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# The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power

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# The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power

EDWARD G. CARMINES\* & MATTHEW FOWLER\*\*

## ABSTRACT

*This paper argues that our increasingly polarized politics has led to political stalemate and policy gridlock in Congress which, in turn, have contributed to a change in the balance of power between the executive and legislative branches of government; specifically, executive power has increased at the expense of a diminished legislature. The paper will trace the extent to which Congress has become increasingly polarized and how this increased polarization has reduced Congress's capability and productivity while simultaneously increasing policy gridlock resulting in the expansion of executive power (and judicial authority) relative to legislative authority.*

## INTRODUCTION

During the last two presidential administrations and especially during the eight years of President Obama's administration, there has been a significant expansion of executive power and a corresponding decline in Congressional authority. This article argues that the change in the relative balance of power between the president and Congress has its roots in the steady increase in the ideological polarization of the congressional parties that began more than a half century ago in the mid-1970s. Increased polarization, by its very nature, not only makes it more difficult for Congress to enact bipartisan legislation but especially in conjunction with relative parity between the parties at the national level and divided party government—two conditions that have

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characterized recent American politics—contributes to legislative gridlock and policy stalemate.<sup>1</sup> Congress, in a nutshell, no longer seems up to the challenge of taking effective action to deal with the major problems facing the country. The dismal performance has led the American public to overwhelmingly disapprove of Congress's performance—less than one in five citizens now approve of Congress's performance.<sup>2</sup> But much more ominously and consequently for the functioning of our representative democracy, a dysfunctional Congress has encouraged recent presidents to take unilateral actions to implement their policy goals rather than pursuing them through legislation. Instead of public policy being jointly determined by equal branches of government, as envisioned by the United States Constitution, recent policy making has been largely dominated by a powerful executive branch with Congress playing mostly a minor, secondary role. Policy making in the first two administrations in the twenty-first century seems, if anything, to have further confirmed the model and reality of presidential government.<sup>3</sup>

This article argues that increased polarization and a decline in legislative capacity have acted as reinforcing influences that, under recent conditions of divided government and highly competitive, approximate parity in the strength of parties at the national level, have led to the expansion of executive authority at the expense of a diminished legislature. As Michael Barber and Nolan McCarty aptly state: "Perhaps one of the most important long-term consequences of the decline in legislative capacity caused by polarization is that Congress's power is declining relative to the other branches of government."<sup>4</sup>

The article proceeds as follows. In the first section we present an overview of the recent expansion of executive power, focusing mainly on the sweeping regulations implemented during the Obama presidency. Executive authority has expanded under both recent Republican and Democratic presidents, but the expansion has been especially pronounced during the last six years of the Obama administration.<sup>5</sup> In

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1. Frances E. Lee, *How Party Polarization Affects Governance*, ANN. REV. POL. SCI. 261, 267 (2015). See generally SARAH BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003) (examining the history of gridlock in America).

2. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited March 10, 2017).

3. See generally BENJAMIN GINSBERG, PRESIDENTIAL GOVERNMENT (2016) (analyzing the historical, constitutional, and legal dimensions of presidential power).

4. Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 50 (Nathaniel Persily ed., 2015).

5. See Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html>.

the second section we show that the recent increase in congressional partisan polarization began in the mid-1970s and has steadily increased since then. Higher levels of partisan polarization have been reached in each successive congressional term during Obama's years, culminating in the most polarized Congress ever in the 114<sup>th</sup> Congress.<sup>6</sup> In the third section we discuss a variety of evidence that highlights the recent decline in Congress's legislative capacity, a decline we argue that has offered both an incentive and an opportunity for recent presidents to expand their executive authority. The fourth section presents three recent cases in which the inability of Congress to pass legislation has led presidents to take unilateral action to implement their policy preferences. These instances include restrictions on stem cell research that were established during the Bush administration but were revoked during the Obama administration and the major expansion of environmental regulations and major changes in immigration policy implemented during the Obama administration. In the concluding section we ask whether future presidents are likely to follow the unilateral policy-making model established by their recent predecessors, thereby further contributing to the institutionalization of expanded executive power.

#### I. THE RECENT EXPANSION OF EXECUTIVE POWER: AN OVERVIEW

There is a widespread perception that there has been a significant expansion of presidential power during the first two presidential administrations of the twenty-first century, especially during President Obama's last six years in office. Moreover, although the expansion in executive authority has occurred in both domestic policies and foreign affairs in both the Bush and Obama presidencies, the relative expansion in these two policy domains has differed in these administrations. Not surprisingly, during the Bush administration the expansion of executive power was most pronounced in foreign affairs. Responding to the terrorist attack of 9/11 the Bush administration quickly established itself as the dominant actor in dealing with terrorism, relegating Congress to mostly an advisory and supporting role.<sup>7</sup> The planning and execution of the 2003 invasion of Iraq as well as the occupation that

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6. See Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RES. CTR., <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/> (last visited Feb. 7, 2016).

7. See generally ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY* (2004) (giving an in-depth look at the Bush White House and the response to national security threats).

followed were also closely controlled by the Bush administration, again with Congress playing a secondary role.<sup>8</sup>

This was not entirely unprecedented or unexpected. On the contrary, going back at least to the Civil War, presidents of both parties have greatly expanded their power during wartime, eclipsing the role of Congress in the process. The aggrandizement of executive power during wartime, in short, has been consistent throughout our history.<sup>9</sup> Thus, the Bush administration was following a well-worn precedent when it took the lead in responding to the 9/11 terrorist attack and planned, orchestrated, and executed the invasion of Iraq.<sup>10</sup>

While the expansion of presidential power occurred most dramatically and forcefully in the area of foreign policy during the Bush administration, the expansion of executive authority during Obama's presidency was concentrated in the domestic arena.<sup>11</sup> In the 2008 presidential election campaign, candidate Obama criticized the unilateral executive actions taken during the Bush administration and vowed to bring a new sense of comity, cooperation, and bipartisanship to the nation's capital. He indicated that he would much prefer to pursue his policy goals through legislation rather than unilateral action.<sup>12</sup> But he quickly discovered that Republican members of Congress had no intention of cooperating with him or his fellow Democrats in Congress to enact his legislative proposals.<sup>13</sup> During his first two years in office this lack of GOP support though annoying and disappointing to the new president was not crucial to the success of his legislative agenda since Democrats had sufficiently large majorities in both the House and Senate to pass legislation without any Republican votes. Thus, during the first Congress of the Obama years in 2009 and 2010, Congress enacted what would turn out to be the three landmark legislative achievements of his entire presidency: the 800 billion dollar stimulus economic package that stabilized and restarted a badly weakened

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8. See Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 3 POLITICAL SCIENCE QUARTERLY 389, 410 (2003).

9. See generally *Executive Orders: Washington – Obama*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> (last updated Mar. 20, 2017) (presenting the total number of executive orders issued by presidential term).

10. See *id.*

11. See Appelbaum & Shear, *supra* note 5; Brandice Canes-Wrone, William G. Howell, & David E. Lewis, *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70, THE JOURNAL OF POLITICS 1, 16 (2008).

12. Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J. (updated Mar. 30, 2012, 12:31 AM), <https://www.wsj.com/articles/SB10001424052702303812904577292273665694712>.

13. See Appelbaum & Shear, *supra* note 5.

economy, the Dodd-Frank Act that tamed and reformed the risky behavior of big banks and other major financial institutions, and the Affordable Care Act that overhauled the nation's health care system and eventually provided health care coverage to more than twenty million previously uninsured citizens.<sup>14</sup> But with virtually no Republican votes these legislative victories represented partisan, not bipartisan, accomplishments.

Given that the president had not been able to garner any Republican support for his most significant legislative initiatives during his first two years in office, it was clear that enacting the administration's policy goals via legislation depended critically on maintaining Democratic control of Congress. Thus, when Republicans regained a majority in the House as a result of the 2010 congressional elections<sup>15</sup> this dealt a severe blow to any prospects of success for the president's future legislative agenda. This result that was further confirmed in 2012 when the party was unable to regain control in the House and lost seats in the Senate even though the president was reelected by a substantial margin.<sup>16</sup>

With strong Republican opposition in Congress blocking his legislative proposals, President Obama faced a crucial choice: continue to try to work with a recalcitrant and uncooperative Congress or use executive authority to further his policy goals. The administration decided to pursue the latter strategy. Thus, during the last two years of his first term and throughout his second term President Obama increasingly employed unilateral executive authority—at first reluctantly but eventually with determination and enthusiasm—to implement his policy goals.<sup>17</sup> During his last six years, President Obama issued hundreds of major executive orders and his departments and agencies implemented regulations that altered significant aspects of American life. A recent article published in *The New York Times* listed the following rules and regulations as some of the most significant issued during Obama's presidency: stricter emissions from power plants, higher fuel efficiency standards for cars and light trucks, expanded rights for same-sex hospital visitations, an airline passenger bill of rights, the requirement of rearview cameras in cars and light trucks by 2018, increased pay, benefits, and overtime eligibility for federal

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14. See *2009 Barack Obama Executive Orders*, FED. REG., <https://www.federalregister.gov/executive-orders/barack-obama/2009> (last visited February 7, 2017).

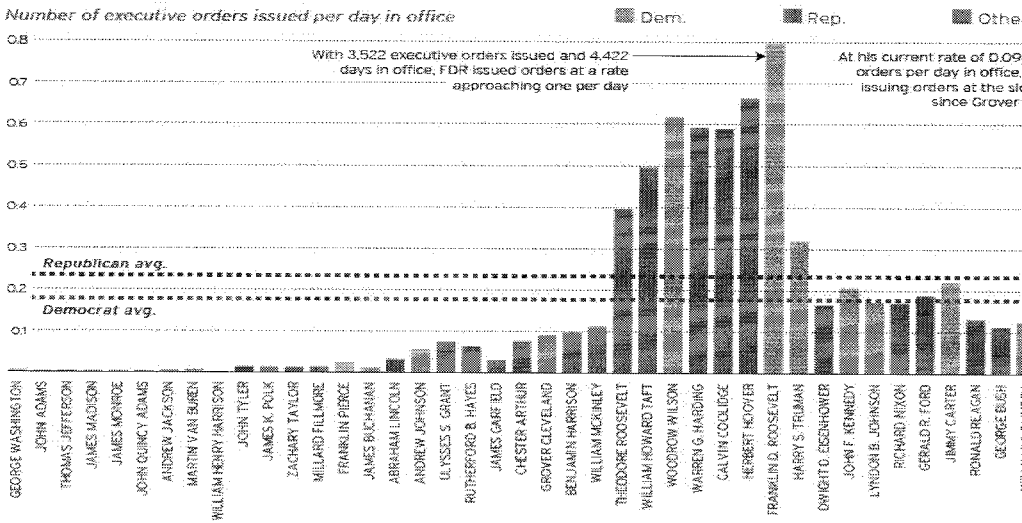
15. See *Election 2010*, N. Y. TIMES, <http://www.nytimes.com/elections/2010/results/house.html> (last visited February 7, 2017).

16. See *Election 2012*, N. Y. TIMES, <http://www.nytimes.com/elections/2010/results/house.html> (last visited February 7, 2017).

17. See Appelbaum & Shear, *supra* note 5.

workers and contractors, treatment of internet companies as utilities, conflict-of-interest rules affecting financial advisors and brokers, overtime and minimum wage protections for home health aides, and policies governing when and where drones can be flown by businesses and individuals.<sup>18</sup> As this list illustrates, unilateral executive actions taken during Obama administration have had a significant long-term impact on American society; they have cost businesses and consumers billions of dollars while at the same time providing new rights and benefits to millions of Americans.

### A history of executive orders



Graphic by Christopher Ingraham. Executive order tallies from the American Presidency Project. Days served from Wikipedia. Note: Grover Cleveland's two non-consecutive terms were merged together for the purposes of this chart.

Figure 1

The number of executive orders issued by presidents provides one means through which presidents can exert executive authority. Figure 1 presents the average number of executive orders issued per day by presidents from George Washington to Barack Obama.<sup>19</sup> This figure shows that recent presidents have issued far fewer executive orders per day than their predecessors during the first half of the twentieth century and that President Obama has issued executive orders at the slowest rate since Grover Cleveland. This comparison highlights the

18. *Id.*

19. James Delorey, *Everything You Need to Know About the Erratic Quality of Topical Twitter Charts in Five Charts*, GLOBAL STRATEGY GROUP (Feb. 6, 2014), <http://www.globalstrategygroup.com/2014/02/everything-need-know-erratic-quality-topical-twitter-charts-five-charts/>.

limitations of using the number of executive orders as a measure of executive authority.<sup>20</sup> Some executive orders are substantive in nature but others are mainly symbolic. Relying only on the number of executive orders conflates these two, very different types of executive orders and thus provides an imperfect indication of the exercise of executive authority.

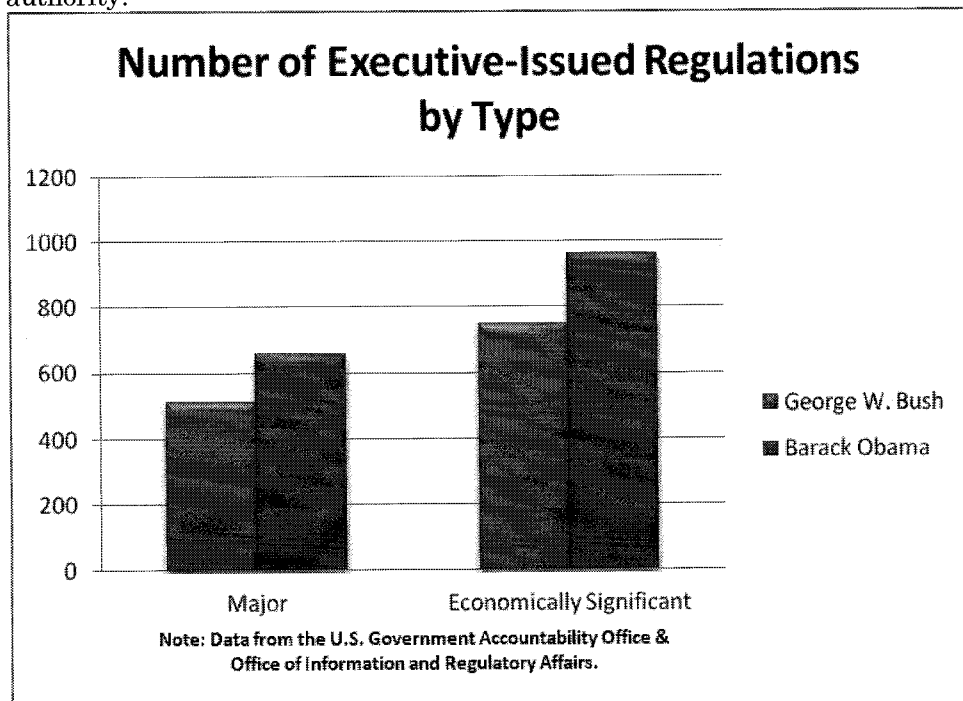


Figure 2

Fortunately, however, the government publishes two sources of data on regulations that have high impact and broad reach, defined as regulations with impacts (benefits or costs) of one hundred million or more in a year.<sup>21</sup> These two similar measures refer to “major” and “economically significant” regulations. Figure 2 presents information on these measures for the Bush and Obama administrations.<sup>22</sup> Clearly,

<sup>20</sup> See generally DANIEL GITTERMAN, *CALLING THE SHOTS: THE PRESIDENT, EXECUTIVE ORDERS, AND PUBLIC POLICY* (2017) (providing readers with a general treatment of presidential use of executive orders).

<sup>21</sup> *Congressional Review Act*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressional-review-act/overview>; *Search of Regulatory Review*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, <https://www.reginfo.gov/public/do/AdvancedSearchMain>.

<sup>22</sup> *Id.*



there has been a substantial increase in the number of significant regulations issued during Obama's presidency. In fact, there has been an increase of twenty-nine percent in major regulations and an increase of twenty-eight percent in economically significant regulations finalized during President Obama's tenure in office compared to the previous Bush administration.

## II. AN INCREASINGLY POLARIZED CONGRESS

The steadily increasing levels of partisan polarization in Congress, we argue, make it more difficult for Congress to produce bipartisan legislation. Instead, under current political conditions a highly polarized Congress leads to political stalemate and policy gridlock and thus undermines Congress's ability to engage in effective policy making.

Party Polarization 1879-2013  
Distance Between the Parties First Dimension

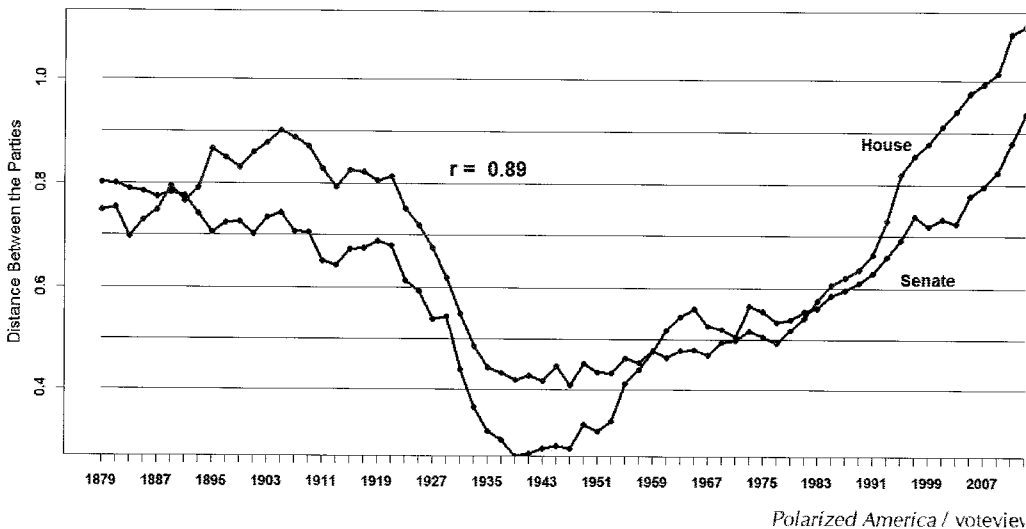


Figure 3

Figure 3 presents a graphical portrayal of partisan polarization in both the House and Senate from 1879 to 2013.<sup>23</sup> The measure of polarization, referred to as DW-Nominate scores, is based on all roll-call votes taken in each chamber over this period and may be interpreted as

23. *The Polarization of the Congressional Parties*, VOTEVIEW, [http://www.voteview.com/political\\_polarization\\_2015.htm](http://www.voteview.com/political_polarization_2015.htm) (last updated Jan. 30, 2016).

the ideological difference between the parties.<sup>24</sup> Higher scores indicate a greater level of ideological difference or polarization between the parties; lower scores indicate a lower level of polarization.

The figure shows that partisan polarization was relatively low between the 1930s and the mid-1970s in both chambers. During this period not only did both parties include a large number of ideological moderates in their ranks, but there were also sizable contingents of liberal Republicans and conservative Democrats in both chambers. During this period both parties were ideologically diverse and the difference between the average Democrat and Republican was small. The overlap in the ideological composition of the parties together with the relatively small ideological gap between them made it easier to strike legislative compromises so that bills were often passed with bipartisan coalitions.

But beginning in the mid-1970s there has been a steady and steep upward movement in the ideological distance between the parties in both the House and Senate.<sup>25</sup> In fact, virtually every new Congress during the last forty years has been more polarized than its predecessor; thus President Obama faced the most polarized Congress in modern American history.<sup>26</sup> Today, the ideological profiles of both congressional parties are much more distinct from one another and both parties are less ideologically diverse.<sup>27</sup> Indeed, according to McCarty, Poole, and Rosenthal (2006) there is now no ideological overlap between the parties: the most liberal Republican member of Congress is more conservative than the most conservative Democratic member.<sup>28</sup> Furthermore, the growing ideological divergence between the congressional parties has been accompanied by an emptying of the political center of both parties so that there are fewer moderates in both chambers.

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24. See Nolan M. McCarty, Keith T. Poole & Howard Rosenthal, *Income Redistribution and the Realignment of American Politics* 3–5 (1997).

25. See Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* 1 (2006) [hereinafter McCarty, Poole & Rosenthal, *Polarized America*].

26. See *The Polarization of the Congressional Parties*, *supra* note 23.

27. See *id.*

28. See McCarty, Poole & Rosenthal, *Polarized America*, *supra* note 25 at 4-5.

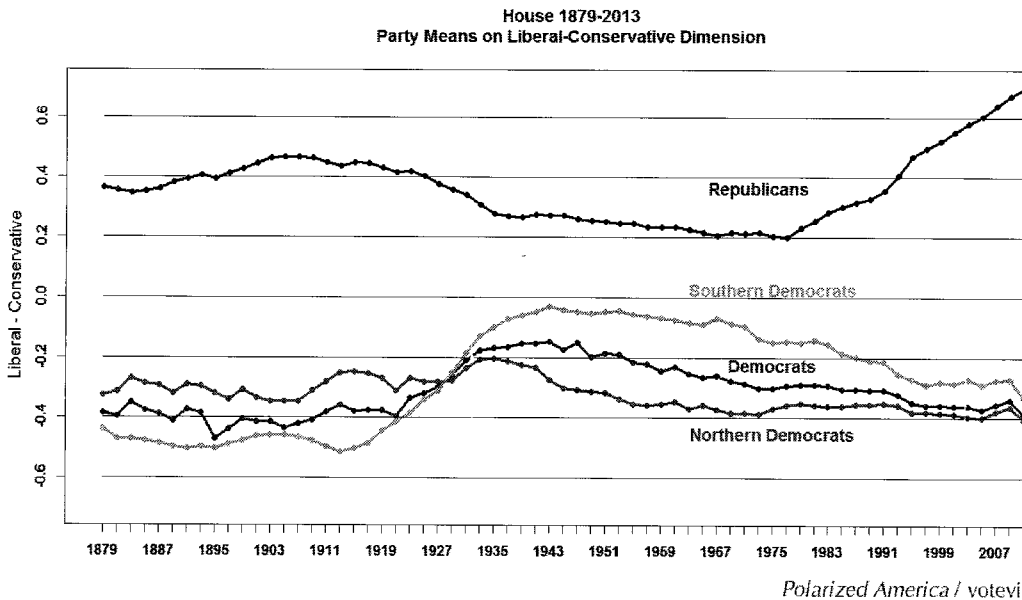


Figure 4

The increasing ideological divergence between congressional parties is not the result of Republicans moving to the right and Democrats moving an equal distance to the left. Quite the contrary, as Figure 4 makes clear, Republicans in the House have moved much further in a rightward direction than House Democrats have moved leftward.<sup>29</sup> In other words, partisan polarization in the Congress has not been symmetric but decidedly asymmetric. The GOP in Congress has become a full throated conservative party. Figure 4 also indicates that the leftward movement among Democrats has been confined to Southern Democrats—reflecting the increased number of House Democrats in the South who are African Americans.

How does polarization affect legislative policy making? At least theoretically it is possible for a highly polarized legislature featuring ideologically cohesive parties to be quite effective in enacting legislation, even on controversial issues. In particular, when conditions of unified party government prevail with the president's party having a clear majority in the House of Representatives and a supermajority of at least 60 members in the Senate, then partisan polarization does not necessarily have detrimental effects on policy making. Under these conditions, polarization poses no particular barrier to policy making because one party is in charge of all of the major levers of government

29. *See id.* at 11.

power. But when one or more of these conditions does not exist—as has been typically the case during the last several decades—then a higher level of congressional polarization undermines policy making. In other words, recent conditions of divided party government and relatively narrow partisan majorities in Congress have provided a political context within which increased polarization has had strongly negative effects on the quality and quantity of public policy. The wide ideological gap that now exists between the typical Democratic member and the typical Republican member makes it much more difficult for their respective parties to bridge their policy differences and reach bipartisan compromises. Instead, under current conditions increased polarization makes it more likely that political stalemate and policy gridlock will occur.

### III. DECLINING LEGISLATIVE PRODUCTIVITY

Has Congress's capacity to legislate declined in recent decades and is the decline due at least partially to an increase in partisan polarization? Has partisan polarization undermined the performance of Congress, reducing its policy making capability? In short, has polarization lead to a dysfunctional Congress? These are large and complicated questions that do not yield to simple or definitive answers. But there is a wide variety of evidence that suggests that Congress's legislative capability has declined in recent decades as a result of increased polarization.

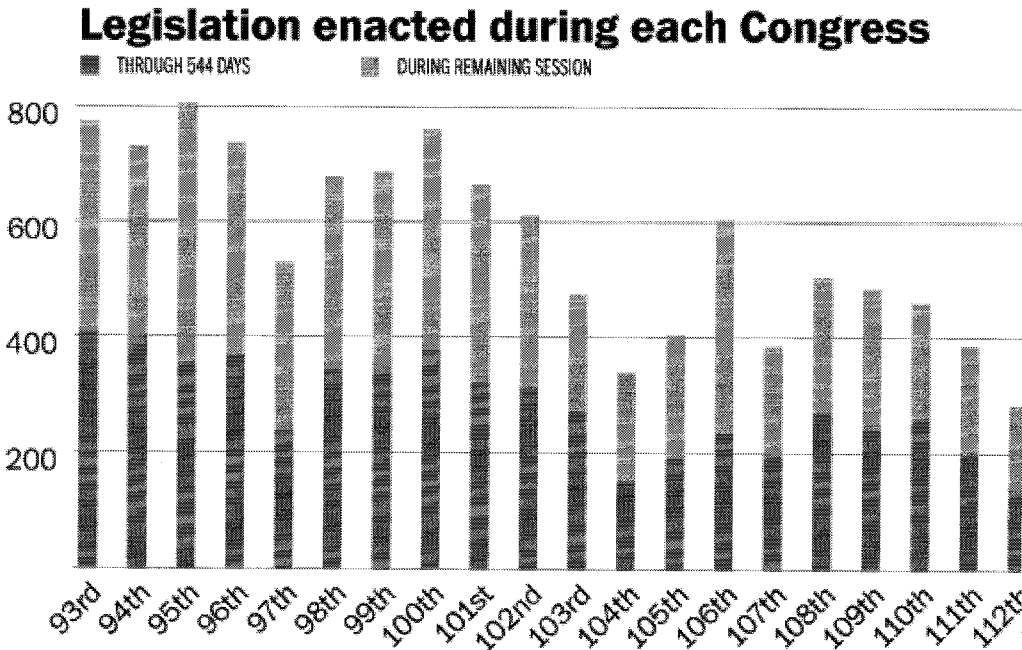
For example, Figure 5 depicts the number of bills passed by each Congress from 93<sup>rd</sup> through the 113<sup>th</sup>, the next to last term of Congress during Obama's tenure in office (2013-14).<sup>30</sup> Constructed by the *Washington Post*, the graph shows a significant decline in productivity over time.<sup>31</sup> The 113<sup>th</sup> Congress passed fewer bills than any other in memory; in fact, this was the least productive Congress since the late 1800s, when polarization was equivalent to the level it is today.<sup>32</sup>

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30. See Philip Bump, *The 113th Congress Is Historically Good at Not Passing Bills*, WASH. POST (July 9, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/?utm\\_term=.903a7c770db7](https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/?utm_term=.903a7c770db7).

31. *Id.*

32. *See id.*

Figure 5<sup>33</sup>

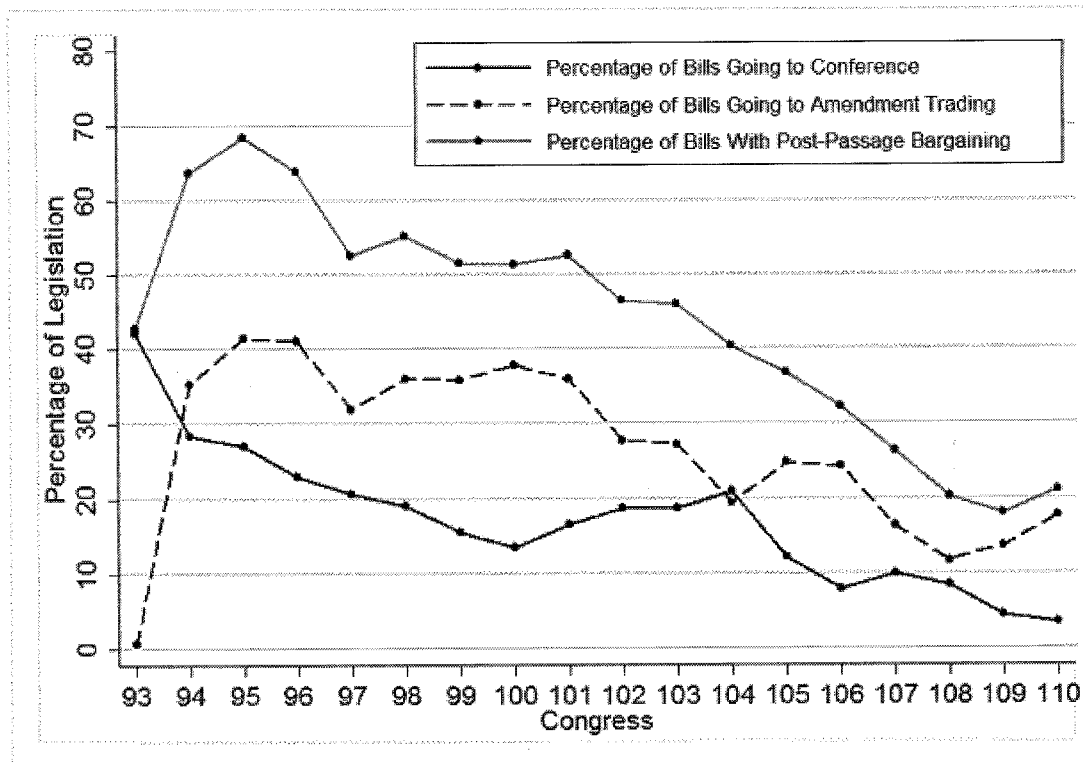
McCarty's research focusing on the passage of landmark legislation also points to the powerful influence of polarization on Congress's productivity.<sup>34</sup> His analysis indicated that the "10 least-polarized congressional terms produced almost 16 significant enactments per term, whereas the 10 most-polarized terms only slightly more than 10."<sup>35</sup>

Binder developed a novel measure of legislative productivity based on the extent to which Congress acted on salient public issues as revealed by unsigned editorials published in *The New York Times*. She found that not only has there been a secular increase in the frequency of inaction by Congress over time but that the most dysfunctional Congress since 1947-48 was the 112<sup>th</sup> Congress, at the height of polarization up to that time.

33. Phillip Bump, *The 113th Congress is Historically Good at Not Passing Bills*, THE WASHINGTON POST (July 9, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/?utm\\_term=.903a7c770db7](https://www.washingtonpost.com/news/the-fix/wp/2014/07/09/the-113th-congress-is-historically-good-at-not-passing-bills/?utm_term=.903a7c770db7).

34. Nolan McCarty, *The Policy Effects of Political Polarization*, in THE TRANSFORMATION OF AMERICAN POLITICS 223, 232-40 (Paul Pierson & Theda Skocpol eds., 2007).

35. Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 42 (Nathaniel Persily ed., 2015).

Figure 6<sup>36</sup>

Another indicator of gridlock in Congress is presented in Figure 6. This figure shows a steep and steady recent decline in the percentage of bills going to conference committees, the percentage of bills involving amendment trading, and the percentage of bills with post-passage bargaining.<sup>37</sup> The House and the Senate use the conference committee to resolve differences between the chambers concerning the substance and wording of legislation. The declining use of the conference committee as well as the decline in amendment trading and post-passage bargaining reflect the lower number of bills passed by recent Congresses and the inability of the two chambers to resolve their differences on controversial bills.<sup>38</sup>

36. Gregory Koger, *Will The Senate Start Going to Conference Again?*, MONKEY CAGE (Feb. 1, 2013), <http://themonkeycage.org/2013/02/will-the-senate-start-going-to-conference-again/>.

37. *See id.*

38. *See id.*

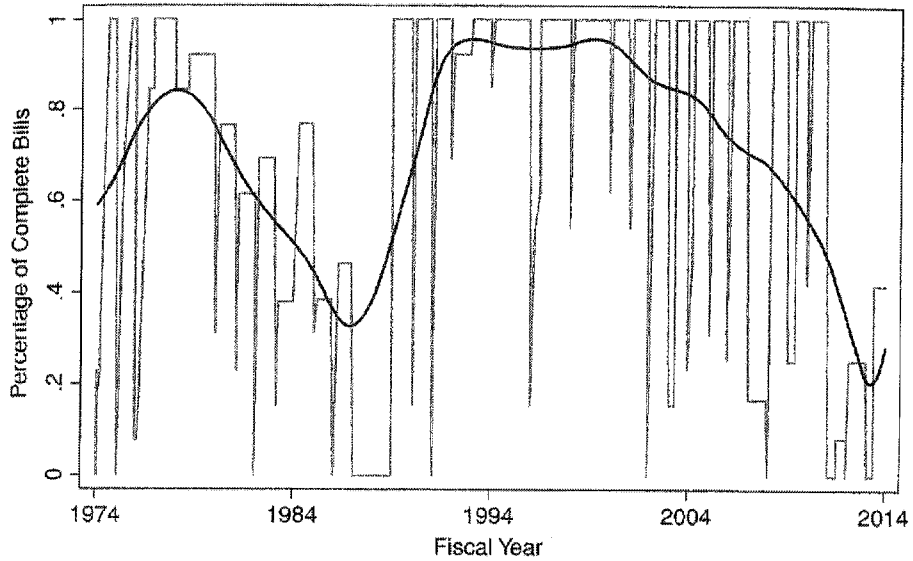


FIGURE 2.10. *The Percentage of Appropriation Bills Completed by Month.* Each observation shows the percentage of regular appropriation bills enacted prior to that month. The dark line is a lowess smoother, which illustrates the longer term trends.

Figure 7

The inability of Congress to pass the annual appropriation bills before the beginning of the fiscal year is another sign of Congress's recent dismal performance. Figure 7 graphs for each month since 1974 the proportion of regular appropriation bills passed prior to that month.<sup>39</sup> The figure also presents a smoothing curve that reflects long-term trends.<sup>40</sup> Barber and McCarty point out that the dismal performance of Congress in timely passing appropriations bills does not closely track the continuous rise in polarization over the last forty years.<sup>41</sup> But the two trends do closely match each other since 2000, which suggests that polarization may have contributed to the especially poor performance of Congress in passing appropriations on time in recent years.

39. Barber & McCarty, *supra* note 4, at 42.

40. *Id.*

41. *Id.*

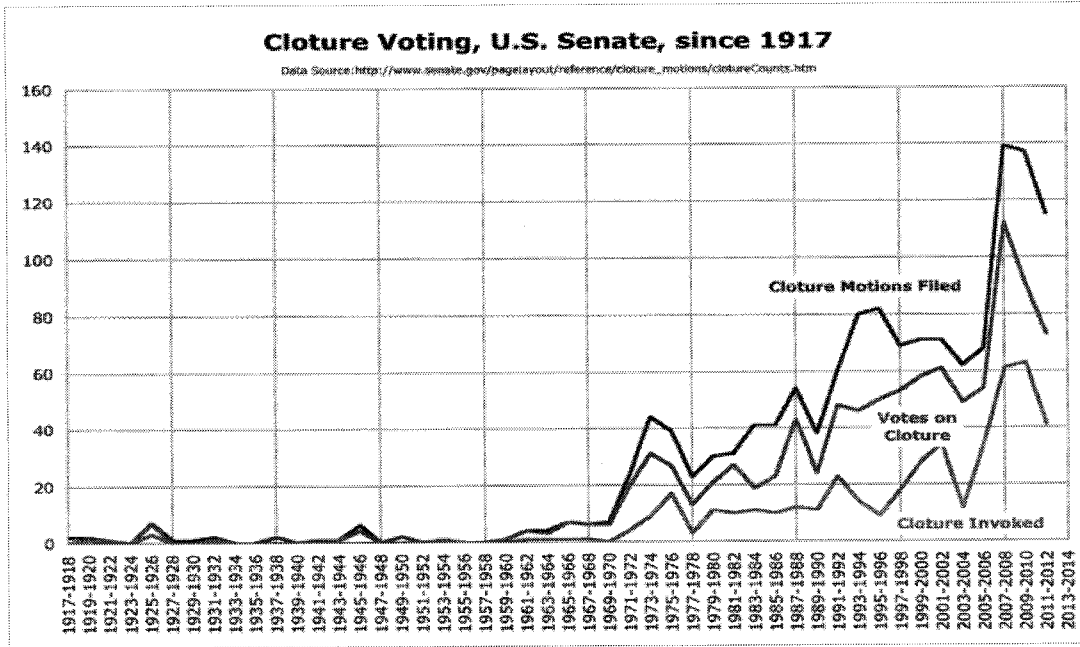


Figure 8

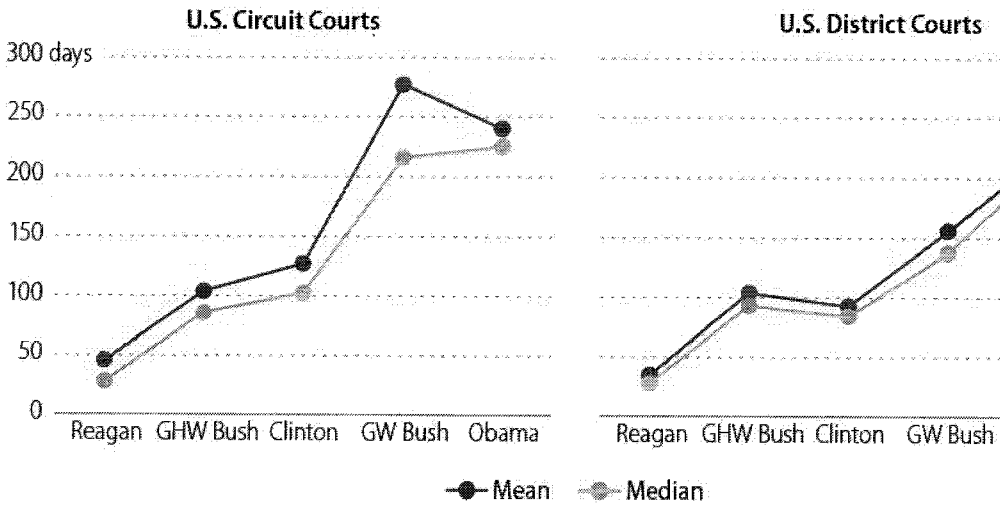
Figure 8 plots cloture voting in the Senate since 1912-13.<sup>42</sup> The figure displays the number of cloture motions filed, the number that came to a vote, and the number approved.<sup>43</sup> Cloture motions are usually employed by the majority party to end debate on pending bills—that is, to end filibusters by the minority party. Clearly, cloture voting has increased significantly over the last fifty years. Part of this change has to do with rules changes enacted by the Senate in 1975 that lowered the requirement for invoking cloture from two-thirds of senators voting to three-fifths of elected senators. However, the change also reflects the more widespread use of delaying tactics and obstructionist strategies employed by the minority party as a result of increased partisan polarization. Indeed, hyper partisanship has created what amounts to a “60-vote Senate” in which virtually every piece of substantive legislation must demonstrate that it has the approval of a three-fifths majority required for cloture.<sup>44</sup> This requirement often prevents the Senate from voting on even modestly controversial legislation.

42. *Cloture Motions*, U.S. SENATE, [https://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](https://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited Apr. 2, 2017).

43. *Id.*

44. See STEVEN S. SMITH, *THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE* 122 (2014).



Figure 9<sup>45</sup>

Finally, consider Figure 9, which charts the length of time in days that the Senate takes to consider presidential nominees for U.S. Circuit and District Courts.<sup>46</sup> Since Reagan, presidents have typically waited much longer for confirmation votes than their immediate predecessor.<sup>47</sup> Increased polarization has made it more difficult for the Senate to fulfill one of its most important constitutional responsibilities.

All of this evidence points to the conclusion that Congress's capability has declined in recent decades partially as a result of increased polarization. Simply stated, Congress is underperforming as a problem-solving institution and not functioning as a coequal branch of government.

#### IV. EXECUTIVE AUTHORITY AND POLARIZATION: THREE CASE STUDIES

Congressional inaction because of polarization has led to an increase in major policy initiatives being implemented through unilateral presidential discretion rather than legislation.<sup>48</sup> The number of bills passed by Congress has been on the decline for the last couple of decades.<sup>49</sup> Congress has become ideologically bifurcated and unwilling

45. <http://www.factcheck.org/2013/06/obamas-judicial-juggling/>

46. *Id.* at 197.

47. *See id.*

48. *See Appelbaum & Shear, supra* note 5.

49. *See id.*

to compromise leading to stalemate.<sup>50</sup> Though their actions are not unprecedented, recent presidents have utilized congressional gridlock to expand their powers.<sup>51</sup> The following case studies illustrate the unilateral expansion in presidential authority during the presidencies of George W. Bush and Barack Obama.

Interestingly, this expansion of executive power is not isolated to one party, and is evidenced in years when presidential and congressional party control is aligned but especially when it is not. Though the number of executive orders has not increased significantly compared to past decades (in fact, it has declined),<sup>52</sup> the substantive impact of some of them has expanded.<sup>53</sup> Therefore, we are seeing a qualitative expansion of power, rather than a qualitative increase. The following three case studies demonstrate the expansion of presidential power. Unilateral executive action was taken by these two presidents when Congress failed to act on stem-cell research, climate change, and immigration.<sup>54</sup> These case studies represent presidents furthering their own policy positions without congressional authority, and each issue has seen its day in court. Judicial action has been sought in an attempt to temper and restrain presidential ambition at power expansion.

#### A. Stem Cells

Stem cell research is a contentious issue in American politics. The various conceptions of when life begins create a sharp rift in the American public and among members of Congress who represent their constituents' views. Conservatives often stand firmly in the belief that life begins at conception, whereas liberals tend to be less convinced or at least skeptical of this categorical definition.<sup>55</sup> This rift can lead to stalemate in policy making by a polarized Congress. Abortion legislation, closely tied to stem cell research, is never easily passed in Congress and sent to the president for approval or veto.<sup>56</sup> Stem cell research offers possibilities for treating and curing a number of ailments. However, the origins of stem cells and the ethical grounds for

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50. See Bump, *supra* note 30.

51. See Jacob S. Hacker & Oona A. Hathaway, *Beware an Unchecked President*, *LOS ANGELES TIMES* (2013).

52. See *Executive Orders: Washington – Obama*, *supra* note 9.

53. See Kenneth R. Mayer & Kevin Price, *Unilateral Presidential Powers: Significant Executive Orders, 1949-99*, 32, *PRES. STUD. QUARTERLY*, 367, 386 (2002).

54. See Appelbaum & Shear, *supra* note 5

55. See Sheryl Gay Stolberg, *Obama Puts His Own Spin on Mix of Science With Politics*, *N.Y. TIMES* (Mar. 9, 2009), [http://www.nytimes.com/2009/03/10/us/politics/10obama.htm?\\_r=0](http://www.nytimes.com/2009/03/10/us/politics/10obama.htm?_r=0).

56. See *id.*

their use and disposal in research facilities, particularly embryonic stem cells, is a hotly contested issue that has made the rounds in all branches of government.<sup>57</sup>

In 1996, the so-called “Dickey Amendment,” which was signed by President Clinton, prohibited the Department of Health and Human Services from using federal funds for creating human embryos for research purposes or for research where embryos are destroyed.<sup>58</sup> Five years later, President Bush furthered a policy whereby federal funds could be used for some pre-existing stem cell lines, but not those from newer lines of stem cells.<sup>59</sup> He also created the President’s Council on Bioethics to monitor stem cell research regulations.<sup>60</sup> At the time, Congress was controlled by Republicans and President Bush had little reason to push forward his own policy initiatives and expand the role of the executive branch in this policy area. However, over the course of his presidency, the Bush administration’s posture on this issue changed as the partisan composition of Congress shifted.

Congress changed party control in 2006, but in 2005 the Stem Cell Research Enhancement Act was passed by both the House and Senate largely along party lines.<sup>61</sup> Democrats were able to convince enough Republicans to join their ranks to pass the bill, but President Bush used his first veto in office to override the bill.<sup>62</sup> Similarly, the Stem Cell Research Enhancement Act of 2007 was passed by Congress (largely along partisan lines) and was vetoed again by President Bush.<sup>63</sup> Immediately afterward, in June 2007, President Bush faced a Democratic Congress that would not heed to his own policy inclinations. Therefore, he took it upon himself to issue Executive Order 13455.<sup>64</sup> The executive order instructed the Secretary of Health and Human Services

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57. *See id.*

58. Shannon McGuire, *Embryonic Stem Cells: Marrow of the Dickey Matter*, 11 J. HIGH TECH. L. 160, 177 (2010).

59. *See* Maya Jackson Randall & Mark H. Anderson, *Judge Backs Obama Order on Stem Cells*, WALL ST. J (July 28, 2011), <http://www.wsj.com/articles/SB10001424053111904888304576472010761428264>.

60. Exec. Order No. 13237, 3 C.F.R. § 13237 (2001), <https://www.gpo.gov/fdsys/granule/CFR-2002-title3-vol1/CFR-2002-title3-vol1-eo13237>.

61. Carl Hulse, *On Wave of Voter Unrest, Democrats Take Control of House*, NEW YORK TIMES, (Nov. 8, 2006), <http://www.nytimes.com/2006/11/08/us/politics/08house.html>; Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (2005), <https://www.govtrack.us/congress/bills/109/hr810>.

62. *See* Message to the House of Representatives, 2 PUB. PAPERS 1424 (July 19, 2006).

63. *Vetoes by President George W. Bush*, U.S. SENATE, <https://www.senate.gov/reference/Legislation/Vetoes/BushGW.htm> (last visited Apr. 2, 2017).

64. Expanding Approved Stem Cell Lines in Ethically Responsible Ways, 72 Fed. Reg. 34591 (June 20, 2007).

to support research in stem cells, but severely restricted research involving embryonic stem cells.<sup>65</sup>

After fewer than two months in office, President Obama issued Executive Order 13505: "Removing Barriers to Responsible Scientific Research Involving Human Stem Cells".<sup>66</sup> In signing the order, President Obama declared that his administration would "make scientific decisions based on facts, not ideology."<sup>67</sup> The order lifted the restrictions from Bush's actions on stem cells, specifically his 2001 action that barred the National Institutes of Health from funding research on embryonic stem cells beyond the cell lines existing at the time.<sup>68</sup> Though Executive Order 13505 does not overturn the Dickey Amendment, the order does expand the ability of researchers to use federal funds for human embryonic stem cell research.<sup>69</sup> President Obama also called on Congress to push for removing further restrictions on stem cell research, but no such legislative action was taken.

The courts, on the other hand, have taken up the issue. A matter of months after Executive Order 13505 was signed, a group of stem cell scientists led by James Sherley filed suit against the Secretary of Health and Human Services, Kathleen Sebelius.<sup>70</sup> The suit claimed that the executive order violated the Dickey Amendment barring federal funding of embryonic stem cell research.<sup>71</sup> The U.S. District Court ruled in favor of embryonic stem cell research with Chief Justice Lambert claiming the "policy question is not answered by any congressional law, and it has fallen on three presidential administrations to provide an answer." <sup>72</sup> Since that time, a U.S. Appeals Court upheld the ruling and the U.S. Supreme Court refused to take up the case, effectively leaving the lower court ruling intact.<sup>73</sup>

These executive orders have expanded the power of the presidency by unilaterally implementing policy on a controversial issue without the participation of Congress. With Congress failing to take decisive action

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65. *See id.*

66. Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, 74 Fed. Reg. 10677 (Mar. 9, 2009) (revoking Executive Order 13435 to allow for the federal funding of stem cell research).

67. Stolberg, *supra* note 55.

68. Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, *supra* note 64, at 10668.

69. *See id.* at 10667.

70. Randall & Anderson, *supra* note 59.

71. *See id.*

72. *Id.*

73. Meredith Wadman, *High Court Ensures Continued US Funding of Human Embryonic-Stem-Cell Research*, NATURE (Jan 7, 2013), <http://www.nature.com/news/high-court-ensures-continued-us-funding-of-human-embryonic-stem-cell-research-1.12171>.

on this issue, recent presidents have used executive authority to further their policy preferences.

### *B. Climate Change*

The issue of climate change was once a matter of only slight policy differences between the parties, as both parties took similar positions in this policy area. But current debates have focused on whether the phenomenon even exists, disregarding scientific evidence that the detrimental effects of climate change are a certainty.<sup>74</sup> Accordingly, Republicans and Democrats in Congress have been largely unable to address the issue and enact bipartisan legislation to address it.

Congressional inaction on the issue originated with Republican obstruction based on beliefs that scientific evidence concerning climate change is inconclusive if not altogether wrong. However, a consensus exists within the scientific community that climate change is a major national security issue that will negatively impact the entire planet.<sup>75</sup> For the most part, congressional Democrats have adopted this position. Congress has been incapacitated by these starkly differing assessments of the existence and consequences of climate change. Therefore, legislation addressing this crucial area of public policy has not been enacted because of polarization-inspired inaction.<sup>76</sup> As a result, President Obama has taken unilateral actions to fill the policy vacuum created by a deadlocked Congress.

An international treaty, the Kyoto Protocol, was created in 1997 and was aimed at reducing greenhouse gas emissions under the assumption that man-made CO<sub>2</sub> emissions are causing damaging climate change effects.<sup>77</sup> However, shortly after taking office, President Bush refused to send the Protocol to Congress for a vote and declared his own strong opposition to the treaty.<sup>78</sup>

Legislation addressing and capping CO<sub>2</sub> emissions was introduced in Congress three times during President Bush's tenure in office. The

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74. *Scientific Consensus: Earth's Climate is Warming*, NASA (2016), <http://climate.nasa.gov/scientific-consensus/> (last updated Feb. 16, 2017); Chelsea Harvey, *Members of Congress Met to Discuss the Costs of Climate Change. They Ended Up Debating its Existence*, THE WASHINGTON POST, (Feb. 28, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/02/28/members-of-congress-met-to-discuss-the-costs-of-climate-change-they-ended-up-debating-its-existence/?utm\\_term=.445fd3c1308f](https://www.washingtonpost.com/news/energy-environment/wp/2017/02/28/members-of-congress-met-to-discuss-the-costs-of-climate-change-they-ended-up-debating-its-existence/?utm_term=.445fd3c1308f)

75. See *Scientific Consensus: Earth's Climate Is Warming*, NASA, <http://climate.nasa.gov/scientific-consensus/> (last updated Feb. 16, 2017).

76. See Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 274 (2015).

77. KENNEDY, JR., *supra* note 7, at 48.

78. See *id.* at 51-52.

Climate Stewardship Act was initially voted on in the Senate in 2003.<sup>79</sup> The bill aimed to be a bipartisan effort introduced by Republican Senator John McCain and Democratic Senator Joseph Lieberman to institute a cap and trade standard for greenhouse gases, but was defeated forty-three to fifty-five with few senators departing from party-line voting.<sup>80</sup> A similar bill was voted on in the Senate in 2005, but was again voted down.<sup>81</sup> In 2007, the bill was referred to committee, but was never even brought before the Senate for a vote.<sup>82</sup>

A few other bills have been introduced but have never left committee. The Global Warming Pollution Reduction Act of 2007, the Climate Protection Act, and the Sustainable Energy Act of 2013 all died before reaching a vote.<sup>83</sup> The American Clean Energy and Security Act of 2009 was approved in the House by a vote of 219 to 212 (with 8 Republicans supporting the bill), but failed to progress further.<sup>84</sup> Finally, Republicans in the House submitted the Energy Tax Prevention Act to the House for a vote in 2011. The bill passed the House, as expected along partisan lines (all the nay votes came from Democrats); however, it died in committee in the Senate before coming to a floor vote. The bill would have amended the Clean Air Act by preventing the EPA from regulating greenhouse gas emissions as pollutants or contributing to climate change.<sup>85</sup>

Climate change policy was not a high priority during the Bush presidency and few executive actions were taken during these eight years. His administration did attempt to pressure scientists into censuring their disclosure of scientific evidence of man-made climate change.<sup>86</sup> President Bush's administration also edited a Center for Disease Control (CDC) report given to Congress, taking out portions

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79. *Id.* at 146-47.

80. Climate Stewardship Act, S. 139, 108th Cong. (2003), <https://www.govtrack.us/congress/bills/108/s139>.

81. Energy Policy Act, S. Amdt. 826 to H.R. 6, 119th Cong. (2005), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=1&vote=00148](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00148).

82. Climate Stewardship and Innovation Act, S. 280, 110th Cong. (2007), <https://www.govtrack.us/congress/bills/110/s280>.

83. Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007-2008), <https://www.congress.gov/bill/110th-congress/senate-bill/309>; Climate Protection Act, S. 332, 113th Cong. (2013), <https://www.govtrack.us/congress/bills/113/s332>; Sustainable Energy Act, S. 329, 113th Cong., <https://www.govtrack.us/congress/bills/113/s329>.

84. American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009), <https://www.govtrack.us/congress/bills/111/hr2454>.

85. Energy Tax Prevention Act, S. 482, 112th Cong. (2001), <https://www.govtrack.us/congress/bills/112/s482>.

86. Dan Froomkin, *Cheney: Neither Here Nor There?*, WASHINGTON POST. (June 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/blog/2007/06/21/BI2007062101075.html?nav=hcmodule>.

that described the negative effects of climate change on human health.<sup>87</sup> Unlike President Obama, however, he issued few executive orders addressing climate change and the environment.<sup>88</sup> The most significant of Bush's executive orders (13432) was signed in 2007 and sought to limit greenhouse gas emissions over time. But Bush faced criticism for the plan, as many saw his efforts as weak after not addressing the issue until the end of his presidency.<sup>89</sup>

President Obama took more decisive actions in the face of congressional inaction. First, he established a new office in the White House with the specific purpose of working to produce climate change policy based on scientific recommendations.<sup>90</sup> President Obama's Secretary of State, Hillary Clinton, appointed Todd Stern as the State Department's Special Envoy for Climate Change in 2009 and shortly afterward initiated a new climate treaty, the Copenhagen Accord, that proposed U.S. goals on emissions in the international arena.<sup>91</sup> According to WikiLeaks, the U.S. may have also used unsavory methods for obtaining support for the accord.<sup>92</sup>

In multiple budget proposals, President Obama proposed increased funding for clean or renewable sources of energy. Cap and trade programs have been the central element of these reforms. In addition, just a few days after taking office, President Obama issued several memoranda aimed at lowering greenhouse gas emissions and raising fuel economy standards in vehicles.<sup>93</sup>

President Obama also signed several significant executive orders aimed at fighting climate change. In 2009, he issued the Federal Leadership in Environmental, Energy, and Economic Performance

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87. *White House Edited Testimony, CDC Official Says*, LOS ANGELES TIMES (Oct 24, 2007), <http://articles.latimes.com/2007/oct/24/nation/na-speech24>.

88. *George W. Bush Executive Order Subjects*, NATIONAL ARCHIVES, <https://www.archives.gov/federal-register/executive-orders/wbush-subjects.html>.

89. Exec. Order No. 13432, 72 Fed. Reg. 27717 (May 16, 2007), <http://www.presidency.ucsb.edu/ws/?pid=75108>.

90. See *Climate Change*, OBAMA WHITE HOUSE ARCHIVES, <https://obamawhitehouse.archives.gov/energy/climate-change> (last visited Feb. 25, 2017).

91. See Damian Carrington, *WikiLeaks Cables Reveal How US Manipulated Climate Accord*, GUARDIAN (Dec. 3, 2010, 4:30 PM), <https://www.theguardian.com/environment/2010/dec/03/wikileaks-us-manipulated-climate-accord>; Garance Franke-Ruta, *Stern Appointed Climate Change Envoy*, WASHINGTON POST (Jan. 26, 2009), [http://voices.washingtonpost.com/44/2009/01/26/stern\\_appointed\\_climate\\_change.html?hpid=topnews](http://voices.washingtonpost.com/44/2009/01/26/stern_appointed_climate_change.html?hpid=topnews).

92. See *id.*

93. Steven Mufson & Juliet Eilperin, *Obama Issues Orders Toward More Fuel-Efficient Cars*, WASH. POST (Jan. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/26/AR2009012602028.html>.

order<sup>94</sup> and in 2013, the Preparing the United States for the Impacts of Climate Change order.<sup>95</sup> Executive Order 13677, entitled Climate-Resilient International Development, directed climate considerations to be an integral part of all U.S. international development initiatives.<sup>96</sup> President Obama's latest executive order on climate change, titled Planning for Federal Sustainability in the Next Decade, ordered federal agencies to work toward limited greenhouse gas emissions by 40 percent by 2025.<sup>97</sup>

Finally, the EPA under President Obama's authority issued the Clean Power Plan in August of 2015. The plan increased regulations on power plants and set goals for state-by-state reduction in carbon emissions.<sup>98</sup> Criticism of the plan was sharp and immediate. Several states issued a lawsuit for an immediate stay of the plan.<sup>99</sup> Conversely, twenty states have signaled support for the plan. In February of 2016, a split vote of five to four in the U.S. Supreme Court ordered the EPA to stop enforcement of the plan until a lower court rules on the matter.<sup>100</sup>

### C. Immigration

During the course of the Bush and Obama administrations, immigration reform has been raised a number of times. None of these have led to substantive change in law or policy. In 2005, the House passed the Border Protection, Anti-terrorism and Illegal Immigration Control Act<sup>101</sup> along partisan lines with more than 90 percent of Republicans in support and more than 80 percent of Democrats opposing.<sup>102</sup> Introduced by Representative James F. Sensenbrenner, Jr.,

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94. Executive Order 13514 of Oct. 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52117 (Oct. 8, 2009).

95. Executive Order 13653 of Nov. 1, 2013, Preparing the United States for the Impacts of Climate Change, 78 Fed. Reg. 66819 (Nov. 6, 2013).

96. See Executive Order 13677 of Sept. 23, 2014, Climate-Resilient International Development, 79 Fed. Reg. 58231, 58231 (Sept. 26, 2014).

97. See Executive Order 13693 of Mar. 19, 2015, Planning for Federal Sustainability in the Next Decade, 80 Fed. Reg. 15871 (Mar. 25, 2015).

98. See Clean Power Plan, 80 Fed. Reg. 64662, 64663-65 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

99. See Jennifer A. Dlouhy & Andrew M. Harris, *Obama's Clean Power Plan Heads to Court: What to Know*, BLOOMBERG (Sept. 23 2016, 5:00 AM), <https://www.bloomberg.com/news/articles/2016-09-23/obama-s-clean-power-plan-heads-to-court-what-to-know>.

100. Alan Neuhauser, *Supreme Court Blocks Signature Obama Climate Rule*, U.S. NEWS (Feb. 10, 2016, 8:18 AM), <http://www.usnews.com/news/articles/2016-02-10/supreme-court-puts-epas-clean-power-plan-on-hold>.

101. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

102. See *Final Vote Results for Roll Call 661*, U.S. HOUSE, <http://clerk.house.gov/evs/2005/ro>



“the bill focused on increased enforcement along the Southern border.<sup>103</sup> The bill failed to gain support in the Senate.<sup>104</sup> Similarly, the Comprehensive Immigration Reform Act of 2006, introduced by Senator Arlen Specter, passed the Senate but not the House.<sup>105</sup> The bill would have provided amnesty for illegal immigrants who were in the country for an extended period of time and increased legal immigration.<sup>106</sup> No compromise between the two chambers was ever reached. A similar bill was introduced in the Senate the next year, but failed to pass as both liberals and conservatives had unresolved reservations about the bill.<sup>107</sup>

During his time in office, President Bush signed two executive orders on immigration. The first, Executive Order 13269, expedited the naturalization of “aliens and noncitizen nationals” serving in active-duty status during the War on Terrorism. The other order merely delegated responsibilities dealing with immigration in the Caribbean region.<sup>108</sup> Although President Bush was highly involved in the immigration reform fight in the House and Senate during his second term, he failed to persuade Congress to pass any significant changes in immigration policy. He came into office with high hopes for immigration reform in conjunction with Mexican President Vicente Fox, but the attacks of September 11, 2001 put these plans on hold and they were never revived while he was in office.<sup>109</sup>

The most far reaching changes in immigration reform, instead, came from President Barack Obama. After proposing legislation that never

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103. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) §§ 309, 607, 1004; *All Bill Information (Except Text) For H.R. 4437*, CONGRESS, <https://www.congress.gov/bill/109th-congress/house-bill/4437/all-info?r=1#major-actions> (last visited Apr. 3, 2017).

104. See *All Bill Information (Except Text) For H.R. 4437*, *supra* note 101.

105. *All Bill Information (Except Text) for S.2611*, CONGRESS, <https://www.congress.gov/bill/109th-congress/senate-bill/2611/all-info?r=1> (last visited Apr. 3, 2017); see also Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

106. *Senate Passes Immigration Bill*, CNN (May 26, 2006, 3:42 AM), <http://www.cnn.com/2006/POLITICS/05/25/immigration/index.html?iref=newssearch>; see also Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

107. *S.9 – Comprehensive Immigration Reform Act of 2007*, CONGRESS, <https://www.congress.gov/bill/110th-congress/senate-bill/9?q=%7B%22search%22%3A%5B%22Comprehensive+Immigration+Reform+Act+of+2006%22%5D%7D&r=3> (last visited Apr. 3, 2017); see also Comprehensive Immigration Reform Act of 2007, S. 9, 110th Cong. (2007).

108. John Woolley & Gerhard Peters, The American Presidency Project, (2017), [http://www.presidency.ucsb.edu/executive\\_orders.php?year=2001&Submit=DISPLAY](http://www.presidency.ucsb.edu/executive_orders.php?year=2001&Submit=DISPLAY). See also Exec. Order No. 13276, 67 Fed. Reg. 29985 (Nov. 15, 2002), <https://www.gpo.gov/fdsys/pkg/FR-2002-11-19/pdf/02-29580.pdf>.

109. Alfredo Corchado, *Once Solid, the George W. Bush-Vicente Fox Partnership Faded After 9/11*, DALLAS MORNING NEWS (Apr. 2013), <https://www.dallasnews.com/news/mexico/2013/04/26/once-solid-the-george-w.-bush-vicente-fox-partnership-faded-after-911>.

came to fruition, he took unilateral and significant action on immigration during his presidency. President Obama sent Congress a sweeping immigration reform bill during his first year in office, but was rebuffed by Senate Republicans.<sup>110</sup> With comprehensive immigration reform out of the picture, President Obama instead focused on increased border enforcement and ramped up deportations.

The Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 was introduced in President Obama's first year, but never made it out of committee.<sup>111</sup> The next attempt for immigration reform that seemed most likely to succeed was the American DREAM Act. Originally introduced in 2001, the Act has been reintroduced several times but has always failed to win congressional approval.<sup>112</sup> The intention of the act is to make it easier for some immigrants to achieve temporary or permanent resident status in the United States.<sup>113</sup> President Obama pushed for reintroduction of the bill in the House in 2010.<sup>114</sup> While it passed the lower chamber, the bill failed to meet the sixty-vote threshold in the Senate.<sup>115</sup>

Immigration reform represents perhaps the most robust case of expansion of executive power in the face of congressional polarization and gridlock. The bipartisan "Border Security, Economic Opportunity,

110. See Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), [https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258\\_blog.html?utm\\_term=.9a641482ccc3](https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html?utm_term=.9a641482ccc3).

111. *H.R. 4321 – CIR ASAP Act of 2009*, CONGRESS, <https://www.congress.gov/bill/111th-congress/house-bill/4321/all-actions> (last visited Apr. 3, 2016); see also Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321, 111th Cong. (2009-10).

112. Dream Act, S. 1291, 107th Cong. (2001-2002), <https://www.congress.gov/bill/107th-congress/senate-bill/1291>; Dream Act, S. 1545, 108th Cong. (2003-2004), <https://www.congress.gov/bill/108th-congress/senate-bill/1545>; Dream Act, S. 2075, 109th Cong. (2006-2006), <https://www.congress.gov/bill/109th-congress/senate-bill/2075>; Dream Act, S. 2205, 110th (2007-2008), <https://www.congress.gov/bill/110th-congress/senate-bill/2205>; Dream Act, S. 3992, 111th Cong. (2009-2010), <https://www.congress.gov/bill/111th-congress/senate-bill/3992>; Dream Act, s. 952, 112th Cong. (2011-2012), <https://www.congress.gov/bill/112th-congress/senate-bill/952>.

113. See generally DREAM Act, S. 3962, 111th Cong. (2010) (proposing a process by which immigrants who satisfy certain requirements first gain conditional residency); DREAM Act, S. 729, 111th Cong. (2009) (same); DREAM Act, S. 1545, 108th Cong. (2003) (same); DREAM Act, S. 1291, 107th Cong. (2001) (same).

114. See DREAM Act, S. 3962 111th Cong. (2010).

115. *H.R. 6497 – DREAM Act of 2010*, CONGRESS, <https://www.congress.gov/bill/111th-congress/house-bill/6497?q=%7B%22search%22%3A%5B%22DREAM+Act%22%5D%7D&r=1> (last visited Apr. 3, 2017); see also DREAM Act, S. 3992, 111th Cong. (2009-2010), <https://www.congress.gov/bill/111th-congress/senate-bill/3992/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

and Immigration Modernization Act of 2013” passed the Senate but has remained stalled in the House.<sup>116</sup> This stalemate likely set the stage for the unilateral action carried out by President Obama in November of 2014. President Obama did not issue an executive order on immigration in 2014.<sup>117</sup> However, he used presidential authority to make discretionary changes to what would and wouldn’t be enforced by the executive branch of government. In June of 2012, the Obama administration began what was called the Deferred Action for Childhood Arrivals (DACA) policy that allowed children who entered the country before June 2007 to receive temporary work permits and made them exempt from deportation.<sup>118</sup> The controversial executive actions in 2014 expanded this program with the Deferred Action for Parents of Americans (DAPA) policy. Similar to the policy for children, this action allowed parents of American citizens or lawful permanent residents to receive work permits and deportation exemptions.<sup>119</sup>

Controversy, as expected, followed this decision. The courts are still debating the matter after twenty-six states with Republican governors sued in a Texas District Court to halt the actions undertaken as a result of both the DACA and DAPA executive orders.<sup>120</sup> In February of 2015, the Texas court ordered a preliminary injunction.<sup>121</sup> The Obama administration issued a failed appeal, and the U.S. Department of Justice appealed to the U.S. Supreme Court to review the case while

116. See generally DREAM Act, S. 3962, 111th Cong. (2010) (proposing a process by which immigrants who satisfy certain requirements first gain conditional residency); DREAM Act, S. 729, 111th Cong. (2009) (same); DREAM Act, S. 1545, 108th Cong. (2003) (same); DREAM Act, S. 1291, 107th Cong. (2001) (same); Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013) <https://www.congress.gov/bill/113th-congress/senate-bill/744?q=%7B%22search%22%3A%5B%22Border+Security%2C+Economic+Opportunity%2C+and+Immigration+Modernization+Act+of+2013%22%5D%7D&r=2>; Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, H.R. 15, 113th Cong. (2013) <https://www.congress.gov/bill/113th-congress/house-bill/15?q=%7B%22search%22%3A%5B%22Border+Security%2C+Economic+Opportunity%2C+and+Immigration+Modernization+Act+of+2013%22%5D%7D&r=1>; Steven Smith, *The Senate Syndrome: The Evolution of Parliamentary Warfare in the Modern U.S. Senate* (2014).

117. Christopher Ingraham, *A history of executive orders*, American Presidency Project (2014), <http://imgur.com/L5Da4bN>.

118. Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director for U.S. Citizenship and Immigration Services, et al. (June 15, 2012), available at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

119. Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director for U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014) available at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

120. See *Texas v. United States*, 809 F.3d 134, 135 (5th Cir. 2015).

121. *Id.*

Texas urged the Court to not consider an appeal.<sup>122</sup> In January of 2016 the U.S. Supreme Court agreed to hear the case.<sup>123</sup> House Republicans, under the direction of Speaker of the House Paul Ryan, have since moved to vote on a resolution to allow the chamber to file a brief in the Supreme Court case of *United States v. Texas*.<sup>124</sup> Until the case is heard, Obama's immigration actions are on hold.

### CONCLUSION

This article argues that the expansion of executive power and the decline in legislative authority have been fueled by complementary forces of increased congressional polarization and decreased legislative capacity. As we noted previously, a more polarized Congress does not always result in a less effective Congress. But under current conditions of divided party government and rough equivalency in the strength of the parties at the national level, polarization does have a detrimental effect on policy making. The reason is straightforward. The increase in congressional polarization means that the ideological distance between the parties in Congress has grown which, in turn, makes it more difficult for the parties to overcome their policy differences and forge legislative compromises. Instead, increased polarization leads to political stalemate and policy gridlock.

The steady decline in Congress's institutional capability and performance has reinforced the negative effects of polarization. A recent article by Lee Drutman and Kevin Kosar notes that "legislative support agencies, which supply Congress with expertise and nonpartisan analysis, have atrophied. Since 1995, staffing at the Congressional Research Service and Government Accountability Office has declined 20 and 31 percent, respectively."<sup>125</sup>

A project sponsored by New America and R Street Institute was launched in spring 2016 to address the decline in Congress's institutional capability.<sup>126</sup> Entitled the Legislative Branch Capacity

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122. *Understanding the Legal Challenges to Executive Action*, AM. IMMIGR. COUNCIL (June 28, 2016), <https://www.americanimmigrationcouncil.org/research/legal-challenges-executive-action-on-immigration>.

123. *Id.*

124. Jake Sherman & Lauren French, *House Moves to File Supreme Court Brief in Obama Immigration Case*, POLITICO (Mar. 1, 2016), <http://www.politico.com/story/2016/03/house-immigration-bill-supreme-court-220025>.

125. Lee Drutman & Kevin R. Kosar, *Does Congress Want to Govern?*, REALCLEAR POLICY (Jan. 14, 2017), [http://www.realclearpolicy.com/articles/2017/01/14/does\\_congress\\_want\\_to\\_govern\\_110137.html](http://www.realclearpolicy.com/articles/2017/01/14/does_congress_want_to_govern_110137.html).

126. See LEGISLATIVE BRANCH CAPACITY WORKING GROUP, <http://www.legbranch.com/> (last visited Jan. 31, 2017).

Working Group, its website states that “the impetus for establishing the group is the widespread perception that Congress is dysfunctional,”<sup>127</sup> adding that the objectives of the group are twofold: “[t]o create an enduring, bipartisan space to assess the capacity of Congress to perform its constitutional duties; and [t]o collaborate on ideas for improving the legislative branch’s performance in our separation of powers system.”<sup>128</sup>

As we reviewed earlier, there is extensive and varied evidence demonstrating the recent decline in Congress’s capacity to engage in effective policy making. From delays and failures in passing appropriation bills to enacting less legislation overall, there is abundant evidence that the contemporary Congress lacks the capacity and perhaps the will to play a coequal role in determining the course of our government.

Congress would find widespread public support for playing a more robust role in policy making. When asked about whether the president, Congress, or both branches equally should set the national agenda, a clear majority of the public prefers that Congress and the president share responsibility for determining the direction of national policy.<sup>129</sup>

Recent presidents have not hesitated to fill the policy vacuum created by an ineffective Congress.<sup>130</sup> “Executive power has expanded steadily under both Democratic and Republican presidents in recent decades,” but the expansion was especially notable during Obama’s presidency.<sup>131</sup> The number of significant regulations and rules issued by his administration substantially outpaced his immediate predecessor.<sup>132</sup>

This recent expansion in executive authority raises the crucial issue as to whether future presidents—most immediately President Trump—will further expand presidential power at the expense of Congress or whether Congress will reassert its policy making influence. On the one hand, the new president has threatened to undo many if not all of the major regulations issued during the Obama administration,<sup>133</sup> a move

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127. *Id.*

128. *Id.*

129. See Brian Schaffner & Stephen Ansolabehere, *Cooperative Congressional Election Study: 2010-2014 Panel Study*, HARVARD DATAVERSE, <https://dataverse.harvard.edu/file.xhtml?fileId=3004613&version=9.0> (last updated Mar. 4, 2017).

130. See Christopher Ingraham, *A History of Executive Orders*, AM. PRESIDENCY PROJECT (Jan. 29, 2014), <http://imgur.com/L5Da4bN> (noting that though recent presidents have issued fewer executive orders, the substantive impact of these orders have increased).

131. Appelbaum & Shear, *supra* note 5.

132. *Id.*

133. Tim Devaney, *Trump Puts Obama Regulations on the Chopping Block*, HILL (Jan. 31, 2017), <http://thehill.com/regulation/316980-trump-puts-obama-regulations-on-the-chopping-block>.

that would have strong support in the Republican Congress. Moreover, with Republican majorities in both the House and Senate<sup>134</sup> President Trump will face a more cooperative Congress than Obama did in the last six years of his presidency. On the other hand, the 2016 elections left the Democrats in a slightly stronger position in the House and Senate.<sup>135</sup> Indeed, with forty-eight members in the “60 vote Senate” Democrats can frustrate many of Trump’s policy initiatives.<sup>136</sup> Under these circumstances will the new president be content to work with a Senate that may be able to block many of his policy goals or will he follow President Obama’s example by taking unilateral actions to further his policy agenda? From everything we know about the new president it seems very unlikely that faced with an uncooperative Congress he will be able to resist the temptation of taking unilateral actions to implement his policy goals, thereby further extending the scope and reach of executive power.

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134. *Congressional Profile*, U.S. HOUSE, [http://clerk.house.gov/member\\_info/cong.aspx](http://clerk.house.gov/member_info/cong.aspx) (last visited Feb. 1, 2017).

135. *Live Results 2016 Election: Senate*, REAL CLEAR POLITICS (last visited May 26, 2017), [http://www.realclearpolitics.com/elections/live\\_results/2016\\_general/senate/](http://www.realclearpolitics.com/elections/live_results/2016_general/senate/).

136. *Filibuster and Cloture*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/mon/briefing/Filibuster\\_Clature.htm](https://www.senate.gov/artandhistory/history/mon/briefing/Filibuster_Clature.htm) (last visited Jan. 31, 2016).

