reprinted in 2 *THE PAPERS OF WOODROW WILSON* 614, 634 (Arthur S. Link ed., 1967).

33. President William H. Taft, Fourth Annual Message (Dec. 3, 1912), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29553>.

34. TAFT, *supra* note 32, at 31 (emphasis added).

35. *Id.*

36. ESTES KEFAUVER & JACK LEVIN, *A TWENTIETH-CENTURY CONGRESS* 70-79 (1947).

37. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 390-92 (1973).

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the Senate,³⁸ was the latest in a long line of proposals for a question and report period in the United States.

II. CONSTITUTIONAL SOURCES AND LIMITS FOR A QUESTION AND REPORT PERIOD

Several constitutional provisions are relevant to a question and report period in the United States. The Necessary and Proper Clause and the State of the Union Clause independently demonstrate the Framers' intent to establish legislative primacy and to create mechanisms for executive accountability. However, the separation of powers and executive privilege doctrines are countervailing constitutional principles that potentially restrict the ability of the legislature to obtain information from the executive branch.

A. THE NECESSARY AND PROPER CLAUSE

The Constitution's Necessary and Proper Clause empowers Congress "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."³⁹ While courts have interpreted the clause to provide Congress with the authority for investigation and oversight of the executive branch,⁴⁰ the Constitution does not expressly authorize a question and report period. Thus, the power to mandate such a requirement hinges on the construction of the words "necessary and proper."

1. Legislative Power Under the Necessary and Proper Clause

Despite creating a government of enumerated powers,⁴¹ the Framers acknowledged the existence of a corpus of related powers beyond the literal text of the Constitution.⁴² However,

38. S. Res. 123, 93rd Cong. (1973).

39. U.S. CONST. art. I, § 8, cl. 18.

40. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *Watkins v. United States*, 354 U.S. 178, 197 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

41. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824) (“[E]numeration presupposes something not enumerated.”).

42. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (noting the Necessary and Proper Clause “empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation”); J. Randy Beck, *The New Jurisprudence of the Necessary*

the Framers rejected the notion that the clause creates a residuum of power unrelated to the enumerated powers.⁴³ Rather, its primary purpose was more limited—to facilitate the exercise of the enumerated powers.⁴⁴ Although these enabling powers remain dormant until Congress needs (and justifies) them, the clause presciently reflects that Congress may need to exercise the enumerated powers in new and unforeseen ways.⁴⁵

While the Framers agreed that the clause confers *some* power, its scope and content was more contentious.⁴⁶ The Supreme Court long ago set out the basic structure for animating and defining these powers. In *McCulloch v. Maryland*, the Court sanctioned the creation of a national bank despite the lack of an explicit authorization among Congress's enumerated Article I powers.⁴⁷ In determining whether the Constitution conveyed such authority, Chief Justice Marshall proffered the following ends/means test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁴⁸ Because the national bank at issue in *McCulloch* facilitated the exercise of other critical legis-

and Proper Clause, 2002 U. ILL. L. REV. 581, 587 ("The Necessary and Proper Clause plainly affirmed that Congress possesses some powers not spelled out in the text of the Constitution.").

43. See, e.g., THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded."); *id.* at 205 ("[W]hy then was [the Necessary and Proper Clause] introduced? The answer is, that it could only have been done for greater caution.").

44. See *Raich*, 545 U.S. at 36 (Scalia, J., concurring) ("[W]here Congress has the authority to enact a regulation, it possesses every power needed to make that regulation effective." (quoting *United States v. Wrightwood Dairy*, 315 U.S. 110, 118–19 (1942))); THE FEDERALIST NO. 44 (James Madison), *supra* note 43, at 304–05 ("[W]herever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.").

45. See THE FEDERALIST NO. 44 (James Madison), *supra* note 43, at 304–05 (describing the "chimerical" task of a complete digest of "laws on every subject to which the Constitution relates; accommodat[ing] . . . not only . . . the existing state of things, but to all the possible changes which futurity may produce").

46. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 188 (2003) (describing competing understandings of the clause among the Framers).

47. 17 U.S. (4 Wheat.) 316, 424 (1819).

48. *Id.* at 421.

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lative powers, the Court upheld its creation under the clause.⁴⁹

Since Chief Justice Marshall's construction in *McCulloch*, the Necessary and Proper Clause has been used to justify numerous legislative enactments.⁵⁰ The Supreme Court has relied on the clause to uphold legislation involving government taking of private property,⁵¹ regulation of commerce,⁵² oversight of public funds,⁵³ procedure of the federal courts,⁵⁴ and use of the contempt power to investigate executive branch conduct.⁵⁵ In spite of some opposition,⁵⁶ the Supreme Court has recently affirmed both the foundational understanding of the clause as fa-

49. *Id.* at 422–24.

50. See AMAR, *supra* note 11, at 362 (noting that during the antebellum period “no Court opinion [with the exception of *Dred Scott*] had ever held that a congressional statute flunked *McCulloch*’s deferential test of congressional power”); Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1378 (1983) (“Since the time of *McCulloch v. Maryland*, it has been clear that the Clause presents no formidable barriers to legislative activity.”).

51. See, e.g., *Kohl v. United States*, 91 U.S. 367, 371–72 (1876) (recognizing the federal government’s power under the Necessary and Proper Clause to take property “needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses”).

52. See, e.g., *Houston, E.&W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 353 (1914) (“[Congress] possess[es] the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.”); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838) (“Any offence which . . . interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers.”).

53. See, e.g., *Sabri v. United States*, 541 U.S. 600, 605 (2004) (“Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare . . . and it has corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare.”).

54. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (holding that 28 U.S.C. § 1404(a), the federal venue statute, falls “comfortably within Congress’ powers under Article III as augmented by the Necessary and Proper Clause”).

55. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

56. See, e.g., *Sabri*, 541 U.S. at 610 (Thomas, J., dissenting) (“I find questionable the scope the Court gives to the Necessary and Proper Clause as applied to Congress’ authority to spend. In particular, the Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a ‘rational means’ to effectuate one of Congress’ enumerated powers.”).

cilitative (i.e., that non-enumerated powers exist, but those powers must be bound up with an enumerated power) and the clause's viability as a source of legislative authority.⁵⁷ These decisions have not only broadly construed Congress's own powers but also have "made explicit what otherwise might have been a disputable reading of the [Constitution's] organizing schema: Congress stood first among equals, with wide power to structure the second-mentioned executive and third-mentioned judicial branches."⁵⁸

While some have viewed the terms "necessary" and "proper" as synonymous,⁵⁹ most scholars argue that each term provides a distinct limitation on legislative authority.⁶⁰ Marshall's interpretation of "necessary" has "never been taken to require 'absolute necessity'; some sort of reasonable relationship between ends and means has been sufficient."⁶¹ On the other hand, a law is "proper" so long as it does not violate some other constitutional mandate.⁶² For example, a law is not proper for carrying into execution the Commerce Clause when it violates the constitutional principle of state sovereignty.⁶³

57. See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) ("[W]hen it enacted [the Controlled Substances Act], Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'").

58. AMAR, *supra* note 11, at 110–11; see also THE FEDERALIST NO. 51 (James Madison), *supra* note 43, at 350 ("In a republican government, the legislative authority, necessarily, predominates.").

59. See, e.g., JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 73 n.23 (1956) ("[O]nly one of the Federalists made any reference to the word 'proper' from the necessary and proper clause. They seemed to assume that anything was proper which they deemed necessary.").

60. See, e.g., Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145, 163–64 (Neil L. York ed., 1988) ("[L]aws passed by Congress must be both instrumentally useful in pursuing one of Congress's delegated powers (necessary) and consistent with traditionally recognized principles of individual right (proper)."); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 275 (1993) ("The [Necessary and Proper Clause] specifies that any laws enacted under its authority must be *both* necessary *and* proper—in the conjunctive.").

61. Carter, *supra* note 50, at 1378.

62. See Lawson & Granger, *supra* note 60, at 297 ("[U]nder a jurisdictional construction of the Sweeping Clause, executive laws must be consistent with principles of separation of powers, principles of federalism, and individual rights."); cf. Beck, *supra* note 42, at 639 (describing the "conceptual and practical difficulties" with Lawson and Granger's propriety requirement).

63. See *Printz v. United States*, 521 U.S. 898, 923–24 (1997); *New York v.*

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Marshall's test reveals that Congress would possess "all powers expressly listed in [the Constitution] and also anything that followed by fair, commonsensical implication."⁶⁴ The constitutional validity of a power claimed under the Necessary and Proper Clause depends, therefore, on whether that power is an appropriate means to exercise a legitimate end.⁶⁵

2. The Necessary and Proper Clause and Investigatory Power

Absent impeachment,⁶⁶ the Constitution does not expressly authorize Congress to investigate the President, the executive branch, or the administrative bureaucracy.⁶⁷ This omission is surprising given the importance of the inquiry power in the British Parliament and the colonial legislatures.⁶⁸ Nonetheless, after ratification of the Constitution, Congress quickly seized the opportunity to inquire into executive branch conduct as a necessary component of its legislative function.

In creating the Treasury Department, the first Congress required the Secretary of the Treasury to "report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, *or which shall appertain to his office.*"⁶⁹ The records of that first Congress are also filled with examples of questions directed at (and answered by) executive officials.⁷⁰ In 1792, the House of Repre-

United States, 505 U.S. 144, 166 (1992).

64. AMAR, *supra* note 11, at 110.

65. See *United States v. Harris*, 106 U.S. 629, 636 (1882) ("Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.") (quoting 2 STORY, *supra* note 29, § 1243, at 136)).

66. See U.S. CONST. art. II, § 4.

67. Cf. *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("[Congress has] no general authority to expose the private affairs of individuals without justification No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.").

68. See RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 15–34 (1974) (noting the importance of inquiry power in British practice and colonial legislatures); James Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159–68 (1926) (same).

69. An Act to Establish the Treasury Department, 1 Stat. 65, 66 (1789) (emphasis added).

70. See, e.g., 1 ANNALS OF CONG. 51 (Joseph Gales ed., 1834) ("The Secretary of Foreign Affairs [Thomas Jefferson] attended, agreeably to order, and

sentatives initiated the first congressional investigation of executive branch conduct.⁷¹ After the country lost hundreds of soldiers in a disastrous military campaign, the House established a committee to investigate the conduct of the executive branch official in charge of the expedition.⁷² The House authorized the committee to “call for such persons, papers, and records, as may be necessary to assist their inquiries.”⁷³ Two years later, the Senate directed President Washington “to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France and said Republic, and between said Minister and the office of Secretary of State.”⁷⁴

A half-century later, Congress described its authority to investigate the executive branch as “not merely an accidental right, *but an original one*, inherent in it, and not an incident of some particular duty.”⁷⁵ These investigations show the early understanding that Congress possessed broad investigatory powers. Notwithstanding Congress’s own view on the matter, the Supreme Court has independently affirmed the legitimacy of congressional investigation generally⁷⁶ and investigation of the executive branch specifically.⁷⁷

Judicial recognition of the power to investigate followed from these early parliamentary,⁷⁸ colonial assembly,⁷⁹ and con-

made the necessary explanations”); *id.* at 66 (“The President of the United States came into the Senate Chamber, attended by General Knox [the Secretary of War], and laid before the Senate the following statement of facts, with the questions thereto annexed, for their advice and consent”).

71. 3 ANNALS OF CONG. 493–94 (1792); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 13–29 (1955); George B. Galloway, *The Investigative Function of Congress*, 21 AM. POL. SCI. REV. 47, 56 (1927).

72. 3 ANNALS OF CONG. 493 (1792).

73. *Id.*

74. 4 ANNALS OF CONG. 38 (1794).

75. H.R. REP. NO. 27-271, at 13 (1843) (emphasis added).

76. *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (describing Congress’s investigatory function as “incidental to the legislative function”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“The power to investigate . . . plainly falls within [the legitimate legislative sphere]”); *Watkins v. United States*, 354 U.S. 178, 197 (1957) (“[A]n investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process.”).

77. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) (approving a congressional inquiry into alleged executive branch malfeasance related to the Teapot Dome scandal because the power to “secure needed information . . . has long been treated as an attribute of the power to legislate”).

78. *Id.* (describing the inquiry power as “an attribute of the power to legis-

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gressional practices.⁸⁰ The Supreme Court has described the scope of this inherent investigatory power as “broad”⁸¹ and “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁸² In other words, Congress’s ability to inquire is limited only by the need to “be related to, and in furtherance of, a legitimate task of Congress.”⁸³ To that end, Congress may conduct inquiries concerning “the administration of existing laws as well as proposed or possibly needed statutes. [Congress’s investigatory power] *includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.*”⁸⁴ Investigation, inquiry, and oversight are all intimately related to these purposes.⁸⁵

B. THE STATE OF THE UNION CLAUSE

Article II’s State of the Union Clause provides additional authority for a question and report period. The State of the Union Clause directs the President to “from time to time give to the Congress information of the state of the union.”⁸⁶ The Supreme Court has never construed the meaning of the State of the Union Clause, and only one federal court has cited the clause in a published opinion.⁸⁷

late” because “[i]t was so regarded in the British Parliament”).

79. *Id.* at 174 (noting that this power was “employed in American legislatures before the Constitution was framed and ratified”).

80. *Id.* at 161–68.

81. *Watkins*, 354 U.S. at 187.

82. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also* William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 798 (“Congress’s power to investigate the President . . . was to be vital and expansive.”).

83. *Watkins*, 354 U.S. at 187; *cf. Barenblatt*, 360 U.S. at 111–12 (“Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the government.”).

84. *Watkins*, 354 U.S. at 187 (emphasis added).

85. AMAR, *supra* note 11, at 112 (“Though Article I did not explicitly enumerate the point, [the Necessary and Proper Clause] . . . gave each house of Congress broad powers of investigation and oversight . . . that were necessary and proper adjuncts to Congress’s enumerated powers to enact legislation, appropriate funds, conduct impeachments, and propose constitutional amendments.”).

86. U.S. CONST. art. II, § 3.

87. *See* *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 50 n.15 (D.D.C. 2002), *vacated and remanded on other grounds sub nom. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004).

The dearth of judicial authority is mirrored in the legal scholarship. Other than the acknowledgement that the State of the Union Clause derives, in large part, from the “royal act of communicating with [the British] parliament,”⁸⁸ the clause is “embarrassingly underexamined.”⁸⁹ Vasán Kesavan and J. Gregory Sidak argue that the clause supports an early understanding of the President as the nation’s chief lawmaker.⁹⁰ Professor Steven Calabresi and Kevin Rhodes argue that the clause does not impede the unitary executive theory of Article II power.⁹¹ In 1974, Professor Raoul Berger described the President’s obligations under the clause as “an unqualified duty to inform Congress as to matters within the Executive Department.”⁹² While that view may stretch the clause to its outer limits,⁹³ the clause serves the broader purpose of communication through at least three distinct functions. First, it recognizes that the President (and executive branch officials) would likely have superior access to information critical for legislative policy making.⁹⁴ Second, it encourages dialogue between the executive and legislative branches by mandating communica-

88. C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY 158 (2d ed. New York, MacMillan & Co. 1894); *see also* Vasán Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 15 (2002) (recognizing the State of the Union Clause was “drafted against the backdrop of the British practice whereby the Monarch would open each session of Parliament with a ‘Speech from the Throne’”).

89. Kesavan & Sidak, *supra* note 88, at 5.

90. *Id.* at 3.

91. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1207 n.262 (1992).

92. BERGER, *supra* note 68, at 37.

93. Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 555 (2000) (“In practice, presidents have used the State of the Union address to present information that they wanted to reveal to Congress, not information that Congress compelled them to present.”); *see also* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 658 (1996) (describing the State of the Union Clause as “exemplify[ing] a meeting of equals, somewhere between a Presidential right and a Presidential duty”).

94. *See* *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 50 n.15 (D.D.C. 2002) (noting the State of the Union Clause “presupposes superior or at least different access to information than the legislative branch”), *vacated and remanded on other grounds sub nom. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004).

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tion “from time to time.”⁹⁵ Finally, the clause underscores the importance of transparency in a liberal democracy.⁹⁶

Historically, the degree of inter-branch dialogue has been mixed. While every President has complied with the minimum requirements of the State of the Union Clause,⁹⁷ some have engaged Congress more than others. The earliest practice involved an in-person, annual speech to Congress.⁹⁸ But beginning with Thomas Jefferson’s presidency, compliance with the clause took the form of a written declaration, a form which continued for the next 112 years.⁹⁹ In 1913, Woodrow Wilson renewed the practice of delivering the message in person by addressed a joint session of Congress.¹⁰⁰ The modern practice is a scripted, annual speech before a joint session of Congress that outlines the President’s agenda for the coming year.¹⁰¹

C. THE SEPARATION OF POWERS DOCTRINE

Congressional query of executive branch officials unavoidably implicates the doctrine of separation of powers. To ensure the United States would remain a “government of laws and not of men,”¹⁰² the Constitution “create[d] three distinct and separate departments—the legislative, the executive, and the judicial.”¹⁰³ The separation of these departments was “not merely a matter of convenience or of governmental mechanism.”¹⁰⁴ Rather, the doctrine’s central purpose was to “preclude a com-

95. U.S. CONST. art. II, § 3; see also 1 STORY, *supra* note 29, § 869, at 604–05; Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 104 (1994); Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1340 (1999).

96. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1371 n.100 (2001) (observing that the State of the Union Clause was one of several “good government” provisions promoting “transparency by requiring the President to report on the State of the Union”).

97. The White House, *From Time to Time: History of the State of the Union*, <http://www.whitehouse.gov/stateoftheunion/2005/history.html> (last visited Mar. 7, 2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*; see also Gerhard Peters, *The Am. Presidency Project, State of the Union Messages*, <http://www.presidency.ucsb.edu/sou.php> (last visited Mar. 7, 2007).

102. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (describing the origin of the phrase in the American colonies and its role in separation of powers).

103. *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933).

104. *Id.*

mingling of these essentially different powers of government in the same hands.”¹⁰⁵ Put another way, no branch “ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.”¹⁰⁶ Separation of powers “does not create or grant power; it only protects powers conferred by the Constitution.”¹⁰⁷

While separation of powers’ principal purpose was to secure liberty, “[the Constitution] also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹⁰⁸ In more recent years the debate has shifted from foundational (and more theoretical) understandings of separation of powers to the doctrine’s practical application to contemporary legal problems.¹⁰⁹ The Court has inconsistently¹¹⁰ alternated between two competing separation of powers approaches: formalism and functionalism.¹¹¹ Ir-

105. *Id.*; see also THE FEDERALIST NO. 47 (James Madison), *supra* note 43, at 324 (“The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); THE FEDERALIST NO. 51 (James Madison), *supra* note 43, at 349 (“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.”).

106. 1 STORY, *supra* note 29, § 530, at 371.

107. BERGER, *supra* note 68, at 45.

108. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

109. See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938) (“The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance.”).

110. See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 5 (1994) (“There is general consensus among scholars that the Court has exhibited a ‘split personality’ in separation of powers cases. The Court has alternated between an anything-goes functionalist method that ‘appears to be designed to do little more than rationalize incursions by one branch into the domain of another,’ and a rigid but principled formalist method that almost always leads to invalidation of the challenged governmental action. There has been little explanation or apparent rationale for the Court’s flipping between these two methods of analysis.” (footnotes omitted)); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 226 (“The Court has alternated between the formal and functional constructions [of the doctrine] . . .”).

111. Compare the formalism of *INS v. Chadha*, 462 U.S. 919, 951 (1983), where the Court noted that “the powers delegated to [each of] the three branches are functionally identifiable,” with the more functionalist approach in *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), which denounced President Nixon’s argument as “an archaic view of the separation

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respective of analytical approach, the separation of powers doctrine presents a potentially formidable barrier to legislative information requests.¹¹²

Although Congress's inquiry authority is broad,¹¹³ separation of powers constrains Congress's ability to compel information on any subject.¹¹⁴ In the context of legislative information requests, as with other separation of powers inquiries, the Court looks to "a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented."¹¹⁵ Separation of powers imposes three general limits on the method and scope of legislative information requests: the request must relate to the branch's legitimate functions,¹¹⁶ it must not arrogate the power of a coordinate branch,¹¹⁷ and it cannot impede another branch's constitutionally prescribed functions.¹¹⁸

of powers as requiring three airtight departments of government."

112. While the judiciary debated competing theories of separation of powers, Congress's regulation of executive branch information continued unabated. Even the Court noted there is "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." *Adm'r of Gen. Servs.*, 433 U.S. at 445. Legislative enactments evincing Congress's power to compel executive branch information sharing include the Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (2000) (requiring executive agencies to give notice and reasoning in rulemaking context), the Freedom of Information Act, 5 U.S.C. § 552 (2000) (directing executive agencies to make information available to the public), the Privacy Act of 1974, Pub. L. No. 93-579 § 3, 88 Stat. 1897 (codified as amended at 5 U.S.C. § 552a (2000)) (regulating the disclosure of information), Census Act, 13 U.S.C. § 8 (2000) (governing the disposition of census data), and Internal Revenue Code, 26 U.S.C. § 6103 (2000) (regulating the IRS's use of tax information).

113. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

114. *See Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959) ("Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."). Congress is also constrained in ways unrelated to separation of powers. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("We have made it clear, however, that Congress is not invested with a 'general' power to inquire into private affairs.").

115. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986).

116. *See McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

117. *See Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Schor*, 478 U.S. at 856; *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

118. *See Loving v. United States*, 517 U.S. 748, 757 (1996); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

The first of these factors is unique in the legislative inquiry context. This factor analyzes the extent to which the challenged conduct is germane to that branch's legitimate functions. In the inquiry context, this limits the subject matter of a legislative inquiry to only that "on which legislation could be had."¹¹⁹ For example, a President could decline legislative requests for information on a pardon "on the ground that the matter is solely executive in nature and of no concern to Congress"¹²⁰

The Court outlined a second separation of powers-based factor limiting the conduct of one branch in *Morrison v. Olson*.¹²¹ There, the Court upheld the provisions of the Ethics in Government Act creating an independent prosecutor to investigate executive branch conduct.¹²² In so holding, Chief Justice Rehnquist emphasized that the Act did not "involve an attempt by Congress to increase its own powers *at the expense of* the Executive Branch."¹²³ Although the Act empowered Congress to ask the Attorney General to appoint an independent prosecutor, the Attorney General had "no duty to comply with the request."¹²⁴ Because the Act did not compel compliance by executive officials or represent a congressional arrogation of power, it withstood a constitutional challenge.¹²⁵ Therefore, the extent to which one branch controls the actions of another is a second critical factor in the Court's separation of powers analysis.¹²⁶

119. *McGrain*, 273 U.S. at 177.

120. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 183 (4th ed. rev. 1997).

121. 487 U.S. 654, 694 (1988).

122. *Id.* at 696-97.

123. *Id.* at 694 (emphasis added); *see also* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986) ("[T]his case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").

124. *Morrison*, 487 U.S. at 694.

125. *Id.* at 695.

126. *Id.*; *see also id.* at 696 ("[T]he Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel."). For another case drawing the line at compulsion, yet upholding legislative efforts to control access to executive branch conduct, *see Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977), which upheld the Presidential Recordings and Materials Preservation Act directing executive officials to take custody of forty-two million pages and 880 tape recordings created during the Nixon presidency.

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The final factor is related to the second, but conceptually distinct. The Court's inquiry focuses on the extent to which the legislative action "prevents the Executive Branch from accomplishing its constitutionally assigned functions."¹²⁷ Only where the potential for disruption is present must the Court then determine "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."¹²⁸

D. THE EXECUTIVE PRIVILEGE DOCTRINE

In addition to separation of powers, the legislative inquiry power implicates a related doctrine: executive privilege. The Supreme Court has long shielded the executive branch from inquiries related to military and diplomatic secrets.¹²⁹ The subject matter and scope of presidential privileges are not, however, unqualified.¹³⁰ In *United States v. Nixon*, President Richard Nixon challenged a subpoena to produce materials related to the Watergate criminal investigation.¹³¹ Because the materials were not related to national security or diplomatic secrets, Nixon asserted that production of the materials infringed a "generalized interest in confidentiality."¹³² While noting the absence of a privilege in the Constitution,¹³³ and rejecting Nixon's own broad construction,¹³⁴ the Court nonetheless recognized a limited privilege for communications "in perform-

127. *Adm'r of Gen. Servs.*, 433 U.S. at 443; see also *Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

128. *Adm'r of Gen. Servs.*, 433 U.S. at 443; see also *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

129. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

130. Even in the context of military and diplomatic secrets, secrecy is not sacrosanct. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.").

131. *United States v. Nixon*, 418 U.S. at 688.

132. *Id.* at 711.

133. *Id.* ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality.").

134. *Id.* ("No case of the Court . . . has extended [a privilege] to a President's generalized interest in confidentiality.").

ance of [a President's] responsibilities . . . of his office . . . and made 'in the process of shaping policies and making decisions.'"¹³⁵ Since *Nixon*, the Court has reiterated the extraordinary and limited nature of executive privilege.¹³⁶

III. ANALYSIS

This Part considers two constitutional sources for the question and report period: the Necessary and Proper Clause, and the State of the Union Clause. Pursuant to these clauses Congress can, by statutory enactment, create a constitutional executive branch question and report period. This period could be crafted to avoid separation of powers concerns and to recognize the validity of executive privilege.

A. A QUESTION AND REPORT PERIOD IS A NECESSARY AND PROPER EXERCISE OF CONGRESSIONAL POWER

A question and report period satisfies Chief Justice Marshall's ends/means test from *McCulloch* because it is reasonably related to a legitimate legislative function (necessary) and does not offend other constitutional precepts (proper). A question and report period is necessary because its central purpose is to gather information (to formulate public policy, inform the public, or exercise oversight). Additionally, a question and report period is proper because it need not offend other constitutional principles, namely separation of powers and executive privilege.

As a threshold matter, the enumerated power to which the question and report period attaches is the entire bundle of enumerated powers in Article I, because, as the Supreme Court has recognized, information-gathering is a necessary aspect of the effective exercise of the general "legislative power."¹³⁷ This general legislative power necessarily subsumes the specific leg-

135. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting *United States v. Nixon*, 418 U.S. at 708, 711, 713).

136. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389 (2004) ("Executive privilege is an extraordinary assertion of power not to be lightly invoked."); *Adm'r of Gen. Servs.*, 433 U.S. at 446 ("[Executive] privilege is a qualified one."); see also Vermeule, *supra* note 95, at 1340 ("[E]xecutive privilege and related protections are properly viewed as exceptions to a general presumption that executive business should be open to public scrutiny.").

137. *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *Watkins v. United States*, 354 U.S. 178, 197 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

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islative powers enumerated in the Constitution (e.g., Commerce, War, Appropriations). Though the Court's language in these cases is often a mix of Necessary and Proper Clause and implied powers, the Court is unambiguous in concluding that the power to investigate is inextricably bound up with legislative power as a whole.¹³⁸ The implication of this conclusion is that any congressional inquiry relying on the Necessary and Proper Clause (e.g., committee hearings, a question and report period) cannot stray from those areas in which the Congress has the power to legislate.¹³⁹

1. A Question and Report Period Is Constitutionally Necessary

A question and report period is only necessary if it would serve a legitimate legislative function. Given that the Court has already affirmed the legitimacy of information-gathering,¹⁴⁰ the issue becomes whether a question and report period would further purposes that are related to this inquiry function. The most significant purpose related to the inquiry function includes gathering information to legislate effectively, to educate the public, and to robustly exercise Congress's oversight role in determining appropriations and program efficacy.¹⁴¹

a. Shape Effective Legislation

The reason for government, particularly a representative assembly in a liberal democratic system, is to formulate and enact public policy.¹⁴² Information forms the basis for this public policy, and therefore it is the lifeblood of representative government.¹⁴³ The institutions of the U.S. government reflect this

138. *Watkins*, 354 U.S. at 197; *McGrain*, 273 U.S. at 174–75.

139. See *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

140. See, e.g., *Eastland*, 421 U.S. at 504; *Watkins*, 354 U.S. at 197; *McGrain*, 273 U.S. at 174–75.

141. Galloway, *supra* note 71, at 60–64.

142. STEPHEN BREYER, *ACTIVE LIBERTY* 101 (2005) (describing the Constitution's use of the legislature to "translate public will, determined through collective deliberation, into sound public policy"); Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 69 n.205 (1992) (describing the democratic legislature as the "ultimate source of legitimate and authoritative policy initiatives").

143. Cf. KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 105 (1991) (noting that legislatures rely on committees to investigate and to apply specialized knowledge to specific fields of legislation); Scott Ashworth, *Reputational Dynamics and Political Careers*, 21 J.L. ECON. & ORG. 441, 444

sylogism. Without access to information—from the public, academia, non-governmental organizations, and others—Congress cannot create intelligent and responsive laws.¹⁴⁴ As the administrative state has expanded,¹⁴⁵ the executive branch has become an increasingly critical source of information.¹⁴⁶ Because the legislative process depends on Congress's ability to procure information,¹⁴⁷ the authority to inquire must be broad and sweeping. A question and report period recognizes the increasing importance of the executive branch *qua* information source.¹⁴⁸

Just as in parliamentary systems, in the United States a question and report period would serve as an important forum for Congress to quickly collect and assess information from the executive branch to formulate public policy.¹⁴⁹ Although a com-

(2005) (“[L]egislatures organize themselves to facilitate information collection about the effects of potential policies.”).

144. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (arguing that a Congress without investigatory powers “cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change”).

145. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634, 691 (2000) (“One statistic is worth a million words: in 1802, the number of nonmilitary officials working for the federal government was precisely 2,597; in 1997, it was 1,872,000.”). In 2005, the federal government employed 1,754,000 full-time civilians (not including congressional, judiciary, and postal employees). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 321 tbl.481 (Oct. 2006), available at <http://www.census.gov/prod/2006pubs/07statab/fedgov.pdf>.

146. Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 739 (2002) (“The subjects of potential lawmaking and investigation have increased a hundredfold since the beginnings of the nation, and it is only natural that Congress’s need for information has paralleled that rise.”).

147. Marshall, *supra* note 82, at 799 (“Legislative bodies would be unable to effectively evaluate policy alternatives and weigh competing priorities if they could not call witnesses and otherwise inquire into complex issues. Indeed, it is often through congressional hearings and investigations that foundational ideas and insights of how to address social ills are generated.”).

148. See *id.* at 783 (“Congress’s dependence upon the Executive to provide . . . information will only increase as social and economic issues become ever more complex.”); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (noting that the executive branch has access to “broader forms” of information in certain areas than does Congress); Wald & Siegel, *supra* note 146, at 739 (describing the executive branch as “the repository of the country’s most important information for public policy formulation”).

149. Philip Norton, *Questions and the Role of Parliament*, in PARLIAMENTARY QUESTIONS, *supra* note 15, at 194, 198 (“Questions can serve to elicit information for a variety of purposes: for the benefit of Members . . . their con-

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plete understanding of public policy has never been a prerequisite for crafting legislation,¹⁵⁰ providing the legislator with a broad information-gathering mandate is nevertheless important (even if only as a normative matter). In other words, where Congress “does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”¹⁵¹ Through direct or written questioning, legislators would be able to ask the executive branch for specific information about the activities and expertise of the executive branch.¹⁵² This approach would not only better inform legislators, because each would receive a specific answer to her inquiry,¹⁵³ but also could decrease the time required to address emerging issues.¹⁵⁴ Instead of resorting to the non-compulsory committee hearing or compulsory subpoena processes, Congress would have a regular forum to direct specific inquiries at executive officials. This informing role is more than anecdotal. A survey of British MPs demonstrated the importance of the question and report period as a tool for information gathering.¹⁵⁵ Of those MPs surveyed, over half (55%) found oral questions useful in discovering hard-to-get information, while almost all (97%) found written questions useful in discovering the same.¹⁵⁶ Legislative questioning is but one means to quickly expose Congress to expert data and analysis available only from the administrative bureaucracy.

stituents, their party, and for particular groups.”).

150. Cf. W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 404 (1992) (“Legislators rarely read the entire text of a bill on which they vote, and sometimes they do not read any of it, relying instead on committee reports, staff summaries, and discussions and debates with other legislators.”).

151. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

152. TAFT, *supra* note 32, at 32 (noting that the presence of executive officials in Congress would “keep each House advised of the facts in the actual operation of the government”).

153. KEFAUVER & LEVIN, *supra* note 36, at 72 (“[T]here would be a great gain in knowledge and background acquired in a manner far more economical of time and energy than any present available method, such as plodding through a thousand-page committee hearing.”).

154. See, e.g., Philip Giddings, *Questions and Departments*, in PARLIAMEN- TARY QUESTIONS, *supra* note 15, at 123, 146 (noting that the British Question Time “accelerated policy responses” to a public health crisis).

155. Mark Franklin & Philip Norton, *Questions and Members*, in PARLIA- MENTARY QUESTIONS, *supra* note 15, at 104, 109.

156. *Id.*

b. *Inform the Public*

Ascertaining information to *formulate* public policy is one, but not the only, legitimate purpose for a question and report period. Like Congress's investigatory powers generally,¹⁵⁷ the question and report period can serve as a means to disseminate information to the public. As President Woodrow Wilson elegantly noted, "[E]ven more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion."¹⁵⁸ As a result, President Wilson concluded, "[t]he informing function of Congress should be preferred even to its legislative function."¹⁵⁹ Stated another way, "the American people cannot make informed ballot judgments, and express their approval or disapproval of elected officials, if they do not know what [those officials] have done and why."¹⁶⁰

A question and report period in the United States would better enable the voters to acquire information about their government and its leaders. In the United Kingdom, various interest and constituent groups use the answers to parliamentary questions to educate their members and to publicize disfavored government policies.¹⁶¹ Question and report periods in parliamentary systems, although not perfect, have, at the very least, popularized political debate.¹⁶² In the United States, a question and report period would not only educate the public about cleavages between Congress and the executive branch, but also

157. Marshall, *supra* note 82, at 799 ("Congress's power to investigate is . . . critical to its duties to inform the public of the inner workings and issues of government.").

158. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297 (1901)

159. *Id.* at 303.

160. Matthew Cooper Weiner, Note, *In the Wake of Whitewater: Executive Privilege and the Institutionalized Conflict Element of Separation of Powers*, 12 J.L. & POL. 775, 780 (1996).

161. Philip Norton, *Questions Outside Parliament*, in PARLIAMENTARY QUESTIONS, *supra* note 15, at 176, 180 ("[Constituencies] make use of PQs as a valuable means of identifying the particular interests of the MPs and . . . their stance on those issues.").

162. See Borthwick, *supra* note 17, at 87 ("[Question Time] has become a spectator sport, first for the radio and now for the television audience."); Franks, *supra* note 24, at 3–4 ("The main topics [of Question Time] are often those on the front pages of the major newspapers, or ones raised on national television news the previous evening."); Norton, *supra* note 161, at 182–83 (noting the prevalence of coverage in the broadcast media).

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between each party's substantive views on the issues.¹⁶³ While it is true that a question and report period may involve grandstanding and partisanship,¹⁶⁴ the wisdom and utility of a question period is for the people (via the legislature) to decide.¹⁶⁵ And while it may involve theatrics, at least the theater is *political*.¹⁶⁶ By disseminating government policies and leadership styles throughout the public forum, a question and report period is undoubtedly a necessary component of Congress's informing function.

c. Foster Accountability and Oversight

A question and report period is also constitutionally necessary because it is a critical component of Congress's constitutionally mandated accountability and oversight functions. Congress undoubtedly has a legitimate interest in holding the executive branch accountable.¹⁶⁷ Various constitutional clauses elevate principles of accountability to the fore of Congress's responsibility as the chosen representatives of "We the People."¹⁶⁸ A question and report period will assist Congress's accountability function in at least two principal ways: facilitating actual oversight of executive departments,¹⁶⁹ and improving the quality of leadership within both the legislative and executive branches.¹⁷⁰

First, a question and report period will assist Congress in its oversight role, shining the light of accountability into the

163. Norton, *supra* note 149, at 199 ("Question Time serves to release—and to some extent channel—the tensions and passions aroused by disagreement between the parties.")

164. Giddings, *supra* note 154, at 149 ("Question Time itself has become a much more partisan occasion, a piece of regular political theatre."); Norton, *supra* note 149, at 195–97.

165. See *McCray v. United States*, 195 U.S. 27, 55 (1904) (noting the people, through the electoral process, and not the courts, possess the power to remedy "abuses committed in the exercise of a lawful power").

166. The Senate select committee dismissed concerns about grandstanding, noting that the "judgment by the people" will "correct any antagonism which threatens the effective working of the government." S. REP. NO. 46-837, at 8 (1881).

167. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2343 (2006) ("[A] crucial part of Congress's job is keeping the Executive accountable.")

168. See, e.g., U.S. CONST. art. I, § 2, cl. 5 (Impeachment Clause); U.S. CONST. art. I, § 8, cl. 1 (General Welfare Clause); U.S. CONST. art. II, § 2, cl. 2 (Advice and Consent Clause).

169. Galloway, *supra* note 71, at 61.

170. S. REP. NO. 46-837, at 8 (1881).

darkest corners of the administrative bureaucracy. Congress's function as "guardian of the public purse," for example, means "the conduct of public servants, their efficiency and their integrity, must then be subject to the severest scrutiny of that organ of the government that determines whether or not they shall subsist."¹⁷¹ The legislative bodies in parliamentary systems share this oversight function. In a survey of British MPs, the most frequent rationale for propounding questions during Parliamentary Questions "was in order to hold ministers accountable for their actions and those of their subordinates."¹⁷² One commentator went further, describing the "bureaucrat's knowledge that he may at any time be called upon to account for his actions" by Parliament as one of two factors ensuring that a benevolent bureaucracy does not become a despotism.¹⁷³ In the United States, President Wilson lauded similar positive effects, noting that in Congress "a single quick and pointed and well-directed question from a keen antagonist may utterly betray any minister who has aught to conceal."¹⁷⁴ Moreover, a question and report period would allow direct questions about executive branch policies and responses to emerging problems (e.g., natural or man-made disasters). As in the United Kingdom, more immediate oversight could correct administrative inaction before it becomes a crisis (e.g., Hurricane Katrina).¹⁷⁵ A question and report period is intimately related to Congress's constitutionally assigned oversight function.

A question and report period would also increase accountability in a related way: improving the quality of leadership within both the executive¹⁷⁶ and legislative branches.¹⁷⁷ Know-

171. Landis, *supra* note 68, at 194.

172. Franklin & Norton, *supra* note 155, at 108; *see also* JOHN D. MILLETT, THE BRITISH UNEMPLOYMENT ASSISTANCE BOARD 160 (1940) ("The most useful means of keeping the work of [an administrative program] under constant review is through the institution of questions asked in the House of Commons."); Cornelius P. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STAN. L. REV. 238, 284 (1954) (praising Question Time as "a device for exposing inadequacies in program administration and for compelling correction").

173. HOWARTH, *supra* note 15, at 6.

174. Woodrow Wilson, *Government by Debate: Being a Short View of Our National Government as It Is and as It Might Be* (Dec. 4, 1882), *in* 2 THE PAPERS OF WOODROW WILSON, *supra* note 32, at 159, 218.

175. Giddings, *supra* note 154, at 146–48 (describing parliamentary pressure on the government).

176. SCHLESINGER, *supra* note 37, at 392 ("[A] question hour could subtly alter the balance of [the President's] power both as against his cabinet, whose

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ing that top officials will regularly spar with Congress over substantive matters of policy, the President might take greater care in choosing capable (and rhetorically adroit) cabinet officials.¹⁷⁸ Once selected, these officials would have greater incentive to know the inner-workings of their departments.¹⁷⁹ President Taft suggested that fear of direct, public inquiry would stimulate “a more thorough familiarity with the actual operations of [the Cabinet official’s] department.”¹⁸⁰ Senator Estes Kefauver and Jack Levin posited that executive officials “would consider more deliberately their decisions and administrative orders if they knew they might be called upon to render an official public accounting in the spotlight of an open House session. . . . These men would have to know their departments and be able to give the facts.”¹⁸¹ President Wilson put the benefit of a question and report period as it related to Congress’s legitimate oversight role more bluntly: “Charlatans [in either the legislative or executive branches] cannot long play statesmen successfully when the whole country is sitting as critic.”¹⁸² While these benefits more clearly apply to oral questions, responses to written questions will also bring new scrutiny of official action.¹⁸³ As a question and report period is logically related to the exercise of the enumerated powers, it satisfies the Court’s necessary prong.

members would have the chance to acquire new visibility and develop their own relationships with Congress and the electorate, and as against Congress, which would have the opportunity of playing off his own cabinet against him.”).

177. S. REP. NO. 46-837, at 8 (1881) (“[A question and report period] will require the strongest men to be the leaders of Congress and participate in debate.”).

178. *Id.*

179. Richard Nixon, upon witnessing a session of the British Parliament, described the experience as “inspiring and compelling.” He added, “I came away with a deep appreciation and respect for the ability of the British parliamentarian to stand up during the question period and answer so effectively. I believe that your question period is much more of an ordeal than our press conference.” President Richard Nixon, Remarks on Departure from Britain, 1 PUB. PAPERS 149 (Feb. 26, 1969).

180. TAFT, *supra* note 32, at 31.

181. KEFAUVER & LEVIN, *supra* note 36, at 73–74.

182. Wilson, *supra* note 174, at 218.

183. Franklin & Norton, *supra* note 155, at 108–09.

2. A Question and Report Period Is Constitutionally Proper

To serve as an adjunct to an enumerated power, a congressionally enacted question and report period also must not offend other constitutional principles.¹⁸⁴ Because a properly crafted question and report period need not violate separation of powers or executive privilege, it will satisfy the proper prong of Chief Justice Marshall's Necessary and Proper Clause analysis.

a. Separation of Powers

Given the unique structural composition of the U.S. government, separation of powers presents the most difficult constitutional issue for a question and report period. This issue is especially relevant given the reliance on the Necessary and Proper Clause as the source for a question and report period. The Supreme Court's separation of powers jurisprudence illustrates the characteristics of a question and report period that are within (and without) the bounds of the Constitution.

First and foremost, a congressionally enacted question and report period must not violate separation of powers as it relates to legislative information gathering. The Court has made clear that valid information requests are limited to areas where Congress *can constitutionally* legislate.¹⁸⁵ But because of the broad scope of the legislative power to investigate,¹⁸⁶ this requirement is a limitation in name only. For example, because Congress has control over the purse strings of government, it can inquire into any subject that involves the expenditure of public funds.¹⁸⁷ Congress could even inquire about a presidential pardon (a power exclusively vested in the President), assuming the pardon required appropriations for an amnesty program.¹⁸⁸ The broad legislative authority (and attendant inquiry power) is further expanded because the Court has never required that a congressional inquiry *actually* produce legislation.¹⁸⁹ To the contrary, "investigations may take researchers

184. See, e.g., *Printz v. United States*, 521 U.S. 898, 923–25 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992).

185. *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

186. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

187. Landis, *supra* note 68, at 194.

188. FISHER, *supra* note 120, at 183.

189. *McGrain*, 273 U.S. at 177 (noting only that the investigation must be related to an area on which Congress could legislate and "would be materially

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up 'blind alleys' and into nonproductive enterprises: '[t]o be a valid legislative inquiry there need be no predictable end result.'¹⁹⁰

As a consequence, a question and report period relating only to the areas where Congress could legislate can easily satisfy this first limitation. A question and report period is intimately related to Congress's inquiry function—a function the Court has repeatedly recognized as valid and expansive.¹⁹¹ As for objections to a specific question on the basis that Congress lacked authority to legislate in that area (thereby justifying a refusal to answer), Congress can adopt a series of rules marking the boundaries of what subjects are proper during the question and report period. On this point, parliamentary practice is instructive. Parliamentary systems have adopted rules limiting the scope of questions—even without separation of powers considerations.¹⁹² To that end, Congress can declare some topics (i.e., the President's personal life, the appointment of officers, military secrets) as outside the purview of the question and report period. Given the breadth of the legislative power, and with some careful self-policing, Congress can create a question and report period that is simultaneously useful as an information-gathering device and constitutionally compliant.

A properly crafted question and report period can also satisfy the second factor in the Supreme Court's separation of powers calculus: compulsion or arrogation of power. In *Commodity Futures Trading Commission v. Schor*, the Court upheld the legislative creation of a non-Article III judicial tribunal for certain claimants in a series of cases involving securities fraud.¹⁹³ The Court stressed that "separation of powers concerns [were] diminished" because aggrieved individuals were not compelled to appear before the tribunal.¹⁹⁴ "[G]iven the degree of judicial control saved to the federal courts," the Court rejected a separation of powers challenge.¹⁹⁵ Similarly, in *Morrison*, the Court cited absence of compulsion as one of the rea-

aided by the information which the investigation was calculated to elicit"); see also *Watkins*, 354 U.S. at 187 (same).

190. FISHER, *supra* note 120, at 168 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975)).

191. See, e.g., *Eastland*, 421 U.S. at 504; *Watkins*, 354 U.S. at 187.

192. See ERSKINE MAY'S TREATISE ON THE LAW, *supra* note 19, at 287–94.

193. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 842 (1986).

194. *Id.* at 855.

195. *Id.*

sons why provisions of the Ethics in Government Act creating an independent prosecutor passed constitutional muster.¹⁹⁶

Assuming a question and report period would preserve an executive official's right to decline to answer a question, it would not permit the legislative branch to control another branch, and thus is acceptable, like the legislation affirmed in *Schor* and *Morrison*.¹⁹⁷ As in *Schor* and *Morrison*, Congress can avoid allegations that it is impermissibly controlling the executive branch by permitting executive branch officials to refuse to comply with congressional requests—namely, to refuse to answer oral or written questions. Furthermore, by adopting flexible rules for when executive officials appear, Congress could minimize most, if not all, of any compulsion associated with the question and report period. The only consequences for failure to appear or for providing evasive answers would arise through the normal political and budgeting processes. Finally, a question and report period is arguably *less* offensive to executive control of information than extant statutory authority. Unlike the Freedom of Information Act, for example, a question and report period would impose no *mandatory* duty to disclose information. Because the question and report period need not exhibit any attempt to aggrandize legislative power by controlling executive officials, it would not violate the separation of powers principles set forth in *Schor* and *Morrison*.¹⁹⁸

Lastly, a question and report period need not violate the third main limitation on legislative conduct as it relates to separation of powers: impairment of the executive branch's constitutional functions.¹⁹⁹ This functionalist balancing test weighs the extent of impairment against the overriding need to promote objectives assigned to the legislature by the Constitu-

196. *Morrison v. Olson*, 487 U.S. 654, 693–95 (1988).

197. In *Bowsher v. Synar*, the Court stated that the President is *not* accountable to the legislature except when she is impeached. 478 U.S. 714, 722 (1986). But this finding cannot reasonably be understood to abrogate Congress's oversight function. Moreover, even in *Bowsher*, the Court took pains to recognize the critical importance of the President's accountability to the people. *Id.*

198. *Morrison*, 487 U.S. at 694 (noting that Congress had not violated separation of powers because it could not compel the Attorney General to comply with its request); *Schor*, 478 U.S. at 727 (finding that the congressional action in question did not pose a “dange[r] of congressional usurpation of Executive Branch functions” by requiring compliance).

199. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683, 711–12 (1974).

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tion.²⁰⁰ As discussed above, the Court has long recognized the importance of Congress's oversight function.²⁰¹ Balanced against this vital role, the executive branch has only a negligible dignity interest in refusing even to entertain congressional questions.²⁰² Stated differently, listening to questions, without an obligation to answer, does not undermine constitutional functions. And unlike the situations in *Bowsher v. Synar* or *INS v. Chadha*, a question and report period would in no way prevent the executive branch from exercising its constitutionally assigned function to execute the laws. The President still would retain control over appointing and dismissing officials, and would direct the extent to which the officials complied with legislative information requests. Therefore, the question and answer process would not interfere with the President's ability to "take Care that the Laws be faithfully executed."²⁰³ The core executive functions would remain safely under executive control, and therefore a question and report period need not "intrude upon the central prerogatives of" the executive branch in any significant way.²⁰⁴

Far from impairing executive functions, a question and report period might increase public awareness of and support for executive policies in two principal ways. First, the period would provide the President with another venue to convince the American people (and their elected representatives) of the importance and superiority of her policies. Second, while the President would not have the authority to ask questions of legislators, she could expect "friendly" questions from members of her own party. These friendly questions would ensure that the President is not faced with an entirely hostile environment. In these ways, a question and report period might actually *increase* executive influence at the expense of the legislature.

200. *Adm'r of Gen. Servs.*, 433 U.S. at 443; *United States v. Nixon*, 418 U.S. at 711–12.

201. See, e.g., *Morrison*, 487 U.S. at 694 (describing Congress's investigatory/oversight function as "incidental to the legislative function"); *Watkins v. United States*, 354 U.S. 178, 197 (1957) ("[A]n investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process.").

202. Congress has long recognized (and accommodated) this interest. See, e.g., S. REP. NO. 46-837, at 7 (1881) ("The committee ventures again to repeat that the effect of the bill does not seek to—and will not—aggrandize or impair the executive power as defined in the Constitution and vested in the President.").

203. U.S. CONST. art. II, § 3.

204. *Loving v. United States*, 517 U.S. 748, 757 (1996).

To be sure, a question and report period might physically tie up an official for a few hours per month—arguably impairing the official's other constitutional duties during that limited time. But a congressional request that an executive official spend a morning on Capitol Hill is far different from an attempt to create a quasi-executive administrator of the Balanced Budget and Emergency Deficit Control Act (as in *Bowsher*²⁰⁵) or to veto executive branch conduct (as in *Chadha*²⁰⁶). Even assuming the question period burdens a cabinet official, the importance of the question and report period should take precedence.²⁰⁷ Congress could even mitigate these concerns by appropriating additional funding, thereby ensuring that cabinet officials have sufficient staff to respond to and prepare for the legislative inquiries.²⁰⁸ Congress could further ameliorate concerns about impairment of constitutional duties by creating a series of flexible rules for physical appearances. These rules might include limitations on the number or length of an official's appearances. They might also create a series of exceptions allowing the official, for example, to skip the question period in cases of emergency or unavoidable conflict. These steps would preempt executive branch arguments of infringement.

These minor infringements on executive functions are balanced, in accordance with the Court's calculus in *Nixon v. Administrator of General Services*, against numerous important legislative interests and objectives.²⁰⁹ This Note has discussed these interests in detail above, but they are all intimately related to Congress's inquiry power. They include making in-

205. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (“By placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.”).

206. *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (“Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.”).

207. *See, e.g.*, S. REP. NO. 46-837, at 8 (1881) (describing cabinet official testimony as outweighing “the harassing cares of distributing clerkships and closely supervising the mere machinery of the departments”).

208. *Id.* (describing a willingness to increase agency budgets to free up cabinet officials).

209. 433 U.S. 425, 452–54 (1977).

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formed public policy decisions and crafting cogent legislation,²¹⁰ exercising effective oversight of executive programs,²¹¹ and disseminating information to the public.²¹² The Court has also recognized that Congress, in addition to acquiring information to create public policy and crafting remedial legislation, has an interest to help “restore public confidence in our political process[].”²¹³ A public debate about the most important issues of the day would directly effectuate all of these interests. Congress’s inquiry power is much more central to these core responsibilities than is the President’s interest in avoiding the indignity of answering questions for a short period of time each month. Because a question and report period need not violate the fundamental separation of powers principles underlying the constitutional scheme, it could serve as “proper” exercise of legislative authority.

b. Executive Privilege

While related to separation of powers, executive privilege presents an independent challenge to the constitutionality of a question and report period. It does so in two primary ways. First, the executive branch could argue that the entire question and report regime is not constitutionally proper because it conflicts with a generalized executive privilege. Second, executive privilege may be invoked so often that it renders the question and report period ineffective. In light of Supreme Court precedent, a well crafted question and report period could overcome both of these objections.

One foreseeable executive branch response to a question and report period is to refuse to comply in *any* form under a generalized assertion of privilege. In essence, the President could argue that the mere existence of the question and report period violates executive branch privileges. In *United States v. Nixon*, the Court confronted a similar issue, namely, whether a “generalized” executive interest in privilege would trump a specific judicial interest in the “fair administration of criminal jus-

210. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (“[Congress] cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”).

211. See Levinson & Pildes, *supra* note 167, at 2343 (“[A] crucial part of Congress’s job is keeping the Executive accountable.”).

212. Cf. WILSON, *supra* note 158, at 303 (“The informing function of Congress should be preferred even to its legislative function.”).

213. *Adm’r of Gen. Servs.*, 433 U.S. at 453.

tice.”²¹⁴ In answering that question in the negative, the Court noted that while the President’s need for confidentiality is “general in nature,” the need for the production of evidence is “specific and central to the fair . . . administration of justice.”²¹⁵ Just as the acquisition of evidence is critical to the judicial function, the acquisition of information is central to the legislative function.²¹⁶ A question and report period is a proper exercise of legislative power because it serves as a critical means—much like the judicial subpoena—to acquire information.

To be sure, there are differences between a narrowly tailored subpoena (as in *United States v. Nixon*²¹⁷) and a broad question and report period. But a question and report period would not violate executive privilege any more than the mere issuance of a judicial subpoena in *United States v. Nixon*. If anything, a question and report period is *less* onerous than the judicial (or congressional) subpoena because it is not compulsory. The question and report period’s constitutional saving grace is its lack of compulsion. It bears repeating that the executive branch could refuse to answer questions based on executive privilege or otherwise. In short, a generally asserted executive privilege does not convert a question and answer period into an improper exercise of legislative power.

The second likely argument is that the question and report period would infringe the President’s right to assert executive privilege even on narrower grounds. The Court in *United States v. Nixon* cautiously stated that, although Nixon’s generalized interest was insufficient to defeat a subpoena, the privilege did protect certain communications.²¹⁸ However, Congress could avoid the assertion that the question and report period is altogether improper through careful formulation and administration of the period. For example, to steer clear of executive privilege issues, Congress could simply follow the path of least

214. 418 U.S. 683, 711–12 (1974).

215. *Id.* at 712–13.

216. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975); *Watkins v. United States*, 354 U.S. 178, 197 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

217. *United States v. Nixon*, 418 U.S. at 706–07 (noting that the subpoena did not violate a “need to protect military, diplomatic, or sensitive national security secrets” and would be conducted in camera “with all the protection that a district court will be obliged to provide” to protect confidentiality).

218. *Id.* at 705 (“[There is a] valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.”).

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resistance: acknowledge the viability of a limited executive privilege. If Congress recognized in the statute authorizing a question and report period the right of executive officials to refuse to answer questions on narrow privilege grounds, it could outflank executive branch assertions that the question and report period violates executive privilege. By recognizing the executive branch official's limited right to refuse to answer, a question and report period and executive privilege could coexist in constitutional harmony.

Not only would Congressional acquiescence with executive privilege disarm the executive branch of one possible challenge, it also would not substantially undermine the efficacy and purpose of a question and report period. To ensure some responsiveness from executive officials, Congress could look to other, non-coercive enforcement mechanisms. As parliamentary practice—even without the doctrine of executive privilege—demonstrates, substantively deficient answers do not go unpunished. Refusing to answer a question or providing indirect answers “can, in [its] own way, shed just as much light on government policy (or the lack of it) in a particular area as a full and detailed response, which in practice may conceal more than it reveals.”²¹⁹ In the United States, the public would likely view a refusal to answer or invocation of executive privilege as an admission of liability.²²⁰ In addition to facing public suspicion, a recalcitrant executive official could be punished for her failure to answer questions through other legislative mechanisms. For instance, Congress's power of the purse is particularly well suited to ensure executive branch compliance—without abridging executive privilege.²²¹ Congress could refuse to act on the

219. ADAM TOMKINS, *THE CONSTITUTION AFTER SCOTT: GOVERNMENT UNWRAPPED* 99 (1998); see also Giddings, *supra* note 154, at 136 (“[G]enerally speaking, ministers prefer to answer if they can—not least because it looks better from a public relations viewpoint, and . . . a refusal may offend.”).

220. Marshall, *supra* note 82, at 811 (“Because the press (and to a lesser extent, the Congress) equates a claim of executive privilege with that of a cover-up, the result is that the claim of executive privilege has become a political liability to the President who invokes it. In fact, its invocation is often so damaging to a President that forcing the President to claim it can mark the victory of his opponents by itself.”).

221. *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (describing Congress's power of the purse as particularly well suited to monitor the “wisdom and soundness of Executive action”); *THE FEDERALIST* NO. 58 (James Madison), *supra* note 43, at 394 (“This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance,

President's legislative agenda as it relates to the question proffered. And for truly serious matters, a question and report period would not abrogate Congress's subpoena and impeachment functions. Evasive answers or excessive invocations of executive privilege would rightly place the executive official between the Scylla of public scorn and suspicion and the Charybdis of damaged congressional relations.

B. THE STATE OF THE UNION CLAUSE AS A SOURCE FOR A QUESTION AND REPORT PERIOD

In addition to the Necessary and Proper Clause, the State of the Union Clause presents a supplemental constitutional foundation for a question and report period. Despite its infrequent judicial treatment as a constitutional source of power, the clause supports a more robust executive branch disclosure requirement. Given Congress's substantial interest in access to executive branch information and agency oversight, a statutory question and report period would closely conform to the broader purposes of the State of the Union Clause.

In his treatise on the Constitution, Justice Story described the clause as a manifestation of the importance of executive-legislative information sharing.²²² "There is great wisdom," Story emphasized, "in not merely allowing, *but in requiring*, the president to lay before congress all facts and information, which may assist in their deliberations; and in enabling him at once to point out the evil and to suggest the remedy."²²³ The State of the Union Clause demonstrates the President's responsibility "not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them."²²⁴ Story's commentary supports a question and report period in at least two ways: (1) the President's obligation to engage Congress in a direct and bilateral manner, and (2) the importance of the President's *ongoing* role in that regard. To these ends, the actions of the first Congress are again illustrative. In coupling an ongoing obligation of the Treasury

and for carrying into effect every just and salutary measure."); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988) ("[A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities.").

222. 2 STORY, *supra* note 29, § 1561, at 417 (describing the importance and validity of the State of the Union Clause as "above all real objection").

223. *Id.* § 1561, at 418 (emphasis added).

224. *Id.*

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Secretary to disclose information to Congress with the Act creating the Treasury Department,²²⁵ the first Congress “followed the furrow plowed by the . . . State of the Union clause.”²²⁶ Notwithstanding its infrequent judicial treatment, the State of the Union Clause envisioned an extensive and continuing role for the executive branch in the legislative process.

The reality of early congressional practice further supports a pragmatic and broader view of the State of the Union Clause. The Constitution’s text mandates only one congressional session per year and does not describe its length.²²⁷ While the importance of an open and accessible executive branch has been important from the Founding, the reality was that the early legislative branch convened infrequently because of geographic considerations.²²⁸ Although the prospect of an absentee Congress is unlikely in the modern era, in the early days of the Republic “Americans expected that [federal] legislators would typically meet in short sessions and quickly return back home to live (like everyone else) under the laws just made.”²²⁹ The President, on the other hand, was always on duty.²³⁰ Because of this early practice, Congress needed immediate, extensive, and continuing contact with the executive branch in order to remain apprised of issues of national importance.

Moreover, the clause goes further than the British custom (with the King’s yearly speech to Parliament) by mandating executive branch disclosures “from time to time.”²³¹ Noting the impossibility of identifying every time when the duty would be

225. An Act to Establish the Treasury Department, 1 Stat. 65, 65–66 (1789).

226. BERGER, *supra* note 68, at 38 (internal quotation marks omitted).

227. U.S. CONST. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.”), *amended* by U.S. CONST. amend. XX, § 2 (changing the meeting date to “the 3d day of January”).

228. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 125–28 (1995); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 452 n.4 (1949) (describing nine-month lapses in congressional sessions).

229. Amar & Amar, *supra* note 228, at 126.

230. See Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) (“Unlike federal lawmakers and judges, the President is at ‘Session’ twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.”); Kesavan & Sidak, *supra* note 88, at 29–32.

231. U.S. CONST. art. II, § 3.

required, Kesavan and Sidak have persuasively posited that the phrase “from time to time,” should be understood as something “more than ‘at least once during every session of Congress.’”²³² It is difficult to imagine, given the early irregularity of legislative sessions and the exigencies of national government, that a single annual message “exhaust[s] the duty to furnish information ‘from time to time.’”²³³ Moreover, if the Framers truly envisaged a yearly speech, they could have easily drafted language more clearly reflecting this less onerous presidential duty.

Some commentators have argued that the State of the Union Clause did not authorize Congress to compel executive branch dialogue and information sharing.²³⁴ However, the fact that the State of the Union Clause imposes an affirmative duty on the President—and does not explicitly confer power on Congress—is not fatal to a broader understanding of the clause. As an initial matter, the Supreme Court has long recognized that one who is owed a duty has a correlative right to require performance of the duty.²³⁵ As Professor Berger posited, “what the President is under a duty to furnish to Congress ‘from time to time’ could be *requested* at its convenience.”²³⁶ At least one nineteenth-century lawmaker also mentioned this view of the State of the Union Clause.²³⁷

Kesavan and Sidak disagreed with this understanding of the clause, arguing that the clause did “not signify any kind of congressional prerogative. [It did] not provide that ‘Congress

232. Kesavan & Sidak, *supra* note 88, at 16. (“The phrase is to be interpreted flexibly because it was impossible for the Framers to specify all of the times that would give rise to the duty of the clauses.”).

233. BERGER, *supra* note 68, at 38.

234. See, e.g., Calabresi & Rhodes, *supra* note 91, at 1207 n.262 (“The State of the Union Clause . . . imposes an obligation on the President only ‘from time to time’ and only on general matters such as the circumstances of the whole country. This Clause gives Congress no power to require presidential opinions *in writing* upon *any* subject relating to the President’s duties, because the Clause governs information exchanges between two independent and co-equal departments of the national government.”); Kesavan & Sidak, *supra* note 88, at 7–8 (arguing that Berger’s reading is “textually awkward and wrong”).

235. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

236. BERGER, *supra* note 68, at 37 (emphasis in original).

237. CONG. GLOBE, 27th Cong., 2d Sess. 482 (1842) (statement of Rep. Cushing) (“The clause requiring the President to see to the execution of the laws, and to give information to Congress of the state of the Union, was imperative on the President, and constituted an obligation, by the omission of which he violated the Constitution and his oath of office, and was liable to impeachment.”).

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may from time to time *require* the President to give to the Congress Information of the State of the Union.”²³⁸ Yet, even assuming the validity of this reading, the State of the Union Clause can still justify a question and report period. Assuming it does not *require* the President to give Congress information through a coercive mechanism, a question and report period safely falls within the clause’s scope because it fulfills its other underlying purposes (i.e., access to information, dialogue, and government transparency). The lack of compulsion demonstrates that a question and report period can coexist with even Kesavan and Sidak’s narrow textual analysis of the State of the Union Clause.

Similarly, Calabresi and Rhodes’s dismissal of the State of the Union Clause does not fatally weaken the clause’s role as a supporting source for a question and report period. In their zeal to nullify any congressional interference with executive branch functions, Calabresi and Rhodes failed to justify their limited understanding of the clause. For example, they argued that the clause requires the President to discuss “general matters” only.²³⁹ This reading is not textually self evident,²⁴⁰ and it was repudiated in the early years of the Republic.²⁴¹ Second, a question and report period would *not* give Congress the power to “require presidential opinions *in writing* upon *any* subject.”²⁴² Congress could only ask the executive branch for information in those areas in which Congress could legislate—and even then, the executive branch’s compliance would be voluntary. Finally, even assuming the validity of a more limited view of the State of the Union Clause, a question and report period lacking a compulsive mechanism (e.g., the contempt sanction) would not *require* anything from the executive branch. Although a healthy (if undeveloped) debate exists about the State of the Union Clause’s meaning, the clause not only encourages

238. Kesavan & Sidak, *supra* note 88, at 7 (emphasis added).

239. *Id.*

240. It is not necessarily true that, because informing Congress about the “state of the union” is a broad *topic*, the President is limited to a superficial or generalized *message*. An equally plausible reading is that the clause envisions the President providing specific details about a wide variety of important issues and enactments of the day.

241. 2 STORY, *supra* note 29, § 1561, at 417–18 (describing the President’s unique knowledge of a variety of subjects, including the “true workings of the laws . . . of trade, finance, and . . . justice; . . . and the military, naval, and civil establishments of the union”).

242. Calabresi & Rhodes, *supra* note 91, at 1207 n.262.

greater executive-legislative dialogue, but also imposes reciprocal duties on the President to disclose, and the Congress to inquire.²⁴³ A question and report period would facilitate both of these obligations.

IV. THE CORE CHARACTERISTICS OF A LIMITED QUESTION AND REPORT PERIOD

It is clear from the foregoing analysis that crafting a constitutional question and report period is no small task. There are many procedural and substantive details of a question and report period that warrant further study. The purpose of this Note, however, is not to devise each provision of a question and report period, but instead to demonstrate the constitutional validity of the general endeavor. Notwithstanding this modest purpose, it is possible to sketch broadly the basic provisions of a question and report period in the United States.

Generally, a question and report period would share many of the British and Canadian provisions. This premise relies on a recognition of the relative success of Question Time in those countries *qua* accountability guarantor and information-gathering mechanism. It also acknowledges the common law traditions those countries share with the United States. Constitutionally, there is little difference for purposes of a question and report period between confirmable cabinet officials and the President. Therefore, a question and report period could involve cabinet officials as well as the President. It could take place in a joint session of Congress, or separately in either house.

As with the British custom, a question and report period in the United States could take either (or both) of two forms: written and oral questions. In the written component, legislators could ask an unlimited number of written questions, addressed to the executive official who is responsible to the subject matter of the question. The President or cabinet official would respond, if at all, by way of publication of both the question and the answer in the Federal Register (or some other publication). Resembling the practice in parliamentary systems (but for different reasons, namely separation of powers and executive privilege), a member of Congress would have no formal enforcement mechanism for an executive official's failure to respond to a written question.

243. BERGER, *supra* note 68, at 38.

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In the oral component of the question and answer regime, individual members of Congress could ask the President and cabinet level officials direct questions for a specified amount of time each month (e.g., one to two hours). To facilitate this exchange, Congress would promulgate a series of rules apportioning time equally between the minority and majority parties, describing the form and mode of questions, and determining which members of each party are allowed to ask questions. Answers (and questions) would be published in the Congressional Record. As with written questions, the separation of powers and executive privilege doctrines would limit the scope of the oral questions to preserve executive branch prerogatives. For example, a question must be related to a subject on which Congress could legislate. Further, the executive official would not be under oath and would retain, on privilege grounds or otherwise, the right to not answer a question altogether. There could be no judicial sanction for failure to respond. As discussed above, excessive refusals to answer or failure to appear would expose the executive official to political and policy consequences.

CONCLUSION

Transparency, accountability, and the primacy of Congress are essential components of the U.S. constitutional structure. Since the attacks of September 11, 2001 these traits have atrophied. A question and report period is a modest—and constitutional—step toward restoring those foundational attributes of American democracy.

A legislatively mandated executive branch question and report period is neither new nor revolutionary. It is also not a panacea to remedy the expansion of executive power and the growth of the administrative bureaucracy; crafting a question and report period that concurrently complies with separation of powers while also remaining an effective tool will be difficult. And there may be logistical problems during its implementation. Despite these challenges, this Note demonstrates not only that a question and report period is compatible with the U.S. political system, but also that such an effort is worth renewed attention in Congress and in legal scholarship. To improve government in the post-9/11 world, Congress should look to a decidedly pre-9/11 mechanism: the question and report period.