

CONGRESS IN CRISIS
A STUDY OF LEGISLATIVE AND PRESIDENTIAL BEHAVIOR IN RESPONSE TO
THE SEPTEMBER 11, 2001 TERROR ATTACKS AND
THE CORONAVIRUS DISEASE 2019 PANDEMIC OF 2020 AND 2021

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ABSTRACT

The separation of powers between the legislative and executive branches is integral to the integrity of the Constitution and public trust in the government. Emergencies like the September 11, 2001 terror attacks and Coronavirus Disease 2019 pandemic of 2020 and 2021 prompt hastened and improvised governmental responses, which may be prone to upsetting the separation of powers. This work provides a quantitative examination of legislative and presidential trends during both crises to determine whether either branch indeed exerted more or less power than expected. While broad observations may be generalized from these trends, the quantitative data provides an excellent foundation for further qualitative research.

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INTRODUCTION

An Uneasy Balance

The separation of powers between the legislative and executive branches has been a subject of debate among scholars, practitioners, and laypeople alike for decades, notably since the ambitious reforms undertaken by President Franklin D. Roosevelt and his vice president and successor, Harry S. Truman.

The notion that presidents have tended to exercise their power more forcefully and unilaterally vis-à-vis the legislature during wartime seems to be universally acknowledged. But what of other crises? Do pandemics, economic depressions and recessions, natural disasters, episodes of civil unrest, and other types of emergencies similarly tilt the separation of powers in the executive's favor?

This essay examines the idea that crises – events that create exigent circumstances requiring a swift governmental response – upset the balance of power between the executive and legislative branches. Specifically, the essay employs a quantitative approach to determine the extent to which trends in the defining actions of congressmembers and presidents have changed during two recent crises: the September 11, 2001 terror attacks and the Coronavirus Disease 2019 (COVID-19) pandemic.

The quantitative methodology used in this essay objectively demonstrates whether trends in congressional oversight, legislative actions, and presidential actions varied alongside the occurrence of these crises. It does so by surveying government records provided by the Library of Congress and Federal Register to determine how many executive or legislative actions each branch conducted in a particular month, then comparing whether frequencies unexpectedly changed following the onset of a crisis.

Specifically, the study examines the frequency of oversight hearings, new legislation, legislation passed by either or both chambers, executive orders, and legislation signed into law by the president. Each of these actions comprise two categories: general legislation and crisis-related legislation. A comparison of results from these two categories then sheds light on whether changes in the separation of powers occur broadly or narrowly in response to certain crises, if any change occurs at all.

PURPOSE

The inspiration for this essay has been the ongoing COVID-19 pandemic and the broad governmental response thereto. Since the Donald J. Trump Administration and 116th Congress recognized the pandemic in February 2020, the policy actions of both the executive and legislative branches have been subject to constant public debate. At times, both the Trump Administration and Joseph R. Biden Administration have been criticized for not doing enough to combat the pandemic, while Congress has sometimes been criticized for doing too much, especially in terms of spending. This separation of powers appears inconsistent with the general notion that presidents usurp congressional power during crises. The balance of power between the federal government and states during the Nation's COVID-19 pandemic response has also proven worthy of public and scholarly scrutiny, though this essay is limited in scope only to the actions of the federal government.

On the other hand, the federal government and especially the George W. Bush Administration have been subject to criticism for the United States' powerful response to the September 11, 2001 terror attacks. Interestingly, at the zenith of American intervention in the Middle East, public opinion of President Bush and the government's policy response was at its peak. It seemed that the president had consolidated power by carrying out a military conflict

without the express consent of Congress, not dissimilar to the United States' excursions in Vietnam and elsewhere. This essay examines the extent to which the separation of powers was indeed upset following the 2001 terror attacks, if at all.

This study of the power dynamics present in the government's response to wartime and peacetime crises serves to validate whether the Constitution is threatened by such events. Is the War Powers Clause in jeopardy? Is Congress more or less willing to use its implied oversight powers as a check on the executive's power during crises? Moreover, the strictly quantitative nature of this essay provides scholars with a foundation for nuanced qualitative work. While this essay does not examine the content of legislation or executive orders, the trends it reveals provide context that may inform related work. Although scholars have long studied the separation of powers, there is a noticeable gap of knowledge in the study of government dynamics during crises other than war. The COVID-19 pandemic has served as a reminder that these sorts of crises do occur and that the government response thereto is of dire importance.

SCHOOLS OF THOUGHT

The foundational work of other scholars on the separation of powers has resulted in the formation of various schools of thought corresponding to the normative views taken by their authors. Although this essay attempts to avoid any normative suggestions in an effort to provide objective empirical evidence, it is worthwhile to briefly consider the positions that dominate academic discourse on the separation of powers. Likewise, it is necessary to mention that while these schools of thought were primarily developed in the context of war powers, their applicability extends to other exigent events requiring a swift government response.

The school of thought that has the most contributions with mainstream attention is the Literalist school, which relies on a textualist interpretation of the Constitution to argue that

crises, especially wars, should not affect the separation of powers. Literalist scholars, such as Arthur Schlesinger of *The Imperial Presidency*, note that past presidents have used crises to usurp powers from Congress, which has in some cases has been complicit by abdicating legislative responsibilities during exigent circumstances.¹ Not only have unilateral presidential actions been unconstitutional acts, those acts have led ipso facto to the steady consolidation of power within the executive branch as presidents have been unwilling to cede those powers assumed during crises.²

Diametrically opposed to the Literalists are the Absolutists, who argue that the modern world has justifiably tipped the balance of powers in favor of a strong executive branch. Absolutists frame the current political dynamic as one unimaginable by the Founders, including James Madison, who vehemently warned against the consolidation of power within one branch. Authors like Eric Posner and Adrian Vermeule argue that it is the people – though their culture and norms – that ought to check the executive to prevent tyranny, rather than a legislature doing so through a system of checks and balances.³ This arrangement, unlike the current separation of powers that features an ineffective congress, is optimal in bringing about social benefit. Although Absolutist scholars do not venture to argue for the abolishment of the legislative and judicial branches in favor of an authoritarian model, they do argue that the Madisonian framework of checks and balances is antiquated and no longer useful for academic research.

¹ Arthur M. Schlesinger Jr., *The Imperial Presidency* (New York: Houghton Mifflin, 1973).

² Louis Fisher, *Presidential War Power*, 3rd ed., rev. (Lawrence, KS: University Press of Kansas, 2013).

³ Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010).

In between the Literalists and Absolutists are the Subjectivists, who hold that the separation of powers may fluctuate during crises but is generally rigid. This camp has grown increasingly popular after the September 11, 2001 terror attacks, which brought to the forefront questions about whether typical constitutional limitations should apply during dire circumstances. In general, authors in this category, such as Oren Gross and Mark Tushnet, find that some flexibility within the Constitution is required to allow the government to effectively perform during crises.⁴⁵ Admittedly, this school of thought is amorphous and captures those scholars who do not lean strongly toward textualism on one end or a plebiscitarian society led by a strong executive on the other.

While a cursory understanding of each of these schools of thought is beneficial to the reader, this essay focuses on stating and interpreting objective data from its case studies. As such, normative arguments on the separation of powers serve this methodology only to provide context rather than act as a benchmark against which to measure legislative and executive behavior.

AGENDA

The remainder of this thesis is comprised of three chapters, each of which studies trends in a specific legislative or executive action, and a conclusion in which the key findings are synthesized. Each of the three chapters examines whether trends in a specific function of Congress or the president change during crises. Specifically, chapter one examines congressional

⁴ Oren Gross, "Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112 (2003): 1011-1134.

⁵ Mark Tushnet, "The Political Constitution of Emergency Powers: Some Lessons from Hamdan," *Minnesota Law Review* 91 (2007): 1451-1472.

oversight, chapter two examines the introduction and passage of legislation, and chapter three examines the issuance of executive orders and the ratification of legislation.

More specifically, chapter one examines Congress' tendency to conduct legislative oversight during national crises. One might naturally assume that crises spur increased government activity, which is predominantly implemented by the executive bureaucracy or administrative state. Like the president himself or herself, the plethora of executive agencies are subject to scrutiny from Congress in the form of legislative oversight. Therefore, it follows that crises are likely to afford Congress the opportunity and responsibility to conduct oversight more frequently than it typically does.

Additionally, conventional political wisdom holds that crises – especially war – create exigent circumstances to which presidents must respond swiftly without awaiting lengthy deliberation by the legislature. Unfortunately, historical executive crisis responses have often crept precariously close to Congress' enumerated powers. Despite the fact that the Constitution vests only in Congress the power to declare war, the United States has waged numerous protracted military conflicts worldwide without formal declarations. In fact, Congress has only declared on five occasions: The War of 1812, the Mexican-American War, the Spanish-American War, and both of the World Wars. While there is notable legislation that has adjusted the boundaries of the presidents' power to make war, it seems that the apparent presidential usurpation of war powers demands increased oversight.

With the suggestion in mind that crises prompt unilateral executive responses with increased agency activity, the first chapter proceeds with a literature review that focuses intently on the structural and psychological factors that guide congressional oversight. These factors most notably include the government's party composition; the legislative branch's relatively limited

resources in comparison to the executive branch; Congress' numerous committees, any of which may be motivated to pass the buck to other committees or simply assume they are already tending to a particular issue; and public opinion on a particular matter, such as a crisis.

The chapter then employs this literature to advise its main hypothesis: the frequency of congressional oversight is expected to increase during a national crisis when the executive response is unpopular; this effect is dampened or entirely nullified when the crisis unifies the public or reduces ideological and partisan divisions. Next, this hypothesis is examined through a quantitative approach applied to two case studies: the September 11, 2001 terror attacks and the COVID-19 pandemic.

Ultimately, chapter one concludes in support of the hypothesis that oversight is expected to decrease during unifying crises but increase during polarizing crises. Indeed, the congressmembers that served alongside Bush conducted oversight far less frequently than normal after the September 11, 2001 terror attacks. As involvement in Middle East and Afghanistan wore on, oversight activity gradually increased in correlation with declining public sentiment on the Bush Administration and War on Terror. On the other hand, in the case of the COVID-19 pandemic, the legislative oversight trends of the 116th Congress were hardly affected by the crisis, perhaps because it was divisive from its outset or because of Congress' concurrent ethical oversight of President Trump. Although the scope of this research is limited to these two case studies – one of wartime and one of peacetime – they do succeed in revealing oversight trends during crises and indicate that they may be determined to a degree by structural and motivational factors.

The second chapter shifts focus to Congress' legislative actions, which include the introduction and passage of legislation. Given that the legislative process is complex and

involves many stakeholders, it generally lasts longer than certain presidential actions, such as the issuance of executive orders, memoranda, and national security directives. Given that exigent circumstances require swift responses, one might suppose that there are some crises during which the executive branch simply cannot wait for Congress to draft a bill, deliberate on it, consider it in both chambers, and make necessary amendments before submission to the president.

Moreover, the fact that crises tend to draw public attention in a manner that is either unifying or polarizing likely also affects Congress' legislative actions. Since many congressmembers either have immediate electoral incentives or are concerned with their legacies, or both, it may be the case that crisis-related legislation has higher stakes given the increased public interest. Accordingly, it follows that legislative activity may differ from the norm during crises, the extent to which is explored throughout the chapter.

Overall, the study's quantitative methodology addresses the hypothesis that the frequency of legislative actions will not change considerably during a crisis, except for short-term lapses if the crisis prohibits Congress from meeting. However, the increased public attention on crisis-related legislation is likely to significantly affect its passage rates, depending on whether the crisis is unifying or divisive in nature. In other words, congressmembers are expected to exercise an atypical degree of bipartisan agreement or partisan disagreement when considering crisis legislation.

Chapter two ultimately finds that the passage of crisis-related legislation does indeed correlate with public opinion. In the case of the 107th Congress, it passed legislation related to the 2001 terror attacks and intervention in the Middle East at about four times the rate it passed other legislation. This result is expected given the public's relatively positive opinion of the

government after the terror attacks and its preference for military intervention. On the other hand, the 116th Congress was less likely to pass COVID-19 pandemic-related legislation, which it did at about 75% of the rate at which it agreed to all legislation. This result also follows from the hypothesis given the public's divided opinion on the COVID-19 pandemic and the government's response thereto.

The third chapter departs from the legislative branch to instead examine presidents' issuance of executive orders and ratification of legislation during crises. While the previous two chapters operate in a context that assumes presidents exert more power than usual during crises, this chapter examines whether this was actually the case after the September 11, 2001 crisis and during the COVID-19 pandemic response.

This chapter's hypothesis is that presidents are expected to issue executive orders more frequently during crises, regardless of whether a particular crisis is unifying or divisive. On the other hand, the presidents' tendency to sign legislation is expected to depend to some degree on whether the crisis is unifying or divisive.

The case studies on the September 11, 2001 terror attacks and COVID-19 pandemic reveal that presidents were actually no more likely to issue *more* executive orders after the onset of the crisis. This invalidates the first part of the hypothesis, with the caveat that presidents likely used other tools, such as executive memoranda and national security directives, to issue guidance during these crises. Unfortunately, these data are inaccessible for the purposes of research due to their classification or lack of archiving in a manner conducive to quantitative research. On the other hand, the latter part of the hypothesis that posits that the presidential ratification of legislation is likely to covary with public opinion during crises is upheld by the case study. Whereas in the case of the September 11, 2001 terror attacks, the Bush Administration ratified

crisis-related legislation at about twice the rate it did all other introduced legislation, in the case of the COVID-19 pandemic the Trump Administration ratified crisis-related legislation at about one-third the rate it did all other legislation. This outcome is largely dependent on the legislative success rates of the House and Senate, which was discussed in the previous chapter. Regardless, the data from the study reveal that presidents' tendency to approve legislation is indeed affected during a crisis, but their tendency to issue executive orders is not necessarily different.

Finally, the conclusion evaluates and synthesizes the findings from these three chapters. It then discusses the key limitations and considerations of a quantitative examination applied to limited case studies. Next, it provides the reader with suggestions for further research, of which there are many given the relative infancy of scholarship on the separation of powers during peacetime emergencies. Lastly, it concludes by demonstrating the practical and academic importance of these findings in the context of the Constitution and the challenges posed to it by crises.

CHAPTER ONE

Congressional Oversight of Executive Responses to National Crises

The executive branch's responses to various national crises have drawn the attention of Congress and the public since America's founding. These crises, including the Civil War, Great Depression, September 11, 2001 terror attacks, and Coronavirus Disease 2019 (COVID-19) pandemic, have often prompted swift executive responses, sometimes with little or no participation from the legislative branch. Instead, the legislative branch has asserted itself in these situations by either supporting the executive branch's actions or promising to hold it accountable through oversight hearings and investigations. This essay seeks to understand to what extent the latter is true: does Congress exercise its oversight responsibilities more often during crises, and if so, why?

There have been several noteworthy executive responses to exigent circumstances in recent history. From the start of the COVID-19 pandemic through the end of Trump's presidency, the Trump Administration's response to the COVID-19 pandemic is dominating national headlines and is the focus of contentious debate on social media and in the halls of Congress. Alongside the intense and partisan national dialogue on the topic, various congressional committees have undertaken oversight hearings to better understand the Trump Administration's policy actions or lack thereof.

Readers might similarly remember the George W. Bush Administration's response to the September 11, 2001 terror attacks. Naturally, these attacks and the executive branch's response were also the center of national attention. However, unlike the COVID-19 pandemic response, the nation was united in despair and rallied behind Bush's decision to deploy forces to the

Middle East.⁶ Perhaps surprisingly, congressional oversight of this important decision was rather quiet from the outset. Why was Congress disinterested in conducting oversight in the early stages of the Global War on Terror? Why has this not been the case for the Trump Administration's COVID-19 pandemic response? This remainder of this essay seeks to understand if national crises affect congressional oversight and, if so, why that is the case.

It does so by conducting a quantitative analysis of congressional meetings related to oversight in two case studies. The first case study is the September 11, 2001 terror attacks and the Bush Administration's response. The second case study is the ongoing COVID-19 pandemic and the Trump Administration's response. Notably, this section keeps in mind the civil unrest that occurred after the homicide of George Floyd, which may have further divided public opinion and amplified the government's sense of crisis. Before examining these cases, this essay provides a brief overview of the existing literature on oversight to better understand previous scholars' findings and methodology. It then restates the research question along with my hypothesis, assumptions, and methodology. The essay then includes both case studies before concluding with a summary of my findings, a prediction for the resolution of the ongoing crises, and recommendations for other scholars to conduct further research on oversight.

⁶ "Presidential Approval Ratings – George W. Bush," Gallup, <https://news.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>. Congress approved the Authorization for the Use of Military Force Against Iraq Resolution of 2002 in a mostly bipartisan manner and public opinion of the Bush Administration was at its all-time high immediately following the September 11, 2001 terror attacks.

LITERATURE REVIEW

The Founders made clear the importance of the legislative branch's responsibility to regulate the executive. Publius, in *Federalist 51*, wrote of the importance of the "auxiliary precautions" provided by the separation of powers, stating that "We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights."⁷ This idea that Congress must regulate the executive branch's power was reaffirmed in 1789 with the ratification of the Constitution and the enumerated powers it delegated to the legislative branch. Importantly, these enumerated powers did not include congressional oversight. Instead, Congress' oversight role became an implied power, without which it could not reasonably conduct its enumerated responsibilities. To date, no amendments have explicitly given Congress oversight responsibility, though several Supreme Court rulings have established its precedent.

Perhaps the most important Supreme Court ruling on congressional oversight is *McGrain v. Daugherty* (1927), in which the Court ruled that Congress has the power to compel individuals to appear for a committee investigation so long as it enables Congress to exercise a legislative function prescribed by the Constitution.⁸ In other words, the Court established the precedent for congressional investigations as an implied power to be exercised when "necessary and appropriate." Oversight is necessarily constrained to serve these legislative purposes, including the consideration of pending legislation, issues that may require future legislation, and the

⁷ Publius, *The Federalist Papers No. 51* (Feb. 8, 1788).

⁸ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

business of federal programs. Oversight cannot, however, be used extrajudicially to target citizens' private affairs, though it has controversially done so in certain instances such as the House Un-American Activities Committee (HUAC) investigations in the mid-20th century.

Other than *McGrain v. Daugherty*, there are few Supreme Court cases or legislative acts that define the true boundaries of oversight.⁹ Instead, centuries of its practice have developed the norms that govern when and how committees should conduct oversight. Importantly, the results of past congressional oversight hearings and investigations have also likely influenced congressmembers' motivators for conducting oversight, which often have less to do with the bureaucracy's proper conduct and more to do with the ideological, partisan, and public interests of congressmembers vis-à-vis the White House.

When and Why Does Congress Conduct Oversight?

Scholars and laypeople alike have long lamented that Congress has shirked its oversight role, allowing presidents and their executive agencies to implement policy unchecked. Although this opinion is still prevalent today, it was especially prominent in academic literature through the early 1980s. Most notably, James Pearson (1975) remarked that "Paradoxically, despite its importance, congressional oversight remains basically weak and effective."¹⁰

⁹ For Supreme Court cases related to oversight, refer to *Quinn v. United States* (1955) and *Watkins v. United States* (1957). For legislation on oversight, refer to the Legislative Reorganization Act of 1946, Legislative Reorganization Act of 1970, and Congressional Budget Act of 1974.

¹⁰ James Pearson, "Oversight: A vital yet neglected congressional function," *Kansas Law Review* 23 (1975): 277-288, quoted in Matthew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked," *American Journal of Political Science* 28, no. 1 (Feb. 1984), 166.

Contrarily, Matthew McCubbins and Thomas Schwartz point out in “Congressional Oversight Overlooked” that this popular academic consensus on oversight failed to seriously question certain truths, instead opting to simply bemoan the Congress. Fearing that academia had become complacent on the topic, McCubbins and Schwartz decided to challenge the consensus that Congress neglects its oversight responsibility. Instead, they argue, Congress performs a less apparent form of oversight, called *fire-alarm oversight*, rather than the prototypical *police-patrol oversight*.¹¹

McCubbins and Schwartz argued that Congress more often performs the decentralized *fire-alarm* approach because it is more efficient and more rewarding than the alternative. In this approach, congressmembers themselves do not actively monitor executive agencies. Instead, watchdogs, including individual citizens, media outlets, interest groups, and other organizations, alert congressional committees to irregular behavior within the executive branch. This relieves congressmembers from the need to actively monitor executive agencies themselves, thereby saving them time and money. Similarly, the *fire-alarm* approach allows congressional committees some leeway in determining which cases to oversee. Since congressmembers do not personally witness regulatory violations in this approach, they can overlook minor and unrewarding allegations and instead opt to oversee cases that will be received popularly by their constituents. In other words, the *fire-alarm* approach allows congressmembers some latitude to decide what to oversee based on a cost-reward model. This phenomenon is important in the context of oversight of crisis response, particularly because national crises often garner public attention, but not necessarily in a partisan manner.

¹¹ McCubbins and Schwartz, “Congressional Oversight Overlooked,” 167.

This work by McCubbins and Schwartz in “Congressional Oversight Overlook” was pivotal to the expansion of legislative studies on oversight. Their findings challenged the paradigm that Congress simply shirks its duties, which has motivated subsequent scholars to consider the various ways in which congressmembers perform this responsibility and their motivation in doing so.

In 2009, Douglas Kriner expanded on their findings by studying congressmembers’ motivators in performing oversight of the executive branch. Specifically, Kriner argues that the legislative branch is “broken,” because of a decline in deliberation, delegation of its power to the executive branch, and failure to engage in “vigorous, sustained oversight.”¹² Congress’ failure to provide consistent oversight is the most alarming of these three factors, Kriner argues, particularly because of the political nature of congressmembers’ decisions to undertake oversight cases.

Kriner uses the George W. Bush administration’s response to the September 11, 2001 terror attacks and Congress’ oversight thereof as a case study in an attempt to understand why there was minimal oversight conducted near the start of the Iraq War and a subsequent increase in oversight activity after Democrats retook control of the House in 2006. He found that there was a strong negative correlation between popular support for the Iraq War and trends in congressional oversight, suggesting that Congress became interested in overseeing Bush’s response to the September 11 attacks after the majority shifted to the opposing party. In broader terms, it follows from Kriner’s findings that the popularity of presidential actions negatively covaries with congressional oversight. As Kriner concludes, this is the case because “only in

¹² Douglas Kriner, “Can Enhanced Oversight Repair ‘The Broken Branch’?” *Boston University Law Review* 89 (2009), 766.

divided government do partisan incentives reinforce the weak institutional incentives driving legislators to oversee the executive aggressively.”¹³

Somewhat contradictorily, congressional committees often conduct oversight of the executive branch even in unified governments. As Jason MacDonald and Robert McGrath found, there are two reasons why congressional oversight is also prevalent during unified governments.¹⁴ First, and perhaps most obviously, congressional committees in unified governments often conduct retrospective oversight of the previous administration, which is often of the opposing party. A noteworthy example here is the coincidence of the first half of Barack Obama’s first term and the Democratic-led House in the 110th Congress. This government, while not entirely united given the Republican majority in the Senate, saw an increase in oversight activity – particularly focused on the Bush Administration’s policies and actions. The other reason that congressional oversight remains prevalent during unified governments is the simple fact that congressional committees remain interested in regulating and improving federal processes even when the executive is led by a president of the same party. In fact, MacDonald and McGrath find that this non-retrospective oversight is likely to be constructive for policy purposes rather than the partisan theater that might exist during split governments.

¹³ Kriner, “Can Enhanced Oversight Repair ‘The Broken Branch’?” 791.

¹⁴ Jason A. MacDonald and Robert J. McGrath, “Retrospective Congressional Oversight and the Dynamics of Legislative Influence over the Bureaucracy,” *Legislative Studies Quarterly* 41, no. 4 (Nov. 2016): 899-934.

On the other hand, David Parker and Matthew Dull's (2013) findings on oversight during unified governments differ from those of MacDonald and McGrath.¹⁵ Parker and Dull find that congressional investigations during unified governments are often cursory displays intended to give the impression that Congress is performing its oversight role. The divergence in their findings might indicate that while oversight hearings are constructive during unified governments, investigations tend to be less thorough than those that occur during split governments. Despite the authors' differences on behavior during unified governments, they do agree that under split governments congressmembers sometimes initiate investigations "willy-nilly" with the hopes of garnering attention from the press and populace.¹⁶

Moreover, Parker and Dull's findings differ from those recorded by David Mayhew in 1991 and 2005, in which he states that both chambers of Congress were "equally willing to investigate the president for charges of wrongdoing regardless of whether party control of the government was divided."¹⁷ Whereas Mayhew argued that government composition did not affect high publicity oversight of presidential wrongdoing, Parker and Dull found that this was only true in the case of the Senate. The frequency and intensity of oversight by the House, on the other hand, does seem to depend on party composition.

Given this understanding of Congress' motivational reasoning for conducting oversight, it is also important to understand the structural factors that shape their behavior. In addition to the topic of unified versus divided governments, scholars have also studied whether Congress

¹⁵ David C. W. Parker and Matthew Dull, "The Weaponization of Congressional Oversight," in *Politics to the Extreme: American Political Institutions in the Twenty-First Century*, eds. S. Frisch and S. Kelly (Palgrave Macmillan, 2013).

¹⁶ Parker and Dull, "The Weaponization of Congressional Oversight," 64.

¹⁷ David Mayhew, xxx

has too many committees to effectively provide oversight and whether a centralized congressional oversight body might improve its efficacy.

Joshua Clinton, David Lewis, and Jennifer Selin have found that Congress' plethora of committees undercut its effectiveness in conducting oversight.¹⁸ They argue that these committees, many of which have overlapping jurisdictions, often overlook or shirk oversight responsibilities with the expectation that another committee should handle it instead. Other scholars, including Matthew Brooker and Michael Livermore, expand on this work by claiming that the decentralized nature of committees hampers congressional oversight.¹⁹ Instead, they argue that a centralized committee responsible for all oversight is preferable, while admitting that it is unlikely that Congress would have an incentive to create and maintain this body. The sort of centralized committee described by Brooker and Livermore would address other authors' concerns on the excessive number of committees, as this committee could take ownership of all oversight and ensure that other committees can no longer pass the buck when an oversight case is not politically expedient.

Focused Studies on Oversight

There are two focused studies on oversight that are worth briefly reviewing to identify nuances in congressional behavior. As discussed earlier, Kriner's case study on congressional oversight of the Iraq War is an exemplar of scholarly work on oversight of an executive response to a crisis. Kriner's findings are that congressional oversight of the Iraq War increased as popular

¹⁸ Joshua D. Clinton, David E. Lewis, and Jennifer L. Selin, "Influencing the Bureaucracy: The Irony of Congressional Oversight," *American Journal of Political Science* 58, no. 2 (Apr. 2014).

¹⁹ Matthew S. Brooker and Michael A. Livermore, "Centralizing Congressional Oversight," *Journal of Law & Politics* 32 (2017).

support for the war decreased. This does not suggest that congressmembers undertook oversight *because* popular support decreased, but simply that the two variables are correlated. It could be the case that to some extent the oversight hearings themselves influence public opinion, thereby reinforcing congressmembers' motivation to conduct those very hearings.

Another important study on oversight is Amy Zegart and Julie Quinn's work on congressional intelligence oversight.²⁰ In short, these authors find that congressional intelligence oversight should be effective in theory, but that a lack of electoral incentives stemming from the general public's lack of interest in the intelligence community fails to motivate congressmembers to carry out this duty as aggressively as it might for other oversight cases. This study relates to oversight of crisis response because in many cases, the intelligence apparatus is an important component of the executive's measures (e.g., the weapons of mass destruction assessments after the September 11 terror attacks).

Altogether, this literature review briefly examined the foundational documents on oversight including the Constitution, *Federalist 51*, and *McGrain v. Daugherty*. With this context in mind, it reviewed the literature that explains why congressional committees undertake oversight in certain circumstances while avoiding it at other times. It then explained the structural factors that discourage oversight, including the sheer number of congressional committees and subcommittees that have overlapping jurisdictions and limited resources. Finally, it briefly reviewed two studies on congressional oversight, which included its oversight tendencies during the Iraq War and its lack of motivation to conduct intelligence oversight. This body of literature is the foundation for the remainder of this essay, which will attempt to further

²⁰ Amy Zegart and Julie Quinn, "Congressional Intelligence Oversight: The Electoral Disconnection," *Intelligence and National Security* 25, no. 6 (Dec. 2010).

understand whether congressional oversight changes during national crises and the motivational or structural factors that might determine why.

Hypothesis

The remainder of this essay seeks to answer the question “how does congressional oversight change during national crises?” by applying the lessons learned from the existing literature to data from two recent national crises. The first crisis to be examined is the September 11, 2001 terror attacks, the George W. Bush Administration’s response, and the congressional oversight thereof. The second case to be examined is the COVID-19 pandemic, the Donald J. Trump Administration’s response, and congressional oversight efforts. Taken together, I evaluate and compare my findings from these two case studies to identify similarities between the two events and offer a prediction for congressional behavior during the resolution of the ongoing COVID-19 and civil unrest crises.

My argument is straightforward and draws upon the findings of earlier legislative scholars. Congressional oversight is expected to increase in frequency during a national crisis, because congressmembers are motivated by the increased public attention it brings. This effect is dampened if the crisis is unifying in nature and does not offer a stark ideological or partisan divide. My presupposition that congressional oversight increases during crises is amplified by an assumption that presidents often take unilateral action to respond to them and therefore provide Congress more activities to oversee, though testing the validity of this assumption is beyond the scope of this essay. In summary, my argument can be understood as one empirical hypothesis:

Hypothesis: The frequency of congressional oversight is expected to increase during a national crisis when the executive response is unpopular. This effect is dampened or

entirely nullified when the national crisis unifies the public and reduces ideological and partisan divisions.

Assumption 1: National crises attract increased public attention.

Assumption 2: Some national crises unify the public, sharply reducing ideological and partisan divisions.

Assumption 3: The frequency of congressional oversight positively covaries with the public attention that a hearing or investigation will receive.

Assumption 4: Congressional oversight occurs more frequently during split governments.

DATA, DESIGN, AND METHODOLOGY

To test this hypothesis, I conduct a comparative study of the two aforementioned cases. This study quantitatively compares the frequency of oversight hearings during each respective crisis response to their frequency before the crisis occurred. To accomplish this, I use the publicly available congressional hearings dataset provided by *Comparative Agendas* for the Congresses that served between 2001 and 2016.²¹ Because this dataset expires in 2017, I also employ a manually compiled dataset provided by at Congress.gov for the 115th and 116th Congresses, which have served during President Trump’s term.²² I filter both of these datasets by a select list of keywords first implemented by McGrath in 2013 to determine whether a

²¹ “Congressional Hearings Dataset,” *Comparative Agendas Project*, accessed Aug. 1, 2020, <https://www.comparativeagendas.net/us>.

²² “Legislative Search Results,” *Congress.gov*, accessed Aug. 1, 2020, <https://www.congress.gov/search>. I search congressional archives provided at Congress.gov and filter for “Committee Meetings.” I use data from all committees in both the House and Senate.

congressional meeting is an oversight hearing, then compare the number of results before and after the incidence of the national crisis under examination.²³ Finally, I further examine these results by filtering for those oversight hearings that specifically relate to the crisis.²⁴ This step assists in determining whether the change, if any, in oversight hearing frequency is directly related to the crisis. I conduct this quantitative analysis with the awareness that the composition of the House and Senate does not remain constant throughout a presidential term and may strongly influence the results of these case studies. Special attention is brought to these changes in Congress in each case study. Altogether, this approach provides an efficient and effective means to identify variations in congressional oversight activity during national crises.

CASE STUDY 1: SEPTEMBER 11, 2001 TERROR ATTACKS

The single most memorable national crisis in recent decades was the September 11, 2001 terror attacks, which prompted George W. Bush to take aggressive and often unilateral action to unite the nation and counter al-Qaeda and their sponsors. Most notably, Bush took action to enter the Global War on Terror, without a formal declaration but with prior authorization by Congress. As this case study will soon examine, public support for the Bush Administration and its

²³ Robert J. McGrath, “Congressional Oversight Hearings and Policy Control,” *Legislative Studies Quarterly* 38, no. 3 (Aug. 2013), 372. McGrath filters congressional meetings to identify those related to oversight hearings by matching results that only include at least one of the following keywords: oversight, review, report, budget request, control, impact, information, investigation, request, explanation, president, administration, contract, consultation, or examination. I add the keyword “urgent” to select some oversight hearings that McGrath’s list omits.

²⁴ To filter for oversight hearings related to crises, I use keywords tailored to each crisis under examination. For the September 11, 2001 terror attack case study, I apply the following keywords: terror, attack, Qaeda, Qaida, Taliban, Iraq, and Afghanistan. For the COVID-19 (and civil unrest) case study, I apply the following keywords: Coronavirus, COVID, pandemic, protest, unrest, George Floyd, brutality, police, crisis.

intervention in the Middle East was strong immediately following the attacks. At this point in the latter half of Bush's first term, the frequency of congressional oversight was at its lowest point in his presidency. However, as time passed, public opinion of Bush and the War on Terror decreased, Democrats won a majority in the House, and the frequency of oversight continuously grew. The remainder of this case study will examine each Congress that served during Bush's presidency to identify how and why oversight behavior might have changed between 2001 and 2009.

The first step in testing the hypothesis in the September 11 case study is a brief examination of congressional oversight activity of the Bush Administration, before and after the terror attacks. This period starts on Bush's inauguration on January 20, 2001 and continues through the end of Barack Obama's first term. This time span is further divided into several subperiods: the 107th Congress' term from the start of Bush's presidency until September 11, 2001; the remainder of the 107th Congress' term ending on January 3, 2003; the 108th Congress' term between January 2003 and January 2005; the 109th Congress' term between 2005 and 2007; the 110th Congress' term between 2007 and 2009; and the 111th Congress' term between 2009 and 2011.

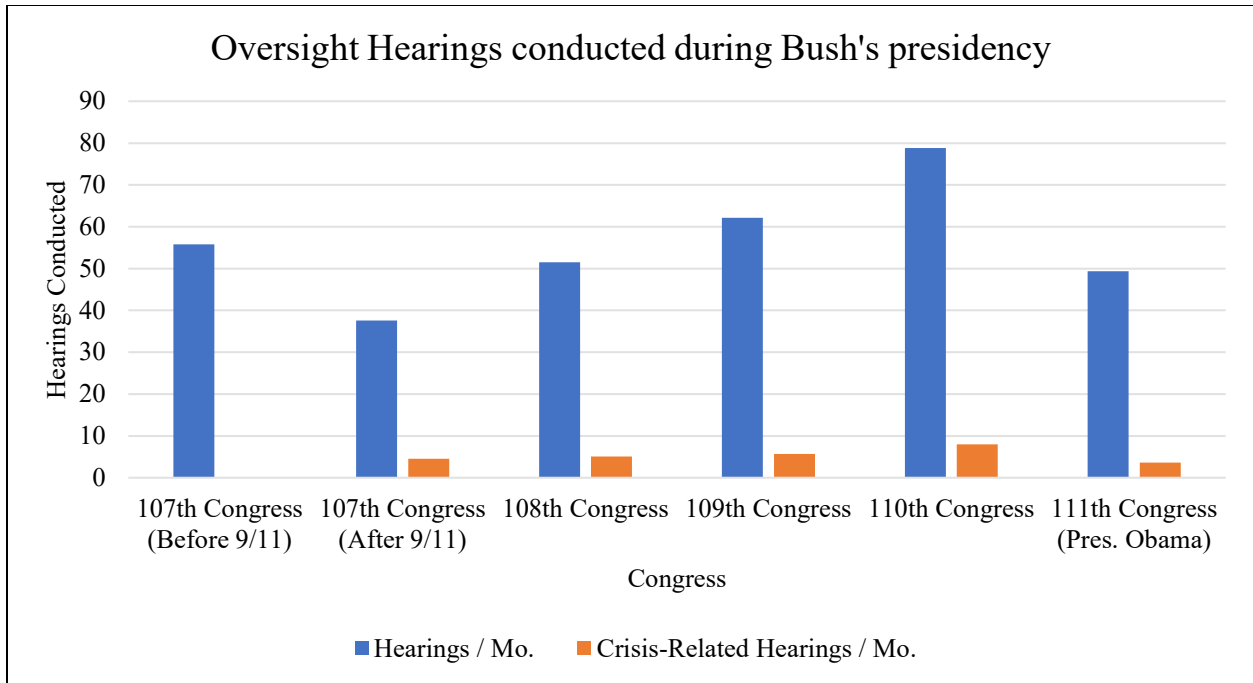


Figure 1-1 – Oversight Hearings conducted during Bush’s presidency

107th Congress

The first subperiod, from the start of Bush’s and the 107th Congress’ terms through September 11, 2001, provides baseline data that serve as a reference by which to compare changes in the frequency and intensity of congressional oversight activity thereafter. It is first necessary to note that this Congress was mostly unified given that the House remained under Republican control for its entire duration, although the Senate majority changed on three occasions. In the 107th Congress’ eight months before the September 11 terror attacks, it conducted an average of 52 congressional meetings related to oversight per month.²⁵ This frequency seems reasonable in the context of other presidencies with a favorable House majority. For example, during the first half of President Obama’s first term, the 111th Congress, which

²⁵ I calculate this value by filtering a table of all congressional meetings between Jan. 20, 2001 and Sep. 10, 2001, filtering by the keywords listed in Footnote 17, then dividing total months by the number of results.

maintained a Democratic House majority, conducted an average of 49 oversight meetings per month. This baseline data does not require further analysis, but can instead be used as a reference for latter subperiods in this case study.

In the 107th Congress' remaining 16 months after September 11, 2001, it conducted oversight hearings significantly less frequently than before the attacks, despite the complex response from the executive branch. The average frequency of oversight hearings per month decreased from 56 to 38 hearings, with about 4.5 of which being related to the terror attacks or the Bush Administration's response.

While one might have expected congressional oversight to increase after the terror attacks simply because the executive branch took unilateral action in response, that was not the case. Instead, Congress' relative disinterest in conducting oversight after the September 11 attacks likely owes to the fact that the country was relatively united after the terror attacks and Bush Administration's response, which was originally met with bipartisan support.²⁶ This likely dissuaded congressmembers from initiating oversight hearings for the sake of publicity or partisan purposes. Moreover, the government was relatively unified during the 107th Congress. The House was soundly controlled by Republicans, who had little incentive to challenge Bush's response. The Senate was evenly split at the start of the term, and while it shifted twice from Democratic control to Republican control, it is unlikely that these minute changes in composition significantly affected oversight trends.

²⁶ John Mueller and Mark G. Stewart, "Trends in Public Opinion on Terrorism" (May 14, 2020), <https://politicalscience.osu.edu/faculty/jmueller/terrorpolls.pdf>.

108th Congress

The 108th Congress took control in January 2003 and maintained a Republican majority in both the House and Senate. Despite being part of a true unified government, this Congress conducted slightly more oversight than its predecessor. It conducted an average of 51.5 oversight hearings per month with an average of five per month being related to the September 11 attacks.

This increase from the 107th Congress' 38 hearings per month to the 108th Congress' 51.5 hearings per month cannot clearly be attributed to change in Congress' composition. While it is likely that some of these hearings were cursory, it is more likely that oversight increased between 2003 and 2005 as public support for the Global War on Terror decreased.²⁷ The declining favorability of Bush's approval rating and his administration's intervention in the Middle East likely incentivized Congress to conduct oversight on the executive branch.²⁸ This correlation of data supports my hypotheses, though it is now necessary to observe trends from the 109th and 110th Congresses.

109th Congress

Following the trend of increased oversight activity, the 109th Congress conducted more oversight than both of its predecessors. This Congress, which maintained a Republican majority in both chambers, conducted 62 oversight hearings per month, with approximately 5.7 of which being related to the September 11 attacks and their aftermath. Once again, this subperiod of the case study does not provide the opportunity to examine how oversight trends might have changed in a split government. Instead, the increase in oversight can likely be attributed to the

²⁷ Mueller and Stewart.

²⁸ "Presidential Approval Ratings – George W. Bush," *Gallup*.

continuing decline of public opinion on Bush and the War on Terror. While Bush and the war saw an increase in popularity after the capture of Saddam Hussein in 2003, Bush's approval rating had dropped by 11% by the inauguration of the 109th Congress in 2005.²⁹ This likely incentivized Congress to conduct oversight, despite the majority being held by Republicans. This trend supports the hypothesis that oversight activity negatively covaries with unity and the next congressional term provides an opportunity to further investigate this relationship.

110th Congress

The 110th Congress was the final session that served during the Bush Administration, and the first time that the Democrats held either the House or the Senate. At this point in Bush's presidency, his approval was between 25% and 39% -- significantly lower than the 49% that he had during the previous Congress and the 90% that he had shortly after the terror attacks. His low approval rating, combined with the Democrats control of Congress, suggested that an increase in congressional oversight was likely. Indeed, the 110th Congress conducted significantly more oversight than any other during Bush's two terms. This Congress conducted 79 hearings per month -- compared to the 56 per month of the 107th Congress. The 110th Congress' hearings also happened to be relevant to the crisis and executive response, with nearly 8 hearings per month being related to terrorism or the wars in the Middle East.

Conclusion.

This data, alongside that of the previous three Congresses, strongly suggests that the frequency of oversight hearings positively correlates with public opinion of the crisis and whether the government is unified or split. Immediately following September 11, 2001,

²⁹ "Presidential Approval Ratings -- George W. Bush," *Gallup*.

congressional oversight activity dropped to its lowest frequency of Bush's two terms. Oversight activity increased steadily throughout the Bush presidency, as his approval and public opinion on the war declined. The increase in oversight was most stark when Democrats took decisive control of the Congress near the end of Bush's term, when his favorability was at record lows.

The methodology satisfactorily tested the hypothesis by correlating public opinion of the administration and its crisis response to the frequency of oversight hearings. The data indicated that these variables negatively covary as hypothesized. The next case study will examine another administration and two new crises to help determine whether these trends were unique to the Bush presidency or are valid in other cases.

CASE STUDY 2: COVID-19 PANDEMIC

As of August 2020, the United States is facing two crises concurrently. The first of these crises is the global COVID-19 pandemic, which has become the spotlight of national and international political discourse since late February 2020. The other crisis yet ongoing is an outburst of civil unrest across the nation, owing to perceived police brutality on the basis of race after the homicide of George Floyd in Minneapolis. While the COVID-19 pandemic remains the focus of this study, it seems that both of these events have prompted policy responses and intervention from the executive branch, as well as deliberation and legislation from the 116th Congress. Not surprisingly, the Trump Administration's response to these crises has sparked public debate, scrutiny, and congressional oversight. This brief case study examines oversight trends in Trump's first term in office to determine how they have changed over time, especially with reference to these crises.

115th Congress

As President Trump was sworn into office on January 17, 2017, he joined a Republican majority in the House and Senate of the 115th Congress to form a unified government. This congress did not serve through a national crisis, but oversight data from their session serves as a baseline to understand if and how oversight trends changed before the government became split as Democrats won a House majority in 2019.

The 115th Congress conducted an average of 21 congressional oversight meetings per month for the duration of its term. This frequency is comparatively low, although Congress.gov's new data standard introduced in 2017 makes difficult an accurate comparison to records from previous congresses.³⁰ Regardless, the relative infrequency of the oversight by the 115th Congress is somewhat expected given that the government was unified with a first-term president.

116th Congress

The current congressional meeting – the 116th Congress – formed in 2019 with a new Democratic majority in the House. As one might expect given a divided government, this Congress conducted considerably more oversight than its Republican-led predecessor. As of the end of July 2020, the 116th Congress has conducted approximately 36 congressional oversight meetings per month.

³⁰ Congress.gov introduced a new data standard for congressional meetings that started with the 115th Congress in January 2017. This new standard allows scholars to access and query records for all congressional hearings, which they can further refine to identify only those hearings related to oversight. This approach is similar to that taken by the Comparative Agendas Project (CAP), but data from Congress.gov and CAP should not be directly compared to each other.

Interestingly, the frequency of congressional oversight in the 116th Congress remained mostly constant before and after the U.S. first recognized the COVID-19 pandemic in February 2020, with the Congress having conducted 37 hearings per month before February 2020 and 34 hearings per month thereafter. It is necessary to note, however, that this frequency is relatively skewed given Congress' extended recess in April and May 2020, for which Senator Mitch McConnell and Speaker Nancy Pelosi cited COVID-related health concerns.³¹

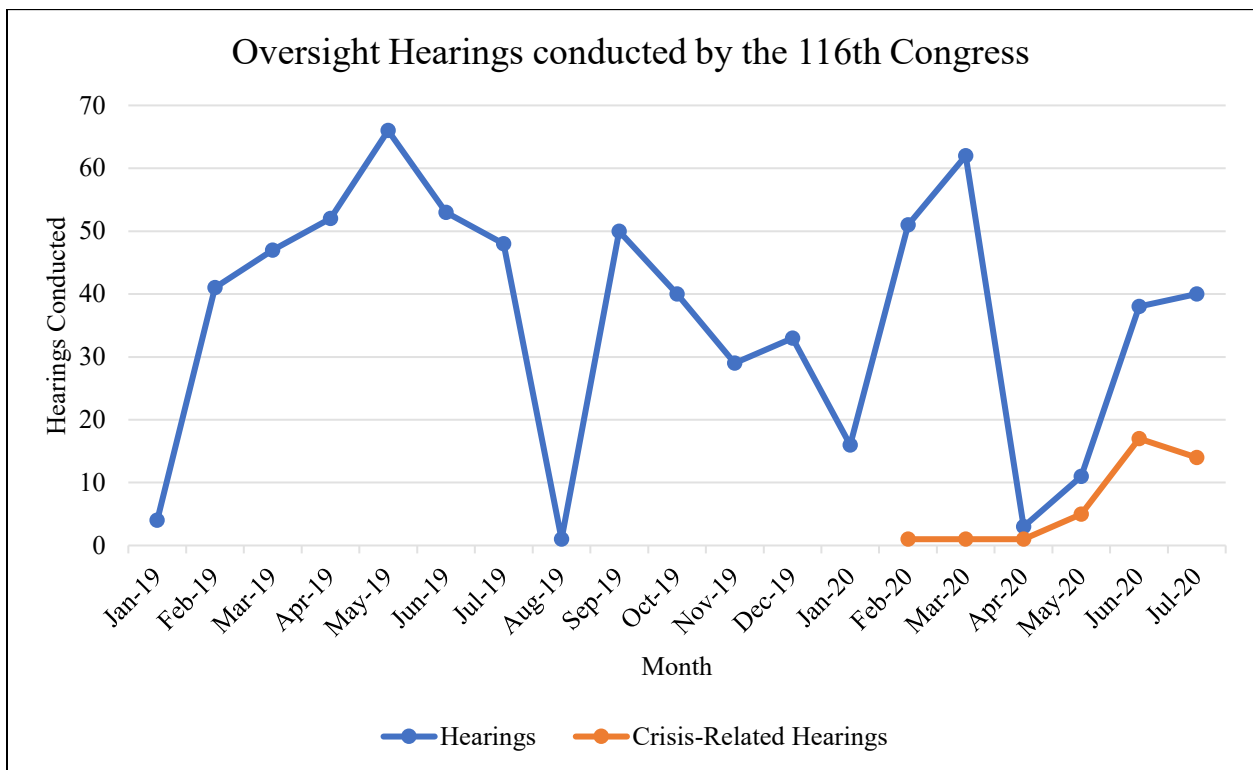


Figure 1-2 – Oversight Hearings conducted by the 116th Congress

³¹ Burgess Everett, “Congress extends recess until at least May 4,” *Politico*, April 14, 2020, <https://www.politico.com/news/2020/04/14/congress-extends-recess-until-at-least-may-4-185792>.

Altogether, the limited data from the 115th and 116th Congress do little to confirm or reject this essay's hypothesis. While oversight frequency did increase in early 2019 as Democrats won a House majority, it remained relatively unchanged as the COVID-19 pandemic and George Floyd protests became the focus of national attention. It will be worth revisiting this data after the completion of the 116th Congress, as well as their immediate successors. If this essay's hypothesis is correct, the frequency of congressional oversight will indeed increase for the remainder of the 116th Congress' term. Similarly, if President Trump is reelected and the government remains split, the 117th Congress can also be expected to conduct oversight frequently.

CONCLUSION

This essay has examined congressional oversight trends from the George W. Bush and Donald J. Trump Administrations to determine whether national crises affect the frequency of oversight. In the case of Bush's response to the September 11, 2001 attacks, the contemporary congresses conducted oversight less frequently than normal until favorability for Bush and the Global War on Terror steeply declined in his second term. On the other hand, oversight trends during the COVID-19 pandemic remained relatively unaffected by the crises through the end of Trump's presidency.

Moreover, there has not been a significant increase in oversight since President Biden's inauguration in January 2021. Congress held an average of 27 oversight hearings per month between January and April, only about five of which per month were related to the COVID-19 pandemic. This indicates that retrospective oversight of the Trump Administration has not occurred to a significant degree. This may be the case because the unified Democratic government is instead focused on legislating or because the House of the previous Congress –

also led by Speaker Pelosi – conducted oversight to a satisfactory degree during Trump’s presidency. Further research into why the 117th Congress has conducted less retrospective oversight than expected may be warranted unless trends change throughout 2021 and 2022.

There is plenty of research left to be done on the topic of congressional oversight, which is surprisingly understudied in the field of legislative studies. First, one might expand the scope of this essay to include national crises prior to September 11, 2001. Several immediately come to mind, including the World Wars, Great Depression, and Civil Rights Movement. These myriad crises might then be further categorized by type, to determine whether economic, military, or sociopolitical crises are met with different congressional responses. Second, one might study how congressional oversight trends are affected in election years. It is apparent that in a divided government, Congress has an increased incentive to challenge the president to affect public opinion (and influence voters) prior to the election. Methodology like that used in this essay can test the veracity of this claim. Third, one might consider how impeachments affect congressional oversight trends. Does Congress conduct more oversight before and during the impeachment process to continue to build its case? Or does it become so preoccupied with impeachment that it overlooks other functions of oversight? Data from the Trump, Clinton, and Nixon Administrations might be examined to test these questions. Continued research on congressional behavior, especially oversight, in the context of external events will help both scholars and practitioners to better understand the structural and psychological factors that affect lawmaking and regulation at a federal level.

The study of oversight during crises is particularly important because it demonstrates how congressional behavior adapts, or fails to adapt, to difficult situations. These crises often invoke a unilateral executive response and its implementation by executive agencies, which

provides Congress many opportunities to execute its oversight responsibilities. Still, as this essay's case studies demonstrate, congressional oversight does not simply increase when crises arise. Instead, the frequency of oversight hearings tends to decrease during crises, as long as the public is unified behind the government's response in a nonpartisan manner. When public confidence in the executive response erodes or becomes partisan, Congress tends to conduct oversight more frequently – especially when the government is divided. In many ways, these trends in congressional oversight during crises mirror what other scholars have found to be the case in regular times. Congressmembers, given their incentives to represent their constituents and earn reelection, tend to conduct oversight when it is politically expedient to do so. When the executive branch and its crisis response are unpopular and partisan, congressmembers of the opposing party tend to step in and conduct oversight more frequently than normal.

CHAPTER TWO

Legislating during Crises

In the previous chapter, we learned that national crises affect the frequency at which Congress conducts oversight of the executive branch. Specifically, the case studies found that Congress conducted less oversight when public opinion of the federal government's crisis response was positive, especially in governments where the president, Senate, and House were led by the same party.

This chapter further explores congressional behavior during crises by examining how Congress' legislative behavior changes immediately following the onset of a national crisis. Specifically, it considers the frequency at which both chambers introduce new legislation and pass existing legislation during and after crises.

An outsider may not intuitively understand just how many bills Congress introduces and considers. While each Congress is different and conditions may vary depending on party composition, a typical Congress is expected to introduce over 500 new bills each month, about 5% of which eventually make it to the White House for action.

Does congressional productivity change when the federal government responds to a crisis? Do crises affect the rate at which Congress agrees to legislation? This essay explores both of these questions through the application of two case studies. First, it examines the September 11, 2001 terror attacks and the 107th Congress' response thereto. Then, it studies the 116th Congress' response to the Coronavirus Disease 2019 (COVID-19) pandemic, as well as its response to the civil unrest that occurred after George Floyd's homicide during an altercation with officers of the Minneapolis Police Department.

Ultimately, the case studies suggest that there is not a clear relationship between crises and long-term legislative productivity. Despite temporary lapses in production owing to emergencies and recesses, in both cases Congress compensated for lost time by increasing the rate at which it introduced legislation in the following months. On the other hand, the case studies revealed that crises affect the likelihood at which legislation passes the House and Senate. Specifically, when public opinion for the government's crisis response is high and unified, Congress was much more likely to pass crisis-related legislation, as was the case after the September 11, 2001 terror attacks. By contrast, when public opinion on the government's crisis response was divided, so too was Congress. In the case of the COVID-19 pandemic and civil unrest, the 116th Congress passed crisis-related legislation at just over half the rate it passed other bills.

LITERATURE REVIEW

Legislative studies scholars have long sought to understand the factors that affect Congress' role in legislating. Throughout more than a century of research, they have produced myriad theories on legislating and policymaking that relate to the structure of the federal government and the psychology of elected officials. This literature review focuses on those schools of thought that relate to the composition and polarization of the government, as well as the psychology of elected officials, to put their theories and models in the context of national crises. This section examines the majoritarian, partisan, and pivot schools of thought, as well as the theory of punctuated equilibrium. It then reviews a limited body of literature relating to congressional behavior during wartime, which may be somewhat analogous to congressional behavior during other types of crises such as pandemics and depressions.

Majoritarian and Partisan Schools

When considering the factors that affect the likelihood of new or updated legislation, the first topic that likely comes to mind is that of government composition. Specifically, which parties control the White House, Senate, and House of Representatives? For example, it is perhaps a foregone conclusion that unified governments are more likely to pass legislation than divided governments. The majoritarian and partisan school of thought attempts to understand the effects of government composition in further detail to understand the extent to which composition affects policymaking and gridlock.

Some scholars of the majoritarian and partisan school of thought, including Alberto Alesina, Randall Calvert, and Donald Wittman, emphasize the role of the majority party in government. They argue that the majority party is more likely to enact its own preferences rather than the wishes of the median voter. Therefore, the two-party system leads policy to ideological extremes rather than toward compromise. This effectively leads to dramatic policy swings when the majority party changes and reinforces the incumbent majority's desire to maintain power.³²

Scholars Gary Cox and Matthew McCubbins place extraordinary value on the importance of agenda setting, which they believe is especially important during unified governments and in the absence of gridlock. Accordingly, proponents of their research believe that congressmembers have a strong electoral incentive to allow their party leadership to set and implement the legislative agenda.³³

³² Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches*, second ed. (Cambridge, MA: MIT Press, 2016).

³³ Gary W. Cox and Matthew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (New York: Cambridge University Press, 2005).

On the other hand, members of the majoritarian and partisan school of thought also assert that in divided governments “policymaking will represent bilateral bargaining between the parties.”³⁴ This partisan bargaining in a divided government is important, because it is expected to result in temporary policy responses that best align with the preferences of *critical voters* – that is, those voters that are likely to affect electoral outcomes.

Still, each party’s ability to bargain and compromise can be impeded by polarization. The further apart each party’s ideologies and policy preferences, the less likely they will be to produce mutually agreeable policy.³⁵ Therefore, polarization may motivate political brinksmanship in situations where the cost-benefit ratio of a policy compromise disproportionately favors one party.³⁶ In contrast to unified governments, divided governments are expected to exhibit “more gridlock and less policy innovation” compared to a government that is unified, or at least, minimally polarized.³⁷

Median Voter Model

In contrast to the majoritarian and partisan school of thought, scholars of the median voter model argue that policy outcomes are likely to drift toward the preferences of the median voter. As time passes, the median voter’s policy preferences are likely to change, and legislation

³⁴ McCarty, Poole, and Rosenthal, *Polarized America*, 266.

³⁵ McCarty, Poole, and Rosenthal, *Polarized America*, 267.

³⁶ Charles Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000).

³⁷ McCarty, Poole, and Rosenthal, *Polarized America*.

is expected to follow as these voters replace elected officials with those more likely to enact their preferences.³⁸

Although the existing literature does not directly address the effect of national crises on the median voter's preferences, it is apparent that certain crises may spur an acute shift in public opinion. Accordingly, elected officials have an electoral incentive to enact crisis-related policies that are at least somewhat aligned with public opinion, regardless of their effectiveness in the long term. The case studies discussed later in this chapter further examine this phenomenon.

Pivot Theories and Models

Whereas the median voter model emphasizes the policy preferences of moderate voters, the pivot school focuses instead on those “politicians whose support is pivotal in overcoming vetoes and filibusters.”³⁹ Scholars, including Keith Krehbiel, David Brady, and Craig Volden, argue that these politicians' votes are particularly important because of the structure and rules of the government and its legislative processes. Notably, the presidential veto and Senate cloture are examples in which pivotal politicians play a much more significant role than those who toe the party line. Pivot models apply to the case studies in this chapter to the extent that a crisis, or executive response thereto, affects which politicians are pivotal. While it is familiar to gauge how public opinion changes in response to a crisis, it seems more difficult – and yet unconduted – to determine whether a crisis affects which politicians' votes are particularly important, especially in the absence of new elections or congressional rule changes.

³⁸ David Wittman, “Candidate Motivation: A Synthesis of Alternative Theories,” *American Political Science Review* 77, no. 1 (March 1983).

³⁹ McCarty, Poole, and Rosenthal, *Polarized America*, 267.

Punctuated Equilibrium

Any discussion of American policymaking would be incomplete without a brief review of Frank Baumgartner and Bryan Jones' theory of punctuated equilibrium (1993).⁴⁰ This theory, which has received popular acclaim by academics and practitioners alike, holds that there are relatively long periods of stability, or status quo maintenance, in public policy. From time to time, these periods of stability are interrupted by acute increases in policy activity, known as *punctuations*.

Baumgartner and Jones describe the importance of *policy monopolies*, which are concentrations of influence regarding “political understandings concerning the policy of interest, and an institutional arrangement that reinforces that understanding.”⁴¹ These organizations, which may include executive agencies or congressional committees, dominate the issues and policy agendas on their respective topics, resulting in little policy change or new policies according to their own preferences. Importantly, when these policy monopolies fail, they leave a vacuum that is likely to be filled by an opportunistic party. Accordingly, the replacement of a policy monopoly often leads to punctuated policy outcomes.

Similarly, the theory of punctuated equilibrium holds that issue definition is the “driving force in both stability and instability.”⁴² When a political party or institution successfully defines an issue, there is likely to be a punctuation in policymaking as elected officials respond to the mobilization of previously disinterested constituents.

⁴⁰ Frank Baumgartner and Jones, Bryan D. *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 2012).

⁴¹ Baumgartner and Jones, *Agendas and Instability in American Politics*, 6.

⁴² Baumgartner and Jones, *Agendas and Instability in American Politics*, 16.

Critically, the replacement of policy monopolies and shifting issue definitions may coincide with “periods of heightened general attention to the policy” to stimulate an acute rise in policymaking.⁴³ This essay’s case studies briefly examine whether this phenomenon is typical of national crises.

Legislation and Public Opinion

If it is accurate that critical or median voters are an integral factor in legislating, it follows that congressmembers must consider public opinion when deciding to introduce or act on a legislative item. Long before scholars espoused the median voter model or pivot theory, Frank V. Cantwell sought to answer the question of whether legislators tend to “follow the guidance of public opinion.”⁴⁴ After studying Congress’ consideration of President Franklin D. Roosevelt’s proposal to expand the Supreme Court from nine to fifteen members, he concluded that public opinion certainly influences congressional policymaking. Specifically, he found that congressmembers “display an inclination to ‘wait on’ public opinion to shape itself before dealing formally with questions” and that “events played a more important role than Congress or the President in shaping the direction of public opinion.”⁴⁵ These conclusions are quite thematic in the context of this essay, as crises may represent “events” that shape public opinion, which in turn affects legislating. Still, Cantwell criticizes legislators who await public opinion to generate courses of action, arguing that while public opinion should inform decision making, the public cannot feasibly be a meaningful part of the process to generate policy proposals. Accordingly, in

⁴³ Baumgartner and Jones, *Agendas and Instability in American Politics*, 20.

⁴⁴ Frank V. Cantwell, “Public Opinion and the Legislative Process,” *The American Political Science Review* 40, no. 5 (October 1946), 924-935.

⁴⁵ Cantwell, “Public Opinion and the Legislative Process,” 932-933.

a crisis, politicians must create policy courses of action rapidly, often before they are aware of how the public will respond. Then, if time permits, they must consider public opinion in determining which policy options to accept or deny.

Moreover, politicians do not simply respond to public opinions. They often shape it using “crafted talk,” which Lawrence R. Jacobs and Robert Y. Shapiro describe as using persuasive rhetoric to convince the public to prefer certain policies.⁴⁶ In this way, it may be the case that congressmembers are partially responsible for uniting or dividing public opinion in certain situations. This concept can be further extended to crises, during which congressmembers may use the increased public awareness of government to garner support for preferred policies or detract from political opponents’ positions.

Congressional Behavior during Wartime

While there is not a breadth of scholarly literature on congressional behavior during certain types of national crises (e.g., pandemics), there is a wide body of literature on the separation of powers during wartime. Arthur Schlesinger famously wrote of the *Imperial Presidency* (1973), a concept that explains how Congress has abdicated much of its authority in foreign relations, which presidents have been eager to usurp.⁴⁷ Due to the exigency of wartime decisions and the relative flexibility of executive policymaking compared to the legislative process, presidents often take unilateral action to deploy forces and execute other wartime functions. In fulfilling this emergency prerogative, as first described by John Locke, presidents

⁴⁶ Robert Y. Shapiro and Lawrence R. Jacobs, *Politicians Don’t Pander: Political Manipulation and the Loss of Democratic Responsiveness* (Chicago: University of Chicago Press, 2000)

⁴⁷ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (New York: Houghton Mifflin, 1973).

exercise their power through a “series of *faits accomplis*,” to which Congress can only respond after the fact⁴⁸. This reasoning explains to some degree why Congress might produce less legislation during wartime, especially on matters that relate directly to military deployments and the organization of the executive branch. Whether this phenomenon can be extrapolated to other exigent crises – such as global pandemics – has yet to be researched in depth.

While Schlesinger’s *Imperial Presidency* and the Literalist school of thought have long dominated academic discourse on presidential power, scholars from the Absolutist school of thought offer an alternate explanation on the separation of powers during wartime. John Yoo, former legal counsel during the George W. Bush Administration and its response to the September 11 attacks, establishes an Absolutist account of presidential power in *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (2005).

Defending the Bush Administration’s response to the attacks, Yoo presents a normative argument that asserts the Constitution allows the president and Congress to “shape different processes depending on the contemporary demands of the international system at the time and the relative political position of the different branches.”⁴⁹ In other words, the president may *need* to take unilateral action to respond to exigent situations if the Congress is situated in a manner that is un conducive to prompt decision making. Despite the scholarly battle between the Literalist and Absolutist fields, both recognize that Congress has demonstrated an inability or unwillingness to legislate on wartime affairs. There seems to be two distinct jurisprudences: a

⁴⁸ Schlesinger, *The Imperial Presidency*, 113-114.

⁴⁹ John Yoo, *The Powers of War and Peace* (Chicago: University of Chicago Press, 2005), Kindle Edition, loc. 166.

wartime jurisprudence and a peacetime jurisprudence. If this is true, then is it possible that the reduced congressional powers of the wartime mandate might also apply to other national crises?

Moreover, while the aforementioned literature has mainly discussed the wartime opportunities that presidents have, it is also necessary to examine how wars affect the legislature. In David Mayhew's review of the effects of war on American politics and political development, he notes that while wars create problems, they may also "offer the best case imaginable for a conceptual tilt toward the idea of windows that are opened up by problems."⁵⁰ In other words, the political situations created by wars may present unparalleled opportunities for significant policy reform. As Mayhew states, this seems to have been the case for the implementation of the Current Tax Payment Act of 1943 – through which the government withholds income taxes from each paycheck – and the USA Patriot Act. While this work specifically focuses on war, it seems likely that other consequential crises, such as the COVID-19 pandemic, might offer a similar window of opportunity for drastic policy reform.

This literature review discussed the majoritarian and partisan school of thought, the pivot school of thought, the median voter theory, and the theory of punctuated equilibrium. It described each school's and theory's nuances, before briefly putting them in the context of national crises. Given the dearth of research on congressional behavior specific to crises other than military conflicts, the works reviewed in this section were critical to developing this chapter's hypothesis and methodology. This literature review then examined how congressmembers tend to wait for public opinion before making policy decisions. Finally, it

⁵⁰ David R. Mayhew, "Wars and American Politics," *Perspectives on Politics* 3, no. 3 (September 2005).

concluded with a review of the de facto separation of powers during wartime, which tends to shift in favor of the presidency at the expense of Congress.

HYPOTHESIS

In an effort to answer the research question of “how does the frequency of congressional legislative action change during national crises?,” I argue that crises are not expected to significantly alter the rate at which Congress introduces new legislation. Although crises may disrupt Congress’ schedule and encourage it to modify its legislative agenda, the need for crisis-related legislation will ensure Congress remains productive during crises. At the same time, Congress is expected to be hypersensitive to public opinion when passing crisis-related legislation, particularly because of increased public attention. This results in an amplified or muted legislative pass rate for crisis-related legislation when compared to other legislation that is dependent on changes in public opinion during the crisis.

Hypothesis: The frequency of legislative actions will not change considerably during a crisis, except during short-term circumstances in which Congress is unable to meet to legislate. The increased public attention on crisis-related policies will amplify bipartisanship or partisan disagreement on crisis-related legislation.

Assumption 1: National crises attract increased public attention.

Assumption 2: Some national crises are unifying in nature, sharply reducing ideological and partisan divisions. Other national crises are divisive, increasing the likelihood of partisan behavior.

Assumption 3: Even during crises, legislative dynamics differ in unified versus divided governments. More legislation is expected to be passed when the government is unified.

DATA, DESIGN, AND METHODOLOGY

This chapter's design and methodology attempt to answer the question of whether Congress' legislative behavior changes during crises. Specifically, it addresses the frequency of three legislative actions before and after the incidence of a crisis: (1) the introduction of a new bill by the House or Senate, (2) the passage of a bill by the House, and (3) the passage of a bill by the Senate.

In order to answer these questions, I first establish a baseline, or control, in each case study by displaying the frequency at which Congress introduces new legislation and passes existing legislation before the onset of a crisis during its term. Next, I compare these data with the frequency of those legislative actions performed after the occurrence of the crisis. Finally, I repeat this methodology in a limited manner that only considers crisis-related legislation to determine if its introduction and pass rate diverge from other legislation. The differences, or lack thereof, in the frequency of legislative actions before and after a crisis, as well as the treatment of crisis-related legislation, present the opportunity for further analysis that considers contemporary political factors, such as the government's party composition and public opinion on policy responses to the crisis.

I apply this methodology to two case studies from modern American history: the September 11, 2001 terror attacks and the COVID-19 pandemic of 2020 and 2021. In the first case study, I review the 107th Congress' legislative record before and after September 11, 2001. In the second case study, I examine the 116th Congress' legislative behavior before and after January 31, 2020, which roughly aligns with the incidence of the COVID-19 pandemic. I compare and analyze my findings from these case studies to ascertain whether dissimilar crises can be understood similarly for their effect on legislative behavior.

CASE STUDY #1: SEPTEMBER 11, 2001 TERROR ATTACKS

Just nine months into the 107th Congress' term, terrorists attacked the United States, killing 2,977 victims and changing the nation's understanding of security indefinitely. These unexpected attacks prompted an urgent response from the federal government, which was led by President George W. Bush (R), Senate Majority Leader Robert Byrd (D), and Speaker of the House Dennis Hastert (R).

The federal government was divided during the 107th Congress in a unique manner that has only happened once in American history: a president and House majority of the same party, split by a Senate majority from the opposition. While the former administration led by President Bill Clinton was also divided as the Republicans held a majority both chambers of Congress, the government remained divided under the 107th Congress after Senator Jim Jeffords' defection from the Republican party in May 2001. This context is important to consider in interpreting the legislative behavior discussed in this case study, particularly because divided governments are expected to produce less legislation than unified governments.

The remainder of this section presents a case study that analyzes trends among three distinct legislative actions during the 107th Congress' meeting: bills introduced, bills signed by the House, and bills signed by the Senate. Ultimately, I find that the 107th Congress' legislative productivity was only slightly affected by the September 11, 2001 terror attacks – particularly in September 2001 as it was preoccupied by the crisis. More significantly, I find that the 107th Congress approached crisis-related legislation in a bipartisan manner, passing it at a significantly higher rate than other legislation.

Between its inauguration in January 2001 and the end of its term in December 2002, the 107th Congress introduced an average of 574 bills per month.⁵¹ This rate is comparable to that of other congresses, including its predecessor's 613 bills per month and successor's 588 bills per month. In short, these data suggest that the September 11, 2001 terror attacks did not have a considerable impact on the quantity of bills introduced by the 107th Congress throughout the duration of its term. In other words, the crisis did not meaningfully limit the 107th Congress' ability, resources, or willingness to introduce legislation in the long term.

However, the terror attacks did have a significant impact on legislative productivity in September 2001, when it introduced just 377 new bills. These 377 bills were only slightly more than the total from its August recess, during which it introduced 320 bills despite being in session for only three business days.

Moreover, the September 11, 2001 terror attacks prompted Congress to realign some of its legislative agenda. In the four months following the attacks, 9.5% of all new legislation was related to the crisis.⁵² Although it spent considerable time on crisis-related legislation, it still produced other legislation at a rate within one deviation of the expected average. In other words, although the attacks led Congress to shift some of its legislative priorities, they did not prompt a drastic change in its agenda or productivity.

⁵¹ Legislative statistics are taken from the interactive query module on Congress.gov. "Legislation introduced by the 107th Congress." *Congress.gov*.

⁵² In the September 11, 2001 Terror Attacks case study, crisis-related legislation must contain at least one of the following keywords in its summary: *terror, attack, Qaeda, Qaida, Taliban, Iraq, Afghanistan*. *Congress.gov*.

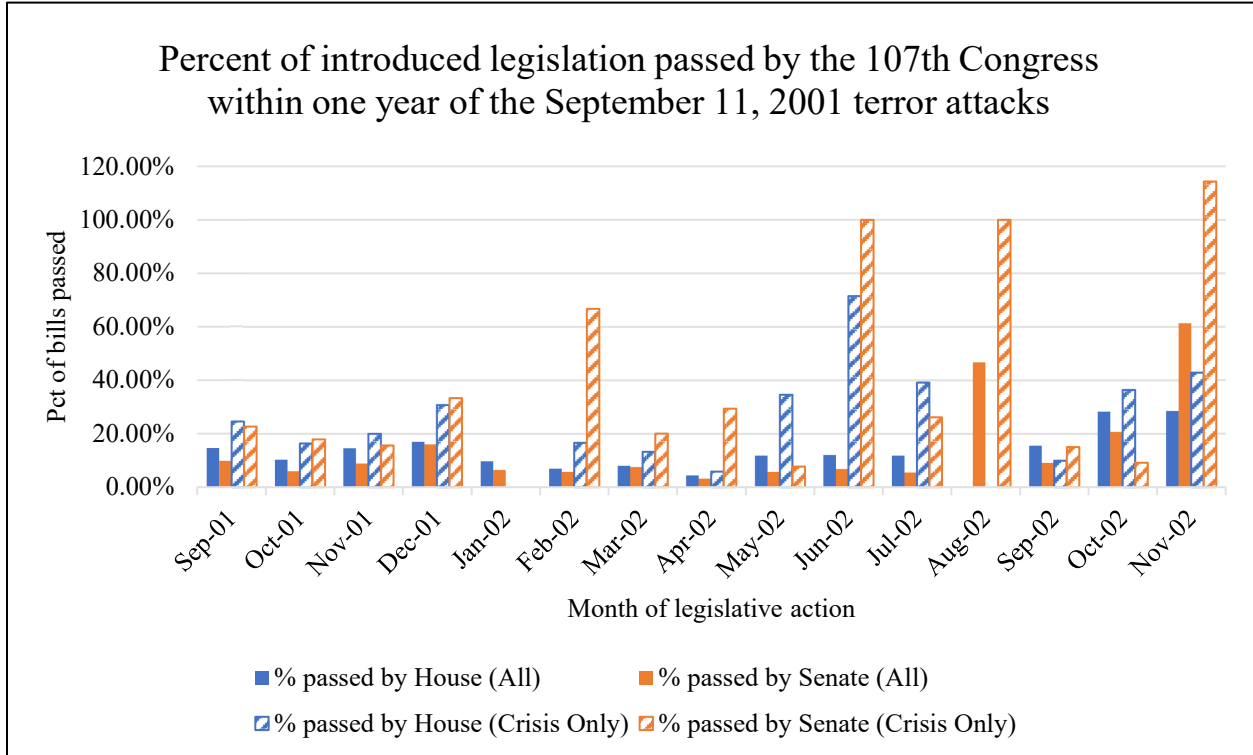


Figure 1-2 – Legislative success rate of the 107th Congress within one year of the September 11, 2001 terror attacks

Finally, the 107th Congress responded to the attacks in a remarkably bipartisan manner. The House and Senate respectively approved 24.3% and 24.57% of all legislation relating to counterterrorism and crisis relief, with the Democrat-led Senate approving nearly all of the legislation advanced to it by the Republican-led House. By contrast, the House and Senate only approved 6.73% and 6.76% of non-crisis-related legislation respectively, which is a frequency typical of the other congresses observed in this study. The important implication here is that the September 11, 2001 terror attacks prompted a bipartisan legislative response, likely to due to the increased public attention and unifying effect of the United States’ response.

As discussed in the previous chapter with respect to congressional oversight, it seems that public opinion might explain why the 107th Congress responded to the September 11 terror

attacks in a bipartisan manner. After the attacks, the nation rallied behind the president in an uncommon fashion – resulting in George W. Bush’s approval rating soaring to an extraordinarily high 90%, compared to the lows at 25% later in his presidency.⁵³

Accordingly, congressmembers tended to pass legislation related to the attacks much more frequently than other legislation. If public opinion was split on the matter, would this have been the case? There are certainly a multitude of other factors that might have affected bipartisanship in this case, but the positive covariance with public opinion seems telling. The next case study will examine the COVID-19 pandemic, which has been far more divisive than the terror attacks were.

CASE STUDY #2: COVID-19 PANDEMIC

The second case study reviews the 116th Congress’ legislative behavior since the start of the federal government’s COVID-19 pandemic response, which this essay considers to be February 1, 2020. It secondarily considers the concurrent civil unrest owing largely to George Floyd’s homicide during an altercation with officers of the Minneapolis Police Department on May 25, 2020. While the pandemic and civil unrest are still ongoing at the time of this essay’s publication, there is sufficient data to examine how the 116th Congress’ behavior may have changed after the incidence of these crises.

The federal response to these crises has occurred entirely under a divided government, led by President Donald J. Trump (R), Senate Majority Leader Mitch McConnell (R), and Speaker of the House Nancy Pelosi (D). While the crisis response after the September 11, 2001

⁵³ “Presidential Approval Ratings – George W. Bush,” *Gallup*.

terror attacks also occurred during a divided government, the government in 2020 is split by the Democratic House majority rather than a Republican Senate majority.

After applying the same methodology described in the previous case study, I found that the 116th Congress' legislative behavior during 2020 has differed significantly from that of the 107th Congress in 2001. Specifically, while the 116th Congress has introduced legislation at a very high rate, it has agreed to crisis-related legislation far less often than the 107th Congress did in response to the terror attacks. Together, these findings imply that the pandemic and civil unrest did not affect the 116th Congress' productivity, but likely aggravated its already low bipartisanship.

This case study found no correlation between the ongoing crises and Congress' long-term ability to introduce new legislation. Between its inauguration in January 2019 and the publication of this essay in December 2020, it has introduced an average of 779 bills per month, which is higher than each of the other congresses examined in this study. As expected, it was most productive between its inauguration and August recess, introducing 1178 new bills per month during that timeframe. Its productivity was lower between September 2019 and April 2020, but the onset of the pandemic in January 2020 does not seem to have had a significant effect. Indeed, the House's and Senate's emergency recesses in April made it very unproductive that month, but it compensated with strong performances in the following months. Whereas it introduced 885 bills per month before the onset of the pandemic, it has averaged 626 per month in the months since. Although this may seem considerably lower, it is expected given that congresses often introduce more legislation in the first half of their term.

Notably, although the 116th Congress remained productive after the onset of the crises, their legislative agenda shifted considerably in response to the pandemic and civil unrest. Since

the start of February 2020, approximately 18% of all new bills have included items related to either COVID-19 or policing.⁵⁴ This suggests that these crises did not limit Congress' ability, resources, or willingness to legislate, but they did force the House and Senate to alter their agendas in response.

Moreover, congressmembers were less likely to agree on legislation related to the crises. While the House has passed 5.90% and the Senate has passed 4.65% of all legislation during the 116th Congress, they have only passed 3.73% and 2.62% of crisis-related legislation respectively. This suggests that crisis-related legislation was less popular on a bipartisan basis and even within each party, as even the majorities failed to advance legislation from their respective chambers.

⁵⁴ In the COVID-19 Pandemic and Civil Unrest in 2020 case study, crisis-related legislation must contain one of the following keywords in its summary: *coronavirus, COVID, pandemic, protest, unrest, George Floyd, brutality, police, crisis*. *Congress.gov*.

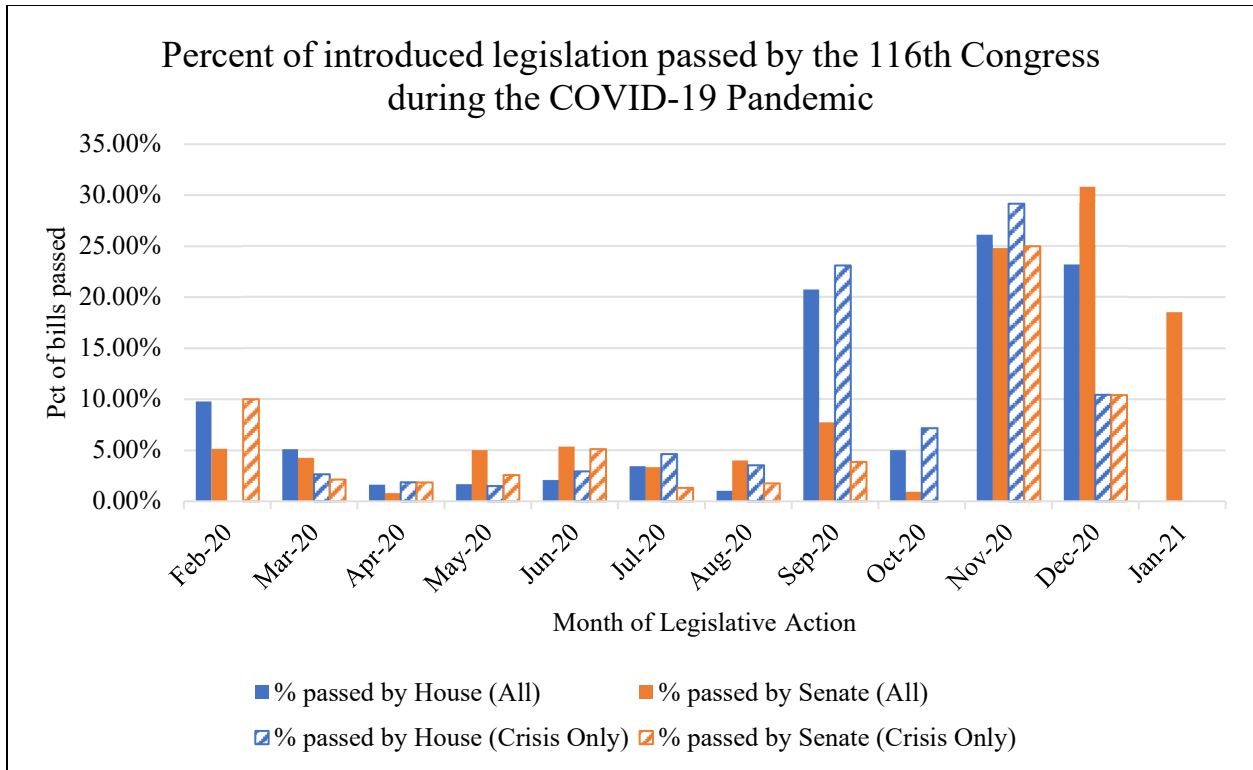


Figure 2-2 – Legislative Success Rate of the 116th Congress during the COVID-19 Pandemic

Other than the important fact that the September 11, 2001 attacks created a security crisis and the COVID-19 pandemic poses a health and economic crisis, one major political difference between the two is public opinion. Whereas the terror attacks had a unifying effect as Americans rallied behind the government’s response, the COVID-19 pandemic has spurred an ideological divide that likely had electoral effects.⁵⁵ Similar to the September 11 case study, public opinion positively covaries with legislative results. In the case of the 116th Congress, divided public opinion has likely discouraged congressmembers from agreeing to crisis-related legislation. As

⁵⁵ Cary Funk and Alec Tyson, “Partisan Differences Over the Pandemic Response Are Growing,” *Pew Research Center*, June 3, 2020.

Cantwell described in his 1946 study, it is likely the case that an event (i.e., the crisis) shaped the direction of public opinion while also prompting legislators to create policy options. However, once Congress realized that many of these policy options would be unpopular, they failed to pass. This explains why the 116th Congress created crisis-related legislation at a hastened rate, but also agreed to that legislation at a much lower rate than normal.

CONCLUSION

While the two case studies demonstrated that not all crises prompt the same legislative response, they also revealed similarities that demand further research. Neither the September 11 terror attacks nor the COVID-19 pandemic meaningfully impacted the 107th or 116th Congresses' legislative productivity. While the 107th Congress ceased operations on the day of the terror attacks and the 116th Congress took extended recesses as a safety precaution, they drafted and deliberated on legislation at a normal rate during and after the crises. Does this imply that crises force congressmembers to be busier, either by extending their work schedules or fitting more meetings into their calendars? Or instead, do these findings suggest that congressional productivity is simply unaffected by external factors and that a given Congress can be expected to systematically produce legislation at a consistent rate throughout its term?

Another interesting finding is that congressmembers' tendencies to agree to crisis-related legislation differed strongly from their tendencies to agree to non-crisis-related legislation. While the crises did not have a significant effect on bipartisanship on legislation unrelated to the crises, the 107th and 116th Congresses agreed to crisis-related legislation at an abnormal rate. In the case of the September 11 terror attacks, the House and Senate of the 107th Congress agreed to crisis-related legislation at about four times the rate it agreed to non-crisis-related legislation. On

the other hand, during the COVID-19 pandemic, the 116th Congress has agreed to crisis-related legislation at about 75% the rate it agrees to non-crisis-related legislation.

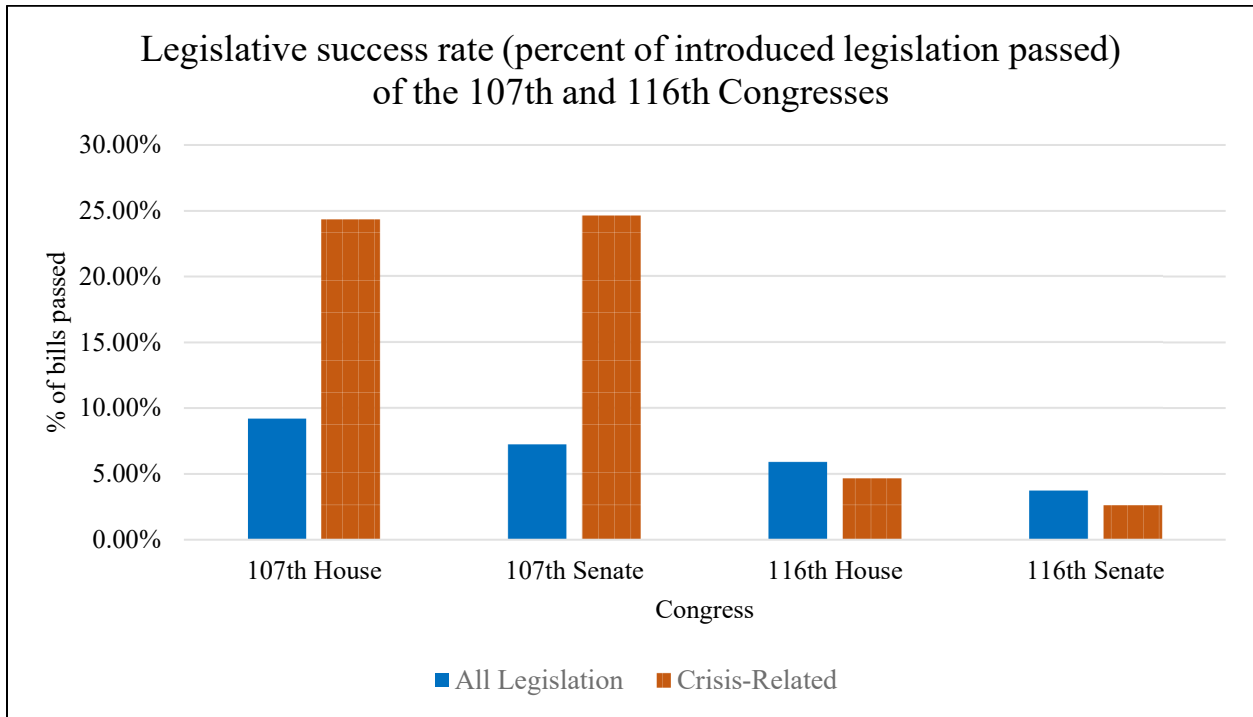


Figure 2-3 – Legislative success rate of the 107th and 116th Congresses

Although each Congress has agreed to crisis-related legislation at a different rate than normal, one crisis had a positive effect on bipartisanship while the other had a negative effect. This raises the question of *why* the 107th Congress was overwhelmingly bipartisan in their passage of crisis-related legislation when the 116th Congress has been comparatively partisan. This essay briefly explored one possible explanation related to public opinion, which ought to be examined further to determine its relationship.

Ambitious scholars might also look to apply this case study's methodology to other crises in American history. Several events that may be categorized as crises come to mind and are non-

inclusive: The Civil War, the 1918 flu pandemic, the Japanese attack on Pearl Harbor, and the Great Depression. Moreover, can crises be further categorized (e.g., security, financial, health) to better explain and predict congressional behavior? It is perhaps the case that congresses demonstrate certain legislative tendencies during wartime crises and others during health crises, for example. In any case, this essay just briefly visited two case studies from the recent past and there is vast research yet to be conducted on the myriad others throughout American history.

The importance of this essay's findings is threefold. First, they offer explanations to better understand congressional behavior after September 11, 2001 and during the COVID-19 pandemic. National discourse during the latter crisis has been particularly rife with sensationalism and disinformation, so an academic approach to elected officials' actions may serve to dispel misconceptions. Second, this essay's findings allow for practitioners and scholars to make educated predictions about congressional behavior during future crises. More importantly, as these findings are further developed through other case studies and refined methodology, they might prompt discussion about congressional or legislative reform specific to crisis response. Third, the study of congressional behavior during crises is relatively nascent, especially for non-wartime crises. Given the criticality of the ongoing COVID-19 pandemic, there is no more appropriate time to develop legislative studies literature that considers the effects of crises.

CHAPTER THREE

Presidential Power during Crises

The previous two chapters examined whether national crises affect trends in congressional oversight and legislating. The case studies on the September 11, 2001 terror attacks and Coronavirus Disease 2019 (COVID-19) pandemic revealed that congressional oversight is likely to slow after the incidence of a crisis, but legislative productivity is generally unaffected. Moreover, crises may amplify or dampen bipartisanship in oversight and the legislative process, depending on public opinion and the government's party composition.

This final chapter provides additional context to overall study of congressional power during crises by examining whether such trends exist in the executive branch. Specifically, do national crises affect a president's willingness to enact executive orders and ratify legislation? In a similar fashion to chapters one and two, this chapter examines the case studies of the September 11, 2001 terror attacks and COVID-19 pandemic to determine whether the tendencies of the Bush, Obama, and Trump administrations were affected by these crises. It also briefly reviews the actions of the nascent Biden Administration and offers a prediction for the remainder of its term.

While popular culture and mainstream academic literature generally share a consensus that the president has subsumed much of the Congress' power throughout the past two centuries and especially since the early-20th century, the extent to which the president has done so during crises is worthy of deeper study. Presidential scholars have long documented past presidents' usurpation of power leading to and during wartime, but it remains yet undetermined whether other sorts of crises (e.g., health and economic) spur similar behavior.

Do presidents enact more executive orders during crises? Are these orders limited in scope to contemporary crises? And are presidents more or less likely to sign legislation, crisis-related or otherwise, during crises? This essay's two case studies provide the opportunity to answer these questions during wartime and peacetime crises to determine if executive trends are indeed affected by crises. First, the essay examines the September 11, 2001 terror attacks and the George W. Bush Administration's response thereto. Next, it studies the Donald J. Trump Administration's response to the COVID-19 pandemic and concurrent civil unrest. Both case studies yield quantitative data to determine whether the rate at which the Bush and Trump administrations signed executive orders and legislation was affected by the crises. This study does not examine the scope or magnitude of these actions, but is useful nonetheless in determining how trends in presidential behavior occur alongside crises.

Ultimately, the case studies suggest that presidential tendencies during crises may depend strongly on congressional actions and public opinion. In the case of the September 11, 2001 terror attacks, Bush issued executive orders and signed legislation significantly more than he did prior to the attacks. On the other hand, Trump's tendencies were less dramatically impacted by the COVID-19 pandemic. While he issued executive orders slightly more frequently, his tendency to sign crisis-related legislation was limited by Congress' unwillingness to agree to such legislation.

LITERATURE REVIEW

Scholars have long studied the separation of powers between the president and congress, particularly with an emphasis on the growth of presidential power that they almost universally claim has occurred throughout American history. This body of literature is predominantly focused on presidential war powers, although some authors have also studied other aspects of

governance, such as budgeting. This literature review primarily focuses on studies of presidential power as they relate to the War Powers Clause, not only because this literature dominates the existing body, but also because it is closely relevant to this study of crises.

Any such review must start with the War Powers Clause (USC, Article I, Section 8, Clause 11), which prescribes to Congress the power “To declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water.” On the other hand, Article II, Section 2 affirms that “The President shall be the Commander in Chief of the Army and Navy of the United States.” This suggests that the president is charged with *making*, or conducting, war, as opposed to Congress, who is primarily responsible for declaring those very wars, as well as funding and overseeing them.

This separation is somewhat blurred the Article IV, which states the US “shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.” Although Articles I and II made clear that Congress declares (and funds) wars while the president conducts war efforts, Article IV implies that there are some exigent circumstances during which the president may act unilaterally to protect states. This distinction is the constitutional basis for many arguments in favor of expanded presidential war powers, although there is yet contention about the extent to which the president should exercise additional power during wartime.

The schools of thought that comprise debates on presidential war powers include the Literalists, Absolutists, and those in between, which this essay brands the Subjectivists. In brief, the Literalist school argues for a strict interpretation of the Constitution that does not allow for the expansion of presidential power during wartime. Starkly opposed to this view are the Absolutists or imperialists, who argue strongly in favor of presidential war powers and, in some

cases, argue for the abolition of the congress entirely or its removal from war processes. The Subjectivists hold the middle ground, arguing that there are some cases in which the president is justified in acting unilaterally. While each of these schools are originally framed in the context of war powers, this essay expands them to apply to other crises that may also require an exigent response.

Perhaps the most seminal work in the debate about presidential power is Arthur Schlesinger's *The Imperial Presidency* (1973), which establishes the foundation of the Literalist school. Schlesinger studies variations in the separation of powers from the ratification of the Constitution through several eventful presidencies, arguing that the executive branch became "imperial" and that it outmatches Congress most significantly in foreign policy and war. He specifically recalls the musings of Alexis de Tocqueville, who after his 1831 visit to the United States, wrote that "the President of the United States possesses almost royal prerogatives which he has no opportunity of exercising."⁵⁶

While this many have been the case in the early nineteenth century, it did not hold up into the twentieth century after technological and foreign policy advancements that created an ever-connected world. The unexpected attack by the Japanese at Pearl Harbor posed an existential threat to the United States, to which the 77th Congress responded with a formal declaration of war advocated by President Franklin D. Roosevelt. These tragic events, like others in American history, presented the president and his successors with expanded powers, which they have generally been unwilling to abdicate long after the crises are resolved. Moreover, as Louis Fisher adds, Congress has been unwilling or unable to reclaim these powers once they have been

⁵⁶ Schlesinger, *The Imperial Presidency*, 420.

usurped by the president or forfeited by itself.⁵⁷ For this reason, crisis responses can be a slippery slope that leads to an increasingly imbalanced separation of powers. This is exacerbated by crises that rally the nation around the president, bolstering his or her support, because one of the most significant informal limitations on presidential power is public opinion.⁵⁸ If public opinion is indeed such an important constraint, it follows that unifying emergencies, such as the September 11, 2001 terror attacks, might indirectly grant the president more leeway than he or she would otherwise have during tranquil times.

While Schlesinger, Fisher, and other scholars of the Literalist school of thought generally believe that the president wrongly consolidates power during crises, others maintain that to some degree this behavior is acceptable. Notably, Absolutists like Eric Posner believe that the current institutional structure and its limitations render the government wholly unequipped to manage crises effectively. Specifically, the legislative branch is an antiquated body that fails to adequately constrain presidential power and ultimately obstructs otherwise effective executive responses. Instead, public opinion and culture constrain presidential actions and prevent despotism. For this reason, some Absolutists go as far as to suggest a plebiscitarian system with direct voting would be preferable to the current congressional system.

Juxtaposed between these two extremes are Subjectivists, who generally argue that there must be some flexibility in interpreting the Constitution to allow the government to perform effectively during emergencies.

⁵⁷ Louis Fisher, *Congressional Abdication on War & Spending* (College Station, TX: Texas A&M University Press, 2000).

⁵⁸ Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal*, 2nd ed., rev. (Lawrence, KS: University Press of Kansas, 2008), 32.

Notably, Subjectivist scholars argue that there must be some flexibility in interpreting the Constitution to allow the government to perform effectively during emergencies. Oren Gross and Mark Tushnet consider whether the assumption that governmental actions must be Constitutional holds up during violent crises.⁵⁹ Moreover, John Yoo, a former high-level attorney in the Bush Administration’s Office of Legal Counsel, similarly argues that wartime presidents should not be constrained by peacetime checks and balances.⁶⁰ While presidents can act in conflict with Congress and even the Supreme Court, such a unitary executive is only acceptable during emergencies. While these Subjectivist scholars stop short of calling for the complete upheaval of constraints on executive power, they do broadly find that such action may be appropriate during crises.

HYPOTHESIS

This study seeks to answer the question of “how does the frequency of presidential policy action change during national crises?” Specifically, these policy actions include executive orders and legislation considered by the president. It does not include executive memoranda and national security directives, which are meaningful in answering the research question but not readily accessible to the public.

In response to the aforementioned research question, I hypothesize that presidents are expected to issue more executive orders in response to national crises. This is the case because these crises often require exigent responses, which the president can provide unilaterally more efficiently than can the congress. Specifically, it is expected that the president issues more

⁵⁹ Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?”

⁶⁰ John Yoo, *Administration of War*, *Duke Law Journal* 58 (2009): 2277-2311.

executive orders that specifically relate to the crises. The number of executive orders issued on other topics is not expected to change significantly.

Similarly, presidents are expected to ratify crisis-related legislation at a higher rate than other legislation. Regardless of whether the crisis – or politicians’ framing thereof – is unifying or divisive, the increased public attention caused by a crisis compels the president to sign legislation that has already been agreed to by both chambers of congress.

Hypothesis: The frequency of executive orders issued by a president is expected to increase during a crisis due to an influx of orders related to the crisis. The frequency of ratified legislation is expected to increase, specifically on those bills related to the crisis.

Assumption 1: National crises attract increased public attention.

Assumption 2: Some national crises are unifying, whereas others are divisive. Unifying crises are those that reduce ideological and partisan divisions. Divisive crises are those that increase the likelihood of partisan behavior and undermine confidence in the government.

Assumption 3: Even during crises, presidential and legislative actions are expected to differ depending on whether the government is unified by a majority of one party or divided. A president that serves alongside a House and Senate majority of his or her own party is likely to ratify more legislation than one who serves in a divided government.

DATA, DESIGN, AND METHODOLOGY

In a similar fashion to the previous two chapters, this chapter employs quantitative methodology to study trends in governmental activity contemporaneous to national crises. Specifically, this chapter attempts to answer whether common presidential actions, including the

executive order and the ratification of legislation, changes during crises. It examines the frequency of these actions before and after the incidence of a crisis to identify unexpected changes, such as a stark increase or decrease in activity.

In order to determine whether presidential actions are affected by crises, this chapter considers the two case studies familiar to the previous chapters: the September 11, 2001 terror attacks and the COVID-19 pandemic. In each case study, I establish a baseline by identifying how many executive orders the contemporary president issued and how many bills he considered before the crisis started. Next, I compare these quantities with those taken after the incidence of the crisis to determine whether the crisis affected presidential activity. I perform these methods while giving attention to contemporary political dynamics such as party composition and public opinion on the crisis and government response thereto.

CASE STUDY #1: SEPTEMBER 11, 2001 TERROR ATTACKS

The terror attacks by Al-Qaida on September 11, 2001 presented a situation that had not been experienced in the United States since the attack on Pearl Harbor some 60 years earlier. These foreign attacks on American soil ostensibly posed an existential threat, which prompted an exigent response from the government. The literature review revealed that dire circumstances often lead the executive branch to act unilaterally, if only because it can do so quicker than Congress can deliberate and pass legislation. This case study examines whether evidence of a causal relationship between the incidence of a security crisis and increased presidential unilateralism manifested itself during President George W. Bush's presidency from 2001 through 2009.

Specifically, this case study compares the frequency at which Bush issued executive orders and considered legislation before and after September 11, 2001. It does not examine the

issuance of executive memoranda, which is not archived in a manner conducive to quantitative research, or national security directives, which are often not available as unclassified media. Nonetheless, the frequency of executive orders and legislation will shed light on whether the Bush Administration’s tendencies were upset by the terror attacks.

Before the terror attacks on September 11, 2001, the recently elected president issued 25 executive orders at an average of approximately three per month but no more than six in one month. This frequency seems typical compared to trends from his predecessor and successors, who roughly averaged slightly more per month.

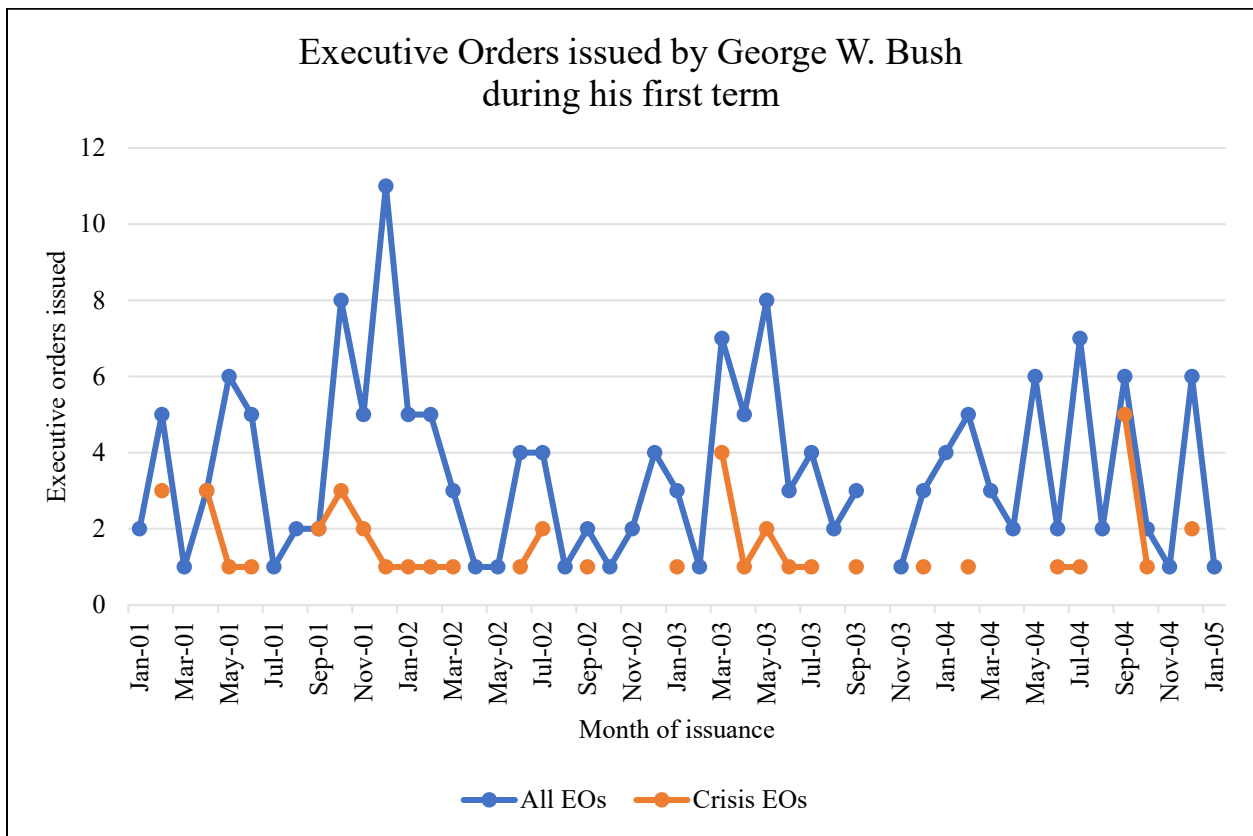


Table 3-1 – Executive Orders issued by George W. Bush during his first term

After the September 11, 2001 terror attacks, the frequency at which Bush issued executive orders sharply increased. He issued eight executive orders in September, five in

November, and a high for both of his terms of 11 in December. While the December data is somewhat anomalous because five of the 11 bills were the establishment of succession of leadership in various executive agencies, these data points indeed mark an increase in executive order issuance significantly higher than the average maintained throughout Bush's presidency. Furthermore, it is notable that only some of this difference is accounted for by crisis-specific policy. Whereas Bush signed about 15 more executive orders than expected during the final quarter of calendar year 2001, only six of these were directly related to the terror attacks.

Bush's willingness to ratify legislation was also apparently affected by the emergency. The two remarkable observations from Bush's legislative record immediately following the terror attacks are his extreme productivity at the end of 2001 and beginning of 2002 and the increased likelihood at which he signed crisis-related bills. Whereas Bush signed an average of less than five bills per month before September 2001, he signed an average of 23 bills per month between October 2001 and January 2002. This nearly fivefold increase corresponded with the timing of the terror attacks, suggesting that the emergency might have spurred increased cooperation between the executive and legislative branches.

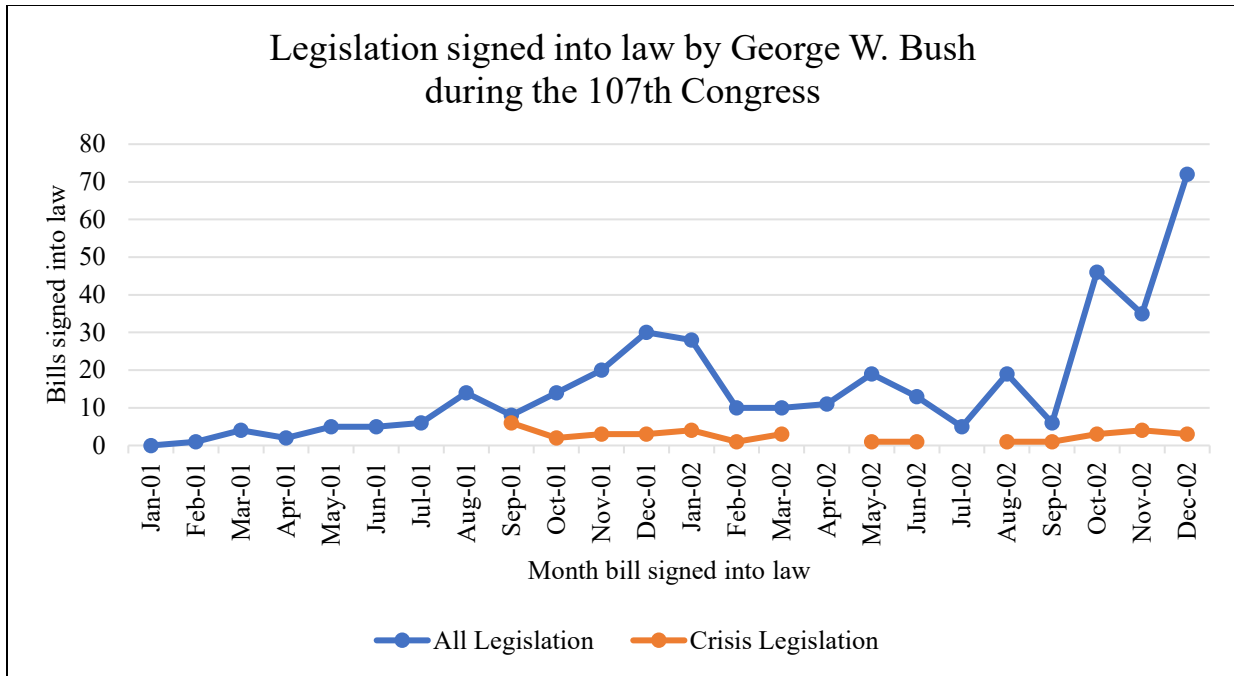


Table 3-2 – Legislation signed into law by George W. Bush during the 107th Congress

Also notable was the increased frequency with which George W. Bush signed crisis-related legislation. Whereas during the 107th Congress’ term he signed less than 5% of the legislation introduced, he signed 40% of crisis-related legislation introduced. This effect was likely determined largely by the Congress’ tendency to agree to crisis-related legislation much more frequently than other legislation as discussed in chapter two of this essay. In other words, while it is clear that Bush signed legislation into law at a significantly increased rate immediately following the attacks and was also more likely to sign crisis-related legislation, this was likely due to the very same tendencies in Congress. The findings of this case study reaffirm the hypothesis that presidents are likely to issue more executive orders and ratify more legislation immediately following a crisis. However, this data does not confirm that those executive orders issued by the president will necessarily be crisis related. Instead, it seems to be the case that Bush simply issued more executive orders that were only tangentially related to the emergency.

CASE STUDY #2: COVID-19 PANDEMIC

The trends from Donald J. Trump's response to the COVID-19 pandemic starkly contrast with those from Bush's response to the 2001 terror attacks. Whereas Bush issued more executive orders and signed more bills immediately following the attacks, Trump's tendency to issue executive orders was not significantly affected by the crisis and he signed crisis-related legislation at a much lower rate than other legislation.

Throughout his term, Trump signed an average of 4.7 executive orders per month compared to Bush's first term average of 3.56 per month and Barack Obama's first term average of 3.03 per month. The frequency at which Trump issued executive orders seems to have changed only slightly after the incidence of the COVID-19 pandemic in February 2020, after which he issued roughly seven executive orders per month – which is about one standard deviation greater than his term's mean. This data indicates that the COVID-19 pandemic did not affect Trump's tendency to issue executive orders as significantly as the 2001 terror attacks affected Bush's tendency. While it is impossible to infer from these findings the root cause of this difference, it is probable that Trump's tendencies were affected by his preoccupation with the upcoming elections and divided public opinion on the pandemic.

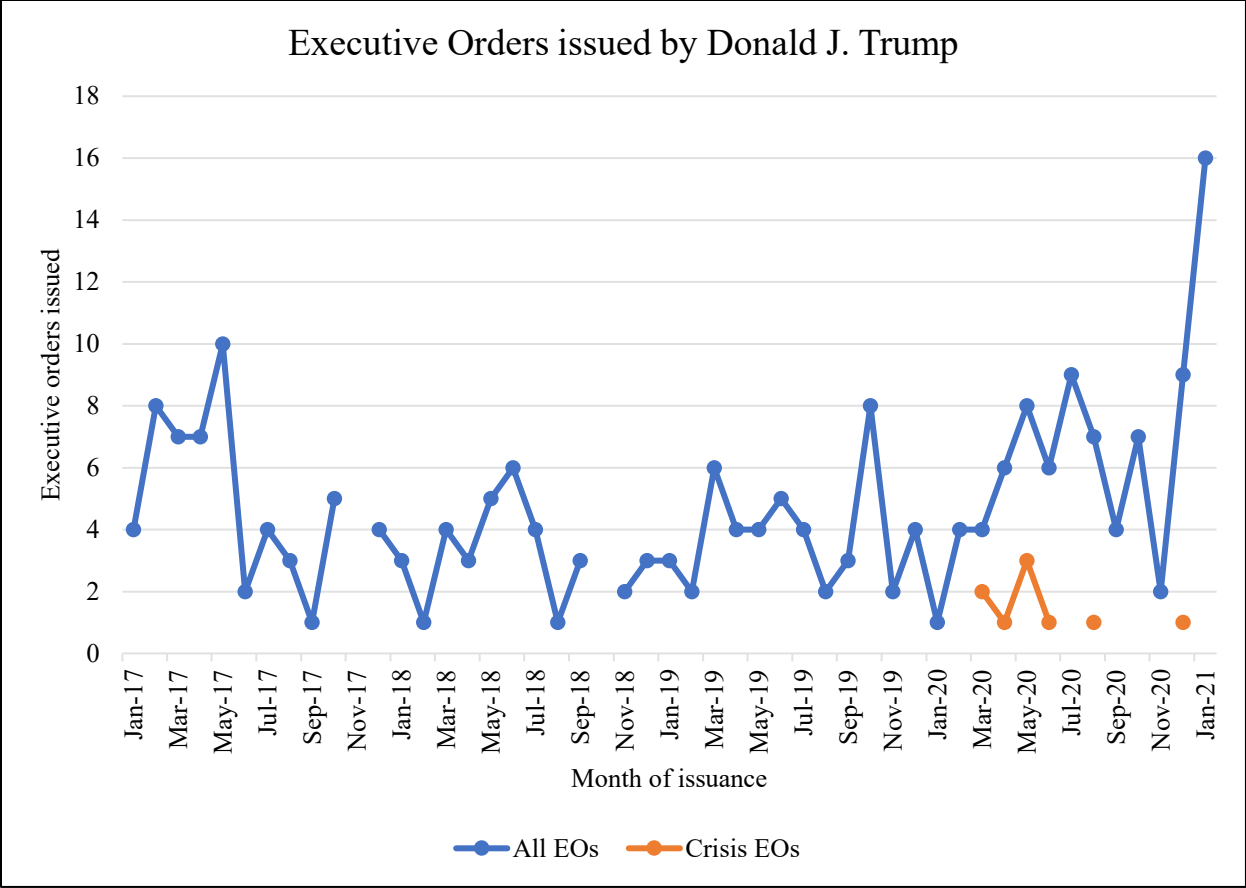


Table 3-3 – Executive Orders issued by Donald J. Trump

At the same time, Trump’s tendency to sign legislation into law seems to have been affected by the crisis. Throughout his presidency, Trump signed into law roughly eight bills per month -- excluding the final two months of his presidency, during which he and the 116th Congress finalized over 200 outstanding bills. Even after the start of the pandemic, Trump maintained this rate for the remainder of his presidency. On the other hand, he was more willing to sign crisis-related legislation into law than he was for other legislation, but could not do so because crisis-related legislation infrequently made it past the House and Senate. Whereas he signed roughly 1.91% of all bills introduced during his presidency, he only signed 1.69% of introduced bills related to COVID-19. This was almost certainly due to Congress’ inability to

pass such legislation, since Trump actually signed almost half of all crisis-related bills that made it through Congress. By contrast, he signed only one-third of all legislation that the House and Senate submitted for his signature. Altogether, the implications from the COVID-19 study suggest that the government did not respond to it in a similar manner than it did to the 2001 terror attacks. While the crisis is still recent and therefore the data is inconclusive, it seems that the divided public opinion on the issue and the fact that it occurred during general election campaigning likely affected Congress' and Trump's responses.

CONCLUSION

Findings from the two case studies suggest that like congressmembers, presidents respond to different crises in different ways that appear to correspond to public opinion. Whereas the Bush Administration issued significantly more executive orders and signed into law significantly more legislation immediately following the 2001 terror attacks, the Trump Administration's tendencies changed very little in response to the COVID-19 pandemic.

One of the main implications from these findings is that not all crises spur power consolidation by the executive branch as some scholars might suggest. The case study on the 2001 terror attacks supports the argument that presidents consolidate power during wartime. However, findings from the COVID-19 case study imply that this is not the case for all crises. Whereas Trump could have exerted more power through executive orders and bill signing after the start of the pandemic, he did not. His decision to abstain from consolidating power likely owed to several factors, including divided public opinion, the upcoming election, scrutiny from Congress and other political institutions, and an ideological preference for federalism. Still, it seems that Trump was willing to exert his influence informally through the bully pulpit. His administration's frequent press briefings, social media releases, media appearances, and

campaign events suggest that he was willing to assert informal power while attempting to preserve public approval ratings.

Interested scholars should expand the work presented in this chapter to case studies of other crises that have occurred throughout American history. Much of this work has already been attempted on wartime crises, but research on government responses to other emergencies lacks comparable depth. Is it perhaps the case that the executive tendency to consolidate power is only true of wartime crises? Pessimists might suggest otherwise, but findings from the COVID-19 pandemic seem to warrant this assumption. Certainly, further research should be done in this field to determine whether this is indeed the case.

Perhaps it is also the case that presidents, understanding their increased public attention during crises, at least want to maintain the impression that they are taking action to resolve a crisis. While it may be the case that certain crises are not effectively addressed by a policy response, political opponents and some of the voting public may take issue with perceived inaction on the part of the government. A further examination of this phenomenon is likely warranted, particularly into President Trump's response to the COVID-19 pandemic and the public response to certain actions – like the invocation of the Defense Production Act and an executive order banning travel from China – and certain inactions, such as the lack of federal COVID-19 policies limiting domestic travel or requiring personal protective equipment.

The importance of this work is evident given the significance of the Constitution and the separation of powers it prescribes. While it seems that the balance of power has gradually shifted in favor of the president throughout American history, it is worthwhile to understand how some crises might spur punctuated changes in power dynamics. Moreover, crises such as the COVID-19 pandemic may instigate disinformation campaigns and general sensationalism. Academic

research on those crises is important because they can disabuse practitioners and laypeople of misleading narratives. Given the seriousness of the pandemic and its revelation that governments and citizens across the world are prone to misleading information during crises, studies on governmental actions during emergencies seem ever important.

CONCLUSION

Legislative and Executive Crisis Behavior in Review

SUMMARY OF FINDINGS

The results of this essay's case studies on the September 11, 2001 terror attacks and COVID-19 pandemic indicate that these crises corresponded with irregular congressional and presidential behavior. Notably, trends in congressional oversight, legislation, and presidential policymaking changed abruptly following the incidence of these crises. In the case of the September 11, 2001 attacks, the 107th Congress conducted significantly less oversight following the attacks than it did in the first eight months of Bush's presidency. The 107th Congress' legislative productivity was relatively unaffected by the terror attacks, but bills relating to the attacks were far more likely to pass both chambers than was other legislation. Accordingly, Bush signed into law these crisis-related bills far more often than he did other legislation. He similarly issued significantly more executive orders immediately following the attacks, which suggests that he was indeed spurred by the crisis to act.

Whereas the 2001 terror attacks generally corresponded with bipartisan and cooperative legislative and executive behavior, the COVID-19 pandemic instigated an opposite effect for the 116th Congress and Trump Administration. The crisis had little effect on the frequency of oversight conducted by Congress, which had notably just concluded its first impeachment – and acquittal – of the president. On the other hand, the 116th Congress was far less likely to agree on legislation relating to the COVID-19 pandemic than non-crisis-related legislation. Accordingly, although Trump signed a greater percentage of the COVID-19 bills that were presented to him, crisis-related bills were less likely to become law because they stalled in Congress.

While the results of the two case studies seem to be at odds, there are several important factors to consider that seem to determine trends in congressional and presidential behavior. First, public opinion of the crisis and the government's response thereto positively covaries with the rate at which legislation is agreed to by Congress and the president. Second, the party composition of the government corresponds with the likelihood of frequent oversight and legislative success. Finally, in the case of the 2001 terror attacks and yet to be determined for the COVID-19 pandemic, congress conducted significant retrospective oversight of the Bush Administration only after it was replaced by the Obama Administration.

Public Opinion

The most notable independent variable noted in this study was public opinion of the crisis response and contemporary government. Across the two case studies, this essay found that favorable public opinion corresponded with less congressional oversight and greater legislative success. This was most remarkably the case after the September 11, 2001 terror attacks, which unified the nation and likely spurred Bush's remarkably high, but short-lived, approval rating of 90%.⁶¹ Other than the president's approval rating, surveys indicated that citizens were concerned about the threat of terrorism and favored interventionism abroad. These factors quite likely led to the bipartisan success of crisis-related legislation introduced by the 107th, 108th, and 109th Congresses, which served during the first six years of Bush's two terms. The 110th Congress was slightly less cooperative, which corresponds with the declining popularity of the Global War on Terror and the Bush Administration near the end of his second term.

⁶¹ "Presidential Approval Ratings – George W. Bush," *Gallup*.

In stark contrast, the Trump Administration's and 116th Congress' response to the COVID-19 pandemic was unpopular and divisive. Whereas many surveyed citizens supported the government's response after the 2001 terror attacks, the COVID-19 pandemic immediately became divided on party lines. Accordingly, the legislative success rate of pandemic-related legislation was significantly lower than that of other legislation. Although data from the COVID-19 pandemic case study is significantly more limited than that of the 2001 terror attacks, the initial trends support the hypothesis that legislative activity corresponds with public opinion during crises.

Party Composition

Another factor that is central to legislative and executive behavior both during crises and otherwise is governmental party composition. In general, unified governments tend to pass more legislation and conduct less oversight than divided governments. Since both crisis responses examined in this essay were conducted by split governments, it is difficult to estimate the extent to which composition influenced legislative and executive crisis-response actions. In the case of the 2001 terror attacks, the government was uniquely split by a Democrat majority in the Senate alongside Republican control of the House and presidency – the only time in American history a Democrat-led Senate split the government. One key observation from this Senate-created split is that it may not have affected legislative oversight as it would have if the split was created by the House, which tends to more frequently carry out oversight. This phenomenon can be examined further by reviewing those Democrat presidencies and House majorities that were split by Republican-led Senates to determine if they behaved similarly to governments split by a Republican-led House.

Retrospective Congressional Oversight

Also noteworthy in the case of the 2001 terror attacks was the significant retrospective oversight conducted shortly after Bush's departure. While this essay focused primarily on the actions of the Congresses that served during the Bush Administration, a cursory glance at data from the 110th Congress suggests that retrospective oversight indeed occurs after crises. The 110th Congress, which started its term weeks before Barack Obama's inauguration, conducted significantly more oversight of executive activities relating to the Global War on Terror than did its predecessors. Ostensibly, most of these oversight hearings were intended to examine some policy or executive agency activity that occurred under the Bush Administration, which was growing increasingly unpopular toward its end.

On the other hand, insufficient time has elapsed since the end of Trump's presidency to determine whether the 117th Congress is performing a significant amount of retrospective oversight. It seems likely that this will indeed be the case given the divisive nature of Trump's presidency and the government's response to the pandemic. These findings on retrospective oversight imply that Congress may wait for a change of administration and shifting public opinion after a crisis before authentically overseeing the executive branch's crisis response policy and its implementation. This must be examined further with qualitative studies, but the initial suggestion is that presidents and the bureaucracy may have additional leeway when responding to crises.

LIMITATIONS AND OTHER CONSIDERATIONS

This essay's quantitative approach was unique in that it considered only the frequency of legislative and executive actions without regard for their substance. In other words, this essay did not examine the subject or content of any oversight hearing, legislation, or executive order. This

methodology demonstrated the benefits of a strictly objective examination of temporal trends in governmental actions. Still, there are several key limitations and idiosyncrasies of such an approach.

First, one cannot accurately estimate the extent of power exerted by the legislature or executive without some qualitative scrutiny of their actions. While an examination of the frequency of these actions provides a foundation upon which to study their substance, the impact of particular bills and executive orders vary significantly and therefore frequency alone does not shed light on power dynamics. Moreover, it is important to note that subjecting legislation and executive orders to qualitative research introduces some risk of subjectivity because findings are likely grounded in normative interpretations of the Constitution and historical precedent. For this reason, quantitative and qualitative studies can work together to reduce subjectivity and achieve meaningful results.

A second limitation of this study is its narrow scope. While the September 11, 2001 terror attacks and COVID-19 pandemic are arguably the most significant national crises since the Vietnam War or even World War II, a broader examination of all major crises would produce findings that have greater explanatory and predictive power. Additionally, the two crises examined in this essay may have entirely different natures given that one is a wartime crisis and the other is not. Scholars have contributed significant research on war powers, but further study of peacetime powers is especially warranted. Interested researchers might also consider that there may be further nuance between specific types of non-war crises, including economic crises, pandemics, natural disasters, and so on.

Third, this essay's findings are somewhat limited since the governments that served during the incidence of the 2001 terror attacks and COVID-19 pandemic were split. As such, this

essay does not provide a unified government against which to compare findings. Perhaps more importantly, the 107th Congress was especially unique since it was the only time in American history that a Democratic Senate majority divided a Republican House and president. The implications thereof should be similar to the more common occurrence of a split induced by a Republican-led Senate, but there are no historical instances against which to verify this supposition. In any case, this essay's findings should be compared to crisis responses that occurred during unified governments to identify differences and similarities.

A final consideration to bear in mind is that presidential power is difficult to measure quantitatively. While mainstream presidential and legislative scholars generally maintain that presidents are more active during crises, empirical temporal data from these studies did little to confirm this. One particular limitation of a quantitative approach in examining presidential power is that much of it is manifest through actions that are not readily accessible to the public, such as national security directives. In a particular crisis, it may be the case that the president issues few executive orders of varying scope while also issuing far more, and far more significant, classified directives. In this regard, a qualitative examination of executive branch actions would better reveal whether the president is exerting more or less influence than expected.

SUGGESTIONS FOR FURTHER RESEARCH

In general, there is plenty of room for further research in studying the separation of powers during crises. While scholars have extensively studied the separation of powers during wartime, comparatively little research has been done to study the various other sorts of crises. Specifically, researchers might examine whether the separation of powers is upset during pandemics, depressions and recessions, and natural disasters. The ongoing COVID-19 pandemic

will likely be the prototypical pandemic featured in upcoming academic research, as the last comparable worldwide pandemic that significantly and acutely affected the United States occurred about one century prior. Moreover, there are several financial crises worthy of examination, including the Great Depression, 1970s energy crisis, and the Global Financial Crisis. Similarly, while natural disasters seldom have a protracted federal response, one might research the governmental reactions to disasters such as the 1900 Galveston hurricane, 1906 San Francisco earthquake, heat waves in 1936 and 1980, and Hurricane Katrina in 2005. It may be the case that the type of crisis determines whether the separation of powers is likely to be upset, such as seems to be the case in wartime.

Moreover, researchers who plan to examine the government's response to the COVID-19 pandemic or the September 11, 2001 terror attacks may use the quantitative results shared in this essay to inform qualitative research. The mixed data from these case studies suggest that a deeper look at the substance of oversight hearings, legislation, and executive orders passed during these crises may yield interesting results. While the quantitative data did not indicate egregious violations of the separation of powers, qualitative research may confirm or rebuff such suspicions.

Another area worthy of further consideration is the separation of powers between the federal government and state governments. The COVID-19 pandemic provided a unique opportunity to examine the relationship between Washington and the states, which had the ability and necessity to implement their own policies to mitigate the crisis. How would public opinion have differed if the federal government imposed broader limitations, such as a domestic travel ban or national personal protective equipment requirement?

Additionally, further research is warranted into congressional spending during crises. While spending efforts in support of wartime activities have been studied in depth by scholars, a review of spending during other crises is warranted. Once again, the COVID-19 case study provides scholars the opportunity to examine irregular fiscal decisions, such as expensive stimulus bills, and implementations of monetary policy, such as quantitative easing. It would be interesting to determine whether certain crises led to punctuated increases in national deficit and whether those increases were ever recouped.

One final topic that necessitates further research is the behavior of the judicial branch during crises. While this essay focused on congressional and presidential behavior, it may also be the case that the judiciary acts differently during crises. For example, the Supreme Court may grant the president more leeway to act unilaterally during wartime, as some argue was the case in decisions like *Youngstown Sheet & Tube Co. v. Sawyer*.⁶² Particularly, it may be worthwhile to investigate whether the Supreme Court deferred to President Trump and President Biden in their responses to the COVID-19 pandemic.

IMPACT

The suddenness of the COVID-19 pandemic demonstrates an excellent reason to study governmental behavior and actions during emergencies. As this crisis took the world by surprise, governments were forced to respond immediately without full consideration of scientific facts, which still continue to be discovered. This scenario challenged governmental power dynamics by presenting opportunities for inconspicuous overreach. Still, despite the difficulties posed by the

⁶² William G. Howell, “War-Time Judgments of Presidential Power: Striking Down but Not Back,” *Minnesota Law Review* 93 (2009).

pandemic, it does not appear that the separation of powers within the United States Government has shifted further in favor of the president.

Moreover, given the relatively divisive political rhetoric of the past several years, it is important to consider if the separation of powers indeed failed to prevent tyranny and demagoguery, if it succeeded in doing exactly that, or if reference to such authoritarianism is misleading and inflammatory political rhetoric. Objective academic research can assist in satisfying or quelling such debates more fulfilling than can ideologically or emotionally guided value judgements.

In the more than 230 years since the ratification of the Constitution, it is clear that the separation of powers has been tested on numerous occasions. While the separation of powers has indeed fluctuated over time, the integrity of the Constitution remains intact thanks to the exemplary work of many politicians, justices, pundits, scholars, and public servants. International and domestic emergencies are doubtlessly difficult events for governments, but to date they have only strengthened the United States' resolve and spirit.

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