Congress, Corporate Boards, and Oversight: A Private Law / Public Law Comparison

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This article argues that a system of congressional oversight based on trust can produce more effective government than one based on highly detailed regulations. The article first presents historic examples of congressional oversight and the ways in which trust contributed both to the effectiveness of the oversight and to the success of the policies at issue. The article goes on to examine the rise of trust theory in corporate governance as a means of making oversight by boards of directors more effective and thereby making corporations more profitable. The final part of the article explores how use of trust theory in corporate governance can be applied to civil governance.

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Another important requirement for the proper functioning of market competition is also not often, if ever, covered in lists of factors contributing to economic growth and standards of living: trust in the word of others . . . . When trust is lost, a nation’s ability to transact business is palpably undermined.

Alan Greenspan

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I. Introduction

During the past 40 years, the practice of the United States electorate has been to divide the executive and the legislative branches of the federal government between the Democratic and Republican political parties. A consequence of divided government has been the desire of the executive branch to evade the authority of a hostile legislature. Expanding executive power has been justified as necessary to effectively meet a complex, if not outright hostile, world, but its practical result has been to further policies thwarted by the opposing party in the legislature.


Political party politics plays a vital role in our system of government. It is party politics, not the separation of powers, that provides the key defense for representative democracy. See Bruce Ackerman, Failure of the Founding Fathers, 4-5 (2005). “[T]he success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a will of its own that would propel departmental ambition to counteract ambition with ambition.” Levinson & Pildes at 2313 (internal citations omitted). This is despite the founders’ great desire to avoid the creation of parties:

All obstructions to the execution of the Laws, all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency. They serve to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation, the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels, and modified by mutual interests.

George Washington, Farewell Address (1796) See Levinson & Pildes at 2313.

4 The chief means of accomplishing this desire has been the usurpation of legislative authority by the executive, particularly with the rulemaking power of administrative agencies (albeit with some help from the usurped legislature). See Levinson & Pildes, supra note 2, at 2356-57 (“There is some tension, to put it mildly, between the assumption that Congress is perpetually engaged in cutthroat competition for power with the Executive and the reality of massive congressional delegations of authority to the executive branch.”) The executive has both size and efficiency on its side. Even counting individual and committee staffs, the number of people who carry out the work of the U.S. Congress pales when compared to the executive administrative agencies. Furthermore, the administrative agencies operate under the control of one person, the President, or his directly appointed agents, whereas the Congress has 535 individual members, and even the leadership of the
practice has been followed by both Democratic and Republican administrations.\(^5\)

A consequence of this period of divided government is that political campaigning essentially never ends. Fundraising for the next campaign begins even before the current election is won or lost. Politicians spend more time with constituents or lobbyists than with their fellow officeholders. Single-issue activists bombard elected officials and are known to launch rebellions against incumbents within their own party over (perceived or actual) failure to address their casus belli. News outlets, mainstream and otherwise, operate 24/7, which often leads to politicians making decisions with an eye to the camera and the media putting out stories with a view to what viewers will watch, not what they need to know. In short, matters tend to be examined through the lens of the next election, or next news cycle, as opposed to the long-term state of the nation.

This situation in civil governance is mirrored in corporate governance. One can substitute “Chief Executive Officer” for “President” and “Board of Directors” for “Congress” and many news stories point to an executive that dominates the representative body. Likewise, substitute “profits reports” for “election results,” “shareholder activists” for “political activists,” and “stock analyst” for “political analyst,” and general observations are essentially interchangeable. The consequences are the same in both worlds: the perceived need for short term

\(^5\) For example: In 1988, the Secretary of Health and Human Services under President Ronald Reagan promulgated regulations that forbade any clinic receiving family planning funds under Title X of the Public Health Service Act to discuss the availability of abortion. 53 Fed.Reg. 2922-45 (February 2, 1988) (codified in 42 C.F.R. 59.10 (1989)). (This decision was upheld by the Supreme Court in Rust v. Sullivan, 500 U.S. 173 (1991)). In 1993, one of the first acts of the Clinton Administration was to rescind those regulations. 58 FR 7462-7463, Feb. 5, 1993. This action affected thousands, if not tens of thousands of people, and Congress had no say in the matter.
success supplants long term planning, deliberative bodies have their role in policy-making dramatically diminished, and criticism is viewed as tantamount to betrayal. This environment has diminished the role of oversight in both civil and corporate governance. Even if the legislature or a board of directors is in agreement with the policies and actions of its respective executive, it is discouraged from meaningfully asserting its independence, especially by acting against or criticizing the policies of the executive, in the name of loyalty. In recent decades, both the federal government and the corporate world have been afflicted not just by scandal, but by out-and-out failures of policies, which in turn have led to the foundering of their respective enterprises, reflected at the ballot-box and in stock prices. Robust oversight could have prevented these failures or, at the very least, ensured that the failures were not the result of incompetence.

Because the problems faced by the legislature and boards of directors are similar, this article will explore how corporate law scholarship has sought to address the problems of corporate oversight and apply them to civil government.6

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6 Corporate governance as an area of law and scholarship has focused on what is known as the agency problem of large corporations. This problem is caused by the fact that the owners of a publicly held corporation, the shareholders, are often completely disconnected from the day-to-day operations of the company and must rely on agents, officers and managers, to run the business. It has often been the case that these agents have different interests than those of the shareholders.

The traditional way to control these agents was to construe them akin to trustees, since they hold and use the assets of others, not themselves. However, because successful business involves risk and risk entails failure, holding corporate agents to the same high standards as actual trustees was seen as counter to the risk-sharing purposes of corporate law. The resulting debate has always been about where and how to strike a balance. See e.g. Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, 149 U. Pa. L. Rev. 1735, 1781-89 (2001); see generally Section III.C, infra.

Beginning in the late 1980s, corporate governance scholars have been debating how beneficial is it for statutes, regulations, and case law to insist upon oversight of executives by boards. The debate has essentially divided into two schools of thought: 1) those who believe that
The issue is not one of legal justification, of which there is plenty. The question is one of practice, namely, what are the goals of oversight and how should those goals be achieved? The focus will be on comparing the U.S. Congress’ oversight powers with those of boards of directors.

Recent articles in corporate governance have applied behavioral economic research to suggest the emergence of an approach to corporate governance that seeks not so much to delineate where responsibility, and thereby legal liability, exists, but instead to develop mechanisms that make it easier for parties with disparate interests to trust one another. Such an approach would be a useful antidote to the current problems of civil government as well.

The first part of this article discusses the oversight function of the U.S. Congress. This will involve a review of the investigative power of Congress and an exploration of the consequences, beneficial and otherwise, of legislative oversight using two well known examples – the Committee on the Conduct of the War from the Civil War era and the Truman Committee from World War II.

Having explored the scope and consequences of legislative oversight, the article will then shift to the corporate realm. It will explore the current legal rules

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monitoring obligations should be a matter of “contract” between shareholders and the corporation; and 2) those who believe that the trustee model is correct, as there are vital reasons for viewing the shareholder/agent relationship as different from a mere contract relationship. See e.g. See Frank H. Easterbrook & David R. Fischel, Contract and Fiduciary Duty, 36 J.L. & Econ. 425, 426 (1993), Tamar Frankel, Fiduciary Duties as Default Rules, 74 Or. L. Rev. 1209, 1212 (1993); see generally Section III.C, infra.

7 These justifications for the U.S. Congress are addressed in Part II.A and for corporate governance in Part III.A.

8 The choice of oversight committees during times of war is deliberate. It is during times of war that the executive branch asserts that oversight interferes with the alacrity required to meet national emergencies. Exploring oversight in extremis will provide the best benchmarks, good and bad, of legislative oversight.
of corporate governance and the current crisis of confidence in these rules as practiced. Further, it will review the developing realignment of legal doctrine which views trust, rather than legal or market sanctions, as the pivotal component governing relations between shareholders and executives. This section will conclude with an evaluation of what shareholders, directors and executives stand to gain by a shift from the external impetus of sanctions to the internal motivation of trust.

This notion of trust in corporate governance will then be applied to civil governance. Specifically, the article will explore how trust in the relationship between a board of directors (which stands in proxy for shareholders), and the executives of a corporation can cause businesses to function more effectively. This is directly paralleled in civil governance by the relationship between the U.S. Congress (as the representative of the people) and the President (as the executive of the country).

But, some may question, is this really a fair comparison? After all, a corporation has only one ultimate goal, namely, to make a profit. Our national civil government, on the other hand, has multiple and sometime contradictory goals.\(^9\) Furthermore, there is competition between multiple companies in any given field in the private sector,\(^10\), while there is only one national civil government - one Congress, one President - and any competition or potential competition is strictly

\(^9\) For example, government has an obligation to protect the population from crime, but also to protect those under investigation and indictment from too ardent enforcers of the law.
\(^10\) One only has to recall that Microsoft, a company found to be a monopoly for its Windows computer operating system, still faced competition from the Apple or Oracle corporations for similar products.
internal. The better argument, though, is that the singular nature of government, with its multiple responsibilities, constituencies and goals, that justifies robust oversight, especially when the legislative and executive branches are in the hands of the same political party.\textsuperscript{11}

II. Oversight by the U.S. Congress

This article ultimately posits that trust is the key element for any system of governance to be successful. This section seeks to demonstrate the efficacy of trust by looking at two congressional investigative committees. The absence or presence of trust that existed between all parties involved in these investigations played a key role in the success or failure of the committees in their mission.

A. The Power Of Oversight - an Overview

Congress’ ability to oversee executive branch activities derives from its power to legislate and investigate. As stated in the Constitution: “All legislative Powers herein granted shall be vested in a Congress of the United States.”\textsuperscript{12} The power to investigate is part of that legislative power. According to the U.S. Supreme Court in McGrain v. Daugherty, “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”\textsuperscript{13} Thus, an investigation undertaken by Congress which could potentially lead to legislation is well within its powers,

\begin{itemize}
  \item[\textsuperscript{11}] See Levinson & Pildes, supra note 2, at 2316.
  \item[\textsuperscript{12}] U.S. Const. Art. I § 1.
  \item[\textsuperscript{13}] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).
\end{itemize}
regardless of whether a statute actually emerges.\textsuperscript{14}

Congressional investigative powers were recognized prior to the Supreme Court decision in McGrain. Even before the Civil War it was observed that:

\textsuperscript{14} Id. at 177. See Barenblatt v. United States, 309 U.S. 109, 111 (1959) (upholding a conviction for contempt of congress for failure to testify before the House Un-American Activities Committee) (“the scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”), Judiciary Committee v. Miers, 558 F. Supp. 2d 53, 77 (D.D.C., 2008) (“So long as the Committee is investigating a matter on which Congress can ultimately propose and enact legislation, the Committee may issue subpoenas in furtherance of its power of inquiry.”).

This investigative function of Congress is not merely one of constitutional permission; both common law and statutes allow Congress to hold in contempt those who refuse to answer its questions. The common-law contempt power of legislative bodies has been recognized as far back as 1821 (Anderson v. Dunn, 19 U.S. 204, 228-29 (1821) (“That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them . . . should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.”)) and as recently as 1972 (Groppi v. Leslie, 404 U.S. 496, 500 (1972) (“Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings and we should not demand that they do so although they possess inherent power to protect their own processes and existence by way of contempt proceedings.”)).

In 1857, Congress passed a contempt statute to delegate the authority to enforce legislative contempt:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192. There is currently some controversy as to the efficacy of the statute in the event of Presidential resistance to Congressional inquiry. 18 U.S.C. § 194 states that, upon violation of § 192, a representative of Congress will report the violation “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.” However, no provisions are made for the failure of the U.S. Attorney to act on a matter. The controversy between President George W. Bush and Congress regarding the dismissal of 8 U.S. Attorneys and the President’s refusal to accept the right of Congress to issue subpoenas calling for two of his aides to testify in the matter indicates that this problem may not be purely academic for much longer. The D.C. District Court has already ruled that Congress does, in fact, have the right of subpoena in this matter. Miers, 558 F. Supp 2d at 108. It remains to be seen whether this will be settled through political means.

For a slightly more detailed discussion of this matter, see Ronald Rotunda and John E. Nowak, Treatise on Constitutional Law § 8.2(b) (2007).

The Supreme Courts of Louisiana and of Pennsylvania have relied on Groppi to uphold their legislatures’ ability to punish those who choose to defy a legislature’s investigation. House of Representatives v. Bernard, 373 So. 2d 188, 194 (La 1979), Com. ex rel Carcaci v. Brandomore, 372 A. 2d 1, 5 (Pa 1974).
[T]here was nothing particularly unique about the legislative branch attempting to influence the executive. And despite the president’s role as commander in chief, it was commonly thought that Congress ought to play an important part in shaping and directing the armed forces because in military matters Presidents serve as Congress’s steward.  

Until the Civil War, it was Congress, not the President, that was seen as the locus of power and authority within the federal government. Even with the ascendance of the executive branch during the 19th Century, Congress continued to be considered the ensurer of the people’s will. In 1885, Woodrow Wilson stated that:

The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but more than that, that the only really self-governing people is that people which discusses and interrogates its administration. . . .

Nor did the idea of legislative oversight diminish, even in the face of extreme circumstances or war. Harry S. Truman, writing in his autobiography, stated:

The power to investigate is necessary to the intelligent exercise of the powers of Congress. This is especially true in wartime, when the Congress must delegate many of its powers. Only by investigating can it review the exercise of them and ascertain how and to what extent they should be modified – by legislation if necessary, by executive action if possible.

It is not enough, however, to demonstrate that oversight of the executive is contained within the DNA of Congress. How this power is used and whether it

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15 Bruce Tap, Over Lincoln’s Shoulder, The Committee on the Conduct of the War 24 (1998) (internal citations omitted).
16 Id. at 13. ("Within the federal government, Congress seemed to have the lion’s share of responsibilities. The powers of Congress are spelled out in great detail in the Constitution, yet those of the president are much more vague and ambiguous.").
17 Woodrow Wilson, Congressional Government, 303-04 (1885).
further or diminishes the actual execution of government policy is an important matter to consider. The results of Congress’ use of its oversight power runs along a spectrum, the extremes of which are represented by the Joint Committee on the Conduct of the War and the Senate Committee to Investigate the Defense Program. 19

B. Joint Committee on the Conduct of the War

The Joint Committee on the Conduct of the War (hereinafter referred to as the CCW) was created in December 1861 20 and continued its activities until May 1865. 21 While its make-up changed over the years, it was consistently comprised of three senators and four representatives, five of whom were Republicans and two who were Democrats. 22

When Fort Sumter fell on April 12, 1861, Congress was not in session and President Abraham Lincoln determined to act immediately rather than wait for Congress to convene in special session. He instead relied on his authority as commander in chief. 23 Congress, when it did finally meet in special session beginning July 4, 1861, approved Lincoln’s actions retroactively on the assumption that they would result in a swift suppression of the rebellion and thereby obviate

19 For a brief discussion on the selection of these two committees See note 7, supra.
20 Tap, supra note 14, at 22.
21 Id. at 251.
22 Id. at 24. The Committee in the 37th Congress was made up of Senate Republicans Benjamin F. Wade and Zachariah Chandler, Senate Democrat Andrew Johnson, House Republicans George W. Julian, John Covode, Daniel W. Gooch, and House Democrat Moses Fowler Odell. Id. at 24. When Johnson became the governor of Tennessee in 1862, Joseph A. Wright replaced him. Id. at 27. The 38th Congress had the same membership, save that Benjamin F. Harding replaced Wright and Benjamin F. Loan replaced John Covode. Id. at 175.
23 Id. at 13 (1998). (“Lincoln did not waste time worrying over constitutional niceties in taking the steps he believed were necessary in dealing with the rebellion. Instead of calling Congress into session, Lincoln acted in his capacity as commander in chief. In addition to his call for 75,000 three month volunteers, he implemented quickly a series of measures designed to prosecute the war.”) Other measures taken by Lincoln included imposing a naval blockade on the rebellious states and suspending the Writ of Habeas Corpus. Id.
the need for greater Congressional involvement. However, the First Battle of Bull Run ended expectations of a quick victory, and a series of disasters, scandals, and flat-out disagreements over war strategy quickly eroded Congress’ faith in Lincoln. In December of 1861, Congress asserted itself and created the CCW.

What was different about the CCW, crucially different, from earlier committees was the broadness of its mandate. Previously, congressional investigative committees had focused on events which had already occurred. The CCW, however, was explicitly granted the authority to not only investigate past military disasters, but also to oversee current military conduct and ongoing actions by other branches of government. This “elastic resolution” gave the CCW the ability to exercise great influence, an ability that it clearly recognized and sought to exploit:

Your committee therefore concluded that they would best perform their duty by endeavoring to obtain such information in respect to the conduct of the war as would best enable them to advise what mistakes had been made in the past and the proper course to be pursued in the future.

Unfortunately, the CCW ultimately used its broad mandate to pursue

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24 Id. at 13-14 (“When Congress met in a special session beginning on July 4, 1861, Lincoln asked for approval of the measures he had implemented. Congress endorsed the president’s actions...If Lincoln were to take the initiative, then he had better deliver–and deliver quickly. Congressional leaders wanted and expected quick results....”).
25 Id. at 22. (“Republican congressmen, in particular, had observed one military disaster after another. They had in special summer session agreed to the president’s actions retroactively; they had accepted his leadership as commander in chief; they had patiently awaited the movement of the Army of the Potomac, only to be frustrated time after time. They were running out of patience, and for many congressional leaders, the sad state of military affairs reflected negatively on Abraham Lincoln.”).
26 Id.
27 Id. at 24.
28 Report of the Joint Committee on the Conduct of the War, 3-4 (1893) reported in Tap, supra note 14, at 34.
blatantly political and partisan ends.\textsuperscript{29} This is not to say that the CCW did not do some good. For example, it uncovered irregularities in ice contracts, manufacturing of heavy ordinance, and logistical operations in New York and Philadelphia.\textsuperscript{30} It also bolstered Union war efforts by bringing to light the atrocities committed by Confederate forces at Fort Pillow and the treatment of Union prisoners of war.\textsuperscript{31} However, the CCW’s approach to most issues reflected the personalities of its two most dominant members, Senator Benjamin F. Wade, the chairman,\textsuperscript{32} and Senator Zachariah Chandler, its creator.\textsuperscript{33} Tap writes about Wade:

> Perhaps Wade’s most notable characteristics were his stubborn combativeness on political issues and his devotion to principle....Wade’s recipe for victory included such radical measures as emancipation and the confiscation of rebel property....Wade also had a stormy relationship with Lincoln, criticizing him for relying on such suspect advisors as William H. Seward and violently disagreeing with his reconstruction policy.\textsuperscript{34}

Chandler was, if possible, even more extreme:

> Sharing Wade’s antislavery convictions, Chandler was equally uncompromising and combative. Opposing any compromise with the South on slavery, he was quoted in the campaign of 1860: “Without a little bloodletting, this Union would not be worth a rush.”...From the beginning of the war, Chandler endorsed such radical measures as emancipation, confiscation, and the arming of black troops....

> Routinely denouncing northern Democrats as disloyal Copperheads and believing many of the rumors about secret societies, Chandler’s frank and bitter rhetoric often placed him at the center of controversy....Like Wade, Chandler was impatient

\textsuperscript{29} Tap, supra note 14, at 258.
\textsuperscript{30} Id. at 177.
\textsuperscript{31} Id. at 22-23.
\textsuperscript{32} Tap, supra note 15, at 24.
\textsuperscript{33} Id. at 22-23.
\textsuperscript{34} Id. at 25.
with the caution of West Point generals. After one interview with McClellan…Wade asked Chandler what he thought of military science. “I don’t know much about war,” Chandler responded, “but this is infernal, unmitigated cowardice.” Although Chandler supported Lincoln’s reelection in 1864, he too was often impatient with the president’s handling of war matters.\footnote{Id. at 26.}

To further their undeniably partisan agenda, Wade and Chandler used the CCW as a means to supplant and at times override the judgments of military professionals with their own.\footnote{Id. at 165-66 (CCW activities in the 37\textsuperscript{th} Congress) and 255 (CCW activities in the 38\textsuperscript{th} Congress).} They had an ideological belief that only constant forward motion was the correct strategy for victory.\footnote{Id. at 166 (CCW activities in the 37\textsuperscript{th} Congress) and 256 (CCW activities in the 38\textsuperscript{th} Congress).} The CCW’s activities caused factionalism and undermined the chain of command within the Union Army, as it allowed subordinates to criticize superiors.\footnote{Id at 166 (CCW activities in the 37\textsuperscript{th} Congress) and 256 (CCW activities in the 38\textsuperscript{th} Congress).} Its hearings and related investigations were frequently conducted in a manner that merely sought to confirm the committee’s predetermined conclusions on a matter.\footnote{Id. at 166 (CCW activities in the 37\textsuperscript{th} Congress) and 256 (CCW activities in the 38\textsuperscript{th} Congress).} Needless to say, these actions eroded the military’s respect for its civilian masters.\footnote{Id. at 165-66 (CCW activities in the 37\textsuperscript{th} Congress) and 255 (CCW activities in the 38\textsuperscript{th} Congress).} Ultimately, the CCW’s abuse of its mandate and its simplistic political approach to military matters was responsible for the loss of thousands of lives.\footnote{Id. at 166 (CCW activities in the 37\textsuperscript{th} Congress) and 256 (CCW activities in the 38\textsuperscript{th} Congress).}

Perhaps the best example of this is came from one of the committee’s best known later victims George McClellan. McClellan used the CCW to criticize his superior, Winfield Scott (the triumphant general of the Mexican American War), and succeed him as the top Union commander. However unfairly history may view the CCW’s later treatment of McClellan, he was the first significant figure to use the CCW further his own interests.\footnote{Id at 166 (CCW activities in the 37\textsuperscript{th} Congress) and 256 (CCW activities in the 38\textsuperscript{th} Congress).}

As this is a particularly bold statement to make in light of civilian control over the military, consider: The case of Ambrose Burnside at Fredericksburg is instructive. Burnside was well aware of the public’s impatience with the lack of military success in the Eastern Theater. He also knew that the committee had pursued McClellan
A similar assessment of the CWW came about some 80 years later:

I had been reading the records of the Joint Committee on the Conduct of the War between the States. These historic records constitute a most interesting set of documents. That committee of the Union Congress was said by Douglas Southall Freeman, the biographer of Robert E. Lee, to have been of material assistance to the Confederacy. 42

Such was the assessment of Harry S. Truman, the chairman of another legislative committee to oversee national defense, and it is to this committee that we turn next.

C. Senate Committee to Investigate the National Defense Program

In 1941, prior to the attack at Pearl Harbor, Senator Harry S. Truman became concerned with industry abuses as the US began war preparations. Specifically, as Truman later wrote:

I was concerned about charges that the huge contracts and the immense purchases that resulted from the appropriations were being handled through favoritism. There were rumors that some of the plants had been located on the basis of friendship. I feared that many of the safeguards usually observed in government transactions were being thrown aside and overlooked, although

because he did not move against the enemy directly. When crucial elements of his plans failed to materialize, Burnside carried out a foolhardy assault against the well-fortified Marye’s Heights because he believed that public opinion demanded action. The committee bears some responsibility for increasing such dissatisfaction and impatience. Id. at 166.

42 Truman, supra note 17, at 168.

Later in his memoirs, Truman expanded on the CCW’s failings.

Many congressional committees, in the past and in recent time, have been guilty of departing from their original purposes and jurisdictions. The most outstanding example of misdirected investigation occurred during the Civil War when the Committee on the Conduct of the War attempted to direct military operations in the field. It was this committee that was responsible for making Pope commanding general of the Army of the Potomac, which proved to be an unfortunate decision...his appearance on the field was soon followed by the disaster of the Second Battle of Bull Run....This Committee on the Conduct of the War abused witnesses unmercifully.

Id. at 188-89.
these safeguards would in no way have slowed up the program.\textsuperscript{43}

There were also concerns that the bigger business operations, on both the labor and capital sides of things, were seeking to eliminate competition - either by having the bulk of contracts steered towards them, or through requisition of heavy machinery from smaller rivals.\textsuperscript{44} Associated social ills arose from this consolidation. For example, there was a lack of housing in areas where operations were concentrated and vacant housing in areas where smaller businesses had, until recently, operated.\textsuperscript{45}

Truman took it upon himself to personally investigate:

\begin{quote}
I gave a lot of thought to this situation, and when I realized that it was growing increasingly worse, I decided to take a closer look at it. I got into my automobile and started out from Washington to make a little investigation of my own. I drove thirty thousand miles in a great circle through Maryland and from there down to Florida, across to Texas, north through Oklahoma to Nebraska, and back though Wisconsin and Michigan. I visited camps, defense plants, and other establishments and projects which had some connection with the total war effort of the country, and did not let any of them know who I was.

The trip was an eye-opener, and I came back to Washington convinced that something needed to be done fast. I had seen at first hand that grounds existed for many of the rumors that were prevalent in Washington concerning the letting of contracts and the concentration of defense industries in big cities.\textsuperscript{46}
\end{quote}

On February 10, 1941, Truman submitted a resolution for the creation of a special committee to oversee the national defense effort.\textsuperscript{47} Its mandate was huge, as

\begin{footnotes}
\item[43] Id. at 165.
\item[44] Id.
\item[45] Id.
\item[46] Id.
\item[47] Id. at 166.
\end{footnotes}
broad as that of the CCW: “the committee was directed to examine every phase of the war program.” What is significant is that Truman was careful to ensure that all members of the committee understood the limits of the mandate:

It was not organized to tell the war agencies what to do or how to do it. It was not to substitute its judgment for their judgment. Its function was to assure that intelligent consideration would be given to the important and difficult problems presented by the war program and that the victory would be won with the least cost in lives and property.

Comprised of five Democrats and two Republicans, the Senate Committee to Investigate the National Defense Program (universally referred to as the Truman Committee) operated from 1941 to 1948. By all accounts, it was a tremendous success, with credit largely given to the chairman. The Truman Committee’s most important accomplishments were its study of the problems of mobilization and its attempts to resolve, often privately, conflicts between the various agencies involved in the mobilization effort. It also addressed issues of resource shortages and fraud,

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48 Id. at 167.
49 Id.
50 Id. at 166.
51 Donald H. Riddle, The Truman Committee, a Study in Congressional Responsibility 141 (1964).
52 Id. at 154.
53 Id. at 143-144.
saving taxpayers hundreds of millions of dollars and was a major source of public information about the war effort, which contributed to public confidence in the conduct of the war.

The Truman Committee accomplished these things by having critical, but not contentious, relationships with individuals inside the agencies involved in its investigations. Indeed, the committee was noted for the degree to which it did not seek out individual scapegoats for problems or impugn the motives of witnesses. At the same time, the committee did not withhold criticism from those it determined deserving of such, not even from the White House. These accomplishments were impressive, and the Truman Committee remains the benchmark against which subsequent committees should be judged.

D. Trust as the Crucial Difference

There were very few structural differences between the CCW and the Truman Committee that would explain such different results. Both committees had a very expansive mandates, and both operated for more than one session of Congress. Further, the majority of both committees were of the same political party as the President. So, what was the crucial factor that explains the very different results of these two committees? The biggest distinction was the degree to which they did or did not promote trust in those they were overseeing.

The CCW saw no reason to build trust. It was led by people who were not

54 Id. at 144-51.
55 Id. at 155.
56 Id. at 162.
57 Id. at 159-60.
58 Id. at 165.
merely convinced of the rightness of their cause, but of the rightness of their means of accomplishing it. Bringing down political foes went hand in hand with bringing down military ones. Those who completely bought into the political mission were supported, while those who did not were attacked, regardless of ability. But such political zealotry did not bring practical results. As discussed above, the tenure of the CCW proved disastrous, adding to the casualty lists and prolonging the war.

In contrast, the Truman Committee cultivated an environment of trust. For example, the committee never openly questioned the motives or patriotism of those it supervised. At the same time, it did not hesitate to criticize the Roosevelt administration when it felt its policies were wasteful or otherwise unhelpful to the war effort. Thus, other actors in the war effort, and by the public at large, largely saw the committee as acting with integrity.

III. Corporate Governance Considerations

It is interesting to note that the Framers of the Constitution sought to create a governmental system whereby the branches of government would have an essentially adversarial relationship (i.e., checks and balances). Mutual suspicion, not trust, would seem key to the success of such a system. Yet trust seems to have been the crucial difference between the CCW and the Truman Committee. The question thus becomes whether trust actually can be, or should be, engineered into U.S. political structures.

Several corporate governance theorists argue that governance method based upon using either legal or market (that is, electoral) forces cannot meet the
complexity inherent in ensuring both good policy and effective execution of those policies in a democratic system. Instead, what is needed is for the actors in a governance systems to act with a degree of trust with one another. This approach does not require all sides to already trust one another; trust can be learned.

Before this approach to corporate governance can be applied to civil governance, it must be understood. What follows is a description of the origins of board oversight in corporations, a discussion of recent events and trends in corporate governance and the rise of a theory of trust in corporate governance. To do this properly, the discussion of congressional oversight will be suspended for the moment.

A. Oversight by the Board of Directors—An Overview

By law, the basic managing unit of a corporation is its board of directors. However, in a modern public corporation the board is not expected to provide actual day-to-day management for the typical publicly traded company. Instead, the board’s principle function is to “authorize the most significant corporate acts or transactions: mergers, changes in capital structure, fundamental changes in business, appointment and compensation of the CEO, etc.” Yet removal from

59 E.g., Cal. Corp. Law § 300(a) (Deering 2003) (“[T]he business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board. . ..”), Del. Code Ann. tit. 8 § 141(a) (2001) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors. . . .”), N.Y. Bus. Corp. Law § 701 (McKinney’s 2003) (“[T]he business of a corporation shall be managed under the direction of its board of directors . . .”).

60 E.g. American Law Institute, Principles of Corporate Governance, § 3.02 cmt. a (1994) (“Although the statutes literally seem to require the board to either manage or direct the management of corporation, it is widely understood that the board of a publicly held corporation normally cannot and does not perform those functions in the usual sense of those terms.”), Business Round Table, Principles of Corporate Governance, 5 (2005) (“Effective Corporate directors are diligent monitors, but not managers, of business corporations.”).

61 In re Caremark, 698 A.2d 959, 968 (Del. Ch. 1996).
ordinary operations does not relegate boards to the sidelines: “the paramount duty of the board of directors of a public corporation is to select a chief executive officer and to oversee the CEO and senior management in the competent and ethical operation of the corporation on a day-to-day basis.”

Court decisions have consistently emphasized this oversight role. In 1924, then district judge Learned Hand wrote that “directors have an individual duty to keep informed in some detail” about corporate affairs and not be “carried along as...figureheads.” In the 1980s, the Delaware courts emphasized the importance of a board’s oversight role in merger situations with the establishment of the Unocal and Revlon standards. In 1996, In re Caremark held directors liable for failing to act in good faith by the “sustained or systematic failure of a director to exercise reasonable oversight” of a corporation’s affairs. In 2006 the Delaware Supreme Court stated:

Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more

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62 Business Round Table, Principles of Corporate Governance, 2 (2005) (emphasis added). This group went on to state:

In performing its oversight function, the board is entitled to rely on the advice, reports and opinions of management, counsel, auditors and expert advisers. The board should assess the qualifications of those it relies on and hold managers and advisers accountable. The board should ask questions and obtain answers about the processes used by managers and the corporation’s advisers to reach their decisions and recommendations, as well as about the substance of the advice and reports received by the board. When appropriate, the board and its committees should seek independent advice. Id. at 7.


64 E.g. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 649 (Del. 1985) (because of concern that directors and managers may wish to prevent any and all takeovers, the Delaware Supreme Court requires that corporate anti-takeover measures are adopted in response to legitimate threats to a corporations interests and that they are proportional to the threat), Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 637 A.2d 173 (Del. 1986)(when a corporation is put up for sale or its demise is otherwise inevitable, a board must take necessary measures to insure that shareholders get the best value for the sale of the corporation).

65 In re Caremark, 698 A.2d 959, 971 (Del. Ch. 1996).
culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed.\textsuperscript{66}

So, not only do boards of directors have the power to oversee corporations, they have a duty, and failure to fulfill that duty can lead to the personal liability of directors.\textsuperscript{67}

The presence of legal duties, in corporate law as with all law, means that courts can be used to enforce them. Unfortunately, using courts to enforce such duties has long presented problems. First, the theories of fiduciary duties have their origins in the rules governing trusts. These rules do not necessarily mesh with the entrepreneurial focus of corporations--investors/shareholders do not want corporate managers to be so careful with corporate assets that they do nothing with them.\textsuperscript{68}

Unlike the recipients of trusts, corporate shareholders are people who knowingly commit to a venture in which the total loss of monies invested is possible.\textsuperscript{69}

Recognizing these differences, courts, especially the Delaware Chancery Courts, rely

\textsuperscript{66} In re Walt Disney Co. Derivative Litigation, 906 A.2d 27, 66 (Del 2006) (emphasis added).

\textsuperscript{67} As a final piece to indicate the parallels of Boards of Directors and Legislatures, consider that Boards have a the ability to act against those who deny them access to information. Unlike a legislature, with its contempt power, a board has a much more direct sanction against those who will not provide the information it seeks: termination. A board hires the CEO, and usually approves, if not actually appoints, other members of the senior management team. See id. and In Re Walt Disney Derivative Litigation, 825 A.2d 275 (Del. Ch. 2003) (the entire Disney litigation concerned a board’s responsibility to hire and oversee the CEO and other corporate officers); see also Business Round Table, Principles of Corporate Governance, 2 (2005).

\textsuperscript{68} Sarah Helene Duggin & Stephen M. Goldman, Restoring Trust in Corporate Directors: The Disney Standard and the “New” Good Faith, 56 Am. U. L. Rev. 211, 224 (2006) [hereinafter “Duggin & Goldman”]. As Chancellor Allen noted in an In re Caremark footnote, the corporate form gets its utility in large part from its ability to allow diversified investors to accept greater investment risk. 698 A.2d 959, 968, n.16 (Del. Ch. 1996).

\textsuperscript{69} See Duggin & Goldman, supra note 67, at 224.
on doctrines such as the business judgment rule when dealing with oversight issues. Unfortunately, events have gotten ahead of the courts, and new approaches are needed in response to the corporate scandals of the 1990s and 2000s.

B. Crisis of Confidence

The current hyper-partisanship of the political sphere, its “take-no-prisoners” approach to the opposition, is not unfamiliar to the corporate sector. The period since the 1980s has been an era which has seen an extraordinary number of corporate takeovers and takeover attempts, as well as new and aggressive means to defeat them. It has seen the decision of Smith v. Van Gorkom by the Delaware Supreme Court, where highly competent directors were found personally liable when they followed the advice of their chair and CEO in approving the purchase price of a company. It has also seen Delaware General Corporation Law, Section

\begin{itemize}
  \item \text{In re Caremark, 698 A.2d at 967, summarized the business judgment rule well, when it stated that cases based upon the direct actions of corporate management}
  \begin{quote}
  \text{...will typically be subject to review under the director-protective business judgment rule, assuming the decision made was the product of a process that was either deliberately considered in good faith or was otherwise rational. What should be understood, but may not be widely be understood by courts or commentators who are not often required to face such questions is that compliance with a director’s duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact believes a decision substantially wrong...provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests (emphasis in original).}
  \end{quote}
  \item \text{E.g., James Tobin, The Squeeze on Directors – Inside is Out, 49 Bus. Law. 1707 (1993) (Focus on takeover defenses, including short term profit maximization, has left some long term scars and inappropriate fixations. The scars mark years when American companies de-emphasized long term investment with the consequent diminution of future (read now current) earnings. The fixations resulted from years of advice to directors concerning the protection afforded them on single event transactions by the business judgment rule in response to the pressures of the takeover era of the 1970s and 1980s.).}
  \item \text{Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (“Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others. Such obligation does not tolerate faithlessness or}
\end{itemize}
102(b)(7) overrule Von Gorkom, whereby the Delaware legislature to allow corporations to relieve their directors of almost any liability for their decisions. 73

The 1990s were a period of unprecedented growth in the stock markets. The Dow Jones Industrial Average rose approximately 500%, from 2000 to 12,000, between 1990 and 1999. 74 The Standard & Poor’s 500 Index also rose 500%, from 300 to 1,500, in the same period. 75 The NASDAQ Composite Index went from 500 to 4,000, an 800% increase. 76 During the same period, prosecutions of corporations were increasing as well, from 111 sentences in 1995 to 304 in 2000. 77

During this period, two types of corporate governance problems occurred. First was that of the willfully oblivious board, whereby directors failed to police self-dealing. But fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here.

73 Del. Code. Ann. tit 8, § 102(b)(7)(2006) (A Delaware corporation’s certificate of incorporation may contain “[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director . . .”).


76 New York Times Interactive Market Chart for NASDAQ Composite Index, available at http://marketwatch.nytimes.com/custom/nyt-com/html-interactivecharting.asp?symb=COMP&time=all&compidx=aaaaa%7E0&comp=&ma=0&maval=60&x=19&y=12&freq=1yr&type=2&uf=0&lf=1&ind_compind=, checked on July 3, 2008. The Index went up another 1000 point in the first three months of 2000 before crashing back to 2,500 at the end of the year and to near 1,000 by the end of 2002. Id.

Subsequently, the indices respectively lost 33%, 50%, and 400% of their value. See New York Times Interactive Charts, supra notes 76 to 78. The NASDAQ never regaining the value held at the end of the 1990s bull market. Id. Whatever gains the Dow Jones Industrial Average and the Standard & Poor’s 500 made was erased in the bear market of 2008-09. Id.

malfeasance taking place in the company. The most egregious examples were Abbott Laboratories, Enron, and WorldCom.\textsuperscript{78} The second problem was the board dominated by a CEO or controlling shareholder and rubber-stamped decisions which ultimately wasted corporate assets. The Eisner/Ovitz debacle at Walt Disney Corporation, because of the court case it spawned, is the most important example of a dominated board.\textsuperscript{79} These numerous scandals led to a loss of faith in officers, directors, and the corporate model itself.\textsuperscript{80}

There have been essentially two types of reactions to these board failures. The first reaction has been to create new rules to curtail bad behavior. The Sarbanes-Oxley Act\textsuperscript{81} and new listing requirements for the New York Stock Exchange\textsuperscript{82} are two well-known examples of this reaction. Whether the rules put in place by Sarbanes-Oxley and the NYSE will be effective remains to be seen. However, history provides reason to believe that such rules will only result in creative circumvention (much as corporations, businesses, and private individuals exploit tax loopholes),\textsuperscript{83} or create perverse incentives (such as increased disclosure of executive pay leading to even higher pay packages across the board since no

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\textsuperscript{78} In the Abbott Laboratories matter, the board failed to set up procedures that would have detected falsified laboratory reports after they became aware of the problem, which led to the largest civil fine ever levied by the FDA and the destruction of $250 million in corporate assets. Abbott Laboratories, 325 F. 3d at 809. Enron and WorldCom involved falsified record keeping which led to the shares being way overvalued.

\textsuperscript{79} Even as the scandals were developing, there was substantial clamor for corporate boards to raise their ethical standards. See Jill E. Fisch, Taking Boards Seriously, 19 Cardozo L. Rev. 265, 255-56 (1997) [hereinafter “Fisch, Taking Boards Seriously”], Duggin & Goldman, supra note 67, at 259-61.

\textsuperscript{80} E.g. Duggin & Goldman, supra note 67 at 261.


\textsuperscript{83} Duggin & Goldman, supra note 67, at 262.
company wants its CEO pay to be “below average.”\textsuperscript{94}

The second reaction has come from the Delaware courts, the best example of which is Walt Disney Derivative Litigation. In a series of decisions, the Chancery and Supreme Courts of Delaware have created a “new” legal standard to address the “structural bias” of corporate boards.\textsuperscript{85} While boards cannot be viewed as engaged in self-dealing, neither can it be said that they are acting solely as disinterested fiduciaries.\textsuperscript{86} In Disney, the Chancery Court has held, and the Supreme Court has affirmed, that directors can be liable for failing to act in good faith\textsuperscript{87} and that “an intentional dereliction of duty, a conscious disregard for one’s responsibilities, is an


\textsuperscript{85} In re Walt Disney Company Derivative Litigation involved actions taken by Disney CEO Michael Eisner in the hiring and firing of Michael Ovitz as president of Disney during 1995-96. It was not the hiring and firing itself that drew the ire of the shareholders so much as the $130 million dollars Ovitz received when he was let go. The case had several pre-trial opinions, an extensive bench trial, and two appearances before the Delaware Supreme Court (one on the initial motion to dismiss, the other after final judgment). Ultimately, the company defendants, including the Disney Board of Directors, won. 906 A.2d at 58-59.

However, this is not to say the Disney board escaped unscathed. They were described, albeit indirectly, as “supine” to the “imperial CEO” Michael Eisner. In re Walt Disney, 907 A.2d at 760, note 487. Chancellor Chandler went on to state:

Eisner stacked his (and I intentionally write ‘his’ as opposed to ‘the Company’s’) board of directors with friends and other acquaintances who, though not necessarily beholden to him in a legal sense, were certainly more willing to accede to his wishes and support him unconditionally than truly independent directors.


\textsuperscript{86} Claire A. Hill & Brett H. McDonnell, Disney, Good Faith, and Structural Bias, 32 J. Corp. L. 833, 839 (2006) (herinafter “Hill & McDonnell”: “[S]tructural bias results on account of (a) the shared group membership between directors and officers, (b) the bonds of collegiality, and (c) the pernicious golden rule–treating other directors and officers as one would want to be treated in one’s capacity as an officer of another corporation. These all come together to yield conditions in which directors’ motivations are not strictly fiduciary in nature, but are also not classically self-serving.” Unocal and Revlon standards, discussed supra, seek to address the same problem in different circumstances.

\textsuperscript{87} In re Walt Disney, 906 A.2d at 66-67.
appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith.”

However, while the Delaware courts may have created a new legal standard concerning liability, to date, no director has been found liable based upon such a duty, including in the Disney case itself. So it seems the Delaware courts view their own legal standard to be, at best, “modest.” However, modest though it may be, this standard is worthy of exploration, and will be discussed later in light of its possible applications to the matter of congressional oversight.

C. The Rise of Trust in Corporate Governance

The Delaware courts’ actions have not resolved just how extensive directors’ fiduciary duties should be. This has provided a new opportunity for corporate law scholars to devote time and energy to the question of corporate governance. Until recently, the matter of corporate governance has been dominated by a bitter argument between two entrenched ideologies.

Scholars have long debated the issue of corporate governance. Perhaps unsurprisingly, the debate has not resulted in consensus, but in a rather contentious quarrel. The dispute concerning corporate governance is a cultural one, turning on the importance of and interpretation of key corporate law doctrine. Fiduciary duties are of particular concern, namely the consequences of these long-recognized

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88 In re Walt Disney, 906 A.2d at 62 (quoting 907 A.2d at 755).
89 In re Walt Disney, 907 A.2d 693, 779 (Del. Ch. 2005) (Chancery Post Trial Opinion), In re Walt Disney, 906 A.2d at 75 (Delaware Supreme Court decision); See e.g. Stone ex. rel. AmSouth Bankcorporation v. Ritter, 911 A.2d 362 (Del. 2006).
90 Duggin & Goldman, supra note 67, at 259.
91 A far more detailed discussion of this debate can be found in Margaret M. Blair & Lynn A. Stout, Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, 149 U. Pa. L. Rev. 1735, 1781-89 (2001) [hereinafter, “Blair & Stout”].
duties, whether such duties are useful to modern corporate law, and whether they were ever valid. Van Gorkom, in particular, limns this divide.  

Unfortunately, as with many disputes, it has given rise to an environment where “[e]xaggeration is the norm, conversation the exception.” This “war” has now gone on for almost three decades between, essentially, two camps: the contractarians and the anticontractarians.

The contractarians, following law and economics theory, hold that fiduciary duties are best regarded as a default rule in the “contract” formed between a corporation and its shareholders. That is, there is “nothing special” about them. In this model, to reduce transactions costs, investors can “opt out” of monitoring duties simply by purchasing stock in a corporation with none. Further,

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92 See Claire A. Hill & Brett H. McDonnell, Disney, Good Faith, and Structural Bias, 32 J. Corp. L. 833, 836 (2007) (“For the most part, the courts are unwilling to hold that defendants have been grossly negligent. The one time that they did, in Smith v. Van Gorkom, the decision shocked the corporate law community, and drew a very quick reaction from the Delaware legislature. Scholars still harshly criticize the decision; indeed, a bashing of Van Gorkom is a ritual of entry into the ranks of the respectable corporate law scholarly community.”) (internal citations omitted), Duggin & Goldman, supra note 67 at 231 (Delaware’s new statute, codified as section 102(b)(7) of the state’s General Corporation Law, eviscerated Van Gorkom by permitting corporations to limit, or even eliminate, the personal liability of directors for almost all breaches of the duty of care.”) (internal citations omitted), John L. Reed and Matt Neiderman, “‘Good Faith’ and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty,” 29 Del. J. Corp. L. 111, 113(2004) (“To help alleviate the consequences and concerns of directors following Van Gorkom, § 103(b)(7), as enacted, permits Delaware corporations to authorize provisions in their certificates of incorporation limiting or eliminating the personal liability of directors for breaches of fiduciary duty . . . .”).

See discussion of the contractarian / anticontractarian debate infra.


94 Blair & Stout, supra note 90, at 1782.

95 Id. at 1781.

96 See e.g. See Frank H. Easterbrook & David R. Fischel, Contract and Fiduciary Duty, 36 J.L. & Econ. 425, 426 (1993) [hereinafter “Easterbrook & Fischel”].

97 Id. at 438.

98 See e.g., id. at 427. (asserting that the duty of loyalty comes at the high price of specification and monitoring). Easterbrook and Fischel do not say outright that companies should disavow fiduciary
contractarians hold that courts should refrain from interfering and let each party in the fiduciary relationship determine what mix of benefits and costs is appropriate.\textsuperscript{99}  

The anticontractarians argue that, under the contractarian approach, “[f]iduciaries will be permitted to act negligently and in conflict of interest, unless expressly or impliedly prohibited from doing so, or if they fulfill certain conditions, such as disclosure. . . . Rules regulating fiduciaries would be far more specific and dependent on the terms of the arrangement among parties.”\textsuperscript{100}  Calling a fiduciary duty simply another clause in a contract “disregard[s] the reasons for the different rules that govern them.”\textsuperscript{101}  One reason for these different rules, according to anticontractarians, is that fiduciary relationships “expose entrustors to extraordinary risks” that “can result in a loss that far exceeds the potential to gain from the fiduciaries’ services.”\textsuperscript{102}  In this model, courts should therefore view fiduciary duties as something that cannot be waived.

Recently, however, some scholars have begun to contest this either/or view of corporate governance. According to them, neither the legal sanctions of fiduciary duties nor the market sanctions that (supposedly) exist outside such duties adequately explain why any corporation operates successfully despite the

\footnotesize{\textsuperscript{99} See e.g. Easterbrook & Fischel at 428. (“Both sides would have been better off had the court selected a rule that enabled them to save these costs.”).  
\textsuperscript{100} E.g. Tamar Frankel, Fiduciary Duties as Default Rules, 74 Or. L. Rev. 1209, 1211(1993).  
\textsuperscript{101} Id.  
\textsuperscript{102} Id. at 1212.}
temptations for management to make off with shareholder funds. These scholars are sympathetic to anticontractarian viewpoints, but acknowledge and accept that current proposed solutions raise serious problems for the corporate enterprise. Using empirical research, especially in behavioral economics, they seek not only to confirm anticontractarian arguments on the consequences of reducing fiduciary duties, but to avoid the extensive costs (especially litigation costs) that are at the heart of contractarian concerns. Based on this research, their focus has shifted to the internalization of social norms, especially those concerning trust and trustworthiness, as a better explanation.

In 2001, Margaret Blair and Lynn Stout argued that trust and trustworthiness play a much larger role in corporate affairs than previously believed. The two external sources of trust looked to in classic economic theory, namely legal and market sanctions, cannot explain the trust that occurs between individuals. Legal sanctions are ultimately too tenuous; that is, they are not backed up often enough by actual sanctions to be more than a weak constraint. Market sanctions – economic retaliation (i.e., refusal to do business), loss of reputation, and mere social sanction (i.e., lack of friendliness) – rely on a high degree of information. The resources needed to gather that information, coupled with an unceasing views of all relationships as “strategic, calculating, and self-interested”, is beyond the ability of most individuals.

103 Blair & Stout, supra note 90, at 1738 (“We contend that people often trust, and often behave trustworthily, to a far greater degree than can possibly be explained by legal or market incentives.”).
104 Id. at 1747.
105 Id. at 1750.
The alternative to these external restraints is trust. Trust, as discussed by Blair and Stout involves three characteristics:

First, trust involves at least two actors—the one who trusts and the actor who is trusted. Second, the trusting actor must deliberately make herself vulnerable to the trusted actor in circumstances in which the trusted actor could benefit from taking advantage of the trusting actor’s vulnerability. Third, the trusting actor must make herself vulnerable in the belief or expectation that the trusted actor will in fact behave “trustworthily”—that is, refrain from exploiting the trusting actor’s vulnerability.\(^{106}\)

Obviously, the trusting actor is looking for a benefit from the trust bestowed. For investors, trust is bestowed in the expectation that company managers will demonstrate fiscal responsibility (and thereby hopefully increase the value of their investment). But what is the basis for such trust? More importantly, what is the basis for management not abusing that trust?

Empirical evidence indicates people often act in an “other-regarding” fashion; that is, one that seeks the benefit of others without a direct benefit to the self.\(^{107}\) This internalized motivation is an efficient tool for groups that rely on social interactions to thrive.\(^{108}\) It allows the trusting party to decide that it is more efficient to trust an actor than to spend the time and resources determining and/or ensuring the actor acts in a trustworthy fashion. Similarly, it allows the trusted actor to decides that it is more efficient (and ultimately more profitable), to act in a trustworthy fashion. If this behavioral model can be deployed at corporations, it

\(^{106}\) Id. at 1745-46 (internal citation omitted).

\(^{107}\) Id. at 1752, 1759-1764.

\(^{108}\) Id. at 1753.
may well address certain behavioral inefficiencies, such as agency costs.\textsuperscript{109}

A corporation, or its agents, does not need to be inherently trusting or trustworthy in order for Stout and Blair’s proposal to be realized. Social dilemma game experiments demonstrate that trust can be learned based upon an individual’s experiences.\textsuperscript{110} These experiments demonstrate that even initially untrustworthy participants can become more trustworthy. This proves to be, especially the case when they are engaged in multiple and long-term games where cooperative behavior produces better results for all participants.\textsuperscript{111}

Trust, however, is not necessarily robust. The same experiments that demonstrate the viability of trust also make it clear that people behave as they believe others in the same situation are behaving.\textsuperscript{112} In experiments where participants play repeated social dilemma games, a pattern quickly emerges: the majority of players either deceive or cooperate.\textsuperscript{113} It is interesting to note that in social dilemma games actual acts of deception are not necessary to undermine trust. Treating other players as if they were untrustworthy, or simple “trash talk,”

\textsuperscript{109} Id. at 1757. Agency costs are resources principals (shareholders) must expend in order to determine and/or ensure agents (management) are properly acting on the principals’ behalf.

In fact, business managers and scholars have long known about the importance of trust in effective management and have long explored means to create trust in business relationships. Id. at 1758 and related footnotes. Blair and Stout speculate that the reason theorists from the law may be blind to this line of scholarship stems from the focus, in legal scholarship as in legal education, on situations where trust has broken down. Id. at 1759.

\textsuperscript{110} Id. at 1766-68.

Social dilemma games involve situations where a group of individuals is brought together and given something of value. The experimenters design situations whereby the subjects are given the opportunity to cooperate to achieve greater gain, but also present each individual with either less risk or potentially greater individual gain by refusing to cooperate. Id. at 1760.

\textsuperscript{111} Id. at 1774.

\textsuperscript{112} Id. at 1775-76.

\textsuperscript{113} Id.
are just as effective in reducing the trust between players.\textsuperscript{114}

The results of social dilemma experiments tend to support the anticontractarian view that “it is fundamentally misleading–even dangerous–to apply the rhetoric of contract to fiduciary duties.”\textsuperscript{115} Contracts assume that each party is acting purely in its own interest.\textsuperscript{116} To bring such assumptions into the realm of fiduciary duties both “accepts and legitimates” self-interested behavior in a situation where one side already must trust the other without protections.\textsuperscript{117}

However, the empirical data which seemingly refutes a contract approach also argues against the anticontractarian position calling for greater enforcement of fiduciary duties in the courts. Use of the courts to enforce fiduciary duties is ultimately just has harmful to trust. Court actions have the effect of indicating that fiduciary duties violations have occurred, even when the courts find that not to be the case. The more such court cases are brought, the more common the practice of fiduciary violations appears to be.\textsuperscript{118} Overuse of the courts leads to the result that more corporate directors and officers will seek to avoid or circumvent their fiduciary responsibilities because, again, people tend to behave as they believe others are behaving.\textsuperscript{119}

\textsuperscript{114} Id. at 1776.
\textsuperscript{115} Id. at 1786 (“A behavioral analysis of the fiduciary relationship accordingly supports the anticontractarian view that it is fundamentally misleading–even dangerous–to apply the rhetoric of contract to fiduciary duties.”).
\textsuperscript{116} Id. at 1784.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 1797.
\textsuperscript{119} Id. at 1797. (“[T]rying to shore up trust behavior by making it easier for corporate participants to ‘litigate trust’ may produce the counterintuitive result of an increase in the incidence of untrustworthy behavior.”).
This is not so say that court cases have no part to play in creating conditions in which trust may develop.\textsuperscript{120} According to Blair and Stout, “fiduciary duty law works through framing, not shaming.”\textsuperscript{121} A court’s opinions, even when finding for director defendants, are part of this framing process, as they influence behavior by establishing the norms of fiduciary relationships.\textsuperscript{122} What judges say is important because

[s]ocial dilemma experiments indicate that individuals trying to decide whether a particular social context calls for cooperation or competition are remarkably sensitive to the signals they receive from the experimenter who defines and has authority over the game. In the context of corporate law, the court, as the authority charged with both creating and enforcing many corporate law rules, may play the role of experimenter and enjoy similar influence. When the Delaware chancery court trumpets the importance of careful attention to fiduciary duties, directors and officers are likely to heed that call—even though they may have little or no external incentive for doing so.\textsuperscript{123}

Thus, when judges say to directors that there are certain standards which shareholders trust them to maintain (even when seldom backed up by legal consequences), such standards may well be internalized.\textsuperscript{124}

The goal, then, would be to find a middle way, one that avoids the problems of the free-for-all caveat emptor views of contractarians on the one hand, and the

\begin{footnotesize}
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\item \textsuperscript{120} Id. at 1776.
\item \textsuperscript{121} Id. at 1796.
\item \textsuperscript{122} Id. (“Courts preach these sermons not to enlist the aid of third-party ‘norm enforcers,’ but primarily to influence corporate participants’ behavior more directly by fleshing out the social context of their relationships, and particularly by framing relationships between managers and their firms as fiduciary relationships based on trust.”).
\item \textsuperscript{123} Id. at 1797.
\item \textsuperscript{124} Id. (“When the Delaware chancery court trumpets the importance of careful attention to fiduciary duties, directors and officers are likely to heed that call—even though they have little or no external incentive for doing so.”). Blair and Stout’s assertion on this point has been supported by others. E.g. Hill & McDonnell, supra note 85 at 862 (2006).
\end{itemize}
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over-regulated, perverse incentive-creating views of the anticontractarians. Blair and Stout argue that this middle way is directors and executives each conducting themselves in a manner worthy of the trust of the other and, ultimately, the shareholders.

D. Why Trust May Work for Shareholders

Using Blair and Stout as a starting point, Sarah Helene Duggin and Stephen M. Goldman focus on the need for directors and other managers to re-establish trust with shareholders.\(^\text{125}\) While unsympathetic to the contractarian laissez faire attitude regarding fiduciary duties, Duggin and Goldman (like Blair and Stout), argues that actions by Congress, the Securities Exchange Commission, or the New York Stock Exchange are not the most effective means of limiting corporate wrongdoing.\(^\text{126}\) However well intentioned, the regulations put in place by these three entities are often counterproductive and simply encourage those who wish to get around them to find “loopholes.”\(^\text{127}\)

For Duggin and Goldman, the Disney litigation provides an alternative to regulation.\(^\text{128}\) They begin with the infamous Section 102(b)(7) of the Delaware Corporation Law, which explicitly states that a Delaware corporation’s certificate of incorporation may contain “[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages

\(^{125}\)Duggin & Goldman, supra note 67, at 286. (“Unless directors are willing to act conscientiously in overseeing the affairs of corporations they manage, no matter how talented or accomplished they may be, they are not worthy of trust, and they should not be entitled to participate in managing the business entities so vital to the economic well-being of their constituents.”).  
\(^{126}\) Id. at 262-63, 272.  
\(^{127}\) Id. at 262.  
\(^{128}\) See note 84 for a summary of this litigation.
for breach of fiduciary duty as a director. . . .”

Interestingly, however, directors cannot opt out of liability for a breach of good faith. As discussed above, the Chancery court in Disney created a standard, approved by the Supreme Court, whereby the provisions of 102(b)(7) could be enforced against directors:

I am of the opinion that the concept of intentional dereliction of duty, a conscious disregard for one’s responsibilities, is an appropriate (although not only) standard for determining whether fiduciaries have acted in good faith. Deliberate indifference and inaction in the face of a duty to act is, in my mind, conduct that is clearly disloyal to the corporation. It is the epitome of faithless conduct.

The application of such a standard, if not defanged by defense counsels, could provide the means for shareholders to begin to trust company managers. An enforceable legal standard “provides a means of holding those who accept…corporate directorships accountable to act when their duty to do so is clear.”

Following Blair and Stout, Duggin and Goldman argue that the most effective and efficient way for directors and other managers to avoid liability would be to internalize the position of the court—that is, to act not because the court

\[\text{\textsuperscript{129}}\text{Del. Corp. L. \S 102(b)(7). ("[T]he certificate of incorporation may also contain...(7) A provision eliminating or limiting the liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director . . . ").}\n\[\text{\textsuperscript{130}}\text{Del. Corp. L. \S 102(b)(7)(ii) ("[P]rovided that such provision shall not eliminate or limit the liability of a director(ii) for acts or omissions not in good faith..." )}\n\[\text{\textsuperscript{131}}\text{In re Walt Disney, 907 A.2d 693, 755 (Del. Ch. 2005) (emphasis in original), affirmed 906 A.2d at 62-62.}\nSeveral commentators have noted this is a means of re-establishing accountability, See. Duggin & Goldman, supra note 67, at 268, or at least, creates a new intermediate standard of scrutiny within the Business Judgment Rule akin to those of Unocal and Revlon, Hill & McDonnel, supra note 123, at 840. Either way, directors must now see to it that they do in fact oversee the activities of their corporations.
\[\text{\textsuperscript{132}}\text{Duggin & Goldman, supra note 67, at 268-69.}\]
requires it, but because the court’s view is correct.  This approach would create
directors and executives who internalize the courts’ standards and “are willing to
act conscientiously in overseeing the affairs of corporations they manage.”

If application of the Disney standard has the trust-building result predicted
by Duggin & Goldman, shareholders will benefit because it eliminates the need to
expend resources monitoring corporations. The standard also avoids the problem of
perverse incentives because it does not create a rigid framework of “do this, do that”
that is a common complaint about Sarbanes-Oxley and other measures adopted in
the wake of Enron et. al. Instead, it calls those subject to the standard to do their
duty. This results in a flexibility which allows directors, executives, and
shareholders to take into account evolving business and social ethics, and thus
requires that directors and other managers keep abreast of such ethics. In short,
with company managers acting in a trustworthy fashion more often, shareholders
are free to devote themselves to finding new investments instead of guarding old
ones.

E. Why Trust May Work for Directors . . . and Managers

This approach is not merely beneficial for shareholders. It could serve to
address concerns of boards of directors as well. As Jill E. Fisch and others have
noted, under the current scheme of corporate governance, a board has two
contradictory functions. As Fisch notes, boards must both monitor and manage.

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133 See id. at 272.
134 Id. at 268.
135 Id at 272.
136 Id. at 270.
137 See Fisch, Taking Boards Seriously, supra note 78, at 268.
This means that a board is required to look out for shareholder interests; however, it simultaneously functions as part of management in a corporation’s business affairs—advising the CEO and other officers, engaging in strategic planning, and reviewing significant transactions—to further the money-making goals that are a corporation’s raison d’être. The qualities that make good monitors—independence, no other business connections, and the ability to make decisions free of company managers’ input—are not necessarily the same qualities that make good managers—namely, teamwork, experience, and long-term intra-firm business relationships.

Application of the concepts discussed by Blair and Stout and Duggins and Goldman, may serve to bridge these two functions. If a board is not having to constantly be wary of activist shareholders, it can better carry out the managerial aspects of its duties. Furthermore, if the rigid, formal requirements of monitoring do not need to be adhered to, the monitoring aspect will be enhanced because it would be done by people who understand the management of the corporation.

Professor Fisch has noted that with the passage of Sabanes-Oxley and other additions to regulations by both the federal government and self regulating organizations (i.e. the New York Stock Exchange and the National Association of Securities Dealers), requiring significant independence of board members has probably positions boards as primarily having a monitoring function. See Fisch, Federal Regulation, supra note 83 at 42-43. Obviously, no such similar event has occurred regarding Congress, therefore Professor Fisch’s observations can still be validly applied.

138 Id. at 272.
139 See id. at 268-72.
140 Fisch, Federal Regulation, supra note 83, at 43; see Fisch, Taking Boards Seriously, supra note 78, at 272-75.
141 See Blair & Stout, supra note 90, at 1757-58; see also Fisch, Taking Boards Seriously, supra note 78, at 281.

As an aside, trust may also well serve to address a common concern of CEOs and other corporate officers, namely that a board which views itself primarily as a monitor is likely to fire the CEO during a period of diminished returns just to satisfy investors. Fisch, Taking Boards
What trust ultimately provides is the freedom to take the long view in corporate affairs. If shareholders trust that directors are not going to waste their investments, they will not focus on quarterly earnings to the same degree. If directors trust that a bad quarter will not lead to summary dismissal, they are more likely to make long term investments that may not immediately see reward. Furthermore, trust affords directors more time to plan and execute long-term strategies, thereby increasing their likelihood of success.

IV. Applying Corporate Governance to Legislative Oversight

A. Congress and the President

This article now turns to a discussion in further detail on the parallels between the functions of boards of directors and of the U.S. Congress and how the concept of trust in corporate governance might be applied. Like boards of directors, Congress has both managing and monitoring functions. Congress manages in the sense that it has the power to make law and the experience in government (often far greater than the term-limited executive) to advise the executive. It also has a responsibility to monitor the executive to ensure that mutually agreed-upon policies for the country are carried out effectively and efficiently. While it is the monitoring function under the spotlight for this article, the managing function cannot be forgotten.

For those concerned about bad actors, the need for monitoring is self-evident. However, for those who are concerned about the problems that arise from over-regulation, perverse incentives, and other unanticipated (and possibly unintended)

Seriously, supra note 78, at 281. Trust remembers, as it were, that corporations are entrepreneurial enterprises and sometimes a risk results in failure.
consequences that may arise, it can be argued that Congress’ power to investigate provides the means to expose such problems as they develop. In other words, public scrutiny through congressional investigation blunts bad results.

For the President, congressional investigation is fraught with risk. It has often been used to thwart executive policies by a Congress in the hands of the opposing party. The actions of the CCW clearly demonstrates that committees can operate counter to agreed-upon policy goals (like winning wars). Yet committee oversight can further such goals as well, as evidenced by the conduct of the Truman Committee. So, how can Congress and the President agree to oversight that avoids abuse but does not restrict scrutiny?

The solution is trust. As discussed earlier, the CCW failed because everyone involved with it was looking out for his own interests, everyone else knew it, and all sides acted accordingly. Conversely, the basis for the Truman Committee’s success lay in the respect that it showed others. As a result, even those who disagreed with the committee viewed it as trustworthy and cooperated with it.

It should be possible to generate trust between Congress and the President in oversight matters. First, the federal courts have provided ample legal basis for the legitimacy of Congress to engage in oversight as well as instructions on how those subject to such investigations should respond.

Second, as discussed in Blair and Stout and as evidenced by the Truman Committee’s success, trust is vital. If committees are used to further individual or partisan interests, they will fail as a tool of governance. Both the trust experiments discussed in Blair and Stout and the actions of the Truman Committee demonstrate
that people engaged in long-term and/or recurring relationships are more likely to act in a trustworthy fashion. In addition to the value of long-term planning in and of itself, this approach allows participants in civil government to maintain relationships beyond the next election cycle. These suggestions will not create immediate results. However, they are necessary groundwork for the legislative and executive branches to act in a trustworthy fashion and in turn trust the other.

The benefits to trust in civil governance exist regardless of whether the legislative and executive branches are divided by party or in the hands of the same party. For Congress, trustworthy executive cooperation ensures that legislative policies are carried out effectively and allows for a working relationship with the executive branch to develop future policies. For the President, trustworthy congressional oversight provides additional safeguards against bad or improper execution of policies. A trusting relationship does not need to mean one branch must defer to the other, but rather that policy debates are honest. The “for me or against me, take-no-prisoners” approach that typified the CCW guarantees a dysfunctional government and reduces political contests merely a matter of finger-pointing, not policy debates. But acting in a trustworthy fashion elevates political debate because it allows for the (perhaps shocking) notion that the ultimate purpose of government is the well-being of the nation.

142 There is the situation of having people in government who do not believe the government should be performing a particular function. I would say that people who will act to keep government from properly functioning as a means to limit government action are acting in a deceptive manner. If they do not believe in the function, they should act to abolish it, not simply keep it from operating.
B. The Third Branch

The federal judiciary also has a role in promoting trust between Congress and the President. As argued in the introduction, the executive has enormous resources at its command to both carry out policies and avoid scrutiny. The federal courts should redress this advantage and restore some balance between the other co-equal branches by 1) refusing to recognize that senior executive officials, or even the President, has absolute immunity based on executive privilege in regards to congressional investigations; and 2) continuing to review and demand action by executive agencies when appropriate.

The reasoning behind this proposal is two-fold. First, it would serve notice that, even with legitimate executive privilege claims, senior executive officials (up to and including the President) cannot escape some degree of oversight by Congress. Such was the position taken by the District of Columbia District Court in Committee on the Judiciary v. Miers et. al.\textsuperscript{143} Relying on United States v. Nixon, the court noted that executive privilege is not immunity from compulsory processes, but “a presumptive privilege that can be overcome by the requisite demonstration of need.”\textsuperscript{144} The court went on to say that “Presidential autonomy, such as it is, cannot mean that the Executive’s actions are totally insulated from scrutiny by Congress. That would eviscerate Congress’ historic oversight function.”\textsuperscript{145} Even if the

\textsuperscript{143} 558 F. Supp. 2d 53 (D.C.C. 2008). President George W. Bush refused to let his senior aides testify before Congress regarding the dismissal of 8 U.S. Attorneys. He asserted that his senior aids have absolute immunity from giving compelled Congressional testimony based on executive privilege.

\textsuperscript{144} Id. at 102 (citing United States v. Nixon, 418 U.S. 683, 707-08 (1974)).

\textsuperscript{145} Miers, 558 F. Supp. 2d at 103.
privilege is found to be legitimately invoked, the reasons must be stated to Congress.146

The second action would remind the President that the federal courts also serve as a source of executive oversight. This was precisely the holding of Massachusetts v. Environmental Protection Agency.147 There, the Environmental Protection Agency ("EPA") was found by the Supreme Court to have failed to carry out its statutory duties and ordered to do so.148 This is not to say that the courts can replace Congress as the overseers of the executive, but to point out that the executive’s actions cannot escape scrutiny by the other co-equal branches of government.

Such action by the courts would bolster the oversight role of Congress. First, it would create legal doctrine in addition to those discussed in Section II.A, in support of congressional oversight. Second, and equally important, the courts would legitimize oversight beyond the merely legal. Congressional oversight involves politically powerful actors, so the law of congressional oversight, just as the law of fiduciary duties, would ultimately function not so much through fear of sanction, but through the internalization of the norms of behavior espoused by the courts.149 As noted by Blair and Stout, court decisions function as "judicial sermons

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146 Id. at 106.
148 Id. at 1463.
149 See id.
on the proper motives and conduct that filter down to directors, officers, and shareholders. . . ." 150 The same would apply here.

Faced with the choice of oversight by Congress or the courts, the executive branch would do well to choose the legislative branch. It is far better to negotiate with the other federal branch also subject to the will of the people than to rely on the whims of politically immune judges. Having made the choice, the executive branch must then act in a trustworthy fashion, for efficiency’s if not propriety’s sake. Granted, Congress would have to reciprocate, but actions begat like actions. 151

V. Conclusion

Civil governance and corporate governance scholars agree, at the very least, that no perfect system of governance can be created by means of organizational structures and strict rules. Our current federal system was designed by the Founders to 1) prevent dominance by the legislature and to 2) prevent the rise of political parties. Their success in achieving the first goal has resulted in giving the executive a dominant role in government, arguably an equally undesirable result. 152 Their failure in achieving the second goal has led to exactly the kind of factionalism that Washington warned about in 1796. 153

Change of some sort would be welcome. Congress and the Executive are consistently named as two of the least-liked institutions in the United States. The

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150 Blair & Stout, supra note 90, at 1796, See Hill & McDonnell, supra note 123, at 855.
151 Blair & Stout, supra note 90, at 1774-76
152 See The Federalist No. 48 at 333-34 (James Madison) (Jacob Cooke ed., 1961), supra note 1 and related text.
153 Washington, supra note 2 and related text.
collapse of major investment banks has been exacerbated in part by the 107th, 108th, and 109th Republican Congresses’ failure to exercise oversight to ensure that the Republican President’s actions would accomplish policy goals that both branches presumably held in common.\textsuperscript{154} While trust/trustworthiness as discussed by Blair and Stout and Duggin and Goldman may not provide all of the answers, it would at least provide tools to improve civil governance, prevent systemic failure and perhaps even increase public confidence in its elected officials.

Monks, these two extremes should not be followed by one who has gone forth as a wanderer. Which two? They are the pursuit of sense pleasures, vulgar practice of villagers, ignoble practice, unprofitable; and the pursuit of self-mortification, which is painful, ignoble, and unprofitable. By avoiding these two extremes, the \textit{Tath gata} (The Buddha) has awakened to the middle path which gives rise to insight, which gives rise to knowledge, which leads to calm direct knowledge, to enlightenment, to nibb na (nirvana).

\textit{From the Saccamyuttasutta}\textsuperscript{155}

\textsuperscript{154} This is not to say the collapse of the financial markets was completely a Republican matter. President Clinton did support and sign the legislation that repealed the Glass-Stigell Act, which allowed Investment Banks to become involved in the real estate market. However, the collapse did happen after a period where the Republican party had held the Congress for over a decade and the White House for eight.

\textsuperscript{155} Carl Olson, ed. Original Buddhist Sources, 47 (2005).