

**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).

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

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).

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 Nride Presid19(11)X

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*

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 thn

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).

2009]

PRESIDENTIAL UNILATERALISM

409

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 I5,her Aittee to m-5.52(defin)5.94

oversight.⁴⁸ But when the President's opponents took over Congress,

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

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>.

2009]

PRESIDENTIAL UNILATERALISM

413

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. Mem oD(b (c047387 Tw[(the President)6.6(itspos8(

2009]

PRESIDENTIAL UNILATERALISM

415

(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.

