
**CAN ENHANCED OVERSIGHT REPAIR
“THE BROKEN BRANCH”?**

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INTRODUCTION

In the waning days of the Republican reign on Capitol Hill that began with the 1994 revolution, inveterate Congress-watchers Norman Ornstein and Thomas Mann echoed Ralph Nader’s diagnosis of two decades before and decried that the United States Congress has become the “broken branch.”¹ The institution of government first established by the Framers in Article I of the Constitution had ceased to play the leading role prescribed for it in our system of separated institutions sharing power. Accompanying this decreasing authority in Washington has been a continual and now rapidly-accelerating erosion of popular support for Congress. More than thirty years ago, Richard Fenno noted that a central paradox of American voting patterns was the public’s continued willingness to return their individual members of Congress to office even as public faith in the legislature as a whole declined.² In recent years, popular support for Congress as an institution has reached its nadir. As of September 2008, less than twenty percent of Americans approved of

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¹ THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

² Richard Fenno, *If as Ralph Nader Says, Congress Is “The Broken Branch,” How Come We Love Our Congressmen So Much?*, in *CONGRESS IN CHANGE: EVOLUTION AND REFORM* 277, 277-78 (Norman J. Ornstein ed., 1975) (observing that while ninety-six percent and eighty-five percent of House and Senate incumbents, respectively, won reelection, only twenty-five percent of the electorate gave Congress a positive rating).

Congress's job performance, while almost a full three quarters actively disapproved.³ The "people's branch," as the Senate's unofficial historian Robert C. Byrd describes it, has become the most disparaged branch.⁴

Three features of the contemporary Congress, I argue, are most responsible for this moniker: the decline of deliberation; rampant delegation of legislative power to the executive; and Congress's frequent failure to engage in vigorous, sustained oversight of the executive branch. Each of these are pillars of a responsible legislature; and in each, the modern Congress falls short both of its own past precedents and normative goals. This Essay begins by briefly surveying Congress's performance along all three dimensions in the contemporary era. It then focuses more intently on congressional oversight as perhaps the most feasible mechanism through which Congress might retain a check on powers delegated to the executive branch. Drawing on empirical data of congressional oversight of the war in Iraq, the Essay identifies the most important barrier to sustained, effective oversight: conflict between the partisan incentives of the congressional majority and the weak institutional incentive to superintend the executive branch. However, further empirical analyses suggest that when Congress does exercise the oversight powers at its disposal, it packs a political punch through its ability to influence public opinion and bring popular pressure to bear on the President to change course. The Essay concludes by discussing the prospects for institutional reforms that could target the barriers to effective oversight and bolster legislative responsibility in the committee room.

I. THREE SYMPTOMS OF THE BROKEN BRANCH

A. *Declining Deliberation*

When legislative scholars reflect on the contemporary Congress, most instinctively emphasize the dramatic changes that have transformed the institution since the reform efforts of the 1970s.⁵ Partisan polarization, the increasing centralization of power within the party leadership, rampant minority obstructionism, and routine, creative manipulation of parliamentary rules and procedures by the majority to stifle the minority are frequently cited as the key innovations separating the Congress of Newt Gingrich and Nancy Pelosi from that of Sam Rayburn and Lyndon Johnson.⁶

³ CBS News Poll, *The Bailout, the Economy and the Campaign* (Oct. 1, 2008), http://www.cbsnews.com/htdocs/pdf/SEP08D_BAILOUT.pdf.

⁴ ROBERT C. BYRD, *LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY* 39 (2004).

⁵ See, e.g., DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 11-13 (1991); JULIAN E. ZELIZER, *ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948-2000*, at 8-10 (2004).

⁶ See, e.g., WALTER OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 324-35 (2007); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE*

Whereas the legislative process was considerably more open for the expression of multiple viewpoints and amendments in the middle of the twentieth century, recent decades have witnessed a sharp decline in the opportunities for discussion, debate and compromise. Over the last three decades, the majority party – particularly in the House of Representatives – has used all of the institutional means at its disposal to move public policy away from the median member of Congress and toward the preferences of the majority party median.⁷ In committee, powerful chairmen have stifled minority participation and input in crafting legislation. In extreme cases, the majority has even used special rules or leadership task forces to circumvent the committee process altogether and substitute a bill more to the liking of party leaders.⁸ On the floor, the prevalence of restrictive rules, which severely limit or forbid amendments and debate, has risen dramatically in recent years. Even in conference committees, the majority has begun refusing members of the minority a seat at the table and instead seizing on the conference process as a final opportunity to craft a bill with minimal minority input. Thus, at every stage of the legislative process, the prospects for serious deliberation have declined precipitously.⁹

These tactics are not unique in American history. Indeed, they strongly resemble those prevalent in the late-nineteenth and early-twentieth centuries when Speakers Reed and Cannon successively ruled their chamber with an iron fist.¹⁰ The engine that drove the increase in such maneuvers and the concomitant decline of Congress as a deliberative body is the same today as it was a century ago – increasing intra-partisan homogeneity and inter-partisan

PROCESSES IN THE U.S. CONGRESS 3-7 (1997) [hereinafter SINCLAIR, UNORTHODOX LAWMAKING].

⁷ See, e.g., GARY W. COX & MATTHEW D. McCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 17 (1993); GARY W. COX & MATTHEW D. McCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 2 (2005) [hereinafter COX & McCUBBINS, *SETTING THE AGENDA*] (asserting that a majority party's ability to set the agenda, rather than its ability to garner sufficient votes, is an important source of its legislative power).

⁸ STANLEY BACH & STEPHEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN THE SPECIAL RULES* 41-42 (1988) (describing the use of special rules allowing party leaders to compromise outside of committees); DONALD R. WOLFENBERGER, *WOODROW WILSON INT'L CTR. FOR SCHOLARS, A REALITY CHECK ON THE REPUBLICAN HOUSE REFORM REVOLUTION AT THE DECADE MARK* 18 (2005), available at <http://www.wilsoncenter.org/news/docs/repub-rev-essay.pdf>.

⁹ For a thorough analysis of the full range and increasing frequency with which such procedures have been employed, see SINCLAIR, *UNORTHODOX LAWMAKING*, *supra* note 6, at 3-7 (outlining how the legislative process in practice diverges from the legislative process in theory); STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* 1-2 (1989) (discussing the increased importance of floor decision-making in Congress).

¹⁰ ZELIZER, *supra* note 5, at 16 (recounting the rise of "extremely powerful" Speakers of the House).

polarization.¹¹ As a result, the great irony of contemporary politics is that even though the partisan balance of power in Congress is so narrow, because the parties are internally homogeneous and the gulf between them is broad, the conditions are ripe for policy to oscillate back and forth far from the center as partisan control of the legislature shifts. Instead of the almost even split in Congress serving as an incentive to compromise and find the middle ground, polarization encourages the majority to exploit all of the institutional advantages available to it to shut out the minority and write its policy preferences into law.

The Senate lacks many of the institutional tools by which majority rule is imposed – at the outright expense of the minority – in the House. Indeed, minority rights have long been protected by Senate rules guaranteeing any member the right of unlimited debate.¹² Early attempts in the nineteenth century led by Henry Clay to scuttle the filibuster failed, and while twentieth-century reformers first provided a mechanism to invoke cloture and terminate floor debate and then adjusted the threshold needed for such a motion to pass, minority rights remain strong in the modern Senate.¹³ However, rather than serve to ensure the representation of minority views and foster active deliberation, the filibuster increasingly has been a tool of minority obstructionism that has brought many an initiative to an untimely death without ever receiving a floor discussion, let alone a vote in the well of the Senate.¹⁴

The end result of these twin processes of majority tyranny in the House and minority obstructionism in the Senate, according to many observers, is a precipitous decline in deliberation.¹⁵ Centrist legislation that would garner the support of majorities is kept from the floor through the powers of negative agenda control; other initiatives are killed by the threat of filibuster before ever reaching the Senate floor; and legislation that does pass is often void of the improvements that genuine debate and compromise among the nation's

¹¹ These are the twin pillars of conditional party governance theories. ROHDE, *supra* note 5, at 31-34; *see* JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 194 (1995). On increasing polarization, *see* generally NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006).

¹² SARAH A. BINDER & STEVE S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 2 (1997).

¹³ *Id.*

¹⁴ *Id.* at 1; GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 1-6 (2006).

¹⁵ *See, e.g.*, DONALD R. WOLFENBERGER, *CONGRESS AND THE PEOPLE: DELIBERATIVE DEMOCRACY ON TRIAL* 6-7 (2000); Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 321-22 (1994).

representatives might generate.¹⁶ Mann and Ornstein put forward a number of recommendations for institutional reforms that might rekindle Congress's deliberative spirit.¹⁷ However, as long as the political environment remains unchanged, elections continue to be tightly contested, and the parties remain internally homogeneous and ideologically polarized one from another, such reforms seem unlikely to gain much traction.

B. *Widespread Delegations to the Executive*

The era of congressional dominance over politics began to end with the emergence of the modern American state. As the scope of government grew dramatically in the early-twentieth century, so too did the necessity for Congress to delegate increasing authority to the departments and agencies charged with administering the bureaucratic state.¹⁸ With each successive war and crisis, the power of the federal government grew, and as the scope and breadth of the policies under its purview expanded, Congress was compelled to delegate ever more power and initiative to the executive branch.¹⁹

To be sure, congressional decisions regarding delegation do respond to changes in the political environment. For example, when writing laws, Congress delegates considerably more authority to the executive branch when the President is close to congressional preferences than when a preference outlier inhabits the other end of Pennsylvania Avenue.²⁰ However, the general pattern over the past fifty years has been for Congress to delegate ever more authority to the executive branch. These blanket transfers of power – occasionally even of powers specifically entrusted to the legislature in the Constitution – threaten to undermine the delicate balance between the branches erected by the Framers.

Some of the starkest cases of such wholesale delegations of authority have come in war powers. Revisionist critiques notwithstanding, the bulk of constitutional scholarship on the distribution of war powers across the

¹⁶ See COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 7, at 224; Andrea C. Campbell, Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. Senate, 1877-1986*, in *PARTY, PROCESS AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 146, 164 (David W. Brady & Mathew D. McCubbins eds., 2002); Sean Gailmard & Jeffery A. Jenkins, *Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power*, 69 J. POL. 689, 689 (2007).

¹⁷ MANN & ORNSTEIN, *supra* note 1, at 226-39.

¹⁸ See, e.g., JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 38 (1981).

¹⁹ *Id.*

²⁰ See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 11 (1999) ("Congress delegates less and constrains more under divided government."). However, for a more nuanced view, see Craig Volden, *A Formal Model of the Politics of Delegation in a Separation of Powers System*, 46 AM. J. POL. SCI. 111, 111 (2002) (exploring the delegation of power under both unified and divided governments).

branches makes clear that Congress was intended to be the primary branch at the helm of the nation's martial affairs.²¹ Article I expressly granted to Congress alone the power to raise and equip Armies and Navies, launch limited wars through letters of Marque and Reprisals, and to declare war.²² Article II provides for the President to serve as Commander in Chief of the Army and Navy and of the state militias when called into national service;²³ however, Alexander Hamilton made clear in *The Federalist No. 69* that this title amounted to "nothing more" than the direction of forces in the field once authorized by Congress.²⁴

Nevertheless, since World War II, the history of inter-branch war powers, Lou Fisher argues, is largely one of Congress's abdication of its war powers to the President.²⁵ While many in the legislature inveighed against Truman's undeclared war in Korea, they did nothing to terminate his action once begun.²⁶ Similarly, during the Vietnam War, Congress eventually revoked the Gulf of Tonkin resolution, but it repeatedly failed to compel President Nixon to end the American military commitment in Southeast Asia.²⁷ Even the most important accomplishment of the congressional "resurgence" after Vietnam, the War Powers Resolution, was essentially an unprecedented delegation of

²¹ Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 701 (1972) (concluding that "Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not").

²² U.S. CONST. art. I, § 8, cls. 11-13.

²³ *Id.* at art. II, § 2, cl. 1.

²⁴ THE FEDERALIST NO. 69, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Of necessity, this is an oversimplification of the vigorous debate on the constitutional distribution of war powers. For a more complete discussion, see generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (discussing the state of war powers post-Vietnam); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990) (examining the division of war powers through legal precedent); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (1996) (examining the distribution of foreign affairs powers under the Constitution); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) (arguing that the Iran-Contra Affair was a result of ineffective national security laws); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) (revisiting the issue of the distribution of foreign policy powers between Congress and the President and advocating for flexibility in times of war); Lofgren, *supra* note 21 (exploring the executive's war powers as understood by the founders).

²⁵ LOUIS FISHER, *CONGRESSIONAL ABDICATION ON WAR AND SPENDING*, at xiv (2000) (arguing that Congress has given the war and spending powers the Framers intended for the legislature to the President); LOUIS FISHER, *PRESIDENTIAL WAR POWER*, at xii (1995) [hereinafter FISHER, *PRESIDENTIAL WAR POWER*] (commenting on the strength of presidential war powers after World War II).

²⁶ FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 25, at 84.

²⁷ *Id.* at 118.

war-making power to the President.²⁸ By focusing on mechanisms by which Congress could compel the President to withdraw American forces from foreign deployments, the compromise language of the resolution implicitly recognized the President's authority to order American troops abroad absent any congressional sanction for up to ninety days on his own initiative.²⁹

A more recent example of a sweeping delegation of congressional war powers to the President is the Authorization for Use of Military Force ("AUMF"), passed by near-unanimous consent in both chambers of Congress in the aftermath of the terrorist attacks on September 11, 2001.³⁰ The AUMF delegated to the President the power "to use all necessary and appropriate force" against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."³¹ The Bush Administration subsequently used this broad language to justify a wide array of assertions of presidential power – from the authority to order wiretaps on the international communications of American citizens without first obtaining warrants from the FISA court as required by law, to the power to unilaterally establish military tribunals to try terror suspects and those designated enemy combatants independent of the federal judicial system, to the ability to authorize "enhanced interrogation techniques" for suspected terrorists. In the last instance, Congress attempted to reign in presidential power legislatively by banning all interrogation practices involving torture.³² However, the Administration's signing statement signaled its willingness to defy Congress if necessary and made clear that the President reserved the right to engage in any action pursuant to his Commander-in-Chief powers that, in his judgment, would prevent further terrorist attacks.³³ Precisely how this inter-branch contest will be resolved is unclear; however, an extensive literature on presidential unilateral powers suggests that the President may well have the upper hand.³⁴

²⁸ 50 U.S.C. §§ 1541-1548 (2000) (setting the procedure by which the President and Congress can engage the U.S. in hostilities abroad).

²⁹ *Id.* § 1544.

³⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³¹ *Id.*

³² Detainee Treatment Act of 2005, 42 U.S.C. §§ 2000dd to 2000dd-1 (2000) ("No individual in the custody or under the physical control of the United States Government . . . shall be subject to cruel, inhuman, or degrading treatment or punishment.").

³³ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1919 (Dec. 30, 2005).

³⁴ See, e.g., PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION, at xi (2002); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 183 (2003); Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 445 (1999).

One means for Congress to become a more responsible branch is for it to wrest back control of legislative powers delegated to the President and to stem the tide of ever-greater delegation to the executive branch. Yet, with the size and scope of government and the ever-increasing complexity of public policy, delegation is unavoidable. Indeed, without it the government would fail to take advantage of the resources and expertise of the permanent bureaucracy in forging and refining public policy. Rather, for Congress to delegate authority responsibly it must maintain some check on power once delegated. When other political actors abuse delegated authority in a way that conflicts with legislative intent, Congress must retain some mechanism to call that actor to account.

Of course, Congress always has the ability to pass new legislation when the executive branch interprets and implements a law in a way that is contra legislative intent. However, an extensive literature in political science has laid bare the stark barriers to Congress doing so. Such efforts require that Congress overcome its collective action problems and a legislative process riddled with transaction costs.³⁵ Any such effort to pass new legislation to undo an executive action must clear super-majoritarian hurdles in the Senate, and even then, it faces a President wielding the veto pen.³⁶ As a result, legislation will frequently offer little remedy to rectifying perceived abuses of delegated authority.

An alternative mechanism, the legislative veto, was ruled unconstitutional by the Supreme Court in 1982.³⁷ While the legislative veto survives by the mutual consent of both branches in many alternative forms, the court ruling and the sometimes cumbersome provisions for the veto to be exercised limit its usefulness as a widespread check on executive discretion.

A third mechanism for Congress to delegate responsibly is to conduct rigorous, sustained oversight of the executive branch and its use of delegated powers. Oversight is perhaps the most logical solution for Congress to maintain some influence over how delegated authority is exercised; yet in this realm too, Congress all too often appears to be the “broken branch.”

³⁵ See EPSTEIN & O'HALLORAN, *supra* note 20, at 34; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 26 (1994); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 140 (1999); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, are not Organized as Markets*, 96 J. POL. ECON. 132, 136 (1989).

³⁶ DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON* 7 (1998); KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 22 (1998) (commenting that two super-majoritarian procedures, the presidential veto and the Senate filibuster, limit the legislative majority's power to pass legislation).

³⁷ *INS v. Chadha*, 462 U.S. 919, 959 (1982).

C. *Failures of Oversight*

Throughout American history, legislative oversight conducted by congressional committees has been one of the most powerful tools in Congress's arsenal to exercise a check on the executive branch and defend its institutional prerogatives. Particularly in times of national exigency – both military and economic – the need for Hamiltonian “energy” tilts the pendulum of power toward the executive branch. The very same collective action dilemmas and cumbersome institutional machinery that encourage such a shift to the executive also hinder Congress's capacity to police the executive branch and retain a check on delegated powers by acting legislatively. Instead, Congress has repeatedly turned to the oversight and investigative powers of its committees to police the executive branch. And, at least anecdotally, when Congress wields its oversight powers forcefully, it can lead to genuine changes in public policy.

The War of 1812 and the accompanying expansion of presidential power strongly contributed to the initial evolution and growth of the standing committee system in the early-nineteenth century.³⁸ As the era of congressional dominance ended and presidential power grew in the early-twentieth century, Congress increasingly used its committee-based oversight powers to keep a watchful eye on the executive branch. For example, in the wake of the Spanish American War it fell to the executive to administer the nation's first major colonial acquisitions in the Philippines. The war undoubtedly bolstered presidential foreign policy power; yet, Congress retained some check on the exercise of this power through inquests into the conduct of the American occupation and continued oversight of its operations. In the aftermath of Teddy Roosevelt's bold assertions of unilateral presidential power, Congress struck back in the committee room with months of investigatory hearings into misconduct in the Interior Department and Forestry Bureau stemming from Roosevelt's proclamations and orders. Investigative oversight was also one of the primary means through which Congress pushed back at President Franklin Roosevelt's New Deal regime. The exponential growth in the size of government and its substantive scope fundamentally shifted the balance of power away from Capitol Hill and toward the other end of Pennsylvania Avenue. However, even in the midst of the Great Depression, Congress routinely used its investigative powers to exercise a check on the Administration's use of executive powers. Democratic Congresses launched sustained high profile investigations into the operation of many of Roosevelt's alphabet army of executive agencies including the National Recovery Administration, the Works Progress Administration and the Tennessee Valley Authority.³⁹

³⁸ Eric Schickler, *Institutional Development of Congress*, in THE LEGISLATIVE BRANCH 35, 40 (Paul J. Quirk & Sarah A. Binder eds., 2005).

³⁹ For a more detailed analysis of congressional oversight in the Roosevelt era, see SUNDQUIST, *supra* note 18, at 133-39.

Even today in the post-World War II era, many of the most potent symbols of congressional power in our system of separated institutions sharing power have emerged not from the chamber floors, but from Congress's committee rooms. In a diverse range of cases from investigations of misconduct by executive agencies to Iran Contra, from Watergate to Whitewater, Congress has used its bully pulpit again and again to expose executive wrongdoing, challenge presidential policies and even to bring presidential administrations to the brink of political disaster. To be sure, the vast majority of congressional oversight is a far cry from such high profile publicity probes aimed at extreme allegations of executive misconduct. However, even more mundane oversight can play an important role in maintaining congressional influence over the implementation of public policy. Indeed, even the anticipation of congressional oversight can be enough to keep an executive agency in line and improve its adherence to legislative intent.⁴⁰

Yet despite its political importance, there are reasons to believe that, on the metric of conducting rigorous oversight, the contemporary Congress is again a broken branch. Interestingly, a principal recommendation of the 9/11 Commission regarding Congress emphasized the critical importance of augmented congressional oversight of anti-terrorism policy.⁴¹ Rather than advocating a further transfer of power to the executive to meet the exigent threat posed by global terrorism, the Commission called for the strengthening of the intelligence committees and emphasized the importance of legislative oversight of antiterrorism policy across levels of government.⁴² The Commission bemoaned the lack of oversight in the pre-9/11 era;⁴³ and there are strong reasons to worry that Congress has done little to improve its oversight capacity – in the realm of military policy and terrorism as well as in other policy arenas – in recent years.

The level and quality of congressional oversight and changes in it over time are inherently difficult concepts to measure. In a leading quantitative study of the volume of congressional oversight over time, Joel Aberbach found that congressional oversight increased significantly in the early 1970s, even before the Watergate scandal rocked Washington, and remained strong into the

⁴⁰ This is a key component of McCubbins and Schwartz's argument about fire alarm oversight. If bureaucrats know that interest groups or the public will sound the fire alarm if the agency strays too far from congressional and interest group preferences, then they will be reluctant to do so and the observable result is little active congressional oversight. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984).

⁴¹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 419 (2004) [hereinafter 9/11 COMMISSION REPORT] (recommending a strengthening of "congressional oversight of intelligence and homeland security" and recognizing that this "may be among the most difficult and important" recommendations to implement).

⁴² *Id.*

⁴³ *Id.* at 420 (referring to previous congressional oversight of intelligence as "dysfunctional").

1990s.⁴⁴ More qualitative analyses, by contrast, have bemoaned a general decrease in quality oversight in recent years, a decline that reached its nadir during the first six years of the George W. Bush Administration.⁴⁵

However, what most sets trends in congressional oversight apart from the quality of legislative deliberation and the nature of widespread delegation of legislative powers to the executive branch is that congressional oversight has not monotonically decreased or increased over time. Rather, when we examine the intensity with which Congress has dedicated itself to its oversight responsibilities, we see a pattern much like that of a swinging pendulum; at times, Congress appears to use its investigative powers aggressively to police the executive while at others it takes a decidedly passive role and fails to meet normative standards of a responsible independent legislature. Perhaps nowhere is this variable nature more readily apparent than in the fluctuations in oversight of the war in Iraq over the preceding five years. The next Part examines these sharp temporal fluctuations in detail. However, the fact that Congress does, in certain political contexts, continue to use its oversight tools to check the executive branch and influence the scope and conduct of public policy raises the hope that Congress might be able to reform itself and bolster its institutional capacity for sustained oversight. The Essay returns to such reforms in the Conclusion.

II. CONGRESSIONAL OVERSIGHT OF THE IRAQ WAR

At least since Aaron Wildavsky's seminal article declaring that there are two presidencies, the conventional wisdom in presidency scholarship is that while Congress can effectively constrain executive power in the domestic arena, the president enjoys significant advantages in foreign affairs.⁴⁶ Throughout American history, Congress has faced significant barriers to using legislation to compel the President to change his preferred policy course and constrain his freedom of action in the international arena. However, even as many legislative initiatives have failed, Congress has repeatedly succeeded in using the oversight and investigative tools at its disposal to offer sharp, politically

⁴⁴ JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 35-47 (1990) (surveying the trends in congressional oversight and finding a sharp increase in oversight in the early 1970s); Joel D. Aberbach, *What's Happened to the Watchful Eye?*, 29 CONG. & PRESIDENCY 3, 5 (2002). For another study challenging the conventional view of Congress's abdication of its oversight role, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 68 (2006) (arguing that Congress has exercised oversight in many ways, both formal and informal, and not just by conducting oversight hearings).

⁴⁵ See, e.g., MANN & ORNSTEIN, *supra* note 1, at 157.

⁴⁶ Aaron Wildavsky, *The Two Presidencies*, 4 TRANS-ACTION 7, 7 (1966). See generally BARBARA HINCKLEY, LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS (1994); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE (2005); THE PRESIDENT, THE CONGRESS AND THE MAKING OF FOREIGN POLICY (Paul E. Peterson ed., 1994).

damaging critiques of executive foreign policy. From the lengthy inquiry into the Truman policies that allegedly “lost China,” to the exposure and condemnation of the Nixon Administration’s clandestine war in Cambodia, to the Iran-Contra investigations that threatened to take down the Reagan presidency, committee hearings have proved an invaluable weapon in Congress’s arsenal when dealing with the foreign policy executive.⁴⁷ In the assessment of Mann and Ornstein, in foreign affairs, “[o]versight, even more than direct legislation, is key to movement.”⁴⁸

However, committee hearings are a tool that Congress has failed to use consistently. This is particularly true in the case of congressional oversight of the Bush Administration’s conduct of the war in Iraq, the nation’s longest and bloodiest conflict since Vietnam. To measure the scope and intensity of critical congressional oversight of the Iraq War, *Congressional Information Service* listings of all war-related hearings were searched from the invasion’s commencement in March of 2003 through the end of April 2008.⁴⁹ A search of the *CIS Abstracts* database on *LexisNexis Congressional Universe* for Iraq in all fields except full text from March 20, 2003 to April 30, 2008 yielded 389 entries.⁵⁰ However, many of these hearings were only tangentially related to the Iraq War, and others were merely mundane reports about happenings in Iraq, not vigorous oversight of the Administration’s conduct of the war effort.⁵¹ To separate the proverbial wheat from the chaff, each hearing’s summary and individual testimony descriptors were used to identify those hearings that explicitly contained at least some critical analysis of the Administration’s prosecution of the war. The results from this search are summarized in Figure 1 below.

⁴⁷ See DOUGLAS KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS AND THE CONDUCT OF MILITARY ACTION* (forthcoming) (manuscript at 213, on file with author); William Howell & Douglas Kriner, *Congress, the President, and the Iraq War’s Domestic Political Front*, in *CONGRESS RECONSIDERED* 311, 319 (Lawrence Dodd & Bruce Oppenheimer eds., 2009) [hereinafter Howell & Kriner, *Iraq War’s Domestic Political Front*].

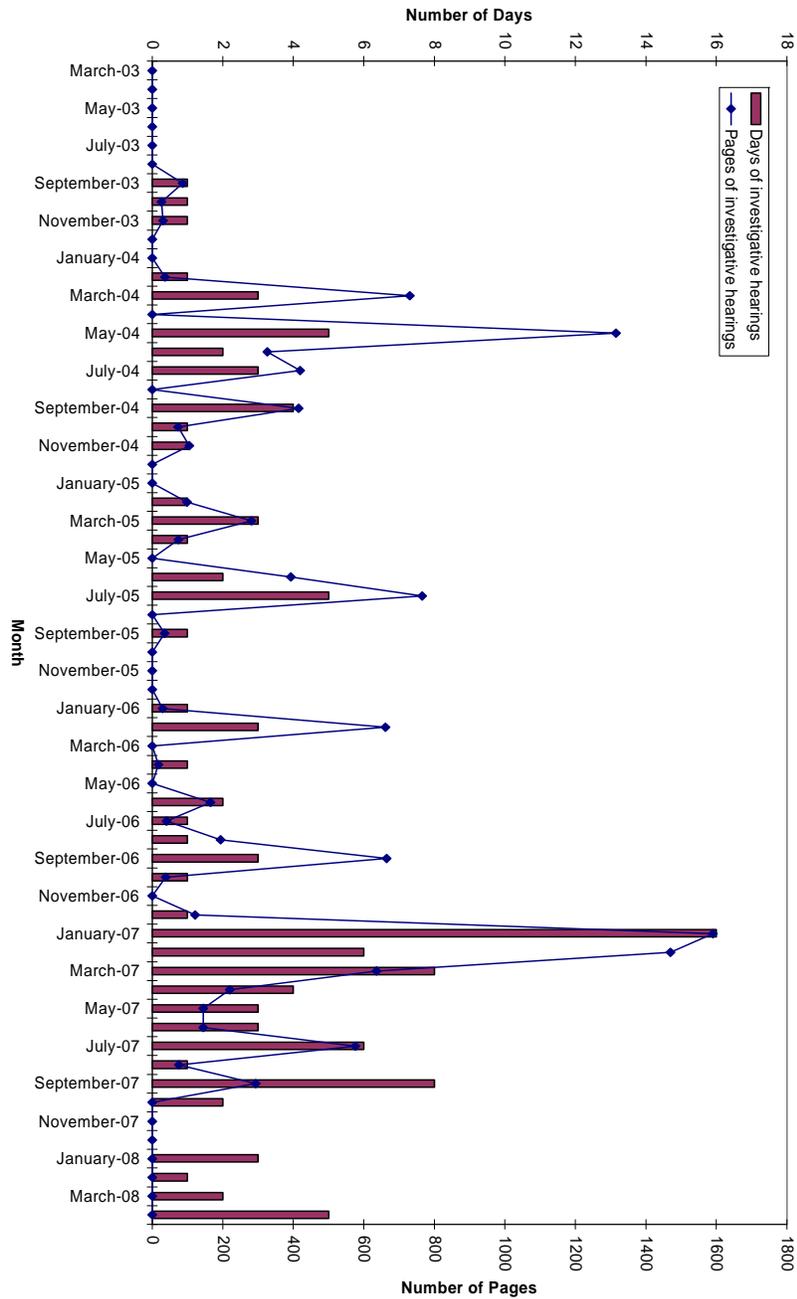
⁴⁸ Norman Ornstein & Thomas Mann, *The Hill Is Alive with the Sound of Hearings*, *FOREIGN AFF.*, Mar. 21, 2007, <http://fullaccess.foreignaffairs.org/20070321faupdate86276/norman-j-ornstein-thomas-e-mann/the-hill-is-alive-with-the-sound-of-hearings.html>.

⁴⁹ This data is taken from Howell & Kriner, *Iraq War’s Domestic Political Front*, *supra* note 47, at 324.

⁵⁰ *Id.*

⁵¹ *Id.* In previous work, Howell and Kriner coded both positive and critical hearings and examined the influence of each on popular support for the war effort. *Id.* at 324-31. Because the focus of this Essay is on legislative responsibility and oversight as a tool by which Congress can retain an important check on presidential action in the military arena, I focus here exclusively on critical oversight. Moreover, Howell and Kriner’s multivariate regression model showed no evidence of a statistically significant correlation between positive hearings and public support for the war. *Id.* at 329.

Figure 1:
Critical Congressional Oversight of the War in Iraq, 2003-2008



Several patterns in the data are immediately apparent. First, critical oversight of the war was quite rare in the conflict's first year; indeed, it was muted throughout the entire period of Republican control of Congress. From the beginning of the invasion through the end of the 109th Congress, legislators held only about fifty days of hearings that were identified from the *CIS Abstracts* as being in some respect explicitly critical of the Administration's conduct of the war or occupation. Moreover, of these almost ten percent were informal hearings commenced by the minority Democrats under the aegis of the Democratic Policy Committee.⁵² During the invasion itself, Congress held virtually no hearings critical of operations on the ground. Even in the face of an escalating insurgency and mounting American casualty counts in the summer of 2003 – months after the President had imprudently declared “mission accomplished” – congressional leaders remained reticent to hold extensive hearings openly critical of the Administration's policies. A few critical oversight hearings emerged during the debate over the first \$87 billion supplemental appropriation bill for continued combat and reconstruction operations in Iraq. The biggest surge in investigative activity during the war's first four years came in the summer of 2004 when Congress investigated revelations of prisoner abuse at Abu Ghraib. Aside from the abuse scandal, however, Republican committee chairs successfully blocked most inquiries into potentially embarrassing questions of the Administration's conduct of the war and military strategy. The success with which Republican leaders muted criticism in the committee room is perhaps best captured in Congressman Henry Waxman's lament that the Republican-controlled House Armed Services Committee held only five hours of testimony on Abu Ghraib, compared to 140 hours of House testimony on whether Bill Clinton improperly used the White House Christmas card list.⁵³

The 2006 midterm elections, however, ushered in a watershed change in the scope and intensity of congressional oversight of the Iraq War. Almost overnight, newly-minted Democratic committee chairmen, owing their majority status in large part to the Iraq War,⁵⁴ banged their gavels to convene a flurry of investigations of the Administration's policies and conduct of operations. In their first fifteen months in power, Democrats held more critical oversight hearings into the war effort than their Republican predecessors did in

⁵² See, e.g., *Oversight Hearing on Waste, Fraud and Abuse in U.S. Government Contracting in Iraq Before the S. Democratic Policy Comm.*, 109th Cong. 1 (2005) (statement of Sen. Dorgan) (“[T]here is a serious problem here in the Congress with a lack of oversight hearings.”).

⁵³ 151 CONG. REC. H4833 (daily ed. June 21, 2005) (statement of Rep. Waxman).

⁵⁴ For the critical importance of the Iraq War in both the House and Senate 2006 elections, see Christian R. Grose & Bruce I. Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Explaining Variation in Partisan Swing in the 2006 U.S. House Elections*, 32 LEGIS. STUD. Q. 531, 550 (2007), and Douglas L. Kriner & Francis X. Shen, *Iraq Casualties and the 2006 Senate Elections*, 32 LEGIS. STUD. Q. 507, 523 (2007), respectively.

the conflict's first four years.⁵⁵ Although much of the Democrats' "six for '06" legislative agenda stalled in the Senate after securing passage in the House⁵⁶ (much as the GOP Contract with America had fared more than a decade before),⁵⁷ the investigative engines of both chambers roared at full speed. In their first 100 days alone, congressional committees staged hearings to question the President's rationale for the "surge," to investigate continued body armor shortages for troops in the field, to highlight abuse by Blackwater, Haliburton, and other private contractors, and, perhaps most detrimentally for the Administration, to uncover and publicly air evidence of the maltreatment of wounded veterans at Walter Reed Army Medical Center.⁵⁸

Significantly, none of these wartime developments probed by Democrats in early 2007 were new. Most if not all of the specific cases of alleged abuse were known well before the 2006 midterm; however, it was not until Democrats seized control that Congress aggressively turned its investigative eye on these wartime failures. The contrast is particularly sharp concerning congressional probes into the quality of care provided for wounded veterans at Walter Reed. Although the mistreatment and poor conditions uncovered by the 2007 probes had existed for some time, Walter Reed was rarely mentioned in any of the hearing descriptors for the 108th and 109th Congresses.⁵⁹ Indeed, one of the only hearings held by the Republican Congress mentioning the facility made no reference to potential problems there, but rather hailed the military's efforts to provide a "seamless transition" for wounded soldiers back to civilian life.⁶⁰

⁵⁵ Howell & Kriner, *Iraq War's Domestic Political Front*, *supra* note 47, at 326 (identifying fifty critical hearings during Republican rule from 2003-2006 compared with sixty-five hearings during the first fifteen months of Democratic control).

⁵⁶ Jonathan Weisman & Lyndsey Layton, *Democrats' Momentum is Stalling*, WASH. POST, May 5, 2007, at A1.

⁵⁷ BRADY & VOLDEN, *supra* note 36, at 157-58.

⁵⁸ Howell & Kriner, *Iraq War's Domestic Political Front*, *supra* note 47, at 326.

⁵⁹ *Id.*

⁶⁰ To illustrate the difference, consider two hearings in the 109th and 110th Congresses on the Department of Defense's health care and transitional assistance programs for veterans. Compare *Seamless Transition: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 109th Cong. (2006) [hereinafter *Seamless Transition*], with *Hearing to Receive Testimony on the Departments of Defense and Veterans Affairs Disability Rating Systems and the Transition of Servicemembers from the Department of Defense to the Department of Veterans Affairs: Joint Hearing Before the Comm. on Armed Servs. and the Comm. on Veterans' Affairs*, 110th Cong. (2007) [hereinafter *Disability Rating Systems*]. In some places, the 109th congressional hearing did raise ways in which the Department of Defense program could be improved. *Seamless Transition*, *supra*, at 2 (statement of Rep. Gus Bilirakis, Chairman, Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs) (commenting that "more can be done" to smooth the transition from military to civilian life). However, the fundamentally more aggressive and critical approach to oversight of this program under divided

Even as conditions improved on the ground in Iraq in late 2007 and early 2008, committee investigations extensively probed continued sources of trouble, including the Iraqi government's failure to meet most of the Administration's benchmarks, the ever-increasing budgetary costs of the war and its lasting economic and social ramifications. Contrasting the flurry of investigation under the Democrats with the more lethargic pace of the preceding two Republican-controlled Congresses, Illinois Democrat Rahm Emanuel perhaps put it best: "What a difference a year makes."⁶¹

A more rigorous, empirical look at the data confirms the impressionistic trends observed from Figure 1. A simple difference in means test reveals that the average number of days of critical oversight hearings conducted per month in unified government was just more than one. By contrast, in divided government this number increased four-fold, a statistically significant increase ($P < .001$). Moving beyond the simple bivariate relationship, Table 1 presents results from two Poisson event count models examining the factors driving the number of critical oversight hearings in each month.⁶²

government is readily apparent from a quick comparison of the opening statements by Chairman Bilirakis (R-FL) in the 109th Congress and Chairman Levin (D-MI) in the 110th Congress. *Compare id.* (statement of Rep. Gus Bilirakis, Chairman, Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs) (recalling a visit to Walter Reed Army Medical Center and applauding the Departments of Defense and Veterans' Affairs for "their efforts to achieve seamless transition"), *with Disability Rating Systems, supra*, at 1-3 (statement of Sen. Carl Levin, Chairman, Comm. on Armed Servs.) (listing the challenges to achieving a seamless transition, including the difficulty some wounded veterans have getting into VA programs).

⁶¹ Peter Baker, *For an Opaque White House, a Reflection of New Scrutiny*, WASH. POST, Mar. 7, 2007, at A1.

⁶² All models were re-estimated using negative binomial event count models and autoregressive Poisson models with very similar results.

Table 1:
Forces Driving Trends in Congressional Oversight of the Iraq War,
March 2003-April 2008⁶³

	(1)	(2)
Divided government	1.06*** (.27)	.71** (.35)
Days in session	.09*** (.02)	.09*** (.02)
Monthly casualties (10s)	--	.07* (.04)
Logged cumulative casualties	--	.25* (.17)
Positive events	--	-.34 (.33)
Negative events	--	.22 (.27)
(N)	62	62
Pseudo-R ²	.26	.29

* p < .10

** p < .05

*** p < .01

The first specification models oversight activity as a function of divided government and an additional control – the number of days that Congress was in session in a given month. The coefficients for both variables are positive and statistically significant. Consistent with the bivariate results, Congress held significantly more critical oversight hearings of the war in periods of divided government. Moreover, monthly counts of critical oversight increased considerably, on average, the longer Congress was in session.

The second specification includes four additional variables to examine the influence of conflict events on oversight trends. The first two variables measure monthly and logged cumulative American casualties. The second set of variables assesses the influence of major conflict events on investigative activity. To construct these measures, I surveyed the *World Almanac* and the *Time Almanac* to identify a series of major positive and negative events in Iraq.⁶⁴ Examples of positive events include the capture of Saddam Hussein,

⁶³ All significance tests are one-tailed; all models report robust standard errors.

⁶⁴ This method follows that of previous attempts to identify positive and negative “rally” events. See PAUL BRACE & BARBARA HINCKLEY, FOLLOW THE LEADER: OPINION POLLS AND THE MODERN PRESIDENTS 183-85 (1992) (describing the method for classifying and coding

the transfer of sovereignty from the United States to a provisional Iraqi government and the January 2008 passage of legislation allowing some ex-Baathist party members to hold governmental positions. Examples of negative events include the bloody Fallujah offensive after the mutilation of five American contractors, the issuance of the final report finding no weapons of mass destruction in Iraq, and the failure of government forces to oust the Mahdi Army from its strongholds in Basra.

Even in this expanded specification, there is evidence of a strong, positive and statistically significant correlation between divided government and the intensity of congressional investigative oversight. The models also offer modest evidence that congressional oversight responds to developments on the ground. Days of critical oversight increase with monthly spikes in casualties and mounting cumulative war debt. Moreover, positive events are negatively correlated with critical oversight while negative events are positively correlated with congressional investigative activity. However, none of these relationships are statistically significant. The most important predictor of congressional oversight is clearly whether the opposition party controls the legislature and its committee chairmanships or whether the President's party holds the reins of power on Capitol Hill.

III. THE PARTISAN DYNAMIC OF CONGRESSIONAL OVERSIGHT

Recent research strongly suggests that this partisan dynamic in congressional investigative oversight is not limited to the contemporary case of the Iraq War. David Mayhew pioneered the study of congressional "publicity probes" of alleged executive misconduct and found that such major congressional investigations of the executive branch were roughly evenly distributed across periods of unified and divided government.⁶⁵ Updating Mayhew's analysis and employing more refined measures that capture the considerable variance in the scope and intensity of these investigations, however, Douglas Kriner and Liam Schwartz found that the level of congressional investigative activity is responsive to both the partisan composition of Congress and the cohesiveness of the majority party.⁶⁶ Specifically, investigatory oversight increases dramatically under divided government, particularly when the opposition majority party is internally cohesive.⁶⁷ By contrast, in unified government investigatory activity is muted,

events); Paul Gronke & John Brehm, *History, Heterogeneity, and Presidential Approval: A Modified ARCH Approach*, 21 ELECTORAL STUD. 425, 433 (2002) (updating the Brace and Hinckley series and developing a more detailed coding method).

⁶⁵ DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002*, at 178, 223 (2005).

⁶⁶ Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEG. STUD. Q. 295, 295 (2008).

⁶⁷ *Id.* at 297.

particularly when the majority is ideologically homogeneous and aligned with the President.⁶⁸

An extensive literature in political science has debated whether oversight in its various forms – from active congressional hearings to more passive “fire alarm” oversight – affords the legislature with a strong check on the actions of the President and executive agencies.⁶⁹ Often, these concerns focus on whether congressional committees possess the necessary tools and political clout required to induce executive branch compliance.⁷⁰ While important, such debates overlook the initial problem with oversight – whether those who control the gavel have the personal and institutional incentives to use it. All too often, partisan incentives to support a President of the same party trump institutional incentives to defend Congress’s institutional prerogatives by vigorously overseeing the actions of the executive branch.

Scholars have long noted that the Framers of the Constitution did not anticipate the emergence of political parties.⁷¹ They explicitly rejected the idea that political parties should promote intra-institutional organization and inter-institutional coordination.⁷² As a result, the checks and balances system that the Founders erected in Philadelphia was based on the assumption that political ambition and the desire to accumulate as much power as possible for themselves would lead politicians to be institutional partisans, first and foremost. The essential feature of checks and balances, James Madison wrote in *The Federalist No. 51*, “consists in giving to those who administer each department, the necessary constitutional means, and *personal motives*, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The *interest of the man* must be connected with the *constitutional*

⁶⁸ *Id.*

⁶⁹ See, e.g., Randall L. Calvert, Matthew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989) (showing that agencies do not operate independent of the legislature); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 1 (1990) (investigating “congressional influence on bureaucracy”); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) (expanding on the contention that the legislature controls agencies); Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance,’* 12 LEG. STUD. Q. 475, 480 (1987) (criticizing the theory of congressional dominance); Barry Weingast & Mark Moran, *Bureaucracy Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 765 (1983) (examining legislative control of agencies).

⁷⁰ See, e.g., Moe, *supra* note 69, at 487 (questioning the efficacy of budgetary mechanisms as a check on bureaucratic discretion).

⁷¹ See, e.g., RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 1 (1969).

⁷² *Id.* at 1.

rights of the place."⁷³ By giving the President and Congress different constituencies, and creating through the apportionment of enumerated powers an "invitation to struggle" in Edward Corwin's famous phrase, the Framers sought to ensure that congressional members' first loyalty would be to their institution.⁷⁴ To further their own power prospects, they must defend and seek to bolster that of Congress vis-à-vis the executive branch.

Partisan incentives undermine this Madisonian logic. Particularly in our contemporary politics of intense partisan polarization and strong shared partisan electoral fates, it is no longer the case that many legislators feel that their personal political interests and ambitions are best served by defending the prerogatives and power of their institution. Rather, the President's co-partisans stand to gain little from attacking the policies of their partisan ally in the White House and instead risk electoral losses from a tarnished party label. Thus, in periods of unified government, the majority has few incentives to push back against a co-partisan president, even when his or her actions threaten majority party members' institutional prerogatives as legislators. Only in divided government do partisan and institutional incentives cleanly align; and only then does investigative oversight become an attractive option to serve both purposes.

IV. DOES OVERSIGHT AFFORD A CHECK ON EXECUTIVE POWER?

The presumption is widespread that through rigorous oversight of the executive branch Congress can maintain a degree of influence over policymaking, even in an era of expanded presidential powers and broad delegations of authority to the executive branch. Immediately after the Democratic takeover of both houses of Congress in 2006, California Congressman Henry Waxman argued that investigations may be "just as important, if not more important, than legislation."⁷⁵ Similarly, in academic circles Thomas Mann spoke for many when he argued that the rise of oversight in the 110th Congress "has been the most important change since the 2006 election in terms of relations between the Congress and the administration."⁷⁶

However, the precise mechanisms through which oversight alone can influence executive behavior and the course of policymaking are frequently ignored. Recommendations by oversight committees are nonbinding and have no force of law. Congress does have budgetary control over executive departments and agencies, an important means of leverage. However, as noted

⁷³ THE FEDERALIST NO. 51 (James Madison), *supra* note 24, at 1 (emphasis added).

⁷⁴ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 200 (1940).

⁷⁵ Elizabeth Williamson, *Revival of Oversight Role Sought; Congress Hires More Investigators, Plans Subpoenas*, WASH. POST, Apr. 25, 2007, at A1.

⁷⁶ Charles Babington, *Democrats Pursue Agenda With Inquiries: When Bills Fail in Congress, Switch is made to Subpoenas, Probes*, MSNBC, Aug. 22, 2007, <http://www.msnbc.msn.com/id/20387829> (quoting Thomas Mann).

by skeptics of congressional dominance theories in the literature on bureaucratic control, budgetary tools are somewhat clumsy instruments for encouraging greater executive compliance with legislative intent.⁷⁷ Moreover, oversight committees themselves normally lack appropriations authority, which diminishes the credibility of any threatened committee sanctions for noncompliance.⁷⁸ Indeed, in most situations an oversight committee's only formal recourse is to propose new legislation that would legally compel a change in course. However, such efforts are subject to the collective action dilemma and intricate procedures riddled with transaction costs and super-majoritarian requirements, not to mention a presidential veto.⁷⁹

If oversight can only constrain executive branch activities through such formal mechanisms, then there are strong reasons to question whether it can truly serve as a real constraint on the executive's freedom of action. And if it does not, then oversight is merely inconsequential position-taking, not a tool for continued congressional influence over policymaking when legislative options fail. However, there are strong theoretical reasons and growing empirical evidence to suggest that congressional oversight *can* influence executive branch behavior through more informal means.

Vigorous congressional oversight can inform policy discourse, influence public opinion and bring popular pressure to bear on the executive to change course. In David Mayhew's words, members of Congress can wield considerable influence not only by legislating, but also by "making moves" in what he terms the "public sphere."⁸⁰ Surveying over 200 years of congressional history, Mayhew identified more than 2300 "actions" members of Congress have taken in the public sphere in an attempt to shape the national policy discourse and mobilize popular opinion.⁸¹ Again and again, oversight and investigative committee hearings have served as a critically important forum in which members of Congress take stands, stake out positions in contrast to those of the executive branch, and battle for influence over the attentive public. As a result, Mayhew argues that "the politics involving members of Congress needs to be modeled not just as opinion *expression* – the custom in political science analysis – but also as opinion *formation*."⁸²

⁷⁷ See Moe, *supra* note 69, at 487.

⁷⁸ *Id.*

⁷⁹ See *supra* Part I.B.

⁸⁰ DAVID R. MAYHEW, AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH, at x (2000) ("By 'public sphere' I mean a realm of shared American consciousness in which government officials and others make moves before an attentive stratum of the public, and in which society's preference formation, politics, and policymaking all substantially take place; they are substantially endogenous to it.").

⁸¹ *Id.* at 62, 66-70.

⁸² *Id.* at 18.

But can congressional oversight really influence public opinion? After all, the vast majority of Americans rarely tune to C-SPAN to catch the latest proceedings from hearing rooms in the Russell or Cannon congressional buildings. However, Congress may have an important ally in the mass media, which aids them in their quest to reach a broader audience. A large literature within political communications suggests that the media “indexes” the scope and tone of its coverage to the political debate in Washington, particularly in Congress.⁸³ Moreover, many congressional hearings are made-for-television events and are consciously designed to generate conflict. Conflict, according to many journalistic norms, is inherently newsworthy, and thus the press may play an important role in amplifying the congressional challenge to administration policies and actions and in broadening the audience such congressional cues reach.⁸⁴

A number of recent studies have found strong empirical evidence that the positions articulated in Congress may indeed have a considerable influence on public opinion, particularly in questions of military policy.⁸⁵ Many studies rely on observational data.⁸⁶ Matthew Baum and Tim Groeling’s research demonstrates strong correlations between media-reported congressional rhetoric surrounding multiple major military missions in the last quarter century and popular support for those endeavors.⁸⁷ However, such studies relying exclusively on observational data usually only demonstrate correlations between congressional actions and public opinion. If this relationship is endogenous – that is, if members of Congress respond to public opinion when crafting their rhetoric and actions even as they seek to lead it – then raw correlations between the two tell us little about the direction of the causal

⁸³ See, e.g., JONATHAN MERMIN, *DEBATING WAR AND PEACE: MEDIA COVERAGE OF U.S. INTERVENTION IN THE POST-VIETNAM ERA* 5-6 (1999) (expounding on the indexing hypothesis by adding correlation and marginalization versions); W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J. COMM. 103, 106 (1990).

⁸⁴ See MERMIN, *supra* note 83, at 16 (focusing on television in order to examine the notion that “television coverage of war and human suffering” can actually pressure the government to use military force).

⁸⁵ See, e.g., Timothy Groeling & Matthew A. Baum, *Crossing the Water’s Edge: Elite Rhetoric, Media Coverage, and the Rally-Round-the-Flag Phenomenon*, 70 J. POL. 1065, 1081-82 (2008) (finding that the following factors influence public support: party affiliation, debaters’ party affiliation, “costliness of the messages communicated to the public,” and media coverage (or lack thereof) of “particular speakers and messages”).

⁸⁶ *Id.* at 1072 (“We collected data on all congressional comments on the president and the executive branch during 61-day windows surrounding each rally event, from 30 days before to 30 days after the announcement or initiation of the major U.S. force deployment associated with each event.”).

⁸⁷ *Id.* at 1078-80 (providing results of public opinion hypotheses testing, which indicate larger effects on popularity during “casualty periods”).

arrow.⁸⁸ Is Congress leading public opinion, or are shifts in public opinion producing changes in congressional positions?

To untangle such thorny questions about causality, a number of studies have turned to experimental evidence. For example, research by William Howell and Douglas Kriner explores the influence of various cues for or against the President's military policies by Republican and Democratic members of Congress on popular support for a number of real and hypothetical military ventures.⁸⁹ A main critique of experimental evidence, however, is that it lacks external validity. While the experimental design clearly establishes the direction of the causal arrow from the treatment condition (e.g., congressional cues) to the observed change in the dependent variable (e.g., observed differences in popular support for the President's military policies), it remains unclear whether similar effects will be observed in the much more complicated environment of real world politics.

A complete investigation of these complicated questions of causality, linking congressional oversight and investigative activity and public opinion, is beyond the scope of this Essay. However, the data analyzed previously – documenting changes in the level of critical oversight of the war in Iraq from 2003 to 2008 – does afford an important opportunity to examine whether congressional oversight patterns have had any influence on levels of popular support for the war.

V. CONGRESSIONAL OVERSIGHT AND PUBLIC SUPPORT FOR THE WAR IN IRAQ

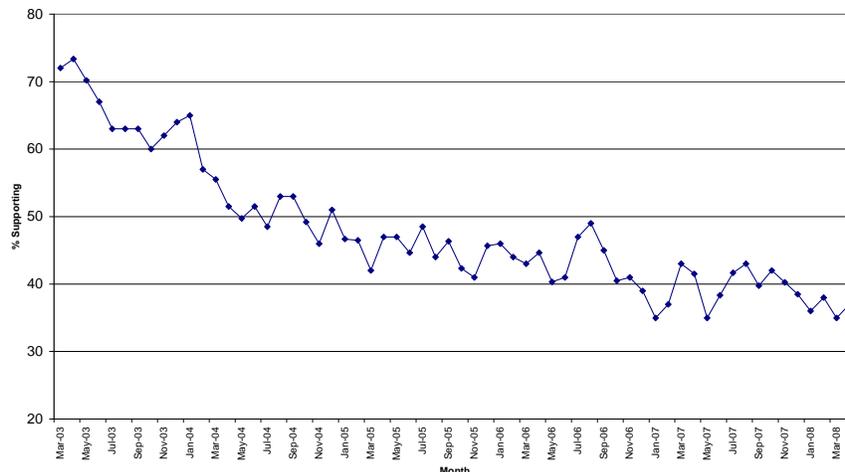
Since the invasion of Iraq in March 2003, multiple polling organizations have repeatedly asked the public whether the United States did the “right thing” by invading Iraq. On this metric, support for the war has declined dramatically over time from a high of seventy percent in the opening days of the American invasion to a low of thirty-five percent in March of 2008. This trend in popular support is captured in Figure 2.⁹⁰

⁸⁸ *But see id.* at 1080-81 (responding to criticism of reverse causality).

⁸⁹ William G. Howell & Douglas L. Kriner, *Bending so as Not to Break: What the Bush Presidency Reveals About the Politics of Unilateral Action*, in *THE POLARIZED PRESIDENCY OF GEORGE W. BUSH* 96, 123 (George C. Edwards III & Desmond S. King eds., 2007); William Howell & Douglas Kriner, *Political Elites and Public Support for War* 7 (2009) (unpublished manuscript, on file with author).

⁹⁰ Howell & Kriner, *Iraq War's Domestic Political Front*, *supra* note 47, at 327. Data was initially taken from GARY C. JACOBSON, *A DIVIDER, NOT A UNITER: GEORGE W. BUSH AND THE AMERICAN PEOPLE* (2006). Several polling outfits asked virtually identically-worded questions. Multiple polls in each month were averaged; the question was only not asked in four of the sixty-two months since March 2003; for these months, the value was linearly interpolated.

Figure 2:
Invading Iraq Was the “Right Thing” to Do



When we compare shifts in popular support for the war (Figure 2) and trends in congressional oversight (Figure 1) we see a strong negative correlation ($r = -.38$). As the intensity of critical congressional oversight increases, support for the war decreases.⁹¹ However, from this raw correlation alone we cannot make any inferences about the direction of causality. Increased congressional critical oversight and the challenges to presidential policies it poses in the public sphere may indeed be driving the observed decreases in popular support for the Iraq War. Alternatively, drops in public war support may compel or embolden members of Congress to speak out against the war as well so that they appear in tune with the preferences of their constituents. To get some leverage on this question of causality, an instrumental variable approach is needed.

To assess the causal effect of oversight activity on war support requires the identification of an instrumental variable that strongly predicts oversight activity, but has no relationship with wartime support except through its influence on oversight. Armed with such an instrument, we can use it to calculate predicted values of congressional oversight that are not influenced by

⁹¹ For a multivariate analysis of this data, see Howell & Kriner, *Iraq War's Domestic Political Front*, *supra* note 47, at 324-30. Even after controlling for a host of factors including American casualties, positive and negative events, the state of the economy, and progress in Iraqi reconstruction, Howell and Kriner observe a strong negative correlation between days of critical oversight and war support. *Id.* at 329. However, Howell and Kriner do not conduct an instrumental variable analysis to account for endogeneity. Absent this, we cannot know whether increasing congressional oversight is causing decreased public support for the war, or whether turning tides of public opinion are emboldening greater criticism of the war in Congress.

the level of public support for the war. Using these predicted values, we can then obtain an estimate of the independent effect of oversight on changes in support for the Iraq War.

In most cases, identifying a proper instrumental variable is exceedingly difficult. However, in the current context one of the variables already examined in the analyses of Table 1 is a strong possibility: the number of days that Congress was in session in a given month. The days in session variable is strongly correlated with monthly counts of critical oversight ($r = .42$). Of equal importance, it is difficult to conceive of any reason why popular support for the war in Iraq should affect the number of days that Congress is in session in a given month. Thus, the days in session variable meets both of the criteria for a good instrument: it is strongly correlated with the independent variable of interest (congressional oversight), and it has no relationship with the dependent variable (war support) except through its influence on the independent variable.

Accordingly, to investigate the influence of oversight on support for the Iraq War, I estimated a two-stage least squares regression modeling monthly war support as a function of: monthly and logged casualties; positive and negative conflict events; and the predicted number of days of critical congressional oversight hearings for that month, obtained from a first stage equation using the same variables plus the instrumental variable, the number of days Congress was in session. Results are presented in Table 2 below.

Table 2:
Effect of Congressional Oversight on Public Support for Iraq War⁹²

Days of oversight #		-.52* (.35)
Monthly casualties (10s)		-.21* (.13)
Logged cumulative casualties		-8.94*** (.50)
Positive events		-.18 (.94)
Negative events		-.36 (.92)
(N)		62
R ²		.92

* p < .10

** p < .05

*** p < .01

The coefficient for the predicted values of congressional oversight is negative as expected, and statistically significant. According to the model, a standard deviation increase in days of critical oversight (three days) produces an estimated 1.5% decrease in popular support for the war in Iraq. Popular support for the war also decreases in the wake of spikes in American casualties, and the strong, significant negative coefficient for logged cumulative casualties tracks the downward trend in wartime support over time.⁹³ Finally, the coefficients for positive and negative events are in the expected direction, though neither is statistically significant.

Thus, even after controlling for endogeneity in the relationship, the instrumental variable analysis strongly suggests that critical congressional oversight can cause political problems for the President by eroding popular support for his military policies. If oversight can systematically influence

⁹² All significance tests are one-tailed; all models report robust standard errors. “#” indicates predicted values of days of oversight obtained from a first stage equation using the number of days Congress was in session in the given month as the instrumental variable.

⁹³ As multiple prior analyses of casualties and public opinion have noted, any measure of cumulative casualties is almost perfectly correlated with time. See Adam Berinsky, *Assuming the Costs of War: Events, Elites, and American Public Support for Military Conflict*, 69 J. POL. 975, 980-82 (2007); Scott Gartner & Gary Segura, *War, Casualties, and Public Opinion*, 42 J. CONFLICT RESOL. 278, 280 (1998). Thus, it is virtually impossible to draw conclusions about whether cumulative casualties are producing the observed erosion of popular support, or some other factor that is highly correlated with time.

public opinion on multiple issues, it may well provide an important check on presidential behavior, even when legislative remedies are unavailable.

CONCLUSION: REFORMS TO FOSTER VIGOROUS, SUSTAINED CONGRESSIONAL
OVERSIGHT

The foregoing analyses suggest that congressional oversight has the potential to serve as an important congressional check on powers delegated to the President. Even though oversight alone cannot formally compel the President or any other executive actor to change course, it can encourage a change in executive behavior at least in part through its ability to influence public opinion and raise the political costs of ignoring legislative wishes for the President. The case of military policymaking examined above may be exceptional; congressional oversight may not have the same capacity to shape public opinion and generate political pressure in other policy venues with lower levels of public salience. However, the empirical evidence showing that the voice of Congress can compete with that of the President and influence public opinion in a policy realm dominated by the executive also suggests that Congress may be even more influential through its oversight actions in the public sphere in other policy realms traditionally dominated by the legislature.

While oversight is a potentially important tool of legislative influence, it is not one that Congress employs uniformly. A wealth of empirical data, both in the specific context of Iraq and of congressional oversight more generally, suggests that congressional willingness to use its investigative and oversight powers to supervise the executive branch varies considerably according to the contours of the political environment. When the President's co-partisans control the committee gavels, partisan incentives to protect their party leader in the White House largely trump the institutional incentives to defend the legislature's prerogatives from executive abuses of power. Only in divided government do partisan incentives reinforce the weak institutional incentives driving legislators to oversee the executive aggressively.⁹⁴

The 9/11 Commission, comprised as it was of multiple former members of Congress, presciently noted that "[o]f all our recommendations, strengthening congressional oversight may be among the most difficult and important."⁹⁵ To strengthen the prospects for effective oversight of antiterrorism policy, the Commission focused primarily on expanding the resources and tools at the intelligence committees' disposal.⁹⁶ For example, the Commission recommended granting the intelligence committees independent appropriations powers over relevant executive departments and agencies;⁹⁷ this would greatly

⁹⁴ Kriner & Schwartz, *supra* note 66, at 314.

⁹⁵ 9/11 COMMISSION REPORT, *supra* note 41, at 419.

⁹⁶ *Id.* at 420 ("Under the terms of existing rules and resolutions the House and Senate intelligence committees lack the power, influence, and sustained capability to meet this challenge.").

⁹⁷ *Id.*

strengthen the carrot and stick available to help bring a wayward agency or department to heel and ensure that congressional preferences are listened to at the policy implementation stage. No doubt, similar reforms in other substantive areas would strengthen an oversight committee's hand when seeking changes from an executive branch actor implementing policy contra legislative intent. However, such reforms do little to address the underlying problem of variable congressional motivation to oversee the executive in the first place. As long as members of the majority party in periods of unified government see themselves first and foremost as "lieutenants in the president's army," in Mann and Ornstein's phrase,⁹⁸ instead of institutional partisans defending the legislature's prerogatives and power prospects, Congress will fail to meet its responsibilities to vigorously oversee executive exercises of power.

An important part of the solution for Mann and Ornstein is to rekindle an institutional identity – or, in Madison's words, to reconnect the interests of members of Congress with the constitutional rights of their institution⁹⁹ – that will encourage members to take their oversight duties seriously and once again to foster legislative responsibility.¹⁰⁰ Yet, it is unclear what specific reforms could be pursued to encourage members of Congress to embrace this collective institutional identity as long as their electoral interests remain so detached from that of the institution itself. As long as most members of Congress can rest secure in their re-electoral prospects even as popular confidence in Congress as an institution plummets, the impetus to put an institutional identity ahead of a partisan one will be lacking. Until voters begin to value effective oversight as much as academics, partisan electoral incentives may continue to trump institutional incentives to protect Congress's power stakes from a wayward executive branch.

An alternative avenue of reform could be to strengthen the power of the minority party within committees to conduct oversight. As mentioned previously, congressional Democrats in the 108th and 109th Congresses, shut out from the process by the negative agenda control of the committee chair's gavel, turned to the Democratic Policy Committee to hold several informal hearings critical of the Administration's conduct of the war.¹⁰¹ Expanding the resources available to these and other venues whose agenda is not controlled by the iron fist of the majority party may spark greater congressional inquiries into executive actions that in some cases could make revelations forcing the majority to relent and allow a formal committee inquiry.

In a similar vein, the 9/11 Commission urged that the staff of the revised intelligence oversight committees should be nonpartisan and at the disposal of

⁹⁸ See MANN & ORNSTEIN, *supra* note 1, at 155.

⁹⁹ THE FEDERALIST NO. 51 (James Madison), *supra* note 24, at 1.

¹⁰⁰ See *id.* at 157-58.

¹⁰¹ See *supra* note 52 and accompanying text.

the committee as a whole.¹⁰² While shared staffing resources alone would not be sufficient to compel the majority party in unified government to oversee vigorously or even investigate the conduct of a co-partisan administration, steps to de-politicize the process and open up committee activities to greater influence from the minority, which possesses partisan incentives to engage in oversight, could potentially bolster congressional oversight in periods of unified government. Reforms in the 1970s attacked the concentration of power in committee chairmen and diffused power to subcommittees and their chairs and members.¹⁰³ However, the objective of those reforms was to bypass chairmen obstructing the will of the median member of the majority party. Whether members of Congress would ever agree to institutional reforms expanding the committee agenda power of the minority party is doubtful at best.

¹⁰² See 9/11 COMMISSION REPORT, *supra* note 41, at 420.

¹⁰³ See, e.g., ZELIZER, *supra* note 5, at 8-10.