

**PRESIDENTIAL UNILATERALISM AND POLITICAL
POLARIZATION: WHY TODAY'S CONGRESS LACKS
THE WILL AND THE WAY TO STOP PRESIDENTIAL
INITIATIVES**

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I know. This is a symposium about presidential power in the 21st century. My essay, however, will focus on Congress. In particular, I want to examine the conditions in which Congress will have the necessary will and way to check presidential initiatives. And even more particularly, I want to assess whether a politically polarized Congress can check presidential unilateralism.

Let me start by quoting Justice Jackson, Justice Ginsburg, and David Gergen.

First, Justice Jackson: In the *Steel Seizure* case, Justice Jackson—who had served both as Attorney General and Solicitor General in the Roosevelt administration—closed his opinion with an observation about the balance of power between the president, the Congress, and the judiciary:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim . . . that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.¹

Justice Ginsburg echoed this theme when serving on the D.C. Circuit. In turning back a lawsuit by members of Congress who challenged the Reagan administration’s backing of the Contras as unconstitutionally subverting Congress’s war making powers, then-judge Ginsburg contended that:

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1. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 654 (1952).

Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. . . . “If Congress chooses not to confront the President, it is not our task to do so.”²

And finally David Gergen (advisor to Presidents Nixon, Ford, and Clinton)—who linked Watergate-era efforts by Congress to assert its institutional prerogatives over war, spending, and the like to the George W. Bush White House’s seeming obsession with presidential power. Gergen, in particular, explained how Dick Cheney’s experiences as Ford’s chief of staff played a defining role in the Bush administration’s strong view of presidential power. Gergen observed:

[F]rom the [Ford] White House point of view, those laws—you felt like you were Gulliver in Lilliput. You had all these strings that were tying you down, and you really couldn’t act

So in effect we moved from the imperial presidency of Richard Nixon very quickly into what many of us thought was an imperiled presidency under Gerald Ford. . . .

That was a pivotal moment in the education of Dick Cheney. Many of us felt strongly that the power of the presidency was threatened, that America could not lead in the world and couldn’t get much done in Washington unless you had a more effective chief executive. . . .

. . . .

. . . [When George W Bush was elected, Cheney felt that] the president was still too hamstrung, and he came in bound and determined as vice president to change that.³

Let me connect these quotes together by laying out my central argument: presidential power is largely defined by the tug and pull between Congress and the White House. During the Watergate-era, a bipartisan Congress was able to come together to limit presidential power. The Bush presidency, in part, was a reaction to those limits—an attempt to extend the advances of Presidents Reagan and Clinton and assert an even stronger view of the President’s power to act unilaterally. And while the Supreme Court has placed some limits on presidential power, the real story of the Bush presidency was the inability of a polarized Congress to check the President. Unless and until party polarization diminishes, Congress is unlikely to assert its

2. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (1979)).

3. Frontline, Interview with David Gergen, <http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/gergen.html> (last visited Jan. 31, 2009).

institutional prerogatives.⁴ As such, even if the Bush administration hurt itself in court by failing to consult Congress or asserting an overly zealous view of presidential power, or by doing both, those failures are not likely to diminish presidential power in the near future.

My comments will be loosely organized around three interrelated topics.

First, I will discuss the competing incentives of the President and Congress—incentives that make it likely that the President will expand the scope of presidential power simply by pursuing favored policy initiatives. Correspondingly, I will explain how these incentives cut against members of Congress acting in a unified way to assert Congress's institutional prerogatives.

Second, I will highlight how the Watergate-era Congress worked as an institution to check presidential power. By focusing the nation's attention on the risks of a too powerful executive, Watergate and Viet Nam before it propelled Congress into action—so that lawmakers were able to advance personal goals by standing up for institutional incentives. As such, Congress had the will to act. More than that, lawmakers found a way to come together and check presidential unilateralism. During this era, Congress was not polarized by parties and, consequently, Democrats and Republicans were able to act in bipartisan ways. They did this through the impeachment of President Nixon and, more tellingly, through the enactment of a broad range of reform measures intended to assert Congress's institutional prerogatives (and, in so doing, limit the sweep of presidential power).

Third, I will contrast the Watergate-era Congress to today's Congress. I make this comparison for several reasons. As noted above, the Watergate-era played a defining role in Dick Cheney's vision of executive power—so much so that the Watergate-era and the George W. Bush presidency are inextricably linked. Correspondingly, just as Richard Nixon asserted a broad view of presidential power and suffered both judicial defeats and low

4. The above analysis assumes that there will be at least 40 members of the President's party in the Senate. If there were a super-majority of 60 or more senators from the opposition party, the opposition party would have a filibuster-proof majority to advance a competing policy agenda. And while the President might use his veto power to limit that policy agenda (assuming that at least one-third of either the House or Senate are members of the President's party), it is nonetheless true that the Senate would be well positioned to pursue an ideological agenda at odds with the President. In so doing, the Senate would undoubtedly seek to advance Congress's institutional prerogatives.

presidential approval ratings, George W. Bush likewise suffered both judicial defeats and low presidential approval ratings for his arguably overzealous claims of presidential power. Needless to say, the criminal misdeeds of the Nixon administration should not be equated with the policy failings of the Bush administration. At the same time, the Nixon and Bush presidencies provided opportunities for Congress to assert its institutional prerogatives and check presidential power. The stark contrast between Congress's response to the Nixon and Bush presidencies calls attention to the circumstances where Congress does not have the needed will and way to check presidential power.

In highlighting differences between the Watergate-era Congress and the modern Congress, Part III will examine the profound role that political polarization has played in defining today's Congress. Initially, I will call attention to how political polarization makes it impossible for Democrats and Republicans in Congress to work together. I will then extend that lesson to the highly partisan impeachment of President Clinton and, more importantly, to the ways in which modern day Presidents have assumed more and more power through unilateral action. Making matters worse (at least if you think Congress should stand as a check to presidential unilateralism), members of Congress see little personal gain in standing together to assert Congress's institutional prerogatives. On national security matters, today's Congress—unlike the post-1969 Viet Nam era Congress—sees little benefit in asserting legislative prerogatives. Put another way: Today's Congress, unlike the Watergate-era, has neither the will nor the way to check presidential initiatives.

Before turning to Part I, let me clarify two points that underlie the analysis that is to follow. *First*, the focus of this essay is the President's power to advance favored policy initiatives. I do not consider the separate question of presidential power over the administrative state. More to the point, if the President does not express a strong policy preference or, alternatively, delegates decision making authority to agency heads, it may be that agency heads will not look to the White House for policy direction. Agency heads, instead, may focus on their own personal agenda or the agendas of congressional committees, interest groups, or careerists in their agency. For reasons I will detail in Part III of this essay, however, Presidents increasingly seek to rein in agency direction—by appointing presidential loyalists and by making use of regulatory review procedures and pre-enforcement directives such as signing statements. *Second*, in saying that presidential power is largely

defined by the dance that takes place between Congress and the White House, I do not mean to suggest that the courts have no role to play in the separation of powers. My point, instead, is that court decisions are of limited reach. They typically settle a case; they rarely establish precedents that define subsequent bargaining between the executive and Congress. In case studies of Supreme Court rulings on the legislative veto, executive privilege, and war powers, Lou Fisher and I (both individually and collectively) have demonstrated the limited reach of Supreme Court decisions.⁵ In this essay, I will make limited reference to those writings—but I will not try to establish a point that I have made several times before.

I. THE COMPETING INCENTIVES OF THE PRESIDENT AND CONGRESS⁶

Thanks both to the singularity of the office and the power to execute, Presidents are well positioned to advance their policy agenda and, in so doing, expand the power of the presidency. In explaining how it is that Presidents are motivated to seek power and have the tools to accomplish the task, political scientists Terry Moe and William Howell put it this way: “[W]hen presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.”⁷

Most significant, when Presidents act, it is up to the other branches to respond. In other words, Presidents often win by default—either because Congress chooses not to respond or because its response is ineffective. Furthermore, by end running the burdensome and often unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the presidency. In other words, the President’s personal interests and the presidency’s institutional

5. See LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (4th ed. 2006) (legislative veto); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996) (executive privilege); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63 (2002) (war powers); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 77–126 (2004) (general discussion of how politics, not court decisions, defines both domestic separation of powers and war powers).

6. This section is drawn from Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65, 66–68 (2000).

7. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 138 (1999).

interests are often one and the same. For this very reason, Presidents have expanded the reach of presidential power by advancing favored policies through executive orders, Office of Management and Budget review of proposed agency regulations, pre-enforcement directives (especially signing statements), and broad claims of inherent presidential power (especially the power to launch military strikes and the power to withhold information from Congress).

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress's 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress regularly tradeoff their interest in Congress as an institution for their personal interests—most notably, reelection and advancing their (and their constituents') policy agenda. In describing this collective action problem, Moe and Howell note that lawmakers are "trapped in a prisoner's dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."⁸

For this reason, lawmakers have no incentive to stop presidential unilateralism simply because the President is expanding his powers vis-à-vis Congress. Consider, for example, the President's use of executive orders to advance favored policies and presidential initiatives to launch military initiatives. Between 1973 and 1998, Presidents issued about 1,000 executive orders. Only 37 of these orders were challenged in Congress and only 3 of these challenges resulted in legislation.⁹

Presidential unilateralism in launching military operations is even more striking—because it involves the President's willingness to commit the nation's blood without congressional authorization. Notwithstanding the clear constitutional mandate that Congress play a significant role in triggering military operations, Congress has very little incentive in playing a leadership role. Rather than oppose the President on a potential military action, most members of Congress find it more convenient to acquiesce and avoid criticism that they obstructed a necessary military operation.

8. *Id.* at 144.

9. *Id.* at 165–66. For a more complete inventory of congressional acquiescence to unilateral presidential policymaking, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION 112–20 (2003).

Let's now shift focus to the Nixon presidency and Congress's willingness to check presidential power in response to Viet Nam and Watergate. As I will now explain, this willingness was tied to two phenomena: (1) Congress had the tools to act—Congress was not sharply divided by ideology and, consequently, could work together in a bipartisan way; and (2) Congress had the will to act. Presidential unilateralism was so unpopular with voters and other constituents that lawmakers achieved political advantage by curbing presidential power through a slew of post-Watergate era legislative enactments.

II. THE WATERGATE ERA (1972–1978)

To start, a few words about Nixon's exercise of presidential power. By moving aggressively both on domestic and national security matters, Nixon sought both to advance his policy agenda and to extend the reach of presidential power.¹⁰ Most notably, Nixon (like President Johnson before him) claimed "broad, virtually unchecked authority to conduct military operations in Southeast Asia."¹¹ He also pushed his commander-in-chief power to block publication of the Pentagon Papers and to engage in warrantless wiretapping in domestic national security cases (claims that the Supreme Court rejected in the *Pentagon Papers* and *Keith* decisions).¹²

In the areas of domestic policy, Nixon moved aggressively to assert presidential powers to impound funds and to pocket veto legislation.¹³ He sought to reorganize, by executive order, the federal government by placing major executive departments (including cabinet officers) under the control of presidential assistants.¹⁴ Nixon also sought to frustrate legislative oversight of the executive branch through claims of executive privilege. Attorney General Richard

10. See generally Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1 (1981). It should be noted at the outset that Nixon inherited a strong presidency and sought to build upon the practices of past Presidents (who used "foreign emergencies and the increasing centralization of the domestic economy" as opportunities to expand presidential power). *Id.* at 2.

11. Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 408 (1989).

12. *New York Times, Co. v. United States (The Pentagon Papers)*, 403 U.S. 713 (1971); *United States v. U.S. Dist. Court for E. Dist. of Mich. (Keith)*, 407 U.S. 297 (1972). For additional discussion, see Quint, *supra* note 10.

13. See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 126–27, 131, 200–01 (5th ed. rev. 2007).

14. PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 198 (1978); JONATHAN SCHELL, THE TIME OF ILLUSION 296–98 (1976).

Keleindienst testified before Congress that “executive privilege insulated the testimony and documents of all employees of the executive branch . . . and that the privilege can be invoked even against an impeachment inquiry involving criminal wrongdoing by the President or his advisors.”¹⁵

Commenting on Nixon’s assertions of executive power, Arthur Schlesinger claimed that Nixon had subverted our constitutional system of checks and balances. Dubbing Nixon’s style of government “the imperial presidency,” Schlesinger argued that Nixon carried to an extreme a trend towards increased presidential power in American government.¹⁶

Before Watergate, Congress enacted the War Powers Resolution of 1973 but otherwise took limited action to countermand the President. During and following Watergate, Congress enacted a slew of legislative restrictions on the President—starting with the 1974 Budget and Impoundment Act (enacted less than one month before Nixon’s resignation) and ending with the 1978 Ethics in Government Act. Congress’s willingness to enact these measures, as I will now show, is a byproduct both of the lack of ideological polarization in Congress and intense public disapproval of Viet Nam and Nixon administration overreaching.

Consider Viet Nam. When Richard Nixon took office in 1969, Congress had strong incentives to assert itself and seek an end to American involvement in Southeast Asia. Before 1969, lawmakers provided funding and other support to a war that was almost exclusively defined by presidential initiative.¹⁷ But with heavy casualties and no apparent end in sight, lawmakers could not sit on the sidelines and expect to be supported by home state voters. In 1969, a bipartisan Senate passed the National Commitments Resolution—expressing the Senate’s belief that the commitment of U.S. armed forces on foreign territory required “affirmative action taken by the executive and legislative branches of the United States Government.”¹⁸ In 1973 (after a series of mis-starts), Congress enacted—over Nixon’s veto—the muddled War Powers Resolution of

15. Quint, *supra* note 10, at 30 (citing RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 254–64 (1974)).

16. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

17. See LOUIS FISHER, PRESIDENTIAL WAR POWER (2nd ed. rev. 2004).

18. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 961–63 (1999) (quoting S. Rep. No. 91-129, at 1 (1969)).

1973.¹⁹ The stated purpose of the Resolution was to “‘fulfill the intent of the framers’ and to ‘insure that the collective judgment of both the Congress and the President’ will apply to the introduction of U.S. forces to foreign hostilities.”²⁰

Lawmakers echoed this theme of checks and balances when enacting a range of reforms during and after Watergate. These measures responded both to voter and lawmaker dissatisfaction with presidential overreaching. In particular, presidential efforts to block both Congress and the courts from investigating Watergate were too much for the American people and Congress. As Peter Quint put it, Watergate brought the nation “face to face with the problem of presidential power, framed not as an issue of political principle, but as a simple question of criminal right and wrong.”²¹

In Congress, lawmakers reflected popular sentiment against a too powerful President and, in so doing, stood up for their institutional prerogatives. Louisiana Democrat Gillis Long put it this way:

Congress will not stand by idly as the President reaches for more and more power. . . . Our message to the President is that he is risking retaliation from the Congress for his power grabs, that support for the counter-offensive is found in the whole range of congressional membership—old Members and new, liberal and conservative, Democratic and Republican.²²

Among several examples of congressional efforts to assert its institutional prerogatives, I will highlight two²³—the 1974 Impoundment Control Act and the 1978 Ethics in Government Act. The Impoundment Control Act was a response to the Nixon administration’s impounding of funds to advance its policy priorities—fiscal and otherwise. By refusing to spend appropriated funds, the administration both weakened disfavored programs and effectively told Congress that “congressional add-ons to the President’s budget were irresponsible and wholly lacking in merit.”²⁴

19. *See id.* at 963–67.

20. *Id.* at 964 (quoting Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973)).

21. Quint, *supra* note 10, at 3.

22. Quoted in JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 6–7 (1981) (omission in original).

23. For a listing of Watergate-era statutes limiting presidential power, see Miller, *supra* note 11, at 410–11; Andrew Rudalevige, *The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 *PRESIDENTIAL STUD. Q.* 506, 509 (2006).

24. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT*, *supra* note 13, at 200.

Intended to “restore responsibility for the spending policy of the United States to the legislative branch,” the Impoundment Act, among other things, forced the President to formally seek legislative approval before rescinding (terminating) appropriations.²⁵

The 1978 Ethics in Government Act was also enacted to “invigorate the constitutional separation of powers between the three branches of government.”²⁶ The Act established the independent counsel (a direct response to President Nixon’s firing of Archibald Cox, the first special prosecutor in Watergate). More than that, Congress asserted its institutional independence from the executive through the creation of a nonpartisan Congressional Legal Counsel. No longer willing to rely on the “ad hoc services of the Justice Department,” Congress concluded that the “interests of Congress as an institution” and the “separation of powers” required Congress to have its own lawyer.²⁷ Most visibly, the Senate Counsel often defends the constitutionality of federal statutes that the executive branch deems unconstitutional.

Congress’s willingness to assert itself through Watergate-era reforms, as suggested above, is tied to popular support for such measures. In particular, lawmakers could reward constituents (voters and interest groups) by reasserting control over appropriations and by expressing disapproval of both presidential unilateralism in Viet Nam and presidential wrongdoing in Watergate. More to the point, members of Congress gained personal advantage by standing up for legislative prerogatives. Voters wanted Congress to check a too powerful President—to prevent future Watergates and Viet Nams.²⁸ Interest group constituents wanted Congress to maintain greater control of the appropriations process.

25. H.R. REP. NO. 93-658, at 3463 (1973) (House Report on the Congressional Budget and Impoundment Control Act, H.R. 7130, 93d Cong. (1973) (enacted)).

26. S. REP. NO. 95-170, at 1 (1977) (Senate Report on the Ethics in Government Act, S. RES. 555, 95th Cong. (1977) (enacted)).

27. *Id.* at 11.

28. Consider, for example, Congress’s willingness to override President Nixon’s veto of the War Powers Resolution. At that time, Nixon had just fired the first Watergate special prosecutor, Archibald Cox. More than that, Nixon’s first Vice President, Spiro Agnew, had resigned in disgrace. Needless to say, the American people were outraged by Nixon administration misdeeds and Congress, in turn, was willing to validate that disapproval by overriding the President’s veto of the War Powers Resolution. *See generally* STANLY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 438–39 (1990) (noting, among other things, that 33 members of the House of Representatives who had initially opposed the War Powers Resolution voted to override Nixon’s veto of the bill after Nixon’s firing of Archibald Cox).

Not only did Congress have the will to enact structural reforms that ostensibly limited presidential power, Congress found a way to get Democrats and Republicans to join together in approving these reform measures. The reason: During the Watergate era, Congress was not ideologically polarized along party lines. Unlike today's polarized Congress (where Democrats and Republicans are often at loggerheads with each other), the pursuit of bipartisan reform was much easier to achieve during the Watergate era. Liberal Rockefeller Republicans and conservative Southern Democrats pushed both parties towards the center. Indeed, "George Wallace justified his third-party bid for the presidency by claiming that there was not a 'dime's worth of difference' between Democrats and Republicans."²⁹

With Democrats and Republicans able to come together, Congress was able to stand up as an institution. I have already mentioned some of the landmark reform measures that Congress enacted during this period. Each of these measures was passed by overwhelming majorities in Congress. The Impoundment Control Act had no dissents in the Senate "and only six in the House;" the Ethics in Government Act was passed by a vote of 74–5 in the Senate and 370–23 in the House; the War Powers resolution passed by votes of 75–20 in the Senate and 238–123 in the House (with several of the "no" votes coming from members who wanted an even stronger bill).³⁰

Bipartisanship was reflected in other important ways. When considering articles of impeachment against President Nixon, many Republicans put loyalty to the President aside and joined with Democrats in pursuing the criminal misdeeds of the Nixon White House. Seven of seventeen Republicans on the House Judiciary Committee joined Democrats in voting for articles of impeachment against Nixon.³¹ And that was before Nixon turned over the smoking gun tapes after the Supreme Court turned down his executive

29. Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L. J. 1525, 1534 (2005). For general treatments of this topic, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

30. SUNDQUIST, *supra* note 22, at 213 (budget act vote), 259 (War Powers Resolution vote). See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 624 (1998) (Ethics in Government Act vote).

31. See Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 255 (2007).

privilege claim.³² Following the release of the tapes, all but one Republican expressed support for the impeachment.³³

Another example of bipartisanship was the use of unified committee staff—rather than separate staffs for the majority and minority party. Under this model, committee members and staff would work together—rather than try to frustrate the political objectives of the other side.³⁴ Indeed, when the House Judiciary Committee began its impeachment inquiry of President Nixon, it formed a special nonpartisan Impeachment Inquiry Staff.³⁵

And while it would be wrong to say that there were no partisan divisions during this time, it is clear that lawmakers had both the will and way to check presidential initiatives. With no significant ideological divide between Democrats and Republicans, lawmakers were able to come together in a bipartisan way. The personal interests of lawmakers, moreover, were advanced by working together to check potential presidential overreaching. Perhaps for this reason, “the size and activity of congressional staffs doubled and then doubled again in the early 1970s as Congress began to reassert privileges and investigative prerogatives that had waned during the” presidencies of Lyndon Johnson and Richard Nixon.³⁶

III. THE MODERN ERA

Let me shift focus to the question that lies at the heart of this essay, namely, why party polarization prevents today’s Congress from standing up for institutional prerogatives and checking the executive branch. Please note that I am not taking a position on whether President Bush’s claims of presidential power were well founded. My concern is simply whether today’s Congress is capable of embracing the types of legislative reforms that were enacted by the Watergate-era Congress.

32. *United States v. Nixon*, 418 U.S. 683 (1974).

33. *See* Neumann, *supra* note 31, at 255.

34. *See* Devins, *The Academic Expert Before Congress*, *supra* note 29.

35. Fred H. Altschuler, *Comparing the Nixon and Clinton Impeachments*, 51 *HASTINGS L.J.* 745, 746 (2000).

36. David Lauter, *As Chief Lawyer for the House, Stanley Brand is Making His Mark*, *NAT’L L.J.*, May 16, 1983, at 1.

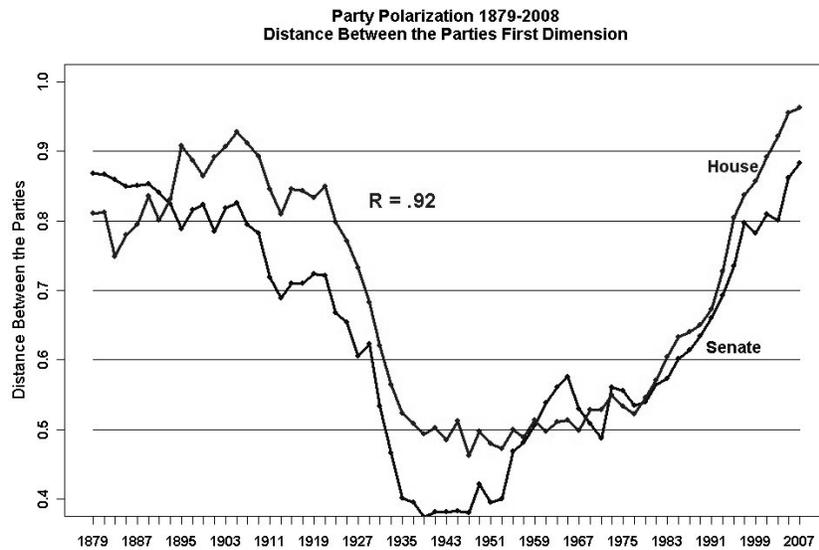
My analysis will proceed in two parts. First, I will discuss party polarization and how it has contributed to the resurgence of presidential unilateralism.³⁷ Second, I will explain why the modern day Congress has neither the will nor the way to check presidential unilateralism. In particular, Congress's uninterest in asserting institutional prerogatives to check the George W. Bush administration highlights dramatic differences between the modern day Congress and the Watergate-era Congress.

With regard to party polarization, it is quite clear that the days of the Rockefeller Republican and Southern Democrat are behind us. Measures of ideology reveal that all or nearly all Republicans are more conservative than the most conservative Democrat.³⁸ Correspondingly, there is no meaningful ideological range within either the Democratic or Republican Party. For example, with the demise of Rockefeller Republicans and Southern Democrats, the gap between Northern and Southern members of the two parties had largely disappeared by the 1990s.³⁹ Indeed, as Figure 1 on the following page makes abundantly clear, party polarization is more extreme today than ever before.

37. Four paragraphs from this discussion are drawn from Devins, *The Academic Expert Before Congress*, *supra* note 29, at 1536–38.

38. See Analyses of Recent Politics, <http://voteview.com/> (follow “110th Ranking: Senate” link for Senate rankings, “110th Ranking: House” for House rankings) (last visited Feb. 1, 2009).

39. See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 46 AM. J. POL. SCI. 305, 306 (2003).

Figure 1.⁴⁰

This pattern will likely continue. With only one-half of eligible voters voting, there is greater emphasis on mobilizing the more partisan base. More than that, in the House of Representatives, computer-driven redistricting has resulted in the drawing of lines that essentially guarantee that Democrats will win certain districts and Republicans other districts.⁴¹ And while there are some toss-up districts, the vast majority of districts are noncompetitive. What this means is that—in the House—the party primary often controls who will win the election and, as such, candidates have incentive to appeal to the partisans who vote in the primaries (and not the median voter in the general elections).⁴²

The consequences of party polarization are profound. Party leaders, especially in the House, have capitalized on the fact that lawmakers are more apt to see themselves as members of a party, not as independent power brokers (willing to cross party lines in order to

40. Reprinted with permission of the author from Keith T. Poole, *Party Polarization: 1879–2008*, Polarized America Page, <http://polarizedamerica.com> (last visited Mar. 25, 2009).

41. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics* 46 WM. & MARY L. REV. 415, 428–31 (2004).

42. See Morris P. Fiorina, *Whatever Happened to the Median Voter?*, Oct. 1999, at 13–14, available at <https://www.msu.edu/~rohde/Fiorina-MIT.pdf>.

pursue favored policies). Correspondingly, party leaders are increasingly concerned with “message politics,” that is, with using the legislative process to make a symbolic statement to voters and other constituents.⁴³ Rather than allow decentralized committees to define Congress’s agenda, Democrats and Republicans alike see the lawmaking process as a way to stand behind a unified party message and, in this way, to distinguish their party from the other. Relatedly, rather than seek middle ground bipartisan solutions, each party looks to gain political advantage from the other.

The Clinton impeachment is a classic example of this phenomenon. Unlike the Nixon impeachment (where members of Congress “rose above partisanship”), “it is harder to identify such actors” in President Clinton’s case.⁴⁴ “The virtual party-line votes in the House and the Senate reinforce public perception of the intense partisanship underlying the proceedings.”⁴⁵

Party polarization likewise contributes to partisanship in how Congress conducts hearings as well as Congress’s willingness to hold the executive accountable through oversight.⁴⁶ Today’s lawmakers do not need hearings to sort out their views. With increasing polarization and appeals to the party base, members are both more ideological and less trusting of the other party. Correspondingly, majority and minority staff rarely work together—instead, each side will call witnesses who back up the predetermined views of the party that has enlisted them.⁴⁷

When it comes to oversight, party identity is also key. When the President and Congress are from the same party, the majority in Congress will not use oversight to hold the President to task. And when the government is divided, Congress will make oversight a top priority. This pattern held true for both the Clinton and George W. Bush presidencies. When the President’s party in Congress was in the majority, the opposition party bitterly complained of the majority’s “lack[ing] backbone” and “abdicating” its responsibility for

43. See generally C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217, 219 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed).

44. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 193 (2d ed. 2000).

45. *Id.*

46. For a discussion of how party polarization impacts congressional hearings (with cites that back up all claims in this paragraph), see Devins, *The Academic Expert Before Congress*, *supra* note 29.

47. *Id.* at 1544.

oversight.⁴⁸ But when the President's opponents took over Congress, oversight became a top priority—with the President's party accusing the majority of using its powers “to harass and intimidate.”⁴⁹

Finally and, for my purposes, most significant, party polarization contributes to the rise of presidential unilateralism. When the Congress is polarized, members of the President's party are not likely to break ranks and vote to limit presidential initiatives. When government is unified, this means that no bill will get through Congress to limit presidential initiatives. When Congress is divided, members of the President's party will resist any opposition party efforts to repudiate the President. More than that, since divided government is increasingly common (thirty of the past forty years), it is also increasingly difficult for Congress to enact significant legislation. As such, Presidents have even more incentive to act unilaterally—since they cannot get Congress to enact their legislative agenda.⁵⁰

Consider, for example, Bill Clinton's health care reforms and George W. Bush's faith-based initiatives. In both instances, the President went to Congress seeking legislative authorization for his policy agenda. In both cases, Congress did not bite, leaving it to the President either to abandon his policy initiative or pursue his initiative through unilateral action. Clinton did so by issuing several directives that, among other things, “established a patient's bill of rights for federal employees . . . and set penalties for companies that deny health coverage to the poor and people with pre-existing medical

48. Keith Bradsher, *House Inquiry Is Urged on Clintons' Land Deals*, N.Y. TIMES, Jan. 12, 1994, at A16; Philip Shenon, *As New 'Cop on The Beat,' Congressman Starts Patrol*, N.Y. TIMES, Feb. 6, 2007, at A18.

49. Jerry Gray, *G.O.P. Accuses Administration of Political Improprieties*, N.Y. TIMES, Apr. 8, 1995, at A10. For a discussion of how Democrats beefed up oversight of the Bush administration after regaining control of Congress in 2006, see Brian Friel, *The Watchdog Growls*, NAT'L J., Mar. 23, 2007, <http://www.nationaljournal.com/about/njweekly/stories/2007/0323nj1.htm#>.

50. When the President and Congress come from the same party, it is far more likely that Presidents will seek to advance favored policies through legislation. With a solid Democratic majority in the House and a near-filibuster proof majority in the Senate, for example, there is good reason to think that President Barack Obama will pursue an ambitious legislative agenda. The success of that agenda, however, is contingent on the willingness of at least some Senate Republicans to cross party lines and back the President (assuming that Democratic lawmakers back the same policies as the President). If not, the Obama administration will have no choice but to advance its policy agenda through unilateral presidential policy-making.

conditions.”⁵¹ Bush likewise acted unilaterally, establishing the White House Office of Faith Based Initiatives and ordering an audit of government agencies to make sure that their practices did not improperly discourage or forbid faith-based organizations.⁵²

Political polarization, moreover, encourages Presidents to act unilaterally and take greater control of the administrative state. Specifically, with political polarization and divided government shifting the locus of government policymaking away from lawmaking and towards executive and administrative action, Presidents (beginning with Ronald Reagan) have used the Office of Management and Budget to review agency policymaking.⁵³ Likewise, in an effort to ensure that agency policymaking conforms to the President’s policy agenda, Presidents (again beginning with Ronald Reagan) have made use of signing statements and pre-regulatory directives.⁵⁴ Finally, Presidents have used their appointments power to ensure agency loyalty to the President’s agenda.⁵⁵

More than any President before him, George W. Bush pushed the boundaries of presidential unilateralism. “What almost no one disputes,” wrote Adam Liptak in *The New York Times*, “is that a central legacy of the Bush presidency will be its distinctively muscular vision of executive power.”⁵⁶ The architect of this campaign was Vice President Dick Cheney.⁵⁷ A witness to Watergate and its aftermath, Cheney helped staff the “White House with conservative veterans of the 1970s and 1980s who believed that” the President

51. William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 418 (2005).

52. *Id.* at 434–35.

53. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

54. See Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 64–65 (2007).

55. GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM?: REAGAN’S REGULATORY DILEMMA (1984); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B. U. L. REV. 459 (2008); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000).

56. Adam Liptak, *More Power for Executive: Will it Last?*, N.Y. TIMES, Dec. 30, 2007, available at <http://www.nytimes.com/2007/12/30/us/politics/30issuesC.html>.

57. Among many books detailing Cheney’s role, see generally JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

should push his agenda “without having to compromise” and that Watergate-era reforms had wrongly “emasculated the presidency.”⁵⁸ More to the point, just as the Nixon administration pushed the boundaries of executive power, the Bush administration extended the efforts of Ronald Reagan and Bill Clinton to assert broad inherent power over national security, to make use of executive orders to unilaterally advance policy objectives, and to centralize presidential control of the administrative state. To cite a few well known examples: the assertion of the power to indefinitely detain so-called enemy combatants, the establishment of a military tribunal system without formal congressional approval, the warrantless wiretapping of U.S. citizens, the robust use of executive privilege, and the expansive use of presidential signing statements to direct agency policymaking—including agency non-enforcement of laws that the President deems unconstitutional.

No doubt, just as Nixon’s strong view of the presidency did not sit well with the Supreme Court or the American people, the Bush White House has also suffered defeats both before the Supreme Court and the court of public opinion.⁵⁹ Unlike the Watergate era, however,

58. Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 502 (2008).

59. President Nixon left office with a 25% approval rating; President Bush left office with a 22% approval rating. Maria Recio, *Bush, His Approval Rating in Tatters, Flies Home to Texas*, MIAMI HERALD, Jan. 20, 2009, available at <http://www.miamiherald.com/inauguration/story/863517.html>. Before the Supreme Court, the Bush administration’s record (on cases implicating executive power) was quite mixed. Presidential unilateralism was rejected in several, highly visible war on terror cases. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. (2008). For a sampling of related news stories, see Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A1; David G. Savage, *The Guantanamo Decision: High Court Rejects Bush’s Claim that He Alone Sets Detainee Rules*, L.A. TIMES, June 30, 2006, at A1; Linda Greenhouse, *The Supreme Court: Detainees; Access to Courts*, N.Y. TIMES, June 29, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9407E1DE1538F93AA15755C09629C8B63>. On the other hand, the administration succeeded in several important (albeit less visible) cases. The Court limited taxpayer standing in a case involving the President’s faith based initiative; it ruled that the Vice President had a strong interest in protecting the disclosure of private sector members of an energy task force that he ran; and it backed up Bush administration preemption arguments and, in so doing, supported administration efforts to expand federal regulatory power. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). For a sampling of related news stories, see William Branigin, *Justices Quash Suit over Funds for Faith Groups*, WASH. POST, June 26, 2007, at A6; David G. Savage, *Court Lets Cheney Avoid Disclosure*, L.A. TIMES, June 25, 2004, at A1; Linda Greenhouse, *Justices Shield Medical Devices from Lawsuits*, N.Y. TIMES, Feb. 21, 2008, available at <http://www.nytimes.com/2008/02/21/washington/21device.html>.

the Bush-era Congress did not enact legislation limiting the reach of presidential unilateralism. Political polarization, for reasons already detailed, is an important part of this story. But it is not the only part of the story. Not only did Congress lack a way to restrict presidential power, Congress also lacked the will to check the President. Members, as I will soon explain, saw no political advantage in defending Congress's institutional turf.

Before explaining why lawmakers lacked the incentives to rein in the President, a bit of a recap. At the start of this essay, I quoted Justices Jackson and Ginsburg to make—what I consider—a fairly obvious point. Congress has the power to check the President. But if it does not use that power, the President has incentive to fill the void. That does not mean that the President can do whatever he wants. As was true in the war on terror cases, the Supreme Court can place some limits on presidential power. But without a Congress willing to assert its institutional prerogatives, defeats in court are not likely to stick to the President. Richard Nixon lost several significant cases in court.⁶⁰ But that is not the reason the presidency was hampered after Nixon left office. The reason was tied to the Watergate-era Congress's willingness to assert itself through numerous legislative enactments and through beefed up oversight. Remember: Dick Cheney's complaint about an imperiled presidency had nothing to do with Supreme Court decision-making and everything to do with congressionally imposed constraints that cut against presidential power.⁶¹

Today, Congress has neither the will nor the way to pursue the type of bipartisan reforms that characterized the Watergate-era Congress. Democrats and Republicans in Congress are more interested in strengthening their position vis-a-vis the other party than in strengthening Congress as an institution. Members of the President's party are loyal to their party, not Congress as an institution, and therefore, will not join forces with the opposition party to assert Congress's institutional prerogatives. Equally telling, members of Congress see little personal gain in advancing a legislative agenda that shifts power from the President to Congress.

60. See *supra* note 12 and accompanying text discussing the *Pentagon Papers* and *Keith* decisions. See also *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting Nixon's sweeping executive privilege claim).

61. See *supra* notes 56–57 and accompanying text.

Unlike during the Watergate era, the American people are not seeking a diminution of presidential power, and especially not on national security matters. Disapproval of President Bush was tied to how he exercised his authority—not to the amount of power the President possesses. Indeed, today's Democratically controlled Congress supported President Bush on national security measures— notwithstanding the President's low job approval rating and Democratic complaints about administration overreaching. In July 2008, for example, Democrats in Congress—rather than open themselves up to election-year charges of being soft on national security—revamped an important Watergate-era statute, the Foreign Intelligence Surveillance Act. Bowing to Bush administration demands, Democrats and Republicans joined together to immunize phone companies from liability when wiretapping the international calls of U.S. citizens.⁶²

The practices of the current Congress are to be expected. Members of Congress hardly ever gain personal political advantage by embracing structural checks of presidential power. Just as Congress has incentive to delegate to the executive (rather than absorb the costs of making a decision that disfavors identifiable participants in the political process), Congress is more interested in responding to executive branch initiatives than in foreclosing particular types of initiatives.⁶³ Sometimes, as was true with the 1974 budget act, structural reforms serve the personal interests of members of Congress. In that case, members had a personal political interest to protect their authority to enact budget bills that reward constituents. Most of the time, however, Congress would rather respond to presidential initiatives than place restrictions on presidential authority—restrictions that shift the locus of decision making power to Congress (so that Congress bears the cost of decision). For this very reason, lawmakers rarely advance their personal political interests by structurally constraining the President in ways that shift the decision back to Congress. Indeed, the War Powers Resolution—while ostensibly placing limits on the President—gave the President significant authority to launch unilateral military strikes. Congress's assent was not required until 60 days after the President's initiative

62. Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, available at <http://www.nytimes.com/2008/07/10/washington/10fisa.html>.

63. For an insightful presentation of this point, see Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

(and only if the President triggered the clock by making a formal report to Congress).⁶⁴ As such, Congress—while insisting it had a role to play—was content to play a reactive role. Long story short: Not only does political polarization stand as a roadblock to the modern Congress standing up for its institutional prerogatives, but lawmakers typically do not gain personal political advantage by placing structural limits on presidential power.

IV. CONCLUSION

On Tuesday November 4, 2008, Barack Obama was elected President. While the Obama administration will undoubtedly pursue a different set of policy initiatives than did the Bush administration, it is to be expected that President Obama will issue executive orders, pre-enforcement directives, review proposed agency regulations, and otherwise take unilateral action to advance his policy initiatives. And it is also to be expected that Congress will not check such presidential unilateralism. Today's polarized Congress lacks both the will and the way to check the presidency.⁶⁵ For those who embrace a constitutional design in which (as James Madison put it) "ambition must be made to counteract ambition,"⁶⁶ today's system of checks and balances is an abject failure.

64. For a short analysis of why the Act is largely ineffective, see FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT, *supra* note 13, at 281–84.

65. The 2008 elections, while undoubtedly significant, did not bring about change in party polarization. A May 2008 study found "that the ideological differences between the political parties are [not just] growing but that they have become embedded in American society itself." William A. Galston & Pietro S. Novola, *Vote Like Thy Neighbor*, N.Y. TIMES MAG., May 11, 2008. Indeed, American neighborhoods now reflect three decades of increasing party polarization—so that "[n]early half of all Americans live in 'landslide counties' where Democrats or Republicans regularly win in a rout." Shankar Vedantam, *Why the Ideological Melting Pot Is Getting So Lumpy*, WASH. POST, Jan. 19, 2009, at A12. The consequence of all this: an increasingly polarized Republican minority that is unlikely to work with an increasingly polarized Democratic majority in asserting the institutional priorities of Congress. For example, in the first months of the Obama administration, House Republicans acted in tandem—standing "firm against Mr. Obama" and, with him, congressional Democrats. See Adam Nagourney, *In Gingrich Mold, a New Voice for Solid Republican Resistance*, N.Y. TIMES, Feb. 15, 2009, at A1.

66. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961).

