
ON CONGRESS AND CONSTITUTIONAL RESPONSIBILITY

JEFFREY K. TULIS*

INTRODUCTION	515
I. MARK TUSHNET	518
II. REMOVAL CONTROVERSY	521
III. RHETORIC OF REPLY	522
IV. EXECUTIVE PRIVILEGE	523

INTRODUCTION

The literature on political ethics offers well-developed discussions of individual responsibility and behavior but is very thin on the topic of institutional responsibility.¹ This lacuna is surprising in the context of American politics because the Constitution is built on a thick theory of institutional responsibility and a thin theory of individual political ethics. Thus, in the classic formulation of *The Federalist*, only a minimal ethical floor of individual virtue was necessary for a well-functioning government.² Under this theory, ordinary self-interest can be tied to institutional place and transformed into public-regarding behavior, regardless of whether individual political motives are authentic or sincere. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”³ By constitutional design, ordinary politicians inhabit institutions that “teach” them to behave in constitutionally appropriate ways. They may or may not be virtuous individuals. For the functioning of the constitutional order, they need only bring a modicum of virtue to their offices.

The thick theory of constitutional responsibility is actually a series of translations. Through constitutionally designed incentives, individual self-interest is translated into ambition, ambition into policy position, policy position into policy argument, and in some important instances, policy

* Associate Professor, University of Texas at Austin; Lawrence S. Rockefeller Visiting Fellow, Princeton University; Ph.D., University of Chicago.

¹ See, e.g., DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* (1987) (surveying and analyzing politicians’ ethical conflicts).

² See, e.g., *THE FEDERALIST* NO. 51 (James Madison).

³ *THE FEDERALIST* NO. 51, at 281 (James Madison) (J.R. Pole ed., 2005).

argument into constitutional argument.⁴ The genius of this induced train of actions is that at no moment need the actor be motivated by his or her argument, even though he or she feels compelled to respond to the arguments of others. As long as politics is induced to trade on the plane of reasons, no matter what the motivations, constitutional democracy succeeds.⁵

Does American politics actually work this way? Is Congress a locus of robust constitutional discourse? Do members of Congress routinely assert and defend the prerogatives of the House and Senate? Not anymore. In the nineteenth century, Congress was a site of healthy constitutional contestation, but there has been a significant decay over the last century. There are very real questions today about whether the core theory of American politics is true, whether the political interests of officeholders are actually connected to the constitutional rights of the place, and whether separation of powers is vitally agonistic.

Over the last seven or eight decades, Congress has increasingly deferred to the President or to the Court on matters that it once jealously guarded as its own prerogatives.⁶ These instances of constitutional abdication have taken several forms. In some cases, Congress simply declines to exercise its power, allowing the President's competing perspective to stand without contest. For example, in the nineteenth century, the Senate challenged and rejected one out of every three Supreme Court nominees, while since the early twentieth century, the Senate has deferred to the President, except in very few instances.⁷ Those few instances of contestation confirm the overall pattern because the Senate regrets rather than celebrates its political victory. For example, the rejection of Robert Bork has come to symbolize a kind of politics to be avoided, not repeated.⁸ In other cases, Congress seems to be acting responsibly and energetically but in fact deepens and extends its constitutional abdication. In the aftermath of the Vietnam War, Congress passed a constitutionally aggressive statute, the War Powers Resolution,⁹ which seemed

⁴ See Jeffrey K. Tulis, *Deliberation Between Institutions*, in *DEBATING DELIBERATIVE DEMOCRACY* 200, 206 (James S. Fishkin & Peter Laslett eds., 2003) [hereinafter Tulis, *Deliberation*].

⁵ THE FEDERALIST NO. 1 (Alexander Hamilton), NO. 51 (James Madison).

⁶ JEFFREY K. TULIS, *THE POLITICS OF DEFERENCE* (forthcoming 2010).

⁷ Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 *CASE W. RES. L. REV.* 1331, 1331 (1997) [hereinafter Tulis, *Constitutional Abdication*].

⁸ CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 154-56 (2007) (discussing various criticisms of the Bork confirmation hearings); Tulis, *Constitutional Abdication*, *supra* note 7, at 1353-57 (asserting that "Presidents, citizens, and especially, Senators want to avoid" a confrontation similar to the Bork confirmation hearings).

⁹ War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2000) (providing that the President can only mobilize the United States Armed Forces if the country is under attack or serious threat or if Congress has authorized the action).

to display just the sort of institutional turf protection that the Federalist theory describes. Nevertheless, since the passage of the Resolution, the President has violated its terms repeatedly without challenge from Congress.¹⁰ Budget making is arguably the core function of any legislature. Yet the American Congress has delegated most of its budget-making responsibility to the executive branch.¹¹ Finally, on a large number of separation of powers disputes over executive privilege, executive agreements and treaties, and other matters previously deemed “political questions,” Congress and the President have turned to the Court to resolve the disputes legally rather than politically.¹²

Congress does not always act irresponsibly. One striking counter-example is the bank bailout in the fall of 2008. The President sought unprecedented discretion for the Secretary of the Treasury, and Congress resisted.¹³ Congress also substantially modified the proposed crisis legislation and continues to play an active role in subsequent stages of the crisis. Many other examples could be arrayed. It is more accurate, therefore, to describe Congress today as in a state of decay, rather than in total constitutional dysfunction.

My fellow political scientists in this symposium paint a much different picture. David R. Mayhew, Barbara Sinclair, and Kenneth A. Shepsle argue that Congress is functioning well.¹⁴ With respect to the more specific question of whether Congress is a capable constitutional interpreter, Mark Tushnet offers a detailed case on its behalf, also depicting a healthy state of affairs.¹⁵ A

¹⁰ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 49 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 192 (1995) (“Presidents have generally done what they wanted to do, notwithstanding the War Powers Resolution.”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 39-40, 123 (1990).

¹¹ See JASMINE FARRIER, *PASSING THE BUCK: CONGRESS, THE BUDGET, AND DEFICITS* 26 (2004).

¹² See LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 295-99 (Univ. Press of Kansas 4th ed. 2007) (1978) (tracing the Court’s recent separation of powers jurisprudence). On the problem of the legalization of political processes, see Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, in *THE CONSTITUTIONAL PRESIDENCY* (Joseph M. Bessette & Jeffrey K. Tulis eds., forthcoming 2009).

¹³ See, e.g., Jon Hilsenrath, Deborah Solomon & Damian Paletta, *Crisis Mode: Paulson, Bernanke Strained for Consensus in Bailout*, *WALL ST. J.*, Nov. 10, 2008, at A1.

¹⁴ See David R. Mayhew, *Is Congress “the Broken Branch”?*, 89 *B.U. L. REV.* 357, 357 (2009) (claiming that Congress is not all that bad); Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 *B.U. L. REV.* 371, 385 (2009) (asserting that however dysfunctional Congress may be, “proposals for constitutional reform are not sufficiently informed by or respectful of the ripple effects of reform on the one hand, and the strategic capacities of politicians on the other”); Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 *B.U. L. REV.* 387, 387-89 (2009) (arguing that despite valid criticisms of Congress, it is functioning reasonably well given its difficult task).

¹⁵ See generally Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 *B.U. L. REV.* 499 (2009).

neutral observer might wonder whether we all are describing the same institution. We are, but we look at the institution through two very different lenses. My colleagues use a narrow-angle lens focused on recent practices. I look at the same institution through a wider-angle lens that takes in the whole history of the American Congress. One can best see the decay in constitutional discourse and congressional action by contrast to a healthy version. Before sketching examples of that contrasting healthy state of affairs, let me address some of the defects of a narrow-angle lens on American politics by commenting on one of the best and most relevant examples of that approach, Tushnet's argument in chapters four and five of his book, *Weak Courts, Strong Rights*, elaborated in his essay for this symposium.¹⁶

I. MARK TUSHNET

There is much to learn from Mark Tushnet's defense of Congress as a constitutional interpreter. It is a rare example of scholarly attention to the issue of institutional, rather than individual, responsibility. Tushnet carefully responds to critics of Congress who claim the legislature is incapable of constitutional interpretation by challenging both the evaluative standards critics employ and the particular empirical judgments they make.¹⁷ His argument should be mandatory reading for anyone interested in this subject. I disagree with Tushnet's argument, but his position is stronger than it first appears once one realizes that he conflates two questions: (1) whether legislatures, qua legislatures, are capable of constitutional interpretation, and (2) whether the American Congress offers an example of competent constitutional interpretation. Tushnet's case for a positive answer to the first question is very strong, while his case for a positive answer to the second is weak, even though some of his answers to the second question offer evidence for the first. How can this be? Tushnet responds to other legal academics that privilege the arguments and actions of courts by showing how legislators often engage in constitutional interpretation and how, generally, they offer arguments within the broad range of plausibility marked by the nation's legal tradition.¹⁸ To show that a legislature is capable of constitutional interpretation, one need not claim that all legislative interpretation is correct any more than one need show the Roberts Court to be correct in order to claim that, in general, courts are capable of constitutional interpretation. Thus, a case for institutional capability in principle is less demanding than a case for institutional capability in fact. Indeed, a decayed polity offers ample evidence

¹⁶ See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 79-157 (2008); Tushnet, *supra* note 15, at 508-09 (concluding "that congressional and judicial *performance* of constitutional interpretation is of roughly equal quality").

¹⁷ See TUSHNET, *supra* note 16, at 79-84.

¹⁸ *Id.* at 85-96.

of the possibility of a healthy polity, in principle, because its actions and arguments are the remnant or residue of something better.

In assessing congressional competence, Tushnet devotes most of his attention to legislation and its constitutionality or unconstitutionality. Indeed, he begins his symposium essay with a tough example against his argument for congressional responsibility: Senator Arlen Specter's vote for a bill with provisions that Specter publicly claimed to be unconstitutional.¹⁹ Specter supported the bill because he was confident the Supreme Court would "clean up" the legislation by striking down portions of it.²⁰ Tushnet regards Specter's action as responsible because Specter's prediction was reasonable.²¹ In the nineteenth century, Specter would have been laughed out of Congress had he announced that stance. Today, however, Specter's position is not at all extraordinary. Tushnet notes many examples of "judicial overhang" – instances in which members of Congress or the President decline to act on their own constitutional understanding because they anticipate the Court will address the issue.

Argument regarding the constitutionality of legislation is a practice familiar to lawyers, so it is understandable that legal academics focus on the question of Congress's responsibility to judge for itself matters that the judiciary might also decide. However, in the nineteenth-century order, Congress was also concerned with constitutional issues that were not, and should not be, the concern of courts. Legislators legitimately argued over whether proposals were more or less constitutional than alternative proposals.²² Whether a policy or a body of policies advances the constitutional aspirations of a people is a legitimate ground for a legislative decision, even though it would not be appropriate for a judicial decision. For a court, anything within a wide ambit of constitutionally permissible actions is legitimate, but legislators might responsibly oppose legislation on the ground that it did not advance constitutional purposes enough or at all. Moreover, standing up for the place of Congress in the constitutional order may require action other than

¹⁹ Tushnet, *supra* note 15, at 499. Tushnet elaborates:

Speaking before he cast his vote in favor of the adoption of the Military Commissions Act, Senator Arlen Specter expressed his strongly-held view that the statute's provisions denying the federal courts power to issue writs of habeas corpus to those determined to be unlawful combatants by military commissions operating at the facility at Guantanamo Bay were unconstitutional.

Id.

²⁰ Dahlia Lithwick and Richard Schragger, *Pass the Buck*, SLATE, Oct. 7, 2006, <http://www.slate.com/id/2151048/>.

²¹ Tushnet, *supra* note 15, at 499 n.3.

²² See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS* (2001) [hereinafter CURRIE, *THE JEFFERSONIANS*] (reviewing the history of congressional constitutional interpretation from 1801 to 1829); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM* (2005) [hereinafter CURRIE, *DESCENT*] (reviewing the history of congressional constitutional interpretation from 1829 to 1861).

legislation, including calling hearings, compelling testimony, delaying action on appointments, holding witnesses for contempt, and taking other actions that might well be defended by constitutional argument. Thus, Congress's constitutional responsibilities cannot be comprehended, nor its performance evaluated, if we confine our analysis to whether the legislature is reasonably competent regarding the sorts of things judiciaries do.

The nineteenth-century constitutional order was a very imperfect regime. To take the most obvious examples, slavery was perpetuated in the Constitution, and the nation required a Civil War to maintain and perfect its operative governing architecture. Many other examples of political defects in the nation or its governing institutions could be rehearsed. Nevertheless, regarding the institutional culture of Congress, there is simply no doubt that the nineteenth-century Congress was much healthier than it is now. To see this point, one merely needs to peruse at random copies of the *Annals of Congress* or the *Congressional Globe* in the nineteenth century and compare those selections with random portions of the *Congressional Record* a century later. Or one could peruse David Currie's fine multi-volume study of Congress and the Constitution and compare it to contemporary legislative discourse and reach the same conclusion.²³

In today's congressional culture, Senator Robert Byrd is regarded as somewhat weird and irrelevant, precisely because he acts like Senators commonly acted in the early part of our history. He regularly stands up for the prerogatives of his institution, no matter which party holds the presidency.²⁴ He carries his copy of the Constitution with him at all times, and shows it to others with little prompting, even though he has committed it to memory and does not actually need the written text in front of him.²⁵ The anachronism that is Senator Byrd marks the extent of the loss of congressional constitutional consciousness today.

In the remainder of this Essay, I will illustrate the contrast provided by the nineteenth-century Congress with brief sketches of three episodes. Taken together, they show what it means for Congress to have a robust constitutional culture in ways that correspond to the forms of constitutional contestation overlooked in Mark Tushnet's defense of legislative competence. The first issue, which began as an episode of the First Congress but continued as a robust debate well into the nineteenth century, is the "removal controversy."

²³ See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD* (1997) (reviewing the history of congressional constitutional interpretation from 1789 to 1801); CURRIE, *THE JEFFERSONIANS*, *supra* note 22 (reviewing the history of congressional constitutional interpretation from 1801 to 1829); CURRIE, *DESCENT*, *supra* note 22 (reviewing the history of congressional constitutional interpretation from 1829 to 1861).

²⁴ See, e.g., James Kuhnhehn, *Byrd's Longevity Spans Political Spectrum*, *MIAMI HERALD*, June 13, 2006, at A9.

²⁵ See *id.*

Senate confirmation is required to appoint principal executive officeholders, but is Senate approval also required for their removal from office? The second episode is the short-lived history of reply to the President's State of the Union addresses by Congress. The final example is a little-known case of executive privilege in the Polk Administration and the extraordinary tools Congress had at its disposal to contest executive decisions to withhold information from the legislature.

II. REMOVAL CONTROVERSY

The issue of removal is interesting because it offers a model of constitutional argument rarely equaled by any branch of the government today.²⁶ The Constitution provides for "executive departments" without specifying any of them in particular.²⁷ It remained for the First Congress to establish departments through regular legislation. In deciding what departments to establish, Congress had to decide upon the larger constitutional question of the political character of these bureaucratic entities. To whom should the executive departments be responsible, and how should they be constructed? Madison pressed the case for executive control of these new institutions, arguing that the nature of their functions made them appropriate instruments of executive power. He stressed that making the executive departments responsible to the President, rather than to Congress or to both Congress and the President, would enhance efficiency and credibility.²⁸ This is not a self-evident argument. For example, one could argue that the functions of the Treasury Department supported a claim for legislative accountability more than for executive accountability, given the core function of Congress to budget and appropriate funds. Madison anticipated this argument and convinced his colleagues to abandon the initial plan to take up the construction of the Treasury Department first and instead discuss the State Department.²⁹ Thus, the context for the removal debate became the most "executive" agency, and the decision to give the President sole power for all bureaucratic agencies was effectively settled before the Treasury Department was constructed.

Since the First Congress settled the removal controversy politically, not theoretically, the issue resurfaced later in the century. Daniel Webster challenged Andrew Jackson's claims of authority in the very arena that James Madison had skillfully sidestepped.³⁰ Webster returned to the original debate and rediscovered its strengths and weaknesses. Webster argued that under the Constitution, the bureaucracy had multiple accountabilities; it was accountable

²⁶ See FISHER, *supra* note 12, at 49 ("In contrast to many members of Congress today, who let constitutional issues slide by to be disposed of by the courts (if at all), the members of the First Congress faced the constitutional issue with a deep sense of responsibility.").

²⁷ U.S. CONST. art. II, § 2.

²⁸ See FISHER, *supra* note 12, at 50.

²⁹ 1 ANNALS OF CONG. 387, 394-95 (Joseph Gales ed., 1834).

³⁰ 11 REG. DEB. 458-70 (1835).

to Congress and more importantly, to the Constitution.³¹ The crucial point here is that it would be hard to find many Supreme Court opinions or speeches in our contemporary Congress as sophisticated and nuanced as Webster's argument about multiple accountabilities.

III. RHETORIC OF REPLY

Until President Jefferson abandoned the practice, both houses of Congress formally replied to the President's State of the Union addresses, and the President replied to the congressional replies.³² Although utilized only for a brief period in the early years of the United States, the practice of reply may be the finest empirical illustration of the theory of separation of powers.

A particularly fascinating congressional reply occurred in 1797, when President Adams called a special session of Congress to deal with a burgeoning national conflict with France over France's war with England. The President's Address detailed this conflict, which began when France seized American ships in an attempt to prevent the neutral United States from sending goods to England; the U.S. protested both France's disruption of American commerce and the capture of American citizens. No clear international law that could resolve this dispute existed, and Adams's diplomatic efforts failed to improve the situation. Explaining this breakdown in normal diplomatic relations, Adams stressed the importance of a powerful American Navy.

Congress debated its reply to Adams for two weeks. The substance of the debate turned on the relative merits of a conciliatory versus an aggressive stance toward France and necessitated competing interpretations of the history and character of American foreign policy beginning with the Jay Treaty. Several formal features of this debate are noteworthy. After delivering his speech, President Adams bolstered his address to Congress with eighteen documents supporting his claims, which became part of the debate. After the Senate finished its reply, the House used the Senate's reply as a source in completing its own reply. The House also referred back to previous texts of its own replies. Partisans on all sides repeatedly warned that the text of its reply would itself partly constitute American foreign policy, so every phrase was treated as having enormous significance. Although the debate was public and open to the press, congressmen in the debate criticized President Adams and France in ways beyond the scope of what they felt they could include in the official reply. Compared with contemporary congressional practices, this concern with textual and inter-textual matters is remarkable.

Faced with all the inter-textual references, the respectful attention to arguments advanced, and the movement of rhetoric in response to those arguments, historians and political scientists might correctly view this reply as

³¹ *Id.* at 457-60.

³² This Part includes an abridged portion of my article, *Deliberation Between Institutions*. Tulis, *Deliberation*, *supra* note 4, at 201-207 (discussing the history and procedure of congressional and presidential replies).

a misleading cover-up of the real play of politics, a web of rationalizations, a kind of collective hypocrisy. The debate does not reveal the true story of the hard-nosed politics of this period.³³ But if hypocrisy is a defect of individual character, it is an institutional virtue intended by the design of the Constitution and perhaps by the nature of modern liberalism more generally. The debate over replies to the President's message well illustrates the ability of a separation of powers system to tie the ambitions of officeholders to the duties of the office in such a manner as to produce impressive arguments, however insincere or inauthentic. These arguments take on a life of their own, and far from being merely the cover or rationalization for private interest and ambition (of "real" politics), they become the substance and action of politics itself. One can see a movement, a rhetorical movement, in this debate that has real consequences for the conduct of American foreign policy.

IV. EXECUTIVE PRIVILEGE

During the week of the *Boston University Law Review* conference, the Bush Administration signaled it was contemplating asserting executive privilege to withhold documents from Congress after George W. Bush left office.³⁴ Harry Truman created a precedent for this claim in 1953 when he asserted that he still had the power to block subpoenas after he left office.³⁵ Here I sketch a more interesting precedent from 1846. In that year, Congress conducted an investigation of allegedly improper uses of money by former Secretary of State Daniel Webster.³⁶ Congress suspected that he misspent money "from a secret contingency fund . . . for clandestine foreign operations" during the Administration of John Tyler.³⁷ A recent Congressional Research Service report explains:

The charges led the committee to issue subpoenas to former Presidents John Quincy Adams and John Tyler. President Polk sent the House a list of the amounts in the contingent fund for the relevant period, which was prior to his term, but refused to furnish documentation of the uses that had been made of the expenditures on the grounds that a sitting President should not publically reveal the confidences of his predecessors. President Polk's refusal to provide the information was mooted by the

³³ For a description of the politics surrounding American foreign policy toward France during the Adams Administration, see, for example, 1 SAMUEL ELIOT MORISON, HENRY STEELE COMMAGER & WILLIAM E. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 317-23 (7th ed. 1980).

³⁴ See, e.g., Charlie Savage, *Out of Office, Bush May Keep Tool to Fight Inquiries*, N.Y. TIMES, Nov. 13, 2008, at A27.

³⁵ *Id.*

³⁶ MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., *CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE* 32 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34097.pdf>.

³⁷ *Id.*

actions of the two investigatory committees established by the House. Former President Tyler testified and former President Adams filed a deposition detailing the uses of the fund during their Administrations. In addition, President Polk's Secretary of State, James Buchanan, was subpoenaed and testified. Ultimately, Mr. Webster was found innocent of any wrongdoing.³⁸

Congress's aggressiveness in pursuing information from the executive and its success in summoning testimony from high officials, including former Presidents, is impressive in light of the inability of recent Congresses to override the Bush Administration's claims of executive privilege.³⁹ What was different about the nineteenth-century Congress? The most salient difference was the nineteenth-century Congress's use of the "inherent contempt" power against uncooperative witnesses, which current Congresses do not invoke.⁴⁰ "Under the inherent contempt power the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail."⁴¹ Unlike criminal and civil contempt procedures, inherent contempt does not require the cooperation of other branches of government.⁴² Congress did not need to use the inherent contempt power often in order for it to be routinely effective. The credible threat of its use was often sufficient to compel testimony.⁴³

Today, Congress relies upon the Department of Justice to prosecute contempt citations, sometimes against officials who were directed by the Department of Justice to assert executive privilege in the first place. Thus, it should not be a surprise that the Bush Administration declined to prosecute congressional contempt charges against executive branch officials. However, from the wide-angle lens of American history, it should be surprising that contemporary Congress is so feeble. The deeper issue here is not institutional resources but institutional culture. The modern Congress is unwilling to stand up for itself. It is unwilling to find or restore the tools necessary to defend its constitutional prerogatives.

³⁸ *Id.* at 32-33 (footnotes omitted).

³⁹ *See id.* at 65-67 (discussing how the House Judiciary Committee held Harriet Miers, former White House Counsel, and Joshua Bolten, former White House Chief of Staff, in contempt after they refused to comply with House subpoenas "on the grounds of executive privilege"). For a more in-depth discussion of this incident, see generally Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. (forthcoming Sept. 2009).

⁴⁰ *See* ROSENBERG & TATELMAN, *supra* note 36, at 12-27 (discussing the history of Congress's use of inherent contempt).

⁴¹ *Id.* at 12.

⁴² *Id.* at 14.

⁴³ *Id.* at 21 n.118.