

Winter 2018

The Limits on Congress's Power to Do Nothing: A Preliminary Inquiry

William P. Marshall
University of North Carolina School of Law, wpm@email.unc.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Constitutional Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Marshall, William P. (2018) "The Limits on Congress's Power to Do Nothing: A Preliminary Inquiry," *Indiana Law Journal*: Vol. 93 : Iss. 1 , Article 10.

Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/10>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Limits on Congress's Power To Do Nothing: A Preliminary Inquiry

WILLIAM P. MARSHALL*

The subject of this Essay may seem anachronistic to some: the constitutional implications of congressional obstruction, a matter typified by the Republican Congress's opposition to the Obama administration during six of its eight years in office. After all, we are now living in a period of an ostensibly united government under a Trump presidency and a Republican Congress, a phenomenon that, as other writers in the symposium point out, raises its own set of constitutional concerns.

Nevertheless, the problem of congressional obstruction is one that is likely to return to the constitutional landscape.¹ The country's equally divided electorate, combined with the nation's intense polarization, means that we can fully expect future episodes of divided government and more prolonged periods when the Congress, no matter which party controls it, will be intent upon using whatever tactics may be available to frustrate the agenda of the opposing party's presidency.² Further, even if polarization somehow subsides at the grassroots, the dynamic of the permanent campaign will continue to foster congressional obstruction. When each party views each other's successes as damaging to their own electoral prospects, there is little room for cross-aisle cooperation.³

President Obama's response to congressional obstruction was to adopt a "we can't wait" strategy under which he strived to pursue as much of his agenda as he could unilaterally, without waiting for Congress to assent.⁴ That approach, however, generated serious criticism on grounds that it exacerbated an already dangerous trend of centering too much power in the presidency.⁵ Congress, after all,

* Kenan Professor of Law, University of North Carolina. A deep thanks to Josh Roquemore, Jon Dugan, and Lauren Russell for their research assistance.

1. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 326 (2011) ("I see no institutional or legal changes that could overcome the paralysis that will characterize divided government, amidst polarized parties, in the coming years.").

2. See Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1099 (2013) (describing the modern legislature as being "defined by heightened partisanship").

3. See SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN* 23–24 (1982) (discussing how concern for the next election, rather than long-term results, motivates current politics); Pildes, *supra* note 1, at 330–31 ("[H]yperpolarized parties are likely to yield little more than legislative gridlock and paralysis."); see also Thomas E. Mann & Norman J. Ornstein, *Finding the Common Good in an Era of Dysfunctional Governance*, DAEDALUS, Spring 2013, at 15, 18 ("[T]he two major political parties in recent decades have become increasingly homogeneous and have moved toward ideological poles.").

4. Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 3 (2014) ("[W]e can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will.") (quoting President Obama).

5. See Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U.L. REV. 1159, 1194 (2014) ("The President's opponents naturally decry

provides the primary bulwark against presidential overreaching,⁶ and the argument that the presidency should assume more power because Congress is using its prerogatives to check executive authority seems exactly backward.⁷ If Congress is to serve its checking function, it would seem that, at the least, it should have the authority not to accede to executive branch direction.⁸ At least on one level, then, Congress has, and should have, the power to do nothing.

The problem of congressional obstruction that President Obama faced, however, also has serious constitutional overtones. First, as history has demonstrated, congressional obstruction often means that Presidents will “push the envelope” when their agenda is frustrated.⁹ President Obama was not the first in this respect, and he undoubtedly will not be the last. (Indeed, as this Essay was going to press, President Trump announced that he will also use unilateral executive action to overcome congressional inaction.¹⁰)

In part, presidents “push the envelope” because of the truth in the old maxim that power abhors a vacuum.¹¹ In part, however, they do so because of expectations. When only the presidency is able to take major governmental action, the expectation

each round of administrative fixes, arguing that he lacks respect for the rule of law and has become a tyrant.”); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration’s Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 781 (2014) (“Since the middle of the twentieth century, presidential power has expanded at a dramatic rate, and that expansion continues unabated.”); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819–20 (1996) (describing the trend toward increasing executive power, and arguing that this trend is a threat to originalists and functionalists alike). See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (discussing the expansion of presidential power).

6. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2222 (2013) (describing the potent congressional checks against the executive branch); see also Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 768, 772–73 (2012) (arguing that Congress’s “hard” and “soft” powers allow it to “vigorously assert itself against the other two branches”).

7. See Chafetz, *supra* note 6, at 772–73 (describing the constitutional powers and checks intentionally allocated to Congress).

8. *Id.* (stating that “the separation of powers requires that the branches maintain the institutional capacity to assert themselves against one another”) (emphasis omitted) (footnote omitted).

9. Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 325 (2016) (“The worse Congressional gridlock becomes, the more presidents push the envelope of what they can do within the executive branch . . .”).

10. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 7:30 AM), <https://twitter.com/realDonaldTrump/status/917698839846576130> [<https://perma.cc/AH8F-MDWK>] (“Since Congress can’t get its act together on HealthCare, I will be using the power of the pen to give great HealthCare to many people—FAST.”). What is particularly notable about President Trump’s tweet is that it suggests that it is permissible for a President to use unilateral action to circumvent congressional inaction even when his own party controls Congress.

11. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (arguing that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility”); see also Balkin, *supra* note 5, at 1193–95 (arguing that when Congress does not wield its legislative power, the President “begins to take on increasing responsibility for

becomes that the executive is the appropriate branch to take major government action.¹² It therefore becomes politically more difficult to claim that a President is overreaching when he acts unilaterally. Equally significantly, it also becomes more politically difficult for the President to refuse to act.¹³ As such, the exercise of presidential authority builds on itself.¹⁴ The lesson of history is that, in the long run, congressional obstruction tends to empower the presidency rather than weaken it;¹⁵ this further exacerbates the power gulf between the President and the Congress.¹⁶

Second, constitutional concerns may also arise if a President does not act in response to an obstructionist Congress. While accumulating too much power in the presidency creates the danger of tyranny coming in through the front door in the form of an imperial presidency, a dysfunctional government that does not respond to the needs of its citizenry creates the danger of tyranny coming in through the back. A society that has lost faith in its institutions is vulnerable to totalitarian appeals and intervention.¹⁷

The Constitution, arguably, was concerned with both types of threats.¹⁸ The Framers, of course, famously designed the Constitution to foster a system of checks and balances in which none of the three branches would be able to amass and exercise too much power.¹⁹ But the Framers also endeavored to create a Constitution that

solving problems of domestic as well as foreign policy”).

12. See Dino P. Christenson & Douglas L. Kriner, *Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action*, 61 AM. J. POL. SCI. 335, 336–37 (2017) (attributing the President’s ability to act unilaterally to both public support and to Congress’s inability to unite in defense of separation of powers); see also Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006–07 (2008) (arguing that “public constitutional sentiment” often dictates which branch will act in a given situation).

13. See Steven G. Calabresi, Book Review, “*The Era of Big Government is Over*,” 50 STAN. L. REV. 1015, 1040 (1998) (reviewing ALAN BRINKLEY, NELSON W. POLSBY & KATHLEEN M. SULLIVAN, *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997)) (arguing that a President’s inability to meet expectations will lead to the perception that his presidency has failed).

14. See William P. Marshall, *Why the Assertion of a “Nationalist” Presidency Does Not Support Claims for Expansive Presidential Power*, 12 U. PA. J. CONST. L. 549, 563 (2010).

15. See Teter, *supra* note 6, at 2222 (analyzing executive usurpation of legislative power, such as when the War Powers Resolution is not enforced by Congress, thereby expanding executive authority in an area shared by the legislature); see also Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2083–84 (2013) (analyzing President Obama’s use of recess appointments in response to congressional obstruction).

16. ACKERMAN, *supra* note 5, at 40 (arguing that the modern presidency has an advantage over the other branches, because “the White House staff can create sweeping changes that will be very hard to reverse once they are set in motion”); see also Flaherty, *supra* note 5, at 1816–24 (detailing the modern imbalance of power between the legislative and executive branches, and arguing that there is a great disparity between the Founders’ characterization of executive power and the current political landscape).

17. Cf. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018).

18. Neil Siegel, *The Essential Functions of the National Government in the Collective Action Constitution 2* (unpublished manuscript on file with the Indiana Law Journal).

19. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (“[T]he great security against a gradual concentration of the several powers in the same department, consists

would work.²⁰ Congressional action (or inaction) that imperils the ability of the government to function also raises constitutional concerns.²¹

It is therefore appropriate to examine whether there may be, or should be, limits on Congress's power to do nothing.²² Concededly, the case for finding such limitations is not easy. As Part I of this Essay will show, arguments for limiting Congress's authority to do nothing are not readily found in history, text, or constitutional structure. Part I concludes, however, that the need for establishing some constitutional limits on congressional inaction is nevertheless compelling because of the seriousness of the dangers involved. Accordingly, Part II goes on to advance an approach that would limit Congress's power to do nothing in certain circumstances. Specifically, Part II proposes an approach that would limit Congress's power to do nothing based on the type of power that Congress is (or is not) exercising. Congress could not refuse to act when the exercise of the power in question is necessary for the government to function, such as appropriations or appointments; but it may refuse to act on matters such as legislation that do not raise functionality concerns. Part III addresses some possible objections to this thesis. Part IV presents a brief conclusion.

I. CONGRESS'S POWER TO DO NOTHING

The case in favor of finding a constitutional obligation for Congress to act is not initially promising.²³ As a historical matter, "Do-Nothing" Congresses are not a new phenomenon. President Truman most notably used the term in his battles with

in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

20. See THE FEDERALIST NO. 21 (Alexander Hamilton) (describing the various defects of the Articles of Confederation), NO. 62, at 314 (James Madison) (Ian Shapiro ed., 2009) (noting that difficulty in passing legislation "may in some instances be injurious as well as beneficial").

21. See Siegel, *supra* note 18.

22. To date, the most significant work on this subject has been done by Michael Teter. See Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435 (2014); Teter, *supra* note 2; Teter, *supra* note 6. Teter's work focuses on the concept of arbitrary inaction, meaning inaction that is not based upon deliberative policy choices. In contrast, the approach offered here concentrates on the distinction between Congress's nonexercise of powers that are necessary to government functionality and those that are not. See *infra* notes 57–79 and accompanying text.

23. As a number of commentators have pointed out, not all "inaction" is the same. Teter, for example, distinguishes between nonarbitrary and arbitrary inaction, the latter being "when Congress fails to act on a matter within its constitutional domain, and such failure lacks a proper motivational or factual basis or is the exercise of discretionary power that involves no clear standards or explanation." Teter, *supra* note 22, at 1441. Franita Tolson distinguishes permissible gridlock from excessive gridlock, the latter being when there is broad political agreement about a course of action but party loyalty stymies any attempt at compromise. Franita Tolson, *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2272 (2013). Josh Chafetz, in turn, differentiates between "legislative inaction resulting from the lack of an adequate public consensus behind a particular course of action, on the one hand, and legislative inaction resulting from some procedural roadblock or dysfunction internal to our political institutions, on the other." Chafetz, *supra* note 15, at 2075.

Congress during the late 1940s,²⁴ but descriptions of Congress as Do-Nothing have been around since at least the nineteenth century.²⁵ More significantly, the critique that a particular Congress is not acting responsively or responsibly goes back even further. Attacks on Congress for not acting are as old as the Congress itself.²⁶

Congressional inaction of the type witnessed during the Obama years, where such inaction was designed with the specific purpose to make the President fail,²⁷ also has historical precedent.²⁸ During the presidency of Martin Van Buren, for example, Congress endeavored to block the efforts of the President to extricate the country

24. See President Harry S. Truman, Democratic Convention Acceptance Speech (July 15, 1948) (transcript available at http://www.pbs.org/newshour/spc/character/links/truman_speech.html [<https://perma.cc/B4EN-9ZB2>]); President Harry S. Truman, Know Nothing, Do Nothing Congress (Oct. 7, 1948) (transcript available at http://www.speeches-usa.com/Transcripts/harry_truman-nothing.html [<https://perma.cc/S8UH-VBMB>]).

25. See, e.g., *Bill of Indictment Against Congress*, CADIZ SENTINEL, Jan. 9, 1867, at 1 (arguing that the efforts of the Congress to impeach Andrew Johnson were wrong in light of Congress's failure to act to prevent national crises); *The Do-Nothing Congress—A Late Session*, NAT'L REPUBLICAN, Mar. 2, 1876 (criticizing the Congress for a particularly unproductive session). The denunciation of Congress as "Do-Nothing" was also occasionally raised by members of Congress themselves. See *The Work of Congress*, NEW-YORK TRIBUNE, Apr. 16, 1880, at 1 (quoting then-Senator James G. Blaine); see also *Fifty-Second Congress. An Analysis of Its Work Presented by Representative Henderson.*, RECORD-UNION, Mar. 11, 1893.

26. R. Shep Melnick, *The Conventional Misdiagnosis: Why "Gridlock" Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 B.U. L. REV. 767, 789–90 (2014) (describing the legislative gridlock during James Madison's presidency as even more intense than the current level of partisanship in Congress); see Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519, 519 (1999) (showing that complaints about gridlock in American politics predate the Constitution); see also David W. Brady & Hahrie C. Han, *Polarization Then and Now: A Historical Perspective*, in 1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 119, 120 (Pietro S. Nivola & David W. Brady eds., 2006) ("For many years, our political institutions and policymaking processes have withstood sharp divisions between the parties. In fact, the early history of the two-party political system in the United States exhibited much more colorful anecdotes about polarization.").

27. See Glenn Kessler, *When Did Mitch McConnell Say He Wanted to Make Obama a 'One-Term President'?*, WASH. POST (Sept. 25, 2012), https://www.washingtonpost.com/blogs/fact-checker/post/when-did-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/2012/09/24/79fd5cd8-0696-11e2-affd-d6c7f20a83bf_blog.html [<https://perma.cc/B5MA-F69M>] (describing McConnell's explicitly partisan statement that a one-term presidency for Obama should be the GOP's top priority); see also ROBERT DRAPER, *DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES xvii–xix* (2012) (quoting Republican Representative Kevin McCarthy as saying, "We've gotta challenge [Democrats] on every single bill," and noting that top House Republicans met the night of President Obama's inauguration to devise a plan to "mortally wound" President Obama through "united and unyielding opposition").

28. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1704 (2015) ("[T]he turn of the nineteenth century saw comparably high levels of conflict between Federalists and Democratic-Republicans, as well as familiar patterns that included 'increased partisan polarization, spreading over new dimensions of politics and policy,' 'close electoral parity between the two parties,' and ruthless strategic behavior to gain electoral advantage.").

from an economic crisis solely in order to further its own partisan agenda.²⁹ History, then, provides very little support for the argument that congressional inaction is, or can be, unconstitutional. Congressional inaction has simply been too prevalent in our nation's history.³⁰

Constitutional text also does not easily support the argument that Congress has a duty to act. The text, rather, imposes very few obligations on the Congress. Article I mandates that the House of Representatives must choose a speaker and other officers;³¹ and that the Senate must choose other officers and a president pro tempore in the absence of the Vice President.³² It also demands that each house must be "the Judge of the Elections"³³ and keep a journal of its proceedings.³⁴ It further requires that Congress from time to time publish a statement and account of receipts and expenditures of all public money,³⁵ and that it appropriate money for the armed forces.³⁶ Article V provides that Congress must call a convention for proposing constitutional amendments upon application of two-thirds of the states.³⁷ Article VI mandates that Senators and Representatives be "bound by Oath or Affirmation, to support [the] Constitution."³⁸ The Twelfth Amendment states that both houses must be present while the President of the Senate opens all the certificates and counts the votes for President.³⁹ The 20th Amendment requires that Congress assemble at least once a year.⁴⁰ The 25th Amendment instructs that Congress must decide whether the President is unfit for duty if "the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide" transmit to it a "written declaration that the President is unable to discharge the powers and duties of his office."⁴¹ Congress, of course, has a multitude of other powers; but beyond meeting these relatively minimal requirements, its exercise of those powers is essentially optional.

Constitutional structure also cuts against the conclusion that Congress has a duty to act. After all, the Constitution presupposes that Congress will check the executive.

29. See MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* 4–11 (2013) (noting Whig Party efforts to obstruct the agenda of President Martin Van Buren).

30. See Binder, *supra* note 26; Melnick, *supra* note 26; see also Brady & Han, *supra* note 26, at 120; JOHN J. PATRICK, RICHARD M. PIOUS & DONALD A. RITCHIE, *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 240 (2002) (noting that "[e]ven in the 1st Congress, minority members delivered long speeches and used the rules to obstruct legislation they opposed.").

31. U.S. CONST. art. I, § 2, cl. 5.

32. *Id.* art. I, § 3, cl. 5.

33. *Id.* art. I, § 5, cl. 1.

34. *Id.* art. I, § 5, cl. 3.

35. *Id.* art. I, § 9, cl. 7.

36. *Id.* art. I, § 8, cl. 12.

37. *Id.* art. V.

38. *Id.* art. VI, § 3.

39. *Id.* amend. XII.

40. *Id.* amend. XX, § 2 (amending U.S. CONST. art. I, § 4, cl. 2 which also required that Congress assemble once a year albeit on a different date. Both provisions, however, allowed Congress to adjust the date from the specific date set forth in the text).

41. *Id.* amend. XXV, § 4.

Obstructing a President's agenda, therefore, may simply be a matter of Congress doing its job.⁴² To be sure, this structural argument may not be as straightforward as it originally seems. As Michael Teter points out, certain types of congressional inaction can also arguably raise structural concerns because Congress's failure to act can mean that it is not performing its checking function.⁴³ Teter therefore distinguishes between Congress's refusal to take action because of deliberative choice and its failure to act because of its inability to make substantive policy decisions—the latter of which he describes as unconstitutional “arbitrary inaction.”⁴⁴ Yet even this insight does not deny that an allowance for *purposeful* congressional inaction is an essential part of the constitutional structure.

The argument from constitutional structure also identifies a definitional concern inherent in the position that congressional inaction can be unconstitutional. At what point does Congress's proper constitutional exercise of its checking function turn into improper congressional obstructionism?⁴⁵ The difficulty of this determination is no doubt exacerbated by the fact that the constitutional goals of checking power and simultaneously allowing for effective use of that power are inevitably in tension.⁴⁶ A President focused on making government work will be motivated to take actions that circumvent congressional blockage.⁴⁷ A Congress intent on blocking the President will take actions (or inactions) that could lead to situations in which the government

42. Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2107 (2013) (describing a former senator's position that intentional legislative gridlock in opposition to the Affordable Care Act was a “constitutional necessity”); see also Jeff Jacoby, *Gridlock, or Democracy as Intended?*, BOS. GLOBE (Dec. 25, 2011), <https://www.bostonglobe.com/opinion/2011/12/25/gridlock-democracy-intended/EJlqriPsRHqeW9wXlAhtMK/story.html> [<https://perma.cc/N656-A6DR>] (arguing that the current state of gridlock is simply a functional norm, intended by the Framers).

43. Teter, *supra* note 6, at 2222 (“Congress cannot perform [its] checking function if it cannot make deliberative decisions.”); see also Teter, *supra* note 2, at 1138 (“[I]f Congress cannot act, it cannot effectively check the executive—or the judiciary—when the other branch extends beyond its authority or impairs Congress's ability to fulfill its constitutional responsibilities.”).

44. Teter, *supra* note 6, at 2218 (“If Congress *chooses* to maintain the status quo or if the Senate *decides* to reject a nominee, that amounts to a substantive decision. But that's not what is happening. With increasing frequency, Congress fails to make policy decisions.”) (emphasis in original).

45. See Tolson, *supra* note 23, at 2272 (2013) (“Although our current system is an obvious departure from the Madisonian ideal, distinguishing ‘permissible’ levels of gridlock from gridlock that is ‘excessive’ and therefore unconstitutional remains difficult.”); see also David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 41 (2014) (arguing that the result of congressional gridlock is “a widespread fear that the breakdown of certain separation-of-powers conventions is contributing to a breakdown of our system of representative government”).

46. Teter, *supra* note 2, at 1114 (stating that the concepts of separation of powers and the checking power “are, at least facially, at odds with each other”).

47. See Lowande & Milkis, *supra* note 4, at 3–6 (describing the gradual expansion of the President's administrative authority in response to partisan legislative gridlock); see also Marshall, *supra* note 5, at 776–77 (describing President Obama's strategy to “circumvent the gridlock in Congress and accomplish several domestic policy initiatives through the unilateral exercise of executive power”).

is disabled from accomplishing its basic functions (consider, for example, the battles over whether Congress should raise the debt ceiling in order to pay for its already-accumulated debts).⁴⁸

Further, any attempt to draw a line between Congress's appropriate exercise of its checking function and improper obstructionism will necessarily be hampered by the difficulty in overcoming partisan perspectives. Many who condemned the Republican Congress as obstructing the agenda of President Obama might very well praise the use of those same tactics to combat the agenda of President Trump as examples of Congress acting according to its highest calling.⁴⁹ Conversely, many who saw the Republican efforts to battle President Obama as examples of Congress acting appropriately might very well see similar Democratic efforts to oppose President Trump as obstruction (in fact, the Senate majority leader and principal architect of the Republican efforts to frustrate President Obama's presidency has made exactly this claim).⁵⁰ Distinguishing between partisan and constitutionally based criticism of congressional inaction is therefore unlikely to be easy. Determinations of unconstitutional inaction, in short, then will inevitably raise the concern of a lack of manageable standards.⁵¹

Finally, any theory setting forth a constitutional obligation for Congress to act would raise a host of enforcement concerns. Is such a doctrine justiciable?⁵² Could courts compel the legislature to act without raising serious separation of powers

48. See, e.g., Balkin, *supra* note 5, at 1176 (characterizing the debt ceiling crisis of 2011 and the government shutdown of 2013, at least in part, as attempts "to weaken and humiliate the President of the opposition party").

49. See Rachel Dicker, *The Internet Wants Congress to #DoYourJob and Consider Merrick Garland*, U.S. NEWS & WORLD REP. (Mar. 17, 2016, 12:46 PM), <https://www.usnews.com/news/articles/2016-03-17/doyourjob-hashtag-asks-congress-to-consider-merrick-garland-for-supreme-court> [<https://perma.cc/TW5C-A6TY>] (discussing Senator Chuck Schumer's condemnation of the Republicans' partisan filibuster of President Obama's Supreme Court nomination). *But see* Robert Barnes, Ed O'Keefe & Ann E. Marimow, *Schumer: Democrats Will Filibuster Gorsuch Nomination*, WASH. POST (Mar. 23, 2017), https://www.washingtonpost.com/powerpost/gorsuch-confirmation-hearing-to-focus-today-on-testimony-from-friends-foes/2017/03/23/14d21116-0fc7-11e7-9d5a-a83e627dc120_story.html [<https://perma.cc/R7PL-JZPB>] (discussing Senator Chuck Schumer's role in leading the partisan filibuster of President Trump's Supreme Court nomination).

50. Compare Kessler, *supra* note 27 (citing Senator McConnell's statement that making Obama a one-term President should be the GOP's top priority), with Cristian Farias, *Mitch McConnell Says Americans Won't Tolerate Democrats Blocking Supreme Court Nominations*, HUFFPOST (Jan. 4, 2017, 6:42 PM), http://www.huffingtonpost.com/entry/mitch-mcconnell-merrick-garland-supreme-court_us_586d6720e4b0c4be0af2bd3a [<https://perma.cc/2LHL-TX5H>] (noting McConnell's criticism of Democrats as obstructionists for opposing President Trump's opportunity to nominate a Supreme Court even though McConnell had refused to hold a vote on President Obama's nominee).

51. Cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (indicating that constitutional standards need to be manageable in order to allow for judicial review). *But see* Teter, *supra* note 22, at 1472–75 (arguing that, while the "manageable standards" requirement of the political question doctrine is certainly an obstacle, it ultimately should not prevent a justiciable challenge to congressional inaction).

52. See Teter, *supra* note 22, at 1472–75.

concerns?⁵³ If it were concluded that there was a nonjudicially enforceable obligation for Congress to act, would that have any effect?

These concerns notwithstanding, the project of finding limits on Congress's power to do nothing is critical for a number of reasons. The first is the most basic. Federal government dysfunction can threaten the provision of basic services and national security (as could occur in the case of a government shutdown).⁵⁴ Congressional inaction can therefore literally place the nation at risk.

Second, a theory of a congressional obligation to act may be necessary to prevent the further expansion of presidential power. As noted above, there is irony in the use of congressional obstruction as a weapon against presidential overreach. It tends to increase presidential power in the long run.⁵⁵ Finding constitutional limits on Congress's power to do nothing, in short, may paradoxically serve to lessen, rather than increase, the expanse of presidential power.

Third, and more pragmatically, a theory of a congressional obligation to act may be necessary to provide a constitutional backstop against further dysfunction. At present, the pressures of polarization are so forceful that even members of Congress who might otherwise work across the aisle are deterred from doing so.⁵⁶ In such a political environment, where politicians need excuses to work with each other, setting a constitutional standard for congressional behavior might provide some political cover for bipartisan action.

Accordingly, it is worthwhile to investigate whether a workable theory can be constructed that posits that Congress has a constitutional duty to act, at least in some circumstances. The next Part offers such an approach.

53. *But see id.* at 1460–61 (arguing that judicial review of potentially arbitrary inaction by Congress would actually support constitutional notions of separation of powers and inter-branch accountability).

54. For a synopsis of the 2013 U.S. government shutdown's negative effects on government entities responsible for public health (including the Centers for Disease Control and Prevention), see Raina M. Merchant, Commentary, *The 2013 US Government Shutdown (#Shutdown) and Health: An Emerging Role for Social Media*, 104 AM. J. PUB. HEALTH 2248, 2248–49 (2014); *see also* Cal Woodward, *Shutdown Hits Health Services, but Obamacare Steams on*, 185 CANADIAN MED. ASS'N 1390, 1390 (2013) (describing the U.S. government's shutdown as “delivering a blow to medical research, dampening disease detection and keeping the gravely ill out of potentially life-saving clinical trials”).

55. *See supra* notes 9–16 and accompanying text.

56. *See* Jonathan Martin & Kenneth P. Vogel, *Trump Backers 'Furious' That Senator Stood Against Health Care Bill*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/us/politics/heller-trump-health-care-adelson-wynn.html> [<https://perma.cc/736F-T322>] (discussing the condemnation of Senator Dean Heller by his fellow Republicans for his refusal to support the conservative replacement for the Affordable Care Act); *see also* Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 645 (2014) (“The goal of most successful constitutional reforms in the United States is to entrench the existing structure of political competition and align other constitutional practices so that the dominant political forces can operate the constitutional order more effectively.”).

II. A THEORY OF CONGRESS'S DUTY TO ACT: DISTINGUISHING BETWEEN TYPES OF CONGRESSIONAL POWERS

There is a difference between Congress's failing to act on a President's favored piece of legislation (including those that enjoy popular support) and Congress's failure to pass a budget. The former may result in the maintenance of bad policy; the latter may lead to a government shutdown. All inactions do not have the same consequences.

I begin with this understanding as a starting point for determining when congressional inaction should be deemed unconstitutional. The constitutionality of congressional inaction should be determined by reference to the specific type of congressional power involved and the consequences of that power's nonexercise, and not on the basis of how purportedly egregious the congressional behavior in question appears to be.⁵⁷ Specifically, and preliminarily, I would suggest that congressional failure to act on appropriations⁵⁸ or, in the case of the Senate, its failure to consider presidential appointments under its advise and consent authority,⁵⁹ should be subject to constitutional scrutiny. Its failure to take legislative action, as when it refuses to sign on to a President's particular policy agenda and enact his proposed legislation, should be constitutionally unobjectionable. (I leave for later discussion whether other congressional powers, such as its oversight and investigatory authority or its powers over war and national security, should or could also trigger constitutional scrutiny when Congress fails to act.)

The primary basis for this distinction is straightforward. Congressional inaction in the areas of appropriations and appointments threatens the ability of the government to function. The government cannot run without funding,⁶⁰ and it cannot operate without leadership.⁶¹ As such, inaction with respect to either the budget⁶² or

57. *But see* Chafetz, *supra* note 15, at 2075 (differentiating between inaction which emanates from a lack of adequate public consensus and that which results from some internal dysfunction); Teter, *supra* note 22, at 1441 (distinguishing between nonarbitrary and arbitrary inaction); Tolson, *supra* note 23, at 2268–69 (distinguishing between permissive and excessive gridlock).

58. *See* Chafetz, *supra* note 6, at 725 (noting that appropriations laws are different from other bills in that “their passage is necessary to the continued functioning of the entire government”); *see also* Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1183 (2012) (arguing that congressional polarization and inaction will lead to “budgetary gridlock forcing the president to take actions that test constitutional limits”).

59. Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1559–60 (2015) (noting that the congressional obstruction of presidential appointments inhibits the President's constitutional duty to faithfully execute the laws); *see also* Teter, *supra* note 6, at 2229 (arguing that Congress's arbitrary inaction with respect to presidential appointments goes against notions of constitutional fairness).

60. *See supra* note 58 and accompanying text.

61. *See supra* note 59 and accompanying text.

62. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345–46 (1988) (arguing that a passive approach to appropriations might be unconstitutional in some cases,

appointments arguably abdicates Congress's core responsibility to maintain and preserve the government.⁶³ In contrast, the government can continue to operate in the absence of new legislation.⁶⁴ Therefore, inaction on legislation, while it may amount to bad policy or bad government, does not undercut the viability of the state itself.

Second, drawing the line between appropriations and appointments on one side and legislation on the other is also supported by separation of powers concerns. Appropriations and appointments are necessary for the President to be able to fulfill his duties, including his obligation to "take care" the laws are faithfully executed.⁶⁵ New legislation is not. Holding back on appropriations and appointments thus crosses into matters within the domain of the executive in a way that holding back legislation does not. To be sure, Presidents have increasingly taken on the role as "legislator-in-chief,"⁶⁶ and one can understand why a President might criticize a Congress for blocking his legislative agenda. Yet from a separation of powers perspective, the notion that a legislature can obstruct a President's legislative agenda is fundamentally misplaced. Article I vests the legislative power in the Congress.⁶⁷ Article II gives the President only the right to make recommendations.⁶⁸

Third, separating categories of powers in which congressional inaction can be unconstitutional and those in which it cannot may also have the unexpected advantage of curbing presidential power. As it stands now, presidents can (and do) argue that Congress has not acted in passing needed legislation as a justification for engaging in unilateral action.⁶⁹ That, indeed, was the central argument underlying President Obama's "we can't wait" strategy.⁷⁰ It was also the reason offered by President George H. W. Bush in moving forward without congressional authorization in his initiative to fund faith-based organizations;⁷¹ and, most recently, the justification

and that "Congress has not only the power but also the duty to exercise legislative control over federal expenditures").

63. See David Schoenbrod, *How to Salvage Article I: The Crumbling Foundation of Our Republic*, 40 HARV. J.L. & PUB. POL'Y 663, 665 (arguing that Article I intentionally assigns Congress the power and duty to decide the most overarching policy issues).

64. In fact, as some leading constitutional theorists have argued, obstructing legislation can at times be beneficial. See Gerhardt, *supra* note 42, at 2107–08 (noting that Justice Scalia believed that gridlock was intended by the framers in order to prevent excessive legislation and quoting Scalia as stating: "God bless gridlock.").

65. U.S. CONST. art. II, § 3.

66. See Schoenbrod, *supra* note 63, at 678 (noting that the President's legislative power has steadily grown, just as Congress's legislative accountability and power has steadily decreased).

67. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

68. *Id.* art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .").

69. Lowande & Milkis, *supra* note 4, at 5 (noting that recent congressional gridlock has encouraged the White House to use unilateral action "in the service of partisan objectives").

70. See *supra* note 4 and accompanying text.

71. Lowande & Milkis, *supra* note 4, at 4; Georgia A. Persons, *Administrative Policy Initiatives and the Limits of Change: Lessons from the Implementation of the Bush Faith-Based and Community Initiative*, 39 POL. & POL'Y 949, 950 (2011).

set forth by President Trump for acting unilaterally in undoing portions of the Affordable Care Act.⁷² Establishing that Congress is within its legitimate prerogatives not to act on legislative matters, however, would take this rationale for unilateral action off the President's desk.

Fourth, breaking down the constitutionality of congressional inaction into categories has the collateral benefit of providing a more effective incentive to motivate Congress to break gridlock. A particularized assertion that an entity has failed to perform a specific constitutionally required duty is a more powerful argument than is a general condemnation that the entity has simply failed to do its job. General criticisms sound in hyperbole. Specific critiques have bite. Further, as business management theory instructs, setting forth specific, clearly defined goals is a better way to both motivate actors and hold them accountable for their results than are general directives.⁷³

Fifth, and for largely the same reasons, to the extent that a particular battle over the constitutionality of congressional inaction is fought politically rather than through the courts (a matter that will be discussed subsequently), the narrow claim that Congress has failed to perform a specific constitutional duty would have greater resonance than would a general attack on Congress as obstructionist. To be sure, one could argue that the battle over the nomination of Judge Merrick Garland to the United States Supreme Court disproves this point. After all, in that instance, the constitutional claim was made narrowly—specifically that the Congress violated a specific and constitutionally imposed duty to give a Supreme Court nominee a hearing.⁷⁴ Perhaps. Yet, it is also true that the attack on Congress for its inaction on Judge Garland was presented against a background of multiple attacks on Congress for purportedly unconstitutional inaction on a wide range of matters.⁷⁵ It is therefore also possible that the power of the argument that Congress was violating its constitutional duty by not acting was weakened by overuse.

Sixth, distinguishing between congressional inaction that threatens the government's ability to operate and inaction that does not impair government functionality arguably makes sense jurisprudentially. As noted above, any claim that congressional

72. Trump, *supra* note 10. Two days after sending this tweet, President Trump signed an executive order ending the federal subsidy program for health insurance companies that insured low-income people and ending requirements that insurers on the health care exchange provide certain benefits—policy changes that health experts said could unravel the Affordable Care Act. Robert Pear, Maggie Haberman & Reed Abelson, *Trump to Scrap Critical Health Care Subsidies, Hitting Obamacare Again*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/trump-obamacare-executive-order-health-insurance.html> [<https://perma.cc/UW4M-R4XR>].

73. Peter F. Drucker, *Managing the Public Service Institution*, PUB. INT., Fall 1973, at 43, 49.

74. David M. Herszenhorn, *Merrick Garland Battle Moves to Home Front as Senate Recesses*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/19/us/politics/merrick-garland-supreme-court-senate-recess.html> [<https://perma.cc/U4GM-NL2R>] (quoting Senator Jon Tester as saying that refusing to vote on Garland's nomination is equal to "not following the Constitution").

75. See Pozen, *supra* note 45, at 6 (citing the various obstruction-related criticisms by the Obama administration against Senate Republicans).

inaction is unconstitutional runs into a considerable headwind, as it is not easily supported by history, text, or structure.⁷⁶ It therefore follows that claims of unconstitutionality, if they are to succeed at all, need to be both narrowly drawn and extraordinarily well justified. Setting the line based on whether congressional inaction threatens the government's ability to function meets these criteria.⁷⁷

Finally, and undoubtedly most wistfully, instructing Congress that it has a constitutional duty to act in certain circumstances might serve to change political culture. The position that congressional action is optional sends the message that there is no need for members to work together because there are no common responsibilities. The notion that Congress has a duty to act, on the other hand, tells the members that they have common goals and common obligations. Such an understanding then could be helpful in turning members away from the mindset of separation of parties that currently dominates political culture⁷⁸ to one in which they have greater institutional identification.⁷⁹ If so, such a change in orientation could serve to reinvigorate separation of powers.

III. POTENTIAL OBJECTIONS AND RESPONSES

There are, of course, a multitude of arguments against the approach advocated in this Essay. This Part will attempt to respond to some of the more likely challenges. The first and primary objection has already been mentioned. It is difficult to discern an obligation for Congress to act from the existing jurisprudence. The claim that Congress has such a duty, therefore, would require moving the needle. I readily cede this point, although I would suggest that drawing the line for when congressional inaction threatens government functionality does not move the needle too far, given the inherent constitutional mandate that elected officers have a fundamental obligation to preserve the republic.⁸⁰

A second objection might be that finding Congress has a constitutional duty to act would further weaken the Congress in its battles with the President. The power of the purse and the power to resist presidential appointments are two of the strongest

76. See *supra* notes 23–44 and accompanying text.

77. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) (arguing that unusual or even extraconstitutional actions must be taken if the constitutional order is in jeopardy).

78. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006) (discussing how Congressional members' loyalty to their party rather than loyalty to their branches has weakened the role of separation of powers in checking government power). *But see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 28–33 (2017) (arguing that separation of powers has not been weakened to the degree that Levinson and Pildes suggest).

79. See George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2303–06 (2013) (discussing nonpartisan staff on congressional committees as a method for reducing gridlock and promoting cross-aisle cohesion).

80. *Cf.* U.S. CONST. art. VI, § 3 (“The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution . . .”). See generally Schoenbrod, *supra* note 63 (arguing that the legislators must return to the constitutionally inherent sense of responsibility that the Framers intended).

weapons in Congress's arsenal.⁸¹ Suggesting that there are constitutional limits on these powers would arguably take away some of Congress's most potent leverage in its interbranch disputes. This objection has substantial merit as well, although only to a point. Concluding that Congress has a duty to act in these areas does not mean that it has to give in to the President in every instance; it only means that there are constitutional limits on its right of inaction. Further, as noted previously, the approach suggested here would also empower Congress in the legislative arena because it would confirm that Congress has no obligation to consider or enact legislation. As such, it would make clear that a President does not have the right to act unilaterally on legislative matters because of congressional inaction.⁸²

Third, it would likely be argued that there are, and can be, no clear standards to determine when congressional inaction runs afoul of constitutional limits. Presumably, a congressional refusal to meet with a President to discuss a budget might be considered improper obstruction; but would (or should) the failure to come to agreement with the President be considered congressional obstruction if the failure to agree is based in good faith?⁸³ Further, if good faith is to be the standard, how is it to be determined when Congress is acting in good faith and when it is not?

These undoubtedly are serious concerns. Nevertheless, some direction is possible. For example, with respect to appointments, a requirement that the Senate has to give a presidential nominee a hearing within a reasonable amount of time provides a workable standard.⁸⁴ Similarly, a rule prohibiting the blocking of a nominee because of objections to some executive branch policy having nothing to do with the prospective nominee's responsibilities, as occurred when Senator Jesse Helms held up a vote on Winston Lord as ambassador to China⁸⁵ or when Senator Mary Landrieu prevented a vote on Jack Lew for OMB Director,⁸⁶ is easily applied.⁸⁷ Just as clear would be a prohibition on voting against (or not voting on) a nominee, not because of any objections to that nominee, but because of an objection to the office to which that nominee has been appointed. Refusing to confirm a nominee because of opposition to the existence of the agency rather than to the nominee himself, for example, is an action more designed to repeal already enacted legislation than it is an action consistent with the Senate's obligation to appraise the merits of a nominee.⁸⁸ Comparable rules

81. See Pozen, *supra* note 45, at 14–15 (describing Congress's appropriations and appointment powers as being among its most formidable); see also CHAFETZ, *supra* note 78, at 45–151 (discussing Congress's appropriation and appointment powers).

82. See *supra* notes 66–68 and accompanying text.

83. See Chafetz, *supra* note 6, at 772–73 (supporting the notion that one branch must be allowed to check another in good faith, but arguing that this should be done judiciously).

84. See Teter, *supra* note 22, at 1482.

85. See Martin Tolchin, *Helms Bars Envoy, Demanding Reagan Halt Abortion Aid*, N.Y. TIMES (Nov. 1, 1985), <http://www.nytimes.com/1985/11/01/us/helms-bars-envoy-demanding-reagan-halt-abortion-aid.html> [<https://perma.cc/HA8S-3UJ3>].

86. This example is noted in Teter, *supra* note 22, at 1487.

87. But see CHAFETZ, *supra* note 78, at 134 (citing the example of blocking nominees because of objections to some executive branch policy having nothing to do with the prospective nominee's responsibilities, as a "capacious," but apparently permissible, use of Congress's appointments powers).

88. See *id.* at 1449 (discussing congressional inaction on the nomination of Richard Cordray to head the Consumer Financial Protection Bureau); see also Ylan Q. Mui, *Senate*

would also make sense when dealing with appropriations issues. No votes or nonvotes should have to be tied to the merits of the specific appropriations proposals and not to a matter fully extraneous to the substance of the appropriations bill.⁸⁹

More difficult will be determining unconstitutionality in instances in which the basis for inaction is less straightforward. The question as to whether a particular congressional inaction is “arbitrary” versus “non-arbitrary,” in the words of Michael Teter,⁹⁰ or “excessive” versus “permissible,” as advocated by Franita Tolson,⁹¹ is not likely to be easily determined. Congress may not take action on specific matters for a variety of reasons, and the bases underlying congressional inaction may be hard to uncover.⁹² In this respect, the approach offered here has an advantage over an across-the-board account of congressional inaction, in that it does not submit all congressional inaction to constitutional review. That only means, however, that the application of the test will be less frequent—not that it will be clearer.⁹³

Fourth, the “clarity of standards” issue leads to the obvious question of enforceability. Is the question of the constitutionality of congressional inaction one that should be resolved by the courts, or is it one in which the role of the constitutional claim is to inform the political rhetoric that accompanies interbranch disputes?⁹⁴ Ideally, I would suggest that, like many interbranch battles,⁹⁵ the claim of unconstitutionality of congressional inaction is better suited to nonjudicial resolution than

Blocks Richard Cordray Confirmation to Head Consumer Watchdog Agency, WASH. POST (Dec. 8, 2011), https://www.washingtonpost.com/blogs/2chambers/post/senate-republicans-block-cordray-as-obama-consumer-watchdog-nominee/2011/12/08/gIQA6j9BfO_blog.html [<https://perma.cc/Q2Z4-K9E9>] (“Though GOP lawmakers have praised Cordray’s qualifications for the job—he currently serves as the CFPB’s director of enforcement—they have pledged to prevent any candidate from being confirmed unless significant structural change are made to the bureau.”).

89. A more difficult question is presented by the vote on the debt ceiling. An argument could be made that not raising the debt ceiling would be unconstitutional because it could effectually force the president to take unconstitutional measures to ensure the government continues to function properly. *See* Buchanan & Dorf, *supra* note 58, at 1188.

90. *See* Teter, *supra* note 22, at 1475 (acknowledging the difficulty of the determination).

91. Tolson, *supra* note 23, at 2272.

92. One issue that might commonly arise is determining who in the Congress is responsible for the inaction. *See* Teter, *supra* note 22, at 1437–38.

93. This is not to suggest, of course, that all constitutional standards must be clear. *See* *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (offering the test for personal jurisdiction of whether the defendant has such minimum contacts with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice); *see also* *Warth v. Seldin*, 422 U.S. 490 (1975) (holding that, in order to establish standing, the plaintiff must have suffered an injury in fact).

94. *See* Posner & Vermeule, *supra* note 12, at 1045 (arguing that the most “frequent and important” constitutional showdowns take place outside of the courts); *see also* Chafetz, *supra* note 6, at 769 (“In many situations, the Constitution does not dictate a stable allocation of decisionmaking authority; rather, it fosters the ability of the branches to engage in continual contestation for that authority.”). *See generally* James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377 (2005).

95. *See* Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 *GEO. L.J.* 737, 743–44 (2002) (citing the various

judicial enforcement. After all, asking a court to order Congress to take a specific action because the latter is ostensibly not doing its job is a heavy lift. Perhaps, as has been argued in the context of presidential appointments, a judicial decision could be relatively limited in scope if the only remedy sought is an order requiring Congress to vote on the nominee.⁹⁶ However, even in this limited circumstance, I remain skeptical. The prospect, for example, of a court entertaining an action in the nature of a mandamus demanding that the Senate hold a confirmation vote seems an unlikely scenario.⁹⁷

That said, the lack of a court remedy is equally problematic. For the constitutional argument to have an effect in the political debate outside the courts, it must have political resonance.⁹⁸ But it is doubtful that the claim that congressional inaction can be unconstitutional will have such reverberation both because of its lack of historical acceptance and because of the nature of the current political climate, which seems to reject any norms that are not judicially imposed. A judicial ruling that congressional inaction can be unconstitutional, in short, may be needed to change the political culture so that claims of unconstitutional congressional inaction can have traction in the public debate.

Finally, it might be argued that the approach in this Essay does not go far enough, and that there should be limits on congressional inaction on legislative matters as well as on appropriations and appointments. After all, not passing critical legislation can also be seriously damaging to the national interest. There is, of course, considerable merit to this position and, as stated previously, this Essay leaves open the question as to whether there should be constitutional scrutiny of congressional inaction on matters affecting national security.⁹⁹ For the most part, however, maintaining a rule that congressional inaction on legislative matters should not be subject to constitutional scrutiny makes sense. As discussed previously, distinguishing Congress's appropriations and appointments from its legislative authority follows from separation of powers principles as well as from concerns of government functionality. More fundamentally, however, expanding the categories of congressional powers subject to constitutional review too broadly undercuts one of the central purposes of this project, which is to promote a structure that serves to limit presidential power, as well as to prompt responsive congressional behavior. Opening up the argument for the President that the Congress may be acting unconstitutionally when it refuses to

benefits and historical precedent for nonjudicial resolution of disputes between Congress and the President).

96. Teter, *supra* note 22, at 1461.

97. Of course, it once might have been assumed that maintaining a mandamus action ordering the Secretary of State to deliver a commission to a presidential appointee would also be an unlikely scenario. *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the appointee had a right to sue for the commission but the court in which he sued did not have proper jurisdiction).

98. For an argument that political rhetoric influences constitutional change, see Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083, 1086–87 (2014) (“Through the effective mobilization of the sovereign people with distinctive—and often sharply antagonistic—political visions, significant constitutional change, for better or worse, is possible.”).

99. There is, of course, always the concern, however, that a President may overstate threats of national security in order to push his agenda.

act on his favored legislation might simply be too much of an invitation for him to engage in unilateral action instead of proceeding through the legislative process.¹⁰⁰

That being said, there is no doubt that this concern and the other objections to the approach advocated in this Essay are substantial. Yet, there is also no question that if we are to begin to overcome the problems in constitutional governance that have been exposed by congressional obstruction, some new approach is needed. Investigating whether there are limits on Congress's power to do nothing by reference to specific congressional powers may offer an appropriate starting point.

CONCLUSION

In a system of checks and balances, an essential prerogative of Congress must be its right to do nothing. Not confirming a President's appointments, not passing his budgets, and not enacting his proposed legislation are some of the most effective ways that a Congress can fulfill its structural obligations and guard against executive branch overreach. Congressional inaction, however, can also serve to improperly empower the executive, as Presidents have often used congressional inaction as a justification for exerting power unilaterally. Further, congressional inaction may be harmful, in and of itself, as it can undercut the ability of the government to function.

In response to these concerns, this Essay suggests that congressional inaction in the areas of presidential appointments and appropriations should be subject to constitutional scrutiny. Congressional inaction in the area of legislation, however, should be deemed unobjectionable. Such an approach could serve to prod congressional action where it is most needed, yet also limit the ability of the President to claim he has a right to act unilaterally on legislative matters when Congress has refused to act. As such, it may offer a helpful starting point in addressing the dual concerns of congressional obstruction and expansive presidential power that have come to define much of contemporary politics.

100. See generally William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 *YALE L.J.F.* 95 (2014).