

The “Flip-Side” of Delegation: Examining Congressional Reassertion Efforts

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Abstract: This paper takes seriously Edward Corwin’s claim that our constitution provides an “invitation to struggle.” Herein we examine the “flip-side” of delegation, or those periods when Congress actively works to reassert its governing authority vis-à-vis the executive branch. Using Stephen Stathis’ index of “landmark legislation” which spans more than 200 years of congressional history (1789-2001), we identify every major law through which Congress reasserts itself vis-à-vis the executive or otherwise works to contest executive branch power. With this “reassertion index” we identify three main strategies by which Congress contests executive branch power, and we substantiate this categorization with a series of qualitative case studies. Next, using large-n statistical techniques, we identify conditions internal to Congress that influence the likelihood of a reassertion effort. In sum, this analysis sheds light on an often overlooked area of Congressional behavior and adds to a growing literature on lawmaking in a system of separated powers.

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I. Introduction

In a column published on May 9, 2011, the *New York Times*' Ross Douthat argues that with Barack Obama in the Oval Office, Democrats have “learned to stop worrying and embrace the imperial presidency.”¹ Like many scholars and commentators writing in the post-George W. Bush era, Douthat invokes Arthur Schlesinger's formulation to describe the ascendancy of the executive in a system built upon the idea of separate and coequal branches of government.² At the same time, by invoking a turn-of-phrase coined in 1973 – before the rise of a generation of scholarship depicting a “resurgent” Congress³ – Douthat points to a recurring phenomenon in American politics: the struggle for governing power between the legislative branch and the executive branch. Such legislative-executive contestation reflects an important structural component of our constitutional system: the blending of governing authority between branches. As Madison argues in *Federalist* 48, the intent behind such blending is to ensure that one branch is not “directly or completely administered” by either of the others and to protect against one branch wielding an “overwhelming influence” over the others.⁴ In this way, therefore, the constitution has been characterized as an “invitation to struggle” and in this paper we aim to identify how one facet of struggle plays out.

Indeed, as we discuss below, concerns about creeping “executive branch tyranny” voiced by legislators themselves are not uncommon. Those who study Congressional behavior, however, have devoted relatively scant attention to the ways in which Congress acts collectively

¹ Ross Douthat, “Whose Foreign Policy Is It?” *New York Times*, May 9, 2011.

² Arthur M. Schlesinger Jr., *The Imperial Presidency* (New York: Houghton Mifflin Books, 1973); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (Ann Arbor: University of Michigan Press, 2005); Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010); Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* 122 (2009): 2070-2103.

³ See, for example, James L. Sundquist, *The Decline and Resurgence of Congress* (Washington: The Brookings Institution, 1981); Randall B. Ripley and James M. Lindsay eds., *Congress Resurgent: Foreign and Defense Policy on Capitol Hill* (Ann Arbor: University of Michigan Press, 1993).

⁴ James Madison, *Federalist* 48.

to mollify this concern. Instead, many who focus on lawmaking and governance in our system of “separate institutions sharing powers” have chosen to either lament congressional “abdication”⁵ or to reframe the discussion by explaining the “logic” of legislative delegation to the executive branch.⁶ The delegation scholarship specifically provides many important insights into not only why Congress transfers governing authority to the executive branch but also how such transfers reflect rational decision-making by legislators who are primarily interested in reelection. Yet the influence of this scholarship has led scholars to avoid examining what we call the “flip-side” of delegation: those periods when Congress actively works to reassert its governing authority vis-à-vis the executive branch. Indeed, with some notable exceptions we know far less about when, why, and how Congress contests executive branch power despite the historical regularity of such contestation. As a consequence, we lack explanations for an important aspect of Congressional behavior.

This paper will examine the flip-side of delegation and will therefore attempt to begin a discussion about an often neglected aspect of our system of divided government. Using Stephen Stathis’ index of “landmark legislation,” which spans more than 200 years of congressional history (1789-2001), we identify every major law through which Congress reasserts itself vis-à-vis the executive or otherwise works to contest executive branch power.⁷ We argue that by examining these laws we can see three legislative strategies by which Congress pursues

⁵ Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: W.W. Norton & Co., 1979); Louis Fisher, *Congressional Abdication on War and Spending* (College Station, TX: Texas A&M University Press, 2000).

⁶ Barry R. Weingast and Mark J. Moran, “Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,” *Journal of Political Economy* 91 (1983): 765-800; D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago: University of Chicago Press, 1991); David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (New York: Cambridge University Press, 1999). For a critique of this literature, see Jasmine Farrier, *Congressional Ambivalence: The Political Burdens of Constitutional Authority* (Lexington, KY: University Press of Kansas, 2010).

⁷ Stephen W. Stathis, *Landmark Legislation, 1774-2002* (Washington, D.C.: CQ Press, 2003).

reassertion. Through “delimiting” legislation, Congress explicitly redefines the potential for executive-based action by reallocating power away from the executive branch. Through “institutional reform” legislation, Congress contests the executive by reorganizing internal institutions in ways that allow it to contest the executive’s first-mover and informational advantages. Finally, through legislation that “reins in discretion,” Congress bolsters oversight capacity in specific policy areas or uses its power of the purse to bring policy back in line with member preferences. Through a series of brief qualitative case studies examining each piece of reassertion legislation we explicate the differences between these strategies.

Our goals are two-fold. First, we provide an historical examination of reassertion efforts from the 1st through 107th Congresses, and by drawing attention to delimiting legislation highlight a different and largely unexplained reassertion strategy. Second, we employ empirical tests to examine how conditions internal to Congress – including polarization, unified vs. divided government, and the life-span of a unified coalition – as well as the growth of presidential power over time influence its ability to successfully reassert authority.

To pursue our goals, the paper proceeds as follows. Section II identifies preexisting work on Congressional reassertion, argues that much of it focuses on institutional reform and reining in strategies, and introduces delimiting legislation as a third strategy. In Section III we provide a brief overview of each law in order to justify the typology we develop and to provide details about each piece of legislation. In Section IV we present our empirical analysis. Section V concludes and provides some thoughts on avenues for future research.

II. Congressional Reassertion: Three Legislative Strategies

To this point, Congress scholars have focused on two strategies by which Congress reasserts itself. For those who examine delegation, the *potential* for Congressional reassertion

acts as a constraint on executive branch policymaking. These scholars argue that with a simple majority vote, Congress can reclaim delegated authorities. With proper oversight mechanisms, strategic use of its “advice and consent” responsibility, and carefully written administrative procedures, therefore, Congress monitors delegated authority and prevents policy from diverging too far from congressional preferences. Alternatively, those who examine institutional reform provide a more direct examination of Congressional reassertion. They demonstrate that Congress contests executive branch power by reorganizing internal procedures and institutions. Collectively, these studies comprise much of what we know about the potential for Congressional reassertion and the conditions under which it occurs. Yet, as we make clear, Congress also reasserts authority through “delimiting” legislation – a strategy that is largely unexamined. Before discussing delimiting legislation, we describe the arguments offered by the “reining in discretion” and “institutional reform” literatures.

For analyses focusing on the delegation of legislative power to the executive branch, Congress is posited as a constraint on executive branch policymaking. As John Ferejohn and Charles Shipan argue, even after delegating “Congress retains the power to review and override agency decisions if it so desires.”⁸ Building off the assumption that executive branch agents prefer not to have their decisions overturned, their model demonstrates that policy will hew close enough to the preferences of the median member of Congress (or the relevant oversight committee) to avoid catalyzing corrective legislative action.⁹ Recent work by William Howell & Jon Pevehouse and Douglas Kriner also suggests that the fear of Congressional reassertion

⁸ John Ferejohn and Charles Shipan, “Congressional Influence on Bureaucracy,” *Journal of Law, Economics, and Organization* 6 (1990): 1-20, 8.

⁹ Ferejohn and Shipan, “Congressional Influence”; see also Charles R. Shipan, “Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence,” *American Political Science Review* 98 (2004): 467-80.

influences executive branch behavior.¹⁰ These scholars argue that concerns with legislative backlash directly influence executive branch decisions to initiate and prolong wars. Here again, the factors highlighted are indirect forms of constraint, but they are also built upon the idea that Congress possesses the institutional capacity to reassert itself and thereby alter policy if it so desires.¹¹

For those who suggest that Congress can rein in delegated authority at any moment, corrective action is guided by statute. With a simple majority vote (or 60 votes in the modern “filibuster era”), policy implemented through the executive branch can be reoriented to better suit legislative preferences. Alternatively, Congress can use the power of the purse – limitation riders, for example – to ensure that policy reflects Congressional preferences.¹² Here it is assumed that with proper oversight mechanisms Congress can (a) learn quickly when policy implemented by executive branch agents departs from Congressional preferences and (b) quickly correct for these departures using majoritarian procedures. The form that these mechanisms take and the path they clear for potential reassertion is discussed in seminal work by those who adopt the “congressional dominance” perspective on the bureaucracy. These scholars argue that Congress engages in “*ex post* efforts at political control using tools that were embedded in legislation *ex ante*.”¹³ Through a combination of oversight hearings, reporting requirements, administrative procedures that minimize discretion, and budget reauthorizations, Congress

¹⁰ William G. Howell and Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton: Princeton University Press, 2007); Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* (Chicago: University of Chicago Press, 2010).

¹¹ For more on this point see Linda L. Fowler, “Congressional War Powers,” in Eric Schickler and Frances E. Lee, eds., *The Oxford Handbook of the American Congress* (New York: Oxford University Press, 2011), 812-33.

¹² Jason A. MacDonald, “Limitation Riders and Congressional Influence Over Bureaucratic Policy Decisions,” *American Political Science Review* 104 (2010): 766-82.

¹³ B. Dan Wood, “Congress and the Executive Branch: Delegation and Presidential Dominance,” in Eric Schickler and Frances E. Lee, eds., *The Oxford Handbook of the American Congress* (New York: Oxford University Press, 2011), 789-911, 793.

constrains executive branch agencies by designing mechanisms that ensure effective reassertion if necessary.¹⁴

Yet, there is reason to believe that delegation may not be as reversible as congressional dominance theorists suggest. As Craig Volden argues, legislation designed to bring agency policy back in line with Congressional preferences may face a presidential veto, which makes reassertion more difficult.¹⁵ Additionally, the fact that Congress is a “fragmented institution” without a “strong central coordinating mechanism” reduces the likelihood that it can act quickly to reassert itself vis-à-vis the executive branch.¹⁶ These structural factors make it difficult for Congress to compete with an executive branch that has both first-mover and informational advantages.¹⁷ Indeed, as David Lewis and Terry Moe argue, structural differences between the legislative and executive branches result in a situation whereby the president has the “will and capacity to promote the power” of the executive branch while “individual legislators have neither and cannot be expected to promote the power of Congress in a coherent and forceful way.”¹⁸

While these various works help illustrate those factors that hinder Congressional reassertion, they do not account for periods when Congress does act to reassert itself against the executive branch. Unlike the “reining in discretion” scholars, those in the institutional reform camp provide a more direct look at Congressional contestation of executive branch power by

¹⁴ Kiewiet and McCubbins, *The Logic of Delegation*; Mathew D. McCubbins, and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms,” *American Journal of Political Science* 28 (1984): 165-79; Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics & Organization* 3 (1987): 243-77; Sean Gailmard, “Discretion Rather than Rules: Choice of Instruments to Control Bureaucratic Policymaking,” *Political Analysis* 17 (2009): 25-44.

¹⁵ Craig Volden, “A Formal Model of the Politics of Delegation in a Separation of Powers System,” *American Journal of Political Science* 46 (2002): 111-33.

¹⁶ Wood, “Congress and the Executive Branch,” 800. See also Kenneth R. Mayer and David T. Canon, *The Dysfunctional Congress: The Individual Roots of an Institutional Dilemma* (Boulder, CO: Westview, 1999).

¹⁷ William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003); Sean Gailmard and John W. Patty, *Learning While Governing: Information, Accountability, and Executive Branch Institutions* (unpublished manuscript, 2011).

¹⁸ David Lewis and Terry Moe, “The Presidency and the Bureaucracy: The Levers of Presidential Control,” in Michael Nelson, ed., *The Presidency and the Political System, 9th Edition* (Washington: CQ Press, 2010), 377.

demonstrating that Congress reforms internal institutions so that it can better contest the executive branch's two primary advantages: ease of action and information. For example, Lawrence Dodd argues that intra-Congressional fragmentation and the collective action problems that result from it are only the first stage of a "cyclical pattern." He finds that at certain times members seeking "national power" decentralize internal institutions to create "committee government" and grow their individual power bases. Such decentralization both allows for and encourages the "presidential assumption of legislative prerogatives" which, in turn, generates renewed interest in reforms that re-centralize authority and thereby fend off executive branch encroachment.¹⁹ The impulse to reform Congress' internal mechanisms for this purpose suggests that under certain circumstances legislative behavior reflects members' "broad institutional interest" in "bolstering the capacity, power, and prestige...of Congress as a whole."²⁰

Eric Schickler's analysis of institutional reforms passed by statute between 1919-1932 and 1937-1952 provide important evidence for Dodd's claim. Through an analysis of the move to recentralize spending decisions in the House Appropriations Committee in 1920 and to consolidate committees and bolster committee staffs with the Legislative Reorganization Act of 1946, Schickler demonstrates the link between Congressional institutions and Congressional capacity. Indeed, he finds that during both periods, members' concerns with Congress' status vis-à-vis the executive branch motivated these reform efforts.²¹ Similarly, Schickler, along with others like Eric Sundquist, Kenneth Shepsle, and Leroy Rieselbach, demonstrate that Congress in the 1970s (amid concerns regarding presidential aggrandizement, stemming from the Vietnam

¹⁹ Lawrence, C. Dodd, "Congress and the Quest for Power," in Lawrence C. Dodd and Bruce I. Oppenheimer eds., *Congress Reconsidered* (New York: Praeger, 1977), 283.

²⁰ Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton: Princeton University Press, 2001), 5; see also Gregory Wawro, *Legislative Entrepreneurship in the U.S. House of Representatives* (Ann Arbor: University of Michigan Press, 2000).

²¹ Schickler, *Disjointed Pluralism*, 85-188.

War and the Watergate scandal) pursued a reform effort designed specifically to overcome its ease of action and informational disadvantages.²² Internal powers were centralized, new budgetary institutions and processes and reporting requirements were created, and informational capacity – with the creation of the CBO and development of the CRS – was expanded. In sum, scholars in the institutional reform tradition argue that members *do* consider the status of Congress in the constitutional order and are willing to reform internal functions in order to prevent the legislative branch from being overrun by an aggrandizing president.

The third legislative reassertion strategy available to Congress is through the passage of laws that explicitly and intentionally redefine the boundaries of executive branch action by removing and reallocating authority previously exerted by the executive. Such “delimiting legislation” is the most direct form of reassertion since Congress acts to contest directly the formal powers available to all presidents. Examples of delimiting legislation would include the Tenure of Office Act (1867), the Posse Comitatus Act (1878) and the War Powers Act (1973), since in each case Congress placed new restrictions on the range of potential executive branch action.

We call attention to delimiting legislation because by passing laws of this type we see that individual legislators are willing to act collectively in ways that redefine Congress’ status in the constitutional order. Scholars who examine reassertion as a function of Congress bringing individual policies back in line with the preferences of the chamber or who link reassertion with institutional reform neglect the structural reforms that result from delimiting legislation. Indeed, with the exception of Sundquist’s detailed discussion of Congressional resurgence in the post-

²² Shickler, *Disjointed Pluralism*; Sundquist, *Decline and Resurgence*; Kenneth A. Shepsle, “Representation and Governance: The Great Legislative Trade-off,” *Political Science Quarterly* 103 (1988): 461-84; Leroy N. Rieselbach, *Congressional Reform: The Changing Modern Congress* (Washington: CQ Press, 1994).

Watergate era, the causes and consequences of this reassertion strategy has gone largely unexplored.

We argue that delimiting legislation should be seen as a reassertion strategy in its own right and, correspondingly, that Congress scholars need to think more clearly about *why* members choose this particular strategy. Further, when viewed alongside the work offered by those who study institutional reform, we see that Congress is not always content to “correct” individual policy outcomes that deviate from Congressional preferences. Instead, the legislative record that we compile demonstrates that policy concerns are linked to concerns with Congress’ status in the constitutional order.²³ Here we present a preliminary analysis of reassertion by examining the conditions under which landmark reassertion laws pass. We do not offer a fully specified theory to explain the motivations underlying each mode of Congressional reassertion but instead suggest that the prevalence of reassertion and the different strategies by which it is pursued makes such a theory necessary.

III. Landmark Congressional Reassertion Efforts Through Time

In this section we provide more details about Congressional reassertion efforts through time. As indicated above, each bill included here is drawn from Stephen Stathis’ index of “landmark legislation.” This data set of laws, according to Stathis, documents “Congress’s most momentous accomplishments...[laws that] represented recognition of needed action and guidance to administrative entities, a significant departure from previous policy, a creative response to an emergency, or a solution to a long-standing national concern.”²⁴ *Landmark*

²³ See Schickler, *Disjointed Pluralism*, for a full discussion of “multiple member interests.”

²⁴ Stathis, *Landmark Legislation*, v.

Legislation, therefore, represents a new resource for studying Congress that some scholars have put to use in new and exciting work.²⁵

Using Stathis' brief summaries, we looked for language that indicated a Congressional reassertion effort. After compiling this list, we consulted *U.S. Statutes at Large* to confirm that the law does, in fact, suggest Congressional reassertion. Overall, we found 22 cases of major reassertion-based laws using the Stathis index. We then divided these reassertion efforts by type: delimiting laws formally place new restrictions on the range of presidential action; institutional reform laws make changes to institutions and procedures internal to Congress for the purpose of bolstering institutional capacity; and laws designed to rein in discretion create policy-specific oversight mechanisms or use the appropriations process to redirect policy outcomes. Table 1 provides summary information for each type of major reassertion law, while Table 2 provides voting data that preceded the relevant enactments.

[Tables 1 and 2 about here]

The rest of this section leverages secondary source material, newspaper accounts, and references to the Congressional record to substantiate our coding decisions and to provide relevant background material on each piece of reassertion legislation. For organizational purposes, the reassertion laws are grouped and divided into four different "eras:" (1) the Antebellum Era (Founding-1864); (2) Reconstruction through the Gilded Age (1865-1900); (3) the New Deal and New Deal "consolidation" years (1932-1968); and (4) the Watergate Era through 2002 (1968-2002). Also, while the first successful reassertion effort did not pass until the 39th Congress, we identify an attempted effort during the Whig period to suggest that a

²⁵ Anthony J. Madonna, "Winning Coalition Formation in the U.S. Senate: The Effects of Legislative Decision Rules and Agenda Change," *American Journal of Political Science* 55 (2011): 276-88; Sean Gailmard and Jeffery A. Jenkins, "Coalition Structure and Legislative Innovation in American National Government," in Jeffery A. Jenkins and Eric M. Patashnik, eds., *Living Legislation: Durability, Change, and the Politics of American Lawmaking* (Chicago: University of Chicago Press, 2012).

theory to explain Congressional reassertion must consider not only landmark laws but also “non-landmark” reassertions and failed reassertion efforts. By highlighting legislative concern with executive aggrandizement as far back as 1840, we also demonstrate that concerns with Congress’ status in the constitutional order occur with historical regularity and should not be seen as purely a reaction against the “modern” presidency.

Era I: The Antebellum Era

In the years following the Jackson presidency and with the emergence of the Whig party, we see one of the first determined efforts to counteract what Henry Clay saw as a “total change of the pure republican character of government” through the “concentration of all power in the hands of one man.”²⁶ Indeed, through the 1840 election, Whig candidates raised the specter of executive tyranny in campaign speeches by focusing on Jackson’s frequent use of the veto power.²⁷ Opposition to the veto, therefore, became the issue through which the Whigs launched their attack on the office of the presidency itself. And in August 1842, Whigs in Congress released a report citing “abusive exercise” of the veto power and argued that “the veto power itself must be restrained and modified by an amendment of the Constitution.”²⁸ Despite the determined efforts of Clay and others, however, the veto reform effort failed on 17 August 1842 when the House defeated the proposed amendment by a vote of 99-90.²⁹

Era II: Reconstruction Through the Gilded Age

The veto reform effort presaged a new era of Congressional reassertion that would emerge in the years following the Civil War. Woodrow Wilson famously described the years

²⁶ Quoted in William M. Goldsmith, *The Growth of Presidential Power: A Documented History, Vol. II* (New York: Chelsea House Publishers, 1974), 613.

²⁷ Goldsmith, *The Growth of Presidential Power*, 641-651.

²⁸ *Congressional Globe*, 27th Congress, 2nd Session (17 August 1842): 896.

²⁹ *Congressional Globe*, 27th Congress, 2nd Session, (17 August 1842): 907-908.

between the end of the Civil War and the end of the “Gilded Age” as a time when Congress was the “central and predominant power” in our constitutional system.³⁰ Our analysis provides evidence to support Wilson’s claim. During this era, the legislative branch pursued reassertion through an exclusive reliance upon a delimiting strategy that intentionally weakened the executive branch and reallocated its powers back to Congress and the states. During this approximately 30 year period, we highlight four pieces of landmark delimiting legislation: the Tenure of Office Act of 1867, the Command of the Army Act of 1867, the Posse Comitatus Act of 1878, and the Federal Election Laws Repeal Act of 1894.³¹

A Republican-controlled Congress passed the Tenure of Office Act and the Command of the Army Act during the tumultuous tenure of President Andrew Johnson. At the time, Johnson and Republicans were battling over the contours of Reconstruction policy, and Johnson worked to attain a political advantage over Congress by replacing political appointees with allies. As Steven Calabresi and Christopher Yoo argue, Johnson’s behavior reflected an attempt to “organize a new political party around himself and his conservative Reconstruction policies.”³² Indeed, historian Jean Edward Smith finds that during the last six months of 1866 alone, Johnson “replaced almost seventeen hundred postmasters, three-quarters for political reasons.”³³

When combined with Congressional anger over Johnson’s opposition to the Wade-Davis Reconstruction plan, the president’s patronage strategy sparked the effort to pass the Tenure of Office Act. In doing so, Congress stripped all future presidents of the power to remove any civil officer appointed with the “advice and consent” of the Senate, as a way of keeping Johnson from

³⁰ Woodrow Wilson, *Congressional Government: A Study in American Politics* (New York: Houghton Mifflin Company, 1900), xv.

³¹ Tenure of Office Act: (14 Stat. 430); Command of the Army Act: (14 Stat. 486); Posse Comitatus Act (20 Stat 152, Section 15); Federal Election Laws Repeal Act (28 Stat. 36-37)

³² Steven G. Calabresi and Christopher S. Yoo, “The Unitary Executive During the Second Half-Century,” *Harvard Journal of Law and Public Policy* 26 (2003): 667-801, 743.

³³ Jean Edward Smith, *Grant* (New York: Touchstone Books, 2001), 422.

replacing political appointees who “might respond to congressional as opposed to executive policies.”³⁴ The House and Senate both passed the Tenure of Office Act in February 1867.³⁵ Johnson responded by vetoing the bill on constitutional grounds. His veto message argued that “the power of removal is constitutionally vested in the President of the United States.”³⁶ On March 2, 1867, both chambers of Congress overrode Johnson’s veto and the Tenure of Office Act became law.

With the Command of the Army Act, Congress pursued a similar strategy. In this case, the House of Representatives attached a rider to an army appropriations bill formally stipulating that the “General of the Army shall not be removed, suspended or relieved of command, or assigned to duty elsewhere than at said headquarters without the previous approval of the Senate.”³⁷ According to political scientist Wilfred Binkley, this rider signaled that Congress was now the “chief organ of the government” for the president no longer held his constitutional position as commander-in-chief of the military.³⁸

Ten years later, Reconstruction came to a close with the “Compromise of 1877,” which put Republican Rutherford B. Hayes into the White House and withdrew federal troops from the South.³⁹ Democrats in Congress also worked to put a legislative end to Reconstruction by passing the Posse Comitatus Act. The bill itself stipulates that from the date of enactment forward, it would be illegal to employ the army to carry out traditional, civilian led law enforcement actions. Here Democrats acted upon their anger over the role that federal troops

³⁴ Goldsmith, *The Growth of Presidential Power*, 1044; Wilfred E. Binkley, *President and Congress* (New York: Knopf, 1947), 138-141; Louis Fisher, *Constitutional Conflicts Between Congress and the President, th Edition* (Lawrence, KS: University Press of Kansas, 2007): 54-56, 58.

³⁵ It is important to note that Congress repealed the bill in 1887.

³⁶ Quoted in Goldsmith, *The Growth of Presidential Power*, 1048.

³⁷ 14 Stat. 486

³⁸ Wilfred E. Binkley, *President and Congress* (New York: Knopf, 1947), 137-138.

³⁹ See generally: Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (New York: Harper and Row Publishers, 1988).

had played in Southern society since the end of the Civil War.⁴⁰ While contemporary analysts continue to debate the implications of this law on the exercise of executive power,⁴¹ by looking at the Congressional debate over this bill we see that restraining presidential power factored into the decision-making of both opponents and supporters of the measure. Opponents of the bill argued that it represented an unconstitutional infringement on the president's constitutional power as commander-in-chief and that it aimed to "spread a snare for the feet of every executive and every military officer who may be called upon to perform the gravest legal duty."⁴² Supporters, however, echoed Senator Augustus Merrimon's (D-NC) dismay with the idea that "a marshal can apply to the President at his pleasure and have a detachment of the Army of the United States to aid him in executing processes placed in his hands."⁴³

The final example of successful reassertion during this era is the Federal Election Laws Repeal Act. Signed soon after the election of 1892, which resulted in unified Democratic control of government, this law reflected a determined effort to end federal influence over elections in the South. Indeed, as Michael Perman argues, it ensured that the federal government would have no authority to enforce the Fifteenth Amendment in the South.⁴⁴ For our purposes, however, it is important to note that this law reallocated power away from the executive branch and back to the states. It repealed the Third Force Act – legislation that empowered the president to use federal troops to enforce the provisions of this act – and thereby removed executive branch authority to

⁴⁰ Calabresi and Yoo, "Unitary Executive," 772.

⁴¹ See, e.g., Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before any More Damage Is Done," *Military Law Review* 175 (2003): 86-183; Sean J. Kealy, "Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement," *Yale Law & Policy Review* 21 (2003): 383-442.

⁴² *Congressional Record*, 44th Congress, 2nd Session (7 June 1878): 4240-4244

⁴³ *Congressional Record*, 44th Congress, 2nd Session (7 June 1878): 4244.

⁴⁴ Michael Perman, *Struggle for Mastery: Disenfranchisement in the South, 1888-1908* (Chapel Hill: University of North Carolina Press, 2001): 43-47.

unilaterally enforce civil rights protections.⁴⁵ Here again, members took action that intentionally reformulated the relationship between the executive branch, the legislative branch, and the states.

New Deal Consolidation Years

During the New Deal consolidation era, Congress pursued reassertion through each of the strategies we have outlined. It delimited executive branch power by passing the Neutrality Act of 1935 and the 22nd Amendment; it reformed internal procedures to better rival executive branch power by passing the Legislative Reorganization Act of 1946 and the Atomic Energy Act of 1946; and it created new oversight procedures to ensure that it could adequately rein in agents of the executive branch by passing the Administrative Procedure Act of 1946 and the Department of Defense Reorganization Act of 1958.⁴⁶ We take up each law in turn.

With the Neutrality Act of 1935, argues Stuart Weiss, Congress dealt President Roosevelt the “first severe rebuke to his prestige and discretionary authority.”⁴⁷ The push to pass this bill reflected Congressional opposition to FDR’s pursuit of a “discretionary embargo,” which would have allowed him to unilaterally take sides in future military conflict in Europe by halting the shipment of goods to those he determined to be the aggressors.⁴⁸ Congress opposed such a plan because it made possible yet another war and suggested a commitment to collective security which many members did not share. In August 1935, Congress legislated its disapproval with the discretionary embargo by using the Neutrality Act to mandate that in the event of a war, all shipments of “arms, ammunition, and implements of war” to all parties engaged in the conflict

⁴⁵ Stathis, *Landmark Legislation*, 109.

⁴⁶ Neutrality Act of 1935 (49 Stat. 1081-1085); Twenty-second Amendment (61 Stat. 959); Legislative Reorganization Act of 1946 (60 Stat. 1080-1082); Atomic Energy Act (60 Stat. 755-775); Administrative Procedures Act (60 Stat. 237-244); Defense Department Reorganization Act of 1958 (72 Stat. 426-438); International Development Associations Act of 1960 (74 Stat. 293-295)

⁴⁷ Stuart L. Weiss, “American Foreign Policy and Presidential Power: The Neutrality Act of 1935,” *Journal of Politics* 30 (1968): 672-95, 673.

⁴⁸ Weiss, “American Foreign Policy,” 675; “War: Must Over May,” *Time* 2 September 1935.

would immediately stop. In this way, the law sought to guarantee American neutrality by “restricting [the President’s] conduct of foreign policy.”⁴⁹ Additionally, by passing the 22nd Amendment, Congress delimited the executive branch by formally limiting a given president to two terms in office.

Schickler and others detail the political wrangling that presaged enactment of the institutional reform measures that we highlight (and thus we will not recount these analyses here).⁵⁰ For our purposes it is simply important to note that in 1946, members worried about executive overreach,⁵¹ and they responded to these concerns by passing institutional reforms that would allow the legislative branch to better rival executive branch power. Schickler’s detailed examination of floor debate over the Legislative Reorganization Act of 1946 (LRA) illustrates that many members echoed the concerns voiced by Senator Styles Bridges (R-NH), when he argued that through the New Deal “Congress had ‘relatively stood still’ as the executive branch expanded tremendously.”⁵² The LRA, therefore, would allow members to “restore...the legislative branch of government to the place of authority, dignity, and respect which it one held in the minds of the people of the United States.”⁵³ To accomplish this goal, the LRA streamlined the committee system and expanded committee staffs – each of which, according to Schickler, bolstered Congressional capacity and power. The Atomic Energy Act, on the other hand, created a joint House-Senate Congressional committee empowered to work with the Atomic Energy

⁴⁹ Weiss, “American Foreign Policy,” 673; see also Glen S. Kurtz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009), 39.

⁵⁰ Schickler, *Disjointed Pluralism*, 140-150; Roger H. Davidson and Walter J. Oleszek “Adaptation and Consolidation: Structural Innovation in the U.S. House of Representatives,” *Legislative Studies Quarterly* 1 (1976): 37-65; Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945-1975* (New York: Cambridge University Press, 1993); Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993) .

⁵¹ Schickler’s analysis makes clear that concerns with executive branch aggrandizement alone did not ensure passage of these reform acts.

⁵² Schickler, *Disjointed Pluralism*, 142.

⁵³ Senate Minority Leader Wallace White (R-ME), as quoted by Schickler, *Disjointed Pluralism*, 143.

Committee (located within the executive branch) on the development of nuclear policy and to oversee all bills and resolutions introduced in Congress that related to atomic energy. As with the LRA, Congress used this law to bolster Congressional capacity and power.⁵⁴

Finally, we turn to legislation designed to ensure that Congress can adequately rein in policy set by executive branch agencies. The most general of these bills is the Administrative Procedures Act of 1946 (APA) – a law that “regulates the procedures for adjudication, access to, disclosure of, and publication of agency information, licensing, rule-making, investigations, tenure of administrative law judges, and judicial review of agency action.”⁵⁵ The APA gained much of its support from conservatives who sought to rein in executive branch power by setting a number of new rules to guide the exercise of agency discretion. More specifically, the law expanded judicial review of agency actions and “required notice and comment rule-making and a formal hearing in cases where the agency’s enabling statute required rule-making on the record.”⁵⁶ Through these mechanisms, Congress worked to ensure that it retained the power to keep agency policymaking in line with its preferences.

With the Defense Department Reorganization Act of 1958, Congress utilized the same reassertion technique, but applied it in discrete policy areas. In 1958, the Eisenhower Administration presented Congress with a Defense Department reorganization plan which sought more “effective strategic planning, unified direction and efficient command structure.”⁵⁷ Congress then began a debate over the plan and, as recounted by the *New York Times*, members

⁵⁴ Schickler, *Disjointed Pluralism*, 155.

⁵⁵ McCubbins, Noll, and Weingast, “Administrative Procedures as Instruments of Political Control;” James E. Brazier, “An Anti-New Dealer Legacy: The Administrative Procedure Act,” *Journal of Policy History* 8 (1996): 206-226. Also see Walter Gellhorn, “The Administrative Procedure Act: The Beginnings,” *University of Virginia Law Review* 72 (1986): 219-33.

⁵⁶ Brazier, “An Anti-New Dealer Legacy,” 222-223.

⁵⁷ “Debate on Defense Plan,” *New York Times*, 10 May 1958.

demonstrated a “zealous determination to safeguard congressional prerogatives.”⁵⁸ This determination translated into a bill that enhanced legislative oversight by allowing “service chiefs and secretaries to bring their complaints to Congress” while also empowering Congress to veto any proposed “transfer, merger, or abolition of service functions.”⁵⁹

Watergate Era to the Present

At different moments during this era, Congress used each of the three reassertion strategies that we have identified. With the Repeal of the Gulf of Tonkin Resolution, the War Powers Resolution, the Congressional Budget and Impoundment Act, the Freedom of Information Act Amendments, the National Security Act, and the Foreign Intelligence Surveillance Act, Congress delimited the executive branch. Additionally, with the Legislative Reorganization Act of 1970, Congress successfully reformed its internal mechanisms, and with the Nuclear Non-Proliferation Act of 1978, the Boland Amendments, the Aid to the Contras Act, and the Intelligence Authorization Acts of 1981 and 1991, Congress contested executive branch discretion. A large secondary literature documents the post-Watergate reforms so here again we will not provide in-depth case studies but will instead provide enough detail to substantiate our claims about Congress’ chosen strategy.

Viewed together, the repeal of the Gulf of Tonkin resolution and the War Powers resolution reflect a determined effort to delimit the executive branch’s war-making authority.⁶⁰ Senator Charles Mathias (R-MD) initiated the effort to repeal the Gulf of Tonkin resolution in February 1970, and Congress held hearings on his proposal almost immediately following its

⁵⁸ “Debate on Defense Plan,” *New York Times*, 10 May 1958.

⁵⁹ “Eisenhower Signs Pentagon Change,” *New York Times*, 7 August 1958.

⁶⁰ Many scholars debate the effectiveness and relevance of the War Powers Resolution. By highlighting it here we are not taking a side in this debate. Instead, we are simply indicating that members *intended* for it delimit the executive branch.

introduction.⁶¹ Mathias argued that by passing the resolution, Congress would be “reasserting the constitutional doctrine that without specific congressional authority, the president can use American forces only to repel an attack on the United States or on a country with which the United States has a treaty requiring immediate military response.”⁶² In the end, Congress passed this resolution as an amendment to the Foreign Military Sales Act of 1970. As Sundquist notes, the Nixon Administration did not oppose the measure because it had “plenty of other legal and constitutional authority on which to base its current activities.”⁶³ To narrow these authorities, Congress in 1973 defied President Nixon’s veto and passed the War Powers Resolution – a law that placed new limits on the president’s power to send American troops abroad.⁶⁴

Additionally, in 1974, Congress passed the Budget and Impoundment Act and the Freedom of Information Act Amendments. With the Budget and Impoundment Act, Congress not only bolstered its institutional capacity by establishing budget committees with “competent analytical staff,” but it also delimited executive branch power by constricting the president’s impoundment authority.⁶⁵ The Freedom of Information Act Amendments, passed over President Ford’s veto, delimited executive branch power by allowing federal judges to review the classification decisions made by agents of the executive. Also, by broadening the definition of

⁶¹ “Vietnam Policy Proposals,” *Hearings Before the Senate Committee on the Foreign Relations*, 91st Congress, February 3, 4, 5, and March 16, 1970.

⁶² “Vietnam Policy Proposals,” 164.

⁶³ Sundquist, *The Decline and Resurgence of Congress*, 249.

⁶⁴ Sundquist, *The Decline and Resurgence of Congress*, 238-272; Fisher, *Constitutional Conflicts Between Congress and the President*, 262-281; Howell and Pevehouse, *While Dangers Gather*, 67-68.

⁶⁵ Sundquist, *The Decline and Resurgence of Congress*, 209-215; Schickler, *Disjointed Pluralism*, 195-200; Louis Fisher, *Presidential Spending Power* (Princeton: Princeton University Press, 1975); James P. Pfiffner, *The President, the Budget and Congress: Impoundment and the 1974 Budget Act* (Boulder, CO: Westview, 1979); Jasmine Farrier, *Passing the Buck: Congress, the Budget and Deficits* (Lexington: University Press of Kentucky, 2004).

an executive branch agency, Congress ensured that the transparency stipulations built into this act would apply to more executive branch officials.⁶⁶

The final delimiting actions came in 1975 and 1978, when Congress passed the National Emergencies Act and the Foreign Intelligence Surveillance Act. The National Emergencies Act aimed to “terminate special powers possessed by the president as a result of existing states of national emergency and establish procedural guidelines for the handling of future emergencies with provision for regular Congressional review.”⁶⁷ More specifically, it terminated existing emergency statutes in place since 1933 and outlined a formal procedure for declaring and sustaining future emergencies. In this way, Congress took back power that had previously been held by the executive alone. Similarly, the Foreign Intelligence Surveillance Act (FISA) represented the first time Congress “interpose[d] any set of procedures to confine the constitutional discretion of the president to engage in electronic surveillance to protect the national security.”⁶⁸ Here Congress both bolstered its oversight capacity and delimited executive branch power by providing for a new form of judicial review over electronic surveillance.⁶⁹

The lone example of reassertion through institutional reform passed during this era is the Legislative Reform Act (LRA) of 1970. Schickler documents that during the debate over this bill, members frequently highlighted the link between legislative organization and capacity. More specifically, Congress acted on an important concern voiced by H. Allen Smith (CA), the ranking Republican on the Rules Committee, that Congress “does not have sufficient information

⁶⁶ Fisher, *Constitutional Conflicts Between Congress and the President*, 189; Stathis, *Landmark Legislation*, 291.

⁶⁷ “Special Committee on National Emergencies and Delegated Emergency Powers,” 93rd Congress, 2nd Session (1974).

⁶⁸ William C. Banks, “The Death of FISA,” *Minnesota Law Review* 91 (2007): 1209-1301, 1211.

⁶⁹ For more on the FISA law see: Frederick A.O. Schwartz and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: The New Press, 2008); Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2007).

available to it in order to deal effectively with the myriad of legislative problems we face.”⁷⁰

Indeed, the information asymmetry between Congress and the president is often cited as one of the president’s primary advantages. To deal with this issue, therefore, the LRA “expanded the staff and redefined the responsibilities of the Congressional Research Service.”⁷¹

The final examples of reassertion in this era reflect an attempt by Congress to “limit discretion” both through the appropriations process and by ensuring that it retains the institutional capacity necessary to correct for policy disagreements. In both 1982 and 1985, Congress used its appropriations power to restrict executive branch initiatives in South America. In 1982, Congress passed the Boland Amendments which formally prohibited the CIA or the Defense Department from using federal funds “for the purpose of overthrowing the government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.”⁷² In 1985, Congress passed legislation that would provide aid to the Nicaraguan rebels but stipulated that none of the money could be used to purchase weaponry and that none of it could be administered by the CIA or the Defense Department.”⁷³ In both of these cases, therefore, Congress asserted its prerogatives by acting as a constraint on executive branch policy implementation.

Alternatively, with the Nuclear Non-Proliferation Act of 1978 and the Intelligence Authorization Acts of 1981 and 1991, Congress legislated itself particular oversight capacities. The Nuclear Non-Proliferation Act included a number of provisions aimed to “establish safeguards against proliferation of nuclear weapons technology while assuring foreign nations that the U.S. will continue to be a reliable supporter of technology for the peaceful use of the

⁷⁰ Schickler, *Disjointed Pluralism*, 214.

⁷¹ Stathis, *Landmark Legislation*, 278.

⁷² Stathis, *Landmark Legislation*, 314; Fisher, *Constitutional Conflicts Between Congress and the President*, 215, 217; Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1990).

⁷³ Stathis, *Landmark Legislation*, 323; “House Approves Funds for Contras,” *New York Times*, 13 June 1985.

atom.” Importantly, the bill stipulates that Congress held veto power over any nuclear export agreement sought by the president.⁷⁴ The intelligence authorization bills each imposed new reporting requirements on the executive branch. The 1981 Act stipulated that the president must “fully inform the intelligence committees in a timely fashion of intelligence activities in foreign countries, other than activities intended solely for obtaining intelligence information,” while the 1991 Act required the president to report all covert activities to Congress and to document the intent of such actions in a “written finding.”⁷⁵

IV. Analysis

In this section, we move beyond an overview of specific cases and proceed to systematically analyze congressional reassertion efforts across time. In doing so, we rely heavily upon the recent spate of research on U.S. lawmaking, much of it stemming from the landmark study by David Mayhew in 1991, for theoretical intuition and empirical specification.⁷⁶

Empirical Setup

We examine cases of congressional reassertion in a variety of ways, based on the frequency of successes, the probability of a single success, and the ratio of successes to non-

⁷⁴ “Bill for Strict Control on Nuclear Exports, Sought by Carter, Is Approved by Senate,” *New York Times*, 8 February 1978; Stathis, *Landmark Legislation*, 300.

⁷⁵ Stathis, *Landmark Legislation*, 308, 342.

⁷⁶ David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven: Yale University Press, 1991); Sean Q. Kelly, “Divided We Govern? A Reassessment,” *Polity* 25 (1993): 475–84; George C. Edwards, III, Andrew Barrett, and Jeffrey Peake, “The Legislative Impact of Divided Government,” *American Journal of Political Science* 41 (1997): 545–63; Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998); John J. Coleman, “Unified Government, Divided Government, and Party Responsiveness,” *American Political Science Review* 93 (1999): 821–35; Sarah A. Binder, “The Dynamics of Legislative Gridlock, 1947-96,” *American Political Science Review* 93 (1999): 519–33; William Howell, Scott Adler, Charles Cameron, and Charles Riemann, “Divided Government and the Legislative Productivity of Congress, 1945-94,” *Legislative Studies Quarterly* 25 (2000): 285–312; Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington: Brookings Institution Press, 2003); David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002*, Second Edition (New Haven: Yale University Press, 2005); Joshua D. Clinton and John S. Lapinski, “Measuring Legislative Accomplishment, 1877-1994,” *American Journal of Political Science* 50 (2006): 232–49; Gailmard and Jenkins, “Coalition Structure and Legislative Innovation in American National Government.”

reassertion successes across more than 200 years of American history. Our unit of analysis will be a Congress, and our analyses will focus on two time periods: (1) the entirety of U.S. history through 2001, which extends from the 1st (1789-91) through the 107th (2001-02) Congress, and (2) the postbellum period in U.S. history, which spans the 39th (1865-67) through the 107th (2001-02) Congresses. The latter period represents the “modern” era in U.S. history, and (as the prior section indicated) contains the bulk of congressional reassertion efforts.

Scholars who study lawmaking commonly leverage measures of ideological agreement/disagreement to help explain Congressional activity. Consequently, a vibrant literature has emerged around the degree to which unified vs. divided government affects the production of major (or landmark) laws – where unified government is defined as a Congress in which the same party controls the presidency and both chambers of Congress. Until recently, the prevailing wisdom had been that lawmaking was more efficient under unified government than divided government; thanks to Mayhew and others, however, this belief has increasingly been challenged. Yet, there is still reason to believe that unified control of government might help insulate the president from congressional reassertion attempts. Recent work by Howell & Pevehouse and Kriner, for example, suggests that the president is provided with more discretion by Congress to enter into military conflicts and extend/expand such conflicts under unified government (or when the percentage of the president’s party in Congress is large).⁷⁷ Similarly, a president may find that he is not constrained or challenged as readily by a friendly Congress. When applied to our analysis, this argument suggests that the likelihood or incidence of reassertion efforts will be lower under unified versus divided government.

While a simple unified/divided dichotomy provides some theoretical leverage to help measure the likelihood of Congressional reassertion, we go further by also considering how

⁷⁷ Howell and Pevehouse, *While Dangers Gather*; Kriner, *After the Rubicon*.

variations in “coalitional context” bear on this question. More specifically, older unified coalitions – those that have been in power for a while – will likely approach the reassertion question differently than newer unified coalitions. The “pivotal politics” spatial model, developed by Keith Krehbiel, acts as our guidepost here.⁷⁸ Per Krehbiel’s model, a governing coalition will move quickly to bring policy within the “gridlock interval” because once accomplished, this policy cannot be changed further without a shift in the distribution of preferences. As a result, as long as the enacting coalition remains in power, no additional policy change is possible. Krehbiel’s argument, therefore, suggests that major policy shifts tend to happen early in the lifetime of a given unified coalition and taper off later in the lifetime of that coalition. Stated differently, passing major policy becomes more difficult for a coalition as it ages. For our purposes, then, Krehbiel’s theory implies that if a unified coalition pursues reassertion it should do so earlier rather than later.

Unified coalitions also differ in how long they have been *out* of power. If a new unified coalition returns to power after a lengthy period in which it failed to control the House, the Senate, and the presidency, it may have a long list of policy demands that require action. This “pent up” demand may result in a spurt of new policy innovations in short order. Alternatively, a new unified coalition that has been out of power for only a short time may not be as aggressive in its approach to lawmaking since it will not have had much time to develop demands for major new legislation.⁷⁹ Applying this thinking to reassertion, we expect that a newly unified coalition *long out of power* will be more likely to pursue reassertion. That is, the more time that has gone by, the more likely on average that disagreements (on questions of power, institutional position within the constitutional order, etc.) between the president and Congress will have arisen.

⁷⁸ Krehbiel, *Pivotal Politics*.

⁷⁹ Binder, “The Dynamics of Legislative Gridlock”; Binder, *Stalemate*.

Our treatment of ideological agreement/disagreement to this point has focused only on a given party's control of all major lawmaking levers. To provide additional detail, we also highlight the distinct preferences of legislators themselves. More specifically, the degree to which the members of the two major parties are "polarized" on matters of policy is arguably a more refined measure of ideological agreement/disagreement when compared to the relatively crude dichotomous measure of unified/divided government. Here again, Krehbiel's pivotal politics model is instructive. A more polarized partisan environment in Congress is likely to result in a wider gridlock zone which, in turn, will reduce the number of policies that can be effectively altered.⁸⁰ Nolan McCarty has provided empirical support for this prediction by demonstrating that polarization (as measured by differences in party medians in the House of Representatives) has a negative effect on major legislative enactments.⁸¹ If major reassertion efforts follow the same pattern as more general landmark legislation, we would expect to observe a negative relationship between polarization and reassertion success.

Finally, our analysis suggests that a secular change in presidential power/authority over time – due to increased executive discretion, the development of the administrative state, increased congressional delegation, etc. – may be related to reassertion success. As the presidency has become a more potent actor in the ever-growing national political-economic

⁸⁰ As Nolan McCarty argues "[the] 'pivotal politics' model of supermajoritarianism suggests that polarization is a legislative retardant." See Nolan McCarty, "The Policy Effects of Political Polarization," in Paul Pierson and Theda Skocpol, eds., *The Transformation of American Politics: Activist Government and the Rise of Conservatism* (Princeton: Princeton University Press, 2007), 235-36.

⁸¹ McCarty, "The Policy Effects of Political Polarization." McCarty does not use the Stathis data in his analysis; rather, he incorporates data from Mayhew, *Divided We Govern*, Second Edition. For robustness checks, McCarty uses data from Howell et al., "Divided Government and the Legislative Productivity of Congress"; R. Eric Petersen, "Is It Science Yet? Replicating and Validating the *Divided We Govern* List of Important Statutes," (Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL, 2001); and Clinton and Lapinski, "Measuring Legislative Accomplishment, 1877-1994." Gailmard and Jenkins use the Stathis data and find no significant effect of polarization on legislative enactments. See Gailmard and Jenkins, "Coalition Structure and Legislative Innovation in American National Government."

system, opportunities for Congress to delimit or rein in presidential power/authority have increased. Thus, reassertion success should be positively related to time.

In terms of coding, we follow conventional accounts in considering government to be unified in a given Congress if the same party controls the House, the Senate, and the presidency. (An alternate measure, which we use as well, is taken from Howell and Pevehouse: the average percentage of the president's party in Congress – with high values indicating more congressional support for the president.⁸²) A unified coalition is either new or continuing. A new unified coalition occurs in any Congress with unified government, and with either divided government or a unified coalition of a *different* party in the previous Congress. A continuing unified coalition occurs in any Congress in which government is unified, and was unified under control of the same party in the prior Congress. The time out of power for a new unified coalition is the number of Congresses since that same party held its previous unified coalition.⁸³ Time out of power is 0 for Congresses with divided coalitions or with continuing unified coalitions. The time in power for a continuing unified coalition is the number of consecutive Congresses for which the party in power has maintained a unified coalition, starting at 1 for a new unified coalition. For divided coalitions time in power is 0. To measure polarization in a given Congress, we follow McCarty in calculating the difference in the DW-NOMINATE scores of the median members of the two parties in the House of Representatives.⁸⁴ Finally, secular change is captured with a simple linear time trend, which increases by one unit for every Congress.

⁸² Howell and Pevehouse, *While Dangers Gather*; see also Kriner, *After the Rubicon*.

⁸³ For a party experiencing its first unified coalition (e.g., the GOP in 1861), time out of power is dated from the founding of the party (1854 in case of the GOP).

⁸⁴ McCarty, "The Policy Effects of Political Polarization." McCarty reports that he tried various measures of polarization including Senate-based measures and an average of House and Senate, and found the results were substantively similar.

Results

Our first set of models examines the frequency of reassertion-based major laws across time. As such, they involve count data – that is, the dependent variable represents the number of reassertion-based major laws passed in Congress *i*. Most of the time, this variable takes on a value of zero. Non-zero values are typically one, but there are five occasions when a larger value is reached (2 in the 39th Congress; 3 in the 79th Congress; 2 in the 91st Congress, 3 in the 93rd Congress, and 2 in the 9th Congress). We use negative binomial regression to estimate the frequency of these reassertion-based major laws.⁸⁵

Results from four different estimations (two different time series, two different measures of partisan cooperation) appear in Table 3. While the time-in-power and time-out-of-power measures generate no significant findings, other variables yield interesting results in the expected direction. The variables tapping partisan cooperation – the unified government dummy and the percent president’s party variable – are negative and significant (except in the column 1). Substantively speaking then, a shift from divided to unified government in the column 3 estimation lowers the predicted count from 0.488 to 0.089 (holding all other variables at their mean values).⁸⁶ The time trend is positive and significant in the extended time series (1789-2001), but not in the postbellum-only data. Finally, the polarization measure is negative and significant in all four estimations. Under divided government in the column 3 estimation, a one standard deviation increase in the polarization measure shifts the predicted count from 0.488 to 0.193 (holding all other variables at their mean values); under unified government, the shift in the predicted count is from 0.089 to 0.035.

⁸⁵ A Poisson model is rejected because the conditional variance of the dependent variable exceeds the mean. Note, however, that Poisson regressions produce very similar results in each of the four estimations.

⁸⁶ Alternatively, looking at the estimation in column 4, a one standard deviation increase in the size of the president’s party lowers the predicted count from 0.190 to 0.077 (holding all other variables at their mean values).

[Table 3 about here]

Our second set of models examines the probability of a reassertion-based major law across time. Here the dependent variable is dichotomous and takes on a value of zero (if no reassertion law passed during a given Congress) or a one (if one or more than one reassertion law passed during a given Congress). As both section III and the summary tables demonstrate, there are 15 unique Congresses – beginning in the early Reconstruction era and extending through the final years of the first Bush administration – in the overall dataset in which a reassertion-based major law was enacted. We use logistic regression to estimate the probability that a major piece of reassertion-based legislation is enacted.

Results from four different estimations appear in Table 4. Similar to the results of the count model, the time-in-power and time-out-of-power measures generate no significant findings. Unlike in the count model, however, both variables tapping partisan cooperation – the unified government dummy and the percent president’s party variable – are not statistically significant. The explanatory leverage in the Table 4 estimations comes from the time trend (in columns 1 and 2), but more importantly, from the polarization measure, which is negative and significant in every column. In the column 1 model, a one standard deviation increase in polarization under unified government (holding all other variables at their mean values) lowers the probability of a reassertion-based major law from 0.051 to 0.022.⁸⁷ In the column 3 model, a one standard deviation increase in polarization under unified government (holding all other variables at their mean values) lowers the probability of a reassertion-based major law from 0.078 to 0.027.⁸⁸

[Table 4 about here]

⁸⁷ The similar calculation under divided government is 0.111 to 0.051.

⁸⁸ The similar calculation under divided government is 0.284 to 0.116.

Our third set of models examines the probability of a particular type of reassertion-based major law – one that “delimits” executive branch action – across time.⁸⁹ Thus, the dependent variable is once again dichotomous, and only takes on values of zero (if no delimiting law passed during a given Congress) or one (if one or more than one delimiting law passed during a given Congress). There are 9 unique Congresses in the overall dataset in which a delimiting-based major law was enacted, beginning in the early Reconstruction era and extending through the early Carter administration. We use logistic regression to estimate the probability that a major piece of delimiting-based legislation is enacted.

Results from four different estimations appear in Table 5. Similar to the results of the discretion-based model, the time-out-of-power measure and the variables tapping partisan cooperation generate no significant findings. However, the time-in-power measure for a unified coalition is negative and significant in three of the four estimations. In the column 3 estimation, for example, a one standard deviation increase in time in power under unified government (holding all other variables at their mean values) lowers the probability of a major delimiting enactment from 0.049 to 0.036. The time trend is *negative* and significant in the postbellum-only data, but not in the extended time series (1789-2001), thereby indicating a secular trend away from congressional delimiting efforts since the beginning of Reconstruction. Like the previous two sets of models, the most consistent results stem from the polarization measure, which is negative and significant in every column. In the column 1 model, a one standard deviation increase in polarization under unified government (holding all other variables at their mean values) lowers the probability of a delimiting law from 0.035 to 0.017.⁹⁰ In the column 3 model,

⁸⁹ See Section II for a description of delimiting laws and our explanation for their uniqueness.

⁹⁰ The similar calculation under divided government is 0.025 to 0.012.

a one standard deviation increase in polarization under unified government (holding all other variables at their mean values) lowers the probability of a delimiting law from 0.049 to 0.013.⁹¹

[Table 5 about here]

Our final set of models examines the proportion of reassertion-based major laws as a function of *all* major laws. Here, therefore, the dependent variable ranges from zero to one (and is theoretically continuous therein) in any given Congress. Practically, this variable ranges from zero to 0.222, with the vast majority of cases equal to zero. We generate this variable to assess the degree of importance coalitions place on the creation of reassertion-based major laws – given time and agenda constraints in Congress, a higher proportion indicates a greater level of attention to reassertion in the legislative process. We use OLS regression to estimate the proportion of reassertion-based major laws. But, because the theoretical constraint at the lower level (i.e., zero) is also a *practical* constraint (since most cases are in fact zero), we also reestimate all models with Tobit, as robustness check.

Results from eight different estimations (OLS in columns 1-4, Tobit in columns 5-8) appear in Table 6. Similar to the results of our initial count model, the time-in-power and time-out-of-power measures generate no significant findings, while the variables tapping partisan cooperation – the unified government dummy and the percent president’s party variable – are negative and significant (except in the column 5). Substantively, a shift from divided to unified government in the column 1 estimation lowers the proportion of reassertion-based major laws by 1.8%, which corresponds to a decrease of more than 2/5 of a standard deviation in the dependent variable.⁹² A similar shift from divided to unified government in the postbellum era (column 3)

⁹¹ The similar calculation under divided government is 0.053 to 0.014.

⁹² Alternatively, looking at the estimation in column 2, a one standard deviation increase in the size of the president’s party lowers the proportion of reassertion-based major laws by 1.84%, which corresponds to a decrease of more than 2/5 of a standard deviation in the dependent variable (holding all other variables at their mean values).

lowers the proportion of reassertion-based laws by 4.5%, which corresponds to a decrease of almost 90% of a standard deviation in the dependent variable.⁹³ Finally, the polarization measure is negative and significant in all eight estimations. Substantively, a one standard deviation increase in polarization lowers the proportion of reassertion-based major laws by 0.6% (column 1) or 2.2% (column 3), which corresponds to decrease of either 1/7 or slightly more than 2/5 of a standard deviation in the dependent variable.

[Table 6 about here]

Summary

The empirical results in Tables 3-6 provide some support for the belief that partisan coordination (via our unified government and percent of president's party measures) has a negative impact on successful reassertion attempts, mostly by reducing the frequency of enactments and lowering the proportion of major laws that involve reassertion. Some support exists for secular change affecting reassertion over time, and time-in-power for a unified coalition appears to reduce the probability of a discretion-based major law. The most robust result, however, involved polarization – that is, polarization had a negative and significant affect on reassertion (whether measured in terms of frequencies, likelihoods, or proportions) across *all* estimations in *all* models. If polarization can be seen as a relatively fine-grained measure of ideological conflict, then more conflict of this type clearly runs counter to successful reassertion efforts. And, moreover, such a finding is consistent with theoretical accounts (in this case, Krehbiel's pivotal politics spatial model) and other empirical treatments of those theoretical accounts (McCarty's study of polarization's effect on landmark legislation).

⁹³ Alternatively, looking at the estimation in column 4, a one standard deviation increase in the size of the president's party lowers the proportion of reassertion-based major laws by 2.3%, which corresponds to a decrease of more than 2/5 of a standard deviation in the dependent variable (holding all other variables at their mean values).

V. Conclusion

In this paper we set out to do the following: identify all landmark reassertion laws; categorize them by reassertion strategy, paying particular attention to delimiting efforts; and begin thinking about the conditions *internal* to Congress that influence the likelihood of a successful reassertion effort. Our results suggest that as the presidency has strengthened over time, Congress has also grown more likely to reassert; that polarization plays a significant role in Congressional decision-making in this area; and that delimiting efforts appear to be an artifact of the 19th century. Our analysis therefore contributes to a large and growing literature on both polarization and the dynamics of lawmaking in a system of separated powers. In summing up, however, it is also worthwhile to briefly note what this paper did not examine and how our results point the way toward future research.

First, we do not consider two realms of legislative behavior that are often considered strategies for Congress to reassert itself against the executive branch: investigations and oversight hearings.⁹⁴ Our decision to not build oversight and investigation into the analysis does not mean that we contest their importance to discussions of Congressional reassertion. Indeed, Kriner's work provides evidence to suggest that president's must consider potential political costs resulting from both so they act as a constraint on presidential decision-making.⁹⁵ Yet the mechanism linking oversight and investigations to reassertion is frequently left unexplained. For example, Kriner's analysis does not indicate if these types of Congressional behavior are simply forums for legislative "position-taking" and for exacting political punishment or if they are more

⁹⁴ For example, see: James Hamilton, *The Power to Probe: A Study of Congressional Investigation* (New York: Random House, 1976); Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, D.C.: Brookings Institution, 1990); Mayhew, *Divided We Govern*; Douglas Kriner and Liam Schwartz, "Divided Government and Congressional Investigations," *Legislative Studies Quarterly* 33 (May 2008): 295-321; Schickler, *Disjointed Pluralism*, 155-163.

⁹⁵ Kriner, *After the Rubicon*, 158-160.

meaningful examples of legislative reassertion. We do not know if Congress uses oversight hearings and investigations as a motivating tool to increase the probability of successfully passing reassertion legislation or even if they are linked. Since the argument here posits a successful reassertion effort as one passed by statute, we avoid discussions of these more indirect – and thus more difficult to measure – mechanisms through which Congress might reassert itself.

The analysis above also suggests the need for a more detailed examination of delimiting efforts specifically. As we argue, because this reassertion strategy formally redefines the boundaries between the legislative and executive branch, it represents the most direct form of Congressional reassertion. Also, we find that systematic explanations of Congressional reassertion largely ignore this strategy. A complete account of delimiting efforts specifically, and a more complete analysis of when and why Congress undertakes reassertion using each of the three strategies we identify, will therefore require an index of *all* reassertion legislation that passes or that fails at the final passage stage. With this index we will be able to identify if delimiting efforts are truly an artifact of 19th century politics or if they simply do not always satisfy Stathis’ criteria for “landmark legislation.” Additionally, this index will allow us to determine if the empirical findings reported above are robust across both landmark and non-landmark laws and it will allow for predictions about the conditions that lead members to choose one strategy over the other two.

In other words, the findings reported here indicate that we need a well-specified theory to identify (a) when we should expect legislators will choose to pursue reassertion and (b) how these conditions are linked to the reassertion strategy that they choose. Such a theory will require a more detailed examination of individual member motivations and will need to link these motivations to political conditions *external* to Congress. At times members can be

motivated to push back against an aggrandizing executive but a theory will provide testable hypotheses to determine when and why this motivation becomes salient. A complete reassertion index will allow us to think more systematically about these conditions by both comparing the conditions that increase the probability of reassertion legislation being introduced and successfully passing. These areas of analysis will be dealt with in future iterations of the project started here.

Nevertheless, our analysis provides insights into an area of policy-making and political conflict that is often overlooked by Congress scholars. This analysis identifies important conditions that guide Congressional decisions regarding whether or not to accept the constitution's "invitation to struggle" with the executive and how best to go about doing so. In the years following the George W. Bush presidency and as scholars and commentators alike begin to raise concerns about President Obama's war in Libya, questions about how and if Congress will reassert itself are frequently asked but left unanswered.⁹⁶ We believe that these questions are important, and here we provide some preliminary answers.

⁹⁶ Jack Balkin and Oona Hathaway, "Death of the War Powers Act?" *Washington Post*, 17 May, 2011; Bruce Ackerman, "Obama's Illegal War," *Foreign Policy* (24 March 2011).

Table 1. Major Reassertion Laws by Type

Law	Date	Description	Reining In	Reform	Delimiting
Tenure of Office Act of 1867 (14 Stat. 430)	2/2/1867 (House Pass); 3/2/1867 (House: Veto); 2/18/1867 (Senate: Pass); 3/2/1867 (Senate: Veto)	Prohibits the president from removing federal officials			X
Command of the Army Act of 1867 (14 Stat. 486)	2/20/1867 (House: Pass)	Prohibits the president from removing the General of the Army			X
Posse Comitatus Act of 1878 (20 Stat 152, Section 15)	5/28/1878 (House); 6/8/1878 (Senate)	Prohibits the president from employing army to execute laws			X
Federal Election Laws Repeal Act of 1894 (28 Stat. 36-37)	10/10/1893 (House); 2/7/1894 (Senate)	Repeals Third Force Act which empowers president to use federal troops to protect black voters			X
Neutrality Act of 1935 (49 Stat. 1081)	8/24/1935 (Senate)	Restricts President's authority to institute an embargo on goods to aggressor states			X
Atomic Energy Act of 1946 (60 Stat. 755)	7/20/1946 (House)	Creates Joint Committee on Atomic Energy		X	
Legislative Reorganization Act of 1946 (60 Stat. 812)	6/10/1946	Reduces standing committees and provides for preparation of annual legislative budget		X	
Administrative Procedures Act of 1946 (60 Stat. 237)	3/12/1946	Proscribes new rules for the operation of executive branch agencies		X	
22nd Amendment (61 Stat. 959)	2/6/1947 (House); 3/12/1947 (Senate)	Limits president to two terms			X

Law	Date	Description	Reining In	Reform	Delimiting
Defense Department Reorganization Act of 1958 (72 Stat. 426-438)	7/18/1958 (Senate); 6/12/1958 (House)	Requires secretary of defense to notify Congress of any plans to change established functions of armed services and gives Congress the power to veto such action	X		
Repeal of Gulf of Tonkin Resolution (84 Stat. 2053)	6/24/1970 (Senate); 3/24/1970 (House)	Repeals Gulf of Tonkin Resolution of August 10, 1964			X
Legislative Reorganization Act of 1970 (84 Stat. 1140)	9/17/1970 (House: Pass); 10/6/1970 (Senate: Pass)	Expands staff of Congressional Research Service		X	
War Powers Resolution (87 Stat. 555)	Pass 7/18/1973 (House); 10/12/1973 (House: Conf Report); 11/7/1973 (House: Veto Override); 10/10/1973 (Senate: Conf Report); 11/7/1973 (Senate: Veto Override)	Places new limits on President's authority to send troops abroad			X
Congressional Budget and Impoundment Act of 1974 (88 Stat. 297)	Pass Title I relating to impoundment 5/10/1973 (Senate);	Limits presidents authority to impound funds and revises Congressional budget procedures			X
Freedom of Information Act Amendments of 1974 (88 Stat. 1561)	11/21/1974 (Senate); 10/7/1974 (House: Conf. Report)	Enhances judicial review of executive branch classification decisions; expands definition of executive branch agency			X

Law	Date	Description	Reining In	Reform	Delimiting
National Emergencies Act (90 Stat. 1241)	9/4/1975 (House)	Terminates 4 states of emergency which repeals executive branch emergency powers; outlines procedure for declaring a state of emergency and provides for Congressional review of such emergency declarations			X
Foreign Intelligence Surveillance Act of 1978 (92 Stat. 1783)	4/20/1978 (Senate); 9/7/1978 (House: Pass); 10/12/1978 (House: Conf Report);	Provides for judicial review of all targets of wiretapping			X
Nuclear Nonproliferation Act of 1978 (92 Stat. 120)	9/28/1977 (House: Pass)	Provides for Congressional veto of nuclear export agreements negotiated by the president	X		
1981 Intelligence Authorization Act (94 Stat. 1975)	9/30/1980 (House)	Requires president to inform intelligence committees of covert operations	X		
Boland Amendments (96 Stat. 1865)	12/8/1982 (House); 12/18/1982 (Senate: Pass as Part of Continuing Resolution)	Prohibits CIA and Department of Defense from providing financial assistance to paramilitary groups in Nicaragua and Honduras	X		
Aid to Nicaraguan Contras (100 Stat. 3191)	6/12/1985 (House: Pass Amendment)	Prohibits CIA and Department of Defense from distributing aid funds	X		
Fiscal 1991 Intelligence Authorization Act (105 Stat. 429)	7/31/1991 (House: Pass)	Creates new reporting requirements for covert operations	X		

Table 2. Major Reassertion Laws: Voting Data

Law	Date	Vote
Tenure of Office Act of 1867 (14 Stat. 430)	2/2/1867 (House Pass); 3/2/1867 (House: Veto); 2/18/1867 (Senate: Pass); 3/2/1867 (Senate: Veto)	<p>House Pass: 111-38</p> <p><u>Yea:</u> 104 Republican 6 Unconditional Unionist 1 Unionist</p> <p><u>Nay:</u> 29 Democrat 2 Republican 3 Unconditional Unionist 4 Unionist</p> <p>Senate Pass: 22-10</p> <p><u>Yea:</u> 21 Republican 1 Unconditional Unionist</p> <p><u>Nay:</u> 3 Republican 5 Democrat 1 Unconditional Unionist 1 Unionist</p> <p>House Veto Override: 134-37</p> <p><u>Yea:</u> 125 Republican 7 Unconditional Unionist 1 Unionist 1 Independent Republican</p> <p><u>Nay:</u> 34 Democrat 3 Unionist</p> <p>Senate Veto Override: 35-11</p> <p><u>Yea:</u> 33 Republican 2 Unconditional Unionist</p> <p><u>Nay:</u> 4 Republican 6 Democrat 1 Unionist</p>
Command of the Army Act of 1867 (14 Stat. 486)	2/20/1867 (House: Pass)	<p>House Pass: 62-69</p> <p>(Note: This is a vote to <i>remove</i> the language from the Army Appropriations bill so a “yea” vote is actually a vote <i>against</i> reassertion)</p> <p><u>Yea:</u> 22 Republican 32 Democrat [26 N, 6 S] 3 Unconditional Unionist 5 Unionist</p> <p><u>Nay:</u> 66 Republican 3 Unconditional Unionist</p>
Posse Comitatus Act of 1878 (20 Stat. 152, Section 15)	5/28/1878 (House); 6/8/1878 (Senate)	<p>House Pass: 130-117</p> <p><u>Yea:</u> 1 Republican 127 Democrat 2 Independent Democrat</p> <p><u>Nay:</u> 112 Republican 5 Democrat</p>

Law	Date	Vote				
		<p align="center">Senate Pass: 21-25</p> <p>(Note: In the Senate the vote was to <i>remove</i> the Posse Comitatus language from the House bill so a "yea" vote is actually a vote <i>against</i> reassertion)</p> <table> <tr> <td><u>Yea:</u> 21 Republican</td> <td><u>Nay:</u> 2 Republican 23 Democrat</td> </tr> </table>	<u>Yea:</u> 21 Republican	<u>Nay:</u> 2 Republican 23 Democrat		
<u>Yea:</u> 21 Republican	<u>Nay:</u> 2 Republican 23 Democrat					
Federal Election Laws Repeal Act of 1894 (28 Stat. 36-37)	10/10/1893 (House); 2/7/1894 (Senate)	<p align="center">House Pass: 201-102</p> <table> <tr> <td><u>Yea:</u> 190 Democrat 2 Independent Democrat 9 Populist</td> <td><u>Nay:</u> 102 Republican</td> </tr> </table> <p align="center">Senate Pass: 39-28</p> <table> <tr> <td><u>Yea:</u> 35 Democrat 3 Populist 1 Silver</td> <td><u>Nay:</u> 28 Republican</td> </tr> </table>	<u>Yea:</u> 190 Democrat 2 Independent Democrat 9 Populist	<u>Nay:</u> 102 Republican	<u>Yea:</u> 35 Democrat 3 Populist 1 Silver	<u>Nay:</u> 28 Republican
<u>Yea:</u> 190 Democrat 2 Independent Democrat 9 Populist	<u>Nay:</u> 102 Republican					
<u>Yea:</u> 35 Democrat 3 Populist 1 Silver	<u>Nay:</u> 28 Republican					
Neutrality Act of 1935 (49 Stat. 1081)	8/24/1935 (Senate)	<p align="center">Senate Pass: 79-2</p> <table> <tr> <td><u>Yea:</u> 17 Republican 60 Democrat 1 Progressive 1 Farm-Labor</td> <td><u>Nay:</u> 2 Democrat</td> </tr> </table> <p>(Note: No recorded House vote.)</p>	<u>Yea:</u> 17 Republican 60 Democrat 1 Progressive 1 Farm-Labor	<u>Nay:</u> 2 Democrat		
<u>Yea:</u> 17 Republican 60 Democrat 1 Progressive 1 Farm-Labor	<u>Nay:</u> 2 Democrat					
Atomic Energy Act of 1946 (60 Stat. 755)	7/20/1946 (House)	<p align="center">House Pass: 266-79</p> <table> <tr> <td><u>Yea:</u> 105 Republican 159 Democrat 1 Progressive 1 American Labor</td> <td><u>Nay:</u> 67 Republican 12 Democrat</td> </tr> </table>	<u>Yea:</u> 105 Republican 159 Democrat 1 Progressive 1 American Labor	<u>Nay:</u> 67 Republican 12 Democrat		
<u>Yea:</u> 105 Republican 159 Democrat 1 Progressive 1 American Labor	<u>Nay:</u> 67 Republican 12 Democrat					
Legislative Reorganization Act of 1946 (60 Stat. 812)	6/10/1946	<p align="center">Senate Pass: 49-16</p> <table> <tr> <td><u>Yea:</u> 22 Republican, 26 Democrat [16N, 10S] 1 Progressive</td> <td><u>Nay:</u> 13 Democrat [4N, 9S] 3 Republican</td> </tr> </table> <p align="center">House Pass: 229-61 (Unrecorded Division Vote)</p>	<u>Yea:</u> 22 Republican, 26 Democrat [16N, 10S] 1 Progressive	<u>Nay:</u> 13 Democrat [4N, 9S] 3 Republican		
<u>Yea:</u> 22 Republican, 26 Democrat [16N, 10S] 1 Progressive	<u>Nay:</u> 13 Democrat [4N, 9S] 3 Republican					
Administrative Procedures Act of 1946 (60 Stat. 237)	3/12/1946	Passed by voice vote				

Law	Date	Vote
22nd Amendment (61 Stat. 959)	2/6/1947 (House); 3/12/1947 (Senate)	House Pass: 285-122 <u>Yea:</u> 238 Republican 47 Democrat [9N, 38S] <u>Nay:</u> 121 Democrat [53N, 68S] 1 American Labor Senate Pass: 59-23 <u>Yea:</u> 46 Republican 13 Democrat [3N, 10S] <u>Nay:</u> 23 Democrat [13N, 10S]
Defense Department Reorganization Act of 1958 (72 Stat. 426)	7/18/1958 (Senate); 6/12/1958 (House)	House Pass: 402-1 <u>Yea:</u> 187 Republican 215 Democrat [114N, 101S] <u>Nay:</u> 1 Republican Senate Pass: 80-0 <u>Yea:</u> 40 Republican 40 Democrat
Repeal of Gulf of Tonkin Resolution (84 Stat. 2053)	6/24/1970 (Senate: Amdt.)	Senate Pass: 81-10 (Note: added as an amendment so a “yea” vote is in support of reassertion through repeal) <u>Yea:</u> 41 Republican 40 Democrat [32N, 8S] <u>Nay:</u> 1 Republican 9 Democrat [1N, 8S] (No vote on this amendment in the House)
Legislative Reorganization Act of 1970 (84 Stat. 1140)	9/17/1970 (House: Pass); 10/6/1970 (Senate: Pass)	House Pass: 326-19 <u>Yea:</u> 140 Republican 186 Democrat [127N, 59S] <u>Nay:</u> 6 Republican 13 Democrat [1 N, 12S] Senate Pass: 59-5 <u>Yea:</u> 29 Republican 30 Democrat [24N, 6S] <u>Nay:</u> 5 Democrat [5S]
War Powers Resolution (87 Stat. 555)	7/18/1973 (House: Pass); 10/12/1973 (House: Conf Report); 11/7/1973 (House: Veto Override); 10/10/1973	House Pass: 244-170 <u>Yea:</u> 73 Republican 170 Democrat [127N, 43S] 1 Ind. Democrat <u>Nay:</u> 109 Republican 61 Democrat [26N, 35S] House Conf. Report: 238-122 <u>Yea:</u> 75 Republican <u>Nay:</u> 84 Republican

Law	Date	Vote
	(Senate: Conf Report); 11/7/1973 (Senate: Veto Override)	162 Democrat [116N, 46S] 38 Democrat [14N, 24S] 1 Ind. Dem House Veto Override: 284-135 <u>Yea:</u> <u>Nay:</u> 87 Republican 103 Republican 196 Democrat [141N, 55S] 32 Democrat [9N, 23S] 1 Ind. Dem Senate Conf. Report: 75-20 <u>Yea:</u> <u>Nay:</u> 27 Republican 12 Republican 47 Democrat [35 N, 12 S] 7 Democrat [5N, 2S] 1 Independent 1 Conservative Senate Veto Override: 75-18 <u>Yea:</u> <u>Nay:</u> 25 Republican 14 Republican 49 Democrat [36N, 13S] 3 Democrat [2N, 1S] 1 Independent 1 Conservative
Congressional Budget and Impoundment Act of 1974 (88 Stat. 297)	6/18/1974 (House: Conf. Report);	House Conf. Report: 401-6 <u>Yea:</u> <u>Nay:</u> 177 Republican 2 Republican 223 Democrat [144N, 79S] 4 Democrat [4N] 1 Ind. Democrat
Freedom of Information Act Amendments of 1974 (88 Stat. 1561)	3/14/1974 (House: Pass); 10/7/1974 (House: Conf. Report); 11/20/1974 (House: Veto Override); 5/30/1974 (Senate: Pass); 11/21/1974 (Senate: Veto Override)	House Pass: 383-8 <u>Yea:</u> <u>Nay:</u> 171 Republican 5 Republican 211 Democrat [140N, 71S] 3 Democrat [3S] 1 Ind. Dem House Conf. Report: 349-2 <u>Yea:</u> <u>Nay:</u> 145 Republican 1 Republican 203 Democrat [136N, 67S] 1 Democrat [1S] 1 Ind. Dem House Veto Override: 370-31 <u>Yea:</u> <u>Nay:</u> 146 Republican 25 Republican 223 Democrat [152N, 71S] 6 Democrat [2N, 4S] 1 Ind. Dem. Senate Pass: 56-29 <u>Yea:</u> <u>Nay:</u>

Law	Date	Vote
		<p>19 Republican 37 Democrat [32N, 5S]</p> <p>17 Republican 11 Democrat [4N, 7S] 1 Independent</p> <p>Senate Veto Override: 65-27</p> <p><u>Yea:</u> 18 Republican 46 Democrat [40 N, 6 S] 1 Independent</p> <p><u>Nay:</u> 20 Republican 7 Democrat [7S]</p>
National Emergencies Act (90 Stat. 1241)	9/4/1975 (House: Pass)	<p>House Pass: 388-5</p> <p><u>Yea:</u> 132 Republican 256 Democrat [176N, 80S]</p> <p><u>Nay:</u> 5 Democrat [5N]</p>
Foreign Intelligence Surveillance Act of 1978 (92 Stat. 1783)	9/7/1978 (House: Pass); 10/12/1978 (House: Conf Report); 4/20/1978 (Senate);	<p>House Pass: 246-128</p> <p><u>Yea:</u> 32 Republican 214 Democrat [162N, 52S]</p> <p><u>Nay:</u> 90 Republican 38 Democrat [13N, 25S]</p> <p>House Conf. Report: 226-176</p> <p><u>Yea:</u> 18 Republican 208 Democrat [161N, 47S]</p> <p><u>Nay:</u> 118 Republican 58 Democrat [23N, 35S]</p> <p>Senate Pass: 95-1</p> <p><u>Yea:</u> 36 Republican 58 Democrat [40N, 18S] 1 Independent</p> <p><u>Nay:</u> 1 Republican</p>
Nuclear Nonproliferation Act of 1978 (92 Stat. 120)	9/28/1977 (House: Pass)	<p>House Pass: 412-0</p> <p><u>Yea:</u> 139 Republican 272 Democrat [188 N, 84 S]</p>
Fiscal 1981 Intelligence Authorization Act (94 Stat. 1975)	9/30/1980 (House: Conf. Report)	<p>House Conf. Report: 385-18</p> <p><u>Yea:</u> 147 Republican 238 Democrat [159N, 79S]</p> <p><u>Nay:</u> 2 Republican 16 Democrat [15N, 1S]</p>
Boland Amendments (96 Stat. 1865)	12/8/1982 (House: Pass); 12/18/1982 (Senate: Pass as Part of Continuing Resolution)	<p>House Pass: 411-0</p> <p><u>Yea:</u> 181 Republican 229 Democrat [154N, 75S] 1 Independent</p> <p>Senate Pass: 55-41</p> <p><u>Yea:</u> <u>Nay:</u></p>

Law	Date	Vote
		37 Republican 18 Democrat [9 N, 9 S]
		15 Republican 25 Democrat [20N, 5S]
Aid to Nicaraguan Contras (100 Stat. 3191)	6/12/1985 (House: Pass Amendment barring CIA DoD from using funds);	House Pass (Amdt): 249-174 <u>Yea:</u> 165 Republican 84 Democrat [22 N, 62 S]
		<u>Nay:</u> 13 Republican 161 Democrat [142N, 19S]
Fiscal 1991 Intelligence Authorization Act (105 Stat. 429)	7/31/1991 (House: Pass)	House Pass: 419-4 <u>Yea:</u> 163 Republican 256 Democrat [173N, 83S]
		<u>Nay:</u> 3 Democrat 1 Independent

Table 3. Frequency of Reassertion-Based Major Laws

Explanatory Variable	Model 1 (1789-2001)	Model 2 (1789-2001)	Model 3 (1865-2001)	Model 4 (1865-2001)
Unified government	-0.92 (0.62)	---	-1.70* (1.01)	---
Percent President Party	---	-7.82** (3.95)	---	-5.87* (2.91)
Time in power for unified coalition	0.37 (0.19)	0.16 (0.20)	0.18 (0.26)	0.08 (0.20)
Time out of power for new unified coalition	0.02 (0.07)	0.03 (0.08)	0.06 (0.07)	0.02 (0.09)
Time Trend	0.03** (0.01)	0.03*** (0.01)	-0.01 (0.02)	0.01 (0.01)
Polarization	-4.45** (1.84)	-5.02*** (1.54)	-7.45*** (1.54)	-6.71*** (1.68)
Constant	-0.54 (1.24)	3.24 (2.00)	4.55* (2.36)	5.61*** (1.87)
Wald χ^2 stat (No. obs.)	24.77*** (107)	30.42*** (107)	25.92*** (69)	25.14*** (69)

Note: Each column is a separate model of reassertion-based major laws estimated using negative binomial regression. Robust standard errors in parentheses.

* $p < .10$, ** $p < .05$, *** $p < .01$ (two-tailed tests)

Table 4. Probability of a Reassertion-Based Major Law

Explanatory Variable	Model 1 (1789-2001)	Model 2 (1789-2001)	Model 3 (1865-2001)	Model 4 (1865-2001)
Unified government	-0.84 (0.80)	---	-1.54 (1.22)	---
Percent President Party	---	-5.40 (5.32)	---	-3.98 (4.13)
Time in power for unified coalition	-0.13 (0.22)	-0.08 (0.27)	-0.05 (0.35)	-0.21 (0.32)
Time out of power for new unified coalition	0.02 (0.10)	0.02 (0.11)	0.06 (0.10)	0.02 (0.13)
Time Trend	0.03*** (0.01)	0.03*** (0.01)	0.00 (0.02)	0.00 (0.02)
Polarization	-5.55** (2.35)	-5.69*** (2.35)	-8.88*** (2.60)	-8.04*** (2.50)
Constant	0.04 (1.34)	2.50 (2.94)	5.63* (2.89)	6.16** (3.13)
χ^2 stat (No. obs.)	19.04*** (107)	19.18*** (107)	15.39*** (69)	13.47** (69)
Pseudo R^2	0.25	0.26	0.20	0.19

Note: Each column is a separate model of reassertion-based major laws estimated using logistic regression. Robust standard errors in parentheses.

* $p < .10$, ** $p < .05$, *** $p < .01$ (two-tailed tests)

Table 5. Probability of a Delimiting-Based Major Law

Explanatory Variable	Model 1 (1789-2001)	Model 2 (1789-2001)	Model 3 (1865-2001)	Model 4 (1865-2001)
Unified government	0.35 (0.98)	---	-0.09 (1.33)	---
Percent President Party	---	-3.97 (7.93)	---	-0.76 (4.46)
Time in power for unified coalition	-0.83* (0.48)	-0.42 (0.30)	-0.89* (0.49)	-0.85** (0.36)
Time out of power for new unified coalition	0.05 (0.09)	0.08 (0.10)	0.10 (0.14)	0.10 (0.13)
Time Trend	0.02 (0.01)	0.01 (0.01)	-0.04* (0.02)	-0.04* (0.02)
Polarization	-4.73* (2.90)	-4.93* (2.88)	-10.86*** (3.58)	-10.75*** (3.47)
Constant	0.16 (1.58)	2.25 (3.75)	9.06** (3.64)	9.24** (3.91)
χ^2 stat (No. obs.)	9.65* (107)	13.84** (107)	16.33*** (69)	18.75*** (69)
Pseudo R^2	0.18	0.19	0.23	0.23

Note: Each column is a separate model of delimiting-based major laws estimated using logistic regression. Robust standard errors in parentheses.

* $p < .10$, ** $p < .05$, *** $p < .01$ (two-tailed tests)

Table 6. Proportion of Major Laws That Involve Reassertion

Explanatory Variable	Model 1 (1789-2001)	Model 2 (1789-2001)	Model 3 (1865-2001)	Model 4 (1865-2001)	Model 5 (1789-2001)	Model 6 (1789-2001)	Model 7 (1865-2001)	Model 8 (1865-2001)
Unified government	-0.018* (0.010)	---	-0.045** (0.021)	---	-0.101 (0.066)	---	-0.161* (0.086)	---
Percent President Party	---	-0.149* (0.085)	---	-0.208** (0.101)	---	-0.679* (0.367)	---	-0.529* (0.270)
Time in power for unified coalition	0.001 (0.001)	0.003 (0.003)	0.006 (0.007)	0.004 (0.006)	-0.004 (0.016)	0.005 (0.018)	0.008 (0.026)	0.003 (0.021)
Time out of power for new unified coalition	0.001 (0.002)	0.001 (0.002)	0.003 (0.003)	0.002 (0.002)	0.006 (0.009)	0.006 (0.008)	0.009 (0.008)	0.006 (0.008)
Time Trend	0.0002* (0.0001)	0.00017 (0.00015)	-0.0006 (0.0005)	-0.0005 (0.0004)	0.002*** (0.0007)	0.002*** (0.0006)	-0.002 (0.002)	-0.001 (0.001)
Polarization	-0.040* (0.021)	-0.052** (0.021)	-0.149*** (0.048)	-0.150*** (0.051)	-0.390*** (0.136)	-0.418*** (0.135)	-0.752*** (0.184)	-0.673*** (0.156)
Constant	0.037* (0.015)	0.118** (0.053)	0.189*** (0.068)	0.270** (0.103)	-0.013 (0.111)	0.327 (0.202)	0.590*** (0.218)	0.703*** (0.224)
<i>F</i> stat (No. obs.)	3.02** (107)	3.21*** (107)	3.31** (69)	2.62* (69)	11.57*** (107)	10.72*** (107)	5.99*** (69)	6.74*** (69)
R^2	0.11	0.16	0.18	0.23	0.44	0.53	0.55	0.56

Note: Each column is a separate model of the proportion of major laws that involve reassertion estimated using OLS regression (columns 1 through 4) and Tobit regression (columns 5 through 8). Lower bound set at zero in Tobit models. Robust standard errors in parentheses.

* $p < .10$, ** $p < .05$, *** $p < .01$ (two-tailed tests)