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Nicholas W. Archibald

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Nicholas W. Archibald

I. Introduction

In creating the U.S. Constitution, Federalists were weary of a government's ability to rule tyrannically over its people, and so decided to turn the government against itself because "[a]mbition must be made to counteract ambition."[1] Publius further argued "the great security against a gradual concentration of the several powers in the same department[] consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[2] Conflict within the government would ensure that energy that could be expended oppressing the people would be focused on maintaining power vis-à-vis the various branches.[3] Congress too was originally structured with some conflict

[1] THE FEDERALIST NO. 51 (James Madison), https://avalon.law.yale.edu/18th_century/fed51.asp.

[2] *Id*. Publius was the pen name James Madison, Alexander Hamilton, and John Jay used when authoring the Federalist Papers advocating for the new U.S. Constitution. John Kincaid, *Publius: Journal of Federalism*, LAFAYETTE COLL., https://meynercenter.lafayette.edu/publius-journal/ (last visited Dec. 21, 2020).

[3] THE FEDERALIST NO. 51, *supra* note 1 ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.)

and slowness in mind.[4] The Federalists proposed structuring Congress specifically to be deliberative, knowing "impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn."[5] This article does not question the efficacy of the Federalists' arguments for separation of powers and cautioning against haste in decision-making, but rather questions if this sound counsel is working in the American peoples' best interests. Specifically, has the legislature reached a point where it can no longer cooperate with the President? Furthermore, has partisan rancor unreasonably paralyzed the legislature itself?

This paper answers in the affirmative. Congressional inaction undoubtedly comes with substantial costs to our republic.[6] The issue is hardly new.[7] While these

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[4] THE FEDERALIST NO. 73 (Alexander Hamilton), https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493465.

[5] *Id.*; *see also* Jeff Jacoby, *Gridlock, or Democracy as Intended?*, BOSTON GLOBE (Dec. 25, 2011, 9:43 PM), https://www.bostonglobe.com/opinion/2011/12/25/gridlock-democracy-intended/EJlqriPsRHqeW9wxlAhtMK/story.html (arguing the gridlock seen in modern-day politics is still working as the Framers of the Constitution intended); Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2110 (2013) (arguing for a more nuanced view of gridlock and that "both protestations about gridlock and the praise for it are overdone."). While this article does not intend to attack legislative gridlock or debate its merits, it still must be recognized, as Gerhardt writes, that "the purpose of the Constitution is not merely to allow gridlock." Gerhardt, *supra*, at 2108.

[6] *See* Jacob Pramuk, *Coronavirus Stimulus Stalemate Could Drag on for Weeks as Congress Leaves Town*, CNBC, https://www.cnbc.com/2020/08/13/coronavirus-stimulus-updates-pelosi-says-no-talks-scheduled-with-white-house.html (last updated Aug. 14, 2020, 10:05 AM) (illuminating the hardships many Americans faced due to Congress' inability to reach a deal on a COVID-19 relief package); *see also, e.g.*, Shelley Ross Saxer, *Paying for Disasters*, 68 U. KAN. L. REV 413 (2020) (discussing the costs of natural disasters as a result of government inaction and proposing holding the government liable in tort to motivate future preventative measures).

[7] *See* Evan Thomas, *The Government Response to Katrina: A Disaster Within a Disaster*, NEWSWEEK (Sept. 18, 2005, 8:00 PM EDT), https://www.newsweek.com/government-response-katrina-disaster-within-disaster-118257 (highlighting the lack of coordination and long process ahead

costs (such as presidential administrations' inability to appoint agency officials) are not always visible to the average American, citizens may nonetheless feel the effects thereof.[8] A more visible symptom of Congress' dysfunction in the way of appointments is the rising controversy surrounding nominations to the Supreme Court.[9] Federal

in terms of investigations as well as describing the government's failure to act in a unitary fashion); Camilo Montoya-Galvez, *Disaster Aid Package Derailed by Lone Republican Lawmaker—Again*, CBS NEWS (May 28, 2019, 1:33 PM), https://www.cbsnews.com/news/disaster-relief-bill-house-will-try-again-to-pass-aid-package-derailed-by-lone-republican-congressman/ (illustrating Representative Chip Roy's opposition to a Puerto Rico relief bill due to a lack of a roll call vote and border security funding, which contributed to paralyzing Congress' ability to provide relief for the U.S. territory). The problem can be traced as far back as the nineteenth century. *See* William P. Marshall, *The Limits on Congress's Power to Do Nothing: A Preliminary Inquiry*, 93 IND. L.J. 159, 168 n.59 (2018).

[8] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 920 (2009) ("[V]acancies promote agency inaction. Agencies without confirmed officials in key roles will be less likely to address important problems and less equipped to handle crises."). With the increasing procedural delays in confirming nominees, it is likely that the consequences O'Connell wrote about in her article have and will continue to come to pass with greater force. *See* Burgess Everett & Marianne Levine, *The Senate's Record-Breaking Gridlock Under Trump*, POLITICO (June 8, 2020, 4:30 AM EDT), https://www.politico.com/news/2020/06/08/senate-record-breaking-gridlocktrump-303811; Clay Risen, *Why Are So Many Government Positions Still Vacant?*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/08/31/us/politics/biden-cabinet-appointments.html.

[9] Chris Jones, *Supreme Court Confirmations & Partisanship*, MEDIUM (July 9, 2018), https://medium.com/@swedishjones/supreme-court-confirmations-partianship-a23cb4ec111b (presenting statistics of "for" and "against" votes for presidential nominations of justices from Presidents Harry Truman to Donald Trump that highlight a trend of increasing contention over nominees). In highlighting the increasing partisanship of the process, Jones observed with now-Justice Brett Kavanaugh "[i]f credentials alone mattered, Kavanaugh would fly through the Senate." *Id.* Partisanship may also have affected the nomination process for now-Justice Amy Coney Barrett. *See* Bruce Peabody, *How the Supreme Court Can Maintain Its Legitimacy Amid Intensifying Partisanship*, THE CONVERSATION (Oct. 20, 2020, 8:20 AM EDT), https://theconversation.com/how-the-supreme-court-can-maintain-its-legitimacy-amid-intensifying-partisanship-148126. Marshall discusses part of the source of the controversy and yet another example of President Barack

inaction has also not gone unnoticed. For example, state governments acted just last year to handle the pressing matter of drug pricing; their worries about "political divisiveness, a packed congressional schedule, and a looming election year" not bringing the needed relief in time are readily apparent.[10]

What is to be done to address the increasing reality of paralyzing, partisan rancor in our legislature? Professor William Marshall proposed that congressional inaction threatening "the ability of the government to function" should be "subject to constitutional scrutiny."[11] While it is noble to invoke the Constitution to strive for "turning members away from the mindset of separation of parties that currently dominates political culture," Marshall concedes "[i]t is difficult to discern an obligation for Congress to act from the existing jurisprudence."[12]

This article is a response to Marshall's proposal and offers a potential solution based on alternative dispute resolution rather than the courts. When faced with seemingly insurmountable differences, Congress must look to alternative dispute resolution to reach a breakthrough on critical issues. This paper proposes the creation of a Mediation Office to assist Congress in coming to these breakthroughs. This mechanism could also possibly

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Obama's nominee, then-Judge Merrick Garland. *See* Marshall, *supra* note 7, at 170.

[10] Steven Findlay, *Not waiting for Congress, states pass laws to lower drug costs*, ABC News (September 9, 2019, 8:31 AM), https://abcnews.go.com/Health/waiting-congress-states-pass-laws-lower-drug-costs/story?id=65483775. Thirty-three states at the time enacted laws to address affordability and access to prescription drugs, though concede "states can only go in addressing drug prices, and that federal legislation would be necessary to have a major impact . . . ." *Id.*

[11] Marshall, *supra* note 7, at 168, 174. Marshall advocates this treatment should only apply to situations such as appropriations and appointments to keep the government running. *Id*. Refusal to sign off on legislation due to opposing a president's policy for example should be left "constitutionally unobjectionable." *Id*.

[12] *Id.* at 171.

intervene when the issue is between Congress and the President.

Part II of this article will elucidate Marshall's argument and clearly define the issues that would trigger the Mediation Office to act. Part III will lay out the author's proposal for how the body would be created, how it would operate, and it will defend why Congress, rather than another branch of the government, is best suited to remedy the issue of legislative deadlock. Part IV will both justify the legality of the body and set forth the benefits that could come of it. Finally, part V will address some potential objections to the author's proposal and attempt to assuage some of these concerns. Part VI will conclude by reminding readers our government is not a watch to be wound and left to its own devices. As new challenges arise, our system should adapt to meet them. In this case, mediation may be the long-awaited solution to breaking the logjam.

II. Background

To begin, I will first lay out Marshall's position on which issues he believed should trigger scrutiny and his rationale. While I am mostly in agreement with Marshall's assessment, I would add an additional category for national emergencies and thus disagree with his separation of functionality versus legislation distinctions as overly narrow.

Marshall determines whether Congress' decision to do nothing is problematic "based on the type of power that Congress is (or is not) exercising," taking issue when "the exercise of the power in question is necessary for the government to function."[13] Marshall mainly focuses on "appropriations or, in the case of the Senate, its failure to consider presidential appointments"[14] but "leave[s] for a

[13] *Id.* at 162. Like Marshall, I advocate for the issues that will trigger alternative dispute resolution ("ADR") to be determined categorically, rather than "how purportedly egregious the congressional behavior in question appears to be." *Id.* at 168.

[14] *Id.* at 168 n.59 (arguing failure to make appointments interferes with the President's ability to execute the laws under Article II of the Constitution).

later discussion whether other congressional powers . . . should or could trigger constitutional scrutiny when Congress fails to act."[15]

Outside of what he deems core functions of "maintain[ing] and preserv[ing] the government," Marshall asserts "the government can continue to operate in the absence of new legislation . . . while it may amount to bad policy or bad government . . . ."[16]

Marshall's observations of why a constitutional theory of accountability may be difficult to implement are persuasive. First, Article I of the U.S. Constitution issues relatively few commands to Congress.[17] Furthermore, besides defining the procedure to amend the Constitution, oaths of office, how to count electoral votes, requiring Congress to convene once a year, and determining if the President is unfit for duty, there are very few mandates for legislators.[18] Second, Marshall points out congressional inaction could merely be a sign of the legislature doing its job to check the President.[19] However, drawing the line between constitutional and unconstitutional obstruction is

[15] *Id.* at 168 (citing Josh Chaftez, *Congress's Constitution,* 160 U. PA. L. REV. 715, 725 (2012) (noting failure to pass appropriations leads to shut down of the entire government)). By appointments, Marshall seems to be concerned with the executive positions that deal with the running of the government. Marshall, *supra* note 7, at 168. For purposes of this article, I will not include the Supreme Court in this category unless the Court would be unable to function with the current number of justices.
[16] *Id.* at 169.
[17] *See* Marshall, *supra* note 7, at 164. *See generally* U.S. Const. art. I, §§ 2, cl. 5, 3, cl. 5, 5, cl.1 & 3, 9, cl.7, 8, cl. 12.
[18] *See* Marshall, *supra* note 7, at 164. *See generally* U.S. Const. arts. V, VI § 3, amend. XII, XX, XXV, §4.
[19] *Id.* at 164–65 (citing *Why Gridlock Matters*, *supra* note 5, at 2107). For a more nuanced discussion that attempts to differentiate valid from invalid congressional inaction, *see generally* Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217 (2013) (describing the issues raised by congressional deadlock and further distinguishing between inaction that works to check the executive and arbitrary inaction that should be viewed as impermissible).

difficult.[20] Finally, this difficulty is compounded when partisan motivations are added to the mix as well as the necessity for legislators to overcome their differences.[21]

Nonetheless, Marshall offers a number of arguments in defense of this framework — reduceable to four main themes.[22] First, Marshall's solution walks the line between making meaningful change and running into concerns about separation of powers.[23] For example, not allowing presidents to make appointments obstructs their Article II duties to faithfully execute the laws.[24] Second, Marshall proposes spurring Congress to action will work to reclaim power from the President by reducing the incentive to act unilaterally.[25] Third, Congress will be more incentivized to act if they can be criticized as failing constitutionally rather than generally because "[s]pecific critiques have bite."[26] Fourth, narrowly defining the duty to act would make sense from a jurisprudence standpoint by setting a standard that is "narrowly drawn and extraordinarily well justified" because the duty to act "is not easily supported by history, text, or structure."[27] Finally, Marshall asserts a constitutional duty to act would change

[20] Marshall, *supra* note 7, at 165.
[21] *Id.* at 166 (also highlighting the issue ambiguity will raise in terms of judicial enforcement).
[22] *Id.* at 168–71.
[23] *Id.* at 168–69.
[24] *Id.* at 169.
[25] *Id.* at 169–70; *see also* Robert Pear, Maggie Haberman, & Reed Abelson, *Trump to Scrap Critical Health Care Subsidies, Hitting Obamacare Again*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/us/politics/trump-obamacare-executive-order-health-insurance.html (noting the Senate's failure to reach the result Trump wanted prompted him in part to dismantle funding for Obamacare unilaterally via executive order). States as well may act on their own making establishing uniform federal policy more difficult to implement. *See* Findlay, *supra* note 10 and accompanying text.
[26] Marshall, *supra* note 7, at 170.
[27] *Id.* at 170–71.

political culture by uniting Congress in "common goals and common obligations."[28]

While I adopt Marshall's categories for purposes of this article as well as some of his reasons in support of his proposition, I would add a third category of national emergencies because "bad policy or bad government" in these events spell arguably more dire consequences for the nation.[29] For example, while the government continued to run without reaching a stimulus deal on COVID-19 relief, its failure to reach an agreement caused considerable damage.[30] Returning to the case of Puerto Rico, since Hurricane Maria struck in 2017, the federal government promised $50 billion dollars in aid—only $16.7 billion having made it to the island thus far.[31] In circumstances like the pandemic and those in Puerto Rico, the welfare of the people should amount to more than a mere policy difference.[32]

Ultimately, this paper proposes three categories which will trigger the congressional Mediation Office to act. The Mediation Office will step in when where the dispute

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[28] *Id.* at 171.
[29] *Id.* at 169.
[30] Neil Irwin, *The Pandemic Depression is Over. The Pandemic Recession has Just Begun*, N.Y. TIMES (Oct. 3, 2020), https://www.nytimes.com/2020/10/03/upshot/pandemic-economy-recession.html (predicting there will not be economic steadiness until 2023 or 2024 and millions of Americans will find difficulty getting another job when the economy reopens). Subsequently, Congress was able to pass a relief bill after months of struggle. *See* Deidre Walsh, *Congress Passes $900 Billion Coronavirus Relief Bill, Ending Months-Long Stalemate*, NPR (Dec. 21, 2020), https://www.npr.org/2020/12/21/948862052/house-passes-900-billion-coronavirus-relief-bill-ending-months-long-stalemate.
[31] Nicole Acevido, *Puerto Rico Sees More Pain and Little Progress Three Years After Hurricane Maria*, NBC NEWS (Sept. 20, 2020, 2:30 PM), https://www.nbcnews.com/news/latino/puerto-rico-sees-more-pain-little-progress-three-years-after-n1240513. Acevido notes that opposition by the President as well as a lag in federal agencies delivering the funding are major sources of why Puerto Rico is still struggling. *Id.* Congress made aid available in 2018, however the President obstructed it from carrying out the relief. *Id.*
[32] *See* Jones, *supra* note 9. *See also* U.S. CONST. art. I, § 8 ("Congress shall have Power to . . . provide for . . . [the] general Welfare of the United States").

involves appropriations to keep the government running; when an impasse is reached over presidential appointments; and when there is an impasse in times of natural emergencies. I will elaborate more on the issue of interpreting whether an issue falls into this category in the following section of this article.

III. Proposed Solution

In order to break gridlock when one of these issues arises, Congress should form a dedicated Mediation Office of outside, nonpartisan specialists to assist them in coming to a resolution.[33] The Mediation Office shall be an executive department with the head appointed by the President and confirmed by the Senate in usual fashion.[34] Congress would be advised to secure some independence for the Mediation Office by limiting the executive's ability to remove the head of the department for cause.[35] Given the already present difficulties created by extreme partisanship, any real or perceived threat of intervention by the Executive in the

[33] To avoid constitutional concerns, mediation is the best course of action since an outside body that has authority to bind the lawmakers would likely run afoul of the Constitution. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

[34] *See* U.S. CONST. art. II, § 2.

[35] For-cause provisions can be constitutionally valid if the limitation applies to an inferior officer and does not unduly impede the President's ability to oversee the executive branch. *See* Morrison v. Olson, 487 U.S. 654, 694–97 (1988). It would have to be established that first, like the independent counsel in *Olson*, the official would have "limited jurisdiction and tenure and lack[] policymaking and significant administrative authority." *Id.* at 692. Indeed, this official would—the Mediation Office only would have the power assigned to it by Congress to flag the key issues and provide support in brokering a compromise on those issues to aid in drafting a bill in a nonbinding manner that leaves Congress free to make the decisions themselves. Second, a for-cause provision does not leave a president with no means "to ensure the 'faithful' execution of the laws . . . the executive . . . retains ample authority to assure that the [official] is competently performing his or her statutory responsibilities." *Id*. at 692. Misconduct remains actionable, and thus, the Executive would retain the ability to ensure the Mediation Office is performing as it should.

process could likely threaten its workability.[36] Because Congress itself will draft the bill that brings the Mediation Office into existence, they can necessarily settle matters of budget, support staff, and procedures or constitutionally delegate those responsibilities. Necessarily, those chosen to mediate will have policy experience in whichever field the legislators require assistance. The system will work in three phases.

First, bills that are presented for debate will be reviewed by the office and flagged if they contain issues that fall into the three specified categories. While some may describe Marshall's line drawing as simplistic, his two categories of appropriations and appointments set clear boundaries of what qualifies and what does not.[37] The third category of national emergencies is more complex. Much scholarship focuses on emergencies in the context of those declared by the President to gain broad powers to act, which have been tempered "through statute, largely after the fact."[38] Necessarily, that definition will likely be massaged into the creating act through legislation and delegation as well. It is understandable that Congress will seek to narrowly define terms where discretion is due to avoid being constrained by this body. I will address these concerns later under Possible Objections in Part V of this article.

Second, the mediation mechanism will be triggered in three scenarios. In the best interests of allowing Congress

[36] *See* Marshall, *supra* note 7, at 167 ("At present, the pressures of polarization are so forceful that even members of Congress who might otherwise work across the aisle are deterred from doing so.").
[37] *Id.* at 169.
[38] Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. (2006) 213. *See generally* Marshall, *supra* note 7 for a detailed tracing of the evolution of the United States' definition of emergency powers and efforts to control those exercised by the Executive. Because national emergencies and their consequences enter a scholarly realm that is beyond the limited purpose of this article, I will have to be content with allowing Congress to fashion the parameters of the triggering emergencies themselves.

every opportunity to act of their own volition, these scenarios necessarily describe failures that can occur in the legislative process. In the first instance, failure of a bill with one or more key issues to pass a vote will trigger mediation.[39] The aim is to avoid situations where Senators or Representatives leave Capitol Hill without a compromise. Second, the Legislature would have the ability to invoke the mediation mechanism at any time. Finally, mediation would be triggered if a proposed bill with one or more key issues was scrapped in committee before seeing a floor vote.

Third, in the actual mediation phase, the mediation will act to both reduce the number of parties in the room (even the perceived power between the parties), providing guidance and support on resolving the issue.[40] Initially, to ease the bargaining process, only the heads of each party and the relevant committee leaders would be parties to the mediation. By only including those in charge of the matters, the key players can be insulated from group pressure.[41] The

[39] *See generally* L. Michael Hager, *Congress Needs a Mediation Tool to Dissolve Gridlock* (June 18, 2010), http://www.washingtonpost.com/wp-dyn/contenfarticle/2010/06/17/AR2010061704566.html; *see also* Sarah Gonski, *Easing Gridlock in the United States Congress through Mediation: Letting our Cities and Streets Teach Us Lessons on Getting Along*, A.B.A., 1, 2 (2013), http://www.americanbar.org/content/dam/aba/events/dispute_resolutiori/lawschool/boskey_essay_contest/2013/easing_gridlock_in_the_united_states_congress_through_medication_letting_our_cities_and_states_teach_us_lessons_on_getting_along.authcheckdam.pdf.

[40] *See generally* Hager, *supra* note 39.

[41] Vice News, *15 Departing Congress Members Tell the Newbies What to Expect*, YOUTUBE (Jan. 14, 2019), https://youtu.be/3gQbt0h5UQk. The importance of this point is underscored by interviews of departing Congress members conducted by Alexandra Pelosi. *See id*. Paul Ryan describes the House of Representatives as a game of rugby where the entire team (voting together) is needed to move the ball. *Id*. In a more humorous instance, one member describes his experience getting "rolled" by former Speaker John Boehner, being cornered in a bathroom, and cajoled to vote with the party. *Id*. Noting that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills," in cases of appropriations the leaders of the House of Representatives may also need to be involved in the mediation process to satisfy

method for choosing the mediators is part of balancing the power in the room. Each party would be allowed to choose one mediator, and the chosen mediators would choose a third to act as the chair.[42] However, as written by Pamela Esterman et al. for the New York State Bar Association, "parties have the opportunity to design their own unique approach and structure for each mediation."[43] The ultimate goal of each triggered mediation would be to draft a compromise bill of only the key issues the parties could agree on to introduce and pass through the normal constitutional process.[44] This article does not contemplate the imposition of any time constraints. While an expedient resolution may be the most beneficial, some issues may be more complex than others and thus demand more time to resolve. The passage of the bill through both chambers would allow the parties to break through the partisan rancor

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the demands of the Constitution if drafting a new appropriations bill. U.S. CONST. art. I, § 7.

[42] AM. ARB. ASS'N, A GUIDE TO COMMERCIAL MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE 20 (2013), https://www.adr.org/sites/default/files/document_repository/A%20Guide%20to%20Commercial.pdf. The process would largely model the AAA's methods for choosing arbitrators in the party arbitration panel context. Even if each party to the negotiation chose a mediator arguably partial to their arguments, the two mediators could compromise in their selection of a chair to preserve neutrality.

[43] PAMELA ESTERMAN, MICHAEL KENNEALLY, JR. & HOWARD PROTTER, THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION FOR RESOLVING MUNICIPAL DISPUTES 2 (2011), https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Dispute%20Resolution%20PDFs/Municipalwhitepaper12-21-2010.pdf. Naturally, as each dispute would be different, the relevant members of Congress would be given liberal authority to structure the mediation along with their mediators to be most productive under the circumstances.

[44] The bill must still pass through both the House of Representatives and Senate before being signed into law by the President. U.S. CONST. art. I, §7. Though it may be prudent to preserve the compromise, it will be up to the judgment of House and Senate leadership whether to limit debate on the compromise to expedite its passing or protect it from unfriendly amendments.

as well as benefit their constituents, assuming the President is on board with the compromise bill.[45]

Because the mediation is nonbinding, the possibility the parties will walk away without reaching a compromise remains.[46] This proposal does not suggest a remedy beyond this point. Perhaps public censure will serve to punish the members for failure to reach a compromise.[47] This is discussed further in a later section of this article.[48]

To implement this system into the workings of the legislative bodies, both the House of Representatives and the Senate will likely need to amend their own rules of procedure.[49] The process for the Senate appears to be more straightforward.[50]

According to Rule V, the Senate has two options to apply the mediation procedures—either by suspending or amending the rules.[51] Either option requires one day's notice in writing before the motion is considered or can be

[45] Even if the President vetoes the compromise, both houses of Congress can vote to override the veto if the bill gains two thirds of the vote. U.S. CONST. art. I, § 7. While admittedly wishful thinking, perhaps Congress will be more likely to use this power to protect their compromise from an unreasonable president. *See* Marshall, *supra* note 7, at 167 (noting, ironically, legislative gridlock promotes the expansion of presidential power by encouraging the President to act unilaterally, thus spurring Congress to be more active may curb presidential power and spur the legislature to continue to do so in defense of their powers); *see also supra* note 2 and accompanying text.

[46] *See* AM. ARB. ASS'N, A GUIDE TO COMMERCIAL MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE, *supra* note 42.

[47] *See supra* note 25 and accompanying text. However, the censure that would come from failure of the proposed system would arise mainly from constituent dissatisfaction.

[48] *See infra* Part IV.B.

[49] *See* CLERK H.R., 116TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, (2019), [hereinafter HOUSE RULES] https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf; COMM. ON RULES & ADMIN., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 113-1, at 5 (2014) [hereinafter SENATE RULES].

[50] SENATE RULES, *supra* note 49, at 5.

[51] *Id.*

accomplished without notice by "unanimous consent of the Senate."[52] In consideration of practicality, creating a new rule to codify how the procedure will be implemented on one occasion eliminates the possibility of unnecessary barriers. If a suspension of the rules were sought on each occasion mediation would be triggered, it would be all too easy to thwart its implementation if unanimous consent could not be achieved or a motion could be defeated at every turn. Further, in the context of appropriations bills, the amendment process would also create further hurdles compared to the creation of a new rule.[53] The Senate may not receive amendments "to any general appropriation bill, the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation . . . ."[54]

The House of Representatives' rules do not contain an equally straightforward procedure.[55] The bill that brings this mechanism to life will likely require the House Rules' changes to be within the text.[56] The House Rules in their current state further support the need to create a new rule to prevent further gridlock.[57]

Whether the Mediation Office could be automatically triggered when the deadlock is between Congress and the President is an entirely different question

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[52] *Id.*
[53] *See id.* at 14–16.
[54] *Id.* at 14. While these types of amendments can be accomplished with the aid of committees having jurisdiction, if the Legislature is already gridlocked to the point of triggering the mechanism, how much could be accomplished by the amendment process may be questionable. *Id.*
[55] *See id*. (noting the lack of a similar rule dedicated to suspension of the rules or amendments contained in SENATE RULES, *supra* note 49, at 5).
[56] *See* HOUSE RULES, *supra* note 49, at 6, 8 (the legislation must be referred to standing committees that have legislative jurisdiction over them, in this case the Rules Committee since implementing the mediation system would not appear to implicate the Official Code of Conduct and likely the order of business in the House).
[57] *Id.* at 37 (limiting the House's ability to agree on Senate Amendments involving appropriations under Rule 12).

of separation of powers. The question is worth asking because the President's signature is needed to make a bill a law.[58] Even if a compromise was reached with the assistance of the Mediation Office, an unwilling president can derail the fruits of compromise with a veto.[59] Because this article focuses on Congress, whether the Executive can be bound by Congress to mediate is a question to be answered at a different time. However, mediation extending beyond Congress to the Executive is unlikely for three reasons. First, the Constitution arguably provides a mechanism for Congress to defend their compromise by overriding the veto.[60] While mustering a supermajority of both houses of Congress is a difficult task, it may be more achievable when the legislature is more united behind a bill.[61] If the President has already vetoed the bill, they are likely beyond discussion or compromise.[62] Second, the President is largely involved in the legislative process and would likely make their voice heard to the Legislature.[63] Because legislating is not a closed system, the President's thoughts will more likely than not be taken into account in drafting, arguing, and attempting to compromise on legislation.[64] Finally, because the Mediation Office would form a new executive department, the mediator's neutrality

[58] U.S. CONST. art 1, §7.
[59] *Id.*
[60] *Id.*
[61] *See supra* note 45 and accompanying text.
[62] *Cf.* Marshall, *supra* note 7, at 165 ("A President focused on making government work will be motivated to take actions that circumvent congressional blockage.").
[63] *See* Lisa Mascaro & Jill Colvin, *House Approves Trump's $2K Checks, Sending to GOP-led Senate*, ASSOC. PRESS (Dec. 28, 2020), https://apnews.com/article/donald-trump-florida-coronavirus-pandemic-financial-markets-bills-f750c127c0d39a62a86ca39ef11ae7db (showing President Trump's sizeable impact on current events surrounding COVID-19 relief as well as the override showdown over the defense bill that bolsters this paper's theory that Congress can band together to defend its compromises).
[64] *See* Marshall, *supra* note 7, at 169 ("Presidents have increasingly taken on the role as 'legislator-in-chief'. . . .").

may be questioned since they are ultimately employed by one of the parties.[65] Congress would likely avoid entering into a bargaining setting at a disadvantage.[66] Ultimately, while mediation may be beneficial between the President and Congress, such discussions seem unlikely.[67]

In all, creating new rules to accommodate the mediation system would seem to provide the most expedient solution to implementing mediation. This method meets the twin goals of reducing complexity and minimizing opportunities for procedural haggling.

Before justifying the body (both legally and in terms of potential benefits), I will defend why Congress must be the government branch to implement this solution to legislative gridlock. First, courts are precluded from issuing advisory opinions and lack a solid jurisprudential foundation to act; second, the Executive lacks independent legislative authority and would provide no benefit to a divided government.[68]

Article III of the Constitution provides limitations on the courts.[69] According to Professor Alexander Bickel, the courts "may make no pronouncements in the large and abstract, . . . and may give no opinions, even in a concrete case, which are advisory because they are not finally decisive . . . ."[70] According to Westling, this ban on issuing

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[65] *See infra* note 80 and accompanying text.
[66] *See* Marshall, *supra* note 7, at 160 (noting that Congress "should have the authority not to accede to executive branch direction.").
[67] *Cf.* ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 8–9 (noting that many disputes involving public officers "often become political," and "these officials will likely have to continue working with one another . . . [so] resolving these disputes through a non-adversarial mediation process will help preserve the working relationship needed between these officials.").
[68] *See* U.S. CONST. art II, § 2. While the President does possess significant power, many actions require the advice and consent of the Senate. *Id.* Additionally, the Constitution does not grant the President any unitary legislative power. *Id.* at §§ 1–4.
[69] *See id*. at § 2.
[70] Richard W. Westling, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379, 392

advisory opinions arises in part due to separation of powers.[71] Without a case or adverse parties, there would be no case "arising under [the] Constitution, the laws of the United States, and treaties made . . . ." and the question of whether Congress should act would only be hypothetical.[72] The Court cannot weigh in "on questions that are 'abstract, hypothetical or contingent.'" [73] Thus, without a constitutional or statutory system in place compelling action, there is little the Court can do to address the gridlock problem.[74] Second, as Marshall already noted, the courts have neither constitutional mandates nor a strong jurisprudential background for demanding action.[75]

The executive branch is also an unlikely place to find a solution. First, the President lacks independent legislative power.[76] Continuing to read Article II, Section Three of the Constitution, the President also has the power to convene Congress "on extraordinary occasions," perhaps begging the question of why, in times of crises, the President does not simply call the Legislature back and advise them to settle their disagreements.[77] The Framers "understood that the government must be able to meet exigent

(1988) (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS 114-15 (92d ed. 1986)).

[71] Westling, *supra* note 70, at 395 (recounting that Chief Justice John Jay declined to advise President Washington regarding treaties between the United States and France because "the lines of separation drawn by the Constitution between the three departments" and that the Supreme Court was "a court in the last resort").

[72] U.S. CONST. art. III, § 2; *see also* Westling, *supra* note 70, at 395.

[73] Westling, *supra* note 70, at 396 (quoting Alabama State Fed'n of Lab. v. McAdory, 325 U.S. 450, 461 (1945)).

[74] *See* Westling, *supra* note 70, at 395 (noting that "no article III case exists" when there is "[n]o lawsuit" and "no parties are adverse.").

[75] *See* Marshall, *supra* note 7, at 170–71.

[76] U.S. CONST. art. II, § 3 ("[H]e shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"). *See also supra* note 54.

[77] U.S. CONST. art. II, § 3.

circumstances."[78] This part of Article II was likely not used because it has rarely been invoked in our nation's history.[79] Another explanation could be that the President's power to convene Congress was rendered obsolete.[80] In sum, the lack of legislative power and limited administrative powers do not give the Executive an ability to compel congressional action on the three categories of issues.

Second, the presence of the Executive may serve to hamper more than help a divided Congress depending on how control of the houses and the presidency appear at the time. The party out of power may feel more threatened by the presence of the Executive, seeing any negotiation brokered by the Executive as a two-on-one scenario versus having the security of a neutral at the table.[81] I find it unlikely that the Executive who likely has a legislative agenda and is also a partisan official belonging to the same

[78] David F. Forte, *Convening of Congress*, *in* FOUNDATION, THE HERITAGE HERITAGE GUIDE TO THE CONSTITUTION 286 (David. F. Forte & Matthew Spalding, eds., 2d ed. 2014). Surely a crisis such as the plight of Americans facing COVID-19 might be considered exigent. This power was given with purposeful limitations, the example of the English monarchy suspending parliament at-will fresh in the Framers' minds. *Id.*

[79] *Id.* (noting the Framers envisioned the need would likely arise from foreign policy concerns such as war and other unexpected events but was only used twenty-seven times).

[80] *Id.* (noting the ratification of the Twentieth Amendment set a date for Congress to convene every year and the standard practice was for Congress to remain in session for twelve months); *see also* U.S. CONST. amend. XX.

[81] *See* Myron S. Greenberg & Megan A. Blazina, *What Mediators Need to Know About Class Actions: A Basic Primer*, 27 HAMLINE L. REV. 191, 212 (2004) (quoting JOHN W. COOLEY, MEDIATION ADVOCACY 9 (1st ed., 1996) ("Mediation has been defined as 'a process in which a disinterested third party (or neutral) assists the disputants . . .'"); ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 3 ("Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have had 'their day in court.'"). This is not to say the power dynamics in Congress will not enter the negotiations. However, a third-party neutral may aid in ensuring the discussion remains focused on the issues at hand rather than discussions that would break down compromise. A neutral would also be beneficial even when the minority party also has the presidency, as the majority party can feel secure if the president takes interest in the mediation on the side of their political adversaries.

party as one of those at the table would find much success in "reconcil[ing] the parties and their positions."[82]

Overall, Congress remains in the best position to solve their own problem of gridlock via mediation when the three categories of issues are triggered. The Court lacks constitutional authority to intervene without a present case or controversy.[83] Additionally, the Executive as an interested party may do more harm than good when attempting to help bridge the divide between the legislators.

IV. Justification

This section will accomplish two goals. First, I will defend the legality of creating the body while addressing nondelegation issues. Second, I will discuss the potential benefits of introducing mediation into Congress when deadlock occurs surrounding the key issues.

A. Legality

Because the body will not be making law per se like a regulatory agency such as the United States Environmental Protection Agency ("EPA"), the nondelegation doctrine may not necessarily apply. However, even if the issue is raised, the mediation body should pass constitutional muster.[84]

First, the nondelegation doctrine may not apply because the mediation department will not deliberate nor create laws or regulations on its own.[85] Esterman et al. notes that parties to mediation, in this case the rival camps of Congress, would "retain control and tailor their own solution" rather than handing the matter off to a third-party agency to make a decision on their behalf.[86] Facilitating and assisting

[82] Greenberg & Blazina, *supra* note 81, at 212.
[83] *See* U.S. CONST. art. III, §2.
[84] "[P]retty much every statute nonetheless survives non-delegation review. The non-delegation doctrine is notoriously lax-or should we say it's kind of fictitious?" Alexander Volokh, *Judicial Non-Delegation, the Inherent Powers Corollary and Federal Common Law*, 66 EMORY L.J. 1391, 1392 (2017).
[85] ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 2 (defining mediation as the engaging of a neutral third party to work with the parties in order to facilitate resolution of the dispute).
[86] *Id.*

in the part of the process of law-making is not likely an act of legislative authority.[87] Furthermore, any solution that comes out of the mediation process would still have to be voted on and signed into law through the normal process.[88] However, the Constitution's instructions are clear—legislative authority cannot be ignored. Although a delegation of power would be mainly procedural, it may be viewed nonetheless as legislative authority. If this is the case, then the Mediation Office must not run afoul of the non-delegation doctrine.

While the theoretical justifications for the non-delegation doctrine are "somewhat unclear," they begin with the separation of powers and the Vesting Clause.[89] Legislative authority is exclusively granted to Congress by the Vesting Clause in Article I of the U.S. Constitution.[90] This language is the source of the non-delegation doctrine's power.[91] Yet, despite the Constitution's deliberate language, Congress routinely delegates much of its regulatory and law-making powers to the administrative state.[92] While not

[87] *See supra* note 33 and accompanying text. Opponents will argue the automatic triggering of a procedure in Congress would be an exertion of authority over the members. However, if Congress enacts the process into law, they are exerting legislative authority over themselves rather than the office independently acting over Congress.

[88] *See supra* Part III (noting Congress is not being bypassed using the ADR mechanism). Furthermore, Congress may very well walk away from the mediation without reaching a solution, meaning they are not tightly bound to the Mediation Office's procedures.

[89] Nathan K. Noh, *Non-Delegation as Non-Deliberation*, 19 N.Y.U. J. LEGIS & PUB. POL'Y 379, 383 (2016).

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

[91] Volokh, *supra* note 84, at 1393.

[92] Noh, *supra* note 89, at 379. Noh finds the doctrine's laxness disturbing regarding the separation of powers, though not all share his bleak view. *Id. See also id.* at 382–83 (listing the more "pragmatic" justifications for delegating legislative authority). *See also* A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 442 (2017) (asserting the Supreme Court "whittled the non-delegation doctrine down to a nub because of practical concerns with implementing it" rather than

everyone shares the same enthusiasm for this practice, Volokh, Noh, and Kritikos agree that the doctrine is weak and does not present much of a challenge to new legislation.[93]

When delegating authority to an executive department, Congress must "always provide an 'intelligible principle' to guide the delegation" and "must make at least certain hard choices rather than entirely passing responsibility to someone else."[94] If this sounds like an easy standard to meet, it's because it is. The late Justice Scalia provided insight into the Court's reluctance to take a tougher look when he dissented in *Mistretta v. United States*, writing "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[95] Put more straightforwardly, the Court does not believe it can "draw a clear line delineating permissible from impermissible delegations."[96] Consequently, Congress has enjoyed the ability to delegate with very little specificity using wording such as "'unduly or unnecessarily complicate[d]' corporate structures and 'unfair[] or inequitabl[e]' . . . price controls, and the 'public interest.'"[97]

"repudiat[ing] the [non-delegation doctrine's] theoretical underpinnings . . . or . . . its importance in maintaining the separation of powers.").

[93] *See supra* note 84 and accompanying text; *see also* Kritikos, *supra* note 92, at 442 (describing the non-delegation doctrine as a toothless test and thus "unsurprisingly, no statutes fail that low bar, and it is a bar that the Court has lowered even further over time.").

[94] Volokh, *supra* note 84, at 1393; Noh, *supra* note 89, at 381 ("If the executive branch is to be able to engage in lawmaking at all, it may do so only when such power is properly delegated to it.").

[95] Kritikos, *supra* note 92, at 444 (quoting Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

[96] *Mistretta*, 488 U.S. at 415. *See also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("We have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'").

[97] Volokh, *supra* note 84, at 1393.

Another theory advocated by Law Professors Eric Posner and Adrian Vermuele attempting to explain non-delegation posits administrative agencies do not wield lawmaking power at all.[98] While lawmakers cannot delegate their ability to vote for legislation or wield their other constitutional grants of power such as oversight, they are able to statutorily grant the authority to promulgate rules and regulations to the executive branch.[99] In this sense, Congress is legislating by granting the authority to create rules and regulations to the executive branch, and the executive branch is merely executing the duly passed law.[100] The Constitution's Take Care Clause authorizes the execution of laws.[101] Thus, allowing administrative agencies to create rules pursuant to the law should not run afoul of the separation of powers.

Finally, Thomas Merrill posits the doctrine should not be thought of in terms of non-delegation but of exclusive delegation, arguing delegating authority is not per se unconstitutional.[102] The source of the confusion surrounding the non-delegation doctrine arises from tension between the non-delegation doctrine and the exclusive delegation doctrine.[103] According to Merrill, the two principles are not in conflict but rather work together.[104] In other words, Congress must clearly delegate rule making authority to the agency, and the agency is then bound by the grant of authority.[105] Merrill explains this theory through two principles. First, under his anti-inherency principle, both the Executive and Judiciary cannot act on their own

[98] Noh, *supra* note 89, at 384.
[99] Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).
[100] *Id.*
[101] Noh, *supra* note 89, at 384; *see* U.S. CONST. art. II, § 3.
[102] Noh, *supra* note 89, at 384–85.
[103] Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).
[104] *Id.* at 2100.
[105] Noh, *supra* note 88, at 385.

with the force of law but must trace their authority to act to existing law.[106] The second principle, the transferability principle, allows Congress "to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes."[107] Thus, while the "intelligible principle" test determines if Congress clearly authorized administrative law making without too much discretion (non-delegation), exclusive delegation is met when the agencies do not act outside the bounds of the power they were given.[108]

The Mediation Office should be able to pass review through all three formulations. First, the office would not be exercising unconstitutional levels of discretion where it lacks an "intelligible principle."[109] With clear instructions for their functions as well as clear rules for when and how the office will act, the Mediation Office has far more than "the public interest" to guide the delegation of their authority.[110] Second, Posner and Vermeule's formulation of the non-delegation doctrine also poses no challenge to the Mediation Office.[111] If the office's activities are not seen as an exercise of legislative power, but rather executive, neither Congress nor the executive branch violate the separation of powers.[112] Performing mediations as authorized would be taking care that the law is faithfully executed rather than creating law by helping to facilitate the process.[113] Finally,

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[106] Merrill, *supra* note 103, at 2101.
[107] *Id.*
[108] *Id.* at 2099, 2101.
[109] *See supra* note 94 and accompanying text; *see also supra* Part III.
[110] *See supra* Part III.
[111] *See generally* Posner & Vermeule, *supra* note 99.
[112] *See supra* note 94 and accompanying text.
[113] *See* Noh, *supra* note 89, at 383. However, I must concede; the question of whether mediating in the legislative process involves an impermissible delegation of "de jure legislative power" is not fully answered in this article. Posner & Vermeule, *supra* note 99, at 1723. While the office is safe

the office will pass review under the exclusive delegation doctrine. If Congress is not forbidden from delegating because they clearly delegated authority, the Constitution should not forbid the creation of the office or its work.[114] First, as explained above, the Mediation Office would have an intelligible principle and clear delegation of authority to provide mediation assistance.[115] While the executive branch could not act on its own, it would be constitutionally vested with authority within the proscribed limits through Merrill's transferability principle.[116] In all, so long as Congress creates the Mediation Office and vests it with authority through duly passed legislation, it should not run afoul of the Constitution.

B. Potential Benefits

After justifying the Mediation Office's legality, I will next highlight seven potential benefits of introducing mediation to Congress. Esterman et al. explicitly recognizes potential benefits exist in using ADR to resolve disputes between elected officials or bodies, which the Mediation Office is designed to do.[117] These benefits will be explained in more detail below. In all, the hope is to give our legislators the tools to come together and find "the persistence that is often necessary to help the parties reach a resolution" without sacrificing control.[118]

First, mediation provides an outside perspective without taking control out of lawmakers' hands. Unlike arbitration or more formal mechanisms of dispute resolution, the parties can design a mediation with the help of the

procedurally, issues may arise when formulating the exact duties and powers exercised by it.
[114] *See* Noh, *supra* note 89, at 384–85.
[115] *See supra* Part III.
[116] Merrill, *supra* note 103, at 2101.
[117] ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 8.
[118] *Id.* at 3.

mediator to best suit their needs.[119] Even with the parties remaining largely in control, mediators are able to assist in the decision making process.[120] Finally, mediators help both sides of the aisle feel heard and cut through the adversarial roadblocks.[121] With these roadblocks cleared, lengthy floor debates engaged in for the purpose of making objections heard could be minimized, more focused, or avoided.

Second, mediation can provide an organizational structure more conducive to solving the problem. According to Esterman et al., "an experienced mediator can . . . help identify and frame the relevant interests and issues of the parties, [and] . . . identify and assist in solving impediments to settlement."[122] Often times, legislation is multi-part and incredibly complex.[123] Different objections and issues can arise which can make setting an agenda a logistical nightmare.[124] Mediation presents an "opportunity to break down the facts and issues into smaller components, enabling

[119] *Id.* at 2. While arbitration also offers a more efficient system of dispute resolution, the finality of an arbitrator's decision raises issues as to whether Congress would be unlawfully giving away their de jure powers to vote on legislation. *Id.* at 6; Posner & Vermeule, *supra* note 99, at 1723.

[120] ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 3 ("An experienced mediator can serve as a sounding board, help . . . the parties test their case [and] . . . if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions . . . .").

[121] *Id.*

[122] *Id.*

[123] Walsh, *supra* note 30. For example, the recently passed COVID-19 stimulus bill was a colossal 5,593-page piece of legislation. *Id.* While this bill was an aberration (the average bill length was 15 pages for the 109th Congress), spending bills "frequently run more than 1,000 [pages]." Christopher Beam, *Paper Weight: The Health Care Bill is More Than 1,000 Pages. Is That a Lot?*, SLATE (Aug. 20, 2009), https://slate.com/news-and-politics/2009/08/is-1000-pages-long-for-a-piece-of-legislation.html.

[124] ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 3.

the parties to separate the matters that they agree upon and those that they do not yet agree upon."[125] Importantly, breaking down the issues is critical to avoid being bogged down in lengthy bills and creating stalemates that could last potentially for months caused by "partisan sniping" or the sheer enormity of the task.[126]

Third, one of Marshall's goals may yet be realized.[127] Bringing parties together through mediation may in fact start "turning members away from the mindset of separation of parties that currently dominates political culture."[128] Esterman et al. agrees and further posits mediation can save the crucial working relationships developed in political offices.[129] Especially in the Senate where terms of office are for six years, legislators will continue to need to work together and compromise multiple times.[130] When politics enter the dispute, solutions are more difficult to come by and the public can become more cynical and lose faith in their representatives.[131] Mediation will help the country by breaking the logjam and also personally benefit our representatives. Prolonged disputes can create high emotional tolls which can be diffused with the presence of a mediator to ensure less adversarial proceedings and help parties maintain a good relationship.[132] In situations where an ongoing relationship or a solution is reasonably expected,

[125] *Id.* ("[T]he mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues").
[126] Walsh, *supra* note 30; *see also* Jones, *supra* note 9 (highlighting through elected officials' tweets the pressure that comes with having to vote quickly on very large bills members barely have time to read).
[127] *See supra* note 11 and accompanying text.
[128] Marshall, *supra* note 7, at 171; *see also* VICE NEWS, *supra* note 41 (underscoring the deep divisive culture through the story of two friends who were both elected told not to eat lunch together due to partisan differences).
[129] ESTERMAN, KENNEALLY, JR., & PROTTER, *supra* note 43, at 7 (noting because government bodies and officials will have to continue to work together, preserving their relationships with ADR is in the best interests of the public).
[130] *Id.* at 9.
[131] *Id.*
[132] *Id.* at 3.

mediation can be quite helpful in protecting both the compromise and relationship.[133] Mediation may also make it easier to reduce the instances of division caused by hard feelings and make working together in the future less of a daunting prospect.[134]

Fourth, the Mediation Office may pressure and incentivize Congress to find solutions by increasing their accountability to constituents. Congress for the fourteenth consecutive year has ranked at the bottom of the list in terms of how much confidence Americans have in their institutions.[135] In fact, Gallup has recently found fewer than one in five Americans express confidence in their legislators.[136] The figure is startlingly low. An article by Melissa De Witte may explain partly why this is the case.[137] Relying on a study by Professor Jon Krosnick, De Witte posits Americans "believe elected officials are not paying enough attention to the general public."[138] Instead, while most Americans surveyed in the study felt the general public's opinions should be at the forefront of legislators' minds, only twenty-eight percent believe this is the case.[139] While mediation does not guarantee the influences of the elite will be put behind those of the people, engaging in the process may lessen the perception that legislators do not care

[133] Greenberg & Blazina, *supra* note 81, at 212–13. While the article focuses on ADR with respect to class actions, the party leadership can be thought of representing their class of lawmakers, interests, donors, etc.
[134] *Id.*
[135] Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (August 12, 2020), https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx
[136] *Id.*
[137] Melissa De Witte, *Americans' Low Opinion of Elected Officials Tied to Perceptions of Decision-Making, Stanford Researchers Find*, STAN. NEWS (Feb. 26, 2018), https://news.stanford.edu/2018/02/26/americans-dont-think-ear-elected-officials/.
[138] *Id.*
[139] *Id.* (noting seventy percent of Americans believe instead that elected officials pay the most attention to campaign donors and the economic elite).

about their constituents.[140] Krosnick asserts the way forward to increase confidence in Congress is greater transparency in explaining voting decisions to show the people they are being heard.[141] If legislators are obligated to mediate key issues as proposed, failure to reach a compromise is a fairly clear explanation partisanship got in the way. When a smaller group of the leadership deadlocks, even with the assistance of mediation, constituents should hold their elected officials accountable. Consequently, the pressure to not end up in this situation should encourage lawmakers to compromise without mediation, or if it is triggered, to ensure the mediation is fruitful. More positively, when the American people see compromise, the public approval will aid in reelection. While objectors will accurately point out this influence is not strong given reelection rates, this quandary will be dealt with in the next section of this article under potential objections.[142]

Fifth, while mediation does not guarantee a more efficient process, it may hasten an effective response to emergencies or important matters such as keeping the government funded and running. While national emergencies present unique challenges, avoidable hardships passed onto the American people by an obstinate legislature should be avoided at all costs.

Sixth, the benefits of compromising may entice lawmakers to continue to broker solutions. According to Greenburg and Blazina, the ability to communicate openly about the dispute and be a part of the resolution confers

[140] Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).
[141] *Id.*
[142] *See* Tom Murse, *Do Members of Congress Ever Lose Re-Election?*, THOUGHTCO. (Dec. 10, 2020), https://www.thoughtco.com/do-congressmen-ever-lose-re-election-3367511 (noting reelection rates remain quite high despite Congress's near perpetual unpopularity in the eyes of the American people).

psychological and emotional benefits upon the parties.[143] These benefits may also come in the form of being able to claim credit for helping to reach the compromise publicly, which may help their personal reelection bids as well as those of other lawmakers in their party.

Finally, Congress has supported ADR for federal agencies since the late 1980s and already recognizes its efficacy.[144] As early as 1986, The Administrative Conference of the United States ("ACUS") recommended federal agencies to more fully adopt ADR in order to tackle the backlog of disputes plaguing the agencies.[145] A year before the recommendation, the U.S. Attorney General issued an order to recognize ADR as a means of reducing the costs of civil lawsuits.[146] Consequently, Congress passed the Administrative Dispute Resolution Acts of 1990 and 1996 as well as the Alternative Dispute Resolution Act of 1988.[147] While focused on reducing the costs of litigation for the federal agencies, the central themes of reducing cost, increasing efficiency, and simplifying the process of resolution are equally applicable to Congress through the Mediation Office.

V. Potential Objections

No solution is without its faults. With a proposal for significant change, many objections are expected to arise. In this section, I will raise a few and attempt to assuage these concerns. Others not mentioned in this article will no doubt have to be ironed out with time and experience if the Mediation Office should come to light.

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[143] Greenberg & Blazina, *supra* note 81, at 212–13.
[144] *See* U.S. OFF. PERS. MGMT., ALTERNATE DISPUTE RESOLUTION HANDBOOK 1, https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf (last visited Jan. 21, 2021).
[145] ADMIN. CONF. U.S., AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1986), https://www.acus.gov/recommendation/agencies-use-alternative-means-dispute-resolution.
[146] *Id.* at 1.
[147] *Id.* Independent use of ADR began in the 1970s. *Id.*

The first objection is the well-reasoned balking at spending more taxpayer dollars. Our national deficit has already ballooned to over $28 trillion, amounting to about $86,025 per person if divided by our population.[148] The three largest contributors to the rising national debt are our aging population (who will incur more costs for their care but contribute less labor), the rising cost of healthcare, and insufficient tax revenue to enact the spending lawmakers put into effect.[149] Currently, the recession induced by the pandemic will likely generate more upward pressure on the deficit.[150] A proposal that would require more spending when the generated revenues cannot cover what is already being spent seems to be somewhat circular reasoning. I concede the point if the Mediation Office is created though ultimately unsuccessful in its endeavors. However, if we are to make a change as a nation, new solutions must be tried. An easy method of accomplishing this would be to include a sunset provision in the bill allowing it to die peacefully should it prove unfruitful.[151] While by no means a perfect solution and the potential for more political haggling, a predetermined end may ease the fears of skeptics.

Second, the sheer complexity of creating legislation may be beyond a Mediation Office. Like Greenberg and Blazina point out that mass tort litigation often brings high numbers of claims whose factors are interdependent, legislation too rests on numerous concerns, objections, and

[148] *What is the National Debt Today?*, PETER G. PETERSON FOUNDATION [hereinafter *Debt Clock*], https://www.pgpf.org/national-debt-clock (2021). If one visits the website, they will continue to see the number climb. *Id.*
[149] *Id.*
[150] *Id.* ("The coronavirus crisis has accelerated an already unsustainable fiscal trajectory, both because of its devastating effect on the economy and the necessary legislative response.").
[151] Stephen R. Latham, *Sunset Law*, ENCYC. BRITANNICA (Apr. 8, 2020), https://www.britannica.com/topic/sunset-law (outlining the provision's history of use as well as some tactical advantages to be gained by using a sunset provision).

influences that all affect one other.[152] Even with high complexity, a third-party neutral (in this case mediators) may be able to use their outside perspective to parse the underlying issues and break them down into more manageable ones.[153]

Third, lawmakers may not tolerate a constriction of their power in the legislative process to gain leverage or give back to their constituents. One such prominent mechanism is the dreaded pork barrel. Pork barreling is defined as legislators trading favors with constituents or special interest groups in exchange for political support.[154] For example, a legislator may vote to ease environmental restrictions in exchange for campaign contributions from an oil company. When the Mediation Office isolates the issues to be hammered out that will inhabit a compromise bill, several bargaining chips and interdependent issues that allow their use could be taken out of play. While morally this may not be a bad thing to see more honest legislative work being done, because Congress makes the rules it is bound by, they will not likely self-impose restrictions on the use of their tools of the trade.[155] However, were this restrictive force put into play, it may motivate members of Congress to reach solutions on their own without the help of mediation to avoid restrictions. Plenty of other broad bills that do not cover triggering categories will come before Congress, meaning their opportunities to pork barrel will not disappear, just be somewhat reduced. While some waste would be found in

[152] Greenberg & Blazina, *supra* note 81, at 211.
[153] *Id.*
[154] *What are Examples of Pork Barrel Politics in the United States?*, INVESTOPEDIA (July 15, 2021) [hereinafter INVESTOPEDIA], https://www.investopedia.com/ask/answers/042115/what-are-some-examples-pork-barrel-politics-united-states.asp (noting several examples of wasteful spending brought about by pork barrel politics).
[155] INVESTOPEDIA, *supra* note 154 (noting the peak of pork barrel politics wasting $30 billion on 14,000 pet projects). While Congress put a moratorium on earmarking in 2010 (setting aside money for a specific purpose), pork barreling still finds its way into politics. *Id.*

the bill, the American people can at least more confidently expect a functioning government. Finally, Congress may be too averse to any limitation of their power to pass the legislation creating the Mediation Office, or at least passing it with the ability to work. I must concede this point as the most likely to defeat the proposal. However, for Congress to take a step forward, they must themselves be willing to do so honestly.

Finally, there is a legitimate counterargument that Congress need not heed constituents as much as this paper may claim, given their "exceptionally high" reelection rate.[156] Murse points out that several factors (such as gerrymandering, name recognition, full campaign war chests, and the franking privilege) work to firmly entrench incumbents and ward off challengers.[157] The ability to use the pork barrel is another tool in an incumbent's belt to win constituent support for pet projects back home.[158] While a formidable objection, this paper's proposal should not be unduly deterred. As mentioned before, isolating the key issues should reduce the opportunities to use the pork barrel by focusing on those key issues at hand.[159] Additionally, today's pressures paint a similar picture to one of the few times incumbents have been ousted en masse. Come 1938 in the middle of the Great Depression, desperate and struggling Americans ousted eighty-one Democrats from office during President Franklin D. Roosevelt's midterm election.[160] Given the desperate times created by the pandemic, the stage may be set for a similar shakeup should

[156] Murse, *supra* note 142; *see* INVESTOPEDIA, *supra* note 154 for a table outlining the reelection rate of House members over the past several years showing reelection to be more likely than not.
[157] Murse, *supra* note 142.
[158] *Id.*
[159] *See supra* paragraph four of this section (Part V).
[160] Murse, *supra* note 142.

the situation not improve, meaning Congress may be more willing to heed their constituents.[161]

VI. Conclusion

When asked what the Founding Fathers had created in the Constitutional Convention, Benjamin Franklin was said to have replied, "[a] republic, if you can keep it."[162] Beeman rightfully gleans from Franklin's wisdom that our Constitution "is neither self-actuating nor a self-correcting document."[163] The disorder and deadlock we see today in our Congress give evidence that while one can assemble the collective wisdom of our representatives in the chambers of Congress, Franklin was right in warning one assembles also "their prejudices, their passions, their errors of opinion, their local interests, and their selfish views."[164] When Professor Marshall wrote his article calling for legal accountability for congressional inaction, he was doing just as Franklin prescribed, his part in keeping the republic.[165] While the Constitution is the guidepost that holds our government together, the government it created must change with the times—and it has.[166] Indeed, Congress is supposed to be a slower, deliberative body, but it too can become stronger and better.[167] Introducing mediation into Congress accomplishes this goal without compromising the body's slow, deliberative nature envisioned by the Framers.

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[161] *See supra* note 6 and accompanying text. While admittedly the situation has changed since the beginning of the pandemic, the fact that Americans are still struggling has not.

[162] Richard R. Beeman, *Perspectives on the Constitution: A Republic, if You Can Keep It*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it (last visited Oct. 11, 2021).

[163] *Id.*

[164] *Id.*

[165] Marshall, *supra* note 7, at 168.

[166] *See* Beeman, *supra* note 162 (using the 13th, 14th, 15th, and 19th amendments as examples of the positive change that has made the Constitution a "stronger, better document.").

[167] *See supra* note 4 and accompanying text.

Deliberation is certainly needed on key issues such as the functioning of our government and in emergencies, though deliberation should not sink into inaction and infighting. Mediation brings about the best of both worlds by not seeking to usurp congressional power, but by keeping progress alive. By breaking the logjam, the benefits of our democracy can again flow to the governed.