

The Fellows Review

2022 - 2023



CSPC

The Fellows Review

Selected Papers of the
2022-2023 Presidential Fellows Program

Center for the Study of the Presidency & Congress

Editor

Erica Ngoenha

with Cara Arnoldi, Elise Mizerak, and Ryan Bender

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The Fellows Review: 2022-2023

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Foreword

For over 50 years, the Center for the Study of the Presidency and Congress has nurtured leadership skills in civic-minded students from across the country and around the world, instilling in them a commitment to civil discourse and public service. As our country faces contemporary political divisions, the Center remains committed to our goal of imparting strong leadership qualities to the next generation, with the aim of fostering a more resilient democracy and a brighter collective future.

Throughout their year-long Fellowship journey, our students learn about the inner-working of the U.S. government and build connections with like-minded peers, subject-matter experts, and public officials through virtual convenings and a week-long policy conference in Washington, D.C. The cornerstone of the program is an independent research project on a topic of importance to the presidency or Congress. In the pages that follow, we are proud to showcase twenty-two exceptional research papers produced by the 2022-2023 Fellows class. Of that group, I am delighted to highlight 5 Fellows who were honored earlier this year for outstanding achievement:

Eric Jackson (University of Toronto) was awarded the David M. Abshire Award for Outstanding Paper by an International Fellow for his paper entitled, “The Influence of U.S. Foreign Policy Rhetoric on the Limitation and Proliferation of Domestic Terrorism.”

Kaylen Shetler (Angelo State University) was awarded the Robert A. Kilmarx Award for Best Military, Intelligence, or National Security Strategic Analysis for her paper entitled, “Defining Weapons of Mass Destruction in a New Age of Cyberwarfare.”

Taylor L. Winters (U.S. Coast Guard Academy) was awarded the Donald B. Marron Award for Best Historical Analysis for her paper entitled, “The Study of Congressional and Presidential Policy Responses in the Maritime Calamities of the Santa Barbara, Exxon Valdez, and Deepwater Horizon Oil Spill.”

Emily Morgan (Sewanee) was awarded the Richard H. Solomon Award for Most Original Paper on Foreign Policy or Diplomacy for her paper entitled, “A New Marshall Plan: How will the United States Help Rebuild Ukraine?”

Dylan Stage (University of Minnesota) was awarded the James R. Moffett Award for Most Original Paper on the Modern Presidency or Congress for his paper entitled, “Worth the Investment? Analyzing the Effect of EB-5 Visa Investors on U.S. Regional Economic Growth.”

We are proud of the excellent research undertaken by these students, and we congratulate all of the members of the 2022-2023 class on their successful completion of the Presidential Fellows Program.

The Center is grateful to the Fellowship sponsors as well as our partner colleges and universities for their generous and indispensable support of the program.

Finally, I would like to extend a special note of appreciation to the Center's 2023 summer interns, Cara Arnoldi, Elise Mizerak, and Ryan Bender for their editorial work on this year's *Fellows Review*. Their contributions have been invaluable to the program and this publication.

Glenn C. Nye III
President & CEO

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Part One

The Presidency

THE PRESIDENCY AND THE KU KLUX KLAN: A STUDY OF AMERICAN PRESIDENTIAL RESPONSES TO WHITE SUPREMACIST DOMESTIC TERRORISM

ADRIAN ALI-CACCAMO
Georgetown University

As the head of the executive branch, the American president has a uniquely complicated responsibility to prevent, preempt, and prosecute terrorism while protecting the civil liberties granted to American citizens. To study the contemporary presidential role in combating white domestic supremacist terrorism, this research conducts a historical analysis of six presidencies during the three waves of the Ku Klux Klan. With data showing rising rates of domestic white supremacist terrorism, the research suggests that current presidents should consider three factors in their counterterrorism policy. This analysis argues that successful presidential intervention seeks and leverages legislative support, uses executive branch investigative institutions and prosecutorial power, and that the presidents themselves demonstrate political courage during a historical inflection point.

INTRODUCTION

All U.S. presidents swear an oath to the Constitution, promising to “establish Justice, insure domestic Tranquility,” and “secure the Blessings of Liberty.”¹ Presidents have a duty to protect these ideals, although the promises have historically been undermined by the institution of chattel slavery, subsequent racism, and the prominence of terrorism—the threat or use of violence in pursuit of a political aim.² Of particular challenge is the racially motivated domestic terrorism that occurs within the territorial jurisdiction of the United States to further “ideological agendas derived from bias, often related to race or ethnicity.”³ The violence of white supremacists is intended to “ensure that whites enjoy more status, privileges, and rights than non-whites—they are ‘pro-white’ in their own view—and they regard social inequality as natural.”⁴

¹ U.S. Const. pmbl.

² Bruce Hoffman, “Defining Terrorism,” in *Inside Terrorism*, 2nd rev. ed. (United States: Columbia University Press, 2006), 1.

³ Federal Bureau of Investigation, “Domestic Terrorism: Definitions, Terminology, and Methodology,” file, November 2020, URL: <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-definitions-terminology-methodology.pdf/view>.

⁴ Daniel Byman, “Counterterrorism and Modern White Supremacy,” *Studies in Conflict & Terrorism*, July 27, 2021, 1-28, <https://doi.org/10.1080/1057610X.2021.1956100>.

The dangers of white supremacist terrorism are particularly prescient today. In 2020, there were more domestic terrorism attacks in the United States than any year in nearly three decades.⁵ In 2019, over 80% of the fatalities from domestic terrorism attacks were caused by white supremacists.⁶ Despite systemic underreporting, the 2019 FBI Hate Crimes Statistics Report recorded the highest number of hate crimes since 2008.⁷ The majority of these crimes were racially motivated, and most of that category featured anti-Blackness hatred.⁸ Although there may be some recent decrease in hate crime rates, a 2021 US Intelligence Community report called domestic violent extremism a heightened terrorism threat.⁹ They specified that racially or ethnically motivated violent extremists are the “most likely to conduct mass-casualty attacks against civilians.”¹⁰

In response, the White House released the first ever National Strategy for Countering Domestic Terrorism in June 2021.¹¹ This report raises questions about the role of an American president in combating domestic terrorism, given the president’s unique responsibility to uphold federal law and protect the wellbeing of American citizens. Throughout American history, U.S. government responses to white supremacist violence have ranged between outright complicity, blind-eye tolerance, and counterterrorism-based intervention.¹² This paper will explore the history of the presidential duty to combat white supremacist terrorism through a case study of three waves of Ku Klux Klan (KKK) activity. First, the paper examines Presidents Andrew Johnson, Ulysses S. Grant, and Rutherford B. Hayes during the reconstruction era emergence of the KKK. Second, this paper critiques the behaviors of President Woodrow Wilson when the KKK reemerged during World War I. Thirdly, the responses of Presidents John F. Kennedy and Lyndon B. Johnson are examined during the Civil Rights Era Third Wave of the KKK.

⁵ Cynthia Miller-Idriss, “From 9/11 to 1/6,” *Foreign Affairs*, August 24, 2021, URL: <https://www.foreignaffairs.com/articles/united-states/2021-08-24/war-on-terror-911-jan6>.

⁶ Ibid.

⁷ Daniel Byman, *Spreading Hate: The Global Rise of White Supremacist Terrorism* (New York: Oxford University Press, 2022), 145-152; “2019 FBI Hate Crimes Statistics Report,” The United States Department of Justice, n.d. <https://www.justice.gov/crs/highlights/fy-2019-hate-crimes>.

⁸ “2019 FBI Hate Crimes Statistics Report.”

⁹ Byman, *Spreading Hate*, 145-152; “(U) Domestic Violent Extremism Poses Heightened Threat in 2021,” (Office of the Director of National Intelligence, March 1, 2021), <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.

¹⁰ “(U) Domestic Violent Extremism Poses Heightened Threat in 2021.”

¹¹ National Security Council, “National Strategy for Countering Domestic Terrorism,” (The White House, June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

¹² Byman, *Spreading Hate*, 172.

This research identifies three factors for successful presidential action against white supremacist domestic terrorism: the use of executive branch investigative and prosecutorial actions, presidential initiative towards supportive legal frameworks, and political courage during historical inflection points. The paper does not cover every detail of American race-based violence, nor does it claim a universally causal relationship between specific presidential actions and white supremacist terrorism outcomes. Rather, this research conducts a case study to offer a macro-level analysis of important presidential action patterns, and their effects on the ecosystem of white supremacist terrorism. The historical analysis should inform U.S. presidents, whose counterterrorism policy must contend with factors such as catalyzing social movements, legal authority for intervention, presidential determination, and overarching protections of American civil liberties. By understanding these factors, and effective policy responses, this research can guide U.S. presidential action against the current white supremacist domestic terrorism threat.

WAVE I: RECONSTRUCTION AND THE RISE OF THE KU KLUX KLAN

This first section focuses on presidential responses to the emergence of the Ku Klux Klan. President Johnson's disregard for the rights of Black Americans, at the close of the Civil War, allowed the KKK to grow unencumbered. In contrast, President Grant's political courage in facilitating legislation to expand federal law enforcement, investigation, and prosecution limited KKK terrorism. However, his Reconstruction success was eventually undermined by Hayes's campaign promise to withdraw federal oversight troops from the Southern states. When the first shots at Fort Sumter initiated the Civil War, racialized violence was already a longstanding cultural norm in the United States. Enslaved Africans had arrived on the Virginia shores in 1619, and the 1789 Constitutional Convention solidified the market-based system of slavery into the founding of the newly proclaimed American democracy.¹³ The Civil War, Emancipation Proclamation, and the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution—changed racial dynamics in the United States. They ended American chattel slavery, granted citizenship to all people born or naturalized in the

¹³ Nikole Hannah Jones, "America Wasn't a Democracy, Until Black Americans Made It One," *The New York Times*, August 14, 2019, URL: <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>; Jeremy C. Pope and Shawn Treier, "Reconsidering the Great Compromise at the Federal Convention of 1787: Deliberation and Agenda Effects on the Senate and Slavery," *American Journal of Political Science* 55, no. 2 (2011): 289–306. <http://www.jstor.org/stable/23025052>.

United States, enfranchised African American men, and purportedly protected all citizens under the rights of the Constitution. However, organizations espousing white terrorism scuttled the brief Reconstruction-era hope for racial equality in the United States.

The Ku Klux Klan emerged in 1865 at the Civil War's conclusion, when a group of ex-confederates gathered in Pulaski, Tennessee to "protect and defend the Constitution of the United States"—a constitution which considered Black people to be three-fifths of a person and did not yet include the Reconstruction Amendments. In their own words, the goal of the KKK was to embody "in its genius and its principles all that is chivalric in conduct, noble in sentiment, generous in manhood and patriotic in purpose," while safeguarding "the weak, innocent and defenseless" former slaveholders and Confederates.¹⁴ Johnson's inaction, and abdication of his post-War unifying presidential responsibilities, helped enable rapid membership growth.

The racist sentiments of the KKK were rife across the Confederate states, sparking violence and informing government policy. Rewriting their state constitution after the Civil War, the Louisiana Democratic Party bluntly proclaimed their white supremacist vision for a government "of white people, made and to be perpetuated for the exclusive benefit of the white race" in which there could not "be any equality between white and other Races."¹⁵ To protect their enfranchisement and support Republican-led civil rights initiatives, a few hundred Black Freedmen processed through New Orleans to the Constitutional Convention.¹⁶ As they marched through the streets, a mob of mostly Democrat ex-confederates and police gathered to disrupt the proceedings. While it is unclear who initially fired a weapon, the white mob rapidly unleashed violent terror upon the mostly unarmed group of Black citizens.¹⁷ Many who tried to flee, were injured, or pled for mercy were ruthlessly murdered by the mob's guns and brickbats.¹⁸ By the end of the New Orleans Massacre, forty-eight men were dead and over two-hundred wounded.¹⁹

The New Orleans Massacre marked a failure of President Andrew Johnson's Reconstruction policy and demonstrated Johnson's refusal to denounce the white terrorism

¹⁴Charles Lane, *The Day Freedom Died: the Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 1st ed (New York: Henry Holt and Company, 2008), 3.

¹⁵ *Ibid.*, 17.

¹⁶ Donald E. Reynolds, "The New Orleans Riot of 1866, Reconsidered," *Louisiana History* 5, no. 1(1964): 5-27, 11.

¹⁷ *Ibid.*, 13.

¹⁸ Ron Chernow, *Grant*, (New York: Penguin Press, 2017), 574.

¹⁹ James G. Hollandsworth, *An Absolute Massacre: the New Orleans Race Riot of July 30, 1866*, (Baton Rouge: Louisiana State University Press, 2001), 3.

spreading across the Southern states. While he had supported emancipation, Johnson was a slave owner who opposed Black enfranchisement and racial intermarriage.²⁰ Johnson stated that “White men alone must manage the South,” because he believed that Black citizens had “less capacity for government than any other race of people.”²¹ He did not believe that Reconstruction should be an expansive project by the Federal Government, and used his presidential pardon authority to reinstate ex-Confederates into government positions.²² The Civil Rights Act of 1866—which banned race-based citizenship rejection—was passed through an override of Johnson’s veto.²³

Within this context, some officials blamed Johnson for the New Orleans Massacre. Thaddeus Stevens, the Radical Republican Representative from Pennsylvania, said that the slaughter occurred “under the sanction of Johnson and his office-holders” while abolitionist Senator Charles Sumner called President Johnson the worst enemy of the Union alongside Confederate President Jefferson Davis.²⁴ *Harper’s Weekly* chastised President Johnson’s inaction. They claimed that he “knew the inflamed condition of the city of New Orleans” in which “the Mayor was a bitter rebel whom he had pardoned into office,” before criticizing his non-use of a presidential “right which empowered him to save all those lives.”²⁵ Similar culpability drove an increase in white supremacist terrorism under President Johnson. In 1868, local chapters of the KKK assassinated a Black Republican Congressman in Arkansas, three Representatives in the South Carolina Legislature, and killed over twenty members of a Black election parade in Georgia.²⁶ The proliferating mobs were embedding themselves in local government and terrorizing communities.

While Johnson failed to prevent domestic terrorism, his successor, President Grant, demonstrated the presidential potential for limiting white supremacist violence. A Congressional Report on the 1868 election found that 1,081 political murders of Black citizens and Republicans

²⁰ Eric Foner, *A Short History of Reconstruction, 1863-1877*, 1st ed. (New York: Perennial Library, 1990), 84.

²¹ *Ibid*, 84.

²² *Ibid*, 83; *Ibid*, 89.

²³ Lane, *The Day Freedom Died*, 35.

²⁴ Reynolds, “The New Orleans Riot of 1866, Reconsidered,” 15.

²⁵ *Ibid*.

²⁶ Lane, *The Day Freedom Died*, 3; *Ibid*, 3. See also, Daniel Byman, “White Supremacy, Terrorism, and the Failure of Reconstruction in the United States,” *International Security* 46, no. 1 (July 19, 2021): 53–103.

https://doi.org/10.1162/isec_a_00410.

occurred in Louisiana alone.²⁷ Grant, the former Union General, understood the threat that groups like the KKK posed to the stability of the United States. To combat the KKK, President Grant emphasized criminal investigation and prosecution of white supremacist terrorism. Until this point, law enforcement had been a state function—questions of constitutionality limited federal duties.²⁸ However, utilizing the newly passed Fourteenth and Fifteenth Amendments, Grant lobbied Congress to pass the Enforcement Acts. These Acts labeled racially motivated terrorism as a federal crime, called the KKK a “rebellion,” and gave the president the ability to suspend habeas corpus. He established the Department of Justice to prosecute Klan terrorism, while simultaneously dispatching Secret Service officers to investigate local Klan violence.²⁹ In a quote demonstrating President Grant’s essential commitment to receiving legislative support, Ohio Rep. James A. Garfield stated that Grant was “very anxious that Congress shall do nothing else, but legislate, concerning the Ku Klux [Klan].”³⁰

In the six years after the 1870 Enforcement Act, the Grant administration obtained seventy-two indictments from federal grand juries.³¹ He mobilized troops in states across the South who protected African American citizens and political processes by infiltrating KKK networks and arresting members.³² His actions earned approval from Frederick Douglass, the famed African-American abolitionist, “for stamping out this murderous *ku-klux*.”³³ Grant’s efficacy was ultimately undermined by the Supreme Court’s landmark 1876 *United States v. Cruikshank* decision, which ruled that because the Fourteenth Amendment governed state-organized behavior not individual actions it could not be used for terrorism prosecution.³⁴ Any remaining prospects for federal counterterrorism policy were eliminated when Grant’s successor, President Hayes, received essential electoral votes in exchange for assurances that federal troops

²⁷ Lane, *The Day Freedom Died*, 19.

²⁸ *Ibid.*, 4.

²⁹ *Ibid.*

³⁰ Chernow, *Grant*, 705.

³¹ *Ibid.*, 759.

³² *Ibid.*, 707.

³³ *Ibid.*, 706.

³⁴ For a detailed description on the *United States v. Cruikshank* case see Lane’s *The Day Freedom Died*. Writing on the implications the cases leading to *Cruikshank*, the Republican Governor Kellogg of Louisiana stated that the decision “was regarded as establishing the principle that hereafter no white man could be punished for killing a negro, and as virtually wiping the Ku Klux laws off the statute books.” Lane 216.

would be removed from the South.³⁵ As the news predicted at the time of Hayes's inauguration, "the negro will disappear from the field of national politics. Henceforth the nation, as a nation, will have nothing more to do with him."³⁶ The brief Reconstruction-era hope for Black political representation was destroyed with the Hayes Presidency, the withdrawal of federal oversight of Southern governance, and the beginnings of Jim Crow segregation. By compromising with Southern Democrats, and their Ku Klux Klan affiliations, Hayes sacrificed the rights and safety of African American citizens for his own political benefit.

W.E.B DuBois wrote that during the Reconstruction Era, "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."³⁷ He pins the end of Reconstruction at Hayes's election of 1876—a despicable "victory" for the South.³⁸ While the Grant Administration was briefly successful in combating white supremacist terrorism, progress was halted by three factors: legal challenges to Grant's prosecutorial authority, the election of President Hayes, and the withdrawal of peacekeeping forces from the Southern states. Over the following centuries, lynching continued but overall KKK membership decreased. White supremacists perceived less need for terroristic methods because oppression, hatred, disenfranchisement, and violence had been institutionalized with Democratic Party governance in the Southern states. The KKK realized their political agenda and emerged victorious, as Hayes began a new era of presidents abdicating their responsibility to protect Black American citizens.

WAVE II: REESTABLISHMENT OF THE KU KLUX KLAN

President Wilson's delayed response to white supremacist propaganda, and decisions against using federal investigative powers, define the policy failures that facilitated the nationwide reemergence of the Ku Klux Klan. Fueled by anti-immigrant sentiments of World War I, and the film success of *The Birth of a Nation*, Colonel William Simmons reestablished the

³⁵ For a discussion on the complexity of this compromise see C. Vann Woodward, (Comer Vann) *Reunion and Reaction: the Compromise of 1877 and the End of Reconstruction*, (New York: Oxford University Press, 1991).

³⁶ Woodward, *Reunion and Reaction*, 214.

³⁷ W.E.B. Du Bois, (William Edward Burghardt) *Black Reconstruction in America; an Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880*, (New York: Russell and Russell, 1966), 30.

³⁸ *Ibid*, 707.

KKK in 1915.³⁹ During its first year at New York's Liberty Theater, over 1 million people viewed the recruitment propaganda of the film's revisionist glorification of the KKK.⁴⁰ Lending credence to the film was the widely reported news that it had been screened for President Wilson at the White House.⁴¹ The absence of any denouncing statement from President Wilson enabled the false rumor that he praised it as "all so terribly true."⁴² Years later Wilson would write, "I have always felt that this was a very unfortunate production and I wish most sincerely that its production might be avoided."⁴³ However, the delayed response was a gift for the legitimization of the growing KKK. Thomas Dixon, whose book the film is based upon, understood the movie's political implications and "to revolutionize Northern sentiments."⁴⁴ The National Association for the Advancement of Colored People (NAACP) leader William Trotter was fearful that the "rebel play" would cause violent riots and "an incentive to great racial hatred."⁴⁵

Unfortunately, these predictions of violence were realized in the coming years. On July 2, 1917, a white mob terrorized the Black neighborhood of East St. Louis. While the official death toll stood at 39, others reported that 150 had died.⁴⁶ The co-founder of the NAACP William English Walling wrote the White House, blaming the "anti-Negro element of the South" for the terrorism and asking for an "immediate Presidential proclamation... the full military power of the nation will be used in defense of the lives and liberty of our colored fellow citizens."⁴⁷ President Wilson was more focused on World War I. Wilson's Secretary of War pleaded that it was "not the time to raise the race issue," and, after prompting his Attorney General to investigate the violence in East St. Louis, President Wilson concluded "that no facts have been presented to us which would justify federal action."⁴⁸ Wilson's inaction and war focus reveal a

³⁹ Arie Perliger, *American Zealots: Inside Right-Wing Domestic Terrorism*, (New York: Columbia University Press, 2020), 37.

⁴⁰ Scott A. Berg (Andrew Scott), *Wilson*, (New York: G.P. Putnam's Sons, 2013), 350. See also Dorothy Dix's 1915 film review in Nicholas F. Jacobs and Sidney M. Milkis, "Extraordinary Isolation? Woodrow Wilson and the Civil Rights Movement," *Studies in American Political Development* 31, no. 2 (2017): 193–217. <https://doi.org/10.1017/S0898588X1700013X>.

⁴¹ Berg, *Wilson*, 349

⁴² *Ibid*, 349.

⁴³ *Ibid*.

⁴⁴ Jacobs et. al., "Extraordinary Isolation?" 205.

⁴⁵ *Ibid*, 207. The NAACP feared widespread racial violence and sought injunctions against the film's screening, see Berg, *Wilson*, 349.

⁴⁶ Berg, *Wilson*, 482

⁴⁷ *Ibid*, 482.

⁴⁸ *Ibid*, 483.

value judgement of priorities, in which he did not protect the lives of Black American citizens or seek justice on their behalf. He was a calculating political scientist, who was both racist in his support of a segregated Federal Government and wary of overreaching his legal authority. After a concerted effort by W.E.B. DuBois and the NAACP, Wilson realized that he could not completely ignore the white terrorism occurring in the country.⁴⁹ In July 1918, a year after the East St. Louis violence, President Wilson invoked the WWI fight for democracy in his proclamation denouncing lynching:

There have been many lynchings, and every one of them has been a blow at the heart of ordered law and humane justice... I say plainly that every American who takes part in the action of a mob or gives it any sort of countenance is no true son of this great democracy, but its betrayer... I therefore very earnestly and solemnly beg that the governors of all the States, the law officers of every community, and, above all, the men and women of every community in the United States... will cooperate—not passively merely, but actively and watchfully—to make an end of this disgraceful evil.⁵⁰

Without accompanying action, President Wilson's rhetoric did little to curb the domestic terrorism of the KKK.

The Wilson Administration undermined their legal authority to respond to KKK violence when the Department of Justice arrested over 10,000 people in the anti-communist action known as the Palmer Raids.⁵¹ The Department of Justice forfeited many of the cases after news broke about illegal warrants and violations of Constitutionally-protected civil liberties.⁵² The Wilson administration's illegal Palmer Raids gave state and local government the confidence to subsequently violate the civil rights of their citizens. Localities could "impose their own standards of good citizenship, complete with loyalty oaths and which hunts" which allowed Klansmen to become "local vigilantes."⁵³ In the absence of any federal intervention, the KKK's strength grew over the remaining course of Wilson's presidency. By the election of 1924, the Klan reached the peak of their nationwide influence.⁵⁴

⁴⁹ Jacobs et. al., "Extraordinary Isolation?"; Ibid, 199.

⁵⁰ "President Woodrow Wilson's Proclamation of July 26, 1918, Denouncing Lynching," document, July 26, 1918, URL: https://www.amistadresource.org/documents/document_07_06_030_wilson.pdf.

⁵¹ Christopher M. Finan, *From the Palmer Raids to the Patriot Act a History of the Fight for Free Speech in America* (Boston: Beacon Press, 2007).

⁵² Berg, *Wilson*, 672

⁵³ Ibid, 672.

⁵⁴ Byman, *Spreading Hate*, 14.

The Klan of the 1920s, which first emerged under Wilson's watch, became a mass movement of violent terrorism. It featured a national organizational hierarchy, rapid fundraising capabilities, and a membership between 1.1 and 5 million people.⁵⁵ While Wilson spoke out against lynching, his pattern of delayed condemnation and nonexistent intervention allowed for this growth of the Ku Klux Klan. However, by the 1930's the Klan collapsed due to corruption based in-fighting and pre-World War II hostility towards fascism. A half-million-dollar bill from the Internal Revenue Service ultimately bankrupted the group in 1944.⁵⁶ While most financial troubles occurred irrespective of any presidential action, the IRS's audit highlights the potential of economic intervention and disruption for combatting domestic terrorism networks.

WAVE III: THE CIVIL RIGHTS ERA

In the 1950s a third wave of the Ku Klux Klan emerged, which would ultimately be challenged by the investigations, federal intervention, and courageous resolve of Presidents Kennedy and Johnson. Emerging in the wake of the Black political and social gains of the Civil Rights Movement, the Third Wave of the KKK reacted negatively to social progress much like the first Klan had during Reconstruction.⁵⁷ The 1954 and 1955 *Brown v. Board of Education* decisions from the Supreme Court gave the Klan a recruiting topic that fomented white resentment.⁵⁸ By 1958, over 500 chapters had opened and 100,000 new members had joined the Klan.⁵⁹ Across the South, hooded Klan Knights hosted rallies under burning crosses to terrorize communities, and violence more tangibly manifested through bombings of community centers, churches, and the homes of political leaders.⁶⁰ As their influence increased, the Klan's bombing, lynching, shooting, and arson was facilitated through frequent cooperation and inaction on behalf of local law enforcement.⁶¹

⁵⁵ Perlinger, *American Zealots*, 37.

⁵⁶ *Ibid*, 38.

⁵⁷ Rory McVeigh, *The Rise of the Ku Klux Klan: Right-Wing Movements and National Politics*, (Minneapolis: University of Minnesota Press, 2009), 201.

⁵⁸ The *Brown v. Board of Education* decisions ruled that segregated schools and the "separate but equal" doctrine of *Plessy v. Ferguson* were unconstitutional and ordered schools to begin a de-segregation process.

⁵⁹ Arnoldi S. Rice, *The Ku Klux Klan in American Politics*, (Washington: Public Affairs Press, 1962), 118.

⁶⁰ *Ibid*, 119.

⁶¹ Perlinger, *American Zealots*, 44.

When John F. Kennedy accepted the 1960 Democratic nomination for president, he stated that he could “run with enthusiasm and with conviction the Party platform” of “equal access for all Americans to all areas of community life” and the use of federal lawsuits to “prevent the denial of any civil rights on grounds of race, creed or color.”⁶² In meetings leading up to the election, Klan leaders warned members to “stay away from Kennedy,” and that if he won he should be “impeached before the sun rises.”⁶³ When Kennedy won, he faced Klan violence and segregationist Governors. In 1961, President Kennedy sent 600 deputy U.S. Marshals to Alabama to protect the Freedom Riders on their desegregation journeys.⁶⁴ He additionally brought suits against police officers and Klansmen who had facilitated violence against the riders and otherwise blocked desegregation.⁶⁵ While the FBI arrested four men who firebombed a Freedom Riders bus, President Kennedy was generally wary of relying on then-FBI Director J. Edgar Hoover.⁶⁶ The FBI was still segregated under Hoover and had long relied upon state and local law enforcement organizations which colluded with the KKK.⁶⁷ As Attorney General, Robert Kennedy bluntly stated that in contrast to the brothers’ support for civil rights, “Hoover’s on the other side.”⁶⁸ Kennedy’s policy was incomplete at the time of his assassination, but the initial interventionist actions demonstrated the necessity of strong presidential action to limit white supremacist terrorism.

With continuing violence, the 1965 U.S. House Committee on Un-American Activities reported that, “In certain areas of the South, a very real fear of the Klan exists among Klansmen themselves, ex-Klansmen, victims of the Klan and the public.”⁶⁹ Many civil rights advocates had been critical of President Kennedy for not pressuring Congress’s southern bloc for stronger Civil Rights legislation.⁷⁰ After inheriting the presidency, Johnson believed that the passage of civil rights legislation could enable federal counterterrorism action and heal the national wound left

⁶² Rice, *The Ku Klux Klan in American Politics*, 126.

⁶³ *Ibid*, 128.

⁶⁴ Theodore C. Sorensen, *Kennedy*, 1st Perennial Library ed. (New York: Perennial Library, 1988), 478.

⁶⁵ *Ibid*.

⁶⁶ Richard Reeves, *President Kennedy: Profile of Power*, (New York: Simon and Schuster, 1993), 130.

⁶⁷ *Ibid*, 127.

⁶⁸ *Ibid*.

⁶⁹ *Report on American Civil Liberties Union Opposition to the Committee, and Investigations of the Civil Rights Movement and Ku Klux Klan (KKK), House Committee on Un-American Activities, Subject File, 1965, 1965.*

⁷⁰ Robert Dallek, *Lyndon B. Johnson: Portrait of a President*, (Oxford, England: Oxford University Press, 2004), 137.

by Kennedy's assassination.⁷¹ Johnson's facilitation of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were monumental, but the federal legislation was a political motivator for the ideologically opposed KKK. With assistance from local law enforcement, the KKK terrorized civil rights leaders throughout the South.⁷² Johnson was deeply moved by the 1963 bombing of a Birmingham church which killed four young Black girls. He harnessed the FBI for counterterrorism by instructing Hoover to open multiple investigations and uncover anything pertaining to the violence in Alabama.⁷³ Fighting for election in 1964, the Johnson campaign ran a television ad against the Republican Nominee Barry Goldwater which featured a Klansman in front of burning cross saying: "I like Barry Goldwater. He needs our help."⁷⁴ The political tides were turning, and the Johnson campaign capitalized upon an emerging intolerance for the Ku Klux Klan amongst the American populace.

The sustained response by Presidents Kennedy and Johnson to the KKK's violence ultimately undermined the Klan. When the White Knights of the Ku Klux Klan murdered three civil rights workers in the Mississippi Burning case, Johnson warned Americans to "get out of the Klan now and return to decent society before it is too late."⁷⁵ Along with action from Attorney General Robert Kennedy, President Johnson further pressured the FBI to perform its investigative duties, and the Bureau opened its first ever state headquarters in Mississippi.⁷⁶ While Hoover's FBI severely harmed the civil rights movement through infiltration and oppression of civil rights leaders, he also referred to the KKK as "sadistic, vicious white trash."⁷⁷ Under presidential pressure, he launched a White Hate Groups branch of COINTELPRO to infiltrate and investigate the Klan.⁷⁸ Similarly to the Second Wave's demise, an IRS audit of the KKK resulted in bankruptcy and financial prosecution.⁷⁹ The totality of presidential intervention,

⁷¹ Ibid, 163. As a former lawmaker from Texas, Senate Majority Whip, and Senate Democratic leader, Johnson had a unique combination of Congressional relationships, legislative abilities, and regional understanding to maneuver civil rights legislation through the southern oppositional forces.

⁷² Robert A Caro. *The Passage of Power*, (New York: Alfred A. Knopf, 2012), 565.

⁷³ Dallek, *Lyndon B. Johnson*, 163.

⁷⁴ Ibid, 186.

⁷⁵ Byman, *Spreading Hate*, 24.

⁷⁶ Ibid, 24.

⁷⁷ O'Reilly, Kenneth. "The FBI and the Civil Rights Movement during the Kennedy Years--from the Freedom Rides to Albany." *The Journal of Southern History* 54, no. 2 .1988. 201-32, <https://doi.org/10.2307/2209399>; Byman, *Spreading Hate*, 27.

⁷⁸ Ibid, Byman, *Spreading Hate*, 27.

⁷⁹ Ibid, 34.

investigative power, television exposure of violence to white moderates, and financial troubles successfully disrupted the Klan. In 1964, the FBI estimated Ku Klux Klan membership to be 14,000. By 1971 the number fell to 4,300, and by 1974 there were under 2,000 Klansmen.⁸⁰

The Kennedy and Johnson Administrations demonstrate a roadmap for effective intervention against white supremacist domestic terrorism. While Kennedy was criticized for inadequate action, any possible follow-through was prevented by his assassination. President Johnson aggressively intervened, utilizing investigative agencies and prosecutorial power, facilitating expanded legislative support for federal protection of civil rights, and harnessing the dynamics of changing public perceptions. The cumulative effect was successful, as Klan membership and terrorism fell dramatically throughout the course of Johnson's presidency.

IMPLICATIONS

This historical case study is by no means exhaustive, nor does it encompass the staggering totality of white supremacist violence in American history. However, three factors emerge as consistently important for presidential action against white supremacist domestic terrorism. Firstly, the case studies in this research show how legislative support facilitates presidential intervention against extremist actors. During Reconstruction, the three new Constitutional amendments and the Enforcement Acts gave President Grant the authority to investigate and prosecute the Ku Klux Klan. In contrast, by the end of his Administration, Supreme Court cases such as *United States v. Cruikshank* undermined his legal authority to intervene. This legal precedent informed President Wilson's inaction in East St. Louis, while we see President Johnson's need for the Civil Rights Acts of the 1960s to bolster his legal grounds for intervention. However, the drafting of legislation is not a phenomenon independent and tangential to presidential counterterrorism abilities. Both President Grant and L.B. Johnson actively lobbied for legislation to strengthen their counterterrorism efforts. In contrast, President A. Johnson was hostile to civil rights legislation, and President Kennedy was criticized for not advocating for legislation as an interventionist tool.

Secondly, this research shows that effective presidential intervention consistently harnessed executive branch investigative institutions. President Grant established the Department

⁸⁰ Ibid, 28.

of Justice and used the Secret Service for investigation, disruption, and prosecution, which prevented some degree of future terrorist activity. By the Hayes Presidency, the investigative and prosecutorial abilities of the Department of Justice had been undermined, and the Klan could operate with impunity. While President Wilson failed to restrict Klan growth, there is an important lesson in the Second Wave's ultimate collapse under financial troubles and IRS investigations. In both the Second and Third Waves, the IRS served as an executive branch investigative institution which prosecuted financial crimes to disrupt the terrorist network. Institutional importance was additionally demonstrated in the Third Wave by increased counterterrorism efficacy when President Johnson felt comfortable relying on Hoover's FBI.

Finally, effective presidential counterterrorism against white supremacist extremists occurred when presidents exerted some degree of political courage during a social inflection point. As the most extreme example of failure, the racist President Andrew Johnson did not support any of the courageous racial equality aspirations of the Reconstruction Era. President Hayes's Compromise of 1877 to secure the presidency in exchange for African American rights by capitulating to the Southern demands that fostered Jim Crow laws and white supremacist violence. During the Second Wave, facing World War I calls of desegregation and an outbreak of racial violence, President Wilson lacked political courage with his resistance to military and federal government integration and refusal to or intervene against the racial violence that terrorized East St. Louis. In contrast, Presidents Grant, Kennedy, and Lyndon Johnson each stood strong in their determination to use federal authority. During the two most consequential Civil Rights eras in American history, they used their presidential powers to counteract some degree of white supremacist terrorist violence. While political courage is difficult to quantify, it emerges as a theme of successful administrations and an important area for future research.

The question, then, is how an American president should respond to the current threats of white supremacist terrorism. In 1868 the leader of the Knights of the White Camilla, one of the earliest branches of the Ku Klux Klan, stated their goal for "the better preservation of the white race, and to see that the white blood was handed down unmixed with the offensive globule of African blood."⁸¹ Over two centuries later, while serving a 1990s prison sentence, white supremacist David Lane penned his famous Fourteen Words: "We must secure the existence of our people and a future for white children." Taken as the contemporary gospel for white

⁸¹ Lane, *The Day Freedom Died*, 39.

supremacist extremists, Lane's phrase is strikingly similar to the earliest proclamations of the KKK. Despite enormous social progress, the most extreme white supremacist ideology remains unchanged and a serious concern for American presidents.

This analysis highlights the importance of legislative support and investigative capabilities for presidents to successfully combat white supremacist terrorism. However, the final factor—political courage during domestic turbulence—may prove the most consequential. Throughout American history, there are countless examples of racist ideology used for political gain. Senator George Wallace admitted the political utility of racism: “I started off talking about schools and highways and prisons and taxes, and I couldn’t make them listen. Then I began talking about niggers—and they stomped the floor.”⁸² This is a tragic reality of our American political ecosystem. After the 2008 election of Barack Obama, the first Black president in American history, the number of hate groups with white supremacist ideology increased in the US.⁸³ Eight years later, as Donald Trump parroted white supremacist rhetoric during his presidential campaign, episodes of racially motivated violence once again increased.⁸⁴ This contrast between the elections of Obama and Trump demonstrate the influence that racial identity, white supremacy, and the American presidency exert on each other. It is an essential prerogative of American presidents to actively combat the current risk of white supremacist domestic terrorism. This analysis detailed the counterterrorism potential when presidents harness legal frameworks and investigative resources. However, the most consequential factor may ultimately be the determination and political courage of American presidents in the current fight against white supremacist domestic terrorism.

⁸² Byman, *Spreading Hate*, 23.

⁸³ *Ibid*, 148.

⁸⁴ *Ibid*, 125.

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PRESIDENTIAL SIGNING STATEMENTS: DEFINING THE EXECUTIVE'S INSTITUTIONAL BOUNDARIES

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Extant scholarship has identified signing statements as a tool for presidents to enact policy change in the short term. This paper challenges this point of view, suggesting that presidents may employ signing statements primarily to delineate the institutional boundaries of the presidency and strengthen executive power vis-à-vis Congress. Through a study of the Reagan administration, this paper argues that presidents include juridical language in signing statements to address constitutionally and politically dubious statutory language, hoping that the judiciary will interpret such language in a manner favorable to the executive in future litigation. Overall, the findings of this paper suggest that presidents issue signing statements chiefly to delineate the long-term institutional boundaries of the presidency rather than to seek short-term policy changes.

INTRODUCTION

On December 30, 2005, on a quiet Friday afternoon in Washington, President George W. Bush signed into law the Department of Defense Appropriations Act of 2006, the annual bill that funds the Department of Defense's military activities. For weeks and months prior to its signing, the Act was subject to bitter partisan infighting among the Republican Party due to one key amendment: the Detainee Treatment Act, colloquially known as the McCain Torture Amendment. The amendment proposed that no individuals under custody of the United States government may be subject to "cruel, inhuman, or degrading treatment or punishment."¹ The Senate overwhelmingly approved the McCain amendment by a vote of 90 to 9, and later in October, President Bush threatened to wield the first veto of his presidency against any appropriations act that included McCain's torture amendment.² On December 30, 2005, Bush acquiesced and signed the McCain torture amendment into law.³ Yet later that same day, Bush issued a signing statement regarding the McCain amendment:

¹ Department of Defense, *Emergency Supplemental Appropriations Act to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2005), <https://www.govinfo.gov/content/pkg/STATUTE-119/pdf/STATUTE-119-Pg2680.pdf>.

² Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown and Company, 2007), 225.

³ Ed Henry, "McCain, Bush agree on torture ban," *CNN*, last modified December 15, 2005, <https://www.cnn.com/2005/POLITICS/12/15/torture.bill/>.

The executive branch shall construe Title X in Division A of the act, relating to detainees, in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the president, evidenced in Title X, of protecting the American people from future terrorist attacks.⁴

With this statement, Bush raised questions about the constitutionality of the ban and implied that he might bypass the ban when he deemed appropriate.

The above situation begets an interesting puzzle. Why would George W. Bush, a Republican president governing alongside a Republican-controlled Congress with whom Bush presumably shares policy goals, publicly state his intention to modify or nullify parts of a law after he has signed it? Does the Constitution not require that presidents enforce laws in their entirety upon signing? Why would Republicans in Congress object to Bush's usage of signing statements? And finally, why would Bush wait until the very end of the legislative process to take such an action? These questions bring about an important question for research: *why do presidents issue signing statements?*

This paper will proceed as follows. First, this paper hypothesizes that presidents will employ juridical language in signing statements to demarcate the confines of executive power. It then examines the Reagan administration as a case study, demonstrating that Reagan's signing statements reflect a presidential desire to delineate the institutional boundaries of the presidency and guard the constitutional separation of powers.

THEORY

Extant literature regarding presidential motivations for using signing statements tends to contextualize the signing statement within the unilateral actor model of presidential power. The unilateral actor model of executive authority suggests that presidential power is predicated on the president's "formal capacity to act unilaterally and thus to make law on his own."⁵ Presidents act alone to seek policy outcomes "that best reflect their policy preferences," rather than seeking to

⁴ George W. Bush, "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," in *Weekly Compilation of Presidential Documents* 41 (Washington, DC: Government Printing Office, 2005): 1919.

<https://www.govinfo.gov/content/pkg/WCPD-2006-01-02/pdf/WCPD-2006-01-02-Pg1918.pdf>.

⁵ Terry M. Moe and William G. Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29, no. 4 (December 1999): 850, <https://doi.org/10.1111/1741-5705.00070>.

persuade or bargain with legislative actors.⁶ They “simply set public policy and dare others to counter.”⁷

But presidents may be motivated to use signing statements not to move policy but to delineate the institutional boundaries of the presidency relative to Congress and the courts and establish an interbranch dialogue. Signing statements may not be about short-term policy concerns, but rather *long-term concerns about the power of the presidency as an institution*.⁸ That is, President X may issue a signing statement at Time 1 to protect and anticipate future legislative intrusions upon the power of President Y at Time 2. Signing statements may help presidents outline where congressional power ends and presidential power begins.⁹ The specific language in signing statements may be indicative of why presidents use signing statements. Such language is closely connected to the judiciary.

The judiciary shapes the balance of power between the three branches of government in the American constitutional order. In *Federalist* No. 78, Publius deems it the sole responsibility of the judiciary “to declare all acts contrary to the manifest tenor of the Constitution void.”¹⁰ The Court as well as other governmental actors have recognized that a “basic” and “permanent and indispensable feature” of American constitutionalism is indeed that “the federal judiciary is supreme in the exposition of the law of the Constitution.”¹¹ The judiciary has become “a system for allocating power.”¹² The ubiquity of such judicial dominance led Theodore Roosevelt to quip that Congress and the president “can say what they think, but it rests with the judiciary to decide what they have really thought.”¹³

⁶ Fang-Yi Chiou and Lawrence S. Rothenberg, *The Enigma of Presidential Power: Parties, Policies and Strategic Uses of Unilateral Action* (Cambridge: Cambridge University Press, 2017); Christopher J. Deering and Forrest Maltzman, “The Politics of Executive Orders: Legislative Constraints on Presidential Power,” *Political Research Quarterly* 52, no. 4 (December 1999).

⁷ William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003), 15.

⁸ Ian Ostrander and Joel Sievert, “What’s So Sinister About Presidential Signing Statements?” *Presidential Studies Quarterly* 43, no. 1 (March 2013), <https://doi.org/10.1111/psq.12003>.

⁹ Joshua B. Kennedy, “Signing Statements, Gridlock, and Presidential Strategy,” *Presidential Studies Quarterly* 44, no. 4 (December 2014): 605, <https://doi.org/10.1111/psq.12152>.

¹⁰ Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 405.

¹¹ *Cooper v. Aaron*, 358 S. Ct. 1, 18 (1958).

¹² Cynthia R. Farina, “Statutory Interpretation and the Balance of Power in the Administrative State,” *Columbia Law Review* 89, no. 3 (April 1989): 452, <https://www.jstor.org/stable/1122864>.

¹³ Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), 3.

Through what specific means does the judiciary shape the balance of power? When deciding questions that will fundamentally alter the governmental balance of powers, courts look to legislative history, defined as “the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates... that can later be used to aid in interpreting the statute.”¹⁴ Courts often look to legislative history to uncover the meaning of ambiguous statutory language or probe the intent of the legislature. Studies have shown that judges use legislative history more than any other canon of statutory construction.¹⁵ But reliance on legislative history as a method of statutory interpretation is not perfect. Judges have likened judicial reliance on legislative history to “looking over a crowd and picking out your friends.”¹⁶ Reliance on legislative history, and the important role it gives to congressional actors, has caught the attention of the executive.

Presidents are always seeking to expand the boundaries of their power. This is inherent in a legal doctrine known as *departmentalism* or *coordinate construction*, which suggests that each branch of government possesses an equal and independent authority to interpret the Constitution as it sees fit.¹⁷ Departmentalism explicitly rejects the notion that the court’s interpretation of the Constitution should be authoritative.¹⁸ In *Federalist* No. 49, Publius sets forth the intellectual origins of the doctrine: “The several departments being *perfectly co-ordinate* by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers [author’s emphasis].”¹⁹ In practice, presidents have pursued the doctrine of departmentalism with great vigor. Such a view was espoused by Ronald Reagan’s Attorney General, Edwin Meese III, noting in a 1986 speech that “constitutional interpretation is not the business of the Court only, but also, and properly, the

¹⁴ *Black’s Law Dictionary*, 7th ed. (Eagan, MN: West Publishing Company, 1999), s.v. “Legislative history.”

¹⁵ Beth M. Henschen, “Judicial Use of Legislative History and Intent in Statutory Interpretation,” *Legislative Studies Quarterly* 10, no. 3 (August 1985): 353, <https://www.jstor.org/stable/440036>.

¹⁶ Patricia M. Wald, “Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,” *Iowa Law Review* 68 (1983): 214.

¹⁷ Richard H. Fallon, Jr., “Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age,” *Texas Law Review* 96, no. 3 (February 2018): 487, <https://texaslawreview.org/wp-content/uploads/2018/02/Fallon.pdf>.

¹⁸ There is a massive literature in law reviews and legal journals regarding the democratic propriety of departmentalism/coordinate construction, judicial supremacy, and popular constitutionalism. See the following for a small sampling: Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2005).

¹⁹ Hamilton, Jay, and Madison, *The Federalist*, 104.

business of all branches of government.”²⁰ Departmentalism reflects the perennial presidential quest for a “means of refusing to enforce laws that violate the supreme law of the Constitution.”²¹ And the language that presidents use in signing statements may provide presidents with just the “means” they are searching for.

Juridical language is legally oriented language that speaks in terms of rules, structures, and institutions, rather than policy language. Juridical language is fundamentally about power. An example of juridical language is as follows: “It is the longstanding position of the executive branch that these provisions unduly impair the ability of the executive branch to determine when and where to prosecutive Guantanamo Bay detainees and where to send them upon release.”²² Here, the president speaks in terms of *power*: he references the institutional function of the executive branch and how Congress is infringing on those properties. By contrast, an example of nonjuridical language is as follows: “Sections 1026-1028 continue unwise funding restrictions.”²³ Nonjuridical language is still substantive: it criticizes policy provisions of the bill. But it speaks in terms of policy, not power or institutions. Juridical language thus reflects primarily institutional concerns.

Courts arbitrate disputes between the branches of government; these disputes shape the balance of power. Courts rely on legislative history to extract meaning from ambiguous statutory language and resolve such disputes. Presidents, aware that the judiciary serves as the final arbiter of power disputes, hope that the judiciary will construe ambiguous statutory language in favor of the executive. Presidents, therefore, will use juridical language in signing statements to put forth an interpretation of vague statutory language that is favorable to the executive. Signing statements should thus be dominated by juridical language. Importantly, this logic still holds even when the concerns that presidents express through juridical language do not reach the judiciary in future litigation. Even objections raised in signing statements that do not reach the judiciary should still contain juridical language conveying institutional concerns. Besides

²⁰ Edwin Meese III, “The Law of the Constitution” (speech, New Orleans, LA, October 21, 1986), Citizens Forum, <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-21-1986.pdf>.

²¹ Steven G. Calabresi and Saikrishna G. Prakash, “The President’s Power to Execute the Laws,” *The Yale Law Journal* 104, no. 3 (1994): 621.

²² Joseph R. Biden, “Statement on Signing the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023,” in *Daily Compilation of Presidential Documents* 01143 (Washington, DC: Government Printing Office): 2. <https://www.govinfo.gov/content/pkg/DCPD-202201143/pdf/DCPD-202201143.pdf>.

²³ Barack Obama, “Statement on Signing the National Defense Authorization Act for Fiscal Year 2012,” in *Daily Compilation of Presidential Documents* 00978 (Washington, DC: Government Printing Office, 2011): 2. <https://www.govinfo.gov/content/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf>.

attempting to advance their short-term policy motives, presidents may issue signing statements to protect the office of the presidency, delimit the confines of executive authority relative to Congress, and ultimately preserve the constitutional separation of powers.

In reaction to the 1985 Gramm-Rudman-Hollings Balanced Budget Act, Reagan took note of questionable language in statutory provisions, issued a signing statement filled with juridical language in response to such language, and most importantly, *included juridical language precisely to enhance the president's interpretation of a law relative to Congress.*

A CASE: THE GRAMM-RUDMAN-HOLLINGS BALANCED BUDGET ACT OF 1985

Reagan's signing statement on the Gramm-Rudman-Hollings Balanced Budget Act of 1985 represents an instance in which a president uses juridical language to infuse presidential intent into legislative history and defend the boundaries of presidential power. My hypothesis operates in the following way. Reagan will observe questionable language in a statute. Then, *seeking to codify his understanding of a law into legislative history to later be used by courts in statutory construction*, Reagan will, more likely than not, issue signing statements dominated by juridical language. With the following case study, I hope to show that the use of juridical language is no mere coincidence, *but rather an intentional act on behalf of the president and his lawyers* to impact the judiciary's interpretation of a law and thus shape the distribution of power among the three branches of government.

On August 1, 1985, Congress introduced the Balanced Budget and Emergency Deficit Control Act of 1985, colloquially known as the Gramm-Rudman Balanced Budget Act, or Gramm-Rudman, for short.²⁴ Gramm-Rudman represented a critical moment for federal budgetary policy, as it constituted Congress' initial attempt to control the size of the debt. The Act, intended as a measure to reduce the federal deficit, enacted automatic spending cuts that would materialize if Congress and the president failed to agree on an established spending target.²⁵ One provision of the bill, involving the Comptroller General of the United States, was particularly notable. The substance of this provision is as follows: Gramm-Rudman set forth an

²⁴ Balanced Budget and Emergency Deficit Control Act of 1985, H.J.Res.372, 99th Cong. (1985), <https://www.congress.gov/99/statute/STATUTE-99/STATUTE-99-Pg1037.pdf>.

²⁵ "Gramm-Rudman-Hollings," National Debt Glossary, accessed March 6, 2023, <https://www.aarp.org/politics-society/government-elections/national-debt-guide/glossary/gramm-rudman-hollings-definition.html>.

acceptable deficit level that the government statutorily could not breach. If the government did breach the prescribed budget allowances, spending cuts would automatically materialize. Section 251 of Gramm-Rudman mandated that the director of the Office of Management and Budget (OMB) and the director of the Congressional Budget Office (CBO) report their budget-cutting recommendations to the Comptroller General.²⁶ The Comptroller General, *a legislative officer*, would then evaluate the reports of these two officials and provide a recommendation to the president.²⁷ Crucially, then, Gramm-Rudman required the president to follow the Comptroller General's recommendations for reductions, unless Congress found a way to make necessary budget reductions on its own.²⁸ These two statutory elements of Gramm-Rudman, the authority of the Comptroller General to calculate budget estimates that would trigger the operative components of the bill and the requirement that the president act upon request of the Comptroller General, gave a legislative officer significant power over the president. Reagan would take note of these provisions when Gramm-Rudman reached his desk for signature.

While Congress was formulating Gramm-Rudman, Reagan and his lawyers were planning how to protect the presidency from the perceived "legislative opportunism" that arose from the Watergate scandal.²⁹ Reagan's lawyers sought to influence judges with their understanding of ambiguous statutory language in the hope that judges would rely on Reagan's statutory exegesis in future litigation. The administration used juridical language in signing statements to accomplish this objective. Gramm-Rudman was introduced in Congress on August 1, 1985, and signed by President Reagan on December 12, 1985. Throughout this five-month period, Reagan, his attorney general Edwin Meese, and other top Justice Department lawyers engaged in much back-and-forth discussion on why they were using the signing statement, particularly in relation to Gramm-Rudman.

The executive branch's response to Gramm-Rudman commences on August 3, 1985, two days after Gramm-Rudman emerged in Congress. Stephen G. Calabresi, Special Assistant to the Attorney General, and John C. Harrison, Deputy Assistant Attorney General, penned a

²⁶ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 § 251, 99 Stat. 1063 (1985).

²⁷ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 § 252, 99 Stat. 1072 (1985).

²⁸ Darrell M. West, "Gramm-Rudman-Hollings and the Politics of Deficit Reduction," *The Annals of the American Academy of Political and Social Science* 499 (September 1988): 96, <https://doi.org/10.1177/0002716288499001007>.

²⁹ Edwin Meese III, *With Reagan: The Inside Story* (Washington, DC: Regnery Gateway, 1992), 119.

memorandum to Reagan's newly selected attorney general, Edwin Meese III. The memorandum begins by expressing displeasure with how courts use legislative history:

The abuse of legislative history is a major way in which legislative power is usurped by activist courts, ideologically motivated congressional staffers, and lobbying groups. If statutes are to be taken seriously as law, legislative history should be a guide to the interpretation of statutory language, not a substitute for it.³⁰

Several points are notable here. First, Calabresi and Harrison suggest that legislative history is abused, implying that the executive branch should do something to remedy this. They note that members of Congress write legislative reports in such a way that Congress' understanding of the law will be the one prioritized by courts. But by claiming that legislative history should serve as a "guide," rather than a "substitute" for statutory language, Calabresi and Harrison intimate that something else can supplement judicial reliance on legislative history. And what Calabresi and Harrison have in mind is the presidential signing statement; they see the signing statement as a way to shape legislative history:

At some time, it would be good for the Department to review the whole question of legislative reports. Even without such a review, however, *we have a potentially powerful, if so far unused, tool: presidential signing statements* [emphasis added]. The President's signing statement represents the basis on which a necessary participant gave his consent to legislation. It is even better than a committee report because it represents an entire branch's view of the matter.³¹

This portion of the memorandum outlines the precise logic by which presidents issue signing statements. Signing statements contain the president's interpretation of a bill. Courts rely too much on legislative history. So, presidents should use signing statements to infuse legislative history with their understanding of ambiguous statutory language. Reagan thus used signing statements *specifically to shape legislative history in such a way that courts will use it to generate desirable institutional outcomes for the president*. This also suggests that the president's lawyers perceive the president as sharing a legislative role with Congress. Signing statements, in the view of Calabresi and Harrison, ensure *that the president's views on a law*

³⁰ Steve Calabresi and John Harrison to Edwin Meese III, Attorney General, Washington, DC, August 23, 1985, Files of Stephen Galebach, 1985-1987, Accession 060-89-269, Box 3, Holdings of the National Archives and Records Administration, Record Group 60, National Archives Building, Washington, DC.

³¹ *Ibid.*

became part of legislative history. Calabresi and Harrison then expand on how the signing statement can guard the powers of the presidency:

There are many steps we can take to remedy this problem [excessive judicial reliance on legislative history] and protect the institutional prerogatives of the Executive Branch. Indeed, the Justice Department can probably *revolutionize* [author's emphasis] this area of law simply by acting on our own initiative. We recommend that you [Ed Meese] take the following steps to make sure that in the future the president's views will be taken into account by courts that look at legislative history.³²

Critically, Calabresi and Harrison see the signing statement as a tool that can “revolutionize” the executive's place vis-à-vis Congress and the courts. They view the tool as one that can reshape the balance of powers between the president and Congress. To enact such a “revolution,” Calabresi and Harrison suggest that top Department of Justice officials give speeches on signing statements, publish signing statements in the Congressional Report, and perhaps most importantly, ensure that Reagan's lawyers “cite these statements in our briefs so judges get used to relying on them.”³³ This clearly establishes that Reagan's lawyers intended for signing statements to influence legislative history. And Reagan's lawyers certainly had long-term considerations in mind. On October 28, 1985, Ralph W. Tarr, Acting Assistant Attorney General, penned a memorandum to T. Kenneth Cribb, describing how Reagan should issue signing statements with such frequency that the courts would become accustomed to signing statements as standard tools of statutory interpretation:

The more often that the government's lawyers cite the signing statements, the more often the courts will refer to them in decisions and the more familiar they will become to other lawyers and courts as legitimate tools of interpretation.³⁴

Throughout all these memoranda, we perceive in Reagan's lawyers a strong desire to protect the institutional prerogatives of the executive branch. Writing to Acting Assistant Attorney General James M. Spears on October 25, 1985, Counselor to the Attorney General T. Kenneth Cribb claims that “This project [using signing statements], I think, has great potential for seeing that

³² Ibid.

³³ Ibid.

³⁴ Ralph W. Tarr, Acting Assistant Attorney General, to T. Kenneth Cribb, Counselor to the Attorney General, Washington, DC, October 28, 1985, Files of Stephen Galebach, 1985-1987, Accession 060-89-269, Box 3, Holdings of the National Archives and Records Administration, Record Group 60, National Archives Building, Washington, DC.

proper weight is given to the Executive's interpretation of bills signed into law by the president."³⁵ Cribb, in a memorandum to Acting Assistant Attorney General Ralph W. Tarr, makes many of the same comments:

We believe that it should be possible to have signing statements join the material other than congressional debates and reports that courts use to determine the meaning of a statute. There is no reason that the same rules of statutory construction that make these materials [legislative reports] legitimate tools for courts confronted by ambiguous statutes should not also apply to presidential signing statements.³⁶

Communication amongst Reagan's top lawyers clearly shows the motives behind signing statements. Using words like "powerful" and "revolutionize" in the context of the signing statement, one sees in Reagan's lawyers a restless drive to defend the executive from congressional intrusions and the abuse of legislative history. The remedy, according to Reagan's lawyers, is to utilize juridical language in signing statements to influence how courts understand ambiguous statutory language. Exchanges between Reagan's top lawyers provide strong support for the notion that Reagan understood juridical language as an important tool to influence courts.

On December 12, 1985, Reagan signed the Gramm-Rudman-Hollings Balanced Budget Act into law. He issued a lengthy signing statement and took care to note his objections with section 251 of Gramm-Rudman:

In signing this bill, I am mindful of the serious constitutional questions raised by some of its provisions. The bill assigns a significant role to the Director of the Congressional Budget Office and the Comptroller General in calculating the budget estimates that trigger the operative provisions of the bill. Under the system of separated powers established by the Constitution, however, executive functions may only be performed by officers in the executive branch. The Director of the Congressional Budget Office and the Comptroller General are agents of Congress, not officers in the executive branch... It is my hope that these outstanding constitutional questions can be promptly resolved.

Similar constitutional concerns are raised by a provision in the bill authorizing the president to terminate or modify defense contracts for deficit reduction purposes, but only if the action is approved by the Comptroller General. Under our

³⁵ T. Kenneth Cribb, Counselor to the Attorney General, to James M. Spears, Acting Assistant Attorney General, Washington, DC, October 25, 1985; Files of Stephen Galebach, 1985-1987; Accession 060-89-269, Box 3; Holdings of the National Archives and Records Administration, Record Group 60; National Archives Building, Washington, DC.

³⁶ *Ibid.*

constitutional system, an agent of Congress may not exercise such supervisory authority over the president.³⁷

Juridical language dominates Reagan's signing statement on Gramm-Rudman. Phrases that implicate institutional concerns, such as "constitutional questions," "executive functions," and "officers of the executive branch" are ubiquitous. This demonstrates that the fundamental question in the Gramm-Rudman dispute is one of *power* and *function*, rather than *policy*. Of course, the distribution of power will always have implications for policy. But here, Reagan's primary concern is not necessarily the substance of the policy, but who has the power to shape such policy. It is about whether the Comptroller General takes on an executive *function* by having a significant role in calculating budget estimates and ultimately whose *power* it is to do so. Reagan, then, notes that he is signing the bill despite some suspect provisions.

... I am nonetheless signing the bill. In doing so, I am in no sense dismissing the constitutional problems or acquiescing in a violation of the system of separated powers carefully crafted by the framers of the Constitution. Rather, it is my hope that the constitutional problems will be promptly resolved so that the vitally important business of deficit reduction can proceed.³⁸

Soon after Reagan signed the bill, Congress faced litigation challenging the constitutionality of the Gramm-Rudman-Hollings Balanced Budget Act. Representative Mike Synar of Oklahoma challenged the constitutionality of the Act. Synar contended that the Government Accountability Office's authority to make automatic budget cuts placed improper limits on the duty of Congress to dictate spending.³⁹

On July 7, 1986, the Supreme court released its decision in *Bowsher v. Synar*. In a 7-2 decision, the Court held that the function that Congress had assigned to the Comptroller General and director of the Office of Management and Budget had violated the constitutional separation of powers:

³⁷ Ronald Reagan, "Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985," *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, <https://www.reaganlibrary.gov/archives/speech/statement-signing-bill-increasing-public-debt-limit-and-enacting-balanced-budget>.

³⁸ Reagan, "Statement on Signing the Bill."

³⁹ "Suppose Synar Wins Suit," *The Oklahoman*, January 14, 1986, <https://www.oklahoman.com/story/news/1986/01/14/suppose-synar-wins-suit/62739370007/>.

By placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function.⁴⁰

The Court took issue with the fact that Gramm-Rudman had assigned an *executive* function to the Comptroller General; this function violated the separation of powers. The Court affirmed the Reagan administration's interpretation of the statute, but it is *how* the Court did so that stands out. Recall Reagan's constitutional objection in his signing statement that an agent under the control of Congress may not exercise supervisory authority over the president. This Court relied precisely on this line of reasoning, and one needs to look no further than the first footnote in the 74-page opinion:

In his signing statement, the president expressed his view that the act was constitutionally defective because of the comptroller general's ability to exercise supervisory authority over the president. Statement on Signing H.J. Res 372 Into Law, 21 Weekly Comp of Pres. Doc. 1491 (1985).⁴¹

The inclusion of this footnote is critical. The court cited Reagan's objection in his signing statement almost word-for-word. While there is no way to ascertain the extent to which Reagan's signing statement impacted the outcome of the case, the justices in the majority opinion cited it as the first footnote in the case. The fact that they went to the length of citing Reagan's views on the act means that his signing statement had some degree of impact on the outcome in *Bowsher*.

The Court accordingly struck down the relevant provision of Gramm-Rudman that granted power to the Comptroller General, a legislative officer, to determine the magnitude of automatic spending cuts. Regardless of the court's ruling in *Bowsher*, however, it is still clear from the above memoranda that Reagan sought to include juridical language in his signing statement to shape legislative history. Memoranda from his administration evince that Reagan's lawyers, who ideally mirror Reagan's legal and political thinking, see the signing statement as a tool to demarcate the institutional boundaries of the presidency. This case shows that 1) Reagan took note of questionable language in Gramm-Rudman, 2) he issued a signing statement filled with juridical language in response to the statute, and most importantly, 3) he *included juridical*

⁴⁰ *Bowsher v. Synar*, 478 S. Ct. 714, 716 (1985).

⁴¹ *Bowsher v. Synar*, 719.

language precisely to advance his interpretation of unclear provisions of Gramm-Rudman to broaden his power relative to Congress.

The Gramm-Rudman signing statement displays Reagan using juridical language in signing statements with the express intent of appealing to courts. At times, however, Reagan was even more explicit in noting that his signing statements were intended to safeguard the long-term powers of his office rather than immediately move policy. In the following example, Reagan issues a signing statement noting his *agreement* with the policy content of a bill but *concerns with a bill's institutional implications*. This example thus shows how Reagan's use of juridical language aimed at courts reflects primarily institutional rather than strictly policy related concerns.

On August 8, 1985, President Reagan signed the International Security and Development Cooperation Act into law: the bill appropriated money to national security organizations and altered congressional oversight regulations.⁴² Section 717 of the bill directed the secretary of state to “initiate negotiations with the Government of Mexico” to reduce impediments to international trade.⁴³ Section 1302 of the bill stated that “The United States will continue to adhere to its present policy with respect to the Palestine Liberation Organization, whereby it will not recognize or negotiate with the Palestine Liberation Organization so long as the Palestine Liberation Organization does not recognize Israel's right to exist.”⁴⁴ Reagan's signing statement in response to the Act is critical:

I do have serious reservations about sections 717 and 1302 of S. 960. In spirit *both sections are consistent with my foreign policy* [emphasis added] ... I am compelled, however, as a matter of principle, to reiterate my refusal to accept any congressional effort to impose legislative restrictions or directions with respect to the conduct of international negotiations which, under Article II of the Constitution, is a function reserved exclusively to the President. I will therefore consider sections 717(b) and 1302(b) as constituting only nonbinding expressions of congressional views on these issues.⁴⁵

⁴² International Security and Development Cooperation Act, S. 960, 99th Cong. (1985), <https://www.congress.gov/bill/99th-congress/senate-bill/960/text>.

⁴³ International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83 § 717, 99 Stat. 247 (1985).

⁴⁴ International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83 § 1302, 99 Stat. 280 (1985).

⁴⁵ Ronald Reagan, “Statement on Signing the International Security and Development Cooperation Act of 1985,” *The Public Papers of President Ronald W. Reagan*, Ronald Reagan Presidential Library, <https://www.reaganlibrary.gov/archives/speech/statement-signing-international-security-and-development-cooperation-act-1985>.

Reagan agrees with the substance of the legislation. Importantly, he issued this signing statement under conditions of divided government: in the 99th Congress (1985-1987), Republicans held a narrow majority in the Senate while Democrats held a strong majority in the House of Representatives.⁴⁶ And the potential for policy disagreement was significant; the act was not expected to pass easily. 161 out of 166 Republicans in the 99th Congress voted against it.⁴⁷ It would be reasonable to expect policy motivations to play a significant role in motivating Reagan's signing statement. Despite signing this bill with a narrow majority in the Senate and a large opposition majority in the House of Representatives, Reagan states explicitly that he is not objecting to the bill on policy-related grounds. It is what the bill entailed for the separation of powers, rather, that causes Reagan to resist. Given that Reagan issued this signing statement under conditions of divided government but expressly noted his agreement with the policy statement of the bill, it is reasonable to assume that Reagan's signing statement attempted to guard the long-term powers of the presidency from congressional encroachment.

Reagan's objections to the International Security and Development Cooperation Act did not reach the judiciary. But signing statements as a tool to shape legislative history do not depend on eventual judicial intervention. For we still see the statement filled with juridical language regarding the president's Article II powers, and this language was aimed at the judiciary, as demonstrated earlier through the examination of the DOJ memoranda.

CONCLUSION

Signing statements in the Reagan administration were dominated by juridical language. Reagan's lawyers explicitly sought to include juridical language in signing statements to influence the judiciary's understanding of nebulous statutory language in future litigation. This trend constitutes evidence of Reagan using the signing statement to delineate the institutional boundaries of the presidency. Of course, Reagan is not representative of all presidents; these findings may thus have limited generalizability to other administrations. But this research represents a significant first step in understanding how presidents use specific language in

⁴⁶ "Party Divisions of the House of Representatives, 1789 to Present," United States House of Representatives, accessed March 6, 2023, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/>; "Party Division," United States Senate, accessed March 6, 2023, <https://www.senate.gov/history/partydiv.htm>.

⁴⁷ International Security and Development Cooperation Act, S.960.

signing statements to delimit the confines of executive power. Signing statements do not appear to be abusive tools of an “imperial” presidency but rather an informal communication device for the president to communicate his understanding of the Constitution to Congress and the public. This represents the true essence of signing statement usage: a delicate dialogue between the branches about what a statute truly means. Presidents likely issue signing statements *to probe the boundaries of their institutional powers while also fending off congressional intrusions of those powers*. This research provides strong support for the notion that presidential desires to uphold the separation of powers and delimit the frontiers of presidential authority may be an important motivating factor behind signing statements.

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PRESIDENTIAL RHETORIC IN RESPONSE TO WHITE SUPREMACIST TERRORISM: A STUDY OF STYLE AND EMOTIONAL STEWARDSHIP

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One of the many responsibilities of the U.S. presidency is to console the nation in times of crisis. Since 2013 there has been a rise in the threat of white supremacist terrorism. These crises have required the most recent American presidents to use the platform of the presidency to publicly respond to and grieve these spectacles of violence and hate. Despite a shared duty to respond, Presidents Obama, Trump, and Biden have addressed these crises with different rhetorical approaches. A stylistic analysis of presidential rhetoric in response to white supremacist terrorism not only provides insights into the individual characteristics of each president, particularly their relationships to race and racism, but indicates the broader importance of the presidency not only as a center of political leadership but also emotional leadership.

INTRODUCTION

Article II, Section 2 of the Constitution opens: “The President shall be Commander in Chief of the Army and Navy of the United States.” It says nothing of a term often used by the media and even presidents themselves, that the president is also a Consoler-in-Chief. Entire TV specials have been devoted to “President Biden as the Consoler-in-Chief,” emphasizing Biden’s comfort in the role of “helping people grieve.”¹ When President Biden ran for election in 2020, his qualifications for office went beyond his years in the Senate, as Vice President, and his preparation for the constitutional duty of Commander in Chief; they were also his public grief after the loss of multiple children and his first wife. These became non-resume qualifications for the non-constitutional duty of Consoler-in-Chief. Consoler-in-Chief captures not only the exemplary moral leadership and national values a president is expected to embody and project, but also the emotional stewardship expected of them in times of crisis and tragedy. The growing crisis of White supremacist domestic terrorism, and the responses of the most recent presidents to this crisis, provides insight into how three very different leaders have embodied the role of Consoler-in-Chief and mobilized the presidency as a source of moral and emotional leadership.

¹ “President Biden as the Consoler in Chief,” PBS, December 18, 2021, <https://www.pbs.org/weta/washingtonweek/video/2021/12/president-biden-as-the-consoler-in-chief>.

The contrast between Consoler- and Commander-in-Chief is an embodiment of the trend described by Theodore Otto Windt Jr., that “the very nature of the presidency has undergone a significant transformation in function and emphasis from administrative office to an executive rhetorical office.”² It is widely accepted that the presidency is a national bully pulpit. Presidents are regarded as moral leaders, not just legislative ones, and are expected to serve the nation through rhetorical action in addition to policy. Windt’s work, among others, solidified presidential rhetoric as a topic of scholarly interest in the 1980s.³ The importance of presidential rhetoric becomes evident in moments of crisis, when dramatic events create a consensus that the president must speak. It is hard to imagine a national tragedy where the president sits quietly on the sidelines. Tragedy, however, complicates presidential speech. Presidents typically use their speech for persuasion, towards policy or electoral aims. In the case of a crisis, especially one resulting in loss of life, there is an additional dimension of rhetoric required to console a nation in pain.⁴ White supremacist terrorism is one such reoccurring crisis that continues to create a vacuum for presidential speech. While there is a large body of work on presidential rhetoric and presidential crisis responses, little has been written about how presidents respond specifically to white supremacist domestic terrorism. These tragedies are unique due to their high-profile combination of public grief, ongoing and historical racism, and questions of national character which they bring to popular attention.

Understanding how a president responds to such a crisis of collective values and simultaneous public loss sheds light on their broader character as a leader. Further, as the Center for Strategic and International Studies found, the “most significant [terrorist] threat likely comes from white supremacists.”⁵ The FBI, Department of Homeland Security and other independent think tanks have also consistently found that racially motivated domestic terrorists “were the primary sources of lethal and significant violence” in the United States.⁶ The ceaseless nature of

² Theodore Otto Windt, “Presidential Rhetoric: Definition of a Field of Study,” *Presidential Studies Quarterly* 16, no. 1 (1986): 102–16.

³ James W. Ceaser et al., “The Rise of the Rhetorical Presidency,” *Presidential Studies Quarterly* 11, no. 2 (1981): 158–71.

⁴ Robert E. Denton, “A Communication Model of Presidential Power,” *Presidential Studies Quarterly* 18, no. 3 (1988): 523–39.

⁵ Seth Jones, Catrina Doxsee, and Nicholas Harrington, “The Escalating Terrorism Problem in the United States,” Center for Strategic and International Studies, June 17, 2020, <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>.

⁶ Federal Bureau of Investigation and Department of Homeland Security, *Strategic Intelligence Assessment and Data on Domestic Terrorism*, (May 2021), <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic->

this violence requires continued presidential responses. This has been especially true of the most recent presidencies. This paper will examine one case study from each of the three of the most recent administrations. These examples not only elucidate dramatically different presidential characters, but also all come after 2013, the last year identified by the Center for Strategic and International Studies where the terrorist threat to the United States was not majority right-wing. In the years covered, 2015 to 2020, the concentration of right-wing terrorism has only grown.⁷

This paper will build from one of David Zarefsky's possible dimensions of study for presidential rhetoric, which emphasizes style, form and setting in addition to the text of presidential speech. Zarefsky describes, "the text itself as the point of departure, analogous to a work of literary or visual art," where analysis is dedicated "not only to the words the president speaks but to the entirety of the presidential performance."⁸ The presidential duty to speak in response to a crisis has meant that across dramatically different personalities and political orientations presidents are equally called upon to respond to instances of white supremacist terrorism. Yet, how presidents have communicated following these atrocities have been shaped not only by available modes for communication but also each president's nuanced relationship to issues of racism and racialized violence. The styles of rhetoric that emerge are informed by each president's background despite a shared duty to respond.

Accordingly, the focus of this paper will be on the form and style mobilized by each president to respond to an instance of white supremacist terrorism. This allows for analysis of their character as an orator and their broader relationship to rhetoric on race and racism. President Obama's eulogy following the Mother Emanuel Massacre in Charleston is a famous example of presidential rhetoric in response to white supremacist demotic terror. Obama's eulogy is notable both for its viral nature as well as its distinctive form and his singular position as the first Black president. President Trump, in stark contrast, was famous for wielding racist dog whistles and epithets from the platform of the presidency. His comments in response to the Charlottesville Unite the Right rally gained infamy when he stated that there were "very fine people on both sides." While President Biden has perhaps most openly embraced the notion of a

report.pdf/view; Cassie Miller and Rivas Rachel Carroll, "The Year in Hate and Extremism 2021," Southern Poverty Law Center, 2022, <https://www.splcenter.org/sites/default/files/splc-2021-year-in-hate-extremism-report.pdf>.

⁷ Jones, Doxsee, and Harrington, "The Escalating Terrorism Problem in the United States."

⁸ David Zarefsky, "Presidential Rhetoric and the Power of Definition," *Presidential Studies Quarterly* 34, no. 3 (2004): 607–19.

Consoler-in-Chief, his response to the massacre at a Buffalo supermarket in 2022 seems systematized. In his efforts fulfil his promise to “restore the soul of the nation,” he has developed a formulaic set of responses to these tragedies, intermixing social media, White House remarks, and travel that complement his efforts to emphasize the stability and predictability of his administration. These three examples illuminate how different administrations have navigated emotional leadership in response to the rise in white supremacist terrorism in the last decade.

OBAMA AND CONSUBSTANTIALITY THROUGH BLACK ORATORY TRADITION

When President Obama broke into song during his 2015 eulogy for Reverend Clementa Pickney it sent shockwaves around the world. The speech made international news and was covered and then written about across the world. Obama was a president already famed for his rhetorical talent, yet this was described by many as his “most fully successful performance as an orator.”⁹ When confronted with the gruesome atrocity of these murders, in order to help the country mourn, Obama turned to “Amazing Grace,” a widely recognized hymn. Obama inspired with his message of grace and brought all listening to his address into a world they might recognize — a church filled with familiar melodies and apt lessons for the moment. Yet the significance of this moment went far beyond the song itself or the message Obama delivered. During the first seven years of his presidency, Obama had often sidestepped discussions of race. As the first Black president, Obama was constantly leaning into or out of the notion of his presidency as “post-racial.”¹⁰ Yet, when he delivered the eulogy in Charleston, Obama’s identity as a Black president was center stage. These were racially motivated murders. He was eulogizing a Black pastor and stepping into the long-entangled tradition of Black churches and Black oratory. Considering his previous public discussions of race, Obama’s use of a specifically Black rhetorical style to mourn blatant hate was even more remarkable. Obama’s embrace of Black rhetoric combined with the humanity communicated by the natural unsteadiness of one who does not typically sing, breaking out into song for an audience of millions watching from afar and

⁹ James Fallows, “Obama’s Grace,” *The Atlantic*, June 27, 2015, <https://www.theatlantic.com/politics/archive/2015/06/grace/397064/>.

¹⁰ Michael Tesler, *Post-Racial or Most-Racial?: Race and Politics in the Obama Era*, (Chicago: University of Chicago Press, 2016), <https://doi.org/10.7208/9780226353159>.

more than five thousand in-person created a viral moment. This moment is reflective of President Obama's broader rhetorical style and complicated relationship to his racialized presidency.

Unlike the other examples in this analysis, Obama did not release a steady stream of public communication following the murders in Charleston. The first word from the White House came the morning after the shooting on June 18. A tweet from the official White House account announced a press conference shortly after.¹¹ The statement President Obama delivered lasted less than ten minutes. It took place in the White House briefing room with the usual decoration behind him. Vice President Biden stood attentively next to Obama throughout the speech. The content the White House speech is remarkably different from the eulogy: he gave a simple, direct, even predictable response to the tragedy that matched the formality of the setting. This speech did not make the headlines. Nor did it surprise the audience with a unique approach to mourning and grief as he would ten days later.

In Charleston, President Obama sang an intimate and familiar Black church song in an unsteady voice, allowing himself to fully join the community of mourners in Charleston and bringing the rest of the nation with him. Throughout his speech he built on the theme of grace. As the thirty-minute eulogy ended, he talked about the power of grace, that is "Amazing Grace." He repeated the phrase twice and then held the room in silence for over ten seconds. When he again opened his mouth, but this time in song, there was an audible gasp in the room. Everyone knew what was about to come before he had finished the second syllable of the word amazing. By the third word of the song, those behind him had risen to their feet and the entire church echoed with the voices of many as Obama's imperfect voice loud and clear, projected over the microphone.¹² Obama sang his way into a natural part of the community. This was not his only means of becoming consubstantial with his audience. His purple tie matched the purple robes of the pulpit he spoke from and church leadership and behind him. His tone throughout the speech matched that of a preacher with fluidity and command of the entire room. Without question this was a purposeful emulation of the style of the Emanuel African Methodist Episcopal Church. By

¹¹ White House Archived (@ObamaWhiteHouse), "At 11:45am ET, President Obama Will Deliver a Statement from the Briefing Room on the Shooting in South Carolina → [Http://Go.Wh.Gov/K5goiK](http://Go.Wh.Gov/K5goiK)," Twitter, June 18, 2015, <https://twitter.com/ObamaWhiteHouse/status/611552740141957120>.

¹² Barack Obama, "President Obama Delivers Eulogy – FULL VIDEO (C-SPAN)," C-Span, June 26, 2015, YouTube video, 37:45, <https://www.youtube.com/watch?v=x9IGyidtfGI>.

matching the norms of those most proximate to the terror, Obama highlighted his leadership guiding them and the nation through the grief and shock of the tragedy.

For President Obama, a moment where his rhetorical work was dedicated to building consubstantiality with his audience in a Black church, was of particular significance. Obama's election was often wielded as evidence of the end of racism in America. Post-2008 there were wide claims his administration represented and was proof of a "post-racial" America. This term and its consequences have become its own topic for scholarly debate with countless articles written on the subject, which overwhelmingly discuss its fallacy.¹³ Despite this, it remains a useful frame for understanding how the Obama administration operated particularly in the ways in which it discussed race. Then-Senator Obama's "A More Perfect Union" speech, in response to controversial remarks from his pastor Reverend Jeremiah A. Wright Jr., is a useful contrast to the Charleston eulogy. It is an example of Obama's previous work to frame his candidacy about more than race, reject Wright's statements while also, as Susanna Dilliplane explains, "not rejecting the pastor's representation to and of the Black community. Given the interrelated historical development of Black churches, African American oratory, and Blacks' struggle against White oppression."¹⁴ Very early in the "A More Perfect Union" speech Obama notes, "Despite the temptation to view my candidacy through a purely racial lens, we won commanding victories in states with some of the Whitest populations in the country."¹⁵ Obama emphasized the idea of a "post-racial" nature of his candidacy throughout the speech and managed at the same time not to disregard the Black community. However, unlike in Charleston, he did not emulate the rhetorical style of a Black church. While in moments such as the Wright controversy and others throughout his administration, Obama avoided fully aligning himself with Blackness, in the case of Charleston he fully embraced it. He took on a position which no other president could have in response to White supremacy as a full member of the church that had just been brutalized.

¹³ Martell Teasley and David Ikard, "Barack Obama and the Politics of Race: The Myth of Postracism in America," *Journal of Black Studies* 40, no. 3 (2010): 411–25.; Bettina L. Love and Brandelyn Tosolt, "Reality or Rhetoric? Barack Obama and Post-Racial America," *Race, Gender & Class* 17, no. 3/4 (2010): 19–37.

¹⁴ Susanna Dilliplane, "Race, Rhetoric, and Running for President: Unpacking the Significance of Barack Obama's 'A More Perfect Union' Speech," *Rhetoric and Public Affairs* 15, no. 1 (2012): 127–52.

¹⁵ Barack Obama, "'A More Perfect Union,'" *The Black Scholar* 38, no. 1 (March 1, 2008): 17–23, <https://doi.org/10.1080/00064246.2008.11413431>.

Obama's efforts to build consubstantially with a historical Black space combined with the striking style of the speech created a viral moment. President Obama's eulogy shows how during a moment of gruesome violence and hate he led not through legislation but rather led emotionally through creating a moment of collective mourning through song. President Obama seemed to surprise audiences with his stylistic embrace of Blackness in a way even he had not previously done. Further, to hear the president sing as such was an open embrace of vulnerability that built intimacy. Obama leaned into his role as a consoler leading a nation in grief, not simply as president leading a nation politically but also emotionally. Thus, his speech in Charleston spoke to the emotional needs of a community and nation reeling from terrorism by creating the intimacy of almost familial loss and accounting for the shock of trauma.

ERRATIC MESSAGING AND TRUMP'S FAR-RIGHT POLITICAL ALIGNMENT

The Charlottesville Unite the Right rally was an organized White supremacist rally and protest attended by thousands. The event was not a mass murder by an individual ideologue but rather a congregation of the White power movement that resulted in the killing of counter protestor Heather Heyer and injury of more than 19 others. Heyer's death was the consequence of escalating White supremacist violence at the Unite the Right rally. President Trump, thus had to address the crisis publicly. Trump, however, was faced with the problem of his political alliances with the far right and links to those involved in the rally, such as the neo-fascist group Proud Boys and political commentator and strategist Steve Bannon. The presidential duty of Consoler-in-Chief created a rhetorical vacuum which required for presidential speech but what he would say, how, and who he aligned himself with was erratic and unclear.

President Trump's relationship with White supremacists and the organized White power movement in the United States has already become a field of scholarly inquiry. Scholars of terrorism, communications studies, political science and history have all written on the topic.¹⁶ While the Unite the Right rally took place only 8 months into Trump's presidency, the rhetorical ties between Trump and the White power movement were already deep. Evidence of this

¹⁶ Joshua Inwood, "White Supremacy, White Counter-Revolutionary Politics, and the Rise of Donald Trump," *Environment and Planning C: Politics and Space* 37, no. 4 (July 2018): 579-596, <https://doi.org/10.1177/2399654418789949>; Katherine M. Bell, "By Any Other Name: White-Supremacist Terrorism in the Trump Era," in *The Trump Presidency, Journalism, and Democracy* (Taylor & Francis, 2018), <https://doi.org/10.4324/9781315142326>.

affiliation can be found in the history of the often repeated line “America first” and the historical claim “Make America Great Again” which both featured prominently in the Trump Campaign and harken to nationalist histories and a glorified notion of the American past respectively.¹⁷ These rhetorical foundations of the Trump Campaign are the tip of the iceberg for understanding President Trump’s rhetoric in relation to White nationalism and White supremacist terrorism.¹⁸ His rhetoric explicitly linked him to White supremacist histories and contemporary organizers, he broadly trafficked in racial epithets throughout the campaign and early presidency.

The unpredictability of President Trump’s rhetoric on race continued in the wake of the Unite the Right rally. Trump first tweeted in early afternoon that “We ALL must be united.”¹⁹ His tone was at first like that employed by other presidents to condemn racism and express solidarity in the face of hate. Yet this message became muddled, quickly creating an incoherent response to the event and therefore incoherent leadership in mourning. At 2:00 PM EST Trump tweeted that he would hold a press conference and ended saying, “-but Charlottesville sad!”²⁰ The tweet, in both its syntax and expression of grief, is confusing. While both of Trump’s first responses are tweets, the contrasting content foreshadows the sporadic nature of his response to the rally that continued to be clouded in other commentary or statements about other agenda items. The first tweet was standard, even predictable. While the message remains similar in the second, emphasizing that he recognizes the horrors of the crisis and will work to address it, its disjointed syntax, and the weakness of the adjective “sad” rings hollow. This weak expression of emotion resurfaced again in his third tweet.²¹

¹⁷ Diane Roberts, “The Great-Granddaddy of White Nationalism,” *Southern Cultures* 25, no. 3 (2019): 133–55.

¹⁸ Brigitte L. Nacos, Robert Y. Shapiro, and Yaeli Bloch-Elkon, “Donald Trump: Aggressive Rhetoric and Political Violence,” *Perspectives on Terrorism* 14, no. 5 (2020): 2–25; Robert C. Rowland, “The Populist and Nationalist Roots of Trump’s Rhetoric,” *Rhetoric and Public Affairs* 22, no. 3 (September 1, 2019): 343–88, <https://doi.org/10.14321/rhetpublaffa.22.3.0343>.

¹⁹ Donald J. Trump (@realDonaldTrump), “We ALL Must Be United & Condemn All That Hate Stands for. There Is No Place for This Kind of Violence in America. Lets Come Together as One!,” Twitter, August 12, 2017, <https://twitter.com/realDonaldTrump/status/896420822780444672>.

²⁰ Donald J. Trump (@realDonaldTrump), “Am in Bedminster for Meetings & Press Conference on V.A. & All That We Have Done, and Are Doing, to Make It Better-but Charlottesville Sad!,” Twitter, August 12, 2017, <https://twitter.com/realDonaldTrump/status/896431205549318144>.

²¹ Donald J. Trump (@realDonaldTrump), “Condolences to the Family of the Young Woman Killed Today, and Best Regards to All of Those Injured, in Charlottesville, Virginia. So Sad!,” Twitter, August 12, 2017, <https://twitter.com/realDonaldTrump/status/896512981319790592>.

Trump made three statements on Charlottesville. On August 12 he briefly addressed the matter in a three-minute press conference from his golf club in Bedminster, New Jersey.²² On August 14 Trump spoke from the White House for five minutes. These statements are the closest Trump came to a dedicated speech on Charlottesville.²³ Other administrations created moments of formal speech dedicated to the crisis; Trump did not. He framed each speech with other issues and then moved to the crisis. He stayed on message, condemning the violence and racism, yet the brevity and the opening both speeches with unrelated topics was indication that he did not see this as an essential moment for focused collective pause. The most famous line of President Trump's response to the death of Heather Heyer was his August 15 comment, there were "very fine people on both sides." As identified in a study of the TV coverage following the Unite the Right Rally, this comment itself made up one of the major categories of news coverage, and "as many entire stories in the corpus" as Hayer's death itself or the fact that a violent White supremacist rally "prompted the governor to call a state of emergency and seriously injured several counter protesters, in addition to killing Heyer."²⁴ Attention in the media was thus disproportionately paid to Trump's response, rather than the tragic events of the rally itself.

Interestingly, while this comment was a major focus of coverage of the Unite the Right rally, it does not seem to have been a prepared statement. President Obama's speech had a similar element of surprise when he broke out into song. According to his close advisor Valerie Jarret, Obama had said prior to the speech, "I don't know whether I'm going to do it, but I just wanted to warn you two that I might sing."²⁵ Though perceived as an authentic moment of spontaneity, Obama's singing was in some way prepared. In contrast, President Trump's most covered line occurred at the end of a news conference on infrastructure, after taking questions from reporters. These were not structured remarks from an impacted location or a formal White House address, as has become the norm in response to national crises. Rather the comment

²² Carly Sitrin, "Read: President Trump's Remarks Condemning Violence 'on Many Sides' in Charlottesville," *Vox*, August 12, 2017, <https://www.vox.com/2017/8/12/16138906/president-trump-remarks-condemning-violence-on-many-sides-charlottesville-rally>.

²³ Donald Trump, "Trump's Full Statement on the Violence in Charlottesville," *Washington Post*, August 14, 2017, YouTube video, 5:17, <https://www.youtube.com/watch?v=00RAteYexNA>.

²⁴ Angie Chuang and Autumn Tyler, "An Obscured View of 'Both Sides': Default Whiteness and the Protest Paradigm in Television News Coverage of the Charlottesville 'Unite the Right' Rally," *Journalism and Mass Communication Quarterly*, (2023), <https://doi.org/10.1177/10776990221146519>.

²⁵ Jordan Phelps, "The Story Behind President Obama Singing 'Amazing Grace' at Charleston Funeral," *ABC News*, July 7, 2015, <https://abcnews.go.com/Politics/story-president-obama-singing-amazing-grace-charleston-funeral/story?id=32264346>.

comes as more of an offhand remark in the middle of a chaotic news conference at Trump Tower.²⁶ The setting communicates that what Trump would say in response to this White supremacist violence was not highly choreographed. Nor was there a singular focus on responding to the events from three days earlier at this press conference. The incoherent message in response to White supremacy and Trump's unpredictable rhetorical style along with Charlottesville consistently coming across as a secondary matter are representative of the defining features of the presidential character that Trump developed.

Hyper-specific analysis of this single comment and the statements that led up to it highlight broader characteristics of Trump's approach to a crisis of White supremacist terror. The pressures to condemn the loss of American life conflicted with his proximity to the far right. The tradition of past presidential crisis responses made it seem almost predetermined, required, that he would condemn the murder of an American citizen and the blatant hate that caused it—and in his first statements this is the approach President Trump took. However, his close ties to White supremacists and past statements relating to White supremacy laid the backdrop for what devolved into a sporadic, attention-grabbing response to violence that walked back many of the original clear condemnations that what had occurred in Charlottesville was wrong.

PREDICTABILITY AND BIDEN'S RESTORATION OF THE NATION'S SOUL

When ten people were murdered at a supermarket in Buffalo on May 14, 2022, President Biden released a statement that evening. The next day he tweeted a string of brief remarks expressing his grief. Three days later both the President and First Lady traveled to Buffalo and Biden delivered the traditional evening presidential address to the nation. Biden's response to the Buffalo massacre lacked the spectacle of Obama's response to Charleston or Trump's stunning soundbites about Charlottesville. He surprised no one with prayers for victims, heavy hearts, and resolve to unify and “work together to address the hate that remains a stain on the soul of this nation.”²⁷ Biden's response to Buffalo gave the appearance of boxes being checked: a statement,

²⁶ Donald Trump, “President Trump Answers Questions on Charlottesville (C-SPAN),” C-Span, August 15, 2017, YouTube video, 17:01, <https://www.youtube.com/watch?v=xzGEyn4RhD8>.

²⁷ President Biden (@POTUS), “Jill and I Pray for the Victims, Their Families and Devastated Community from Yesterday's Mass Shooting in Buffalo, New York. Our Hearts Are Heavy Once Again but Our Resolve Must Not Waver; We Must Work Together to Address the Hate That Remains a Stain on the Soul of This Nation.,” Twitter, May 15, 2022, <https://twitter.com/POTUS/status/1525926492680728577>.

tweets and ultimately, a speech. He offered prayers and grief for the “emotional wounds of this horrific shooting,” recognition of “bravery of members of law enforcement and other first responders,” and immediate, clear articulation that “any act of domestic terrorism, including an act perpetrated in the name of a repugnant White nationalist ideology, is antithetical to everything we stand for in America.”²⁸ He projected the same sensible predictability called for by his campaign slogan to “restore the soul of the nation” and maintain stability even in the face of crisis.

The structure of Biden’s response was logical, building from rapid response tweets to a statement, to prepared remarks devoid of personal flair or spectacle. In the first White House statement Biden was careful as to present caution: “we still need to learn more about the motivation for today’s shooting as law enforcement does its work.” At the same time, he publicly reaffirmed a commitment to denouncing racial terrorism: “A racially motivated hate crime is abhorrent to the very fabric of this nation.”²⁹ The statement swiftly condemns White supremacy but avoids making unsubstantiated claims about the specific crimes and motivations in Buffalo. What is most evident in Biden’s response are his efforts to assure unwavering clarity and stability in response to a deeply unsettling national crisis. This focus reflects the characteristics he highlighted during his candidacy for president. Biden achieves this effect of steadfastness through his consistent, predictable language and themes, but also in the timing and setting of his various communications. It comes across as simple, almost boring in comparison to the spirited intimacy of President Obama’s speech in Charleston or the erratic unpredictability of President Trump’s remarks.

This trend of predictability neatly aligns with Biden’s campaign aim to “restore the soul of the nation” in the wake of the Trump Presidency. This often manifests as a desire to emphasize national values in response to tragedies without rocking the boat in any capacity. Biden’s goal in all his speech is to define and advocate for what he sees as the “soul” of the nation. In the case of the Buffalo massacre, this strategy manifested in direct condemnation of racism and racist violence, and an assertion of White supremacy as anti-American. Little scholarly analysis exists on Biden’s rhetoric, largely due to the newness of his administration.

²⁸ “Statement by President Biden on Mass Shooting in Buffalo, New York,” The White House, May 15, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/14/statement-by-president-biden-on-mass-shooting-in-buffalo-new-york/>.

²⁹ *Ibid.*

There are, however, limited writings on Biden as a public griever, a role that he has occupied for decades. Intimate familial loss has always been a part of Biden's public persona: His first wife and daughter Naomi died the same year he was elected to the Senate in 1972. His son Beau died forty years later. Biden has, for decades, spoken about feelings of grief in public. Jess Bergmann has critiqued the barrage of coverage of Biden as a public mourner in her article "Hail to the Grief":

Grief is his 'superpower' and 'secret weapon'; through it, he has shown 'that out of the darkness can come light.' He has 'turned his tragedies into purpose.' He is a 'grief-counselor-in-chief.' He makes people feel that 'he understands the depth of their pain.'³⁰

Bergmann effectively captures the endless slew of media coverage of Biden relating to public grief. His enactment of public grief goes beyond the political promise to restore normalcy to the "soul" or character of the nation. Biden's multi-decade history of discussion of mourning in public is also key to understanding how he addresses the nation.

By the time President Biden had traveled to Buffalo to address the nation alongside the First Lady, he had already touched on the themes of the speech in tweets and statements, mentioning his familiarity with loss, and forceful condemnation of White supremacy. Notable in the remarks Biden made in his national address was the clear rhetorical structure and simple setting. President Biden opened by thanking the relevant political leaders and then addressing the families of those lost: "And to the families: We've come here to grieve with you."³¹ Biden then leaned into the role of a public mourner and focused in on the individuals impacted to move the nation collectively through the shock of mass tragedy. Only then does he move into the larger themes of anti-hate.

Similar to the emphasis on unwavering directness in condemning violence, and connection-building with Americans experiencing loss, Biden's message on unity in the face of racism has always been a central aspect of his political character. It is logical that Biden would

³⁰ Jess Bergman, "Hail to the Grief: The Mourning-Porn Fallacies of President-Elect Joe Biden," *The Baffler*, no. 55 (2021): 34–37.

³¹ "Remarks by President Biden and First Lady Biden Honoring the Lives Lost in Buffalo, New York, and Calling on All Americans to Condemn White Supremacy," The White House, May 17, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/17/remarks-by-president-biden-and-first-lady-biden-honoring-the-lives-lost-in-buffalo-new-york-and-calling-on-all-americans-to-condemn-white-supremacy/>.

thus position himself as a direct communicator with a deep connection to the longstanding fight against racism in the United States. Biden often points to his civil rights record in the Senate and his strong relationships with Delaware's Black community. His links to race and American politics are most evident with his most recent political partnerships—vice president to the first Black president and president with the first Black and Asian vice president. Biden has even directly identified a different instance of White supremacist terror, the Charlottesville Unite the Right Rally, as the ultimate catalyst for his 2020 presidential run. The second half of his remarks in Buffalo emphasizes this history of allyship, outlining a condemnation of racism and racist violence and positioning himself as the leader for the moment. Biden demonstrated his commitment to the cause of racial justice by reminding mourners and the nation, as he had before and since the attack in Buffalo, that this very issue is why he ran for president.³² He vividly recollected the Charlottesville Unite the Right Rally:

But when I saw those people coming out of the woods—of the fields of—in Virginia, in Charlottesville, carrying torches, shouting ‘You will not replace us,’ accompanied by white supremacists and carrying Nazi banners—that’s when I said, ‘No.’³³

Biden reminded the audience of his consistency on the issue of White supremacist terrorism and projects this through a cohesive message and predictable language and reminders of his historical consistency in response to this specific tragedy. Thus, the predictability in the structure of President Biden's responses, beginning with tweets and ending in the televised address, is matched by his projection of reliability on the very issue at hand—White supremacy.

Further, the delivery and setting of the Buffalo speech emphasize predictability in President Biden's response. Biden is famous for gaffs in his speech in conjunction with and in addition to his stutter. He speaks off-the-cuff and goes off script, and the result is a mess for his communications team to clean up: Buffalo represented a clear departure from this pattern. The official transcript and released recording of the speech reveal that Biden misspoke only twice. While impossible to verify, there appear to be no moments where he went off message or topic

³² President Biden (@POTUS), “I Decided to Run for President after Charlottesville Because I Believed Our Story Is to Unite as One People, One Nation, One America. Today, We Convened a First-of-Its-Kind United We Stand Summit Held at the White House to Make That Story Clear.,” Twitter, September 15, 2022, <https://twitter.com/POTUS/status/1570500684528906240>.

³³ The White House, “Remarks by President Biden and First Lady Biden Honoring the Lives Lost in Buffalo, New York, and Calling on All Americans to Condemn White Supremacy.”

from the written text. His verbal mistakes appear relatively insignificant to the content of the speech: he mispronounced a victim's name and mistakenly cited another victim as a "banker" rather than a "backer."³⁴ The notable lack of gaffs in the Buffalo speech further indicate stability and predictability. These were also emphasized by the room décor and both President and Dr. Biden's outfits. Biden stood at a plain podium adorned only with the presidential seal, against a background of thick black drapery and two flags. When the camera focused on Biden himself, the plainness of the background allowed his words and face to become the primary point of focus for the viewer. His choice of a simple suit and tie matched Jill Biden's solid black traditional mourning outfit. The performance and setting of the speech matched its message and goal.

President Biden ran on the promise of a stable and predictable response to a crisis, particularly a White supremacist one. His response to the Buffalo shooting is an embodiment of this promise and a representation of efforts to construct a rhetorical response in opposition to President Trump. Therefore, it is unsurprising that predictability in the information he discusses takes center stage in both the structure and content of his speech. His multiple responses to the Buffalo crisis allowed him to reach varied audiences with increasing specificity and personal touch. The message is coherent and formulaic throughout his communications following the Buffalo massacre: unity in the face of hate, condemnation of White supremacy and grief for the victims. That said, the entirety of Biden's public response comes across as almost flat in comparison to the far more spirited, if unpredictable, responses of Presidents Obama and Trump.

CONCLUSION

Crises of domestic White supremacist terrorism require presidents to address public violence, simultaneously accounting for ideological, hateful motives and for the intimate and personal grief and loss resulting from mass murder. The precipitous rise in White supremacist terrorism in the last decade has meant that the three most recent presidents have all been faced with multiple such crises, including but not limited to these case studies. Looking in detail at the specifics of their responses to a single incident makes evident the importance of the style of their speech. In each instance the particular combination of response, not only of what was said but

³⁴ The White House, "Remarks by President Biden and First Lady Biden Honoring the Lives Lost in Buffalo, New York, and Calling on All Americans to Condemn White Supremacy."

how the president publicly responded to White supremacist terrorism, is a reflection of their personality and past relationships to racism and racist violence.

President Obama, through much of his campaign and presidency worked within the confines of the notion of a “post-racial presidency.” As such his total, and surprising, embrace of Black rhetorical style via gospel song was a notable shift in his usual communication modes and captured international attention. While a far cry from policy stance to mitigate future white supremacist violence this speech was an essential means of collective mourning both in the United States and around the world. President Trump’s own proximity to white supremacist organizers throughout his campaign and presidency similarly relates to the sporadic and inconsistent style of speech that followed the Charlottesville rally and Heather Heyer’s murder. In contrast, President Biden, while known for his gaffs, was direct and measured in his communication following the Buffalo supermarket massacre. His determination to be unwavering in condemnation of white supremacy and communicate accurate facts in the face of terror ultimately resulted in a formulaic seeming response to the violence. The style of these responses illuminates how each president leads the nation not only in defining national values but also in emotional stewardship in the face of horrendous violence.

This rhetoric raises multiple important questions for considering how we respond to violence and the role of presidential leadership in grief and mourning. These national tragedies are on the rise, and while presidents are tasked with influencing policy and creating an agenda that stops future massacres, they are also emotional leaders in the wake of terror which has already occurred. This specific form of presidential leadership is not without consequence. It impacts the survivors and victims’ families who a terrorist attack catapulted into the national spotlight in a moment of immense personal grief. When a president speaks on an instance of white supremacist terrorism, they are speaking to a relatively small community of those directly impacted. At the same time, presidents are leaders of an entire nation grappling with the shock of often graphic atrocities. Understanding how presidents move us through these moments is essential not only to gain a better grasp of the presidency itself but also when considering what it means to elect someone to this role. However much a president’s policy agenda or political tenor may impact daily and cultural life, there is perhaps nothing more intimate than how we grieve, and presidents partake in this too—we should therefore consider this as citizens determining who

to elect and scholars seeking to better understand the presidency itself and the differences between its office holders.

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THE PRESIDENT'S "LOADED WEAPON": USING JUSTICE JACKSON'S FRAMEWORK TO ADDRESS STATUTORY AMBIGUITY IN THE NATIONAL EMERGENCIES ACT

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In the 1952 Steel Seizure case, Supreme Court Justice Robert Jackson penned a now widely known concurrence which laid out a "three-pronged test" as a basis for assessing assertions of executive power. In the decades since, Congress has passed an array of legislation concerning presidential emergency powers, including the National Emergencies Act of 1976. Yet, in an era of novel emerging security threats at home and abroad, there have been controversial uses of these emergency powers with an apparent rift as to the understanding of how Jackson's concurrence informs their limitations. This research will use an in-depth analysis of Justice Jackson's framework to clarify what has become a gray zone both legally and constitutionally. I will begin by analyzing Justice Jackson's Steel Seizure concurrence and broader legal background with a specific focus on issues of statutory ambiguity and legislative intent. I will then use my findings from such research to analyze the 1976 National Emergencies Act along with recommendations for how policymakers can proceed in preventing potential abuse.

INTRODUCTION

When it comes to public policy and law, words are far more than an art; they are power. The problem is that the meaning of words is not always clear. In fact, in law, even what one considers to be reasonably clear can be construed to the edge of reason, or somewhere in between. This struggle has been evident when it comes to the issue of statutory interpretation. While it may be difficult for Congress to completely avoid statutory ambiguity, or perhaps in some cases it might even be useful, it is a critical balancing act that Congress needs to maintain. One such law where this problem has emerged is the National Emergencies Act of 1976 (NEA), which originally sought to create a safeguard for presidential emergency powers.¹ However, the NEA's problem with ambiguity has almost completely reduced its effectiveness.

¹ For the sake of clarity and consistency, I will use the NEA to describe both the general National Emergencies Act of 1976 as well the much broader and more expansive federal national emergencies framework, which encompasses hundreds of federal statutes; Jennifer K. Elsea and Edward C. Liu, *Legal Authority to Repurpose Funds for Border Barrier Construction*, Congressional Research Service, R45908, December 30, 2019, [https://crsreports.congress.gov/product/pdf/R/R45908#:~:text=Legal%20Authority%20to%20Repurpose%20Funds%20for%20Border%20Barrier,Department%20of%20Homeland%20Security%20%28DHS%29%20for%20that%20purpose](https://crsreports.congress.gov/product/pdf/R/R45908#:~:text=Legal%20Authority%20to%20Repurpose%20Funds%20for%20Border%20Barrier,Department%20of%20Homeland%20Security%20%28DHS%29%20for%20that%20purpose;); ("In 1973, the [Senate Special Committee on National Emergencies and Delegated Emergency Powers]

Such ineffectiveness was demonstrated in February of 2019, when then President Donald Trump declared a national emergency and invoked the NEA to access additional funds for construction of a wall on the southern border after Congress refused to give him the funds that he requested in full.² Importantly, President Trump seemed to imply that he did not think use of the NEA was truly necessary.³ Shortly after, a range of lawsuits were filed challenging the president's authority to do so.⁴ One might assume that this story does not go much deeper. A president frustrated by congressional opposition turning to a vaguely worded statute to obtain a "workaround" to achieve their desired policy, and then subsequent battles in court over whether they could do so, does not sound too out of the ordinary.⁵ Yet, this story goes much deeper, and well beyond simply using emergency funds to build a border wall. As has now been revealed, there was a meeting held in the final days of the Trump administration, where then President Trump received advice on and considered a plan to use obscure emergency powers to seize voting machines in the wake of the 2020 election.⁶ This revelation is chilling to the soul of democracy, and represents a serious and foreboding manifestation of a danger with the potential to transgress the rule of law and the bounds of our constitutional system. Such a situation begs the question, if the NEA offers so much unchecked power, what can be done to fix it?⁷

concluded that the President's crisis powers 'confer[red] enough authority to rule the country without reference to normal constitutional process,' and so Congress enacted the NEA in 1976 to pare back the President's emergency authorities.")

² President Trump also invoked 10 U.S.C. § 12302 and 10 U.S.C. § 2808, two additional laws that are a part of many making up the national emergencies framework that can be accessed upon invocation of the National Emergencies Act (NEA); See Trump White House, "Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States," National Archives and Records Administration, February 15, 2019, <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>; Trump White House, "President Donald J. Trump Stands by His Declaration of a National Emergency on Our Southern Border," National Archives and Records Administration, March 15, 2019, <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-stands-declaration-national-emergency-southern-border/>.

³ Cheyenne Haslett, "Trump Declares National Emergency to Get Border Wall Funding," *ABC News Network*, February 15, 2019, <https://abcnews.go.com/Politics/trump-sign-border-bill-declare-national-emergency-wall/story?id=61088949>. ("I could do the wall over a longer period of time. I didn't need to do this, but I'd rather do it much faster," the president said, seeming to concede that a national emergency was avoidable.")

⁴ Jeremy Gordon and Hadley Baker, "Border Wall Litigation Tracker," *Lawfare*, June 5, 2019, <https://www.lawfareblog.com/border-wall-litigation-tracker>.

⁵ Haslett, "Trump Declares National Emergency."

⁶ Jonathan Swan and Zachary Basu, "Off the Rails: Inside the Craziest Meeting of the Trump Presidency," *Axios*, February 2, 2021, <https://www.axios.com/2021/02/02/trump-oval-office-meeting-sidney-powell>.

⁷ For a complete list of the powers available to the president in an emergency, see The Brennan Center for Justice, "A Guide to Emergency Powers and Their Use," February 8, 2023, <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

In analyzing the intense legal disputes over Trump's usage of the NEA to construct a border wall, including taking a close look at the various legal briefs filed, there is not a lot that the two sides seem to agree on. However, in *Sierra Club v Trump*, there is an interesting common denominator.⁸ Justice Robert H. Jackson, and more specifically, his famous concurrence on presidential power in *Youngstown Sheet and Tube Co. v Sawyer*, popularly known as the Steel Seizure Case, is mentioned in the legal briefs of both sides to support opposite arguments.⁹ Of course, the same justice's opinion being used to support conflicting conclusions as to how we should determine intended congressional policy in the NEA warrants a closer inspection. Thus, we must return to the beginning.

I will detail the often-missed context of Jackson's concurrence to shed light on why it is so important to contemporary separation of powers issues, as well as the lessons we can learn when it comes to resolving issues of statutory ambiguity in the NEA. This context will include a history and explanation of Jackson's concurrence to determine the source of the divergence in understanding, before digging into his legal career, broader judicial philosophy, and past judicial opinions. Through these lessons, we can learn from Jackson that there may be more to determining Congress's intended policy than just a plain reading of the law. However, his own past and broader legal philosophy illustrate the danger of relying on vague congressional intent alone to control the presidency. These findings demonstrate that it is mostly up to Congress, and not the courts, to solve this issue. Further, I will show that while the NEA is an important law with the purpose of providing the president the ability to respond adequately to emergency, the ambiguity built into the law currently provides too much discretion to the president which leaves the door open to future abuses of power. Congress needs to immediately address this issue to restore their role as an institutional check on the excesses of presidential power.

JACKSON'S STEEL SEIZURE CONCURRENCE AND LEGISLATIVE INTENT

The history and events leading up to Justice Jackson's Steel Seizure concurrence are complex and historically fascinating. Many of the details are beyond the scope of this paper, but

⁸ *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

⁹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Plaintiff's Mot. for Preliminary Injunction, at 10-12, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. 2019); Defendant's Opposition to Mot. for Preliminary Injunction, at 27, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. 2019).

for the sake of setting essential context, there are some important ones to take note of. By early 1952, the Korean War was in full swing with a large amount of domestic production being put toward the ongoing war effort. Importantly, before the war started, there had been a fundamental change in the way that Congress approached the subject of production plant seizures. Throughout World War I and II, Congress often deferred seizure power to the president in one way or another when strikes might occur that threatened industries key to ongoing war efforts.¹⁰ After World War II ended, a string of legislation including the Defense Production Act, the Taft-Hartley Act of 1947, as well as amendments to the Selective Service Act in 1948 and 1951 all contributed to a much more constrained presidential seizure power.¹¹ Perhaps the most important of these, the Taft-Hartley Act of 1947, did not authorize presidential seizure but rather “permitted the President to appoint a board of inquiry when he believed that a threatened strike would ‘imperil the national health or safety,’” which upon issuance of a report would then allow the attorney general to ask federal courts to enjoin strikes for up to eighty days.¹²

Thus, when tensions in the steel industry began to flare in 1951, trouble loomed for the Truman administration. After the United Steel Workers of America announced that they were seeking a new contract—which was opposed by the steel mill owners—President Truman tried just about everything he could under the statutory authority to avoid a crushing labor strike.¹³ Unfortunately, these efforts were to no avail and before the strike commenced on April 9, President Truman instructed the secretary of commerce to seize control of the national steel mills.¹⁴ Lawsuits quickly followed in a federal district court, where a critical error was made by the government which allowed the case to be framed around the lawfulness of the seizure, as opposed to just the legal remedies.¹⁵ Thus, the stage was set for a major Supreme Court decision.

While the opinion written by Justice Hugo Black served as the official opinion of the court, there is very little dispute that Justice Jackson’s concurrence is now what one may consider to be the de facto precedent.¹⁶ There is also evidence to support the idea that Jackson’s

¹⁰ Christopher Schroeder, Curtis A. Bradley, and Patricia L. Bellia, “The Story of the Steel Seizure Case,” essay, in *Presidential Power Stories* (New York: Foundation Press, 2009) 233-285.

¹¹ *Ibid*, 241.

¹² *Ibid*, 241.

¹³ *Ibid*, 242.

¹⁴ *Ibid*, 243.

¹⁵ *Ibid*, 244-252.

¹⁶ Edward T. Swaine, “The Political Economy of Youngstown,” *Southern California Law Review* 83, no. 2 (2010): 9,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474320#:~:text=A%20political%20economy%20approach%2

concurrence has “not only transcended its original context to speak to presidential authority in all settings, but somehow leapt into the active consciousness of members of Congress and the executive branch.”¹⁷ The reason that Jackson’s concurrence is so entrenched in legal and political battles over presidential power is because it “proves important in cases where conventional statutory interpretation does not directly answer the question of whether the President enjoys a claimed power” and “requires drawing inferences from statutory silences and the history of congressional consideration of the subject matter.”¹⁸ While the concurrence as a whole is quite nuanced, the source of the concurrence’s enduring prominence comes from Jackson’s three-pronged test. Before assessing the seizure of the steel mills, Jackson stated that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”¹⁹ Jackson then goes on to describe three basic categories of presidential action. Jackson’s first category states that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”²⁰ In the second category, “the President acts in absence of either a congressional grant or denial of authority, [where] he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”²¹ Finally, the third category describes “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²²

Ultimately, using his own framework to assess the situation at hand, Jackson came to the same conclusion as the majority of the court in determining that President Truman did not have either the statutory or constitutional power to seize the steel mills. Jackson concluded that

[Obetter%20explains%20the%20problem, categories%20offer%20a%20practical%2C%20if%20legally%20unorthodox%2C%20constraint.](#)

¹⁷ Ibid, 5-6; See also Robert M. Chesney and Stephen I. Vladeck, “Episode 89: A Deep Dive into the Steel Seizure Case (Youngstown Sheet & Tube V. Sawyer),” The National Security Law Podcast, September 4, 2018, 32:17, <https://www.nationalsecuritylawpodcast.com/episode-89-a-deep-dive-into-the-steel-seizure-case-youngstown-sheet-tube-v-sawyer/>.

¹⁸ David M. Driesen and William C. Banks, “Implied Presidential and Congressional Power,” *Cardozo Law Review* 41, no. 4 (2019): 1301-1365, <https://doi.org/10.2139/ssrn.3333366>.

¹⁹ Jackson, *Youngstown*, 343 U.S. 579, 635.

²⁰ Ibid, 635-37.

²¹ Ibid, 637.

²² Ibid, 637-638.

President Truman's actions should fall underneath the third category, as he concurred with Justice Frankfurter's assessment of the Taft-Hartley Act of 1947 where "Congress has expressed its will to withhold this [seizure] power from the President as though it had said so in so many words" and that "[n]o authority that has since been given to the President can by any fair process of statutory construction be deemed to withdraw the restriction or change the will of Congress."²³ Jackson then went on to analyze the constitutional claims of the president, where he argued that "[i]n view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute."²⁴

However, as is clearly demonstrated by the Sierra Club case, Jackson's framework may be susceptible to being manipulated, especially given that in some parts of the framework, Jackson is not completely clear as to the practical meaning of his words, such as what exactly constitutes "an express or implied authorization" or "will of Congress."²⁵ Given the apparent vagueness of this portion of Jackson's concurrence, it would be quite harmful to engage in conjecture about the meaning of this portion of his concurrence without looking to the broader context. While Justice Jackson is the only person who would have truly known how he would have applied the framework to the case at hand, the context of his life, legal career, and judicial philosophy shed light on key lessons as to how his framework should be read.

First, it is important to recognize that Justice Jackson's legal background was much different than that of nearly all contemporary attorneys. After graduating from high school in 1910, Jackson did not attend college but rather began work as an apprentice for two local attorneys in his hometown of Jamestown, New York.²⁶ Jackson was heavily influenced by his legal mentors, Frank Mott and Benjamin Dean, especially in the realm of common law where "[h]e learned that while the common-law mind strives for continuity... it also allows for adaptation of principles to meet particular circumstances."²⁷ Jackson took a break from his apprenticeship to attend Albany Law School for a year before returning to his apprenticeship due

²³ Frankfurter, *Youngstown*, 343 U.S. 579, 602 and 604.

²⁴ *Ibid.*

²⁵ Swaine, *Political Economy*, 7/8; Jackson, *Youngstown*, 343 U.S. 579, 635-638.

²⁶ Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, Md: Rowman and Littlefield, 1996), 218.

²⁷ *Ibid.*, 219.

to the state requiring at least three total years in school or work to prepare for the bar.²⁸ In his final year of apprenticeship, Jackson had to take on a larger workload and in litigating cases, assumed a philosophy that “emphasized the circumstances of the particular case over any concern with continuity in the law.”²⁹ As he ventured into his early career “[w]ith a legal education acquired primarily through office training, and with a practice that fit the standard of the nineteenth-century legal community (i.e., the generalist country lawyer), Jackson possessed a thoroughly traditional legal background.”³⁰ However, Jackson’s career did not remain so rigidly traditional. Briefly, Jackson was active in politics during the election of President Woodrow Wilson, where he made a key connection in future President Franklin D. Roosevelt.³¹ After initially declining to join Roosevelt’s administrations as governor and then president, Jackson would eventually accept a position in 1934 as an attorney within the Bureau of Internal Revenue where he would then work his way up in the administration to eventually become the solicitor general in 1938.³²

Jackson’s time as solicitor general and later as attorney general a few years later represented the often-complicated dynamic between a legal adviser and their superior, especially where the “distinction between private advice and public advocacy is implicit in many of Jackson’s experiences.”³³ Even though popular conceptions of Jackson’s concurrence have painted him as an opponent of presidential power, his legal career in the Department of Justice tells a different story. In this setting, “Jackson was quite willing, at least in private, to render impartial advice utterly contrary to the president’s wishes. At the same time, once the president reached a decision, Jackson would fully support the decision.”³⁴ Such support included instances where the actions taken by the president were most likely or even clearly unlawful. Perhaps the most notable of these includes Jackson’s support of Roosevelt’s destroyer deal with the British in 1940, where Roosevelt “confronted powerful opposition in Congress to providing military aid, including destroyers, to Britain.”³⁵ The deal’s lawfulness was extremely questionable under

²⁸ Ibid, 219-220.

²⁹ Ibid, 220.

³⁰ Ibid, 221.

³¹ Ibid, 224-225.

³² Ibid, 226-231.

³³ William R. Casto, *Advising the President: Attorney General Robert H. Jackson and Franklin D. Roosevelt* (Lawrence: University Press of Kansas, 2018), 140.

³⁴ Ibid, 151.

³⁵ Robert J. Delahunty, “Robert Jackson’s Opinion on the Destroyer Deal and the Question of Presidential Prerogative,” *Vermont Law Review* (2013), U of St. Thomas (Minnesota) Legal Studies Research Paper No. 13-08,

multiple statutes and international law; even though Jackson did convey what some consider to be clever arguments in part, I agree with the general assessment of scholars who critique his legal opinion in this case to be quite poor given his attempt to contort the law to the president's policy.³⁶ While there are many other notable examples of Jackson justifying probable or even clearly unlawful presidential action, what is important to note is that in his experience at the Department of Justice, "[a]lthough Jackson saw himself as a partisan, he implicitly recognized an inherent conflict between his duty to serve the president and his duty to follow the law."³⁷

Certainly, Jackson did not serve on the Supreme Court in the same manner that he did as solicitor general and attorney general. Nonetheless, he would have been well-aware of these experiences as justice and his opinions regarding presidential power should be read with that in mind. Additionally, when analyzing his judicial philosophy as a justice, one scholar points out that there may actually be a measure of consistency in Jackson's opinions across his career, specifically concerning his view of:

[P]residential prerogative—in the sense of an Executive action, unsupported by or contrary to an Act of Congress or the Constitution—would be judicially reviewable and should presumptively be invalidated, whether in wartime or not, if it injured a class of American nationals and did not concern a zone or theater of military operations.³⁸

Further:

[I]f this sketch of a Jacksonian account of the prerogative is broadly correct, then we can no longer view Jackson's work as Attorney General and as an Associate Justice as if they were sharply distinct. Instead, we must acknowledge that Jackson's thinking about Executive power, though obviously influenced by the roles he occupied, showed a marked continuity and indeed consistency over time.³⁹

available at SSRN: <https://ssrn.com/abstract=2243980>, 10; See also Martin S. Sheffer, "The Attorney General and Presidential Power: Robert H. Jackson, Franklin Roosevelt, and the Prerogative Presidency," *Presidential Studies Quarterly* 12, no. 1 (1982): 54-65, https://www.jstor.org/stable/pdf/27547779.pdf?refreqid=excelsior%3AAbb6628fc1409ae3345526d3e601c3b4c&ab_segments=&origin=; 56-58 and Casto, *Advising the President*, 59-75.

³⁶ Delahunty, "Destroyer Deal and Prerogative", 19-25, 25 ("one must judge Jackson's statutory analysis to be unimpressive and unconvincing."); Sheffer, *Presidential Power*, 57 ("It would seem that Jackson did nothing more than force the statutes to conform to the exchange"); Casto, *Advising the President*, (Chapter 6: 76-82) 76, ("His treatment of the Walsh Amendment was brilliant... In contrast, his 'hairsplitting' analysis of the Espionage Act was somewhat contrived and sophistic... Finally, his reliance on section 492's proviso was utterly unacceptable and can be justified only in terms of raw political power.")

³⁷ Casto, *Advising the President*, 132.

³⁸ Delahunty, "Destroyer Deal and Prerogative," 35.

³⁹ *Ibid*, 38.

In addition to the importance of viewing Jackson's concurrence in the context of his broader legal career, it is also important that his concurrence be read considering his overarching legal philosophy, where "[a]s a justice, Jackson usually eschewed formal legal doctrine in favor of pragmatism that enabled him to consider all aspects of a particular case."⁴⁰ One scholar who analyzed and categorized all of Jackson's opinions described him "as ideologically a pragmatic, individualistic conservative; and attitudinally as a political moderate and economic conservative."⁴¹ As described by the legal scholar and former federal judge, Richard A. Posner:

[L]egal pragmatism is not concerned just with immediate consequences, is not a form of consequentialism, is not hostile to social science, is not Hartian positivism, is not legal realism, is not critical legal studies, is not unprincipled, and does not reject rule of law. It is resolutely antiformalist, it denies that legal reasoning differs importantly from ordinary practical reasoning, it favors narrow over broad grounds of decision at the outset of the development of an area of law, it is friendly to rhetoric and unfriendly to moral theory, it is empirical, it is historicist but recognizes no 'duty' to the past, it distrusts exception-less legal rules, and it doubts that judges can do better in difficult cases than to reach reasonable (as distinct from demonstrably correct) results... which constitute generalizations to supplement "the core of pragmatic adjudication - 'a disposition to ground policy judgements on facts and consequences rather than on conceptualisms and generalities...'"⁴²

Within his broader pragmatic style, Jackson also held notable fears of both "majority oppression... [where] constitutional adjudication provides an essential limit on politics..." and "of judicial abstraction."⁴³ Jackson's pragmatism can be attributed to his background, in that "[h]e had come from a practical people, had studied as an apprentice the empirical method of the common law, and had developed as a country lawyer an appreciation for the varying contexts surrounding cases."⁴⁴ Given Jackson's pragmatism, an analysis of his legal opinions prior to the Steel Seizure Case give significant insight on how to properly conceptualize his framework.

In determining his views on congressional intent, we can first begin with a description by Justice Jackson himself, in a speech given to the American Law Institute. In the speech, Jackson

⁴⁰ Casto, *Advising the President*, 123.

⁴¹ Glendon Schubert, "Jackson's Judicial Philosophy: An Exploration in Value Analysis," *The American Political Science Review* 59, no. 4 (December 1965): 940-963, https://www.jstor.org/stable/pdf/1953215.pdf?refreqid=excelsior%3A1c483bfa08363dda6d19a9cb0ab38f9a&ab_segments=&origin=&acceptTC=1.

⁴² Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), 85.

⁴³ Hockett, *New Deal Justice*, 17.

⁴⁴ *Ibid.*

stated that generally, “when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible.”⁴⁵ However, he warns that “[legislative history] is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems...” before professing sympathy for the view that we should adopt a clear meaning standard.⁴⁶ Such a view was reflected in Jackson’s opinion in *Western Union Telegraph Co. v Lenroot*, where Jackson stated that “we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it.”⁴⁷ He further elaborates his preference for clear meaning in that “had [Congress] determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that [it] is beyond the judicial power of innovation to supply a direct prohibition by construction.”⁴⁸ There are examples, however, that show Jackson’s willingness to go beyond simply the language of a statute, especially if a statute was being construed in a way that clearly contradicted the policy that Congress had clearly sought to implement. One such instance was in *United States v South Buffalo RY. CO.*, where Jackson stated that:

The pertinent portions of the legislative history which are set out at length... indicate clearly we think, that this Senate Committee responsible for S. 2009... deliberately refused to recommend and the Congress refused to legislate into the law the change we are now asked to make by judicial decision.⁴⁹

Such a view may seem to conflict with his opinion on the limits of legislative history, but another opinion may clarify Jackson’s methodology. In *Shapiro v United States*, Jackson states that “[w]e should not attribute to Congress such a purpose or intent unless it used language so mandatory and unmistakable that it left no alternative, and certainly should not base that inference on ‘legislative history’ of such dubious meaning as exists in this case.”⁵⁰ According to one scholar, “Jackson thought that judges should restrain themselves from imputing their

⁴⁵ Robert Jackson, “The Meaning of Statutes: What Congress Says or What the Court Says,” *American Bar Association Journal* 34 (1948): 535-538. <http://www.roberthjackson.org/wp-content/uploads/migrated-files/thecenter/files/bibliography/1940s/the-meaning-of-statutes.pdf>.

⁴⁶ *Ibid*, 537-538.

⁴⁷ Jackson, *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 501 (1945).

⁴⁸ *Ibid*.

⁴⁹ Jackson, *United States v. South Buffalo Ry. Co.*, 333 U.S. 771, 778-80 (1948).

⁵⁰ Jackson, *Shapiro v. United States*, 335 U.S. 1, 71 (1948).

personal policy preferences into a statute’s meaning...” and “that an objectively correct answer could be found in the law.”⁵¹ I certainly agree as to Jackson’s preference for a clear meaning interpretative method but I will add that Jackson’s pragmatism allowed for additional context when a proposed interpretation is clearly “contrary to the purpose and spirit” of a law.⁵²

Going back to the legal briefs in the Sierra Club case, the divergence in understanding pertains to Jackson’s framework and which of the three categories should be applied. The lawyers for Sierra Club argued that Congress had limited border wall construction funds to a specific amount in the Consolidated Appropriations Act of 2019 (\$1.375 billion), where “Congress specifically considered and rejected the administration’s plan” and prohibited the president from “unilaterally [increasing] funding to projects before Congress acts to approve such actions.”⁵³ They argued that this, along with the “unprecedented passage of a disapproval resolution,” placed President Trump’s action under the third category in Jackson’s framework (where presidential power would be at its lowest).⁵⁴ To the contrary, President Trump’s attorneys disputed this categorization, arguing that the actions taken by the president should be considered under the first category (expressly authorized by Congress).⁵⁵ They stated that the president acted “pursuant to statutory authority” as “the fact that Congress authorized funding for certain border-barrier construction in the CAA does not mean that it prohibited the use of other available statutory sources [relevant national emergency statutes] to provide additional funding for such construction.”⁵⁶ Further, they point out that “Congress’s failed attempt to override the president’s veto of its disapproval of the national emergency declaration does not have the force of law.”⁵⁷ Here, the difference between categories is incredibly important; while the categories do not guarantee the outcome, they are certainly significant in determining it.⁵⁸

⁵¹ Charles Patrick Thomas, “A New Deal Approach to Statutory Interpretation: Selected Cases Authored by Justice Robert Jackson,” *Notre Dame Journal of Legislation* 44, no. 1 (December 11, 2017): 132-153, https://scholarship.law.nd.edu/jleg/vol44/iss1/6/?utm_source=scholarship.law.nd.edu%2Fjleg%2Fvol44%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages.

⁵² Jackson, *Com. Of Mass. v. U.S.*, 333 U.S. 611, 638 (1948).

⁵³ Plaintiff’s Mot., *Sierra Club*, No. 4:19-cv-00892-HSG, 6-7.

⁵⁴ *Ibid.*, 10-12.

⁵⁵ Defendant’s Opposition, *Sierra Club*, No. 4:19-cv-00892-HSG, 27.

⁵⁶ *Ibid.*, 27-28.

⁵⁷ *Ibid.*, 28.

⁵⁸ Sai Prakash, Mark Tushnet, and Jeffrey Rosen, “Can the President Declare a National Emergency to Build the Wall?,” National Constitution Center, January 10, 2019, 27:02, <https://constitutioncenter.org/news-debate/podcasts/can-the-president-declare-a-national-emergency-to-build-the-wall>; Chesney and Vladeck, *Deep Dive*, 37:30.

With all this together, what does it tell us about how Justice Jackson's concurrence has been conceptualized today? It appears that both sides of the Sierra Club case oversimplified what Jackson meant by the intent or will of Congress. Of course, Justice Jackson would have been the only person to know exactly how he would have applied his concurrence in this case. However, given the broader context, there may be more to determining the intent of Congress than just merely a plain reading of its words—as Trump's attorneys seem to suggest—especially when there is evidence to suggest that is not how Congress meant those words to be used. On the other hand, the attorneys for Sierra Club seem to be underestimating truly how much discretion the NEA defers to the president. Each side may be demonstrating a major flaw of the concurrence, as mentioned previously, in that Jackson's framework can easily be molded to fit a specific policy. Furthermore, there is another flaw in Jackson's concurrence that I think applies quite clearly here. Even if we can determine the express or implied will of Congress, the concurrence does not give us much guidance as to how to reconcile mixed signals in the law.

Despite the difficulties resulting from Jackson's framework, I believe there is a broader and more important lesson at hand. Jackson was one who “believed in the vitality and efficacy of democratic politics,” even if he believed in some broader presidential prerogative power.⁵⁹ Additionally, there are some who believe that the broader point of Jackson's concurrence has been missed by Congress specifically, in that the true point is not to take every conflict between Congress and the president into court, rather it is to legislate.⁶⁰ Such a view is confirmed at the end of Justice Jackson's concurrence when he states that “[no] decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems” and further that the “power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”⁶¹ It appears that Jackson's central concern was not to focus on the creation of a rigid judicial structure, but rather to reiterate the importance of an active and involved Congress in keeping presidential power at bay.

⁵⁹ Delahunty, *Destroyer Deal and Prerogative*, 39.

⁶⁰ Chesney and Vladeck, *Deep Dive*, 1:11:34.

⁶¹ Jackson, *Youngstown*, 343 U.S. 579, 654.

POLICY RECOMMENDATIONS: NATIONAL EMERGENCIES ACT

In sum, the border wall case has revealed the potential for abuse contained within the NEA. Justice Jackson's concurrence demonstrates the importance of Congress in reasserting its role as an essential check on abuses of presidential power. Based on these findings, it has become incredibly clear that if Congress wants to prevent potential executive abuse of the NEA, then it needs to take serious legislative action. At the start, this should begin with Congress taking action to clarify ambiguity within the NEA, including at least basic guidelines as to what constitutes an emergency, something it had the opportunity to do in 1976.⁶² However, as stated by the Brennan Center and CATO Institute legal brief in the Sierra Club case:

[A]lthough Congress purposely omitted a definition of 'national emergency,' the legislative history makes clear that Congress did not intend for the law to provide an affirmative grant of limitless discretion, and that it expected the limits contained within specific emergency powers to be scrupulously observed and enforced...

since they did not want the impression to be given that the president was receiving additional authority.⁶³ Moreover, the Brennan Center and CATO Institute are correct in calling this strategy "flawed, as the majority of the statutes in place today that confer power on the president during 'national emergencies' do not include definitions of the term or criteria that must be met beyond the issuance of the declaration."⁶⁴ In addition to adding a working definition into the law, it may be smart for Congress to complete a new review of the federal emergencies framework, where:

Congress could repeal the laws that are obsolete or unnecessary. It could revise others to include stronger protections against abuse. It could issue new criteria for emergency declarations, require a connection between the nature of the emergency and the powers invoked, and prohibit indefinite emergencies.⁶⁵

In addition to limiting ambiguity and situations where a president could claim unchecked discretion as to declaring emergencies, there are a couple of other safeguards which Congress could consider. A few bills that would institute varying time limits on a presidential declaration

⁶² Jennifer K. Elsea, "Definition of National Emergency under the National Emergencies Act," CRS Legal Sidebar, Congressional Research Service, March 1, 2019, 2-3, <https://crsreports.congress.gov/product/pdf/LSB/LSB10267>.

⁶³ Amicus Brief of Brennan CTR. and CATO, at 1, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. 2019).

⁶⁴ *Ibid*, 14.

⁶⁵ Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," The Atlantic (Atlantic Media Company, 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

of emergency have been proposed and could address the problem of the NEA essentially allowing indefinite emergencies; presidents can currently renew them each year with a signature and in the wake of the Supreme Court overturning legislative vetoes in 1983, would require a veto-proof majority in Congress to end an emergency declaration.⁶⁶ Perhaps a step further would be to implement a judicial safeguard, which is not without precedent.⁶⁷ The way that Congress may go about this could certainly vary, and they would have to be very careful not to intrude on separation of powers or the political question doctrine. While a broader judicial check could prove difficult, it may be feasible for Congress to implement an expedited judicial review process to prevent emergency disputes from dragging out over long periods of time. Overall, affording the president the discretion needed to act in a time of emergency, while also maximizing the safeguards in place to prevent abuse, will be no easy task. Nonetheless, given the immense power within the NEA, it has become a necessary task.

CONCLUSION

Unwritten norms that have guided our democracy thus far have given Americans a false sense of security as to the strength of our institutional safeguards against violations of liberty and abuses of power. As is demonstrated by Justice Jackson, Congress cannot afford to be unclear, and Congress cannot rely on the courts alone to maintain the balance of power in our constitutional system. Over time, it has become clear that the American presidency has evolved, an evolution which has largely been driven by the deployment of the president's interpretive powers. In respects to the emergency powers of the president, growth may bring policy benefits, especially in an age of increasing partisan divide. These benefits in times of divide may seem benign, however, they may also lead us down a path containing the upmost risk to our democracy, handing incredible unchecked power to a position which will not always be held by

⁶⁶ *INS v. Chadha*, 462 U.S. 919 (1983); Richard Gephardt, Gary Hart, and Mark Medish, "Time for President Biden to Push Emergency Powers Reform," *The Hill* (The Hill, June 16, 2022), <https://thehill.com/opinion/white-house/3525901-time-for-president-biden-to-push-emergency-powers-reform/>; Elizabeth Goitein and Joseph Nunn, "Reform Presidential Emergency Powers before It's Too Late," *Brennan Center for Justice*, August 4, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/reform-presidential-emergency-powers-its-too-late>.

⁶⁷ Michael R. Rouland and Christian E. Fearer, "Calling Forth the Military A Brief History of the Insurrection Act," *Joint Force Quarterly* 99, 4th Quarter (2020): pp. 124-134, <https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-99/jfq-99%20124-134%20Rouland-Fearer.pdf?ver=-NCJUZx23CxWGU35YdCEMA%3d%3d>, 125. In the Militia Act of 1792 – an early version of the Insurrection Act – a federal judge had to ensure that use of the law was truly necessary.

those who have a serious regard for the limits of our constitutional system. Today, the modern emergency powers framework sits like a “loaded weapon,” given to the president by Congress for times of emergency.⁶⁸ A lack of constraints, however, has given the president incredible discretion as to when that weapon may be drawn. The problem is, once it has been drawn, there is no telling where it might be aimed.

⁶⁸ Jackson, *Korematsu vs U.S.* 323 U.S. 214, 246 (1944). In this decision, Jackson used the term “loaded weapon” to describe the danger in judicial rationalization of unconstitutional military emergency powers. I believe that such a danger now applies to congressional deference regarding presidential emergency powers.

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Part Two

The Congress

PRESIDENTIAL WAR POWERS AND THE CONGRESSIONAL RESPONSE DURING THE 21ST CENTURY

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The United States has not declared war since 1942 during World War II. Still, the United States has continued to find itself engaged in international conflict during the sixty years since fighting the Axis powers, especially during the 21st century. The Authorizations for Use of Military Force from the early 2000s perform an instrumental role in establishing norms regarding the Executive Branch's actions. This research examines how the George W. Bush, Barack Obama, and Donald Trump administrations—the previous 21st century presidencies—have utilized their war powers and justified their actions. The research also examines the congressional response to these actions and provides an analysis of overarching themes and precedents that have been followed throughout the 21st century.

INTRODUCTION

A great component of the American democratic system is the checks and balances that each branch imposes on each other. Our Founding Fathers sought to create a system to promote collaboration within the government. Though they could not anticipate every challenge that would face the nation, one of the challenges that has faced the presidency and Congress has been regarding what war powers the executive is unilaterally allowed to pursue. Senator Bernie Sanders wrote that “the president has the responsibility to keep Americans safe, but for too long administrations of both parties have interpreted their authorities in an extremely expansive way to continue war.”¹ This idea encourages research into how the recent administrations have utilized and justified their war powers.

Article I Section 8 of the Constitution allocates war powers to the legislative branch. It states that “Congress shall have the power...to declare war...raise and support armies...provide and maintain a navy...provide for calling forth the militia...[and] to provide for organizing, arming, and disciplining the militia.”² To complement the legislative powers, Article II Section 2 details that “the president shall be the Commander in Chief of the Army and the Navy of the

¹ Bernie Sanders (@SenSanders), Twitter, February 26, 2021, 1:03 PM, <https://twitter.com/SenSanders/status/1365361968513744897>.

² U.S. Const. art. 1, sec. 8.

United States” and will make treaties that are ratified by the Senate.³ War powers were not to be vested in a single person, nor a single entity. The Constitution allows Congress to declare war, ratify treaties, and control the monetary allocations for the military. The executive branch bears the responsibility for commanding the armed forces, however, it was not given the authority to wage war. Presidents have followed a historic precedent to insert the military into hostile situations, without actually declaring war.

The War Powers Resolution (WPR), which was passed in 1973, was the congressional response to Nixon’s “indefinite and indeterminate misadventure in Asia.”⁴ It represented the antithesis to the Gulf of Tonkin Resolution which states that Nixon, in his role as Commander in Chief, was approved by Congress “to take all necessary measures” to defend the United States.⁵ While presidents have justified unilateral military initiative with claims that a swift response was necessary, Congress’s role in the democratic system is to ensure presidents are held accountable for their actions.⁶ Congress passed the WPR over Nixon’s veto to reaffirm its power to declare war. The joint resolution intended to mandate the president to consult Congress when possible before introducing the United States military into hostile environments or areas where they face imminent threats. Additionally, it outlines clear instances when the president is permitted to insert troops. Congress was granted the power to direct the removal of troops if the engagement exceeds an authorized time restraint for U.S. involvement. Holistically, the WPR aimed at returning the branches to their constitutionally allocated powers.

However, circumstances change and new threats develop. The presidencies from the 21st century have found ways to subvert the WPR authorities through Authorizations for Use of Military Force (AUMF) which have granted presidents broad power to conduct military initiatives in the post 9/11 world. The recent administrations have thus depended on these authorizations which has caused irritation from the congressional body. Despite their discontent with the current state of presidential war powers, Congress has continuously reached an impasse to restrain the executive’s authority.

³ U.S. Const. art. 2, sec. 2.

⁴ James Nathan, “Salvaging the War Powers Resolution,” *Presidential Studies Quarterly* 23, no. 2 (1993): 235–68, <http://www.jstor.org/stable/27532277>.

⁵ *Tonkin Gulf Resolution*, Public Law 88-408, 88th Congress (1964).

⁶ Sarah Burns, “Legalizing a Political Fight: Congressional Abdication of War Powers in the Bush and Obama Administrations,” *Presidential Studies Quarterly* 51, no. 3 (2021): 468.

In this essay, I will compare the presidencies of the 21st century regarding how they used their war powers, where their justification came from, and the congressional response. I will refer back to how the Bush administration's AUMF served as a catalyst for actions in the preceding presidencies. Next, I will analyze the congressional proposals that could be the future for war powers. Lastly, I will discuss implications and analyze how the war powers are relevant in sustaining American democracy.

AUMFs AND THE BUSH ADMINISTRATION

The United States homeland was attacked by terrorists on September 11, 2001. Short of declaring war, Congress passed a joint resolution to authorize using armed forces against the agents of the attack. Similar to the language used in the Gulf of Tonkin Resolution, the 2001 AUMF authorized the president to use all necessary force against the nations, organizations, or individuals who were responsible for planning, coordinating, and executing the attacks.⁷ Within the resolution is a subsection that recognizes that this AUMF is consistent with the War Powers Resolution's circumstances and demands.

The 21st century AUMFs are unique compared to previous declarations of war and authorizations for force. Instead of targeting a specific state actor, the more recent AUMFs expand their bounds by allowing force to be used against stateless international terrorist organizations.⁸ This resolution can be viewed as dangerous due to its open-ended language, unmentioned end date, and brevity.⁹ Not to mention the uncertainty that comes with an enemy that has no borders and the new military tactics that must be utilized in the authorized attacks.¹⁰ Despite the documents' legality, they stripped war powers from the legislative branch once again and consolidated more unilateral power and precedent within the executive office.

The 2002 AUMF Against Iraq Resolution responded to Iraq's growing threat towards the United States. This document cites numerous reasons to justify executive action, the last being Public Law 107-40, otherwise known as the 2001 AUMF. Additionally, the 2002 rendition utilizes United Nations Security Council resolutions to provide more accountability towards

⁷ *Authorization for the Use of Military Force*, Public Law 107-40, 115 Stat.224-225 (2001).

⁸ Burns, "Legalizing a Political Fight," 474.

⁹ Tim Kaine and Todd Young, "War, Diplomacy, and Congressional Involvement," *Harvard Journal on Legislation* 58, no. 2 (2021): 198.

¹⁰ Burns, "Legalizing a Political Fight," 474.

Thus, the snowball effect caused by the 2001 resolutions which established a precedent for unilateral presidential action to defend the state from terrorism began. As the century has progressed, additional presidential administrations frequently cite these authorizations to justify their unilateral presidential action. Additionally, congressional pushback is a common product.

Despite the appearance of legality in introducing troops into Iraq in 2003, and the support from Congress at the time, there were several senators and representatives that thought this action was outside the bounds of presidential war powers and that the AUMF should not have been adopted. Congresswoman Pelosi opposed the American military involvement that the Iraq Resolution allowed. She issued a statement saying “I cannot support the administration’s resolution regarding the use of force in Iraq...I have seen no evidence or intelligence that suggests that Iraq indeed poses an imminent threat to our nation.”¹¹ She proceeds by elaborating on the potential benefits that could be achieved from additional diplomatic approaches. Such approaches would introduce multilateral initiatives from the executive and legislative branch, providing checks and balances on each other’s foreign policy efforts.

NEW ADMINISTRATION, SAME BEHAVIOR: THE OBAMA ADMINISTRATION

On March 19, 2011, the Obama administration authorized airstrikes on Libya to enforce United Nations Security Council Resolution 1973 which called for UN member nations to take all necessary measures to protect civilians under attack in Libya, as well as imposing a no-fly zone.¹² These strikes were deemed necessary to stop the violence pursued by the Libyan government against their citizens. UN members issued condemnations toward Muammar Qadhafi’s behavior regarding the massacres and President Obama ultimately directed the U.S. military to participate in a “series of strikes against air defense systems and military airfields” to support the international mission in enforcing Resolution 1973.¹³ The Obama administration approved additional airstrikes against terrorist organizations in Libya in August 2016. A month later, Representative Paul Cook, a member of the House Committee on Foreign Affairs and

¹¹ Nancy Pelosi, “Pelosi Statement on Iraq Resolution,” October 3, 2002, <https://pelosi.house.gov/sites/pelosi.house.gov/files/pressarchives/releases/prIraqResolution100302.htm#:~:text=Ho use%20Democratic%20Whip%20Nancy%20Pelosi,face%20as%20Members%20of%20Congress.>

¹² Caroline D. Krass, “Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General,” *Opinions of the Office of Legal Counsel*, April 1, 2011.

¹³ *Ibid.*

Subcommittee on Terrorism gave a statement on Libya's terrorist descent. He noted that ISIS and al-Qaeda have established an even larger foothold in Libya since Qadhafi was ousted from power.¹⁴

How does this decision relate to Bush's AUMFs from 2001 and 2002? In 2016 when the United States initiated more airstrikes against Libya, Pentagon press secretary Peter Cook justified all the strikes by citing the 2001 AUMF. When a reporter asked where the legal authority to issue strikes originated from, Mr. Cook responded bluntly saying "the 2001 Authorization for the Use of Military Force similar to our previous airstrikes in Libya."¹⁵ Continuing over a decade after its issue, Bush's AUMFs were still used to justify presidential unilateral military action. The open-ended language, unmentioned end date, and brevity were used to the presidential advantage when seeking legal authority to justify the airstrikes.

The 2011 airstrikes, however, caused concern in the legislative branch. Inconsistent with the War Powers Resolution, the Obama administration let the military initiative last for longer than sixty days. This prompted a hearing before the Senate Foreign Relations Committee condemning the administration's actions. Legal adviser Harold Koh's argument for the operation's legitimacy was rooted in how the term "hostilities" was defined, or rather, left undefined, by the War Powers Resolution. Additionally, Koh's argument features interpretations for what "limited military operations" entails which Congress also critiqued as a broad category with vague defining features.¹⁶

The issue that Chairman John Kerry presented before Congress is that the WPR was not drafted with the current military capabilities in mind.¹⁷ The equivocal language also adds to the disconnect between the executive and legislative powers. Kerry saw the purpose of the committee hearing was to put forth a unified Senate resolution to deter Qadhafi's aggression and bolster how the American political system's effectiveness is perceived by other aggressive

¹⁴ *Libya's Terrorist Descent: Causes and Solutions before the Subcommittee on Terrorism, Nonproliferation, and Trade*, 114th Congress, 2nd session, 1-2 (2016).

¹⁵ Peter Cook, United States Department of Defense, *Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room* (August 1, 2016), <https://www.defense.gov/News/Transcripts/Transcript/Article/1033978/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in/>.

¹⁶ *Separation of Powers—War Powers Resolution—Obama Administration Argues that U.S. Military Action in Libya Does Not Constitute "Hostilities,"*: Hearings before the Senate Committee on Foreign Relations, 112th Congress, 1st Session, (June 28, 2011).

¹⁷ *Libya and War Powers: Hearings before the Senate Committee on Foreign Relations*, 112th Congress, 1st Session, 2 June 28, 2011.

actors. In spite of Kerry's optimism, other congressional members were not convinced that Obama abided by constitutional law. Senator Richard Lugar condemned the airstrikes by saying,

Our country was not attacked or threatened with an attack. We were not obligated under a treaty to defend the Libyan people. We were not rescuing Americans or launching a one-time punitive retaliation. Nor did the operation require surprise that would have made a public debate impractical.¹⁸

Lugar also raised the idea that Obama violated standard provisions because if these attacks had occurred on the U.S. homeland, the United States would have viewed these actions as hostile and constitute grounds for war.¹⁹

The airstrikes on Libya in 2011 and 2016 have sparked debate regarding the Obama administration undermining the War Power Resolution authorities. Additionally, Bush's AUMFs were cited to give the attacks rationale. The ambiguous language used in both of these resolutions came under scrutiny in the Senate when Chairman of the Senate Foreign Relations Committee, John Kerry, brought in Harold Koh to testify before Congress regarding the airstrikes' legal basis. He was met with dissent from other congressional members who called for reforming the WPR to reflect present day military capabilities.

FOLLOWING THE PRECEDENT: THE TRUMP ADMINISTRATION

On January 2, 2020, the Trump administration authorized a drone strike which targeted and killed Iranian General Qassim Suleimani. Suleimani was a crucial asset to Iranian intelligence and developing attacks against American military and civilians working in the Middle East, especially Iraq.

The following month, the administration released a report to Congress which supplied the justification and legality for the strikes. The report cited Article II in the Constitution, Article 51 in the United Nations Charter, and the 2002 AUMF issued by the Bush administration to warrant the attack against Suleimani. Though Article II merely specifies that the president is the Commander in Chief of the armed forces when called into service, Trump interpreted this to mean that he had express authority to approve military action since there was a perceived

¹⁸ *Libya and War Powers*, 5.

¹⁹ *Ibid*, 19.

imminent threat against the United States' interests.²⁰ Article 51 in the United Nations Charter allows member states to pursue self-defense military actions until the UN Security Council is able to restore peace and security.²¹ The Trump administration claimed these airstrikes were consistent with international law because the United States reported the strikes to the UNSC. Though it is stated that the right to self-defense was present before the airstrikes, it was especially present due to the escalation between Iranian and U.S. backed forces after the attacks were carried out.²²

Lastly, the report proceeds to justify the drone strike by citing the 2002 AUMF against Iraq. It acknowledges that this statute specifies that military force is authorized to "defend the national security of the United States against the continuing threat posed by Iraq," but proceeds to justify action against an Iranian official due to the threat which Suleimani and Iranian forces posed to the United States in Iraq.²³

The Trump administration engaged in unilateral executive action that bypassed congressional approval. Just as Obama faced numerous levels of push-back from the legislative branch, Trump received criticism as well. Senate Joint Resolution 68 from the 116th Congress was released following the drone strike against General Suleimani and specifically addressed the issue regarding if the AUMFs released by the Bush administration two decades ago could be used as valid justification for these actions. The findings include that neither AUMF "serve as a specific statutory authorization for the use of force against Iran."²⁴ Additionally, it found that the troops inserted into Iran were in a hostile environment which would require that the provisions within the War Powers Resolution should be followed.²⁵ The airstrike caused an escalation between Iranian and U.S. forces which the Senate then used to justify their assessment that the American military was indeed involved in a hostile environment.

²⁰ Catie Edmondson, "White House Memo Justifying Suleimani Strike Cites No Imminent Threat," *The New York Times*, February 14, 2020, <https://www.nytimes.com/2020/02/14/us/politics/white-house-memo-suleimani-strike.html>.

²¹ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <https://www.un.org/en/about-us/un-charter/full-text#:~:text=Article%2051,maintain%20international%20peace%20and%20security>.

²² Elliott Setzer, "White House Releases Report Justifying Soleimani Strike," *Lawfare*, February 14, 2020, <https://www.lawfareblog.com/white-house-releases-report-justifying-soleimani-strike>.

²³ *Ibid.*

²⁴ A joint resolution to direct the removal of United States Armed Forces from hostilities against the Islamic Republic of Iran that have not been authorized by Congress, SJ Resolution 68, 116th Cong., 1st session, (2020), <https://www.congress.gov/116/bills/sjres/68/BILLS-116sjres68enr.pdf>.

²⁵ *Ibid.*

Other than the issues with existing policies that the Senate Joint Resolution analyzed regarding the drone strike in Iran, it condemned the Trump administration's unilateral actions and called for a briefing to Congress to determine if U.S. forces should be engaged in hostilities versus Iran.²⁶ Finally, it concluded by directing the removal of U.S. armed forces from Iran unless the president had received an explicit declaration of war; something that explicitly falls under the powers allocated to Congress in Article I Section 8 of the Constitution. The Senate garnered bipartisan approval and passed the bill 55-45. In the House, it recorded a vote of 227-186 but was vetoed on the President's desk.

Unlike during Obama's terms, Trump's actions were again met with congressional dissent through a resolution titled the "No War Against Iran Act" in the House of Representatives. This resolution clarified that the AUMF from 2002 and any other proceeding law could not be interpreted to authorize military force against Iran.²⁷ The following title in this act also called to repeal the 2002 AUMF against Iraq. This bill saw great support in the House, passing with a 236-166 vote that included Republican and Democrat support.²⁸ Trump tweeted his discontent with the House's actions by saying that "Democrats want to make it harder for Presidents to defend America."²⁹ However, representatives voting in favor of the resolution argued that the 2002 AUMF is no longer needed today and that "it should be repealed, not used to launch more military action."³⁰

The House Committee on Foreign Affairs held a hearing intended to evaluate the Trump administration's policy on Iran. Chairman of the Committee, Eliot Engel's, opening statement was riddled with objections toward the Iran policy. He stated that using the AUMFs from the Bush administration which granted authority for the drone strike was particularly "dubious" and his call to action also reiterated the importance of maintaining the power balance between the executive and legislative branches. Representative Engel expressed these sentiments by saying,

We are asking these questions because Congress has not authorized war with Iran... We are asking these questions because war powers are vested in the Congress, and if we allow any administration to carry out strikes like these, to risk plunging

²⁶ Ibid.

²⁷ No War Against Iran Act, HR 550, 116th Cong., 1st session, (2019), <https://www.congress.gov/bill/116th-congress/house-bill/550/text>.

²⁸ Merrit Kennedy, "House Votes 'No War Against Iran,' In Rebuke to Trump," *NPR*, January 30, 2020, <https://www.npr.org/2020/01/30/801183240/congress-votes-no-war-against-iran-in-rebuke-to-trump>.

²⁹ Ibid.

³⁰ Ibid.

us into war without scrutiny, then we might as well cross out Article I Section 8 [of the Constitution].³¹

In his statement to the committee, Chairman Engel scrutinized this presidential unilateral action. He submitted for the record the letters he sent to then Secretaries Mike Pompeo and Mark Esper and demanded detailed explanations that would justify the legal authority for the strikes, why there was not consultation with Congress in accordance with the War Powers Resolution, and the imminent attack that the drone strike against Suleimani was intended to prevent.³²

Not dissimilar to the congressional response that Obama's airstrikes in Libya received, Trump's drone strike against Iranian General Qassim Suleimani was not received well in Congress. More adamantly than his predecessor's administration, Trump promptly cited the AUMFs from 2001 and 2002 to bring legality towards his actions. In standard fashion, Congress criticized these resolutions and even called for their replacement with legislation that would correspond with the U.S. military's current capabilities and methods for fighting their adversaries. Congress demonstrated its fervor for repealing the 2002 AUMF through numerous resolutions that gained a large amount of support in both chambers. Despite the inability to ratify any of the bills, the initiatives demonstrated a growing resolve to make an effective effort to bring war powers back to the legislative branch and limit the unilateral action that the president can take.

IMPLICATIONS FOR OUR DEMOCRACY AND A WAY FORWARD

Congress members have demonstrated an unstable stance on unilateral war powers. This impairs their ability to execute their positions effectively as they seek reelection in future races. Congress members are seemingly incentivized to default to the President's policy in order to deflect responsibility regarding difficult decisions.³³ War is a costly and dangerous subject to bring onto the chamber floors. A vote in either direction could cost a Congressperson their seat.

³¹ *From Sanctions to the Soleimani Strike to Escalation: Evaluating the Administration's Iran Policy: Hearings before the House Committee on Foreign Affairs*, 116th Congress, 2nd session, 2 (2020).

³² *Ibid.*

³³ Kelly A. McHugh, "At War with Congress: War Powers Disputes during the Trump Administration," *Democracy and Security* 18, no. 3 (2022): 231-232, accessed January 10, 2023, <https://doi.org/10.1080/17419166.2021.2010554>.

It leaves them vulnerable for future critique should military action become unpopular or if the military action eventually becomes seen as a political necessity.

In fact, Obama used Hillary Clinton's vote in support of Bush's 2002 AUMF against Iraq against her on the 2008 presidential election campaign trail.³⁴ Similarly, Biden faced criticism for his vote supporting the 2002 AUMF during his campaign for the 2020 presidential election. When the U.S. military lacked success, he revised his support for the Iraq War and began averting more responsibility onto Bush. In a newscast on NBC in 2005, Biden stated that the Senate had deflected the responsibility for an improved Iraq policy onto President Bush. Biden explained that the vote of no confidence meant that the Senate was deferring to Bush's judgment to create a timeline to withdraw, rather than continue sending U.S. forces into Iraq.³⁵ Once the intelligence communities found no evidence for weapons of mass destruction and intervening in Iraq's affairs tainted the U.S. government's image, public support for the war declined. As seen with Biden's newer statements discouraging involvement, Congress members walk a fine line when supporting policy that puts American lives in dangerous, possibly unnecessary, positions.

Tim Kaine and Todd Young have served on the Senate Foreign Relations Committee and have spearheaded a bipartisan approach to reform how the government allocates its war powers to the various branches. In an essay outlining their approach to revise the existing provisions, they confess that the executive branch is not the only one at fault for establishing unilateral norms. When the Senate was considering taking a vote to authorize Obama's airstrikes against ISIS in September of 2014 a Democratic Senate staff member was quoted saying that "asking anybody to take that vote within two months of an election is just stupid."³⁶ This illustrates the hesitation that Congress members have bringing the onus for military force back onto themselves.

Kaine and Young summarize the unfortunate norm that has developed within the government by writing that Congress's "great contempt [led] to great disregard."³⁷ The lackluster accountability towards the executive branch has crippled Congress's ability to execute

³⁴ Roger Simon, "Obama beats Hillary over head with Iraq," *Politico*, January 31, 2008, <https://www.politico.com/story/2008/01/obama-beats-hillary-over-head-with-iraq-008248>.

³⁵ Joe Biden and John Warner, interviewed by Time Russert, *NBM News*, November 27, 2005, <https://www.nbcnews.com/id/wbna10154103#.XhtkxhdKh3k>.

³⁶ Tim Kaine and Todd Young, "War, Diplomacy, and Congressional Involvement," *Harvard Journal on Legislation* 58, no. 2 (2021): 207.

³⁷ Tim Kaine and Todd Young, "War, Diplomacy, and Congressional Involvement," *Harvard Journal on Legislation* 58, no. 2 (2021): 208.

their jobs in informing the legislative process and creating balance within the government. When the power balance is off within the United States government, that creates a danger for the democratic process. Defenders of democracy, then, have an impetus to reform the current system and restore war powers back to the Constitution's initial allocations.

Repealing and creating new authorizations for the use of military force would pressure Congress members be more in touch with their constituents. If voters used their representatives to voice their preference on military initiatives, then public opinion could play a larger role in the legislative process. Additionally, this shifts some of the responsibility for initiating military action back onto Congress. Walt writes that the current systems allows Doves to claim the president is misusing their war powers while Hawks can criticize a president for now using enough force.³⁸ Just as elections create a feedback loop for who the voters want to represent them on Capital Hill, congressional votes on future authorizations creates a feedback loop for where military action appears permissible, thus bringing the power to declare war back into the legislative chambers.

Undoing the unilateral war powers precedent that have been established by so many administrations and Congresses will take time. Recent senators and representatives have completed trailblazing steps to restore the Constitution's balance of power. This will further be established when the 2001 and 2002 AUMFs are repealed in both the Senate and the House of Representatives. The presidential administrations in the 21st century have established a pattern of using these resolutions to justify their military actions. Creating new authorizations that use more specific language and create more definitive boundaries will inhibit military action that compels Congress, and the public, to question if the president's decision is legally and ethically supported.

³⁸ Stephen M. Walt, "How Biden Benefits from Limiting His Own War Powers," *Foreign Policy*, March 11, 2021, <https://foreignpolicy.com/2021/03/11/biden-aumf-limit-war-powers/>.

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NEGOTIATING THE CONSTITUTIONAL BALANCE: HOW THE RECONSTRUCTION CONGRESS EXPANDED AND CONTRACTED JUDICIAL POWER

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This paper analyzes the historical role of the Reconstruction Congress in both expanding and contracting judicial power in a continuous negotiation of the postwar constitutional balance. Drawing upon passed legislation, proposed reforms, judicial decisions, and historical newspapers, this paper argues that the Reconstruction Congress used expanding and contracting measures to form a “working relationship” with the judiciary. This historical example proves especially relevant today when public conversations of Supreme Court reform largely focus on the role of the Executive in reforming the courts. Rather, this paper offers an example of how Congress can assert its power in shaping the constitutional balance.

Public confidence in the Supreme Court, and the judiciary in general, has fallen to a historic low. In 2022, a Gallup poll found that only 25% of Americans are confident in the Supreme Court, down from 36% in 2021. 2022 confidence was the lowest level recorded in the fifty years that Gallup has conducted the poll.¹ This trend exists outside of One First Street; public confidence in federal courts has decreased 60% to 57% in 2022, and public confidence in state courts has decreased from 64% to 60%.² Clearly, Americans are losing faith in the ability of courts to protect democracy—and the Supreme Court seems to have lost even more faith than the judiciary as a whole.

This lack in confidence has brought conversations of how to reform the Supreme Court into the mainstream. During the campaign for the 2020 Democratic presidential nomination, many of the candidates outlined their pet plans for reforming the Supreme Court. Pete Buttigieg recommended establishing a 15-member court comprised of five Republican justices, 5 Democratic justices, and five less partisan justices chosen by the ten partisans.³ While many

¹ Jeffrey M. Jones, “Confidence in U.S. Supreme Court Sinks to Historic Low,” Gallup, June 23, 2022, <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>.

² “State of the State Courts Survey Reveals Declining Public Trust, Growing Confidence in Remote Hearings,” National Center for State Courts, December 7, 2022, <https://www.ncsc.org/newsroom/at-the-center/2022/state-of-the-state-courts-survey-reveals-declining-public-trust,-growing-confidence-in-remote-hearings>.

³ David A. Graham, “The Democrats Discover the Supreme Court,” *The Atlantic*, June 4, 2019, <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/>.

Democrats called to expand the size of the Court, Senator Bernie Sanders (I-VT) denounced such plans, instead recommending a plan to rotate Supreme Court justices on and off the federal circuit.⁴ Many of these conversations dominated the party debates. Once elected, President Joe Biden established a Presidential Commission on the Supreme Court of the United States to research and report on the potential need for and paths for judicial reform.⁵

In the public psyche, past and present challenges rely on historical examples of a strong executive branch pressuring the court to change its course. The most popular and dramatic example may be President Franklin D. Roosevelt and “the switch in time that saved nine,” in which the President’s court-packing plan successfully convinced an obstructionist court to change its decisions and permit certain New Deal policies.⁶ But Roosevelt wasn’t alone. As President Abraham Lincoln fought Chief Justice Roger Taney over emergency action in the early stages of the Civil War, he wrote, “are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?”⁷ And President Andrew Jackson allegedly mocked the Court’s decision against Cherokee removal, saying, “John Marshall has made his decision; now let him enforce it.”⁸ These narratives have led to the executive branch taking the wheel and assuming the role of judicial reformer—at least rhetorically.

Missing from these popular narratives are historical examples of Congress, not the executive branch, using its power to challenge the judiciary. This lack creates a more lopsided understanding of the balance of federal power and the role that the legislative branch should play in the negotiated relationship between the courts and democracy. Is judicial reform a purely executive game, or is there a role for Congress to play?

Congressional Reconstruction provides an example of another possible approach. The 1866—1868 Congress demonstrated a role for Congress to assert itself when it believes the Supreme Court is going astray. The Reconstruction Congress created a “working relationship”

⁴ Justin Wise, “Bernie Sanders Says He Would Move to ‘Rotate’ Supreme Court Justices If Elected,” *The Hill*, June 27, 2019, <https://thehill.com/homenews/campaign/450800-bernie-sanders-says-he-would-move-to-rotate-supreme-court-justices-if/>.

⁵ Presidential Commission on the Supreme Court of the United States, *Draft Final Report*, December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

⁶ For an example of this kind of narrative, see Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* (New York: Grand Central Publishing, 2010).

⁷ “The Writ of Habeas Corpus - Fort McHenry National Monument and Historic Shrine,” National Park Service, February 26, 2015, <https://www.nps.gov/fomc/learn/historyculture/the-writ-of-habeus-corpus.htm>.

⁸ Breyer, “University of Pennsylvania Law School Commencement Remarks,” Supreme Court of the United States, May 19, 2003, https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_05-19-03.

with the Court, one where Congress both expanded judicial power and retracted it in a continuous negotiation over constitutionalism and the balance of power.

I begin with a brief historical overview of the postwar failures of Presidential Reconstruction, establishing the political, social, and legal landscape that led to Congressional Reconstruction. I then outline how the Reconstruction Congress expanded federal judicial power, followed by a section discussing how the Reconstruction Congress also retracted federal judicial power. I conclude with a discussion of the broader implications of this negotiated relationship between Congress and the federal judiciary.

THE IMMEDIATE POSTWAR LANDSCAPE

In the immediate postwar period, Southern states adopted postwar state constitutions and reestablished state governments, but many of the drafters and politicians were former Confederate soldiers or officials. As a result, many of these state constitutions denied rights and protections to freedmen. Poll taxes and literacy tests prevented freedmen from voting in the immediate postwar period. In the firearms context, Arkansas's immediate postwar constitution explicitly granted the state right to bear arms exclusively to "free white men."⁹ Even more alarmingly, some Southern states began to evade the mandate of the Thirteenth Amendment by expanding the definitions of felonies, convicting disproportionate numbers of Freedmen, then sentencing them to convict labor leading on plantations, mines, and industries in the South. As one Texas Republican group wrote, "The courts of law are employed to re-enslave the colored race... The plantations are worked, as of old, by slaves, under the name of convicts."¹⁰

President Andrew Johnson seemed content with this legal landscape. Johnson's Reconstruction policy was to require Southern states to abolish slavery and to encourage them to ratify the Thirteenth Amendment—but beyond these measures and a required oath of loyalty, Johnson had few conditions for Southern constitutional conventions.¹¹ This policy was the reason that so many of the immediate postwar state constitutions continued to deny certain rights to freedmen on the basis of race. The period of Johnson's policies, known as Presidential

⁹ 1864 Constitution of the State of Arkansas, art. 2, sec. 21.

¹⁰ Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton & Company, 2019), 50.

¹¹ Foner, 38–39.

Reconstruction, featured minimal progress towards postwar political, economic, or social equality for freedmen. Congress, led by more radical Republicans, quickly grew weary of Johnson's more conciliatory vision, and it soon wrested control of Reconstruction from the executive branch.

By late 1866, Congress—then dominated by Republicans, and increasingly Radical Republicans—was fed up with Johnson's limited vision of Reconstruction. Congress asserted its power to set the agenda, ending Presidential Reconstruction and beginning an era of Congressional Reconstruction. Many of the defining moments of Reconstruction—those powerful yet unfulfilled promises of true, equal multiracial democracy—occurred during this period. The Reconstruction Congress went beyond the Fourteenth and Fifteenth Amendments; it passed the first two federal civil rights laws in U.S. history, and it implemented the Reconstruction Acts to compel defiant Southern states into protecting the political, social, and economic rights of freedmen.

The Reconstruction Congress had a strong vision for the postwar constitutional order: a redefined relationship between the federal government and the states. Not only would the federal government now assume more power, it would assert itself into the realm of protecting civil rights, combatting state-level laws and actions. But to enact this vision, Congress would also need to change the power of another branch of U.S. federal power: the judiciary.

HOW THE RECONSTRUCTION CONGRESS EXPANDED JUDICIAL POWER

The Reconstruction Congress knew that it needed to expand the power of the federal judiciary in order to protect freedmen in the Reconstruction South. Even before the end of the war, to many, it was clear that the American political order required a revised judiciary. Even in his first message to Congress in 1861, President Abraham Lincoln called for an overhaul of the circuit system, arguing that “the country has outgrown our present judicial system.”¹² The war, and the immediate postwar political landscape, demonstrated to many Reconstruction Republicans that Lincoln's “overhaul” was necessary.

To protect the political, social, and economic rights of freedmen, the Reconstruction Congress employed several strategies to expand the judiciary's power. In fact, as one legal

¹² Presidential Commission on the Supreme Court of the United States, *Draft Final Report*, 47.

historian has commented, “in no comparable period of our nation’s history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction.”¹³ Similarly, as President Biden’s Presidential Commission on Supreme Court reform found, the general trend of post-Civil War judicial power was “toward stronger federal courts with more robust jurisdiction.”¹⁴ Of the many tools that the Reconstruction Congress employed to expand judicial power, the two most influential and longest-lasting were removal jurisdiction and habeas reform.

The first of the long-lasting new federal judicial powers was the creation of removal jurisdiction, which allowed federal courts to hear state court cases in certain scenarios—particularly when it seemed that the state courts could not be reasonably expected to hear cases fairly. In the Reconstruction context, removal jurisdiction was often employed in state trials of former Confederates, Klansmen, and others who terrorized freedmen. Given that many state judges and juries privately endorsed such violence, they were often unlikely to convict the attacker, regardless of the evidence. But with removal jurisdiction, the federal judiciary could hear such cases. Legal historian William Wiecek has referred to removal legislation as “the most important source of new federal judicial power.”¹⁵ Through removal jurisdiction, Congress made it easier for prosecutions to request jurisdiction in a location other than where the crime occurred.

The other long-lasting Reconstruction reform to the judiciary came from Section 1 of the 1867 Habeas Corpus Act. The statute changed American understanding of the “Great Writ.” Before the act, habeas was “principally a means of testing the legality of confinements by *executive* authority”; after the act, “appellate courts took on power to determine whether lower courts acted properly when they deprived a man of his liberty.”¹⁶ There were further implications of the habeas expansion. Before the Civil War, the Supreme Court could not use habeas review to free people imprisoned by state authorities. The Reconstruction Congress changed that.¹⁷ This was no accident, as several sponsors and supporters of the bill argued explicitly of the need to

¹³ William M. Wiecek, “The Reconstruction of Federal Judicial Power, 1863-1875,” *The American Journal of Legal History* 13, no. 4 (1969): 333, <https://doi.org/10.2307/844183>.

¹⁴ Presidential Commission on the Supreme Court of the United States, *Draft Final Report*, 46.

¹⁵ Wiecek, “The Reconstruction of Federal Judicial Power, 1863-1875,” 336.

¹⁶ *Ibid.*, 342.

¹⁷ *Ibid.*, 344.

expand habeas review to allow federal courts to protect the rights of freedmen facing postwar state persecution.¹⁸

As President Biden's commission recently concluded, the weight of these expansive judicial reform meant that the previously weak federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."¹⁹ The expansion of the judiciary's power was one part of a broader postwar reckoning and reshaping of the antebellum constitutional order. Reconstruction Republicans hoped for a restructured federalism and constitutionalism, one that would place the federal government as a guarantor of liberty. The federal judiciary had become an integral part of the restructure, as courts could now hear cases that the federal government could not trust the states to adjudicate fairly. One of the lasting legal legacies of Reconstruction era reforms is a reinforced federal judiciary.

HOW THE RECONSTRUCTION CONGRESS RETRACTED JUDICIAL POWER

Many Reconstruction histories that address judicial power stop with the previous point: that the Reconstruction Congress largely expanded federal judicial power as part of the broader postwar constitutional shakeup of federalism. These arguments often ignore or downplay the critical ways that Congress also restricted federal judicial power when necessary to protect broader Reconstruction vision. As historian Stanley Kutler noted, "the Republicans' determination to protect their reconstruction legislation lay at the heart of Court-Congress relations during the late 1860's."²⁰

The Reconstruction Congress took its role quite seriously; it was no one-way ratchet. While Congress clearly saw how the judiciary could help protect the rights of freedmen, it also saw how an obstructionist judiciary could halt Reconstruction's progress using the same expanded powers that Congress had newly granted. As a result, Congressional action moved in both ways, charting a balance in new Reconstruction federalism.

¹⁸ Ibid, 344-345.

¹⁹ Presidential Commission on the Supreme Court of the United States, *Draft Final Report*, 48.

²⁰ Stanley Kutler, "Ex Parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," *The American Historical Review* 72, no. 3 (April 1967): 837.

Congress faced a few early warning signs that the Republicans' Reconstruction agenda may face threats from judicial review in the Supreme Court. While the most famous Supreme Court-imposed limits on Reconstruction came a decade later, in the *Slaughterhouse* and *Cruikshank* cases, the 1866 and 1868 cases of *Ex parte Milligan* and *Ex parte McCardle* represented similar early threats.²¹ And Congress's response between these cases demonstrated how congressional Republicans saw their role in establishing postwar balance of power.

Ex parte Milligan, the Habeas Bill, and Ex parte McCardle

Congressional fears were soon partly realized with the Supreme Court's ruling in *Ex parte Milligan*. In its shortest summary, *Ex parte Milligan* invalidated military trials of civilians.²² In longer form, it represented that the judiciary could soon stand in the way of the Reconstruction Congress's plans.

The case arose after an Indiana military commission sentenced Lambdin Milligan to death for aiding the Confederacy. Milligan sought habeas relief from the federal circuit. The case reached the Supreme Court, and Justice Davis's majority opinions found this military trial of a civilian to be unconstitutional.²³ The ruling invalidated Congress's decision during the war to suspend the writ of habeas corpus, permitting military tribunals to try Confederates when necessary. It was this congressional action that the court ruled could no longer be justified.²⁴ The court unanimously invalidated the military commission established by a presidential order, and five justices separately concurred to deny that power to Congress as well.²⁵ Though Davis's opinion insisted that the ruling had nothing to do with the South, the holding clearly questioned the constitutionality of martial law and Freedmen's Bureau courts.²⁶

The Court's decision in *Milligan* sent a "wave of alarm" through the Republican Party.²⁷ Many Congressional Republicans feared that the Supreme Court would soon limit or strike down the entire Reconstruction agenda. Congress weighed a variety of reforms to limit the judiciary's

²¹ *Slaughterhouse Cases*, 83 U.S. 36 (1872); *United States v. Cruikshank*, 92 U.S. 542 (1875).

²² David P. Currie, "The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873," *The University of Chicago Law Review* 51, no. 1 (1984): 133, <https://doi.org/10.2307/1599604>.

²³ *Ibid.*, 133-34.

²⁴ *Ex parte Milligan*, 71 U.S. 2 (1866).

²⁵ Kutler, "Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," 836.

²⁶ Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, First Edition (New York, NY: Harper and Row, 1988), 272.

²⁷ Kutler, "Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," 837-38.

power to strike down Congressional actions. Some reforms were quite limited in scope, while others were quite expansive.

Congress's response to *Ex parte Milligan* demonstrates the dynamic, negotiating role that the Reconstruction Congress played in both expanding and restricting judicial power. As seen in two examples—the *Ex parte McCardle* incident and the two-thirds bill—Congress proved it was willing to restrict judicial power to protect democratically-endorsed legislation, but it generally expected those reforms to be narrowly constrained to specific threats, rather than broad judicial reforms that would limit court power in all cases.

The *Ex Parte McCardle* incident flowed naturally from the aftermath of the *Milligan* controversy. One year after the court's ruling in *Milligan*, the court was preparing to hear oral argument in *McCardle*. The case arose when military officials in Mississippi imprisoned a newspaper editor for publishing “incendiary and libellous” [sic] articles; the editor sought habeas review, arguing that the Reconstruction Acts were unconstitutional.²⁸ By the time the case reached the Supreme Court, defenders of Reconstruction feared a repeat of *Ex parte Milligan*—that the Supreme Court would find for the editor and strike down the Reconstruction Acts, imperiling the entire postwar congressional agenda.

After the court had heard oral argument in *McCardle* (four *days* of oral argument, a marked difference from current practice), but before the court had released its opinion, Congress passed legislation to deny the court habeas review in this type of case.²⁹ Congress repealed the components of the 1867 habeas review expansion that would have allowed the U.S. Supreme Court to review a lower court's decision on a habeas petition—and only those provisions within the act. The supporters of the “McCardle repealer” (as it was known) claimed that the bill would not go into effect retroactively; instead, they were quite explicit that the changes were designed to prevent the Supreme Court from ruling in *McCardle*.³⁰

The court complied. Through an opinion by Chief Justice Salmon P. Chase, the Supreme Court dismissed *McCardle* without noted dissent.³¹ Chase's opinion held that the Constitution grants the Supreme Court appellate jurisdiction, but that Congress does indeed have the authority

²⁸ Currie, “The Constitution in the Supreme Court,” 154.

²⁹ Kutler, “Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered,” 843–44.

³⁰ Wiecek, “The Reconstruction of Federal Judicial Power, 1863-1875,” 345–46.

³¹ Currie, “The Constitution in the Supreme Court,” 155.

to make exceptions to the Court's jurisdiction.³² Chase wrote, "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the law confer."³³

Though early twentieth century historians used this case to argue that Congress bullied a weak court into submission, that narrative has long been challenged.³⁴ That narrative was part of a broader historiographical trend of delegitimizing the entirety of Reconstruction, often for racist justifications for later Jim Crow policy.³⁵ These historical narratives failed to account for all the ways Congress *expanded* judicial power. The *Ex parte McCardle* incident was a very limited aberration.³⁶ Something else was going on.

What this incident actually shows is that Congress was constructing a dynamic "working relationship" with the court.³⁷ Congress was both giving and taking the power of constitutional interpretation and rights protection.

In historical discussion of the Reconstruction Congress and the judiciary, much of the scholarship focuses nearly exclusively on how Congress expanded judicial power. As explained above, there was indeed a strong trend of Congress expanding judicial power to protect Freedmen and establish a new understanding of federalism. However, the main aberration from the expansionist trend was the *Ex parte McCardle* incident.³⁸ Republicans worried that the court would use this case to strike down the entirety of the Reconstruction Acts, which were critical to protecting the rights and lives of freedmen. Congressional Republicans—whether moderate or radical—rallied together in the face of the judicial threat to keystone postwar legislation.

The broader significance of the *McCardle* battle and the habeas bill come into light when compared against another proposed reform that Congress *did not* pass. During the *McCardle* controversy, Congress weighed a proposal to change the proportion of justices required to strike

³² *Ex parte McCardle*, 74 U.S. 506 (1868)

³³ *Ibid.*

³⁴ Kutler, "Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," 835.

³⁵ This historiographical trend is known as "the Dunning School." For examples, see William Archibald Dunning, *Essays on the Civil War and Reconstruction and Related Topics* (New York: The Macmillan Company, 1904); Walter L. Fleming, *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time*, vol. 1, 2 vols. (Cleveland, Ohio: The Arthur H. Clark Company, 1906). Eric Foner's seminal work presented itself as a reaction to such Dunning School narratives, and it marked a turning point in Reconstruction historiography. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*.

³⁶ Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875"; Kutler, "Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered."

³⁷ Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875."

³⁸ *Ibid.*

down federal legislation from a simple majority to two-thirds. The distinctions between the two-thirds bill and the habeas reform bill reveal much about how the Reconstruction Congress chose to restrict judicial power when necessary.

The Two-Thirds Bill

While deciding how to respond to judicial threats to the Reconstruction agenda, Congress also weighed a broader-sweeping reform, one that would have changed Supreme Court procedure in all cases involving federal legislation, not just the *Ex parte McCordle* incident. Between December 1867 and February 1868, Congress considered imposing a change to the number of Supreme Court justices necessary for overturning federal legislation—a change from a simple majority to two-thirds.

The two-thirds bill purported to make it more difficult for the Supreme Court to overturn federal legislation. The bill declared that “no case pending before the Supreme Court, involving the action or effect of any law of the United States, shall be decided adversely to the validity of such without the concurrence of two-thirds of all the members of the Court.”³⁹

As *The New York Herald* reacted, “it is also pretty well understood that upon several incidental cases the question of the constitutionality of these reconstruction laws will shortly come before the court for its decision. This two-thirds rule, therefore, is interposed to save the radical policy from shipwreck.”⁴⁰ The *Herald’s* argument was not merely one out of respect for checks and balance or the prewar constitutional order; it was one rooted in racist fears, as the next paragraph made clear. “Their Supreme Court bill, therefore, means that the Southern negro-supremacy programme of congress is to be pushed through at all hazards.”⁴¹

Representative John Bingham (R-OH) defended the bill, arguing that the proposal fit the original numerical makeup as established in the Judiciary Act of 1789. Bingham read from the Act: “the Supreme Court of the United States shall consist of a Chief-Justice and five Associate Justices, and four of whom shall constitute a quorum.” As Bingham pointed out, four of the five justices—the original standard—was over two-thirds. Therefore, in Bingham’s eyes, the proposal did not add any additional requirements to the founders’ guidelines for the Supreme Court.⁴²

³⁹ “Fortieth Congress. Second Session.,” *The New York Times*, January 14, 1868.

⁴⁰ “The News: Congress,” *The New York Herald*, January 14, 1868.

⁴¹ *Ibid.*

⁴² “Fortieth Congress. Second Session.”

The result: the House passed the bill 116-39.⁴³ However, the Senate declined to pass it, and the bill seems to have otherwise disappeared from the historical record.⁴⁴ Few Reconstruction historians have discussed the bill, and it seems to have faded into yet another obscure, failed reform proposal from the Reconstruction era.

This saga, especially compared with the reforms that Congress actually passed in response to the *Ex parte McCardle* dilemma, reveals a few critical components of how the Reconstruction Congress understood its role in the postwar constitutional order. The habeas reform bill was quite specific and limited to a particular area in which the Court was perceived to be overstepping; the two-thirds bill was a wide-sweeping reform that would have limited the Court's power in a wide swath of cases. Other legal historians, such as William Wiecek, have made a similar distinction between the reform that Congress actually approved for *McCardle* and the reforms that Congress never fully passed. "The amputation in *McCardle* was not done with a cleaver but with a surgical knife. Congress did not withdraw all habeas review, but only a small portion of it recently conferred."⁴⁵ This seems to be the defining distinction between how Congress did and did not contract Supreme Court power.

CONCLUSION

The Reconstruction Congress—concerned with both protecting freedmen and redefining the postwar constitutional order—both expanded and retracted judicial power in a negotiated relationship with the judiciary. As many Reconstruction historians have pointed out, the major trend was Congress choosing to expand judicial power, primarily through habeas and removal jurisdiction expansions. But this episode in congressional history adds a crucial caveat to those histories: when Congress felt that courts had too much power and seemed poised to threaten Reconstruction legislation, Congress chose to retract some of those judicial expansions. And

⁴³ "The News: Congress."

⁴⁴ Contrary to the history published in a recent column in *The New York Times* on a similar subject, the Senate did not, in fact, pass the bill. The opinion column claimed that the bill passed both chambers, but President Johnson refused to sign it. The column links to a few historical newspapers to support the claim, but none of the sources claim that the Senate passed the bill. Several alternate historical accounts claim otherwise, making the same claim as I do here. It is unclear what documents led the columnist to make his claim. Jamelle Bouie, "Opinion | This Is How to Put the Supreme Court in Its Place," *The New York Times*, October 14, 2022, Online edition, sec. Opinion, <https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html>.

⁴⁵ Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," 357-58.

when weighing retractions, Congress chose narrow, limited reforms specific to the threat at hand, not sweeping reforms that would have affected the Judiciary in all situations.

What does this episode tell us about the present? With public faith in the judiciary at historic lows, Americans are discussing how to reform the Supreme Court and the judiciary at large. This historical analysis is both a plea and a guide. It pleads with the public and Congress to reinsert Congress as a major player in court reform, not leaving it to the realm of the executive. As one legal historian has noted, the executive has a minimal role, if any, in expanding or narrowing the jurisdiction of courts—that responsibility lies with Congress.⁴⁶ By returning Congress's agency to court reform, we open a wider range of options. But this analysis is also a guide. In conversations of Court reform, Congressional actors and advisors should heed the example of the Reconstruction Congress, which, as a whole, chose not to act as a one-way ratchet or a nuclear option. Instead, the Reconstruction Congress chose targeted, necessary reforms in response to specific threats. This was all part of the Reconstruction Congress's approach to a negotiated relationship between the federal branches.

None of this paper should be construed as advocacy for any specific reform to the judiciary, or as an argument that the judiciary is in need of reform. Rather, it is an argument that our understandings of the balance of federal power—along with any future discussions of judicial reform—should include space for an active, coequal Congress. As we continuously renegotiate the balance of power between our branches of government, the Reconstruction Congress should be our guide.

⁴⁶ *Ibid*, 334.

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THE STUDY OF CONGRESSIONAL AND PRESIDENTIAL POLICY RESPONSES IN THE MARITIME CALAMITIES OF THE SANTA BARBARA, EXXON VALDEZ, AND DEEPWATER HORIZON OIL SPILL

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This project examines how U.S. presidents and Congress respond to maritime calamities over time. Of particular interest are the 1969 Santa Barbara oil spill, the 1989 Exxon Valdez oil spill, and the 2010 Deepwater Horizon oil spill. This project examines the causes of sweeping federal regulations and congressional action in response to oil spills. Specifically, this analysis identifies the shortening policy window to enact policies and legislation due to the proliferation of competing media sources.

INTRODUCTION

Over time, oil has primarily shaped the political and economic global dominance of the United States of America.¹ Throughout history, the United States of America has actively fought “to gain and maintain control of overseas oil reserves.”² Even today, oil accounts for over 40 percent of the nation’s energy sources, showcasing the continued importance of oil in the 21st century.³ Oil spills produce environmental degradation and maritime disasters. These same spills also act as focusing events that lead to congressional and presidential policy responses.

The federal government’s role in responding to oil spills has changed over time, as Congress and the executive branch have enacted significant legislation and agency regulations in the aftermath of the 1969 oil spill near Santa Barbara, California, the 1989 Exxon Valdez tanker grounding off the coast of Alaska, and the 2010 Deepwater Horizon oil rig. Congress and the president, stakeholders, and federal agencies improve upon disaster response strategies by understanding and analyzing the failures of previous maritime calamities. Furthermore, damages

¹ David S. Painter, “Oil and the American Century,” *The Journal of American History* 99, no. 1 (May 22, 2012): 24–39, <https://doi.org/10.1093/jahist/jas073>.

² Painter, “Oil and the American Century,” 24–39.

³ “Renewable Energy Is Growing Fast in the U.S., but Fossil Fuels Still Dominate,” Pew Research Center, May 30, 2020, <https://www.pewresearch.org/fact-tank/2020/01/15/renewable-energy-is-growing-fast-in-the-u-s-but-fossil-fuels-still-dominate/#:~:text=In%202018%2C%20those%20E2%80%9Cfossil%20fuels%20E2%80%9D%20fed%20about%2080%25,energy%20tab%20has%20fluctuated%20between%2035%25%20and%2040%25.>

from significant oil spills can impact the president's approval rating with the American public, severely impact ecosystems, or prompt the passing of sweeping federal legislation. Oil spills force the executive and legislative branches to collaborate on decision-making and policies. However, despite presidential and congressional responses, the history of maritime oil spills in the United States of America showcases that no organization or agency acquires the resources to combat and respond to significant catastrophes.

In this paper, I analyze presidential and congressional responses and failures to the Santa Barbara oil spill, the Exxon Valdez oil spill, and the Deepwater Horizon oil spill. After reviewing relevant scholarly literature regarding past research findings, I highlight key factors that shape presidential and congressional responses to maritime disasters. I then provide more depth on these three significant oil spills and conclude with a summary and policy recommendations.

LITERATURE REVIEW

Prior research on maritime oil spills has focused on how the president frames oil spill disasters to the American public while analyzing the president's increasing role in overseeing the disaster management process. Presidents can frame oil spills to shape public perceptions and congressional legislative responses. For example, in the Santa Barbara oil spill, President Nixon framed the oil spill as the beginning of the rise of American environmentalism by stating the future of America's natural resources was at risk, urging lawmakers to draft legislation to protect the environment.⁴ President Bush framed the oil spill of Exxon Valdez as the result of human error and the unsafe regulations of the oil drilling industry, forcing lawmakers to more tightly regulate the oil industry.⁵

As they have responded to significant oil spills throughout American history, presidents have received different treatment and pressures from the American public and media depending on the composition of Congress, the general political climate, and the news media environment. Before Deepwater Horizon, President Obama introduced a climate change bill into Congress that

⁴ Alex Greer, "Oil Spill Events and Prominent Frames and Policy Implications," (Masters diss., University of Delaware, 2012).

⁵ Pew Research Center, "Renewable Energy Is Growing Fast in the U.S., but Fossil Fuels Still Dominate."

increased off-shore oil drilling.⁶ Following Deepwater Horizon, President Obama received large-scale criticism from those that opposed the climate change legislation fueling domestic polarization.⁷ Natural disasters allow Americans, the media, and political entities to quickly place the blame on the president or members of Congress.⁸ Due to the nature of a maritime crisis, researchers find that polarization and pressures on political figures are common and widely prevalent.

Additionally, environmental disasters showcase the diverse approaches and tactics of the executive and legislative branches. Congress only seems to act and pass prominent legislation following large-scale disasters. Researchers found that maritime disasters highlight “the wrongdoing of corporate actors,” allowing the responsibility and blame to be given to industry as well as political forces.⁹ However, throughout oil spills, the federal government ensures that the American public knows that the federal industry is the primary blame for the crisis.¹⁰

THE NEWS CYCLE INFLUENCE ON POLICY WINDOWS

Over time, the number of media outlets, news channels, and news articles has increased greatly. Media companies compete to produce news articles and headlines that capture the American reader’s attention. Consequently, news articles published about oil spill disasters decreased drastically over time. Throughout the 1969 Santa Barbara oil spill, major newspapers such as the New York Times did not compete with as many media competitors. In the 2010 Deepwater Horizon oil spill, social media, news channels, and newspapers covered the event, consuming the American news media cycle.

As the news cycle continues to get shorter, and an event such as an oil spill generates diminishing attention more quickly, the policy window to enact legislation is not open as long. John Kingdon’s three-stream policy window model states focusing events open windows for

⁶ Laura Li, “Media Narratives of the Deepwater Horizon Oil Spill Response.” Berkeley, 2015. Accessed February 19, 2023. https://nature.berkeley.edu/classes/es196/projects/2015final/LiL_2015.pdf.

⁷ Greer, “Oil Spill Events.”

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

policy, political, and problem streams, leading to policy change.¹¹ Santa Barbara, Exxon Valdez, and Deepwater Horizon displayed distinct problems, politics, and policies resulting in various measures and legislation passed following the maritime crises.

Additionally, the data from news articles reveals that the policy window for the president and Congress to enact legislation is short following maritime calamities, constraining the president and Congress to pass legislation within a limited time frame. While Americans may think that the president and Congress have unlimited time to enact legislation, there is a short window before a policy cycle ends.

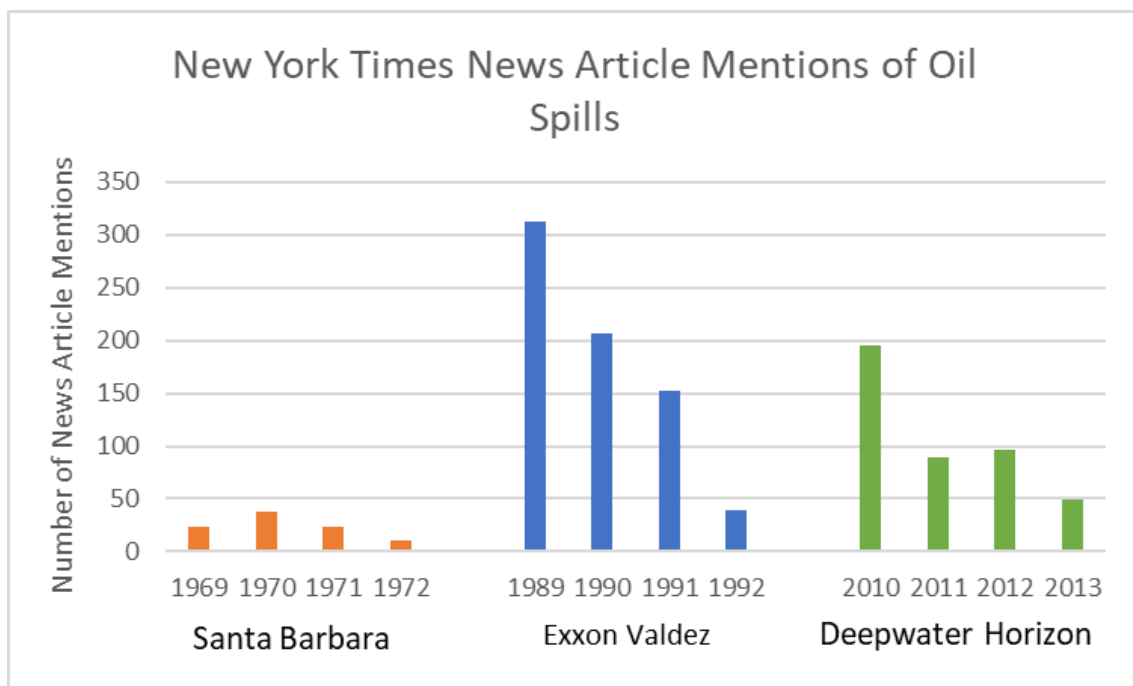


Figure 1

The New York Times released twenty-three articles about the Santa Barbara oil spill in 1969, thirty-eight articles in 1970, twenty-three in 1971, and ten in 1972.¹² In Exxon Valdez, in 1989 the New York Times published 312 articles, two hundred and six in 1990, one hundred and fifty-three in 1991, and thirty-nine in 1992.¹³ Throughout Deepwater Horizon, in 2010 The New

¹¹ Ramesh Devi Thakur, “Kingdon’s Three Stream Policy Window Model and Cardiac Rehabilitation Policy,” March 30, 2014, <https://rameshdthakur.wordpress.com/2014/03/30/kingdons-three-stream-policy-window-model-and-cardiac-rehabilitation-policy/>.

¹² “New York Times Article Archive,” *The New York Times*, accessed March 1, 2023, <https://archive.nytimes.com/www.nytimes.com/ref/membercenter/nytarchive.html>.

¹³ *Ibid.*

York Times published one hundred and ninety-five articles, ninety in 2011, ninety-six in 2012, and forty-nine in 2013.¹⁴ The data results reveal that mainstream American media steadily declines to report oil spill calamities two to three years following the event, allowing Americans to shift their focus and attention away from maritime disasters. If the media continued to report on maritime disasters over time, the president and Congress would face pressure to pass legislation from the American people.

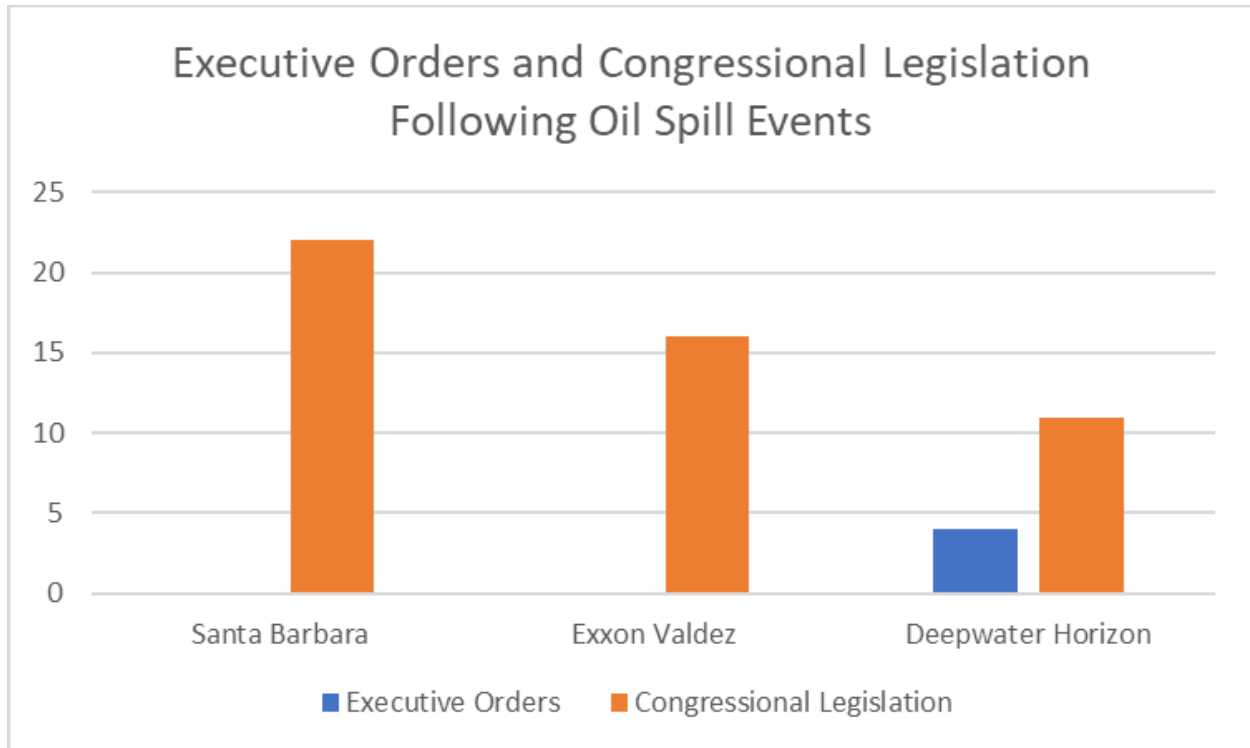


Figure 2

Presidents want to respond to maritime calamities rapidly to prevent crises from affecting their presidential term. Factors such as approval ratings and reelection bids prompt the president to enact executive orders or persuade Congress to pass legislation. There are a low number of executive orders passed following maritime disasters. President Nixon published zero executive orders following the Santa Barbara oil spill, and President H. W. Bush passed zero executive orders throughout Exxon Valdez.¹⁵ In Deepwater Horizon, President Obama issued four

¹⁴ Ibid.

¹⁵ “Executive Orders Disposition Tables Historical Index,” National Archives, April 14, 2021, <https://www.archives.gov/federal-register/executive-orders/disposition>.

executive orders.¹⁶ Over time, major oil spills continue to result in fewer pieces of congressional legislation passed. The Santa Barbara oil spill produced twenty-two legislative bills that became law, Exxon Valdez created sixteen, and Deepwater Horizon produced eleven.¹⁷ Due to the rising polarization of environmental policies and beliefs in the United States, the president and Congress have difficulty passing laws.

SANTA BARBARA OIL SPILL

The Santa Barbara oil spill marked the first prominent oil spill in the United States and prompted a revolution of environmental legislation throughout the country. On January 28, 1969, an oil rig platform blowout caused over 3,250,000 gallons of oil to spill across the coasts of California.¹⁸ The oil spill lasted over eleven days, allowing the media to publicize the first prominent oil spill catastrophe to the American people. Researchers estimate that the blowout was due to industry failure to comply with existing regulations.¹⁹ Ultimately, Union Oil Company constructed the exterior on a drilling hole “61 feet short of the federal minimum requirements” leading to an oil blowout.²⁰

Just nineteen days after his inauguration as the 37th president, Richard Nixon visited Santa Barbara and stated, “It is sad that it was necessary that Santa Barbara should be the example that had to bring it to the attention of the American people.... The Santa Barbara incident has frankly touched the conscience of the American people.”²¹ The media’s portrayal of the oil spill showcased the severity of the environmental degradation prompting the American public to come together for the clean-up response.²² The oil spill clean-up illustrated that in times of response information sharing is crucial for maritime calamities.

¹⁶ Ibid.

¹⁷ “Current Legislative Activities,” United States Congress, accessed March 1, 2023, <https://www.congress.gov/>.

¹⁸ Malcolm F. Baldwin, “The Santa Barbara Oil Spill,” *University of Colorado Law Review* 42, no. 1 (May 1970): 33-78.

¹⁹ “New York Times Article Archive.”

²⁰ “How the 1969 Santa Barbara Oil Spill Led to 50 Years of Coastal Protections in California - Los Angeles Times,” *Los Angeles Times*, February 1, 2019, <https://www.latimes.com/local/lanow/la-me-oil-spill-santa-barbara-retrospective-20190131-story.html>.

²¹ Keith C. Clarke and Jeffrey J. Hemphill, “The Santa Barbara Oil Spill: A Retrospective,” *Yearbook of the Association of Pacific Coast Geographers* 64 (2002): 157–62, <http://www.jstor.org/stable/24041411>.

²² “New York Times Article Archive.”

Following the Santa Barbara oil spill, Congress passed the National Environmental Policy Act of 1969 demonstrating the United States of America's commitment to federal policy protecting and preserving the environment.²³ Additionally, following the Santa Barbara oil spill, Congress responded by passing the Clean Air and Safe Drinking Water Acts showcasing large-scale environmental domestic policy sweeping across the nation for the first time. Throughout the Santa Barbara oil spill, President Nixon expressed to the American people that existing environmental policies and regulations failed to meet the federal standard. President Nixon's full ownership of the failure allowed the president, Congress, and stakeholders to come together to pass major environmental legislation. Almost sixty years later, the Santa Barbara spill continues to shape California's energy and environmental policies, as the state has largely moved away from offshore oil drilling and oil platforms due to the federal moratorium banning offshore oil drilling off the federal waters of California.²⁴

EXXON VALDEZ OIL SPILL

In March 1989, the Exxon Valdez oil spill occurred because the Exxon Valdez oil carrier knocked into Bligh Reef in Prince William Sound, Alaska.²⁵ Over eleven million gallons of oil spilled across the Prince William Sound habitat killing over "250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, and twenty-two killer whales" affecting species that in modern times will not recover.²⁶ Due to the remote location of Valdez, over 13,000 volunteers rushed to assist in the oil spill response efforts.²⁷ Exxon Valdez not only heavily impacted the species and ecosystems of Alaska but displayed the effects of oil spills on the domestic Alaska economy. Similarly to the Santa Barbara oil spill, the media provided in-depth coverage on the effects of the oil spill, shocking the American public. While the Alaska economy was severely devastated, President George H.W. Bush did not travel to Prince William Sound to visit the oil spill site.²⁸

²³ National Archives, "Executive Orders Disposition Tables Historical Index."

²⁴ "New York Times Article Archive."

²⁵ R. T. Paine et al., "Trouble on Oiled Waters: Lessons from the Exxon Valdez Oil Spill," *Annual Review of Ecology and Systematics* 27 (1996): 197–235, <http://www.jstor.org/stable/2097234>.

²⁶ "Damage Assessment, Remediation, and Restoration Program," NOAA, August 17, 2020, <https://darrp.noaa.gov/oil-spills/exxon-valdez>.

²⁷ David Struck, "Twenty Years Later, Impacts of the Exxon Valdez Linger," *Yale Environment*, March 4, 2009, https://e360.yale.edu/features/twenty_years_later_impacts_of_the_exxon_valdez_linger.

²⁸ Clarke and Hemphill, "The Santa Barbara Oil Spill: A Retrospective," 157–62.

Political scientists argue that President H. W. Bush received a “free pass” from the press compared to other presidents throughout history.²⁹ For example, in April 1989, the New York Times only published one news article with “Exxon Valdez” and “Bush” in the article.³⁰ Therefore, the blame of Exxon Valdez was largely placed on oil companies rather than the inactions of the president or the federal government. In April 1989, President Bush stated in a speech to the news media, that the operation and clean-up responsibility of Exxon Valdez was not a “federal-operation” but relied on stakeholders such as the Coast Guard as primary experts.³¹

In August 2015, Exxon Valdez led to President Bush passing the Oil Pollution Act of 1990 (OPA).³² OPA ultimately eliminated the use of single-hulled oil tankers.³³ Additionally, the prominent legislation requires that tug vessels accompany oil tankers around the entrance and exit of Valdez.³⁴ OPA heavily increased the safety measures of the utilization of oil tankers and oil spill catastrophes by prescribing a “comprehensive system of compensation and response to marine pollution.”³⁵ Overall, OPA enhanced the environmental safety regulations of the maritime oil industry through shipping safety regulations, planning and response techniques, and improving liabilities (Coast Guard).

DEEPWATER HORIZON OIL SPILL

On April 20, 2010, in the Mississippi Eastern region, the British Petroleum (BP) oil rig Deepwater Horizon burst and sank into the ocean.³⁶ Deepwater Horizon was “the largest marine oil spill in all of U.S. history” lasting eighty-seven days and killing eleven individuals.³⁷

²⁹ Eric Boehlert, “FLASHBACK: During Exxon Valdez Disaster, President Bush Got a Free Pass From the Press,” *HuffPost*, May 25, 2011, https://www.huffpost.com/entry/flashback-during-exxon-va_b_615525.

³⁰ Clarke and Hemphill, “The Santa Barbara Oil Spill: A Retrospective,” 157–62.

³¹ George H.W. Bush, “President George H.W. Bush Discusses Federal Efforts in the Cleanup of the Exxon Valdez Oil Spill,” *YouTube video*, Associated Press Archive, streamed July 31, 2015, <https://www.youtube.com/watch?v=AMgOx6Rs-HE>.

³² Los Angeles Times, “How the 1969 Santa Barbara Oil Spill Led to 50 Years of Coastal Protections in California - Los Angeles Times.”

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Michael P. Donaldson, “The Oil Pollution Act of 1990: Reaction and Response,” *Villanova Environmental Law Journal* 3, no. 2 (1992): 283-322.

³⁶ Jonny Beyer et al., “Environmental effects of the Deepwater Horizon Oil Spill: A review,” *Marine Pollution Bulletin* 110, no. 1, (2016): 28-51, <https://doi.org/10.1016/j.marpolbul.2016.06.027>.

³⁷ David Struck, “Twenty Years Later, Impacts of the Exxon Valdez Linger.”

Scientists estimate that over “3.19 million barrels of oil” were discharged contaminating the Louisiana, Mississippi, Alabama, and Florida shorelines.³⁸ BP Oil Company was held responsible for the oil spill disaster by the federal government, paying over fourteen billion in response and clean-up operations, and private parties for economic compensation.³⁹

Due to the media’s criticism over President Bush’s management of Hurricane Katrina, newly elected President Obama visited the Gulf of Mexico region four times, visiting areas such as New Orleans and Venice.⁴⁰ On June 16, 2010, President Obama addressed the American people in an Oval Office address and stated that compared to other environmental disasters oil spills “are more like an epidemic, one that we will be fighting for months and even years.”⁴¹

In June 2010, President Obama signed an executive order to establish the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, a seven member task force designed to bring knowledgeable individuals together to “prevent and mitigate the impact of any future spills from offshore drilling.” The creation of the Commission signaled an acknowledgement by the U.S. government that the offshore oil drilling industry must have federal environmental and safety regulations.⁴² Therefore, the President under the recommendations of the Minerals Management Service, issued a six-month moratorium on all offshore oil drilling activities to allow the federal government time to thoroughly evaluate and investigate offshore oil drilling including safety, environmental, and technological reviews of the industry.⁴³

Following Deepwater Horizon, Congress became heavily interested in legislative proposals over oil spill management and safety. The House of Representatives carried out “33 hearings in 10 committees” while the Senate oversaw “30 hearings in 8 committees” showcasing American lawmaker’s interest to reform the offshore oil industry.⁴⁴

³⁸ Beyer et al., “Environmental effects of the Deepwater Horizon Oil Spill,” 28-51.

³⁹ Ibid.

⁴⁰ Scott Horsley, “Obama Puts Boots On The Ground In Gulf States,” *NPR*, May 29, 2010, <https://www.npr.org/templates/story/story.php?storyId=127257154>.

⁴¹ Jesse Lee, “President Obama’s Oval Office Address on the BP Oil Spill: “A Faith in the Future that Sustains us as a People,” The White House, June 16, 2010, <https://obamawhitehouse.archives.gov/blog/2010/06/16/president-obamas-oval-office-address-bp-oil-spill-a-faith-future-sustains-us-a-peopl>

⁴² “Weekly Address: President Obama Establishes Bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling,” The White House, May 2010, <https://obamawhitehouse.archives.gov/the-press-office/weekly-address-president-obama-establishes-bipartisan-national-commission-bp-deepwa>.

⁴³ Jesse Lee, “President Obama’s Oval Office Address on the BP Oil Spill.”

⁴⁴ U.S. Library of Congress, Congressional Research Service, *Oil Spill Legislation in the 111th Congress*, by Jonathan L. Ramseur, R41453, (2010), <https://crsreports.congress.gov/product/pdf/R/R41453/5>.

The Obama administration transformed the structure of the federal offshore regulatory system. Following Deepwater Horizon, the Minerals Management Service (MMS) transformed into the Bureau of Safety and Environmental Enforcement and the Bureau of Ocean Energy Management.⁴⁵ Michael R. Bromwich, former BOEMRE director, stated that the Obama administration's structural changes of the Minerals Management Service clarified agencies' roles and responsibilities and strengthened our oversight capabilities' allowing the federal government to increase oversight of the offshore oil and gas industry.⁴⁶

In 2020, members of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore reported that ten years following the Deepwater Horizon oil spill, Congress failed to enact their policy recommendations and stated that the Trump administration reversed the environmental and safety requirements enacted by the Obama administration.⁴⁷

CONCLUSION

Over time, America's acquisition of oil increases America's global dominance and the risks of domestic maritime disasters. Congress and the president collaborate on the response efforts, legislative policies, and federal regulations for combating maritime oil spills. Presidents have the power to frame oil spill disasters to shape the American public's general political climate and public opinion through visits to the spill location, public speeches, and influences over legislative policies and federal regulations. Due to the president's ability to respond to maritime disasters, the American public primarily places the blame on maritime disasters on the presidency rather than regulatory agencies or industries.

Furthermore, oil spills in modern times equate to shorter news cycles due to competing media entertainment sources and news outlets. Various media outlets and news entertainment sources allow the American public's attention toward maritime disasters and calamities to lessen over time. The policy window for presidential policies and congressional legislation continues to

⁴⁵ H.W. Bush, "President George H.W. Bush Discusses Federal Efforts in the Cleanup of the Exxon Valdez Oil Spill."

⁴⁶ "Interior Department Completes Reorganization of the Former MMS," U.S. Department of the Interior, last modified September 5, 2019, <https://www.doi.gov/news/pressreleases/Interior-Department-Completes-Reorganization-of-the-Former-MMS>.

⁴⁷ Lisa Friedman, "Deepwater Horizon Ten Years On," *The New York Times*, April 21, 2020, <https://www.nytimes.com/2020/04/19/climate/deepwater-horizon-anniversary.html>.

narrow in scope, prompting a shorter window for policy and regulation changes. Evidence such as a fewer news articles and executive orders proves that the news cycle becomes increasingly narrow with competing media outlets.

Due to the increasingly shortened news cycle, I recommend the following policy options for congressional and presidential endeavors. First, Congress and the president must ensure that industries abide by existing federal and industry-driven regulations to prevent future maritime disasters. I recommend that the United States Coast Guard receive the regulatory power to distribute monetary fines for industries that do not follow proper protocols. Additionally, I recommend that both houses of Congress vote within thirty days to approve safety recommendations following maritime oil spills. Often, members of Congress do not act quickly enough to pass effective legislation, allowing the American public to avert attention away from maritime disasters. Finally, research shows that the use of presidential executive orders continues to decline over time. Shifting presidential administrations allows presidents to overturn previous administrations' executive orders, diminishing the overall impact of the executive order.

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Part Three

Foreign Policy & National Security

EXAMINING THE FENTANYL EPIDEMIC: THE FEASIBILITY OF LONGSTANDING COLLABORATIVE EFFORTS WITH THE PEOPLE'S REPUBLIC OF CHINA

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Since 1999, drug overdoses that are attributed to Fentanyl have almost quintupled. A review of the data and bodies of work show that at this current rate of Fentanyl deaths the United States finds itself in a crisis. Efforts to quell the use and acquisition of this synthetic drug through cooperation with the People's Republic of China have been ratiocinated, however the United States continues to suffer from the effects of its' use. This paper examines the unique historical solutions to wide scale illicit drug use that each country has made. It will then further examine bilateral cooperation mechanisms such as Drug Enforcement Administration residential offices located within the People's Republic of China; the Bilateral Drug Intelligence Working Group and Counternarcotic Working Group; and senior leader exchanges. The examination will specifically focus on the ways in which cooperation has successfully worked and the challenges of collaborative efforts with modern-day diplomacy.

INTRODUCTION

In 1999, the United States encountered its first significant wave of narcotics-related deaths from opioids with a second wave in 2010 being primarily attributed to heroin. The third and most deadly wave to date arrived in 2013 with the advent of synthetic opioids, particularly illicitly manufactured Fentanyl. The United States is facing a rise in deaths involving Fentanyl unlike any other drug crisis the country has faced before.

The rise in Fentanyl related deaths has a range of explanations. This work will focus on the most significant contributing factor, the People's Republic of China (PRC) as the primary contributor of base Fentanyl chemicals and precursors. The alarming rate of export for these precursor chemicals presents not just a health risk for American citizens but a national security risk as well. United States policymakers must figure out how to navigate this health crisis while by working cooperatively with the PRC while also maintaining firm stances for American policy.

This work will begin by examining the current Fentanyl crisis and its' consequences as well as how both the United States and the People's Republic of China have historically handled national illicit drug problem sets to provide historical background. It will then continue to seek the effectiveness of historically established counternarcotic and drug intelligence sharing

programs and whether it has been effective for both nations. Tertiarily, it will examine present day geopolitical effects on accomplishing or continuing bilateral cooperation to decrease the amount of Fentanyl entering the United States. The conclusion of this body of work will discuss the implications of continuing cooperative measures and the possible consequences of navigating the measures with a tumultuous political landscape. Overall, this paper will attempt to gain a deeper understanding of working in conjunction with the PRC on combatting a seemingly American crisis and its' effectiveness.

THE OPIUM WARS

To understand the stance of the People's Republic of China's regarding addictive drugs, it is imperative to understand its' history with similar substances, such as Opium. Opium is a powerful narcotic that is produced by air drying the milky substance secreted from unripe poppy seeds. This narcotic was the catalyst for a series of conflicts known as the Opium Wars. The First Opium War was a series of conflicts fought between Britain and the Qing dynasty of China between 1839 and 1842. The primary dispute was the Chinese enforcement of their ban on the opium trade by seizing private opium stocks from merchants and the lack circulation of silver between the two nations.¹ By the 19th century opium had become prevalent within China's population and was causing public health concerns. It is by 1800 that Qing Dynasty officials banned the production and importation of opium.² This caused some exporters to rely on other methods of distributing opium throughout the country. The British East India company hired smugglers to transport opium through China through a complex smuggling network.³ The amount of smuggled opium and opium use was becoming a worse problem than before. More aggressive measures to quell both the use and distribution were being enforced. By 1836, the Chinese government closed major centers of opium distribution and started to execute Chinese dealers.⁴ Although these measures were significant, China still looked forward to a more comprehensive solution.

¹ Stan Florek, "The Mechanics of the Opium Wars," Australian Museum, last modified November 14, 2018 <https://australian.museum/learn/cultures/international-collection/chinese/the-mechanics-of-opium-wars/>.

² Jack P. Hayes, "The Opium Wars in China," Asia Pacific Curriculum, <https://asiapacificcurriculum.ca/learning-module/opium-wars-china>.

³ Ibid.

⁴ Ibid.

A comprehensive solution was executed in the form of Lin Zexu, a Chinese government official. Lin Zexu argued that the opium trade was a moral issue that needed to be eliminated. He went on to argue that the Chinese empire would lose a working population needed to keep the empire functioning due to heavy addiction to the drug.⁵ In 1839, Lin Zexu began a complex attack on the opium trade that involved diplomatic communication to Great Britain, arresting a swath of Chinese dealers, and the destruction of opium and opium-related products. He also quarantined and stopped all foreign trade in Guangzhou after British merchants refused to turn over their opium stock in exchange for tea.⁶ These such actions caused tensions to rise and eventually lead to the First Opium War. Great Britain and China fought in a series of battles 1840-1842 that led to Chinese loss and resulted in the Treaty of Nanjing. The treaty included:

- An excellent deep-water port at Hong Kong;
- A huge indemnity (compensation) to be paid to the British government and merchants;
- Five new Chinese treaty ports at Guangzhou (Canton), Shanghai, Xiamen (Amoy), Ningbo, and Fuzhou, where British merchants and their families could reside;
- Extraterritoriality for British citizens residing in these treaty ports, meaning that they were subject to British, not Chinese, laws; and
- A “most favoured nation” clause that any rights gained by other foreign countries would automatically apply to Great Britain as well.⁷

The Chinese saw no benefits behind this treaty that overwhelming favored British interests. After the treaty was signed the free flow of opium within the country skyrocketed past pre-Opium War levels (Figure 1). In 1850, the Chinese emperor, Emperor Xuanzong of Qing, died and was replaced by, Emperor Wenzong of Qing, who closely aligned with the ideals set forth by Lin Zexu.⁸ The new Court’s compliance with the treaties fell short of Western countries’ expectations leading to the start of the Second Opium War. Fighting between China and a joint Britain-France force continued 1856-1860 until British and French forces captured China’s capital city of Beijing. This led to the legalization of opium once again plaguing the country with drug addiction that affected up to 90% of the population leading to devastation.⁹ The loss from both Opium Wars would start an era in which China views as its “Century of Humiliation”

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Wan Yi, Wang Shuqing, Lu Yanzhen, *Daily Life in the Forbidden City* (Viking Adult, 1989).

⁹ Florek, “Opium Wars.”

marked by rebellion movements, civil wars, and the collapse of the imperial system that had reigned a millennium long.¹⁰

Following the century of humiliation and the founding of the People's Republic of China in 1949, the newly enacted government made targeting opium use as a priority to re-shape a new China. At its' establishment the drug addict population in China was estimated to be at 20 million people. The government attempted to eradicate drug use and trafficking by utilizing comprehensive measures such as persuasion, education, coercion, and punishment.¹¹ The swift enactments led to approximately 220,000 convictions; 80,000 of these cases were attributed to manufacturing and distribution 800 of which were sentenced to death.¹² The new government of China was serious about quelling the use of opium but also about the recovery of a nation that had been suffering through out a century. Rehabilitation centers were set up over the country where addicts could quit voluntarily or forced sobriety was enacted. Poppy fields were destroyed through rent reduction and land reform efforts.¹³ Through these massive and intense measures, China reported to enjoy the two decades of being a "drug-free nation."¹⁴

In conclusion, the history of opium in China has not only brought a health crisis to the country but worked as a catalyst to a governmental revolution. The conflicts that arose from this narcotic are viewed by China as being caused by western powers' imperialism and greed. While western powers viewed the conflicts as necessary to end China's aggression towards their economies. Upending the once former imperial nation, opium has long lasting connotations within the country to present day that will not be forgotten.

THE CRACK COCAINE EPIDEMIC

In similarity to China, the United States has also struggled with issue of rampant drug use within the country. Cocaine, which is produced by extracting substances from a Coca plant, became a powerful stimulant that had a multitude of uses. Cocaine had a variety of medical uses and could be bought over the counter. It was even used in the original version of Coca-Cola

¹⁰ U.S.-China Economic and Security Review Commission, *The "Century of Humiliation" and China's National Narratives*, by Alison A. Kaufman, March 10, 2011, <https://www.uscc.gov/sites/default/files/3.10.11Kaufman.pdf>

¹¹ Bin Liang, Hong Lu, and Terance Miethe, *China's Drug Practices and Policies: Regulating Controlled Substances in a Global Context* (2009), 84.

¹² *Ibid*, 85.

¹³ *Ibid*, 83.

¹⁴ *Ibid*, 77.

soda.¹⁵ In the 1970s inhaled cocaine misuse became a popular recreational drug. Although popular, cocaine was estimated to have a street value of \$100 to \$200 per gram.¹⁶ The elevated price of cocaine drove the creation of its alternative form known as crack. Crack is created by dissolving cocaine in water, adding baking soda, and heating.¹⁷ This version formed into a rocky substance that was able to be smoked vice inhaled in powder form, which it makes it extremely effective in delivering the drug in a psychopharmacological manner.¹⁸ Crack was able to give an intense high and was inexpensive in comparison to cocaine. The low-cost and accessibility of crack is how the epidemic proliferated.

Crack use was on the rise throughout the 1980s. The largest surge of crack use is reported to be between 1984 and 1990. In 1985, the number of people who admitted to using cocaine on a routine basis increased from 4.2 million to 5.8 million.¹⁹ To combat the surge in drug use throughout the United States, the government passed sweeping drug enforcement measures. Through these measures the Anti-Drug Abuse Act of 1986 was signed into law by President Ronald Reagan. Harsher penalties, minimum prison sentences, increased funds for drug enforcement measures, and education were all a part of the national strategy to combat the drug epidemic.²⁰

The proposal of creating harsher punishments for individuals possessing crack is the dominating factor of the national strategy to combat drug use in the United States. The Anti-Drug Abuse Act of 1986 states that the possession of five grams of crack would elicit a minimum mandatory prison sentence of five years and the possession of fifty grams would elicit a 10-year minimum sentence.²¹ Possession of powdered cocaine would yield the respective minimum prison sentences, however, the possession quantities would have to be 100 times more to trigger the equivalent sentences.²² This disparity in sentencing was the attempt to emphasize and catch large-scale producers and traffickers. In the role of education, the law directed the

¹⁵ Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Levitt, and Kevin M. Murphy, "Measuring Crack Cocaine and Its Impact," *Economic Inquiry* 51, no. 3 (2013): 1651-1681.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ "1985-1990," History, Drug Enforcement Administration, https://www.dea.gov/sites/default/files/2021-04/1985-1990_p_58-67.pdf.

²⁰ Martha Abrams, Lily Johnston, and Sam Lauten, "War on Crack," Crackdown, University of Michigan, Accessed December 25, 2022, <https://policing.umhistorylabs.lsa.umich.edu/s/crackdowndetroit/page/war-on-crack-1986-89>.

²¹ *Ibid.*

²² *Ibid.*

Secretary of Education to carry out educational and prevention activities on drug abuse. The law also provided billions of dollars towards training, acquisition, and establishment of drug enforcement activities.²³

Comparing both the United States and China, during their periods of national drug abuse periods, both nations acted with sweeping measures to gain control of the issue. Both countries instilled harsher punishments for drug manufacturers and distributors. Both countries provided more resources for the goal of eradicating drug abuse within their borders. The most prominent difference between the two: the emphasis on assistance to the addicted. China provided comprehensive measures to create centers to rehabilitate those affected en masse. The Chinese government set measures to ensure sobriety of the people even in force. This lacks in the United States' approach to the crack cocaine epidemic. Out of the fifteen titles within the Anti-Drug Abuse Act of 1986, none address the healthcare options for the addicted. It was not until the Anti-Drug Abuse Act of 1988, that the United States included medical assistance to the strategy to combat the rampant drug use.²⁴ Following this act, estimated cocaine consumption decreased throughout the following decade (Figure 2). This fundamental difference in strategy could play a role in possible cooperation in combatting future issues.

THE CURRENT EFFECTS AND ORIGINS OF FENTANYL IN THE UNITED STATES

In the United States, a new wave of illicit drug use has become prominent: Fentanyl. Fentanyl is a powerful opioid that is typically used to treat patients with severe pain especially ones following a surgical procedure and is approximately 100 times more potent than morphine.²⁵ However, the United States has witnessed a dramatic increase in the misuse of this drug throughout the 2010s extending into the 2020s. According to the Centers for Disease Control, the number of total deaths by drug overdoses from 2015 to 2022 increased by approximately 226%. The number of total deaths by drug overdose during a twelve-month period

²³ Anti-Drug Abuse Act of 1986, H.R. 5484, 99th Cong. (1986), <https://www.congress.gov/bill/99th-congress/house-bill/5484/text>.

²⁴ Anti-Drug Abuse Act of 1988. HR 5582. 100th Cong. (1988), <https://www.congress.gov/bill/100th-congress/house-bill/5210/text>.

²⁵ "Fentanyl Drug Facts," National Institutes of Health, National Institute on Drug Abuse, last modified June 2021, <https://nida.nih.gov/publications/drugfacts/fentanyl>; Drug Enforcement Administration, "Fentanyl," Department of Justice/Drug Enforcement Administration, last modified October 2022, <https://www.dea.gov/sites/default/files/2023-03/Fentanyl%202022%20Drug%20Fact%20Sheet.pdf>.

ending in January 2022 was 107,625 and synthetic opioids to include Fentanyl made up approximately 67% of those deaths.²⁶ The number individuals sentenced to prison due to fentanyl trafficking offenses has also increased as well. In fiscal year 2017 the United States Sentencing Commission reported 146 fentanyl trafficking offenders. In fiscal year 2021 there were 1,533 fentanyl trafficking offenders, accounting for a 950% increase of trafficking offenders within four years.²⁷

The Drug Enforcement Administration announced in December 2022, 10,000 pounds of fentanyl powder had been seized over the course of the calendar year.²⁸ With the large quantities of fentanyl being seized and stark increases in fentanyl-related incidents, the question of its' origins must be discussed. Fentanyl distribution is regarded by enforcement agencies as being most commonly exported from Mexico. The Drug Enforcement Agency cites Mexican transnational criminal organizations smuggling a substantial amount of fentanyl pills into the United States as a common means for distribution.²⁹ This decreases the need for illicit pill pressing operations within the United States borders and continues the flow of fentanyl from Mexico. Although Mexican transnational crime organizations are the primary source of finished fentanyl-based products, the chemical precursors come from elsewhere.³⁰

Prior to 2019, China had been the primary source of illicit inbound fentanyl and fentanyl products. Today, China is no longer is the main source for finished product, however China remains a primary producer of the precursor chemicals that allow illicit fentanyl to be produced. These precursor chemicals are being manufactured and shipped via mail and express packaging to North America. (Figure 4) Since 1996, measures have been taken to add fentanyl precursors to the list of controlled substances. These steps may have contributed to the decrease in finished fentanyl products exported to the United States. Regardless of the moves to control the precursor

²⁶ "Provisional Drug Overdose Death Counts," Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, last modified January 11, 2023, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>

²⁷ "Quick Facts: Fentanyl Trafficking Offenses," United States Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY22.pdf

²⁸ "Drug Enforcement Administration Announces the Seizure of Over 379 million Deadly Doses of Fentanyl in 2022," Drug Enforcement Administration, last modified December 20, 2022, <https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly>

²⁹ "2020 National Drug Threat Assessment," Drug Enforcement Administration, last modified March 2021, https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

³⁰ *Ibid*, 18.

chemical more heavily, China still is the primary producer of precursor chemicals that are not on a controlled substance list. The flow of these products is still rampant and pose an instrumental threat to the United States.

BILATERAL EFFORTS BETWEEN CHINA AND THE UNITED STATES

The difficulty of nation-wide drug use needs, yet again, exhaustive measures to overcome. This fentanyl complexity called for not only domestic measures, but foreign diplomacy. The United States and China have a long-standing bilateral relationship on the topic of combatting illicit narcotic use and manufacturing. The DEA has maintained liaison presence in the PRC with a working office in Beijing for the last three decades.³¹ Currently, the DEA maintains three resident offices in mainland China and one Special Administrative Region office in Hong Kong. These geographical offices allow the direct communication and strengthened relationship with China's Ministry of Public Safety, Narcotic Control Bureau (NCB).³² This face-to-face interaction is a primary mechanism for the United States in combatting illicit fentanyl manufacturing abroad.

Alongside abroad DEA offices, the United States and China collaborate on other levels. Established from a joint DEA and NCB memorandum of agreement in 2002, the Bilateral Drug Intelligence Working Group was formed (BDIWG).³³ The BDIWG functions as an annual, bilateral engagement to share information on drug-related intelligence and trends that each organization has noted, on an operational level. At an additional operational, working level the DEA and NCB participate in the Counter Narcotics Working Group (CNWG) which seeks to improve bilateral investigations of mutual interest; as well as discuss laws, regulations, and policies, annually.³⁴ These two working groups reaffirmed the need for collaboration to not only combat current narcotics issues, but also allow the advancement of knowledge with regards to each country's regulations, policies, and new efforts.

³¹ *Tackling Fentanyl: The China Connection: Hearings Before the House Committee on Foreign Affairs*, 115th Cong. 22-23 (2018).

³² *Ibid*, 22.

³³ *Ibid*.

³⁴ United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report Volume I: Drug and Chemical Control* (2021), 112, <https://www.state.gov/wp-content/uploads/2021/02/International-Narcotics-Control-Strategy-Report-Volume-I-FINAL-1.pdf>.

The last key mechanism to bilateral cooperation is higher policy engagements. Both governments participate in two fora regarding counternarcotics matters. The first being the Law Enforcement and Cybersecurity Dialogue (LECD) which is co-chaired by the Attorney General of the United States and the Chinese Ministry of Public Security. This dialogue was one of four dialogues launched by President Donald J. Trump and Chinese President Xi Jinping in 2017. The dialogue focuses on a plethora of issues including counter-narcotics policies.³⁵ The second policy engagement includes the Joint Liaison Group (JLG) on Law Enforcement Cooperation. The JLG is co-chaired by the Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) and Department of Homeland Security.³⁶ Both of these policy engagements allow both American and Chinese policymakers to have a direct connection with another. Establishing these cooperative measures at all levels, from regional offices to policymaker engagements, sets a forward leaning precedent of eagerness for collaborative solutions.

Due to the collaborative nature of the aforementioned efforts, there have been some positive advancements in combatting the fentanyl epidemic. The U.S. Government has cited enhanced cooperation as a key factor leading to stricter narcotics controls in China. In 2015, following discussions, China implemented domestic control on 116 new psychoactive Substances including a number of fentanyl analogues.³⁷ On December 28, 2017, China's Ministry of Public Security announced the scheduling of two key fentanyl precursor chemicals. This followed U.S. encouragement and complied with steps previously taken by the UN Commission on Narcotic Drugs.³⁸ Lastly, in August 2018, announced the control of an additional 32 New Psychoactive Substances, bringing the total number of these chemicals and fentanyl precursors to 175 since 2015 (the start of regularly attended discussions on bilateral efforts to counter the threat to the United States from fentanyl class substances).³⁹ These actions taken by China demonstrated an onward evolution towards more collaboration on the narcotics issue. Collaborative efforts have been improving but some may interpret China's actions as not being as successful as the anticipate. Deputy Chief of Operations for the Office of Global Enforcement

³⁵ United States Department of State, Office of the Spokesperson, *U.S.-China Law Enforcement and Cybersecurity Dialogue* (2017), <https://2017-2021.state.gov/u-s-china-law-enforcement-and-cybersecurity-dialogue/index.html>.

³⁶ *Tackling Fentanyl: Hearings Before the House Committee on Foreign Affairs*, 22.

³⁷ *Ibid*, 23.

³⁸ *Ibid*.

³⁹ *Ibid*.

at the Department of Justice, Paul E. Knierim, stated that, “Their [China’s] actions are steps in the right direction, but more can be done.”⁴⁰ The fundamental disagreement on areas of responsibility amongst policymakers highlights the issue of diplomacy and broader geopolitical considerations hampering cooperation.

GEOPOLITICAL IMPACTS ON NARCOTICS DIPLOMACY

Cooperation takes a considerable amount of goodwill diplomacy. While efforts, in respect to counternarcotics, have been positive; positive relations in other areas of diplomacy have lacked. Conflicts of these nature can affect how cooperative China is willing to be. In July 2020, growing criticism of China’s treatment of Uyghur Muslims in the Xinjiang Uyghur Autonomous Region led to the United States imposing sanctions on one Chinese government entity and four current or former government officials.⁴¹ Chinese official categorically denied the accusations of human right abuses and admonished the United States and other European Union countries stating that the accusations were “baseless.” Diplomatic moments such as these started to impact how willing China was to engage in full scale cooperation with the United States.

In December 2021, the United States imposed sanctions on four Chinese companies and one individual stating the prevention of opioid and precursor chemical from reaching the United States. Foreign Ministry Spokesperson Wang Wenbin stated:

I must point out that China has scheduled fentanyl substances as a class while the US has not yet taken permanent measures so far. Even worse, the US sanctioned the Institution of Forensic Science of the Ministry of Public Security and the National Narcotics Laboratory in China by adding them to the entity list.⁴²

Wenbin argued that the United States has had no significant progress in combatting fentanyl and suggests that the United States is stunting their own progress by these sanctions. Ministry of Public Safety was instrumental in combatting fentanyl manufacturing and production within China’s borders. Sanctioning an entity of the MPS, degrades cooperation efforts. In this

⁴⁰ Ibid.

⁴¹ United States Department of Treasury, *Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act* (2020), <https://home.treasury.gov/news/press-releases/sm10551>.

⁴² The Ministry of Foreign Affairs of the People’s Republic of China, “Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on December 16, 2021,” December 16, 2021, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202112/t20211216_10470627.html?ref=china-trade-monitor.

statement Spokesperson Wang Wenbin suggests that China is cooperating enough and the United States has not done enough. This sentiment is continued with statements from Ambassador Qin Gang. During an interview, Ambassador Qin Gang stated:

China and the United States have had decades of productive cooperation in combating narcotics. Though not confronting prevalent fentanyl overdoses or any death case ourselves — because of the rigorous control measures — China has done everything possible on our end, out of goodwill, to help the United States address this problem. On May 1, 2019, China permanently scheduled all fentanyl-related substances, the first country in the world to do so, while the United States has stopped short of doing the same.⁴³

Vocalizing a position aligned with the above statement, China sees itself in a position that finds the United States lacking in lasting progress. Ambassador Qin Gang even states that China is taking critical steps to assist the United States that they are not willing to take themselves.

Finally, tensions had reached a paramount point between China and the United States in 2022. In early August 2022, The United States Speaker of the House, Nancy Pelosi visited Taiwan despite the wishes of the Chinese government. The issue of Taiwan has always been a point of conversation between China and the United States, however this visit sparked widespread controversy. After the one-day visit on the island, China declared that they were suspending a range of bilateral efforts. One of the suspended measures includes bilateral counternarcotics cooperation.⁴⁴ Tensions between the United States and China remain high and is expected to stay that way into the near future. With China taking the position of doing everything they could and the United States taking the position of China has not done enough and is utilizing the epidemic as a political weapon; it will more than likely take an intense conversation to return to the cooperation table.

STRATEGIC RECOMMENDATIONS

RESTRENGTHEN RELATIONSHIPS

⁴³ The Ministry of Foreign Affairs of the People's Republic of China, "Chinese Ambassador to the US Qin Gang Takes an Interview with Newsweek on the Fentanyl Issue," September 30, 2022, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202112/t20211216_10470627.html?ref=china-trade-monitor.

⁴⁴ The Ministry of Foreign Affairs of the People's Republic of China, "The Ministry of Foreign Affairs Announces Countermeasures in Response to Nancy Pelosi's Visit to Taiwan," August 5, 2022, https://www.fmprc.gov.cn/eng/zxxx_662805/202208/t20220805_10735706.html.

To recover the cooperation that has been built over decades regarding counternarcotic operation, the relationship will need to be restrengthened. China as a country and culture has a long history and a very strong memory. Chinese government officials will most likely look at the diplomatic shortcoming as an additional example of long line of western aggression and a challenge to their sovereignty. Restrengthening a relationship in this environment would require major common benefits as well as some concessions on the part of the United States. The announcement of a reexamination of sanctions may return some favorability in the conversation about reinstating bilateral cooperation on the narcotics issue.

FOCUS ON DOMESTIC HEALTHCARE EFFORTS

While the possibility of cooperation between the United States and China is unavailable indefinitely, there is still room to start solving the epidemic in the country. Reallocating focus from punishing fentanyl to educating and providing health solutions to the afflicted. Looking from a historical lens, providing help as opposed to strictly criminalizing has provided the more positive results. The Anti-Drug Abuse Act of 1986 sought to bring harsher punishment for those caught with crack cocaine. It wasn't until the Anti-Drug Abuse Act of 1988 that the United States started to yield a noticeable difference in crack cocaine use (Figure 2).

Following the Opium Wars, China sought to rebuild a torn nation. While building the PRC, China reportedly rehabilitated all of its addicts. Although, China reports succeeded in attaining a “drug-free nation,” they sometimes did so by forced means. But they always prioritized making a healthier people.

This should not preclude pressing criminal matters. An emphasis on manufacturers and distributors should be pressed. This recommendation suggests that both should be done simultaneously but focusing on providing health solutions as a priority.

HOLD CHINA ACCOUNTABLE WITH PROOF

China, in the face of controversy, will more likely than not deny allegations. Statements from Chinese officials almost always align with the sentiment that there is no existence of proof of allegations against them. Especially with the fentanyl epidemic in the United States, China has

held firm that there is no proof that the source of a majority of fentanyl is within their borders.⁴⁵ With no viable proof, these issues will virtually lack the attention from a world stage that is needed to hold China accountable. The solution to the issue is to publicly provide undeniable proof.

Publicly providing irrefutable evidence of China's mismanagement and neglect of controlling the situation within their borders, allows for the international community to provide the attention that it warrants. The presence of irrefutable proof will also deny the façade that China presents in the case of narcotics within their country. China's sentiment heavily emphasizes that there is no drug crisis within their borders and their accomplishments are world renown on the world stage.⁴⁶ This solution would shatter that illusion, as well as, change the narrative in hopes of seeking more international assistance in discovering more permanent solutions for illicit fentanyl trade over international borders.

CONCLUSION

Collaborative cooperation in the goal of counternarcotics between the United States and China has already seen decades of success. However, the decades of success were built during a "more times than not" stable and positive bilateral relationship. History has proven this relationship to be successful but, can it continue to be successful? In theory, bilateral cooperation can still be of great success. Chemical precursor scheduling, joint investigations on fentanyl trafficking that results in criminal charges, and agreements on additional DEA liaison offices in China all equate to substantial progress in fighting the fentanyl epidemic.⁴⁷ Collaborative efforts have the potential to continue to solve key issues that lead to mass illicit fentanyl uses within the United States.

⁴⁵ The Ministry of Foreign Affairs of the People's Republic of China, "Chinese Ambassador to the US Qin Gang Takes an Interview with Newsweek on the Fentanyl Issue," September 30, 2022, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202112/t20211216_10470627.html?ref=china-trade-monitor.

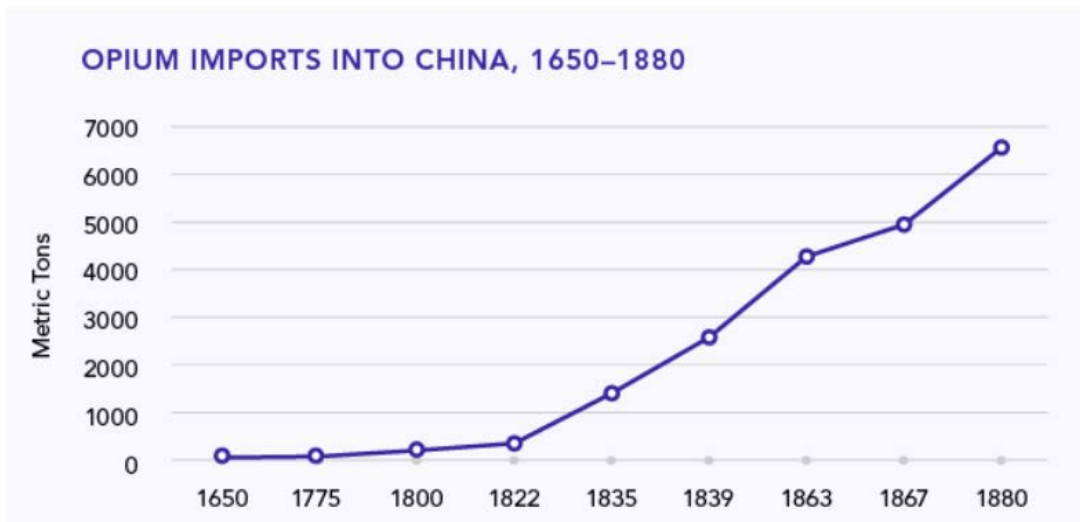
⁴⁶ The Ministry of Foreign Affairs of the People's Republic of China, "Chinese Ambassador to the US Qin Gang Takes an Interview with Newsweek on the Fentanyl Issue," September 30, 2022, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202112/t20211216_10470627.html?ref=china-trade-monitor.

⁴⁷ Congressional Research Service. "China Primer: Illicit Fentanyl and China's Role." December 8, 2022. Accessed February 4, 2023.

The reality of the situation is much more stark in execution. With an issue as multi-faceted as mass illicit drug use, collaboration efforts rely on a basis of mutual respect and gain. Rhetoric from policymakers from both the United States and China hamper the possibility of what maximum cooperation could yield. While diplomatic relationships can be rebuilt in a multitude of ways, trying to provide solutions via a healthcare centric, community rehabilitating lens will most likely fair more longstanding results than bilateral cooperation can in the current state of geopolitical tensions. Bilateral collaborative efforts are feasible, however with the current geopolitical tensions, those efforts will continue to be stymied.

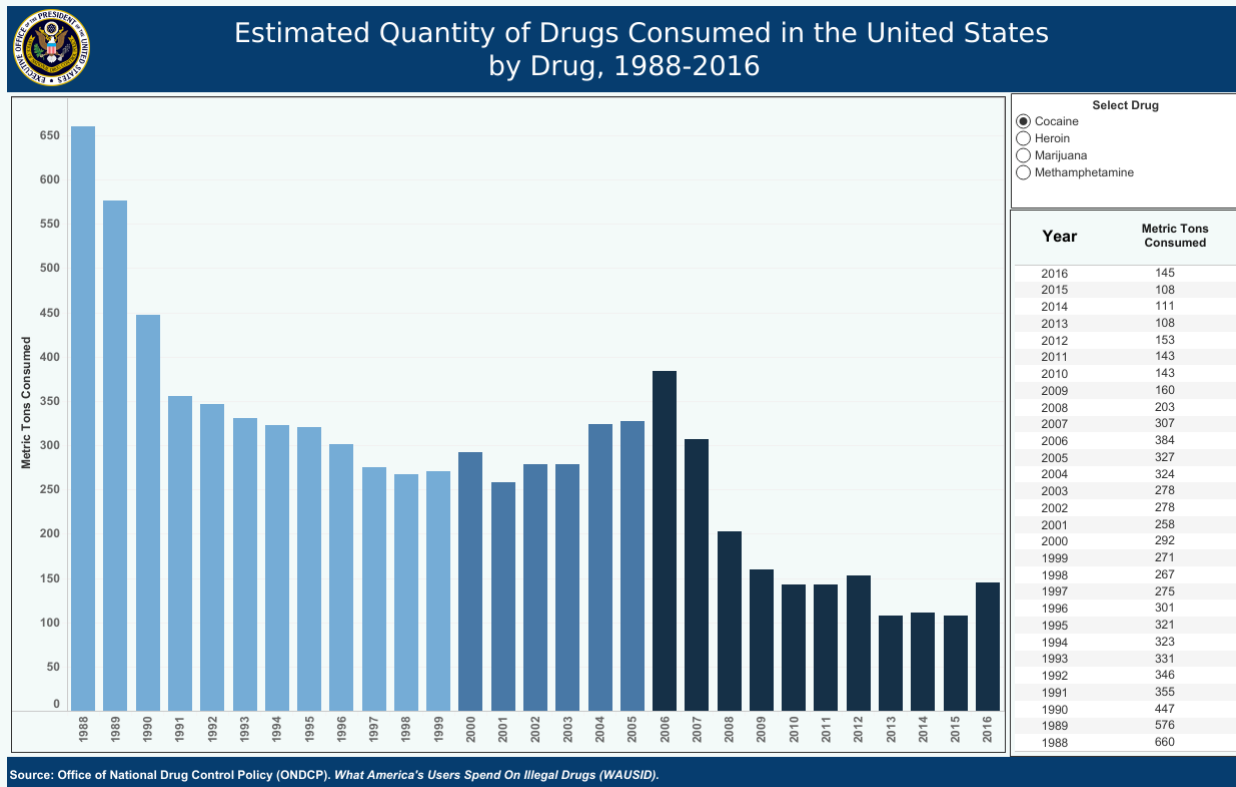
ANNEX

1. Opium imports into China, 1650-1880



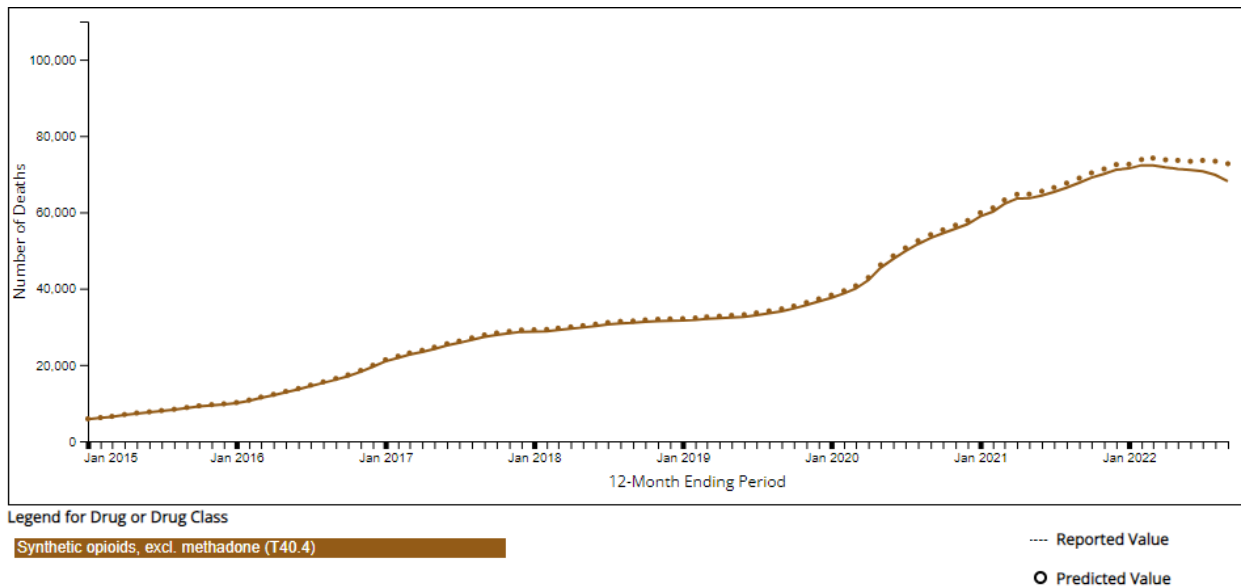
Source: UN Office on Drugs and Crime

2. Estimated Quantity of Drugs (Cocaine) Consumed in the United States, 1988-2016



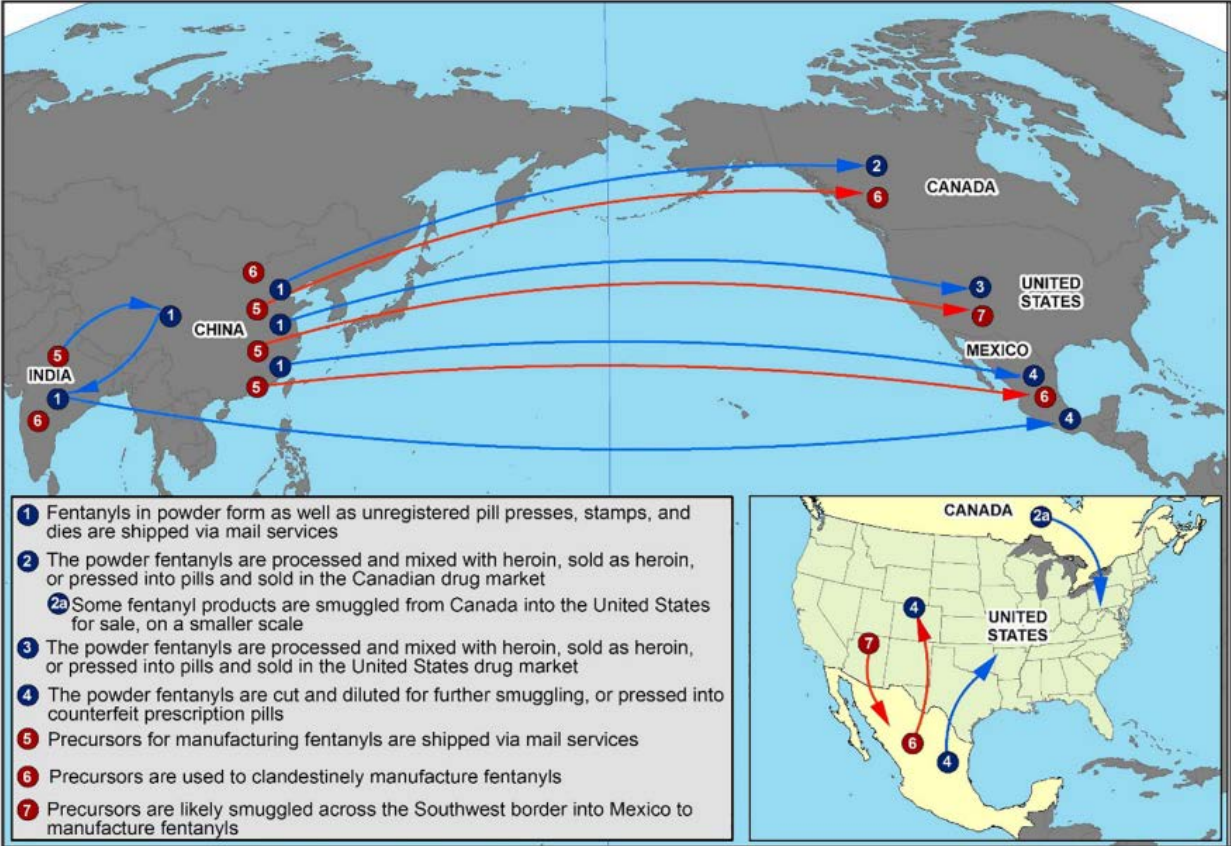
Source: Office of National Drug Control Policy (ONDCP).

3. Overdose deaths by synthetic opioids, excluding methadone (T 40.4), 2015-2022



Source: Centers for Disease Control and Prevention (CDC), National Center for Health Statistics

4. Fentanyl flow into the United States



Source: Drug Enforcement Administration

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THE INFLUENCE OF U.S. FOREIGN POLICY RHETORIC ON THE LIMITATION AND PROLIFERATION OF DOMESTIC TERRORISM

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Despite extensive funding for counterterrorism operations, the United States remains vulnerable to domestic terrorist threats. While 9/11 created a perception that radical Islamic terrorism remains the primary terrorist-related adversary, the United States has grappled with a growing trend in far-right extremism and white supremacy. This paper examines how language in foreign policy focused on countering radical Islamic terrorism has contributed to an ecosystem conducive to the proliferation of far-right ideologies. Using word frequency analysis of U.S. State of the Union addresses, this paper explores the importance of word choice in foreign policy decision-making and its implications domestically.

INTRODUCTION

In a 2021 interview, the then Acting-U.S. Ambassador to Canada, Arnold Chacón, the important role of U.S. leadership in global affairs. In his assessment, he stated: “It’s very important for the United States to demonstrate to the American people that leading the world isn’t an investment we make to feel good about ourselves; it’s how we can best ensure that the American people are able to live in peace.”¹ This comment serves as an impetus for this research endeavor in that it links foreign policy to domestic security—in other words, a foreign policy centered on the notion that protecting the homefront requires a proactive approach to stemming security threats from abroad. The previous two decades have been marked by the events of 9/11, and a foreign policy focused on the prevention of terrorism occurring in the United States. This paper will examine the ways in which U.S. foreign policy rhetoric post-9/11—particularly in its messaging regarding the operations in the Middle East in rooting out Islamic terrorism— influenced the occurrences of domestic terrorism within the United States.

¹ NATO Association of Canada, “Renewing Alliances: A Discussion with Arnold Chacon, Acting U.S. Ambassador to Canada,” NATOCanada, July 12, 2021, https://www.youtube.com/watch?v=o3h1hnhRHmU&list=PLUJbdmEnmxrIO0I9zvbi9sGVnrYxiG_Y1.

This analysis focuses on far-right and religious terrorism, both of which are the most prominent forms of terrorism in the United States since the mid-1990s.² The driving forces of far-right terrorism often include racial and ethnic supremacy and contains political motivations to create a white nationalist state that supplants all other races.³ On the other hand, religious terrorism involves violence in support of faith-based practices, such as Islam and Christianity.⁴ A shared feature between the two, particularly in the United States, is the dominance of Christianity in far-right politics and the rise of Christian nationalism in the decades following 9/11.⁵

This paper contends that U.S. foreign policy has successfully guarded its citizens against the threat of Salafi-jihadi terrorist movements, leading to the limitation of domestic Islamic terrorism. However, the attention given to foreign-based terrorism has contributed to an ecosystem that has enabled the slow proliferation of far-right domestic terrorism. Moreover, the allocation of budgetary resources towards the limitation of Islamic terrorism (see Figure 1) contributed to an environment that allowed the slow build-up of domestic right-wing terrorism. This paper is not arguing that U.S. foreign policy is the sole cause of the rise in far-right domestic terrorism in the United States. There are key confounding economic and political circumstances that drive social violence. Instead, this paper asserts that U.S. foreign policy has served as an accelerant for much of today’s far-right terrorism found in the United States.

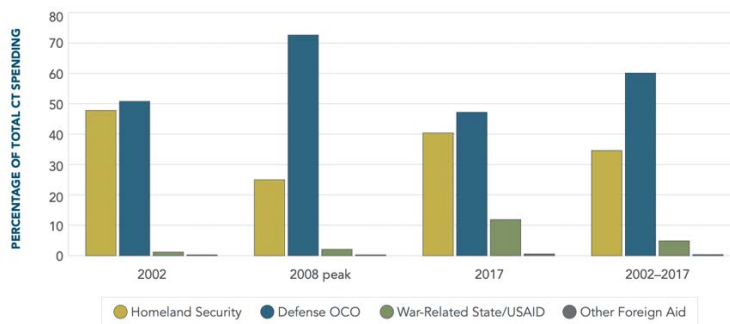


Figure 1: Composition of Counterterrorism Spending in the U.S., 2002-2017⁶

² Seth Jones, Catrina Doxsee, and Nicholas Harrington, “The Escalating Terrorism Problem in the United States,” Center for Strategic & International Studies, June 17, 2020, <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>.

³ Ibid.

⁴ Ibid.

⁵ Miles T. Armaly, David T. Buckley, and Adam M. Enders, “Christian Nationalism and Political Violence: Victimhood, Racial Identity, Conspiracy, and Support for the Capitol Attacks,” *Political Behavior* 44, no. 2 (2022), <https://doi.org/10.1007/s11109-021-09758-y>.

⁶ Laicie Heely et al., “Counterterrorism Spending: Protecting America While Promoting Efficiencies and Accountability,” Stimson Center, May 16, 2018, <https://www.stimson.org/2018/counterterrorism-spending->

This paper is divided into five main sections. Section one explores the goals of U.S. foreign policy post-9/11 in the limitation of terrorism. The second section examines the recent terrorism trends in the United States. Section three establishes the connection between U.S. foreign policy and domestic terrorism by examining the role of political rhetoric and decisions that have vilified specific ethnic groups following the events of 9/11. Using a word frequency and text analysis of foreign policy in State of the Union addresses, this paper demonstrates how U.S. foreign policy shaped a domestic ecosystem conducive to white nationalism and far-right terrorism. Finally, section four concludes by offering actionable policy recommendations for Congress and the president to better promote domestic security in the wake of the nation's foreign policy goals.

POST-9/11 U.S. FOREIGN POLICY AND COUNTERTERRORISM

The focus of U.S. foreign policy post-9/11 was to prevent an attack like 9/11 from happening again—an ideal at the heart of the administrations of Presidents Bush, Obama and Trump.⁷ From this standpoint, it is critical to acknowledge that the foreign policy focused on preventing foreign-based terrorism was highly successful in preventing threats to the United States. On 9/11, 2,977 Americans were killed, with others later succumbing to health and trauma-related complications. In the twenty years following the tragedy, 107 Americans have been killed in Salafi-jihadi terrorist incidents in the United States, marking a staggering reduction in American lives lost.⁸ The successful prevention of a second mass casualty foreign terrorist attack on the scale of 9/11 is due in large part to the creation of and resource allocation to new security institutions, such as the Department of Homeland Security (DHS), Directorate of

protecting-america-while-promoting-efficiencies-and-accountability/. Defense Overseas Contingency Operations (OCO) account for the majority for resource allocation with respect to counterterrorism. In total, between 2002 and 2017, Defense OCO accounts for 60% of spending, compared to 35% for Homeland Security—signalling the prioritization of counterterrorism abroad.

⁷ Janet Reitman, “U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How to Stop It,” *The New York Times*, November 3, 2018, <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html>.

⁸ Brian Katulis and Peter Juul, “The Lessons Learned for U.S. National Security Policy in the 20 Years since 9/11,” Center for American Progress, September 10, 2021, <https://www.americanprogress.org/article/lessons-learned-u-s-national-security-policy-20-years-since-911/>.

National Intelligence, and the National Counterterrorism Center.⁹ These agencies enhance intelligence sharing amongst law enforcement agencies to help prevent attacks on U.S. soil.

The challenge of having a foreign policy centered around a counterterrorism strategy that has almost exclusively focused on American and foreign-born jihadists for two decades is that it seeps into the domestic institutions and siphons resources away from other potential threats. In a 2018 investigative report by the New York Times, journalists found that intelligence reports going back to the mid-2000s had little in the way of information on the far-right.¹⁰ The DHS, which serves as the primary agency to counter domestic security threats and produced regular intelligence reports for local law enforcement, had limited material on hite supremacists.¹¹ For example, Figure 2 outlines the DHS’s spending allocation between 2002 and 2017. Funding for “Domestic Counterterrorism” and “Intelligence and Warning” is consistently lower than for other purposes, leaving the department unprepared to deal with domestic threats. In fact, in the years that followed 9/11, the perceived threats from Al Qaeda and other Islamic terrorist organizations continued to drive policy within Bush’s DHS.¹² Focus on foreign-based terrorism within U.S. domestic security institutions continued throughout the Obama administration—taking a “whole of government approach” focused heavily on the recruitment and radicalization of ISIS and Al Qaeda fighters.¹³

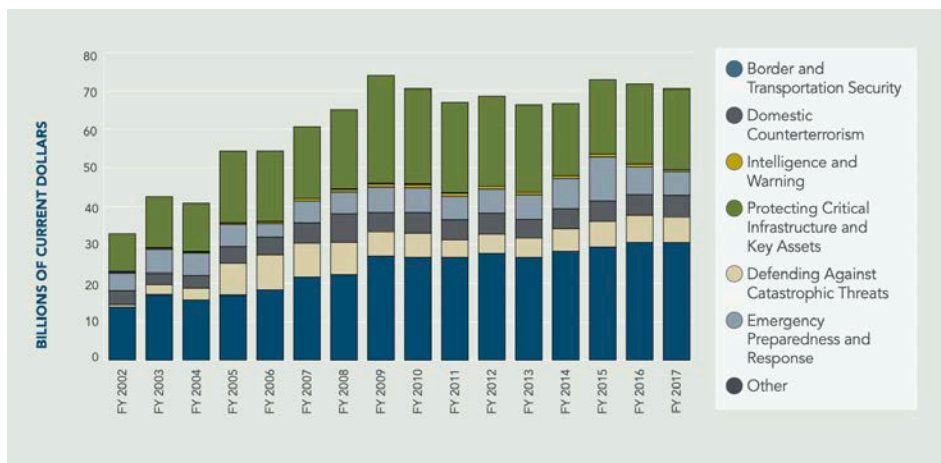


Figure 2: Historical Homeland Security Spending Levels by Purpose, Fiscal Years 2002-2017¹⁴

⁹ Ibid.

¹⁰ Reitman, “White Nationalism.”

¹¹ Ibid

¹² Heely et al., “Counterterrorism.”

¹³ Ibid.

¹⁴ Ibid.

This same trend was exacerbated during the Trump administration as a new national security team—that included Steve Bannon, Michael Flynn, and Sebastian Gorka—held Islamophobic views.¹⁵ Decisions around counterterrorism became increasingly political as officials in the Trump White House shied away from discussing white supremacy and far-right terrorism due to the real political costs in exploring these topics.¹⁶

According to the Stimson Center, a non-partisan foreign affairs think tank, the United States spent approximately \$2.8 trillion between 2002 and 2017 on counterterrorism efforts, including the wars in Iraq and Afghanistan.¹⁷ In that same period, Islamic extremists killed 100 people in the United States—far fewer than were killed by domestic extremists, white supremacists, and far-right groups.¹⁸ These statistics begin to tell the story of a counterterrorism environment influenced by U.S. foreign policy that has successfully limited threats from Islamic terrorism but has overlooked the national security implications of far-right extremism.

THE TRENDS OF U.S. DOMESTIC TERRORISM

As introduced in the previous section, the proliferation of far-right extremist groups that perpetrate terrorist activities has become the dominant domestic security concern in the United States. Far-right terrorism has outpaced terrorist activities from other sources, including far-left organizations and individuals or groups influenced by Islamic fundamentalists like ISIS and Al Qaeda.¹⁹ In 2020, far-right extremists committed over 90% of the attacks and plots in the United States, as well as accounting for 66% of incidents in 2021.²⁰ In examining a larger data set between 1994 and 2020, the Center for Strategic and International Studies (CSIS) compiled a list of 893 terrorists attacks and plots in the United States. Of those 893 incidents, far-right terrorists committed 57, while religious terrorists were the perpetrators of 15% of the instances.²¹

¹⁵ Faiza Patel, “The Islamophobic Administration,” Brennan Center for Justice, April 19, 2017, <https://www.brennancenter.org/our-work/research-reports/islamophobic-administration>.

¹⁶ Oxford Analytica, “Virginia Attack Handling Will Cost Trump with Party,” *Emerald Expert Briefings*, August, 2017, <https://doi.org/10.1108/oxan-es223763>.

¹⁷ Heely et al., “Counterterrorism.”

¹⁸ Reitman, “White Nationalism.”

¹⁹ Jones et al., “Terrorism.”

²⁰ Ibid.

²¹ Ibid.

According to CSIS, violent far-right attacks are the most frequent type of domestic terrorism.²² Of the 77 U.S. terrorist incidents in 2021, far-right groups committed 49% of them, while religious terrorists—specifically Salafi-jihadists—committed 3%.²³

In a 2019 statement to the Senate Homeland Security and Governmental Affairs Committee, FBI Director Christopher Wray detailed that the “most persistent threats to the nation and to U.S. interests abroad are homegrown violent extremists (HVEs), domestic violent extremists, and foreign terrorist organizations (FTOs).”²⁴ In his speech, Director Wray asserted that HVEs are most closely associated with international terrorist threats, particular from FTOs such as ISIS and Al Qaeda. In addressing violent domestic extremists—whose underlying drivers are “government or law enforcement overreach, socio-political conditions, racism, anti-Semitism, Islamophobia, and reactions to legislative actions”—Director Wray stated that these individuals and entities present a “steady threat of violence and economic harm to the [United States].”²⁵

Finally, it is necessary to acknowledge the primary targets of far-right terrorism. Since 2014, far-right terrorism has focused largely on individuals—with people most often targeted based on religion, race, or ethnicity—and religious institutions and places of worship.²⁶ Alongside this trend is the increased risk of physical harm directed toward Muslims in the United States. The Council on American-Islamic Relations reported 3,359 incidents of anti-Muslim threats in 2014, 3,786 in 2015, and 4,283 in 2016.²⁷ After 9/11, Muslims in America became increasingly targeted by these far-right groups, who were more likely to use weapons with a greater lethality, such as firearms, according to a CSIS brief on domestic terrorism.²⁸

These first two sections have explored U.S. foreign policy related to terrorism and how it has impacted the counterterrorism apparatus within the United States. Moreover, it has examined the recent trends in domestic terrorism over the past two decades. While a broad body of

²² Catrina Doxsee, Seth G. Jones, Jared Thompson, Kateryna Halstead, and Grace Hwang, “Pushed to Extremes: Domestic Terrorism amid Polarization and Protest,” Center for Strategic & International Studies, May 17, 2022, <https://www.csis.org/analysis/pushed-extremes-domestic-terrorism-amid-polarization-and-protest>.

²³ *Ibid.*

²⁴ Christopher Wray, “Worldwide Threats,” Federal Bureau of Investigation, November 5, 2019, <https://www.fbi.gov/news/testimony/worldwide-threats-110519>.

²⁵ *Ibid.*

²⁶ Doxsee et al., “Extremes.”

²⁷ Nazita Lajevardi, “The Media Matters: Muslim American Portrayals and the Effects on Mass Attitudes.” *The Journal of Politics* 83, no. 3, (2020), <https://doi.org/10.1086/711300>.

²⁸ Doxsee et al., “Extremes.”

literature has demonstrated the success of U.S. foreign policy in limiting Islamic terrorism, the proliferation of domestic terrorism by far-right and white supremacist groups has outpaced other threats without sufficient funding to counter this trend. Returning to the motivation of this paper, is there an explanation for the increase in far-right extremism and resource allocation based on language choices in foreign policy?

AN ECOSYSTEM OF TERROR: AN ANALYSIS OF U.S. STATE OF THE UNION ADDRESSES AND THEIR IMPACT ON THE MEDIA PORTRAYAL OF TERRORISM

“We will make no distinction between the terrorists who committed these acts and those who harbor them.”²⁹

- George H. W. Bush, September 11, 2001

President Bush delivered this powerful quote in his statement to the nation in the wake of 9/11. It promised America’s enemies they would find no sanctuary and was a rallying cry for the American people. Yet, it also served, unwittingly, as a catalyst for increased animosity and violence towards populations who shared similar ethnic and religious backgrounds as the 9/11 attackers by reinforcing an “us” versus “them” mentality.³⁰

A word frequency and text analysis of U.S. State of the Union (SOTU) addresses provides evidence to suggest that the foundation of this rhetoric lies within foreign policy language. This analysis yields important insights into an administration’s priorities and objectives. The remainder of this section will examine the word frequency of foreign policy in the U.S. SOTU addresses from 2001 to 2020 of the Bush, Obama, and Trump administrations. The choice to examine these addresses stems from the fact that SOTU addresses inform, influence, and, ultimately, shape the administration’s policy goals for the following year.³¹ Consequently, there is an expectation from the American public to see the fulfilment of SOTU policy.³²

²⁹ George W. Bush, “Statement by the President in Address to the Nation,” National Archives, September 11, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>.

³⁰ Lajevardi, “Media Matters.”

³¹ U.S. Library of Congress, Congressional Research Service, *The President’s State of the Union Address: Tradition, Function, and Policy Implications* by Collen Shogan and Thomas Neale, R40132 (2015).

³² Ibid.

Data Set and Methodology

The data set includes 20 SOTU addresses following 9/11 in 2001 to the conclusion of President Trump's term in office in 2020. The purpose of this timeframe is to account for the changing political leadership in the office of the president and the evolving expectations of the American people. Furthermore, examining these 20 SOTU addresses offers a unique contextualization to the counterterrorism priorities, and resource allocation discussed previously.

The world frequency analysis is limited to words of at least four characters long to not include most prepositions and simple nouns. Unnecessary words and their stemmed phrases that were otherwise not caught by the four-character limit, such as "good," "give," "need," etc., have also been removed from the frequency analysis. Additionally, high-frequency words unrelated to the topics of counterterrorism, security, and foreign policy, such as "children," "energy," and "schools," were removed to ensure the focus on foreign policy language. Finally, each president's SOTU addresses are examined as a batch to compare the different language choices across administrations easily. The result is a word frequency analysis that examines the 20 most frequent words found in the addresses of Presidents Bush, Obama, and Trump.

Results

President Bush's time in office was defined by the events of 9/11 and his subsequent decision to engage in counterterrorism operations in the Middle East.³³ This notion is reflected in his SOTU addresses as keywords like "terrorist," "security," and "Iraq" became reoccurring themes throughout his eight speeches (see Figure 3). The words "terror" and "terrorist" combine for 168 occurrences throughout his eight speeches, which make it the third most frequently discussed theme in his addresses—just behind "nation" and "people." The words "Iraq" and "Iraqi" combine for 164 occurrences making it the fourth most reoccurring theme. Lastly, "security" occurred 137 times, placing it as the fifth most reoccurring theme.

³³ Paul Hart, Karen Tindall, and Christer Brown, "Crisis Leadership of the Bush Presidency: Advisory Capacity and Presidential Performance in the Acute Stages of the 9/11 and Katrina Crises." *Presidential Studies Quarterly* 39, no. 3 (2009): 473–93, <https://doi.org/10.1111/j.1741-5705.2009.03687.x>.

Discussion

The word frequency analysis suggests a repetition of the common themes of “people,” “nation”/“country,” and “security.” These are unmistakable hallmarks of any U.S. foreign policy and national security. However, the themes of “terror”/“terrorist” and “Iraq”/“Iraqi” only appeared significantly throughout the Bush administration and saw a drawdown in use during the Obama and Trump eras. Moreover, “protect” and “force” become increasingly important themes as time progresses. This evolution in language likely represents a change from Bush’s necessary reaction post-9/11 to one that is more proactive at countering terrorist threats. Nonetheless, these reoccurring themes underpin the notion that there are specific populations that represent violent threats to the American people. However, undertaking foreign policy in this manner risks the creation of sweeping generalizations that paint all members of a specific population as evil.

Take, for example, the following quotes from various SOTU addresses of President Bush:

“Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax and nerve gas and nuclear weapons for over a decade.”³⁴

- President George H. W. Bush, 2002

“As long as the Middle East remains a place of tyranny and despair and anger, it will continue to produce men and movements that threaten the safety of America and our friends.”³⁵

- President George H. W. Bush, 2004

“Our country must also remain on the offensive against terrorism here at home.”³⁶

- President George H. W. Bush, 2006

Where the word frequency analysis showcases a pattern of repeated themes, these quotes contextualize the themes in their foreign policy mandate. The first two quotes specify a region of the world and associate it with “terror” and “tyranny.” At the same time, the third quote indicates that these same terrorist threats could be anywhere within the United States.

The danger of this style of rhetoric becomes evident when assessing its impact on the U.S. media landscape. Political scientist Nazita Lajevardi used sentiment analysis of the portrayal of Muslims in U.S. news media to show that Muslims experience greater amounts of

³⁴ “Annual Messages to Congress on the State of the Union (Washington 1790 - the Present),” The American Presidency Project, <https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/annual-messages-congress-the-state-the-union>.

³⁵ Ibid.

³⁶ Ibid.

negative coverage than other marginalized groups—particularly in the two decades following 9/11 up to the presidency of Donald Trump.³⁷ Lajevardi further demonstrated that a negative portrayal of Muslims and Muslim Americans shape anti-Muslim sentiment and policy objectives.³⁸ This effect was more pronounced for frequent consumers of Fox News and among its predominantly white, conservative viewer base.³⁹

The impact of this foreign policy rhetoric is even more pronounced upon examining the Trump administration. In his first SOTU address, President Trump stated in his first SOTU address: “we cannot allow a beachhead of terrorism to form inside America. We cannot allow our nation to become a sanctuary for extremists.”⁴⁰ This national security pretext helped President Trump justify his 2017 travel ban of six Muslim-majority countries due to their association with radical Islamic terrorism.⁴¹ In its SOTU address and the consequent policy, the Trump administration reminded the American public of the connection between terrorism and people from Muslim-majority countries—a sentiment that began during the Bush administration.

The negative media portrayal of Muslims has similar repercussions in other nations. Baker, Gabrielatos, and McEnery found that the 9/11 attacks acted as a trigger event that induced greater levels of negative interest in Muslims within the United Kingdom.⁴² Through a keyword analysis of leading U.K. media, the researchers found that Muslims and Islam tend to garner greater attention with the context of conflict, terrorist attacks, wars, and political debates.⁴³ Additionally, the concept of “extremism” was prevalent throughout their analysis and was directly tied to the portrayal of Muslims in the U.K.—particularly in the usage of terms like “hardliner,” “fanatic,” “militant,” “radical,” and “extremist.”⁴⁴ These findings mirror those of Lajevardi. Stories about Islam and Muslims frequently enter the U.S. news landscape with connections to “war,” “terrorism,” and “geopolitics,” creating a perception for viewers that

³⁷ Lajevardi, “Media Matters.”

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ The American Presidency Project, “State of the Union.”

⁴¹ Jeffrey Addicott, “The Trump Travel Ban: Rhetoric vs Reality,” *University of Dayton Law Review* 44, no.3 (2019): 491–528.

⁴² Paul Baker, Costas Gabrielatos, and Tony McEnery, “The 9/11 Effect: Change over Time,” in *Discourse Analysis and Media Attitudes*, (Cambridge: Cambridge University Press, 2013).

⁴³ Ibid.

⁴⁴ Ibid.

Muslims and other people from the Middle East are inherently linked to violence, terrorism, and aggression.⁴⁵

Notably absent from the SOTU speeches is any acknowledgment of far-right extremism or white supremacy as a domestic terrorist threat. According to a 2019 House Judiciary report, an environment based on racism and anti-Muslim sentiment proved to be a successful tool for white supremacist recruitment.⁴⁶ Moreover, in a 2022 study from the International Center for the Study of Violent Extremism on the topic of white supremacy recruitment, researchers found that about 40% of interviewees joined their respective groups out of pre-existing hateful ideology, including anti-Muslim and anti-immigrant sentiment.⁴⁷ Once joined, ideological indoctrination leaves those who did not join with pre-existing beliefs ultimately adopt the same hatred.⁴⁸

The analysis of foreign policy language provides insight into the previously discussed counterterrorism and resource allocation trends. The absence of any attention on domestic terrorism in the SOTU addresses enhances the priorities of counterterror operations abroad focused on Islamic terrorism. This decision leaves little prioritization for homegrown threats unaffiliated with 9/11.

TOWARDS A FOREIGN POLICY ACCOUNTING FOR DOMESTIC TERRORISM

Before concluding, this paper offers two policy recommendations to improve future foreign policy decision-making. The first focuses on improving clarity and transparency within counterterrorism operations. The second suggests safeguarding Congress and the Office of the President from extremist influence.

Clarify the specific targets of counterterrorist operations to avoid generalizations: Given the repeated rhetoric and themes that connect terrorism to Muslim-majority countries, there must be greater effort to distinguish the extremist ideology from the general population. In a 2001

⁴⁵ Lajevardi, "Media Matters."

⁴⁶ *Hate Crimes and the Rise of White Nationalism: Hearings Before the House Judiciary Committee*, 116th Cong., (2019).

⁴⁷ Anne Speckhard, Molly Ellenberg, and TM Garret, "White Supremacists Speak: Recruitment, Radicalization & Experiences of Engaging and Disengaging from Hate Groups," International Center for the Study of Violent Extremism, May 23, 2022, <https://www.icsve.org/white-supremacists-speak-recruitment-radicalization-experiences-of-engaging-and-disengaging-from-hate-groups-2/>.

⁴⁸ Ibid.

speech at the Islamic Center of Washington D.C. after 9/11, President Bush famously said: “Islam is peace.”⁴⁹ Yet, this same clarity was absent in Bush’s eight SOTU addresses. There is a capacity to distinguish between ideology and religious identity, but the noise associated with tragedy drowns out this ability. To ensure that U.S. foreign policy does not continue contributing to an ecosystem proliferating hatred towards a specific ethnic group, elected officials must do better at promoting acceptance of religious beliefs and ethnicities unaffiliated with their ideological extremes.

Create a congressional mechanism to prevent extremist ideologies from influencing

government officials: In the wake of the January 6th insurrection, media coverage examined the connection between Republican Members of Congress and far-right extremist groups. Reporting from the New York Times links Representatives Paul Gosar and Matt Gaetz to the Proud Boys, and Lauren Boebert to the Three Percenters.⁵⁰ These connections represent opportunities for racially-motivated rhetoric to enter congressional decision-making. Safeguards must be in place to prevent such an outcome, such as an automatic censuring system for any member associated with an identified extremist group. Such a system must target not only far-right groups but also far-left ones. Groups such as the Animal Liberation Front, Antifa, and Black Bloc represent violent, anarchist movements and must not be allowed to influence U.S. decision-making.⁵¹ Ensuring that Congress is not influenced by extremist ideology will contribute to an ecosystem that is conducive to security.

CONCLUSION

This paper has offered a 20-year examination of the trends in U.S. domestic terrorism. Since 9/11, the United States has successfully prevented a large-scale Islamic terrorist attack from occurring again due in large part to the allocation of resources toward countering foreign-based terrorism. However, in doing so, the United States was left vulnerable to a proliferation in

⁴⁹ George W. Bush, “‘Islam Is Peace’ Says President,” National Archives, September 18, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>.

⁵⁰ Luke Broadwater and Matthew Rosenberg, “Republican Ties to Extremist Groups Are under Scrutiny,” *The New York Times*, January 29, 2021, <https://www.nytimes.com/2021/01/29/us/republicans-trump-capitol-riot.html>.

⁵¹ “Far-Left Extremist Groups in the United States,” Counter Extremism Project, August 2022, <https://www.counterextremism.com/content/far-left-extremist-groups-united-states>.

far-right extremism and white supremacy that now account for most domestic terrorist attacks. This proliferation was caused, in part, by foreign policy rhetoric that links the themes of “terror” to Muslim-based countries abroad. A connection repeated throughout the U.S. media landscape, ultimately creating an ecosystem of hatred and resentment towards minority populations in the United States.

Crucially, this paper is not arguing that U.S. foreign policy is the sole cause of far-right extremism – merely that it is one contributing factor. Since 9/11, the world has seen exponential growth in the accessibility of information and political commentary. As a result, our politicians must take greater care in their comments and word choices. Returning to the motivation for this paper, Ambassador Arnold Chacón suggested that engagement abroad increases domestic security. This paper presents evidence to support that statement, as Islamic terrorist threats have declined since 9/11. However, success cannot be at the expense of complacency in failing to address the growing threats of far-right terrorism and white supremacy in the United States.

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THE IMPORTANCE OF STRONG U.S. – PANAMA RELATIONS IN THE FACE OF THE GROWING PRESENCE OF THE PEOPLE’S REPUBLIC OF CHINA IN THE COUNTRY

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The histories of the United States and Panama have been intertwined since the latter’s inception in 1903. Despite the United States relinquishing operative control of the canal to Panama by means of the Panama Canal Treaty of 1977, the canal has remained the cornerstone of U.S.-Panama foreign relations and a strategic asset in the context of U.S. national security. In recent years, the presence of the People’s Republic of China (hereinafter referred to as PRC) has substantially increased in Panama. The fundamental question this paper seeks to answer is: Could the growing Chinese presence in Panama undermine the United States’ influence in the country? Or is the United States shielded by its long history as Panama’s closest ally? While the United States’ influence has not waned, specific steps can be taken to further strengthen U.S.-Panama relations, thereby cementing the future of this historically fruitful partnership. This research aims to contribute to shaping a foreign policy framework that achieves that objective.

CONTEXTUALIZING U.S.-PANAMA RELATIONS

To accurately comprehend the significance of the relationship between the United States and Panama, it is necessary to revisit its origin. To say that Panama’s status as an independent state is directly correlated with the United States’ intention to build a canal in the isthmus would be an understatement.¹ After all, the conspiracy that led to the independence of the Republic of Panama was a joint effort between Americans and then Isthmians. American support of Panamanian independence even resulted in the U.S.S. Nashville being dispatched to Panama to deter Colombian interference with the revolutionary efforts.²

Ultimately, this resulted in the signing of the Hay-Bunau-Varilla Treaty, by which the United States recognized the independence of the Republic of Panama. In exchange, Panama granted the United States “in perpetuity the use, occupation, and control of a zone of land... for the construction, maintenance, operation, sanitation and protection” of the soon-to-be-built

¹ *The Story of Panama: Hearings On the Rainey Resolution Before the House Committee On Foreign Affairs*, 65th Cong. 356 (1918).

² Charles D. Ameringer, “Philippe Bunau-Varilla: New Light on the Panama Canal Treaty,” *Hispanic American Historical Review* 46, no. 1 (February 1, 1966): 28-52, <https://doi.org/10.1215/00182168-46.1.28>.

Panama Canal.³ Since the Canal's opening in 1914, it has been the central element of U.S.-Panama relations, even serving as a vital asset to U.S. wartime efforts during World War II.⁴

In the following decades, tensions in Panama regarding the Canal's sovereignty grew steadily, temporarily interrupting diplomatic ties between both states.⁵ Panamanian intentions of assuming control of the Canal had been voiced to the United States as early as 1961.⁶ Despite congressional criticism at the time, the overall consensus was that the Panama Canal Treaty had to be revised.⁷ The ensuing negotiations culminated in the signing of two treaties: The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, and The Panama Canal Treaty. The former allowed the United States military to defend the Panama Canal against any threats to its neutrality, while the latter terminated the Panama Canal Zone's existence and returned its operative control to Panama on December 31, 1999.⁸ Together, these treaties would be known as the Torrijos-Carter treaties, both of which were signed on September 7, 1977.⁹

The treaties represented a significant showing of bilateral cooperation and a healthy relationship between both states. However, this relationship has undergone some tumultuous times. Most notably during the 1980s, when General Manuel Antonio Noriega was at the helm of an authoritarian regime.¹⁰ Flaring tensions throughout the decade culminated in Noriega's abrupt declaration of war against the United States.¹¹ This situation prompted the aptly named

³ "Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty)," Concluded November 18, 1903, *The Avalon Project*, https://avalon.law.yale.edu/20th_century/pan001.asp.

⁴ James G. Steese, "The Panama Canal in World War II," *The Military Engineer* 40, no. 267 (1948): 20-24, <http://www.jstor.org/stable/44516081>.

⁵ United States Department of State, Bureau of Western Hemisphere Affairs, "U.S. Relations with Panama," November 3, 2022, <https://www.state.gov/u-s-relations-with-panama/>.

⁶ John F. Kennedy, "National Security Memoranda, NSAM 152, Panama Canal Policy and Relations With Panama," in *Papers of John F. Kennedy, 1962-1964*.

⁷ "32 Senators Back Resolution Opposing Panama Canal Pact," *New York Times*, March 30, 1974, <https://www.nytimes.com/1974/03/30/archives/32-senators-back-resolution-opposing-panama-canal-pact-false.html>; *New Panama Canal Treaty: A Latin America Imperative, Report of a Study Mission to Panama: Hearings Before the Senate Committee on Interstate and Foreign Commerce*, 94th Cong., 2nd sess., (1976).

⁸ "The Panama Canal and the Torrijos-Carter Treaties", Office of the Historian, Milestones: 1977-1980, <https://history.state.gov/milestones/1977-1980/panama-canal>.

⁹ "Panama Canal Treaty," U.S.-PAN, *U.N.T.S.* 1280, No. 21086, September 7, 1977;

"Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal," U.S.-PAN, *U.N.T.S.* Vol. 1161, No. 18342, September 7, 1977.

¹⁰ R. Cody Phillips, *Operation Just Cause: The Incursion into Panama*, (Center of Military History, March, 2004), Pub No. 70-85-1, https://history.army.mil/html/books/070/70-85-1/cmhPub_70-85-1.pdf.

¹¹ "Fighting in Panama: The President; A Transcript of Bush's Address on the Decision to Use Force in Panama," *The New York Times*, December 21, 1989, <https://www.nytimes.com/1989/12/21/world/fighting-panama-president-transcript-bush-s-address-decision-use-force-panama.html>.; U.S. General Accounting Office, *Issues Relating to the U.S. Invasion, Panama, Fact Sheet for the Honorable Charles B. Rangel, House of Representatives*, NSIAD-91-174FS (Washington, DC, April 24, 1991), accessed December 1, 2022.

Operation Just Cause. Consisting of nearly 26,000 U.S. military personnel, resorting to such extreme military action undoubtedly reflected the United States' resolve to preserve democracy and protect Panama's integrity and the Canal's neutrality.¹² The scale and success of Operation Just Cause not only reaffirmed the United States' commitment to Panama but further proved the Canal's significance from a national security perspective.

The United States' ceremonial return of the Canal to Panama on December 31, 1999, ushered in a new century of prosperous cooperation between both countries.¹³ Namely, through the celebration of a Trade Promotion Agreement in 2007, which sought to eliminate tariffs on over 87% of U.S. goods, strengthen the protection and enforcement of intellectual property rights in Panama, provide increased access to Panama's \$20.6B services market, specifically in the financial, telecommunications, energy, and environmental sectors, as well as opportunities to participate in major infrastructure projects such as highways, airports, and the expansion of the Panama Canal.¹⁴ Accordingly, the United States has become the Canal's top user by origin and destination of cargo, holding a 73.7% share of all Canal transit in FY2022.¹⁵

It is also relevant to address the issue of the Canal's second most frequent user by the same metric, the PRC.¹⁶ Therefore, this paper will first discuss the evolution of Panama's relationship with the PRC before analyzing its possible implications on U.S.-Panama relations. Finally, the paper will share suggestions on how the United States can reinforce its historically unique relationship with Panama.

PANAMA AND THE PRC

Historically, Panama had been one of Taiwan's closest allies and one of the few countries with a bilateral Free Trade Agreement.¹⁷ However, on June 13, 2017, Panama suddenly broke

¹² Philips, *Operation Just Cause*.

¹³ United States Department of State, Office of the Spokesman, "Secretary of State Madeleine K. Albright Remarks Prior to Dinner with President Moscoso, Presidential Palace," *Archive, U.S. Department of State*, January 15, 2000, <https://1997-2001.state.gov/statements/2000/000115a.html>

¹⁴ Office of the United States Trade Representative, "U.S.-Panama Trade Promotion Agreement," U.S.-PAN, June 28, 2007, Pub. L. 112-43, 125 Stat. 49, Signed Oct. 21, 2011.

¹⁵ Panama Canal Authority, "Top 15 Countries by Origin and Destination of Cargo, Fiscal Year 2022," Statistics and Models Administration, Table No. 10, 2022.

¹⁶ *Ibid.*

¹⁷ "Free Trade Agreement between The Republic of China (Taiwan) and the Republic of Panama," TAIWAN-PAN, Foreign Trade Information System, August 21, 2003, http://www.sice.oas.org/trade/panrc/PANRC1_e.asp.

diplomatic ties with Taiwan and established them with the PRC.¹⁸ At the time, Panama's Foreign Minister justified the move by pointing to increased trade, investment, and tourism opportunities resulting from the newly formed ties with the PRC. However, this abrupt change came to the surprise of both Panamanians and the United States, as these negotiations had been intentionally kept secret.¹⁹ Since then, forty-seven bilateral agreements have been signed between Panama and the PRC.²⁰ Initially, these were received with broad skepticism from the Panamanian public, fueled by the lack of transparency with which they were signed.²¹ In addition to the lack of transparency, the hastiness with which Panama entered into these agreements—many of which directly respond to the strategic interests and agenda of the PRC—may put the country at a disadvantage. Panama's membership in the Belt and Road Initiative was among the obligations acquired under these agreements, making it the first Latin American member to join this infrastructure initiative.²²

In recent years, Chinese technology behemoth Huawei has significantly grown its footprint in Panama by relocating its main Latin America distribution center to the Colon Free Zone, going as far as to install its Safe City facial recognition technology to deter crime in the area.²³ Likewise, the state-owned Industrial and Commercial Bank of China Limited recently opened a branch in Panama, its fifth in Latin America.²⁴ The commercial relationship led to bilateral Free Trade Agreement (FTA) negotiations. Initially started on July 9, 2018, these have been on hold since April 26, 2019. Among the notable changes since then is the transition from the Nationalist Party of former President Juan Carlos Varela to the Revolutionary Democratic

¹⁸ "Joint Communiqué between the Republic of Panama and the People's Republic of China on the Establishment of Diplomatic Relations," PRC-PAN, June 13, 2017.

¹⁹ Evan Ellis, "The Evolution of Panama-PRC Relations since Recognition, and Their Strategic Implications for the U.S. and the Region," *Global Americans*, September 21, 2018.

²⁰ Ministry of Foreign Affairs, "Agreements Between the Republic of Panama and the People's Republic of China," September 14, 2017.

²¹ Alonso Illueca, "The Panama-PRC Relationship Has Lacked Transparency," *Expediente Público*, June 10, 2022.

²² "Memorandum of Understanding Between the Republic of Panama and The Government of the People's Republic of China on Cooperation Within the Framework of The Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative", PRC-PAN, November 17, 2017.; Evan Ellis, "China's advance in Panama: An update," *Global Americans*, April 14, 2021.

²³ Ministry of Commerce and Industries, "Huawei Highlights Panama as an Ideal Country to Invest In," September 19, 2022; House Committee on Foreign Affairs, "China Regional Snapshot: Mexico and Central America," Foreign Affairs Committee, October 25, 2022, <https://foreignaffairs.house.gov/mexico-and-central-america/>.

²⁴ Lourdes García Armuelles, "ICBC chooses Panama to Establish its Fifth Bank in Latin America," *La Estrella de Panama*, June 11, 2021.

Party of President Laurentino Cortizo in 2019.²⁵ Recently, President Cortizo voiced his desire to resume FTA negotiations with the PRC through an eerily timed statement at the Ninth Summit of the Americas in Los Angeles, California.²⁶

From 2015 to 2022, Panama received \$2.5 billion in investments from the PRC, the largest sum in the region.²⁷ In addition, the PRC's involvement in key infrastructure projects has grown significantly, specifically in the logistics, electricity, and construction sectors.²⁸ For instance, a \$1.4 billion contract to build a much-needed fourth bridge over the Panama Canal was awarded to a consortium composed of China Communications Construction Company and China Harbour Engineering Company.²⁹ At the time, this project was touted by President Juan Carlos Varela as “the fifth most important in the history of the country.”³⁰ Other notable developments include the \$900 million investment of Shanghai Gorgeous to build a 441 MW natural gas-fired electricity generation facility in the Margarita Island of Colon; the Amador Convention Center, financed by Chinese loans and built by China Construction Americas; and the renewal of a 25-year concession to Panama Ports Company, a subsidiary of Hong Kong-based Hutchison Ports Holdings, which will represent an estimated \$800 million for the Panamanian government during said term.³¹ From a trade standpoint, since establishing diplomatic relations, imports from the PRC to Panama have fallen, while exports have risen significantly.³²

²⁵ Lourdes García Armuelles, “Negotiating a Free Trade Agreement with China. What can Panama Win or Lose?” *La Estrella de Panama*, June 10, 2022.

²⁶ Laurentino Cortizo, “The Inclusion of Cuba, Venezuela and Nicaragua in the IX Summit of the Americas was Very Important,” *France 24*, June 10, 2022, video, 1:09, <https://www.france24.com/es/programas/la-entrevista/20220609-laurentino-cortizo-entrevista-panama-presidente>.

²⁷ “China Global Investment Tracker,” American Enterprise Institute, 2022, <https://www.aei.org/china-global-investment-tracker/>.

²⁸ Evan Ellis, “The Evolution of Panama-PRC relations since recognition, and their strategic implications for the U.S. and the region,” *Global Americans*, September 21, 2018, <https://theglobalamericans.org/2018/09/the-evolution-of-panama-prc-relations-since-recognition-and-their-strategic-implications-for-the-u-s-and-the-region/>.

²⁹ “Panama awards a \$1.4 bn Bridge Project to Chinese group,” *France 24*, December 15, 2018, <https://www.france24.com/en/20181205-panama-awards-14-bn-bridge-project-chinese-group>.

³⁰ Daniel F. Runde, “Key Decision Point Coming for the Panama Canal,” Center for Strategic & International Studies, May 21, 2021, <https://www.csis.org/analysis/key-decision-point-coming-panama-canal>.

³¹ Ibid; Michele Labrut, “Panama Renews 25-year concession to Hutchison’s Panama Ports,” *Seatrade Maritime News*, June 25, 2021, <https://www.seatrade-maritime.com/ports-logistics/panama-renews-25-year-concession-hutchisons-panama-ports>.

³² Runde, “Key Decision Point Coming for the Panama Canal.”; “Central American Trade Statistics System,” Central American Economic Integration Secretariat, accessed December 7, 2022, <http://www.sec.sieca.int/>.

Aside from the PRC's successful ventures, some major proposed projects have had some notable shortcomings. The postponement or outright cancellation of some of these can be attributed to the aforementioned change in presidential administrations in 2019. For instance, the construction of the Panama Colon Container Port (PCCP), conveniently located at the Caribbean entrance of the Panama Canal, was to be carried out by Landbridge Group. While private in nature, the entity has several tangible ties to the Chinese Communist Party and the People's Liberation Army, prompting concerns over their proximity to the Canal.³³ After an audit by the Panamanian Maritime Authority determined that Landbridge had breached the existing contract, the PCCP concession was revoked.³⁴ Perhaps the most significant of the projects, a \$4.1 billion high-speed rail train connecting the entire isthmus, was also shuttered, despite the feasibility study that calculated the cost never being made public.³⁵

Parallel to the PRC's economic commitments in Panama, there has been a visible uptick in their social, academic, and cultural presence. While there has always been a solid Panamanian Chinese contingent in the country, the establishment of the Confucius Institute in 2018 and the founding of the Center for Strategic Asian Studies of Panama suggest a more impactful cultural influence in the country.³⁶ The same applies from a political and ideological perspective, as high-ranking PRC officials have been given prominent platforms to promote the socialist modernization of China in Panama.³⁷

The PRC's failure to deliver on some of its more significant promises, coupled with the rise in cultural and social presence in Panama, has raised internal and external concerns about its possible implications on U.S.-Panama relations.³⁸ Specifically, there is fear that Panama has fallen victim to the PRC's soft power diplomacy, a strategy that "encompasses politics, culture,

³³ Christopher Cairns, "Chinese Investment Setbacks in Panama," *The Diplomat*, February 26, 2022, <https://thediplomat.com/2022/02/chinas-investment-setbacks-in-panama/>.

³⁴ "AMP Begins Cancellation Process of Panama Colon Container Ports due to Contractual Breaches," Panama Maritime Authority, June 28, 2021, <https://www.amp.gob.pa/noticias/notas-de-prensa/amp-inicia-proceso-de-cancelacion-por-incumplimiento-de-contrato-a-panama-colon-container-ports-pccp/>.

³⁵ Juan Alberto Cajar B., "Chinese Train, Not a Priority for Cortizo," *La Estrella de Panamá*, September 7, 2019; Rasheed Griffith and Sebastian Naranjo, "China in the Americas: Panama-China Relations," Podcast, Spotify, 2022.

³⁶ Illueca, "The Panama PRC Relationship Has Lacked Transparency."; Thais E. A. Camacho, "China, Expectations and Perceptions," *La Estrella De Panamá*, November 27, 2022.

³⁷ Wei Qiang, "The XXth National Congress of the Chinese Communist Party and Sino-Panamanian Relations," *La Estrella De Panamá*, November 1, 2022; Mileika Lasso, "China Presents Panama with Its Plan to Become a Modern Socialist Nation," *La Estrella De Panamá*, November 2, 2022.

³⁸ Illueca, "The Panama PRC Relationship Has Lacked Transparency."; Mirta Rodriguez, "The Rise of China's Influence in Latin America: What Are the Risks?" *La Estrella De Panamá*, October 24, 2022.

economy, cultural exchange; which is also promoted through the presence of the Chinese population in the world, which allows strengthening cultural and economic ties with greater acceptance and propagation, reinforced by the government's policy of spreading their culture.”³⁹ The former seems to be a fitting description of the rapid evolution of the early years of this relationship. Having laid out the issue at hand, it is now pertinent to discuss the possible ramifications for Panama's relations with its first and oldest ally, the United States.

IMPACT ON U.S.-PANAMA RELATIONS

Panama's unexpected severing of diplomatic ties with Taiwan did not go without consequences. Shortly thereafter, U.S. Ambassador John Feely was recalled from his post.⁴⁰ This response was not unique to Panama, as the same occurred in the Dominican Republic and El Salvador after recently establishing diplomatic relations with the PRC. The sudden wave of PRC diplomatic influence that swept the region in 2017 and 2018 even prompted legislative efforts in the United States to discourage Taiwan's current allies from siding with the PRC.⁴¹ Moreover, high-ranking U.S. officials have stressed the significance of China's growing presence in the Latin-American region to United States national security, leading them to heighten the “scrutiny of Chinese investment in America to protect our national security from Beijing's predatory actions.”⁴² As it pertains to Panama, the role of the Canal as a United States national security interest has been demonstrated herein and reiterated throughout history.⁴³

Military authorities have even gone as far as to raise concerns regarding the PRC's strategic investments in Panama, explicitly addressing the previously mentioned infrastructure projects such as the port operations and logistics parks.⁴⁴ The threat to national security stems

³⁹ Luis C. Herrera, Markelda Montenegro, and Virginia Torres-Lista, “New Diplomatic Relations between Panama and China: Geopolitical and Socioeconomic Implications,” *Working Paper, SENACYT-FID-18-034*, April, 2021.

⁴⁰ Reuters Staff, “U.S. Recalls Diplomats in El Salvador, Panama, Dominican Republic over Taiwan,” *Reuters*, September 7, 2018, <https://www.reuters.com/article/us-usa-china-taiwan/u-s-recalls-diplomats-in-el-salvador-panama-dominican-republic-over-taiwan-idUSKCN1LO00N>.

⁴¹ Reuters Staff, “U.S. Senators Introduce Bill to Help Taiwan Keep Its Allies,” *Reuters*, September 5, 2018, <https://www.reuters.com/world/us/us-senators-introduce-broad-taiwan-bill-boost-security-assistance-2022-06-16/>

⁴² Enrique D. Peters, “China's Recent Engagement In Latin America And The Caribbean: Current Conditions And Challenges,” *Carter Center*, August 29, 2019, https://www.cartercenter.org/resources/pdfs/news/peace_publications/china/china-engagement-latin-america-and-caribbean.pdf.

⁴³ Kennedy, “Panama Canal Policy and Relations With Panama.”

⁴⁴ *Army Gen. Laura Richardson, U.S. Southern Command, 2022 Posture Statement to Congress: Hearings Before the Senate Committee on Armed Services*, 117th Cong., 4 (March 8, 2022).

from the physical proximity of these projects to the Panama Canal, a global strategic chokepoint.⁴⁵ This is not a novel concern, as Chinese presence near the Canal, specifically through the previously mentioned Hong Kong-based Hutchison Port Holdings Limited (then Hutchinson Whampoa), has drawn congressional attention since 1998.⁴⁶ As was the case then, both countries continue to share an interest in the secure and efficient operation of the Canal while preserving its neutrality.⁴⁷

Instead of idling by while the PRC undermines its influence in a strategically important partner state such as Panama, the United States has taken concrete steps to retain its position as the country's closest ally. After nearly five years since John Feeley was recalled from his post, Panama finally has a U.S. Ambassador. The U.S. Senate confirmed Ambassador Mari Carmen Aponte on September 29, after being appointed by President Joe Biden on January 4, 2022.⁴⁸ The cornerstones of Ambassador Aponte's agenda are threefold. Her ambassadorship will focus on combating corruption, regulating migration, and attracting Foreign Direct Investment from the United States to Panama.⁴⁹ These three areas are crucial to Panama's prospects of sustainable development.

Regarding the first focus area, corruption is one of Panama's major deficiencies, as evidenced by its global rank of 96 out of 140 countries included in the World Justice Project's Rule of Law Index, a metric that has continually worsened over the last decade.⁵⁰ The lack of a coherent migration policy has also made that issue a priority for the current administration.⁵¹ The presence of U.S. Secretary of State Anthony Blinken at the Ministerial Migration Conference held in Panama on April 20, 2022, bodes well for U.S.-Panama collaboration on the matter.⁵² On the investment front, U.S. direct investment inflows and outflows have yet to return to pre-

⁴⁵ Ibid.

⁴⁶ *The Panama Canal and United States Interests: Hearing Before Senate Committee on Foreign Relations*, 105th Cong., 2nd sess., 105-672, (June 16, 1998).

⁴⁷ Ibid.

⁴⁸ U.S. Congress, Senate, *Confirmation of Mari Carmen Aponte by Voice Vote*, PNI56, 117th Cong., September 29, 2022, <https://www.congress.gov/nomination/117th-congress/1565>.

⁴⁹ Adelita Coriat, "Aponte Lists Priorities on Her Agenda," *La Estrella De Panamá*, November 23, 2022.

⁵⁰ "Rule of Law Index," World Justice Project, 2022.

⁵¹ Maria E. Capurro and David Papadopoulos, "Migration Through Panama Sinks 94% From Peak, Minister Says," *Bloomberg*, May 18, 2022, <https://www.bloomberg.com/news/articles/2022-05-18/migration-through-panama-plunges-94-from-peak-minister-says>.

⁵² "Panama Reaches Regional Consensus To Address Irregular Migration With Continental Coordination Mechanisms And Hopes To Standardize Migration Policies," Ministry of Foreign Affairs, April 20, 2022.

pandemic levels. The \$3.5 billion in outward direct investment, an 11.3% decrease from 2020, suggests there is room for improvement in the future.⁵³

Panama's inclusion in the American Partnership for Economic Prosperity (APEP) is a positive indicator of future collaboration with the United States. This initiative focuses on five pillars: (1) reinvigorating economic institutions, mobilizing investment, (2) making more resilient supply chains, (3) updating the basic bargain, (4) creating clean energy jobs and advancing biodiversity, and (5) ensuring sustainable and inclusive trade.⁵⁴ Evidently, the United States is aware of the ongoing issue and has demonstrated a renewed interest in reinforcing its influential role in the region, and Panama in particular.

The cohesion between the APEP's proposed framework and the priorities of Ambassador Aponte's agenda suggests that the United States is motivated to help solve the critical issues plaguing Panama.⁵⁵ Specifically, efforts to improve Panama's lack of transparency would prove especially useful in reinforcing the rule of law, as the country was ranked 105 out of 180 in the Transparency International Corruption Perceptions Index.⁵⁶ In addition, there has been a fruitful collaboration between both countries on the sustainability front, specifically regarding the U.S. Army Corps of Engineers' technical assistance to the Panama Canal Authority in a multi-billion dollar water management project.⁵⁷ The logical focal point to kick off this initiative should be the Panama Canal. Concrete strategies to promote U.S. investment and engagement in and around the Canal will represent significant economic contributions to Panama and help curtail any possible efforts by the PRC to amass influence in the area.⁵⁸

⁵³ "Panama – International Trade and Investment Country Facts," Bureau of Economic Analysis, 2022.

⁵⁴ "Fact Sheet: President Biden Announces the Americas Partnership for Economic Prosperity," White House Briefing Room, June 8, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/08/fact-sheet-president-biden-announces-the-americas-partnership-for-economic-prosperity/>.

⁵⁵ Daniel F. Runde, "Taking the Americas Partnership for Economic Prosperity as an 'Opening Bid' to Go Bigger," Center for Strategic & International Studies, June 29, 2022, <https://www.csis.org/analysis/taking-americas-partnership-economic-prosperity-opening-bid-go-bigger>.

⁵⁶ "Corruption Perceptions Index," Transparency International, 2021, <https://www.transparency.org/en/cpi/2021/index/pan>.

⁵⁷ U.S. Congress, Senate, Committee, *Army Gen. Laura Richardson*, 15.

⁵⁸ Runde, "Key Decision Point Coming for the Panama Canal."

CONCLUSION

The potential of the forenamed initiatives bodes well for the prospects of revitalizing the U.S.-Panama relationship. Specifically, trade relations may improve by promoting mutually recognized regulatory processes, thereby decreasing the number of bureaucratic impediments to trade. The same applies to access to capital and financing for infrastructure projects. A strategic policy of transitioning to more straightforward, smarter contracts will make U.S. financing more attractive to smaller countries such as Panama, which are unprepared to navigate the complex regulatory hurdles required to access International Monetary Fund financing. Similarly, the United States may capitalize on the recent lull in financing offered by the PRC in Latin America, which may be partly attributable to the COVID-19 pandemic but must not be mistaken as permanent.⁵⁹ Nonetheless, the steep drop in financing must not be mistaken for a decrease in Foreign Direct Investment to the Latin-American region, which quadrupled in 2020-2021 when compared to the previous five-year period.⁶⁰

From a national security perspective, increased funding for SOUTHCOMM will ensure greater collaboration with Panamanian authorities. Moreover, increased national security in the Latin American region and Panama specifically will make it a more attractive investment hub, indirectly contributing to its economic development. Recently, collaborations between U.S. and Panamanian authorities have yielded successful results in Foreign Military Financed exercises such as search and rescue operations, joint drug interdiction operations, and Panama Canal defense exercises.⁶¹ There is no shortage of proposals for U.S.-Panama cooperation that can prove mutually beneficial while simultaneously strengthening the relationship.

While the rapid evolution of the Panama-PRC relationship has undoubtedly affected U.S.-Panama relations, the effects have only been temporary. So far, the intricate and complex history of the U.S.-Panama bond has protected its place as Panama's top ally. As previously explained, this relationship has not gone without its periods of strain. However, these have been momentary and, once overcome, have resulted in more prosperous collaboration than before.

⁵⁹ Margaret Myers and Rebecca Ray, "What Role for China's Policy Banks in LAC?" *The Dialogue Leadership for the Americas, China-Latin America Report*, March 2022, <https://www.thedialogue.org/wp-content/uploads/2022/03/Chinas-policy-banks-final-mar22.pdf>

⁶⁰ Megha Mandavia, "China's Belt and Road Plan is Down, Not Out," *Wall Street Journal*, January 9, 2023, <https://www.wsj.com/articles/chinas-belt-and-road-plan-is-down-not-out-11673276687>.

⁶¹ U.S. Congress, Senate, Committee, *Army Gen. Laura Richardson*, 14, 18, 20, 21.

Similar to the tensions over control of the Canal and the brief hostilities that led to Operation Just Cause, Panama's flirtations with the PRC will hopefully serve as a wake-up call for the United States to pay closer attention to what goes on in its backyard. Likewise, Panama must realize where its true loyalties must lie. Being reminded of the importance of a healthy relationship, Panama and the United States are still on time to bolster their relations and neutralize any possible threat posed by the PRC's continually growing presence in Panama.

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A NEW MARSHALL PLAN: HOW WILL THE UNITED STATES HELP REBUILD UKRAINE?

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On the first anniversary of the Russian invasion of Ukraine, the United States is faced with the question of whether or not it will assist with the reconstruction of Ukraine at the conclusion of the war. This paper analyzes the damage inflicted by Russia to Ukraine, the United States' involvement with Ukraine since 2014, what the United States can do to help rebuild Ukraine once the conflict ends, and why it would benefit the United States to continue support after hostilities cease. This paper also presents a plan for how the Ukrainian reconstruction period should take place and sources of funding. The proposed plan within this paper will only be beneficial if Ukraine maintains its' sovereign status at the end of the war.

CASE ANALYSIS: RUSSIA AND UKRAINE

On February 24, 2022, Russian President Vladimir Putin announced a “special military operation” in Ukraine. The Ukrainian capital city of Kyiv was attacked. Ill prepared for an attack, Ukraine did not have the proper weapons, artillery, or soldiers to fight Russia. However, due to the will of the Ukrainian people to defend their homeland, Ukraine was able to mount a defense, and Russia retreated from Kyiv weeks later. This initial attack sparked an ongoing war between the two states, resulting in the displacement of a large portion of the Ukrainian population, thousands of fatalities on both sides, and a groundswell of donations and volunteers for Ukraine from the international community.

This is not the first time that Russia invaded Ukraine. In November 2013, then Ukrainian President Viktor Yanukovich refused to sign an association agreement with the European Union (hereinafter “EU”). In return, Russia invested \$15 billion in Ukraine’s government debt.¹ This agreement came as a shock to many. Three months prior, President Yanukovich sought an agreement to increase trade and cooperation with the EU.² Ukrainian citizens were outraged by their president’s decision, resulting in months of protests. By February 2014, President

¹ Elizabeth Piper, “Special Report: Why Ukraine Spurned the EU and Embraced Russia,” *Reuters*, December 19, 2013, <https://www.reuters.com/article/us-ukraine-russia-deal-special-report/special-report-why-ukraine-spurned-the-eu-and-embraced-russia-idUSBRE9BI0DZ20131219>.

² *Ibid.*

Yanukovich had fled Ukraine. Crimea, a peninsula in the south of Ukraine, and home to a majority of Russian descendants, became Russia's focal point. President Putin sent an army into Ukraine unannounced. On February 27th, gunmen seized government buildings in Crimea and took control of two Crimean airports. On March 18, 2014, the Treaty of Accession of the Republic of Crimea to Russia was signed by both Crimean and Russian officials. By using force, Russia violated the first principle of international law—states may not acquire territory or change borders by force.³ Russia's actions also blatantly violated their own international commitments, including Article 2 of the United Nations Charter.⁴ Because of this, many nations refused to recognize the annexation of Crimea.

UNITED STATES' INVOLVEMENT WITH UKRAINE

The United States is committed to supporting Ukraine. Between the 2014 Crimean attacks and January 25, 2023, the United States has provided approximately \$34 billion in security assistance to “help Ukraine preserve its territorial integrity, secure its borders, and improve interoperability with NATO.”⁵ Aside from financial contributions, the United States has provided Ukraine with non-lethal security assistance, such as “body armor, helmets, vehicles, night and thermal vision devices, heavy engineering equipment, advanced radios, patrol boats, rations, tents, counter-mortar radars, uniforms, medical kits, and other related items.”⁶ The United States also provided assistance in developing programs such as the Ukrainian Armed Forces (hereinafter “UAF”). This program helped train, equip, and advise Ukrainian war efforts. Following the Crimean crisis, in 2015, the U.S. Army and National Guard provided training and mentoring to the UAF. This training mission was suspended at the beginning of Russia's invasion in 2022. However, in April 2022, the U.S. Department of Defense announced it would resume training Ukrainian personnel. The training now takes place outside of Ukraine.⁷

³ Neil Bush, “Seventh Anniversary of Russia's Illegal Annexation of Crimea: UK Statement,” GOV.UK, March 4, 2021, <https://www.gov.uk/government/speeches/seven-years-of-illegal-occupation-of-crimea-by-the-russian-federation-uk-statement>.

⁴ United Nations, “Charter of the United Nations,” *Repertory of Practice of United Nations Organs* (Codification Division Publications, March 2021), <https://legal.un.org/repertory/art2.shtml>.

⁵ Congressional Research Service, “U.S. Security Assistance to Ukraine,” 2023, <https://crsreports.congress.gov/product/pdf/IF/IF12040>.

⁶ *Ibid.*

⁷ *Ibid.*, 5.

In 2022, the Biden administration and the U.S. Congress directed close to \$78 billion in assistance to Ukraine. This included \$3.93 billion directed towards humanitarian aid, \$26.5 billion towards financial aid, and \$46.9 billion towards military aid.⁸ Most of the financial aid has gone towards providing weapons, training, and intelligence for ongoing military operations against Russia. Nevertheless, the United States, as well as other states, have refrained from supplying Ukraine with certain advanced weaponry, out of fear of escalating the war. As of December 2022, the Biden administration has agreed to continue providing Ukraine with a “long list of weaponry.”⁹ However, this does not include advanced weaponry.

President Zelensky (hereinafter “Zelensky”) made headlines in December 2022, when he traveled to Washington D.C. to meet with President Biden, as well as to address Congress in a special joint session. This was Zelensky’s first trip outside Ukraine since the invasion began in February 2022. Zelensky thanked President Biden for his help and support since the beginning of the conflict but noted that Ukraine needed more weapons in order to fight Russia. In his bid for help with more weapons and financial assistance, in an address to Congress, Zelensky told lawmakers, “Your money is not charity, it is an investment in global security and democracy,” and that, “[O]ur two nations are allies in this battle.”¹⁰

THE UNITED STATES’ ROLE IN REBUILDING UKRAINE

The United States must lead in providing assistance in rebuilding Ukraine with a “New Marshall Plan.” In order to promote economic stability, social stability, and political stability and further democracy within the region, a plan similar to the Marshall Plan of 1948 must be created. While the US will provide economic and financial assistance, Ukraine will direct its own reconstruction and recovery efforts.

The destruction in Ukraine is colossal. In August 2022, it was reported that the war had already caused \$108 billion in damage to Ukraine’s infrastructure, with that number only

⁸ “Ukraine Support Tracker - A Database of Military, Financial and Humanitarian Aid to Ukraine,” Kiel Institute for the World Economy, 2023, <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>.

⁹ Johnathan Masters and Will Merrow, “How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts,” Council on Foreign Relations, December 16, 2022, <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>.

¹⁰ Volodymyr Zelensky, “Ukrainian President Zelensky Address to Joint Meeting of Congress,” *C-SPAN*, December 21, 2022, <https://www.c-span.org/video/?525000-1%2Fukrainian-president-zelensky-address-joint-meeting-congress>.

growing higher as the months went on.¹¹ Most recently, the Ukrainian energy infrastructure was the main target of the Russian military. Many Ukrainians faced a “life-threatening” winter during 2022 and 2023, without electricity, heat, or running water.¹² Hans Henri P. Kluge, regional director of the World Health Organization (hereinafter “WHO”), estimated that two to three million Ukrainians were expected to leave their homes in search of “warmth and safety” during the winter months.¹³ Community infrastructure, such as schools and hospitals, have also been a target of attack. As of January 31, 2023, the WHO reports 749 attacks on Ukrainian health care facilities, resulting in 101 deaths and 131 injuries.¹⁴ As for schools, over 2,600 schools have been damaged and over 400 have been destroyed across Ukraine since the war began in February 2022.¹⁵

Recently, President Putin has toyed with the idea of using “tactical nuclear bombs” in Ukraine.¹⁶ These weapons are much smaller than the nuclear bomb used on Hiroshima in 1945. In fact, they only hold 1,000th of the power of the Hiroshima bomb.¹⁷ Although they are smaller, these weapons are portable and powerful. The tactical nuclear bombs that Putin has are left over from the Cold War.¹⁸ Russia currently claims to have over 1,500 nuclear warheads in their arsenal.¹⁹ Instead of causing one major explosion in one place, Russia has the power to cause hundreds of explosions all over Ukraine, making reconstruction a much more dispersed issue.

Aside from infrastructure damage, the war has also harmed the Ukrainian population. As of November 2022, over 7.8 million Ukrainian refugees were reported to be living in safety in neighboring states. Poland has taken in over 1.2 million Ukrainian refugees, while other nearby

¹¹ Madeline Halpert, “War Has Caused \$108 Billion in Damage to Ukraine's Infrastructure, Study Finds,” *Forbes*, August 2, 2022, <https://www.forbes.com/sites/madelinehalpert/2022/08/02/war-has-caused-108-billion-in-damage-to-ukraines-infrastructure-study-finds/?sh=771bc58423e5>.

¹² David L. Stern, Emily Rauhala, and Michael Birnbaum, “Ukrainian Energy Systems on Brink of Collapse after Weeks of Russian Bombing,” *The Washington Post*, November 24, 2022, <https://www.washingtonpost.com/world/2022/11/23/ukraine-infrastructure-damage-electricity-water-russia/>.

¹³ *Ibid.*

¹⁴ World Health Organization, “Surveillance System for Attacks on Health Care (SSA),” *Surveillance System for Attacks on Health Care (SSA)*, 2023, <https://extranet.who.int/ssa/Index.aspx>.

¹⁵ Damian Rance, “War Has Hampered Education for 5.3 Million Children in Ukraine, Warns Unicef,” UNICEF, January 2023, <https://www.unicef.org/ukraine/en/press-releases/war-has-hampered-education>.

¹⁶ Sabrina Tavernise and Bill Broad, “What Are Tactical Nuclear Weapons, and What If Russia Uses Them?” *The New York Times*, October 7, 2022, <https://www.nytimes.com/2022/10/07/podcasts/the-daily/putin-russia-ukraine-tactical-nuclear-weapons.html?showTrans>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Mary Beth Nikitin, “Russia's Nuclear Weapons: Doctrine, Forces, and Modernization,” April 2022, <https://crsreports.congress.gov/product/pdf/R/R45861>.

states have offered protection to thousands of Ukrainians. Czechia is currently hosting the most refugees per capita in Europe, granting protection to almost half a million people.²⁰ Those who decided to stay in Ukraine do so at the risk of their lives. As of January 2023, close to 7,000 Ukrainian civilians have been killed, and over 11,000 had been injured.²¹

Finally, the war has profoundly impacted the Ukrainian economy. Ukraine lost one-third of its GDP in 2022.²² Shockingly, Ukrainian banks and businesses have remained open since the war began. This has allowed some businesses to remain open, and some citizens are able to work and earn an income, despite the 35% unemployment rate.²³ In addition, the government has been collecting taxes and fundraising to support Ukrainian troops.²⁴ Trade has also been impacted by the war. Agriculture products, specifically, are Ukraine's top export. In 2021, agriculture exports totaled \$27.8 billion, amounting for 41% of Ukraine's total exports.²⁵ Agriculture also provided employment for 14% of the population.²⁶ Ukraine is currently the world's seventh-largest exporter of corn and fifth-largest exporter of wheat. In 2021, Ukraine's corn exports were valued at \$5.9 billion, with corn exports valued at \$5.1 billion.²⁷ When Russia invaded Ukraine, all grain exports halted. This directly impacted not only the Ukrainian economy, but also the millions of people around the world who rely on this grain daily, creating a "catastrophic food crisis." With help from the United Nations (UN), Russia, Ukraine, and Turkey, a deal was agreed upon to open trade through the Black Sea Grain Initiative. This deal allowed Ukraine to resume shipments of grain to states all over the world. Since the agreement was signed on August 1, 2022, millions of metric tons of grain have been shipped to states most affected by the food

²⁰ "Ukraine War: What Are the Impacts on the World Today?," The International Rescue Committee, August 23, 2022, <https://www.rescue.org/article/ukraine-war-what-are-impacts-world-today>.

²¹ Office on the High Commissioner on Human Rights, "Ukraine: Civilian Casualty Update 3 January 2023," January 3, 2023, <https://www.ohchr.org/en/news/2023/01/ukraine-civilian-casualty-update-3-january-2023>.

²² "How Ukraine Is Managing a War Economy," The International Monetary Fund, December 22, 2022, <https://www.imf.org/en/News/Articles/2022/12/20/cf-how-ukraine-is-managing-a-war-economy>.

²³ Nathan Rott, Claire Harbage, and Kateryna Malofieieva, "Millions of Ukrainians Have Escaped the War. Many Still Can't Find Enough Work," *NPR*, November 2, 2022, <https://www.npr.org/2022/11/01/1132167234/russia-ukraine-war-unemployment-displaced-economy>.

²⁴ Julia Horowitz, "Ukraine's Economy Shrank by More than 30% in 2022 | CNN Business," *CNN*, January 5, 2023, <https://www.cnn.com/2023/01/05/business/ukraine-economy/index.html>.

²⁵ U.S. Department of Agriculture, "Ukraine Agricultural Production and Trade," *Ukraine Agricultural Production and Trade*, April 2022, <https://www.fas.usda.gov/sites/default/files/2022-04/Ukraine-Factsheet-April2022.pdf>.

²⁶ *Ibid.*

²⁷ *Ibid.*

crisis.²⁸ However, this deal is set to expire one hundred and twenty days after November 17, 2023. The deal can continue after this expiration if all parties agree.

Assuming Ukraine emerges from the conflict as a sovereign nation, the country will be in a situation very similar to post-WWII Europe. Ukraine, as well as the United States, needs to be prepared for the worst when it comes to the rehabilitation of the Ukraine. Plans for reconstruction must start now so the United States and Ukraine can create a foundation for what needs to be implemented once the conflict ends. If the two states are to wait a long period of time between the end of the conflict and the beginning of reconstruction, it would prolong the problems that need immediate assistance, making the reconstruction and recovery period even more difficult than it is presumed to be. Putting this plan aside until the end of the conflict could cause a lack of trust from the Ukrainian people towards their government—which Ukraine does not need in a time of vulnerability.

But why is this something that the U.S. Congress and President need to think about? How would this benefit them? Why are they providing so much money and support?

HOW WILL THIS BENEFIT THE US?

The United States has been a strong ally of Ukraine since the initial conflict in 2014. It is vital that the United States maintains a close relationship with Ukraine once it emerges from the conflict and begins the rebuilding process. In his speech at Harvard University in 1947, U.S. Secretary of State George Marshall said that “our policy” is directed not against any country or doctrine but “against hunger, poverty, desperation, and chaos.”²⁹ Just as Secretary Marshall recognized the need for U.S. involvement to ensure a stable future for a vital region, it is critical that the modern U.S. government serve as a standard bearer in the effort to rebuild a sustainable society in Ukraine. There are several reasons that the United States should continue with these principled objectives 75 years later. First, helping rebuild Ukraine would promote western generosity and democracy. Aiding Ukraine’s recovery is a way to show that western generosity

²⁸ United States Agency of International Development, “The Black Sea Grain Initiative,” *The Black Sea Grain Initiative*, November 10, 2022, https://www.usaid.gov/sites/default/files/2022-12/Black_Sea_Grain_Initiative_Fact_Sheet_November_2022.pdf.

²⁹ Colleen Walsh, “70 Years Ago, a Harvard Commencement Speech Outlined the Marshall Plan, and Calmed a Continent,” *Harvard Gazette*, December 10, 2018, <https://news.harvard.edu/gazette/story/2017/05/70-years-ago-a-harvard-commencement-speech-outlined-the-marshall-plan-and-calmed-a-continent/>.

is sincere, and that security and prosperity still go hand-in-hand, just as the United States set forth decades ago via the Marshall Plan. Promoting Western generosity also promotes the spread of democracy. In 1991, Ukraine began its transition from authoritarianism to democratization. States in this transitional period are susceptible to conflict due to their lack of stability within their government. Democracy is important, especially in Eastern Europe. At minimum, democracy helps promote peace, economic development, and deters states from aggression. Democratic peace theorizes that states are generally more peaceful than authoritarian governments. Furthermore, when Democracies fight wars against authoritarian states, almost never fight each other.³⁰ Promoting democracy in Ukraine promotes peace within the international community. If the United States helps to strengthen democracy within Ukraine, it would be promoting peace in an area of the world that is traditionally authoritarian. A flourishing post-conflict Ukraine would remind the world that Western generosity and the ideals of democracy are sincere, and not just about gaining and maintaining power.

Second, supporting Ukraine would strengthen the trust among the United States and its allies. Trust goes a long way. The United States has invested millions of dollars in this conflict, on Ukraine's behalf. It would be unconscionable if the United States withdrew support for Ukraine at the end of the conflict, just when democracy is victorious. This would cause a lack of trust within the international community. If the United States remains a primary support for Ukraine through the reconstruction period, the United States will rise in legitimacy among other states, giving opportunities that could benefit the United States on many fronts.³¹

Third, following a Ukrainian victory, the United States will have a much stronger ally in Eastern Europe, resulting in more national security benefits. This is not simply a war between Russia and Ukraine, it is Russia against Ukraine and the United States. The United States has had a long, complicated, history with Russia, with Russia most recently interfering in U.S. presidential elections, and threatening to do so again in the future. If Russia wins the war, it will lead to a direct security threat to the United States, as well as U.S. allies. If Ukraine wins, the United States will have a much stronger ally in Eastern Europe. Having allies within Eastern Europe will provide a better staging area for pursuing peace in Eastern Europe and keeping a close eye on Russian operatives.

³⁰ Jon C. Pevehouse and Joshua S. Goldstein, *International Relations* (Boston: Pearson Education, 2017).

³¹ Vitaliy Syzov, "Four Reasons Why Supporting Ukraine Is a Good Investment," *Wilson Center*, January 11, 2023, <https://www.wilsoncenter.org/blog-post/four-reasons-why-supporting-ukraine-good-investment>.

Fourth, U.S. assistance has positive, indirect military benefits. Although there are no U.S. troops involved in direct combat, the U.S. military is providing tactical training to Ukrainian forces.³² Congress has also allocated funds for the Ukrainian military, and allowed the transport of U.S. weapons to Ukraine for use in battle.³³ As a result, the American defense industry prospers, and the American economy prospers because weapons manufacturers increase the capacity to build weapons, thereby increasing the number of jobs available to U.S. citizens.³⁴

Finally, when Ukraine prevails with the help of the United States, this sends a message that an act of unprovoked aggression towards another state will have consequences. By sending this message, the United States could deter a possible future Chinese invasion of Taiwan or Iranian aggression in the Middle East.³⁵ This would not only benefit the United States, but the entire international community.

THE PLAN

The development and reconstruction of Ukraine will determine the country's future success. In his 2009 TEDTalk, Paul Collier, an economist from Oxford University, argued that the first decade after a conflict is the most important. 40% of all-post conflict situations have reverted to conflict within a decade.³⁶ This statistic is relevant to Ukraine, the 2014 conflict with Russia came eight years before the 2022 conflict. Critical objectives, such as building a foundation of security and economic development, need to be the focus during the first decade. Jobs, improvements in basic services, and clean government take precedence. If Ukraine is to flourish once the conflict is over, it must observe a plan like the following during its first decade of reconstruction:

1. Phase one—immediate plan of action

³² C. Todd Lopez, "U.S. Plans Combined Arms Training for Ukrainian Soldiers," *U.S. Department of Defense*, December 15, 2022, <https://www.defense.gov/News/News-Stories/Article/Article/3248075/us-plans-combined-arms-training-for-ukrainian-soldiers/>.

³³ *Ibid*, 5.

³⁴ C. Todd Lopez, "Department Moves Quick to Replenish Weapons Sent to Ukraine," *U.S. Department of Defense*, September 9, 2022, <https://www.defense.gov/News/News-Stories/Article/Article/3154210/department-moves-quick-to-replenish-weapons-sent-to-ukraine/>.

³⁵ Raphael S. Cohen and Gian Gentile, "Support to Ukraine Continues to Be for America First," *RAND Corporation*, February 15, 2023, <https://www.rand.org/blog/2023/02/support-to-ukraine-continues-to-be-for-america-first.html>.

³⁶ Paul Collier, "New Rules for Rebuilding a Broken Nation," *Paul Collier: New Rules for Rebuilding a Broken Nation / TED Talk*, June 2009, https://www.ted.com/talks/paul_collier_new_rules_for_rebuilding_a_broken_nation.

- 1.1. Financial donations go directly towards humanitarian needs. Food, water, shelter, and electricity should be the main priority at this time. Because of the harsh winter that Ukraine has endured in the midst of a war, it is possible that the population is unable to grow the crops needed for nutritional support. If Ukraine is able to grow its own crops for food, a smaller percentage of the funds should be allocated towards food. Temporary housing should be provided.
 - 1.1.1. The United States needs to draft an agreement that fosters accountability and transparency in Ukraine's government. Ukraine has a history of corruption. Most recently, President Zelensky has fired senior government officials amid a growing corruption scandal linked to war-time supplies. Because of this, an agreement among donors working on reconstruction and the Ukrainian government is necessary.³⁷
- 1.2. Ukraine needs to assess the damage and create an inventory of what needs to be reconstructed.
- 1.3. Promote the importance of mental health. Bring in psychologists to help with the traumatic effects that war can have on individuals.
 - 1.3.1. Non-profit organizations that would be beneficial to work alongside include Doctors with Borders, Partners in Health, and the International Rescue Committee.
- 1.4. The Ukrainian military needs to work alongside the U.S. military to assess the danger of possible landmines and other possible threats to the Ukrainian public, and then to address those dangers.
 - 1.4.1. There are hundreds of landmines strewn across Ukraine. Many scholars claim that the landmines pose a significant threat towards the reconstruction of infrastructure. In order for any real reconstruction to happen, these landmines must be found and dismantled.³⁸ It is estimated

³⁷ Ivana Kottasová, Kostan Nechyporenko, and Jo Shelley, "Zelensky Shakes up Ukrainian Government amid Growing Corruption Scandal," *CNN*, January 24, 2023, <https://www.cnn.com/2023/01/24/europe/ukraine-anti-corruption-zelensky-intl/index.html>.

³⁸ Mat Whatley, "The West's Consensus for a Ukraine Marshall Plan Is Wrong," *Politico*, November 30, 2022, <https://www.politico.eu/article/ukraine-war-wrong-marshall-plan-money-european-union/>.

- that the landmines could damage up to 160,000 kilometers if not taken into proper consideration.
- 1.4.2. Seamines within the Black Sea also pose a threat, especially in regard to trade.
 - 1.5. Create jobs as a way for Ukrainians to earn money.
 - 1.5.1. This can be done in a variety of different ways, but one option is to pay Ukrainians who help with construction during the rehabilitation process.
 - 1.5.2. Encourage the creation of agriculture, energy, metallurgy, chemicals, and manufacturing jobs. These are the major industries within Ukraine.³⁹
 - 1.5.3. All jobs being created need to be within Ukraine to help promote a prosperous Ukraine after the war.
 - 1.6. Start restoring critical infrastructure.
 - 1.6.1. Rebuild demolished roads and highways. Rebuild all destroyed oil pipelines. Modernize the electric grids and reinstall broadband internet that was destroyed by the Russians.⁴⁰ Rebuild and reopen schools.
 - 1.7. Make sure the export of grain is still in operation.
 - 1.7.1. Reassess the Black Sea Grain Initiative.
2. Phase two
- 2.1. Continue enforcing the actions mentioned in phase one.
 - 2.2. Continue working on critical infrastructure, while also expanding into rebuilding other forms of infrastructure (businesses, schools, government buildings, housing, etc.).
 - 2.2.1. Investing in infrastructure such as housing will be a key element to Ukraine's post-war success. After World War II, many states struggled with maintaining a stable population because people did not have

³⁹ Library of Congress, "Research Guides: Ukraine: Resources for Business and Economic Research: Business and Industry Resources," Business and Industry Resources - Ukraine: Resources for Business and Economic Research - Research Guides at Library of Congress, 2023, <https://guides.loc.gov/ukraine-economy/industry-resources>.

⁴⁰ Vera Bergengruen, "The Battle for Control over Ukraine's Internet," *Time*, October 18, 2022, <https://time.com/6222111/ukraine-internet-russia-reclaimed-territory/>.

anywhere to live. Refugees are more likely to return to Ukraine if they are promised stable housing.⁴¹

2.3. Ukraine needs to work in collaboration with the United States to assist with government/democracy building, as well as preventing authoritarian regime takeovers in the future.

2.3.1. In 2022, Ukraine was given the democracy score of 39/100 by Freedom House. This score represents how Ukraine ranks on a scale of global freedom. Ukraine lacked in issuing safeguards to stop corruption, operating with openness and transparency, an independent judiciary, and proper due process.⁴² Ukraine would benefit from the United States' assistance in democracy building.

3. Phase three—ten years and beyond

3.1. Create long-lasting relationships between Ukraine and other states/government organizations.

3.1.1. Ukraine joins the EU.

3.1.2. Ukraine joins NATO.⁴³

3.2. Transportation. Finalize and complete all projects related to transportation.

3.3. Create clean energy sources that do not require the use of fossil fuels. If the state is to experience a war of some sorts again in the future, having energy systems that does not rely on fossil fuels will be very beneficial.

3.4. Infrastructure. Finish creating an environment that is attractive to Ukrainians who left during the war.

3.5. Public Relations Fix. Change the narrative that follows Ukraine. Ukraine itself is not a troubled state. Emphasize the resilience shown by Ukrainians during the war.

3.6. Focus on rebuilding the national healthcare system.

3.7. Elections can finally take place for a new Ukrainian President.

⁴¹ Turbjorn Becker et al., "A Blueprint for the Reconstruction of Ukraine," *A Blueprint for the Reconstruction of Ukraine* (2022), <https://cepr.org/system/files/2022-06/BlueprintReconstructionUkraine.pdf>.

⁴² Freedom House, "Ukraine: Freedom in the World 2021 Country Report," *Ukraine*, 2022, <https://freedomhouse.org/country/ukraine/freedom-world/2021>.

⁴³ Lili Bayer, "The West's Last War-Time Taboo: Ukraine Joining NATO," *Politico*, December 6, 2022, <https://www.politico.eu/article/west-war-taboo-ukraine-join-nato/>.

- 3.7.1. In order for Ukraine to have a strong reconstruction period, changes in government leadership should not take place until once the state is settled. The United States needs to support a fair and free election once the reconstruction has plateaued.

FUNDING

The Ukrainian Prime Minister estimated in July 2022 that the rebuilding of Ukraine will cost roughly \$750 billion over the next ten years.⁴⁴ With that being a hefty price to pay, the United States will work alongside the International Monetary Fund (Hereinafter “IMF”), World Bank, and other states willing to help fund this plan. However, the United States will be the primary contributor. Because the United States has already been supplying financial aid, the United States needs to continue leading the way with support. The United States also has immense voting power within the IMF and World Bank, giving Ukraine a higher chance of receiving funds.

In the first phase of the plan, the United States, Ukraine, as well as organizations and states wishing to contribute, will come to an agreement on how to properly allocate the funds necessary for reconstruction. The states contributing must provide budgetary support, while also providing scrutiny towards Ukraine, so that their budget can be spent correctly. One of the biggest problems with the Marshall Plan 1948 was the corruption surrounding aid.

As previously mentioned, Ukraine ranked two out of seven in corruption by Freedom House in 2022.⁴⁵ Corruption remains a significant issue within the Ukrainian government. As long as those who abuse their positions of power remain unpunished and there is impunity for their actions, there will be no trust in the legal system, decreasing the chances of the civil society holding people accountable. In order to prevent possible corruption that could take place when the state is granted vast amounts of money for rebuilding, Ukraine needs to empower its citizens to hold people accountable for their actions. This can be done through investigative journalism, community accountability, and expanding the Anti-Corruption Bureau of Ukraine. This could

⁴⁴ Dan Bilefsky and Nick Cumming-Bruce, “Ukraine's Prime Minister Says Rebuilding Will Cost \$750 Billion.,” *The New York Times*, July 5, 2022, <https://www.nytimes.com/2022/07/05/world/europe/ukraines-prime-minister-says-rebuilding-will-cost-750-billion.html>.

⁴⁵ *Ibid*, 42.

potentially lead to violence. The United States, especially the U.S. Agency of International Development (USAID), needs to work alongside Ukraine to promote a witness protection program that would protect the Ukrainians who are reporting the truth.

Making Russia pay for the reconstruction of Ukraine sounds like the logical answer for funding. However, freezing Russian assets and directing the money towards reconstruction would cause many legal and financial problems. Although the EU has been eyeing two kinds of assets—nineteen billion euros worth of sanctioned oligarchs' money and 165 billion euros of frozen Russian reserves sitting in eurozone central banks—the legal ground of actually using this money is controversial.⁴⁶ In order to access these funds, European governments would have to ignore treaties that protect individuals and businesses from expropriation. Treaties are bound by international law, and states must uphold these treaties in good faith (the principle of *pacta sunt servanda*). If a state is to break a treaty, resulting in a breach, Article 60 of the Vienna Convention on Laws and Treaties states that “[the breach] entitles the [other state] to invoke the breach as a ground for terminating or suspending its operation in whole or in part.”⁴⁷ Technically speaking, if both states agree that the breach is necessary, resulting in a suspension of the treaty, access to the funds would be possible. However, this would jeopardize the individuals and businesses not involved but related to Russian assets within the states where the treaty was broken. Aside from the legal issues, few sanctioned oligarchs have already transferred assets to family-controlled trusts before the sanctions hit.⁴⁸ If the assets were used to fund the reconstruction of Ukraine, regardless of the legal problems that it would cause, the assets would amount to very little when they finally got in the hands of the Ukrainian government. The returns would amount to a little more than four billion euros a year, less than a month of the Ukrainian government’s current financing needs.⁴⁹ The problems that come with using Russian assets to help finance the reconstruction outweigh what Ukraine would receive in return.

⁴⁶ Pierre Briancon, “Breakingviews - EU's Frozen Russian Assets Plan Is Best Put on Ice,” *Reuters*, January 12, 2023, <https://www.reuters.com/breakingviews/eus-frozen-russian-assets-plan-is-best-put-ice-2023-01-12/>.

⁴⁷ United Nations, “Vienna Convention on the Law of Treaties (1969) - United Nations Office ...,” *Vienna Convention on the Law of Treaties (1969)*, accessed February 20, 2023, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

What the United States can do moving forward is raise tariffs on Russian imports. The United States is preparing to implement a 200% tariff on Russian-made aluminum.⁵⁰ No other states have implemented a tariff on aluminum. However, the EU has banned imports of Russian oil, gas, and fuels.⁵¹ If the United States decides to not ban Russian imports, it must increase tariffs on specific imports. A tariff imposed on oil would have a large impact on the Russian economy. Currently, the United States averages 199,000 barrels per day of crude oil and 473,000 barrels per day of other petroleum products from Russia.⁵² The United States needs to implement a tariff of \$50/barrel of oil on Russian imports. Edward Chow, Center for Strategic and International Studies, recommends \$50/barrel at current prices, directing the collected funds to Ukrainian humanitarian relief and reconstruction.⁵³ In this scenario, U.S. oil companies can still buy Russian oil, but a large portion of the price will be collected by the government in the form of the tariff.

Aside from raising tariffs, the U.S. Congress will need to appropriate a suitable amount of funds to be spent on the reconstruction. The United States should not be responsible for paying the entire sum of money necessary to rebuild Ukraine. However, if the United States leads the way for Ukraine's reconstruction, Congress should consider allocating a large sum of money. Non-governmental organizations and other states willing to contribute to this cause will be urged to do so as well. The International Monetary Fund and World Bank can vote to give loans to Ukraine. France and Germany have recently promised to increase defense spending by a third to help support Ukraine. Poland has increased its budget by 70% since Russia's initial invasion in 2014. Smaller states, such as Estonia, are willing to help contribute to the reconstruction. Estonia has donated an equivalent of 1% of GDP in military aid to Ukraine.⁵⁴ The United States will not be alone in helping provide financial assistance to Ukraine after the war.

⁵⁰ Jenny Leonard, "US Plans 200% Tariff on Russia Aluminum as Soon as This Week," *Bloomberg*, February 6, 2023, <https://www.bloomberg.com/news/articles/2023-02-06/us-plans-200-tariff-on-russian-aluminum-as-soon-as-this-week>.

⁵¹ *Ibid.*

⁵² AFPM Communications, "Oil and Petroleum Imports from Russia Explained - Updated*," *American Fuel & Petrochemical Manufacturers*, February 8, 2023, <https://www.afpm.org/newsroom/blog/oil-and-petroleum-imports-russia-explained-updated>.

⁵³ Edward C. Chow, "Smart Oil Sanctions against Russia," CSIS, June, 2022, <https://www.csis.org/analysis/smart-oil-sanctions-against-russia>.

⁵⁴ *Ibid.*, 35.

CONCLUSION

In order to preserve stability in Eastern Europe, the United States must play an active role in the reconstruction of Ukraine. Without U.S. involvement, there is a likelihood of future conflict. A reconstruction plan modeled on the 1947 Marshall Plan would focus on economics, infrastructure, modernization of the country, rebuilding society, and nation building. Funding will be provided through various channels including U.S. aid, reparations from Russia, and aid from other stakeholders.

It is important to note that the recommendations in this paper are premised on the notion that Ukraine will remain a sovereign nation once the war ends. Moreover, this paper is a modest attempt, with very limited space, to address what will be a massive endeavor. And, finally, these recommendations are a suggested foundation for a reconstruction program that will take many years of dedicated effort.

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NUCLEAR “FRIENDLY”? AMERICAN NUCLEAR SHARING PRACTICES AND ALLIANCE FORMATION

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In my analysis, I examine the extent to which the United States uses nuclear sharing to shape alliance behavior, specifically with regards to power competition. I hypothesize that the United States employs nuclear sharing agreements with other burgeoning powers to prevent them from developing nuclear capabilities, thus warding off any potential threats to the United States. In conducting my research, I apply process tracing across a set of comparative cases (i.e. the United Kingdom and France) while drawing on qualitative data. My research also seeks to understand the level of depth-cohesion within nuclear sharing agreements. It also investigates how durable nuclear sharing is in establishing alliances, or if they are easily abrogated. Based on my findings, it seems that the greater the depth-cohesion, the lower the level of political competition with allies. Furthermore, the more intense the sharing agreement in terms of depth-cohesion, the harder it is to relinquish and vice versa.

INTRODUCTION

In the wake of World War II, President Truman and the U.S. Congress mutually agreed to conceal information relating to nuclear technology from other states, as there were considerable risks from sharing. Perhaps, one of the most sinister was that nuclear weapons can be seized by external parties and used for clandestine activities. Another fear was that nuclear weapons could be reverse engineered and, by extension, reveal classified information. There were also grave concerns regarding the kind of personnel that would have access to nuclear weaponry and potential of being penetrated by outsiders.¹ There are other theoretical arguments behind nuclear non-sharing, one of the most popular being Scott Sagan’s “elusive deterrence model.” His work challenges the assumption that nuclear deterrence is an effective practice and entertains the possibility of exposure to nuclear weapons; therefore, limiting access to this kind of technology is critical in protecting the general population.² In contrast, the “intervention model” posits that nuclear sharing places stronger states in a dangerous position, as it may lose its leverage of weaker states.³ In the current body of literature, there is very little attention placed on

¹ Julian Schofield, *Strategic Nuclear Sharing* (London: Palgrave Macmillan, 2014), 71-72.

² Schofield, *Strategic Nuclear Sharing*, 7-8.

³ *Ibid*, 9-10.

understanding why states would choose to engage in nuclear sharing, and why the United States has become the forebearer of this practice in the 20th and 21st centuries. This research deviates from the conventional wisdom behind non-sharing and investigates the extent to which the United States uses nuclear sharing to shape alliance behavior.

METHODOLOGY

This analysis utilizes process-tracing across a set of comparative case studies, with most-similar cases. The dependent variable will be measuring the outcomes of alliance behavior, whereas the independent variable will evaluate the nuclear sharing practices between the United States and allies. For the purposes of this paper, “nuclear sharing” refers to any arrangement whereby states exchange information and/or technical assistance pertaining to nuclear technologies. I will be using process tracing to identify when my causal mechanism became activated; this will be the point at which the United States chooses to participate in nuclear sharing with allies. It is important to acknowledge that nuclear sharing practices are not easily marked. However, within the parameters of my research, I will be focusing on the establishment of nuclear sharing agreements through legal frameworks; this means that any covert sharing agreements do not constitute the activation of my causal mechanism. There are also different-levels of activation based on “depth-cohesion.” This can be understood as the level of integration in nuclear sharing practices, ranging from intelligence to technical assistance.

For my case-selection, I have developed an index to determine which countries met the criteria. Each criterion point is worth ± 1 . If a country satisfies a criterion point, then it receives +1, but if it does not then it receives a -1. I have only included cases where allies receive an aggregate score of +3 to minimize variation, thereby optimizing my results. Based on my index, I have decided to include the following cases: (i) United States/United Kingdom and (ii) United States/France.

Points	Criteria
± 1	<i>Allyship</i> Must have been an ally to the United States prior to nuclear sharing.
± 1	<i>Nuclear Sharing</i> Must participate in nuclear sharing with the United States but hasn't always historically-speaking.

± 1	<p><i>Nuclear Capabilities</i></p> <p>Must have some sort of nuclear capabilities to be considered a threat for political competition.</p>
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In predicting the outcomes of these different combinations, I have developed the following set of hypotheses: (i) if the United States provides technical assistance to its allies, then there is a lower level of competition, thereby strengthening the alliance; (ii) if the United States engages in information-sharing with allies, then there is a moderate amount of competition, leading to a weaker (but nonetheless intact) alliance; (iii) if the United States refuses to practice nuclear sharing with its ally, then it is creating a high level of competition and actively harming the alliance. Considering the cases that were selected for this study, I expect that most of the results will indicate that the United States maintains lower levels of competition through technical assistance. I have developed a matrix to visualize my hypotheses below:

		United States		
		Non-Existent	Information-Based	Technical-Based
Allies	Outcome	High Level: Poor Alliance	Medium Level: Weaker Alliance	Low Level: Stronger Alliance

These hypotheses rest on the assumption that states are motivated by political (mis)trust, thus subverting some of the foundational principles of international relations theory. To provide further background, many of the pioneers of IR believed that there was little role for trust in analyzing state interactions; rather, states acted in a way that would maximize their self-interest. Later, scholars put forward a “rationalist paradigm of trust” which postulated that states would cooperate so long as the other party was relatively likely to reciprocate; in other words, they

would act based on calculated risks. However, in an anarchical system, there are no enforceable mechanisms to ensure that others fulfill their promises, thus deeming the trust hypothesis futile.⁴

While these frameworks offer compelling arguments, they fail to consider the security dilemma. According to John Herz, the security dilemma refers to a situation whereby a state takes action to increase its security which, paradoxically, compromises it. Most apparently, it reveals that conflict ensues when there is mistrust. However, it also demonstrates the inverse: states which prioritize their safety, and are aware of the security dilemma, are more likely to cooperate.⁵ In the realm of nuclear policy, it then holds that states seeking to advance their security are more willing to cooperate with those that they may traditionally be skeptical of. Therefore, the stronger the cooperation, the lower the level of political competition.

CASE STUDY I: THE UNITED STATES & BRITAIN (1946-1960)

At the beginning of World War II, the British government created a committee called the Military Application of Uranium Detonation (MAUD) to determine the feasibility of developing an atomic bomb. In the summer of 1941, the members of MAUD reported that it was, in fact, possible to create an atomic bomb, but that the British government did not have the financial nor the physical resources to carry out the three-year long project. Since the United States “had the physical means and the leisure,” and was overall less consumed by the war effort than the UK, it was better equipped to manufacture an atomic weapon. President Roosevelt then established the Office of Scientific Research and Development (OSRD) which was intended to closely coordinate its operations with MAUD.⁶ Although British scientists were granted access to data, they were excluded from on-site operations and prevented from gaining technical information.⁷ Dr. Hugh Taylor, a British physicist working at Princeton who had been appointed to the OSRD, noted that “[much] time was lost and a great deal of misunderstanding, frustration, and confusion” was caused by this arrangement.⁸

⁴ Hiski Haukkala, “Understanding the trust–distrust nexus between the United States and Egypt,” in *Trust in International Relations*, ed. Carina van de Wetering, and Johanna Vuorelma, (United Kingdom: Routledge, 2018), 10-11.

⁵ Kydd, Andrew H., “Trust and the Security Dilemma,” in *Trust and Mistrust in International Relations*, (Princeton: Princeton University Press, 2018), 28-29.

⁶ Craig D. Andrews, “Cominco and the Manhattan Project,” *BC Studies: The British Columbian Quarterly* 11 (1971): 52.

⁷ Schofield, *Strategic Nuclear Sharing*, 73.

⁸ Andrews, “Cominco,” 53.

Shortly after the end of World War II, the United States government enacted the Atomic Energy McMahon Act (1946) which discontinued technical assistance to other states.⁹ As such, the majority of the McMahon Act focused on domestic mechanisms to maintain the production of nuclear technologies, namely the Atomic Energy Commission (AEC).¹⁰ The AEC was intended to facilitate research assistance within private and public institutions, but was significantly hampered by the presidency.¹¹ In fact:

Scientists feared that continued military regulation of research and development of atomic energy would signal to the world that the United States saw nuclear power as a weapon to be guarded instead of a new technology to be cooperatively cultivated for the advancement of humanity.¹²

Ostensibly, the McMahon Act was intended to decrease the risks of espionage leaks, but it was also, less overtly, designed to “maximize relative U.S. power.”¹³ However, without the support and resources of its allies, the McMahon Act placed its British allies in a precarious position, prompting them to establish their own nuclear program in 1947. The British’s fear of abandonment, in large part, stemmed from “standing alone against a Nazi-dominated continent” on the Western Front. With the advancement of the Soviet Union, the UK government was concerned that a similar situation would arise again; as such, developing nuclear capabilities became a policy priority for the British. Moreover, Britain’s ego had been slightly bruised by the war as it was the weakest of the Big Three, and saw the advent of a nuclear program as an opportunity to prove itself on the international stage.¹⁴

A year after the establishment of a British nuclear program, the United States relaxed the McMahon Act, allowing for information-sharing between Anglo-American intelligence officers.¹⁵ The main vehicle this was done through was the Anglo-American Combined Policy

⁹ Schofield, *Strategic Nuclear Sharing*, 70; U.S. Atomic Energy Commission, *Atomic Energy Act of 1946*, 6-8.

¹⁰ U.S. Atomic Energy Commission, *Atomic Energy Act of 1946*, 2-4.

¹¹ The president personally selected the chairman and appointed all other members of the AEC. He also had the right to direct the commission on matters relating to national security and gave his recommendations before submitting the AEC’s reports to Congress. He also had the right to use any other government agency, at his discretion, for the transfer of source materials.

¹² “The Atomic Energy Act of 1946,” The National WWII Museum, <https://www.nationalww2museum.org/war/articles/atomic-energy-act-1946>.

¹³ Schofield, *Strategic Nuclear Sharing*, 70.

¹⁴ This refers to the victorious powers of World War II, specifically the United States, Britain, and the Soviet Union; Malcolm Chalmers, “The United Kingdom: A Status Quo Nuclear Power?” *Small Nuclear Forces* (2011): 13-14.

¹⁵ Ibid.

Committee, which brought together British and American officials to work on the strategic coordination of nuclear policy without divulging technical knowledge.¹⁶ However, it was not until after the Soviet nuclear test in September 1949 that the committee began to share fruitful information.¹⁷

Despite having only had a nuclear program for five years, the British “became the third country to successfully test an atomic bomb,” making it a formidable power and considerable threat to the United States.¹⁸ In light of this, the Eisenhower administration drastically reoriented its approach towards military-nuclear relations with Britain, emphasizing closer cooperation. The U.S. Atomic Energy Act of 1954 was the first step towards achieving this as it permitted the government to share data on the effects of nuclear testing.¹⁹ It also allowed for the foreign distribution of special nuclear material (i.e. enriched nuclear material) and source material (i.e. non-enriched nuclear material) as well as byproduct material.²⁰ Notably, these provisions were made under the condition that they advanced “[the United States’] national interest and [...] provide for the common defense and security and to protect the health and safety of the public.”²¹ Thus, it becomes clear that nuclear sharing practices under the 1954 Atomic Energy Act were created with the intention of bolstering the states’ security architecture, not necessarily out of benevolence for its allies.

However, Eisenhower criticized the restrictive nature of the act since it prohibited the U.S. government from sharing designs of its weaponry and only gave the British exclusive privileges on test data.²² In addition, it restricted the U.S. government from, both indirectly and directly, transferring source materials for the development of nuclear weapons outside of the United States.²³ Though this is not explicitly stated, it can be inferred that these measures are intended to prevent the state’s research counterparts from enhancing their nuclear technologies. With that said, it is worth mentioning that the limitations on the Atomic Energy Act were largely

¹⁶ Michael Goodman, *Spying on the Nuclear Bear* (Stanford: Stanford University Press, 2007), 70.

¹⁷ Schofield, *Strategic Nuclear Sharing*, 73-74.

¹⁸ Malcolm Chalmers, "The United Kingdom: A Status Quo Nuclear Power?" *Small Nuclear Forces* (2011): 13.

¹⁹ It should be noted that this is an amended version of the McMahon Act; Jan Melissen, "The restoration of the nuclear alliance: Great Britain and atomic negotiations with the United States, 1957–58." *Contemporary British History* 6, no. 1 (1992): 72-106.

²⁰ “Atomic Energy Act of 1954,” House of Representatives, 931-933.

²¹ *Ibid*, 921.

²² Schofield, *Strategic Nuclear Sharing*, 74.

²³ “Atomic Energy Act of 1954,” 921.

born out of domestic opposition in the United States.²⁴ It is possible that the government was willing to collaborate more closely with Britain but was worried about public support. For example, the United States signed several bilateral agreements with Britain in 1955 which permitted the transfer of uranium for civil purposes and exchange of intelligence between military cadres; however, the British used this as an opportunity to improve their fusion warheads, making it difficult to pursue meaningful collaboration efforts.²⁵

Congress remained steadfast in its strategic nuclear policy until 1958, at which time it decided to amend the Atomic Energy Act (AEA). The updated version of the AEA allowed the United States to exchange privileged information with close allies, making it easier to coordinate the United States' nuclear program with its allies.²⁶ Schofield reveals that "in practical terms [the 1958 AEA] applied to the British but excluded France," meaning that it was selective in how it worked with its allies.²⁷ Later that year, Congress also established the US-UK Mutual Defence Agreement (MDA) which authorized the government "to exchange nuclear materials, technology and information," thus expanding the purview of the nuclear-military relations to include technical assistance and knowledge.²⁸ An important feature of the MDA was that it was set to expire in 2014, requiring both parties to cooperate with each other on the nuclear front for decades to come. As such, it can be argued that the greater the level of depth-cohesion in nuclear sharing agreements, the harder it is for the parties involved to change their policy.

There still begs the question as to why there was a decisive shift in American nuclear policy in 1958. To a large extent, this can be attributed to the Suez Canal Crisis. Shortly after Egyptian President Gamal Abdel Nasser nationalized the Suez Canal Company, Israel invaded to gain control over the territory. The United Kingdom and France were deeply worried about losing their foothold in the region and, as such, decided to deploy their forces in the region. The UK was unable to successfully mediate the situation and, as a result, lost its international prowess. Therefore, it became increasingly important for the MacMillian government to develop an independent nuclear program following its inauguration in 1957.²⁹ By June, the British had

²⁴ Jan Melissen, "The restoration of the nuclear alliance: Great Britain and atomic negotiations with the United States, 1957–58," *Contemporary British History* 6, no. 1 (1992): 72-106.

²⁵ Schofield, *Strategic Nuclear Sharing*, 74; Claire Mills, "UK-US Mutual Defence Agreement," House of Commons Library, October 20, 2014, 2-3.

²⁶ Ibid.

²⁷ Schofield, *Strategic Nuclear Sharing*, 74.

²⁸ Mills, "Mutual Defence Agreement."

²⁹ Melissen, "The restoration of the nuclear alliance," 73.

conducted several thermonuclear tests, signaling to the United States that its nuclear sharing agreements with Britain were not strong enough to prevent them from further developing their capabilities.³⁰ Another confounding factor was the Soviet launch of the Sputnik satellite. According to Melissen, it had “caused a profound psychological shock to American confidence in the technological superiority of the United States,” triggering the United States to create a serious change in its strategic nuclear policy.³¹

It seems that the United States was successful in curbing the ambitions of Britain’s national nuclear program through these bilateral agreements, as the UK government abandoned its project on developing the Blue Streak ballistic missile and instead bought Skybolt and Polaris missiles from the United States in 1960.³² The United States also capitalized on fears of nuclear mobilization to convince Macmillan and his advisors that alliance cohesion is necessary to control Soviet aggression. In doing so, the United States was able to ensure that Britain would not develop a special relationship with other allies in Europe, thereby protecting American interests.³³ It thus becomes apparent that the United States leveraged its anxieties about political adversaries to prevent its allies from following a similar path.

CASE STUDY II: THE UNITED STATES & FRANCE (1946-1996)

In the immediate aftermath of World War II, the United States had sent intelligence officers to investigate the French’s nuclear capabilities and found evidence that the government had been carrying out extensive research projects and, more concerningly, sharing nuclear technology with smaller states. Naturally, threatened by this prospect, the United States placed a “premium [to discourage] the French” from developing a “nuclear weapons program.”³⁴ This did little to stop the French, as the government quietly continued researching nuclear technologies while adopting a “minimum deterrence” approach, meaning that it would not develop or possess any more nuclear weapons than necessary to discourage its adversaries (but developing nuclear capabilities nonetheless). On February 13, 1960, France had finally achieved nuclear capabilities,

³⁰ Schofield, *Strategic Nuclear Sharing*, 74.

³¹ Melissen, “The restoration of the nuclear alliance,” 83.

³² *Ibid*, 72.

³³ *Ibid*, 97.

³⁴ Schofield, *Strategic Nuclear Sharing*, 78.

as it was able to carry out its first test.³⁵ However, it still was not as competitive as the United States or the British, considering that its only nuclear weapons in the 1960s were the Mirage IV bombers.³⁶ By the 1970s, the French developed a more robust nuclear program with the birth of the *Redoutable-class SSBN*, a class of submarine ballistic missiles.³⁷

During this time, the United States did not look favorably towards the French and resorted to spying on French nuclear facilities. In 1966, the United States flew one of its U-2 planes over a nuclear test site located in the South Pacific, Mururoa, without having been granted foreign basing rights.³⁸ Both the Kennedy and Johnson administrations were also very wary of sharing information with the French and deliberately “blocked the transfer of missile and guidance technology to France.” This was in line with the government’s actions in the early 1960s, as it denied France’s request to observe a nuclear test in Nevada.³⁹ While these measures were initially intended to prevent France from obtaining information to develop nuclear technologies, it clearly created a pattern which prompted the French to enhance its nuclear capabilities. It should be mentioned that the government’s reluctance to work with the French, at least in part, were due to concerns that France had an active Communist National Front.⁴⁰ Given the incompatible nature of American and French domestic politics, it seemed unwise to share information about nuclear weapons, especially with the presence of the Soviet Union in Eastern Europe.

With respect to proliferation, the main means of communication between the United States and France occurred vis-à-vis the North Atlantic Treaty Organization (NATO). Between 1961-1966, the United States equipped France “with 68 nuclear-capable F-100 aircraft,” and an agreement was signed promising dual-key warheads to these systems. There had been a few other mild attempts at improving nuclear sharing practices with France, as evidenced with the sale of the Polaris SLBM and the Multilateral Force (MLF) program; however, the United States

³⁵ Camille Grand, "France and Nuclear Stability at Low Numbers," *Small Nuclear Forces*, 29.

³⁶ Schofield, *Strategic Nuclear Sharing*, 78-79.

³⁷ Camille Grand, "France and Nuclear Stability at Low Numbers," *Small Nuclear Forces*, 29.

³⁸ Joseph Trevithick, “How the U.S. Air Force Spied on French Nuke Blasts,” Medium, last modified March 27, 2015, <https://medium.com/war-is-boring/how-the-u-s-air-force-snooped-on-french-nuclear-explosions-305e0b9c2c6f>; “Project Whale Tale: U-2 Flights Off Aircraft Carriers,” Central Intelligence Agency, accessed January 16, 2023, <https://www.cia.gov/stories/story/project-whale-tale-u-2-flights-off-aircraft-carriers-2/>; “U.S. Intelligence and the French Nuclear Weapons Program,” The National Security Archive, last modified March 21, 2006, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB184/index.htm>.

³⁹ Schofield, *Strategic Nuclear Sharing*, 79.

⁴⁰ Schofield, *Strategic Nuclear Sharing*, 79; Trevithick, “French Nuke Blasts.”

did not offer the same warhead technology to France as it did to Britain. The United States also tried to incorporate France into the Limited Test Ban Treaty, but de Gaulle declined the offer. Following the Strategic Arms Limitation Talks (SALT) in 1969, arms control became a greater focus for the United States and NATO was viewed as the main vehicle to realizing this; France, by extension, became an increasingly important player in nuclear policy. President Nixon was also of the conviction that the United States was beyond the point of inhibiting France's nuclear arsenal so it would be in the United States' strategic interest to work together.⁴¹ Additionally, previous concerns surrounding the National Front were acquiesced, as "France had [purged] its nuclear industry of communist sympathizers" by 1970, making it possible to work together.⁴²

Two years later, the United States reopened covert talks with the French to ensure that its counterparts' nuclear capabilities were up to par.⁴³ Interestingly, the United States did not disseminate information to the French outright, but assisted them through "negative guidance" by confirming whether their work was accurate. In part, this was due to the fact that the AEA prohibited technical assistance to other countries—and with the absence of other bilateral agreements like the British—the only way to bypass this was through subtle gestures. However, Schofield points out that the United States could have circumvented this by invoking Section 144.c of the AEA, which permits the president to authorize cooperation with other countries on pertinent issues relating to health and safety, however, the United States chose not to do so.⁴⁴ On some level, this indicates that there was still a level of distrust from the American side towards the French which prevented further depth-cohesion. This was reciprocated by the French as well, as they avoided working with the Americans on topics relating to rocketry, or intelligence more generally. The consequence of this was that France's nuclear program was less effective than it could have been, thereby weakening the states' attempts at arms control.

Under the Carter administration, nuclear collaboration became more prominent than ever before. This can be attributed to the many personalized visits between American and French high-level officials which fostered a special working relationship. Perhaps, the most impactful of these were David Aaron's trips to Paris, where he would meet with the Secretary-General of the

⁴¹ Schofield, *Strategic Nuclear Sharing*, 79-80.

⁴² *Ibid*, 80.

⁴³ This came after the United States established a cooperation agreement with the French in 1961.

⁴⁴ Schofield, *Strategic Nuclear Sharing*, 79-80; U.S. Congress, Atomic Energy Act of 1954, *U.S. Government Information*, 942.

Élysée Jacques Wahl—in his capacity as Carter’s Deputy National Security Advisor—to discuss the specifics of their joint-ventures.⁴⁵ However, there were concerns that the French were gaining more than the Americans, as the United States traded assistance in exchange for French responses on joint-projects. The logic underpinning this arrangement, though, was that the United States would be able to establish itself as a leading-nuclear power, while the French would benefit from these funds and strengthen its national image through a more “conventional posture.”⁴⁶

It arguably became more difficult for the United States to engage in nuclear sharing practices with the French after the second round of SALT. To further elaborate, there was a provision made during negotiations so that the signing parties could not circumvent the other’s operations “through any other State or States.” The Soviet side was particularly keen on defining what “circumvention” meant in the context of SALT, but the United States refused to comply. It is speculated that the Soviet Union was aware of its (informal) arrangement with France and was trying to use the agreement to proverbially “force its hand” and limit Franco-American cooperation. However, this did not have much bearing on the United States as it refused to define the term upon signing the agreement and informed its Soviet counterparts that its nuclear practices would remain unchanged. There is also the claim that this would place additional pressure on the Soviet Union and ensure that it follows the terms laid out in the agreement.⁴⁷

Finally in 1985, the United States amended its 1961 cooperation agreement to allow the lawful transfer of data. This specifically applied to information regarding warheads in relation to safety and security.⁴⁸ Another key aspect of the agreement was that there would be a two-way exchange, meaning that the French would not be as reliant on the Americans for information and that they would contribute more to the technical side of things.⁴⁹ This agreement is currently legally binding and Ullman notes that “[no] new legislation is needed.” Should the United States or France want to change the nature of their agreement, it can easily be amended to include whichever technologies the governments would like.⁵⁰

⁴⁵ Richard H. Ullman, “The covert French connection,” *Foreign Policy* 75 (1989): 18-19.

⁴⁶ Ullman, “French Connection,” 20.

⁴⁷ *Ibid*, 28-29.

⁴⁸ *Ibid*, 15-16.

⁴⁹ *Ibid*; Schofield, *Strategic Nuclear Sharing*, 81.

⁵⁰ Ullman, “French Connection,” 31.

DISCUSSION

In my analysis, I observed several interesting trends in nuclear-military relations between the United States and its allies. Firstly, the United States was distrustful of both allies developing nuclear capabilities and siphoned them off from intelligence-gathering in the aftermath of World War II. It was not until Britain and France became viable threats and had established their own national programs that the United States began to consider coordinating nuclear policy. Secondly, the United States was more open to engaging in nuclear sharing practices with Britain than it was with France due to discrepancies in policy priorities and incompatibilities between their political doctrines. Thirdly, the greater the level of depth-cohesion, the less the threat of political competition. With each amendment made to the AEA, the stronger relations between the United States and Britain became. The logical explanation behind this is that the two countries became more dependent on each other in realizing their political goals and, as such, developed closer ties. However, this also came with its drawbacks because they became more entrenched in each other's nuclear programs, as evidenced with the 2014-expiry date on the MDA. France, on the other hand, does not have as restrictive measures placed on its agreements with the United States because there are more walls around the information-sharing. Even when comparing the different bilateral agreements between the United States and France from 1946 onwards, it is clear that it was easier to amend legislation to become more inclusive of nuclear sharing, rather than the other way around. Furthermore, all of these agreements, by-and-large, are intended to last indefinitely, meaning that there is no set point at which the signatories can leave, unless there is a change in circumstances. Therefore, agreeing to participate in nuclear sharing is a strong commitment for the United States and its allies alike and requires a certain degree of shared political interests. Fourthly, the United States capitalized on fears of Soviet mobilization to circumvent its allies and encourage nuclear sharing practices. Therefore, the findings of my analysis confirm my hypotheses.

The implications of these findings are manifold. Most obviously, the United States can use information-sharing or technical assistance as a way to strengthen ties with allies and decrease political competition. This is not only limited to nuclear proliferation but can also apply to any area of policy. Furthermore, nuclear sharing practices can be used as a strategy to place pressure on adversaries. Another important lesson learned was that the government can manipulate political fears to prevent its allies from becoming too powerful. This research also

sheds light on a predicament in nuclear sharing agreements: that is, how difficult it is to relinquish these agreements. It seems that these strides can only be taken in an increasingly positive direction and that a reversal would be signaling that the United States, or either party, would like to weaken the alliance and increase the level of competition. As such, it is incredibly important to be careful in crafting these policies and be selective when furthering the level of depth-cohesion.

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DEFINING WEAPONS OF MASS DESTRUCTION IN THE NEW AGE OF CYBERWARFARE

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With the rise of technology and the development of what can be done with it over the last twenty years, cyberspace has become a very important topic in the national security world. Cybersecurity is skyrocketing in importance as cyber threats now pose major risks to national security. In the realm of foreign policy, it is important to ensure that specifically coded, offensive, large-scale cyberattacks and similar cyber weapons have a distinct, defined place within the United States' national security arsenal. This research highlights the necessity of modernizing the definition of weapons of mass destruction in a way that includes large-scale cyberattacks, while still being specific enough to prevent the inclusion of minor disturbances. This paper analyzes the term "weapons of mass destruction" from its coinage in 1937 through its formalization in the United Nations (UN) Declaration of 1948 and continuing controversy over its usage throughout the remainder of the twentieth century. The paper argues that the rise of new cyber technologies poses sufficient threats to national security to merit redefining weapons of mass destruction to include large-scale cyberattacks, thus allowing the United States to have the flexibility to respond to a rapidly changing global environment fueled by technological advances in the cyberspace realm.

The rapidly evolving technologies of the present day require a change in the definition of weapons of mass destruction to allow the United States to more successfully compete in cyberwarfare and cybersecurity. Cyberspace continually presents new developments that are not currently covered by security strategies. This technological dimension is a relatively new introduction to a whole realm of possibilities for the globe to take advantage of and utilize to the benefit of private and government actors, a method of connection and information gathering and sharing that allows a person a multitude of opportunities placed at their fingertips. The development and evolution of cyberspace caused the world to find itself in an ongoing information war, where information warfare (IW), defined as "offensive and defensive warfighting actions in or via the information environment to control or exploit it," is changing the norms of how wars are conducted.¹ In particular, cyberattacks have become a leading weapon used to wreak havoc and gather useful intelligence on adversaries. Each year the world becomes increasingly dependent on cyber to ensure safe and successful societies, economies,

¹ Daniel Kuehl, "Defining Information Power," Institute for National Strategic Studies, Strategic Forum Number 115 (June 1997), 3, <https://apps.dtic.mil/sti/citations/ADA394366>.

governments, and even environments.² The crucial role of cyberspace and the intangibility of its landscape make cyberattacks—more specifically, coded, offensive, large-scale cyberattacks and similar cyber weapons—a substantial national security issue.³ Cyberspace and cyberattacks have become key topics in recent strategic and national security publications, such as the 2022 Annual Threat Assessment, 2022 National Defense Strategy, and 2022 National Security Strategy, as policymakers and analysts work to understand and monitor this newer, rapidly changing form of warfare. The world is accustomed to physical wars, ones that are fought with troops and weapons of mass destruction (WMD). The most recent definition of WMDs was created by the UN in 1948 and the United States uses this definition in policymaking to this day:

“[WMD are]...atomic explosive weapons, radio active [sic] material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above.”⁴ While this definition alludes to the development of future weapons, its specificity does not currently allow large-scale cyberattacks to fall under the term. The creators of this definition understood the potential for new weapons to emerge in the future; however, the future they envisioned is now here and has brought with it weapons with the capability of achieving mass destruction, but through different means than the ones outlined in this definition.

Countries are still learning how to adapt, survive, and thrive in an ongoing war that is fought in a way that challenges historical notions of warfare tactics.⁵ Modern cyber capabilities require a fresh look at the 1948 definition of weapons of mass destruction and its relevance to the global environment today. The assumption is often made, by both the public and sometimes policymakers, that the term weapons of mass destruction “is an amorphous one, changing meaning according to the whims of the speaker,” meaning that it “has no accepted definition and that it means whatever the user wants it to mean.”⁶ This is an incorrect assumption, as WMDs have always been explicitly defined.⁷ This assumed variability of the term is largely due to a

² Shane Smith, “Cyber Threats and Weapons of Mass Destruction,” Center for the Study of Weapons of Mass Destruction, June, 2021.

³ Roger Molander, *Strategic Information Warfare: A New Face of War* (RAND 1996), Ch. 4.

⁴ W. Seth Carus, *Defining “Weapons of Mass Destruction,”* Center for the Study of Weapons of Mass Destruction National Defense University, January, 2012, 5.

⁵ “2018 National Defense Strategy of the United States of America,” Department of Defense, 2018.

⁶ Carus, *Defining “Weapons of Mass Destruction,”* 3.

⁷ *Ibid.*

“universal lack of familiarity with its history.”⁸ Understanding the evolution of twentieth century concepts of WMDs allows for a better understanding of how changes in weaponry require alterations in strategy. Evaluating the rise of weapons of mass destruction in the last two centuries as well as the rise of cyberspace allows for the necessary perspective to be maintained. An analysis of the nature of large-scale cyberattacks and the potential they carry, as well as an analysis of the benefits this would bring to foreign policy and national security, aids the decision to define them as weapons of mass destruction.

WEAPONS OF MASS DESTRUCTION IN THE TWENTIETH CENTURY

Weapons of mass destruction are not a new development and have been a tool in warfare for many decades. As time progresses, WMDs themselves have seen technological improvements and enhancements as science expanded and humans experienced breakthroughs in warfare developments. Furthermore, the definition of what constitutes a WMD has also seen many changes. The introduction of chemical warfare, as well as the machine gun, in World War I and the development of nuclear and radioactive weapons during World War II, required the international community to define the term weapons of mass destruction. The current definition of WMDs was developed in direct response to World War II and was used to spread awareness about the additional dangers brought about by the global conflict. Giving the new technologies a defined place in the national security realm led to improved tactics and strategies for combating enemies. In the twentieth century, the term WMD expanded more and more as new weapons were introduced. Conflicts such as the Cold War and specifically the Cuban Missile Crisis had a significant impact on the way the government and the public viewed WMDs. The rapid development of highly destructive weapons by the United States and the Soviet Union substantially increased the capability of each nation to cause widespread devastation to its adversaries. The comprehension of the palpable potential of WMDs raised a sense of “alarmism” towards weapons of mass destruction and generated public fear of those countries that were known to possess dangerous arms.⁹

⁸ Ibid, 6.

⁹ Francis J. Gavin, “Same As It Ever Was: Nuclear Alarmism, Proliferation, and the Cold War,” *International Security*, vol. 34, no. 3 (2010).

There have been many debates over the term weapons of mass destruction, resulting in a variety of international definitions. Deputy Director of the Center for the Study of Weapons of Mass Destruction of the National Defense University, Dr. W. Seth Carus, organized more than 50 found definitions of the term from throughout the twentieth century into 6 categories:

1. WMD as nuclear, biological, and chemical weapons (NBC)
2. WMD as chemical, biological, radiological, and nuclear weapons (CBRN)
3. WMD as CBRN and high explosive weapons (CBRNE)
4. WMD as CBRN weapons capable of causing mass destruction or mass casualties
5. WMD as weapons, including some CBRN weapons but not limited to CBRN, capable of causing mass destruction or mass casualties
6. WMD as weapons of mass effect capable of causing mass destruction or mass casualties or that cause mass disruption.¹⁰

The need to categorize numerous existing definitions of a single term points to the need for a specific international definition that can be adopted by many or all nations, even those who don't possess weapons of mass destruction, as there is still a possibility they may fall victim to the dangerous effects. This could result in more consistency between major WMD-possessing powers and smooth out some of the treaty/agreement-making processes.

One of the first known uses of the term weapons of mass destruction was by the Archbishop of Canterbury, William Cosmo Gordon Lang, in his December 1937 Christmas address on "Christian Responsibility."¹¹ This use of the term occurred prior to the development of atomic warfare, and while there is not a true understanding of what he was referring to in the use of the term, it is suggested that he was thinking of more than just aerial bombardment and explosive weapons.¹² Ten years later, the UN provided the first applicable definition. The 1948 definition is still used in policy agreements today; however, the Cold War era saw frequent debates over specific applications of the term. For example, when outlining the 1967 Outer Space Treaty concerning whether or not WMDs should be allowed in space, there were inconsistencies between the United States and the Soviet Union over what exact types of weapons should be included in the treaty because no common definition of weapons of mass

¹⁰ Carus, *Defining "Weapons of Mass Destruction,"* 6.

¹¹ *Ibid.*

¹² *Ibid.*, 7.

destruction existed. The lack of an agreed-upon definition caused the treaty to be highly controversial and resulted in countless debates over the term.¹³ In general, disputes over the definition of WMDs were most common in the developmental stages of a treaty, due to the fact that policymakers wanted the term to apply to certain situations but not others.¹⁴ President Richard Nixon also questioned the term weapons of mass destruction and argued over what weapons should be included in the definition.¹⁵ In particular, many of Nixon's discussions over weapons of mass destruction aimed to "clarify U.S. policies on the use of chemical and biological weapons," due to pressure to do so from members of Congress.¹⁶ The United States faced major international backlash from the use of defoliants such as Agent Orange during the Vietnam War, as they had unintended impacts on human lives, and this contributed to the need for a WMD policy review because, at the time, the United States had not considered Agent Orange as a WMD due to the sole intent for it to kill plant life.¹⁷ However, the term weapons of mass destruction became less specific when the Nixon administration was drafting a seabed treaty with the Soviet Union. The treaty loosely mentions the term weapons of mass destruction in order to limit the weapons that were prohibited from being used on the seabed, as the Nixon administration was concerned more specificity would "detract from U.S. national security," and "completely demilitarize" the seabed.¹⁸ The term often gets misused and/or misinterpreted to fit the context of a particular policy, treaty, or statement, thus reinforcing the need to define the term WMD.

History indicates that the term WMD has undergone periodic revision. Because weapons are rooted in technology, WMDs are not meant to remain unchanging. Their definition and scope need to evolve with technological advancements.¹⁹ Given the rapid pace of technological development and the increasing reach of cyber technologies, the use of a seventy-five-year-old definition of WMDs for all policy and most government purposes leaves the United States vulnerable and demands a re-evaluation of current policy.

¹³ Ibid, 14.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Jonathan B. Tucker and Erin R. Mahan, "President Nixon's Decision to Renounce the U.S. Offensive Biological Weapons Program," *Case Study Series, 1*, Center for the Study of Weapons of Mass Destruction (October 2009): 1.

¹⁷ Ibid, 2.

¹⁸ Carus, *Defining "Weapons of Mass Destruction,"* 16.

¹⁹ "2018 National Defense Strategy of the United States of America." Department of Defense, 2018.

WEAPONS OF MASS DESTRUCTION TODAY

In the present day, human beings still maintain the same motivation as they did in the past to create weapons that can cause mass destruction. What has changed is technology. The increased dependence on technology by civilians, businesses, and governments, the range of readily available technology that can be used to create a weapon, and the convenience and accessibility of that available technology have all changed with the passage of time. Technology fuels changes in warfare, and as warfare changes, the necessity of different weapons of mass destruction does too.²⁰ Many major powers are looking to lessen the global norm of direct, extreme violence and this causes shifts in the purpose of WMDs. For example, today, the use and/or existence of nuclear weapons, and the notion that they may be used, is more of a “just in case” basis. For decades the priority in WMD conversations and policies has often been largely nuclear, but with skyrocketing nuclear capabilities, most countries that possess nuclear weapons are too afraid of global devastation to use them, and they are instead reserved for intimidation tactics.²¹ The nonproliferation movement and specifically numerous anti-WMD treaties have also strongly decreased the desire and need for weapons of mass destruction. In the unique case of Russia’s ongoing conflict with Ukraine, Russia was confident that western countries would not interfere, due to Vladimir Putin’s threats of major retaliation if they did and was also confident that Ukraine would be unable to retaliate in a similar manner to which they were attacked.²² Because of this, Russia used artillery bombardment and other methods, with the goal of causing mass casualties, to debilitate Ukraine. If nuclear weaponry was to be used between two or more major world powers, the resulting destruction would permanently alter the world as we know it.²³

Critics of expanding the definition of weapons of mass destruction believe that WMDs are more of a disturbance than destructive; however, defense experts have shown that large-scale cyberattacks fit the criteria of being a weapon of mass destruction and are just missing the necessary classification that allows them to be considered WMDs. In his book *Countering WMD*,

²⁰ Molander, *Strategic Information Warfare: A New Face of War*, Ch. 3.

²¹ Joan Hoff, “A Revisionist View of Nixon’s Foreign Policy,” *Presidential Studies Quarterly* 26, no. 1 (1996).

²² Richard Weitz, “WMD Issues: Russia’s War in Ukraine,” International Center for Defense and Security, series no. 8 (July 2022).

²³ *Ibid.*

Air War College Professor and WMD expert Al Mauroni discusses the three basic conditions required for a weapons system to meet to be defined as a WMD. The system must be fundamentally designed to cause major destruction; the weapon must have the “capability to cause mass casualties;” and it should be “defined by internationally accepted conventions as a ‘special’ category of weapons systems.”²⁴ Mauroni goes on to explain that large-scale cyberattacks meet the first two conditions and only require global consensus and acceptance to be applicable as a weapon of mass destruction.²⁵

Mass destruction can be simply defined as widespread devastation, and especially in today’s global society, violence is not required in causing detrimental effects in the physical domain.²⁶ In a world where technology has become the backbone of the economy, infrastructure, and individual lives, technology is so intertwined with all other aspects of life that an attack on technology is an attack on all elements of society. Large-scale cyberattacks have the potential and the goal of causing a domino effect that very well could eventually lead to physical harm and/or deprivation. There exist large-scale cyberattacks that can achieve both physical destruction and technological destruction. However, most cyberattacks are not violent in nature, in the sense that the goal is not to bring considerable harm or even death to large numbers of people. While this is a potential result, especially with the ‘domino effect’ attacks, it is most often not the direct intent of the attacker. With that being said, the emphasis on violence in the current definition of WMDs may limit U.S. efforts to respond to current threats. The strict physicality of war throughout history often meant that direct, physical harm was the only way to cause mass destruction, which created a mold for WMDs to fit into. However, that mold can and should be broken, as large-scale cyberattacks can still be extremely harmful weapons.

Certain worst-case cyberattack scenarios that cause physical damage could include “trigger[ing] a nuclear plant meltdown; open[ing] a dam above a populated area, causing destruction; or disabl[ing] air traffic control services, resulting in airplane crashes...or computer viruses designed to ‘sabotage missile launches.’”²⁷ These examples and their potential outcomes allow large-scale cyberattacks to fall within the general context of the current definition of

²⁴ Benjamin B. Hatch, “Defining a Class of Cyber Weapons as WMD: An Examination of the Merits,” *Journal of Strategic Security*, 11, no. 1 (Spring 2018), 47.

²⁵ Ibid.

²⁶ Ibid, 45.

²⁷ Ibid.

weapons of mass destruction, i.e., they are comparable in destructive capacity to the already specified WMDs. However, the variability of cyberattacks also introduces internal, systemic damage as a potential effect, and this requires a redefinition to be able to fit large-scale cyberattacks and cyber weapons into the 1948 concept of WMDs. In this case, the damage could look like deterioration to infrastructure; for example, “large scale malware infections, affecting many different organizations, or incidents with cascading effects, such as a disruption at an electricity supplier, that causes problems for a telecom service provider that in turn causes problems for a financial service.”²⁸ Furthermore, recently the “first confirmed fatality due to a cyberattack” occurred in 2020 when a German hospital was hit by a major ransomware attack.²⁹ The results and timeline of large-scale cyberattacks are the key factors that set them apart from the currently defined weapons of mass destruction.³⁰ Even after major physical, destructive acts and terrorist violence, such as the events of September 11th, 2001, there is proof the United States can still remain the world’s number one power because it has the infrastructure to rebuild and improve to better protect against future attacks. While this is also the case for smaller-scale cyberattacks, an extensive, large-scale attack targeting the nation’s infrastructure has the potential to tear down the system that U.S. society depends on for its way of life, while at the same time destroying any rebuilding capabilities. These attacks more often than not remain unnoticed for days, weeks, or months, while WMDs like nuclear weapons inflict immediate and visible damage. Hackers could get access to top-secret information that could then lead to enemy countries, or non-nation-state actors, inflicting an attack on an area of U.S. systems they have found to contain weak points. Information has become a priority and has almost become its own form of currency in today’s world.³¹

Cyberspace

Destruction is no longer solely physical. Cyberspace allows foreign warfare to be conducted within the borders of an attacker's home country; the disadvantage of this is that the U.S. homeland is no longer a sanctuary to Americans and is at risk of attack.³² The range of

²⁸ Frank Fransen, Andre Smulders, and Richard Kerkdijk, "Cyber Security Information Exchange to Gain Insight Into the Effects of Cyber Threats and Incidents," *Elektrotech, Informationstechnik* 132, no. 2 (2015).

²⁹ Smith, “Cyber Threats and Weapons of Mass Destruction.”

³⁰ Molander, *Strategic Information Warfare*, Ch. 4.

³¹ Molander, *Strategic Information Warfare*, Ch. 1.

³² Molander, *Strategic Information Warfare*, Ch. 4.

cyberspace expands the scope of where attacks can originate from, and a wider range of actors is capable of committing cyber crimes because the price to develop the “high-performance IW capabilities” that make cybercrime possible is low.³³ Because of this, there is both private and public involvement in cyberspace and cyber warfare.³⁴ In the twentieth century, in dealing with the regulation of weapons of mass destruction, it was not as much of a mystery to determine which countries or terrorist groups held weapons or were building them. Additionally, WMDs were more generally held under government control. Cyber is more complex than that. There is no such thing as reconnaissance in cyberspace. The high levels of traffic make it easier for actors to disguise cyberattacks and stay hidden long enough to cause catastrophic damage or collect vital information.³⁵ Anonymity is an inviting characteristic, and it may encourage the prioritization of cyber weapons as an adversary’s central means for inflicting destruction on the United States.³⁶

While there is more evidence of cyberattacks coming from non-nation-state actors in recent years, this does not mean that private contenders should be the sole focus of cybersecurity. The 2022 Annual Threat Assessment included a subsection on cyber for its discussion of each of the US’s main adversaries, and the findings of the Intelligence Community showed that China is the “broadest, most active, and persistent cyber espionage threat to U.S. Government,” going on to say that China is “almost certainly capable of launching cyber attacks that would disrupt critical infrastructure services within the United States, including against oil and gas pipelines and rail systems.”³⁷ These proven capabilities require extreme prevention in order to uphold U.S. national security. The threat assessment then identified Russia as the United States’ other top cyber threat, stating that “Russia views cyber disruptions as a foreign policy lever to shape other countries’ decisions, as well as a deterrence and military tool.”³⁸ However, the United States also takes part in the weaponization of cyberspace. According to Benjamin Hatch, previous government officials, such as past Secretary of Defense Ashton Carter, have confirmed “that the United States [is] using cyber as a weapon of war.” Both Carter and open-source information

³³ Ibid.

³⁴ “2018 National Defense Strategy of the United States of America,” Department of Defense, 2018.

³⁵ Molander, *Strategic Information Warfare*, Ch. 4.

³⁶ Hatch, “Defining a Class of Cyber Weapons as WMD,” 50.

³⁷ “Annual Threat Assessment of the U.S. Intelligence Community,” Office of the Director of National Intelligence, February, 2022, 8.

³⁸ “Annual Threat Assessment,” 12.

have previously suggested “that the United States may have cyber weapons with the ability to cause destructive effects in the physical domain.”³⁹ Furthermore, Carter defined a large-scale cyberattack as “something that threatens significant loss of life, destruction of property, or lasting economic damage.”⁴⁰ The United States has acknowledged the reality and credibility of cyber-attacks. The 2017 National Security Strategy discussed the ability of cyberattacks to “harm large numbers of people and institutions.”⁴¹ All major powers of the globe are utilizing cyberspace to expand their offensive capabilities and because of this, cyberattacks need to be taken seriously enough to be identified as WMDs, as this will influence more preventative strategies against the possible attacks of China and Russia and strengthen governmental support behind U.S. cyber efforts.

Large-scale cyberattacks differ from generic WMDs because they have the ability to occur anywhere, at any time, for however long, and it’s very difficult to initially know who is behind the attack. They are extremely difficult to predict, thus it is even more difficult to set exact defenses in place. Artificially intelligent, state-of-the-art malware that uses specific stealth techniques to avoid detection currently exists.⁴² These weapons have the ability to tear down U.S. infrastructure, government, and/or economy. Cyberattacks have skyrocketed in the past three years due to new widespread reliance on the Internet and cyberspace in order to continue life in a pandemic. Any increase in dependence on Information and Communications Technology (ICT) worsens the potential impact of an attack.⁴³ So while the Information War introduced the concept of cyberattacks, the pandemic prioritized them.⁴⁴ In its discussion of cyber weapons, the Center for the Study of Weapons of Mass Destruction highlights that “the landscape of cyber threats is rapidly evolving,” and that “new vulnerabilities emerge at a tremendous pace and these vulnerabilities are increasingly qualified as severe,” with the fast-paced evolution of cyberspace.⁴⁵ Furthermore, cyberattacks are becoming increasingly sophisticated, and are exponentially growing and improving as time passes. Large-scale attacks have become more persistent and “involve elaborate combinations of methods” used to achieve

³⁹ Hatch, “Defining a Class of Cyber Weapons as WMD,” 45.

⁴⁰ *Ibid.*

⁴¹ “National Security Strategy of the United States of America,” (December 2017): 31.

⁴² Smith, “Cyber Threats and Weapons of Mass Destruction.”

⁴³ *Ibid.*

⁴⁴ “Annual Threat Assessment,” 4.

⁴⁵ Smith, “Cyber Threats and Weapons of Mass Destruction.”

extensive destruction.⁴⁶ Because of these dynamics in present-day threats, typical preventative measures used by organizations cannot be passively relied on and will need to be updated.⁴⁷

Social Media

The continuous rise of social media plays a role in the weaponization of cyberspace. Many different social media platforms are being weaponized by both foreign and domestic actors in order to achieve goals such as identity theft, privacy invasion, and the spread of misinformation. Adversaries of the United States have taken to the “information battlefield” to attempt to stunt the rapid growth of the United States as a nation and prevent “Western dominance.”⁴⁸ Both Russia and China have made extensive advances in the manipulation of information through social media. The 2022 Threat Assessment stated that China in particular is currently “reviewing publicly disclosed Russian influence operations and gaining experience from operations that use social media and other technologies against societies in Asia and elsewhere.”⁴⁹ Furthermore, Russia has been employing “tactics of influence and coercion” since long before the invention of social media.⁵⁰ Now, social media has given Russia more opportunities to continue to use these tactics, as it “allows for nearly ubiquitous access to its targets and [has] a prolific capability for controlling a narrative.”⁵¹ The United States’ information-weaponizing adversaries view its defining qualities, such as diversity, pluralism, and democracy, as potential weaknesses to exploit in the information realm.

Covert operations conducted on the Internet by foreign adversaries are changing the way the United States society consumes information and will continue to generate unrest among the American people. While these actions may not equal a cyberattack, they do act as another example of the dangers of cyberspace and the need for better protection of the United States people. They also highlight the way that the Information War has caused information itself to be almost as valuable as currency, while at the same time being as dangerous as a weapon, particularly in information’s ability to be manipulated. The American government must set the

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Sarah Jacobs Gamberini, “Social Media Weaponization: The Biohazard of Russian Disinformation Campaigns,” *Joint Force Quarterly* 99, (November 2020): 4.

⁴⁹ “Annual Threat Assessment,” 9.

⁵⁰ Gamberini, “Social Media Weaponization,” 5.

⁵¹ Ibid.

example of prioritizing the identifying and discrediting of disinformation so that the public may follow suit and become less exposed to foreign cyber weapons.

NATIONAL SECURITY AND FOREIGN POLICY

There is benefit in establishing a global agreement of the definition on weapons of mass destruction. This is also applicable in the case of cyber. No consensus currently exists on the regulation of cyber weapons.⁵² With the rise of cyberspace as its own warfare battleground, it is in the United States' best interest to partner with the international community to define acceptable behaviors for cyber activity, and in doing this, evaluate the role of offensive, destructive cyber weapons in the future global environment. The redefining of WMD would assist in "clarify[ing] 'norms' and communicat[ing] 'redlines' to potential adversaries," and in determining how to develop policies to guide technological advancements and cybersecurity initiatives.⁵³ In defining cyber weapons in global affairs, cyber weapons and attacks should be a special category of weapons that are unique from other, more general tools of warfare.⁵⁴ The true danger of large-scale cyberattacks is more operational, rather than strategic. Because of this, as the 2018 National Defense Strategy suggests, it is important for the United States to become "strategically predictable, but operationally unpredictable" in cyberspace, in order to achieve the capabilities necessary to disarm an adversary, rather than just inconvenience them.⁵⁵

The entire world is becoming increasingly codependent on cyber and will continue to do so in the future.⁵⁶ It is urgent that the global community redefine weapons of mass destruction in order to include large-scale cyberattacks because it has been proven likely that as cyberattacks develop and evolve just like any other weapon of mass destruction, possibly even faster considering the rapid development of cyberspace capabilities, they will continue to become more violence-prone, as foreign actors test the limits of the United States to determine where the line is that decides what kind of attacks warrant a specific response.⁵⁷ The United States must define large-scale cyberattacks before this testing of limits occurs, so that foreign policies may be

⁵² Smith, "Cyber Threats and Weapons of Mass Destruction."

⁵³ Hatch, "Defining a Class of Cyber Weapons as WMD," 55.

⁵⁴ Ibid.

⁵⁵ "2018 National Defense Strategy of the United States of America."

⁵⁶ Ibid.

⁵⁷ Hatch, "Defining a Class of Cyber Weapons as WMD," 51.

enacted to help prevent a turn towards violence, and instead start decreasing the ability of foreign actors to conduct cyberattacks on the United States in both the public and private sectors by properly preparing the government, infrastructure, economy, and society ahead of time. This would assist in determining a “metric that specifies the threshold of destructive effects that would warrant a response,” which would lead to more consistent and cohesive efforts in cyberspace as currently there are no such details in U.S. policy.⁵⁸ Strictly defining large-scale cyberattacks as WMD would also more specifically set guidelines on how to address cyberattacks in foreign policy and how to categorize cyberspace into the bureaucracy. While there are a handful of organizations and agencies that deal with cyberspace, such as the Cybersecurity and Infrastructure Security Agency (CISA), it would be beneficial to make cybersecurity a more integral part of the national security realm. Overall, defining large-scale cyberattacks as WMDs would result in a greater deterrence initiative in the United States and the international realm as cyber weapons would become a focus in the global nonproliferation movement because the priority is to deter the unconstrained use of weapons that can result in mass destruction, no matter the means of employing them.⁵⁹

CONCLUSION

If weapons can be defined as something used to injure, defeat, or destroy, and mass destruction can be defined as widespread devastation, the current definition of WMD needs to be updated in a way that includes cyberattacks that fulfill those two things even without the use of violence. The United States needs to take the lead in forging a global consensus for preserving the existing definition of WMD in order to protect its own and the broader global population. The current definition used to define and identify weapons of mass destruction does not allow room for ebb and flow, and growth in societies, cultures, and governments, but instead it is so specific that any evolution in what is considered mass destruction will not take precedence in national security policies. It is vital that cyber rises to the forefront of national security efforts because, until it does, United States national security will be more at risk and foreign policy will be inconsistent with global current events. To successfully integrate cyber fully into the scope of

⁵⁸ Ibid.

⁵⁹ Ibid.

national security and foreign policy the United States must deliberately clarify the dated definition of weapons of mass destruction to include large-scale cyberattacks. The definition should exclude minor attacks, including ones aimed at individuals, and ones resulting in little damage, and highlight those capable of achieving high levels of impact. There is importance in avoiding the complete dropping of the definition of WMDs and starting anew, as there are multiple valuable treaties and policies that were created using the 1948 definition. Instead, the definition needs to be carefully updated in a way that includes the weapons highlighted in the original definition, while also incorporating large-scale cyberattacks and their effects.

Redefining weapons of mass destruction and including large-scale cyberattacks and cyber weapons in that definition is an opportunity to create better protection for U.S. people and interests. The United States remains unsure about what cyberattacks are, on a specific level, thus causing the United States to have a weaker defense against them. Adversaries, such as Russia and China, are progressing and validating their viewpoints of cyberattacks and how they must combat them and/or conduct them, against the United States or its allies.⁶⁰ Identifying large-scale cyberattacks as WMD will also set the necessary example and influence the public to take seriously the need to protect themselves and their business against cybercrime; this will have a monumental impact on the private sector of cyberspace and will trigger major steps towards securing the country as a whole. The United States must seize the opportunity and act quickly in order to remain ahead and keep the American people, and the United States as a whole, safe.

⁶⁰ “Annual Threat Assessment,” 24.

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CRYPTOCURRENCY AND CONFLICT: DIGITAL ASSETS AS A THREAT TO NATIONAL SECURITY

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The term digital assets, more widely recognized as cryptocurrency, is used to describe the decentralized medium of exchange that is rapidly expanding across the international financial system. Built on ledger or blockchain technology, these digital assets can be transferred efficiently and pseudonymously. Understanding the role that digital assets can play in the midst of a global technological race presents the United States with an opportunity to place itself at the center of that international race. By viewing digital assets as an opportunity for innovation, rather than as a threat to the U.S. dollar and national security, the United States can reinforce its role as the dominant economic and technological power in the international system. The United States needs a national security strategy that recognizes the potential for expansion of the use of digital assets while preventing their illicit use as a threat to national security. To do this, the U.S. government must work closely with international partners to create a strategy that balances national security and economic growth and transcends the duration of the administration that creates it.

INTRODUCTION

The term digital assets, more widely recognized as cryptocurrency, is used to describe the decentralized medium of exchange that is rapidly expanding across the international financial system. Built completely on ledger or blockchain technology, these digital assets can be transferred efficiently and pseudonymously.¹ Cryptocurrency operates in a decentralized manner, therefore removing the need for a monetary authority. With a global market cap just above one trillion dollars in 2023, the cryptocurrency ecosystem is still relatively small. This market, however, is expected to grow at a compound annual growth rate of 11.1% in the next five years.² This rapid growth is primarily attributed to the growth of ledger technology and digital investment in venture capital.

Of the different cryptocurrencies, Bitcoin is the oldest and one of the most widely recognized coins in the world. The coin, which was created in 2009 during the global financial crisis by an unknown person using the pseudonym Satoshi Nakamoto, was first released as open-

¹ “The Innovator’s Dilemma and U.S. Adoption of a Digital Dollar,” Brookings, accessed January 16, 2023, <https://www.brookings.edu/techstream/the-innovators-dilemma-and-u-s-adoption-of-a-digital-dollar/>.

² “Cryptocurrency Market Size, Growth & Trends | Forecast [2028],” Fortune Business Insights, accessed January 16, 2023, <https://www.fortunebusinessinsights.com/industry-reports/cryptocurrency-market-100149>.

source software.³ In 2011, the price of Bitcoin was one dollar per coin. Over the years, the coin's price has risen to a high price of sixty-nine-thousand dollars in November 2021, but it also faced extreme volatility.⁴

In 2022, the cryptocurrency market was plagued by a series of major insolvencies and scandals, including the collapse of the cryptocurrency exchange FTX.⁵ This exchange, which was valued at thirty-two billion dollars, went bankrupt after the company's founder Sam Bankman-Fried was charged with criminal fraud.⁶ This series of failures in the cryptocurrency industry and subsequent price decline are often referred to as a "crypto winter." While some believe that cryptocurrency will recover from these setbacks, many investors, especially those not heavily invested, had a different reaction.⁷ The collapse of the largest exchange further painted cryptocurrency as a tool for illegal activity, not a feasible financial alternative to the monetary system.

Like Bitcoin and other cryptocurrencies, Central Bank Digital Currencies (CBDCs) use the same blockchain technology but are regulated by a central bank or monetary authority as a form of digital liability that is widely available to the public.⁸ This regulation introduces a monetary authority, allowing for greater control of the transfer of funds. Of the G7 economies, the United States and the United Kingdom are currently last in the development of CBDCs.⁹ Ten countries, which do not include the United States, have launched digital currencies, including Iran, China, and Russia.¹⁰

As nations more willingly turn to economic sanctions and 1.7 billion people remain unbanked globally, digital assets and the blockchain technology they are built on have immense

³ "The History of Bitcoin, the First Cryptocurrency | Investing | U.S. News," U.S. News, accessed January 16, 2023, <https://money.usnews.com/investing/articles/the-history-of-bitcoin>.

⁴ Ryan Browne, "New Year, New Rally: Why Bitcoin Is up 26% This Month after a Tumultuous 2022," *CNBC*, accessed January 16, 2023, <https://www.cnbc.com/2023/01/16/why-is-bitcoin-btc-rallying-in-january.html>.

⁵ David Gura, "2022 Was the Year Crypto Came Crashing down to Earth," *NPR*, December 29, 2022, sec. Business, <https://www.npr.org/2022/12/29/1145297807/crypto-crash-ftx-cryptocurrency-bitcoin>.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ "Central Bank Digital Currency (CBDC)," Federal Reserve, accessed January 16, 2023, <https://www.federalreserve.gov/central-bank-digital-currency.htm>.

⁹ "Central Bank Digital Currency Tracker," Atlantic Council, accessed January 16, 2023, <https://www.atlanticcouncil.org/cbdctracker/>.

¹⁰ "China's Progress Towards a Central Bank Digital Currency," CSIS, accessed January 17, 2023, <https://www.csis.org/blogs/new-perspectives-asia/chinas-progress-towards-central-bank-digital-currency>.

potential for expansion.¹¹ This leaves The United States in a position to face the “innovators dilemma.” How does an incumbent respond to a threatening insurgent?¹² Should they adopt the insurgent or fight it? I believe the United States should adopt.

Understanding the future role that digital assets can play in the midst of a global technological race presents the United States with an opportunity to “write the rules of the road” and place itself at the center of that international race.¹³ By viewing digital assets as an opportunity for innovation, rather than as a threat to the U.S. dollar and national security, the United States can reinforce its role as the dominant economic and technological power in the international system.

To adopt, America needs a national security strategy. “How will cryptocurrency and blockchain technology change the world?” is not a financial question; it is a national security question. Sigal Mandelkar, Former Under Secretary of the Treasury for Terrorism and Financial Intelligence, argues it is the most urgent national security question the United States faces.¹⁴ This is because leaders who can harness this technology for economic, political, and military power will have an outsized influence on shaping our world. The country that is willing to take on digital assets will find itself at the center of the global financial infrastructure, a place the United States wants to stay. This is because the power to affect the budgets of America’s enemies is an enormous power that needs to be tended to carefully and wielded wisely. America’s enemies, especially terrorist organizations, will continue to find ways to work around the international pressure and strictures put upon them. Near-peer adversaries will develop technology to reduce dependency on the U.S. dollar and evade economic sanctions. This campaign against illicit digital financing is an ongoing and critical part of the international security landscape. The U.S. government must continue to innovate and find ways to make it harder, costlier, and riskier for terrorist groups and near-peer adversaries around the world to raise and move money.

¹¹ “The Global Findex Database 2021,” World Bank, accessed January 16, 2023, <https://www.worldbank.org/en/publication/globalindex>.

¹² “The Innovator’s Dilemma: When New Technologies Cause Great Firms to Fail - Book - Faculty & Research - Harvard Business School,” HBS, accessed January 16, 2023, <https://www.hbs.edu/faculty/Pages/item.aspx?num=46>.

¹³ “Will Crypto Save the World? | CNAS 2022 National Security Conference,” 2022, <https://www.youtube.com/watch?v=rObrSsvIrrs>.

¹⁴ *Ibid.*

CURRENT USE BY U.S. ADVERSARIES

The United States currently faces two distinct national security threats because of the illicit use of digital assets. The first is the use of digital assets as a fundraising and financing tool by terrorist organizations. The second is the rise of digital assets as a tool to evade sanctions and reduce dependence on the U.S. dollar by near-peer adversaries, including China and Russia.

Terrorist Organizations

Terrorist financing is the material foundation that allows terrorist organizations to operate and carry out terrorist attacks. Typically, terrorist organization fundraising tools have included taxes, oil, smuggling, extortion, and drug trafficking to purchase weapons and equipment, fund training and recruitment, and pay for travel. The growth of the internet, however, has allowed terrorist organizations to expand both their following and their access to financial resources. While cash remains the prevalent method for terrorist funding, the decentralized nature and pseudonymity of cryptocurrency have made it a tool for money laundering, ransomware attacks, and other forms of terrorist funding.¹⁵ For terrorist organizations that rely on anonymity, lack of regulation, and secure funding, cryptocurrency is an attractive alternative to cash. As the tools facilitating the use of cryptocurrencies become more widely available, this use of digital assets for illicit purposes has grown in both volume and sophistication.

In August 2015, an individual was found guilty of providing resources to the Islamic State of Iraq and al-Sham (ISIS) after using social media to teach donors how Bitcoin can provide financial support to terrorist organizations.¹⁶ In August 2020, the Department of Justice dismantled three terrorist financing campaigns that involved the illicit use of digital assets from Al-Qassam Brigades, al-Qaeda, and ISIS.¹⁷ These groups were using cyber tools to solicit cryptocurrency donations from supporters worldwide. When gathering funds for violent attacks online, these groups sometimes acted as charities or retailers. In total, the U.S. government seized four websites and three hundred cryptocurrency accounts worth millions of dollars.¹⁸ In

¹⁵ Shacheng Wang and Xixi Zhu, "Evaluation of Potential Cryptocurrency Development Ability in Terrorist Financing," *Policing: A Journal of Policy and Practice* 15, no. 4 (December 1, 2021): 2329–40, <https://doi.org/10.1093/police/paab059>.

¹⁶ "Report of the Attorney General's Cyber Digital Task Force" (Washington [D.C.]: United States Department of Justice, October 2020), <https://www.justice.gov/archives/ag/page/file/1326061/download>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

addition to these websites, a group of extremists published a book titled *Bitcoin was Sadahaqat al Jihad*, which teaches those from North America and Western Europe to transfer Bitcoin to jihadis.¹⁹ In another example, jihadis created a website titled “Fund the Islamic Struggle without Leaving a Trace” to raise and transfer bitcoins.²⁰ In June 2014, an American citizen plead guilty to teaching Islamic state members how to use Bitcoin wallets to reach potential donors.²¹ Svetlana Martynova, a senior legal officer at the United Nations Counter-Terrorism Committee Executive Directorate, said that “a couple of years ago 5% of terrorist attacks were viewed as crypto-financed or linked to digital assets. ‘Now we’re thinking that it may reach about 20%.’”²² These examples illustrate just a few of the many ways that terrorist organizations are learning to use Bitcoin to reach a wider audience and gather donations. As technology advances, these terrorist organizations will have increased potential to use digital assets as a resource.

Near-Peer Adversaries

In 2018, the United States Army published its new doctrine manual, FM3-0: Operations, which describes the Army’s mission plan to face the current operational environment against emerging near-peer threats like Iran, Russia, North Korea, and China.²³ At the core of this transition from counterinsurgency operations to large-scale combat operations is the idea that the character of war is changing to include new domains, including cyberspace and financial warfare. The United States’ response to the Russian invasion of Ukraine introduced an unprecedented level of economic sanctions designed to devastate the Russian economy and prevent Russian President Vladimir Putin’s ability to wage warfare. Working with more than thirty allies from across the world, these sanctions targeted Russian financial institutions, state-owned enterprises, elites, and natural resources.²⁴

¹⁹ Wang and Zhu, “Evaluation of Potential Cryptocurrency Development Ability in Terrorist Financing.”

²⁰ Ibid.

²¹ Angela S.M. Irwin and George Milad, “The Use of Crypto-Currencies in Funding Violent Jihad,” *Journal of Money Laundering Control* 19, no. 4 (January 1, 2016): 407–25, <https://doi.org/10.1108/JMLC-01-2016-0003>.

²² “Crypto-Linked Terror Attacks Probably Quadrupled, UN Official Says: Report,” Coin Desk, accessed January 16, 2023, <https://www.coindesk.com/policy/2022/10/31/crypto-linked-terror-attacks-probably-quadrupled-un-official-says-report/>.

²³ Caroline Bechtel, “What the Army’s Return to Large-Scale Operations Means for the Intelligence Warfighting Function,” Modern War Institute, May 8, 2018, <https://mwi.usma.edu/armys-return-large-scale-operations-means-intelligence-warfighting-function/>.

²⁴ “FACT SHEET: United States, G7 and EU Impose Severe and Immediate Costs on Russia,” The White House, April 6, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/>.

While the development of Central Bank Digital Currencies (CBDCs) by many U.S. adversaries began prior to the invasion of Ukraine, this conflict exacerbated the importance of international institutions and the role that evolving technology plays in the ability of the United States to monitor, control, and prevent international transactions. Thirty-one countries, including Iran and Russia, have threatened the United States, stating that they will use digital assets to avoid sanctions or develop their own digital assets with the explicit purpose of evading international oversight.²⁵

In 2020, the People's Bank of China (PBOC) announced a pilot program for a CBDC that has been making steady progress over the past several years.²⁶ This program, titled the Digital Currency Electronic Payment (DC/EP) program, is a digital version of China's currency, the renminbi (RMB). Currently, the RMB makes up 4% of international transactions, compared to the U.S. dollar's 40% and Euro's 35%. The internationalization of the RMB, however, is a long-term goal of the People's Republic of China, and the development of a Chinese CBDC is another attempt to realize that goal.²⁷

In August 2022, the Bank of Russia announced the plan to launch the digital ruble of 2024 to connect all Russian banks.²⁸ This action, which is an attempt to circumvent economic sanctions imposed by the United States and Western Allies following the invasion of Ukraine, will allow Russia to conduct cross-border integration with the digital yuan of China and other U.S. adversaries.²⁹

These attempts to develop CBDCs by U.S. near-peer adversaries aim to reduce their dependence on the U.S. dollar and the United States' ability to impose economic sanctions. Although in their early stages, these actions illustrate the dynamic nature of the international financial system in today's complex operational environment. To combat the threat of this innovation, the United States, led by the Biden administration, is working closely to mitigate the illicit use of digital assets in the international system.

²⁵ "Report of the Attorney General's Cyber Digital Task Force," 32.

²⁶ "China's Progress Towards a Central Bank Digital Currency."

²⁷ *Ibid.*

²⁸ "Russian Banks Set to Use Digital Ruble in 2024," Central Banking, August 17, 2022, <https://www.centralbanking.com/node/7952291>.

²⁹ *Ibid.*

CURRENT U.S. RESPONSE

In Executive Order 14067, President Biden calls for the “responsible development of digital assets,” urging agencies to develop policy that will protect U.S. consumers while allowing for innovation.³⁰ Specifically, this Executive Order aims to mitigate the illicit finance and national security risks posed by the misuse of digital assets while also looking into the development of a U.S. CBDC. Although this Executive Order calls for action and innovation from agencies, it does not immediately change any of the legal regulations. It does, however, reinforce the United States’ commitment to remaining the leader of the global financial system.

In the past, the response by the United States has been spearheaded by the Financial Action Task Force (FATF), an intergovernmental organization to combat money laundering. This task force was founded in 1989 by members of the G7 with the goal of setting standards to promote the effective use of regulatory and operational measures to combat money laundering, terrorist funding, and other threats to the international financial system.³¹ Currently, there are thirty-nine member countries of the FATF, including Russia and China.³² The FATF works closely with the U.S. Department of Justice (DOJ), which is responsible for the investigation and prosecution of malicious actors. Working under the executive branch, the DOJ is comprised of forty component organizations, each of which works to enforce the law to defend the interests of the United States against foreign and domestic threats.³³

In President Biden’s Executive Order 14067, he calls for the first-ever “whole-of-government approach to addressing the risks and harnessing the potential benefits of digital assets.”³⁴ President Biden divides the priorities of digital asset national policy into six key sectors: consumer and investor protection; financial stability; countering illicit finance; leadership in the global financial system and economic competitiveness; financial inclusion; and responsible innovation. As the executive branch works with the legislative and judicial branches and international partners in this total government response to achieve Biden’s six priorities, the

³⁰ “Executive Order on Ensuring Responsible Development of Digital Assets,” The White House, March 9, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

³¹ “Report of the Attorney General’s Cyber Digital Task Force,” 35.

³² “Members and Observers - Financial Action Task Force (FATF),” The Financial Action Task Force, accessed January 17, 2023, <https://www.fatf-gafi.org/about/membersandobservers/>.

³³ “The Executive Branch,” The White House, accessed March 1, 2023, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/>.

³⁴ House, “Executive Order on Ensuring Responsible Development of Digital Assets.”

U.S. government must keep balance competing interests of national security and international economic growth.

RESPONSE FRAMEWORK

One of the key roles of government is to regulate and oversee the financial system while protecting its citizens. As the United States government attempts to collaborate to achieve President Biden's six priorities, I believe there are four key factors the United States must follow to properly balance national security and international economic power as technology changes. They are a holistic view, public opinion, innovation, and international collaboration. By coordinating efforts across multiple agencies and international partners, the executive branch can play a critical role in driving this effort and ensuring that digital assets are used in a safe and responsible manner. Ultimately, however, the success of the United States' effort to combat the illicit use of digital assets while encouraging innovation will be based on their ability to keep pace with rapidly changing technology. By keeping these four factors in mind, the United States can develop and adjust policy to fit the goals of the nation as a global economic leader.

1. A Holistic View

In a relatively new system that has enormous potential to expand, the United States needs to first take a more holistic approach to create a policy that will transcend the duration of any one presidential administration. To do this, the U.S. government must first define its right and left limits by asking, "What is it that we are most concerned about as a society?" By identifying the decision space early in the process, the U.S. government can give agencies more freedom to better understand how to balance innovation with risk mitigation and think in the long term. These agencies need to understand that this policy will shape the financial ecosystem, not just in President Biden's administration, but in all administrations that follow him.

2. Public Interest

As seen in the advancement of cryptocurrency and digital assets, citizens across the world hold different opinions regarding the value and security of digital assets. Despite one's individual opinion on the role that digital assets will play in the future, the monetary system is central to

each individual's daily life. Therefore, the U.S. response must balance competing interests, such as the public interest of economic benefits, with national security, safety, and the right to privacy. To promote this public safety while balancing national security, the United States should encourage all stakeholders – users, regulators, innovators, and elected officials – to take steps to ensure cryptocurrency is used legally.

As the largest potential stakeholder, many consumers do not fully understand the technology behind digital assets and the risk associated. It is important for the government to not only take steps to protect consumers from fraudulent or deceptive practices related to digital assets but also to educate citizens about their proper use. This could involve establishing clear guidelines around disclosures and transparency, as well as enforcing existing laws and regulations to prevent fraud and abuse.

3. An Opportunity for Innovation

The United States needs to view digital assets as an opportunity to embrace a new system while recognizing that cryptocurrency and the dollar do not exist in a zero-sum world. To do this, the U.S. government's approach must balance top-down regulation from the government with bottom-up innovation from entrepreneurs. This is where the importance of communication between the U.S. government and the private sector will be crucial. By viewing digital assets as an opportunity for innovation and opening the door to these innovators, the United States can create a policy that will allow for continued growth while protecting its citizens, thereby reinforcing its role as a dominant economic and technological power.

To compete and continue to dominate the international economic system, the United States should pursue the development of a CBDC. Currently, the Federal Reserve has not decided to pursue a CBDC, as it is hesitant to pursue change in an “already safe and efficient U.S. domestic payments system.”³⁵ This hesitation to pursue technological innovation in an international race, however, is not the type of modernization that will allow the United States to remain a global economic leader.

³⁵ “Central Bank Digital Currency (CBDC).”

4. International Collaboration

The very nature of digital assets, which rely on global technology, creates significant threats to the U.S. law enforcement agencies. Therefore, in this system that transcends borders, international collaboration will be paramount. The United States should not, and cannot, compete alone. Instead, the United States should capitalize on its allied advantage by partnering with like-minded nations. This core group should include technology-leading democracies that can engage in the collaborative standard setting. A technological alliance of democratic nations will ensure a consistent approach to regulating digital assets, empower citizens, and help nations protect themselves while competing economically. It will also support developing nations that lack the technology and resources to deter the illicit use of digital assets, further emphasizing the role of the United States in the international system. If these nations fail to work together, they are unlikely to win a global competition with incredibly high stakes - the ability to shape a democratic technological future.

The government has the legal and regulatory tools available to confront the threat of cryptocurrency. Using these four factors as a general framework, there are several potential actions that the executive branch can take to regulate the illicit use of digital assets without stifling economic potential. These actions include enhancing public knowledge of “know your customer” and Anti-Money Laundering requirements, encouraging analytics, fostering self-regulation, creating international organizations, and encouraging innovation. Each of these actions will require a delicate balance between preventing illegal activities and promoting innovation and growth. Ultimately, however, the success of the United States’ response to digital assets will be dependent on its ability to adapt to growing technology. These four factors provide a framework for that adaptation.

CONCLUSION

The United States, as the world’s leading reserve currency, has an opportunity to accept that technological change to the international financial system is evident. As near-peer adversaries and terrorist organizations increase their illicit use of digital assets to avoid legal ramifications from the United States and reduce their dependency on the U.S. dollar, the United

States must act to create a safer, more stable financial future, not just for its citizens, but for all who rely on its economy.

While President Biden's Executive Order 14067 is a call to action, the United States needs a national security strategy that recognizes the potential for expansion of the use of digital assets while preventing their illicit use as a threat to national security. If the United States takes a holistic approach that considers political and public interest, innovation, and international collaboration, the government has an opportunity to reinforce its role as the dominant figure in the global financial system and a leader of the free world. To do this, the United States government must work closely with international partners to create a strategy that balances national security and economic growth and transcends the duration of the administration that creates it.

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Part Four

Domestic Policy

COVID-19 HATE CRIMES: REPAIR THROUGH RACIAL RECONCILIATION

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The domestic COVID-19 outbreak resulted in a reckoning on the condition and treatment of racial minorities in America through the Black Lives Matter and Stop Asian Hate movements. Although bills in support of both communities were drafted, only the COVID-19 Hate Crimes Act to address anti-Asian violence successfully passed through Congress. The bill empowers local law enforcement to document hate crimes through a national database but overlooks the adverse impact law enforcement have on other ethnic and racial minorities. As such, a community organizing approach modeled after the 1900s anti-lynching movement should be drafted to create hate crime policy that is preventative, rather than reactive, and address material resource inequalities in Asian American communities: protecting not only Asian Americans but facilitating racial reconciliation for all minority racial groups.

INTRODUCTION

The United States confirmed its first case of the COVID-19 infection on January 20th, 2020. The virus, which would shortly escalate to a global pandemic, held potential to deplete national ventilator supplies, overwhelm hospitals and halt the U.S. economy. By February, America documented its first COVID case of unknown origin and a national emergency was declared. In a time of heightened fear and uncertainty, many leaders across state and federal government relied upon xenophobic tropes against Asian Americans to explain the evolving crisis. Chinese Americans were largely scapegoated for spreading the disease, despite community transmission from those with no travel history occurring as the primary mode of spread.¹

Racism, operationalized for this paper, is defined as opinions and practices which stratify positions of superiority and inferiority based on the use of descriptors including race and ethnicity.² Those who identify as Asian American or Pacific Islander (AAPI) can descend from

¹ Elias Amanuel, Jehonathan Ben, Fethi Mansouri, and Yin Paradies, "Racism and Nationalism during and beyond the COVID-19 Pandemic," *Journal of Ethnic and Racial Studies* 44, no. 5 (January 2021), <https://www.tandfonline.com/doi/full/10.1080/01419870.2020.1851382>.

² Ibid.

East Asia, which includes but is not limited to Vietnam, Korea and China; Southeast Asia, which includes but is not limited to Myanmar, Laos, and the Philippines; and South Asia, which encompasses the Indian subcontinent. Each region is also home to multiple ethnic minority groups, distinct from the national identity by characteristics such as language and culture; for example, ethnically Hmong people live in China, Vietnam, and Thailand. This paper will largely refer to sentiment against East-Asians living in America. However, national data on hate crimes does not specify which ethnicities or nationalities within the category of Asian are specifically targeted in reports. Based off this general information, known examples of violence towards South and Southeast Asians are also cited through the paper as anti-Asian hate crimes.

RACIAL VIOLENCE AMIDST A DEADLY PANDEMIC

The Center for the Study of Hate and Extremism found that anti-Asian hate crimes across major U.S. cities occurred more frequently when federal figures expressed anti-Asian sentiment.³ President Donald Trump often referenced COVID-19 as a “Chinese virus” or the “kung flu,” blaming those of Chinese descent for spreading the disease.⁴ Commissioner chair Marvin Rodriguez of Riley County, Kansas assured citizens in a March press conference that they would be safe from infection given the low population of East-Asian residents in the area.⁵ John Cornyn of the United States Senate promoted stereotypes about the Chinese as “savages” who eat dogs and bats.⁶ These proclamations escalated civilian fears towards Asian Americans, viewing them as implicitly responsible for the COVID-19 pandemic.

The domestic Coronavirus outbreak occurred in a climate already plagued by nationalism, influencing racist views both against Asian and Black Americans. A 2021 study by the Journal of Ethnic and Racial Studies identified Christian nationalist ideology as the strongest predictor of American citizens harboring racist or xenophobic perspectives on the COVID-19

³ “Report to the Nation: Anti-Asian Prejudice & Hate Crime,” Center for the Study of Hate and Extremism, California State University, San Bernardino, April 2021, <https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Report-to-the-Nation-Anti-Asian-Prejudice-and-Hate-Crime-1-1.pdf?emrc=63d06f60b1ce7>.

⁴ Tyler T. Reny and Matt A Barreto, “Xenophobia in the Time of Pandemic: Othering, Anti-Asian Attitudes, and Covid-19,” *Politics, Groups, and Identities* 10, no. 2 (May 2020): 209-232, <https://www.tandfonline.com/doi/full/10.1080/21565503.2020.1769693>.

⁵ Ibid.

⁶ Ibid.

pandemic.⁷ Nationalism is defined as a belief system which “privileges nations as ‘imagined communities’ and ‘natural’ units of socio-political organization and favors membership in the nation or national movements.”⁸ Favoring certain communities as naturally superior enables a power dynamic, often fostering discrimination and violence towards “inferior” groups. When surveyed in individual racial groups, Americans with stronger Christian nationalist views were shown to agree with anti-Asian rhetoric more than those with weaker belief in Christian nationalism.⁹ When disaggregated by race, White respondents showed the strongest association between Christian nationalism and Asian hate, followed by Black and Latino respondents. Asian respondents, too, showed a positive correlation between Christian nationalism and racism, but specifically in support of anti-Black racism, as opposed to anti-Asian, as they were more likely than White respondents to agree that “higher rates of COVID-19 infection among [majority-Black] prison populations could be divine justice.”¹⁰

3800 cases of anti-Asian discrimination related to the Coronavirus were reported between March 2020 and February 2021 across all 50 states.¹¹ That number has since risen to over 9,000 in 2022, with cases including explicit verbal harassment accusing Asian victims of “having COVID” or “creating the pandemic,” physical assault, spitting, and denial of service.¹² Long-held stereotypes on Asian submissiveness and fetishization have also contributed to hate crimes: for instance, on March 16, 2021, six Korean women working in Young’s Asian Massage Parlor in Acworth, GA were shot and two were killed by a man who sought to “punish” the women for their “temptation... [as they provided] an outlet for his addiction to sex.”¹³ East-Asian women have historically been stereotyped as hyper-sexual and submissive: a consequence of sex tourism

⁷ Samuel L. Perry, Andrew L. Whitehead, and Joshua B. Grubbs, “Prejudice and Pandemic in the Promised Land: How White Christian Nationalism Shapes Americans’ Racist and Xenophobic Views of COVID-19: Semantic Scholar,” *Journal of Ethnic and Racial Studies* 44 (January 1, 2021): 759-772, <https://www.semanticscholar.org/paper/Prejudice-and-pandemic-in-the-promised-land%3A-how-of-Perry-Whitehead/c581fe84d3488e89ad983e95e53919e2107930cc>.

⁸ Elias, Ben, Mansouri, and Paradies, “Racism and Nationalism During and Beyond the COVID-19 Pandemic.”
⁹ Ibid.

¹⁰ Perry, Whitehead, and Grubbs, “Prejudice and Pandemic in the Promised Land.”

¹¹ U.S. Congress, Senate, *Covid-19 Hate Crimes Act*, S.937, 117th Cong., introduced in Senate March 23, 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/937>.

¹² Aggie J. Yellow Horse, PhD., Russell Jeung, PhD., Ronae Matriano, “National Report (through December 31, 2021),” Stop AAPI Hate, AAPI Equity Alliance, March, 2022, <https://stopaapihate.org/national-report-through-december-31-2021/>.

¹³ Valerie Bauerlein, Cameron McWhirter, and Esther Fung, “For Asian-Americans, Atlanta Spa Shootings Heighten Worries,” *The Wall Street Journal*, March 24, 2021, <https://www.wsj.com/articles/atlanta-spa-shootings-amplify-racial-concerns-amid-rising-anti-asian-violence-11616097162>.

throughout East-Asia during the Vietnam and Cold Wars.¹⁴ Many of these women later immigrated to the United States to open massage parlors and spas but were perceived as continuing illicit sex work. Explicit Sinophobic sentiment, normalized throughout the COVID crisis, thus gave power to more specific stereotypes grounded in imperial legacies.

The assault on Young's Asian Massage Parlor, however, was not investigated as a hate crime, as law enforcement labeled the motive as "sexual addiction."¹⁵ Though the illicit sex trade is prevalent in massage parlors throughout Georgia, there is no evidence suggesting the Acworth parlor provided any form of sexual service. The recorded motive suggests that the female victims were being sexualized generally, rather than as Asian women specifically. The attacker explicitly admitted that he had a sexual addiction, but law enforcement failed to connect this with historical context of Asian women being forced into prostitution overseas: a factor that amplifies the perception of Asian women as being sexual or "seductive" in America. Current hate-crime identification frameworks cannot consistently process the dual oppressions of racial and gender identity, identifying only singularly anti-Asian incidences during explicit verbal assaults such as shouting "kung-flu," or singularly anti-woman cases of hyper-sexualization. Inaccurate Asian archetypes derived from centuries-old imperial narratives are thus overlooked in hate crime reporting, as well as violence against Asians which does not have a direct verbal or written anti-Asian motive.

In response to the Acworth shooting, leaders of three California-based Asian organizations, the AAPI Equity Alliance, Chinese for Affirmative Action, and the head of the Asian American Studies Department at San Francisco State University founded Stop AAPI Hate, a website for people to document incidents of anti-Asian aggression.¹⁶ This database includes anonymous personal submissions, and events which garnered national attention but were not investigated as hate crimes. For example, eight workers at an Indianapolis FedEx facility employing predominantly Punjabi-Sikh employees were shot in 2021, and an Asian woman in

¹⁴ Lily Z. Stewart, "The Yellow Figment of East Asian American Women: A Case Study of the 2021 Atlanta Spa Shootings," *The Cardinal Edge* 1, no. 2 (May 2022), <https://ir.library.louisville.edu/tce/vol1/iss2/12/>.

¹⁵ Valerie Bauerlein and Cameron McWhirter, "Atlanta Shooting Suspect Told Police He Targeted Massage Parlors Because of Sex Addiction," *The Wall Street Journal*, March 19, 2021, https://www.wsj.com/articles/atlanta-shootings-fbi-investigating-killing-of-eight-at-massage-parlors-11615989454?mod=article_inline.

¹⁶ Li Zhou, "The Stop Asian Hate Movement Is at a Crossroads," *Vox*, March 15, 2022, <https://www.vox.com/22820364/stop-asian-hate-movement-atlanta-shootings>.

New York City was pushed in front of a subway and killed in 2022.¹⁷ The culmination of reports sparked protests in all 50 states, raising awareness for Asian victims of such attacks, and building an informal network of support called Stop Asian Hate.

As COVID incited a culture of violence against Asian Americans, the disease itself disproportionately infected and decimated Black communities. A July 2020 study reviewed COVID-19 infections in disproportionately Black counties across the United States, with a Black population greater than or equal to the national average of 13%. Although these counties represent less than 20% of counties nationally, they accounted for 52% of COVID-19 diagnoses and 58% of COVID-19 deaths nationwide.¹⁸ This heightened infection reflects broader inequalities that disproportionately affect and risk Black Americans, such as access to healthcare, higher reliance on public transportation where infection can occur, and higher likelihood of being essential workers exposed to the disease.¹⁹ Black Americans living in high-density prisons were also disproportionately harmed: the COVID-19 positivity rate in New York State prisons was 1.4 times higher than that of New York residents overall.²⁰ Additionally, this is an underestimate, given COVID test shortages and processing delays in prisons. Though Black Americans represent 50% of the state's incarcerated population, Black inmates comprised 60% of COVID-19 New York State prisoner deaths by May 2020.²¹ Yet, racist and Christian nationalist rhetoric blamed Black communities for being infected out of irresponsible behavior, or their infection serving as a form of "divine justice."²²

The pandemic particularly emphasized the prevalence of police brutality on Black Americans. In May 2020, a Black man named George Floyd was violently suffocated to death by a White police officer in Minneapolis, Minnesota. This murder prompted the 2020 Black Lives Matter protests, as an estimated fifteen to twenty-six million Americans marched throughout the

¹⁷ Frances Kai-Hwa Wang, "How Violence against Asian Americans Has Grown and How to Stop It, According to Activists," *PBS*, April 11, 2022, <https://www.pbs.org/newshour/nation/a-year-after-atlanta-and-indianapolis-shootings-targeting-asian-americans-activists-say-we-cant-lose-momentum>.

¹⁸ Gregorio Millet et al., "Assessing Differential Impacts of COVID-19 on Black Communities," *Annals of Epidemiology* 47, (July 2020): 37-44, <https://www.sciencedirect.com/science/article/pii/S1047279720301769?pes=vor>.

¹⁹ "Racial Disparities in Jails and Prisons: Covid-19's Impact on the Black Community," ACLU West Virginia, June 12, 2020, <https://www.acluww.org/en/news/racial-disparities-jails-and-prisons-covid-19s-impact-black-community>.

²⁰ "A State-by-State Look at 15 Months of Coronavirus in Prisons," The Marshall Project, June 24, 2021, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

²¹ "Racial Disparities in Jails and Prisons: Covid-19's Impact on the Black Community," ACLU West Virginia, June 12, 2020, <https://www.acluww.org/en/news/racial-disparities-jails-and-prisons-covid-19s-impact-black-community>.

²² Perry, Whitehead, and Grubbs, "Prejudice and Pandemic in the Promised Land."

nation to demand an end to institutional racism not only in policing, but also education, healthcare, and the legal system.²³ Videos documenting Black men and women being choked, shot, and pulled over by officers went viral on social media, exposing the gruesome truth of police violence, and a more multidimensional picture of racial violence: an Asian American police officer present during George Floyd's murder was spotted trying to steer away onlookers.²⁴ Racial violence is perpetrated both by White actors against non-White victims, and between minority racial groups. Perpetrators cannot solely be identified by membership in a minority or majority race. Rather, their participation in systems that are embedded with racism must also be considered as an indicator of violence.

COVID-19 caused the specific tragedies of anti-Asian violence and high death rates of Black Americans in 2020, but the racist ideologies which fuel violence against each race reflect broader historical and structural problems. Asian Americans with strong beliefs in Christian nationalism are more likely to agree that high COVID infection rates in prisons are a form of divine justice.²⁵ Conversely, a Black man was recorded hitting a Filipino woman in the head over 100 times while calling her an “Asian slut” in 2022.²⁶ These anti-Black Christian nationalist views and derogatory tropes against Asian women did not originate from a virus. The pandemic simply amplified the consequences of systemic racism and how such beliefs are perpetuated by majority and minority races.

BLACK LIVES MATTER: THE GEORGE FLOYD JUSTICE IN POLICING ACT

The federal government attempted to address the Black Lives Matter movement and reform law enforcement throughout 2021. The George Floyd Justice in Policing Act, passed twice in the House of Representatives on Democratic party line support, mandated the use of body cameras for on duty officers, provided federal-led mental health and de-escalation training

²³ Larry Buchanan, Quoc Trung Bui, and Jugal K. Patel, “Black Lives Matter May Be the Largest Movement in U.S. History,” *The New York Times*, July 3, 2020, <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

²⁴ Christine Fernando and N’dea Yancey-Bragg, “Amid a Rise in Hate Crimes, Black and Asian Americans Are Standing Together: ‘Solidarity Is the Answer,’” *USA Today*, September 16, 2021, <https://www.usatoday.com/story/news/nation/2021/09/13/black-asian-american-solidarity-rise-hate-crimes/5772816001/>.

²⁵ Perry, Whitehead, and Grubbs, “Prejudice and Pandemic in the Promised Land.”

²⁶ Ed Shanahan, “Man Hit Woman in the Head 125 Times Because She Was Asian, Officials Say,” *The New York Times*, March 14, 2022, <https://www.nytimes.com/2022/03/14/nyregion/yonkers-hate-crime-anti-asian-attack.html>.

courses, banned chokeholds and no-knock warrants, formed a database for force data and violent officer reports, and drafted a federal anti-lynching bill.²⁷ The bill also called for the repeal of qualified immunity, a legal doctrine which protects police officers convicted of misconduct in court from financial responsibility; instead, taxpayers funds go towards legal costs associated with police court visits. A majority of Americans, including 40% of Republicans, supported this repeal in a 2021 survey.²⁸ This push for accountability, though, ultimately prevented the bill from gaining a majority needed to advance through a gridlocked Senate.

President Biden signed a less encompassing executive order for federal law enforcement reform on the anniversary of George Floyd's death in 2022, based on voluntary police participation. Executive Order 14074 on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety limits federal officers from using chokeholds and no-knock warrants except in cases where "no feasible alternative appears to exist."²⁹ It also bans federal agencies from providing military-grade equipment to state and local police, mandates federal agencies to report police misconduct to a national database, and authorizes incentive grants to state and local law enforcement who choose to comply with the executive order.³⁰ Though it is the largest federal police reform act to date, reform is limited to only federal officers. According to the American Civil Liberties Union, most civilian interactions with police occur in local and state law enforcement, making the voluntary provisions of the executive order less relevant to the public.³¹

²⁷ Rashawn Ray, "One Year after George Floyd's Murder, What Is the Status of Police Reform in the United States?" Brookings, March 9, 2022, <https://www.brookings.edu/blog/how-we-rise/2021/05/25/one-year-after-george-floyds-murder-what-is-the-status-of-police-reform-in-the-united-states/>.

²⁸ Sara Atske, "Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct," Pew Research Center, March 2, 2021, <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/>.

²⁹ Rachael Eisenberg and Kate Kahan, "The Biden Administration's Executive Order on Policing Is a Foundation to Build upon: ACLU," American Civil Liberties Union, February 24, 2023, <https://www.aclu.org/news/criminal-law-reform/the-biden-administrations-executive-order-on-policing-is-a-foundation-to-build-upon>.

³⁰ *Ibid.*

³¹ *Ibid.*

STOP ASIAN HATE: THE COVID-19 HATE CRIMES ACT

The COVID-19 Hate Crimes Act was signed into law by President Biden on May 20, 2021, as a response to the murders of the six Asian spa workers in Acworth, GA.³² The bill allocates grants from the Department of Justice towards state and local law enforcement who put forth a “good-faith effort” towards collecting hate crime data, increasing police presence in harmed communities, and assessing harsher penalties for hate crimes. The bill aims to combat underreporting of hate crimes through two modes: firstly, training law enforcement to more accurately identify and report hate crime data to the FBI, and secondly, addressing the language barriers to communicating with police in many communities of color.³³ Individual law agencies may apply for grants on a voluntary basis and must demonstrate investment in crime reduction programs related to anti-Asian hate crimes by hiring language translators for police units and increasing police presence in neighborhoods with Asian residents, or else return the funding.³⁴ The bill received overwhelming congressional support, winning 364-62 in the House of Representatives, and 94-1 in the Senate. The National Incident Based Reporting System, established in 2021, has since served as the database consolidating all hate crimes voluntarily reported by state and local law enforcement.³⁵

Although Asian groups like Asian Americans Advancing Justice helped draft the COVID-19 Hate Crimes Act, even larger coalitions of AAPI groups nationwide stood in opposition, as the legislation failed to address the structural factors that make Asian Americans vulnerable targets for attack.³⁶ Eighty-five Asian, LGBTQ and multiracial affinity groups issued a joint statement in May after the Act was signed into law.

Our movements have learned the hard lesson that relying on law enforcement and crime statistics does not prevent violence. The federal government has been

³² U.S. Congress, Senate, *Covid-19 Hate Crimes Act*, S.937, 117th Cong., introduced in Senate March 23, 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/937>.

³³ “Remarks by President Biden at Signing of the Covid-19 Hate Crimes Act.” 2021. *The White House*. The United States Government. May 21. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/20/remarks-by-president-biden-at-signing-of-the-covid-19-hate-crimes-act/>.

³⁴ Sonnenberg, Rhonda. “One Year Later: Covid-19 Hate Crimes Act a Promising Work in Progress.” Southern Poverty Law Center. The Civil Rights Memorial Center, May 20, 2022. <https://www.splcenter.org/news/2022/05/20/one-year-later-covid-19-hate-crimes-act-promising-work-progress>.

³⁵ U.S. Congress, Senate, *Covid-19 Hate Crimes Act*, S.937, 117th Cong., May 5, 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/937..>

³⁶ “75+ Asian and LGBTQ Organizations’ Statement in Opposition to Law Enforcement-Based Hate Crime Legislation,” GAPIMNY, May 19, 2021, <https://www.gapimny.org/75-asian-and-lgbtq-organizations-statement-in-opposition-to-law-enforcement-based-hate-crime-legislation/>.

collecting hate crime statistics since 1990. In 2009, the Matthew Shepard Act expanded federal hate crime categories to include sexual orientation and gender identity, yet deadly anti-trans violence continues to occur at alarming rates year after year, most impacting Black trans women and femmes.³⁷

Community organizing groups argue that this bill is merely reactive, not preventative. Simply having data on what crimes have already occurred does not inherently define or lead to policies that will deter those crimes from occurring again. The Act attempts to bring visibility to violence experienced in Asian communities, but beyond documenting victims, it fails to address the motivations which lead attackers to commit hate crimes.

The COVID-19 Hate Crimes Act overlooks the intersectionality of racial groups in how they experience violence between one another, and how they are harmed by outside forces. Police are known to inflict harm on minority groups including Black Americans, South Asian Americans, and LGBTQ Asian Americans. According to a coalition of eighty-five AAPI groups opposing the legislation:

The bolstering of law enforcement and criminalization...further violence against Asian communities facing some of the greatest disparities and attacks – sex workers, low wage workers, people with disabilities, people living with HIV, youth, women, trans and non-binary people, migrants amongst others... police violence is also anti-Asian violence, which has disproportionately targeted Black and Brown Asians. We uplift the names of Christian Hall and Angelo Quinto, Asian Americans who were recently killed by police during mental health crises.³⁸

Asian Americans are not a monolith; they hold other identities along ethnic, multiracial, religious and gender identity lines which are threatened by the institution of policing. Relying on law enforcement to enact government grants and facilitate hate crime reporting directly emboldens the institution harming Black Americans and Asian groups of intersectional identities. Asian American survey respondents largely support making laws against hate crimes stronger, but not at the expense of endangering Black communities. Approximately half of all Asian Americans, when asked about interventions to reduce violence against Asian Americans, supported stronger hate crime laws.³⁹ A 2020 national survey by Asian Americans Advancing

³⁷ Ibid.

³⁸ Ibid.

³⁹ Luis Noe-Bustamante, Neil G. Ruiz, Mark Hugo Lopez, and Khadijah Edwards, “About a Third of Asian Americans Say They Have Changed Their Daily Routine Due to Concerns over Threats, Attacks,” Pew Research Center, May 17, 2022, <https://www.pewresearch.org/fact-tank/2022/05/09/about-a-third-of-asian-americans-say-they-have-changed-their-daily-routine-due-to-concerns-over-threats-attacks/>.

Justice found that Asian Americans largely support reallocating local government funding away from law enforcement programs, with 44% of ethnically Chinese respondents agreeing strongly or somewhat, and 75% of ethnically Indian respondents showing support.⁴⁰ AAPI groups also agree that discrimination against Black people is severe, with over 55% of all Asian ethnicities surveyed agreeing that there is “some” or “a lot” of discrimination against Black people today.⁴¹

The COVID-19 pandemic lingers in the United States and hate crimes against Asian Americans persist well into 2023: one in three Asian Americans have had to change their daily routine out of fear for their safety.⁴² Nine major U.S. cities, including New York and Los Angeles reported a record high in overall hate crimes in 2022, but some decrease in those specifically against Asians. The fall in anti-Asian hate crimes is likely attributed to an overall reduction in COVID-related news coverage and hospitalization rates, as a 2021 Center for the Study of Hate and Extremism study found that anti-Asian hate crimes in NYC fell amidst similar conditions in 2020.⁴³ The COVID-19 Hate Crimes Act may have certainly contributed to national hate-crime reporting, but data is still missing in many cities, as grant funding for hate crime hotlines is only distributed to police forces who voluntarily wish to increase statistics documentation.

REPAIR THROUGH RE-INVESTMENT AND RACIAL RECONCILIATION

Racial reconciliation must be facilitated on a congressional level by accounting for the institutions that disproportionately harm all racial groups while seeking redress for Asian Americans. Interventions to prevent Asian hate crimes should be data driven, but to identify which Asian groups are most harmed— and more importantly, why— hate crime data should be disaggregated among ethnic, gender identity, income, and citizenship margins. Congress must ensure that the institutions responsible for data collection, though, do not leverage power against minority groups, and have the capacity to recommend meaningful interventions from disaggregated information. Thus, Congress must revise the current COVID-19 Hate Crimes act

⁴⁰ Jennifer Lee and Tiffany Huang, “Why the Trope of Black-Asian Conflict in the Face of Anti-Asian Violence Dismisses Solidarity,” Brookings, March 9, 2022, <https://www.brookings.edu/blog/how-we-rise/2021/03/11/why-the-trope-of-black-asian-conflict-in-the-face-of-anti-asian-violence-dismisses-solidarity/>.

⁴¹ *Ibid.*

⁴² Noe-Bustamante, Ruiz, Lopez, and Edwards, “Asian Americans Say They Have Changed Their Daily Routine.”

⁴³ “Report to the Nation: Anti-Asian Prejudice & Hate Crime.”

to designate hate crimes as a public health responsibility: not simply assessing the extent to which violence has already occurred, but also pooling resources into the infrastructures of AAPI communities to reduce vulnerability and prevent future attacks. Congress can proactively deter violence against AAPI groups without adversely hurting other racial and gender identities by directing its federal grants in the current Act towards community organizing groups, rather than the police. This non-carceral intervention is a vital first step to beginning a longer-term racial reconciliation process, by keeping the varying experiences of all oppressed racial groups in mind during policymaking.

Disaggregating Data to Identify the Most Vulnerable

Under the current framework, hate crime data on anti-Asian cases is difficult to draw meaningful conclusions from, as Asians are not a monolithic race. Socioeconomic, citizenship, class, and intersectional identity markers vary between those who are East Asian and those from the Indian Subcontinent, impacting risk of experiencing violence and being able to report it. To name an example, an estimated 1.7 million Asian immigrants in the U.S. are undocumented.⁴⁴ Nearly 5 million Asian Americans are limited English proficient, almost half of Burmese, Nepalese, Hmong, Bangladeshi and Pacific Islander immigrants are low-income, and Pacific Islander immigrants had the second highest unemployment rate of all racial groups.⁴⁵ Disaggregating hate crime data by specific margins within the broad category of race can identify the most vulnerable among specific demographics within Asian Americans. By knowing which ethnicities or those of particular citizenship status are at risk, their neighborhoods, businesses, and schools can be reinforced with specific interventions, driven by federal grants.

Currently, law enforcement is not equipped to recommend any form of preventative policy based on collected hate-crime data. To ensure that hate-crime data can be collected, and then interpreted effectively, data collection should be designated as a public health responsibility, regulated through the U.S. Department of Health and Human Services, rather than through the Department of Justice and national law enforcement. The Office of Minority Health within the Health and Human Services Department reviews outcomes among American racial groups

⁴⁴ “Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities,” Asian Americans Advancing Justice, June, 2019, <https://www.advancingjustice-aajc.org/publication/inside-numbers-how-immigration-shapes-asian-american-and-pacific-islander-communities>.

⁴⁵ Ibid.

including household income, educational attainment, insurance coverage, common health concerns, and language fluency.⁴⁶ They have experience researching specific health outcomes within minority ethnic groups, and already understand many of the inequalities that exist in racial categories as broad as Asian Americans. With this data in the hands of experts in health and social service interventions, approaches that are non-carceral and aimed at providing resources ranging from translator services to vocational programming can be implemented as more accurate preventions to vulnerability in Asian communities.

Healing Through Community Re-Investment

Anti-lynching campaigns throughout the 1900s present a compelling non-carceral framework for protecting racial minorities. The practice of lynching Black Americans turned endemic between 1890-1960, as an estimated 4,743 Black people were terrorized through mob violence, obstructing families and livelihoods.⁴⁷ This number is likely underreported, as there was no formal documentation of national lynchings. The National American Association of Colored People called for the criminalization of lynching as a federal crime, and state- and city-level organizations simultaneously rallied to reinforce the political and economic institutions that endanger Black people long before lynching occurs. For example, following the 1906 Atlanta Race Riot in Atlanta, GA, the Commission on Interracial Cooperation (CIC) drafted legislation advocating for community level interventions to address the material consequences of systemic racism.⁴⁸ The CIC partnered with Atlanta community organizations, including the Neighborhood Union, a nonprofit serving Black middle-class women across Georgia, to draft policy memos outlining the specific failures of the government to protect Black citizens' lives and property, which enabled the societal hierarchy and abuses of power that occur in lynching.⁴⁹ Lack of suffrage and poor social welfare were among the top issues, and the CIC pushed for improved working conditions and regular hours for Black housemaids and home caregivers, better pay and longer terms for social workers and teachers in racially segregated schools and parole officer

⁴⁶ "Office of Minority Health," Asian American Data, U.S. Department of Health and Human Services, Office of Minority Health, June 2021, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=63>.

⁴⁷ "History of Lynching in America," NAACP, February 11, 2022, <https://naacp.org/find-resources/history-explained/history-lynching-america>.

⁴⁸ "What the Negro Wants," Carolina Story: Virtual Museum of University History, 1944, <https://museum.unc.edu/exhibits/show/segregation/mary-mcleod-bethune--1875-1955>.

⁴⁹ Ibid.

allocation so incarcerated Black youth could continue their education.⁵⁰ Further requests for investment in neighborhood sanitation, street renovation, and school buildings were made to increase safety in infrastructure.⁵¹

A revised COVID-19 Hate Crimes bill should be modeled after these goals of the anti-lynching movement, bolstering resources available to AAPI communities. The revision should assign the responsibility of implementing government funding to social services which already directly serve AAPI communities. Nonprofit and social service organizations nationwide, like Asian Mental Health Collective, currently support vulnerable Asian communities who have been affected by the rise in hate crimes. Notably, the Asian American Federation supplied grants to Asian-owned businesses which were vandalized in New York City hate crimes and assisted AAPI victims of physical assault by paying their hospital bills.⁵² Federal grants can further support these social services for victims, while also investing in programs that strengthen the infrastructure of vulnerable Asian communities. English language classes, food pantry services and vocational programs, for example, can be funded and taught by local organizations who serve undocumented Asian clients. This improves economic outcomes and makes such groups less vulnerable targets for attack.

Social service agencies can also facilitate civic engagement programs for dialogues on race, power, and prejudice between Asian clients and broader city residents. In dialogues on race, power, and prejudice, Asians can share their experiences during the pandemic with their neighbors, fostering a sense of interdependence in community, and combat colonial archetypes that have led to attacks on Asian women. These conversations must promote multiracial engagement in schools and businesses, shedding light both on the ways that Asian Americans are perceived by non-Asians, and the anti-Black ideologies Asians may harbor against other groups: discussing both how these beliefs were formed, and how to correct them. Grant funding for these micro-level engagements, though not an ultimate solution to systemic racism, is an interpersonal starting point to correcting racist narratives.

⁵⁰ “Statement to the Committee on Inter-Racial Relations of the Women’s Missionary Council of the Methodist Episcopal Church,” AUC Woodruff Library Digital Exhibits, 1920, <https://digitalexhibits.auctr.edu/exhibits/show/seekingtote/183>.

⁵¹ “What the Negro Wants,” Carolina Story: Virtual Museum of University History, 1944, <https://museum.unc.edu/exhibits/show/segregation/mary-mcleod-bethune--1875-1955>.

⁵² “About Us,” Asian American Federation, accessed February 28, 2023, <https://www.aafederation.org/about-us#what-we-do>.

CONCLUSION

Racial reconciliation within and between racial minorities and majority groups is a long-term strategy for preventing racially motivated hate crimes. Revising existing policy on anti-Asian violence prevention is the first step. By funding services that directly provide resources to Asian groups and increase belonging in multiracial communities, Congress can protect Asian Americans from attacks, without harming other racial identities. Documenting the intersections of race, class, and gender, within Asian groups specifically identifies the communities who require federal aid and advances narrative justice for the diverse groups that identify as Asian American. Ultimately, the structural racism which motivates hate crimes between all racial groups must be addressed, but through immediate interventions facilitated by non-carceral agencies, Congress can more equitably prevent anti-Asian hate crimes. The United States began addressing injustice against Asian-Americans in the pandemic through the COVID-19 Hate Crimes Act. As the pandemic and threats to Asian communities persist, America must reinforce its commitments not just to serving Asian Americans, but serving all minorities through accountability and reconciliation.

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FEDERALISM IN EDUCATION POLICY: A LOOK BACKWARDS AND A LOOK FORWARD

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The American education system is largely administered on a state and local government basis, but the federal government has increasingly taken on a market-style view of education and exerted more influence over education policy. An assessment of two major pieces of federal education policy legislation, The Elementary and Secondary Education Act of 1965 and The No Child Left Behind Act of 2001, shows that federal intervention has historically occurred during times of increased concern about civil rights and socioeconomic inequality. Significantly, federal government intervention in these realms occurs during policy windows spurred by multiple states' actions or inactions to equalize academic opportunities for disadvantaged students. This paper will assess what opportunity exists, if any, for federal government intervention in the next five to ten years on similar issues without overstepping established boundaries between federal and state power in education.

INTRODUCTION

Since its inception in the early 19th century, the American education system has been structured so that state and local governments hold the power to administer public education. However, the tension between states and the federal government that is inherent in federalism still strongly impacts education policy. Times of national crisis or larger social movements spur the federal government to invest more in human capital by exerting more influence on education policy. Disputes over racial and socioeconomic disparities between and within states, which the federal government sees as needing to be reconciled to ensure equal opportunities for all students, lead to increased presidential and congressional attempts to influence education policy. During the 1950s and 1960s, the decentralized nature of the American education system allowed southern states the freedom to segregate public schools until the federal government intervened, first with the monumental *Brown v. Board of Education* decision in 1954. However, legislation to guide the integration of schools did not appear until the Civil Rights Act of 1964, which was soon followed by the passage of the Elementary and Secondary Education Act (ESEA) of 1965 as part of President Lyndon B. Johnson's "Great Society" initiatives. While desegregation was not the only intention behind the original ESEA, it greatly increased the speed of desegregation

in schools by threatening to withhold federal funds until the school showed proof of integration or had a plan to integrate.¹ The ESEA was the first major attempt by the federal government to exert centralized control over education policy, permanently changing the dynamic of the American education system.

While the ESEA set a precedent for federal government spending in American education, it also led to a continuing series of debates about the scope of federal intervention. Both the Democratic and Republican Parties have shifted between viewing more expansive federal education policy negatively and positively. President Richard Nixon, President Gerald Ford, and President Ronald Reagan all argued for a decreased federal role in education, while both President George H.W. Bush and George W. Bush envisioned a federal commitment on an even grander scale. President George H.W. Bush campaigned heavily on his desire to reform education in 1988, going as far as to state “I want to be the Education President. I want to lead a renaissance of quality in our schools.”² His son George W. Bush went on to sponsor and sign the No Child Left Behind Act (NCLB) in 2001, which was a groundbreaking piece of education reform that built upon the ESEA by adding school performance requirements. Conversely, President Barack Obama signed the Every Student Succeeds Act of 2015, which shrank the role of the federal government in education and marked a shift in Democratic education policy.

An analysis of both these groundbreaking pieces of legislation reveals how a market-style view of education impacted the American education system and contributed to the desire to remedy racial and socioeconomic inequality as a means of strengthening American human capital. As described by Stanford Education Professor David F. Labaree, the United States’ three major educational goals of democratic equality, social efficiency, and social mobility stem from the general responsibility of a liberal democracy to “meet its collective needs while simultaneously guaranteeing the liberty of individuals to pursue their own interests.”³ Labaree also argues that there is an inherent tension between education as a private and collective good that is impossible to reconcile in a liberal democracy. Federal government intervention in

¹ David A. Gamson, Kathryn A. McDermott, and Douglas S. Reed, “The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations,” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 1–29. <https://doi.org/10.7758/rsf.2015.1.3.01>.

² Maris A. Vinovskis, *The Road to Charlottesville: the 1989 Education Summit*, (National Education Goals Panel, 1999), <https://govinfo.library.unt.edu/negp/reports/negp30.pdf>

³ David F. Labaree, *Someone Has to Fail: The Zero-Sum Game of Public Schooling*, (Cambridge: Harvard University Press, 2010), Accessed January 14, 2023. ProQuest eBook Central.

education policy reform has occurred due to the popularity of the idea that education is primarily a collective good that benefits the United States both socially and economically. Achieving greater social efficiency and social mobility is the key motivation behind education policy reform on the federal level. The federal government primarily intervenes in education reform regarding issues of poor racial and socioeconomic conditions in schools, which limits social mobility and thus negatively affects the United States' social efficiency as a whole.

A historical analysis of how and why the ESEA and NCLB were passed will serve as a reference for considering the potential for federal government education in policy today. The United States still faces similar challenges relating to how to equalize academic opportunities for disadvantaged students. With a polarized Congress and high partisan sensitivity around today's educational issues, it appears unlikely there will be any expansive federal education bill soon that will attempt to equalize resources for elementary or higher students across the country. However, it is possible that federal government intervention in education policy could appear in the next five to ten years in a surprisingly bipartisan policy area: early childhood education. By looking at how red, blue, and purple states such as Florida, Vermont, Colorado, and New Mexico have already successfully implemented policies that support universal preschool, the federal government could possibly draw upon these policies to create a bill providing more funding to support better early childhood education across the country.

THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA) 1965

Before passage of the Elementary and Secondary Education Act in 1965, the only major piece of federal legislation regarding education signed into law was the National Defense Education Act (NDEA) of 1958. The NDEA was a Cold War national security measure passed in response to the launch of Sputnik in October of 1957, and it was still strongly supportive of the premise that the states should retain the power to administer their education policies as they see fit.⁴ The reluctance to pass any federal legislation regarding education before this was clear, since every federal funding of education bill introduced during the eighty-second, eighty-third,

⁴ Arthur S. Flemming, "The Philosophy and Objectives of The National Defense Education Act," *The Annals of the American Academy of Political and Social Science* 327 (1960): 132-138, <http://www.jstor.org/stable/1033973>.

and eighty-fourth Congresses (1951-1955) failed to make it pass the House.⁵ In maintaining the division between federal versus state supremacy over education, the NDEA strictly prohibited any federal control over curriculum. Instead, it was primarily focused on keeping talented students in school and expanding science, mathematics, and foreign language instruction. The NDEA showed that the federal government was increasingly beginning to view public education as a means of generating greater economic development and subsequently a more productive society. During the Cold War, producing more knowledgeable citizens was also a national security matter, but the expansion of federal funding in education came to mean much more than just that.

When President Lyndon B. Johnson took office in 1963, an estimated 19.5% of Americans were living below the poverty threshold.⁶ Of those living in poverty, 51% were Black or of other minority races.⁷ Furthermore, the unemployment rate for Black Americans was 10.9%, over double the national unemployment rate of 5%.⁸ The nation was also in the crux of the Civil Rights Movement, with President Kennedy sending his Civil Rights bill to Congress in June and the March on Washington for Jobs and Freedom following in August. President Johnson made his intention to prioritize mending these growing social and economic issues clear in a special message to Congress on March 16, 1964, where he officially declared a “War on Poverty.” There are echoes of the themes of social mobility and efficiency throughout the speech, stating that the war on poverty “is a struggle to give people a chance,” as well as “an investment in the most valuable of our resources—the skill and strength of our people.”⁹ This speech announced the Economic Opportunity Act (EOA), which was eventually signed into law in August 1964 and preceded President Johnson’s official Great Society agenda in 1965. President Johnson also fulfilled the late President Kennedy’s desire to pass comprehensive civil rights legislation with the monumental Civil Rights Act of 1964. The successful passage of both

⁵ “Sputnik Spurs Passage of the National Defense Education Act,” United States Senate, accessed January 2, 2023, https://www.senate.gov/artandhistory/history/minute/Sputnik_Spurs_Passage_of_National_Defense_Education_Act.htm.

⁶ Robert G. Mogull, “American Poverty in the 1960’s,” *Phylon* 33, no.2 (1972): 161-168, <https://doi.org/10.2307/273344>.

⁷ *Ibid.*

⁸ Algernon Austin, “The Unfinished March,” Economic Policy Institute, June 18, 2013, <https://www.epi.org/publication/unfinished-march-overview/>

⁹ Lyndon B. Johnson, “Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty,” The American Presidency Project, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-nationwide-war-the-sources-poverty>

the EOA and the Civil Rights Act highlights how President Johnson was able to seize the policy window presented by the state government's demonstrated inability, and in some states, unwillingness, to deal with racial discrimination and poor economic conditions.

To better understand how and why President Johnson was able to pass the ESEA, this paper will be drawing upon William and Mary's Director of Public Policy Paul Manna's model of federalism called "borrowing strength."¹⁰ Federalism is often imagined as being top-down or bottom-up, meaning the federal government inspires action on the state level or vice versa, but borrowing strength rejects these ideas as being too simplistic. Instead, policy entrepreneurs at both levels "leverage their own supplies of license and capacity and also borrow strength from one another," which creates a loop of feedback that can empower or discourage both to pursue different political agendas.¹¹ In 1963, feedback from southern states about inequality in education was negative towards any legislation dealing with that inequality through integration, despite growing pressure from the federal government and in various protests against racial discrimination in the country. In response, President Johnson was determined to increase federal involvement because of the overwhelming sense that education equality would not be achieved without federal help. The U.S. Assistant Commissioner of Education for Legislation under President Johnson, Samuel Halperin even said in a later interview with Manna that "The people who you would call the Kennedy and Johnson elites – I don't use that term negatively – didn't think that we could get educational justice from the states."¹² A 1968 taped conversation between Dr. Samuel Halperin, Deputy Assistant Secretary for Legislation, and Mr. Harold Howe II, U.S. Commissioner of Education, further reveals how the Johnson administration viewed economic disparities between states as a reason for federal involvement. Howe points out that more fortunate states, which were states with greater industry and employment, had a much higher per-pupil expenditures compared to those in poorer states even though "the youngsters in the low-expenditure states are citizens of the United States just as the children from the more affluent states are."¹³ A student in the Northeast had much better access to educational resources

¹⁰ Paul Manna, *School's in: Federalism and the National Education Agenda* (Washington, DC: Georgetown University Press, 2006).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Dr. Samuel Halperin and Harold Howe II, "The Federal Government's Remaining Role in Education," July 31, 1968, transcript, LBJ Presidential Library, Austin, Texas, <https://www.discoverljb.org/item/oh-halperins-nd-s2-66-1hew-5>.

than a student in the South, where 49% of the United States' impoverished population lived in 1960.¹⁴ Combined, the lack of state government action to desegregate schools in the South and the unequal resources across states due to different tax revenues created a window for the federal government to intervene.

The different sanctions contained within the ESEA aimed at addressing only issues of federal concern and avoided encroachment into other educational areas. Mr. J. Graham Sullivan, the Deputy Commissioner of Education during the Johnson administration, described in a 1968 interview how the federal government decided upon the content of the bill:

The Federal government, I assume, has felt that the best way to provide assistance to bringing about specific change in education, was to identify specific areas of concern that were of national interest and then provide funds that served as a catalyst, as a stimulus to local agencies and State departments of education.¹⁵

The five major provisions in the bill strategically focused on providing funding in specific areas that theoretically would help equalize opportunities for all students, but still granted states the main responsibility for spending these funds on programs and initiatives of their own creations. One of the most impactful provisions of the bill was Title I, which directed around \$1.06 billion in funding to help low-income children by “provid[ing] for payment of one half of the average per pupil expenditure for children from families with an income below \$2,000 per year.”¹⁶ Since the bill directly targeted addressing the needs of impoverished children, the Title I provision bulk received the bulk the of funding in the bill versus the other four titles.¹⁷ Although President Johnson's bill was primarily targeted at ensuring students living in poverty received an equal education, the bill also assisted federal integration efforts to some extent. States could not access the substantial amount of funding made available to them through the ESEA if they remained segregated due to Title VI of the Civil Rights Act of 1964, which

¹⁴ Jens Manuel Krogstad, “How the geography of U.S. poverty has shifted since 1960,” Pew Research Center, September 10, 2015, <https://www.pewresearch.org/fact-tank/2015/09/10/how-the-geography-of-u-s-poverty-has-shifted-since-1960/>.

¹⁵ J. Graham Sullivan, interview by Monna Clark, July 22, 1968, transcript, LBJ Presidential Library, Austin, Texas, <https://www.discoverlbj.org/item/oh-sullivanj-19680722-1-66-1hew-16>.

¹⁶ Buckman Osborne, “The Elementary and Secondary Education Act of 1965,” *The Clearing House* 40, no. 3 (1965): 190–92, <http://www.jstor.org/stable/30182931>.

¹⁷ David A. Gamson et al., “The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations,” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no.3 (2015): 1-29, <https://doi.org/10.7758/rsf.2015.1.3.01>.

prohibited the spending of any federal funding on any program that racially discriminated.¹⁸ It is important to note, however, that there was still resistance in many southern school districts and that the ESEA did not achieve desegregation on a grand scale.¹⁹ Overall, the ESEA substantially increased federal spending in education and opened the door for increased federal influence. The federal government had gone from spending a meager \$240 million on the NDEA in comparison to the \$1.3 billion appropriated towards the ESEA.²⁰ The next major expansion of federal government influence in education policy, the No Child Left Behind Act of 2001, would build upon the ESEA and introduce a key new aspect of increased federal control: the desire for accountability.

THE NO CHILD LEFT BEHIND ACT (NCLB) 2001

Unlike the ESEA, the No Child Left Behind Act (NCLB) represents the other side of the “borrowing strength” model where policy entrepreneurs in the federal government seize upon the momentum spreading in many states towards similar policies. In 1989, forty-nine governors met in Charlottesville, Virginia to discuss public education reform following the 1983 *A Nation at Risk* report released during the Reagan administration that highlighted poor educational performance across the country.²¹ The Education Summit spurred several major state education reform initiatives centered around creating new academic standards and ways to hold schools accountable for meeting these standards.

Before being elected President in 2000, George W. Bush signed several major education reform initiatives into law as Governor of Texas in 1995. The seventy-fourth Texas Legislature passed Senate Bill (SB) 1 which “established one of the country’s first statewide accountability systems for public schools,” through the creation of curriculum standards known as the Texas Essential Knowledge and Skills.²² Texas was not the only state in the 1990s to adopt some form

¹⁸ Ibid.

¹⁹ Harvey Kantor, “Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s,” *American Journal of Education* 100, no.1 (1991): 47-83, <http://www.jstor.org/stable/1085652>.

²⁰ Miriam Cohen, “Reconsidering Schools and the American Welfare State,” *History of Education Quarterly* 45, no.4 (2005): 511-37, <http://www.jstor.org/stable/20462007>.

²¹ Ferrel Guillory, “Perspective: An education summit made waves, now barely ripples,” EducationNC, October 11, 2019, <https://www.ednc.org/perspective-an-education-summit-made-waves-now-barely-ripples/>.

²² Mario Loyola, “Almost a Miracle,” *City Journal*, Manhattan Institute for Policy Research, Inc. (2016), <https://www.city-journal.org/html/almost-miracle-14734.html>.

of an accountability system for school and testing performance. Massachusetts also created new curriculum standards as well as an accountability system with the Massachusetts Education Reform Act of 1993.²³ In New York, the Board of Regents established new learning standards and an “institutional accountability system with public transparency” in 1995 and 1996.²⁴ Florida implemented the “Florida Formula” under Governor Jeb Bush during his tenure in the late 1990s to early 2000s that also included holding schools accountable for their performance.²⁵ The common thread between these state education reforms is a focus on accountability and standards.

Furthermore, there was also momentum in Congress regarding bipartisan support for greater federal government intervention in education after President Bill Clinton signed the Goals 2000: Educate America Act into law in 1994. By codifying into law the National Educational Goals set by President George H.W. Bush in 1990, Goals 2000 jump-started the standards movement by assisting states with designing and implementing their own rigorous academic standards.²⁶ However, the pace of improvement was not rapid enough for lawmakers on both sides of the aisle. This idea of requiring state accountability in education reform greatly appealed to both conservatives and liberals, creating a policy window for the federal government to intervene when George W. Bush entered office looking to replicate his success in Texas on a national level. The bill was appealing to both sides due to the opportunity it presented to finally gather real data about the correlation between increased federal funding and student performance. By passing NCLB, states would have to meet proficiency benchmarks in testing or face negative consequences like loss of federal funding for poor performance. This concern for increased federal spending in education is explicitly mentioned in President Bush’s blueprint for NCLB, in which he notes that despite \$120 billion being spent every year, the United States “has still fallen short in meeting [its] goals for educational excellence.”²⁷

²³ Mitchell D. Chester, “Building on 20 Years of Massachusetts Education Reform,” Massachusetts Department of Elementary and Secondary Education, November 2014, <https://www.doe.mass.edu/commissioner/buildingonreform.pdf>.

²⁴ “History of New York State Assessments,” New York State Education Department, <http://www.nysed.gov/state-assessment/history-new-york-state-assessments>.

²⁵ “The Evidence on the ‘Florida Formula’ for Education Reform,” Albert Shanker Institute, <https://www.shankerinstitute.org/resource/evidence-florida-formula-education-reform>.

²⁶ Marshall S. Smith, Brett W. Scoll, and Jeffery Link, “Research-Based School Reform: The Clinton Administration’s Agenda,” ed. National Research Council (Washington, D.C.: National Academy Press, 1995), <https://nap.nationalacademies.org/read/9250/chapter/5#12>.

²⁷ “Foreword by President George W. Bush,” George Bush White House Archives, accessed February 22, 2023, <https://georgewbush-whitehouse.archives.gov/news/reports/no-child-left-behind.html#1>.

Some NCLB's supporters also viewed the bill as a civil rights matter and an important step towards closing the achievement gap between White and minority students. In a speech given to the NAACP in 2000, President Bush vowed to correct "the soft bigotry of low expectations" and close the achievement gap through education reform.²⁸ Frederick M. Hess, the Director of Education Policy Studies at the American Enterprise Institute, argues that both "Democrats and Republicans vehemently rejected the notion that poverty, culture, or family background constituted legitimate explanations for mediocre student performance."²⁹ Both sides embraced stricter standards as a way to prove greater student achievement was possible across all demographics, especially low-income and minority students. Robert Gordon, an education advisor for Democratic nominee Senator John Kerry during the 2004 general election, even went so far as to argue that NCLB "requires a form of affirmative action," emphasizing how NCLB was a way to equalize opportunities for minority students.

The main way in which NCLB significantly expanded federal influence in education was by requiring Title I schools to meet Adequate Yearly Progress (AYP) standards, but it also maintained some boundaries between federal and state influence by letting states develop their own "state-specified academic plans."³⁰ NCLB required testing in both mathematics and reading for all students in grades three through eight, and that all students must meet proficiency on these state tests by the 2013-2014 school year. Schools that failed to meet NCLB criteria for two years or more were subject to strict sanctions, with even closure of the respective school being listed as a potential consequence if there was longstanding underperformance.³¹ NCLB also required the hiring of "highly qualified" teachers, with Title I money, which essentially meant teachers with bachelor's degrees and state certifications. Through increased state accountability measures, NCLB set out to close the achievement gap. Again, state influence and concern about limited social mobility and the country's social efficiency pushed lawmakers into addressing unequal conditions in schools. Senator Edward Kennedy, one of the most prominent Democrats who worked on the bill, described NCLB as "a defining issue about the future of our nation and about

²⁸ "Text: George W. Bush's Speech to the NAACP," *Washington Post*, eMediaMillWorks, July 10, 2000, <https://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm>.

²⁹ Frederick M. Hess and Michael J. Petrilli, "The Politics of No Child Left Behind: Will the Coalition Hold?" *The Journal of Education* 185, no. 3 (2004): 13–25. <http://www.jstor.org/stable/42744085>.

³⁰ Kenneth Wong and Gail Sunderman, "Education Accountability as a Presidential Priority: No Child Left behind and the Bush Presidency," *Publius* 37, no. 3 (2007): 333–50, <http://www.jstor.org/stable/4624798>.

³¹ Alyson Klein, "No Child Left Behind: An Overview," *Education Week*, April 10, 2015, <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

the future of democracy, the future of liberty, and the future of the United States in leading the free world.”³² By addressing educational disparities through an accountability system, NCLB showed the federal government’s commitment to equalizing academic opportunities for disadvantaged students for the overall prosperity of the country.

FUTURE FEDERAL EDUCATION POLICY

Educational inequality remains a persistent problem in the United States. There is a substantial funding gap between the wealthiest and poorest school districts in the country, with the wealthiest 10% of school districts spending nearly ten times more than the poorest 10%.³³ This unequal resource allocation primarily negatively affects low-income and minority children, who are more likely to attend lower-funded schools than their White, suburban counterparts. School districts also remain heavily segregated by race. The Government Accountability Office (GAO) found that for the 2020-2021 school year, more than a third of students attended a predominately same-race/ethnicity school.³⁴ School segregation, combined with the fact that the average nonwhite school district receives \$2,226 less than a White school district, means minority students are not being granted equal educational opportunities.³⁵ The unequal distribution of resources likely contributes to the continuing gap between White students and Black students in testing scores. The National Assessment of Educational Progress (NAEP) conducts yearly report cards of fourth and eighth-grade reading and mathematics assessment scores. Between 2019-2022, White NAEP reading scores dropped from an average of 230 to 227, while Black NAEP reading scores dropped from an average of 204 to 199, with the gap between groups increasing by two points.³⁶ In mathematics, the gap between White and Black average scores increased to twenty-nine points.

³² Andrew Rudalevige, “The Politics of No Child Left Behind,” *Education Next* 3, no.4 (2003), <https://www.educationnext.org/the-politics-of-no-child-left-behind/>.

³³ Linda-Darling Hammond, “Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color in America,” in *The Right Thing to Do, The Smart Thing to Do*, ed. Smedly BD, Stith AY, Colburn L, et al. (Washington D.C.: National Academies Press, 2001), <https://www.ncbi.nlm.nih.gov/books/NBK223640/>.

³⁴ Sequoia Carrillo, “The U.S. student population is more diverse, but schools are still highly segregated,” *NPR*, July 14, 2022, <https://www.npr.org/2022/07/14/1111060299/school-segregation-report>.

³⁵ “The School Funding System is Broken,” edbuild, 2019, <https://edbuild.org/content/23-billion>.

³⁶ “NAEP Report Card: 2022 NAEP Reading Assessment,” The Nation’s Report Card, 2022, <https://www.nationsreportcard.gov/highlights/reading/2022/>.

It is once again time to address the disparity in academic achievement and educational resources. The achievement gap limits both social efficiency and social mobility, the key motivating factors behind federal government intervention. However, it is unlikely a policy window will appear on the federal level in the next five to ten years due to substantial polarization and the politicization of education issues. Key to both the passage of the ESEA and NCLB was great bipartisan support and shared interests in closing the achievement gap for the betterment of the country. In 2023, partisan debates over issues like critical race theory, book banning, school choice, and even the closure of schools during COVID-19 have clouded issues such as school funding, school segregation, and improving teacher quality. With a split Congress and today's hyperpolarized environment, it would take a lot for both sides to agree on a federal education policy bill matching the breadth of both the ESEA and NCLB.

However, drawing back to Manna's idea of "borrowing strength," collective state action around similar education policies still has the potential to spur federal policy. Thus, one potential area for federal intervention in the next five or ten years is early childhood education, which has found success on the state level. It is important to note that President Biden's Build Back Better bill in 2022 included measures to incentivize implementing universal preschool for all three and four-year-olds, with guaranteed funding for the next six years.³⁷ It was an ambitious reform that would have completely transformed the role of the federal government in early childhood education. The bill's failure, however, is not necessarily a referendum against universal preschool since the bill included numerous, unrelated provisions that attracted Republican and some Democrat opposition. According to Daphna Bassok, the Associate Director of EdPolicyWorks, there is buy-in right now for the need for a more expansive educational early childhood system, but a few states need to lead the way and show some big results to inspire federal action.³⁸

Many states have begun to push for varying forms of universal pre-kindergarten, with the most notable and recent success being New Mexico's passage of Constitutional Amendment 1 in 2022. One of the biggest roadblocks to student access to early childhood education is a lack of teachers due to low pay. During the COVID-19 pandemic, New Mexico's Early Childhood

³⁷ "Build Back Better Framework," The White House, October 18, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/build-back-better-framework/>.

³⁸ Daphna Bassok, interview by Charlotte Kiss, February 1, 2023.

Education and Care Department invested federal dollars from the Coronavirus Response and Relief Supplemental Act (CRRSA) into raises for early education workers.³⁹ Now with the passage of Constitutional Amendment 1, \$150 million in funding will be used from the state's Land Grant Permanent Fund to solidify teacher raises and expand preschool opportunities in the state.⁴⁰ New Mexico also became the first state to guarantee a right to education for children ages zero to five in its constitution, possibly serving as a blueprint for other states.

However, even without this constitutional guarantee, multiple states have expressed interest in moving towards universal preschool or passed legislation. In 2021, California Governor Gavin Newsom signed into law the California Comeback Plan, which included universal kindergarten for all four-year-olds beginning in 2022-23.⁴¹ Importantly, state interest in universal preschool and universal kindergarten appeared even after the failure of Build Back Better. In Colorado, Governor Jared Polis signed a bill in 2022 granting all four-year-old students access to free preschool in 2023, with funds partially coming from a new state tax on nicotine.⁴² Michigan is trying to follow California and Colorado's lead, with Governor Gretchen Whitmer proposing universal preschool at her State of the State address in January 2023. The push for universal preschool and kindergarten is also coming from red states. In April of 2022, Alabama boosted its prekindergarten program, which already serves 42% of the state, with another \$22.5 million in funding in hopes to expand the program even further.⁴³ Arkansas Governor Sarah Huckabee Sanders campaigned on the promise of improving access to quality pre-kindergarten and has included some provisions doing so in her Arkansas LEARNS act, which is now headed to the state Senate.⁴⁴ Finally, in January of 2022, the Mississippi State Board of Education added five new early learning collaboratives, greatly expanding its pre-

³⁹ "One Time Incentive Payment for Child Care Professionals," New Mexico Early Childhood Education and Care Department, 2021, <https://www.nmececd.org/one-time-incentive-payment-for-child-care-professionals/>.

⁴⁰ Bryce Covert, "New Mexico is the First State to Guarantee a Right to Early Childhood Education. Universal Child Care Could Come Next," *Early Learning Nation*, November 9, 2022, <https://earlylearningnation.com/2022/11/new-mexico-is-the-first-state-to-guarantee-a-right-to-early-childhood-education-universal-child-care-could-come-next/>.

⁴¹ "Governor Newsom Signs Early Childhood Legislation, Highlights Transformative Investments in Early Learning," Office of Governor Gavin Newsom, October 5, 2021, <https://www.gov.ca.gov/2021/10/05/governor-newsom-signs-early-childhood-legislation-highlights-transformative-investments-in-early-learning/>.

⁴² Erica Meltzer, "Gov. Polis signs Colorado universal preschool bill into law," *Chalkbeat Colorado*, April 25, 2022, <https://co.chalkbeat.org/2022/4/25/23041861/colorado-free-universal-preschool-polis-bill-signed>.

⁴³ Jemma Stephenson, "Top of the class; Alabama expands nation-leading pre-kindergarten program," *Montgomery Advertiser*, April 29, 2022, <https://www.montgomeryadvertiser.com/story/news/2022/04/29/legislature-expands-alabama-first-class-pre-k-pre-kindergarten-program-funding-22-5-million-dollars/9560708002/>.

⁴⁴ "Arkansas LEARNS – The Sarah Huckabee Sanders Education Plan," Sarah for Governor, <https://www.sarahforgovernor.com/arkansas-learns/>.

kindergarten program as an estimated additional 3,220 four-year-old students will now have access to the classroom.⁴⁵

With a regional and partisan mix of states expanding their early childhood education programs, the federal government has an opportunity to try again to pass universal preschool. Universal preschool may not address the inequalities in different school districts' funding or school segregation, but equal access to preschool education can be another step forward towards closing the achievement gap between different socioeconomic and racial groups. Universal preschool would greatly benefit low-income families who cannot afford childcare without state assistance. It is likely a reappearance or a new variation of the universal preschool provisions in Build Back Better will appear in the next five to ten years, as more states choose to invest in early childhood education. In the interest of social efficiency and social mobility, universal preschool would ensure students from all states at least have the opportunity to gain an equal footing with their peers from richer states or richer school districts. Both the ESEA and NCLB passed during windows of great bipartisan support for an education bill and concerns about unequal educational opportunities across states. In 2023, both of these key ingredients show signs of existing, but the question remains if Congress and the president will be able to replicate the success of President Johnson and President Bush in getting a federal education bill passed.

CONCLUSION

In the United States, education policy provides a unique look into the way the federal government and states interact in a federalist system. Although education systems remain largely administered on a state and local government basis, the federal government has an interest in shaping education as a collective good. Through President Johnson's successful passage of the ESEA, the federal government codified their role in setting education policy. It recognized education's importance for the future of the country and the continuation of an efficient workforce. This market-style view of education being the foremost way to strengthen human capital has become engrained in education policymaking decisions. President George W. Bush affirmed the importance of equalizing educational opportunities and closing the achievement gap

⁴⁵ "State Board of Education approves five new early learning collaboratives to serve pre-K 4-year-olds," Mississippi Department of Education, January 21, 2022, https://www.mdek12.org/news/2022/1/21/State-Board-of-Education-approves-five-new-early-learning-collaboratives-to-serve-pre-K-4-year-olds_20220121.

through the passage of NCLB. Both President Johnson and President Bush recognized that allowing academic performance to depend on each state's educational infrastructure and funding failed to harness the power of the federal government to try to resolve racial and socioeconomic disparities between and within states. However, both laws also "borrowed strength" from the states in different ways. While President Johnson was empowered by the lack of state action to equalize academic opportunities for disadvantaged students, President Bush used state implementation of accountability frameworks as a blueprint for NCLB. Today, the spread of state implementation of universal preschool and kindergarten could serve as a blueprint for a new federal education bill.

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GOING BEYOND CARBON: MITIGATING NITROGEN POLLUTION FROM AGRICULTURE IN THE U.S.

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Agricultural nitrogen (N) management is a critical federal policy challenge, affecting public health, the economy, the environment, and the viability of our food production systems. As the federal government debates the next Farm Bill and the United States Department of Agriculture (USDA) utilizes the new funds it received in the recently-passed Inflation Reduction Act (IRA), it is important to identify ways that Congress can reduce agricultural N pollution and its associated impacts. By contributing to a better understanding of existing policies and course cases that relate to agricultural N emissions, this paper will pave the way for more effective federal action. The resulting analysis makes it clear that moving incentive-based regulations to more traditional forms of government oversight, as well as adopting a holistic and “multimedia” approach that prioritizes the health of soils, the hydrosphere, and the atmosphere all at once, are critical steps forward in reducing agricultural N pollution.

INTRODUCTION

The rapid industrialization of the past few centuries has vastly changed the ways in which we live our lives. The global population has increased from around one billion in 1800 to nearly eight billion today and fueled unprecedented advances in technology, prosperity, and life expectancy.¹ With these markers of progress, however, have come growing environmental challenges. The new report released by the Intergovernmental Panel on Climate Change (IPCC) this year warns that climate change has already caused “irreversible changes” in ecosystem health globally along with significant direct effects on human life.² The panel warns that without drastic actions toward greenhouse gas emissions reductions, limiting warming to 1.5°C above pre-industrial levels, as outlined in the 2016 Paris Climate Accords, will be out of reach.

Climate change, however, is just one of numerous “planetary boundaries” the world has

¹ Kees Klein Goldewijk, Arthur Beusen, and Peter Janssen, “Long-Term Dynamic Modeling of Global Population and Built-up Area in a Spatially Explicit Way: Hyde 3.1,” *The Holocene* 20, no. 4 (March 22, 2010): 565–73, <https://doi.org/10.1177/0959683609356587>; “World Population Dashboard,” United Nations Population Fund, Retrieved November 9, 2022, from <https://www.unfpa.org/data/world-population-dashboard>.

² Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022—Impacts, Adaptation, and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. (Cambridge: Cambridge University Press, 2023), <https://doi.org/10.1017/9781009325844>.

crossed in the past century.³ Numerous others, including biochemical flows into our air and water and biodiversity, demand our attention.⁴ One common element of these crises that is often overlooked is nitrogen (N) pollution, which limits biodiversity through the loss of N-sensitive native species and exacerbates other environmental issues like eutrophication and water pollution.⁵ While much attention is paid to the role of carbon emissions in climate change, it is also critical to also consider the role of N. Agriculture is responsible for three-quarters of nitrous oxide emissions, one key N pollutant and a “forgotten” greenhouse gas that nevertheless has the power to result in more than 3°C of warming above pre-industrial levels before 2100 if current trends continue.⁶ Thus, an emphasis on net-zero CO₂ emissions that forgets the impacts of N₂O would be disastrous.

N is such a critical element in human society due to its role in ameliorating a serious global problem: food security.⁷ The Nobel Prize-winning Haber-Bosch process, allowing mass production of ammonia (NH₃) from atmospheric nitrogen (N₂), provided for the large-scale production of cheap N-based fertilizer.⁸ N fertilizer use is a central element of modern agriculture—it is estimated that 40% of people today are alive because of fertilizers produced by the Haber-Bosch process.⁹ Because of this utility in large-scale agriculture, synthetic N use worldwide has risen drastically from 10.8 Mt N per year in 1960 to 118.8 Mt N per year in

³ Will Steffen et al., “Planetary Boundaries: Guiding Human Development on a Changing Planet.” *Science* 347, no. 6223 (May 13, 2015), <https://doi.org/10.1126/science.1259855>.

⁴ Ibid.

⁵ Eric Davidson et al., “Excess Nitrogen in the U.S. Environment: Trends, Risks, and Solutions.” *Issues in Ecology*, no. 15 (January 2012); Susan Guthrie et al., *Impact of Ammonia Emissions from Agriculture on Biodiversity: An Evidence Synthesis*, (Santa Monica: RAND, January 2018), <https://doi.org/10.7249/RR2695>; P.M. Vitousek et al., “Nutrient Imbalances in Agricultural Development,” *Science* 324, no. 5934 (June 19, 2009): 1519–20, <https://doi.org/10.1126/science.1170261>.

⁶ John Lynch et al., “Agriculture’s Contribution to Climate Change and Role in Mitigation Is Distinct from Predominantly Fossil CO₂-Emitting Sectors,” *Frontiers in Sustainable Food Systems* 4 (February 3, 2021), <https://doi.org/10.3389/fsufs.2020.518039>; Hanqin Tian et al., “A Comprehensive Quantification of Global Nitrous Oxide Sources and Sinks,” *Nature* 586, no. 7828 (October 7, 2020): 248–56, <https://doi.org/10.1038/s41586-020-2780-0>.

⁷ Adrian Leip, Benjamin Leon Bodirsky, and Susanna Kugelberg, “The Role of Nitrogen in Achieving Sustainable Food Systems for Healthy Diets,” *Global Food Security* 28 (2021): 100408, <https://doi.org/10.1016/j.gfs.2020.100408>.

⁸ Jan Willem Erisman et al., “How a Century of Ammonia Synthesis Changed the World,” *Nature Geoscience* 1, no. 10 (September 28, 2008): 636–39, <https://doi.org/10.1038/ngeo325>; Jorge A. Delgado, R. F. Follett, J. R. Follett, R. F. Follett, and W. C. Herz, “Environmental and Human Impacts of Reactive Nitrogen,” Essay, In *Advances in Nitrogen Management for Water Quality* (2010):1–37.

⁹ Vaclav Smill, *Enriching the Earth: Fritz Haber, Carl Bosch, and the Transformation of World Food Production* (Cambridge: MIT, 2004).

2019.¹⁰ This trend shows no sign of stopping as N fertilizer use is projected to increase significantly by 2030, particularly in the Global South, and it will continue to play a dominant role in agriculture worldwide.¹¹ Unfortunately, N fertilizer use is also a primary factor in human transgression of numerous planetary boundaries beyond biodiversity, including drinking water quality, air quality, freshwater and coastal ecosystem health, stratospheric ozone depletion, and climate change.¹²

These impacts arise from the excess of N introduced to the Earth system: nearly two-thirds of the 115 million tons of N applied to crops each year are not used and thus become a serious pollutant.¹³ Additionally, 90% of NH₃ pollution results from agriculture, leading to the production of secondary inorganic aerosols (SIAs) and thus additional PM_{2.5} pollution.¹⁴ Exposure to PM_{2.5} is associated with many health impacts, including Chronic Obstructive Pulmonary Disease (COPD), diabetes, respiratory illness, cardiovascular problems, and birth defects.¹⁵ These diseases can be deadly, with Nansai et al. estimating that PM_{2.5} pollution worldwide causes more than four million premature deaths per year, primarily in low-income and minority communities.¹⁶ In fact, PM_{2.5} pollution from U.S. maize production is so impactful (with total yearly damages summing 39 billion dollars) that in 40% of maize-growing states, the costs outweigh the profits.¹⁷

¹⁰ FAO. 2019. “World fertilizer trends and outlook to 2022.” Rome.

¹¹ Patrick Heffer and Michael Prud’homme, “Global Nitrogen Fertilizer Demand and Supply: Trend, Current Level and Outlook,” Paper presented at International Nitrogen Initiative Conference, Melbourne, Australia, December 4-8, 2016, <https://www.fertilizer.org/wp-content/uploads/2023/01/2016-Global-nitrogen-fertiliser-demand-and-supply.pdf>.

¹² Jan Willem Erisman et al., “Consequences of Human Modification of the Global Nitrogen Cycle,” *Philosophical Transactions of the Royal Society B: Biological Sciences* 368, no. 1621 (July 5, 2013): 20130116, <https://doi.org/10.1098/rstb.2013.0116>.

¹³ Luis Lassaletta et al., “50 Year Trends in Nitrogen Use Efficiency of World Cropping Systems: The Relationship between Yield and Nitrogen Input to Cropland,” *Environmental Research Letters* 9, no. 10 (October 1, 2014): 105011, <https://doi.org/10.1088/1748-9326/9/10/105011>.

¹⁴ Viney P. Aneja, William H. Schlesinger, and Jan Willem Erisman, “Farming Pollution,” *Nature Geoscience* 1, no. 7 (July 2008): 409–11, <https://doi.org/10.1038/ngeo236>; Anna M. Backes et al., “Ammonia Emissions in Europe, PART II: How Ammonia Emission Abatement Strategies Affect Secondary Aerosols,” *Atmospheric Environment* 126 (2016): 153–61, <https://doi.org/10.1016/j.atmosenv.2015.11.039>.

¹⁵ Cindy Feng et al., “Impact of Ambient Fine Particulate Matter (PM_{2.5}) Exposure on the Risk of Influenza-like-Illness: A Time-Series Analysis in Beijing, China,” *Environmental Health* 15, no. 1 (February 11, 2016), <https://doi.org/10.1186/s12940-016-0115-2>.

¹⁶ Nansai et al., “Consumption in the G20 Nations Causes Particulate Air Pollution Resulting in Two Million Premature Deaths Annually”; Jiawen Liu et al., “Disparities in Air Pollution Exposure in the United States by Race/Ethnicity and Income, 1990–2010,” *Environmental Health Perspectives* 129, no. 12 (November 2021), <https://doi.org/10.1289/ehp8584>.

¹⁷ Jason Hill et al., “Air-Quality-Related Health Damages of Maize,” *Nature Sustainability* 2, no. 5 (April 1, 2019): 397–403, <https://doi.org/10.1038/s41893-019-0261-y>.

N pollution's serious effect on social, environmental, and economic systems in the United States suggests the need for more robust policy and law, at both the federal and state levels, to address the problem. While there has been a lack of new federal policy in recent years specifically addressing the N overuse crisis, the recently-passed Inflation Reduction Act (IRA) represents the largest infusion of money into agricultural pollution mitigation in decades, with more than 10 billion dollars in additional funds going to two key initiatives: the Environmental Quality Incentives Program (EQIP) and the Conservation Stewardship Program (CSP).¹⁸ This rare increase in resources represents an important opportunity for the United States to finally achieve meaningful increases in the adoption of practices like cover cropping and "nutrient management" and reverse a trend of increasing N emissions that has persisted since the mid-20th-century.

Despite this encouraging development, there are still many obstacles to circumvent when attempting to manage agricultural N pollution. Slow increases in the adoption of potential N management strategies suggest that additional funding for incentive programs like EQIP and CSP may not translate into the transformational change necessary to address the N overuse crisis. The Biden administration recently released a new "Methane Emissions Reduction Action Plan" that outlines the use of these two incentive programs to address manure management and increase the adoption of climate-smart agricultural management practices.¹⁹ The focus of these new funds on the issue of climate change without heeding N's climate impact or its severe contribution to air pollution is a missed opportunity to reduce N emissions. The power of the agricultural lobby is another significant obstacle—agribusiness conglomerates are behind several significant legal victories impeding effective oversight, creating precedents that will be difficult to overcome.²⁰

One key issue impeding the effective regulation of agribusinesses is preemption, a term that refers to the supremacy of federal legislation over state laws. This doctrine means that when state laws conflict with federal laws that limit regulatory powers, the federal laws supersede the

¹⁸ *Inflation Reduction Act of 2022*, Public Law No. 117-169.

¹⁹ White House Office of Domestic Climate Policy, *U.S. Methane Emissions Reduction Action Plan*, November, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/11/US-Methane-Emissions-Reduction-Action-Plan-1.pdf>.

²⁰ Madhavi Kulkarni, "Out of Sight, But Not Out of Mind: Reevaluating the Role of Federalism in Adequately Regulating Concentrated Animal Feeding Operations," *William & Mary Environmental Law & Policy* 44, Rev. 285 (2019), <https://scholarship.law.wm.edu/wmelpr/vol44/iss1/7>.

state laws. For example, the state of California was forced to rescind a set of regulations it imposed on federally inspected slaughterhouses due to the primacy of the Federal Meat Inspection Act of 1906.²¹ Preemption thus prevents certain states from expanding upon insufficient federal policies, while other states less keen on regulating the agriculture sector must meet only the bare minimum standards outlined by the federal government. In this sense, it is a win-win for agricultural lobbyists—because of the weakness of federal legislation on the issue (in part due to additional factors that will be discussed below), corporations are largely free to manage their lands in ways that maximize efficiency and profits at the expense of the environment and public health. Because the N pollution crisis is often overshadowed by pressing climate and biodiversity concerns, there is currently an insufficient body of literature analyzing these obstacles.

Nevertheless, federal policy and law are incredibly important in shaping agricultural practices and achieving long-term sustainability. In particular, many court cases in recent years have explored the application of decades-old statutes to modern environmental problems, with mixed results. Analyzing these legal battles and better understanding the federal policy landscape related to agricultural emissions is critical to achieving sustainable agricultural systems—without a resilient foundation of federal statutes, only a small handful of states currently attempt to meaningfully regulate agribusinesses. This paper will identify key successes and areas for improvement in federal agricultural N management policy, focusing on relevant legislation and court cases dating back to the environmental movement of the late 1960s and 1970s. After this exploration, it will be clear that transitioning from a voluntary and incentive-based regulatory framework to more traditional forms of government oversight, as well as adopting a holistic and “multimedia” approach that prioritizes the health of soils, the hydrosphere, and the atmosphere all at once, are critical steps forward in reducing agricultural N pollution.

RESULTS

One key set of legislation that outlines the authority of the federal government to regulate agricultural pollution is the Farm Bill. Around every five years dating back to the Agricultural

²¹ Samantha Mikolajczyk, “Procedures: Federal Preemption,” National Agricultural Law Center, May 19, 2022, <https://nationalaglawcenter.org/procedures-federal-preemption/>.

Adjustment Act of 1938, the United States Congress has debated on and passed an omnibus bill relating to agricultural operations. Farm Bills are massive pieces of legislation with a wide scope, totaling more than 600 pages per bill in recent years.²² The extreme power of the agricultural lobby, represented by 150 million dollars in annual spending on congressional influence, has led to the inclusion of favorable terms for the industry in recent Farm Bills.²³

One highly important aspect of Farm Bills is provisions that exempt farms from regulations in other environmental legislation. For example, the 2018 Farm Bill (like the others before it) exempts farms from providing data on greenhouse gas emissions that nearly every other industry, big or small, is required to record.²⁴ This concession both precludes the EPA and other government agencies from holding agricultural polluters accountable and limits the availability of important emissions data, inhibiting effective climate regulation. In the context of N, it means that the huge N₂O footprint of the agriculture industry is largely untraceable. Even if farms were not explicitly excused from Clean Air Act regulations, this lack of point source data would make it incredibly difficult to pinpoint major emissions sources and enforce existing regulations. Thus, even states that wish to reduce agricultural N₂O emissions are largely unable to do so.

The other significant provision in Farm Bills is the allocation of resources towards conservation programs at the USDA and other federal government entities. The power of the agriculture lobby, especially when compared to the minimal leverage of conservation advocacy groups, has meant that major nutrient management and cover cropping programs that could reduce N emissions are profoundly under-resourced. Government subsidies and incentive programs provided to farmers that practice monocropping or simple corn-soybean rotations without sustainable practice modifications continue to be much larger than similar funding sources for these conservation practices. Without a change in this incentive structure, farmers will continue to take advantage of incentives that encourage unsustainable management. Thus, changing future Farm Bills to require greenhouse gas inventories and alter a flawed incentive structure are critical to solving the N pollution crisis.

²² *Agriculture Improvement Act of 2018*, Public Law No. 115-334.

²³ “Agribusiness: Lobbying, 2022,” Opensecrets RSS, Accessed January 17, 2023, <https://www.opensecrets.org/industries/lobbying.php?ind=A>.

²⁴ *Agriculture Improvement Act of 2018*, Pub. L. No. 115-334.

The Farm Bill's special treatment of agricultural enterprises is intertwined with numerous provisions in the Clean Air Act (CAA), most notably the greenhouse gas reporting requirements referenced above. The EPA has used its CAA authority to outline National Ambient Air Quality Standards (NAAQS) for six "criteria" air pollutants: "sulfur dioxide (SO₂), particulate matter (PM_{2.5} and PM₁₀), nitrogen dioxide (NO₂), carbon monoxide (CO), ozone, and lead."²⁵ Largely because of political obstacles, these standards evolve very slowly and thus frequently fail to account for new scientific knowledge. Even the EPA's recently proposed updates to particulate matter (soot) standards are much weaker than those recommended by the agency's own independent science advisors, which could save 20,000 lives a year.²⁶ Even if agricultural pollution was adequately addressed within the NAAQS, it is likely that unacceptable and harmful levels of pollution would persist.

The federal government has yet to meaningfully address agricultural pollution through the Clean Air Act. The operative language in the CAA is its emphasis on providing jurisdiction to the EPA to regulate "major" sources of air pollution.²⁷ By this definition, most farms are not subject to regulation, since most of them do not exceed the threshold outline for nitrogen dioxide (NO₂) or PM_{2.5}. In particular, regulating PM_{2.5} that arises from agricultural emissions of ammonia (NH₃) is challenging, since emissions from farms may indirectly violate NAAQS through contributing to PM_{2.5} production without being a direct source. It is nevertheless important to explore new legal methods to use existing PM_{2.5} standards in the CAA to more effectively regulate polluters, since agriculture alone is responsible for 29% of PM_{2.5} pollution and the associated mortality in the United States.²⁸ Furthermore, NH₃ is often the limiting factor in the formation of PM_{2.5}, so reducing these emissions is critical for air quality overall.²⁹

Despite the regulation of NH₃ under the CAA, emissions from agricultural sources continue to grow, pointing also towards the importance of more robust enforcement.³⁰ The

²⁵ "Clean Air Act Overview," National Agricultural Law Center, August 23, 2021, <https://nationalaglawcenter.org/overview/caa/>.

²⁶ Valerie Volcovici, "U.S. EPA Tightens Soot Standards for First Time in Decade," *Reuters*, January 6, 2023. <https://www.reuters.com/world/us/us-epa-tightens-soot-standards-first-time-decade-2023-01-06/>.

²⁷ *Clean Air Act of 1970*, Public Law No. 91-604.

²⁸ Shu-Yuan Pan et al., "Addressing Nitrogenous Gases from Croplands toward Low-Emission Agriculture," *npj Climate and Atmospheric Science* 5, no. 1 (June 2, 2022), <https://doi.org/10.1038/s41612-022-00265-3>.

²⁹ J. Lelieveld et al., "The Contribution of Outdoor Air Pollution Sources to Premature Mortality on a Global Scale," *Nature* 525, no. 7569 (September 16, 2015): 367–71, <https://doi.org/10.1038/nature15371>.

³⁰ Lei Liu et al., "Exploring Global Changes in Agricultural Ammonia Emissions and Their Contribution to Nitrogen Deposition since 1980," *Proceedings of the National Academy of Sciences* 119, no. 14 (March 28, 2022), <https://doi.org/10.1073/pnas.2121998119>.

inclusion of NH₃ as a criteria pollutant like the six mentioned above is a critical step towards bolstering the authority of the EPA and other government agencies to secure emissions reductions. Especially given progress mitigating other sources of N pollution such as large industrial facilities and power plants, applying the power of the CAA to agriculture, and to NH₃ specifically, is integral to achieving progress.³¹ One potential avenue for better enforcing the existing provisions of the CAA is an increase in monitoring and fines against large fertilizer producers. The EPA's settlement with Terra Industries in 2011 is one of many examples of an important victory made possible through enhanced oversight of corporations, who are rarely fined or caught and thus conclude that breaking the law is profitable.³² More stringent oversight and enforcement of the CAA, when combined with harsher penalties, have the potential to achieve badly needed N emissions reductions in the agricultural sector.

In June 2022, the Supreme Court decided one highly important court case limiting the application of the CAA. The case, *West Virginia v. EPA*, targeted the EPA's regulatory authority under section 111(d) of the CAA, which provides for the regulation of pollutants from existing point sources and was interpreted by the EPA to allow for the implementation of "best system of emissions reduction" (BSER) standards.³³ The Supreme Court reaffirmed the case as representing a "major question," requiring the court to find a clear congressional delegation of sweeping responsibility to regulate as large a sector of the economy as the power sector.³⁴ The Court thus held that the EPA did not have the authority to regulate greenhouse gas emissions beyond setting standards, since outlining the BSER and thus mandating specific types of actions on the part of power plants was beyond its stated responsibility in section 111(d).³⁵ While this case addressed government authority to implement the Clean Power Plan and not agricultural regulations, the decision limiting federal powers set a troubling precedent for those seeking to increase the regulation of agricultural runoff.

³¹ Jake Solyst, "What We've Learned from Exploring a Century of Nitrogen Pollution," Chesapeake Bay Program, June 6, 2022, <https://www.chesapeakebay.net/news/blog/what-weve-learned-from-exploring-a-century-of-nitrogen-pollution>.

³² "Terra Industries Clean Air Act Settlement," Environmental Protection Agency, April 19, 2011. <https://www.epa.gov/enforcement/terra-industries-clean-air-act-settlement>; Nathan Atkinson, "Do Corporations Profit from Breaking the Law? Evidence from Environmental Violations," SocArXiv, July 29, 2022, doi:10.31235/osf.io/jk4r7.

³³ "West Virginia v. EPA," Legal Information Institute, accessed January 17, 2023. <https://www.law.cornell.edu/supremecourt/text/20-1530>.

³⁴ Ibid.

³⁵ Ibid.

The “companion” of the CAA, the Clean Water Act (the CWA), also has an important role to play in agricultural N regulation. Leaching from excess N in soils is a significant contributor to water pollution that causes serious environmental and public health impacts.³⁶ The most notable section of the CWA is Section 319, which Congress added to the law in 1987. It establishes grant funding mechanisms for states, territories, and tribes to address nonpoint source pollution more effectively.³⁷ Because the CAA and CWA are geared towards addressing pollution that comes from point sources, discrete origins of measurable emissions, nonpoint sources of pollutants that coalesce in the soil, waterways, and the air are difficult to regulate. The result is many voluntary regulations and incentive programs like EQIP and CSP, which have not been effective at mitigating water pollution from agricultural runoff.³⁸ Clearly, a more robust application of these laws towards agricultural emissions is paramount.

One way to achieve this goal is to bolster enforcement mechanisms for existing CWA provisions. The CWA charges U.S. states with establishing numeric nutrient standards for particular bodies of water based on their “designated uses” that would guide the allotment of permits, facilitate the creation of pollution limits from specific industries, and enable more efficient cleanup of badly polluted waters.³⁹ However, despite acknowledgement from the EPA’s Inspector General in 2010 that states were abdicating this responsibility and the agency should take charge, the EPA has instead taken to the courts to continue dodging this task and maintain the status quo of severely polluted waters.⁴⁰ The weakness of the CWA when applied to agricultural runoff makes enforcing the development and maintenance of these numeric nutrient standards all the more important, since other potential solutions are likely to encounter serious legal challenges.

Despite this ineffectiveness of the CWA in regulating agricultural N pollution, there are important paths forward to use the existing bill text more fully.⁴¹ One significant area for improvement relates to the CWA’s Total Maximum Daily Load (TMDL) standards for the

³⁶ Eric Davidson et al., “Excess Nitrogen in the U.S. Environment: Trends, Risks, and Solutions,” *Issues in Ecology* 15, January 2012.

³⁷ *Clean Air Act of 1970*, Public Law No. 91-604.

³⁸ Guthrie, *Impact of Ammonia Emissions from Agriculture on Biodiversity*.

³⁹ Jon Devine, “How the Clean Water Act Can Combat Harmful Algal Blooms,” Natural Resources Defense Council, September 24, 2019, <https://www.nrdc.org/experts/jon-devine/how-clean-water-act-can-combat-harmful-algal-blooms>.

⁴⁰ *Ibid.*

⁴¹ *Clean Air Act of 1970*, Public Law No. 91-604.

cleanup of “impaired” waters. The lack of enforcement and legal backing behind these standards necessitates the EPA revisiting its revocation of a set of rules to strengthen them.⁴² All too often, instead of holding polluters accountable, the EPA has supported corporations and states in shirking their responsibilities under the law.⁴³ This phenomenon must end if agricultural runoff into waterways is to be reduced. Luckily, the EPA’s 2022 Nutrient Reduction Memorandum includes an entire strategy devoted to CWA authorities, including “urging more robust adoption of numeric nutrient criteria ... into Water Quality Standards,” assisting states more robustly in developing TMDL standards, and “providing strong support of innovative permitting approaches that can drive deeper, sustained nutrient reductions.”⁴⁴ These steps would mark important progress in the decades-long struggle to adequately regulate agricultural runoff.

The permitting system outlined in the CWA has been the subject of much legal dispute, leading to a large number of important court decisions under the Act. One important lawsuit that upheld important CWA provisions came in *C. Bernard Fowler et al. v. EPA et al.*, a case brought by a number of environmental NGOs with an interest in reducing pollution in the Chesapeake Bay. In this case, the Chesapeake Bay Foundation and other regional nonprofits settled a case with the EPA requiring the agency to take sufficient actions to remove the Chesapeake Bay from the federally impaired waters list under the CWA.⁴⁵ The settlement also stated that the EPA would consider concrete consequences if states did not meet the subsequent TMDL standards, an important safety mechanism given the incentive for all states not around the Chesapeake Bay to continue polluting.⁴⁶ This case set a critical precedent for groups seeking to hold the EPA accountable in areas it fails to regulate adequately.

The *Fowler* decision paved the way for another key case that was decided in 2016 by the Supreme Court. In this case, the American Farm Bureau Federation, the “face” of the agricultural lobby, sued the EPA (along with numerous other industry claimants) after it implemented a TMDL standard for excess N, phosphorus, and sediment pollution in the entire Chesapeake Bay

⁴² Devine, “How the Clean Water Act Can Combat Harmful Algal Blooms.”

⁴³ Brian, Sweeney, “Lawsuit Targets EPA Failure to Clean up Pollution in Puget Sound,” Western Environmental Law Center, December 7, 2021, <https://westernlaw.org/lawsuit-targets-epa-failure-clean-pollution-puget-sound/>.

⁴⁴ “2022 EPA Nutrient Reduction Memorandum,” Environmental Protection Agency, April 5, 2022, <https://www.epa.gov/nutrient-policy-data/2022-epa-nutrient-reduction-memorandum>.

⁴⁵ “Concluded Litigation Cases,” Chesapeake Bay Foundation, accessed January 17, 2023, <https://www.cbf.org/about-cbf/our-mission/litigate/concluded-cases.html>.

⁴⁶ *Ibid.*

watershed.⁴⁷ They alleged a lack of authority, issues with the public commenting process for the agency's recent regulatory action, and faulty scientific backing for the action despite more than twenty-five years of negotiation and precedent moving towards Chesapeake Bay protections.⁴⁸ After numerous appeals and a nationwide battle, the Court ruled that EPA's decision to implement a TMDL was an entirely "reasonable" policy decision given the powers outlined for them in the CWA.⁴⁹ This case upheld the EPA's power to implement these standards in highly polluted areas, a crucial victory for ameliorating water quality.

One key provision of the CWA is the nature of its permitting requirements for point source polluters like wastewater treatment plants. A final relevant court case and a critical environmental victory, which the environmental law nonprofit Earthjustice referred to as the "clean water case of the century," came in *County of Maui v. Hawaii Wildlife Fund*.⁵⁰ In this case, the County of Maui was knowingly releasing liquid waste into federal waters through discharging it into groundwater first, where it then eventually flowed into nearby rivers and eventually ended up in the ocean.⁵¹ The Supreme Court, when deciding in favor of the Hawaii Wildlife Fund, upheld the requirement that point source pollution that ends up in federal waters, no matter if it arrived in those waters through a "nonpoint source" like groundwater, would be subject to permitting requirements under the CWA.⁵² Despite weaknesses with the enforcement of permitting under the CWA, the strength of point source pollution regulation is key to protecting water quality nationwide.

One form of N pollution that the above laws do not strongly address is nitrate (NO_3^-) pollution in waterways from agricultural runoff. Luckily, the Safe Drinking Water Act (SDWA) includes nitrates in its suite of pollution standards to protect drinking water.⁵³ Like numerous other environmental laws, though, the initial provisions laid out in the SDWA were woefully inadequate at preventing contamination of public waterways.⁵⁴ Thus, the Drinking Water Protection Act, an amendment to the SDWA, was passed to bolster the assessment and

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *American Farm Bureau Foundation et al. v. EPA et al.*, 836 F.3d 963 (8th Cir. 2016).

⁵⁰ *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. (2020).

⁵¹ "The Clean Water Case of the Century," Earthjustice, January 24, 2022, <https://earthjustice.org/features/supreme-court-maui-clean-water-case>.

⁵² *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. (2020).

⁵³ *Safe Drinking Water Act of 1974*, Public Law No. 93-523.

⁵⁴ Clean Water Action, *Putting Drinking Water First to Address Nutrient Pollution*, 2018, <https://cleanwater.org/publications/putting-drinking-water-first-address-nutrient-pollution>.

management of “algal toxins” in drinking water.⁵⁵ Unfortunately, the SDWA is still not sufficiently protecting Americans from nitrate pollution in their drinking water, with the EPA standard of 10 mg/L being above the external contamination threshold of 3 mg/L.⁵⁶ As a result, more than twenty million Americans face elevated levels of nitrates in their water.⁵⁷ Battles to update standards in light of newly discovered impacts on human health have persisted throughout the implementation of the SDWA and similar laws.

The limitations of these bedrock environmental laws geared towards assessing pollution have inspired scholarship and legal action exploring the applications of other environmental legislation to the problem of N pollution. One such law is the Endangered Species Act (ESA), which has the potential to address N pollution that represents a direct threat to biodiversity.⁵⁸ Fortunately, there is a growing body of research that addresses the problem of N pollution for federally protected species. Hernández et al. found that 78 of the 1400 federally listed species they surveyed experienced direct impacts from N pollution for which impact pathways could be traced, potentially providing enough evidence for legal challenges to polluters.⁵⁹ Assigning liability to either individual nonpoint source polluters or state regulators for a dereliction of their responsibility to conduct business and regulate effectively is an important potential benefit of using the ESA, since few other environmental laws allow citizen suits on behalf of endangered species.⁶⁰ Because studies of particular species can be much more granular than assessments of overall ecosystem health, the ESA allows NGOs and other actors to present a convincing science-based argument for assigning liability. This smaller scale of action allows suits under the EPA to isolate target regions for improvement where point sources are difficult to identify and place that onus on local and state regulators. The ESA is also notoriously strong, one of the few environmental laws (or laws in general) that places sweeping powers in the hands of the federal government.⁶¹ An increase in ESA-based litigation could make polluters think twice before

⁵⁵ *Safe Drinking Water Act of 1974*, Public Law No. 93-523.

⁵⁶ *Ibid.*

⁵⁷ Environmental Working Group, “EWG Investigation: Across Farm Country, Nitrate Pollution of Drinking Water for More than 20 Million Americans Is Getting Worse,” June 24, 2020, <https://www.ewg.org/interactive-maps/2020-nitrate-pollution-of-drinking-water-for-more-than-20-million-americans-is-getting-worse/ca/>.

⁵⁸ *Endangered Species Act of 1973*, Public Law No. 93-205.

⁵⁹ Daniel L. Hernández et al., “Nitrogen Pollution Is Linked to US Listed Species Declines,” *BioScience* 66, no. 3 (February 24, 2016): 213–22, <https://doi.org/10.1093/biosci/biw003>.

⁶⁰ Zdravka Tzankova. “The Difficult Problem of Nonpoint Nutrient Pollution: Could the Endangered Species Act Offer Some Relief?” *William and Mary Environmental Law and Policy Review* 37, no. 3 (2013).

⁶¹ *Ibid.*

harming endangered species, providing a much stronger deterrent than the paltry fines imposed by other statutes. Even though the ESA badly needs new legal interpretations in light of indiscrete causes of endangerment like climate change, this room for growth under a law that already grants strong authority to the federal government could pave the way for critical 21st century applications of the law to numerous important environmental crises.

Another important area for improvement outside of heightening enforcement of pollution regulations and standards is a more effective allocation of the 424 billion dollars of federal funds that went towards crop insurance payments alone from 1995-2020.⁶² Especially in light of the larger budgets granted to EQIP and CSP under the IRA, ensuring that valuable federal funds produce the greatest emissions reductions possible is paramount. There are multiple ways in which the USDA and other important agencies could improve the efficiency of conservation programs. One key aspect of funding dispersal is the importance of supporting agricultural practices that reduce pollution overall, since mitigating N emissions can reduce carbon sequestration and vice versa.⁶³

In combination with supporting practices that protect the environment in numerous ways, the U.S. government should also expand programs that support the adoption of a suite of conservation agriculture practices on farms, as opposed to a single-practice approach. Doing so would maximize the financial and soil health benefits that come from the simultaneous adoption of multiple conservation practices—these management decisions can each address potential limitations of the others and maximize efficiency.⁶⁴ Another major concern is location: adoption of cover crops in Southeastern states is at least twice that in major agricultural producers like Iowa and Illinois, where adoption is still below 5%.⁶⁵ Additionally, rates of cover crop adoption in high-cover crop states like Maryland, Pennsylvania, Virginia, and Georgia far outstrip those in the Corn Belt and along the West Coast.⁶⁶ Allocating EQIP, CSP, and local conservation

⁶² Emily K. Burchfield et al., “The State of US Farm Operator Livelihoods,” *Frontiers in Sustainable Food Systems* 5 (February 21, 2022), <https://doi.org/10.3389/fsufs.2021.795901>.

⁶³ Changsheng Li, Steve Frohling, and Klaus Butterbach-Bahl, “Carbon Sequestration in Arable Soils Is Likely to Increase Nitrous Oxide Emissions, Offsetting Reductions in Climate Radiative Forcing,” *Climatic Change* 72, no. 3 (2005): 321–38, <https://doi.org/10.1007/s10584-005-6791-5>.

⁶⁴ Maggie Monast, Laura Sands, and Anne Grafton, *Farm Finance and Conservation: How Stewardship Generates Value for Farmers, Lenders, Insurers and Landowners*, (Environmental Defense Fund, 2018), <https://supplychain.edf.org/resources/farm-finance-and-conservation-how-stewardship-generates-value-for-farmers-lenders-insurers-and-landowners/>.

⁶⁵ Steven Wallander et al., *Cover Crop Trends, Programs, and Practices in the United States*, United States Department of Agriculture, Economic Research Service, Economic Information Bulletin, no. 222 (2021).

⁶⁶ *Ibid.*

program funds more thoughtfully to states that are experiencing low rates of adoption and low total cover crop usage is a critical step towards increasing N fixation in agricultural soils.

Another key concern in federal conservation funding is additionality, which refers to the ability of an investment to “cause a change in practice(s) that lead(s) to improved environmental quality.”⁶⁷ If a practice would not be adopted without such investment and/or the use of the practice would halt without that investment, then high additionality is present. This metric is lower for conservation tillage and cover cropping than numerous other conservation practices.⁶⁸ Therefore, while conservation finance can be a critical component of a successful push to increase practice adoption, it must be supported by shifts that can address non-financial barriers and ensure that the investments in sustainable agriculture reach low-income, minority, and rural farmers.

Finally, legislation like Farm Bills and the IRA that impacts funding allotments to agricultural activities must be made with these equity concerns in mind. The status quo of agricultural subsidies disproportionately benefits large farms, incentivizing consolidation: insurance indemnity payments and crop subsidies totaled over 424 billion dollars from 1995 to 2020, 78% of which went to the top 10% of recipients.⁶⁹ These larger entities are much less likely to be implementing sustainable agricultural practices on their lands, which ought to be a top priority of the government when distributing funding.⁷⁰ Federal dollars must be used in ways that advance environmental protection, equity, and farmer livelihoods all at once to maximize value.

⁶⁷ Roger L. Claasen, et al., *Additionality in U.S. Agricultural Conservation and Regulatory Offset Programs*, United States Department of Agriculture, Economic Research Service, Economic Information Bulletin, No. 222 (February 2021).

⁶⁸ Wendiam Sawadgo, Alejandro Plastina, and Fang-ge Liu, *Additionality in Cover Crop Cost-Share Programs in Iowa: A Matching Assessment*, Iowa State University Center of Agricultural and Rural Development, 2019.; Gonzalez-Ramirez, Maria Jimena, Catherine L. Kling, and J. Gordon Arbuckle Jr. 2015. “Cost-share Effectiveness in the Adoption of Cover Crops in Iowa,” 2015 AAEA & WAEA Joint Annual Meeting, July 26-28, San Francisco, California 205876, Agricultural and Applied Economics Association.

⁶⁹ Burchfield et al., “The State of US Farm Operator Livelihoods.”

⁷⁰ United States Department of Agriculture (USDA), “2017 Census of Agriculture,” National Agricultural Statistics Service, 2017, www.nass.usda.gov/AgCensus.

DISCUSSION

The analysis of key legislation and court cases presented in this paper yields important lessons for parties interested in more effectively regulating agricultural N pollution. Perhaps most important is the conclusion that the current framework in U.S. environmental policy and law to address nonpoint source pollution, comprising only voluntary regulations and incentive programs, is woefully inadequate. Countering decades-long patterns of increasing water contamination and heightened fertilizer use and achieving reductions in N pollution will require the government to carefully monitor and enforce binding regulations and standards on agricultural entities, like those that have been successful in reducing power plant emissions in the CAA.⁷¹ Even if emissions per farm begin to decrease, the world's population growth will drive an increase in N fertilizer use for at least the upcoming decade, necessitating drastic and system-wide change in the agriculture sector if the impacts of agricultural N pollution are to be significantly abated.⁷² Choosing which involuntary regulations to implement is also critical, since without a “multimedia” regulatory approach—one that considers the impact of agricultural pollution on soils, waterways, and the air—government agencies might inadvertently incentivize farmers to choose practices that mitigate one form of pollution only at the cost of exacerbating another. For example, some manure application patterns that reduce atmospheric ammonia emissions also increase nutrient runoff into waterways, making them a poor choice for government subsidization.⁷³ By setting stringent pollution standards for multiple N compounds simultaneously and addressing these different reservoirs of excess nutrients, regulators could begin to bring about the profound change necessary to reach sustainable agricultural production.

In combination with enacting and enforcing mandatory regulations, enhancing the effectiveness of existing voluntary regulations and incentive programs is key to achieving the fastest possible emissions reductions. Maximizing the value of funding allocated to programs like EQIP and CSP in the IRA and Farm Bills is an easy way to tip the balance of government subsidization in favor of sustainable agricultural practices. Numerous state programs for cover cropping and conservation tillage, many of them partially funded with federal dollars, in states

⁷¹ “Cleaner Power Plant,” Environmental Protection Agency, July 26, 2022, <https://www.epa.gov/mats/cleaner-power-plants>.

⁷² Patrick Heffer, “Global Nitrogen Fertilizer Demand and Supply: Trend, Current Level and Outlook.”

⁷³ Li, “Carbon Sequestration in Arable Soils Is Likely to Increase Nitrous Oxide Emissions, Offsetting Reductions in Climate Radiative Forcing.”

like Maryland and Pennsylvania have yielded rapid increases in adoption even as total adoption climbs above the majority of other states.⁷⁴ Even with the influx of new IRA funding, there is still not enough funding within EQIP and CSP for these incentive programs to outcompete existing subsidies in many states, but optimizing them can support efforts made in other areas. The federal government can also provide support to key states in funding their own programs as well as increasing monitoring and enforcement of pollution standards, helping circumvent the difficulty of changing state budgets due to the influence of agribusiness.

Future work should inquire into the application of additional federal policy and law to N pollution regulations. Potential subjects of additional inquiry include the Resource Conservation and Recovery Act and the wide body of cases involving government and NGO challenges against fertilizer-producing corporations. In addition, exploring where federal-state collaborations on this issue can be most effective is another excellent way to achieve emissions reductions. Nevertheless, learning from the successes and failures in implementation of complicated and oft-used legislation like the Clean Air Act and the Clean Water Act is a great first step towards achieving a cleaner and more sustainable future for people and for the environment we inhabit.

⁷⁴ Wallander, *Cover Crop Trends, Programs, and Practices in the United States*.

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THE POLITICAL INSTABILITY OF THE CHILD TAX CREDIT

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This research paper will examine the political unsustainability of the 2021 Child Tax Credit (CTC) and suggest a possible path for a similar policy to be implemented sustainably. First, it will argue that ‘policy backlash’ offers an appropriate theoretical framework to analyze this episode. Then, it will compare theoretical backlash mechanisms across six states to find that comparatively high material losses are not necessary for a backlash to occur. Second, it will focus on West Virginia as a case study and trace the process from conditions for a backlash to the resulting vote in the Senate. This example identifies policy framing as a significant factor which can be used by political elites to elicit backlash mechanisms. Finally, it will use these insights to suggest that, under heightened partisanship and polarization, there is a possible path to sustainably implement a policy similar to the CTC.

INTRODUCTION

Congress created the Child Tax Credit (CTC) in 1997 as a subsidy for middle- and upper-middle-income households. Successive reforms since 2001 have expanded eligibility and increased its value. In 2017, Republican lawmakers broadened the credit’s eligibility as part of their campaign to reduce taxes. The Tax Cuts and Jobs Act raised the income threshold to \$200,000 for single parents and \$400,000 for married parents, as well as doubled the credit’s maximum size.¹ In 2021, the American Rescue Plan (ARP) temporarily transformed the CTC into a child allowance by raising the credit and making it fully refundable. The reform removed earning requirements, which made it available to all couples earning less than \$150,000 and single parents earning less than \$112,500 on their tax filings. The benefit was then phased out for higher incomes. Another change was that it was given in monthly installments of \$250, or \$300 for children below six years old. Additionally, the maximum annual credit amount was raised to \$3,000 for children ages six to seventeen and \$3,600 for children under six.

The combination of the reforms of 2021 and 2017 produced a nearly universal benefit that was presented both as a tax cut for the middle class as well as a child allowance to alleviate

¹ U.S. Library of Congress, Congressional Research Service, *The Child Tax Credit: Legislative History*, by Margot L. Crandall-Hollick, R45124 (2019).

poverty in low-income households. While designing the last expansion, Democratic strategists expected that its implementation would produce sufficient ‘positive’ feedback from citizens to ensure its sustainability.² However, attempts to extend the benefit failed in early 2022, as Build Back Better (BBB) was rejected by the Senate. Republicans and Democratic Senator Joe Manchin voted against it in December 2021. Later, Congress would approve the Inflation Reduction Act (IRA), a similar but smaller package which excluded the CTC. This episode can be analyzed within the theoretical framework of a ‘policy backlash’ to identify the mechanisms which led to the CTC not being extended beyond 2021.

LITERATURE ON ECONOMIC AND POLITICAL DEVELOPMENT

The issue of the CTC lies at the intersection between two lines of scholarship. Cash transfer programs have been researched in Economic Development as a means to promote general equity by alleviating high inequality in childhood.³ Making conditions early in life more equal would be socially desirable because it reduces the effect of trans-generational inequality so that later differences in outcomes are the consequence of fair competition. Early research on the CTC suggests that monthly payments have contributed to doing so by reducing food insufficiency and child poverty.⁴ The common concern from economists is that such a distortion of the labor market can lead to a significant number of parents exiting the workforce. If this was the case, an alternative policy design that includes working incentives, such as the original CTC or the Earned Income Tax Credit (EITC), would be preferable.

In general, it is not socially desirable to disincentivize work, since working contributors will deem the policy unfair. Additionally, a shortage in labor supply would imply a loss to the general welfare, due to inefficiency in the labor market. However, the current empirical evidence does not support claims that the expanded CTC reduced employment among recipients. So far,

² Beau Branton, “The Key Role the Child Tax Credit Can Play: New Survey of Nation, Battleground, and Competitive CDs,” Democracy Corps, 2022, <https://democracycorps.com/battleground-surveys/the-key-role-the-child-tax-credit-can-play/>.

³ [Abhijit V. Banerjee](#), [Rema Hanna](#), Gabriel E. Kreindler, Benjamin A. Olken, “Debunking the Stereotype of the Lazy Welfare Recipient: Evidence from Cash Transfer Programs,” *World Bank Research Observer* 32, no. 2 (2017), <https://doi.org/10.1093/wbro/lkx002>.

⁴ Elizabeth Ananat, Benjamin Glasner, Christal Hamilton, and Zachary Parolin, “Effects of the Expanded Child Tax Credit on Employment Outcomes: Evidence from Real-World Data from April to September 2021,” Center on Poverty and Social Policy, Columbia University, 2022, accessed at povertycenter.columbia.edu/publication/2021/expanded-child-tax-credit-impact-on-employment.

real-world effects only show significant equity gains in poverty alleviation to negligible efficiency costs on labor supply.⁵ Data collected from real-world surveys has persuaded multiple economists that equity gains have offset efficiency costs and that the policy should be extended. A poll of influential economists by the Hoover Institute found a broad consensus in favor. Most respondents believed that a permanent version of the 2021 expansion of the CTC would reduce child poverty substantially, that its costs would be offset by the fiscal benefits of improving the outcomes of children, and that parental labor supply would be unlikely to fall significantly.⁶

Despite this incipient consensus among economists in favor of the CTC, barriers to its implementation emerged from political actors. A second field, American Political Development (APD) studies such changes in the policy cycle to explain the dynamics of continuity and change in policy regimes. Scholars of historical institutionalism and political behavior have explained policy stability by the generation of positive feedback from supportive constituencies. For instance, Social Security built a broad and organized constituency of seniors who defended it against threats.⁷ Alternatively, Jacobs and Weaver refer to ‘self-undermining feedback’ as processes derived from the policy characteristics which undermine the basis of their support and “expand the political opportunities for policy change.”⁸ Still, since most of the policy feedback literature was generated in an era with lower levels of polarization and party competition, their theories are not suited to account for an increasingly unstable policy regime.

APD scholars have noted that heightened polarization and partisanship have distorted the processes which traditionally constitute the policy cycle. For instance, Morris Fiorina has noted that ideological polarization and thin margins have made electoral bases more partisan and willing to support candidates with more extreme positions.⁹ Graham and Svulik make a similar argument in pointing out that polarization has raised the stakes of elections so that some voters

⁵ Ibid.

⁶ Romesh Vaitilingam, “Child Tax Credit - US economists panel,” IGM Forum, 2022, <https://www.igmchicago.org/surveys/child-tax-credit/>.

⁷ Eric M. Patashnik, “Backlash Politics in America’s Disunited and Polarized State,” *Studies in American Political Development* 5 no.1 (2022), <https://doi.org/10.1017/S0898588X22000116>.

⁸ Alan M. Jacobs and Kent R. Weaver, “When Policies Undo Themselves: Self-Undermining Feedback as a Source of Policy Change,” *Governance: An International Journal of Policy, Administration, and Institutions* 28, no. 4 (October 2015): 441–457, [10.1111/gove.12101](https://doi.org/10.1111/gove.12101).

⁹ Fiorina P. Morris, *Unstable majorities: Polarization, party sorting, and political stalemate* (Stanford: Hoover Press, 2017).

have come to prioritize partisan interests even over democratic principles.¹⁰ From the mobilizations against the Affordable Care Act (ACA), Eric M. Patashnik has elaborated a theoretical framework for sudden changes in policies. This category of ‘policy backlash’ is defined as extreme cases of negative feedback in which political elites and the mass public mobilize against a policy during or after its enactment, diminishing the power of its supporters and reducing the likelihood of it expanding or becoming entrenched.¹¹

THE CTC AS A BACKLASH EPISODE

Given the support from the Biden administration and the sudden mobilization against it in the Senate, the episode of the CTC stands outside of the regular dynamics of negative and positive feedback. Instead, ‘backlash’ is a relevant theoretical framework to analyze it as an episode of extremely negative feedback. At the level of political elites, two main characteristics distinguish it from regular negative feedback. First, ‘backlash’ is substantially different from the absence of positive feedback; it implies active mobilization against the policy. The CTC certainly had positive feedback from specialists who attributed the reduction in childhood poverty to its implementation, and from the Democratic Party which made it central to its legislative strategy.¹² Second, if routine feedback gradually erodes support for a policy, a ‘backlash’ is a sudden mobilization for its overturning. The failure to extend the CTC was not the product of the accumulation of feedback, but of Senator Manchin’s shift from voting in favor of the policy as a part of the ARP in March to opposing it in December of 2021.

Within this theoretical framework, the Senate vote in December 2021 resembles a *disagreement* between political elites. While the Biden administration actively mobilized in favor of BBB, Republicans and Senator Manchin voted against it due to strategic or fundamental disagreements with the policy. Further, ‘backlash’ requires that the *disagreement* between political elites interacts with mechanisms active on the mass public. Theoretically, policies can

¹⁰ Matthew H. Graham and Milan W. Svobik, “Democracy in America? Partisanship, Polarization, and the Robustness of Support for Democracy in the United States,” *American Political Science Review* 114 no. 2 (2017): 392-409, doi:10.1017/S0003055420000052.

¹¹ Eric M. Patashnik, “Backlash Politics in America’s Disunited and Polarized State.”

¹² Kevin Corinth, Bruce D. Meyer, Matthew Stadnicki, and Dereck Wu, “The Anti-Poverty, Targeting, and Labor Supply Effects of the Proposed Child Tax Credit Expansion,” University of Chicago, Becker Friedman Institute for Economics, October 2021, <http://dx.doi.org/10.2139/ssrn.3938983>.

be threatened when the mass public experiences (I) *material* and (II) *ideational losses*. Additionally, certain (III) *policy characteristics* can cause such losses and motivate a backlash.

(I) *Material Losses*

A cost-benefit analysis of the \$1.6 trillion yearly cost of the CTC identified a direct cost of \$1,040 to the average taxpayer for a \$1,000 increase in household income.¹³ However, estimates of cost incidence are not suitable indicators to suggest a backlash because the experience of *material losses* is a matter of perceptions, which may or may not correspond to the costs of a policy.¹⁴ While citizens are often not informed about these costs, a party or candidate may make them able to “trace back” their experience of losses to the cost of government actions, especially when they do not notice benefits to offset those costs.¹⁵ For instance, increases in inflation and taxation represent *material losses* when political elites make them noticeable and attribute them to excessive government spending.¹⁶

(II) *Ideational Losses*

Citizens may resent a policy that they understand fails to respect their core values, beliefs, or priorities. Then, being interpreted to counter a set of widely held ideas and beliefs makes a policy vulnerable to a ‘backlash.’ Again, parties and politicians act as mediators in the framing of a policy as contrary to a value for voters to perceive an *ideational loss* and attribute it to a political rival. However, under heightened partisanship and polarization, losses are experienced by political rivals, irrespective of the ideas associated with a particular policy. Thus, a policy implemented by a Democratic administration may signify *ideational losses* on two streams: ideological and partisan. The first will occur when there is fundamental opposition to the policy on ideological grounds and the second will occur when it is implemented by a rival party.

¹³ Irwin Garfinkel, Elizabeth Ananat, Sophie Collyer, and Christopher Wimer, “The costs and benefits of a child allowance,” Center on Poverty and Social Policy, Columbia, February 2021, accessed at <https://static1.squarespace.com/static/610831a16c95260dbd68934a/t/6113e84ec4ea72172c221d2c/1628694621357/Child-Allowance-CBA-discussion-paper-CPSP-2021.pdf>.

¹⁴ Eric M. Patashnik, “Limiting Policy Backlash: Strategies for Taming Counter coalitions in an Era of Polarization,” *The ANNALS of the American Academy of Political and Social Science* 685, no. 1 (September 10, 2019), <https://doi.org/10.1177/0002716219862511>

¹⁵ Arnold R. Douglas, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990).

¹⁶ YouGov, “The Economist,” The Economist/YouGov Poll, 2021, <https://docs.cdn.yougov.com/1aaz80mjhy/econTabReport.pdf>.

(III) Policy Characteristics

Finally, the CTC's universality may make it vulnerable to backlash. The 2017 increase in the income threshold and the 2021 elimination of work requirements expanded the eligibility towards the bottom and the top of the income distribution. Arguably, these households, which previously had an income either too high or too low to be included, would provide the type of positive feedback that sustains a policy.¹⁷ Nevertheless, a backlash can occur if voters perceive these as "undeserving" beneficiaries. The existence of such 'free riders,' referred to with derogatory epithets such as 'welfare queen' and 'deadbeat dad,' is also more of a matter of perception than fact.¹⁸ It follows that, if the implementation of the CTC brought forward such attitudes, its characteristic universality could elicit a backlash from resentful voters.

CROSS-STATE COMPARISON

The 2021 implementation of the CTC coincided with an increase in taxes and inflation rates across all states. The attribution of the increase in the costs to households to the change in fiscal policy lies beyond the scope of this paper. However, where these indicators are higher, the conditions appear more conducive to a backlash being triggered due to the perception of *material losses*. The yearly change in prices since January 2021 and the yearly change in total tax collection from 2020 to 2021 are displayed for six states in Table I. While these do not exhaust the possible variables that account for backlash mechanisms, they are intended as empirical measures of these theoretical processes in the *mass public*. Furthermore, the findings from such a restricted sample are limited in their generalizability and the existence of similar conditions across states with equal outcomes does not imply that there is a causal relation between antecedent conditions and a certain outcome.

However, this limited cross-case comparison is useful to identify what conditions are not necessary for a certain outcome. In the sample displayed, three of the four cases in which there was a backlash did not have comparatively high indicators for *material losses*. Then,

¹⁷ Eric M. Patashnik, "Backlash Politics in America's Disunited and Polarized State."

¹⁸ Katherine Cramer, *The politics of resentment: Rural consciousness in Wisconsin and the rise of Scott Walker* (Chicago, IL: University of Chicago Press, 2016); Catherine Cozzarelli, Michael J. Tagler, and Anna V. Wilkinson, "Attitudes Toward the Poor and Attributions for Poverty," *Journal of Social Issues* 57 no. 2 (2001): 207–227.

comparatively high *material losses* are not necessary for the occurrence of a backlash. Additionally, senators from states with the highest average CTC payments tended to vote against its renewal (see Table I). A pattern emerges in which senators from states with comparatively low *material losses* and high material gains opposed the bill. It follows that neither *material losses* nor gains are particularly significant to either the occurrence or prevention of a backlash.

Table I: Selected Indicators for Backlash Mechanisms Across Six States

	West Virginia	Virginia	Ohio	Pennsylvania	Kentucky	Arizona
<i>Child Tax Credit (CTC)</i> ¹⁹						
Average payment (\$)	431	416	436	424	437	444
Qualifying children (%)	82,93	83,59	82,94	83,43	83,35	84,13
<i>Material losses</i> ²⁰						
Change in inflation (%)	13,79	13,79	13,77	11,62	12,80	15,65
Change in taxation (%)	0,11	0,15	0,14	0,22	0,10	0,18
<i>Ideational losses</i> ²¹						
Biden victory in 2020	No	Yes	No	Yes	No	Yes
Republican (%)	65	45	54	49	61	51
Conservative (%)	47	36	41	37	43	39
Backlash (y)	Yes	No	Yes	Yes	Yes	No

As the incidence of *material losses* appears less significant, *ideational losses* emerge as more significant in triggering the backlash. While it is difficult to disentangle partisan from ideological mechanisms of mobilization, party membership is conspicuously influential in voting. Both the IRA and ARP were passed along partisan lines and all Republicans opposed BBB while only Democrat Joe Manchin broke away from the party line. Accordingly, states in

¹⁹ United States Department of the Treasury, “Treasury and IRS Disburse Second Month of Advance Child Tax Credit Payments,” 2021, <https://home.treasury.gov/news/press-releases/jy0322>.

²⁰ United States Department of Labor, Bureau of Labor Statistics, “Consumer Expenditure Survey,” 2022, <https://www.bls.gov/cex/>; United States Census Bureau, “2021 State Government Tax Tables,” 2022, <https://www.census.gov/data/tables/2021/econ/stc/2021-annual.html>.

²¹ “2020 Elections Voter Surveys: How Different Groups Voted,” The Associated Press by NORC at the University of Chicago, 2020, <https://www.nytimes.com/interactive/2020/11/03/us/elections/ap-polls-west-virginia.html>.

which there was a backlash have at least one Republican senator, tend to have higher proportions of voters identifying as republicans and conservatives, and were lost by Biden in 2020 (see Table I). States with a senator from each party offer a test for the relevance of partisanship. In Ohio and Pennsylvania, senators from different parties who faced the same conditions voted with their co-partisans regardless of *material* and *ideological losses* to their constituents (see Table I).

While partisanship may account for Republicans opposing BBB, a full explanation requires an account of Manchin's divergence from partisanship. West Virginia is similar to Arizona in the structural conditions that could motivate a Democratic senator to oppose the bill. Trump's 2020 victory, along with the comparatively high proportion of Republicans and Conservatives in these states condition senators to account for their preferences in their voting. Thus, where conditions are conducive to high *ideational losses* (see Table I), Democrats have incentives to either change a policy's characteristics or perform what is referred to as a *strategic disagreement*, with the particularity that in this case, it is against their party.

Given that their party membership implies some opposition on the partisan stream, these Democratic senators must prevent further ideological losses by differentiating themselves from their party to remain competitive in statewide elections. Senator Kyrsten Sinema of Arizona did this by dithering from the party line during negotiations on BBB. She publicly linked the bill to tax increases and reached an agreement to put a maximum limit on the bill's cost.²² After voting in favor, her net approval rating decreased, a trend which continued after she voted in favor of the IRA. Instead, Manchin opposed the bill, which was followed by an increase in his net approval rating. While they both lost support from voters identifying as Democrats, Manchin's losses were offset by the increase in approval among those identifying as Republicans.²³

THE CASE OF WEST VIRGINIA

West Virginia offers a relevant case to analyze how *policy characteristics* and *ideational* and *material losses* relate to each other in eliciting a policy backlash. The main finding of this

²² Lauren Fox, "Sinema won't commit to voting for Biden's sweeping social safety net expansion," *CNN*, December 2, 2021, <https://edition.cnn.com/2021/12/02/politics/kyrsten-sinema-interview-build-back-better/index.html>.

²³ Eli Yokley, "Senator Approval Ratings 2022," *Morning Consult*, 2022, <https://morningconsult.com/2022/04/25/joe-manchins-approach-paying-off/>.

case is that through effective framing, *political elites* can make losses perceivable to the *mass public* and elicit a backlash despite the material benefits that a policy offers to them. First, some *preceding conditions* imply that there are incentives for elites to mobilize against a given policy. Second, *political elites* such as parties, organized groups and politicians react to these incentives by framing the policy in a way that is conducive to a backlash. In framing, they emphasize particular characteristics that link the policy to losses which are perceived by the *mass public* and attributable to their political rivals. Third, they perform a *strategic disagreement* with their rivals based on the *ideational* and *material losses* to their electorate, from which they stand to have electoral gains in the form of higher approval ratings.

(I) *Preceding Conditions*

Senators in states with conditions conducive to *ideational losses* had incentives to differentiate themselves from the Biden administration in 2021. West Virginia offered particularly high incentives to do so due to its higher proportion of voters identifying as Republicans and Trump's victory in 2020. These imply that a policy implemented by a Democratic administration would suppose *ideational losses* for a significant part of the electorate in the state regardless of its characteristics. However, as displayed in Table I, the CTC's characteristics also place West Virginia among the states with the highest material gains. The elimination of work requirements, higher income threshold and higher maximum credit made it so that 82,93% of West Virginia's children qualified to receive high average benefits relative to other states (see Table I). While the political preferences of the majority represent an incentive to oppose, *policy characteristics* offer substantial material incentives to support the CTC.

(II) *Framing by Political Elites*

In the months leading to the vote, Senator Manchin and his office emphasized characteristics which were more easily associated with *material* as well as *ideational* instead of those that implied material gains. Through op-eds, public declarations, and position papers, they framed BBB to make losses perceptible and attributable to the Biden administration. On *material losses*, they presented causal relations between BBB and higher taxes and inflationary costs. A tactic to this end has been referring to increases in prices as an 'inflation tax,' which implies a

link between higher costs to households and government actions.²⁴ In this discourse, price increases are due to the ARP 'overheating' the economy, as the fiscal policy exceeded the level demanded by the post-pandemic recovery in economic activity.

An overheating economy has imposed a costly “inflation tax” on every middle- and working-class American. At \$28.7 trillion and growing, the nation’s debt has reached record levels. Over the past 18 months, we’ve spent more than \$5 trillion responding to the coronavirus pandemic.²⁵

Additionally, they argue that extensive government spending will force federal taxes to increase. The post-pandemic recovery stimulus would have raised the costs of running the government while the level of funding remained constant, with the difference between the two being financed by public debt and ultimately by raising taxes. Then, increasing the deficit would imply the need to eventually pass on the debt taken to pay for BBB to taxpayers.²⁶

Democratic congressional leaders propose to pass the largest single spending bill in history with no regard to rising inflation or crippling debt. Ignoring the fiscal consequences of our policy choices will create a disastrous future for the next generation of Americans.²⁷

Further, Senator Manchin framed the policy as an *ideational loss* through the figure of ‘undeserving recipients.’ In this narrative, giving benefits at the bottom or towards the top of the income distribution would create an ‘entitlement society’ in which work is disincentivized and ‘welfare dependency’ is promoted.²⁸ The first group of beneficiaries described as ‘illegitimate’ are those with incomes that are too high. Income thresholds being set at \$200,000 for single parents and \$400,000 for couples implies that the benefit is received by households earning above the 2021 median U.S. household income of \$61,937.²⁹

²⁴ Joe Manchin, “Manchin Statement On Build Back Better Act | U.S.,” Senator Joe Manchin – Newsroom, 2021, <https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-build-back-better-act>.

²⁵ Joe Manchin, “Opinion | Why I Won’t Support Spending Another \$3.5 Trillion,” *The Wall Street Journal*, September 2, 2021, https://www.wsj.com/articles/manchin-pelosi-biden-3-5-trillion-reconciliation-government-spending-debt-deficit-inflation-11630605657?mod=opinion_lead_pos5.

²⁶ Hans Nichols, “Scoop: Manchin’s red lines,” *Axios*, October 17, 2021, <https://www.axios.com/2021/10/17/scoop-manchins-red-lines>.

²⁷ Ibid.

²⁸ Howard Gleckman, “Manchin’s Child Credit Work Requirement And Income Cap Leave Many Questions Unanswered,” *Forbes*, January 6, 2023, <https://www.forbes.com/sites/howardgleckman/2021/10/20/manchins-child-credit-work-requirement-and-income-cap-leave-many-questions-unanswered/?sh=1b84044871e1>.

²⁹ Ibid.

Do you believe people making \$200,000 and \$400,000 would still get the child tax credit the same as someone making \$50,000, \$60,000 or \$70,000 that really needs it?³⁰

Second, are those said to be unwilling to work. The Senator's declarations suggest that those at the bottom of the income distribution would work less to enjoy government-funded leisure time instead. These 'free-riders' represent an unfair burden on working contributors who have a cause for resentment. While not using epithets such as 'welfare queen,' the Senator implied that welfare programs should include work requirements to prevent efficiency costs on the labor market, regardless of the empirical evidence indicating otherwise.³¹

So we have done an awful lot, and there's still an awful lot of people that need help but there are still 11 million jobs that aren't filled right now. Eight million people are still unemployed. Something's not matching up. Don't you think we ought to hit the pause and find out?³²

(III) *Response from the Mass Public*

Given a high proportion of Republicans and having framed it as a cause of higher inflation, higher taxation, and as an illegitimate provision of government benefits, Senator Manchin differentiated himself from the Democratic Party by voting against BBB. The mass public responded positively to this *strategic disagreement*, and its payoffs could be quantified by the gains in the Senator's net approval rating. After the vote on BBB, it approached that of the other Senator from West Virginia, Republican Shelley Capito, and diverged from President Biden's falling approval (see Graph I). Conversely, after voting with the Democratic majority in the IRA, Senator Manchin's approval rating tended down to Biden's net approval rating.³³

*Graph I: Net approval rating among registered voters in West Virginia (2021-2022)*³⁴

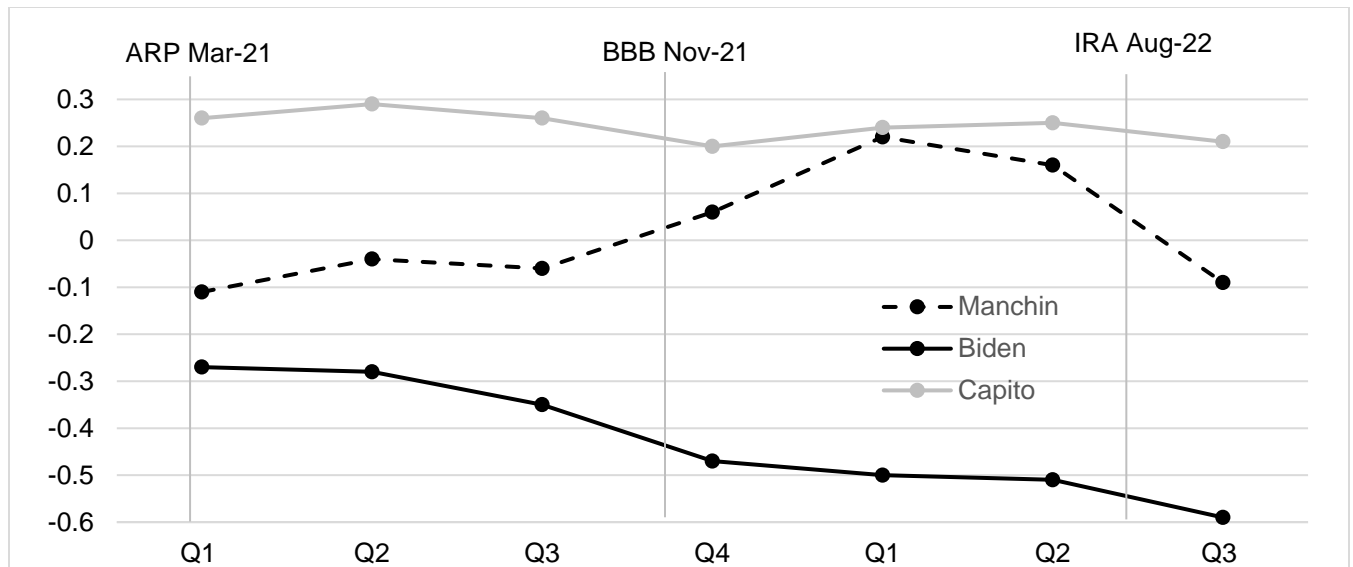
³⁰ Tami Luhby, "Manchin thinks the child tax credit is too generous -- but Republicans are responsible for that," *CNN*, January 5, 2022, <https://edition.cnn.com/2022/01/05/politics/manchin-child-tax-credit-income-limit/index.html>.

³¹ Romesh Vaitilingam, "Child Tax Credit - US economists panel," IGM Forum (2022), accessed at <https://www.igmchicago.org/surveys/child-tax-credit/>.

³² Daniella Diaz, Devan Cole, and Chandelis Duster, "Joe Manchin says he won't support the \$3.5 trillion economic bill, but would support closer to \$1.5 trillion," *CNN*, September 12, 2021, accessed at <https://edition.cnn.com/2021/09/12/politics/joe-manchin-democratic-bill-3-trillion-climate-provisions/index.html>.

³³ Eli Yokley, "West Virginians Sour on Joe Manchin After He Delivers a Big Win for Democrats," *Morning Consult*, 2022, accessed at <https://morningconsult.com/2022/10/10/senator-manchin-approval-rating-drops-west-virginia-survey/>.

³⁴ *Ibid.*



Increases from the third to the fourth quarters of 2021, and then to the first quarter of 2022 were driven by Senator Manchin doubling his approval rating among West Virginia Republicans to 69%.³⁵ This upward trend was the largest approval rating improvement of any senator at the time, with 57% of voters in the first quarter of 2022 approving of Manchin's performance, compared to 40% in the first quarter of 2021. The 34.5% of Republicans who improved their approval are a measure of how effective the Senator was at appealing to the other party, showing that the ideological effects of framing can work independently of partisanship.

POLICYMAKING UNDER PARTISANSHIP AND POLARIZATION

Partisan backlash promoted by Republicans, compounded by the ideological backlash from moderate Democrats, poses a significant threat to the sustainability of policies. The slim majority in the 2023–2025 Senate continues to give Democratic senators from states with higher ideological losses the capacity to impose conditions on the party's legislative goals. Then, the ideational preferences of these constituencies would continue to be overrepresented in policy outcomes. Further, partisan opposition from the Republican majority in the House of Representatives to any legislative initiatives sponsored by the Biden administration presents a major obstacle for a policy similar to the expanded CTC to pass through the 118th Congress.

³⁵ Eli Yokley, "Senator Manchin Approval Rating | Senator Approval Ratings 2022," *Morning Consult*, 2022, <https://morningconsult.com/2022/04/25/joe-manchins-approach-paying-off/>.

However, tracing the process of the backlash episode in West Virginia indicates that the policy's characteristics were not a significant factor in eliciting the backlash. Instead, political elites can successfully frame the policy for it to represent *ideational* and *material losses* to the mass public regardless of its benefits. Their choice of which policy characteristics to emphasize over others corresponds to an intended effect on the mass public. If the focus is on characteristics associated with losses, framing would be conducive to a backlash. Moreover, Manchin's popularity among Republicans suggests that the ideational effects of framing can be promoted independently of partisanship to gain support from voters in the other party.

Then, a nearly universal monthly cash transfer with no working requirements could be sustainably implemented if political elites framed it strategically, that is: according to the preferences of constituencies with high *ideational losses*. Additionally, in the cross-state comparison, comparatively high *material losses* were not a necessary condition for the backlash. Then, policymakers seeking to implement a policy similar to the CTC should alleviate *ideational losses* rather than decrease *material losses* associated with the policy. This means that a policy with the same characteristics, including possible tax and inflation costs, could be sustainable if it did not suppose *ideational losses*. Taken together, these insights offer a possible path towards sustainability for a policy similar to the expanded CTC.

Such strategic framing has already been used to implement the policy according to the ideational preferences of the party in government. Having been originally presented as a middle-class subsidy, then as a tax cut in 2017, and finally, as an anti-poverty cash transfer program in 2021, it has proven to be a malleable policy that can serve the interests of both parties. Throughout its different iterations, eligibility and maximum benefits have been expanded to create the nearly universal child allowance that was effective at reducing poverty rates without decreasing parental labor supply in 2021. A policy with these characteristics, and the ensuing poverty reduction, could be framed again by *political elites* according to the ideational preferences of some Republican representatives and moderate Democratic senators.

A PATH TOWARDS POLITICAL SUSTAINABILITY IN THE 118th CONGRESS

Hungary has a package of family policies which include a monthly childcare allowance with the purported aim of increasing the birth rate among ethnic Hungarians, as opposed to recent immigrants.³⁶ This example shows that a child can also be framed as an anti-immigration measure when migration is a salient issue. Within the context of the United States, the competition with China may offer such a salient issue which can be seized by policy entrepreneurs to advance a policy goal. The creation in 2023 of the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party and the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022 suggest that competition with China may be a promising area for bipartisanship in the 118th Congress. The broad objective of improving the United States' competitiveness appears to align the interests of moderate Democratic senators, the Democratic Party and some Republican lawmakers.

Then, policy initiatives effectively framed within this policy objective would not suppose the *ideational losses* that can elicit a backlash. On the contrary, by using Senator Manchin's framing as a template, political elites could emphasize the characteristics of a universal child allowance which are associated with ideational gains. If its universality made it liable to ideational backlashes due to the perception of 'undeserving recipients,' political elites could present it as being exclusive to U.S.-born children instead. Supporting their early development would be a means to increase their future productivity as workers so that they gain competitiveness relative to workers born in China. A second characteristic is the average benefit being higher in states such as Ohio, Pennsylvania, West Virginia and other of the so-called 'Rust Belt states.' There, a universal child allowance could be presented as supporting middle-income households in areas which were de-industrialized by the offshoring of manufacturing to China.

This framing strategy would seek to establish a universal child allowance as a subsidy for the domestic labor force of the future. It would attempt to persuade the *mass public* that

³⁶ Gearoid Reidy, "Analysis | Can Any Amount of Money Turn the Tide on Global Fertility?" *The Washington Post*, February 20, 2023, https://www.washingtonpost.com/business/can-any-amount-of-money-turn-the-tide-on-global-fertility/2023/02/19/495342cc-b09b-11ed-94a0-512954d75716_story.html.

promoting early childhood development is a means to increase labor productivity and become more competitive against the Chinese labor force. Furthermore, it could be presented as a complement to industrial policy. The CHIPS Act was passed with bipartisan support under the official aim of securing the country's autonomy from China in the supply of microchips by offering incentives for the re-shoring of manufacturing. This industry could be said to require a high-productivity labor force that can compete against foreign labor. Social policies that promote human capital can be presented as necessary to produce a high-productivity domestic labor force that matches the capital investments in manufacturing.

In this discourse, the industrial policy offers incentives for the establishment of capital while social policy promotes labor productivity in strategic industries to improve the country's competitiveness against China. If framed like this, a universal child allowance could gain political support as it is presented by *political elites* to the *mass public* as necessary to complement industrial policy and achieve its national security objectives, rather than being a measure to reduce childhood poverty and promote social equity.

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TALE OF TWO AMERICAS: AN ANALYSIS OF THE RISE OF EMPIRICAL POLARIZATION

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American polarization is traditionally described as either ideological or affective, but recent developments in American politics suggest that a new kind of polarization is emerging. The American public seems to be increasingly divided not only on its political priorities or partisan attitudes, but also on the fundamental empirical facts which underlie the former two. This research examines the rise of empirical polarization through an analysis of presidential rhetoric and political discourse. First, I analyze the rise of ‘empirical rhetoric’ in presidential interviews and debates. Second, I track the increasingly empirical nature of partisan divides across the 2000, 2008, and 2016 general presidential debates. Finally, I briefly survey electorally-relevant political issues over the past twenty years in order to identify the increase in empirical divisions underlying American political discourse.

INTRODUCTION

In modern American life, three things are inevitable: death, taxes, and polarization. An essential feature of the post-WWII era has been an increase in ‘party identitarianism,’ in which the average American’s social identity is increasingly associated with their party affiliation.¹ This has accompanied an increase in affective polarization, a term which describes the discrepancy between peoples’ attitudes toward their own party and toward the opposing party. In 2022, 62 percent of Republicans and 54 percent of Democrats—up from 21 percent and 17 percent, respectively, in 1994—viewed the opposing party as “very unfavorable.”² Romantic attitudes between partisans have deteriorated.³ In fact, the extent of this phenomenon has been largely unique to the United States: compared to twelve other OECD countries, the United States has “experienced the most rapid growth in affective polarization” over the past four decades.⁴

¹ Shanto Iyengar and Masha Krupenkin, “Partisanship as Social Identity; Implications for the Study of Party Polarization,” *The Forum* 16, no. 1 (January 2018): pp. 23-45, <https://doi.org/10.1515/for-2018-0003>.

² “As Partisan Hostility Grows, Signs of Frustration With the Two-Party System,” Pew Research Center, last modified August 9, 2022, 15, https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/08/PP_2022.09.08_partisan-hostility_REPORT.pdf.

³ Wendy Wang, “Marriages between Democrats and Republicans Are Extremely Rare,” Institute for Family Studies, last modified November 3, 2020, <https://ifstudies.org/blog/marriages-between-democrats-and-republicans-are-extremely-rare>.

⁴ Matthew Gentzkow and Jesse Shapiro, “Cross-Country Trends in Affective Polarization,” National Bureau of Economic Research, November 2021, <https://doi.org/10.3386/w26669>, 11.

The rise of affective polarization has accompanied a rise in elite or governmental polarization. Over the past century and a half, the speeches of elected officials have grown significantly more partisan.⁵ Another example is that Supreme Court nominations have been so thoroughly politicized that they are considered political ‘victories’ alongside policy achievements.⁶

Elite polarization has a discernible effect on the political attitudes of the general public. Polarization among elected officials frames political issues in sharper terms, thus encouraging partisan thinking and polarization among the public.⁷ This is especially true with Americans who identify with the Democratic or Republican party.⁸ In other words, partisanship in government is, most likely, inextricably linked to affective polarization and national unity overall.

An assumption that often underlies scholarship on elite polarization, however, is that there are only two *kinds* of elite polarization. The aforementioned studies on the rise of elite polarization and other studies on potential causes for this rise analyze elite polarization as either an ideological or affective rift.⁹ The same categories are applied to popular polarization as well: when examining the state of partisanship among the American people, scholars often focus solely on ideological or interpersonal differences in the populace.

The effects of bifurcating polarization as ‘ideological’ or ‘affective’ are significant. For instance, the notion that polarization is fundamentally ideological motivates the proposal of discourse-oriented solutions, wherein Americans are encouraged to be more open-minded about other perspectives and to form opinions based on reason rather than emotion.¹⁰ Likewise, the

⁵ Matthew Gentzkow, Jesse M. Shapiro, and Matt Taddy, “Measuring Group Differences in High-Dimensional Choices: Method and Application to Congressional Speech,” *Econometrica* 87, no. 4 (July 2019): pp. 1307-1340, <https://doi.org/10.3982/ecta16566>.

⁶ Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” *SSRN Electronic Journal*, 2016, <https://doi.org/10.2139/ssrn.2432111>.

⁷ Marc J Hetherington, “Resurgent Mass Partisanship: The Role of Elite Polarization,” *American Political Science Review* 95, no. 3 (2001): pp. 619-631, <https://doi.org/10.1017/s0003055401003045>; James N. Druckman, Erik Peterson, and Rune Slothuus, “How Elite Partisan Polarization Affects Public Opinion Formation,” *American Political Science Review* 107, no. 1 (2013): pp. 57-79, <https://doi.org/10.1017/s0003055412000500>.

⁸ John H. Evans, “Have Americans' Attitudes Become More Polarized?-An Update,” *Social Science Quarterly* 84, no. 1 (March 2003): pp. 71-90, <https://doi.org/10.1111/1540-6237.00141>.

⁹ Richard H Pildes, “Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America,” *California Law Review* 99, no. 2 (April 2011): pp. 273-333; David M Kennedy, “What Pildes Missed: The Framers, the True Impact of the Voting Rights Act, and the Far Right,” *California Law Review* 99, no. 2 (April 2011): pp. 351-357; Paul Frymer, “Debating the Causes of Party Polarization in America,” *California Law Review* 99, no. 2 (April 2011): pp. 335-349.

¹⁰ Lee De-Wit, Sander van der Linden, and Cameron Brick, “What Are the Solutions to Political Polarization?,” *Greater Good Magazine*, last modified July 2, 2019, https://greatergood.berkeley.edu/article/item/what_are_the_solutions_to_political_polarization.

notion that polarization is fundamentally affective motivates the proposal of integrity-based solutions, wherein Americans are encouraged to avoid identitarian antipathy and to empathize with those deemed partisan ‘enemies.’¹¹ Of course, the applicability of these solutions are contingent upon polarization being reducible to ideological and affective division.

Yet, recent events in American political history suggest that a new kind of polarization has emerged. The 2016 presidential election brought this possibility to the foreground: candidates Donald Trump and Hilary Clinton seemed to disagree not only on ideological and personal issues, but also on the *fundamental facts* on which policy is structured. Whereas previous presidential candidates focused on *ideological* issues like the distribution of tax burdens, the 2016 presidential debates were dominated by *empirical* variance on the effects of U.S. trade policy, the safety of American cities, and the identity of cybersecurity threats. This suggests that the traditional framework of American polarization as either ‘ideological’ or ‘affective’ might be deficient insofar as it excludes an ‘empirical’ category.

Moreover, the existence, scope, and intensity of this possible category is highly relevant to the study of polarization. If it is demonstrated that empirical polarization is a salient feature of modern American politics, then the aforementioned traditional solutions to partisanship are inadequate inasmuch as they fail to consider a third factor driving division and identitarianism. In other words, an effective prognosis of American polarization is contingent upon an accurate diagnosis of the phenomenon.

In this paper, I examine the rise of empirical polarization through an analysis of presidential rhetoric. My hypothesis is that presidential rhetoric—both in general and when utilized against political opponents—has indeed become more empirical. Thus, I predict that the data will reveal a novel source of division within American politics, wherein presidents are increasingly unable to agree upon the fundamental facts which inform policy.

The paper is divided into four sections. First, I attempt to identify and track the general rise of empirical or ‘truth-based’ rhetoric in presidential debates and interviews since 1960. Second, I focus on the issue of empirical polarization by examining clashes between candidates in the first debates of the 2000, 2008, and 2016 presidential elections. Third, I survey the political issues considered most important by the American electorate over the past twenty years

¹¹ Rachel Kleinfeld and Aaron Sobel, “7 Ideas to Reduce Political Polarization. and Save America from Itself.,” Carnegie Endowment for International Peace, July 23, 2020, <https://carnegieendowment.org/2020/07/23/7-ideas-to-reduce-political-polarization.-and-save-america-from-itself-pub-82365>.

to show that such issues have become increasingly empirical in nature. Finally, I conclude by considering the ways that my methodology could be improved in future research.

THE SCOPE OF ANALYSIS

Before examining the data, it should be briefly noted that I isolated my analysis to presidential rhetoric for two reasons. First, the president is elected by the nation rather than a particular state or district, thereby making his rhetoric more representative of the American public's perspective than any other elected official. Second, as will be discussed in the next section, the president exerts a unique moral and political influence upon the people through the presidential pulpit. Thus, his rhetorical choices influence the direction in which the attitudes of political parties and the public will transform. For these reasons, it seemed that an analysis of presidential rhetoric in particular would furnish more conclusions about the state of polarization in American society as a whole.

THE RISE OF EMPIRICAL PRESIDENTIAL RHETORIC

The Relevance of Presidential Rhetoric to Polarization

In order to track the rise of empirical polarization, I first examined changes in the kind of rhetoric used by recent presidents. More specifically, I was interested in identifying whether presidential rhetoric has become more empirical or 'truth-based' rather than ideological or 'value-based.' If it can be demonstrated that there is an increase in empirical presidential rhetoric, then there are two reasons why this would strengthen my hypothesis that polarization has become increasingly empirical.

First, change in the type of presidential rhetoric would suggest that some fundamental shift has occurred in American politics, one that has caused presidents to increasingly favor empirical rhetoric. It is unlikely that such a shift would have no bearing on the political attitudes of Americans and, by extension, the issue of polarization. Thus, at a theoretical level, it is worthwhile to examine general changes in presidential rhetoric. Second and more directly, this analysis is relevant insofar as presidential rhetoric influences policy priorities. Despite evidence that the agenda-setting power of the presidency has decreased, research still shows that

presidents exert a unique influence on said political agendas.¹² So, even if presidents do not ‘single-handedly’ determine which issues are relevant, their words nonetheless affect the policy priorities that become sites for partisan disagreement. Examining changes in types of presidential rhetoric can thus serve as a basis for further analysis on the state of polarization.

I tracked the change in types of presidential rhetoric by identifying changes in the frequency of certain words. For example, the word ‘fact’ is almost always used in ‘truth-based’ or empirical propositions (e.g., “The fact of the matter is that schools are underfunded), meaning an increase in the word ‘fact’ over time would be one sign of an increase in empirical rhetoric. Conversely, the word ‘fair’ is almost always used in ‘value-based’ or ethical propositions (e.g., “It isn’t fair that the one percent hold so much wealth”), meaning an increase in the word ‘fair’ over time would be one sign of an increase in value-based rhetoric. Of course, an analysis of one word alone is not sufficient to derive a conclusion about broad trends. But, when applied to multiple words with specifically empirical or valuative connotations, this approach can help reveal such trends.

Data and Methodology

To conduct my analysis, I drew from primary and general presidential debates and presidential interviews from 1960 to the present. I selected these sources and excluded other sources, like State of the Union addresses or public announcements, because the former contains spontaneous dialogue whereas the latter is more prepared. The content and political function of such prepared speeches suggest that they are consciously less partisan or divisive, presumably because their purpose is to lead and inform the nation rather than communicate one’s grievances and critiques. In this sense, unscripted speech, as found in the aforementioned sources, seems to be more fitting for an analysis of polarization as it naturally exists in American life.

¹² Matthew Eshbaugh-Soha and Jeffrey S. Peake, “Presidents and the Economic Agenda,” *Political Research Quarterly* 58, no. 1 (March 2005): pp. 127-138, <https://doi.org/10.2307/3595602>; Garry Young and William B. Perkins, “Presidential Rhetoric, the Public Agenda, and the End of Presidential Television’s ‘Golden Age,’” *The Journal of Politics* 67, no. 4 (November 2005): pp. 1190-1205, <https://doi.org/10.1111/j.1468-2508.2005.00356.x>; Jeffrey E. Cohen, “Presidential Rhetoric and the Public Agenda,” *American Journal of Political Science* 39, no. 1 (February 1995): pp. 87-107, <https://doi.org/10.2307/2111759>; Kim Quaile Hill, “The Policy Agendas of the President and the Mass Public: A Research Validation and Extension,” *American Journal of Political Science* 42, no. 4 (October 1998): pp. 1328-1334, <https://doi.org/10.2307/2991859>; John W. Kingdon, *Agendas, Alternatives, and Public Policies* (TBS The Book Service Ltd, 1984).

I collected 167 presidential debates and 865 interviews from The American Presidency Project compilation created by UC Santa Barbara researchers.¹³ For the debates, I manually saved each debate as a text file. I quickly realized that this process was tedious and prone to error, so I decided to collect the interviews using web scraping instead. Through Jupyter Notebook, I wrote a Python script that utilized Selenium—a library that expedites the process of scraping Javascript-generated web content, which was how The American Presidency Project stored its documents—in order to scrape and save all the debates as text files.

As I scraped these documents, I also organized the data by tagging the date and political party attached to each document. For example, I scraped an interview from President Biden that occurred May 12th, 2021: as I saved the text of the interview itself, I would also store the year ‘2021’ and the party ‘Democrat’ into respective variables, thereby allowing me to organize the later results into the relevant categories. The debate data set was not filtered through a similar process because all the relevant information had been stored manually into a Python dictionary.

Once I had saved all the files and the corresponding information, I wrote another Python script on Jupyter Notebook that counted and charted the frequency of an inputted word. More specifically, the program parsed through each line of each document and would increase the ‘counter’ by one if a word matched with the input. After parsing through the entire document, the final count would be added to a separate list based on its associated party and/or debate type (i.e., “General and VP Debate,” “Republican Primary Debate,” etc.) and then ‘attached’ to its previously saved date.

The end result was a Python dictionary in which all the ‘counts’ of interviews and debates conducted for each year were organized according to political party and/or debate type.¹⁴ The program then calculated the average frequency of the inputted word in a given year. At this point, I also decided to adjust the frequencies according to the average word count of the documents in a given decade. The adjusted frequencies were calculated by multiplying a decade’s frequencies by the ratio of the respective decade’s average word count to the average

¹³ “American Presidency Document Categories,” The American Presidency Project, n.d., <https://www.presidency.ucsb.edu/documents>.

¹⁴ In the final organization, all interviews with Republican presidents and Republican primary debates were grouped under the category ‘Republican.’ The same was done for the Democrats under the category ‘Democrat.’

word count of 2000-2010, which was the decade with the highest average word count.¹⁵ This was done in order to account for the fact that decades with longer interviews and debates will have higher average frequencies of the inputted word.

The adjusted average frequencies were then plotted in boxplots. Thus, the boxplots for each decade are representations of the adjusted average frequencies of the inputted word for each year (e.g., the boxplot for '1970-1980' represents the collective data of the average frequency of the inputted word in 1970, 1971, ..., 1979). I used boxplots rather than line or bar graphs because they are able to represent the set of per-decade average frequencies in multiple ways, including the set's median, range, and outliers. Line or bar graphs, on the other hand, would only be able to represent the median or average of the set's values. Moreover, line and bar graphs are more effective in displaying linear trends across time, whereas this data would not be strictly linear due to the effects of political circumstance on each year's presidential rhetoric. A more granular, boxplot-style analysis of each decade and its relation to other decades is therefore more fitting.

Findings

I split my analysis into four rhetorical categories: value-based, policy-based, personal, and empirical rhetoric. I defined 'value-based rhetoric' as rhetoric that focuses on disagreements in fundamental political values, such as the importance of wealth equality, foreign interventionism, and labor rights. These 'values' can also be considered aspects of an official's 'political ideology,' whether it be fiscal conservatism, social progressivism, etc. 'Policy-based rhetoric' is defined as rhetoric about policy assessments and predictions. This includes judgements on the effects of policy, such as the efficacy of certain tax policies, healthcare plans, and diplomatic strategies. Additionally, in order to avoid conflation between policy-based and empirical rhetoric, this category only includes rhetoric about the *future* impacts of policy rather than assessments of past policy. 'Personal rhetoric' is rhetoric centering around character qualities or professional competency, including level of experience, temperament, and integrity. Finally, 'empirical rhetoric' is rhetoric about fundamental empirical facts, such as whether there is a crisis of violence in American cities, whether wages have increased, or whether certain

¹⁵ The average word counts per decade were 75802.2, 46210.8, 75129.4, 78616.8, and 67431.08333333333, respectively. Thus, only the adjustment of the frequencies for 1980-1990 would be affected to any significant degree.

foreign interventions have been successful in securing peace. These same categories will be used in the analysis described in the next section, although I use them in a slightly different way.

For each category, I selected five words that are almost always associated with the respective category in order to avoid ‘double-counting’ (e.g., I avoided analyzing the word ‘wrong’ because it is often used in both value-based and empirical propositions). It is worth noting, however, that even this precaution cannot entirely account for the fact that certain types of words can be used in many different contexts. The word ‘guarantee,’ for example, might be used in more results-oriented statements about policy. However, it is also used in empirical statements, such as when a president ‘guarantees’ that a certain description of reality is not true. Given that it is difficult to completely isolate these categories—especially policy-based and empirical rhetoric due to their similar ends of describing political situations—future analysis should use a larger set of data or more complex combinations of words in order to yield the most accurate results. Nonetheless, this preliminary analysis is still useful insofar as the words I have chosen seem to fit more with their assigned category than any other. Moreover, regarding the similarity of policy-based and empirical rhetoric, the results indicate that the trends for both categories actually converge, which suggests that the results of my analysis would be similar even if I combined the categories due to their mutual ends. This prospect will be discussed further in the conclusion.

Analysis of the ‘value-based’ category, composed of the words ‘perspective,’ ‘rights,’ ‘free,’ and ‘democratic’ yielded the results found in *Figure 1*. For each of the five value-based words, both the overall median and range do not change significantly over time—especially after 1980. With the exception of 1980-1990 for ‘perspective,’ ‘rights,’ and ‘fair,’ even the outliers for each decade remain relatively close to the non-outlier data. The analysis of policy-based words, which are terms used in propositions related to policy assessments or predictions, yield similar results, as per *Figure 2*. As evidenced by increases in median but also range and outlier values—the latter of which indicates that particular years might use these terms at abnormally high rates relative to the rest of the decade set—‘fail’ and ‘effective’ seem to increase in frequency over time. Conversely, the rest of the terms seem to be used at similar frequencies over time. While the reason for this discrepancy is unclear, it is clear that there is no uniform increase in the frequency of these policy-based terms.

The results of the ‘personal’ rhetoric analysis are found in *Figure 3*. Both ‘character’ and ‘integrity’—perhaps the most explicitly ‘personal’ shaded terms—display abnormally high frequencies in 1990-2000. The frequency of the other words, however, remains relatively stable over time. The only somewhat notable increase is in the word ‘establishment,’ insofar as there are more abnormally high-frequency years (represented by the outliers) from 2010 until the present.

Finally, analysis of empirical terms yielded the results found in *Figure 4*. Interestingly, although the medians for each decade’s data set do not seem to change significantly over time, the overall range, interquartile range, and values of the outliers increase drastically. Every word except for ‘reality’ sees a notable increase in the values of the maximum over time. Moreover, with the exception of ‘false,’ analysis of every other word reveals far higher outliers in 2010-present than in any other decade.

Therefore, although the rate of empirical rhetoric has not shifted so drastically that per-decade median values have changed, recent decades have been seeing significantly more empirically-charged rhetoric overall. More specifically, the rise in empirical rhetoric tends to begin most prominently in 2000 for each analyzed word, which corresponds to the results of the previously-cited Pew Research study in which affective and ideological polarization began to rise after the mid-1990s.¹⁶ This correlation will serve as the basis for focusing on 2000-present in the analysis outlined in the next section.

The fact that only empirical rhetoric has an unequivocal increase in frequency over time indicates that an important shift has occurred in presidential language. Contrary to descriptions that reduce all of modern politics to a state of hyper-politicization, it seems that the current landscape of presidential politics is more unique in its emphasis on empirical facts rather than ideology or personal characteristics. Although this does not prove my hypothesis that polarization in particular has become empirical, it shows that the development of rhetoric overall *has* exemplified this hypothesized trend.

This conclusion is the backdrop against which shifts in polarization in particular can be analyzed. Given this broad shift toward empirical presidential rhetoric, the question then becomes whether such a shift can be identified in polarization trends as well.

¹⁶ Pew Research Center, “As Partisan Hostility Grows, Signs of Frustration With the Two-Party System,” 15.

A NEW SOURCE OF POLITICAL DIVISION

Presidential Clashes as Representative of Polarization

Polarization is a complex phenomenon with many social, cultural, and economic elements. For this reason, there are many ways to identify the precise areas in which Americans across the nation disagree, ranging from electoral surveys to analysis of news media coverage. I adopted the approach of examining presidential debates—particularly the clashes that occurred between candidates during the debates.

As mentioned previously, the president is uniquely representative of the entire nation. They also exercise an important agenda-setting power or, at the very least, a special ability to influence which issues capture the public eye. By extension, partisan disagreements *between presidential candidates*—particularly through televised debates to which millions of Americans listen—can be a valuable source of analysis for partisan disagreements between Americans broadly. Therefore, although trends of presidential divides might not transpose perfectly to trends of electoral divides, isolating my analysis to these points of disagreement can highlight the ways in which candidates are divided, which subsequently represents the ways in which Americans are divided as well. Empirical evidence for this connection will be outlined in the next section.

In other words, if it can be demonstrated that presidential candidates have increasingly clashed over empirical facts rather than ideology, policy, or personal character, then my hypothesis that American polarization has become more empirical would be strengthened.

Data and Methodology

I analyzed clashes across three presidential debates: the 2000 debate between George W. Bush and Al Gore, the 2008 debate between John McCain and Barack Obama, and the 2016 debate between Donald Trump and Hilary Clinton. First, I selected these debates in particular because, as mentioned previously, both the earlier-cited Pew Research study and the results outlined in the previous section indicate that polarization and empirical rhetoric, respectively, began to rise around the mid-1990s.¹⁷ Consequently, I focused my analysis on the past two decades. Second, I selected these particular years within the past two decades since each debate featured new candidates rather than incumbents. This was done mainly to avoid any extraneous

¹⁷ Ibid.

variable influencing the results, such as an incumbent's tendency to focus more on policy achievements. Third, I limited my analysis to the first debate of each cycle because these debates tend to cover the most important issues and are, therefore, more likely to cover a wider variety of political issues. I predicted that this would lead to more clashes between the candidates, which provides more data from which I can draw conclusions.

I manually prepared the data by reading through the debate transcripts and deleting everything except for the sections in which the candidates directly disagree with each other. Any sections in which the candidates agree or make independent points that do not contradict each other were not included in my data set. I also removed all punctuation through the wildcard search-and-replace function because the program I used to analyze the document counted punctuation as well, which inflated the final results. Further details about this program are outlined below.

Similar to the approach outlined in the previous section, I split my analysis into four categories: value-based, policy-based, personal, and empirical divisions. I define each category in the same way as I did previously, although in this section I analyze propositions rather than words. In order to identify the extent to which each of these types of rhetoric dominated each debate, I read through the adjusted transcripts and manually highlighted points of disagreement based on whether the disagreement occurred over values, policy, personal qualifications, or empirical facts. Each category was distinguished by different colored highlights. I then quantified how much of the debate was composed of each type of rhetoric through a Microsoft VBA program I copied from a blog post by DataNumen which counted how many words in a document were highlighted in the inputted color.¹⁸

It should be noted that there are many benefits to this proposition-based approach compared to the word-based approach of the previous analysis. As prefaced in the previous section, one methodological issue with analyzing words is that the same word is often used in different contexts, which makes it difficult to neatly categorize a word as belonging to a particular type of rhetoric. The benefit of manually categorizing propositions, on the other hand, is that I can account for context. Another benefit is that I can include in my analysis propositions that belong in a particular category but do not contain any of the associated words. For example,

¹⁸ Vera Chen, "2 Quick Ways to Count the Number of Highlighted Words in Your Word Document," DataNumen, August 1, 2017, <https://www.datanumen.com/blogs/2-quick-ways-count-number-highlighted-words-word-document/>.

a candidate might express pro-life values without using any of the words typically associated with value-based rhetoric, such as ‘just’ or ‘evil.’ Thus, the proposition-based approach is generally more comprehensive than the word-based approach. The downside, of course, is that this method is far more tedious and time-consuming.

Findings

After compiling the data derived through the VBA program, I generated the bar graph found in *Figure 5*.

The proportion of value-based rhetoric reduces dramatically over time, whereas the proportions of empirical and personal rhetoric increase significantly. The only kind of rhetoric that does not change significantly in proportion is policy-based rhetoric. To be clear, these results do not prove that value-based disagreement has decreased or that empirical and personal disagreement has increased. Rather, it simply shows that the latter have dominated an increasingly large proportion of vocalized presidential clashes. Thus, it could still be the case that value-based disagreements remain highly salient insofar as they inform the political choices and affective impressions of presidential candidates.

That said, the fact that vocalized presidential disagreement seems to be increasingly empirical in content is important for three reasons. First, it shows that differences in empirical observations have become far more salient than they were in the past. This begs the question of *what* exactly is driving the increased salience. It also suggests that explanations of American polarization which operate on a definition of polarization as either ideological or affective are deficient because they fail to account for an emerging category of political difference. Second, if presidents *do* exercise the agenda-setting influence that they seem to, then this shift toward more explicitly empirical disagreement would ostensibly politicize empirical reality itself among the electorate. In the following section, I argue that this is precisely what has occurred.

THE EMPIRICAL FOUNDATIONS OF CONTEMPORARY POLITICAL ISSUES

A broad survey of topics of national debate over the past twenty years seem to corroborate the predicted relationship between the increasingly empirical nature of presidential disagreement and the politicization of empirical reality. In the 2000 presidential election, the

most important issues for voters were distrust in government due to scandal in the Clinton administration and which programs should be funded with the federal surplus funds.¹⁹ Within these issues, the only area of empirical disagreement along partisan lines was whether American society was experiencing ‘moral decay’; but even this subject can hardly be described as truly ‘empirical’ given how inextricably intertwined it is with value-based judgements about moral goods. In other words, as reflected in the results of my analysis in the previous section, the partisan landscape of 2000 centered more on value-based rather than empirical differences.

In the 2008 election, the top issues were the economy, energy, health care, education, and Iraq.²⁰ The main partisan empirical debates were over the extent to which the economy was fundamentally structured in favor of the wealthy, the existence of climate change, and whether the Bush administration was successful in achieving its goals in Iraq.²¹ This is already a significant increase in areas of empirical contention from 2000.

The most recent election in 2020 had similar features. According to Pew Research Center, the most important issues were the economy, healthcare, Supreme Court appointments, the coronavirus outbreak, and violent crime.²² Empirical partisan contentions plagued the latter four issues. Debate about the effectiveness of Obamacare remained starkly divided along partisan lines.²³ The ‘empirical’ question of whether Brett Kavanaugh was guilty of sexual assault dominated his Senate confirmation and similarly split the nation by party: “about two-thirds of Democrats said they believed the allegations and nearly two-thirds of Republicans said they did not.”²⁴ Democrats and Republicans largely disagree on the mortality rate of COVID,

¹⁹ Arthur H Miller and Thomas F Klobucar, “The Role of Issues in the 2000 U. S. Presidential Election,” *Presidential Studies Quarterly* 33, no. 1 (March 2003): pp. 101-124, <https://doi.org/10.1111/j.1741-5705.2003.tb00018.x>.

²⁰ Pew Forum on Religion & Public Life and Pew Research Center for the People & the Press, “More Americans Question Religion's Role in Politics,” *Pew Research Center*, August 21, 2008, 24-33.

²¹ Will Weissert, “How the 2008 Financial Crisis Fuels Today's Populist Politics,” *PBS*, March 15, 2023, <https://www.pbs.org/newshour/politics/how-the-2008-financial-crisis-fuels-todays-populist-politics>; Pew Research Center for the People & the Press, “A Deeper Partisan Divide Over Global Warming,” *Pew Research Center*, May 8, 2008; Russell Heimlich, “Views of the Iraq War,” *Pew Research Center*, November 23, 2011, <https://www.pewresearch.org/fact-tank/2011/11/23/views-of-the-iraq-war/>.

²² Pew Research Center, “Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting,” *Pew Research Center*, August 13, 2020, 35-38.

²³ Ashley Kirzinger et al., “5 Charts About Public Opinion on the Affordable Care Act,” Kaiser Family Foundation, April 14, 2022, <https://www.kff.org/health-reform/poll-finding/5-charts-about-public-opinion-on-the-affordable-care-act-and-the-supreme-court/>.

²⁴ Chris Kahn, “Four in 10 Believe Allegations against Kavanaugh, Three in 10 Do Not - Poll,” *Reuters*, September 30, 2018, <https://www.reuters.com/article/uk-usa-court-kavanaugh-poll-idAFKCN1MA10H>.

rates of hospitalization resulting from COVID, and efficacy of vaccines.²⁵ Americans' answers to whether widespread gun violence is due to mental health issues or deficient gun laws also differ greatly according to partisan affiliation.²⁶ Over the past twenty years, it seems that the political issues on which the electorate focuses have become increasingly empirical in nature. The outcome of this informal survey empirically substantiates the theoretical connection between presidential disagreement and public polarization described earlier.

CONCLUSION

Traditional accounts of polarization describe it as either ideological or affective. However, the results of my analysis seem to confirm my hypothesis that a new kind of *empirical* polarization has emerged in American presidential and electoral politics. A study of presidential rhetoric, presidential cross-party discourse, and national political issues show that Americans are increasingly divided not only on their political priorities or partisan attitudes, but also on the fundamental empirical facts which underlie the former two.

However, it should be noted that there are a few aspects of my methodology that could be improved in order to render results more reliable. First, my data set could be significantly expanded. For instance, my first analysis examined only twenty words. Although it did furnish consistent results across each category of analysis, my study is nonetheless deficient insofar as it could examine a far larger set of inputs. Future research could improve upon my approach by analyzing more terms and thereby rendering results more reliable. The same recommendation applies to my second analysis, in which three debates were analyzed.

That said, a natural limitation is the limited supply of words which have predominantly value-based, policy-based, personal, or empirical connotations. When accounting for context, the vast majority of terms cannot be confined to a particular category. This leads to the second area of possible improvement: my research would benefit significantly from the use of sentiment

²⁵ Jonathan Rothwell and Sonal Desai, "How Misinformation Is Distorting COVID Policies and Behaviors," Brookings, December 22, 2020, <https://www.brookings.edu/research/how-misinformation-is-distorting-covid-policies-and-behaviors/>; Ted van Green and Alec Tyson, "5 Facts About Partisan Reactions to COVID-19 in the U.S.," Pew Research Center, April 2, 2020, <https://www.pewresearch.org/fact-tank/2020/04/02/5-facts-about-partisan-reactions-to-covid-19-in-the-u-s/>.

²⁶ Suzanne Bates, "New Poll: Americans Agree Gun Violence Is a Problem, but Divided on Causes," *Deseret News*, October 18, 2022, <https://www.deseret.com/2022/10/17/23401318/new-poll-americans-agree-gun-violence-is-a-problem-but-divided-on-causes>.

analysis. One methodological issue that was mentioned previously is that manual analysis of entire texts and propositions rather than words takes significantly more time and effort to conduct but yields better results by accounting for context. This dilemma could be overcome through the use of sentiment analysis, which computerizes the categorization of propositions according to their meanings and connotations. Given my lack of experience in sentiment analysis, I refrained from utilizing it in this paper. Nonetheless, future research could both expedite and strengthen the analysis by doing otherwise.

Despite these methodological flaws, the results of my analysis seem consistent across each level. Political scientists would do well to consider whether the American public is increasingly divided in their perception of political reality itself, for such a situation would bear significant implications for the future of American polarization. All forms of discourse depend upon a mutual foundation of assumptions and definitions; without this foundation, discourse inevitably loses its character of rationality and will fail to be fruitful. Thus, the rise of empirical polarization poses an unprecedented threat to the future of the United States insofar as it attacks the foundation upon which political decision-making itself is conducted.

Moreover, the fact that this rise is occurring in both general rhetoric and specific partisan divides suggests that its cause is more essential to modern American society than superficial. Therefore, it is imperative that political scientists and elected officials treat this issue with particular comprehensiveness and probity in order to ensure that America is not split into two nations within one border.

FIGURES

Figure 1: Frequencies of ‘value-based’ presidential rhetoric

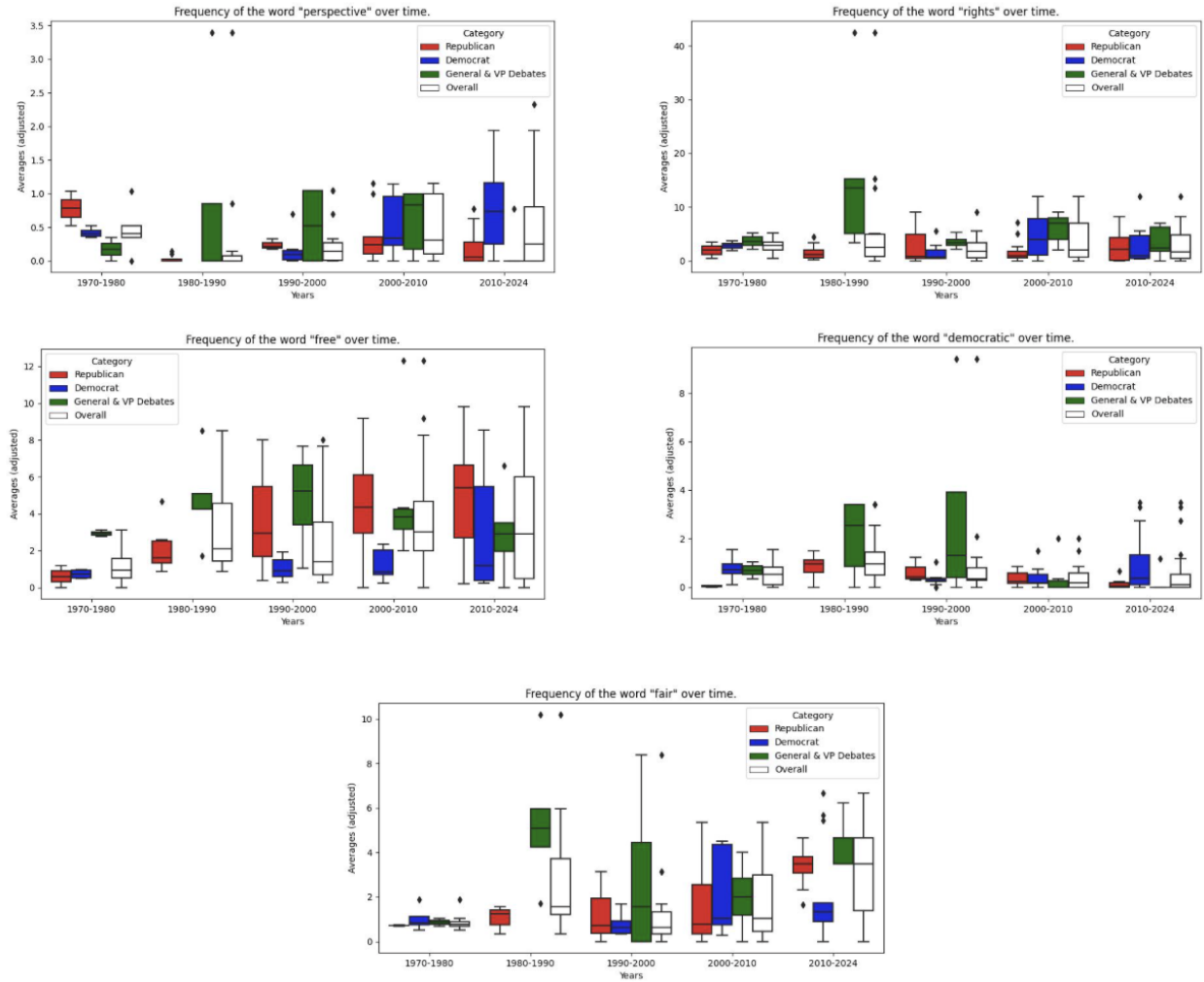


Figure 2: Frequencies of ‘policy-based’ presidential rhetoric

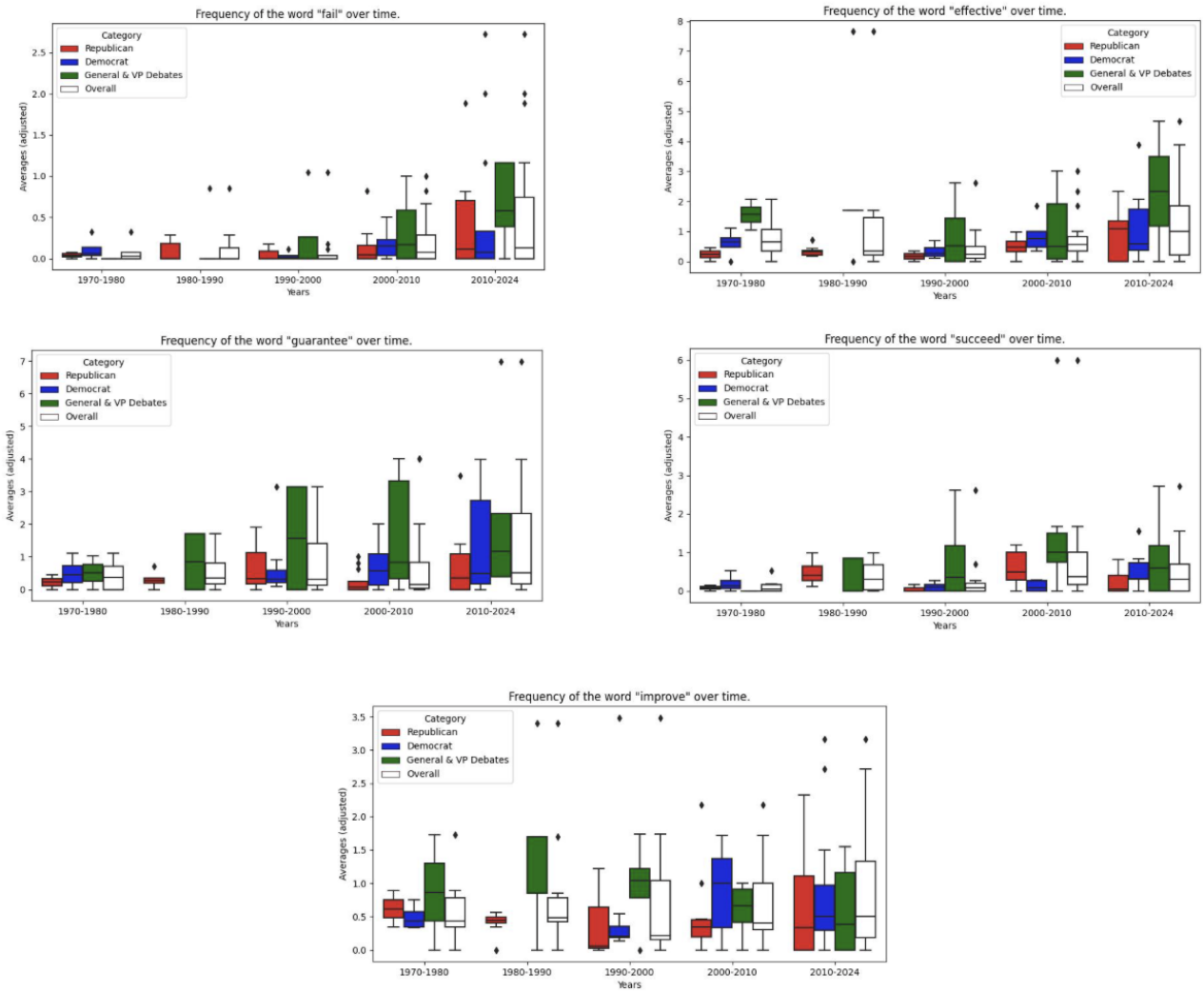


Figure 3: Frequencies of 'personal' presidential rhetoric

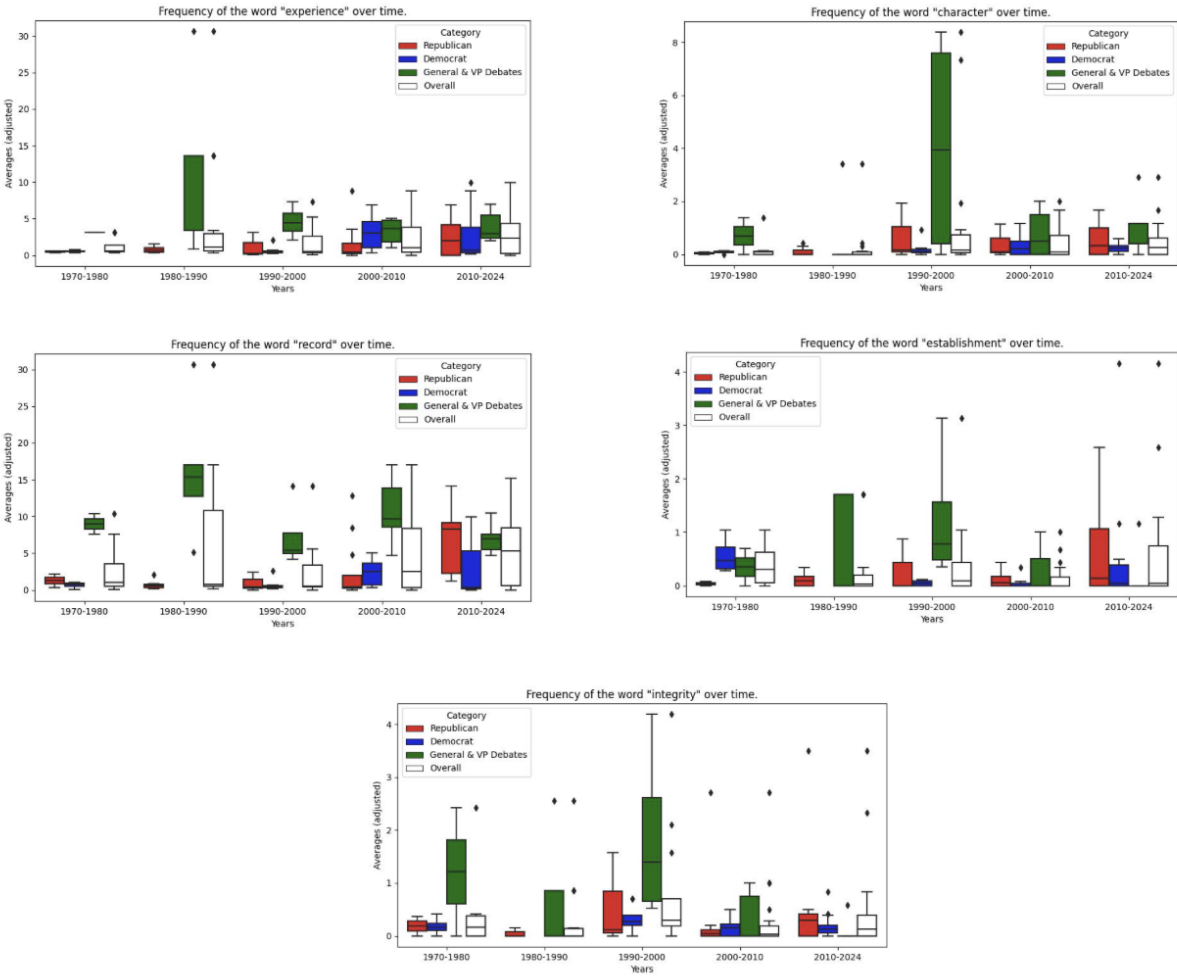


Figure 4: Frequencies of ‘empirical’ presidential rhetoric

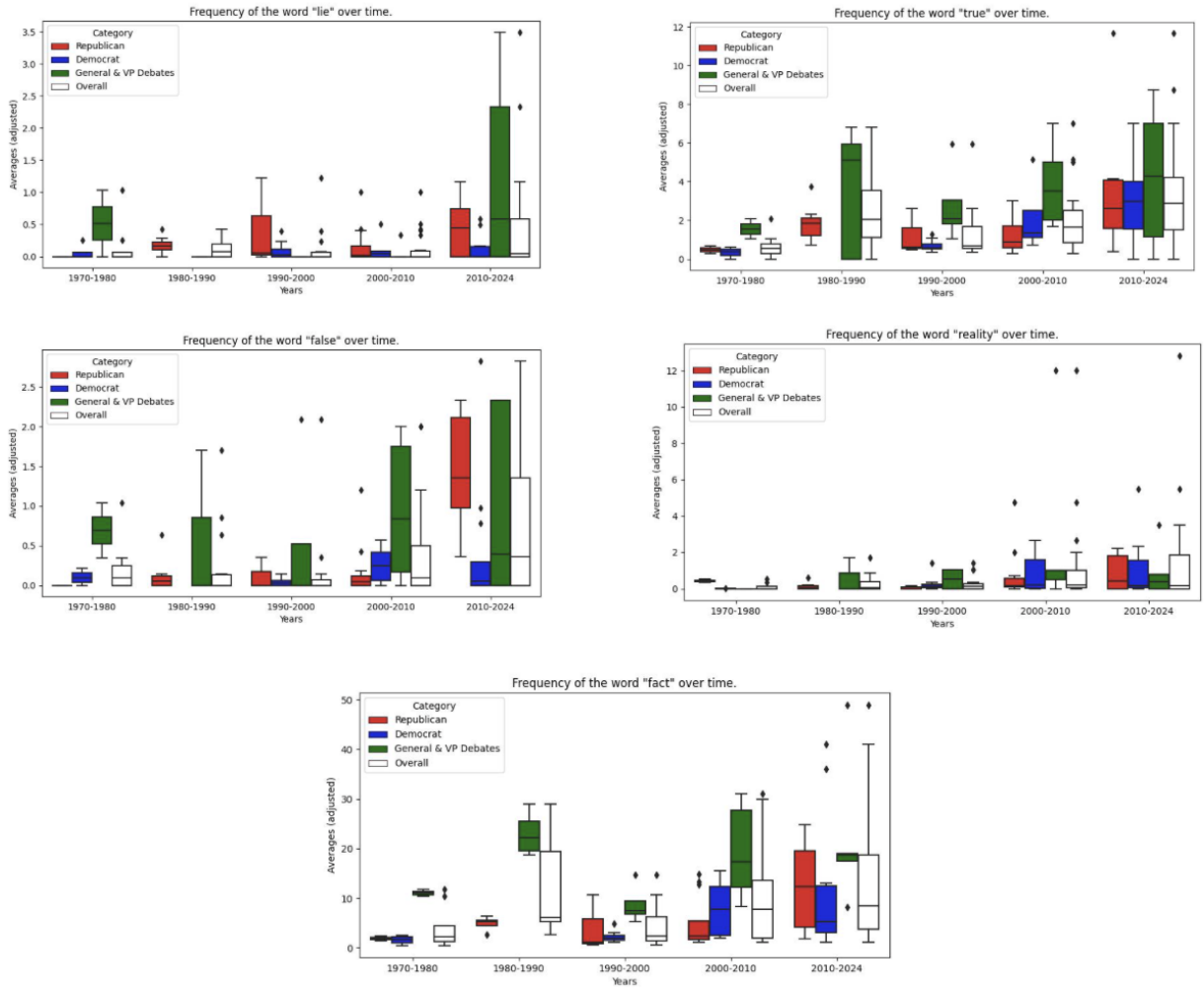
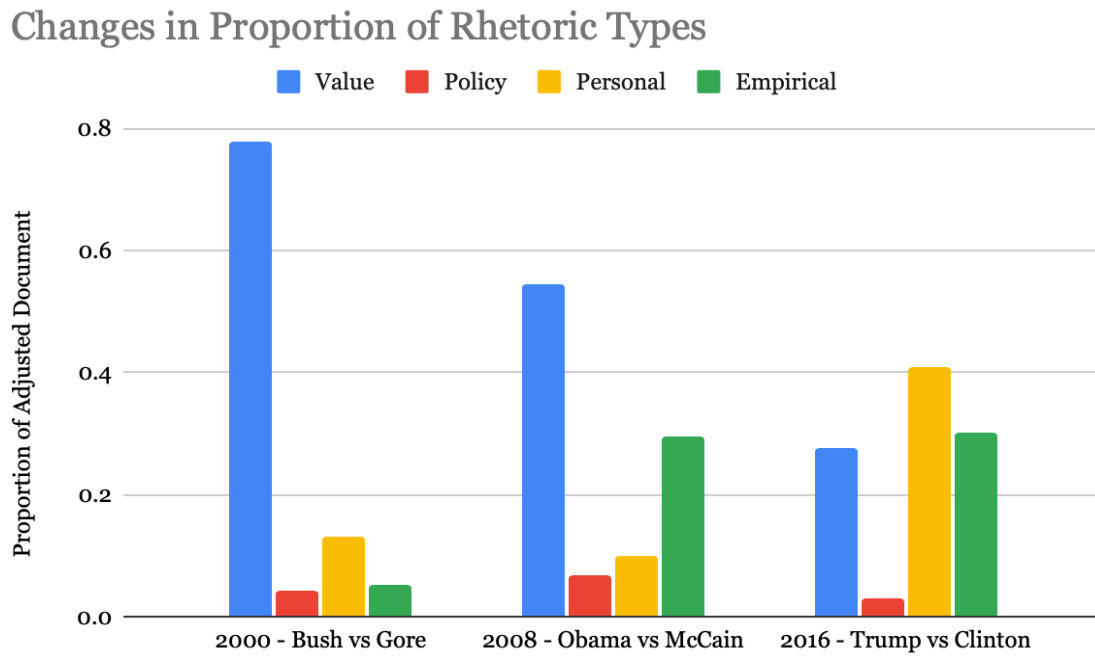


Figure 5: Proportions of rhetorical types in disagreements between presidential candidates



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WORTH THE INVESTMENT? ANALYZING THE EFFECT OF EB-5 VISA INVESTORS ON U.S. REGIONAL ECONOMIC GROWTH

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Economists have long studied the effects of immigration on the U.S. economy and have frequently debated whether these effects are positive or negative.¹ Often left out of these debates are immigrant investor visa programs, such as the United States' EB-5 visa program. Such programs require recipients to invest hundreds of thousands of dollars in specific income areas throughout the United States, potentially affecting economic growth outcomes inconsistently throughout the country. This paper gives an overview of immigrant investment, the EB-5 visa, and economic-immigrant research before determining the effect of EB-5 investors on economic growth in all U.S. regions. This research finds that EB-5 investors increased economic growth across three different indicators in all eight regions of the United States. These effects are strongest in the Plains and Southwest regions, and weakest in the Southeast and Rocky Mountain regions.

INTRODUCTION

The United States' EB-5 visa is “made available to qualified applications under the provisions of U.S. immigration law,” and allows immigrant investors to “enter the United States to engage in new commercial enterprises that benefit the U.S. economy through job creation and capital investment.”² EB-5 visas are employment-based immigrant visas, meaning that, after residing and working in the United States for a required period of time, recipients and their families are eligible to apply for green cards to become U.S. citizens.³ The visa has two primary requirements: (1) recipients are required to invest at least \$800,000 in Targeted Employment Areas (TEAs) or at least \$1.05 million elsewhere, and (2) qualifying investments must “create full-time jobs for at least ten U.S. citizens, lawful permanent residents, or other immigrants authorized to work in the United States.”⁴ The U.S. Department of State defines a TEA as “an

¹ Christian Dustmann and Ian Preston. “Is Immigration Good or Bad for the Economy? Analysis of Attitudinal Responses.” *The Economics of Immigration and Social Diversity*, (2006): 3-34.

² Bureau of Consular Affairs, “Immigrant Investor Visas,” U.S. Department of State, accessed 2023, <https://travel.state.gov/content/travel/en/us-visas/immigrate/immigrant-investor-visas.html>.

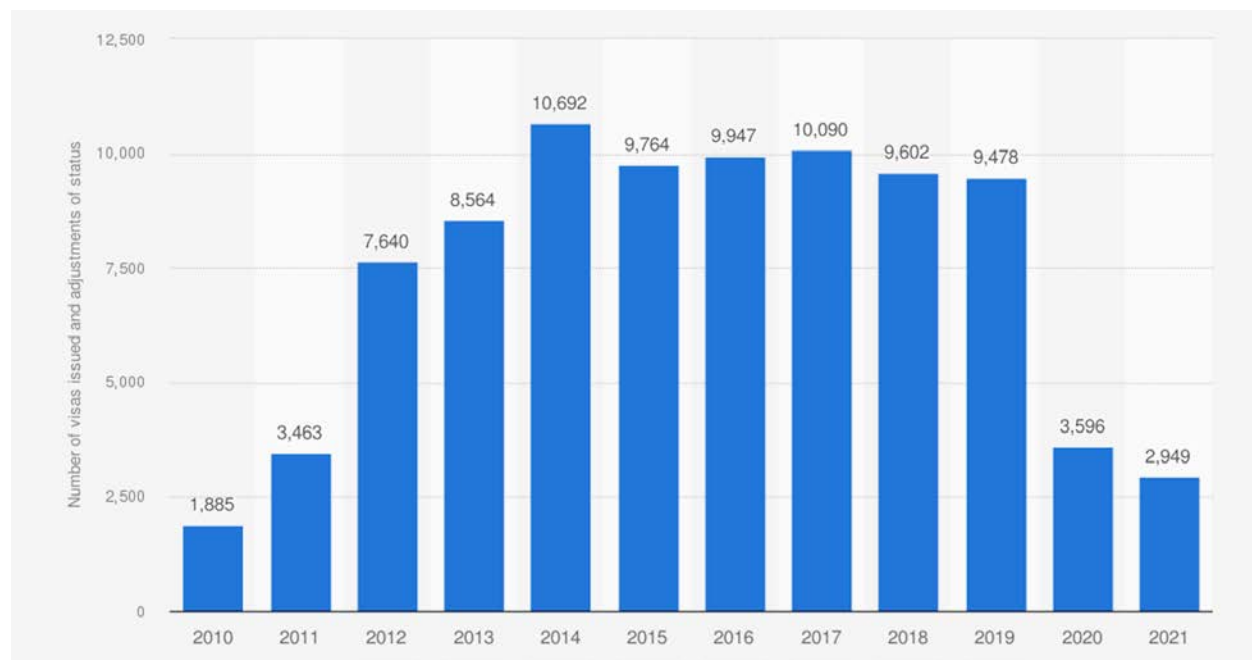
³ Ibid.

⁴ Ibid.

area, which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150% of the national average.”⁵

Although EB-5 visa issuances have fluctuated over time, they have remained relatively unchanged in recent years (see Figure 1). From 2010 to 2014, issuances increased from 1,885 to 10,692. From 2014 to 2019, issuances remained fixed at around 10,000 visas. From 2019 to 2020, issuances experienced a rapid decrease from 9,478 to 3,596. It is likely that this decrease was caused by the COVID-19 pandemic, as U.S. employment rates fell drastically between February 2020 and April 2020. The repercussions of the pandemic reverberated through the labor market, affecting not only domestic workers, but immigrant workers as well; border shutdowns and job cancellations momentarily halted immigration work flows.⁶ Regardless, it is relatively clear that the EB-5 visa has been growing in popularity since 2010, and it is likely that it will continue to grow after recovery from the pandemic.

Figure 1: Number of EB-5 Immigrant Visas Issued from FY 2010 to FY 2021



Data retrieved from the U.S. Department of State

⁵ Michael Ashoori, “What is a Targeted Employment Area?” Ashoori Law - U.S. Immigration Lawyers, 2023, <https://www.ashoorilaw.com/blog/targeted-employment-area/#:~:text=The%20EB%2D5%20regulations%20define,percent%20of%20the%20national%20average.%E2%80%9D>.

⁶ George Borjas, and Hugh Cassidy, “The Adverse Effect of the COVID-19 Labor Market Shock on Immigrant Employment,” NBER Working Paper No. 27243, May 2020, <http://www.nber.org/papers/w27243>.

As the number of EB-5 visa recipients increase, it becomes more imperative to understand the program's effects on the U.S. economy, especially U.S. regional economies. While some EB-5 investors relocate and pursue investment projects in rural, low-employment areas, others do not. This may lead to a misallocation of EB-5 investments and economically benefit some regions more than others. Understanding EB-5 investors' impacts on U.S. regional economic growth can help guide the presidency and Congress in allocating EB-5 investments more effectively throughout the United States and to regions that need economic stimulation the most. Such an understanding can also help the presidency and Congress determine whether the EB-5 visa program has been successful in meeting Congress' expectations regarding regional investment and job creation.

OVERVIEW OF IMMIGRANT INVESTMENT

Immigrant investor programs are designed to “attract foreign capital and investors” to a country in exchange for “legal residence and citizenship.”⁷ While individual investors are able to choose which country they would like to invest and reside in, each country has a different program and a unique set of requirements. Some programs require investors to create a certain number of jobs or contribute to government funds, while others require them to purchase real estate or invest in a specific business or industry. Investments received from these programs are used by countries for economic development and welfare purposes, and many countries offer these programs for the sole purpose of boosting their economies and creating more job opportunities for their citizens, especially in areas or regions that are in most need of economic stimulus.⁸

A growing number of countries offer immigrant investor programs, with approximately one quarter of all countries issuing such programs as of 2015.⁹ Among these countries, there exist two types of programs: citizenship by investment and residence by investment. Citizenship by investment programs exist in approximately one dozen countries, including five countries in the Caribbean (Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, and Saint

⁷ “Immigrant Investor Program Explained,” Global Citizen Solutions, accessed Jan. 15, 2023, <https://www.globalcitizensolutions.com/what-are-immigrant-investor-programs/>.

⁸ Ibid.

⁹ Ahmed El-Ashram, Judith Gold, and Xin Xu, “Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs,” Working paper, International Monetary Fund, 2015.

Lucia) as well as select countries in Asia and Europe, such as Cambodia, Egypt, Jordan, Malta, and Turkey.¹⁰ This type of program allows investors to quickly obtain citizenship with no required residence period, meaning they can earn direct, immediate citizenship in a country without having previously lived there.¹¹ Residence by investment programs, on the other hand, are the opposite. For this type of program, investors must reside in a country for a required amount of time before obtaining citizenship to that country.¹² Notable countries offering this type of program include Australia, Brazil, Ireland, New Zealand, Portugal, Spain, the United Kingdom, and the United States.¹³

Although the United States has no citizenship by investment programs, it has two residence by investment programs: the E-2 and EB-5 visa programs. The major difference between the two visas is their age. While the EB-5 program was established in 1990, the E-2 visa predates modern immigration laws and has been in use for over 200 years.¹⁴ Another difference between the two visas is their immigrant status. The E-2 visa is a non-immigrant visa, meaning it only allows people to temporarily live in the United States for work.¹⁵ On the contrary, the EB-5 visa is an immigrant visa and, as mentioned before, investors and their families can apply for citizenship after completing a required residency period.¹⁶

THE EB-5 VISA: POLICY HISTORY AND CONTROVERSY

Prior to examining the EB-5 visa's economic impact, one must first examine the historical influence of the presidency and Congress on the visa. The EB-5 visa was created in 1990 after President George H.W. Bush signed the Immigration Act of 1990, which significantly restructured the U.S. immigration system.¹⁷ Two years later, in 1992, Congress created the Immigrant Investor Pilot Program to increase interest in the EB-5 visa. The pilot program

¹⁰ Ibid.

¹¹ Allison Christians, "Buying in: Residence and Citizenship by Investment," *St. Louis University Law Journal* 62, no. 51 (2017): 51-72.

¹² Ibid.

¹³ El-Ashram, "Too Much of a Good Thing?"

¹⁴ U.S. Citizenship and Immigration Services, "E-2 Treaty Investors," accessed 2023, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-2-treaty-investors>.

¹⁵ Ibid.

¹⁶ U.S. Citizenship and Immigration Services, "EB-5 Immigrant Investor Program," accessed 2023, <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program>.

¹⁷ Immigration Act, Public Law 101-649 § 104 Stat. 4978 (1990).

established EB-5 regional centers, or business entities that receive special designation from the United States Citizenship and Immigration Services (USCIS) to administer EB-5 investments.¹⁸

Many reforms of the EB-5 visa program were made in response to the 2001 ruling in the U.S. District Court case of *U.S. v. O'Connor*, which revealed fraudulent EB-5 investment schemes in a very public manner.¹⁹ This tainted the reputation of the program and its investors, resulting in a significant decrease of EB-5 applicants. As a result, the USCIS issued changes to the EB-5 visa program, requiring investors to provide proof that EB-5 investments originate from lawful sources and that they are personally involved with their investment project.²⁰

Additionally, in 2003, Congress passed the Basic Pilot Program Extension and Expansion Act to help revitalize the EB-5 visa program. The act required the Government Accounting Office (GAO) to conduct a thorough investigation into the EB-5 visa program. The investigation found that only a fraction of the 10,000 visas allocated to the program were actually being granted each year, which quickly prompted more program reforms.²¹ One such reform was the creation of the Investor and Regional Center Unit (IRCU) of the USCIS in 2005, which oversaw the entirety of the EB-5 visa program. The formation of the IRCU ultimately led to better coordination and increased reliability in the program.²²

Throughout the EB-5 visa's history, many economics and immigration scholars have debated whether the program has been able to meet Congress' expectations regarding job creation and regional investment. Prior to the passage of the program, many of its supporters predicted that about 4,000 millionaire investors would apply, bringing in \$4 billion in new investments and creating 40,000 jobs annually.²³ However, the 2005 GAO investigation found that, between 1992 and 2004, the EB-5 visa program only led to \$1 billion in investments instead of the predicted \$48 billion. The investigation also found no reliable accounting of jobs

¹⁸ U.S. Citizenship and Immigration Services, Proposed Rule, "EB-5 Immigrant Investor Regional Center Program," *Federal Register* 82, no. 7 (January 11, 2017): 3211, <https://www.federalregister.gov/documents/2017/01/11/2017-00441/eb-5-immigrant-investor-regional-center-program>.

¹⁹ *U.S. v. O'Connor*, 158 F. Supp. 2d 697 - Dist. Court, ED Virginia (2001).

²⁰ "History of the EB-5 Program," EB5 Investors Magazine, accessed Jan. 15, 2023, <https://www.eb5investors.com/eb5-basics/history-of-eb5>.

²¹ U.S. Government Accounting Office, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors*, GAO-05-256, (Washington, DC, 2005), <https://www.gao.gov/assets/gao-05-256.pdf>.

²² EB5 Investors Magazine, "History of the EB-5 Program."

²³ Al Kamen, "An Investment in American Citizenship," *The Washington Post*, 1991, <https://www.washingtonpost.com/archive/politics/1991/09/29/an-investment-in-american-citizenship/07f24e97-f33f-4cfc-9456-1ff51a301f4b/>.

created.²⁴ These insights reveal that Congress drastically overestimated the initial popularity of the program. Within that 12-year period, a grand total of 6,024 visas were issued—an average of about 460 visas annually.²⁵

In addition, there has been a significant discussion on whether TEAs have been gerrymandered or manipulated in a way that prevented investments from reaching traditionally underserved areas. This is a concern that has been brought to the Senate floor for discussion. For example, U.S. Senator Chuck Grassley of Iowa prepared a floor statement calling on the President to address this potential issue:

Perhaps the greatest violation of Congressional intent that has evolved over the years is the manner in which so much of the investment money coming into Targeted Employment Areas has been directed towards lavish building projects in well-to-do urban areas. Four-star hotels and commercial office buildings are being built with foreign investment dollars in affluent urban neighborhoods rather than high unemployment and rural areas, which Congress intended to benefit. This has been done by “gerrymandering” the boundaries of the Targeted Employment Area.²⁶

Many politicians agree with Senator Grassley and have sided with him on this issue. Likewise, many scholars have written about the potential misallocation of EB-5 investments. Some scholars believe funds have been taken from TEAs and put toward real estate ventures in wealthier areas and have called on Congress to enact better EB-5 policies as a result.²⁷

Some scholars view the EB-5 visa as a “valuable contribution to local economic development projects”²⁸ and believe that it “significantly [improved] employment in the United States while at the same time costing taxpayers nothing.”²⁹ Others believe the visa causes national security concerns, is too prone to fraud, and is unable to keep up with applicants’

²⁴ U.S. Government Accounting Office, *Immigrant Investors*.

²⁵ Cynthia Lange, “A Legislative History of EB-5 and the Regional Center Program,” *EB-5 Investors Magazine*, August 21, 2015, <https://www.eb5investors.com/magazine/article/eb-5-legislation-history>.

²⁶ Chuck Grassley, “Gerrymandering In EB-5 Program Flies In The Face Of Congressional Intent - Prepared Floor Statement of Senator Chuck Grassley of Iowa,” October 7, 2015, <https://www.grassley.senate.gov/news/news-releases/gerrymandering-eb-5-program-flies-face-congressional-intent>.

²⁷ Rachel Behar, “EB-5 Visa Regulation and Controversy: How an Immigration-Securities Hybrid Visa Has Been Used to Fund Real Estate Ventures,” *International Comparative, Policy & Ethics Law Review* 183, (2018-2019).

²⁸ Camille Galdes and Audrey Singer, “Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development,” Brookings, last modified on February 5, 2014, <https://www.brookings.edu/articles/improving-the-eb-5-investor-visa-program-international-financing-for-u-s-regional-economic-development/>.

²⁹ Michael Sichter, “Pumping Up America: Using the EB-5 Visa to Inject Entrepreneurial Steroids into a Struggling U.S. Economy,” *University of Missouri-Kansas City Law Review* 79, no. 1007 (2010-2011).

demands.³⁰ It has also been said that “program successes have thus far been difficult to track.”³¹ These concerns, doubtlessly, helped contribute to a temporary lapse in the EB-5 Regional Center Program in 2021. Although this program is once again in force, it is now authorized under the EB-5 Reform and Integrity Act of 2022. This bipartisan legislation re-authorized the Regional Center Program for 5 years, and increased investment thresholds for immigrant investors in TEAs from \$500,000 to \$800,000 and in non-TEAs from \$1 million to \$1.05 million.³²

ECONOMIC IMPACTS OF IMMIGRATION

It is clear that immigrants impact the U.S. economy, so much so that economics and immigration scholars have contributed to an immensely large body of literature surrounding this subject. Many scholars believe that immigration positively impacts the U.S. economy in many ways. For example, it increases potential economic output by increasing the size of the labor force, as well as contributes to increasing productivity.³³ Immigration also boosts innovation. Specifically, research finds that for every 1% increase in the population share of immigrant college graduates, patents per capita increase by 9% to 18%.³⁴ Research also indicates that immigrants increase business earnings, which, in turn, increases GDP by \$1.6 trillion annually.³⁵ On the contrary, some scholars believe that immigration negatively impacts the U.S. economy, namely by decreasing domestic wages and employment.³⁶

Much of this research examines immigrants’ usage of U.S. welfare programs. Many scholars argue that immigrants’ usage of such programs limits the economic benefit of

³⁰ Christine Ryan, “Too Porous for Protection? Loopholes in EB-5 Investor Visa Oversight Are Cause for National Security Concern,” *San Diego International Law Journal* 16, no. 417 (2014-2015): 418-441.

³¹ Camille Galdes and Audrey Singer, “Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development,” Brookings, last modified on February 5, 2014, <https://www.brookings.edu/articles/improving-the-eb-5-investor-visa-program-international-financing-for-u-s-regional-economic-development/>.

³² Brownstein Hyatt Farber Schreck LLP. “EB-5 Immigrant Investor Program Returns.” Accessed Feb. 25, 2023. <https://www.bhfs.com/insights/alerts-articles/2022/eb-5-immigrant-investor-program-returns>.

³³ Lisa Barrow, Kevin Rinz, Ceilia Rouse, and Evan Soltas, “The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants,” White House Counsel of Economic Advisers, last modified September 17, 2021, <https://www.whitehouse.gov/cea/written-materials/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants/>.

³⁴ Marjolaine Gauthier-Loiselle and Jennifer Hunt, “How Much Does Immigration Boost Innovation?” *American Economic Journal: Macroeconomics* 2, (2010): 31-56.

³⁵ Gordon H. Hanson, “The Economics and Policy of Illegal Immigration in the United States,” *Migration Policy Institute* (2009): 1-16.

³⁶ George Borjas, “The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,” *The Quarterly Journal of Economics* 118, no. 4 (2003): 1335-74.

immigration; however, others disagree. Disagreeing scholars argue that, although immigrants are more likely to use social programs upon entering a country than native residents, they quickly exit welfare programs.³⁷ Other disagreeing scholars argue that immigrants are not eligible for many U.S. welfare programs, which limits the extent to which their usage of such programs affects the economy.³⁸

Economic research on immigrants also supports the urgency to test the EB-5 visa's impact on the U.S. economy. This is because immigrant investor programs can “generate discrimination between high- and low-income people,” meaning that immigrants of different wealth statuses affect economies in different ways.³⁹ Wealthy immigrants have bought property and secured residence in new countries in increasing numbers in recent years. Specifically, the number of people with a net worth above \$1 million moving internationally more than doubled from 51,000 in 2013 to 110,000 in 2018.⁴⁰ In 2020, much of this movement may have been briefly stalled by the COVID-19 pandemic, but even after a dip during the pandemic, about 88,000 high-net-worth immigrants were projected to relocate by the end of 2022, and a record-setting 125,000 transnational millionaires are anticipated to be on the move in 2023.⁴¹ These numbers, although large, are actually tiny compared to most immigration streams, especially streams of low-income immigrants, which was over one million people to the United States alone in 2022.⁴²

³⁷ George Borjas and Stephen J Trejo. “Immigrant Participation in the Welfare System.” *Industrial and Labor Relations Review* 44, no. 2 (1991): 195–211; Sari Kerr and William Kerr, “Economic Impacts of Immigration: A Survey.” NBER Working Paper No. 16736, January, 2011, 1–37.

³⁸ Jonathan Blazer, Tanya Broder, and Avidah Moussavian, “Overview of Immigrant Eligibility for Federal Programs,” *National Immigration Law Center* (2015): 1–10.

³⁹ Leila Adim, “Residence and Citizenship by Investment: An Updated Database on Immigrant Investor Programs,” University of Barcelona, 2019, <https://www.readcube.com/articles/10.2139%2Fssrn.3474396>.

⁴⁰ Elizabeth Shaw, “Millionaire Migration Rises and Heads to New Destinations,” *Migration Policy Institute*, 2022.

⁴¹ Ibid.

⁴² Anthony Knapp and Tiangeng Lu, “Net Migration Between the United States and Abroad in 2022 Reaches Highest Level Since 2017,” U.S. Census Bureau, last modified December 22, 2022, <https://www.census.gov/library/stories/2022/12/net-international-migration-returns-to-pre-pandemic-levels.html#:~:text=According%20to%20Vintage%202022%20population,2021%20and%20July%201%2C%202022.>

METHODOLOGY

This research seeks to analyze the effect of EB-5 investors on economic growth throughout the United States, while paying particular attention to differences across regions. This research estimates three multiple linear regression models, all of which use EB-5 visa issuances as the dependent variable and economic growth as the independent variable. However, each regression utilizes different economic indicators for economic growth. The first regression examines the effect of EB-5 investors on gross domestic product (GDP), the second examines the effect on employment, and the third examines the effect on personal consumption expenditures. Despite the occasional criticism of GDP as a social welfare and progress indicator, “its role on economics, public policy, politics, and society continues to be influential.”⁴³ In fact, it is one of the most widely used economic indicators for economic growth and well-being, having been used in such a way in thousands of studies.⁴⁴ In addition, it has been found that employment and economic growth are nearly substitutable; both variables tend to fluctuate very similarly throughout a typical economic cycle.⁴⁵ Personal consumption can also give valuable insights into economic growth, as individuals tend to consume more when an economy is larger or growing.⁴⁶

Data on EB-5 visa issuances is provided by the U.S. Department of State and is available for the years 2010 to 2021. Data on GDP, employment, and personal consumption expenditures all come from the Bureau of Economic Analysis, which provides regional economic data for all U.S. states and the District of Columbia, and are available from 1997 to 2021. GDP is measured as Real GDP in millions of chained 2012 dollars. Employment is measured as total employment via number of jobs at both the state and local level. Personal consumption expenditures are measured in millions of current dollars and take into consideration various satellite accounts, including spending on arts and culture activities and spending on outdoor recreation activities, among others.

The Bureau of Economic Analysis data divides the United States into eight categorical regions: (1) “New England” (Connecticut, Maine, Massachusetts, New Hampshire, Rhode

⁴³ Jeroen C.J.M. van den Bergh, “The GDP Paradox,” *Journal of Economic Psychology* 30, no. 2 (2009): 117-135.

⁴⁴ *Ibid.*

⁴⁵ Edward Denison, *Trends in American Economic Growth, 1929-1982* (Washington, D.C.: Brookings Institution Press, 2011).

⁴⁶ Campbell Harvey, “Forecasts of Economic Growth from the Bond and Stock Markets,” *Financial Analysts Journal* 45, no. 5 (1989): 38-45.

Island, and Vermont); (2) “Mideast” (Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania); (3) “Great Lakes” (Illinois, Indiana, Michigan, Ohio, Wisconsin); (4) “Plains” (Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota); (5) “Southeast” (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia); (6) “Southwest” (Arizona, New Mexico, Oklahoma, Texas); (7) “Rocky Mountain” (Colorado, Idaho, Montana, Utah, Wyoming); and (8) “Far West” (Alaska, California, Hawaii, Nevada, Oregon, Washington). After each regression is completed, EB-5 visa investors’ effects on GDP, employment, and personal consumption expenditures will be compared between regions in order to determine where EB-5 investors are most and least impactful.

Furthermore, all three indicators for economic growth are used in logarithms. This is done following the advice of two scholars who discussed the benefits of using logarithms in economic analyses. As advised, “a logarithmic transformation is often employed to obtain a more homogenous variance of a series or to make its distribution more normal.” More so, logarithms are commonly used for data forecasting and for simple regressions aimed at testing correlation or causation between multiple variables.⁴⁷ Additionally, as previously mentioned, the COVID-19 pandemic may have momentarily stalled EB-5 visa issuances, and may have affected other economic variables, such as GDP, employment, and personal consumption, in unexpected ways. Therefore, the year 2020 and all subsequent years will be excluded from this research; it will only analyze the pre-pandemic effect of EB-5 investors on economic growth. This research thus spans from 2010 to 2019—a ten-year period.

This research estimates three regression models, each of which combine one of eight U.S. regions with one of three economic growth indicators to form a unique variable. Namely, the first regression examines whether EB-5 investors increase GDP in the New England region, in the Mideast region, and so forth. The second regression examines whether EB-5 investors increase employment in any of the regions. Finally, the third regression examines whether EB-5 investors increase personal consumption in any of the regions. Whether or not an increase is observed will be determined by a positive or negative coefficient, and whether any statistical

⁴⁷ Helmut Lütkepohl and Fang Xu, “The Role of the Log Transformation in Forecasting Economic Variables,” *Empirical Economics* 42, (2012): 619-638.

significance is observed will be determined by the p-values. Regression results can be found in Table 1 in the next section.

RESULTS

In the first regression, all eight regions yielded statistically significant results to some degree. Additionally, for the regression as a whole, there was a positive coefficient. This means that, from 2010 to 2019, EB-5 investors contributed to increases in GDP in all eight regions of the United States; as EB-5 investors increased in a given region, GDP also increased in that region. These results, however, differed in significance region-by-region. The Plains region experienced the lowest p-value of all the regions (0.002149), thus the relationship is strongest for this region. Meanwhile, the New England region experienced the highest p-value (0.05506), thus the relationship is weakest for this region.

Similar to the first regression, in the second regression, all eight regions yielded statistically significant results to some degree. There was also a positive coefficient for the regression as a whole. This means that, from 2010 to 2019, EB-5 investors contributed to increases in employment in all eight regions of the United States; as EB-5 investors increased in a given region, employment also increased in that region. Once again, the Plains region experienced the lowest p-value of all the regions (0.001465), which means the relationship is strongest for this region. On the contrary, the Southeast region experienced the highest p-value (0.0129), which means the relationship is weakest for this region. Interestingly, six out

Table 1: Regression Results for EB-5 Visa Investors’ Effects on (1) Gross Domestic Product, (2) Employment, and (3) Personal Consumption Expenditures

	ECONOMIC GROWTH		
	(1) GDP	(2) EMPLOYMENT	(3) PERSONAL CONSUMPTION
NEW ENGLAND	0.05506 ‘.’ +	0.005965 ‘***’ +	0.0137 ‘*’ +
MIDEAST	0.01449 ‘*’ +	0.006931 ‘***’ +	0.0132 ‘*’ +
GREAT LAKES	0.004665 ‘***’ +	0.003197 ‘***’ +	0.01149 ‘*’ +
PLAINS	0.002149 ‘***’ +	0.001465 ‘***’ +	0.009413 ‘***’ +

SOUTHEAST	0.03485 ‘*’ +	0.0129 ‘*’ +	0.0135 ‘*’ +
SOUTHWEST	0.00431 ‘***’ +	0.005564 ‘***’ +	0.008189 ‘***’ +
ROCKY MOUNTAIN	0.02604 ‘*’ +	0.01164 ‘*’ +	0.01498 ‘*’ +
FAR WEST	0.02538 ‘*’ +	0.004761 ‘***’ +	0.01592 ‘*’ +
Coefficient Codes:	“+” denotes positive		“-” denotes negative
Significance Codes:	0 ‘***’	0.01 ‘*’	0.1 ‘ ’
	0.001 ‘***’	0.05 ‘.’	1

of eight regions experienced the highest level of statistical significance for the employment regression, while only three regions experienced this level for the GDP regression. This may suggest that EB-5 investors contributed more to overall growth in employment than GDP, which makes sense given the program’s job creation requirement.

Similar to the first two regressions, in the third regression, all eight regions yielded statistically significant results to some degree. Once more, there is a positive coefficient for the whole regression. This means that, from 2010 to 2019, EB-5 investors contributed to increases in personal consumption in all eight regions of the United States; as EB-5 investors increased in a given region, personal consumption also increased in that region. The Southwest region experienced the lowest p-value of all the regions (0.008189), which means the relationship is strongest for that region. Separately, the Far West region experienced the highest p-value (0.01592), which means the relationship is weakest for that region. For the personal consumption regression, only two regions experienced the highest level of statistical significance. Therefore, when comparing this regression with the previous two, it can be observed that employment yielded the most statistically significant results, GDP yielded the second most, and personal consumption yielded the least.

Overall, it can be observed that EB-5 investors had a positive effect on economic growth. Focusing on individual regions, only two regions experienced the highest level of significance across all three economic indicators: the Plains and Southwest regions. Likewise, only two regions experienced the lowest level of significance across all three economic indicators: the Southeast and Rocky Mountain regions. Although these regressions solely provided insight into

the significance of the variables' causal relationships, these results may provide some insights into what regions have been impacted the most and least by EB-5 investors.

POLICY DISCUSSION

Given the statistical significance of EB-5 investors' impacts in all eight U.S. regions and across all three economic indicators for economic growth, the United States should continue to promote the EB-5 visa program and encourage EB-5 immigrant investment. Encouraging EB-5 investors to work in the United States will continue to decrease unemployment, create jobs, and improve the U.S. economy. Increasing the number of annual EB-5 visa issuances will likely have more profound, positive effects on the U.S. economy.

To encourage more applicants to apply to the EB-5 visa program, there are a number of policy responses that Congress can take. First, Congress can expand the program and curate it not only toward immigrant investors, but toward immigrant entrepreneurs as well. A small pool of scholars believe that "the program cannot effectively target both immigrant entrepreneurs and investors" under its current structure. This same pool of scholars also believes that "using the program as an investor's visa rather than as an entrepreneur's visa is contrary to legislative intent."⁴⁸ Immigrant investors are important for bringing foreign capital investment into the United States; however, immigrant entrepreneurs bring both human and physical capital investments into an economy.⁴⁹ Curating the EB-5 visa program toward both immigrant investors and entrepreneurs will not only increase overall investments, but open the program to a broader array of applicants. Second, Congress can model the United States' EB-5 visa after other countries' immigrant investment programs that have been more successful in garnering large volumes of applicants.⁵⁰

Additionally, Congress may want to consider reallocating EB-5 investments and encourage EB-5 investors to pursue projects in regions in need of the most economic stimulation. As previously stated, the EB-5 visa program has been criticized for potential gerrymandering; for allocating more funds and investors to urban, high-income areas than rural, low-income areas (or

⁴⁸ Annie Anjung Lin, "Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors," *Chapman Law Review* 18, no. 2 (2015).

⁴⁹ *Ibid.*

⁵⁰ Emily Kendall, "Green Cards as the Ultimate Dividends: Why Improving the U.S. Investment Visa Program Will Encourage the Economic Recovery by Increasing Foreign Investment and Creating Jobs for Americans," *Georgetown Immigration Law Review* 579, no. 27 (2012-2013).

TEAs). Acknowledging the results of this research, which found that increases in EB-5 investors also lead to increases in economic growth, such a policy may lessen economic growth disparities that are seen throughout the United States, especially if opportunities for investors are capped in already flourishing areas.

Beyond reallocation of investments, the EB-5 visa has been condemned for fraud. As mentioned before, many scholars argue that such fraud occurred due to the lack of surveillance of the program. Although Congress created the IRCU, which increased coordination and reliability in the EB-5 program, as a response to various fraud investigations, further recommendations for program improvements have been made. Economists at the Brookings Institute claim that “a reconsideration of the [EB-5 program] can strengthen its utility and better accomplish its central goal of aiding regional economic development.”⁵¹ The think tank provides three recommendations for reform. First, the Department of Commerce should play a greater role in supervising the adjudication of regional centers and monitor the program’s impacts more closely. Second, incentives should be created for partnerships between EB-5 regional centers and EDAs, since regional centers and EDAs “often possess complementary resources and can leverage more funding and reduce risk for investors.” Lastly, high-quality, multi-variable public data on regional centers should be generated in order to facilitate better evaluation of the program.⁵²

CONCLUSION

This research found that increased levels of EB-5 investors increase regional economic growth in the United States. This phenomenon likely occurs due to EB-5 job creation and investment requirements. However, it is likely that EB-5 investors inconsistently affect the economies of different U.S. regions, given that investors choose the areas in which they will invest and complete their projects in. Therefore, U.S. policymakers should support initiatives to increase the number of EB-5 investors in the United States, as well as support initiatives to allocate EB-5 investments more effectively throughout the country.

⁵¹ Camille Galdes and Audrey Singer, “Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development,” Brookings, last modified on February 5, 2014, <https://www.brookings.edu/articles/improving-the-eb-5-investor-visa-program-international-financing-for-u-s-regional-economic-development/>.

⁵² *Ibid.*

There are some limitations to this research. This research did not control for the age or gender of EB-5 investors. Future research should examine these factors to obtain a better understanding of the EB-5 visa's economic impact. This research also did not take the E-2 visa into consideration. While the E-2 visa was mainly excluded from this research due to the lack of public, readily available data on the visa, future research should seek E-2 data and merge it with EB-5 data in order to more fully examine how immigrant investment affects the U.S. economy. Considering the fact that E-2 visas are issued at nearly four times the rate of EB-5 visas, and the fact that it has similar job creation and investment requirements, it is likely that this research left out some significant findings by focusing solely on the EB-5 visa.⁵³ More so, future research may perform more thorough economic analyses that transcend beyond multiple linear regressions, as well as examine other economic indicators and standards of economic well-being to illustrate the influence of EB-5 investors on the U.S. economy. Finally, future research may consider expanding the time frame of the analysis beyond a ten-year period, and one that includes post-pandemic years. Considering the recently passed EB-5 Reform and Integrity Act of 2022, which increased investment thresholds and investor protections, and revamped means of determining TEAs, conducting another analysis in the future may be necessary in order to see the effects of this recent EB-5 legislation, as it is too soon to have meaningful data given that it was just enacted last year.⁵⁴

Overall, this research provides valuable insights into the EB-5 visa program and contributes to the scholarship that supports the program and its capabilities. As the Biden administration continues to propose changes to U.S. immigration policies, it should especially consider proposing changes to the EB-5 visa program. Paying particular attention to the EB-5 program may also aid the President in achieving his goals for job creation and economic recovery after the COVID-19 pandemic.

⁵³ "US E2 Visa Statistics," Investment Migration Insider, accessed Feb. 25, 2023, <https://www.imidaily.com/datacenter/united-states-e2-visa-statistics/>.

⁵⁴ Brownstein Hyatt Farber Schreck LLP. "EB-5 Immigrant Investor Program Returns." Accessed Feb. 25, 2023. <https://www.bhfs.com/insights/alerts-articles/2022/eb-5-immigrant-investor-program-returns>.

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Part Five

Campaigns & Elections

A LITTLE GOES A LONG WAY: HOW SMALL-DOLLAR DONATIONS EMPOWER CANDIDATES OF COLOR AND PROPEL CONGRESSIONAL REPRESENTATION IN A POST-CITIZENS UNITED ERA

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Data from the U.S. Census Bureau indicates an increasing racial and ethnic minority population in the United States reaching majority status within the next two decades. While minority representation in Congress has improved in recent elections, people of color remain significantly underrepresented. Meanwhile, post-Citizens United campaign finance data suggests unprecedented amounts of money, particularly big money, spent in elections. Obstacles to improving representation in the modern campaign finance system include disparities in fundraising resources, which perpetuate the racial fundraising gap. This paper seeks to analyze the relationship between donor size and minority representation. Through a regression analysis on campaign finance data in every congressional election from 2008-2022, this paper finds a statistically significant and positive relationship between small-dollar donations and proportions of non-White representation in Congress. As big money continues to rise in scope and influence, small-dollar donations and public financing systems assist the diversifying electorate with choosing leaders from their communities.

BACKGROUND

Data collected from the 2020 Census projects that the United States will become “minority White” by 2045, in which White Americans will comprise 49.7 percent of the population relative to non-White Americans, encompassing 50.3 percent of the population.¹ White Americans have mixed feelings about this demographic ‘minority-majority.’ Studies indicate that media framing, public discourse, and political elites trigger anxiety and feelings of threat toward immigration and increasing diversity, resulting in an increase in hate crimes, voter suppression, and other discriminatory institutional policies.² Thus, the current political moment is one of increased awareness regarding the role of race and ethnicity in political outcomes.

¹ William H. Frey, “The US Will Become ‘Minority White’ in 2045, Census Projects,” Brookings, last modified March 9, 2022, <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects>.

² Maureen A. Craig and Jennifer A. Richeson, “On the Precipice of a ‘Majority-Minority’ America: Perceived Status Threat From the Racial Demographic Shift Affects White Americans’ Political Ideology,” *Psychological Science* 25, no. 6 (2014): 1189. In four separate experiments, Craig and Richeson find that group-status threats have motivated

Another factor helping define the political landscape is the exponential rise of money raised for elections. The total amount raised by both the House and the Senate in the 2022 midterm election was more \$3.7 billion making it the second most fundraised midterm election in US history.³ The historic 2020 election, in which total money raised for congressional races totaled over \$3.9 billion, was more than double the amount raised during the previous general election in 2016.⁴ As seen in Figure 1 (see Appendix), the total amount of money raised, including by political action committees (PACs) and by individuals, in congressional elections has continued to grow with each cycle.

The explosion of money in politics can be significantly attributed to the 2010 decision in *Citizens United v. Federal Election Commission*, enabling corporations and other powerful outside groups to spend unlimited amounts of money in campaigns as free speech.⁵ In his dissent, Justice John Paul Stevens noted that the case prompting a rise of money in politics “will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process.”⁶ In hindsight, Justice Stevens and his three other dissenting colleagues correctly predicted the next decade distinguished by the rise of big money in politics at the expense of everyday voters and the health of democracy.

One of the key implications of large amounts of money spent in politics is a link between campaign spending and electoral success. Between 2000 and 2018 (with the exception of 2010), more than 90 percent of candidates who spent the most won their race.⁷ Though there is a strong correlation between the amount of money spent on elections and the amount of money raised, other indicators of electability persist. Richard Lau, a professor of political science at Rutgers University, notes that “it’s more that winning attracts money.”⁸ In other words, the most competitive races often stimulate the most funding. Lau alludes to other factors that contribute to electoral success including incumbency advantage, district composition, and partisanship.

White Americans, regardless of political affiliation, to endorse conservative policy positions and that increasing diversity of the United States has the potential to deepen the partisan divide.

³ “Elections Overview,” OpenSecrets, accessed February 28, 2023, <https://www.opensecrets.org/elections-overview>.

⁴ Ibid.

⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁶ Ibid.

⁷ Maggie Koerth, “How Money Affects Elections,” *FiveThirtyEight*, last modified September 10, 2018, <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story>.

⁸ Ibid.

However, money in politics remains a barrier for electoral success. During the 2022 midterm elections, the 100 largest donors spent 60 percent more altogether than each small donor, or donations of less than \$200, combined.⁹ Top donors included billionaires and leaders of the largest corporations in the United States. Ordinary voters and donors' voices are outweighed by money from a very small class of elite donors.

A BROKEN SYSTEM FOR PEOPLE OF COLOR

Although the bias favoring very few large donors and corporations hurts all Americans, the effects for communities of color are amplified. The wealthy and predominantly White donor class results in disadvantages for people of color in two main ways, as outlined by a 2015 Demos study.¹⁰ The first indicates that candidates are generally preoccupied with courting wealthy, often White, donors for campaign donations rather than prioritizing the issues that affect communities of color. Secondly, communities of color are underrepresented in office, given that candidates of color are less likely to run for office and raise money, and thus less likely to win elections.¹¹ Candidates of color face what this paper identifies as the racial fundraising gap, which denotes the differences in the amount of money raised by individuals of color and their White counterparts.

One factor that influences a candidate's ability to raise money includes the use of personal funds and wealthy networks. Robert Maguire, director of research at Citizens for an Ethical Washington (CREW), notes the following:

If you look at what it takes to run for office in America, you start to see pretty quickly how it's stacked against women and people of color. First, there's the money it takes to run for office. You need to be able to raise millions of dollars to run. This favors extremely wealthy candidates—who tend, overwhelmingly, to be white men—not only because they can write six- or seven-figure checks to their

⁹ Taylor Giorno, “‘Midterm spending spree’: Cost of 2022 federal elections tops \$8.9 billion, a new midterm record,” Open Secrets, last modified February 7, 2023, <https://www.opensecrets.org/news/2023/02/midterms-spending-sprees-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record>.

¹⁰ Adam Lioz, “Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy,” Demos, July 23, 2015, https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.

¹¹ *Ibid.*

campaigns, but because wealthy candidates have wealthy friends who can max out their campaigns and write large checks to outside groups supporting them.¹²

Maguire alludes to the racial wealth gap, which is the unequal distribution of wealth between different racial and ethnic groups in the United States. Black and Hispanic/Latine individuals have lower levels of wealth than their White counterparts, even after adjusting for factors such as income and education. This is due to systemic factors such as historical and ongoing discrimination in areas such as homeownership, which economist Heather McGhee describes as “the center of financial security and wealth-building for most families – and for the American economy.”¹³ Candidates of color are not able to spend their own money to run for office nor have access to wealthy networks, both of which their White counterparts utilize to fuel their campaigns. In fact, White candidates are significantly more likely to be able to self-fund campaigns.¹⁴

Adam Bozzi, Vice President for Communications at End Citizens United, with over fifteen years of campaign and government communications at both the federal and state level, also discusses the lack of wealthy networks for people of color:

We have a broken campaign finance system, and that can be a barrier to entry for candidates of color, who often don't have access to the same fundraising networks as other candidates. Early in the election cycle, fundraising is unfairly and unfortunately used as a barometer to judge the quality of candidates and their campaigns. Lower fundraising numbers early can lead to less institutional support and less media attention, which makes it even hard to get a campaign off the ground.¹⁵

Racial and ethnic representation in Congress has been a long-standing issue in the United States. While the country has become more demographically diverse, the same cannot be said for the legislative body. In the early decades of the country's history, Congress only consisted of White men, many of whom were wealthy and owned slaves. The first Black American to serve in Congress was Hiram Revels, elected to the Senate in 1870, just five years after the end of the

¹² Robert Maguire, email message to author, February 27, 2023.

¹³ Heather C., McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together*. (New York: One World, 2021), 275.

¹⁴ Megan Moore, *Money and Diversity: 2004 State Legislature Elections* (Helena: The Institute on Money in State Politics, 2006), <https://www.followthemoney.org/assets/press/Reports/200603292.pdf>.

¹⁵ Adam Bozzi, email message to author, February 24, 2023.

Civil War.¹⁶ Senator Revels was among many other Black elected officials who served at the local, state, and national level as a result of federal Reconstruction policies.¹⁷ However, these reforms were met with opposition from many Southern states, which deliberately implemented policies, or Jim Crow laws, which enforced racial segregation and stripped Black Americans of the right to vote and own property.

It was not until the Civil Rights Movement of the 1960s when significant gains in terms of racial and ethnic representation, occurred in Congress. This was mainly credited to legislation such as the Voting Rights Act of 1965 which constitutionally guaranteed Black Americans the right to vote under the 15th Amendment.¹⁸ As a result, a number of Black Americans in Congress increased significantly, with Shirley Chisholm becoming the first Black woman elected to Congress in 1968.¹⁹ Likewise, the number of other racial and ethnic groups, such as Hispanic/Latine and Asian Americans, also began to increase during this time albeit at a slow rate. Since the accomplishments of the Civil Rights Movement, there have been more gains in terms of diversity in Congress, with a record number of women, people of color, and LGBTQ+ individuals being elected in recent years.²⁰ However, representation in Congress does not fully reflect the demographics of the country, and there is a continued push for more diverse and inclusive political institutions. Table 1 (see Appendix) illustrates how the racial and ethnic makeup of the United States population lacks congruent representation in its largest electoral body.

Underrepresentation in Congress has profound policy implications on communities of color. A field experiment conducted within state legislatures revealed that “White legislators of both parties exhibit similar levels of discrimination” against Black constituents and reply to

¹⁶ History, Art & Archives, U.S. House of Representatives, Office of the Historian, “Black Americans in Congress, 1870-2007,” (Washington, D.C.: U.S. Government Printing Office, 2008), <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Historical-Data---Nav/>

¹⁷ “Reconstruction and Rights,” Library of Congress, accessed February 28, 2023. <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/civil-war-and-reconstruction-1861-1877/reconstruction-and-rights>.

¹⁸ “Voting Rights Act of 1965,” The History Channel, last modified January 10, 2023, <https://history.com/topics/black-history/voting-rights-act#:~:text=The%20Voting%20Rights%20Act%20of,Amendment%20to%20the%20U.S.%20Constitution>.

¹⁹ Ibid.

²⁰ Katherine Schaeffer, “The Changing Face of Congress in 8 charts,” Pew Research Center, last modified February 7, 2023, <https://www.pewresearch.org/fact-tank/2023/02/07/the-changing-face-of-congress>.

requests less often.²¹ However, “minority legislators do the opposite” and “respond more frequently.”²² These results are consistent with other research which has determined that White officials exhibit bias against minority groups, such as the Hispanic/Latine constituents.²³

Along with a lack of representation, the presence of large and corporate money in politics has several salient policy consequences. One example includes the private prison industry. People of color, namely Black and Hispanic/Latino men, make up about 30 percent of the United States’ population, yet comprise 60 percent of people imprisoned.²⁴ Moreover, people of color disproportionately make up private prisons, which have been controversial due to unethical practices and treatment of inmates.²⁵ Since 1990, the average contributions of for-profit or private prisons to members of Congress has risen significantly, peaking in the 2016, 2018, and 2020 elections. These elections were dominated by private prison companies and special interest groups, such as CoreCivic and GEO Group, who gave approximately \$2 million in the 2020 election to mostly Republican candidates.²⁶ Through their substantial campaign donations, private prison companies were able to successfully lobby for harsher sentencing laws for non-violent offenses, mandatory sentencing, elimination of parole, and other policies that disproportionately affect communities of color.²⁷

Several other industries, including oil and gas, pharmaceutical, and real estate companies have dumped hundreds of millions of dollars in a single election cycle. In the 2022 election, the oil and gas industry spent nearly \$130 million to PACs, political party committees, and candidates.²⁸ The oil and gas industry, which annually releases about 9 million tons of methane

²¹ Daniel M. Butler, and David E. Broockman, “Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators,” *American Journal of Political Science* 55, no. 3 (2011): 463.

²² *Ibid.*

²³ Ariel R. White, et al., “What do I need to vote? Bureaucratic discretion and discrimination by local election officials,” *American Political Science Review* 109, no. 1 (2015): 129.

²⁴ “Mass Incarceration & People of Color,” Southern Coalition for Social Justice, accessed February 28, 2023, <https://southerncoalition.org/mass-incarceration-people-color>.

²⁵ Andrea N Montes, “Ethical Concerns About Private (and Public) Corrections: Extending the Focus Beyond Profit-Making and the Delegation of Punishment,” *Criminal Justice Policy Review* 31, no. 4 (2020): 609.

²⁶ “For-profit Prisons,” OpenSecrets, accessed February 28, 2023, <https://www.opensecrets.org/industries/indus.php?ind=G7000>.

²⁷ Jason L. Morín, et al., “Cosponsoring and Cashing In: U.S. House Members’ Support for Punitive Immigration Policy and Financial Payoffs from the Private Prison Industry,” *Business and Politics* 23, no. 4 (2021): 492. This research explores the relationship between campaign donations made on behalf of the private prison industry and an untested form of position taking—bill cosponsorship—in the U.S. House of Representatives. The authors find support for their second hypothesis, that private prison companies are more likely to reward House Democrats who cosponsor punitive immigration policies even after accounting for possible endogeneity. The findings have important implications regarding the relationship between House members and private interests.

²⁸ “Elections Overview,” OpenSecrets, accessed February 28, 2023, <https://www.opensecrets.org/>

gas and other toxic chemicals into the atmosphere, frequently lobbies Congress for tax breaks and benefits.²⁹ Adverse environmental conditions disproportionately hurt communities of color as they are more likely to live near polluted areas.³⁰ As a result, exposure to pollution increases health risks in communities of color. The health industry also seeks to influence policy through large donations, including many pharmaceutical companies, who contribute millions of dollars each election to campaigns of members of Congress “as part of a multipronged effort to influence health care lawmaking and spending priorities.”³¹

Overall, wealthy donors, corporations, and interest groups are able to exert an outsized influence on the political process, leading to policies that often favor the interests of the wealthy over the needs of low-income communities and people of color. This perpetuates a cycle of economic and political inequality, leaving marginalized communities with limited access to resources and political power. Additionally, candidates who rely on large donations from corporations and wealthy individuals are less likely to prioritize the concerns of low-income communities, who are often disproportionately impacted by issues such as poverty, lack of access to healthcare, and systemic racism. As a result, communities of color are left with inadequate representation and policies that fail to address their unique needs and challenges.

SMALL-DOLLAR DONATIONS

Contrary to large and corporate donors, small-dollar donations, or donations under \$200, can play a key role in empowering racial and ethnic representation in Congress by providing critical funding for candidates of color. Unlike large donors or corporate PACs, small-dollar donors tend to be individuals from diverse backgrounds who are invested in supporting candidates who share their values and represent their communities. Studies have found that small-dollar donors include “more women and more ethnic minorities than large donors.”³² By contributing even small amounts of money to these candidates, small-dollar donors can help

elections-overview.

²⁹ “It Is Time to Phase Out 9 Unnecessary Oil and Gas Tax Breaks,” Center for American Progress, last modified May 26, 2016, <https://www.americanprogress.org/article/it-is-time-to-phase-out-9-unnecessary-oil-and-gas-tax-breaks>.

³⁰ Ibid.

³¹ Elizabeth Lucas, “Pharma Cash to Congress,” last modified March 23, 2022, <https://khn.org/news/campaign/>

³² Laurent Bouton, Julia Cagé, Edgard Dewitte, and Vincent Pons, “Small Campaign Donors,” *NBER Working Paper Series*, (2022): <http://www.nber.org/papers/w30050>.

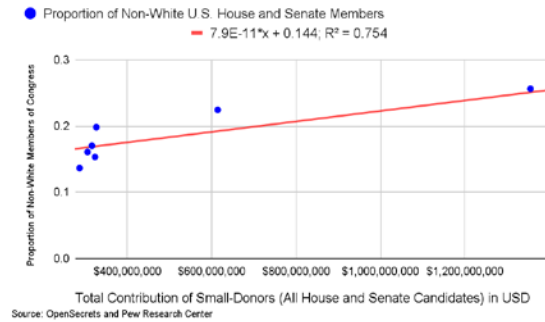
level the playing field and provide candidates of color with the resources they need to compete effectively in elections. This can be particularly important in races where the candidate faces significant barriers to accessing traditional sources of funding, such as personal wealthy networks and funding networks as a result of the incumbency advantage.

Online fundraising tools such as ActBlue and WinRed, of the Democratic and Republican parties respectively, have been largely responsible for the rise of small-dollar donations in recent election cycles. These fundraising platforms allow political campaigns and organizations to directly collect donations from supporters. ActBlue has been notably successful in mobilizing small-dollar donations from individual donors, with a focus on grassroots activism and democratic participation. On the other hand, WinRed is a Republican fundraising platform that was created as a response to the success of ActBlue. WinRed has helped elect a slew of conservative members of Congress, yet has experienced significantly less success than the Democratic platform.³³ Nonetheless, small-dollar donations continue to fuel campaigns for both major parties.

Regression Analysis of Small-Dollar Donations and Representation in Congress

To evaluate the relationship between minority representation in Congress and the rise of small-dollar donations, a regression analysis seeks to evaluate the relationship between the total amount of small-donor contributions and the proportion of non-White representation in the past eight election cycles and their respective sessions of Congress. The hypothesis for the model (H1) is that there is a statistically significant relationship between small-dollar donations and minority representation. The simple linear regression model produces a p-value of 0.005, which allows for a rejection of the null hypothesis. There is a statistically significant relationship between the two variables. Figure 3 (see Appendix for regression summary table) displays a simple linear regression model that produces an R^2 value of 0.754 and thus a Pearson correlation coefficient (r) of 0.869, which indicates that there is a strong, linear relationship between the proportion of non-White members in Congress and the total amount of small-dollar donations.

³³ Melissa Holzberg, "ActBlue still outraises WinRed, but the GOP platform is catching up," OpenSecrets, Last modified August 4, 2021, <https://www.opensecrets.org/news/2021/08/actblue-outraises-winred-gop-catching-up/>.

Figure 2. Small-Dollar Donations and Representation in Congress (2008-2022)³⁴

Caveats

While a stronger regression model is recommended to include more data and explanatory variables, such as redistricting, media, and polarization effects, this model offers initial results that an increase in small-dollar donations is associated with an increase of non-White members in Congress. Further research is necessary to establish any causal effects of small-dollar donations on diverse representation in Congress.

Discussion

It is important to note the adverse effects of small-dollar donations. Although small-dollar donations have played a significant role in shaping the political landscape in Congress, they have also contributed to the rise of ideological extremism on both sides of the aisle.³⁵ For example, during the 2022 midterm elections, conservative Representative Marjorie Taylor Greene (R-GA-14) received \$8,572,02, or 68.32 percent in small-dollar donations and progressive Senator Bernie Sanders (I-VT) received \$26,913,409, or 70.25 percent in small-dollar donations.³⁶ This dependence on small-dollar donations has provided far-right and far-left groups and individuals a disproportionate amount of influence in shaping political discourse and

³⁴ Katherine Schaeffer, “The Changing Face of Congress in 8 charts,” Pew Research Center, last modified February 7, 2023, <https://www.pewresearch.org/fact-tank/2023/02/07/the-changing-face-of-congress>.; “Large Versus Small Individual Donations,” OpenSecrets, accessed March 1, 2023, <https://www.opensecrets.org/elections-overview/large-vs-small-donations>.

³⁵ Richard H. Pildes, “Small dollars, big changes,” *Washington Post*, last modified February 6, 2020, <https://www.washingtonpost.com/outlook/2020/02/06/small-dollars-big-changes>.

³⁶ “Large Versus Small Individual Donations,” OpenSecrets, accessed March 1, 2023, <https://www.opensecrets.org/elections-overview/large-vs-small-donations>.

policy decisions. Politicians are often more likely to pander to the interests of their small-dollar donors, who may hold views on the far ends of the political spectrum, rather than representing the broader interests of their constituents. This has resulted in a polarized political environment that has made it increasingly difficult for Congress to make progress on important issues that affect the American public. Concerns over hyperpartisanship, extremism, and policy gridlock are genuine concerns that come with small-dollar donations. Policymakers should be wary of the role that small-dollar donations play in the rise of extreme ideology. However, if these radical views are mitigated through efforts such as redistricting and primary election reforms, small-dollar donations allow for a more democratic campaign finance system.³⁷

In the past few elections, small-dollar donations have propelled racial and ethnic minority fundraising efforts. For example, in 2020, Representative Jamaal Bowman (D-NY-20), a Black educator and activist, won his congressional race with the help of small-dollar donations. Bowman raised a total of \$2,915,373.03 for his primary campaign, which is the most competitive part of the race given its historical Democratic holding.³⁸ Over half of his campaign donations were less than \$200.³⁹ Bowman's fundraising success allowed him to mount a competitive challenge against 16-term incumbent, Eliot Engel, who had held the seat for over thirty years.⁴⁰ Bowman's campaign was also notable for its emphasis on community organizing and engaging voters through grassroots activism. His fundraising model demonstrates the power of small-dollar donations in enabling candidates from marginalized communities to compete on a level playing field and to run competitive campaigns and challenge entrenched political interests. It also highlights the growing trend of grassroots fundraising, which has become a vital tool for candidates of color seeking to transform the political landscape.

³⁷ David Montgomery, "How to Save America From Extremism by Changing the Way We Vote," *Washington Post*, last modified October 31, 2022. <https://www.washingtonpost.com/magazine/2022/10/31/ranked-choice-voting-multi-member-house-districts>.

³⁸ "New York District 16 2020 Racem" OpenSecrets, accessed February 2, 2023, <https://www.opensecrets.org/races/candidates?cycle=2020&id=NY16&spec=N>.

³⁹ *Ibid.*

⁴⁰ Elena Moore, "Progressive Jamaal Bowman Projected To Oust Longtime Rep. Engel In N.Y. Primary," *NPR*, last modified July 17, 2020, <https://www.npr.org/2020/07/17/882034409/progressive-jamaal-bowman-projected-to-oust-longtime-n-y-rep-engel-in-primary>.

POLICY RECOMMENDATIONS

As concerns about the role of money in politics continue to grow, many advocates and policymakers call for bipartisan reform of the current campaign finance system. According to a survey conducted by the Pew Research Center in 2018, 77 percent of Americans believe that there should be limits on the amount of money that individuals and organizations can spend on political campaigns.⁴¹ There are a variety of existing policy recommendations for campaign finance reform including strict limits on PAC and corporate contributions, greater transparency and disclosure, reversing *Citizens United* decision through a constitutional amendment, and stronger enforcement of laws. Many have been successful on a state level at creating a more equitable campaign finance system.⁴² For example, studies have found that campaign finance transparency affects legislative behavior in a positive way.⁴³ Moreover, research finds that if more candidates of color ran for office, then the amount of donations from voters of color would most likely rise as well.⁴⁴ While these are all worthwhile efforts, this section proposes a robust public financing system that matches small-dollar donations to create a more democratic campaign finance system for marginalized communities and people of color.

Adam Bozzi recommends a system that “empowers small-dollar donations from regular people that diversifies both the pool of donors and candidates would serve our democracy better than the current system, which relies on the biggest political donors, whose values and demographics are out of line with the country.”⁴⁵ Public financing of elections and donation limits can level the field, reduce money's influence, close racial gaps, and let candidates compete based on ideas rather than their fundraising abilities.

While all fifty states regulate campaign finance policies in some ways, Connecticut's public financing system is critically acclaimed as a model for campaign finance reform that has

⁴¹ Bradley Jones, “Most Americans want to limit campaign spending, say big donors have greater political influence,” Pew Research Center, last modified May 8, 2018, <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence>.

⁴² “Washington Advisory Question about the Rights of Corporations and Money as Free Speech, Initiative 735 (2016),” Ballotpedia, accessed March 1, 2023, [https://ballotpedia.org/Washington_Advisory_Question_about_the_Rights_of_Corporations_and_Money_as_Free_Speech,_Initiative_735_\(2016\)](https://ballotpedia.org/Washington_Advisory_Question_about_the_Rights_of_Corporations_and_Money_as_Free_Speech,_Initiative_735_(2016)). Washington state was successful at approved “Initiative 735,” which called for a constitutional amendment to overturn *Citizens United* and “reserves constitutional rights for people and not corporations.”

⁴³ Abby Wood and Christian R. Grose, “Campaign Finance Transparency Affects Legislators’ Election Outcomes and Behavior,” *American Journal of Political Science* 66, no. 2 (2022): 516.

⁴⁴ Jacob M. Grumbach and Alexander Sahn, “Race and Representation in Campaign Finance,” *The American Political Science Review* 114, no. 1 (2020): 206.

⁴⁵ Adam Bozzi, email message to author, February 24, 2023.

helped to amplify small-dollar donors in the wake of *Citizens United*. The program provides candidates with public funds to help them run their campaigns, which reduces the influence of big-money donors and makes it easier for candidates to focus on reaching out to everyday voters. To qualify for public financing, candidates must collect a certain number of small-dollar donations from constituents in their district.⁴⁶ This encourages candidates to prioritize the concerns and needs of their constituents. Connecticut's public financing program has also helped to diversify the candidate pool by making it easier for people of color and other underrepresented groups to run for office. The success of several candidates who have run under the program, including Representative Jahana Hayes, who was the first Black woman elected to Congress from Connecticut, highlights the potential for public financing programs to promote greater diversity and inclusivity in politics.⁴⁷ By reducing the influence of big-money donors, Connecticut's public financing program has helped to build a more representative and responsive democracy for all and serves as a model for policy adopted on a federal level.

A strong, federal public financing system would likely be met with support. More than 80 percent of voters support public disclosing contributions to organizations involved in elections.⁴⁸ Furthermore, public financing has become more popular as fourteen states and nineteen municipalities have adopted public financing systems in recent years.⁴⁹ Robert Maguire recommends a similar model but by requiring that any large contributions must be first matched by small-dollar donations. He claims:

There is no panacea for the problems stemming from our current campaign finance system, but almost anything would be better than what we currently have. The two main issues when it comes to large and small donors is that large donors have an outsized influence in the system, and many of the candidates who have the most success raising small-donor money are candidates who feed on anger and division, which incentivizes appeals that further feeds polarization. The ideal solution, in my

⁴⁶ "Connecticut Citizens' Election Program: Example of a Public Funding System," Blueprints for Democracy, accessed February 26, 2023, <http://www.blueprintsfordemocracy.org/model-public-funding-system>.

⁴⁷ "Jahana Hayes, Connecticut's 1st Black Congresswoman, Wins 2nd Term," Hartford Courant, last modified November 7, 2018, <https://www.courant.com/2018/11/07/jahana-hayes-wins-becomes-1st-black-woman-from-connecticut-in-congress>.

⁴⁸ "Bipartisan Poll Finds Voters Want Stronger Enforcement of Campaign Finance Laws, Increased Transparency in Elections," Campaign Legal Center, last modified November 18, 2019, <https://campaignlegal.org/update/bipartisan-poll-finds-voters-want-stronger-enforcement-campaign-finance-laws-increased>.

⁴⁹ Hazel Millard and Mariana Paez, "How Public Campaign Financing Empowers Small Donors Nationwide," Brennan Center, last modified April 12, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/how-public-campaign-financing-empowers-small-donors-nationwide>.

opinion, would be one that tries to mitigate both of these issues by, for example, allowing larger contributions directly to candidates and party committees, but requiring that the money from those larger contributions has to be matched by the equivalent in small-donor funds. And of course, to work, disclosure would have to be strengthened so that the original sources of all the funds — rather than some anodyne sounding dark money group — would have to be disclosed to the public.⁵⁰

CONCLUSION

As more Americans call attention to the inequitable campaign finance system dominated by corporations, wealthy donors, and undisclosed dark money, states such as Connecticut have successfully implemented public financing systems. These reforms are critical in reducing the racial fundraising gap and increasing racial and ethnic diversity in Congress. Though further research is needed, this paper presents a regression model using data from the previous eight elections, indicating that there is a statistically significant relationship between the amount of small-dollar donations and the proportion of non-White members of Congress. As the U.S. population and electorate becomes more diverse, it is increasingly important that the legislative body is not only of and for the people, but is also *by the people*.

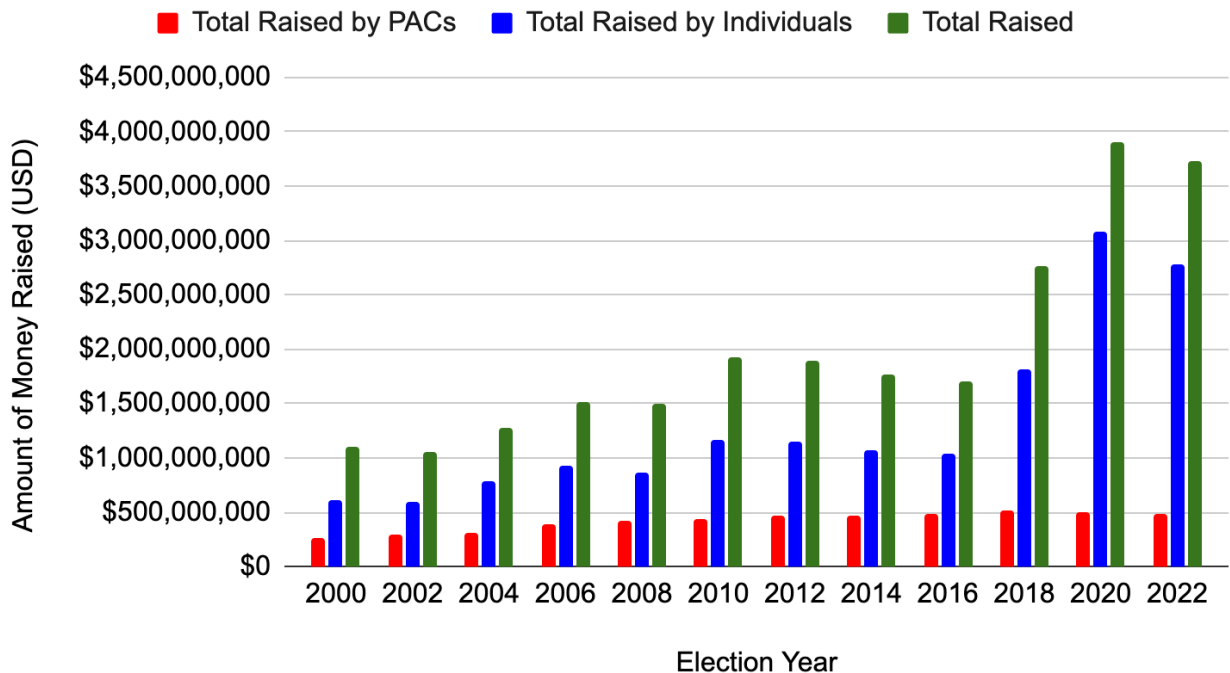
⁵⁰ Robert Maguire, email message to author, February 27, 2023.

APPENDIX

Table 1. Racial and Ethnic Makeup of 118th Congress vs. United States Population⁵¹

Race/Ethnicity	Percentage of Population	Percentage of Congress
White	59%	74%
Hispanic or Latine	14%	11%
Black or African American	19%	10%
Asian or Pacific Islander	6%	3%
Native American or Alaska Native	1%	1%

Figure 1: Total Raised in Congressional Elections (2000-2022)⁵²



Source: OpenSecrets

⁵¹ Katherine Schaeffer, “The Changing Face of Congress in 8 charts,” Pew Research Center, last modified February 7, 2023, <https://www.pewresearch.org/fact-tank/2023/02/07/the-changing-face-of-congress/>; U.S. Census Bureau. Race; Table P1, 2020: DEC Redistricting Data (PL 94-171); generated by Hope Ledford; using data.census.gov; <<https://data.census.gov/table?tid=DECENNIALPL2020.P1>> (23 February 2023).

⁵² “Elections Overview,” OpenSecrets, accessed February 28, 2023, <https://www.opensecrets.org/elections-overview>.

Raw Data

Election Year	Total Raised by PACs (House)	Total Raised by Individuals (House)	Total Raised (House)	Total Raised by PACs (Senate)	Total Raised by Individuals (Senate)	Total Raised (Senate)	Total Raised by PACs (House and Senate)	Total Raised by Individuals (House and Senate)	Total Raised (House and Senate)
2000	\$64,885,398	\$297,413,226	\$496,539,666	\$202,699,095	\$319,660,133	\$607,895,199	\$267,584,493	\$617,073,359	\$1,104,434,865
2002	\$223,407,745	\$335,278,739	\$658,236,440	\$72,823,241	\$266,034,192	\$397,288,911	\$296,230,986	\$601,312,931	\$1,055,525,351
2004	\$237,072,709	\$399,161,393	\$706,800,659	\$82,352,781	\$388,622,361	\$574,802,808	\$319,425,490	\$787,783,754	\$1,281,603,467
2006	\$298,878,674	\$483,038,450	\$876,687,176	\$88,626,407	\$441,407,996	\$645,252,937	\$387,505,081	\$924,446,446	\$1,521,940,113
2008	\$324,000,368	\$537,434,763	\$993,126,172	\$101,211,857	\$323,001,706	\$499,354,330	\$425,212,225	\$860,436,469	\$1,492,480,502
2010	\$331,481,111	\$647,033,519	\$1,096,535,923	\$109,919,585	\$517,854,913	\$824,399,235	\$441,400,696	\$1,164,888,432	\$1,920,935,158
2012	\$356,595,985	\$633,194,057	\$1,117,371,438	\$105,555,174	\$511,949,812	\$781,354,366	\$462,151,159	\$1,145,143,869	\$1,898,725,804
2014	\$353,645,910	\$569,896,159	\$1,045,980,320	\$124,196,002	\$498,013,008	\$722,217,401	\$477,841,912	\$1,067,909,167	\$1,768,197,721
2016	\$362,619,038	\$552,484,656	\$1,033,545,523	\$115,868,474	\$481,118,961	\$667,687,880	\$478,487,512	\$1,033,603,617	\$1,701,233,403
2018	\$405,027,475	\$1,060,597,274	\$1,682,347,862	\$109,076,368	\$756,334,748	\$1,086,013,679	\$514,103,843	\$1,816,932,022	\$2,768,361,541
2020	\$387,848,282	\$1,328,315,098	\$1,901,379,636	\$107,048,683	\$1,745,852,942	\$2,005,771,999	\$494,896,965	\$3,074,168,040	\$3,907,151,635
2022	\$382,920,048	\$1,337,515,798	\$1,937,596,482	\$98,271,565	\$1,442,670,902	\$1,787,893,867	\$481,191,613	\$2,780,186,700	\$3,725,490,349

Figure 2. Small-Dollar Donations and Representation in Congress (2008-2022)⁵³.

Raw Data

Election Year (Respective Session of Congress)	Total Contribution of Small-Donors (All House and Senate Candidates)	Proportion of Non-White U.S. House and Senate Members
2008 (111th Congress)	\$286,283,713	0.1364485981
2010 (112th Congress)	\$322,925,318	0.153271028
2012 (113th Congress)	\$305,106,903	0.1607476636
2014 (114th Congress)	\$315,609,017	0.1700934579
2016 (115th Congress)	\$326,034,853	0.1981308411
2018 (116th Congress)	\$613,989,919	0.2242990654
2020 (117th Congress)	\$1,400,123,714	0.2392523364
2022 (118th Congress)	\$1,355,755,723	0.2560747664

Regression Table

```
Call:
lm(formula = SDD$Proportion ~ SDD$`Small Dollar`)

Residuals:
    Min       1Q   Median       3Q      Max
-0.029818 -0.015221 -0.002747  0.011178  0.032147

Coefficients:
            Estimate Std. Error t value Pr(>|t|)
(Intercept)  1.437e-01  1.404e-02  10.231 5.08e-05 ***
SDD$`Small Dollar` 7.899e-11  1.840e-11  4.294 0.00513 **
---
Signif. codes:  0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 0.02347 on 6 degrees of freedom
Multiple R-squared:  0.7545,    Adjusted R-squared:  0.7136
F-statistic: 18.44 on 1 and 6 DF,  p-value: 0.005126
```

⁵³ Katherine Schaeffer, “The Changing Face of Congress in 8 charts,” Pew Research Center, last modified February 7, 2023, <https://www.pewresearch.org/fact-tank/2023/02/07/the-changing-face-of-congress>.; “Large Versus Small Individual Donations,” OpenSecrets, accessed March 1, 2023, <https://www.opensecrets.org/elections-overview/large-vs-small-donations>.

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INVISIBLE POWER: THE UNTAPPED UNIVERSE OF VOTERS OF COLOR

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The share of Nonwhite voters in the electorate has been steadily increasing, driven primarily by U.S.-born children of Latino immigrants coming of age and a steady rise in the number of naturalized Asian American immigrants who have become eligible to vote. Despite comprising 42.2% of eligible voters in the United States, communities of color are often ignored by campaigns. Existing literature indicates that voter engagement by staffers from the same community can increase turnout amongst voters of color as they are able to draw upon shared lived experiences. For this research, 18 staffers of color from across geographies, levels of government, and campaign positions were interviewed to understand which strategies are successful at mobilizing voters of color. While many specific examples were shared, the overarching theme is that campaigns need to prioritize building trust with communities of color by engaging authentically through relational organizing and providing culturally conscious communications.

BACKGROUND

Demographic changes across the United States have shifted the composition of the electorate, with the number of people who identify as non-Hispanic White—the largest racial or ethnic category—decreasing from 63.7% in 2010 to 57.8% in 2020.¹ While Asian Americans are the fastest-growing racial or ethnic group in the country, they still comprise the smallest share of eligible voters out of all major ethno-racial groups making up only 5.5%.² Much of their recent increase in eligible voters has been attributed to the significant and sustained increase in the number of naturalized Asian American immigrants who have become eligible to vote since 2000, accounting for 64% of the growth in the Asian American electorate.³ The fastest-growing and largest ethno-racial group in the U.S. electorate is Hispanics, making up 14.3% of eligible voters

¹ Eric Jensen et al., “The Chance That Two People Chosen at Random Are of Different Race or Ethnicity Groups Has Increased Since 2010,” *U.S. Census Bureau*, August 12, 2021, <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html>.

² Carolyne Im, “Key Facts About Asian American Eligible Voters in 2022,” *Pew Research Center*, October 12, 2022, <https://www.pewresearch.org/fact-tank/2022/10/12/key-facts-about-asian-american-eligible-voters-in-2022/>.

³ Ruth Igielnik and Abby Budiman, “The Changing Racial and Ethnic Composition of the U.S. Electorate,” *Pew Research Center*, September 23, 2020, <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>.

in the country.⁴ Most notably is that 80% of the increase in Hispanic eligible voters is due to the large population of U.S.-born children of immigrants who are turning 18, making 2020 the first time this voting bloc has been the biggest minority group.⁵ The growth rate for Black eligible voters has grown a modest 2% since 2018, making Black voters 13.6% of the total electorate. However, Black eligible voters have the highest voter turnout of any ethno-racial group.⁶ Although the share of non-Hispanic White eligible voters has been steadily declining across the country, this group of the electorate still accounts for 70.3% of registered voters despite only making up less than 64% of the population, indicating that the rapid growth of eligible voters of color is not necessarily translating into increased voter registration nor higher voter turnout.⁷ In fact, 81 million people—or 33.9% of eligible voters—did not vote in the 2020 election, equaling just 0.1% less than President Joe Biden’s total vote share. Biden beat Donald Trump by 7.1 million votes, which begs the question of what campaigns can do differently to engage with and mobilize America’s increasingly diverse voter population.⁸

As logic would suggest, hiring a diverse campaign staff from the communities that the candidate is aiming to represent would help the campaign understand those voters’ motivations, interests, and priorities. But historically, campaign staff across all levels of government have been extremely homogenous in terms of racial and ethnic diversity. For example, in 2020, nearly 80% of campaign staff were White. Aside from racial and ethnic characteristics, campaign staffers tend to be overwhelmingly male, college-educated, and from families earning over \$100,000 a year, with the most diversity typically being seen in the political department, which is responsible for direct voter outreach.⁹ Fortunately, campaigns have recently started to recognize the value of having diverse perspectives on their team, and the media has taken an interest in the issue of staff diversity as well. After months of inquiries by the press, then-candidate Joe Biden released demographic data on his 2020 campaign’s staff, of which 35% were people of color and 36% of those staff were in senior positions, including consultants; 25% of then-President Donald

⁴ Carolyne Im, “Key Facts About Hispanic Eligible Voters in 2022,” *Pew Research Center*, October 12, 2022, <https://www.pewresearch.org/fact-tank/2022/10/12/key-facts-about-hispanic-eligible-voters-in-2022/>.

⁵ Igielnik and Budiman, “Changing Racial and Ethnic Composition.”

⁶ Mohamad Moslimani, “Keys Facts About Black Eligible Voters in 2022,” *Pew Research Center*, October 12, 2022, <https://www.pewresearch.org/fact-tank/2022/10/12/key-facts-about-black-eligible-voters-in-2022/>.

⁷ “Breaking Down Demographic Data, the Diversifying U.S. Population, and What It Means for the 2022 Elections and Beyond,” Election Demographics and Voter Turnout, Bloomberg Government, last modified July 13, 2022, <https://about.bgov.com/brief/election-demographics-and-voter-turnout/>.

⁸ Daniel Laurison, *Producing Politics* (Boston: Beacon Press, 2022).

⁹ *Ibid.*

Trump's campaign staff from that same year identified as a person of color.¹⁰ While their numbers reflect a marginal improvement, they are still far from parity on both the junior and senior staff levels. For example, Chuck Rocha, a former senior advisor to Senator Bernie Sanders (D-VT) and founder of BlackBrown Partners—a minority-owned media consulting firm—conducted survey research on 50 competitive House, Senate, and governor's races in 2020 and found that there was only one person of color managing a Senate race and another managing a House race.¹¹

Increasing ethno-racial diversity amongst campaign staff not only allows the campaign to understand their constituency in greater depth by learning from the lived experiences of its staff, but it also creates opportunities for more innovative and effective voter engagement, including how resources are allocated. According to Rocha:

In every campaign I've ever worked in, there's a meeting that happens that determines what money will be spent, where, and on what voters. And in my 30-year career, there's just never been a Latino or a Black or brown person in that room to advocate, to make sure that the resources are spent early and often enough on our community.¹²

There is no one formula for a successful campaign. However, it is common knowledge that campaigns are less likely to contact voters that they categorize as unlikely voters, which is based on the voter's turnout score and vote history. Unlikely voters are disproportionately people of color due to systemic historical factors, such as poll taxes and grandfather clauses, that have disenfranchised voters of color since the country's founding and result in low turnout scores. In addition, people of color are more likely to be low-wage workers and often cannot take time off from work to go vote.¹³ Consequently, communities of color are often not contacted by campaigns at all despite research that shows that direct voter contact increases the chance of voting. Staff of color who come from these communities and are generally more culturally

¹⁰ Sean Sullivan, "Biden Campaign Staff is 35% People of Color and 53% Female, New Diversity Data Shows," *The Washington Post*, June 27, 2020, https://www.washingtonpost.com/politics/biden-promises-to-release-campaign-diversity-data/2020/06/27/9146cc84-b8b9-11ea-a8da-693df3d7674a_story.html.

¹¹ Bridget Bowman, "Democrats Look to Boost Campaign Staff Diversity Ahead of Midterms," *Roll Call*, April 8, 2021, <https://rollcall.com/2021/04/08/democrats-look-to-boost-campaign-staff-diversity-ahead-of-midterms/>.

¹² *Ibid.*

¹³ Sendhil Mullainathan, "For Racial Justice, Employees Need Paid Hours Off for Voting," *The New York Times*, June 12, 2020, <https://www.nytimes.com/2020/06/12/business/for-racial-justice-employees-need-paid-hours-off-for-voting.html?searchResultPosition=1>.

conscious than their White counterparts can not only advocate for prioritizing resources for these communities, but they are also able to engage more authentically once they do make contact.

While barriers certainly exist that prevent more people of color from working on campaigns, some organizations have invested in efforts to counteract those and improve diversity amongst campaign staff. For example, Dan Sena became the first Latino executive director of the Democratic Congressional Campaign Committee (DCCC) in 2018 noting the role of the Party's diverse coalition of voters in winning the House and highlighting that "you have to have operatives who can talk to everybody in that coalition, who also happen to be people of color."¹⁴ During the 2020 cycle, the Biden campaign diversified their staff by working with Inclusv, a nonprofit whose goal is to help people of color find jobs at every level of politics.¹⁵ In 2021, Missayr Boker became the first Black woman to run the DCCC's independent expenditure arm and Tasha Cole, a fellow Black woman, became the DCCC's deputy executive director and chief diversity officer. That same cycle, the Democratic Senatorial Campaign Committee created the role of chief diversity and inclusion officer that was filled—along with the deputy executive director role—by Jessica Knight Henry, another Black woman.¹⁶ The DCCC also partnered with the Blue Leadership Collaborative to train and place campaign managers of color on campaigns in Virginia, three of whom participated in this research.¹⁷ Additional organizations working to increase staff diversity include Staff Academy, Black Campaign School, and Arena, among others. In acknowledging the value that racial and ethnic diversity brings to a campaign, Aimee Allison—founder of She the People, an organization dedicated to elevating women of color in politics—said campaigns can be "more successful having a set of top advisers who relate to and can connect with the very communities they are dependent on to win."¹⁸

Although very limited, there is existing literature outlining strategies campaigns have used to engage voters of color. The most robust evidence is Lisa Garcia Bedolla and Melissa R. Michelson's book *Mobilizing Inclusion*, which explores what voter mobilization strategies have been successful in marginalized communities of ethno-racial voters in California. Because of the James Irvine Foundation's grant funding requirements to implement rigorous evaluation

¹⁴ Bowman, "Democrats Look to Boost Campaign Staff Diversity."

¹⁵ Sullivan, "Biden Campaign Staff is 35% People of Color."

¹⁶ Bowman, "Democrats Look to Boost Campaign Staff Diversity."

¹⁷ Zach Montellaro, "DCCC Launching Partnership to Boost Campaign Staff Diversity," *Politico*, December 23, 2021, <https://www.politico.com/news/2021/12/23/dccc-partnership-campaign-staff-diversity-526041>.

¹⁸ Sullivan, "Biden Campaign Staff is 35% People of Color."

methods, Bedolla and Michelson were able to evaluate over 250 randomized voter mobilization experiments between 2006 and 2008. The findings include the development of a sociocultural cognition model that suggests that effective mobilization strategies must lead the voter to change their attitude toward voting by adopting a new voter schema. For example, they evaluated an experiment by the Asian Pacific American Legal Center (APALC) where follow-up phone calls were made to Asian American residents who had given a verbal commitment to vote. Because follow-up calls were made in several different languages, the group who received a follow-up call was 13 percentage points more likely to vote than those who did not receive a call. They also evaluated a canvassing experiment with infrequent Latino American voters by PICO—an interfaith group—where voters were urged to exercise their legal right to vote as many of the canvassers were in the process of getting their own citizenship; PICO saw a 10-percentage point gain in voter mobilization. Bedolla and Michelson attribute these cognitive changes to the fact that those who engaged with the voters were from the community and were able to share personal stories that resonated.¹⁹ This evidence shows that those deemed unlikely voters could actually be mobilized if the engagement is culturally conscious.

Politicos on both sides of the aisle are beginning to understand that if they are going to win elections, they cannot ignore the rapidly growing electorate that is voters of color. The United States' history of racism—including the slew of statewide initiatives to restrict voting laws after the *Shelby v. Holder* decision gutted the Voting Rights Act of 1965—has made it so that not only are Nonwhite voters less likely to register to vote, but the ones who do are mistrustful of the political process.²⁰ While there are advocates who are working on addressing the structural barriers for voters of color, the staffers who were interviewed for this research repeatedly highlighted the need for campaigns to build trust with communities of color, especially those who have never been contacted by a candidate or elected official. One of the primary ways to build trust while campaigning is through “deep canvassing” where campaign staff are encouraged to have long conversations with voters with the main goal of merely listening to the voter’s concerns. Through deep canvassing, the staffer would only share personal

¹⁹ Lisa Garcia Bedolla and Melissa R. Michelson, *Mobilizing Inclusion: Transforming the Electorate Through Get-Out-the-Vote Campaigns* (New Haven: Yale University Press, 2012), <https://doi.org/10.12987/9780300167399>.

²⁰ Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020 Election,” *The Brennan Center*, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

stories related to their views if the opportunity arises and otherwise would not interject.²¹ This practice has been referred to as nonjudgmental listening by Yale professor Josh Kalla, who studies deep canvassing. Although resource-intensive, Kalla has found that deep canvassing has proven effective at changing people's long-term thinking, including significantly reducing transphobia from just a 10-minute interaction.²² Deep canvassing has demonstrated the power of active listening and perspective-taking, yet this practice is not common amongst campaigns, presumably because of the large amount of time—and thus money—required to do so. However, staffers of color have found ways to apply the concept to mobilizing Nonwhite voters, regardless of the campaign's budget.

METHODOLOGY

Because the *Mobilizing Inclusion* literature was specific to California, completed almost 15 years ago, and took a heavily quantitative evaluative approach, this research utilizes one-on-one video interviews with staffers of color to understand, from their perspective, what strategies work to engage voters of color. 18 virtual interviews were conducted by the same interviewer between December 5, 2022, and February 15, 2023. Each interview was customized to each staffer in advance and drafted based on publicly available information online. The average time it took to complete an interview was one hour, during which the conversation was transcribed by hand in real time. Upon completion, the interviewer cleaned each transcript and confirmed it with the relevant staffer to ensure accuracy.²³ Staffers of color were initially identified using the Leadership Connect database and knowledge of political figures from media coverage, but most of the interviews resulted from personal referrals. Demographically, staffers spanned a wide range of geographic areas, campaign roles, and ethno-racial groups as outlined below and in the appendix. However, there remain gaps in that the sample includes only one Republican and zero Native Americans. Although there is generally not consensus on the matter, for purposes of this research, Latino will be used to refer to those whose heritage is from a Spanish-speaking and/or Latin American country; Asian American Pacific Islander (AAPI) will include Asian, South

²¹ Eliza Griswold, "Does Door-Knocking Matter?" *The New Yorker*, October 6, 2020, <https://www.newyorker.com/news/campaign-chronicles/does-door-knocking-matter>.

²² David Broockman and Joshua Kalla, "Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing," *Science* 352, no. 6282 (April 2016): 220-224, <https://doi.org/10.1126/science.aad9713>.

²³ Interviews were completed without undergoing an IRB review.

Hines shared other examples of successful voter engagement from the 2022 cycle, including a town hall event on Black maternal health and the dedication of a community garden. Incumbent Congresswoman Lauren Underwood (IL-14) founded the Black Maternal Health Caucus in 2019, and although she is a nurse herself with a master's degree in Nursing and another in Public Health, Hines recalled that Underwood still sought the opinions of her constituents. "We got 60 Black folks in the room in Joliet where the community told stories of how they'd been impacted with the lack of hospitals and things. It was really moving."²⁵ The campaign separately solicited feedback about what the community needed and learned that they wanted to bring back a community garden, which the campaign helped facilitate, even securing private enterprises to continue the project once the campaign was over. "A lot of communities get mad that campaigns invest in them during the election cycle and then leave right after," Hines shared. "So you have to earn the vote, not just ask for the vote. You need to invest in the community."

Staffers' insights into what specific campaign tactics have proven effective at engaging voters of color largely fall into two buckets: campaigning authentically through relational organizing and expanding access by providing culturally conscious communications. Relational organizing is the idea that campaigns can mobilize voters around an issue by leveraging the organic personal and professional networks of their staff and volunteers.²⁶ It builds on deep canvassing in that it empowers community members and provides the campaign with opportunities to build relationships with local partners. Most of the staffers who were interviewed strongly emphasized the importance of hiring local campaign staff, not only because they have existing community relationships, but because they know the cultural nuance of the district as well. For example, Amanda Salas—South Texas Coalitions Director for Beto O'Rourke's 2022 gubernatorial race—recounted how Beto was scheduled to do a church visit on a Sunday at the beginning of *semana santa*, or Holy Week, which is the most important religious celebration in Spain and widely celebrated by Catholics across Latin America. Growing up in a border town, Salas understood the magnitude of the event, noting that "bridges shut down, people come in from Mexico - it's a big deal."²⁷ Salas continued, "I'm not Catholic...[but] I pushed back. It's so disrespectful. We [didn't] have enough inroads yet to just show up at the

²⁵ Ibid.

²⁶ "Relational Organizing Online 101," Leadership, IGNITE, last modified February 14, 2022, <https://ignitenational.org/blog/relational-organizing-online-101>.

²⁷ Amanda Salas, interview by author.

holy shrine and ask for [votes].”²⁸ The event was ultimately rescheduled. Salas’ local knowledge also brought value when it came to endorsements. She contrasted the process for seeking endorsements in big cities like Austin and Houston with that in South Texas, saying:

In Houston, if you get the caucus, they’ll knock for you. Commissioners will put you on their mailers and knock and make calls, and sometimes they give you access to their funding networks. In South Texas, we don’t have [that]. When they tried telling the candidate, you’re wasting your time [seeking endorsements], they were like, don’t worry. But it didn’t culturally resonate with the voters.²⁹

Another approach that staffers overwhelmingly cited as successful was starting door-knocking early and maintaining consistent engagement, even in the off years. Most communities of color, if visited at all, are not contacted by campaigns until the last weeks leading up to Election Day since they tend to be seen as infrequent voters. Nonwhite voters have historically trended toward the Democratic Party, meaning Democratic candidates likely do not see voters of color as targets for persuasion, but they could be targets for Get Out The Vote (GOTV) efforts that happen closer to Election Day. Because increasing turnout is more expensive than persuasion and has a lower return on investment, Democratic campaigns may not view communities of color as an effective use of time and money. Further, Republican campaigns may see persuasion of this electorate as unlikely. This also applies to efforts beyond canvassing, as April Harley—Illinois Finance Director for Barack Obama—explained. “In January of 2012, we had time with President Obama and he hadn’t been to Hyde Park in a considerable amount of time for a major donor fundraiser, which is historically Black and wealthy. He hadn’t fundraised there since ‘07 or ‘08, and I made the decision to have a home fundraiser there [because] I felt it was important.”³⁰ Tyrone Williams—Regional Political Director for Jennifer McClellan’s 2022 congressional race—elaborated saying:

I push back because if you spend 14 days, if that, and then never darken their door again until another election, how do you build trust and transparency? There’s no reason for them to trust you because you only come around for a vote. When we put together the universe for the electorate, I say we’re going to hit communities of color first because they have just as much right to know about town halls or debates and who the candidates are in the primary. You cannot patronize them.³¹

²⁸ Ibid.

²⁹ Ibid.

³⁰ April Harley, interview by author.

³¹ Tyrone Williams, interview by author.

As the diverse Nonwhite electorate grows, both parties have very recently started to shift their focus to winning over these voters, as voting Democratic is not necessarily guaranteed. Hines suggested having year-round community ambassadors to give guidance to candidates about how to interact with voters of color in the community and highlighted the effectiveness of the DCCC's constituency organizing directors who keep the candidate updated as to what is happening in specific communities in the district. "It was super helpful," Hines said.³² "Like Abigail Spanberger (D-VA) was at every Black event in the district because her coordinator was great."³³ If campaigns are to build trust with communities of color, they need to start early and be consistent. Rodericka Applewhaite—Senior Communications Advisor for the Michigan Democratic Party during their historic 2022 cycle—doubled down, stating:

I get that not all Democratic state parties do this, but Michigan is all year round. We knock all year—regardless of whether anyone is on the ballot—and it makes people feel more engaged, like we don't just need their vote. Not every party can do that, but it's been really effective, and I hope more state parties are able to adopt that.³⁴

PROVIDING CULTURALLY CONSCIOUS COMMUNICATIONS

One of the most referenced strategies for effective engagement with voters of color is making campaign materials accessible in multiple languages rather than spending resources coming up with entirely new messaging. Ken Gonzales—Organizing Director for the Colorado Democratic Party for the 2022 cycle—explains:

Instead of [TV] ads for three days, it was like, let's do an ad every day in the Korean press. We didn't change our messaging, we just made sure that the reach was expanded, and that's often where people misconstrue that we need to create something different for these communities. It's about knowing that people of color care about the same thing as other Americans, and it's about putting it in front of them in different ways and having them consume the media.³⁵

³² Hines, interview.

³³ Ibid.

³⁴ Rodericka Applewhaite, interview by author.

³⁵ Ken Gonzales, interview by author.

Providing in-language materials, whether it be direct mail or subtitled television ads, is especially important for connecting with AAPI communities because of the many different dialects, with Chinese alone having at least seven. Out of over 350 languages spoken in homes across the United States, the most spoken language after English and fastest growing is Spanish, with the U.S. having the second highest number of Spanish speakers in the world behind Mexico.³⁶ Consequently, campaign communications, including websites, have increasingly been produced in Spanish and some campaigns have even created dedicated Instagram pages in Spanish. While it can sometimes be seen as pandering, an increasing number of candidates have started giving speeches, or portions of their remarks, in Spanish. In reference to her time working with a Puerto Rican candidate for lieutenant governor, Colleen Roache—Speechwriter for Barbara Buono’s 2013 gubernatorial race—clarified that, “For me, it felt genuine because it’s such a part of her identity and it felt real for her. So as a communications advisor, even if I’m writing it, I’m just like, be yourself.”³⁷

In addition to in-language materials, having a diverse staff who speak multiple languages also helps. Jon Fisher-Espinoza—a Nevada Field Organizer for Donald Trump’s 2020 campaign—noted the impact it has on Latino voters when he can make casual conversation while canvassing. “A language barrier naturally makes communications difficult...so being able to comment in Spanish about how the house smells like tamales or tortillas and break down barriers first was important.”³⁸ Salim Shariff, Executive Director of Contest Every Race, emphasized the value of bilingual staff in being able to know the difference between various Spanish-speaking audiences. “On the day-to-day, his feedback on how content should look based on norms in the Spanish-speaking community was helpful. Like do you say Latino or Latinx or Chicano?”³⁹ Recounting her time working on a 2020 presidential race, Lavanna Martinez—Campaign Manager for Deidre DeJear’s 2022 gubernatorial race—highlighted the difference that multilingual precinct captains could make in satellite caucus locations saying:

This was the first year they assigned satellite caucus locations in Iowa and it was meant to engage those who didn’t usually vote, like those with a disability, non-English language speakers, etc. The caucus system always wrote off those people

³⁶ Dylan Lyons, “What Are the Most Spoken Languages in the U.S.?” *Babbel*, May 18, 2020, <https://www.babbel.com/en/magazine/most-spoken-languages-in-the-us>.

³⁷ Colleen Roache, interview by author.

³⁸ Jon Fisher-Espinoza, interview by author.

³⁹ Salim Shariff, interview by author.

because they didn't typically participate because...they don't speak the language or what have you. So especially for immigrant communities, for them to have their own voting locations—they'd never caucused a day in their lives, and they showed up in large numbers.⁴⁰

What Campaigns Say

Aside from language itself affecting communications with voters of color, the substance of the messaging also matters. Williams summarized the approach as messaging substantively about the reasons why they should vote for you and not just that they should go out and vote. He added that for incumbent candidates, highlighting the specific work they have already accomplished helps, as does elevating historical aspects that have broken glass ceilings, such as becoming the first African American woman to represent Virginia in Congress. While acknowledging that negative messaging is sometimes necessary, Williams leaned into the opportunity to message positively noting, “With messaging, we found that we wanted more of a positive route than a desperate one. Like an email [saying] we need you and your vote because we're going to lose. Why would anyone want to support a loser?”⁴¹ It is also important to consider the cultural and historical context of your audience. Jose Altamirano—Deputy Voter Protection Director for the North Carolina Democratic Party during the 2020 cycle—described the messaging challenge his team faced when it came to mail-in ballots noting:

It was clear that Black voters, and especially rural Black voters in the eastern part of the state, were skeptical of mail-in voting because of Trump's attacks on the system. There's also a legitimate historical concern for having their ballots count and be fairly counted... We had to thread the needle of suggesting voting early to make sure it counts but also [that] voters [could] vote early in person if [they] want, that's fine.⁴²

Based on message testing, Ale Gomez—Civic Engagement Coordinator for Make the Road Action—learned that what is helpful, especially for Latinos, is “talking about how important immigrants are to this country and the work they do, instead of, ‘[We] want to give you more opportunities.’ But [they] do so much work already and contribute to the economy, so we'll acknowledge that and protect [them].”⁴³

⁴⁰ Lavanna Martinez, interview by author.

⁴¹ Williams, interview by author.

⁴² Jose Altamirano, interview by author.

⁴³ Ale Gomez, interview by author.

Equally as important as providing substantive content is the framing and word choice of those issues. Drisana Hughes—Campaign Manager for Alvin Bragg’s 2021 Manhattan District Attorney race—explained that:

First and foremost is meeting people where they’re at, and then having something relevant to say. Like ‘criminal justice reform’ versus ‘public safety’ – some messages are more accessible and better understood for some communities of color than others. For example, saying public safety might resonate more than specific bail reforms or things like that. Candidates who understand those differences and toe that line can be more successful - it’s the same policy, but you can learn to describe it in a more relevant way.⁴⁴

Several staffers mentioned the need to relay messages in a way that connects with voters of color and avoid discussing technocratic topics that are difficult to observe in everyday life, such as the SALT deduction. Applewhaite shared that during the 2020 presidential primary, people were trying to “out-progress” each other online in an elitist and condescending way that she likened to plantation politics in that they were “telling people of color how to think and feel.”⁴⁵ She added sarcastically, “That’s not very woke.”⁴⁶ Salas also shared a powerful example of framing challenges in Latino communities like the ones in South Texas where many are employed in the oil industry or work in law enforcement saying:

When you talk about progressive taglines, you’re not [always] making it malleable for a local person to understand that I’m not taking away your job with defund the police or getting rid of oil rigs with the Green New Deal. If you understand that these ideas that people have can be very traumatic, like, a Green New Deal will take my job away. They’re talking about trauma.⁴⁷

She went on to describe how Beto framed conversations about abortion in a way that would garner support for investments in healthcare by saying that it is about a woman’s right to choose and that “better healthcare led to less abortions, more contraceptives led to less abortions, [and] proper sex education led to less abortions.”⁴⁸

Another recurring topic amongst staffers was the importance of culturally conscious polling, as the research results not only inform how a campaign prioritizes resources across

⁴⁴ Drisana Hughes, interview by author.

⁴⁵ Applewhaite, interview.

⁴⁶ Ibid.

⁴⁷ Salas, interview.

⁴⁸ Ibid.

voters but also their messaging strategy. Jermaine House—Senior Director of Communications for HIT Strategies, a millennial and minority-owned public opinion research firm—explained why polling is so critical and how HIT’s fresh approach to research departs from tradition to truly galvanize voters of color:

It’s hard to craft a message when you don’t have a holistic and accurate understanding of the community. It’s especially the case for voters of diverse backgrounds. Historically, older White men have led the public opinion industry, so diversifying the industry by race and background is one way to obtain a more accurate interpretation of diverse communities’ attitudes. Traditionally, pollsters ask respondents if they plan to vote to predict election turnout. However, we also like to ask a question to test voters’ perception of their vote power. We ask, ‘Do you believe your vote has the power to make a change?’ And in many cases, we find that voters who believed their vote had power were more likely to vote. And in many cases, you get a more accurate number than asking, ‘Do you plan to vote?’⁴⁹

House elaborated stressing that empowering voters is the key to mobilization efforts, which starts with asking the right questions and having messaging that resonates. “If you tell voters what you’ve done, don’t center the politician as the hero. The hero is the voter. This happened because you voted, it’s not, I did this *for* you.”⁵⁰ We want to avoid conjuring up the White savior complex, which Black voters hear when politicians talk about what they did for them.” He also shared that it is critical to continuously poll voters of color, not just invest a few times as many firms do. For example, HIT conducts a monthly poll of Black voters called BLACKtrack that analyzes attitudes toward various salient issues over time.

There’s no shortage of research on suburban White women who between voting for Republicans and Democrats. Just a fraction of that budget is spent on empowering African American voters who are likely to vote Democrat but have barriers to entry like information, knowledge of the candidates, and general cynicism, which attenuates their perception of power.⁵¹

How Campaigns Say It

The effectiveness of voter engagement in communities of color is also dependent upon the medium used to message, including digital platforms and typography. Staffers acknowledged

⁴⁹ Jermaine House, interview by author.

⁵⁰ Ibid.

⁵¹ Ibid.

that campaigns have been forced to modify the way they interact with voters given the increasing use of technology and social media platforms. While it does take time and money to adapt to the everchanging digital environment, Shariff instead sees it as an opportunity, especially for campaigns with more modest budgets, commenting that:

This whole focus on social media influencers is cool because, from an ad budget perspective, it can be cost effective and [you] can pay for paid content directly instead of through Facebook. You pay them to make an ad for you to reach their audiences, who you assume are people of color too...Choosing to pay specific influencers on TikTok is a key strategy recently.⁵²

As of 2021, 30% of Black adults and 31% of Latino adults in the U.S. use Tik Tok, compared to only 18% of White adults, indicating that platforms like TikTok might be a cost-effective way to maintain engagement with voters of color.⁵³ It is also important to consider that different communities utilize different forms of technology at varying rates, for example Chinese voters tend to prefer the app WeChat to traditional texting. In the spirit of relational organizing, multiple staffers shared that they have used the app Reach for voter contact, which allows a voter or volunteer to text-bank existing contacts in their phone rather than reach out to strangers with cookie cutter messages, both making the message itself more authentic and increasing the chances that the receiver will take action as Reach integrates with several messaging apps.

Williams characterized it as “mak[ing] sure the messenger was just as strong as the message” and noted that he has also worked with the company Language Line to have translators on standby if needed.⁵⁴ Doug Thornell—political advertising expert and CEO of the firm SKDK—offered additional evidence describing the use of credible public figures in ads for then gubernatorial candidate Wes Moore in 2022. “To the extent possible, you should try to use people who are influencers and leaders in the community. For example, we produced ads for Wes Moore with a well-known Baltimore pastor, Oprah Winfrey, Prince George’s County Executive Angela Alsobrooks, and a number of other trusted figures.”⁵⁵ When it comes to visuals, campaign materials can also evoke subtle messaging, such as Congresswoman Alexandria Ocasio-Cortez’s now iconic logo (*See Appendix*). Political designers say that her logo

⁵² Shariff, interview.

⁵³ “Who Uses TikTok, Nextdoor,” Research Topics, *Pew Research Center*, last modified April 7, 2021, <https://www.pewresearch.org/internet/chart/who-uses-tiktok-nextdoor/>.

⁵⁴ Williams, interview.

⁵⁵ Doug Thornell, interview by author.

“has come to convey insurgency, youth, diversity, liberalism—and winning” because of the Rosie the Riveter-inspired speech bubble, outward gaze drawn from labor activist Cesar Chavez, and overall vibe from union and luchador posters.⁵⁶ Offering his own example of typography engaging voters of color, Shariff shares that:

Given the style guides and clear tone of voice that they wanted, my team of non-Black people could draft content in their voices and get that approved by the national brand. There’s nothing that stops non-Black people from being good allies when they have a clear design and tone of voice, and that pays real dividends to have an unapologetically Black public persona.⁵⁷

Where Campaigns Say It

Where campaigns choose to engage with voters of color undoubtedly impacts the effectiveness of the message itself. The most significant location that staffers have identified as successful for Black voter outreach is churches, including Souls to the Polls, which describes the organized voting efforts that Black churchgoers have historically taken part in after Sunday services leading up to Election Day. The history of Souls to the Polls traces back to the Jim Crow Era when Black people were fighting for the right to vote and found safety in going with their church group to vote, a tradition which is still cherished by many and especially by rural Black voters who have to travel long distances to their polling locations.⁵⁸ As such, campaigns consistently include church tours on the trail, albeit not all visits are genuine. For example, one staffer disclosed that he worked for a candidate who just showed up to a Black church for a photo and then left, noting with amusement that sometimes pastors will now tell candidates to wait until the end of the service to engage with churchgoers or give remarks. For Latino voters, staffers suggested specialty grocery stores, like *carinenas*; parties known as *pachangas*; and Hispanic-owned small businesses. Aron Johnson—Campaign Manager for Chris Mann’s Kansas Attorney General’s race— notes:

⁵⁶ Shane Goldmacher, “A.O.C. Had a Catchy Logo. Now Progressives Everywhere Are Copying It,” *The New York Times*, September 24, 2021, <https://www.nytimes.com/2021/05/14/us/politics/alexandria-ocasio-cortez-progressives-logo.html>.

⁵⁷ Shariff, interview.

⁵⁸ James Doubek and Steve Inskeep, “Black Church Leaders in Georgia on the Importance of ‘Souls to the Polls,’” *NPR*, March 22, 2021, <https://www.npr.org/2021/03/22/977929338/black-church-leaders-in-georgia-on-the-importance-of-souls-to-the-polls>.

We toured Hispanic-owned businesses, like the oldest operating Latino restaurant in Topeka, and listened to their issues and concerns and what they viewed as a priority. Just be intentional. There are lots of pockets of communities that campaigns just don't talk to, so you need to connect there.⁵⁹

Fisher-Espinoza expanded on the importance of these locations in the Latino community, acknowledging that he brought an understanding of how hesitant the Latino population can be when they are contacted by a campaign staffer because they are afraid that the staffer is part of the government. "We knew how to reach people where they felt comfortable and safe, and so that they didn't think we were out to get them."⁶⁰ Additional locations for successful outreach across ethno-racial groups include block parties, thinking couch groups, local radio stations—including AM—and papers tailored toward communities of color.

CONCLUSION

Whether it is referred to as a sociocultural cognition model, deep canvassing, relational organizing, culturally conscious messaging, or trauma-informed engagement, it is clear that mobilization efforts with voters of color need to be personal and authentic, as should be the case for all voters. In conjunction with existing literature, these interviews with staffers of color shed light on successful campaign tactics and actionable items that campaigns can adopt to become better representatives of the communities they have committed to serving. If turnout costs more than persuasion, but research shows that persuasion is only marginally and conditionally effective, campaigns should change the way they approach voter turnout efforts so that they are more efficient.⁶¹ If the share of White voters is declining, campaigns should focus more on the growing bloc of Nonwhite voters, for example investing in engaging rural Black women instead of suburban White women, as has been the case over the last several cycles. If staffers of color know how to use resources creatively in order to reach their communities, campaigns should do everything in their power to reduce barriers to entry and hire more of them. The overarching priority needs to be building trust with communities of color, which means investing early and

⁵⁹ Aron Johnson, interview by author.

⁶⁰ Fisher-Espinoza, interview.

⁶¹ Joshua L. Kalla and David E. Broockman, "The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments," *American Political Science Review* 112, no. 1 (2018): 148-166, doi:10.1017/S0003055417000363.

consistently; showing up in an authentic and culturally appropriate way; and delivering on promises made. This formula does not appear to be novel, but it has yet to be adopted as an industry standard. Daniella Gibbs Leger—Executive VP of Communications and Strategy at the Center for American Progress—may have characterized the current political climate best when she shared the following:

I always hated the term, ‘Demographics is destiny.’ No, it’s not. It’s all potential, and it’s about what you do with these emerging communities. You can’t rely on the fact that because Texas is getting browner, for example, it’ll become a blue state. It’s not going to unless we can figure out how to invest and engage in communities in a long-term way.⁶²

⁶² Daniella Gibbs Leger, interview by author

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APPENDIX

Table 1. Campaign Positions of Interviewed Staffers of Color

Campaign Positions		
Campaign Manager (3)	Finance Director	Senior Communications Advisor
Deputy Coalitions Latino Vote Director	Organizing Director (2)	Senior Director of Communications
Deputy Voter Protection Director	National Engagement Coordinator	South Texas Coalitions Director
Executive VP of Communications and Strategy	Political Advertising Consultant	Speechwriter
Field Organizer	Regional Political Director	VP of Digital Communications

Table 2. Ethno-Racial and Gender Identities of Interviewed Staffers of Color

Ethno-Racial and Gender Identities		
AAPI Man (2)	Black Man (5)	Latina Woman (3)
Afro-Latina Woman (3)	Black Woman (3)	Latino Man (2)

Figure 2: Congresswoman Alexandria Ocasio-Cortez’s 2018 Campaign Poster



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