PROFESSIONAL DEVELOPMENT

# AP® Government and Politics: United States

## Balance of Power Between Congress and the President

Special Focus

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# Introduction

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The relationship between the presidency and Congress has been, since the beginning, a difficult one. The founders put into place a system of checks and balances to help ensure that there would always be such a struggle. The inherent tension between one branch writing laws and budgets and the other branch carrying out the laws and spending the money has been a basic characteristic of American government.

This symposium looks at that struggle in six different contexts. It aspires to give teachers material to help them illustrate the relationship between the legislative and executive branches in national government. The readings are short and accessible; they could easily be assigned readings for AP® students in their quest for understanding as well. Each essay is accompanied with a list of several key terms that may be included in an AP Exam, and a sample essay formatted in the manner of an AP free-response question. In other words, the goal of this symposium is that it be as relevant as possible to the AP U.S. Government and Politics course. The authors of these essays have extensive experience with the AP Program and have served as Readers at the AP Reading, so they come not only as scholars of American politics but as participants in the AP process.

The essay by Lydia Andrade, "Going Public and the Problem of Avoiding Presidential/Congressional Compromise," examines one of the major changes in presidential/congressional politics in the electronic media age. Simply put, when presidents make public proclamations about their policy positions, the result is that they have difficulty negotiating with Congress on those topics. If they compromise on issues, they look as if they are backing down on promises they have made. As a result, bargaining between the two branches has evolved into a different form in recent decades. Andrade's essay addresses that changing relationship.

Adam Schiffer and Carrie Currier examine one of the most important sources of presidential conflict with Congress: the war-making power. In "War Powers, International Alliances, the President, and Congress," Schiffer and Currier look at two issues that have dominated the political debates regarding U.S. foreign policy in recent years: (1) the tension between the congressional power to declare war and the presidential power as commander in chief, and (2) the use of multilateral force and unilateral force in war-making. They examine how these debates have impacted the conduct of wars in the Persian Gulf and Iraq.

Richard Waterman addresses another issue that challenges the relationship between presidential and congressional authority in his essay "Presidential Signing Statements: The Constitutional Versus the New Government Models." Waterman examines the extraconstitutional "signing statement" strategy used in recent years. He demonstrates that the use of signing statements is a step away from the traditional constitutional balance of power between the president and Congress, moving toward a new government model that might jeopardize the balance of power in the United States.

Jeffrey Fine examines the consequences of divided government on presidential–congressional relations in "The Problem of Divided Government in an Era of Polarized Parties." He demonstrates that divided government leads to difficulties in enacting laws that can lead to gridlock. When divided government is accompanied with party polarization, there can also be increased incidence of filibusters. He argues, however, that to say that legislating is more difficult in a divided government does not necessarily lead to worse governmental outcomes.

The essays by Peter Yacobucci and James D. King examine the role of senate confirmation of judicial and executive appointments. Yacobucci shows that the process of appointing Supreme Court justices is one that often leads to conflict. Using the cases of Robert Bork, Clarence Thomas, and John Roberts, he shows the types of issues that might characterize the confirmation process regarding judicial appointments by the president.

While senators also confirm major executive appointments, the politics are quite different; judicial appointments are lifetime appointments, while cabinet and executive office personnel serve at the pleasure of the president and usually have relatively short tenures in office. King elaborates on the politics of executive confirmation in his essay "Senate Confirmation of Cabinet Appointments." He uses a research article format and provides tables to present data. The essay demonstrates the degree to which various weaknesses can make confirmation more difficult.

As a group, these essays will allow AP teachers to take material beyond the textbook to help students assess the complex relationships between the president and Congress. The essays will allow ambitious students to go beyond the norm and begin to understand the complexity of institutional relationships. They will learn key terms that will be helpful in preparing for their exam, and teachers will have sample exam questions that might help students translate their substantive knowledge to successfully responding to free-response questions.

# Going Public and the Problem of Avoiding Presidential/Congressional Compromise

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Every president seeks to determine or influence policy. Upon election, presidents bring to office their goals, objectives, and hopes for public policy. To accomplish these policy initiatives and changes they have to work with Congress. The institutions of Congress and the presidency are designed such that only rarely can one institution dominate policymaking. Their interdependence is so strong that most of the time they must find ways to compromise or get along. Congress controls the budget so the president has to find a way to work with Congress in order to accomplish virtually any goals. On the other hand, the president has veto power over legislation and is the head of the executive branch (bureaucracy), so Congress has to work with the president to avoid time-consuming roadblocks and conflicts. So, they work together and compromise. Most of the time.

The president has numerous tools at his disposal to aid in his efforts to convince Congress to work toward his policy goals. He can promise to help the reelection campaign of a member of Congress, provide (or deny) access to information on policy negotiations, invite members of Congress to White House events or to travel with him on Air Force One, etc. These resources are desirable to the members of Congress and can be used in negotiations (both implicitly and explicitly) with Congress. The overwhelming majority of presidential initiatives are only accomplished through long, detailed negotiations and compromise. Therefore, presidents will use all their political skills and resources to influence members of Congress.

Compromise and cooperation may be desirable as a mechanism for institutional balance, but that does not mean that it is the preference of either party. This institutional interdependence most of the time results in neither Congress nor the

president succeeding in achieving *all* they desire. The essence of compromise is that each party relinquishes or gives in on some of their positions so that the final product represents something less than each party may want but that on which both parties can agree. The degree to which each party must retreat from their optimal position will vary by circumstance and case but in the end, the need for agreement between the institutions will yield some sort of middle ground position.

Compromise can also be extremely time consuming. It does not have to be, but most of the time it is. Each party will endeavor to achieve their goals. It only takes one participant to pull back or stall to delay the process on any policy initiative. Even when all parties are sincerely working to reach a compromise, it can take a significant amount of time to reconcile the various demands on, perspectives on, and interests of any issue. And the greater the number of competing interests or viewpoints, the more difficult and time consuming the reconciliation may be.

Additionally, presidents may find compromise too costly in terms of the resources it requires. Access to the White House, photo ops with the president, inclusion of members of Congress in information sessions, or promises of consideration of future issues/concerns, etc., are all resources of the president. In general, the more the president asks of Congress, the more he may have to use his legislative resources to get it.

Furthermore, compromise and negotiations are not necessarily isolated to singular policy initiatives. All members of Congress have their own agendas and may only be willing to negotiate with the president on one issue by trading votes, support, or resources on another issue. This may be particularly true in cases where the president really wants something but lacks the ability to push it through without significant bargaining. The president may have to trade his future support or position on an issue in order to gain the support or cooperation of Congress today. This type of linking policy issues can make accomplishing the president's agenda significantly more difficult than might be expected if one considers each policy action as a separate and unrelated objective.

Given the time, cost, and sometimes unrewarding nature of compromise, it is not surprising that presidents may seek ways to bypass the negotiation of compromise in order to attempt to achieve their policy goals without modification.

## Going Public

One of the most common ways presidents have avoided the need to compromise with Congress is by going public. The term "going public" is used to describe activities

that enable the president to take his issue/message directly to the people. The goal or intention here is to influence the public, who in turn put pressure on Congress. For example, when the president speaks to the nation in a televised address, when he makes a speech to a group of conventioneers, or even when he attends the opening of a new technology center, he can draw attention to and make arguments for his legislative goals. Going public can be as explicit as the president using a national television address to ask the American public to contact their members of Congress to express their support for his proposals. Going public can also be more subtle. The White House can stimulate media coverage (and, with luck, public interest) on a topic or issue by giving press briefings and updates, having cabinet officers visit locations that highlight the issue, as well as by less direct means. If the message is well received by the public, Congress may also respond.

Presidents can go public in either a positive or negative manner. That means the president can spend his time expounding the benefits of some pending legislation or prospective policy change or he can be out front criticizing that initiative. The negative tone may not be received well by the public, so presidents are likely to not go public negatively unless they are faced with few other options. It is much more common for them to go public in a positive way. Presidents can also turn to the public on their own initiatives as well as those put forth by Congress or the bureaucracy. However, presidents are more likely to only invest their time, efforts, and resources going public on their own policy objectives.

The classic view of going public is as described above: presidents turn to the public as a means of influencing Congress. However, given the well-known apathy and lack of participation of the American citizenry, some authors have argued that going public is really more of a signal. In this scenario presidents make public speeches, travel, or take part in other such public activities in order to send cues to political elites. In this case those elites are Congress and the bureaucracy. The president sends signals or cues concerning presidential preferences and priorities. Members of Congress and the bureaucracy can then use these cues to make efficient and informed decisions. Knowing what the president wants and will accept in terms of policy changes can provide a framework for members of Congress in the development of their own positions. These presidential cues raise the saliency of the issue and may set the framework within which the discussion of the issue takes place.

No matter which view of going public one accepts (presidential activity is intended to stimulate public influence on Congress, or presidential activity is a signal

to political elites), one thing is clear: presidents have been taking their voice, policies, and concerns to the public more and more over time. In the post–World War II era the average number of public speeches given by the president has increased from 84 per year under Eisenhower to more than 300 per year under President Clinton.

## The Ease of Going Public

Going public is an age-old strategy, discussed as early as Madison in *Federalist Paper #49*. While presidents have clearly known of this tool for quite some time, it appears to be more attractive than it once was. There are several developments to which this can be attributed. The ease of presidential travel that came about with the commercialization of air travel after World War II has made it easier for presidents to visit locations (and take the press corps with them) that highlight their agenda. Presidential travel and visits, whether foreign or domestic, draw significant media attention and may bring saliency to a policy or issue of concern to the president.

The advent of the modern media has also made going public more appealing. The proliferation of televisions in every home in America changed the nature of public appeals and stimulated a dramatic increase in the use of photo opportunities (aka photo ops). The development of the Internet and the 24-hour news cycle has dramatically increased the number of outlets for information and the volume of presidential coverage. The White House can easily post pictures, speeches, information, and policy objectives on the Web, giving the American public unprecedented access into the intentions and workings of the presidency. Perhaps more important, the White House can also respond at a moment's notice to news, events, and comments made by other political actors. Today the president can hop on Air Force One, fly across the country to give a speech to some group, have CNN cover it live, post the transcripts of the speech on the Web before he leaves, take the appropriate photos and make sure they are distributed to the news outlets, and be back in D.C. that same evening to discuss the public response with members of Congress. The amount of media coverage of presidential actions, speeches, goals, and behavior has never been greater. And as such, the access the president is given into the lives and living rooms of the American public is unprecedented. If the president wants to relay a message to us, it is not that difficult.

## Issues and Going Public

So, if it is so easy, why don't presidents go public more often? Why are they not talking to us all the time? Before a president decides to take an issue to the public, there are some factors to consider. First of all, not all issues go public well. Some issues or topics are going to be more sympathetic, interesting, or understandable to the general public than others. The American public is not known for its attention span or its comprehension of policy making. Policy complexity may determine if a president decides to offer a policy solution, whether it gets discussed publicly, as well as its prospects for success. Some issues are so complicated, with so many interests at stake, that the president may decide it is not worth the political capital to tackle the problem at all. Or if the issue *is* addressed, he may prefer to do so quietly so that the risk of incurring a very public failure is reduced.

If an issue is particularly complicated or difficult, it is not a good candidate for the public's interest. For example, it is easier to go public on an education bill that provides money for college scholarships than for one that would modify the tax law on corporate foreign investments. The public "gets" education but they have little understanding (or interest) in corporate tax law. Now virtually all legislative proposals and issues are complex. The key, however, will be to summarize and simplify, or "package," the issue in some way that captures the American public's attention.

Going public is, in essence, a request. When the president goes public he is asking the American public to help him move or persuade Congress into action (or he is signaling political elites of his priorities). And with any favor or request, timing can be crucial. Gauging when the public will be ready to move on an issue and force congressional compliance can be tricky. The saliency of an issue can be critical. If the president has to make the public aware of, care about, *and* support his position on an issue, he has a much more difficult task (and perhaps a lower probability of success) than if the issue is already salient to the public. Issues that at one point did not resonate with the public will at some other point in time cause dramatic calls for action. For example, when President Johnson got passed into law a complicated package of domestic policy initiatives (which had gone nowhere just a few years earlier) known as the War on Poverty, it was about timing and packaging. Johnson was able to "sell" these initiatives to the public effectively in part by invoking the legacy of his fallen predecessor, John F. Kennedy.

Beyond saliency, the popularity of an issue may also determine if a president goes public on any policy objective. Where **saliency** provides a sense that the public is aware of something, popularity tells us the level of public support for resolving the

issue. It is one thing for the populace to recognize something as a problem in society; it is another thing for them to believe it is the appropriate role of government to address it. Presidents are more likely to go public and call for action on those issues for which the public already favors resolution.

Finally, presidents are significantly less likely to go public on easily winnable issues. If the policy objective/goal seems easily within reach of the president, he is not likely to waste his time and the goodwill of the American public by asking for their support. This also suggests presidents will not go public on issues that are foregone conclusions just to appear successful. When they go public on a topic it is because the president really believes he needs to in order to accomplish his goals.

## The Political Environment

Presidents also have to consider their own standing or support in the public when considering going public. Popular presidents will enjoy a public that is open to their appeals and agenda, while presidents with low public approval ratings will find it more difficult to persuade their constituents into action. Even if the president is able to persuade the public, he will find Congress uncooperative when they know his approval ratings are not good. Low **public approval ratings** of the president free members of Congress who would not otherwise support him to pursue their own policy objectives and goals. When presidential approval declines, Congress may consider any public interest in a given topic as fleeting and not be as moved by it as when the president enjoys a great deal of public support. This is particularly true in light of the fact that all presidents see a steady decline in their approval ratings over time. There will be a decline; the only question is how soon and how far. Congress knows this and they will use this information in their determination of response. President George W. Bush's ratings for much of his second term were so low that he found a "going public strategy" difficult to utilize.

The modern presidency is one of constant polling and gauging of public opinion. Presidents have been collecting and attempting to use public opinion data for many years. However, with each passing administration we have seen presidents increase their efforts to measure public opinion both more frequently and on a greater variety of topics. This seemingly ever-growing use of public opinion polls as guidance for presidential action is known as the rise of the **permanent campaign**. Just as they do during their campaigns, presidents now take into consideration public opinion on issues as well as presidential approval in general when determining strategy and policy action.

The partisan and ideological makeup of Congress can also influence the decision to go public. Presidents who enjoy a Congress controlled by their own political party are less likely to need to go public than those facing a Congress of the opposing party. That said, party identification can be outweighed by ideology in the determination of presidential strategy. Presidents may choose to compromise/build coalitions with a Congress controlled by the other party if the ideological majority is similar to that of the president. President Clinton was often able to work successfully with conservatives from both parties in Congress to accomplish his legislative goals, as they shared a common ideological foundation that facilitated legislative action. The shared conservatism enabled the president to work across party lines. However, the congressional dynamics that are most likely to push the president to go public also reflect those instances when party and ideology are working against him. Presidents will be more inclined to go public when faced with congressional gridlock or divided government. President George W. Bush was criticized for failing to compromise with Congress even when the Democrats were in control, stubbornly preferring to "appeal to his conservative base" than to compromise with the majority in Congress (Jacobson 2008).

Presidential approval can work in conjunction with the ideological makeup of Congress to influence presidential strategy. The role of presidential popularity in Congress is not fixed. It will fluctuate in importance on congressional voting based on the partisan and ideological pressures faced by members of Congress. Members of Congress get voting cues from their constituency, their party, and their ideology. When these three sources are in harmony, the directions to the members are clear. When a member's constituency, party, and ideology provide conflicting directives we refer to the member as **cross-pressured**. Cross-pressured members of Congress are more susceptible to the influence of a popular president. When it does not get clear signals from its political party, ideology, and constituency, Congress is more inclined to follow the lead of a president who enjoys the support of the American people.

## The Risks of Going Public

Is avoiding compromise always such a good idea? Going public does entail some risks that should be considered. If a president chooses to go public but is not successful in achieving his legislative goals, the ramifications can be significant. If the president successfully raises awareness of his position but that does not translate into public support or congressional action, then the president fails in a very public light. He has just taken a public stand, made his opinion known, and been rejected by Congress.

Not only does the president look weak, ineffective, and distinctly nonpresidential, the situation also signals members of Congress that ignoring presidential preference has few significant ramifications.

Even if the president is successful in his efforts to go public, this is not a strategy that can be used too often. Asking the public for their support too frequently may make a president look weak, appearing as if he cannot get the job done on his own. The American public also has a fairly short attention span. If a president turns to them too frequently he will lose the novelty of the communication and they will cease to pay attention or respond.

Additionally, going public runs the risk of offending Congress. Members of Congress may feel the president has bypassed them or gone over their heads by appealing directly to the public. This resentment may not only affect the current policy discussion but it may also carry over into future dealings with Congress. Presidents have to be concerned about how their going public is perceived by Congress and the public. They also need to be aware that they should not do it too frequently.

## Conclusion

If a president goes public and wins, he is able to achieve his legislative goals exactly as he wishes. And unlike traditional compromises, he will not have to settle or negotiate on his preferences. The policy initiatives will be exactly as the president planned. However, if the president goes public, he may be jeopardizing future dealings with both the public and Congress. The determination of strategy on any policy objective will have to include the consideration of the nature of the issue, timing, saliency, presidential popularity, congressional makeup, etc. With so many variables in the strategy equation we should not be surprised when presidents select poorly and end up not accomplishing their objectives.

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# Study Information

**Key terms:**

1. **Cross-pressured members:** Members of Congress who receive conflicting directions from their constituencies on public policy. Cross-pressured members of Congress are more susceptible to the influence of a popular president than are members from strongly partisan districts.
2. **Going public:** The practice often used by presidents of taking their policy agendas directly to the public rather than to Congress.
3. **Permanent campaign:** The constant attention to public opinion polls that cause political leaders to respond constantly to changing political opinions. The ever-growing use of public opinion polls as guidance for presidential action might cause a president to choose to go public on an issue that is both salient and popular among the citizens of the nation.
4. **Photo ops:** The strategy used by presidents to keep their faces and images before the public constantly. The proliferation of televisions in every home in America changed the nature of public appeals and stimulated a dramatic increase in the use of photo ops. The development of the Internet and the 24-hour news cycle has dramatically increased the number of outlets for information and the volume of presidential coverage.

5. **Public approval rating:** The popularity of the president in public opinion polls. A high rating might make going public successful, but low ratings free members of Congress to pursue their own policy objectives and goals and not respond to a president's initiatives.
6. **Saliency:** A sense that the public is aware of a policy and that it is of importance to them. Going public will be more likely to succeed on a salient issue than on one that is not well known or of major importance.

# Sample free-response question:

In the modern age, presidents often try to influence congressional decision-making by a process known as "going public." In your essay, answer the following:

(a) Define what is meant by "going public."
(b) Discuss one reason that presidents might go public and identify one risk associated with the strategy.
(c) Define what is meant by "cross-pressured members" of Congress.
(d) Explain how the president might use such techniques as "photo ops" and pressure on "cross-pressured members" of Congress to achieve his goals.

# War Powers, International Alliances, the President, and Congress

**Adam Schiffer, Ph.D. and Carrie Liu Currier, Ph.D.**

Though the United States has been involved in numerous foreign conflicts in the post–World War II era, none of them garnered an official declaration of war from Congress. Instead, presidents have used their perceived war-making powers to send troops into battle and to dictate the length and terms of U.S. military involvement around the world. As a result, the balance of war-making power between Congress and the president has been the source of increasing controversy in the postwar era, especially during the longest and most controversial conflicts. In this essay, we address the battle between the president and Congress over contemporary war-making powers, with an emphasis on the constitutional framework, as well as the tactics that were employed by the two presidents Bush to gain an upper hand on Congress during the first and second wars with Iraq. We also discuss the international consequences of the use of presidential war-making powers during those two conflicts.

As with many of the contemporary controversies surrounding the balance of power between Congress and the president, the question of who has the power to make war cannot be resolved by the text of the Constitution alone. The ambiguity of the Constitution has led to a high-stakes fight for control over America's involvement in international conflicts. Article I, section 8, gives Congress **the power to declare war**, and to determine the size and scope of the military. Meanwhile, the president's most important war power derives from his role, per article II, section 2, as "**commander in chief**" of the military. Within this sparse framework, the legislative and executive branches continually jockey over the limits of their powers, and their obligations to each other, during the undeclared wars and other military operations that have been the hallmark of the post–World War II era.

Until the mid-twentieth century, the Constitutional framework provided suitable guidance to keep Congress and the president from fighting extensively over war

powers. Beyond the wars that were officially declared by Congress—the War of 1812, the Mexican-American War, the Spanish-American War, and the two world wars—the relatively small peacetime standing military left the president with limited options for use of the military. During the Cold War era, however, presidents were able to initiate and sustain a deployment of troops anywhere in the world, sometimes leading directly to conflict, as a result of the increased size of the military. These involvements were often quick—for example, President Carter's failed attempt to rescue hostages from Iran in 1980, or President Reagan's 1983 invasion of the tiny country of Grenada. However, the president's asserted war powers under the commander-in-chief clause have also been the basis for controversial, protracted conflicts such as the Korean War, the Vietnam War, and the current war in Iraq and its aftermath.

At the end of U.S. involvement in Vietnam in 1973, a large congressional majority believed that presidents Johnson and Nixon had far exceeded the presidential war-making authority envisioned by the founders under the commander-in-chief clause. To restore what it viewed as the proper balance, Congress passed the **War Powers Resolution** over Nixon's veto. The resolution requires the president to report to Congress within 48 hours after deploying U.S. troops into direct hostilities, or into "situations where imminent involvement in hostilities is clearly indicated by the circumstances." The report must provide justification for the engagement and set forth its "estimated scope and duration." It also requires follow-up reports no less frequently than every six months. The most controversial clause in the War Powers Resolution sets a 60-day deadline after the reporting of an engagement for the president to obtain a resolution of war or at least an express authorization for the use of military force from Congress. If the deadline is not met or extended, the president must end the engagement. The resolution also requires the president to consult with Congress "whenever possible" throughout the process, a provision intended to increase consultation but which presidents might, at their discretion, use to prevent communication until after action is taken.

To varying degrees, post-Vietnam presidents have been willing to comply with parts of the War Powers Resolution. At the same time, however, they insist that the resolution is unconstitutional. In particular, they view the deadline for obtaining Congressional permission as an unacceptable encroachment on their commander-in-chief powers. Though courts have never adjudicated the constitutionality of the resolution, its opponents take encouragement from a 1983 Supreme Court ruling (*INS v. Chadha*) that disallowed a "**legislative veto**"—the nullification of presidential or executive-agency action by congressional resolution. In light of this precedent, it is

widely assumed that the War Powers Resolution would meet a similar fate were it ever brought before the Supreme Court.

Presidents have repeatedly expressed that they feel no formal obligation to follow what they believe to be a clearly unconstitutional law. As a result, they have often ignored Congress entirely when deploying U.S. forces in small-scale conflicts. For conflicts that promise to be long and costly, however, presidents have clear strategic incentives, beyond the law, to gain at least some form of permission from Congress. For example, it is widely believed that the public will be more likely to support the use of force if Congress—the people's branch—gives the conflict its stamp of approval after sufficient public deliberation. Also, putting members of Congress on the record as authorizing the use of force effectively preempts future criticism, even if the war turns out to be longer or costlier than anticipated.

Even as they ostensibly encourage congressional debate over whether to grant permission to use force overseas, presidents employ a variety of tactics to tilt the scales in their favor. For example, immediately after Iraqi forces invaded Kuwait in August 1990, President George H. W. Bush deployed a massive number of U.S. troops to Saudi Arabia. Nearly 200,000 American men and women were involved by the time Congress was brought into the picture, and another 150,000 were added during the autumn congressional recess. Despite this attempt to make war appear inevitable, bolstered by an impressive international coalition Bush had assembled during the early autumn, Congress held a vigorous, impassioned debate over whether to force Saddam Hussein's troops out of Kuwait. The House and Senate each passed the Authorization for Use of Military Force Against Iraq Resolution (AUMF) on January 12, 1991, with the Senate approving it by a razor-thin 52–47 margin. The air war began less than a week later.

During the 2002 buildup to the second war in Iraq, President George W. Bush took advantage of the electoral calendar and his post–Sept. 11 popularity to gain the upper hand in Congress. After a summer in which Iraq became the increasing focus of the Bush administration's public remarks, it made the case directly to Congress in September that Iraq was a significant threat. Though Bush requested a resolution of support for strategic reasons, he made it clear that he did not believe the War Powers Resolution required such a move. Within a few weeks, the House leadership introduced the AUMF of 2002. After a few days of debate in early October—less than a month before every House seat and one-third of the Senate would be up for election—both chambers passed the resolution overwhelmingly. Many Democrats

later expressed regret over their affirmative votes, with some attributing them to the debate's proximity to the November midterm elections.

The AUMF also provides the most striking example of how gaining Congress's permission for the use of force can preempt future criticism. By the time the 2004 presidential election was fully under way—more than a year after President Bush had declared an end to major combat operations after the fall of Baghdad—public sentiment had begun to turn against continued involvement in Iraq, with most polls showing a roughly even split between those who thought that going to war was the right thing to do and those who thought it was a mistake. In theory, Democratic presidential nominee John Kerry should have been able to make a convincing argument that Bush should be punished for taking the country to an increasingly unpopular war against Iraq under what were later shown to be false pretenses. However, Bush and his supporters had an easy retort: Kerry had read all of the relevant intelligence, taken part in a vigorous Senate debate in October of 2002, and ended up voting for the AUMF. As a result, Kerry's criticism of Bush during the campaign was far more muted than many of the vocal war critics in his party would have liked to have heard.

The president's advantages over Congress in the foreign policy realm have consequences far beyond the intragovernmental struggle over power and accountability. In recent years, the use of military force by the United States to compel other countries to abide by international norms or laws has generated criticism from members of the global community. Specifically the fear is that U.S. foreign policy in the post–Cold War era has become the pursuit of a new world order that essentially reflects American hegemony. The "war on terror," the Bush doctrine, and the war efforts in Afghanistan and Iraq have all showcased the commitment of the United States to unilateralism rather than coalition building, and raise concern about the powers of the American presidency. During the Cold War, the absence of multilateralism in U.S. foreign policy was not as problematic as it appears today. However, the strengthening of presidential authority under the second Bush administration has raised alarm in many countries around the world.

In the past, the bipolar nature of the international system and the lack of consensus found among the five permanent members of the United Nations Security Council decreased the likelihood the United States could draw on multilateral action to counter its adversaries. In contrast, the post–Cold War era is one where countries are expected to fully utilize institutions like the United Nations to garner international support and establish coalitions, rather than resorting to unilateralism. Thus, the

international community has been critical of countries that appear to circumvent these norms when dealing with global conflicts in the contemporary period. To highlight some of the differences in the international community's post–Cold War support for U.S. military action abroad, we briefly examine the cases of the Persian Gulf War (1991) and the war in Iraq (2003). Both cases effectively demonstrate how two presidents, George H. W. Bush and George W. Bush, utilized the spirit of the War Powers Resolution in consulting with Congress but then reveal how their use of presidential authority led to very disparate degrees of support from the international community.

These two examples of U.S. military action in the Middle East offer several useful bases for comparison. In both conflicts there were underlying interests in securing oil resources, a desire to remove Saddam Hussein from power, and a sense that Iraq was seeking regional hegemony and defying international law based on its invasion of Kuwait in 1990 and its continued development of a weapons of mass destruction program. The contrasting responses of President George H. W. Bush and his son George W. Bush, however, illustrate how much discretion is left to the president in the current practice of war powers. In the first Gulf War, President George H. W. Bush fully utilized the international structures in place by getting the UN Security Council to adopt Resolution 678 authorizing member states to use "all necessary means," including military force, to drive Iraq out of Kuwait and comply with international law. In accordance with the War Powers Resolution the president reported to Congress on Iraq's refusal to adhere to the Security Council resolution, and indicated he was prepared to craft a **multilateral strategy** to respond to the crisis. He did not march the troops north to Baghdad and overthrow Saddam Hussein at this time because he had neither the approval nor the support of the UN to take these initiatives at the time. The Iraq policy set forth by the Bush administration thus relied on the use of a multilateral coalition to generate a sense of domestic and international legitimacy to the military actions taken by the United States and its allies, and was acknowledged as within the acceptable parameters as determined by the global community.

In contrast, the 2003 war in Iraq did not gain the support of the UN Security Council and was largely a unilateral effort by President George W. Bush. This **unilateralist strategy** can be seen on two levels, in the sense that he did not consult with allies and that his actions were rather declaratory with minimum consultation with Congress (Dumbrell 2002, 284). Global leaders warned that preemptive war and "American-led military action was illegitimate, threatened the future of the United Nations, undermined international support for the 'war on

terrorism,' and created new threats to international peace and security" (Dombrowski and Payne 2003, 395). The "coalition of the willing" that supported U.S. initiatives in Iraq was negligible in both size and relative power and was not an attempt at true multilateralism. UN Resolution 1441, indicating Iraq was in material breach with regard to its WMD program, had been carefully worded so as not to permit an American military operation to enforce Iraq's compliance. Instead, the Security Council was only willing to reopen discussions of weapons inspections and engage in further fact-finding. The terrorism rhetoric used by the second Bush administration established the urgent need for a U.S. response, and further served the president's unilateralist efforts by instilling a sense of danger in waiting for other actors to give legitimacy to the U.S.-led war.

The battle between the unilateralists and multilateralists with regard to U.S. foreign policy raises concerns about presidents whose actions promote American exceptionalism. The idea that the United States operates with an authority above supranational institutions like the UN gives the impression that the country and the president have the ability to engage in reckless foreign policy behavior with few repercussions. The post–Cold War increase in UN action raises concerns about whether the War Powers Resolution should be amended to either facilitate or restrain the president's ability to supply troops for UN missions without congressional approval (Grimmett 2004). Until then, the two cases of U.S. military action in the Middle East demonstrate important comparisons in how multilateralism and unilateralism are viewed by the global community and how they are used to establish the legitimacy of American foreign policy.

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# Study Information

**Key terms:**

1. **Commander in chief:** The constitutional power of the president to manage and deploy troops in military conflict. This power means that the president is largely responsible for carrying out war strategy once war has begun.
2. **Power to declare war:** The constitutional power of Congress to make the decision regarding whether the nation should enter a war. This power is designed as a way to make certain that the decision to enter war is not made lightly or by one executive leader.
3. **Legislative veto:** A congressional technique that provisionally grants the president authority to engage in government conduct ordinarily reserved for Congress with the provision that if the Congress does not approve of the presidential action, it might veto that action. The legislative veto is an inherent part of the War Powers Resolution, but it is of questionable constitutional status since the Supreme Court ruling in *INS v. Chadha.*
4. **Multilateral strategy:** Utilizing international structures in conducting international wars, often including working with the United Nations or numerous nations in the international community before deciding to enter a war. President George H. W. Bush used such a strategy in the 1991 Persian Gulf War.
5. **Unilateral strategy:** Engaging in a war without relying on international coalitions to carry out the war. President George W. Bush pursued such a strategy in waging the war in Iraq, arguing that in combating terrorism, multilateralism was not a necessary precondition for entering conflict.
6. **War Powers Resolution:** An action in Congress intended to set limitations on the presidential power to make war. While it set limits on undeclared wars, it really never functioned as designed. However, it remains a guide by which the decision to enter war is measured.

# Sample free-response question:

Of all the decisions government makes, none has a greater impact than the decision to enter armed conflict. In your essay, do the following:

(a) Discuss a way in which the War Powers Resolution might limit foreign wars.
(b) Identify why the legislative veto aspect of the resolution might jeopardize the legality of the resolution.
(c) Identify one advantage the president has over Congress and identify one advantage Congress has over the president in war making.
(d) Discuss how unilateral and multilateral approaches to war making illustrate presidential discretion in war powers.

# Presidential Signing Statements: The Constitutional Versus the New Government Models

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There are two ways (or what I call models) of thinking about American politics today. The first is the **constitutional model**. This is the way politics should be done according to the U.S. Constitution. The second is the **new government model**. This is the way politics often really exists in America today. I call it the new government model because it represents a totally new system of government, one that our country's founders did not envision when they wrote the Constitution.

Let us begin with a discussion of the constitutional model since it is the most familiar of the two models. Every textbook on American government notes that according to our Constitution, (1) the Congress or legislative branch passes our laws; (2) the president in the executive branch then makes sure that our laws are properly enforced or executed; and (3) in case of a disagreement over the meaning of a particular law, it is the courts that interpret the law.

What happens if Congress passes a bill that the president does not like? The Constitution provides a formal remedy. Article I, section 7 of the Constitution states, "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated…" In other words, the president can veto any bill and, unless two-thirds of the members of both chambers vote to override the veto, it does not become a law. If two-thirds vote to override then it becomes a law, even if the president vetoed it.

Once a bill becomes a law, what is the president's responsibility? According to the presidential oath of office the president swears or affirms that he or she "will faithfully execute the Office of President of the United States and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." This means that the president is bound to obey the Constitution by a solemn oath of office. In addition, the Constitution prescribes that the president "shall **take care that the Laws be faithfully executed**…" The key word here is "faithfully," which the *New Oxford Dictionary* defines as "in a loyal manner" and "in a manner that is true to the facts of the original." If we accept this definition of faithful, then presidents are required to enforce the law in a loyal manner that is true to the facts of the original legislation passed by Congress.

What else can a president do if he or she does not like a particular law? There is an additional constitutional remedy. A president can "recommend" to Congress' "consideration such Measures as he shall judge necessary and expedient…" Therefore, if a president disagrees with an existing law, the president can recommend that Congress enact or pass new legislation. This means that if a president did not agree with a law protecting the environment because it was considered to be too weak and ineffectual, that president can recommend new legislation to change or even replace the old law.

Therefore, presidents can (1) veto bills they do not agree with or (2) recommend that a law already on the books should be changed or repealed. They also are bound to (3) "faithfully" execute the law, (4) "faithfully execute the Office of the President," and (5) "preserve, protect and defend the Constitution of the United States."

One of the key characteristics of the constitutional model of American government is that it provides for a separation of power, as well as for checks and balances. This means that only the Congress has the power to pass a law. Likewise, only the president is given the power to sign or veto a law. Only the president is given the responsibility of enforcing the law. While the Constitution does not grant the courts the right to interpret the law, this has been an accepted practice since the presidency of Thomas Jefferson, when the Supreme Court in the case of *Marbury v. Madison* first invoked the idea of "judicial review." Under judicial review only the courts can find a law to be unconstitutional in full or in part.

Why did the founders create such a carefully constructed system of separated powers combined with selected checks and balances? The founders designed this system of government so that no one branch of the government would have too much power. Rather, it was their intent that each branch (legislative, executive, and judicial)

would be given sufficient power to check the power of the other branches. This balance of powers is therefore a critical component of the constitutional model, for without it any one of the three branches of government could attain too much power, a potentially dangerous development.

American politics generally followed the basic framework of the constitutional model for almost two centuries. While the powers of the three branches of government increased or decreased somewhat over time (for example, presidents generally become more powerful during war time), the essential balance was preserved until recently. Presidents in recent decades have made greater use of what are called "unilateral powers." These are powers that the president alone or unilaterally can invoke, without the need for action by the legislative or the judicial branches. Some of these powers long have been accepted as proper. For example, presidents since George Washington have made use of presidential proclamations rather than asking Congress to pass new laws. But most proclamations were for ceremonial purposes, though Lincoln famously used this power to declare the emancipation or freeing of the slaves with his Emancipation Proclamation. Presidents also have long used a technique called an executive agreement with other nations, rather than asking the Senate to ratify a treaty, and executive orders instead of asking Congress to pass a bill. What is new is that in recent decades, particularly since Ronald Reagan served as president in the 1980s, it has been common for presidents of both political parties to use their unilateral powers to make policy. As a result, presidents are less likely to recommend that Congress enact legislation. Instead, they unilaterally enact policy on their own. This development has expanded the power of the presidency at the expense of the legislative branch.

One of the most important developments in this regard is the ever-greater use of what has come to be known as the "**presidential signing statement**" (PSS). According to T. J. Halstead of the Congressional Research Service, "Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's constitutional prerogatives."

What does this mean? First you will notice that presidents are the ones who issue pronouncements or statements at the time that they sign a bill. This means that

the president agrees that the bill should become a law. Otherwise, the president could veto the law. Halstead's definition also notes that the presidential signing statements allow the president to comment on their interpretation of the law. The initial idea was that a president, while signing a bill, could, for example, note that they did not like a particular section or provision in a bill, but considered the whole bill so important that they were willing to sign it anyway. Also, presidents could provide an opinion as to what they believed the law meant. This could be important if a law's meaning was ambiguous. The courts could then consider whether or not to accept the president's interpretation of the law. This gave the president an important voice in determining how a law was interpreted, and the Supreme Court has specifically cited presidential signing statements in deciding cases before the court.

The first president to use a presidential signing statement was our fifth president, James Monroe. It was not until Ronald Reagan became president in the 1980s, however, that it was used often and specifically to identify the president's interpretation of the law. To emphasize the importance of presidential signing statements, Ronald Reagan's second attorney general, Edwin Meese, even had one published in the *Legislative History of the U. S. Code, Congressional and Administrative News* (published by West Publishing Company) so that it "could be available to the court for future consideration of what that statute really means" (Kelley 2005, 27). The Supreme Court relied on presidential signing statements in deciding both *INS v. Chadha* (1983) and *Bowsher v. Synar* (1986). Their ruling in *Chadha* suggested that individual waivers to the immigration laws were inherently legislative functions and could not be ceded to the Department of Justice's understanding of such laws.

It is important to note that Reagan's innovative use of presidential signing statements was not controversial. In fact, except for lawyers writing in law journals, few people paid any attention to this development. When they did they generally considered it to be an appropriate use of presidential power. That is, it was believed presidents should have a say in how a law is interpreted by the courts. The constitutional balance, therefore, was not affected, since presidents still were expected to enforce the law, even those they did not personally like, and courts ultimately still interpreted the meaning of the law. Therefore, as presidents George H. W. Bush and Bill Clinton continued to use presidential signing statements, there was little concern that they threatened the balance of power.

Still, there was a trend that presidential scholars paid scant attention to. Following Reagan's lead, presidents were making vastly greater use of signing statements than did past presidents. As Christopher Kelley (2005, 30–31) writes:

> From the Monroe administration to the Carter administration, the executive branch issued a total of 75 signing statements that protected the presidential prerogatives and a total of 34 statements instructing the executive branch agencies of the interpretation of sections of the bill. From the Reagan administration through the Clinton administration, the number of both categories jumped drastically. The number of statements protecting the executive branch prerogatives went from 75 for all presidents up to Carter to 322, and the number of instructions to executive branch agencies on the interpretations of provisions of the law went from a total of 34 to 74. (2005, 30–31)

When George W. Bush became president in 2001, presidential signing statements were used even more often. He issued "435 statements, mostly objecting to encroachments upon presidential prerogative" during his first four years in office (Kelley 2005, 31). But not only were presidents using signing statements more often, the nature of the statements themselves also changed. Presidents have long wanted the line-item veto power. This is the power to veto parts or sections of a bill, rather than the entire law. Congress gave President Bill Clinton this power, but the Supreme Court ruled it unconstitutional, noting that the president must veto the entire bill, not just a part of it.

When George W. Bush became president, political observers noted something unusual. As Pulitzer–prize–winning *Boston Globe* journalist Charlie Savage writes:

> For years, political observers had puzzled about why Bush, who was so aggressive about exerting his executive prerogatives in every other respect, was not vetoing bills. As the full scope of Bush's use of signing statements became clear, so did the answer to the mystery: Bush's legal team was using signing statements as something better than a veto—something close to a line item veto. (2007: 231)

In a variety of signing statements, the Bush administration identified parts of laws that it intended to ignore—in essence announcing that it would not "faithfully" execute the law because it believed the section in question was unconstitutional. For example, President Bush signed a law that banned the torture of prisoners, but added a signing statement that the president, as commander in chief, can waive the

torture ban if he makes the decision that harsh interrogation techniques might assist in preventing a terrorist attack. In a report on signing statements issued in July 2006, the American Bar Association warned, "A line-item veto is not a constitutionally permissible alternative, even when the president believes that some provisions of a bill are unconstitutional" (quoted in Savage 2007, 245). Yet President Bush used presidential signing statements for this purpose, sometimes even announcing that although he was signing a bill he did not intend to enforce it at all.

What does this mean in terms of how our government operates? If we go back to the model I discussed at the beginning of this essay, you will remember that the constitutional model requires the president to "faithfully" execute the law. The idea of judicial review also provides the courts with the responsibility of interpreting the law. Presidential signing statements change this process. Now, presidents can sign laws that they do not agree with and then ignore the law or various parts of the law. In addition, under a new theory of presidential power called the **unitary executive** model, which is often cited by President Bush in his signing statements, the president can also decide how to interpret the law.

Christopher Kelley (2005, 5) notes, "The unitary executive rests upon the *independent* power of the president to resist encroachments upon the prerogatives of his office and to control the executive branch." The president alone is responsible for making the determination, not the courts. Kelley (2005, 6) writes that the unitary executive "largely draws from two sources within the Constitution—the 'Oath' and 'Take Care' clauses of Article II."

Why is this important? As of spring 2005, George W. Bush referenced the unitary executive model 95 times in various signing statements and **executive orders** (Kelley 2005, 1). For example, in its October 4, 2006, signing statement on the Department of Homeland Security Appropriations Act, the Bush White House states, "The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch" (The American Presidency Project, americanpresidency.org). This means that the president reserves the right to enforce the law as he sees fit, based on his own interpretation of the law.

This results in the new government model. Now, while Congress enacts the laws, it is the president who decides whether to enforce them and how to interpret them. This means that presidents have acquired vast new power that is not mentioned in the Constitution.

What can be done about it? Congress can reassert its power by challenging the president's right to issue presidential signing statements. Though Congress has held hearings on the subject, there has been no attempt to limit this power as of yet. Likewise, the Supreme Court could rule the practice unconstitutional. Thus far, in the few cases that have mentioned presidential signing statements, the courts have refused to do so. Presidential signing statements therefore provide presidents with greater power, while threatening to undermine the carefully separated powers and checks and balances that are fundamental to the constitutional model.

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# Study Information

**Key terms:**

1. **Constitutional model**: Sets up a system where Congress passes the laws, the president in the executive branch makes sure that the laws are properly carried out, and in case of a disagreement over the meaning of a particular law, the courts interpret the law.

2. **Executive orders**: Directives issued by the president, usually to U.S. executive officers to help direct their operation. Executive orders are normal tools of presidential leadership, but they also can have major policy implications.
3. **New government model**: A system where although Congress enacts the laws, it is the president who decides whether to enforce them and how to interpret them. This means that presidents have acquired a vast new power not mentioned in the Constitution.
4. **Presidential signing statements**: Pronouncements issued by the president when bills are signed into law that might comment on the law generally but also explain the president's interpretation of the law's language. Pursuant to that interpretation, presidents may announce that the provisions of the law will be administered according to the president's views and not necessarily according to legislative intent. In short, they announce what parts of a law the president might choose not to enforce.
5. **"Take care that the laws are faithfully executed"**: A core element of presidential authority mentioned in the oath of office, requiring the enforcement of laws in a manner that is true to the facts of the original legislation passed by Congress.
6. **Unitary executive model**: Rests upon the independent power of the president to resist encroachments upon the prerogatives of his office and to control the executive branch. Under this interpretation, the president alone is responsible for making his determination, not the courts.

# Sample free-response question:

The president of the United States is charged with the faithful execution of the laws. In your essay, do the following:

(a) Discuss what the "constitutional model" is and the president's role in the "faithful execution" of the laws.
(b) Discuss what the "new government model" is and how it might be furthered with signing statements.
(c) Explain how the new government model might jeopardize traditional interpretations of checks and balances.

# The Problem of Divided Government in an Era of Polarized Parties

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In the wake of the 2006 congressional elections, the Democratic Party held a majority of seats in both the House of Representatives and the Senate for the first time since the "Republican revolution" of the 1994 midterm elections. The shift from Republican to Democratic control also ushered in a new period of divided government, which exists when the president's party does not also control both chambers of Congress. **Divided government**, sometimes referred to as divided party control, has been extremely common in the post–World War II period. In fact, divided government has actually been more common than **unified government** during this time span, with the president facing opposition control of at least one chamber for 36 of the previous 62 years. Although divided government has been prevalent since the mid-twentieth century, the level of disagreement between the president and Congress has varied greatly over this period. This essay describes the variations in divided government over this period, paying particular attention to how polarization of Democratic and Republican elected officials in recent years has impacted presidential–congressional outcomes during periods of divided party control.

For much of the post-1945 period, divided government arrived in Washington alongside Republican presidents. Since the Democratic Party held a majority of seats in both the House and Senate for the vast majority of this time frame, Democratic presidents such as Kennedy, Johnson, and Carter faced unified party control, while their Republican counterparts (Eisenhower, Nixon, Ford, Reagan, and George H. W. Bush) all served during times of divided government. Not until Bill Clinton took office did we have a Democratic president who spent the majority of his time in the White House facing an opposition Congress. Similarly, George W. Bush's presidency

constituted the first time that a Republican chief executive presided over a period of unified party control in the last 40 years.

Although divided government has become the norm, there has been a great deal of variation in the degree to which government has been unified or divided over the last 60 years. While Republican presidents have typically governed during periods of divided government, the size of their opposition (the Democratic majorities in Congress) has fluctuated greatly. Compare, for example, the political situation faced by two Republican presidents: Richard Nixon and George W. Bush. During Nixon's first term as president, the Democratic Party controlled large majorities in both chambers—there were 54 Democrats in the Senate and 254 House Democrats (roughly 58 percent of the seats). George W. Bush has governed during two different periods of divided party control. At the beginning of Bush's first term as president, the Republican Party held a majority of seats in both chambers (a 221-212 majority in the House, and a 50-50 majority in the Senate due to Vice President Dick Cheney's tiebreaking vote). However, the Republican Party lost its slim majority control of the Senate following the defection of James Jeffords of Vermont from the Republican Party to an independent affiliation in June 2001, giving the Democrats a razor-thin margin in the Senate (50 Democrats, 49 Republicans, and 1 independent). The Republicans, however, retained control of the House of Representatives. Clearly, controlling one chamber is more advantageous for a president than controlling neither. Later during Bush's presidency, the Democratic Party regained control of Congress during the 2006 midterm election by seizing a 51-49[1] majority in the Senate and a 233-202 majority in the House. The different seat allocations under Nixon and Bush II underscore that different presidents have encountered very different political environments with respect to divided government. Furthermore, the Bush examples show a president who faced two dramatically different periods of divided government during a *single* presidency. The prevalence of divided government, as well as the wide variation in the size of party control, has led scholars to turn their attention to this phenomenon to assess the impact of party control on various political outcomes in the American system.

1. Technically, there are 49 Democrats in the 110th Senate (2007–2008), as both Joseph Lieberman of Connecticut and Bernie Sanders of Vermont are independents. However, both Lieberman and Sanders caucus with the Democratic Party, effectively giving them a 51-49 majority.

## The Effect of Divided Government on Presidential–Congressional Outcomes

Before political scientists investigated the effects of divided government, the conventional wisdom was that divided party control led to gridlock. While untested empirically, the assumption was that divided government resulted in a markedly worse political relationship between the president and Congress. Mayhew's landmark book *Divided We Govern* (1991) offered one of the initial tests of this conventional wisdom. Mayhew examined whether the amount of major pieces of legislation passed in a particular year was affected by the presence of divided government. Examining outcomes over a roughly 50-year period, Mayhew ultimately concluded that there was not a significant difference between the amount of major legislation passed during times of unified and divided government. Mayhew also considered whether Congress was more likely to conduct investigations of the executive branch during divided government, again finding that there was no significant difference between the number of investigations conducted in periods of unified and divided party control. Mayhew ultimately concluded that contrary to conventional wisdom, divided government did not present an adverse political environment between the president and Congress.

The surprising and counterintuitive nature of Mayhew's conclusions sparked a wave of subsequent research that set out to confirm or challenge his findings. The vast majority of studies conducted after Mayhew's seminal book produced very different findings. For instance, Huber, Shipan, and Pfahler (2001) observed that while the number of legislative enactments does not vary between times of unified and divided government, the legislative *content* does. Congress delegates greater levels of discretion to the bureaucracy when a president of the same party inhabits the White House and less discretion during periods of divided government. Edwards, Barrett, and Peake (1997) investigated whether legislative *failure* was more likely during divided party control, concluding that the propensity of presidents to block legislation and the likelihood of presidential failure to pass legislation is greatest during periods of divided government. Similarly, Binder (2003) noted greater levels of policy gridlock during periods of divided government, as the *percentage* of legislation passed is significantly lower when different parties control the presidency and Congress. Along this same line, presidents are more likely to veto legislation or veto bargain (see Cameron 2000) in periods of divided government. Research by Krutz (2001, 1) also suggests that omnibus legislation—which combines "numerous measures from

disparate policy areas into one massive bill" —is more prevalent when the president and the majority of Congress are controlled by different parties.

Studies of the effect of divided government are not limited to legislative outcomes. The Senate's "advise and consent" role on presidential nominations to the judiciary and executive branch makes this yet another presidential–congressional outcome that may be affected by divided government. In his study of the fate of Supreme Court nominations in the Senate, Segal (1987) determined that unified government is crucial to the president, as opposition control of the Senate has a negative impact on nominations. Segal posited that the process is a struggle between the Senate and the president, rather than just a struggle between the parties.

Binder and Maltzman (2002) moved beyond simple confirmation rates of judges to examine the increasing length of the Senate confirmation process. These authors concluded that the ideological distance between the Congress and the president is an important constraint on the ability of presidents to get their nominees through the Senate quickly. More ideological discord between the president and Congress leads to a longer confirmation process and a higher likelihood of obstruction. McCarty and Razaghian (1999) examined the determinants of a lengthy confirmation process for executive branch nominees, again finding that the presence of divided government and a more ideologically polarized Senate lead to a longer confirmation process. Thus, in the wake of Mayhew's work, the majority of the literature suggests that divided government does in fact have a negative impact on presidential–congressional relations.

The effect of divided government on the various outcomes discussed above appears to be contingent on the *degree* to which government is divided. The wide variations in the number of seats held by the president's party during periods of both unified and divided government help determine how well presidents and Congress work together. Perhaps more important than the number of seats held by the president's party is the ideological composition of Congress in relation to the chief executive. Not surprisingly, when the president and Congress are ideologically close, we typically see higher levels of legislative productivity and interbranch cooperation. When larger ideological differences exist, **gridlock** dominates Washington.

To illustrate the importance of ideology when considering the effect of divided government, again consider two political environments. Both Richard Nixon (from 1971 to 1972) and Bill Clinton (from 1995 to 1996) faced a period of divided government where the opposition party held 54 seats in the U.S. Senate. When Nixon was president, the Democratic and Republican parties were much closer to one

another ideologically. At that time, it was not uncommon to see members of either party voting more often with the *other* party than with their own. This pattern was especially common among Southern Democratic legislators who were markedly more conservative than non-Southern Democrats. Thus, while Nixon faced a large seat deficit, the political environment that he faced was less adverse than it would otherwise appear. Contrast this situation with that confronting Clinton after the 1994 Republican revolution in which the Republican Party gained control of both chambers of Congress for the first time in nearly half a century.

By the 1990s, the Democratic and Republican parties had become much more polarized ideologically. Members of Congress voting alongside the opposition party were extremely rare. In fact, party unity—the degree to which party members all vote together—reached high levels, especially in the House of Representatives. As the median Democrat and Republican became more ideologically extreme and unified, cooperation between the parties dissipated. Clinton, a liberal Democrat, was faced with a large Republican majority that was quite far from him ideologically. The leadership of both parties was polarized as well, with both the Republican and Democratic parties selecting floor leaders who were far left or right of center.

As this example demonstrates, the effect of divided government on presidential–congressional relations is not as straightforward as simple party control of government. Unified government is not sufficient for presidential success in Congress or high levels of legislative productivity, nor is divided government a recipe for gridlock. Instead, the allocation of seats in Congress and the preferences of both legislators and presidents affect the relationship between the executive and legislative branches. When either the president or Congress has an incentive to transcend party polarization, such incentive might ease the passage of legislation.

## Party Polarization and the Future of Presidential–Congressional Relations

The polarization of the Democratic and Republican parties in recent years (see Bond and Fleisher 2000) has changed the tenor of presidential–congressional relations. This ideological polarization has translated into larger disparities between the ideological position of the present and key congressmen during periods of divided government. Not only has the average Democrat and Republican become polarized from one another, but the parties have also selected more polarized floor leaders and committee chairs in recent decades, again meaning that the distance between the preferences of key legislators and the president has been increasing. This increased ideological

distance, rather than merely divided party control of institutions, appears to be the cause of the numerous negative political outcomes discussed above. Today's party polarization means that divided government is more problematic now than at any other point in the last 60 years. As the Democratic and Republican parties select more ideologically extreme candidates for public office and more polarized leaders, this trend is likely to continue.

A note of caution is warranted when discussing the problems of divided government, even in a period of **party polarization** such as the one that exists today. Those who argue that party polarization and divided government are the source of gridlock often imply that periods of unified government automatically equate to better outcomes, including high levels of legislative productivity and a relatively smooth judicial and executive branch confirmation process. Unfortunately, gridlock is still common during unified government.

For example, minority party members in the Senate have resorted to frequent use of the **filibuster** in recent years to block unwanted legislation and thwart presidential nominees who the minority deems to be "outside the mainstream." Party polarization only exacerbates the use of the filibuster, as the minority party is now further ideologically from the majority party. Given the prevalent use of the filibuster, presidential legislation can fail even during unified government unless a supermajority of 60 senators supports a bill. George W. Bush, who governed during two different periods of unified party control, had a difficult time achieving various legislative victories and getting many of his nominees confirmed because the Democratic senators were quite willing to use the filibuster as a tool for obstruction. The only presidents whose party controlled a supermajority large enough to invoke **cloture** to stop a filibuster were Kennedy, Johnson, and Carter. Even with a seemingly filibuster-proof majority, these presidents faced some obstruction because the Democratic senators, particularly Southern Democrats, did not always vote with their party and the president. Thus, without a filibuster-proof supermajority in the Senate, even presidents who govern during periods of unified government often find dealing with Congress difficult. In sum, the literature suggests that the seat allocations in the House and Senate, the ideological composition of Congress, and the level of party unity affect outcomes far more than simply whether government is "divided" or "unified."

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# Study Information

## Key terms:

1. **Cloture**: The process in the Senate that is used to end a filibuster. It requires 60 votes to invoke cloture, which in turn ends a filibuster.
2. **Divided government**: The situation of different parties controlling the presidency and one or both houses of Congress. Divided government has been common throughout American history at times, but has been particularly prevalent since 1968.
3. **Filibuster**: The senate tradition of unlimited debate, allowing a senator, once he or she has the floor, to speak for an unlimited time. This process can block or delay the consideration of legislation and can only be stopped by invoking cloture.
4. **Gridlock**: The situation that occurs when partisan conflict in government prevents the Congress and president from enacting and putting into effect legislation. While gridlock might be seen as positive when it prevents bad legislation from becoming law, it is problematic when needed legislation cannot be passed into law. This situation is more likely to occur in divided government than in unified government.
5. **Party polarization**: A situation that occurs in the United States when the two parties become ideologically controlled. When that happens, the result is that relatively few moderates staff Congress, leading to difficulty in making legislative compromises.
6. **Unified government**: The circumstance of one party controlling both chambers of Congress and the presidency at the same time. Under unified government, a relatively rare occurrence in recent times, it is easier to enact legislation than when there is divided government.

# Sample free-response question:

Since 1968, a common feature of American politics has been that the government process has been complicated by "divided government." In your essay,

(a) Identify what is meant by "unified" government and discuss the advantages of a unified government for the following:
   (1) enacting laws
   (2) the filibuster

(b) Identify what is meant by "divided government" and discuss the possible consequences of divided government for the following:
   (1) gridlock
   (2) the filibuster

(c) Explain why the founders might not be troubled by gridlock, even if it hampers the governmental process.

# The Tensions of Judicial Appointment

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The rancor that exists around the nomination of judges to the federal court continues to rise as the battle over the partisan control of our government intensifies. Perhaps no other decision of our president results in greater division between the two political parties' partisans than his choice for the federal bench. After a brief overview of the framers structuring of the judicial selection process, an analysis of the modern selection of federal judges by the executive branch will reveal the changing patterns of judicial appointment. The political and philosophical implications of the current selection process of judicial appointments will be addressed, highlighting a few of the more revealing battles between the president and Congress.

## Development of Constitutional Procedures of Selection

For nearly the entire constitutional convention in Philadelphia in 1787, the delegates debated the manner in which federal judges were to obtain office. Many of the delegates, such as George Mason and Oliver Ellsworth, pushed for judges to be selected by the national legislature, as was the practice in most of the states at the time. Alexander Hamilton, James Madison, and others instead insisted that judges should be appointed by the president (Farand 1967). After extensive debate the delegates reached an impasse and referred the matter to a special committee. Perhaps out of frustration, the delegates unanimously accepted the current arrangement of appointment by the president with confirmation by the Senate.

While it took months for the delegates in Philadelphia to determine the method of selection, a consensus developed concerning the term of federal judges. After little debate the delegates decided to follow the English tradition of allowing judges to serve life appointments "during **Good Behavior**." This is a lower standard than is required

for officials within the executive branch, who can be removed from office for "treason, bribery, or other high crimes and misdemeanors." As a result, it has been exceedingly rare for federal judges to be removed from office. Only 13 judges throughout our history have been impeached, and the majority of these either were acquitted by the Senate or left office before the Senate could hear the case.

Much debate has ensued concerning the intent of the Framers in establishing the **advice and consent of the Senate** procedures concerning judicial appointments. Some commentators, Alexander Hamilton chief among them, believed that the Senate would only play a minor role in determining the makeup of the federal judiciary. Hamilton wrote in *Federalist No. 76*:

> The person ultimately appointed must be the object of his [the president's] preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them.

Hamilton believed that the Senate's role in the process was simply to ensure that truly "unfit" nominations would not make it to the federal bench. Contrary to this limited role, many of the framers called for a more robust role for the Senate. Indeed, the Senate rejected one of George Washington's selections for the U.S. Supreme Court in 1795.

A more complex debate has ensued over the role partisanship should play in the process. Henry Abraham, a political scientist who researches the courts, writes that the "delegates simply assumed, perhaps a mote naively, albeit quite understandably, that those selected as federal jurists would be chosen on the basis of merit. Period." (Abraham 1999, 18) Other commentators disagree with this assessment and suggest that the founders were fully aware that the appointment and confirmation process would be partisan and expected politics to play a role in the process as it does in other executive appointments. This debate is likely to never be resolved.

## How Does the Nomination Process Work?

The process of nomination to the federal bench differs depending on the level of the court vacancy. What is normal for a U.S. District Court or Circuit Court of Appeals

vacancy is very different for the process followed for a vacancy in one of the nine seats on the U.S. Supreme Court. In actuality it is more accurate to say that the Senate has the power of appointment at the district court and circuit court of appeals levels while the president is left the power to confirm. When a vacancy occurs on a district court, a senator from the president's party who represents that state will submit a list of names to the president's staff for consideration, and if the president seeks to circumvent such consultation, the senator may invoke a tradition called **"senatorial courtesy."** According to that tradition, if a senator invokes senatorial courtesy, the president's selection will have a difficult time being confirmed. If no senator from that state is from the president's party, the president will likely consider the opinions of other high-ranking officials from his party in the state. The president is then likely to accept this recommendation as his first choice for the open post.

The same process is followed when a vacancy occurs on the U.S. Circuit Court of Appeals. Since a circuit court has jurisdiction over several states, by tradition the senator of the president's party who is from the state in which the departing jurist resided has a large say over who the new appointee will be. If there are two senators of the president's party who are from the same state in which a vacancy occurs, the nominee must usually be acceptable to both of the state's senators. Finally, even if both of the senators from a state are from the opposition party of the president, it is likely they will have significant leverage in the final choice of the president with their influence in their own chamber.

A different process exists concerning the selection of nominees for the U.S. Supreme Court. While each nomination differs depending on the balance of partisan power in the nation's capital and sitting president, a general pattern has developed. Typically, a subset of the president's advisers along with the high-ranking staff of the Department of Justice compile a list of candidates and assemble background files on these individuals. The individuals on this list may be submitted by interest groups, internal executive branch officials, members of the judiciary and Congress, and even the president himself. Candidates who survive a first investigation are sent extensive questionnaires about their personal lives and judicial philosophies. The answers to these surveys are forwarded to officials at the Department of Justice, the president's inner circle and, if the president desires, to the **American Bar Association's (ABA) Standing Committee on the Federal Judiciary**. If the ABA committee's recommendation is favorable, the FBI is asked to do a security check and the ABA issues a more formal report. However, the ABA's role was drastically reduced by President Bush in 2001. Speculation exists for the reasons behind the limitation of the

ABA's role, but many insiders believe it stems from the treatment of Ronald Reagan's appointment of Robert Bork to the Supreme Court. (See below for more information on the Bork nomination.)

With the FBI report and, prior to President Bush, the formal recommendation of the ABA in hand, the president contacts the potential nominee and conducts an interview in Washington, D.C. If the president is satisfied with the nominee, the nominee's name is announced and he or she is officially nominated to the bench.

When a nomination arrives in the Senate it is transferred to the Committee on the Judiciary. After providing time for the committee's senators and staff to prepare, the committee will hold hearings concerning the nominee in which the nominee and other interested parties will testify. Once the hearing is complete, the members of the committee will vote and make a recommendation to the full Senate. The Senate will then consider the candidate and, with the support of a majority of the senators, make a formal recommendation to approve the nomination. Nominees receiving this recommendation are then sworn in as federal judges.

It would be remiss to not mention a last check of the Senate. This is the power of the filibuster. The filibuster refers to the ability of any senator to take the floor during debate to prevent the vote on any motion or nomination. Under current Senate rules, a formal motion of cloture must be approved to force the end of a filibuster. Cloture requires the consent of at least 60 of the 100 senators. As a result, a minority of 41 senators can prevent the approval of any nomination. Another tactic in recent years is "the hold," a process whereby a single senator might request a delay in considering a judicial appointment until some "question" is resolved. The hold is a technique more likely to be used in lower court appointments.

Prior to 1968 there is no record of a filibuster being used to prevent the approval of a judicial nominee. Abe Fortas, an associate justice on the U.S. Supreme Court, was nominated by Lyndon Johnson for the position of chief justice, but his nomination was thwarted by a coalition of Southern Democrats and Republicans who used the filibuster to prevent his approval by the full Senate. That filibuster was based on the fact that Fortas had continued to advise President Johnson on political matters even after his appointment to the Court, and the revelation of this continued relationship was perceived as a violation of checks and balances between the presidency and the Court. Today, the blockage of judicial nominations in the Senate is commonplace by both parties using the filibuster and other procedural rules. During 2005, in frustration with the successful use of the filibuster by the minority Democrats, an attempt was made by Republicans to alter the ability of the filibuster to prevent judicial

nominations. The "**nuclear option**," as it came to be called, suggested changing the Senate filibuster rules allowing a simple majority of the Senate to vote directly on the approval of a judicial nominee. The nuclear option was forestalled by a coalition of senators referred to as "the Gang of 14," led by Republican John McCain and Democrat Joseph Lieberman, who preserved the strength of the filibuster in judicial nominations; at present, the nuclear option has simply been removed from Senate consideration.

## The Process in Motion: Recent Approval Battles

It is difficult to judge the influence of each selection process on future nominations, however, three nominations in the past quarter century stand out for their influence on the current politics of the nomination process. The nominations of Robert Bork, Clarence Thomas, and John Roberts all shed a different light on the nomination and confirmation process.

Robert Bork was introduced by President Ronald Reagan as the replacement for the moderate Lewis Powell Jr., who had served on the Court since January 1972 (see Bronner 1989). While Ronald Reagan introduced Bork as an "even-handed and open-minded" judge who was neither a conservative nor a liberal, Bork is more accurately described as a true conservative who practices an **original intent** manner of constitutional interpretation. Bork had previously served in numerous capacities in Washington, including as the country's solicitor general and as the acting attorney general under Richard Nixon. Bork is famously responsible for firing Special Prosecutor Archibald Cox, who was investigating the Watergate scandal; this firing is now known today as the "Saturday Night Massacre." Prior to his nomination to the Supreme Court, Bork served as a justice on the Circuit Court of Appeals for the District of Columbia.

Bork's nomination was met with immediate derision by the Democratically controlled Congress. Within an hour of Reagan's announcement, Senator Ted Kennedy, an influential member of the Committee on the Judiciary, took to the Senate floor and, on a nationally televised broadcast, denounced the appointment and suggested Bork supported segregation and banning the teaching of evolution. The hearings conducted before the Committee on the Judiciary concerning the Bork nomination are some of the longest on record, lasting 12 days and producing a written transcript of more than 6,000 pages. The senators examined every aspect of Bork's judicial philosophy and his long political career. In response, Bork was forthcoming and detailed in his answers.

After the exhaustive process, the committee reported Bork's nomination to the full Senate with only 5 of the 14 members of the committee supportive of his appointment. In the end, only 42 senators voted to support the Bork appointment, and the vacancy on the Court was eventually filled by the more moderate Anthony Kennedy.

The Bork nomination is the first that truly energized the entire interest group establishment that had grown in Washington over the past 50 years. Interest groups as varied as the National Organization of Women, the American Civil Liberties Union, the NAACP, and Planned Parenthood all mobilized to convince the Senate to reject his nomination. In the two-and-a-half months between his appointment by Ronald Reagan and his eventual rejection by the Senate, millions of dollars were spent and countless hours were occupied concerning the outcome of his appointment. Even today, to be **"Borked"** is used to describe a coordinated attack against a nominee to prevent his or her approval by the Senate.

If the Bork nomination revealed the contentious side of the confirmation process, the approval of Clarence Thomas may be regarded as the darkest days for the process. Thomas was chosen by the first President Bush to succeed the first African American seated on the Court, Thurgood Marshall, in the summer of 1991 (see Mayer and Abramson 1994). While Thomas maintained the racial balance on the Court, his conservative judicial viewpoints differed dramatically from his predecessor. Thomas had served in numerous positions under the tutelage of John Danforth, who at the time of Thomas's appointment to the Supreme Court was serving as a senator.

Thomas's most influential government position had been chairman of the Equal Employment Opportunity Commission (EEOC) under Ronald Reagan. While Thomas was originally challenged by women's rights groups for his disapproval of the *Roe v. Wade* decision that established a woman's right to choose whether to have an abortion at least in the early stages of pregnancy, his nomination appeared headed for a quick approval by the Committee on the Judiciary. As the committee's hearings neared their end, National Public Radio's Supreme Court correspondent Nina Totenberg reported that Anita Hill, now a law professor at the University of Oklahoma but previously a member of Thomas's staff at the EEOC, claimed to have been sexually harassed by Thomas.

On October 11, 1991, Hill was sworn in before the Senate Committee on the Judiciary to provide her testimony. Hill claimed that on numerous occasions Thomas made inappropriate sexual gestures toward her when they worked together at the EEOC. Hill's testimony was both graphic and riveting to the national media. The

committee called forth numerous other witnesses who either corroborated Hill's testimony or supported Thomas in his full denial of the charges leveled against him. Thomas lashed out at the committee, testifying that:

> This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree. (Senate Judiciary Committee Hearing, 1991)

After extensive debate the committee sent the Thomas nomination to the full Senate without a recommendation. In the closest vote in over a century, the Senate approved Thomas to the Supreme Court by a vote of 52-48.

A final exemplar of the appointment process came with the recent appointment to fill the vacated seat of the Chief Justice William Rehnquist upon his death in 2005. Originally appointed by President George W. Bush to replace the retiring associate justice Sandra Day O'Connor, John Roberts's nomination was transitioned to that of chief justice upon the unexpected death of Rehnquist. Following a successful career in both private and public legal service, including service as one of Chief Justice Rehnquist's law clerks, Roberts was prominent on the short list of potential Supreme Court justices after he took a position on the Circuit Court of Appeals for the District of Columbia in 2003. Described as a judicial minimalist whose opinions stick narrowly to the context of each case and who favors precedent and a limited role for the judiciary, Roberts's supporters expected little opposition to his nomination.

The Roberts nomination and hearings process is exemplary because it highlights the differing philosophies concerning the role of the Senate in the confirmation process. During his hearings before the Senate Committee on the Judiciary, Senator Orrin Hatch asserted that the Senate must apply a "judicial rather than a political standard to evaluate Justice Roberts's fitness for the Supreme Court." Senator Hatch asserted "judges interpret and apply but do not make the law." (See *Confirmation Hearings on the Nomination of John G. Roberts Jr.*) Justice Roberts built Senator Hatch's assessment into an analogy: "Umpires don't make the rules; they apply them. I come before the committee with no agenda. I have no platform. Judges are not

politicians." He assured the senators that if seated on the Court, he would "remember that it is [his] job to call balls and strikes and not to pitch or bat."

Democratic Senator Charles Schumer argued instead that "the most important function of the hearings . . . is to understand your legal philosophy and judicial ideology." He believed it is the Senate's right to inquire into the detailed beliefs of the nominee. He stated that the nominee "should be prepared to explain [his] views on the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers' rights, women's rights, and a host of other issues."

Both Hatch and Schumer had distilled valid yet inconsistent views on what Supreme Court justices do and how the Senate should evaluate them. For Hatch, a nominee's political values were irrelevant because judges were expected to be neutral arbiters, akin to umpires not politicians. For Schumer, a nominee's political beliefs were the fundamental aspect of the confirmation process because an individual's political beliefs determine the direction of their votes on future cases (see Eisgruber 2007).

After the committee discussion, the Roberts appointment was recommended by the committee for approval by the whole Senate. He won broad support from members of both political parties in the vote before the full Senate to become the seventeenth chief justice of the United States Supreme Court and was approved by a vote of 78-22.

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# Study Information

**Key terms:**

1. **Advice and consent of the United States Senate**: A constitutional phrase that gives the Senate the power to confirm or reject judicial and major executive appointments and the power to ratify or reject treaties.
2. **American Bar Association's Standing Committee on the Federal Judiciary**: A group that provides the president and the Senate information regarding the suitability of a judicial nominee for service on the federal bench.
3. **Borked**: A term arising out of the rejected nomination of Robert Bork, suggesting that the judicial confirmation process is hyperpolitical and that judicial appointees might be rejected if they get caught in the political crossfire of the Senate.
4. **Good behavior**: The length of the term of office for a federal judge. This often implies a lifetime appointment; it is the long length of the judge's term that makes the confirmation process so important and the stakes for confirmation so high.
5. **Nuclear option**: A proposal that suggested changing Senate filibuster rules by allowing a simple majority of the Senate to vote directly on the approval of a judicial nominee. The nuclear option was forestalled by a coalition of senators, referred to as "the Gang of 14," led by Republican John McCain and Democrat Joseph Lieberman, who preserved the strength of the filibuster in judicial nominations; at present the nuclear option has simply been removed from Senate consideration.

6. **Original intent**: A judicial philosophy that suggests that the power of the Supreme Court is limited to discovering what the founders originally meant when they wrote the Constitution and that all other issues should be left to legislative lawmaking. This limited view was embraced by Robert Bork.
7. ***Roe v. Wade***: The famous Supreme Court decision regarding abortion. Since it was handed down, this case has been a litmus test for candidates for the Supreme Court. If they support ***Roe***, they are seen as liberal and often are opposed by conservatives, and if they oppose it they are seen as conservative and are often opposed by liberals.
8. **Senatorial courtesy**: The tradition in the upper chamber that when a district court position becomes vacant, a senator from the president's party who represents that state will submit a list of names to the president's staff for consideration, and if the president seeks to circumvent such consultation, the president's selection will have a difficult time being confirmed.

# Sample free-response question:

The confirmation of Supreme Court justices is often a contentious process. In your essay, do the following:

(a) Define what is meant by "the advice and consent of the United States Senate."

(b) Discuss two of the following and their relationship to the debates regarding judicial appointments:
   (1) original intent
   (2) "Borked"
   (3) ***Roe v. Wade***

(c) Explain how judicial terms of "good behavior" might affect the confirmation process.

# Senate Confirmation of Cabinet Appointments

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At the start of his presidency, George H. W. Bush nominated fellow Texan and former U.S. senator John Tower to be secretary of defense. There was little reason to expect the Senate would not confirm the appointment. Tower was a recognized expert on defense policy who for many years was a member of the Senate Armed Services Committee and had served as chief U.S. negotiator with the Soviet Union on nuclear arms reduction after retiring from the Senate. To the surprise of many, however, Tower's nomination was derailed when questions arose about his role as a consultant to defense contractors and allegations of alcohol abuse were made. After a six-week battle, the Senate voted 53-47 to reject Tower's nomination, the first nomination to the president's cabinet in 30 years to be rejected outright by the Senate.

The rejection of Tower's nomination was surprising because the Senate allows presidents great latitude in selecting top-level members of their administrations. As Joseph P. Harris (1953, 259) observed in his extensive study of presidential appointments, "It is recognized that unless [the president] is given a free hand in the choice of his Cabinet he cannot be held responsible for the administration of the executive branch." Senators of the president's party often portray the president's appointment of advisers not as a power of the office but as a privilege of the office. Senate Republican leader Robert Dole (R-KS) reflected this perspective during deliberations over Tower's nomination when he remarked, "This is [the president's] nominee. . . .He has a right to have [his] people in his Cabinet." (*CQ Almanac 1989,* 407). Senators of the opposing political party do not accept presidential appointment power as a right but acknowledge the need for the president to receive advice from trusted confidants and that winning the election entitles the president to choose cabinet officers who share his policy views. In explaining his vote against the

Tower nomination, Edward Kennedy (D-MA) commented, "[O]n almost all occasions, the Senate defers to the President, and his nominations are approved. But on rare occasions, such as the one before us, it is the Senate's duty to the Constitution and the country, so say no to the President and ask him to choose again." (U.S. Congress, Senate Committee on Armed Services, 1989)

Article II , section 2, of the U.S. Constitution invests in the president the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." However, this power is not absolute, as the Constitution stipulates that the president makes these appointments "by and with the Advice and Consent of the Senate." While the Constitution has similar language concerning the shared power of appointing judges and executive officers, the appointment of executive officers has been much less controversial in recent years. Judges are effectively appointed for life and are independent of executive or legislative control; as a consequence, conflicts between the White House and opposition party senators over particular nominations have received substantial attention. This contrasts sharply with members of the president's cabinet, who are immediately answerable to the chief executive and who serve at the pleasure of the president. Thus, the Senate generally, but not always, defers to the president on executive appointments.

The term "**cabinet**" refers to the heads of the 15 principal departments of the United States executive branch. George Washington initiated the practice of having the department heads serve as a body of advisers, a practice that continued until the presidency of Franklin D. Roosevelt. Under Roosevelt, the **Executive Office of the President (EOP)** was created to provide a set of advisers at the immediate disposal of the president and whose responsibilities did not include managing departments charged with implementing policy decisions. The evolution of the EOP continued through administrations, reaching its current structure during the Nixon presidency. Today, most of the president's closest advisers are in the EOP, with particular cabinet officers providing input as appropriate; rarely does the cabinet counsel the president as a body. A number of positions within the EOP, for example, the director of the Office of Management and Budget, require Senate confirmation. Thus, this analysis includes both the 15 department heads who by statute have cabinet status and key positions within the EOP.

## Patterns of Confirmation Decisions

At the simplest level, there are two possible outcomes when the president sends a nomination to the Senate: confirmation or rejection. However, the process is more complicated, as different levels of support of or opposition to a nomination provide different signals to the president even when the opposition is not substantial enough to prevent confirmation. It is therefore preferable to group nominations into three categories. The first includes nominations that are confirmed with no or only token opposition. In these instances, the nomination will be confirmed by a voice vote of the Senate or by a roll-call vote that has less than 10 percent of senators voting "no." In general, Senate deference to the president on cabinet-level positions results in the vast majority of cabinet-level nominations being confirmed with no or only token opposition. Between 1969 and 2008, 86 percent of nominations were confirmed without significant opposition. Recent examples include President George W. Bush's nomination of Henry Paulson to be secretary of the treasury, which was confirmed by voice vote, and nomination of Robert Gates to be secretary of defense, which was confirmed with only two dissenting votes. The few dissenting votes are cast for various reasons, but with full knowledge that the appointment will be confirmed.

The second category includes nominations confirmed but with significant opposition, here defined as more than 10 percent of senators opposing the appointment. Eleven percent of nominations fit this category. In these instances, senators use the confirmation process to express discontent with the nominee or with the president's policies. The most recent example was President Bush's nomination of Michael Mukasey to be attorney general. Senate Democrats challenged Mukasey to state clearly his views on the legality of the interrogation techniques that some consider torture and domestic surveillance techniques the president claimed were necessary to combat terrorism. There was little hope of defeating the nomination, but the opposing senators hoped to influence Mukasey's policy decisions or implementation of programs by voicing their opposition.

The third category includes nominations that are rejected by the Senate. While Tower's nomination to be defense secretary was the only one rejected by a vote of the Senate since 1969, other nominations were withdrawn in the face of opposition by senators (Table 1). Some of these nominations might have been confirmed if the president had chosen to press the issue, but either the president decided not to expend political capital on a contentious confirmation battle or the nominee decided

the personal cost of the ordeal was too great. Whether the nomination fails because of a negative vote in the Senate or a forced withdrawal does not matter; either way, the opponents have succeeded in preventing an unacceptable nominee from gaining office. In all, 3 percent of cabinet-level nominations have failed either by rejection or withdrawal.

**TABLE 1**
**FAILED NOMINATIONS TO CABINET-LEVEL POSITIONS, 1969–2008**

| | Year | President | Nominee | Department | Outcome |
|---|---|---|---|---|---|
| Cabinet Departments | **1989** | G. H. W. Bush | John Tower | Defense | Rejected |
| | **1993** | Clinton | Zöe Baird | Justice | Withdrawn |
| | **1997** | Clinton | Hershel Gober | Veterans Affairs | Withdrawn |
| | **2001** | G. W. Bush | Linda Chavez | Labor | Withdrawn |
| | **2004** | G. W. Bush | Bernard Kerik | Homeland Security | Withdrawn |
| Executive Office of the President | **1977** | Carter | Ted Sorenson | CIA | Withdrawn |
| | **1987** | Reagan | Robert Gates | CIA | Withdrawn |
| | **1995** | Clinton | Anthony Lake | CIA | Withdrawn |
| | **2005** | G. W. Bush | John Bolton | UN Ambassador | Withdrawn |

There have been few differences across administrations in the rate of opposition to appointments. However, there are differences in the level of opposition by office (Table 2). Nominations to particular offices, by the nature of the policies for which they are responsible, generate greater opposition in the Senate. Not a single nominee to 6 of the 22 offices included here faced significant opposition between 1969 and 2008. On the other hand, a majority of the nominations generating significant opposition were to three positions: attorney general, director of central intelligence, and secretary of the interior.

The Department of Justice is a particular lightning rod when it comes to confirmation politics, with half of nominations for attorney general encountering opposition. Although only one nominee (Zöe Baird, during the Clinton administration) failed to eventually gain the office, several others, including George W. Bush's three nominations for attorney general, have met resistance in the Senate. The next greatest level of opposition has been in the intelligence field. Forty-four percent of all nominations in this area encountered significant opposition, with three nominations being withdrawn due to Senate opposition. Almost as high a proportion (42 percent) of nominations to head the Department of the Interior were challenged in the Senate.

**TABLE 2**
**LEVEL OF OPPOSITION BY OFFICE**

| Department or Position | No or Token Opposition | Confirmed with Significant Opposition | Rejected or Withdrawn |
|---|---|---|---|
| State | 91% | 9% | 0% |
| Treasury | 100% | 0% | 0% |
| Defense | 93% | 0% | 7% |
| Justice | 50% | 44% | 6% |
| Interior | 58% | 42% | 0% |
| Agriculture | 92% | 8% | 0% |
| Commerce | 93% | 7% | 0% |
| Labor | 70% | 20% | 6% |
| Health and Human Services* | 92% | 8% | 0% |
| Housing and Urban Development | 100% | 0% | 0% |
| Transportation | 100% | 0% | 0% |
| Energy | 100% | 0% | 0% |
| Education* | 100% | 0% | 0% |
| Veterans Affairs | 86% | 0% | 14% |
| Homeland Security | 67% | 0% | 33% |
| CIA / National Intelligence | 56% | 25% | 19% |
| UN Ambassador | 89% | 6% | 6% |
| US Trade Representative | 92% | 8% | 0% |
| Office of Management and Budget | 93% | 7% | 0% |
| Council of Economic Advisors | 94% | 6% | 0% |
| Environmental Protection Agency | 100% | 0% | 0% |
| National Drug Control Policy | 80% | 20% | 0% |
| **Totals** | 86% | 11% | 3% |

*These two departments were divided from the old Department of Health, Education, and Welfare; HEW appointments are included with the HHS Department.

Why do nominations to these offices generate greater opposition than nominations to other offices? The answer lies, at least in part, in the responsibilities of these agencies. Historically, the intelligence gathering and covert operations of the CIA and questions of proper law enforcement, including enforcement of civil rights laws, were at the center of conflicts between the White House and Senate over these positions. During the presidency of George W. Bush, both the CIA and Justice Department have been involved in controversial detentions and interrogations of prisoners captured in Afghanistan and Iraq. Unwilling to let pass an opportunity to challenge the administration, senators disagreeing with the president—whether the president was Jimmy Carter or George W. Bush—have made confirmation deliberation extensions of broader debates over policies and programs. Conflicts over nominations for secretary

of the interior are part of the ongoing struggle between conservationists wanting to preserve federal lands in their present conditions and resource developers wishing to tap the highly restricted mineral and forest resources on federal lands. All challenges to secretaries-designate of the interior involved conservationists claiming the nominee was biased toward development and insensitive to environmental concerns. Other departments have seen fewer challenges to nominations, as they are not consistently at the heart of policy debates or do not have rival constituencies within their areas of responsibilities.

## Reasons for opposing nominations

In *Federalist 76* (Rossiter 1999, 457), Alexander Hamilton explained that the president was expected to have wide latitude in selecting executive officials and that the Senate's confirmation would be refused only when there are "special and strong reasons for the refusal." The rarity of a failed nomination indicates that senators have mostly embraced Hamilton's view. However, because neither the text of the Constitution nor any of the framers who wrote about its provisions provided a clear indication of what "special and strong reasons" might warrant the rejection of a presidential nomination, each senator is free to define the "special and strong reasons" that will lead him or her to oppose the president. The reasons most often given by senators for opposing a cabinet nomination fall into four broad categories: illegal or unethical behavior, conflicts of interest, qualifications for the office, and public policy. The frequency of objections being raised on each basis varies widely, as does the impact of each on confirmation votes in the Senate.

### Illegal or Unethical Behavior

In his study of presidential nomination politics, G. Calvin Mackenzie (1981, 97) observed: "The most elementary of the purposes for which the confirmation process is used is that of examining and passing judgment on the character and competence of the President's nominees." Most basic to a nominee's character is whether he or she has violated the law or engaged in unethical behavior. As seen in Table 3, such allegations appeared in 27 percent of contentious nomination deliberations and were the primary reasons for opposing the nomination in 24 percent of the cases. These allegations can be especially damaging to a nomination being considered by the Senate. Senators of the political party other than the president's are significantly more likely to vote against a nomination when allegations of wrongdoing are raised. Interestingly, senators of the president's party are more likely to vote for the

nomination when such allegations are made; apparently, there is a closing of ranks within the president's party in these circumstances (King and Riddlesperger 2006).

**TABLE 3**
**REASONS FOR OPPOSING CABINET-LEVEL NOMINATIONS, 1969–2008**

| Reason | Reason Primary | Given Reason |
|---|---|---|
| Illegal or unethical behavior | 27% | 24% |
| Conflict of interest | 22% | 8% |
| Unqualified | 16% | 11% |
| Public policy differences | 70% | 57% |
| Number of cases | 37 | 37 |

Occasionally, allegations of inappropriate behavior involve possible felonies. Reagan's nomination of Raymond Donovan to be secretary of labor was delayed while the Senate investigated allegations of connections between Donovan's construction company and organized crime and allegations of union corruption. Donovan was confirmed over substantial opposition but later faced criminal indictment and was forced to resign. Several possible cabinet officers had their nominations derailed during the Clinton and George W. Bush administrations for possible violations of immigration laws. The first was Zöe Baird, nominated by Clinton to be attorney general. An accomplished corporate lawyer, Baird had employed illegal immigrants as domestic servants and failed to pay Social Security taxes on their wages. The legal breach was discovered and efforts to correct the situation were initiated prior to Baird's nomination. However, this did not stop opponents from questioning her credentials to be the nation's chief legal officer. Baird withdrew from consideration when it appeared the Senate might reject her nomination. Similar allegations led Bush to withdraw his nominations of Linda Chavez to be secretary of labor and Bernard Kerik to be secretary of homeland security. Most novel, of course, were the allegations of alcohol abuse that helped derail Tower's nomination to be secretary of defense.

## Conflicts of Interest

Another character-related reason for opposing a nomination is conflict of interest. The most basic form of conflict of interest is financial gain. Does the nominee stand to benefit financially from decisions made in office? There often is concern when a cabinet nominee has extensive stock holdings in companies with contracts issued or administered by his or her department, as government contracts improve a company's profitability, which in turn increases the value of company stock. These concerns are usually soothed by having the nominee divest him- or herself of stock in certain

companies or place assets in blind trusts. For example, President John Kennedy nominated Robert McNamara, president of Ford Motor Company, to be secretary of defense. Because Ford had substantial contracts with the Department of Defense, McNamara sold his interest in the company before assuming office. Practices such as these for handling personal assets have resulted in financial conflicts of interest rarely being a concern in confirmation debates.

More troubling are what Mackenzie (1981, 103–105) calls "predispositional conflicts of interest." Predispositional conflicts of interest occur when a nominee has close ties to the industry or constituency overseen by the department and therefore might be predisposed to supporting a particular policy perspective because of that former affiliation. There are policy implications to these challenges, but the focus is not on explicit policy positions expressed by the nominee or policies of the administration. Instead, the focus is on potential biases held by the nominee. The essence of predispositional conflicts of interest was reflected by Senator Hubert Humphrey, who once told a cabinet nominee, "You can put all [your investments] in escrow, but I don't think you can put your philosophy in escrow" (quoted in Mackenzie 1981, 104). The nomination of John Tower to be secretary of defense failed, in part, because of predispositional conflicts of interest. Although recognized as an expert on defense policy, Tower had been a consultant to defense industries after leaving the Senate and many senators were concerned that his decisions as secretary of defense would be heavily influenced by connections with defense industries. Allegations of predispositional conflicts of interest are made in 22 percent of contentious nominations but are the primary reason in only 8 percent of the cases.

## Qualifications

Most nominees have the training or experience to be considered specialists in the policies of their departments. It is common, in fact, for cabinet officers to have served previously in the executive branch of the national government or even the department they now lead (King and Riddlesperger 1984; Riddlesperger and King 1986). However, on rare occasions, a nominee's qualifications for a cabinet post will be questioned by senators. For example, President Reagan nominated William Clark, a close adviser to Reagan since his days as governor of California and a foreign policy adviser to the president at the start of his administration, to be secretary of the interior after James Watt, plagued by controversy, resigned. While the nomination was confirmed, several senators questioned Clark's qualifications to be interior secretary, noting that he had no expertise or background in natural resource policy.

A peculiar qualification-related objection raised occasionally is whether the nominee, if confirmed, will be sufficiently independent of the president. Senatorial deference to the president is justified, at least in part, on the idea that allowing the president to choose cabinet officers is necessary to hold the president accountable for executive decisions. However, controversies of the manner in which policies are implemented, most notably by the Department of Justice and Central Intelligence Agency, have resulted in some senators expressing concern that a cabinet officer will obey commands from the White House rather than stand up for other principles. George W. Bush's nomination of Porter Goss to be director of central intelligence illustrates this. Some Senate Democrats were concerned that pressure from the White House had led the CIA to provide biased intelligence information concerning Iraq's weapons of mass destruction program; these senators wanted assurances that the new director of central intelligence would provide Congress with unbiased reports.

Regardless of the qualification in question, challenges to a nominee's qualifications are rarely sufficient to defeat a nomination. Cabinet nominees are highly intelligent men and women who have been very successful in their careers in the public and private sectors. A substantial majority of senators will defer to the president and vote to confirm when qualifications are the only grounds for challenging a nomination.

## Public Policy

The principal change in confirmation politics over the past half century is that disagreements over public policy now dominate debates over contested cabinet-level nominations. "Senators vote against nominees, and nominations fail," G. Calvin Mackenzie (2001, 27–28) noted, "because the appointments process has become a policy battleground." This is substantially different from the middle of the twentieth century, when Harris (1953, 263–264) observed: "Senators who have opposed Cabinet nominations have usually conceded . . . that nominees should not be rejected merely because they hold views that are not agreeable to a majority of the Senate." Over the past three decades, disagreements over public policy have moved to the forefront of most contentious confirmation debates. Public policy concerns were expressed by senators in 70 percent of nominations encountering significant opposition and were the primary reason expressed in 57 percent of cases.

Differences over public policy can focus on the positions advocated by the nominee or the president. Examples of both have been seen in George W. Bush's nominations for attorney general. At the start of his administration, Bush named

former Senator John Ashcroft to head the Department of Justice. Former senators were once considered shoo-ins for confirmation, but no longer. Ashcroft found his positions on affirmative action and abortion challenged by his Democratic former colleagues and endured a bruising confirmation battle that ended in a 58-42 vote in his favor. Ashcroft left the administration following Bush's reelection and was replaced by White House counsel Alberto Gonzales, whose nomination was also challenged, but for very different reasons. The wars in Afghanistan and Iraq that followed the September 11, 2001, terrorist attacks resulted in many legal questions about the detention of prisoners captured in these wars and the interrogation of detainees. Gonzales was questioned about the administration's policies on interrogation techniques, including whether torture was permitted, and his role in formulating those policies as White House counsel. The 36 votes cast against his confirmation reflected concerns over both the administration's and Gonzales's perspectives on detention and interrogation. Many of these issues were revisited in 2007 when Michael Mukasey was nominated to succeed Gonzales as attorney general.

## Is the "Advice and Consent" Power Effective?

The deference to the president shown by the Senate in senior-level executive appointments has caused some observers to question whether the spirit of shared powers reflected in the Constitution's "advice and consent" clause is being satisfied. Richard Fenno characterized the confirmation process as "hardly a limitation at all upon the ultimacy of the presidential decision" (1966, 54). Constitutional scholar James Sundquist concluded that this power "can never be more than a weak instrument for controlling the executive branch" (1989, 319). Others view the rarity of rejections of presidential nominees to executive positions as evidence that the oversight function is succeeding. "Conflict avoidance in the selection process and conflict resolution in the confirmation process combine to make rejection a rarity," Mackenzie argued (1981, 175). "Those individuals likely to be unacceptable to the Senate are usually weeded out before a formal nomination is made." There is no better example of this effect on the president's choice of cabinet officer than George W. Bush's selection in 2006 of Robert Gates to replace Donald Rumsfeld as secretary of defense. Growing public discontent with the war in Iraq and congressional discontent with Rumsfeld meant that Bush had to choose a new secretary from outside his administration, rather than promoting someone from within as is usually done at this stage of a presidency. A nominee respected on Capitol Hill and who had expressed reservations about some aspects of Bush's foreign policy was needed to avoid a wholesale examination of the

administration's Iraq policy. Gates, who had previously served respectably as director of central intelligence and on the Iraq Study Group, which issued a report critical of the administration shortly after the change at the Pentagon was announced, met these criteria. Of course, Gates's case is an interesting one—he had withdrawn his original nomination as CIA director during the Reagan years because of concern about his role in the Iran-Contra Crisis. With a bit of perspective over time, Gates was seen as a perfect replacement for the unpopular Rumsfeld. The confirmation process is also used by senators to extract pledges of support for specific policies or commitments to implement policies in a particular way. Mukasey's nomination to be attorney general is the most recent of many possible examples of this dynamic.

Oddly, for all the criticism directed toward the Senate's consideration of cabinet nominations, the contemporary process might be closer to what the framers of the Constitution intended than at any other time in American history. During the middle part of the nineteenth century, the process was turned on its head, with the Senate effectively dictating to the president the membership of his cabinet. The pendulum of control over appointments shifted toward the president, culminating with almost total presidential control by the mid-twentieth century (Binkley 1947, 152–167; Harris 1953, 65–98; Mackenzie 1981, 11–78). Almost immediate confirmation, with at best perfunctory scrutiny and deliberation by the Senate, became the norm. Today, appointments to the Department of the Interior and the Department of Justice are reviewed carefully, but the nominations of Frederick Seaton and Nicholas Katzenbach, for secretary of the interior in the Eisenhower administration and attorney general in the Lyndon Johnson administration, respectively, were confirmed just days after being announced. Such an approach hardly seems in line with the sharing of powers by the president and Congress that the Constitution's authors envisioned.

Beginning with Richard Nixon, each president has faced a Senate prepared to scrutinize cabinet appointments but not prepared to reject nominations irresponsibly. Alexander Hamilton predicted "it is unlikely that [senators'] sanction would often be refused, where there were not special and strong reasons for the refusal" (Rossiter 1999, 457). While presidents and the senators of their party often bemoan the loss of executive prerogative during contentious confirmation debates, time has borne out Hamilton's prophecy. Even a president encountering an obstructionist Congress can expect four out of five nominations to be confirmed with little or no opposition. The president has retained responsibility for senior-level positions while the Senate performs its watchdog role, raising objections when those "special and strong reasons" arise.

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# Study Information

**Key terms:**

1. **Cabinet**: The group of administrative officials overseeing the major administrative departments of the national government. Because of the importance of their positions, they often stand in the crossfire in the struggle between Congress and the president.
2. **Executive Office of the President**: A group of offices, originally created in the 1930s, whose members serve as some of the president's closest advisers.
3. **Reasons of opposition to executive appointments**:
   a. *Conflict of interest*: A charge that might arise if a nominee stands to benefit financially from decisions made in office. For example, there often is concern when a cabinet nominee has extensive stock holdings in companies with contracts issued or administered by his or her department.
   b. *Illegal or unethical behavior*: The confirmation process is ultimately about a nominee's character. Most basic to a nominee's character is whether he or she has violated the law or engaged in unethical behavior.
   c. *Qualifications*: Though one might expect all candidates to have extensive backgrounds in the areas to which they are appointed, on rare occasions, a nominee's qualifications for a cabinet post will be questioned by senators.
   d. *Public policy*: The appointments process has become a policy battleground in recent times. Senators may oppose a candidate because they disagree with the policy preferences of the candidate.

# Sample free-response question:

One of the ways in which the Senate can exercise a check against presidential power is through the confirmation process of major executive branch officials. In this essay, answer the following:

(a) Discuss how two of the following might affect the success of a nominee for a cabinet or Executive Office of the President position:
   (1) Conflict of interest
   (2) Illegal or unethical behavior
   (3) Qualifications
   (4) Public policy

(b) Using Table 3, identify which of the four issues addressed in (a) above is most likely to be cited as the primary reason for opposing an executive department nominee.

(c) Using Table 2, identify one important difference between the opposition rates of appointees to major offices.

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