

## **Congress's Role in Foreign Policymaking**

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In April 2009 the new administration of President Barack Obama made public Justice Department memos legitimizing interrogation techniques used by the CIA in an attempt to gain information regarding terrorist activities. By comparison to the Bush Administration, this seemed a remarkable act of transparency. And it provoked a fire-storm of claims and counter claims. That same week the administration argued in federal court that the “state-secrets” privilege prevented them from going forward with a case involving a civil lawsuit by five former detainees. Like the Bush Administration, the Obama team asked that the case be dismissed or risk revelation of critical national security information.<sup>1</sup>

Meanwhile, House Democrats on the Judiciary and Foreign Affairs committees sought additional documents regarding detainee interrogation practices – specifically a memo authored by State Department legal counsel Philip D. Zelikow that was purportedly critical of the Bush Justice Department – while Senate Democrats introduced legislation pressing for greater judicial supervision of claims of executive privilege.<sup>2</sup> At nearly the same time, the Senate Homeland Security and Governmental Affairs Committee approved a bill that essentially rubber-stamped an executive order by Obama regarding a president’s ability to withhold information from Congress and the public.<sup>3</sup>

Which Obama will we get? Which Congress will we get? That is the question. Early actions on both sides begin to suggest the outlines for at least the 111<sup>th</sup> Congress. Beyond that it’s tough to tell. The purpose of this paper is to sketch out some of the factors that will condition the executive-legislative relationship in foreign and defense policymaking in the coming years.

### **What Conditions Promote or Impede Congressional Responsibility?**

From at least 1921, with passage of the Budget and Accounting Act, until its end the 20<sup>th</sup> century was marked by the virtually unchecked expansion of executive power generally and the national security state in particular. In the 1970s this trend was encapsulated by historian Arthur Schlesinger, Jr. as the “imperial presidency.” But, inasmuch as Schlesinger’s analysis focused upon the presidency of Richard Nixon, the historian’s appellation was tinged with an anti-conservative air. With but a little distance, however, it is clear that this is not simply an ideological critique but, rather, a fundamental institutional phenomenon – one that applies to Clinton Administration as well as a Bush Administration.

In the aftermath of the Nixon Administration a literature emerged, some popular some scholarly, announcing a “resurgent” Congress. These included, but were not limited to, Frye’s *A Responsible Congress*, Franck and Weisband’s *Foreign Policy By Congress*, Sundquist’s *The Decline and Resurgence of Congress*, Blechman’s *The Politics of National Security*, and Ripley and Lindsay’s *Congress Resurgent*.<sup>4</sup>

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<sup>1</sup> In a unanimous opinion a three judge panel in the 9<sup>th</sup> Circuit rejected the request, allowing the case to go forward. Carrie Johnson, “Appeals Court Rejects ‘State Secrets’ Claim, Revives Detainee Suit.” *Washington Post*. April 29, 2009.

<sup>2</sup> Carrie Johnson, “Democrats Seek More Interrogation Documents.” *Washington Post*. May 5, 2009.

<sup>3</sup> Rob Margetta, “Senate Panel Backs Obama Position Regarding Executive Privilege.” *CQWeekly*. April 6, 2009. 786.

<sup>4</sup> Alton Frye, *A Responsible Congress: The Politics of National Security*. New York: McGraw Hill. 1975; Thomas Franck and Edward Weisband, *Foreign Policy by Congress*. New York: Oxford. 1979; James L. Sundquist, *The Decline and Resurgence of Congress*. Washington, D.C.: The Brookings Institution, 1981; Barry Blechman, *The Politics of National Security*. New York: Oxford. 1990; Randall B. Ripley and James M. Lindsay, *Congress Resurgent: Foreign*

By the middle nineties, however, the bloom was off the rose. Louis Fisher wrote convincingly of the continued erosion of legislative authority.<sup>5</sup> Capitol Hill insider Stephen R. Weissman detailed Congress's *Culture of Deference* and its failed leadership on foreign policy.<sup>6</sup> And Barbara Hinckley presented *Less than Meets the Eye*, a book about the "myth of the assertive Congress."<sup>7</sup> And that's not all as in 2006 *The New York Times Magazine* published an essay by Noah Feldman entitled "Who Can Check the President?" and in 2008 another by Jonathan Mahler called "After the Imperial Presidency."<sup>8</sup> And there's been an outpouring of literature, some of which does a good bit of hand-wringing, about this new "imperial presidency."<sup>9</sup> So, to borrow from Frye, where and what is the responsible Congress?

It turns out, that congressional responsibility is very much in the eye of the beholder. For some, former Vice President Richard V. Cheney for example, almost no amount of legislative meddling is in order. For others, former Nebraska Republican Senator Chuck Hagel, for example, an activist Congress inclined to challenge presidential positions is all to the good. So there is no clear cut answer to this important question. Restated slightly, therefore, the question becomes: what conditions promote or impede congressional *activism*? Four factors stand out, in the estimation of those who have studied the balance of executive and legislative influence: crisis politics, bipartisanship, divided government, and polarized politics. It is important to note that these factors can and do appear in isolation and coincidentally and that they can cut both ways – that is they can either promote or impede legislative action.

### ***Crisis Politics***

From scholars like John Mueller we long have known that international crises, particularly war, produce rally effects in public opinion.<sup>10</sup> These effects, of course, generally redound to the advantage of the president and generally induce Congress to join in support – at least initially. According to Mueller, that support can and does erode – as it did with both the Vietnam War and the Iraq War. There is some debate in the scholarly literature about which of two mechanisms is at work here. One school offers an "event response" theory, which suggests that the public responds to events on the ground to assess the costs and benefits of military conflict.<sup>11</sup> This is sometimes referred to as the "casualty hypothesis." The more casualties there are, the lower support will be for military conflict. The other approach offers an "elite cue" theory, which suggests that the nature of (public) conflict among political elites shapes opinions

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*and Defense Policy on Capitol Hill*. Ann Arbor: University of Michigan Press, 1993; James M. Lindsay, *Congress and the Politics of U.S. Foreign Policy*. Baltimore: Johns Hopkins. 1994.

<sup>5</sup> Louis Fisher, *Presidential War Power*. Lawrence: University of Kansas. 2004.

<sup>6</sup> Stephen R. Weissman, *A Culture of Deference: Congress's Failure of Leadership in Foreign Policy*. New York: Basic Books. 1995.

<sup>7</sup> Barbara Hinckley, *Less Than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress*. Chicago: University of Chicago Press. 1994.

<sup>8</sup> Noah Feldman, "Who Can Check the President?" *New York Times Magazine*, January 8, 2006. Jonathan Mahler, "After the Imperial Presidency," *New York Times Magazine*, November 7, 2008.

<sup>9</sup>See, for example, Stephen Graubard, *Command of Office: How War, Secrecy, and Deception Transformed the Presidency From Theodore Roosevelt to George W. Bush*. New York: Basic Books. 2005; James P. Pfiffner, *Power Play: The Bush Presidency and the Constitutions*. Washington, D.C.: Brookings Institution. 2008; and Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced*. New York: W.W. Norton. 2007.

<sup>10</sup> John E. Mueller, *War, Presidents, and Public Opinion*. New York: Wiley. 1973.

<sup>11</sup> See, in particular, James Burk, "Public Support for Peacekeeping in Lebanon and Somalia: Assessing the Casualties Hypothesis." *Political Science Quarterly* 114 (1): 53-78 and Peter D. Feaver and Christopher Gelpi. *Choosing Your Battles: American Civil-Military Relations and the Use of Force*. Princeton: Princeton University Press. 2004.

about the desirability of military conflict. Regardless, both approaches suggest that policy, and hence Congress's relative level of activism is conditioned by public opinion. And all agree that presidents and legislators are sensitive to the direction of public opinion.<sup>12</sup>

The point here is that the onset of crises tend to put public opinion behind the executive (although the anticipation of crises may not, as was the case with World War II). But continuing crises, crises going badly, and elite debates about the wisdom of specific policies can embolden Congress to become more active. Consider, in this context, the words of Senator Lindsey Graham, a South Carolina Republican, regarding Congress's response to the war on terror:

People were afraid to get in the way of a strong executive who was talking about suppressing a vicious enemy, and we were AWOL for a while, and I'll take the blame for that. We should have been more aggressive after 9/11 in working with the executive to find a collaboration, and I think the fact that we weren't probably hurt the country. I wish I had spoken out sooner and louder.<sup>13</sup>

The Bush Administration was aggressive about seizing authority. And, at least initially, Congress was reluctant to assert itself. But as the Republican ruling coalition eroded, as the War in Iraq seemed to go increasingly badly, and public disenchantment increased, members of Congress became far more willing to challenge the Administration politically.

### ***Bipartisanship***

In the context of crisis politics, bipartisanship is likely to emerge at least for a period of time. But the stylized wisdom is that it is a supportive bipartisanship that leaves the executive unconstrained. But not always, as it turns out. Congress's aggressive response to the policies and politics of the Nixon Administration (and its hangover into the Ford and Carter years) is an obvious case in point. It depended upon a fairly high level of bipartisanship. Democrats and Republicans were *both* mad at Richard Nixon (and so was the public). It also might be said to have been a crisis of sorts, albeit a domestic political crisis. But Congress was far from quiescent. The point is that an aggressive Congress, especially where foreign and military policy is concerned is frequently animated by bipartisanship.

In his history of *Congress and the Cold War*, Robert David Johnson challenges the common wisdom that Congress simply sat back and ceded ground to the commander-in-chief on Containment, NATO, and stationing troops in Europe.<sup>14</sup> But he sustains the notion that foreign policy during the earliest period of the Cold War was based upon bipartisan support from Congress – with Michigan's Republican Senator Arthur H. Vandenberg ("Politics stops at the water's edge.") as one of the core participants. His argument, however, is that this was constructive and influential bipartisanship. Indeed, apropos of the discussion just above, he credits legislative debates during this bipartisan era with exposing the "weaknesses of the main alternatives to the Cold War consensus – liberal internationalism and revisionism – in part explaining the ease with which Truman's agenda achieved public backing." That is, the absence of dissensus promoted public consensus.<sup>15</sup>

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<sup>12</sup> See Adam J. Berinsky, *In Time of War: Understanding American Public Opinion From World War II to Iraq*. Chicago: University of Chicago Press. 2009.

<sup>13</sup> Mahler, November 9, 2008.

<sup>14</sup> New York: Cambridge University Press. 2006.

<sup>15</sup> Johnson, 34.

## ***Divided Government***

If bipartisanship has no single affect, neither does divided government. But at least we can say it is a post World War II phenomenon – indeed, even a post-Nixon phenomenon since divided government didn't become routine until 1969. So Nixon's problems domestically and with regard to foreign policy are at least partially attributable to Congress's control by opposition Democrats. But the fact that Republicans joined the fray to make it bipartisan was far more important. And, as noted above, Democrats went after Ford and Carter in equal measure. Reagan – with a Republican Senate – faced only a muted version of opposition control early on but that changed for both him and George H.W. Bush. Bush received substantial support for Desert Storm once it commenced, but Congress was aggressive legislatively and in terms of oversight throughout his administration. As for Clinton, he certainly had the short honeymoon of the 103<sup>rd</sup> Congress but Republicans actually gave him a relatively free pass on foreign policy (and oversight generally), choosing instead to focus primarily on personal scandals. Finally, George W. Bush faced an overly complacent Republican Congress for six years, at least in Lindsey Graham's mind. So the overall record suggests that divided government is an inducement for congressional activism. But it is no guarantee.

The potential for aggressiveness, however, is captured in a statement by Ike Skelton, a Missouri Democrat, shortly before the midterm elections in 2006:

Oversight. I'll repeat it: oversight, oversight, oversight! Congress has done a poor job of overseeing the conduct of the war., the corruption in the reconstruction program in Iraq, the recruiting problems, particularly in the Army. They have rubber-stamped the Pentagon. What we need today is a Truman Commission.<sup>16</sup>

And as of this writing that is precisely what they have done. But it also is fair to say they are focused primarily on punishing the Bush Administration. It remains to be seen whether they will give equal measure to the Obama Administration.

## ***Polarized Partisanship***

The final condition that shapes the level of congressional involvement is polarized politics. This is, of course, the obverse of bipartisanship but has its own peculiar affects and interpretations. And unlike the aforementioned conditions it is more unidirectional in its impact. Greater polarization aggravates divided government, prevents bipartisanship, and attenuates the effects of crisis politics. It aggravates divided government because it increases the aggressiveness of an out-party at such times and increases the protectionist tendencies of the in-party during unified government. It prevents bipartisanship even if there is some “two presidencies” phenomenon at work in normal circumstances.<sup>17</sup> And it attenuates crisis politics because the out-party has less

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<sup>16</sup> Sydney J. Freedberg, “Out Now? Not Likely,” *National Journal*. September 9, 2006, 61.

<sup>17</sup> The notion of the two presidencies – one domestic and one foreign – was first advanced by Aaron Wildavsky. With an assist from Arthur H. Vandenberg's famous “politics stops at the water's edge” comment, it articulated the notion that both parties tend to support the president on foreign policy while partisanship holds sway on domestic policy. The empirics of the proposition have been hotly debated over the years. But they are clearly subject to the extent of party polarization. See Aaron Wildavsky, “The Two Presidencies.” *Trans-Action* 4 (December 1966): 7-14

fear of electoral retribution for opposing the in-president's policies – regardless of divided government.

There is little question that partisan polarization has been on the rise for some time – since 1980 certainly and far longer according to some. In fact, by one measure of ideology based on congressional voting the nadir of polarization occurred just before World War II, rose only slightly until the early 1970s, but dramatically thereafter.<sup>18</sup> (See Figure 1.) Polarized, or disciplined, parties on Capitol Hill are highly consequential as the president's partisans dig in to protect the collective electoral good of their leader and party banner. And partisanship, as measured by the percentage of party votes and the percentage of the time members vote with their party on those votes has risen steadily in both chambers since the early 1970s.<sup>19</sup> (See Figures 2 and 3.) In-party faithful are loathe to admit this, particularly in an age of “message” politics. But out-party members are more than happy to do so, as Senator Patrick Leahy, Democrat of Vermont, did just before the 2008 elections: “I think in a way this [Bush] administration set out to make the Republican Party on the Hill an arm of the White House.”<sup>20</sup> No doubt, this is something all presidents would do with their respective parties if only they could.

(Figures 1-3 about here.)

### **What Will the President Do? Strategies for the Chief Executive**

Executive prerogative is the hallmark of every post World War II administration – with Eisenhower and Carter, perhaps, being partial exceptions. And the panoply of powers, both formal and informal, available to chief executives has been provided either by statute (e.g., National Security Act of 1947), by judicial decision (e.g. *U.S. v. Curtis-Wright Export*), or by simple precedent (e.g., repeated usage of the armed forces overseas). Although prerogative presidents are now the norm, regardless of partisan orientation, some distinctions can be sketched out as between Republicans and Democrats. And this, in turn, will offer some clues as to President Obama's possible governing style.

#### ***Ultra-Whig Approach***

While no viable contemporary candidate for president has the mindset (or a campaign strategist) that would permit them to pursue this strategy it provides a baseline against which one may evaluate the distinctiveness of contemporary circumstances. James Madison and (to a lesser extent) Thomas Jefferson were models of this (conservative) approach during the early years of the republic. Subsequent examples emerged occasionally in the 19<sup>th</sup> Century. The ultra-Whig approach would be fiscally conservative and oppose any large federal establishment – including any attached to the presidency itself. By contrast to contemporary conservatism, however, it also would oppose a large standing military and would be deferential to constitutional and statutory constraints. Among other characteristics, it would feature the following: 1) a deference to

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<sup>18</sup> See Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized Politics: The Dance of Ideology and Unequal Riches*. Cambridge: MIT Press. 2006. Data in Figure 1 are plotted from Keith Poole's website: [http://voteview.com/Polarized\\_America.htm](http://voteview.com/Polarized_America.htm)

<sup>19</sup> The party votes data and party support data are published by Congressional Quarterly each year. These data were collected and made available by Keith Poole. See note 18.

<sup>20</sup> Mahler, November 9, 2008.

legislative initiatives; 2) a parliamentary style executive-legislative partnership; 3) an emphasis on a small, professional military; 4) a dependence on explicit constitutional authority; 5) a tendency to provide prior notification to military or covert action; and 6) a quasi-isolationist policy orientation. Needless to say, such an approach would be a radical throwback by today's standards and perhaps only a libertarian such as Ron Paul would even approximate such a position.

### ***Expansionist Approach***

Although also prerogative in orientation, Republican administrations are more likely to employ an expansionist variant of this strategy. The pattern is *not* inviolate, to be sure, as the Johnson Administration tends to demonstrate. But the expansionist approach clearly is characteristic of the Bush administration. No matter the particular policy, their avowed goal was to expand executive authority and exclude Congress and the judiciary from meddling in foreign affairs. Or, as Vice President Cheney put it to a reporter from the *Washington Post*, "Having repeatedly seen an erosion of the powers of the president of the United States to do his job," the goal coming into office was to "pass on our offices in better shape than we found them to our successors."<sup>21</sup> Characteristic elements include: 1) aggressive use of executive authority; 2) deny or delay requests for testimony; 3) tendency toward secrecy; 4) independent use of military force; 5) block access to documents; 6) plan and execute policy unilaterally; and 7) exploit executive orders, executive agreements, and signing statements.

### ***The Mixed Cooperative Approach***

Although generally prerogative in orientation, Democratic administrations are most likely to employ a mixed, cooperative variant of this strategy. And early evidence puts the Obama team on track to follow this path. Emphasis on the cooperative elements will be increased under unified government and somewhat diminished under divided government. Characteristic elements include: 1) active consultation; 2) expansive use of legislative liaison; 3) independent use of military force; 4) cooperative approach to oversight; 5) emphasis on information sharing 6) emphasis on multilateral techniques; and 7) opportunistic formation of legislative coalitions.

Shortly before Obama's inauguration the outgoing vice president had this to say about the likely behavior of the incoming chief executive and his new administration:

My guess is, once they get here and they're faced with the same problems we deal with every day, that they will appreciate some of the things we've put in place. I believe very deeply in a strong executive, and I think that's essential in this day and age. And I think the Obama administration is not likely to cede that authority back to Congress. I think they'll find that given a challenge they face, they'll need all the authority they can muster.<sup>22</sup>

If Cheney is correct, then successive administrations will emphasize and protect executive prerogatives regardless of political orientation. And needless to say personality will matter more than a little. But systematic differences attend the election of a Republican-led or Democratic-led administration. To this point, the Obama Administration *has* been more consultative, *has* been

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<sup>21</sup> Quoted in Robert Kaiser, "Congress-s-s-s: That Giant Hissing Sound You Hear Is Capitol Hill Giving Up Its Clout." *Washington Post*, March 14, 2004, B4.

<sup>22</sup> Adriel Bettelheim, "The Shape of the Office." *CQ Weekly*. January 5, 2009, 20.

more cooperative regarding oversight, and *has* been more transparent. But only hindsight will allow a full accounting of the differences between Bush (or Cheney) and Obama. Thus, the question becomes: What can and what will Congress do?

### **What *Can* Congress Do? Tools of the Trade in Foreign and National Security Policy**

By the close of the 1960s Congress had established and the executive had readily embraced the national security state. This shift in power and influence was highly consequential and it was in no way ephemeral. But it did not leave Congress wholly without influence in foreign affairs. By the early 1970s a majority of legislators concluded that the delegation of power to the executive had gone too far. As a consequence, the House and Senate set about reclaiming congressional authority from the president. In this section, Congress's attempt to restore a balance of power is examined. It does so by examining, in turn, the various legislative tools that Congress has to make or to influence foreign affairs and war. The argument is that Congress's attempt to reclaim power fell far short of its goals because it lacked sufficient political will, or bipartisan will, to do so.

The most direct route for Congress to reassert influence over decisions on war and foreign affairs was simply to legislate – with or without the president's consent. And up to a point, that's precisely what Congress did in the waning years of the Nixon Administration and into the Ford Administration. To do so, however, Congress needed to marshal veto proof majorities, a circumstance requiring the cooperation of minority Republicans. On many matters, Republicans were remarkably willing to oblige. But the differences between the two parties were sufficiently great that legislative bargains had to be struck. And the resulting bills were never quite so strong or quite so coherent as the statutes that delegated power to the executive in the first place. Thus, Congress also attempted to exploit its authority over trade and tariff authority, on treaties and nominations, and through investigations as added means for limiting the executive branch.

#### **Authorizations and Appropriations**

Congress's authority to "make all laws that are necessary and proper" and its companion authority to draw funds from the Treasury pursuant to "appropriations made by law" are the bulwarks of its national authority. Put simply, absent statutory authority and the funds to execute that authority nothing should happen. In addition, Article I, Section 8 carries the special restriction that "no appropriation of money to [the Army] shall be for a longer term than two years." (Clause 12) But Congress has long since taken that basic safeguard a step further by appropriating virtually all foreign and defense monies annually. Thus, the legislature's powers to authorize programs and to appropriate funding are absolute – so long as Congress and its component committees choose to use those powers.

From the early 19<sup>th</sup> century until nearly the end of the Vietnam War, Congress and its committees did not always exploit these powers. Rather, they tended to give open-ended authorizations to the military departments – authorizations that sketched out general missions and persisted from year to year. Moreover, for most of this period, those same military departments were run on the so-called bureau system, which bestowed substantial authority on bureau chiefs answerable neither to the military's chain of command nor to Congress as a whole – though they were frequently cozy with the relevant committee chairs. During wartime an expanded defense establishment operated with enhanced authority. But after each conflict



demobilization returned the military to its previously diminished state. In the immediate post World War II era, little had changed with respect to open-ended grants.<sup>23</sup> But these grants of authority and the presence of a large standing army greatly reduced the role of the House and Senate Armed Services Committees in national security policy making.

Meanwhile the three defense-oriented Appropriations subcommittees' – Procurement, Personnel, and Military Construction – continued the practice of annual appropriations, a process that frequently also included programmatic guidance. This practice further reduced the influence of the authorizing committees. In response, the Armed Services Committees seized upon a similar procedural device by annually reauthorizing various military programs, this to enhance the committees' capacity to participate in defense policy making. The trend toward annual reauthorization began in 1959 with the so-called Russell Amendment, which required annual statutory authorization for the procurement of aircraft, missiles, and naval vessels.<sup>24</sup> Those authorizations also set limits on how much could be spent to do so. From 1962 through 1982 the annual authorization requirement was expanded eleven more times. By one estimate, only two percent of defense appropriations required annual authorization in 1961, virtually all accounted for by military construction. By 1982 the figure stood, effectively, at 100 percent. Each year, therefore, the Armed Services Committees produce a “must pass” piece of legislation, the annual defense authorization bill.

By contrast, during the immediate post-World War II period the annual foreign aid authorization bill produced by the House Foreign Affairs and Senate Foreign Relations Committees provided these two panels with a consistent opportunity to influence policy. But as Armed Services' role expanded through the late 1960s and into the 1970s the two foreign policy committees suffered a comparable decline. Ideological and partisan differences regarding foreign aid ultimately ended in stalemate as the committees were unable to report a foreign aid bill that could garner majority support in the chamber. Foreign aid programs did not disappear, but the committees' influence was ceded to the Foreign Operations subcommittees of the Appropriations committees. Weakly led and without an annual authorization bill, Foreign Relations and Foreign Affairs became a shadow of their former selves. As Senator Christopher J. Dodd (D-CT) put it: “By frittering away its authorizing function, the Foreign Relations Committee became a largely irrelevant debating society.”<sup>25</sup>

In an attempt to arrest this decline the foreign policy committees simply emulated the Armed Services committees by expanding their use of the State Department authorization bill.<sup>26</sup> Starting in 1972, the two committees required periodic reauthorization of, among other things, the State Department and its programs, the United States Information Agency, and the Arms Control and Disarmament Agency. Previously, State and its constituent foreign policy components operated under open-ended authorizations of the traditional sort. Pursuant to the new requirement, Congress then passed the necessary reauthorizing legislation for the various foreign relations

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<sup>23</sup> For example, before 1962 the committees authorized the military services an aggregate active duty personnel ceiling of 5 million even though actual peace-time, active duty personnel levels rarely reached half these authorized levels. Likewise, the Secretary of the Air Force was authorized to “procure 24,000 serviceable aircraft or 225,000 airframe tons...as he may determine.”

<sup>24</sup> The Russell Amendment is named after the venerable chair of the Senate Armed Services Committee, Democrat Richard Russell of Georgia.

<sup>25</sup> Quoted in John M. Goshko, “Virtuoso Performance Surprises Hill.” *Washington Post*. November 3, 1985, p. A12.

<sup>26</sup> The current requirement proscribing the use of any funds appropriated to the Department of State without specific authorization is at 22 U.S.C. 2680.

activities. Two years later, Congress extended the requirement by instructing the president to submit three major pieces of legislation each year – a foreign aid proposal, a military aid proposal, and a foreign relations proposal.

Although a State Department authorization has passed nearly every year since then, the bill's impact has been limited. More importantly, Congress has failed to pass a foreign aid bill in almost every year during the same period. That bill, of course, would authorize most of the spending controlled by the foreign policy committees. And this potential but unrealized influence means the authorizing committees have ceded their leverage. The vacuum is filled, if it is filled at all, only by the Appropriations subcommittees.<sup>27</sup> On balance, therefore, attempts by the Foreign Affairs and Foreign Relations committees to assert their authority have fallen far short of what some activist members had hoped for. Partly this is due to the long recognized fact that the foreign policy committees simply do not have any pork to distribute – no juicy procurement contracts, no large construction programs. Absent that, the panels are good platforms for position taking by policy mavens or members attempting to burnish their foreign policy credentials but otherwise unattractive to a broad cross section of the membership. But it also is the case that both committees suffered from a lack of strong leadership or an engaged membership more generally.

In sum, attempts by Congress, and its authorizing committees, to regain power in the last three decades of the twentieth century were at best only marginally successful. Leadership capacity enhanced the role of the military committees, but those leaders were mostly inclined to leave power with the Pentagon. In contrast, leadership incapacity was, for the most part, an outright barrier to influence for the foreign policy panels. But both chambers found it difficult to write into law changes in foreign and military policy, a far more difficult task than delegating power. As important, both chambers found it increasingly difficult to bridge an ever-widening partisan gap – narrowest in the 1970s and widening thereafter

### **Tariff and Trade Authority**

Authority and initiative for tariff and trade policy belongs unambiguously to Congress. Article I, Sec. 8, Clause 3 gives Congress the power “to regulate Commerce with foreign Nations, and among the several States.” Inasmuch as tariff legislation is tax legislation, it could hardly be otherwise. For most of American history, therefore, trade legislation has been initiated and dominated by Congress – from the Tariff of 1816 and the 1828 Tariff of Abominations right on through Fordney-McCumber in 1922.<sup>28</sup>

This trend culminated in 1930, when the Republican-controlled 71<sup>st</sup> Congress passed and President Hoover signed the Smoot-Hawley Tariff Act, widely regarded as one of the most protectionist tariff structures in American history.<sup>29</sup> Just four years later, however, in 1934, the Democratic-controlled 73<sup>rd</sup> Congress passed and President Roosevelt signed the Reciprocal Trade Agreements Act, which gave the president broad authority to negotiate trade agreements

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<sup>27</sup> On post-war developments in the foreign policy committees see James M. McCormick, “Decision Making in the Foreign Affairs and Foreign Relations Committees.” In *Congress Resurgent: Foreign and Defense Policy on Capitol Hill*, eds. Randall B. Ripley and James M. Lindsay. Ann Arbor: University of Michigan Press, 1993, pp. 118-121.

<sup>28</sup> A standard on the history of U.S. tariff policy: F.W. Taussig, *The Tariff History of the United States*. New York: Putnam Sons, 1923.

<sup>29</sup> On Smoot-Hawley, see E.E.Schattschneider's classic, *Politics, Pressures, and the Tariff*. Englewood Cliffs, N.J.: Prentice-Hall, 1935. Schattschneider's work is generally viewed as a case for the triumph of special interests over the national interest and, thus, an indictment of the centripetal nature of Congress.

and then implement them via executive order. This sea change, which lasted until 1974, marked a long period of legislative delegation to executive agents insofar as trade policy was concerned. For a large portion of this period, however, Congress and the presidency were controlled by the same party.

By 1974 an era of divided government had commenced, legislative distrust of the president was at its apex, and trade negotiations had shifted from tariffs to non-tariff barriers. Congress had rethought its position. It did not, however, revert to its parochial and protectionist ways. Rather, through the Trade Act of 1974, it delegated negotiating authority to the executive branch, but retained its own veto option through a mechanism commonly called fast track authority.

Under fast track, the president was permitted to negotiate trade agreements but required to submit those same agreements to Congress for review and approval by an up-or-down vote. Absent the prospect of amendment, it was assumed, negotiated agreements would not fall victim to Congress's parochial tendencies or a Senate filibuster. But in a time of divided government neither would an administration be able to ignore blithely the views of legislators. Moreover, the negotiation process would include a congressionally created agent, the U.S. trade representative, and it further provided for hearings, reporting requirements, and participatory conduits for stakeholders in the process. Fast track was subsequently renewed, though in somewhat altered form, by the Trade Agreements Act of 1979 and the Omnibus Trade and Competitiveness Act of 1988. Thus, by various means it remained in place through April 1994, at which point ideological and partisan disagreements produced stalemate. It would be another eight years, August 2002, before the various factions could agree upon legislation reinstating fast-track authority.<sup>30</sup>

Congress's solution to trade legislation is emblematic of recent trends. It may be called Byzantine. Mindful that its own parochial tendencies can be damaging it delegates trade authority. Distrustful of the chief executive as its agent it institutes ex ante controls by instructing negotiators to include particular provisions in agreements while at the same time establishing complex mechanisms to assure timely decisions via expedited procedures.<sup>31</sup> Trade legislation is hardly unique in this respect. The budget process, arms exports, war powers, covert actions, and base closures all include similar mechanisms. Attendant legislation becomes more complex. Trade bills themselves are more complex (and longer). And the compromises enshrined within them make for less coherent policy.<sup>32</sup>

## Appointments and Treaties

The Senate's advice and consent authority reflects a political compromise. Formally, the Constitution provides for the nomination by the president and confirmation by the Senate of ambassadors, public ministers and consuls, justices of the Supreme Court, and all others officers

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<sup>30</sup> The Trade Act of 2002 (P.L. 107-210). Fast-track had received a new moniker, Trade Promotion Authority, and Democrats won some concessions. The President Bush received negotiating authority through June 2005, and the likelihood of a two-year extension. Background on fast-track and events leading up to passage of The Trade Act can be found in CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107<sup>th</sup> Congress*, Lenore Sek, January 14, 2003.

<sup>31</sup> On delegation in trade policy, utilizing principal-agent theory, see Sharyn O'Halloran, "Congress and Trade Policy," in Ripley and Lindsay, pp. 283-303.

<sup>32</sup> These and other conclusions may be found in Destler's review of trade policy during the thirty-year period 1961-1990. I.M. Destler, "Delegating Trade Policy." In *The President, The Congress, and the Making of Foreign Policy*, ed. Paul E. Peterson. Norman: University of Oklahoma Press, 228-245.

of the United States as established by law. Likewise, it provides that the president may make treaties “by and with the advice and consent of the Senate.” These executive powers, conditioned as they are by Senate approval, evidence the caution with which authority was invested in the chief executive. In general, presidential freedom was preferred while the Senate’s advice and consent would deter the chief executive from offering up “unfit characters” or, in the case of treaties assure products that are “cautiously formed and steadily pursued.”<sup>33</sup>

Although the Senate has somewhat rarely utilized its advice and consent authority to influence foreign and defense policy the politics of the appointment process has received much more attention by pundits and scholars in the last several decades. The withdrawal of Earnest W. Lefever (Assistant Secretary of State for Human Rights) during the Reagan Administration, the rejection of John Tower (Secretary of Defense) during the Bush Administration, the withdrawal of both Bobby Ray Inman (Secretary of Defense) and Anthony Lake (Director of Central Intelligence) during the Clinton Administration, and Bush’s recess appointment of John Bolton to be UN Ambassador over Senate objections provide prominent recent examples. Survivors of the process, such as Paul Warnke, who became Carter’s arms control negotiator despite 40 ‘nay’ votes in the Senate, can enter a president’s administration severely weakened. Meanwhile all nominations, even if overwhelmingly successful, can become a referendum on an administration’s foreign and defense policy, particularly for members of the president’s so-called “inner cabinet”— State, Defense, Treasury, and Justice.

From the end of World War I onward major treaty ratifications have been highly politicized events. And although few treaties are rejected Senate influence through amendments, reservations, limitations, and understandings is far from trivial. Moreover, since many treaties require implementation measures passed by Congress, the Panama Canal Treaty for example, even the House has occasion to become an important player in this post-ratification process. Like nominations, treaties are communicated to the Senate by the White House, whereupon they are numbered, placed on the executive calendar, and referred to the appropriate committee – in this case Foreign Relations. Also like nominations, the committee may simply ignore the submission – in which case it is likely dead – or hold hearings, of greater or lesser duration, prior to returning it to the floor with a positive or negative recommendation. Unlike nominations, however, a resolution of consent may contain the aforementioned additional provisions. The most severe of these, amendments, require renegotiation of the treaty. But any of them can be politically consequential for the incumbent administration. In anticipation of additional provisions, modern presidents and their advisors have been far more solicitous of the Senate’s advice during the negotiating phase of contemporary treaties.

In a systematic study of treaties from 1947 to 2000, Auerswald and Maltzman found that treaties addressing “high politics” (security and sovereignty) were much more likely to be the subject of Senate reservations than those that focused upon economics or international norms. Also, consistent with the “two presidencies” thesis, treaties during the Cold War were less likely to be targeted in this way. By itself, divided government had no significant impact on the likelihood of

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<sup>33</sup> Hamilton writes in No. 76 (p. 463) that Senate consent will prevent the president from appointing “unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” Jay’s words on treaties are from No. 64, pp. 392-393.

treaty reservations, but as the ideological distance of the president and the pivotal senator diverged, the likelihood of reservations increased.<sup>34</sup>

It cannot be said that Congress has suddenly seized the upper hand where advice and consent is concerned. And as previously noted presidents have found ways to circumvent the power that does exist. But legislators, particularly individual members, have seized upon the opportunities presented to pressure the executive branch generally and the president in particular on policies that resonate with their constituencies. With most appointments foreordained to succeed and few highly consequential treaties even presented, the opportunities are far from frequent. And, as with oversight which is treated next, the best that Congress can sometimes hope for is the spotlight of media coverage for a short period of time.

## Oversight

If Congress's function as architect and financier of government activity is well founded then so too is the legislature's responsibility to oversee, control, and correct executive implementation.<sup>35</sup> By wide agreement the precedent for the legislature's role in this activity was established in 1792 when Congress undertook an investigation into the disastrous military campaign of General Arthur St. Clair in the Northwest Territory (near present day Fort Wayne, Indiana).<sup>36</sup> More than two centuries later, Congress continues to respond in similar ways whenever foreign or military crises hit the headlines – the Iran-Contra and Abu Ghraib affairs being prominent recent examples.

What, then, is the best approach to this oversight responsibility? Should it be done retrospectively by investigating administrative malfeasance and shirking? Or should it be done prospectively through legislative design and statutory guidance? In 1984, Mathew McCubbins and Thomas Schwartz introduced a now widely used metaphor to capture Congress's alternatives. Legislators might engage in "police patrols," by the routine review of programs, or they might simply investigate whenever things go awry, by responding to "fire alarms."<sup>37</sup> McCubbins and Schwartz argue that Congress prefers the efficiency of alarms to the drudgery of patrols.

Perhaps recognizing this tendency, Congress adopted a statutory requirement for oversight in the Legislative Reorganization Act of 1946. That act required Congress's standing committees to engage in "continuous watchfulness" over the execution of laws by departments and agencies within their jurisdictions.<sup>38</sup> It was not to be strictly reactive or fire alarm in orientation. In addition, Sec. 190(d) of the law required each committee to provide a report of its oversight

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<sup>34</sup> David Auerswald and Forrest Maltzman, "Policymaking through Advice and Consent: Treaty Consideration by the United States Senate." *The Journal of Politics* 65 (November 2003): 1097-1110. The pivotal senator is the person or persons near the two-thirds point necessary for consent.

<sup>35</sup> For a more complete treatment of these developments see Christopher J. Deering, "Alarms and Patrols: Legislative Oversight in Foreign and Defense Policy." In *Congress and the Politics of Foreign Policy*, ed. Colton C. Campbell, Nicol C. Rae, and John F. Stack, Jr. Upper Saddle River, N.J.: Prentice Hall, 2003: 112-138.

<sup>36</sup> During the course of its investigation St. Clair was largely exonerated for any culpability in the loss of more than half of his troops while very serious shortcomings in the military's supply and ordnance capacity were uncovered. In the actual event, newspaper reports of the military defeat spread faster than official reports through government channels and were, therefore, partly responsible for Congress's investigation.

<sup>37</sup> Mathew D. McCubbins and Thomas Schwartz. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science*. 28 (February 1984): 165-179.

<sup>38</sup> Today, that language (now reading "shall review and study, on a continuing basis") is at 2 U.S.C. 190d. It was originally contained in Sec. 136 of the Legislative Reorganization Act of 1946.

activity for each Congress. In practice, most oversight – comprised of hearings, reports, and draft legislation – is performed by the legislative staffs of the various committees. Committee staffs are frequently experienced, well connected, and substantively knowledgeable. And, because they are well connected, departments and agencies generally are reluctant to try and put anything over on the committees who, after all, provide them with the legal authority and the funding to carry out their programs.

The available evidence, total hearings and hearing days, indicates that despite the dictates of the 1946 act Congress performed its oversight role only indifferently through the 1950s and into the 1960s. From the 88<sup>th</sup> Congress (1963-65) to the 100<sup>th</sup> Congress (1987-89) overall oversight in the House steadily increased but was then replaced by a slow decline and then a sharp drop in that same effort. (See Table 1 for details.) The pattern for foreign and defense oversight is much the same. After a sharp post-World War II drop, House foreign and defense policy hearings steadily increased from the 90<sup>th</sup> (1967-69) to the 100<sup>th</sup> Congress –dropping off thereafter. Though not precisely the same, trends in overall levels and foreign and defense levels in the Senate are very similar.

(Table 1 about here.)

As with its legislative role, therefore, Congress sought new ways to enhance its oversight capacity as the Vietnam War and other elements of U.S. foreign policy became more controversial. Thus, during the 1970s, Congress fashioned a more active rather than passive form of oversight. This oversight not only featured third party informants, to pull fire alarms, but also a form of self incrimination through executive branch reporting requirements. These reporting requirements, in turn, allowed for actual legislative participation in policy making. This “new oversight,” as Franck and Weisband called it, includes annual authorizations along with reporting requirements, notifications, and other anticipatory techniques.<sup>39</sup>

By the 1970s Congress was fully motivated to enhance its consultation and participation through the use of a variety of reporting requirements. Not a few of these, in turn, carried legislative veto provisions. For example, the Case-Zablocki Act of 1972 required that all executive agreements be reported to Congress; the Nelson-Bingham Amendment of 1974 required that all major arms sales be reported to Congress; and the Hughes-Ryan Amendment of 1974 required the President and the CIA to report any covert activity to Congress in a “timely manner.” Each of these provisions, and there were more, gave to Congress a formal opportunity to reject, alter, or terminate the activity. And although the Supreme Court invalidated most such vetoes in *Immigration and Naturalization Service v. Chabda* (1983) Congress continues to utilize artfully worded legislative vetoes to force executive agents to report to Congress prior to taking particular actions defined in statutes.<sup>40</sup>

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<sup>39</sup> Thomas M. Franck and Edward Weisband, *Foreign Policy by Congress*. New York: Oxford University Press, 1984: p. 84. The technique was not entirely new, of course, as early as 1951 Congress included language in the Military Construction Act that required military departments to “come into agreement” with the Armed Services committees prior to completing any real estate transaction in excess of \$25,000. See Raymond H. Dawson, “Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems.” *American Political Science Review* 61 (March 1962), 47.

<sup>40</sup> On the Court’s reasoning in *Chabda* and its aftermath see Louis Fisher, “The Legislative Veto: Invalidated, It Survives.” *Law and Contemporary Problems* 56 (Autumn 1993): 273-292. Fisher reports, as early as 1993, that Congress had passed into law at least 200 additional veto provisions. Although presumably unconstitutional, they continued to thrive as a practical accommodation between the branches, unchallenged in court.

Like the “old” oversight, new oversight techniques require energy, motivation, and staff resources to be successful. But changes in the last decade of the century all militated against such success. First, upon gaining control of the House, Republican leaders redeemed a promise to reduce the size of legislative staffs much as their Senate colleagues had done in the 1980s. As a consequence, the level of oversight necessarily declined without the human resources required to arrange and hold hearings. Second, the distractions of fund raising, which by all accounts take an ever larger portion of legislators’ time, reduced the amount of attention that members could devote to oversight activity. And, third, unified (Republican) government eliminated a primary political motivation for investing time and resources in investigatory efforts.

Given these deterrents, an increased emphasis on fire alarm oversight would come as no surprise. But how do we know it when we see it? Consider, as an example, the House Armed Services Committee’s 1997 oversight plan, which states: “While most of the committee’s oversight agenda was designed to serve primarily in support of the annual authorization bill, much of the committee’s most demanding oversight activity was *event-driven* and not subject to prior planning.”<sup>41</sup> And the opening phrases that describe certain hearings are good indicators of whether the committee staff considers them to be event driven. For example, language used in the summary of a hearing for the House Foreign Affairs committee in the 108<sup>th</sup> Congress included:

- “In light of North Korea’s covert uranium enrichment program for the development of nuclear weapons...”
- “...focusing on recent actions by the regime of Fidel Castro against political dissidents...”
- “Hearing was held in light of alleged abuses in the L-1 visa program...”
- “Hearing to examine alleged Sudan Government sponsored attacks on civilians in the Darfur region of Sudan...”
- “Hearing to examine alleged corruption involved UN-monitored 1996-2003 ‘oil for food’ program...”

While there is no reason to expect the committee staff to adopt McCubbins and Schwartz’s (1984) language, they actually come very close, by distinguishing routine oversight (attendant to the annual defense authorization bill, for example) from event driven oversight in response to crises and other occurrences.

An alternative measure, but again one that has not been thoroughly exploited or validated is to examine hearing abstracts and code hearings as either “routine” or “event driven.” Data for the House and Senate defense and foreign policy committees for two congresses, the 104<sup>th</sup> and 108<sup>th</sup>, is contained in Table 2. (Data for two previous congresses, the 96<sup>th</sup> and 100<sup>th</sup>, also are included for the defense committees.) Police patrol oversight has clearly dominated both the House and the Senate. There does not appear to be any pattern that is related to which party controlled Congress or the Presidency either. The House Foreign Affairs Committee in the 104<sup>th</sup> draws our attention because nearly a quarter of its hearings were fire alarm oversight. This effect is not mirrored in any other committee for that year, making it unlikely that there were strong partisan factors behind this increase. Instead, actual events, as well as possible individual motives could

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<sup>41</sup> United States Congress. House. Committee on National Security. *Report of the Activities of the Committee on National Security for the One Hundred Fourth Congress*. 104<sup>th</sup> Cong., 2d sess, 1997, H. Rept. 104-884, p. 35, emphasis added.

better explain this spike in fire alarm cases. The number of fire alarm cases also appears to drop in the 108<sup>th</sup> Congress but this is most likely the result of insufficient data available. The pattern of oversight remains fairly consistent despite changes in the party leadership in Congress and in the Presidency and the changing environmental context of the world. There also does not appear to be a major difference between police patrol and fire alarm oversight hearings dependent on whether America's military is actively deployed.

(Table 2 about here.)

### **Legislative Facts of Life**

As with other institutions a Republican Congress is more likely to be tolerant of a centralized or hierarchical organizing scheme. By contrast, Democrats tend to distribute power more widely and are less tolerant of a central directorate guiding the actions of either chamber – though the speakership of Texas Democrat Jim Wright is an obvious counter example. Neither tendency is by any means universal or complete. Republican committee chairs of the 104<sup>th</sup>, “Contract Congress,” quickly grew weary of the tight controls laid upon them by Speaker Gingrich and his leadership team. And Democrats, though less than enamored with Speaker Wright, nonetheless took some delight in the orchestration of floor proceedings during his brief reign and the continued power of the Rules Committee after his departure. But even with these discernable differences the Obama administration faces a pair of legislative institutions very much set in their ways – as he know well. The challenge for Obama, therefore, is to work with or to overcome these institutional features. The most prominent of these “facts of life” are as follows.

*Institutional Stickiness:* Institutions are notoriously sticky. That is, once adopted they persist with a good deal of stubbornness. The Senate will not soon abandon the filibuster or institute a germaneness rule. The House is not about to abandon the Rules committee or the special orders that it produces. The House only grudgingly created a temporary Select Committee on Homeland Security. The Senate refused entirely initially. Now both chambers have standing Homeland Security committees but their institutionalization will take time and their immediate impact has been limited.

*Turf Consciousness:* Committee turf not only hampers what Congress can accomplish, it also affects and limits what the executive can accomplish – and the likelihood of stepping on a Capitol Hill landmine. In some instances, control over military procurement for example, legislative turf is well established. In other cases however, homeland security being the most obvious example, property rights are not yet clearly established or, in the case of the House Committee those rights are undermined by a balkanized membership from other standing committees. Kansas Republican Pat Roberts, chair of the Senate Intelligence Committee, put it succinctly shortly after the Sept. 11 commission report came out “The No. 1 issue for any chairman of any committee is that you don’t give up your turf under any circumstances — not a spadeful.”

*Stare Decisis:* Stare decisis – literally, “let the decision stand” – is a long standing judicial doctrine that militates against jurisprudential change. To the extent that the current regime has a basis in judicial precedent there is no reason to think that foundation will change dramatically or change soon. The contemporary state of judicial “opinion,” as Gordon Silverstein points out, favors



executive prerogative in foreign and defense policy.<sup>42</sup> To the extent that judicial policy changes slowly, an obeisance to *stare decisis*, there is no reasonable prospect that that opinion will be supplanted or dislodged. As important, the bulk of legislative opinion, particularly but not solely among Republicans, is in support of this doctrine.

*Legacy Programs:* Bureaucratic pressure, constituent pressure, and interest-group pressures all ensure the Congress will prefer existing programs to new programs – no matter how rational or compelling. This is the inveterate “iron triangle” of relations among authorizers, providers, and beneficiaries. Thus, programs such as the F-22 or V-22 are perpetuated while newer programs face fierce budget scrutiny. These “legacy” programs have strong backing from institutionalized backers, turf-conscious bureaucrats, and reelection-oriented legislators.

*Polarized Politics:* The polarized politics and lack of comity often commented upon as features of contemporary politics did not appear over night. And they are not likely to disappear overnight. From the nadir of modern partisanship in the 1970s – featuring historically low levels of party voting and cross-chamber cooperation – to the identifiable reemergence of cohesive party politics on Capitol Hill took ten years. Commentary on that emergence and its crystallization into “polarized politics” took nearly another ten years. Current electoral institutions reward incumbents and punish challengers. Thus, there are few incentives for legislators to alter or to moderate their behavior. By one popular measure, the last couple of congresses featured nearly wholly distinct partisan groupings, with no more than a bare handful of Democrats featuring voting records more conservative than a single Republican. There is no reason to expect that the 111<sup>th</sup> or the 112<sup>th</sup> Congresses will be any different. (Again, see Figures 1-3 for details.)

In sum, institutional imperatives *will* dominate during the coming administration. And yet this is not to say that partisan control does not matter. A Democratic Congress *will* produce markedly different policies than a liberal Congress. It *will* emphasize butter more than guns, more supportive of a multilateralist approach to security and diplomacy, less trusting of executive prerogatives, and less tolerant of intrusions upon civil liberties in the pursuit of national security. And unified government *will* be less prone to stalemate, or gridlock, on numerous policy fronts. But the situation will continue to be animated by the aforementioned polarized politics so much depends upon the balance of party members in the two chambers.

### **What *Will* Congress Do? Key Committee Players in Foreign Affairs**

Given the aforementioned “facts of life” it is unlikely that Congress will resemble its 93<sup>rd</sup> Congress (1973-1975) forbear in any meaningful way. There is simply no critical mass – or common executive opponent – to induce the legislative and oversight aggressiveness of the early 1970s.

***Armed Services Committees:*** Throughout the post-World War II era, and now in the post-Cold War II era, the Armed Services committees have been continuously populated by members who are more conservative than either chamber as a whole and more conservative than their respective party contingents. It is no surprise, therefore, that they have provided steadfast support for both Republican and Democratic administrations. Indeed, regardless of party control,

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<sup>42</sup> Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press. 1997.

the committees generally have been *more* supportive of the military and military programs than even the administration has been – a product of long-standing bureaucratic-legislative ties.

Membership on both of the military committees is highly prized and seniority on both panels easily exceeds most other committees. Thus, both panels have substantial expertise and institutional memory – further bolstering their clout within the chamber and in security policy making generally.

***Foreign Relations and Foreign Affairs:*** By contrast to the Armed Services committees Foreign Relations and Foreign Affairs (sometimes called International Relations) were consistently more liberal than the both the party contingents and the respective chambers. This liberal, internationalist point of view meant that they generally supported post-World War II presidents – at least up until opinion turned against the Vietnam War. By the 1980s, however, a chasm had opened on both the House and Senate committee splitting Democrats and Republicans. As important, neither committee could mount the political will to pass foreign aid legislation. This effectively ceded control over those programs to the Appropriations committees and to the administration, all but removing the two panels from any influence over foreign affairs. That circumstance is much the same today, with conservatives largely doing the bidding of the White House when Republicans are in occupancy and liberals critiquing presidents of either party with but little effect.

In contrast to the military committees, the two foreign policy committees rank much lower in attractiveness and status in their respective chambers. And, while the Armed Services committees combine both spending and policy clout the foreign policy committees have none of the former and little of the latter. Senate Republican and Democratic rules further hamstring that chamber's committee – limiting members of the conference to one assignment from among Appropriations, Armed Services, Finance, and Foreign Relations.<sup>43</sup> As a result, Foreign Relations' Republican contingent had the very senior chair, Richard Lugar (R-Ind.) and then a group of members who average only about six or seven years in the chamber. Although a bit deeper the Democrats – with John Kerry, Chris Dodd, and Russ Feingold at the top – the Democratic contingent is much the same. Thus, there is little in the way of reputational weight or institutional memory among either the majority or minority group.

***Select Intelligence Committees:*** When the Intelligence committees were created in 1972 they had oversight responsibility but no legislative authority. In addition, membership on the two panels rotated – with a six year limit that was later changed to eight. Although it made good sense to limit tenure on the intelligence oversight committees when they were created the constant shuffling of members and the lack of prestige that attends a limited-tenure committee no longer looks like such a hot idea. Despite this, the committee has been well informed and occasionally influential. But the addition of authorizing powers, in 1992, over intelligence agencies such as the CIA, DIA, FBI, NSA and others bolstered their status substantially.

Members of the two panels have been neither as conservative as those on Armed Services nor as liberal as those on the foreign policy committees. Thus, bipartisanship has been more apparent on these two panels than elsewhere –although increased stridency is notable on both as it is elsewhere in the chamber. A national disaster of any sort is, inevitably, followed by recriminations and September 11<sup>th</sup> is no exception. Since oversight in general has been weak

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<sup>43</sup> The Democrats also include the Commerce, Science, and Transportation Committee in this list of so-called Super A committees.

during the last two decades recent events have simply brought greater illumination to oversight failures where intelligence activities are concerned. (See the paper on intelligence issues in this volume.) Would a liberal Congress have fared better? It is unlikely even though liberals are more suspicious of intelligence activities in general. Will events of the recent past and the 9/11 Commission report resuscitate Congress's oversight efforts? Perhaps, and regardless of partisan control, but party polarization and a dearth of payoff incentives will continue to undercut the effort.

***Homeland Security Committees:*** Simply by referring to them the Homeland Security Committees is key to the first, and perhaps foremost, problem. In the Senate the committee was created by grafting the name and jurisdiction onto the pre-existing Governmental Affairs panel – which started with wide ranging oversight over all manner of government operations. In the House, a free standing committee was created – rather than grafting it onto Government Operations – but chair after chair refused to give up oversight jurisdiction to the new panel. Thus, the Senate committee has struggled with competing demands for its time and attention while both committees, but more so the House committee, have struggled to carve out their own turf.

### **Congress and America's Future**

What, then, will Congress do during the early part of the Twenty-First Century? The argument of the previous sections suggests that a dramatic resurgence of congressional influence in war and foreign affairs is highly unlikely. But that still leaves substantial leeway for the First Branch to play a greater or lesser role, and a more or less responsible role in that same realm. The purpose of this final section is to sketch out three scenarios for the coming decades – an abdicating scenario, a legislating scenario, and a tinkering scenario.

***Abdicate:*** In 1965 Samuel P. Huntington wrote a provocative essay, “Congressional Responses to the Twentieth Century,” in which he argued that Congress should reshape its role within American constitutional government in a quite fundamental fashion.<sup>44</sup> Huntington's essay was one of eight chapters designed to consider the “vitality and effectiveness” of Congress more than half way through the twentieth century. Huntington's contribution to that volume was novel, however, because it was the only chapter written by someone who would not, even then, have been pigeon-holed as a Congress or presidency scholar. Perhaps it is not surprising then that Huntington advanced the least conventional of all the arguments contained within that volume. In brief, he asserted that Congress should simply abdicate its position as principal policy maker:

If Congress can generate the leadership and the will to make the drastic reforms required to reverse the trends toward insulation, dispersion, and overseeing, it could still resume a positive role in the legislative process. If this is impossible, an alternative path is to eschew the legislative and to adapt itself to discharge effectively those functions of constituent service and bureaucratic control which insulation and dispersion do enable it to play in the national government.<sup>45</sup>

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<sup>44</sup> See Samuel P. Huntington, “Congressional Responses to the Twentieth Century.” In *The Congress and America's Future*. Ed. David B. Truman. Englewood Cliffs, N.J.: 1973.

<sup>45</sup> Huntington, “Congressional Responses,” 38.

Huntington's argument was premised on the assumption that Congress had been insulated from the otherwise nationalizing tendencies of national politics. That is, that Congress remained locally oriented, atomized, and decentralized. Needless to say, a change of the sort that Huntington advocated in the middle 1960s would be extraordinarily fundamental. And formal changes of such a magnitude are nearly impossible to contemplate. That said, passive abdication is neither far-fetched nor unprecedented.<sup>46</sup>

Abdication today might be either formal or informal. Some critics of the contemporary Congress argue that by doing nothing the institution has run away from its constitutional authority. This would be an informal variant of abdication – the president proposes and the Congress disposes. But there also is a more formal variant wherein Congress delegates power to the executive branch but then fails to oversee the bureaucracy's activities. Congressional critics would view the war powers act as a formal abdication of authority inasmuch as it recognizes the president's authority to use U.S. military forces under a wide variety of circumstances.

**Legislate:** In 1969, Theodore J. Lowi argued, in *The End of Liberalism*, that Congress had ceased to legislate in an authoritative fashion.<sup>47</sup> Instead, Congress had come to focus on establishing procedures aimed at delegating authority and ensuring interest-group participation in policy decisions. If Lowi was correct, then the most obvious way for Congress to regain or enhance its influence over foreign affairs is to reassert its lawmaking authority. That is to say, Congress is most powerful and influential when it legislates in a clear and convincing fashion. After a number of abortive tries, it did cut off funding for military activity in Cambodia, Laos, and Thailand in 1970. Despite the president's opposition it did establish a nuclear nonproliferation policy for the United States in 1978. In 1986, again over executive opposition, it passed tough trade restriction against South Africa in support of the anti-apartheid movement. And it passed fairly sweeping reorganization plans affecting the Pentagon – the so-called Goldwater-Nichols Act of 1986. These examples demonstrate that Congress can act when properly motivated and that it can do so even in the face of presidential opposition.

Will Congress legislate? For the reasons stated above that seems unlikely. So long as Republicans hold the White House and control Congress the likelihood of inter-branch disagreement is much diminished – as it should be. Moreover, most Republicans and not a few Democrats are simply content with the current balance of power where foreign affairs are concerned. What would a legislative reassertion of power look like if were to occur? One frequently discussed option would have Congress repeal or rewrite the War Powers Resolution. But several attempts on that front have failed. Alternatively, it could substantially reduce or nearly eliminate the standing army or proscribe its being based over seas. That, admittedly, is an extreme example and it is extremely unlikely. But for the better part of one and half centuries it is precisely what Congress did do. Short of such extreme, and likely unwise, measures Congress might still find a way to utilize the annual defense authorization bill, the State Department authorization bill, and even the long-dormant foreign aid bill to influence U.S. policy in war and foreign affairs. Those are proximate, feasible, vehicles for the reassertion of influence. But there is no reason to expect that outcome anytime soon.

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<sup>46</sup> See for example, Lou Fisher's arguments in *Presidential War Power*. Lawrence: University Press of Kansas, 2004.

<sup>47</sup> Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority*. New York: W.W. Norton. 1969.

***Tinker:*** The third scenario, a tinkering strategy, is the one most likely to be adopted by Congress. Or, to put it more accurately, it is likely to be the default strategy. Changes emanating from a tinkering strategy will be incremental because none will constitute a major break with the status quo. Like abdication, legislative tinkering can take two forms. One form involves the alteration of institutional features – rules, structures, procedures, and so forth. The other form involves relatively isolated changes in policy via legislation or other informal mechanisms.

The alteration of various chamber rules and the statutes-at-large in small ways occurs all the time. Not infrequently, today's changes simply undo yesterday's seemingly good ideas. For example, it made good sense for tenure on the intelligence oversight committees to be limited – ultimately to eight-year stints. But the constant shuffling of members and the lack of prestige that attends a limited-tenure committee no longer looks like such a hot idea.<sup>48</sup> Likewise, when the Intelligence Committees were originally created they had oversight responsibility but no legislative responsibility. Not surprisingly, the committee was well informed but only occasionally influential. But in 1992 the addition of authorizing powers over intelligence agencies such as the CIA, DIA, FBI, and NSA bolstered their status substantially. A somewhat comparable change, also involving the Senate, would be to alter the Foreign Relations Committee's "Super A" status. Demoting Foreign Relations might actually elevate its status.

Legislative tinkering regarding narrow issues also occurs all the time. The intelligence bill passed at the end of the 108<sup>th</sup> Congress in 2004 included foreign policy provisions on Pakistan, Afghanistan, and Saudi Arabia and it also established the International Youth Opportunity Fund to support American-sponsored schools in Muslim countries. Also in 2004, Congress passed and the president signed the North Korean Human Rights Act. This act featured bipartisan support and was designed to increase pressure on the repressive North Korean regime to improve its human rights policies. The act authorized the appropriation of \$24 million over a four year period. This sort of tinkering is resisted by the executive branch but, ultimately, it is tolerated because it beats the alternative – full scale legislating by Congress. It remains, however, an atomized, piecemeal approach to policy making and not one that enhances institutional influence.

In sum, current circumstances suggest that Congress will eschew abdication but find itself without the political will to legislate. The roadblocks to reform, to legislating, are simply too formidable at this point in time. Party polarization means that super-majority coalitions of the sort that briefly emerged in Congress during the 1970s are unlikely. Decades of Court decisions tilt toward the executive in the absence of clear legislation. Institutional features reinforce the parochial electoral motives of individual members in even more pronounced fashion than Huntington observed in the late 1960s. And presidents of both parties are fully prepared to press the limits of executive power. Unable to legislate, unwilling to abdicate, Congress likely will tinker, leaving the conduct of foreign affairs and war largely to the discretion of the president.

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<sup>48</sup> Just such a move was included in the FY2005 intelligence authorization bill reported by the Senate Intelligence Committee. Helen Fessenden, "Senate Intelligence Committee Advances Authorization Bill, Removes Its Own Term Limits." *CQWeekly*, May 8, 2004, p. 1088.

Figure 1: Party Polarization  
57th to 110th Congress

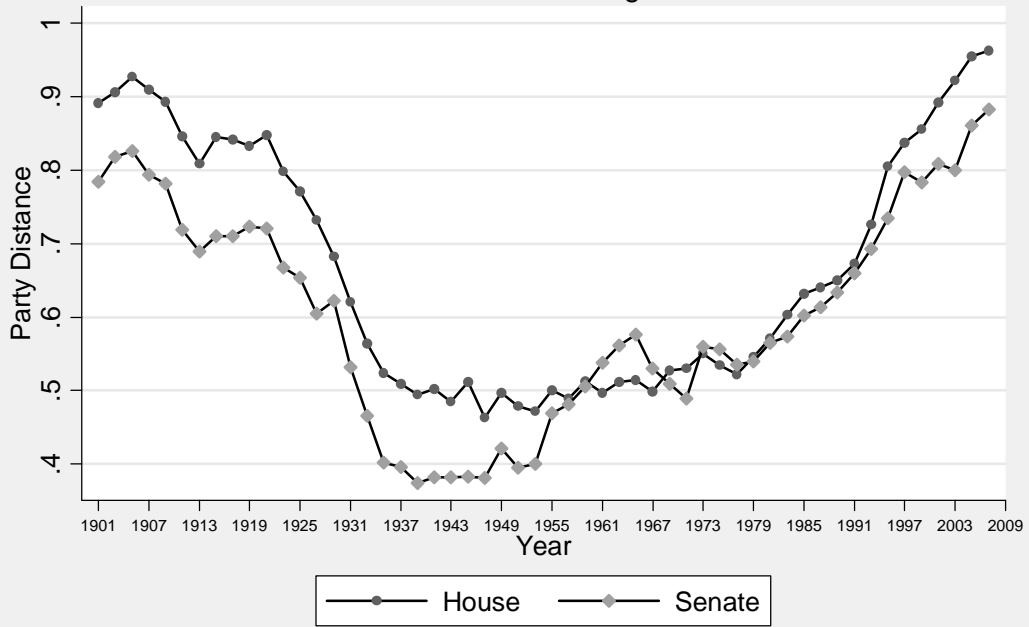


Figure 2: House Party Votes and Party Support Scores  
80th to 110th Congress

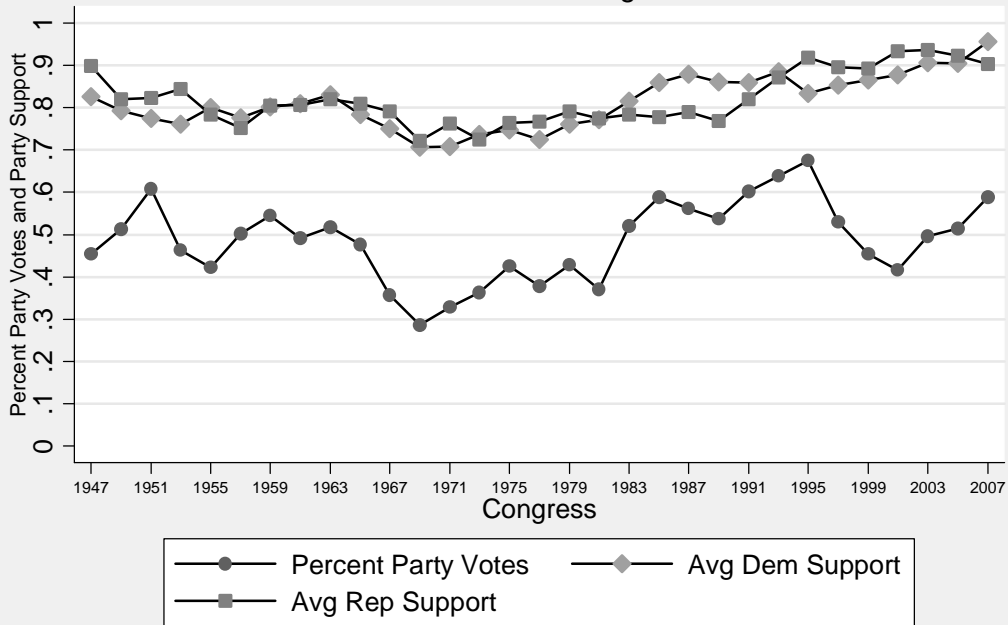
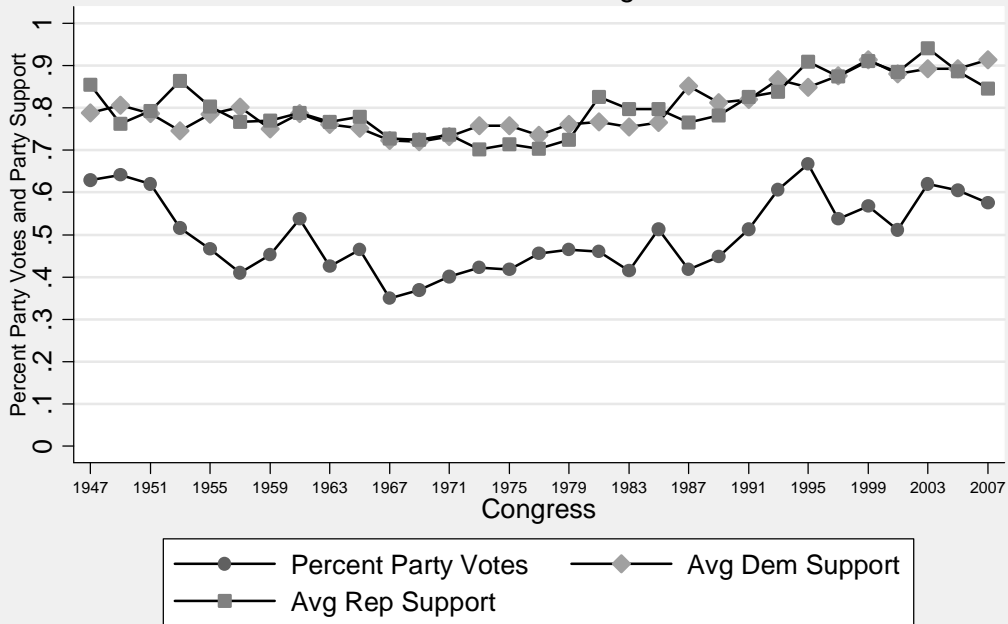


Figure 3: Senate Party Votes and Party Support Scores  
80th to 110th Congress



**Table 1: Total House and Senate Hearings and Hearing Days (80<sup>th</sup> to 108<sup>th</sup> Congresses\*)**

Congress	House Hearings (Hearing Days)	House Foreign and Defense Hearings (Hearing Days)	Senate Hearings (Hearing Days)	Senate Foreign and Defense Hearings (Hearing Days)
80th	1857 (4206)	498 (819)	796 (1996)	196 (458)
81st	1337 (2461)	359 (791)	856 (2416)	203 (518)
82nd	1078 (3019)	250 (827)	704 (2050)	191 (609)
83rd	1326 (3228)	315 (805)	1172 (2406)	260 (561)
84th	1450 (3674)	300 (838)	1026 (2346)	318 (608)
85th	1547 (3762)	345 (804)	927 (2292)	200 (461)
86th	778 (2803)	211 (755)	907 (1988)	142 (351)
87th	776 (2795)	189 (525)	1016 (2236)	158 (477)
88th	758 (2901)	179 (446)	905 (2147)	159 (522)
89th	864 (3050)	204 (417)	1004 (2456)	137 (374)
90th	800 (2691)	183 (334)	1062 (2473)	150 (342)
91st	1108 (4393)	218 (521)	1362 (3269)	165 (454)
92nd	1073 (3702)	212 (482)	1201 (2858)	155 (501)
93rd	1363 (4308)	287 (596)	1448 (3325)	205 (529)
94th	1753 (5192)	326 (631)	1449 (3064)	209 (555)
95th	1984 (5283)	391 (553)	1583 (3303)	225 (515)
96th	2201 (5337)	436 (629)	1628 (3075)	218 (527)
97th	2164 (4671)	409 (552)	1524 (2615)	228 (504)
98th	2174 (4205)	415 (497)	1379 (2246)	229 (417)
99th	2108 (3791)	448 (456)	1084 (1819)	196 (370)
100th	2303 (3765)	508 (572)	1238 (2081)	179 (429)
101st	2460 (3870)	500 (482)	1411 (2204)	209 (430)
102nd	2327 (3710)	487 (430)	1301 (1956)	235 (463)
103rd	2133 (3151)	422 (279)	1480 (2150)	240 (428)
104 <sup>th</sup>	1615 (2440)	354 (219)	941 (1540)	146 (276)
105 <sup>th</sup>	1738 (2372)	378 (201)	919 (1619)	131 (180)
106 <sup>th</sup>	1899 (2302)	384 (217)	1201 (1564)	202 (336)
107 <sup>th</sup>	1663 (1968)	346 (212)	1141 (1518)	165 (223)
108 <sup>th</sup>	1675 (1892)	342 (171)	869 (1093)	207 (266)
Total	46,312 (101,912)	9,901 (15,061)	33,534 (66,105)	5,668 (12,701)

Source: Unless otherwise noted the data reported here and in subsequent tables and/or figures are the author's compilations using data collected by Baumgartner and Jones (2000) for the *Policy Agendas Project*.

\* Note: Data for the 106<sup>th</sup>, 107<sup>th</sup>, and 108<sup>th</sup> congresses likely represent undercounts because the *Agendas Project* has not yet coded all CIS volumes.



**Table 2: Percentage of Police-Patrol and Fire-Alarm Hearings in Four House and Senate Committees: 96<sup>th</sup>, 100<sup>th</sup>, 104<sup>th</sup> and 108<sup>th</sup> Congresses (N in Parentheses).**

	<i>96<sup>th</sup> Congress</i>		<i>100<sup>th</sup> Congress</i>		<i>104<sup>th</sup> Congress</i>		<i>108<sup>th</sup> Congress</i>	
<i>House</i>	<i>Patrol</i>	<i>Alarm</i>	<i>Patrol</i>	<i>Alarm</i>	<i>Patrol</i>	<i>Alarm</i>	<i>Patrol</i>	<i>Alarm</i>
Armed Services	88.4 (76)	11.6 (10)	91.5 (119)	8.5 (11)	80.7 (42)	19.3 (10)	94.5 (35)	5.5 (2)
Foreign Affairs*	--	--	--	--	72.3 (128)	27.7 (49)	85.9 (110)	14.1 (18)
Totals	88.4 (76)	11.6 (10)	91.5 (119)	8.5 (11)	74.3 (170)	25.7 (59)	87.8 (145)	12.2 (20)
 <i>Senate</i>								
Armed Services	90.6 (29)	9.4 (3)	85.4 (35)	14.6 (6)	82.3 (28)	17.7 (6)	97.7 (43)	2.3 (1)
Foreign Relations*	--	--	--	--	87.2 (41)	12.8 (7)	91.9 (102)	8.1 (9)
Totals	90.6 (29)	9.4 (3)	85.4 (35)	14.6 (6)	84.1 (69)	15.9 (13)	93.5 (145)	6.5 (10)

Note: Entries are percentages with raw totals in parentheses. Executive Calendar items (nominations and hearings) are excluded for the Senate committees. 108th Congress may be undercounted due to the limited number of CIS abstracts published at time of study.

Source: Congressional Information Service, *CIS/Annual: Abstracts of Congressional Publications* (various years).

\*Data is unavailable for these committees for the 96<sup>th</sup> and 100<sup>th</sup> Congress.