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# CONGRESS, CORPORATE BOARDS, AND OVERSIGHT: A PUBLIC LAW/PRIVATE LAW COMPARISON

*Paul S. Miller* \*

*[An] 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.<sup>1</sup>*

## I. INTRODUCTION

During the past forty 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.<sup>2</sup> A consequence of divided govern-

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1. Alan Greenspan, *Markets and the Judiciary*, Address at the Sandra Day O'Connor Project on the State of the Judiciary Conference 3-4 (Oct. 2, 2008), available at <http://www.law.georgetown.edu/news/documents/Greenspan.pdf>.

2. During the administrations of Richard Nixon (1969-74), Gerald Ford (1974-77), Ronald Reagan (1981-89), George H.W. Bush (1989-93), William J. Clinton (1993-2001), and George W. Bush (2001-2009), the opposing party controlled at least one, if not both, houses of Congress for the majority of their tenures. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2331 (2006).

Political party politics play 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, *THE FAILURE OF THE FOUNDING FATHERS* 5 (2005). "The 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 '[a]mbition . . . to counteract ambition.'" Levinson & Pildes, *supra*, at 2313 (alteration in original) (quoting THE FEDERALIST NO. 51 (James Madison)). This is despite the Founders' great desire to avoid

ment 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.<sup>3</sup> This practice has been followed by both Democratic and Republican administrations.<sup>4</sup>

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 fail-

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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 illconcerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils and modified by mutual interests.

GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. DOC. NO. 106-21, at 14 (2000), available at <http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf>.

3. 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 majority party only directly controls a fraction of the congressional staff.

4. 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. See 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988). This decision was upheld by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173, 177-78 (1991). In 1993, one of the first acts of the Clinton administration was to rescind those regulations. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). This action affected thousands, if not tens of thousands, of people, and Congress had no say in the matter.

ure 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 success supplants long-term planning, deliberative bodies have their role in policymaking 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.<sup>5</sup> The issue is not one of

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5. 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

legal justification, of which there is plenty.<sup>6</sup> 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 Congress's 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.<sup>7</sup> 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.<sup>8</sup>

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and managers, to run the business. These agents often 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. 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 Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1781–82 (2001). See generally *infra* Part III.C.

Beginning in the late 1980s, corporate governance scholars have been debating how beneficial it is 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 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 contractual relationship. 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 (1995). See generally *infra* Part III.C.

6. These justifications for the U.S. Congress are addressed in Part II.A, while the justifications for corporate governance are addressed in Part III.A.

7. See Blair & Stout, *supra* note 5, at 1744; 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, 270–72 (2006).

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 such extreme situations will provide the best benchmarks, good and bad, of legislative oversight.

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 of corporate governance and the existent 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 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, however, has multiple and sometime contradictory goals.<sup>9</sup> Furthermore, there is competition among multiple companies in any given field in the private sector,<sup>10</sup> while there is only one national civil government—one Congress, one President—and any competition or potential competition is strictly internal. The better argument, though, is that the singular nature of government, with its multiple responsibilities, constituencies, and goals, justifies robust oversight, especially when the legislative and executive branches are in the hands of the same political party.<sup>11</sup>

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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 and Oracle corporations for similar products.

11. See Levinson & Pildes, *supra* note 2, at 2316.

## II. OVERSIGHT BY 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's 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 . . . ."<sup>12</sup> The power to investigate is part of that legislative power. According to the 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."<sup>13</sup> Thus, an investigation undertaken by Congress that could potentially lead to legislation is well within its powers regardless of whether a statute actually emerges.<sup>14</sup>

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12. U.S. CONST. art. I, § 1. State constitutions provide the same power to their own legislatures. *E.g.*, CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature . . . ."); N.Y. CONST. art. III, § 1 ("The legislative power of this state shall be vested in the senate and assembly.").

13. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

14. *See id.* at 177; *Barenblatt v. United States*, 360 U.S. 109, 111, 134 (1959) (upholding a conviction for contempt of Congress for failure to testify before the House Un-American Activities Committee and stating that "[t]he 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"); *Comm. on the Judiciary, U.S. House of Representatives 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. *See, e.g.*, *Anderson v. Dunn*, 19 U.S. 204, 228–29 (1821) ("That a deliberate 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 rebel insult, is a supposition too wild to be suggested."). It has also been cited as recently as 1972. *See, e.g.*, *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

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

[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."<sup>15</sup>

Until the Civil War, it was Congress, not the President, that was seen as the locus of power and authority within the federal government.<sup>16</sup> Even with the ascendance of the executive branch dur-

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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. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155 (current version at 2 U.S.C. § 192 (2006)). The current version of the statute provides:

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 (2006). 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, the President of the Senate or Speaker of the House 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 eight 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 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.2 (4th ed. 2007).

The Supreme Courts of Louisiana and Pennsylvania have relied on *Groppi* to uphold their legislatures' ability to punish those who choose to defy a legislative investigation. *House of Representatives v. Bernard*, 373 So. 2d 188, 194–95 (La. 1979); *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 4–5 (Pa. 1974).

15. BRUCE TAP, *OVER LINCOLN'S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* 22 (1998) (quoting HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 144 (1973)).

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.”).



ing the nineteenth century, Congress continued to be considered the ensurer of the people's will. In 1885, Woodrow Wilson stated that "[t]he 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."<sup>17</sup>

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 investigation 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.<sup>18</sup>

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 furthers 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.

### B. *Joint Committee on the Conduct of the War*

The Joint Committee on the Conduct of the War ("CCW") was created in December 1861 and continued its activities until May 1865.<sup>19</sup> While its make-up changed over the years, it was initially comprised of three senators and four representatives, five of whom were Republicans and two of whom were Democrats.<sup>20</sup>

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17. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (15th ed. 1900).

18. 1 HARRY S. TRUMAN, MEMOIRS 168 (1955).

19. TAP, *supra* note 15, at 22–24, 250–51.

20. *See id.* at 24. The CCW 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, and Daniel W. Gooch, and House Democrat Moses Fowler Odell. *See id.* When Johnson became the governor of Tennessee in 1862, Jo-

When Confederate gunfire bombarded Fort Sumter on April 12, 1861, Congress was not in session and President Abraham Lincoln was determined to act immediately rather than wait for Congress to convene in special session.<sup>21</sup> He instead relied on his authority as commander in chief.<sup>22</sup> 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 the need for greater congressional involvement.<sup>23</sup> 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's faith in Lincoln.<sup>24</sup> In December of 1861, Congress asserted itself and created the CCW.<sup>25</sup>

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 that had already occurred.<sup>26</sup> The CCW, however, was explicitly granted the authority not only to investigate past military disasters but also to oversee current military conduct and ongoing actions by other branches of government.<sup>27</sup> This "elastic resolution"

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seph 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 Covode. *Id.* at 175.

21. *See id.* at 11, 13.

22. *Id.* at 13 ("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 Lincoln took included imposing a naval blockade on the rebellious states and suspending the writ of habeas corpus. *Id.*

23. *See 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 . . .").

24. *See id.* at 22 ("Republican congressmen, in particular, had observed helplessly one military disaster after another. They had in the 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.")

25. *See id.* at 24.

26. *Id.* at 34.

27. *Id.* at 24.

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.<sup>28</sup>

Unfortunately, the CCW ultimately used its broad mandate to pursue blatantly political and partisan ends.<sup>29</sup> This is not to say that the CCW did not do some good. For example, it uncovered irregularities in ice contracts and conducted investigations into the manufacturing of heavy ordnance and logistical operations in New York and Philadelphia.<sup>30</sup> 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.<sup>31</sup> However, the CCW's approach to most issues reflected the personalities of Senators Benjamin F. Wade and Zachariah Chandler, its two most dominant members.<sup>32</sup> Tap describes Wade thus:

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 advisers as William H. Seward and violently disagreeing with his reconstruction policy.<sup>33</sup>

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

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28. *Id.* at 34 (quoting REPORT OF THE J. COMM. ON THE CONDUCT OF THE WAR, S. REP. NO. 37-108, at 4 (1863)).

29. *Id.* at 258.

30. *Id.* at 176-77.

31. *Id.* at 34.

32. *Id.* at 22-24.

33. *Id.* at 25.

the controversy. . . . Like Wade, Chandler was impatient 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.<sup>34</sup>

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.<sup>35</sup> They had an ideological belief that constant forward motion was the only correct strategy for victory.<sup>36</sup> The CCW's activities caused factionalism and undermined the chain of command within the Union Army as it allowed subordinates to criticize superiors.<sup>37</sup> Its hearings and related investigations were frequently conducted in a manner that merely sought to confirm the committee's predetermined conclusions on a matter.<sup>38</sup> Needless to say, these actions eroded the military's respect for its civilian masters.<sup>39</sup> Ultimately, the CCW's abuse of its mandate and its simplistic political approach to military matters had an undeniably negative impact on the Union war effort, sometimes leading military officers to take foolish actions.<sup>40</sup>

A similar assessment of the CCW came about some eighty years later:

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34. *Id.* at 26.

35. *See id.* at 165–66.

36. *Id.* at 166.

37. *Id.* at 166, 256. Perhaps the best example of this came from one of the CCW'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. *See id.* at 18–19. However unfairly history may view the CCW's later treatment of McClellan, he was a significant figure that used the CCW to further his own interests.

38. *Id.* at 256.

39. *See id.* at 166.

40. *Id.* at 256. As this is a particularly bold statement to make in light of civilian control over the military, consider the following:

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 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.

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.<sup>41</sup>

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 United States began war preparations. Specifically, as Truman later wrote:

I was concerned about charges that the huge contracts and the immense purchases that resulted from these appropriations were being handled through favoritism. There were rumors that some of the plants had been located on a basis of friendship. I feared that many of the safeguards usually observed in government transactions were being thrown aside and overlooked, although these safeguards would in no way have slowed up the program.<sup>42</sup>

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.<sup>43</sup> Associated social ills arose from this consolidation. For example, there was a lack of housing in areas where op-

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41. TRUMAN, *supra* note 18, at 168. Later in his memoirs, Truman expanded on the CCW's failings:

Many congressional committees, in the past and in recent times, 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. . . . [H]is appearance on the field was soon followed by the disaster of the Second Battle of Bull Run. . . .

*Id.* at 188–89.

42. *Id.* at 165.

43. *Id.*

erations were concentrated and vacant housing in areas where smaller businesses had, until recently, operated.<sup>44</sup>

Truman took it upon himself to personally investigate:

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 on 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 through Wisconsin and Michigan. I visited war 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 a good many of the rumors that were prevalent in Washington concerning the letting of contracts and the concentration of defense industries in big cities.<sup>45</sup>

On February 10, 1941, Truman submitted a resolution for the creation of a special committee to oversee the national defense effort.<sup>46</sup> Its mandate was huge, as broad as that of the CCW: “[T]he committee was directed to examine every phase of the entire war program.”<sup>47</sup> 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 pro-

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44. *Id.*

45. *Id.*

46. *Id.* at 166.

47. *Id.* at 167. Truman described the scope in greater detail:

The committee had been authorized and directed by the United States Senate to investigate the operation of the program for the procurement and construction of all supplies, materials, munitions, vehicles, aircraft, vessels, plants, camps, and other articles and facilities connected with the war program. It had also been directed to examine the types and terms of all contracts awarded; the methods by which they were awarded; the contractors selected; the utilization of small business concerns through subcontracts or otherwise; geographical distribution of contracts and locations of plants and facilities; the effects of such a program with respect to labor and the migration of labor; the practices of management or labor; and the benefits accruing to contractors with respect to amortization for purposes of taxation or otherwise.

*Id.*

gram and that the victory would be won with the least cost in lives and property.<sup>48</sup>

Comprised of five Democrats and two Republicans,<sup>49</sup> the Senate Committee to Investigate the National Defense Program (universally referred to as the "Truman Committee") operated from 1941 to 1948.<sup>50</sup> By all accounts, it was a tremendous success, with credit largely given to the chairman.<sup>51</sup> 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.<sup>52</sup> It also addressed issues of resource shortages and fraud, saving taxpayers hundreds of millions of dollars,<sup>53</sup> and was a major source of public information about the war effort, which contributed to public confidence in the conduct of the war.<sup>54</sup>

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.<sup>55</sup> At the same time, the committee did not withhold criticism from those it determined deserving of such, not even from the White House.<sup>56</sup> These accomplishments were impressive, and the Truman Committee remains the benchmark against which subsequent committees should be judged.<sup>57</sup>

#### 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 very expansive mandates and operated for more than one session of Congress. Further, the majority of

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48. *Id.*

49. *Id.* at 166.

50. DONALD H. RIDDLE, *THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY* 141 (1964).

51. *See id.* at 152, 154.

52. *Id.* at 143-44.

53. *Id.* at 144-51.

54. *Id.* at 155-56.

55. *Id.* at 162.

56. *See id.* at 159-60.

57. *Id.* at 165.

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 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, increasing 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 the American public 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. Thus, the question becomes whether trust actually can be, or should be, engineered into U.S. political structures.

Several corporate governance theorists argue that a governance method based upon using either legal or market (i.e., 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 system to act with a degree of trust toward 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.<sup>58</sup> However, in a modern public corporation the board is not expected to provide actual day-to-day management for the typical publicly traded company.<sup>59</sup> Instead, the board's principal 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."<sup>60</sup> Yet removal from ordinary operations does not relegate boards to the sidelines: "[T]he 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."<sup>61</sup>

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58. See e.g., CAL. CORP. CODE § 300(a) (West 1990) ("[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 (Consol. 1983) ("[T]he business of a corporation shall be managed under the direction of its board of directors . . .").

59. E.g., 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 cmt. a (1994) ("Although the statutes literally seem to require the board to either manage or direct the management of the 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 ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 5 (2005) ("Effective corporate directors are diligent monitors, but not managers, of business operations.")

60. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996).

61. BUSINESS ROUNDTABLE, *supra* note 59, at 2. 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.

Court decisions have consistently emphasized this oversight role. In 1924, then-district Judge Learned Hand wrote that directors “have an individual duty to keep themselves informed in some detail” about corporate affairs and to not “be carried along as . . . figurehead[s].”<sup>62</sup> 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.<sup>63</sup> In 1996, the Delaware Chancery Court, in *In re Caremark International Inc. Derivative Litigation*, 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.<sup>64</sup> 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 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.<sup>65</sup>

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.<sup>66</sup>

The presence of legal duties, in corporate law as with all types of 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

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62. *Barnes v. Andrews*, 298 F. 614, 615–16 (S.D.N.Y. 1924).

63. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (finding that when a corporation is put up for sale or its demise is otherwise inevitable, a board must take necessary measures to ensure that shareholders get the best value for the sale of the corporation); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954–55 (Del. 1985) (establishing that, 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 be adopted in response to legitimate threats to a corporation’s interests and be proportional to the threat in order to be protected by the business judgment rule).

64. *Caremark*, 698 A.2d at 971.

65. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).

66. *See id.* at 66. As a final piece to indicate the parallels of boards of directors and legislatures, consider that Boards have 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 BUSINESS ROUNDTABLE*, *supra* note 59, at 2.

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.<sup>67</sup> 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.<sup>68</sup> Recognizing these differences, courts, especially the Delaware Chancery Court, rely on doctrines such as the business judgment rule when dealing with oversight issues.<sup>69</sup> 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 1970s and 1980s have been referred to as the “takeover era,” a period which saw an extraordinary number of corporate takeovers and takeover attempts, as well as new and aggressive means to defeat them.<sup>70</sup> It has seen the decision of *Smith v. Van Gorkom* by the Delaware Supreme Court,

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67. See Duggin & Goldman, *supra* note 7, at 224. As Chancellor Allen noted in a footnote in *Caremark*, “[t]he corporate form gets its utility in large part from its ability to allow diversified investors to accept greater investment risk.” 698 A.2d at 967–68 n.16.

68. See Duggin & Goldman, *supra* note 7, at 224.

69. *Caremark* summarized the business judgment rule well when it stated:

[Cases based upon the direct actions of corporate management] 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 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 substantively 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.

698 A.2d at 967 (citations omitted).

70. See James M. Tobin, *The Squeeze on Directors—Inside is Out*, 49 BUS. LAW. 1707, 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 deemphasized long term investment with consequent diminution of future (now read 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 1970’s and 1980’s.”).

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.<sup>71</sup> It has also seen Delaware General Corporation Law section 102(b)(7) overrule *Van Gorkom*, whereby the Delaware legislature allowed corporations to relieve their directors of almost any liability for their decisions.<sup>72</sup>

The 1990s were a period of unprecedented growth in the stock markets. The Dow Jones Industrial Average increased by approximately 500%, from about 2000 points in 1990 to around 12,000 points in 1999.<sup>73</sup> The Standard & Poor's 500 Index also increased by 500%, from about 300 points to nearly 1,500 points in the same period.<sup>74</sup> The NASDAQ Composite Index grew from around 500 points to around 4,000 points, an 800% increase.<sup>75</sup> During the same period, sentencing of corporations increased as well, from 111 in 1995 to 304 in 2000.<sup>76</sup>

During this period, two types of corporate governance problems occurred. The first was that of the willfully oblivious board, whereby directors failed to police malfeasance taking place in the company. The most egregious examples were Abbott Laborato-

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71. See *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 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.”), *superseded by statute*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

72. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (stating 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 for breach of fiduciary duty as a director . . .”).

73. The Privateer, The Dow Jones Industrial Average, <http://www.the-privateer.com/chart/dow-long.html> (last visited Dec. 18, 2009).

74. New York Stock and Commodity Exchanges, S&P 500 History, <http://www.nyse.tv/s-and-p-500-history.htm> (last visited Dec. 18, 2009).

75. Amateur-Investors.com, Nasdaq Chart History, [http://www.amateur-investor.net/Nasdaq\\_Chart\\_History.htm](http://www.amateur-investor.net/Nasdaq_Chart_History.htm) (last visited Dec. 18, 2009). The Index went up another 1000 points 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. The NASDAQ never regained the value held at the end of the 1990s bull market. Whatever gains the Dow Jones Industrial Average and the Standard & Poor's 500 made were erased in the bear market of 2008–09. The Privateer, *supra* note 73; New York Stock and Commodity Exchanges, *supra* note 74; Amateur-Investors.com, *supra*.

76. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 876–77 (2003).

ries, Enron, and WorldCom.<sup>77</sup> The second problem was that of a board dominated by a CEO or controlling shareholder that rubber-stamped decisions which ultimately wasted corporate assets. The Eisner/Ovitz debacle at The Walt Disney Company, because of the court case it spawned, is the most important example of a dominated board.<sup>78</sup> These numerous scandals led to a loss of faith in officers, directors, and the corporate model itself.<sup>79</sup>

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<sup>80</sup> and new listing requirements for the New York Stock Exchange ("NYSE")<sup>81</sup> 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. History provides reason to believe that such rules will only result in creative circumvention (much as corporations, businesses, and private individuals exploit tax loopholes)<sup>82</sup> or create perverse incentives (such as increased disclosure of executive pay leading to even higher pay packages across the board since no company wants its CEO pay to be "below average").<sup>83</sup>

The second reaction came from the Delaware courts, the best example of which is *In re The Walt Disney Co. Derivative Litigation*.<sup>84</sup> In a series of decisions, the Chancery and Supreme Courts of Delaware have created a "new" legal standard to address the

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77. 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. *In re Abbott Laboratories Derivative S'holders Litig.*, 325 F. 3d 795, 809 (7th Cir. 2003). Enron and WorldCom involved falsified record keeping that led to the shares being way overvalued. See Kathleen F. Brickley, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 363 n.29, 372 (2003).

78. See generally *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006). 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, 265-66 (1997) [hereinafter Fisch, *Taking Boards Seriously*]; Duggin & Goldman, *supra* note 7, at 259-61.

79. *E.g.*, Duggin & Goldman, *supra* note 7, at 261.

80. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

81. Order Approving NYSE and NASDAQ Proposed Rule Changes Relating to Corporate Governance, 68 Fed. Reg. 64,154 (Nov. 4, 2003).

82. Duggin & Goldman, *supra* note 7, at 262.

83. See Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POLY 39, 44-45 (2004) [hereinafter Fisch, *Federal Regulation*].

84. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

“structural bias” of corporate boards.<sup>85</sup> While boards cannot be viewed as engaged in self-dealing, it cannot be said that they are acting solely as disinterested fiduciaries.<sup>86</sup> In *Disney*, the Delaware Chancery Court held, and the Delaware Supreme Court affirmed, that directors can be liable for failing to act in good faith<sup>87</sup> and that an “*intentional dereliction of duty, a conscious disregard for one’s responsibilities, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith.*”<sup>88</sup>

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.<sup>89</sup> So it seems the Delaware courts view their own legal standard to be, at best, “modest.”<sup>90</sup> Modest though it may be, this standard is nevertheless worthy of exploration, and will be dis-

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85. *Disney* 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). *Id.* at 35–36. Ultimately, the company defendants, including the Disney Board of Directors, prevailed. *Id.*

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 The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 760 & n.487 (Del. Ch. 2005). Chancellor Chandler stated: “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.” *Id.* at 760–61. The Ovitz litigation, and the problems it revealed, caused Eisner to be removed as chairman of Disney in February 2004 and forced to retire by September 2005. See Laura M. Holson, *Next Disney Chief Plans Company’s Transformation*, N.Y. TIMES, Aug. 15, 2005, at C1; Nick Madigan, *New Sport in Hollywood: Watching Eisner’s Fall*, N.Y. TIMES, Mar. 8, 2004, at C1; Floyd Norris, *For Eisner, A Sharp Turn on a Trip Through Disney*, N.Y. TIMES, Sept. 11, 2004, at C1.

86. Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 839 (2006) (“[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.”). The *Unocal* and *Revlon* standards, discussed *supra* note 63 and accompanying text, seek to address the same problem in different circumstances.

87. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66–67 (Del. 2006).

88. *Id.* at 62 (quoting *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)).

89. See *id.* at 35–36; *Stone v. Ritter*, 911 A.2d 362, 373 (Del. 2006).

90. See Duggin & Goldman, *supra* note 7, at 259.

cussed 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 the bounds of what the 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.<sup>91</sup> 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 resulted not in consensus but rather in a 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 duties, whether such duties are useful to modern corporate law, and whether they were ever valid. *Van Gorkom*, in particular, limns this divide.<sup>92</sup> Unfortunately, as with many disputes, it has given rise to an environment where "[e]xaggeration is the norm; conversation the exception."<sup>93</sup> This "war" has now

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91. A far more detailed discussion of this debate can be found in Blair & Stout, *supra* note 5, at 1780–89.

92. See Duggin & Goldman, *supra* note 7 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."); Hill & McDonnell, *supra* note 86, at 836 ("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." (footnotes omitted)); John L. Reed & Matt Neiderman, "Good Faith" and the Ability of Directors to Assert Section 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*, § 102(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 . . .").

93. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 3 (2007).

gone on for almost three decades between, essentially, two camps: the contractarians and the anticontractarians.<sup>94</sup>

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.<sup>95</sup> That is, there is “nothing special” about them.<sup>96</sup> In this model, to reduce transaction costs, investors can “opt out” of monitoring duties simply by purchasing stock in a corporation with none.<sup>97</sup> Further, 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.<sup>98</sup>

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 the parties.”<sup>99</sup> Calling a fiduciary duty simply another clause in a contract “disregard[s] the reasons for the different rules that govern them.”<sup>100</sup> 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 gain from the fiduciaries’ services.”<sup>101</sup> In this model, courts should therefore view fiduciary duties as something that cannot be waived.<sup>102</sup>

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94. See Blair & Stout, *supra* note 5, at 1781–82.

95. See, e.g., Easterbrook & Fischel, *supra* note 5, at 426.

96. *Id.* at 438.

97. 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 duties in order to gain the benefits of the “contract,” but it can be inferred from their statements dismissing unequal relationships as a justification for fiduciary duties. For example, they say that “[p]eople may take advantage of their superior information, the better to induce them to gather information.” *Id.* at 436. However, this absence of explicit statement regarding the lack of disclosure has led to a collateral attack on the contractarian position, with a demand for explicitness before the waiver can be said to be in effect. See Frankel, *supra* note 5, at 1212.

98. See, e.g., Easterbrook & Fischel, *supra* note 5, at 428. (“Both sides would have been better off had the court selected a rule that enabled them to save these costs.”).

99. Frankel, *supra* note 5, at 1211.

100. *Id.*

101. *Id.* at 1212.

102. See Blair & Stout, *supra* note 5, at 1782.



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 temptations for management to abscond with shareholder funds.<sup>103</sup> These scholars are sympathetic to anticontractarian viewpoints but acknowledge and accept that current proposed solutions raise serious problems for the corporate enterprise.<sup>104</sup> 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.<sup>105</sup> Based on this research, their focus has shifted to the internalization of social norms, especially those concerning trust and trustworthiness, as a better explanation.<sup>106</sup>

In 2001, Margaret Blair and Lynn Stout argued that trust and trustworthiness play a much larger role in corporate affairs than previously believed.<sup>107</sup> They argued that the two external sources of restraint looked to in classic economic theory—legal and market sanctions—cannot explain the trust that occurs between individuals.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> The resources needed to gather that information, coupled with an unceasing view of all relationships as “strategic, calculating, and self-interested,” are beyond the ability of most individuals.<sup>111</sup>

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103. *See, e.g., id.* at 1738, 1780.

104. *See id.* at 1782.

105. *See id.* at 1759–80, 1797–99.

106. *See id.* at 1796–97.

107. *See id.* 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.”).

108. *Id.*

109. *Id.* at 1747.

110. *See id.* at 1748, 1750.

111. *See 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 actor 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.<sup>112</sup>

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).<sup>113</sup> 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 one’s self.<sup>114</sup> This internalized motivation is an efficient tool for groups that rely on social interactions to thrive.<sup>115</sup> It allows the trusting party to decide that it is more efficient to trust an actor than to spend time and resources determining and ensuring the actor acts in a trustworthy fashion.<sup>116</sup> Similarly, it allows the trusted actor to decide that it is more efficient (and ultimately more profitable) to act in a trustworthy fashion. If this behavioral model can be deployed in corporations, it may well address certain behavioral inefficiencies, such as agency costs.<sup>117</sup>

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112. *Id.* at 1745–46 (footnotes omitted).

113. Duggin & Goldman, *supra* note 7, at 257–58.

114. Blair & Stout, *supra* note 5, at 1752, 1761–62.

115. *See id.* at 1753.

116. *See id.* at 1757 (“Trust permits transactions to go forward on the basis of a handshake rather than a complex formal contract; it reduces the need to expend resources on constant monitoring of employees and business partners . . . . Trust behavior also reduces losses from others’ undetectable or unpunishable opportunistic behavior, losses that could discourage the formation of valuable agency and team production relationships in the first place.”).

117. *Id.* 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 rela-

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 games demonstrate that trust can be learned based upon an individual's experiences.<sup>118</sup> These experiments demonstrate that even initially untrustworthy participants can become more trustworthy.<sup>119</sup> This is especially true when they are engaged in multiple and long-term games where cooperative behavior produces better results for all participants.<sup>120</sup>

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.<sup>121</sup> In experiments where participants play repeated social dilemma games, a pattern quickly emerges: the majority of players either defect or cooperate.<sup>122</sup> 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" are just as effective in reducing the trust between players.<sup>123</sup>

The results of social dilemma games tend to support "the anti-contractarian view that it is fundamentally misleading—even dangerous—to apply the rhetoric of contract to fiduciary duties."<sup>124</sup> The theory of contracts assumes that each party is acting purely in its own interest.<sup>125</sup> To bring such assumptions into the realm of fiduciary duties both "assumes and legitimates" self-interested behavior in a situation where one side already must trust the other without protections.<sup>126</sup>

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tionships. *Id.* at 1758. 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 and legal education, on situations where trust has broken down. *See id.* at 1759.

118. *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. *See id.* at 1759–60.

119. *See id.* at 1774–75.

120. *Id.* at 1774.

121. *See id.* at 1776.

122. *Id.*

123. *See id.*

124. *Id.* at 1786.

125. *Id.* at 1784.

126. *See id.* (emphasis omitted).

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.<sup>127</sup> Use of the courts to enforce fiduciary duties is ultimately just as harmful to trust. Court actions have the effect of indicating that fiduciary duties have been breached, even when courts find that is not the case.<sup>128</sup> The more such court cases are brought, the more common the practice of fiduciary violations appears to be.<sup>129</sup> 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.<sup>130</sup>

This is not to say that court cases have no part to play in creating conditions in which trust may develop.<sup>131</sup> According to Blair and Stout, “fiduciary duty law works through framing, not shaming.”<sup>132</sup> 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.<sup>133</sup> 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 the 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.<sup>134</sup>

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127. *See id.* at 1797.

128. *See id.*

129. *Id.*

130. *See id.* (“[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 the untrustworthy behavior.”)

131. *See id.* at 1796.

132. *Id.* (emphasis omitted).

133. *Id.* at 1796–97 (“Courts preach these sermons not to enlist the aid of third-party ‘norms 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.”)

134. *Id.* at 1797.

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.<sup>135</sup>

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 over-regulated, perverse incentive-creating views of the anticontractarians on the other. Blair and Stout argue that this middle way involves directors and executives conducting themselves in a manner worthy of the trust of the other and, ultimately, the shareholders.<sup>136</sup>

#### 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.<sup>137</sup> While unsympathetic to the contractarian laissez-faire attitude regarding fiduciary duties, Duggin and Goldman (like Blair and Stout), argue that actions by Congress, the Securities and Exchange Commission, or the NYSE are not the most effective means of limiting corporate wrongdoing.<sup>138</sup> However well-intentioned, the regulations put in place by these three entities are often counter-productive and simply encourage those who wish to get around them to find "loopholes."<sup>139</sup>

For Duggin and Goldman, the *Disney* litigation provides an alternative to regulation.<sup>140</sup> 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

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135. *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 may have little or no external incentive for doing so."). Blair and Stout's assertion on this point has been supported by others. *See, e.g.,* Hill & McDonnell, *supra* note 86, at 862.

136. *See* Blair & Stout, *supra* note 5, at 1799.

137. *See* Duggin & Goldman, *supra* note 7, at 268 ("Unless directors are willing to act conscientiously in overseeing the affairs of the 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." (footnotes omitted)).

138. *See id.* at 262–63.

139. *See id.* at 262.

140. For a summary of the *Disney* litigation, see *supra* note 85.

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. . . .”<sup>141</sup> Interestingly, however, directors cannot opt out of liability for a breach of good faith.<sup>142</sup> As discussed above,<sup>143</sup> the Chancery Court in *Disney* created a standard, approved by the Supreme Court, whereby the provisions of section 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 the 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.<sup>144</sup>

The application of such a standard, if not defanged by defense counsel, could provide the means for shareholders to begin to trust company managers. An enforceable legal standard “provide[s] a means of holding those who accept . . . corporate directorships accountable to act when their duty to do so is clear.”<sup>145</sup> 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 requires it but because the court’s view is correct.<sup>146</sup> This approach would create directors and executives who internalize the courts’ standards and “are willing to act conscientiously in overseeing the affairs of the corporations they manage.”<sup>147</sup>

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141. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

142. *Id.* § 102(b)(7)(ii) (“[S]uch provision shall not eliminate or limit the liability of a director . . . for acts or omissions not in good faith . . .”).

143. See *supra* notes 85–86 and accompanying text.

144. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) (emphasis omitted) (footnotes omitted), *aff’d In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006). Several commentators have noted this is a means of re-establishing accountability. See, e.g., Duggin & Goldman, *supra* note 7, at 268; Hill & McDonnel, *supra* note 86, at 837–41 (suggesting the creation of a new intermediate standard of scrutiny within the business judgment rule akin to those of *Unocal* and *Revlon*). Either way, directors must now see to it that they do in fact oversee the activities of their corporations. See Duggin & Goldman, *supra* note 7, at 272.

145. Duggin & Goldman, *supra* note 7, at 269.

146. See *id.* at 271–72.

147. *Id.* at 268.

If application of the *Disney* standard has the trust-building result predicted by Duggin and 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 corporate scandals like the Enron fiasco. Instead, it calls those subject to the standard to do their duty.<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> As Fisch notes, boards must both monitor and manage.<sup>151</sup> 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*.<sup>152</sup> The qualities that make good monitors—independence, the lack of other business connections, and the ability to make decisions free of company managers’ input<sup>153</sup>—

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148. *Id.* at 271–72.

149. *Id.* at 270.

150. See Fisch, *Taking Boards Seriously*, *supra* note 78, at 268.

151. See *id.* 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 positioned boards having a primarily 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.

152. See Fisch, *Taking Boards Seriously*, *supra* note 78, at 272.

153. See *id.* at 268–72.

are not necessarily the same qualities that make good managers—namely, teamwork, experience, and long-term business relationships.<sup>154</sup>

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 constantly wary of activist shareholders, it can better carry out the managerial aspects of its duties. Furthermore, if the rigid, formal requirements of monitoring are eliminated, the monitoring aspect will benefit because it would be done by people who understand the management of the corporation.<sup>155</sup>

What trust ultimately provides is the freedom to view the long-term picture of corporate affairs. If shareholders trust that directors do not 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 of the parallels between the boards of directors and of Congress's functions in further detail and how the concept of trust in corporate governance might be applied. Like boards of directors, Congress functions both to manage and monitor. Congress manages in the sense that it has

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154. Fisch, *Federal Regulation*, *supra* note 83, at 43; see Fisch, *Taking Boards Seriously*, *supra* note 78, at 272–75.

155. See Blair & Stout, *supra* note 5, at 1757–58 (discussing the relationship between promoting trust and competitive advantage); see also Fisch, *Taking Boards Seriously*, *supra* note 78, at 281 (“[A] board that maintains a greater distance may risk inadequately understanding the company it is attempting to monitor.”).

As an aside, trust may also serve to address a common concern of CEOs and other corporate officers, namely that a board that views itself primarily as a monitor is likely to fire the CEO during a period of diminished returns just to satisfy investors. See *id.* at 281. Trust remembers, as it were, that corporations are entrepreneurial enterprises and sometimes a risk results in failure.



the power to make law<sup>156</sup> and the obligation to advise the executive because they often have far greater experience than the term-limited President.<sup>157</sup> It also has a responsibility to monitor the executive to ensure that mutually agreed-upon policies are carried out effectively and efficiently.<sup>158</sup> While the monitoring function is 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 concerned about the problems that arise from over-regulation, perverse incentives, and other unanticipated (and possibly unintended) consequences, the argument is that Congress's 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 demonstrate that committees can operate counter to agreed-upon policy goals (like winning wars).<sup>159</sup> Yet committee oversight can also further such goals, as evidenced by the conduct of the Truman Committee.<sup>160</sup> 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 was looking out for his own interests, everyone else knew it, and all sides acted accordingly.<sup>161</sup> Conversely, the basis for the Truman Committee's success lay in the

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156. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

157. The Constitution grants Congress the power to draft law, yet "[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it." U.S. CONST. art. I, § 7.

158. See FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 2 (2007) [hereinafter OVERSIGHT MANUAL], available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>.

159. See TAP, *supra* note 15, at 165–66 (discussing the negative influence of the CCW on the military during the Civil War).

160. See RIDDLE, *supra* note 50, at 152 (discussing the Truman Committee's success in solving problems during the mobilization period).

161. See TAP, *supra* note 15, at 258.

respect that it showed others.<sup>162</sup> As a result, even those who disagreed with the committee viewed it as trustworthy and cooperated with it.<sup>163</sup>

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 Congress to engage in oversight and provided instructions on how those subject to such investigations should respond.<sup>164</sup>

Second, as Blair and Stout discussed, and the Truman Committee's success evidenced, trust is vital.<sup>165</sup> If committees act 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.<sup>166</sup> In addition to the value of long-term planning, 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 each other.

The benefits to trust in civil governance exist regardless of the political make-up of the legislative and executive branches. For Congress, trustworthy executive cooperation ensures that legislative policies are effective and allows for a working relationship with the executive branch to develop future policies.<sup>167</sup> 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 po-

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162. See RIDDLE, *supra* note 50, at 162.

163. *Id.*

164. OVERSIGHT MANUAL, *supra* note 158, at 32.

165. See Blair & Stout, *supra* note 5, at 1739; RIDDLE, *supra* note 50, at 165.

166. See Blair & Stout, *supra* note 5, at 1776-77; RIDDLE, *supra* note 50, at 141-42 (discussing the actions and accomplishments of the Truman committee).

167. Cf. Levinson & Pildes, *supra* note 2, at 2323 (explaining that when Congress and the President align politically, the relationship between the two can shift from competitive to cooperative).

litical contests to mere finger-pointing.<sup>168</sup> But acting in a trustworthy fashion elevates political debate because it allows for the (perhaps shocking) notion that the ultimate purpose of government is ensuring the well-being of the nation.

### B. *The Third Branch*

The federal judiciary also has a role in promoting trust between Congress and the President. The President has enormous resources at its command to both carry out policies and avoid scrutiny.<sup>169</sup> The federal courts should redress this advantage and restore balance between the other co-equal branches by: 1) refusing to recognize that senior executive officials, or even the President, 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 the *Miers* case.<sup>170</sup> Relying on *United States v. Nixon*, the court noted that executive privilege is not an immunity from compulsory processes, but “a presumptive privilege that can be overcome by the requisite demonstration of need.”<sup>171</sup> The court went on to say that “[p]residential autonomy, such as it is, cannot mean that the Executive’s actions are totally insulated from scrutiny by Congress. That would eviscerate Congress’s historic oversight func-

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168. See TAP, *supra* note 15, at 232. There exists 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 of limiting 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.

169. See generally Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

170. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 108 (D.D.C. 2008). President George W. Bush refused to let his senior aides testify before Congress regarding the dismissal of eight U.S. Attorneys. *Id.* at 55–56. He asserted that his senior aides have absolute immunity from giving compelled Congressional testimony based on executive privilege. *Id.* at 56.

171. *Id.* at 102 (citing *United States v. Nixon*, 418 U.S. 683, 707–08 (1974)).

tion.”<sup>172</sup> Even if the privilege is found to be legitimately invoked, the reasons must be stated to Congress.<sup>173</sup>

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*.<sup>174</sup> There, the Supreme Court found that the Environmental Protection Agency (“EPA”) failed to carry out its statutory duties and ordered it to do so.<sup>175</sup> This is not to say that the Court can replace Congress as the overseer of the executive, but is meant to point out that the executive’s actions cannot escape scrutiny by the other co-equal branches of government.<sup>176</sup>

Such action by the courts would bolster the oversight role of Congress. First, it would create legal doctrine, in addition to those discussed earlier, that support congressional oversight.<sup>177</sup> Second, and equally important, the courts would legitimize oversight beyond the merely legal. Congressional oversight involves politically powerful actors; therefore, 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.<sup>178</sup> As noted by Blair and Stout, court decisions function as “judicial ‘sermons’ on proper motives and conduct that filter down to directors, officers, and shareholders.”<sup>179</sup> 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. The executive branch must then act in a trustworthy fashion, for efficiency’s, if not propriety’s, sake.

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172. *Id.* at 103.

173. *See id.* at 106.

174. 549 U.S. 497, 533–35 (2007).

175. *Id.* at 534–35.

176. *Id.* at 527–28 (describing the Court’s power of review, yet emphasizing its narrow scope).

177. *See supra* Part II.A.

178. *See Blair & Stout, supra* note 5, at 1795–96 (discussing role of fiduciary duty law in internalizing norms of behavior espoused by the courts).

179. *Id.* at 1796.

Granted, Congress would have to reciprocate, but actions beget like actions.<sup>180</sup>

## 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 (2) prevent the rise of political parties. Their success in achieving the first goal has resulted in giving the executive branch a dominant role in government, arguably an equally undesirable result.<sup>181</sup> Their failure in achieving the second goal has led to exactly the kind of factionalism that Washington warned about in 1796.<sup>182</sup>

Change of some sort would be welcome. Congress and the President are consistently named as two of the least liked institutions in the United States.<sup>183</sup> The 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.<sup>184</sup> While trust 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.

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180. *Id.* at 1774–76.

181. See THE FEDERALIST NO. 48 (James Madison).

182. See *supra* note 2 and related text.

183. See, e.g., Frank Newport, *Americans' Trust in Legislative Branch at Record Low*, GALLUP, Sept. 10, 2009, <http://www.gallup.com/poll/122897/americants-trust-legislative-branch-record-low.aspx>.

184. See, e.g., Mark Landler & Sheryl Gay Stolberg, *As Fingers Point in the Financial Crisis, Many of them Are Aimed at Bush*, N.Y. TIMES, Sept. 20, 2008, at A15. This is not to say the collapse of the financial markets was completely a Republican matter. See *id.* President Clinton did support and sign the legislation that repealed the Glass-Steagall Act, which allowed investment banks to become involved in the real estate market. See Daniel J. Boyle, *Greenspan's Lament: Incentive Mechanisms and the Contamination of the Safety and Soundness of Depository Institutions from Risky Derivative Securities*, 10 TRANSACTIONS: TENN. J. BUS. L. 199, 227–28 (2009). However, the collapse did happen after a period where the Republican Party had held the Congress for over ten years and the White House for eight.

Monks, these two extremes should not be followed by one who has gone forth as a wanderer. What 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 Tathāgata [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 nibbāna [nirvana].<sup>185</sup>

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185. ORIGINAL BUDDHIST SOURCES 47 (Carl Olson ed., 2005) (emphasis added).

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