

# THE PRESIDENT’S QUESTION TIME: POWER, INFORMATION, AND THE EXECUTIVE CREDIBILITY GAP

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## ABSTRACT

The rule of law depends on a working separation of powers and transparency and accountability in government. If information is power, the ability of one branch of government to control information represents the ability to control federal legislation, policy, and decision-making. The Framers of the United States Constitution developed the Madisonian model of separated powers and functions, and a system of checks and balances to maintain those separations, with this in mind. History has shown a progressive shift of the power to control information toward the executive branch and away from the Legislature. Particularly when unified, one-party government precludes effective Congressional investigations and oversight, little recourse exists for accessing information. This article addresses an institutional design element that would increase transparency and accountability: periodic question-and-answer sessions between Congress and the President modeled on the United Kingdom’s Prime Minister’s Question Time. This article makes the case for such a measure in the U.S. by examining the comparative political history and legal norms of the U.K. and the United States, and the need for a Question Time to increase government transparency and efficiency.

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**“You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”<sup>1</sup>**

INTRODUCTION

The framers of the Constitution premised the separation of powers and functions on the idea that one branch of government should not be trusted with too much power.<sup>2</sup> In the first years of government under the Constitution, the President, Congress and the courts experimented with ways to communicate and operate government efficiently while also respecting the constitutional separation of powers.<sup>3</sup> Historically, when one

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<sup>1</sup> THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).  
<sup>2</sup> THE FEDERALIST NO. 51 (James Madison).  
<sup>3</sup> See *infra* Part III.C.

branch of government shifts its mode of operation and the information it controls, the other branches must adjust to maintain the systemic balance of government.

The current administration has asserted increased authority over the flow of information from the executive branch than was previously the case, has failed to respond to formal and informal queries by members of Congress, and has attempted to manipulate press coverage favorably while diminishing the information it actually discloses to the media.<sup>4</sup> Similar criticisms—of a lack of public information, accountability, and transparency<sup>5</sup> in government—have been directed toward most, if not all, recent U.S. presidents.<sup>6</sup>

This article considers one institutional element used by the United Kingdom and other democracies to hold their executives accountable and increase governmental transparency: a periodic opportunity for elected representatives to pose questions to the leader of the executive branch. This article asks whether a President's Question Time, in which members of Congress would periodically question the President in person regarding his policies, actions and plans, would be constitutional, or even desirable.

In analyzing these questions, this article considers the historical and comparative bases for adopting a measure commonly used in parliamentary government. It also seeks to determine how a President's Question Time would fit within the range of options that Congress typically uses to request information from the executive branch.

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<sup>4</sup> See discussion *infra* Part I; see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2351–53 (2006); Adam M. Samaha, *Government Secrets, Constitutional Law and Platforms for Judicial Intervention*, 53 U.C.L.A. L. REV. 909, 910, 919 (2006).

<sup>5</sup> Governmental accountability and transparency are two of the hallmarks of democratic nations operating under the rule of law. See generally Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001). The manner in which such objectives are achieved varies significantly, depending on the nature of the system (e.g., Westminster-style parliamentary system, French system of dual-executive power, U.S. system of unitary executive). See *id.* at 1330–37.

<sup>6</sup> See MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 42–48 (1994) (outlining twentieth-century legislative-executive tensions over the invocation of executive privilege against legislative inquiries). For discussions of a perceived concentration of power in the executive branch in various administrations over the last thirty years, see generally Stephen L. Carter, *Comment: The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL'Y 543 (2003); Peter W. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503 (2003) [hereinafter Shane, *Inter-Branch Norms*].

Part I looks at the shift in the balance of power among the branches of the U.S. government over the last 200-plus years and suggests that increased consolidation of power within the control of the executive branch has redefined the careful structural separations and balances established by framers of the U.S. Constitution who believed in divided governmental power. Part I also analyzes the current lack of transparency and accountability of the executive branch and addresses how these issues are amplified when one political party controls both the executive and legislative branches of government.

Part II considers as a comparative model the political history of the United Kingdom, including the increase in executive power of the Prime Minister, that led to the establishment of a Prime Minister's Question Time in that country.

Part III examines the U.S. framers' deliberate institutionalization of a low level of presidential responsiveness to Congress and the public and discusses the framers' expectation that the Legislature was likely to dominate and coerce both the executive and the judicial branches of government. Their concern that the President and Judiciary would need support in the face of legislative bullying served as the backdrop for requiring a low level of executive accountability to the Legislature. That view did not anticipate the ability of the President to control legislators within his own party and garner power through the administrative departments. Part III also considers early experiments in inter-branch communications within the government, including instances in which President George Washington appeared before Congress to answer questions about executive branch activity.

Finally, Part IV addresses the right of the Legislature to seek information from the Executive. An examination of various legislative measures toward increased oversight of the executive branch sheds some light on the constitutionality of instituting a President's Question Time.

## I. NO EFFICIENT CHECK ON AN INCREASINGLY POWERFUL EXECUTIVE BRANCH

The institutions of American government were designed so that each branch of government would act as a "co-equal" in its powers and functions,<sup>7</sup> and that ongoing competition among the branches of government would keep each of them in check.<sup>8</sup> Under the model of divided government advanced by James Madison, "ambition would counteract

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<sup>7</sup> See THE FEDERALIST NOS. 48, 51 (James Madison); see also Levinson & Pildes, *supra* note 4, at 2312.

<sup>8</sup> See THE FEDERALIST NO. 51 (James Madison); see also Levinson & Pildes, *supra* note 4, at 2312.

ambition,”<sup>9</sup> keeping the Executive, Legislature, and Judiciary exercising their proper functions—no more and no less.

When the executive branch asserts additional rights or powers for the President, Congress has the right and the obligation to exert pressure and provide oversight on the Presidency in order to maintain this balance among co-equals. History, however, has demonstrated major vulnerabilities of the Madisonian vision: a steady increase in the powers and functions asserted by the executive branch, including the level of control that the executive branch has been able to assert over Congress at any given time; and the unwillingness of Congress, at times, to challenge presidential policy, demand information and transparency from the executive branch, and generally exercise its constitutionally-mandated oversight role.<sup>10</sup>

Here lies the problem: Congress’s will and ability to maintain its independence from executive branch interests and exercise its oversight role—to demand information, initiate investigations or raise the specter of impeachment—requires the will of the majority party in Congress.<sup>11</sup> When Congress chooses not to exercise these rights, presidential conduct—which may result in bad policy decisions, overreaching into the purview of other branches of government, or constitutionally suspect infringements on individual rights—remains unchallenged and opaque to the public and other branches of government.

In times of divided government, in which at least one chamber of Congress is controlled by a different political party than the President, the likelihood that Congress will act in accord with the Madisonian assumption of balanced branches working against each other as co-equals increases dramatically.<sup>12</sup> When, however, unified government is in place (i.e., the President and both chambers of Congress are controlled by the same political party),<sup>13</sup> Congress’s efficacy as a limitation on the aggregation of presidential power via legislation or investigation diminishes

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<sup>9</sup> See THE FEDERALIST NO. 51 (James Madison).

<sup>10</sup> See Farina, *supra* note 6, at 508; Levinson & Pildes, *supra* note 4, at 2316–17.

<sup>11</sup> See Levinson & Pildes, *supra* note 4, at 2313 (noting that “[p]olitical competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through . . . political parties”).

<sup>12</sup> Levinson & Pildes, *supra* note 4, at 2371 (citing JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 59–75 (1990)) (concluding that congressional committees exercised over 26% more oversight in times of divided government than unified government between 1961 and 1977). Levinson and Pildes use a straightforward majority to assess whether a party is able to exert control in the legislature. *Id.* at 2368–71.

<sup>13</sup> This is sometimes referred to as “full authority” government. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 648 (2000).

tremendously, due largely to the power of political party loyalty and discipline.<sup>14</sup>

In times of unified government, when Congress chooses not to exercise its oversight responsibilities, the available recourse against presidential overreaching is inefficient at best. The public is left to rely on the democratic process to elect a different president or a Congress with greater muscle in exercising oversight and demanding information from a president. Or the public can generate direct political pressure on Congress to initiate information requests, investigations or impeachment proceedings. Marshalling such political will is often a difficult feat if presidential decision-making is opaque and influential members of Congress belonging to the President's own political party are unwilling to break ranks, even in the face of public pressure.<sup>15</sup>

#### A. CONSOLIDATION OF POWER IN THE EXECUTIVE BRANCH

Madison, at the time the Constitution was framed, valued the tension between the executive and legislative branch as essential to the functioning of government. The actions (or inaction) of the branches, however, eventually redefined the spheres of power in favor of the executive branch. The history of the removal power and its cemented position within the executive branch is one example of actions that consolidated power in the presidency over time,<sup>16</sup> and it exemplifies the fact that the carefully structured model of divided and balanced branches of government that Madison eloquently defended in his *Federalist No. 51*<sup>17</sup> was tinkered with from very early on.

During the first Congress in 1789, Congress debated whether the President had the unilateral right to remove members of the administration who had been appointed with the consent of the Senate.<sup>18</sup> Propo-

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<sup>14</sup> Levinson & Pildes, *supra* note 4, at 2334–37; see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 66 (2006).

<sup>15</sup> DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 121–62 (1999).

<sup>16</sup> Naturally, proponents of a more powerful executive argue the converse—that the legislative and judicial branches have been attempting a power grab from early times in U.S. history. See, e.g., Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 195–202 (Summer 2006); cf. Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review of some executive branch actions over the argument by the executive branch that the Judiciary had no right to pass judgment on executive branch actions).

<sup>17</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>18</sup> Kent Greenfield, *Original Penumbra: Constitutional Interpretations in the First Year of Congress*, 26 CONN. L. REV. 79, 100–01 (1993) (citing 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: DEBATES IN THE HOUSE OF REPRESENTATIVES 843 (Charlene Bangs Bickford et al. eds., 1992)); see also Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1041–63 (2006) (detailing the thinking of the first Congress on the passage of the Foreign Affairs Act that allowed for the construction of the removal power being vested in the President).

nents of the view that the Senate needed to acquiesce to such removal cited the language of the Constitution itself and documents such as the *Federalist No. 77*.<sup>19</sup> In that essay, Alexander Hamilton reassured a public wary of a potential monarchy that Presidential power over the administration of government would be limited by, among other measures, the fact that the President would not have the right to remove those officers of the executive branch who had been appointed with the consent of the Senate.<sup>20</sup> Congress, however, decided during the first Congress that the President could remove executive officers without the consent of the Senate.<sup>21</sup>

*Myers v. United States* and *Bowsher v. Synar* are both twentieth-century cases testing the constitutionality of legislative initiatives allowing for Congress to remove an official who was, at least in some part, performing executive branch responsibilities.<sup>22</sup> In both cases, the Supreme Court unequivocally stated that the removal power falls wholly within the ambit of executive power, broadly validating the shift in removal power that had occurred in 1789.<sup>23</sup>

In addition to outright shifts in power, like that of the removal power, the growth of the administrative departments accelerated the executive branch's reach and power into the New Deal era and beyond.<sup>24</sup> The framers of the Constitution did not foresee the shift of law-making power away from the Legislature and into the departments run by the executive branch.<sup>25</sup>

<sup>19</sup> See Greenfield, *supra* note 18, at 100–01.

<sup>20</sup> THE FEDERALIST NO. 77, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>21</sup> Greenfield, *supra* note 18, at 100–01; see also Gerhard Casper, *The American Constitutional Tradition of Shared and Separated Powers: An Essay in Separation of Powers*, 30 WM. & MARY L. REV. 211, 234–35 (1989) (noting that James Madison lobbied for the removal power to be vested in the President to prevent intermingling between the legislative and executive branches, which was a marked departure from the stance taken by his co-author of the Federalist Papers, Alexander Hamilton).

<sup>22</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>23</sup> See *Bowsher*, 478 U.S. at 726 (“Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”); *Myers*, 272 U.S. at 160–63 (invalidating Congress’s attempt to involve itself in the removal of an executive official based on separation of powers grounds).

<sup>24</sup> See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819–21 (1996); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994); Peter W. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 162–65 (1995) [hereinafter Shane, *Political Accountability*]; see also Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 70–71 (1983) (noting that the Constitution makes reference to the existence of government departments, but is silent as to how the departments relate to the President or Congress).

<sup>25</sup> See Farina, *supra* note 6, at 508; Michael Zuckerman, *Charles Beard and the Constitution: The Uses of Enchantment*, 56 GEO. WASH. L. REV. 81, 84–85 (1987).

This reach gained momentum with the advent of the Cold War and a political worldview governed by the philosophy of the Truman Doctrine. After World War II, the United States became increasingly concerned with strengthening the executive branch to deal with the national security issues that arose with its ascendancy as a newly dominant force in terms of its economic and political clout.<sup>26</sup> This new reality led to an increase in Congress's willingness to cede certain powers to the President, particularly in the area of foreign relations.<sup>27</sup> This trend has continued during almost every administration since that time.<sup>28</sup>

This consolidation of power was temporarily slowed by a massive drop in support for the presidency during the Vietnam War and after the revelation of the Watergate scandal.<sup>29</sup> In the mid-1970s, as a response to this credibility gap between the administration and the public, numerous oversight measures increased accountability and transparency in government. Among these were the creation of the independent counsel,<sup>30</sup> the enactment of the War Powers Resolution,<sup>31</sup> the strengthening of the General Accounting Office,<sup>32</sup> and the passage of the Freedom of Information Act.<sup>33</sup>

However, some of these measures, such as the independent counsel statute, have lost popularity and have been allowed to expire.<sup>34</sup> For others, the executive branch has been able to circumvent many of the controls that were intended to curb executive excess.<sup>35</sup> Additionally, laws such as the Foreign Intelligence Surveillance Act (FISA), which

<sup>26</sup> Zuckerman, *supra* note 25, at 83–84.

<sup>27</sup> See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1014–15 (2004); see also Zuckerman, *supra* note 25, at 83–84.

<sup>28</sup> Zuckerman, *supra* note 25, at 87–88 (discussing President Kennedy's penchant for circumventing the legislative process by issuing executive orders).

<sup>29</sup> *Id.* at 88–89.

<sup>30</sup> Ethics in Government Act, 28 U.S.C. § 595 (2000).

<sup>31</sup> War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555.

<sup>32</sup> See Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

<sup>33</sup> 5 U.S.C. § 552 (2000 & Supp. 2004) (amended 2002).

<sup>34</sup> The statute most recently authorizing the independent counsel, the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, expired on June 30, 1999.

<sup>35</sup> For example, no President has ever formally acknowledged that his actions should be governed by the War Powers Resolution. See RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 5 (2007), <http://www.au.af.mil/au/awc/awcgate/crs/rl33532.pdf>. Additionally, the Government Accountability Office (GAO) offers recommendations on the performance and accountability of various government programs, but those recommendations are non-binding: according to the GAO, approximately 85% of its recommendations from the year 2001 had been implemented by 2005. See U.S. Gov't Accountability Office, GAO at a Glance, <http://www.gao.gov/about/gg glance.html> (last visited Jan. 9, 2008). Finally, presidents can prevent public access to documents under the Freedom of Information Act by designating documents as "classified." 5 U.S.C. § 552(b) (2000).



was designed as a judicial check on warrantless surveillance, have faced significant challenges from presidents seeking greater latitude and discretion in conducting such surveillance in the post-Cold War era.<sup>36</sup>

In addition, the departments under the control of the executive branch have been increasingly insulated from legislative or judicial review.<sup>37</sup> Recent administrations have pushed for less congressional oversight of agencies.<sup>38</sup> At the same time, the gradual reduction of Congress's influence in the arena of foreign policy<sup>39</sup> and the refusal to cooperate with congressional investigations of executive branch actions<sup>40</sup> have further insulated the executive branch from oversight.

The White House reaction to the terrorist attacks of September 11, 2001, intensified concerns that the separation of functions among the branches of government was being abrogated. The President undertook several major initiatives to consolidate additional power in the executive branch in the name of national security, executive privilege, or expediency, at the expense of meaningful input by other branches of government. Such initiatives include limitations to habeas corpus rights,<sup>41</sup>

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<sup>36</sup> See Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, §§ 101–111, 92 Stat. 1783, 1783–96 (1978) (codified as amended at 50 U.S.C. §§ 1801–1811 (2000)); see also Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1250–58 (2006) (noting the executive branch's use of constitutional avoidance theory to assert its right to circumvent the parameters of FISA).

<sup>37</sup> See Farina, *supra* note 6, at 503–04 (discussing the ways in which the President can influence the decision-making of agency heads to further his own agenda); Shane, *Political Accountability*, *supra* note 24, at 162 (noting the trend toward confidentiality in the dealings between the White House and various administrative agencies); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447 (1987) (discussing the burgeoning of the administrative state after the New Deal, and how the administrative departments are not properly held to account by the President or by anyone else); Zuckerman, *supra* note 25, at 95 (noting that constitutional checks and balances have not been effective in regulating and controlling administrative agencies).

<sup>38</sup> See, e.g., Farina, *supra* note 6, at 506–07 (noting that the Office of Management and Budget has become a vehicle for imposing presidential policy on various agencies, but has “escaped any meaningful legislative curb on its activities”); Tiefer, *supra* note 24, at 60–61 (discussing how the Department of Justice challenged the legislative oversight measures that had been enacted in the wake of the Watergate scandal).

<sup>39</sup> See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67–69 (1990); Shane, *Inter-Branch Norms*, *supra* note 6, at 514.

<sup>40</sup> Shane, *Inter-Branch Norms*, *supra* note 6, at 514–15 (discussing the false testimony given by various members of the Reagan administration during the Iran-Contra hearings).

<sup>41</sup> See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2786 (2006) (holding that the military tribunal system used for the Guantanamo Bay detainees violated the Uniform Code of Military Justice and the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 533 (2004) (affirming the government's right to detain unlawful combatants but recognizing that U.S. citizens have habeas corpus rights).

human rights litigation,<sup>42</sup> and individual privacy rights.<sup>43</sup> Regardless of whether these measures were necessary to fight the war on terror, the marked lack of basic information about executive branch practices further insulated administrative policies and actions from legislative or judicial review.

#### B. THE LACK OF TRANSPARENCY AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH

In addition to shifting power away from Congress, recent administrations have also successfully manipulated the public's access to executive branch information through two primary means: limiting the amount of information that it discloses to other branches of government and the public; and influencing press coverage.

The current Administration has limited information disclosure in response to inquiries from other parts of the government in numerous ways, each of which is a small step in aggregating political power within the executive branch. Some instances relate to the Administration's efforts in the war on terror, which arguably offers a heightened justification for nondisclosure.<sup>44</sup> For example, the White House prevented an official inquiry into the accuracy of U.S. intelligence on Iraq's weapons programs, which had been offered as the primary justification for the invasion of Iraq;<sup>45</sup> President Bush refused to respond to a May 2005 letter, signed by over 100 members of Congress,<sup>46</sup> asking questions about the

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<sup>42</sup> See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 182 (2004) (documenting the attempts of the George W. Bush administration to curtail judicial review in cases of alleged human rights violations by the U.S. government).

<sup>43</sup> The Bush Administration instructed the National Security Agency (NSA) to conduct civilian wiretapping without undergoing the process required by the Foreign Intelligence Surveillance Act (FISA), which requires a post hoc authorization of wiretapping by a judge. 50 U.S.C. §§ 1801–1862 (2000 & Supp. II 2004); U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 4–5, 18–20 (2006). The administration maintains that it had the authority to circumvent FISA under the Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). See U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 17–28 (2006); see also Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENVER U. L. REV. 375, 379–80 (2002) (addressing the effects of the Patriot Act on individual privacy rights).

<sup>44</sup> See KOH, *supra* note 39, at 38–72 (1990) (noting marked deference to executive branch in times of war and contrasting it with the need for openness in times of war to protect the rule of law); Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3, 15–16 (2007) (arguing for more congressional oversight in times of war, and citing the oversight work of the Truman Committee on military spending in the 1940s).

<sup>45</sup> Paul Krugman, Op-Ed., *The War President*, N.Y. TIMES, June 24, 2005, at A23.

<sup>46</sup> *Inquiry Sought on Prewar Memo; Questions Swirl Around Document*, SAN JOSE MERCURY NEWS, June 17, 2005, at 14A.

Downing Street Memo;<sup>47</sup> and the President refused to appear before the September 11 Commission unless accompanied by Vice President Cheney, assured that no transcript would be made of the interview, and promised that the public release of the finalized report was contingent on White House review.<sup>48</sup>

Other examples of the current Administration's nondisclosure are unrelated or have only an attenuated connection to the war on terror: the White House refused to provide the Senate with documents regarding John Bolton during the proceedings to confirm Bolton as United Nations ambassador despite the long-standing practice granting senators access to such papers prior to voting on nominations;<sup>49</sup> Vice President Cheney refused to turn over documents to the Government Accountability Office (GAO) related to a White House energy task force in which he participated in 2000 and 2001, impeding the GAO from overseeing the executive branch.<sup>50</sup> In his refusal, Cheney asserted that his activities related to those of the executive branch and implied that he could exercise executive privilege under the Recommendations Clause.<sup>51</sup> In another example, the White House labeled a record number of documents "classified" to

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<sup>47</sup> The Downing Street Memo is a memorandum detailing a July 23, 2002 meeting between Prime Minister Tony Blair and his national security team. According to its contents, one official at the meeting warned, "[Military] action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD [weapons of mass destruction] . . . the intelligence and facts were being fixed around the policy." Michael Smith, *Blair Planned Iraq War from the Start*, THE TIMES (London), May 1, 2005, at 7.

<sup>48</sup> See John King & Sean Loughlin, *Bush, Cheney Meet with 9/11 Panel*, CNN.COM, Apr. 30, 2004, <http://www.cnn.com/2004/ALLPOLITICS/04/29/bush.911.commission>.

<sup>49</sup> Andrea Koppel, *Democrats Force Delay on Bolton Vote*, CNN.COM, May 27, 2005, <http://www.cnn.com/2005/POLITICS/05/26/bolton.senate/index.html> (quoting Senators Joseph Biden (D-Delaware) and Christopher Dodd (D-Connecticut) remarks that the Administration's refusal to provide the requested documents constituted "a threat to the Senate's constitutional power to advise and consent"); Reid: *No Documents, No Bolton*, CNN.COM, June 9, 2005, <http://www.cnn.com/2005/POLITICS/06/09/senate.bolton/index.html> (citing Senate minority leader Harry Reid (D-Nevada) as saying that the Senate Democrats' requests for information about Bolton were of the type that had been routinely made for "decades").

<sup>50</sup> See *Walker v. Cheney*, 230 F. Supp. 2d 51, 54–55 (D.D.C. 2002). In the statement accompanying the filing of its suit against Vice President Cheney, the Government Accountability Office (GAO) noted: "This is the first time that GAO has filed suit against a federal official in connection with a records access issue. We take this step reluctantly. Nevertheless, given GAO's responsibility to Congress and the American people, we have no other choice. Our repeated attempts to reach a reasonable accommodation on this matter have not been successful." Press Release, U.S. Gen. Acct. Off., GAO Statement Concerning Litigation (Feb. 22, 2002), available at <http://www.democrats.reform.house.gov/Documents/20040830153549-62303.pdf>.

<sup>51</sup> Ultimately, the U.S. Commerce Department was required to release some redacted material from the task force to the public after the issuance of a court order enforcing a Freedom of Information Act request for the documents. See *Judicial Watch Inc. v. U.S. Dep't. of Energy*, 191 F. Supp. 2d 138, 141 (D.D.C. 2002).

immunize them from Freedom of Information Act (FOIA) requests,<sup>52</sup> and rolled back the Clinton Administration policy of encouraging broader and faster disclosure in response to FOIA requests.<sup>53</sup>

The executive branch compounds its failure to disclose information by attempting to manipulate the press into providing a favorable portrayal, undermining the media's role in increasing transparency of the political process and governmental institutions. An illustrative example was the creation and dissemination of "video news releases" by the government—pro-administration segments which looked similar to actual news reports. The GAO found that these violated the government's own policies because they "constitute covert propaganda."<sup>54</sup> Further, the President's public appearances are carefully controlled to weed out those who might disagree with his policies, creating an impression that little media or public opposition exists to administration policies.<sup>55</sup>

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<sup>52</sup> See, e.g., Christopher Lee, *Cold War Missiles Target of Blackout*, WASH. POST, Aug. 21, 2006, at A1.

<sup>53</sup> Compare Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/011012.htm> (stating that "[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis"), with Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies (Oct. 4, 1993), available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm) (noting that "[t]he Department [of Justice] will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so. Rather, in determining whether or not to defend nondisclosure decisions, we will apply a presumption of disclosure"). In March 2002, the House of Representatives responded to Ashcroft's memorandum with a strong statement advocating the presumption of disclosure: "Contrary to the instructions issued by the Department of Justice on Oct. 12, 2001, the standard should not be to allow the withholding of information whenever there is merely a 'sound legal basis' for doing so." COMM. ON GOV'T REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 107-371, pt. 1, at 3 (2002).

<sup>54</sup> Memorandum of Anthony H. Gamboa, General Counsel, U.S. Government Accountability Office, on the Office of National Drug Control Policy Video News Release to Henry A. Waxman, Committee on Government Reform, and John W. Olver, Subcommittee on Transportation, Treasury and Independent Agencies and Committee on Appropriations 1 (Jan. 4, 2005), available at <http://www.gao.gov/decisions/appro/303495.pdf>.

<sup>55</sup> See Dana Milbank, *The Tenacious Trio*, WASH. POST, June 22, 2005, at A10 (following the attempts of three Coloradoans who disagreed with the President's policies to determine who impersonated a Secret Service agent and forcibly removed them from a taxpayer-funded event with President Bush); Frank Rich, Editorial, *Two Top Guns Shoot Blanks*, N.Y. TIMES, June 19, 2005, at 12 (discussing the pre-scripted "Ask the President" town-hall style campaign stops in which any potentially hostile questioner was either denied admittance or removed from the venue); see also Shane, *Political Accountability*, supra note 24, at 207–08 (discussing the ability of a President to dissociate from politically unpopular actions of an agency when it is convenient to do so, or to embrace those actions when speaking to audiences who support the agency's actions). At other times, President Bush has responded to potentially difficult or damaging questions by refusing to answer the query, or to ignore the reporter asking the question. See, e.g., Rachel Clarke, *How Bush Shuns the Media*, BBC NEWS, July 30, 2003, <http://www.news.bbc.co.uk/2/hi/americas/3110591.stm>; Peter Johnson, *Bush Has Media Walking a*

Each of these shifts in policy or practice, taken individually, may seem insignificant. Together, however, they paint a picture of a major shift in the disclosure practices of the Administration on both the defensive and offensive fronts. Defensively, the Administration curbs the provision of information to Congress and limits the release of documents in response to FOIA requests. Offensively, unless information has already been disclosed, the Administration looks to influence the media and public perception through conventional and unconventional means.

The manipulation of information disclosure extends beyond the current administration,<sup>56</sup> and has not been effectively combated by the press.<sup>57</sup> The President, under most circumstances, is under no constitutional or legal obligation to volunteer information to the press. However, the media's perceived role as an informal "fourth branch" of government,<sup>58</sup> exercising a watchdog function particularly over the executive branch, is severely compromised under such circumstances.<sup>59</sup>

The consolidation of power in the executive branch unbalances the constitutional model of co-equal branches of government. The inability of the media to consistently unearth information and documents for public scrutiny compounds this problem. Consequently, without vigorous action on the part of Congress to exercise its constitutional powers, the executive branch is able to take actions that are largely unpublicized and unchecked. Regardless of which political party holds power in the White

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*Fine Line*, USA TODAY, Mar. 10, 2003, at 3D, available at [http://www.usatoday.com/life/television/news/2003-03-09-media-mix\\_x.htm](http://www.usatoday.com/life/television/news/2003-03-09-media-mix_x.htm).

<sup>56</sup> See Zuckerman, *supra* note 25, at 89–90 (noting the problem of misinformation disseminated to the press during the Iran-Contra investigations).

<sup>57</sup> See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 20–21 (2003) (arguing that the media's efficacy at bringing important issues to light is curtailed by pressure to provide entertaining sound bites to gain market share, and that the media's role as a neutral arbiter is compromised by its need to further its own interests).

<sup>58</sup> DOUGLASS CATER, *THE FOURTH BRANCH OF GOVERNMENT* 13 (1959) (describing the power of the media in evaluating the actions of government). The media can exercise significant influence on voters, thereby giving the media a substantial role in outcome of the democratic process. See, e.g., Linda Hirschman, *16 Ways of Looking at a Female Voter*, N.Y. TIMES MAGAZINE, Feb. 3, 2008, at 38, available at <http://www.nytimes.com/2008/02/03/magazine/03womenvoters-t.html?pagewanted=1&sq=media%20influence%20vote&st=nyt&scp=2> (addressing how media coverage of the 2008 Democratic Party primaries likely influenced some women voters in New Hampshire).

<sup>59</sup> E.g., Steve Urbon, *Kerry Assails Bush on Iraq: Policies on Social Security, Health Care Also Draw Fire*, THE STANDARD TIMES, June 2, 2005, at A1, available at <http://archive.southcoasttoday.com/daily/06-05/06-06-05/a01lo167.htm> (noting the "near silence in the U.S. mass media" over the Downing Street memo); Patrick D. Healy, *Senator Clinton Assails Bush and G.O.P. at Campaign Fund-Raiser*, N.Y. TIMES, June 6, 2005, at B1 (quoting Senator Hillary Rodham Clinton (D-New York) as comparing the press corps in the Watergate era to modern reporters: "The press is missing in action . . . Where are the investigative reporters today? Why aren't they asking the hard questions? . . . If they're criticized by the White House, they just fall apart.").

House, this situation poses a major systemic challenge which becomes even more problematic in the case of unified government.

### C. ONE-PARTY RULE AND THE LIMITS OF THE CONGRESSIONAL INVESTIGATIVE FUNCTION

Congress's will to exercise its power as the "Grand Inquest"<sup>60</sup> of government that combats executive overreaching is badly impaired in times of one-party or unified government. Congress's will to make a formal demand for information or initiate investigations<sup>61</sup> depends on individual members of Congress, particularly the committee chairs within the House of Representatives.<sup>62</sup> In the original Madisonian conception of American governmental institutions, political parties would not have influence over politicians, thereby enabling representatives to initiate inquiries and investigations without being hindered by party pressure.<sup>63</sup> The modern reality<sup>64</sup> is quite different: committee chairmanships

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<sup>60</sup> RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 34 (Harv. Univ. Press 1974) (denoting the House of Representatives as the "grand inquest" based on its investigative powers and its right to demand information from the President under Article I, § 2); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION 111 (2005) (noting that "Article I . . . implicitly [sic] gave each house of Congress broad powers of investigation and oversight . . . that were necessary and proper adjuncts to Congress's enumerated powers").

<sup>61</sup> The common construction of Article II, § 4, is that Congress's impeachment power implies that Congress has an unambiguous right to make inquiries of the Executive branch as a means of determining whether an impeachable offense has occurred. *See* BERGER, *supra* note 60, at 36–37, 41 (citing an 1843 House of Representatives report and an 1860 House of Representatives report to this effect).

<sup>62</sup> H.R. XI(2)(m)(3)(A)(i), 110th Cong. (1997).

<sup>63</sup> *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840, at 40 (1969); GERALD LEONARD, THE INVENTION OF PARTY POLITICS 18–50 (2002); Levinson & Pildes, *supra* note 4, at 2314–15 (noting that, contrary to the pre-ratification Madisonian vision of the branches of government working independent of outside influences, the functional reality of the separation of powers is that their efficacy is compromised by the strength of political parties). Madison's ideal of a political system without parties did not last. Within a few years of ratification, Madison's views on political parties shifted dramatically, and he became a central figure in the creation of the First Party System. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 351–63 (1995); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 263–70 (1993).

<sup>64</sup> Justice Jackson, in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), opined on the effect of political parties on the structural limitations placed on the President:

[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he may often win, as a political leader, what he cannot command under the Constitution.

*Id.* at 654.

are awarded to representatives that are members of the political party that holds the majority of the House and who show party loyalty.<sup>65</sup>

In times of unified government, genuine oversight is limited to the extent that Congressional leadership is willing to investigate its own national party leader.<sup>66</sup> When committee chairs are unwilling to buck the political pressure exerted by a president of the same political party,<sup>67</sup> formal and meaningful investigation has to wait until a shift in control of a chamber of Congress.<sup>68</sup> The number and nature of inquiries made by Congress turns on which party governs each chamber of Congress and the presidency,<sup>69</sup> thereby marginalizing, in times of unified government, the ability of the House of Representatives to provide meaningful oversight.<sup>70</sup>

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<sup>65</sup> TUSHNET, *supra* note 57, at 18–19; *see also* W. IVOR JENNINGS, *THE BRITISH CONSTITUTION* 66 (5th ed. 1966) (recognizing that party discipline is of paramount importance in parliamentary governments); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 44–45 (2007) (noting that political parties are more ideologically polarized than in previous eras).

<sup>66</sup> *See* George C. Edwards III & Andrew Barrett, *Presidential Agenda Setting in Congress*, in *POLARIZED POLITICS* 109, 112–16 (Jon R. Bond & Richard Fleischer eds., 2000); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) (noting that under unified government, Congress tends to support the President without questioning the wisdom of his policies); Interview by Michele Norris with Rep. Henry Waxman, then chair-elect to the House Government Reform Committee, in Washington, D.C. (Nov. 15, 2006), *available at* <http://www.npr.org/templates/story/story.php?storyId=6493071> (noting that he had requested Republican committee chairs to launch investigations of President George W. Bush's administration on numerous occasions between 2001 and 2006, when Bush was President and both chambers of Congress had Republican majorities. Waxman states that his requests had been denied, and he had no further recourse); *see also* James Glanz et al., *Democrats Aim to Save Inquiry on Work in Iraq*, N.Y. TIMES, Nov. 12, 2006, §1, at 11, *available at* <http://www.nytimes.com/2006/11/12/washington/12oversight.html?ei=5070&en=5050e4>.

<sup>67</sup> In rare instances, a minority party in Congress has exerted enough political pressure on majority leaders to heighten or maintain oversight. One such example is the Senate Intelligence Committee's completion of its investigation into the flawed intelligence that was reported in the National Intelligence Estimate of 2002. *See* Wald & Kinkopf, *supra* note 65, at 48. The completion of the Intelligence Committee's work only occurred after Senate Democrats threatened to stall business on the Senate floor. *See id.*

<sup>68</sup> *See, e.g.,* ROZELL, *supra* note 6, at 6 (addressing the lack of investigations of President Clinton while Democrats controlled both chambers of Congress from 1992 to 1994); Kristin Roberts, *Rumsfeld Quits After Democrats Ride Iraq to Win*, POLITICAL NEWS, Nov. 8, 2006, <http://www.political-news.org/breaking/32490/rumsfeld-quits-after-democrats-ride-iraq-to-win.html> (noting that the new-found Democratic right to initiate investigations may have been one reason that Secretary Rumsfeld resigned his post).

<sup>69</sup> *See* JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 59–75 (1990) (noting that congressional committees exercise significantly more oversight during times of divided government than unified government); *see also* Levinson & Pildes, *supra* note 4, at 2371.

<sup>70</sup> *See* BERGER, *supra* note 60, at 35; Wald & Kinkopf, *supra* note 65, at 47 (comparing the number of House oversight hearings in early 1983 and 1997 and highlighting the drastic system-wide decline in oversight); Stanley Brand, Op-Ed., *Let the Investigations Begin*, N.Y. TIMES, Nov. 12, 2006, § 4, at 13, *available at* <http://www.nytimes.com/2006/11/12/opinion/12>

One alternative, formal way to demand information from the executive branch is for Congress to initiate impeachment proceedings.<sup>71</sup> This course of action is problematic in two ways. First, the same lack of political will that derails an investigation or formal information request will cause inertia in the context of discussing impeachment. Second, initiation of impeachment proceedings immediately alters the context of the dialogue to one that focuses on potential criminality, rather than the question of good government policy.<sup>72</sup>

The combination of an executive branch that has aggregated powers and limited disclosure of information, with the political limitations of congressional action in times of unified government,<sup>73</sup> has created an information and credibility gap that needs to be addressed. Part II argues that these problems are best addressed through the addition of an institutional design element that is common in parliamentary systems.

## II. A PRESIDENT'S QUESTION TIME? COMPARATIVE HISTORICAL AND NORMATIVE CONSIDERATIONS

While every constitutional nation has taken up the question of executive accountability, their various solutions reflect numerous differences—in the structures of government, cultural expectations of

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Brand.html?ei=5070&en=d68010ea6324 (noting that after the shift in Congressional power toward the Democrats in the 2006 midterm election, “[a] vigorous examination of the administration’s conduct . . . is the politically necessary response to voters’ overwhelming rejection of the current Congress’s failure to assert itself in this area”); Editorial, *Hiding from Oversight*, N.Y. TIMES, Nov. 13, 2006, at A24, available at <http://www.nytimes.com/2006/11/13/opinion/13mon2.html> (“There have been many examples of the shambles that the Republican-controlled Congress made of its responsibility for oversight in the Bush administration.”); Carl Hulse, *On Wave of Voter Unrest, Democrats Take Control of House*, N.Y. TIMES, Nov. 8, 2006, at P2, available at <http://www.nytimes.com/2006/11/08/us/politics/08house.html?page-wanted=print> (“Democrats have complained for years that Republicans have ignored their responsibility as an independent branch of government to police the executive branch.”); Robin Toner, *A Loud Message for Bush*, N.Y. TIMES, Nov. 8, 2006, at A1, available at <http://www.nytimes.com/2006/11/08/us/politics/08assess.html?ei=5094&en=654cbccf9b7> (recognizing “a significantly bigger Democratic caucus in the Senate that was elected on the promise to act as a strong check on [the] administration.”).

<sup>71</sup> U.S. CONST. art. I, § 2, cl. 4.

<sup>72</sup> See *Morrison v. Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting) (arguing that the office of the independent counsel enfeebles the President by contextualizing the discussion around whether the President is “not merely wrongheaded, naive, ineffective, but, in all probability, ‘[a] crook [ ]’”); Carter, *supra* note 6, at 139 (arguing that independent counsel investigations lower the public’s standard of what is acceptable behavior in the executive branch to the question of whether certain activity was illegal, as opposed to whether “the executive branch performs with dignity and propriety.”).

<sup>73</sup> Different levels of oversight activity have occurred during different periods of unified government. See, e.g., Schumer, *supra* note 44, at 9 (noting that the House Government Reform Committee conducted 135 hearings during the 1993–1994 session and only 37 during the 2003–2004 session).



information-sharing, and institutionalized rights to governmental transparency.<sup>74</sup>

The Prime Minister's Question Time (Question Time) in the United Kingdom, which takes place for half an hour each week that the House of Commons is in session,<sup>75</sup> provides a compelling comparative example.<sup>76</sup> The Prime Minister maintains this weekly appointment with the House of Commons to field a number of questions from leaders of the major opposition parties and other Members of Parliament (MPs) belonging to various political parties.<sup>77</sup> A periodic President's Question Time in the United States, although likely occurring less frequently than the U.K. Question Time, would serve to alleviate some of the information deficit between the executive branch and the Legislature, particularly when that deficit is exacerbated in times of unified government.<sup>78</sup>

A brief overview of the history, purpose and mechanics of the Prime Minister's Question Time provides some context for why a similar measure might be appropriate and useful to increase government accountability in the United States, particularly given the increasing parallels found in the roles of the U.S. President and the U.K. Prime Minister.<sup>79</sup>

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<sup>74</sup> For example, Russia has experimented with an annual "Question Time" in which the President spends an hour responding to questions asked by members of the public via the President's website. See Kieren McCarthy, *Putin 'Bares All' in First Russian President Webcast*, THE REGISTER, Mar. 7, 2001, [http://www.theregister.co.uk/2001/03/07/putin\\_bares\\_all\\_in\\_first/](http://www.theregister.co.uk/2001/03/07/putin_bares_all_in_first/); *Wrap: Putin Talks Foreign, Domestic Policy in Annual Q&A Session*, RUSSIAN NEWS AND INFORMATION AGENCY, Oct. 25, 2006, <http://en.rian.ru/russia/20061025/55133901.html>.

<sup>75</sup> See J.A.G. GRIFFITH & MICHAEL RYLE, *PARLIAMENT: FUNCTIONS, PRACTICE AND PROCEDURES* 353 (1989); 10 Downing Street, Prime Minister's Question Time, <http://www.number-10.gov.uk/output/Page5180.asp> (last visited Jan. 9, 2008).

<sup>76</sup> Similar institutions, modeled after the Prime Minister's Question Time, have been adopted in several parliamentary nations, including Australia, Canada, India and New Zealand. See HOUSE OF REPRESENTATIVES PRACTICE 527–57 (I. C. Harris ed., 5th ed. 2005), available at <http://www.aph.gov.au/house/pubs/PRACTICE/chapter15.htm#an1> (describing the use of Question Time in Australia); Compendium, House of Commons: Procedure Online, [http://www.parl.gc.ca/compendium/web-content/c\\_g\\_questions-e.htm#2](http://www.parl.gc.ca/compendium/web-content/c_g_questions-e.htm#2) (last visited Jan. 9, 2008) (describing the procedures used in Canada's Question Period); New Zealand Parliament, Evolution of Parliament: House of Representatives, <http://www.parliament.nz/en-NZ/HstBldgs/History/Evolution/HoReps/9/6/0/9600aa606e98449eabbdbba9f9a75391.htm> (last visited Jan. 9, 2008) (describing the use of Question Time in the New Zealand Parliament); Question Hour in Lok Sabha, <http://www.parliamentofindia.nic.in/ls/intro/p6.htm> (last visited Jan. 9, 2008) (describing the importance of Question Hour in the Parliament of India).

<sup>77</sup> See GRIFFITH & RYLE, *supra* note 75, at 259–60; 10 Downing Street, *supra* note 75. The wide variety of topics addressed during the Question Time indicates the extraordinarily high level of access that Members of Parliament have to the Prime Minister, and is especially notable because the discussion takes place in a public, televised setting.

<sup>78</sup> See *supra* Part I.C.

<sup>79</sup> See Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 390 (2004) ("The urgent issue in constitutional studies typically is to know whether the experiences of some constitutional settings are helpful for understanding others—and that will depend on how similar other systems are to one's own, whether they have dealt with the same sort of historical problems, whether they have drawn their constitutional ideas from the same well.").

## A. THE PRIME MINISTER'S QUESTION TIME

Parliament formally established the Prime Minister's Question Time in 1961 as a means to increase the accountability of the Prime Minister to the House of Commons and to the general public.<sup>80</sup> The Prime Minister and his Cabinet function both as the leadership of the House of Commons and as the executive branch of the British government,<sup>81</sup> but it is in their latter capacity that they must answer to the House of Commons for their policies and actions. The Prime Minister's Question Time appears to be equal parts an attack on the Prime Minister's policies by Members of Parliament (MPs) of opposition parties, support of the Prime Minister by MPs of his own party, an opportunity for the Prime Minister to discuss the achievements of his party and Cabinet, and an opportunity for MPs to demonstrate to their constituents that they are addressing their concerns.<sup>82</sup> Perhaps most importantly, the dialogue among the MPs and the Prime Minister makes the process of government more transparent, and serves an indispensable means to keep the Prime Minister and his government accountable to the public.

### 1. *Role of the Prime Minister*

The Prime Minister serves in multiple capacities—he or she is both the leader of the political party that enjoys a majority in the House of Commons and the executive in charge of government.<sup>83</sup> Unlike the U.S. presidency, the prime ministership was not established by a governmental or constitutional mandate, but developed over time as a Cabinet posi-

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<sup>80</sup> See GRIFFITH & RYLE, *supra* note 75, at 354, 357; David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL LEGAL STUD. 323, 335 (2001); 10 Downing Street, *supra* note 75; HOUSE OF COMMONS INFORMATION OFFICE, FACTSHEET P1: PARLIAMENTARY QUESTIONS 9 (Mar. 2007), available at <http://www.parliament.uk/factsheets> [hereinafter PARLIAMENTARY QUESTIONS FACTSHEET]. The Prime Minister has been, along with other cabinet ministers, subjected to questioning from Members of Parliament since 1721, but the formal institution of a separate Prime Minister's Question Time took place in 1961. See PARLIAMENTARY QUESTIONS FACTSHEET 2, 10.

<sup>81</sup> See GRIFFITH & RYLE, *supra* note 75, at 19.

<sup>82</sup> RONALD BUTT, THE POWER OF PARLIAMENT 323–24 (1967); PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 9 (noting that: “While some questions are genuinely seeking information or action, others will be designed to highlight the alleged shortcomings of the Minister’s department or the merits of an alternative policy. But not all questions are hostile. Many, especially those ‘inspired’ by [a] Minister or otherwise put down by party colleagues, will enable popular decisions to be announced and government successes to be advertised.”).

<sup>83</sup> See PETER HENNESSY, PRIME MINISTER: THE OFFICE AND ITS HOLDERS SINCE 1945, at 41 (2000); PAUL CHRISTOPHER MANUEL & ANNE MARIE CAMMISA, CHECKS & BALANCES? HOW A PARLIAMENTARY SYSTEM COULD CHANGE AMERICAN POLITICS 25 (1999).

tion.<sup>84</sup> Together, the Prime Minister and his Cabinet act as the executive branch of the British government.<sup>85</sup>

The roles of the Prime Minister of the United Kingdom and that of the President of the United States are significantly different.<sup>86</sup> However, the evolution of the position of Prime Minister into the powerful leader of the Legislature and the executive figure at the helm of government<sup>87</sup> explains much of the momentum behind the creation of the Prime Minister's Question Time in 1961. This evolution provides a backdrop for examining whether the Question Time is a useful and effective tool for executive accountability that should—from a policy perspective—be considered for use in the United States.<sup>88</sup>

The position of Prime Minister was not always considered to be a powerful one, let alone the executive in charge of government. In the early eighteenth century, when the Cabinet first designated the position, it was viewed less than favorably: "In [the] inner ring of [Cabinet] ministers there was frequently one who by common consent was the foremost,

<sup>84</sup> HENNESSY, *supra* note 83, at 43 (citing PETER HENNESSY, *THE HIDDEN WIRING: UNEARTHING THE BRITISH CONSTITUTION* 78–79 (1995)). The United Kingdom has no written constitution comparable to that of the United States. Positions such as that of the Prime Minister developed over time, not as the result of constitutional mandate or a statute. *See id.* at 36–39.

<sup>85</sup> *See* GRIFFITH & RYLE, *supra* note 75, at 19; MANUEL & CAMMISA, *supra* note 83, at 25.

<sup>86</sup> *See* HAROLD J. LASKI, *PARLIAMENTARY GOVERNMENT IN ENGLAND* 201–02 (1938).

<sup>87</sup> The Prime Minister is the executive at the head of government in the United Kingdom, as opposed to the monarch, who is the executive at the head of state. MANUEL & CAMMISA, *supra* note 83, at 25. The monarch's diplomatic and patriotic duties as head of state are relatively clear, but her responsibilities as a leader in government are somewhat murkier: the revolution of 1688 gave Parliament formal control of many governmental functions. *See* HENNESSY, *supra* note 83, at 33–34. The monarch retains certain "personal prerogatives" about which Parliament and the Prime Minister can advise, but cannot mandate a particular course of action. *Id.* These prerogatives include the dissolution of Parliament preceding a general election, and the formal appointment of the Prime Minister. *See id.*; *see also* Peter North, *The United Kingdom—An Era of Constitutional Change*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 99, 100 (2000) (noting that the Queen did, in 1963, have to step in and appoint Alec Douglas Home as Prime Minister because of a lack of consensus within the Conservative Party as to who should succeed Harold Macmillan after his resignation from office). Constitutional conventions, or norms, in Britain dictate that, with the exception of extraordinary circumstances, the monarch will dissolve Parliament when requested to do so by the Prime Minister, and appoint as Prime Minister the leader of the political party which secured the most seats in the House of Commons in a general election. HENNESSY, *supra* note 83, at 33–34; *see also* Adam Tomkins, *The Republican Monarchy Revisited*, 19 CONST. COMMENT. 737, 744 (2002) (book review) (noting that although the Queen has the right to appoint anyone as Prime Minister, constitutional conventions and norms dictate that she will appoint the leader of the party with the most seats in the House of Commons).

<sup>88</sup> British political scientists consider the rise of the Prime Minister's power as making him or her analogous to the U.S. President in a number of ways. *See, e.g.*, JENNINGS, *supra* note 65, at 162. For a discussion of the differences in the roles of the British Prime Minister and the American President, *see generally* GRAHAM ALLEN, *THE LAST PRIME MINISTER: BEING HONEST ABOUT THE U.K. PRESIDENCY* (2d ed. 2003).

whose word carried the most weight and who acted as the principal vehicle in their relations with the King. Sometimes he was called the Prime Minister, but usually only by his enemies and as a term of mild abuse. He was still very much the King's servant."<sup>89</sup>

The position of Prime Minister, however, has evolved greatly over time. A vast amount of political power has been consolidated under the Prime Minister's control. Not only is the Prime Minister's office now responsible for almost all duties as the head of government, but it also controls some aspects of government traditionally within the ambit of Parliament.<sup>90</sup>

As the prominence and power of the Prime Minister increased, so did the perceived need by the Houses of Parliament and the public to keep him or her accountable to the other branches of government and to the general public.<sup>91</sup> The advent of the Prime Minister's Question Time, which is one means by which that need is served in the British political process, is grounded in the United Kingdom's long history of requiring all Cabinet ministers to answer representatives' questions about government policies and actions during Parliamentary sessions.<sup>92</sup> The rationale behind such questioning is, quite simply, to "oblige Ministers to explain and defend the work, policy decisions and actions of their departments."<sup>93</sup>

## 2. *History of Parliamentary Questions*

Parliamentary questions, a key element in holding the government to account,<sup>94</sup> originated in 1721 during floor debates and have undergone

<sup>89</sup> HENNESSY, *supra* note 83, at 39 (citing J.H. PLUMB, ENGLAND IN THE EIGHTEENTH CENTURY (1714–1815) 49–50 (1966)).

<sup>90</sup> See HENNESSY, *supra* note 83, at 41, 45–51 (noting that the Prime Minister has, over time, reduced the number of personal prerogatives of the monarch, and has gradually shifted control over the power to initiate legislation from the Parliament to the executive); MANUEL & CAMMISA, *supra* note 83, at 54 (noting that although the Queen formally opens each session of Parliament by reading her government's proposals for the upcoming legislative session, the text of the Queen's speech is prepared by the Prime Minister, and the Queen is obligated to read whatever is put before her); North, *supra* note 87, at 104 (stating that "constitutionally in many areas [the Queen] has to act on the formal advice of the government of the day. That is, indeed, the role of a constitutional monarch.").

<sup>91</sup> HOUSE OF COMMONS PROCEDURE COMMITTEE, THIRD REPORT, 2001-2, H.C. 622, at 18, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmproced/622/62203.htm> [hereinafter THIRD REPORT]; PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 9.

<sup>92</sup> THIRD REPORT, *supra* note 91, at 6 (citing PATRICK HOWARTH, QUESTIONS IN THE HOUSE: THE HISTORY OF A UNIQUE BRITISH INSTITUTION 11–14 (1956)).

<sup>93</sup> GRIFFITH & RYLE, *supra* note 75, at 254; PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 2.

<sup>94</sup> North, *supra* note 87, at 100. One scholar noted in reference to parliamentary questions, "How easy it would be for the Government to ride off after a blunder if it had not to meet the criticism which inevitably follows." JENNINGS, *supra* note 65, at 88. Individual min-

an evolution in form and substance over the subsequent years.<sup>95</sup> The establishment of a formal questioning period of the Cabinet ministers arose in 1833,<sup>96</sup> until which point oral questions were typically posed to the Cabinet ministers and the Prime Minister on an ad hoc basis during floor discussion or debates.<sup>97</sup>

Notably, no formal question time existed in the United Kingdom in the 1780s, when the framers of the U.S. Constitution were debating the structure of the federal government and considering possible means of providing systemic limitations on the branches of government.

As to substance, each question posed must seek information that is unpublished, on a matter within the responsibility of the Cabinet official from whom an answer is sought, and must not seek a legal opinion or information which is confidential for security reasons.<sup>98</sup> Cabinet ministers are allowed to delegate the answering of questions to junior officials within their department, whereas the Prime Minister is not allowed to do so.<sup>99</sup>

### 3. *Development of the Prime Minister's Question Time*

Until 1961, the Prime Minister and other Cabinet ministers fielded questions during the same Question Time.<sup>100</sup> In practice, this meant that the Prime Minister, who retains a certain scope of duties not delegated to

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isters are accountable for their own actions and decisions, as well as for those who work in their departments. See GRANT JORDAN, *THE BRITISH ADMINISTRATIVE SYSTEM* 210 (1994).

<sup>95</sup> It is commonly believed that the first question to be posed orally to a Cabinet minister, and maintained as part of the parliamentary record, was in 1721. PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 2.

<sup>96</sup> PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 2; see also BUTT, *supra* note 79, at 63 (discussing the effect of select committee report of 1832).

<sup>97</sup> PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 2. Both written and oral questions could be posed to any of the Cabinet ministers, and were only to be addressed to the Cabinet minister who was responsible for the subject matter of the question. *Id.* This restriction effectively shielded the Prime Minister from having to answer questions, since most subject areas would have been covered by one of his Cabinet ministers. *Id.* In 1833, Members of Parliament began the practice of giving a Cabinet minister written notice of a question by listing it in a Notice Paper which outlined issues raised for future discussion. *Id.* By 1869, all of the questions to be posed were consolidated into one section of the Notices. *Id.* The practical effect of this change was that Cabinet ministers answered the questions in succession for a certain period of time. See *id.* at 2–3. The establishment of a formal departmental Question Time for Cabinet officials stems from this practice. *Id.* The procedures surrounding the Parliamentary Questions have been reviewed and adapted several times by Parliamentary select committees, most recently in 2002. See *id.* at 3.

<sup>98</sup> GRIFFITH & RYLE, *supra* note 75, at 255–56; PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 4. The government (meaning the Prime Minister and Cabinet) also retains the right to refuse to answer any question outright. THIRD REPORT, *supra* note 91, at 6.

<sup>99</sup> PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 4.

<sup>100</sup> THIRD REPORT, *supra* note 91, at 7.

Cabinet ministers,<sup>101</sup> answered very few questions himself.<sup>102</sup> This practice of shielding the Prime Minister from questions led Parliament in 1961 to set aside a separate Question Time in which only the Prime Minister would answer questions.<sup>103</sup> The establishment of the Prime Minister's Question Time was a matter of Parliamentary convention and not the result of a new law or an Act of Parliament.<sup>104</sup> It is now considered a matter of British constitutional convention.<sup>105</sup>

Since 1961, each week that the House of Commons has been in session, the Prime Minister has been obliged to answer their questions.<sup>106</sup> Even so, the Prime Minister continued the practice of referring questions to other Cabinet ministers until 1977, when the Parliament adopted a new format for questions posed. The change permitted Members of Parliament to ask an open question followed by supplementary questions, all of which the Prime Minister was required to answer himself during the Prime Minister's Question Time without necessarily having prior knowledge of the substance of the questions.<sup>107</sup>

This paved the way for a significant shift in the utility of the Prime Minister's Question Time to opposition parties and the public.<sup>108</sup> By asking numerous questions with follow-up queries, the leaders of the major opposition parties in Parliament used the Question Time to hold the Prime Minister accountable for his actions.<sup>109</sup>

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<sup>101</sup> PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 6; THIRD REPORT, *supra* note 91, at 7.

<sup>102</sup> Under the departmental Question Time format, the Prime Minister would usually answer questions relating only to areas not specifically within the responsibility of another cabinet minister, such as questions of national security or the appointment of ambassadors. THIRD REPORT, *supra* note 91, at 7; PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 6.

<sup>103</sup> GRIFFITH & RYLE, *supra* note 75, at 259.

<sup>104</sup> Tomkins, *supra* note 87, at 742 n.13.

<sup>105</sup> *Id.* Constitutional conventions in Britain are practices that have been adopted as norms by the government, and which are related to constitutional concepts. *See id.* at 742–44.

<sup>106</sup> PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 2. Initially the Prime Minister answered questions twice a week for fifteen minutes each time. *See id.* at 7. In 1997, the sessions were consolidated into one weekly half-hour session. *Id.* at 6.

<sup>107</sup> HENNESSY, *supra* note 83, at 81 (noting that the change in practice “added greatly to the stress and intensity of the preparation required in No. 10 [Downing Street, the Prime Minister’s official residential and office address,] on PMQ days.”); *see also* GRIFFITH & RYLE, *supra* note 75, at 371. Procedurally, the PMQ begins with a Member asking the Prime Minister to list his engagements for the day. GRIFFITH & RYLE, *supra* note 75, at 259. This catch-all question serves as a springboard for supplementaries on any topic of interest, the theory being that the supplementary relates to what the Prime Minister’s job is, which was the focus of the original questions. *Id.* In 2005, Tony Blair, the Prime Minister of the United Kingdom from 1997–2007, reported still feeling nervous on PMQ days despite eight years of practice. *Home News: Day 15—Election 2005*, THE TIMES (London), April 20, 2005, at 25.

<sup>108</sup> *See* GRIFFITH & RYLE, *supra* note 75, at 260, 354. In fact, Opposition leaders were known to forego asking any questions prior to the adoption of the open format, since the question would likely not be answered by the Prime Minister himself. *See id.* at 354.

<sup>109</sup> *See id.* at 259, 354. In the current make-up of the House of Commons in which the Labor Party holds the most seats, the leader of the Conservative Party, which holds the second-

The questions asked showcase the differences in policies between parties and highlight perceived shortcomings in the Prime Minister's actions. They also give the opposition party leaders an important opportunity to confront the Prime Minister on topical issues of importance to their parties and the public, and increase the visibility of opposition Members of Parliament within their own constituencies.<sup>110</sup>

Although critics of the Prime Minister's Question Time dispute whether it fulfills its promise of governmental accountability,<sup>111</sup> other politicians, commentators and critics believe that there is significant value in the Prime Minister's Question Time.<sup>112</sup> In fact, some regard it as "the very centre of political argument and believe this is the time when the Government and the Prime Minister are most exposed."<sup>113</sup>

Question Time also institutionalizes the right for Members of Parliament from minority political parties to have a public voice in the ongoing business of government. Considering Britain's fused executive and legislative branch, this voice is tremendously important in providing a public check on a dominant political party.

A secondary function is that the Prime Minister's Question Time affords all Members of Parliament the opportunity to be publicly heard by the Prime Minister, and to air their constituents' particular concerns. In doing so, the Members of Parliament who ask questions can demon-

most seats, has the right to ask three or four supplementary questions, and the leader of the Liberal Democrats, with the next largest contingent of seats, has the right to ask two supplementary questions. 10 Downing Street, *supra* note 75.

<sup>110</sup> GRIFFITH & RYLE, *supra* note 75, at 260, 354. Other MPs (known as "backbenchers") are also granted the right to ask a single question through a lottery system called the "shuffle." *Id.* at 254–55. The public gets an additional gloss on the Prime Minister's Question Time from the press, who digest the Prime Minister's Question Time and comment upon the quality and content of the questions and answers each week. *See id.* at 354.

<sup>111</sup> BUTT, *supra* note 82, at 21 (noting that the Prime Minister's Question Time has been attacked as the "ritual exchange of non-information"); Robin Oakley, *Blair Avoiding Face-to-Face Debate*, CNN.COM, Apr. 29, 2005, <http://www.cnn.com/2005/WORLD/europe/04/29/oakley.blog.29/index.html> (noting that the exchanges between party leaders at Prime Minister's Question Time are "sharply time-limited and do not permit the serious examination of policy positions"); THIRD REPORT, *supra* note 91, at 7 (noting some politicians' belief that the PMQ had "developed from being a procedure for the legislature to hold the executive to account into a partisan 'joust' between the noisier supporters of the main political parties").

<sup>112</sup> *See* LEVINSON, *supra* note 14, at 68 (describing the press conferences held by United States Presidents to be "an exceedingly pale and inadequate substitute" for the rigorous questioning that the United Kingdom Prime Minister undergoes during Question Time).

<sup>113</sup> THIRD REPORT, *supra* note 91, at 7. The U.K. government believes that parliamentary questions are fulfilling their objective of accountability. *See* PRESIDENT OF THE COUNCIL & LEADER OF THE HOUSE OF COMMONS, GOVERNMENT RESPONSE TO THE PROCEDURE COMMITTEE REPORT ON PARLIAMENTARY QUESTIONS (H.C. 622), Oct. 2002, Cm. 5628, at 7; BUTT, *supra* note 82, at 323 (arguing that the Prime Minister's Question Time benefits the "collective psychology of British Politics because it obliges the Prime Minister, the most powerful man in the Executive, to come down to Parliament and answer the attacks of the humblest backbencher").

strate their responsiveness to their own constituencies and highlight topics of local importance, particularly when an election is impending or controversial policies are being discussed.<sup>114</sup>

## B. A PRESIDENT'S QUESTION TIME

In the United States, the executive branch now wields a great deal more power than was originally envisioned or expected under the Madisonian model of separated and divided government. Just as the role of the British Prime Minister has gained more prominence over time, so has that of the President of the United States.<sup>115</sup> Additionally, political parties in the United States have become more powerful, and the President, through highly successful mechanisms of party discipline, can exercise effective control over his own party members.<sup>116</sup> Recent history offers examples of how the congressional oversight function can be rendered virtually impotent when there is one-party rule in the legislative and executive branches.<sup>117</sup> Mandatory question-and-answer sessions, akin to the Prime Minister's Question Time in the United Kingdom, would afford a timely,<sup>118</sup> efficient, and effective means of opening up discourse between the President and Congress, particularly at times when no other avenue of information-gathering by Congress is politically viable.<sup>119</sup>

### 1. *Accountability and Transparency to Improve the Function of Government*

The primary policy objectives of introducing a new institutional element into the relationship between the President and Congress akin to a Question Time are to increase the accountability of the executive branch,

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<sup>114</sup> BUTT, *supra* note 82, at 324. See, e.g., James Blitz, *Blair's Tough Challenger: Man in the News Michael Howard*, FINANCIAL TIMES (US), Apr. 9, 2005, at 7 (noting that Mr. Howard's "virtuoso performance at prime minister's question time" could help gain seats for the Conservative party in the upcoming parliamentary elections); Matthew Parris, *When It's Time to Seize the Moment, Kennedy Is Fumbling in the Dark*, THE TIMES (London), Apr. 16, 2005, at F21 (stating that Charles Kennedy, leader of the Liberal Democratic party, has not used his questions at the PMQ to challenge Tony Blair's "mendacity" on the question of Iraq).

<sup>115</sup> See *supra* Part I.

<sup>116</sup> TUSHNET, *supra* note 57, at 18–19 (arguing that modern political parties are characterized by internal ideological agreement coupled with a willingness to cede authority to party leaders to enforce discipline among the members, set objectives, name committee chairs, and set committee agendas); Levinson & Pildes, *supra* note 4, at 2334.

<sup>117</sup> See *supra* Part I.C.

<sup>118</sup> A lack of timeliness is endemic to Congressional investigations. See Schumer, *supra* note 44, at 24 (noting that Attorney General Alberto Gonzales took five and a half months to respond to questions from the Senate Judiciary Committee relating to warrantless wiretapping, and that the Attorney General provided his responses on the eve of his next appointment to meet with the committee).

<sup>119</sup> Prakash, *supra* note 6, at 546 (discussing the need for flexibility in the nature of interactions among different branches of government, and noting that changes in these interactions are often "appropriate and desirable").



offer greater government transparency,<sup>120</sup> and improve the function of government through public and timely communication.<sup>121</sup> The current system does not provide a mechanism for direct interaction between the President and Congress without resort to a formal investigation and the use of Congress's subpoena or impeachment power.<sup>122</sup> If Congress chooses not to utilize a subpoena against the executive branch, the only remaining institutional option for "dialogue" between Congress and the President is the State of the Union address.<sup>123</sup>

Given this backdrop, a President's Question Time should not be construed as a formal or punitive check on the Executive by the Legislature. Unlike some of the checks and power-dividing elements delineated in the Constitution, such as the ability to override a presidential veto or impeach the President,<sup>124</sup> a President's Question Time would not give the Legislature the right to prevent the President from taking any particular course of action.<sup>125</sup> Rather, a President's Question Time would simply be an additional reporting requirement for the President.<sup>126</sup>

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<sup>120</sup> See Shane, *Political Accountability*, *supra* note 24, at 210 (arguing that greater political accountability can only be achieved through "widespread access to information about the nature of the decisions at issue," among other factors).

<sup>121</sup> Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 25–26 (Oct. 2003) (stating that the relations among the different branches of government can be a means to strengthen government and reduce inter-branch impasses); Shane, *Political Accountability*, *supra* note 24, at 204–05 (stating that "open, vigorous government dialogue" may be the primary means of ensuring that the government acts in the public interest).

<sup>122</sup> See U.S. CONST. art. II, § 4 (describing the grounds on which the President may be removed from office following impeachment); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) ("[T]he power to secure needed information has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial Legislatures before the American Revolution.").

<sup>123</sup> U.S. CONST. art. II, § 3 (establishing the obligation of the President to address Congress "from time to time" to inform Congress of the State of the Union and recommend measures for Congress's consideration). Despite the fanfare generated by the President's State of the Union address each year, there is no avenue for dialogue between party members, as the President generally offers his speech, which is dissected after the fact by the media and politicians of the opposing political party. See J.R. Labbe, *That Speech the Other Night: Applause! Applause!*, FT. WORTH STAR TELEGRAM, Jan. 29, 2007, at E3 (noting that Congress's response to the President's State of the Union address can be measured by its body language and level of applause).

<sup>124</sup> U.S. CONST. art. I, § 7, cl. 2 (granting Congress the right to override a presidential veto with a two-thirds supermajority); U.S. CONST., art. I, § 3, cl. 6 (granting the Senate exclusive power to try the President after impeachment).

<sup>125</sup> In this regard, a President's Question Time would be fundamentally distinguishable from a legislative veto or any similar efforts at limiting the power of the executive branch or administrative bodies. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down the legislative veto, noting that it ran afoul of the separation of powers and the framers' "finely wrought and exhaustively considered" procedures which governed the enactment of legislation. *Id.* at 951.

<sup>126</sup> See *infra* Part IV. (discussing different Presidential disclosure and reporting requirements). The proposition of this additional reporting requirement on the Executive would, un-

Unlike investigations conducted by an independent counsel or other investigative committee in which the ultimate question is one of criminality or severe wrongdoing,<sup>127</sup> a President's Question Time would provide a window into the actions of the executive branch without the specter of possible indictment in tow.<sup>128</sup> Thus, rather than being in the form of a criminal inquiry, the periodic interaction between Congress and the President could focus on the substance of policy issues and the wisdom of the President's decisions.<sup>129</sup>

The State of the Union address—the only time at which the President is obligated under the Constitution to appear before Congress,<sup>130</sup> barring a formal investigation or impeachment proceeding—provides the basis for a comparative example, particularly since it was modeled after the monarch's speech opening Parliament in the United Kingdom.<sup>131</sup> The U.S. Constitution only provides that the President must deliver such an address from “time to time,”<sup>132</sup> and does not provide any opportunity for Congress to respond to the President's address at the time it is made and before the same audience.<sup>133</sup>

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doubtedly, be met with a great deal of presidential resistance. *See generally* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005) (providing an overview of modern presidential resistance to legislative oversight).

<sup>127</sup> Carter, *supra* note 6, at 138–39.

<sup>128</sup> *See* Shane, *Inter-Branch Norms*, *supra* note 6, at 524–25 (arguing that the threat of impeachment is wielded too freely when the House of Representatives disagrees with the politics of the President).

<sup>129</sup> *See* CHARLES M. HARDIN, *PRESIDENTIAL POWER & ACCOUNTABILITY: TOWARD A NEW CONSTITUTION 6–7* (1974) (arguing that impeachment incorrectly focuses the public on the question of criminal guilt or innocence, which “hides and even denies the *political* responsibility” underlying the decision-making in government). “Political adequacy is judged not by weighing individual guilt or innocence according to the rules of evidence but rather by political procedures for testing confidence in the prudence and judgment of government.” *Id.* at 7; *see also* Carter, *supra* note 6, at 138–39 (noting that the existence of an independent counsel lowers the public's standard of what is acceptable behavior in the executive branch to the question of whether certain activity was illegal, as opposed to whether “the executive branch performs with dignity and propriety”).

<sup>130</sup> U.S. CONST. art. II, § 3 (requiring that the President 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”).

<sup>131</sup> While modeled after the speech of the monarch opening Parliament, the State of the Union speech was always intended to serve a different function. *See* THE FEDERALIST NO. 77, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>132</sup> U.S. CONST. art. II, § 3. The Constitution does not specify any particular interval at which the President is required to report to Congress. It is a matter of convention that the State of the Union address has been delivered in person, and annually, since the mid-twentieth century.

<sup>133</sup> *See* BERGER, *supra* note 60, at 37 (arguing that Article II, § 3 of the U.S. Constitution places the President under an unqualified duty to inform Congress of matters within the executive branch).

Regardless of a particular president's party affiliation, the State of the Union address typically lays out lofty plans and ambitions for the coming year, ignores issues the President does not want to confront, and cannot be challenged at the time.<sup>134</sup>

The United Kingdom offers an instructive comparative example. The Queen opens each session of Parliament with a speech in which, like the President's State of the Union address, she describes governmental objectives for the coming session of Parliament.<sup>135</sup> The Prime Minister writes the speech but because the monarch acts as the figurehead of government, the Queen delivers the speech.<sup>136</sup> However, unlike the U.S. State of the Union address, after opposition parties have had an opportunity to parse the government's proposals, a Question Time follows the Queen's speech and gives opposition parties the ability to question the Prime Minister on the wisdom and feasibility of the announced objectives.<sup>137</sup>

Such questioning does not prevent the Prime Minister and his Cabinet from pushing their preferred policies and agenda.<sup>138</sup> Instead, by probing those policies and highlighting any perceived deficiencies or benefits, the questioning advances the Madisonian model of government actors working against each other for the benefit of the polity as a whole. This questioning may actually strengthen the Prime Minister by forcing him to develop policy objectives that are better grounded and less vulnerable to well-reasoned criticism.<sup>139</sup> The same argument would hold true for the President.

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<sup>134</sup> Instead, challenges to the agenda set forth in the State of the Union address are voiced through news analysis or statements made by opposition party politicians after the fact. *See, e.g.,* Frank Rich, Editorial, *We're Not in Watergate Anymore*, N.Y. TIMES, July 10, 2005, at 12 (discussing how in his 2003 State of the Union address, President George W. Bush claimed that Iraq was stockpiling uranium—a statement that turned out to be inaccurate—as he made a case for waging war in Iraq); Democratic Response by Senator Jim Webb, <http://speaker.gov/newsroom/multimedia?id=0011> (last visited Jan. 9, 2008) (providing a webcast and transcript of Senator Webb's response to President Bush's State of the Union address on January 23, 2007).

<sup>135</sup> MANUEL & CAMMISA, *supra* note 83, at 54.

<sup>136</sup> *Id.*

<sup>137</sup> U.K. Parliament: State Opening of Parliament, <http://www.parliament.uk/about/how/occasions/stateopening.cfm> (last visited Jan. 9, 2008).

<sup>138</sup> MANUEL & CAMMISA, *supra* note 83, at 54.

<sup>139</sup> Additionally, in order to properly prepare for the Question Time, he must familiarize himself on all probable topics of discussion, thereby making all of the executive departments more accountable to the Executive himself. HENNESSY, *supra* note 83, at 81 (discussing the ability of the Prime Minister to hold his Cabinet members to a higher standard of accountability because of his need to prepare for the Prime Minister's Question Time). The President's ability to keep the officers and employees of the executive branch accountable to him is explicitly established in the Constitution itself. *See* U.S. CONST. art. II, § 2, cl. 1. Commentators have noted a distinct lack of accountability in the administrative departments which could be mitigated by the President taking a more active role in holding administration officials to account himself. *See* Sunstein, *supra* note 37, at 453 (arguing that "the President is in an

Further, the ability of congressional representatives to speak directly to the President in a public venue,<sup>140</sup> such as a President's Question Time, would create a transparent means of communication between Congress and the White House.<sup>141</sup> Such a forum for public dialogue and debate would alleviate the current limitations of reliance on politicians' statements to the press, on questions and answers during interviews or press conferences,<sup>142</sup> or on guesswork.<sup>143</sup> This dialogue would also have a ripple effect in creating greater accountability of each Representative to his or her constituents.

Significantly heightened access to the Executive would create a stronger culture of accountability and would work against the diffusion of responsibility within the bureaucracy of the administration.<sup>144</sup> Such diffusion often allows the President to dissociate with unsuccessful or controversial activities of the executive branch by claiming a lack of direct oversight or a lack of reporting by the various offices to him.<sup>145</sup>

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unusual position to centralize and coordinate the regulatory process"). "The President is the only national official charged with the implementation of a mass of legislation. This capacity is especially important in light of the proliferation of agencies with overlapping responsibilities." *Id.*

<sup>140</sup> Obviously, informal, non-public communications occur between the executive branch and Congress on a frequent basis, particularly during critical periods of government action. For example, Cyrus Vance, Secretary of State from 1977 to 1980, recalls having "regular and full consultations with the congressional leadership several times a week" during the Iranian hostage crisis. Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 92 (1984); cf. JENNINGS, *supra* note 65, at 89 ("Secret sessions were suited to the oligarchic government of the eighteenth century. They are the negation of democratic principles.").

<sup>141</sup> See Williams, *supra* note 80, at 335 (noting that Justice Robert H. Jackson admired the British system of parliamentary questions for offering a means to greater accountability of Ministers).

<sup>142</sup> Michael Ignatieff, *Who Are Americans to Think That Freedom Is Theirs to Spread?*, N.Y. TIMES MAGAZINE, June 26, 2005, at 42 (noting that the administration of George W. Bush has "the least care for consistency between what it says and does of any administration in modern times."); e.g., Richard W. Stevenson, *At White House, a Day of Silence on Rove's Role in C.I.A. Leak*, N.Y. TIMES, July 12, 2005, at A1; see also *supra* Part I.B. (discussing why dependence on press conferences is problematic from a transparency perspective).

<sup>143</sup> The value of such a mechanism is significant in increasing the transparency of the government by insisting that the President himself answer sometimes difficult questions without the protection of a spokesperson. For example, in a July 2005 press conference, White House spokesman Scott McClellan declined to answer almost all questions related to the President's understanding of whether presidential adviser Karl Rove leaked the name of a covert C.I.A. operative to the press, essentially ignoring the question altogether. Press Briefing by Scott McClellan (July 11, 2005), <http://www.whitehouse.gov/news/releases/2005/07/20050711-3.html>.

<sup>144</sup> Shane, *Political Accountability*, *supra* note 24, at 207–08. I do not mean to argue that the independent nature of certain administrative agencies, such as the Securities and Exchange Commission or the Federal Election Commission, should be compromised.

<sup>145</sup> For example, during the Iran-Contra investigation, President Reagan's professed a lack of knowledge about the activities of numerous executive branch officials. Shane, *Political Accountability*, *supra* note 24, at 173. A President's Question Time, by obligating the President to exercise his rights under the Opinion Clause, U.S. CONST. art. II, § 2, cl. 1, and

Further, a President's Question Time would assist in improving the function of the Legislature by allowing representatives to elevate issues of importance beyond House floor debates. Important issues could be aired before the President, addressed by the executive branch, and evaluated by the public in a relatively timely fashion,<sup>146</sup> even if the White House and both branches of Congress are controlled by one party.<sup>147</sup>

The organization and role of political parties in the United States is significantly different than in the United States. The presidential system in the United States has no formal institution akin to the "opposition rights" that are found in parliamentary systems.<sup>148</sup> The difference in the role of parties, however, should not operate as an impediment to establishing a system by which members of a minority political party have a public forum enabling direct dialogue with the President.

In the case of unified government, the function of a Question Time is obvious and remarkably similar to that of the Prime Minister's Question Time in Britain: to restore a sense of balance in government in accordance with the Madisonian ideal promulgated at the time the Constitution was drafted. Although the framers of the Constitution hoped that political parties would never take root in the United States,<sup>149</sup> the modern reality is that the strength of political parties at times of unified government makes the U.S. system remarkably similar to the Westminster parliamentary system of a linked executive and legislative branch.<sup>150</sup> As such, similar measures should be considered to restore a greater degree of accountability of the executive branch.

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familiarize himself with issues within various executive offices, would at least partially ameliorate the problem of a President deliberately remaining uninformed of a department's actions in order to be able to dissociate from controversial or politically unpopular actions that the department takes.

<sup>146</sup> One can imagine Newt Gingrich in 1995, as Speaker of the House of Representatives, using a Question Time as an opportunity to question and criticize President Clinton about various aspects of the federal budget prior to the two shut-downs of the federal government that year. See Shane, *Inter-Branch Norms*, *supra* note 6, at 517–18.

<sup>147</sup> Shane, *Political Accountability*, *supra* note 24, at 202 (discussing the fact that when one party dominates both chambers of Congress and the Presidency, Congress's checks on the White House tend to diminish significantly); see also Richard W. Stevenson, *Pressure by White House Is Being Applied with Care*, N.Y. TIMES, May 19, 2005, at A24 (noting the ability of the White House to pressure Senate Republicans to follow the White House agenda regarding judicial nominations and filibusters); *c.f.* North, *supra* note 87, at 106 (noting that even when the Conservative Party had a 175-seat deficit in the House of Commons, the Prime Minister's Question Time gave its leader a platform to voice the party's concerns and criticisms about government policy).

<sup>148</sup> See Robert A. Dahl, *The American Oppositions: Affirmation and Denial*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES 34–69 (Robert A. Dahl ed., 1966); Ludger Helms, *Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies*, 39 GOV'T & OPPOSITION 22, 26–30 (2004).

<sup>149</sup> See THE FEDERALIST NOS. 48, 51 (James Madison).

<sup>150</sup> Levinson & Pildes, *supra* note 4, at 2368–69.

As a tool for heightened accountability, a President's Question Time would have some limitations. For example, a president would likely use the Question Time as a platform to spin his positions on a given issue without providing a real answer to a question, a criticism that has been leveled at the Prime Minister.<sup>151</sup> Additionally, a president could give false information in response to questions posed.<sup>152</sup> This is obviously a risk any time a president speaks to Congress, the press, or the public, particularly in cases in which the President is not under oath.<sup>153</sup>

However, because a Presidential Question Time would require the President himself to answer questions on a regular, periodic basis, and because a Presidential Question Time would be public and televised, there are significant political incentives and pressures for the President to avoid the dissemination of misinformation. Any impediment to government efficiency<sup>154</sup> imposed by the institution of a Presidential Question Time would be offset by the larger policy benefits.<sup>155</sup>

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<sup>151</sup> See THIRD REPORT, *supra* note 91, at 18 (citing Procedure Committee Report from 1994–1995, in which some Members of Parliament said that the Prime Minister's Question Time had “developed from being a procedure for the legislative to hold the executive to account into a partisan ‘joust’”).

<sup>152</sup> Zuckerman, *supra* note 25, at 91–92 (noting that deception of Congress has become “commonplace” among executive branch officers, particularly focusing on the Congressional investigations of the Iran-Contra deals).

<sup>153</sup> Even being under oath does not guarantee honest information. See *Clinton Acquitted; President Apologizes Again*, CNN.COM, Feb. 12, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/02/12/impeachment/> (discussing President Clinton's impeachment by the U.S. House of Representatives, and his ultimate acquittal by the U.S. Senate, on charges of perjury and obstruction of justice).

<sup>154</sup> The British government has found its Question Times to be relatively cost-effective, estimating in 2004 that it spent approximately £345 to research and answer each oral question posed to the Prime Minister or a Cabinet minister. PARLIAMENTARY QUESTIONS FACTSHEET, *supra* note 80, at 12 (noting that MPs “regard this as money well spent in the pursuit of Ministerial accountability”). The Prime Minister typically answers about fifteen questions during each Question Time. *Id.* Although a similar cost analysis cannot be assumed in the United States, the costs incurred by the British government provides some insight as to the potential costs to be incurred in instituting a Question Time in the United States.

<sup>155</sup> This is particularly so when recalling that deliberation, balance, and caution were viewed by various framers of the Constitution as hallmarks of a republican government that was safeguarded from the threat of despotism or tyranny. See Farina, *supra* note 6, at 522. The Supreme Court in *INS v. Chadha* stated plainly that “it is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.” *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (rejecting the proffered justification that the legislative veto would make certain government functions more efficient); see also Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 694 (2002) (noting that the system of separation of powers “does not aim to enhance efficiency”). It is also evident that one of those key values was government responsiveness to the people. James Madison argued, “A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.” Paul C. Light, *Filibusters Are Only Half the Problem*, N.Y. TIMES, June 3, 2005, at A23 (noting that the framers of the Constitution would have objected to the “secret gangs” that

## 2. *The Role of the House of Representatives*

The bicameral structure of the U.S. Legislature raises the question of which chamber of Congress the President's Question Time should address. The House of Representatives is the more appropriate body, in light of historical and functional considerations. The House of Representatives, considered by some to be the "Grand Inquest" of government,<sup>156</sup> was envisioned by the framers of the Constitution to be the voice of the people.<sup>157</sup> In the *Federalist No. 49*, Madison writes:

The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.<sup>158</sup>

The Senate, with its longer terms of office and purported detachment from localized politics, was not structured to serve the same function.<sup>159</sup> Because the primary purpose of a Question Time is increased accountability and transparency, as well as responsiveness to the concerns of the public's representatives, it is most appropriate for the President to answer questions from the representatives of geographic regions within each state, who would be able to raise the concerns of a localized group of constituents.<sup>160</sup>

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seem to be the normal mode of communication between the White House and Congress to break impasses).

<sup>156</sup> BERGER, *supra* note 60, at 12–13.

<sup>157</sup> THE FEDERALIST NO. 49 (James Madison).

<sup>158</sup> THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 2003).

<sup>159</sup> Madison once opined:

[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

THE FEDERALIST NO. 63, at 382–83 (James Madison) (Clinton Rossiter ed., 2003).

<sup>160</sup> Whereas the framers of the Constitution envision the strength of the connection between the people and the House of Representatives to be a source of concern for legislative tyranny, in the case of a President's Question Time, that same connection would be a tool to affect greater responsiveness to the people's concerns. The framers clearly believed that the House of Representatives would live up to its name. James Madison wrote:

Who are to be the objects of popular choice [to become representatives]? Every citizen whose merit may recommend him to the esteem and confidence of his coun-

Article I, Section 2 of the Constitution grants the House, acting as the proxy for the public that Madison envisioned, the power of investigation and oversight of the executive branch.<sup>161</sup> A discourse between the President and those representatives considered to be most connected to the general population would mirror the structure of the Prime Minister's Question Time, which takes place in the House of Commons because of its populist nature.<sup>162</sup>

### III. INFORMATION-SHARING: THE STRUCTURE OF THE CONSTITUTION AND EARLY PRACTICES

The President's Question Time would alleviate the credibility gap between the President and Congress, as well as foster a culture of governmental accountability, as it has in the United Kingdom. However, the Constitution's low level of executive responsiveness raises the question of whether it would be constitutionally feasible to establish a President's Question Time.<sup>163</sup> History suggests that a constitutional amendment would not be necessary, based on early experiments in inter-branch communications and previous governmental adaptations to a changing political environment.<sup>164</sup>

#### A. THE LANGUAGE OF THE CONSTITUTION

The language of the Constitution itself does not speak to the validity of an in-person reporting relationship between the President and the Legislature. The Constitution's sole requirement of the President to report information to Congress is in Article II, Section 3, which requires the President to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures

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try. No qualifications of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people. THE FEDERALIST NO. 57, at 349 (James Madison) (Clinton Rossiter ed., 2003).

<sup>161</sup> In enacting a President's Question Time, the Congress would need to promulgate legislation using its power under Article I, Section 2, and potentially the "necessary and proper" clause of Article I, Section 8. See *McGrain v. Daugherty*, 273 U.S. 131, 161 (1927) (noting that power of legislative inquiry has been long-established in the United States).

<sup>162</sup> See BERGER, *supra* note 60, at 34 n.118, 35–36 (citing the modeling of the House of Representatives on the House of Commons); JENNINGS, *supra* note 65, at 88–89 (noting that "Government and Opposition speak to each other, but for the education of the people. . . . The members of the House of Commons . . . have no authority except as representatives, and in order that their representative character may be preserved they must debate in public.").

<sup>163</sup> *INS v. Chadha*, 462 U.S. 919, 945 (1985) (noting that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to [the legislative veto], sets out just how those powers are to be exercised.").

<sup>164</sup> *Id.* at 946–47 (noting the need for such legislation to go through normal channels for enactment into law and not circumvent the Presentment Clause in U.S. CONST. art. I, § 7. cl. 2).



as he shall judge necessary and expedient.”<sup>165</sup> In the *Federalist No. 77*,<sup>166</sup> Hamilton comments that “no objection has been made to this [provision]; nor could they possibly admit of any,” suggesting that the fact and structure of the State of the Union was not cause for argument between the Federalists and Anti-Federalists.<sup>167</sup>

The Opinion Clause in Article II empowers the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,”<sup>168</sup> but no such corollary clause exists in Article I, where the powers of Congress are delineated.<sup>169</sup> Given the political compromise embodied in the Constitution, it is hardly surprising that no reporting requirement exists from the President to Congress: the framers of the Constitution were attempting to craft the position of the Chief Executive to be independent of the expected attempts at political domination by the legislative branch.<sup>170</sup>

It would be incorrect, however, to assume that because the Constitution does not explicitly demand that the President answer questions posed by Congress, it would be unconstitutional to enact a law that establishes such a requirement.<sup>171</sup> To the contrary, the fact that no such re-

<sup>165</sup> U.S. CONST. art. II, § 3. The same section of the Constitution also grants the President the right to, “on extraordinary Occasions, convene both Houses, or either of them.” *Id.* As discussed previously, the State of the Union provides no venue for rebuttal or direct questioning of the President by Congress. See *supra* note 118 and accompanying text.

<sup>166</sup> Throughout this section, I rely on the Federalist Papers and the writings of the Anti-Federalists to illustrate the major views offered for and against the Constitution’s ratification. These writings are a mixture of political theory and advocacy, however, and are not offered as an authoritative exposition of the views of the framers or the delegates to the Federal Convention. Other sources, such as the notes of James Madison on the Convention, provide additional illumination as to the views of the framers. See JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–7 (1997).

<sup>167</sup> Scholars have suggested that other parts of the Constitution open up the executive branch to legislative inquiry, including the “Take Care” clause of Article II, Section 3, which directs the President to take care of the implementation of Congress’ legislation, and Article I, Section 5(3), which allows Congress to conceal information from the public; there is no corollary right enumerated in the Constitution for the President. See BERGER, *supra* note 60, at 3, 206, 306.

<sup>168</sup> U.S. CONST. art. II, § 2, cl.1.

<sup>169</sup> See generally AMAR, *supra* note 60 (suggesting that the lack of an Opinion Clause in Article I implies that Congress does not have the right to institute a reporting requirement on the President). Notably, Alexander Hamilton described the Opinion Clause as a “mere redundancy” in the Constitution, since, as Chief Executive, the President has the inherent right to demand reports from subordinates in the executive branch. THE FEDERALIST No. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed. 2003).

<sup>170</sup> See *supra* Part II.B.

<sup>171</sup> The President’s Question Time would be a means to increase the efficacy of the Legislature, and Congress has the right to exercise its power toward such a goal. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“When any Branch [of government] acts, it is presumptively exercising the power the Constitution has delegated to it.” (citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928))). The catch-all provision of Article I, which gives

quirement exists should be viewed as meaning only that it has not been a part of the historical practice of the nation.<sup>172</sup> The Constitution is a procedural and structural framework for the nation—it would be far more remarkable if more specific language supporting a Presidential Question Time existed in the Constitution.<sup>173</sup>

## B. CHECKS AND BALANCES AS ENVISIONED BY THE FRAMERS

Even Madison, the most ardent proponent of systemic checks on the Presidency, believed that a relatively low level of executive accountability to Congress and to the public was sufficient.<sup>174</sup> He and other framers believed this would strengthen an executive branch that they perceived as weaker than and endangered by the Legislature.<sup>175</sup> Their context for their assumption was the experience of other nations, such as the United Kingdom, in which Parliament, at the time, had control over most aspects of the government,<sup>176</sup> as well as the early American experience of inef-

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Congress the power “[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,” is, therefore, seemingly the most appropriate basis to enact a law requiring a President’s Question Time. U.S. CONST. art. I, § 8, cl. 18.

<sup>172</sup> Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 122–23 (1984) (arguing that the fact that Presidents have assumed the unilateral authority to instruct American troops into battle does not mean that the War Powers Resolution, which requires some Congressional involvement in the decision to deploy troops, is constitutionally unacceptable; rather, it only means that the War Powers Resolution differs from historical practices of the government).

<sup>173</sup> Charles J. Cooper et al., *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts: What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 188–89 (1988) (noting that the Constitution is “a short, clean, general outline of the structure and principle of government . . . and a most appropriate starting place for the evolution of a body of law.”).

<sup>174</sup> In arguing for a strong executive, Madison reasoned that the sheer number of people in the Legislature, compared to the Executive and the Judiciary, meant that the Legislature would be the only branch with regular access to, and, therefore, influence over, the voters:

The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 2003).

<sup>175</sup> See *supra* Part II.B.

<sup>176</sup> THE FEDERALIST NO. 52, at 324–25 (James Madison) (Clinton Rossiter ed., 2003); see also Bendor & Segal, *supra* note 155, at 684 (discussing traditions of parliamentary supremacy).

fective government that resulted from the overwhelming power of the Legislature under the Articles of Confederation.<sup>177</sup>

Power has shifted toward the executive branch, and political party strength and discipline have grown. Accordingly, there is a need to revisit the original assumptions of the framers and consider means to enhance executive accountability in response to a systemic gap between the expectations of the framers and the reality of the modern political systems.<sup>178</sup>

### 1. *The Desire to Strengthen the Executive Branch*

The framers of the Constitution were swayed by competing interests when restructuring the federal government after finding the Articles of Confederation inadequate.<sup>179</sup> They wanted to adopt the best aspects of European governments already in existence at the time.<sup>180</sup> Moreover, after having fought a long and bloody war for independence from an empire, they wanted to structure a new government in such a way as to prevent the emergence of a new tyrant.<sup>181</sup> At the same time, however, the government needed to be more efficient and effective than the legislature-led government of the Articles of Confederation.<sup>182</sup>

The framers debated at length about the extent to which the U.S. government should adopt the structure and practices of other established governments, and used the United Kingdom's parliamentary system as the primary model by which to evaluate the merits of various proposed aspects of the new U.S. government.<sup>183</sup>

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<sup>177</sup> Cooper, *supra* note 173, at 170 (stating that the “Articles of Confederation established no executive authority at all”); THE FEDERALIST NO. 22, at 147–48 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>178</sup> Analyzing the framers' intentions regarding the system of checks and balances and the relative strength of the branches of government informs a comparison of whether the current balance of powers achieves their intentions. See Peabody & Nugent, *supra* note 121, at 3 (noting the value of looking at “originalist” sources as a “starting point for further discussions about the doctrine's meaning and purposes”); see also RAKOVE, *supra* note 166, at 3–7.

<sup>179</sup> Farina, *supra* note 6, at 489–90.

<sup>180</sup> See generally THE FEDERALIST NOS. 15–17 (Alexander Hamilton), Nos. 18–20 (Alexander Hamilton and James Madison).

<sup>181</sup> Farina, *supra* note 6, at 518.

<sup>182</sup> Cooper, *supra* note 173, at 170 (noting that, under the Articles of Confederation, executive power during the Revolutionary War was exercised by a series of ad hoc congressional committees, creating inefficient and ineffective wartime leadership); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 994–95 (1993); Sunstein, *supra* note 37, at 435.

<sup>183</sup> See BERGER, *supra* note 60, at 35–36; see also *Ex parte Grossman*, 217 U.S. 87, 108–09 (1925) (noting that the Framers' decision-making process regarding the allocation of Constitutional powers was grounded in the context of British governmental institutions).

The debates focused on two areas: the need to avoid the monarchy that existed in Britain,<sup>184</sup> and the need to alleviate the persistent concern that Parliamentary supremacy in Britain would lead to a legislative tyranny in the United States.<sup>185</sup> In 1787, the prevailing conceptions of a new U.S. Constitution laid out plans for a President with substantial powers, but little accountability to the people or other branches of government.<sup>186</sup> Delegates to the Federal Convention that year met to debate the merits of the draft constitution and to propose changes.<sup>187</sup>

The framers attributed the ineffectiveness of government under the Articles of Confederation, in part, to the fact that the Articles vested all legislative, executive, and judicial functions in the unicameral Legislature.<sup>188</sup> The natural response was to propose an executive who was independent of the Legislature and vested with significant power to administer laws and provide leadership to the nation.<sup>189</sup> Nonetheless, a significant number of delegates to the Federal Convention abhorred the prospect of a powerful executive at the head of the U.S. government.<sup>190</sup>

Those views were effectively countered by other delegates who spoke of the need for a strong, unitary executive to guide the nation, counter the numerosity and power of the Legislature, and to champion

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<sup>184</sup> Ralph Ketcham, *Introduction to THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 1, 3–5* (Ralph Ketcham ed., 1986) [hereinafter *THE ANTI-FEDERALIST PAPERS*].

<sup>185</sup> *Id.*

<sup>186</sup> See Farina, *supra* note 6, at 493–98.

<sup>187</sup> Ketcham, *supra* note 184, at 4.

<sup>188</sup> See Cooper, *supra* note 173, at 170 (discussing the inability of the Legislature to act efficiently in the role of the Executive under the Articles of Confederation due to its size).

<sup>189</sup> *Id.*

<sup>190</sup> The powers of the presidency were a topic of significant debate at the Federal Convention; in fact, debates over the appropriate powers for the Executive lasted for many days of the Convention. During the first debate on executive power on June 1, 1787, Charles Pinckney, a delegate from South Carolina, voiced the concern that an executive may encroach on the Legislature's right to declare war and peace, "which would render the Executive a monarchy, of the worst kind, to wit an elective one." *Debate on Executive Power* (June 1, 1787), in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 42, 42. Three days later, on June 4, 1787, the delegates considered whether an executive council, as opposed to a unitary executive, would be an effective safeguard against both an abuse of the power and the lack of accountability vested in the proposed executive branch. See George Mason, *Opposition to a Unitary Executive* (June 4, 1787), in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 47, 47. George Mason, a delegate from Virginia, suggested that an executive council would be most responsive to the needs of the people:

If the Executive is vested in three Persons, one chosen from the northern, one from the middle, and one from the Southern States, will it not contribute to quiet the Minds of the People, [and] convince them that there will be proper attention paid to their respective Concerns? Will not three Men so chosen bring with them, into Office, a more perfect and extensive Knowledge of the real Interests of this great Union?

*Id.* at 48–49.

the cause of the common person.<sup>191</sup> Federal delegates also distinguished the powers of the President from the powers of a King and defended the perception that the presidency needed to be strengthened against the other branches of government: “[The Executive’s] means of defending [his interest is] so feeble, that there is the justest ground to fear his want of firmness in resisting incroachments.”<sup>192</sup> They further noted that “[e]ncroachments of the popular branch of the Government [the Legislature] ought to be guarded against.”<sup>193</sup>

Those lobbying for a constitution with a strong executive ultimately prevailed. During the next phase of the constitutional process—when the states considered ratifying the proposed Constitution—the Federalists and Anti-Federalists, through their writings, provided the primary debate on the strength and accountability of the Executive.<sup>194</sup> Federalist writers defended the proposed Constitution, dismissing concerns that the President would become a quasi-monarch<sup>195</sup> and defending the system of checks and balances as the primary means to prevent the dominance of

<sup>191</sup> Gouverneur Morris, a delegate from Pennsylvania, argued that:

[T]he Executive Magistrate should be the guardian of the people, even of the lower classes, against Legislative tyranny, against the Great and the wealthy who in the course of things will necessarily compose the Legislative body. . . . The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people.

*Federalist Convention Debate on Election and Term of Office of the National Executive* (July 17 and 19, 1787), in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 114, 117.

<sup>192</sup> *Federalist Convention Debate on The Judiciary, the Veto, and Separation of Powers* (July 21, 1787), in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 120, 122.

<sup>193</sup> *Federalist Convention Debate on Executive Veto Power* (Aug. 15, 1787), in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 159, 159.

<sup>194</sup> In their attempts to capitalize on the fear of a tyrannical monarch, the Anti-Federalist writers cited concerns that the presidency would either quickly evolve into a monarchy or, conversely, would become a weak and ineffectual head of government. See Samuel Bryan, *Centinel*, No. 1, *FREEMAN’S J. and INDEP. GAZETTEER*, Oct. 5, 1787 (Philadelphia), reprinted in *THE ANTI-FEDERALIST PAPERS*, *supra* note 184, at 227, 235. “Centinel,” the pen name of noted Anti-Federalist Samuel Bryan, argued that “[t]he President, who would be a mere pageant of state, unless he coincides with the views of the Senate, would either become the head of the aristocratic junto in that body, or its minion.” *Id.* Centinel also critiqued the proposed Constitution by arguing that the entire structure of the system of checks and balances would lead to a pronounced lack of accountability of the government to the public: “If you complicate the [structure of government] by various orders, the people will be perplexed and divided in their sentiments about the source of abuses or misconduct, some will impute it to the senate, others to the house of representatives, and so on . . . .” *Id.* at 231.

<sup>195</sup> Hamilton attacked the Anti-Federalist position, noting the limitations on both the term of office and the powers of the President, which did not exist in the British monarchy. See *THE FEDERALIST* No. 69 (Alexander Hamilton). Hamilton concluded one paper by querying:

What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

*THE FEDERALIST* No. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed. 2003).

any one branch of government.<sup>196</sup> Hamilton emphasized the need for presidential independence from the Legislature: “[Another] ingredient towards constituting the vigor of the executive authority is an adequate provision for its support. It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory.”<sup>197</sup>

Throughout *The Federalist Papers*, it is clear that Hamilton, Madison, Jay, and their supporters believed that the provisions already incorporated into the proposed Constitution satisfied the need for executive accountability to the public. In particular, the *Federalist* authors championed the Constitution’s provisions for a unitary executive,<sup>198</sup> an executive whose term limited to four years,<sup>199</sup> and a process for impeaching a president who abrogates his responsibilities.<sup>200</sup> Other than the accountability theoretically built into its structure,<sup>201</sup> the Constitution

<sup>196</sup> See Shane, *Inter-Branch Norms*, *supra* note 6, at 506.

<sup>197</sup> THE FEDERALIST NO. 73, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>198</sup> The use of *unitary executive* in *The Federalist Papers* and other writings refers to the executive power ultimately being vested in one individual, the President, as opposed to an executive comprising a council. See, e.g., THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (inferring that executive power be vested in one individual by discussing what would destroy a unitary executive). In *The Federalist No. 70*, Hamilton noted that “one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan [for an executive council] is that it tends to conceal faults and destroy responsibility.” *Id.* at 426. He later wrote that “[i]t is evident from these considerations that the plurality of the executive tends to deprive the people of . . . the opportunity of discovering with facility and clearness the misconduct of the persons they trust.” *Id.* at 427.

<sup>199</sup> Although the federalists supported a four-year term limit, they did not want to limit the number of times the electorate could reelect a President; a Presidency without term limits offers greater accountability of the Executive to the electorate. See THE FEDERALIST NO. 72, at 435–36 (Alexander Hamilton) (Clinton Rossiter ed., 2003). The Twenty-Second Amendment, added in 1951, created the current two-term limit of the Presidency. U.S. CONST. amend. XXII. Modern commentators have noted that since the Constitution does now limit the Presidency to two terms, the accountability of a President after being re-elected has been diminished greatly. See, e.g., Shane, *Political Accountability*, *supra* note 24, at 199–200.

<sup>200</sup> In *The Federalist No. 69*, Hamilton contrasted the accountability of the President against that of the British monarch: “The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable.” THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>201</sup> Some commentators have noted that the framers viewed the Constitution as requiring a relatively high degree of accountability because executive power is vested in only one person. See, e.g., Prakash, *supra* note 182, at 991–92. The framers of the Constitution predicted that the President would delegate some responsibility to officials in administrative departments but believed that the President remained ultimately responsible for their actions. *Id.* at 1014–15. *But see* Akhil Reed Amar, *Essay: Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 657–58 (1996) (noting that there is no Opinion Clause in Article I of the U.S. Constitution that would enable Congress to demand reports from the President at will). At any rate, the framers were clear in their overarching belief that the Presidency needed to be strengthened, not checked, in the face of the perceived likelihood of the Legislature attempting to dominate the other branches of the federal government. See Farina, *supra* note 6, at 517.

requires very little in terms of the President's responsiveness to the legislative branch or the public.<sup>202</sup>

As the framers developed and debated the U.S. Constitution in the 1780s and 1790s, the British monarchy's power was greatly limited as a result of the revolution in 1688. However, the King was still the only strong executive figure in the British government.<sup>203</sup> The position of Prime Minister, although in existence since 1721,<sup>204</sup> was not vested with any significant authority until long after the time when the framers of the U.S. Constitution were debating executive power and looking to Britain as a potential model of government.<sup>205</sup>

The extent of the Prime Minister's powers, like the President's powers, has shifted and expanded dramatically in the last 200-plus years.<sup>206</sup> In the late eighteenth century, the framers of the Constitution accurately viewed the United Kingdom as a country in which the legislature had a stronghold on many aspects of political power.<sup>207</sup>

## 2. *Legislative Tyranny Is Feared but Unrealized*

The consolidation of power in one branch of government was an aspect of the British government that the framers of the U.S. Constitution sought strenuously to avoid.<sup>208</sup> The 1688 revolution in England estab-

<sup>202</sup> See *McGrain v. Daugherty*, 273 U.S. 131, 161 (1927) (noting that the power of legislative inquiry has been long-established in the United States and was regarded as part of the power to legislate by the British Parliament); BERGER, *supra* note 60, at 2–7 (discussing the importance of Congress's investigative function in informing itself but noting the increased use of the executive privilege to deny congressional requests for executive information). The framers argued for a strong Executive largely because of their belief that the British parliamentary system, which was very much a model for the U.S. Congress, was vulnerable to a tyranny of the popular branch—the House of Commons. See THE FEDERALIST NO. 63, at 382–88 (James Madison) (Clinton Rossiter ed., 2003) (discussing the nature of the bicameral legislature and likening the House of Commons to the House of Representatives).

<sup>203</sup> Cooper, *supra* note 173, at 192–93.

<sup>204</sup> See *supra* Part II.A.1 (discussing the history and evolution of the position of Prime Minister).

<sup>205</sup> See BERGER, *supra* note 60, at 35–36, 42.

<sup>206</sup> See Cooper, *supra* note 173, at 192–93 (noting that the current system of British government had not yet been established at the time the U.S. Constitution was being framed).

<sup>207</sup> Farina, *supra* note 6, at 518.

<sup>208</sup> In *The Federalist No. 71*, Hamilton discusses the dangerous accumulation of power in the House of Commons and offers the view that no such danger exists with the U.S. presidency:

If a British House of Commons, from the most feeble beginnings, *from the mere power of assenting or disagreeing to the imposition of a new tax*, have, by rapid strides, reduced the prerogatives of the crown and the privileges of nobility within the limits they conceived to be compatible with the principles of a free government, while they raised themselves to the rank and consequence of a co-equal branch of the legislature; if they have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments . . . if they have been able, on a recent occasion, to make the monarch tremble at the prospect of an inno-

lished parliamentary supremacy over the monarch and dramatically increased the political power of the House of Commons, which became an overwhelming governmental force.<sup>209</sup>

Although some anti-federalists and delegates to the Federal Convention feared a rise of a U.S. monarch, delegates were generally more concerned that the President would not be strong enough in the face of an overreaching Legislature.<sup>210</sup> Even after proposing three separate branches of the federal government and a system of divided functions and checks and balances,<sup>211</sup> the framers still had to address the belief that Congress would be able to bully and coerce the President and the Judiciary into becoming little more than puppets of the legislative branch, akin to the English system at the time.<sup>212</sup>

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vation attempted by them, what would be to be feared from an elective magistrate of four years' duration with the confined authorities of a President of the United States? THE FEDERALIST NO. 71, at 433–34 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>209</sup> Hamilton outlined the need to restrain the Legislature based on the example of how the House of Commons had stripped power from the monarchy:

At the revolution [of 1688], to abolish the exercise of [the king having control over the army], it became an article of the Bill of Rights then framed that 'the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law.

THE FEDERALIST NO. 26, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>210</sup> Cf. RAKOVE, *supra* note 166, at 286–87 (discussing the importance of a strong president to avoid the strong possibility of civil war).

<sup>211</sup> The framers saw the Legislature as the greatest threat to the balance of power among the branches of government, and structured the checks and balances accordingly, to control and limit the reach of the Legislature. See Farina, *supra* note 6, at 494–96. The establishment of a bicameral legislature was one of the key means by which the framers sought to limit the power of Congress. In the debates at the Federal Convention of 1787, delegate James Wilson commented:

Despotism comes on mankind in different shapes, sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory and practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.

James Madison, *In Committee of the Whole on Resolutions Proposed by Mr. P & Mr. R* (June 16, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249, 254 (M. Farrand ed., 1911). Although some concern over the powers delegated to the Executive remained, the belief that the Executive was significantly weaker than Congress and, considering the weakness of the position, sufficiently accountable to the public, served as a comfort. See, e.g., Bryan, *supra* note 194, at 243 (noting that the powers of Congress under the new Constitution, are complete and unlimited over the *purse* and the *sword*).

<sup>212</sup> In *The Federalist No. 65*, responding to fears that the Legislature's ability to impeach the President signals an overwhelming consolidation of power in the Senate, Alexander Hamilton queried whether the impeachment power would be better vested with the Supreme Court. THE FEDERALIST NO. 65, at 396–97 (Alexander Hamilton) (Clinton Rossiter ed., 2003). He concluded that the Senate is the better repository of the impeachment power, as:

[I]t is much doubted whether the members of [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would



The framers recognized a serious concern over legislative dominance: “We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”<sup>213</sup> In the *Federalist No. 51*, “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,” Madison wrote that “[i]n a republican government, the legislative authority necessarily predominates.”<sup>214</sup> In the *Federalist No. 71*, Hamilton, a strong believer in a powerful presidency, concurred.<sup>215</sup>

The fear of legislative dominance led the framers to act accordingly by embodying a low level of presidential responsiveness in the Constitution.<sup>216</sup> Yet, that original structure has been vulnerable to the executive branch’s ability to consolidate power.<sup>217</sup> This history demands consideration of different institutional elements to strengthen Congress’s hand, such as a Question Time. In fact, such an arrangement was considered soon after the ratification of the Constitution, during the First Congress.

### C. EARLY EXPERIMENTS WITH INTER-BRANCH COMMUNICATIONS

In the years immediately following the ratification of the Constitution, Congress and the President frequently experimented with various

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possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives.

*Id.* at 396.

<sup>213</sup> THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 2003).

<sup>214</sup> THE FEDERALIST NO. 51, at 319–20 (James Madison) (Clinton Rossiter ed., 2003). Madison discussed the need for a bicameral legislature to diffuse the power, but noted that further measures may be warranted: “[i]t may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.” *Id.*

<sup>215</sup> THE FEDERALIST NO. 71 (Alexander Hamilton). Hamilton wrote:

The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding [Federalist papers]. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity.

THE FEDERALIST NO. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 2003). As Hamilton makes clear, even with the formal separation of powers, the Legislature has the tendency to subsume other branches of government: “[Legislators] often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.” *Id.* Madison agreed with this assessment, although to a more moderate extent. See THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 2003).

<sup>216</sup> See *supra* Part III.B.1.

<sup>217</sup> See Farina, *supra* note 6, at 503–05.

techniques in how best to operate the government.<sup>218</sup> In the course of determining how Congress was to exercise its power of inquiry into executive branch activities, the first Congress experimented with measures that would have the President answering questions on the floor of the House or Senate.<sup>219</sup>

For example, in 1789, soon after George Washington was sworn in<sup>220</sup> and the first session of the House of Representatives was convened,<sup>221</sup> the House began considering a bill to establish the Treasury Department.<sup>222</sup> The bill included language that would obligate the Secretary of the Treasury to “digest and report plans for the improvement and management of the revenue, and the support of the public credit.”<sup>223</sup> The idea of the Treasury Secretary “reporting” to the House of Representatives created discomfort among representatives who perceived it as a means by which the executive branch could intrude on legislators and attempt to influence their opinions.<sup>224</sup> One Representative believed that the State of the Union address represented the constitutional extent of personal appearances that the President should make before Congress.<sup>225</sup> Another Representative concurred, citing the danger of “having prime and great ministers of State.”<sup>226</sup> These doubts arose amid concern that the United States government would devolve into one like the United Kingdom.<sup>227</sup>

Eventually the House of Representatives passed the Treasury Department bill, but only after the word “report” was replaced with “prepare.”<sup>228</sup> This revision led to the practice of information-sharing being carried out in writing.<sup>229</sup> The level of unease among some representatives in the years immediately following the ratification of the Constitution

<sup>218</sup> RAKOVE, *supra* note 166, at 358–61.

<sup>219</sup> See Casper, *supra* note 21, at 227.

<sup>220</sup> George Washington was sworn in on April 30, 1789. JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON 185–86* (2004).

<sup>221</sup> The first session of the U.S. Congress was convened from March 4, 1789 to March 3, 1791. *THE OXFORD COMPANION TO UNITED STATES HISTORY* 256 (Paul S. Boyer ed., 2001).

<sup>222</sup> The House of Representatives is vested with the right to originate bills concerning the raising of revenue for the federal government. U.S. CONST. art. I, § 7, cl. 1.

<sup>223</sup> Casper, *supra* note 21, at 227 (citing 1 ANNALS OF CONG. 592 (Joseph Gales ed., 1789)).

<sup>224</sup> *Id.* at 228 (citing 1 ANNALS OF CONG. 592–93 (Joseph Gales ed., 1789)).

<sup>225</sup> *Id.* (citing 1 ANNALS OF CONG. 593 (Joseph Gales ed., 1789)).

<sup>226</sup> *Id.* (citing 1 ANNALS OF CONG. 601 (Joseph Gales ed., 1789)). Congressman Gerry was accurate in his portrayal of the parliamentary system. By 1789, when the first Congress was convened, the practice of oral parliamentary questions in Britain had been growing for over 50 years. See *supra* Part III.A.

<sup>227</sup> See *supra* Part II.A–B for a full discussion of the framers’ efforts to prevent the development of a tyrannical government in the United States.

<sup>228</sup> Casper, *supra* note 21, at 228 (citing 1 ANNALS OF CONG. 607 (Joseph Gales ed., 1789)).

<sup>229</sup> Casper, *supra* note 21, at 227–28.

at the prospect of the President somehow participating in congressional floor debate is understandable: the legislative and executive branches are meant to serve very different purposes under the Constitution, and the relationship between the branches is extremely different from that between the Prime Minister and the other Members of Parliament, where such participation is normal.<sup>230</sup> Even the current language of the rules of the Senate and House of Representatives codify this sense of caution, limiting the President's presence in those chambers to those occasions for which the unanimous consent of the legislators has been secured.<sup>231</sup>

Another example of wrangling between the President and the first Congress over how best to interact arose in the context of the Senate's role to "advise and consent" to the making of treaties.<sup>232</sup> In the process of negotiating a treaty with certain Native American tribes, President Washington "sent a message to the Senat[e] informing them that he would meet them in their chamber the following day" to discuss the terms of the treaty.<sup>233</sup> In a manner rather similar to that of the British system of parliamentary questions, President Washington was accompanied by the Secretary of War to assist in answering the Senators' questions.<sup>234</sup> The discussion was awkward and not particularly useful, since the senators' questions were "too complex to be dealt with orally and without preparation."<sup>235</sup> After this experience, the President sought advice from the Senate on the making of treaties only in writing.<sup>236</sup>

The experiments of President Washington and the first Congress make clear that the modes of communication between the executive and legislative branches were not cemented in the language of the new Constitution.<sup>237</sup> Rather, the early politicians established norms of behavior that suited the political context of the time.

<sup>230</sup> Scheppele, *supra* note 27, at 1001 (noting the plasticity of intragovernmental relations in emerging constitutional structures). A President's Question Time would not allow the President to intrude upon the debate and deliberations of Congress in the same way. To the contrary, the President would have an opportunity to explain and defend those policies that representatives choose to question him about, and the President would not have the ability to dictate the terms or the logistics of his appearance before the House.

<sup>231</sup> FLOYD RIDDICK & ALAN FRUMIN, RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28, at 1009 (revised 1992); JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 109-157 (2007).

<sup>232</sup> U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .").

<sup>233</sup> Casper, *supra* note 21, at 226-27 (citing 1 ANNALS OF CONG. 65 (Joseph Gales ed., 1789)).

<sup>234</sup> *Id.* at 227.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 227 (citing 1 ANNALS OF CONG. 592 (Joseph Gales ed., 1789)).

<sup>237</sup> *Contra* Clinton v. City of New York, 524 U.S. 417, 439-40, 448 (1998) (holding that a line-item veto was unconstitutional because there was no reference to it in the Constitution

Perhaps the low level of responsiveness of the Executive<sup>238</sup> to the public would continue to be preferable if the framers' fear of legislative tyranny were realized. Legislative tyranny, however, has not come to pass as the Legislature has not become the dominant branch of government against which other branches fight for control.<sup>239</sup> Instead, the executive branch has asserted significant powers not contemplated by the Constitution's framers.<sup>240</sup> The President has leverage over other politicians through his unmatched ability to influence the media and voters.<sup>241</sup> This history gives rise to the question of whether the institutional elements of inter-branch dynamics should be adjusted to re-establish the balanced and divided model of government envisioned by the Framers.<sup>242</sup>

One way to begin resolving this systemic imbalance is to increase the means by which the people can hold the President accountable for his actions.<sup>243</sup> A President's Question Time would establish a new institu-

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and there was no evidence of its consideration contemporaneous to the drafting and ratification of the Constitution).

<sup>238</sup> Cooper, *supra* note 173, at 171 (stating that the President, under the Constitution, "was neither responsible to, nor removable by, the legislative branch," other than by impeachment).

<sup>239</sup> See Farina, *supra* note 6, at 511–12 ("The legislative delegation of regulatory authority [to the President] implicates separation of powers by threatening to undermine structural protections against the accumulation (and consequent abuse) of power.").

<sup>240</sup> Zuckerman, *supra* note 25, at 84–87 (noting that the Framers envisioned an executive "only strong enough to offset the legislature, not to overmaster it," and devised a system of government more candid and responsive to the people than what has occurred in recent administrations); THE FEDERALIST NO. 48, at 247 (James Madison) (Clinton Rossiter ed., 2003) ("An elective despotism was not the Government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.").

<sup>241</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring) (describing the President's unique power in society and government: "No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.").

<sup>242</sup> See HARDIN, *supra* note 129, at 6; Farina, *supra* note 6, at 519–20 ("[The Framers'] emphasis on shoring up the President's position arose not from the expectation that he would emerge as the dominant domestic policy-making force, but rather from sad experience that no branch could be trusted with too much power. . . . Thus, history affords no basis for assuming that the constitutional structure was set up to favor a predominant role for the President. Indeed, to divorce the Framers' concern for establishing a strong Chief Executive from its context poses a grave risk of using their words to sanction precisely the sort of harm they had determined to avoid: a dangerous concentration of authority in one power center of government.").

<sup>243</sup> James Madison wrote of the need to acknowledge the danger of an unbalanced government, and to act to cure it:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of

tional element not entirely different from that contemplated in the first Congress and would be appropriate given the present political context and current imbalance of powers among the branches of government.<sup>244</sup>

#### IV. INFORMATION-SHARING IN THE MODERN ERA

A President's Question Time would fit within the current framework of information-sharing relationships that exists between the legislative and executive branches.<sup>245</sup> These information-sharing relationships take numerous forms, depending on what congressional power the Legislature is invoking in making the information request and to what extent the executive branch responds or invokes executive privilege.<sup>246</sup>

The everyday interactions between the Legislature and the executive branch involve numerous statutes that require information from the administration.<sup>247</sup> The executive branch routinely complies with the com-

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passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. There are two methods of curing the mischiefs of faction: The one, by removing its causes; the other, by controlling its effects.

THE FEDERALIST NO. 10, at 54 (James Madison) (Clinton Rossiter ed., 2003). Although Madison's argument referred to the dangers of faction, it is equally applicable to a government in which the control mechanisms are no longer working as they should.

<sup>244</sup> See Wald & Kinkopf, *supra* note 65, at 41 (illustrating the need for additional oversight options through the perception that, "[Congress] cannot muster the institutional cohesion to stand up to an overbearing executive, even if it possesses the desire to do so."); see also *supra* Part I.B, for a discussion of the consolidation of power in the executive branch.

<sup>245</sup> I am not considering oversight measures that Congress has used to exercise control over the executive branch, since they do not deal strictly with information disclosure. See, e.g., Ethics in Government Act, 28 U.S.C. §§ 591–598 (1982) [hereinafter Independent Counsel Statute]. The Independent Counsel Statute was made in the wake of the Watergate scandal, when the movement for Congressional oversight of the executive branch gained momentum. See Carter, *supra* note 6, at 107–08. The constitutionality of the Statute was upheld in *Morrison v. Olson* in which the court found that the Statute did not abrogate the constitutionally prescribed separation of powers. See generally *Morrison v. Olson*, 487 U.S. 654 (1988). Professor Carter views the *Morrison* decision as an example of the Supreme Court taking a pragmatic view of the separation of powers doctrine and paying little attention to the historical legitimacy of an institution such as the independent counsel. Carter, *supra* note 6, at 110. Although measures such as the War Powers Resolution and Independent Counsel Statute have been extraordinarily controversial in this regard, neither has been voided or declared unconstitutional by the courts. See *Morrison*, 487 U.S. at 695–97 (upholding the independent counsel statute). The legislative veto, on the other hand, was struck down on separation of powers grounds in *INS v. Chadha*. See generally *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>246</sup> *INS v. Chadha* observes that only four areas of power can be exercised unilaterally by the House or the Senate: the House has the right to initiate impeachment (U.S. CONST. art. I, § 2, cl. 5), the Senate has the right to conduct a trial following impeachment (U.S. CONST. art. I, § 3, cl. 6), the Senate has the sole power to approve or disapprove Presidential appointments (U.S. CONST. art. II, § 2, cl. 2), and the Senate has the sole power to ratify treaties negotiated by the President (U.S. CONST. art. II, § 2, cl. 2). *Chadha*, 462 U.S. at 955.

<sup>247</sup> E.g., 31 U.S.C. § 1105 (2007) (requiring the President to submit an annual budget to Congress, and delineating the specific provisions that the President must include within the budget); 15 U.S.C. § 1022 (2007) (requiring the President to submit to Congress an annual

mon reporting requirements embedded in standard legislation requests for information, such as those associated with Congress's appropriations function.<sup>248</sup> Demands for information stemming from those acts and resolutions which implicate Congress's right to declare war, such as the War Powers Resolution, however, have encountered far more resistance from the executive branch.<sup>249</sup>

The result of public and legislative requests for executive branch information depends on the decision of the executive branch with regard to each request. The Government Accountability Office (formerly the General Accounting Office), a watchdog agency that reports to Congress on activities of the administrative departments<sup>250</sup> and provides non-binding decisions as to the propriety of the actions of the administrative departments, regularly makes specific requests for executive branch information, with a positive rate of return.<sup>251</sup>

Another statutory mechanism promoting public disclosure is the Freedom of Information Act (FOIA), which enables the Legislature and the public to gain access to documents within the ambit of the executive branch and administrative departments.<sup>252</sup> In terms of the type of information to be disclosed, FOIA provides a limited analogy to a President's Question Time, although FOIA is limited to disclosure by government agencies.<sup>253</sup> Similar to the Prime Minister's Question Time,<sup>254</sup> FOIA

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economic report detailing, among other things, forecasts for the economic well-being of the country in the coming year).

<sup>248</sup> See Amar, *supra* note 201, at 657 (addressing the right of Congress to require such information).

<sup>249</sup> See War Powers Resolution, 50 U.S.C.S. § 1543(c) (LexisNexis 1973) (requiring the President to report to Congress at least every six months on the status and progress of U.S. troops deployed on certain missions). The obligation of the Executive to disclose information to Congress under the War Powers Resolution remains unresolved. See Carter, *supra* note 172, at 105.

<sup>250</sup> Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (creating the General Accounting Office).

<sup>251</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, PERFORMANCE AND ACCOUNTABILITY HIGHLIGHTS: FISCAL YEAR 2006, 9-10 (2007) (noting that 82% of GAO recommendations were accepted and implemented by agencies).

<sup>252</sup> The Freedom of Information Act was originally enacted as part of the Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946), and a stronger version was signed into law by President Lyndon Johnson in 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966). During the Senate floor debates on the 1966 amendments, backers of the move toward fuller disclosure invoked Madison's Federalist Paper writings, citing the need for a government accountable to the public. 111 CONG. REC. 26821 (1965). The current version of FOIA is codified at 5 U.S.C. § 552 (2002) (as amended by Pub. L. No. 104-231, 110 Stat. 3048).

<sup>253</sup> FOIA requests are limited to documents, which makes the nature of a President's Question Time fundamentally different. See *generally* Freedom of Information Act, 5 U.S.C. § 552 (2002). However, the scope and type of information requested would be similar.

<sup>254</sup> Under Britain's Official Secrets Act 1989, government officials in the United Kingdom who are privileged with classified information, primarily related to national security and military intelligence, are not only freed from an obligation to disclose such information, but are affirmatively barred from doing so. Britain's Official Secrets Act, 1989, c. 6, § 6. Though

allows for exceptions to disclosure based on national security, trade secrets, and other grounds.<sup>255</sup> Insofar as a President's Question Time is similar to FOIA, the institution is likely to withstand constitutional scrutiny.<sup>256</sup>

Legislative information demands are routinely complicated by executive privilege.<sup>257</sup> The Legislature or the Executive that makes a request for information or invokes executive privilege must protect its own interests while attempting not to violate the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others."<sup>258</sup> The liberal invocation of executive privilege could serve to defeat the purpose of a Question Time, just as it could with any other legislation that seeks information from the executive branch.<sup>259</sup> However, political and public pressure toward disclosure, particularly when the President himself<sup>260</sup> would need to publicly claim the privilege after being asked a question, would likely curb the extent to which a President would choose to invoke it.<sup>261</sup>

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FOIA and its exceptions operate on a different premise, comparing the institutionalized barring of information-sharing is at least superficially useful.

<sup>255</sup> It is fair to question the extent of FOIA's utility given the fact that the President and heads of federal agencies can decline to provide information on a wide range of topics based on FOIA's exceptions. See Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 496–99 (2006); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 820–21 (2004). Nonetheless, there are clear benefits to having FOIA in place, despite a lack of government responsiveness at times. See generally H.R. REP. NO. 89-1497 (1966); S. REP. NO. 89-813 (1965).

<sup>256</sup> Although various administrations may have attempted to weaken FOIA's effect, the constitutionality of FOIA itself has not been seriously questioned. See, e.g., *supra* note 53 and accompanying text. More commonly, the Supreme Court relies on the provisions of FOIA and its legislative history to determine whether certain information from the executive branch is appropriate to disclose under FOIA. See, e.g., *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (citing S. REP. NO. 89-813, at 3 (1965)); *E.P.A. v. Mink*, 410 U.S. 73, 80 (1973) (citing S. REP. NO. 89-813 (1965)).

<sup>257</sup> See, e.g., Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 199–200 (1992).

<sup>258</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). The Court in *Humphrey's* upheld congressionally mandated limitations on the removal power of the President as consistent with the separation of powers doctrine. *Id.* at 630.

<sup>259</sup> See Morrison, *supra* note 36, at 1234–37 (noting how abuses of constitutional avoidance theory could lead to the executive branch choosing not to enforce laws that enable greater legislative oversight of the executive branch); see also Levinson, *supra* note 14, at 107 (stating that a President who believed strongly in his own right to interpret the Constitution without consideration of legislative intent would likely assert the freedom to ignore laws that seem to impinge on presidential powers).

<sup>260</sup> Having the President himself answer questions would also circumvent the problem of executive branch officials having to wait for presidential approval of information disclosure in response to Congressional inquiries. See generally Wald & Kinkopf, *supra* note 65, at 50.

<sup>261</sup> Public and political pressure can sometimes compel disclosure of information that the executive branch previously regarded "privileged." See Shane, *supra* note 257, at 222.

### CONCLUSION

The structure of our Constitution is premised on each branch of government exercising its rights to prevent any one branch from overreaching. Over time, the executive branch has consolidated a great deal of power and now exerts ever-stronger control over the information it discloses. When Congress, particularly in times of one-party government, chooses not to exercise its right to check executive overreaching, the envisioned balance in government comes undone.

The lack of balance fosters a lack of accountability and transparency in government and demands an adjustment to our system. One adjustment should come in the form of a President's Question Time, an institutional element that would give muscle to Congress in times of one-party government, and that would further accountability and promote good government that is responsive to the people.