

Titel „U.S. Public Policy Creation in Response to the Financial Crisis of 2007-2008“

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Abstract

Crises can have significant effects on the method of policy creation and on the content of the resulting policy itself. This paper investigates the method of policy creation employed in response to the financial crisis of 2007-2008. In particular, this paper looks at the creation and implementation of the Dodd-Frank Act that attempted to address the causes of the crisis and minimize the likelihood and severity of future crises. By using a rational choice theory and a transaction cost analysis framework to investigate the actions taken by political actors as they responded to the unfolding crisis, this paper investigated the method of policy creation and the motivations that determined it.

A close reading of the actions of the legislative branch during the crisis and post-crisis period investigating whether the actions were consistent with the results predicted by delegation theory literature found considerable support for the abdication hypothesis during this crisis. It also became apparent that a few key constraints including time limits and consultation requirements were used extensively by congress during this period to control the actions of agents that were delegated power whereas some other sorts of constraints. By way of comparison, other constraint types were used sparingly.

Congress also appeared to have had specific motivations for the choice of agent to delegate to which were present for most of the acts of delegation. These included ensuring agency independence, ensuring coordination, leveraging agency expertise, and ensuring constant and long-term attention to an issue.

Along with congress' explicit delegation of power to the administration, there were considerable amounts of implicit delegation in which executive branch actors asserted powers that were not explicitly delegated. The instances of implicit delegation decreased later in the crisis as the focus of policy creation shifted from mitigating the current crisis to forestalling future crises.

During the crisis, the president primarily relied on the power to persuade and largely avoided using executive actions to create policy. In addition, minimal power and authority was delegated by congress directly to the president during this financial crisis.

1. Introduction

The public policy of the United States directly affects the lives of more than 300 million American citizens as well as countless individuals residing in other nations. It thus is of great importance as to where this policy comes from and what it consists of. There are numerous ways in which public policy gets created in the United States. Most of these are formal processes requiring actions of the president, congress, or the bureaucracy to enact policy though in some instances policy can be created or enacted by habit or precedent or through the courts. By the term public policy, this paper is referring to those actions of government that set governmental action and priorities. This can include laws and regulations, but also includes spending priorities, foreign relations, military actions, and other courses of actions that affect the lives of citizens or the actions of the nation.

For much of the history of the United States, enacting public policy was primarily done by congress through the issuance of laws. Now however, it is increasingly performed by other political actors and by other methods such as delegation¹ and unilateral executive actions.² By making the assumption that the president, those in congress, and the bureaucracy are rational political actors one can investigate why specific avenues of policy creation are used and why this has led to a decrease in the percentage of policy enacted by congress. One can also examine how the process of creating policy is altered by the existence of a crisis affecting the nation. There are numerous methods that can be used to create policy and the decision to use one avenue of policy creation rather than another is a conscious political decision by one or more political actors. There are different requirements, costs, and payoffs for each method of enacting policy and some are open to only certain political actors or are available only at certain times. Some methods are cyclical in nature and more valuable at different times in a political cycle. The existence of a crisis influences the political decisions that lead to actors selecting one method or another with

¹ Kiewiet, D. Roderick and Mathew D. McCubbins. *The Logic of Delegation: Congressional Parties and the Appropriations Process*. University of Chicago Press. 1991.

² Howell, William G. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton University Press, 2003.

which to pursue their ends. Furthermore, this decision can have profound effects throughout the process affecting issue identification, policy formulation, agenda setting, decision-making, and policy implementation. The resulting policy is in turn greatly affected by these factors and thus is dependent on whether there is a crisis and its characteristics.

The common methods through which policy can be created are directly by congress in the form of legislation, through delegation, or unilaterally by the president. Each of these has many different potential variations. For instance the president can perform a host of different types of unilateral actions and congress can structure delegation in a number of ways depending on the needs of the situation.

While congress, due to its role as the incarnation of legislative power, has typically been viewed as the creator of policy in the government, the situation is far more complex and congress plays a much smaller role than the constitution may imply. The president, governmental agencies, organizations, local government, and international organizations all create policy. There are often complex policy solutions and a large number of potential ways for public policy to be created and congress does not have a monopoly on these. Even when enacting policy using methods in which congress has primacy it must make allowances and adapt its policy preferences to those of others.

There have been different views on the extent to which the various bodies of government have control over the actions of government. These range from those that believe that there is congressional dominance³ to those that see a powerful presidency that over time has continued to gain powers.⁴ The central question about dominance is to what extent do the various bodies have power over the policy creation outcomes and the actions of government. Similar to the question of who has power over policy, there is the debate over whose preferences are represented by the actions of the government.

Often policy creation does not have a single source but relies on political bodies that have an overt role in its shaping as well as those that have had a more subtle role. Governmental bodies negotiate amongst themselves to determine what actions are taken. Different political entities often will adopt differing strategies to address an issue even when

³ Calvert, Moran and Weingast 1987; McCubbins and Schwartz 1984; Weingast and Moran 1983

⁴ Golden 2000; Nathan 1983

the desired end result is similar. There is an interplay between political actors and governmental bodies that work with and compete against each other as each tries to achieve its political ends.⁵ While each political actor ultimately seeks to advance his/her own ends, the fact that national politics is a repeated game leads political actors and political bodies to be strongly incentivized to get along and work together and rules become institutionalized.⁶ This cooperation leads to the best and most predictable results for individual political actors and thereby maximizes their returns. In part, governmental bodies take actions that are in accordance with the political actors that comprise them, but also limit the range of action of the typical political actor. The bodies or institutions take steps such as punishing those that do not act in good faith that can bring actions of the body more in line with the median actor that comprises it. These individuals that are aggrieved will sometimes act as strong reciprocators and punish those that they feel have trespassed against them even when the act of punishment may lead to even greater losses for the aggrieved.⁷ This helps lead to more predictable political results.

The creation of public policy is not a discrete event, but typically consists of a political dialog over time between a number of individuals and groups. Often a draft of a public policy is first designed or created and it is only a later date that it may get enacted. At both the initial creation stage of the policy and at its enactment the policy can be shaped and individuals and entities can change the policy that is enacted. In the current political system bills for example may come from a number of sources such as interest groups or congressional committees. Most bills that are submitted each session do not get passed in that session.⁸ Over time support may grow for a policy and it may be reintroduced and eventually become a law. The president also often cherry picks from proposals with good acceptance from congress and the nation and he adopts and embraces certain of these initiatives which become part of his legislative agenda or a plank in his campaign. This can lead to a significant lag between the initial drafting of a proposal and the point at which support for the bill has increase to such an extent that it gets enacted. During a crisis, this

⁵ Hall, Peter A. and Rosemary C. R. Taylor. *Political Science and the Three New Institutionalisms*. 1996.

⁶ Greif, and Christopher Kingston. "Institutions: Rules or Equilibria" in *Political Economy of Institutions, Democracy and Voting*. 2011.

⁷ Gintis, Herbert. "The Evolution of Strong Reciprocity: Cooperation in Heterogeneous Populations." *Theoretical Population Biology*, 65: 17–28. 2004.

⁸ Govtrack. "Statistics and Historical Comparison" <https://www.govtrack.us/congress/bills/statistics>

time period between the initial policy proposal and policy implementation can be significantly shortened as is the period between the problem recognition and the policy proposal. This is one of the factors that can lead to differences between the policy formed during a crisis and that formed during the steady state.

Certain policy areas lend themselves to different methods of enacting policy. Foreign affairs and military affairs are typically domains in which the president has primacy. While both the president and congress have some formal powers in these areas, typically the president largely guides the creation of policy in these policy areas. However even in these areas congress has some powers and though the president typically is able to move first in this arena, congress often has recourses available if it were to decide that it disapproved of the agreements that the president has signed or the policy that he is proposing that the nation adopt. Economic policy is an area where the president typically has less ability to unilaterally set policy, however his/her ability to do so is bolstered in a crisis.

In addition to the president's role in creating policy, congress also delegates considerable power to executive agencies and other bodies. While congress often places constraints on these entities to ensure that the policy that is ultimately created is within a narrow range of alternatives that are acceptable to congress, this still allows pieces of public policy to be determined by those to whom this power is delegated. In a crisis, the bureaucracy creates and implements policies based off of power that had been authorized prior to the crisis and often receives additional powers to deal with the crisis. In some instances these powers may be temporary, but often even these can have an effect on altering allowed actions of the bureaucracy and can affect the shaping of future economic policy.

This paper will look at the methods of policy creation used during the financial crisis and the causes for those methods. It also looks for general trends regarding the structure of delegation during this period and the reasons that it was used.

1.1 Methodology

The analysis conducted in this paper makes several assumptions. First of all, bounded rationality is assumed in order to investigate the way political actors and bodies behave and how it affects public policy creation. In other words political actors cannot know all the relevant facts and often must make decisions in a fast-paced environment with incomplete information. They are thus capable of making mistakes. This is not to say that these actors are irrational. Rather, this paper makes the assumption that each actor has a payoff function that may be shaped by multiple motivations and that each actor will attempt to maximize their payoff function.

This dissertation looks at the creation of economic policy during a crisis over the 7-year period spanning the start of the housing crisis and ending with the 4-year anniversary of the Dodd–Frank Wall Street Reform and Consumer Protection Act. In other words, this paper covers the period from 2007 through July 2014. This timeframe shows the current status of policy creation and also includes a number of political situations and corresponding power balances. It also includes different economic crises including the bursting of the housing bubble, the following recession, and a number of related issues and at all segments of a crisis: lead up, identification, initial response, deepening, plateau, improvement, resolution, and aftermath. By bubble the paper refers to a large and long-lasting deviation of the price of some asset—such as a stock, bond, or a house—from its *fundamental* value.⁹

There were several crises that occurred since 2000. By the term “crises” this paper refers to external events that combine immediacy, severe downside risk, and public salience. Typically these are exogenous events that are not expected. Using this definition, there were a number of crises during this period. The lists of crises during this period include the tech bust, a series of corporate accounting scandals, the Deepwater Horizon oil spill, the oil crisis from the mid-2000s, the California Electricity Crisis, Hurricane Katrina, the responses to the 9/11 terror attacks and the wars in Iraq and Afghanistan, California electricity crisis, the war in Afghanistan, the war in Iraq, escalating world food prices, the Housing Crisis, and the Financial Crisis. This paper focuses on the housing and financial crisis because the populace was severely adversely affected by this crisis and it was viewed by most of the nations as being a threat to them and as having immediacy. The crisis this

⁹ Blinder, Alan S. *After the Music Stopped: The Financial Crisis, the Response, and the Work Ahead*. Penguin Press. 2013.

paper will investigate was selected because it arguably accounts for some of the most important legislation made since the start of the millennium and thus can show how policy is created in this day and age. Also, because of its importance, it is comprised of much more than a single policy decision, but rather is shaped by a host of different actions and thus gives us more data and complexity to investigate.

By nature of their public visibility and the threat they entail, crises will generally elicit a response from government to either forestall the deleterious effects of the crisis or at least to be seen by the public as taking action and working for their constituents by dealing with the crisis. Thus this is typically a time when the government will attempt to enact significant public policy changes and there generally is greater willingness on the part of the public and governmental institutions to accept larger initiatives than would be the case otherwise. When confronted with a crisis, the government must decide how to respond to the crisis and what policy should get implemented as part of this response. Crisis after all comes from the Greek word *krisis* meaning 'decision'. This tendency to made significant and often drastic policy changes when confronted with cries makes this an important area to investigate.

To investigate the questions posed by this paper, this paper makes use of common theories and research on such topics as political motivations, crises, and delegation. This dissertation investigates where public policy originates from and the way it is structured by looking at actions during the period studied and by looking at a detailed case study. This will help this paper to determine the validity of the assertion that the legislative branch is but one of many actors enacting public policy and the role of different avenues of policy creation in response to a crisis. Furthermore this paper will use those methods to determine how this public policy is determined by institutional and environmental variables and how in turn in turn will determine the content of the public policy. The case study included focuses on the creation of a major piece or pieces of economic public policy and provides a vantage point into the steps taken to create the policy. It also investigates the roles of various political actors in it the policy creation process. These major pieces of policy are particularly pertinent and are worthy of study because they have had significant second and third order effects on the actions of the United States and the lives of its citizens and also form the default pattern for future government action when faced with similar stimuli.

To investigate the effect of crisis, this paper will assume a default case in which congress creates policy without a crisis. It then looks to see what the result would be in this default, status quo case and from that it will try to ascertain any changes in the causes or net effects on policy that occur do to the existence of a crisis

The methods by which policy is created change over time and some scholars have claimed that in the current day and age there has been a shift in who creates policy in that the executive branch is said to have an increasing role in this domain.¹⁰ By looking in depth at the actions of political players, these assertions will be tested with the empirical data in these examples to determine the extent of the role during a crisis. The paper also investigates how various policy tools fit into a politician's toolbox and how they interact to each other during a crisis.

While this paper is focused on successful policy changes, it is important to note that other major attempts to change policy have been less successful. The failure to enact new policy can provide insight into the policy making process and the avenues for policy creation.

The period that was selected to study was 2007-2014. This span of time is a long enough period that information can be gained by investigating it, but is focused enough to allow the study to determine the details of the current processes of public policy creation. This paper intends to do an empirical analysis to see if the data during this period are consistent with hypotheses put forward by researchers in the field. This paper largely uses a case study to investigate these facts as opposed to more of a statistical method such as that employed by Shull¹¹ or Epstein and O'Halloran¹² as this seems to gloss over much of the details and complexity.

There is a complex interplay of forces that shape the method by which policy is created and the policy creation itself depends on numerous political actors. There are

¹⁰ Golden 2000; Nathan 1983

¹¹ Shull, Steven A. *Policy by Other Means*. Texas A & M University Press, 2006.

¹² Epstein, David and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge University Press, 1999.

number of variables that determine the actions of economic actors and the method they choose to create policy. There are also environmental issues such as whether there is a crisis or not that can alter behaviors of political actors and thus alter policy produced in terms of scale as well as content. In addition, there are also institutional and structural variables such as whether the congress and presidency are both held by the same party. Finally, there are also personal variables such as the president's ADA score and tendency to act unilaterally. This dissertation does not use either a congress-centric or president-centric framework to delve into the nuances, but rather attempts to look at the events and causality that created policy. The actual actions that led to the formation of policy depend on a number of factors and cannot be adequately summarized with a simpler framework. That being said, this analysis can provide general information that can be used to investigate this topic and can serve researchers who wish to explore it further.

As part of this assessment process, this research will attempt to ascertain if there is a pattern that describes the methods through which policy is created. In particular in looking at a case study this paper seeks to determine whether it was congress, the president, the executive branch, or some complex interrelation amongst these that led to the establishment of public policy. Public policy is one of the main outputs of government and so one can gain a broad sense as to government's functioning by its handling of this key governmental capability. The specifics of public policy and its effects rely largely on who creates the policy and the manner that was used to create it. Thus one would expect the institutional framework as well as power balances between the various political actors to have an effect on the resultant policy they create.

There are differences in the methods used to create public policy between the current period and past eras of government as shown by recent studies stating for instance that delegation is a lot more common today than it was in the past.¹³ In addition, there is an increase in partisanship that should both affect the way that policy is created as well as the way it is structured. While partisanship and battles between the president and the congress

¹³ Marshall, William P. "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters" Boston University Law Review Vol 88, Number 2: 505-522. 2008.

have a long history it is generally acknowledge to have increased over the last few decades and this has led to difficulty passing laws.

There have been major structural changes over the years that have altered the institutions and the political environment and thus the policy creation of the current era differs significantly from those in say the 1960s. Among these changes have been changes in power between the president and congress, the tendency in the House to send a bill to multiple committees, the ruling that legislative vetoes are unconstitutional, the Democrats losing their stranglehold on the House of Representatives, and the move away from centralized control of the House of Representatives.

While each of these may seem like a relatively small change, when combined they have a major effect which leads to the conclusion that policy creation from the 1960s was significantly different from how it is now. In addition, there are countless other factors that are different about this period, such as an all-time low in vetoes, which may have as of yet unknown effects on policy creation and thus also make this period unique. Thus, since the framework in which policy is created is so transitory, this paper focuses on a small time period to get a snapshot of policy creation as it currently stands. While the period is small it is relatively representative in terms of governmental control. It includes a period with a Democrat as president and a period with a Republican as president. Furthermore, this period includes periods in which one party controls both the presidency and the congress, those in which congress and the presidency are controlled by opposite parties, and those in which congress itself was split so that one party controlled one house while the other party controlled the other house.

The first step to analyzing the creation of policy during a crisis is to determine what methods are used in which situations and why it is they are used in those situations. The choice of a method to create policy is a political act that directly affects policy and so it must be analyzed as such. As such one may look to what determines this political action taken by various members of government.

Delegation is one of the key methods of creating policy and should be investigated to see in what situations it is used rather than direct legislation. One method one can use to analyze the act of delegation is to use the Truth in Legislation Statement posited by

Schoenbrod.¹⁴ While he uses these hypothetical statements as a way to think about curbing what he sees as rampant delegation, the sections where he breaks out the required information that congress would need to supply for each bill under his hypothetical Truth in Legislation Act match the information that we'd want to analyze the individual acts of delegation. He lays out the following article regarding each piece of delegation: each issue that the bill delegates; the extent to which the bill does and does not give guidance on how the delegation should be implanted; why Congress decided not to make the law itself; the kinds of blame that the delegation might shift from legislators to the agency; the resources and time needed to carry out the delegation in comparison with the resources and time provided in the bill and current appropriations; the extent to which legislators may intervene in the implementation of the delegation; and the personal advantage that could accrue to legislators from such intervention. A similar analysis can also be done for unilateral executive action.

The focus on resources was included in Schoenbrod's list as congress' lack of time to handle issues is a common reason given for why congress delegates. Schoenbrod also focused on it due to a concern about unfunded mandates in which congress can pass political costs on to others, but get credit for doing a good deed. Among the examples of this he describes is the mandate by the federal government that schools and the local governments that fund them to clean up asbestos. The local governments are not allowed to decide at what point it made sense to require asbestos removal or to weigh the costs and benefits of actions. Instead congress got credit for protecting the safety of school children, but the costs, both economic and political, were borne by the local governments. Looking at this second point can tell us about what congress is trying to accomplish with this delegation.

The analysis of the choice of policy creation method is focused largely on the factors listed by Schoenbrod. This paper does this by looking at the characteristics of the policy creation method and making suppositions about the motivations of political actors based off their votes, words, political power, etc.

¹⁴ Schoenbrod, David. *Power Without Responsibility: How Congress Abuses the People Through Delegation*. Yale University Press, 2008. Page 172.

When delegation is used to create policy one can look at related factors as well such as who is delegated too, the constraints used in the delegation, and the scope of the delegation. These can get to the heart of some of the questions above, but can also give a view as to what the result of the delegation will be and how the delegation changed the ultimate resulting policy instead of if congress had directly created a law. Similar analysis will prove helpful when evaluating the use of unilateral executive action in policy creation which in many instances can be viewed as a type of delegation and often comes about due to a broad delegation of power to the executive branch.

There are other types of crises such as military conflict, terrorism, environmental, political, and law and order. However, this paper investigates economic crises because they are a relatively common type of crisis and one in which congress has the ability to address directly or delegate. Furthermore it is an area in which congress has primacy over the president as opposed to military and international affairs in which case in practice if not in theory. During a crisis, power tends to shift from the congress to the president, but as this is a case in which congress would typically start with significant power, this allows for congress to continue to play a role. The president is viewed by most citizens as the proper initiator of major actions and he acts in accordance with this perception.

1.2 Theoretical Framework

Rational choice institutionalism lays out one of the frameworks that this paper uses to evaluate the actions of congress and other political actors such as the president and executive agencies. This framework investigates the interrelation between the institutions of the federal government. It views political actors as being rational and being utility-maximizers however it presupposes constraints and boundaries upon actions based off of factors such as the structure of the institutional framework.

Rational choice institutionalism contains concepts of principal-agent theory. It also makes the assumption that political actors look at each problem rationally. The strict interpretation of this assumption can be questioned in the real world, but in general can be

taken as a rule that can simplify the analysis while still explaining much of the behaviors of those making political decisions.

The policy choices that the nation can make at any given time are not infinite. The possibilities are circumscribed by a number of factors such as the public sentiment about a topic, the opinions of those in office, the limits of action afforded to institutions that craft the legislation, social and legal norms. Thus not all policies preferred by those involved in creating policy can be achieved under circumstances. Among those policies that are unattainable are some beneficial policies that provide higher utility to the nation and the politicians than the policies that are ultimately enacted. In addition institutions, such as congress, are influenced by other institutions and entities. The institutions are bound by limits of their power, the procedures they use, their constituent member makeup, and the institutional history.

Besides these limitations, policy creation faces a number of real world circumstances such as uncertainty about the current economic and political state that shape the policy. There will also be uncertainty about economic theory as well as human actions. Those creating policy cannot know the results of their policy or how the policy will ultimately be viewed by voters. The full range of effects will not be known going in and unintended consequences are almost assured. For instance, during the economic crisis from 2008 to 2009 there was a 21% increase in the number of applications for disability as there was more economic incentive to go on disability.¹⁵ Typically 50% of those that apply for disability are granted disability and 99% of those approved for disability payments never go back to work despite the fact that the average age of new recipients is only 49.¹⁶ Thus there can be second order effects that can affect the nation for decades.

Furthermore as in all political processes a number of individuals often with different goals and working at cross-purposes have a hand in shaping the resulting policy. This can lead to inefficient or poorly designed legislation or even legislation that has within it provisions that undermine itself. The conflicting goals of the individuals that shape policy

¹⁵ Hargreaves, Steve. "Disability Claims Skyrocket: Here's Why" CNN. 4/11/2013.

¹⁶ Fletcher, Michael A. "Disability claims rising sharply at Social Security." *Washington Post*. September 14, 2010.

can also limit the size and scope of the action that can be taken. In such an environment, political actors do their best to maximize their utility by making approximations of the resulting effects of legislation and trying to change the political landscape and the policy decisions in question to achieve a result that best matches their desired ends while minimizing risk. The creation of policy is greatly complicated by this fact that parties have incomplete knowledge and they have to make estimates as to likely outcomes and the risks. The strategic interaction of these actors through a complex process shapes and creates the policy that is produced.

Policy is created at many levels of government and by many institutions. Congress is typically seen as the preeminent policy making entity in America due to the legislative powers that are uniquely given to it by the U.S. Constitution. However, there are a vast number of entities that actually create public policy in the United States with congress being but one of these. This ability of other institutions to create policy is in large part due to the vast quantity of policymaking power that congress has delegated. Much of this power was delegated to executive agencies that comprise much of the governmental bureaucracy. Similarly, the heads of these agencies are delegated a great deal of power as well. Members of the cabinet and other agency heads often can generate policy and law without the direct action of congress or the president and thus have the power to unilaterally make policy decisions that can affect the nation and those that live in it. The president also has been delegated significant powers and due to his unique role as the head of the executive branch he is able to have a major effect on policy.¹⁷ His ability to affect policy is even greater in a crisis in which his/her uniqueness causes people to look to him to provide leadership and guidance. Thus he gets first mover advantage in crafting solutions to the policy and has significant political backing and public support to enact changes. He also is often given emergency powers far in excess of the tools he typically employs to create policy.

The public can most readily be swayed by the president as he has a unique role and he is far better known than other members of the government. Most individuals do not even know the members of congress that represent them and do not attentively listen for

¹⁷ Marshall. 2008.

messages emanating from congress.¹⁸ People have higher expectations for the president and expect him to perform actions and fix problems that the country faces even in areas in which the president's formal powers are slight. A message from the president increases salience and improves the likelihood that things will go the way the president wants.

People's expectations of the president often require that he needs to take actions to address these expectations whether the actions taken have much value or not. High gas prices affect the president's ratings though he has little control over them and moves that would be taken would be short-sited and politically motivated. Gas prices rise annually in the summer due to increase usage however the president is still considered responsible by many for it.

Issues that affect people's lives directly such as the price of gas or the unemployment rate have an outsized effect on the opinions of voters and are typically a greater impetus for change than issues that do not directly affect them. Economic crises have a major effect on voters and thus lead to a call to action. However, it is not only these personal effects that can affect voters. People change their opinions and voting preferences and thus the pressure they put on congress based off of both their personal economic interests as well as sociotropic reasons. An economic crisis has both personal and sociotropic salience and so the message of the president was likely to be heard. The same is true of the threat of terrorism.

Arnold argued that the politics of explicit economic policy, policy proposed in an effort to improve the economy, differed from the policy of derivative economic theory, policy with macroeconomic effects that is proposed for other reasons.¹⁹ For derivative economic theory, he states that policy makers focus more on the noneconomic components of the policy than for explicit economic policy. This is in large part due to considerations of how their constituencies will judge the policy and the factors that will determine if a policy is broadly supported

¹⁸ 2000 Social Capital Community Benchmark Survey.
http://thearda.com/Archive/Files/Downloads/SCCBS_DL2.asp

¹⁹ Arnold, R. Douglas. *The Logic of Congressional Action*. Yale University Press, 1992. 151.

1.3 Theories about Delegation

This paper looks at the governmental responses to the fiscal crisis and attempts to see how well theories of delegation match with the governmental action that was taken during this period to deal with the financial crisis. This paper investigates below some of the more common theories of delegation. There have been a number of investigations into the tendency of congress to delegate. These range from Kiewiet and McCubbins²⁰ theoretical framework to Epstein and O' Halloran's statistical approach.²¹ Many of these analyses rely on a principal-agent theory framework to make conclusions about motivations and effects of delegations. Most frameworks sought to use theory to determine the motivations of congress in delegating to the executive branch. These have typically viewed delegation in one of two ways. Either they see delegation as a positive development in which congress uses an innovative political tool to enact better policy that benefits from the expertise, time and attention, and a depoliticized environment that congress would struggle to supply. Those such as Kiewiet and McCubbins are in this positive camp. There are however those that view congress' actions in delegating as fundamentally negative and stemming from an aversion to make tough policy decisions. This avoidance hypothesis says that delegation by congress is fundamentally just a crass political way to get reelected and that it stems from an unwillingness on the part of politicians to make unpopular political positions or those that may eventually cause political harm even when in the interests of the nation.

One theory of delegation is that lawmakers delegate because it is politically useful to them. From this theory it follows that looking as the personal advantage that would accrue to lawmakers can help determine actions that political actors will take since these may be major motivators for the delegation and can also shape how the delegation is structured.²² Similarly, by investigating the blame shifting or credit-taking enabled by the delegation one can learn about the act of delegation itself.

²⁰ Kiewiet, D. Roderick and Mathew D. McCubbins. 1991.

²¹ Epstein, David and Sharyn O'Halloran. 1999.

²² Campbell, Colton C. "Creating an Angel: Congressional Delegation to Ad Hoc Commissions". *Congress & the Presidency*. Vol. 25, Iss. 2. 1998.

This tendency to delegation does not need to be a linear or one directional movement and some individuals argue that delegation may occur in response to a short-term impetus, but that subsequently congress will regress the delegation and will try to “nibble back” some of the authority that it delegated.²³

1.3.1 Abdication Hypothesis

The abdication hypothesis of delegation argues that the trend towards increasing amounts of delegation has come about primarily due to members of congress wishing to avoid having to make unpopular decisions. This hypothesis also states that delegation leads to excessive centralization of power in the executive branch and to a too intrusive government.

The constitution’s framers envisioned a legislature composed of numerous individuals as posing less of threat of tyranny than the accumulation of power by the president who could gain a kinglike role if his authority was unchecked. A similar view on the risks of power accumulation tends to lead to question the extensive use of delegation that currently occurs. The vast transfer of power to the executive branch has already in some eyes, such as David Schoenbrod, begun to pose a threat to liberty. The decrease in the public opinion of the congress relative to the president in recent decades however does little to fortify congress as a policy creating body when juxtaposed against a more popular president. Part of this perception comes from the belief that congress is not doing the job it was sent to Washington to do. This view is also represented among some academics that study delegation and feel that it displays this. Lowi argued that congress abdicated its responsibility for creating public policy by essentially giving that responsibility to unelected bureaucrats.²⁴

While there have been differing views on delegation, one widely accepted fact is that delegation has led directly to the increase in the bureaucracy. Some, such as Schoenbrod,

²³ Farrier, Jasmine. *Congressional Ambivalence: The Political Burdens of Constitutional Authority*. University Press of Kentucky, 2010.

²⁴ Lowi, Theodore J. *The End of Liberalism: The Second Republic of the United States*. New York, NY: W. W. Norton and Co. 1979.

argue that this increase in the size of the government in turn has led to people feeling to a greater extent that their lives are being run by nameless bureaucrats who are unelected and unanswerable to the people. The logical conclusion is that this has helped feed dissatisfaction in the United States with the quality of the government and in particular the role played by the congress.

Those who see delegation primarily as a ploy to help get members of congress elected, such as David Schoenbrod, tend to have a negative view of both the causes and effects of delegation. This camp believes that by delegating away the tough decisions that congress is abdicating their responsibility and is merely participating in issue avoidance out of cowardice and self-concern. Fiorina argues that Delegation can shift blame from legislator onto the agent.²⁵ He then went on to argue that the decision to delegate is a function of the political costs and benefits for which they have been held accountable. This matches up with studies that show that due to the use of political heuristics that voters use in selecting politicians, it is far more damaging for a politician to be blamed than it is for them not to get credit. Despite the potential benefits of delegation, works have tried to show that the actual motivation to delegate does not appear to be for the sake of efficiency gains.²⁶ Thus it is often politically a good move to disassociate or obscure the congressperson from the politically risky goal that the congress wishes to achieve. By delegating, a commission can enable this and it can be especially valuable if the congressperson can in good faith deny they were aware of the commission's actions and decisions. Congleton and Sweester refer to this as, "Policy making under the veil of ignorance".²⁷ This enables a congressman to take credit for a much desired good, but they do not get blamed for the inevitable costs as they can set up an agent to figure out how to pay for it and delegate that responsibility. Fiorina and others have surmised that delegation to the executive branch is largely an attempt to shift political and other costs.

²⁵ Fiorina, Morris P. "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39(1):33.

²⁶ Aranson, Peter H. , Ernest Gellhorn, and Glen O. Robinson. "Theory of Legislative Delegation" *Cornell Law Review* 68:1. 1982.

²⁷ Congleton, Roger D. and Wendell Sweester. "Political Deadlocks and Distributional Information: The Value of the Veil" *Public Choice*. 1992. 73:1.

It is argued by this camp that delegation leads to a lack of legitimacy and representativeness on the part of the policy makers. Congress was elected to represent the people and the ceding of power by the electorate entails a contract with those they elect for those to act on their behalf. By congress delegating power to unelected bureaucrats who are typically unknown to voters and are not charged with representing them or the districts that they comprise, this contract is voided. In other words the recipients of the delegated power do not have a mandate and this delegation would negate Rousseau's Social Contract.²⁸ Seymour Martin Lipset discussed the idea of legitimacy by saying that it, "involves the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate and proper ones for the society."²⁹ The public perception of the institutions of democracy is eroded by delegation. This decreases the legitimacy of these institutions and the government in general. This can be seen in those that want small government and are opposed to the increase in bureaucracy. The Tea Party movement in particular argued for a smaller government and questioned its legitimacy and representativeness.

Despite the occasional push back against increasing executive power, congress continues to delegate new powers to the executive branch. According to the abdication hypothesis, the reason for this increase in delegation by the congress is that individual lawmakers believe it is in their interest to delegate. This is primarily for two reasons: they feel it will help them get reelected and they feel it will allow for better public policy. Of these two motivations, researchers have tended to conclude that the former of these is the one that has the most influence upon the minds of lawmakers. David Mayhew for instance argues that reelection is the principle goal of congress.³⁰

Using delegation Congress can appear to be acting on the behalf of their voters. Acting on constituents' behalf and intervening for them with executive agencies can be one of the most politically beneficial actions a congressperson can take and along with garnering votes is a major source of campaign funding. It can also allow a lawmaker to take credit for

²⁸ Rousseau, Jean-Jacques. *The Social Contract: & Discourses*. No. 660. JM Dent & Sons, Limited, 1920.

²⁹ Lipset, Seymore Martin. *Political Man: The Social Bases of Politics*. Doubleday. 1960. P. 64.

³⁰ Mayhew, David R. *Congress: The Electoral Connection*. Yale University Press. 1974.

programs while disavowing responsibility for spending or any burdens of the program. In the words of John Quarles, former Environmental Protection Agency deputy administrator, delegating to the executive branch is, "a handy set of mirrors--so useful in Washington--by which politicians can appear to kiss both sides of the apple."³¹

The trope of fat cat bureaucrats and insiders in Washington juxtaposed against the narrative of disaffected, unrepresented outsider in true America has long been common. In America there has also long been anxiety about the power of the state. In the words of Kenneth Dyson, "The American liberal tradition is profoundly individualistic and anti-bureaucratic; it begins with autonomous individual and with a populist belief that all authority emanates from the people. A dispersal of public power was seen as necessary in order to maintain the supremacy of the popular will and to protect the individual."³² Its central premise that decision makers can create laws that impinge on personal freedom while not knowing or caring about those they govern resonates especially strongly in the case of delegation to executive agencies and those that work for them.

The proliferation of delegation has allowed for more rules and regulations David Schoenbrod, states this and further argues that despite the emergence of the bureaucratic state, that delegation is not inevitable and that without delegation from the legislative to the executive branch that government would be more legitimate and less intrusive and he states that without the delegation, "more would be done through private ordering, common law, and state and local rules."³³ Others such as Richard Pierce argue the opposite and go so far as to say that the nondelegation doctrine never truly existed and that it was not necessary.³⁴ Likewise, Justice Blackmun who delivered the majority opinion in *Mistretta v. United States*³⁵, wrote that, "As society increases in complexity, Congress must delegate its job, "under broad general directives". The broad delegation, "is sufficiently specific and detailed to meet constitutional requirements." He further stated that, "in our increasingly

³¹ Boaz, David. *Cato Handbook for Policy Makers: 7th Edition*. Cato Institute. 2009. Pg. 86.

³² Dyson, Kenneth. *The State Tradition in Western Europe: The Study of an Idea and Institution*. ECPR Press. 1980. P. 271.

³³ Schoenbrod, David. The Federalist Society's Administrative Law and Regulation Practice Group's panel discussion at the 1998 National Lawyers Convention. 1998.

³⁴ Pierce, Richard. The Federalist Society's Administrative Law and Regulation Practice Group's panel discussion at the 1998 National Lawyers Convention. 1998.

³⁵ 488 U.S. 361 (1989)

complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

John Locke argued that a legislature, "cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorized to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands ".³⁶

In the 1989 Federal district case *United States v. Mills*, Judge Roger Vinson wrote, "A delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency such as the [Army] Corps of Engineers, does violence to this time-honored principle. . . . Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law." The concept that delegated or transferred powers cannot be further delegated or transferred is the legal concept of *delegata potestas non potest delegari* which is a standard legal concept in the United States as well as in the United Kingdom upon which much of the U.S. legal system, tradition, and historic examples were based. It was explicitly stated in such cases as *United States v. Sav. Bank*.³⁷

In addition, prior to the New Deal there was less centralization of power in the federal government. John R. Bolton largely ascribes this tendency to the Commerce Clause

³⁶ Locke, John. *Two Treatises of Government*. Cambridge University Press. 1988 [1689]. Second Treatise, Section 141.

³⁷ 104 U.S. 728 (1881)

of the U.S. Constitution³⁸ and the Tenth Amendment of the constitution which states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Together these sections of the constitution preserve powers for the states that are not specifically given to the federal government. This lack of power in the federal government limited its ability to delegate power as it had less control and needed less of a bureaucracy to control things. However over time both the commerce clause and the Tenth Amendment have continued to be reinterpreted and the federal government has gained more power at the expense of the states. This shift of power to the federal government consist of a number of other small transfers of power to the federal government such as the Seventeenth amendment which allowed for direct election of senators by citizens as opposed to having senators selected by state legislators.³⁹ In addition, it also coincided with the weakening of ties between individuals and the state they live in. This centralization of power can be seen in various new provisions such as the federal income tax that was permanently ushered in with the Sixteenth Amendment to the U.S. Constitution.

The change in the interpretation of the commerce clause can be seen in *Wickard v. Filburn*⁴⁰, in which the U.S. Supreme Court used the Commerce Clause to sustain the Agricultural Adjustment Act of 1938⁴¹ and they ruled that the constitution gave the government the ability to regulate agriculture even in this case where the crops grown were not for sale, but rather for internal consumption. In the words of Justice Robert H. Jackson, “even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.’” It wasn’t until *United States v. Alfonso Lopez, Jr.*⁴², that the Supreme Court ruled that there was a limit to congress’ power to regulate activity under the Commerce Clause.

³⁸ Article 1 Section 8 Clause 3.

³⁹ Bybee, Jay S. "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment". *Northwestern University Law Review*. 91: 505. 1997.

⁴⁰ 317 U.S. 111 (1942)

⁴¹ Pub.L. 75-430.

⁴² 514 U.S. 549 (1995)

Delegation tends to increase laws produced and some view this as impinging on liberties. The constitution was designed so that law would be made by the two houses of congress with the president's involvement and this thereby would limit the number of laws that get passed. This would limit the number of laws enacted because it requires more steps to be completed and more obstacles overcome in order for a law to get passed. In addition with bills needing to pass both houses of congress it makes legislation, especially excessively partisan legislation, much more difficult to get enacted. As James Madison said in arguing for Bicameralism, "Another advantage accruing from this ingredient in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation."⁴³

Among those who think that delegation helps lead to too many restrictions and regulations are the CATO Institute, a libertarian think tank that advocates small government, and the American Civil Liberties Union, an advocacy group focused on protecting individual rights. In its Handbook for Congress, the CATO Institute refers to the separation of powers as a Bulwark of Freedom. While this alludes to the protection from tyranny that a separation of powers ensures by limiting the ability of any one political actor to consolidate all power, it also refers to the personal freedoms safeguarded by having a weaker national government since it is less capable of action due to competing interests and gridlock. As it says in the handbook, "The upshot was that the separation of powers effectively restrained federal power".⁴⁴ This concern about excess laws is not new and has been around throughout the history of America. James Madison wrote, "The facility and excess of law-making seem to be the diseases to which our governments are most liable."⁴⁵ Besides personal liberties, those that hold this view also see delegation as a means to shift power to the federal government that should be left to the states. Thus even with the increase in delegation, there are lingering questions about both the legality and constitutionality of delegation as to about the lack of legitimacy and representativeness engendered by delegation. Delegation has certainly become commonplace and the number of regulations created each year is quite large. According to the U.S. Government Accountability Office, in

⁴³ The Federalist Papers 62

⁴⁴ Cato Institute. "Delegating Legislative Powers." Cato Handbook for Policymakers 105-4.

⁴⁵ Madison, James. Federalist 62.

the four fiscal years from 1996 to 1999, 15,286 regulations were created. This far exceeds the number of laws enacted during that period.

However, delegation does not always provide solutions. There is still a political dimension in all administrative processes and poorly designed commissions can suffer from some of the same issues. Fisher has shown that delegating can be risky due to the fact that voluntary cooperation from legislators is typically given for political not legal or moral reasons.

Delegation lowers the accountability for legislators. Theorists have suggested that delegation does not destroy the principal of democracy because voters can always vote out members of congress if they are unhappy with the actions done by an agency that was delegated power. However in practice this is a very tenuous link. Most voters have only a basic awareness of the votes and positions of their congressional representatives and they do not know if their representative voted to delegate the power and tend not to know about the process of the creation of administrative law or even the rules that have recently been promulgated by agencies. Congress is able to use this to avoid tough decisions and if a new law gets bad publicity, the congress person can pretend to be against it and fighting on the side of the people against the agency that created the rules regardless of their actual viewpoints and role in the agency action. This delegation also goes contrary to the ideal of congress taking responsibility for legislation and policy.

Furthermore, as Schoenbrod argues, congress finds it in their own interests to create laws if they can delegate since it allows for them to do case work or perform credit taking whereas if the market or states settled the issue then congress would be unable to perform these functions.⁴⁶ This leads to more federal rules.

He also suggests that delegation helps exacerbate other issues plaguing the U.S. democratic process. For instance he has have suggested that high rates of voter apathy are tied to congress' use of delegation. He also suggests that the tendency to delegate decreases congress' willingness to compromise.

⁴⁶ Schoenbrod. 2008. Pg. 19.

Delegating can help a legislator's electability by allowing the legislator to avoid taking political decisions which would be unpopular with the constituency in their district. It can also allow the legislator to selectively take positions that would help them politically while avoiding those which would be detrimental to their reelection chances. Selective position taking can help frame and create a politician's narrative in an election and thereby help them position themselves politically to be most likely to be approved of by the constituency in their district. It also allows for the legislator to do casework on behalf of those they represent.

Schoenbrod following the work of Fiorina lays out a hypothesis of how responsibility shifting affects legislation in which he hypothesizes that legislators will delegate instead of directly legislate, "if the public would perceive the net benefits from the bill that delegates as greater than those from the bill that does not delegate."⁴⁷ He builds this from an axiom that lawmakers will vote for a bill when it will appear good to constituents as opposed to any sort of merit of the bill in and of itself. This pessimistic view is not fully borne out by empirical evidence as there have been numerous occasions where legislators have voted for a bill that it is well known will not be popular and will hurt them politically. An example of this is the TARP Act which was uniformly unpopular with voters, but which never the less ended up passing due to the nation's need for the legislation.

Schoenbrod explicates further by stating than a member of congress will be more likely to use delegation if it will shift blame away from them or would still allow credit to accrue to them.⁴⁸ He uses this result to say that members of congress will act differently than if the option of delegation had not been there.⁴⁹

Delegation also allows congress to claim the benefits of the action while the blame often is placed on the agency that must formulate the details of the rules. An example of this is congress which in 2001 in response to terror threats passed the Aviation and Transportation Security Act and was able to claim that they were making flying safer and protecting people. The agency created by this act to create and enforce rules, The Transportations Safety Administration (TSA) by comparison was given the unpopular job of taking the invasive steps to ensure this safety and they have been vilified for their actions.

⁴⁷ Schoenbrod. 90.

⁴⁸ Schoenbrod. 91.

⁴⁹ Schoenbrod. 92.

The split between blame and praise for agencies and congress is particularly true for concentrated interests.

The question arises of whether the delegation of power goes against the notion of living in a democracy, if those who are delegated to can so often go against the wishes of our elected representatives who entrusted them to make decisions. If instead of our representatives making decisions, self-interested bureaucrats make decisions then the link to the people is lost. The same criticism hold true of special interests, which tend to be more partisan in their views, effectively making these decisions through their capture of an agency.

According to Arnold, Congress tends to prefer concentrated benefits and diffuse costs while citizens typically prefer diffuse benefits.⁵⁰ This provides another impetus to delegate power. As legislators' policy preferences are misaligned with those of voters, delegation can help them achieve their ends without this being visible to voters who would often not approve. Delegation can also allow members of congress to get credit for benefits of a program and blame the agency for the costs. It can also help with credit claiming as well as blame avoidance. Trying to insulate congresses' decisions and policy from political considerations can at times lead to better policy and in these situations delegation can be viewed as a tool that can improve policy outcomes.

1.3.2 Political Tool Hypothesis

The political tool hypothesis views delegation more positively. Rather than delegation being caused by congress' unwillingness to make unpopular decisions, this hypothesis views delegation as being the result of congress choosing a tool to create better policy and results than it could not achieve by acting directly.

By delegating, congress can lead to a less political and politicized decision. Congress is fearful of alarms or public outcry being raised and thus will try to minimize the risk of this. However, there are times when congress' ends or analysis of a situation is likely to vary from

⁵⁰ Arnold, R. Douglas. *The Logic of Congressional Action*. Yale University Press, 1992.

those of news outlets or the public and which thus may give rise to just such alarms or outcry. By delegating, congress can avoid the pressure to deviate from a policy course.

Delegation can lead to commitment to a goal or course of action, such as budget reduction, without requiring discussion of the problematic and controversial details that can lead to gridlock. This can allow for problem resolution to be broken down into two discrete steps. The decision to address the issue and the means by which the issue is addressed. This can bind congress to a solution created by the agent. This precommitment is very important and is more commonplace than is expected. One can think of the constitution as a form of precommitment that limits the potential courses of action for future congresses since they have less freedom of action than if the constitution was in place. However, this was done for a purpose to ensure that future leaders of government would follow course of action that were deemed acceptable actions when the constitution was written in order to ensure the actions of congress do not focus only on the short term exigencies of the day, but keep with these more important goals that are enshrined in law – in this case in the form of the constitution. Precommitment can be seen in the deficit reduction debates in which each side agreed that a certain amount of spending cuts needed to be enacted though they could not decide on the specifics of the cuts and agreed to have a committee iron out those details. It thus separated out the decision of cutting spending from the difficult and deeply politicized question of what spending to cut.

Precommitment is used in many forms. Even the Constitution can be viewed as a form of precommitment in that it limits the ability of congress to pass laws that it would be able to otherwise. It gives primacy to predetermined, key principals rather than current day expediency and needs or even the will of the majority. It was essentially a bequest from one body in power to a future group of law makers much as it is a straitjacket. The future congress is effectively an agent of the current congress. Precommitment can encourage public discussion to avoid heedlessly rushing into reactionary action. Precommitment limits the actions of congress and thus is effectively self-incapacitation. It can be used as a signaling mechanism in which the effectively limit the payoff table and thus if the announcement is credible it can alter the actions of the other side. Likewise if they announce that they will punish the other side and pay a tit-for-tat response if the other side does not coordinate. This can help lead to a Nash equilibrium and coordination.

Precommitment is often used to affect the actions of others, but can also be used to ensure an entity's actions are consistent with their current intentions much as a man that is sober may ensure that when he is drunk that he does not drive home though when he is drunk he may be tempted to drive. A political actor can strategically burn bridges to enforce their course of action. Institutions and contracts can also commit an actor or both actors to ensure a better end result. Another factor in this solution is credibility that can be built based off of the options an actor has and their credibility which is based on their past actions and whether they accord with their words.

Those who view delegation in a more positive light such as Kiewiet and McCubbins view delegation as a useful political tool that can allow policy to be enacted that otherwise would not be viable if created directly by congress. Congress can suffer from gridlock, excessive politicization, a lack of expertise on relevant issues areas, a lack of timeliness, an excessive workload, and inconsistent policy. Aberbach and Rockman have stated that delegation allows for offloading of excessive amounts of congressional work to a commission that has time to thoroughly investigate issues and which unlike congress has the necessary skills to handle technical policy issues that are not available in congress at large.⁵¹ By delegating, congress can mitigate some of these structural problems. Executive agencies and ad hoc committees can be set up to be non-partisan and less politicized.

An example of this is the Defense Base Closure and Realignment (BRAC) Commission which was set up in 1988 to deal with the over-politicized topic of defense base closures. For decades before the BRAC Commission few bases were closed, but the five BRAC rounds were able to close hundreds of bases over the last 25 years. Prior to BRAC, law makers for political reasons would jealously guard bases in their district as a source of jobs and as a key economic benefit to the district. While there were more bases than needed, the extra money saved by closing a base would be shared by all tax payers while the political cost of a base staying open would only accrue to the congressman in that district. This describes the classic situation in which there was a public good, in this case the prudent policy of closing an unneeded base, was undersupplied. Social choice theory also predicts this result. By setting up the BRAC commission, an ad hoc committee, congress could remove this block to

⁵¹ Aberbach, Joel D. and Bert Rockman. "Image IV Revisited: Executive and Political Roles" *Governance*. Vol 1, Iss. 1. Pages 1-25. 1988.

base closures and provide a better solution. Analyses by researchers have shown that delegating to BRAC obscures the causal chain of Congressional actions in the base closure process thereby making it so that no member could be directly blamed for the negative effects in the community. The process even allows the affected congressional districts' representatives to essentially appear as "champions" for their region fighting a losing fight to keep a base open.⁵² While lawmakers and those they represent want efficient government that does not waste resource this result cannot be achieved by the congress. This was one example of how delegation can help solve collective action problems that the congress is unable to handle as well as general political issues. If there was a policy production frontier of potential policy that can be achieved by congress and another showing potential policies produced by a commission, you could see the policy production frontier has been shifted and is closer to the combined utility function of the populace.

Others such as Max Weber also saw positives in Bureaucracy.⁵³ They argue that government by bureaucracy fixes defects inherent in other types of government and is a more efficient type of administration than other options as it allows for specialization and has a tendency towards meritocracy. This would argue for more delegation.

In addition, outsourcing their workload to the large bureaucracy allows for a timelier and responsive policy and can allow for subject matter experts to play a larger role in shaping policy about complex or technical subjects. Also by removing the decision making from congress's hands it helps assure that policy is consistent over time and allows credible commitments to be made to those affected by policy. Supreme Court Justice Blackmun wrote about *Mistretta v. U.S.*⁵⁴, "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."

Delegation not only allows for expertise, but also encourages it. Those in agencies tend to be more interested and know more about an area than those in other agencies. In

⁵² Mayer, Kenneth R. "Closing Military Bases (Finally): Solving Collective Dilemmas through Delegation," *Legislative Studies Quarterly* 20(3): 393-413. 1995.

⁵³ Weber, Max. *Wirtschaft und Gesellschaft*. Tübingen, J.C.B. Mohr (P. Siebeck). 1925.

⁵⁴ 488 US 361 (1989)

addition, repeated exposure and familiarity with the key subject matter gives them practical real world experience that would be difficult for congress to gain and which enables agency staffs to provide better judgment with regard to areas in the subject matter. There is also the important fact that agencies do their hiring knowing the areas they will be responsible for and the functions that they will need to fulfill. This enables them to specifically hire those who can fill areas in which they need specialized knowledge. Furthermore as the requirements of the agency change or the field of knowledge changes, the agency can adapt their hiring to account for these changes and thereby continue to have the necessary skillsets to address the policy areas delegated to them.

Delegation can have a significant impact with regard to producing effective public policy and the efficient allocation of scarce resources. The parameters used to determine the method of delegation have a big effect on the resulting policy created and thus determining which method of delegation to use when has a major effect. Therefore analysis of these can help answer questions such as whether it is beneficial to require commissions to justify their decision using recognizable standards of utility or whether strict membership controls should be devised to minimize political influence.

Delegation to agencies also can simplify the process of performing some tasks. Agencies can perform simple, informal actions with less overhead than can congress and thus may be able to accomplish goals more efficiently. In some cases these informal methods may serve in lieu of general policy or regulation. Agencies are also able to interpret the law and can do this in such a way as to simplify the creation of policy and its promulgation in society. Bureaucrats also can differ from congress in personality. For instance, bureaucrats tend to be risk adverse. Also they may have different values such as a focus on equity as opposed to just efficiency. In some situations this can help improve the resulting policies that they make.

The political tool hypothesis states that there are reasons for the use of delegation and reasons to view it as a beneficial development. In the words of Lowi, "It is of course impossible to imagine a modern state in which central authorities do not delegate functions, responsibilities, and powers to administrators. Thus the practice of delegation itself can hardly be criticized. The practice becomes pathological, and criticizable, at the point where

it comes to be considered a good thing in itself, flowing to administrators without guides, checks, and safeguards.”⁵⁵ Delegation has many facets and may be interpreted as a positive or a negative phenomenon based on the user’s view point.

Delegation can also be leveraged as a strategic gesture in order to gain political support from rival members of congress. For example, members of congress on powerful steering committees may use delegation to gain acceptance from other members of congress by agreeing to delegate to a notionally nonpartisan agency or board. This may occur if they believe that the issue will be handled fairly or in other words favorably, by a nonpartisan body or if this will cause their homologues in congress to be more willing to compromise on controversial issues. Successful reconciliation via delegation can lead to logrolls in which many members of congress agree to an approach to an issue to remove it from their plate. This process creates a win-win situation for members of congress as they are able to convince others who have less at stake to compromise and forge strong coalitions that can withstand the rigors of the legislative drafting and approval process.

Delegation allows for the offloading of congress’ excessive workload to agencies so that issues can get the time and attention that they deserve. Members of congress spend more time soliciting contributions and taking other actions in order to get reelected than in actual legislating and so the time they have to analyze and pass legislation is even more limited and thus offloading workload makes more sense.⁵⁶

Theories of delegation often suppose delegation is used to move policy making to those with expertise, however even agencies that are considered experts in a field are still often lacking key knowledge that would help determine a policy response.

Institutional factors such as the shape and size of voting districts can affect the resulting election and thus the policies created. Delegation moves away from a reliance on electoral majorities and can remove factors such as district makeup from the decision of what policy to enact.

⁵⁵ Lowi. 93-94.

⁵⁶ Campbell. 2001.

As Arneson argues, Democracy is not in and of itself a good thing. Rather it produces good outcomes.⁵⁷ Following upon this the way to judge the normative effect of mass delegation of legislative power to the executive branch is to judge the resulting structure by its fruits. There is nothing intrinsically wrong with bureaucracy and the results that it produces relies heavily on the structure of the delegation and the manning in which it is carried out and performed. Thus the legitimacy or value of delegation depends on these factors as well.

Delegation can solve some of the structural problems that congress has in addressing issues and in creating policy. For instance congress tends to have a short-term temporal focus as their time horizon is typically focused squarely on the next election and in the case of the House of Representatives this is at most two years in the future and not a decent goalpost with which to craft policy. By delegating decisions to an impartial and theoretically non-partisan body such as a commission, congress is able to give the decision to a body that is more deliberative and has less inherent need to focus on the short term political implications, but which can rather find a policy solution that is better for the nation over the long term.

Delegation can be used to convince people to sign on to a specific goal without going into the particulars or the means. This is a useful method for getting things done. Examples of cases where this method is used are the Defense Base Closure and Realignment Commission and the Joint Select Committee on Deficit Reduction (Supercommittee) charged with cutting long-term spending. Congressman James Florio explained this technique, “with all the contentiousness, with all the outside forces ... one consciously strives for ambiguity in order to get people to sign on to things.”⁵⁸ Delegating to commissions such as this also allows negotiation to be conducted secretly in an unpoliticized environment. In the words of Campbell, “When deliberations are private, parties can make offers without being denounced either by their opponents or by affected groups. Removing external contact

⁵⁷ Arneson, Richard J. “Democracy is Not Intrinsically Just” *Justice and Democracy*. Cambridge University Press. 2004.

⁵⁸ Bass, Janet. “Congress is a Frustrating Place.” *Lodi-News Sentinel*. Nov 28, 1989. 4.

reduces the opportunity to use an offer from the other side to curry favor with constituents.”⁵⁹

Delegation can also be used to minimize risk. Congress does not merely want to maximize credit and minimize blame, but also has an incentive to minimize the risk of a “catastrophic” career-ending piece of legislation. Delegation, even when not strictly profit-maximizing in terms of expected blame-credit value, can protect a systematic advantage held by incumbents and thus still increase their chance of being reelected.

The amount of constraint and delegation thus vary in part based on the relationship between the congress and the executive branch. As Allen Schick writes, “Where members are willing to entrust the fate of their policies to administrators, they are apt to legislate in broad terms. The laws can be brief, with little bickering among members over the details. Not so, however, when members are skeptical about whether executive agencies will perform according to their expectations.”⁶⁰ Thus in politically contentious periods such as when there is split control of government there tends to be more constrain on delegated power. However the amount of delegation will not necessarily decrease as there are competing forces at work. The lack of trust between the branches will tend toward less authority being delegated, but the gridlock that may occur in the traditional legislative process may lead to legislators being more willing delegate because they are not able to pass legislation themselves and they want to use delegation as a political tool to accomplish their political goals. During much of the period this paper covers, the relationship between the president and the congress was largely adversarial.

Kiewiet and McCubbins investigate delegation from a principal-agent framework.⁶¹ They treat the congress as the principal and the bureaucracy as the agent and investigate what occurs. They argue that bureaucrats have gained significant power through delegation and that this has been increasing. They also argue that limited oversight allows the bureaucracy to largely use this delegated power as it sees fit. Furthermore they argue that the bureaucrats have significant control over congress. They however list ways that the delegation can be structured or actions that congress can take to better control its agents.

⁵⁹ Campbell, Colton C. *Discharging Congress: Government by Commission*. Greenwood Publishing Group, 2002. 70.

⁶⁰ Schick, Allen. “Politics through Law: Congressional Limitations on Executive Action.” in Anthony King ed., *Both Ends of the Avenue*. AEI Press. 1983. 168-69

⁶¹ Kiewiet and McCubbins. 1991.

The increase in delegation of power was not inevitable. There have been trends that have contributed to the increase and acceptance of delegation. Among these trends are the growth of the nation and the growth of the executive branch. The dominance of the executive branch is by no means enshrined in law nor is it inevitable. In previous periods the legislative branch had been dominant. A quarter century before he was elected to public office, political scholar and future president Woodrow Wilson asserted that Congress, "has entered more and more into the details of administration until it has virtually taken into its own hands all the substantial powers of government."⁶² Wilson and other liberal politicians at the turn of the 20th century helped to reverse this trend. Their focus on efficiency and their belief that governance could be more scientific led to power shifting to the executive branch. This trend towards more executive power has been exacerbated by actions taken by the government during crisis. During those periods power often gets centralized or increased, but these changes can persist even beyond the scope of the crisis.

Congress has taken steps to counter the increasing power of the executive branch. Among these actions were a series of changes designed to strengthen and increase its own capabilities. By increasing the proficiency of congress, its committees, and legislative agencies it gives itself the ability to perform oversight of executive agencies and create policy. The legislative branch in the United States is considerably larger than in most nations. By funding and staffing the Congressional Budget Office, the Congressional Research Service, and the Government Accountability Office, congress greatly increases its capabilities and it can thus counterbalance the abilities of the executive branch.

1.3.3 The Capacity of Politicians Affects the Amount of Delegation

Huber and Shipan hypothesize that capacity of politicians to write detailed statutes affects whether they delegate.⁶³ This can be broken into two pieces. One is that if the institutional capacity and resources are less, that delegation will increase. The other is that

⁶² Wilson, Woodrow. *Congressional Government*. 1885.

⁶³ Huber, John D., and Charles R. Shipan. *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy*. Cambridge University Press. 2002.

if the requisite expertise is to be found in congress to deal with the issue area efficiently, it is less likely to delegate than if the experience is lacking. The United States Congress has significant institutional resources compared to other legislative bodies around the world. However congress does not have deep knowledge of financial matters and needed expertise to deal appropriately with the crisis. Congress was having difficulty passing bills and the majority of its time and energy was directed to health care reform and that meant that the throughput and attention that could be dedicated to dealing with the crisis was limited.

1.3.4 More Authority will be Delegated to the Executive Branch in Informationally Intense Issue Areas

Epstein and O'Halloran investigated whether intense issue areas, which have more political uncertainty for politicians, lead to more delegation to the executive.⁶⁴ The thought behind this hypothesis is that politicians would not want to risk making an action that would later turn out to be a political liability and this is more likely in these issue areas. Politicians tend to be risk adverse and are more concerned with avoiding blame than taking credit as the former can hurt more than the latter can help. Moe also argued that political uncertainty affected policy formation.⁶⁵

1.3.5 Complex policy areas lead to more delegation

Epstein and O'Halloran also looked into whether more discretion will be delegated to the executive in complex when reported by committees in informationally intense policy jurisdictions.⁶⁶ This would seem intuitive since more complex issue areas require specialized knowledge beyond that which congress has. Finance and the economic decisions involved in dealing with a crisis are complex policy areas.

⁶⁴ Epstein, David and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge University Press, 1999.

⁶⁵ Moe, Terry. "The Politics of Bureaucratic Structure" in *Principles and Practice of American Politics: Classic and Contemporary Readings*. 5th Edition. CQ Press. 2012. Pg. 332.

⁶⁶ Epstein and O'Halloran. 1999.

1.3.6 Where this Paper Fits in to the Literature

This paper seeks to investigate the use of delegation in response to a financial crisis. This paper is the first in depth investigation of the use of delegation in creating public policy in response to the 2008 financial crisis. It is one of the few empirical studies to investigate the common theories of delegation such as the abdication hypothesis and the only one to investigate the creation of policy in crisis situations. The understanding of the creation of policy during and in response to crises is important because significant policy changes are more possible during these periods than they are in periods without crises. It also is worth investigated actual policy creation to see if it matched up with the results that would be expected by various theories.

The paper also seeks to investigate the different constraints used and the way that delegation is structured in response to the crisis. The specifics of delegation are important for understanding the reason for the delegation, the probable effects of the delegation, and whether policy could be created to be more effective and efficient and lead to better results.

1.4 Existing Framework

While much of this paper focused on specific laws and the delegation they contained, these acts do not take place in a vacuum. There were in place some laws that were far ranging and affected the amount or details of delegation and which set the political climate and structural framework for future delegation. One of the most important and far reaching of these bills is The Administrative Procedure Act (APA).⁶⁷ The APA sets out a number of rules for executive agencies and thus effectively limits the power of these agencies and the executive branch. It constrains the president and the agencies' freedom of action and ensures that actions are in the desired direction that congress would like them to

⁶⁷ Pub.L. 79-404, 60 Stat. 237

take. The APA came about during the period of increased delegation and power to the executive branch that came to pass with Franklin Roosevelt's New Deal efforts. This led to congress putting in place the APA as a framework for the use of this power that congress had started to delegate to the executive branch. This view that this new concentration of powers needs to be limited was even supported by the president. Roosevelt felt that creating these agencies and vesting in them powers of different branches of government, "threatens to develop a fourth branch of government for which there is no sanction in the Constitution."⁶⁸ He thus proposed a study to determine the best set of administrative rules and procedures to deal with that risk as well as to ensure good and efficient governance on the part of these agencies.

Though the APA was an act of congress, the president too can change the dynamics and framework in which power is delegated by congress. In 1939, the president issued Executive Order 8248, which created the Executive Office of the President. It also greatly empowered the Office of Management and Budget (OMB) and changed its functions which in effect gave the president greater political power over executive agencies. In establishing the OMB, this executive order calls on the OMB, "To conduct research in the development of improved plans of administrative management, and to advise the executive departments and agencies of the Government with respect to improved administrative organization and practice ...To aid the President to bring about more efficient and economical conduct of Government service ...To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments, in accordance with past practice...To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government; all to the end that the work programs of the several agencies of the Executive branch of the Government may be coordinated and that the monies appropriated by the Congress may be expended in the most economical manner possible with the least possible overlapping and duplication of effort."⁶⁹ This

⁶⁸ Roosevelt, Franklin D. "Message to Congress Recommending Reorganization of the Executive Branch" January 12, 1937.

⁶⁹ Executive Order 8248 Section II 2. Subsections c,d,e,h

clearly enables the president to determine the course of actions being pursued by the agencies and to better guide and control these organizations.

The Executive Office of the President is sometimes viewed as working for the current president rather than the presidency in general. It is a politicized and partisan body that has accumulated powers that used to belong to congress. It was given these powers despite the fact that the Executive Office of the President is not as readily answerable to congress or as controllable by it as other agencies are. This body has grown substantially since its founding with the Reorganization Act of 1939.⁷⁰ Very few members of the Executive Office of the President have to be confirmed by the Senate and even the head of the organization, the president's Chief of Staff does not need to be confirmed. This allows the Executive Office of the President significant freedom from congress and gives the president considerable sway over the office.

The APA helped solve potential problems that could occur due to information asymmetry and hidden actions or actors. The APA requires the agency and other political actors post to their intentions and give congress notice of their intended actions. This gives congress first mover advantage and allows them to gain information and evaluate the political landscape to better control the agency and determine the potential positives and negatives of taking an action on an issue.

Another act that changed the underlying framework of delegation is The Budget & Accounting Procedures Act of 1950 which President Harry S. Truman described in his signing statement as, "the most important legislation enacted by the Congress in the budget and accounting field since the Budget and Accounting Act, 1921." While this act primarily created rules and standards as to how organizations did their budgeting and accounting, it by extension increased financial control of these organizations. This helped the president's ability to control these organizations and helped increase transparency and changed the operating procedures of these agencies. Later in President Truman's signing statement it states this when it says, "The budget provisions will enable the President to present the financial program of the Government in simpler and more meaningful terms. It will provide the basis for a better evaluation of Government programs and activities in terms of where

⁷⁰ Pub.L. 76-19.

the funds come from, the purposes to which they are to be applied, and the costs involved.”⁷¹

Temporal binding of congress can be useful for congress as it can ensure that current preferences are enshrined in future policy preferences and congress can ensure that policies are enacted that allow for better public policy. This can best be accomplished by delegating the power to make and alter policy to the executive branch. It has been shown that internal delegation to congressional committees and the establishment of rules is not able to bind future congresses since if the wishes of congress change, the new congress can simply undo or ignore the steps taken by prior congresses to constrain their actions. Examples of this can be seen in the repeal of Gramm–Rudman–Hollings Balanced Budget Act,⁷² which had been created to stop future congresses from excessive deficit spending. Ultimately a future congress decided that it did not like the restrictions on spending nor did it approve of the sequesters, or automatic spending cuts, that were implemented when the deficit spending exceeded predefined levels. Likewise the empowerment of the house appropriations committee to defend the treasury from claims coming from other congressional committees was a significant force in trimming spending, but eventually congress overturned this trend and disempowered the committee and spending increased as the new congress wanted.

Most U.S. States have the concept of separation of powers and have distinct branches of state government with separate powers vested in each branch. Most also have a concept of delegation and allow the delegation of at least some power and authority from the legislative branch to the executive branch. States enforce the delegation doctrine more strictly and state courts are far more likely to strike down delegations of power from the legislative branch to the executive branch.

At the federal level, delegation has effectively become the law of the land, however some Supreme Court justices, lawmakers, and law scholars have seen continued value and importance in the non-delegation doctrine. This ranges from Justice Rehnquist’s opinion

⁷¹ Truman, Harry S. “Statement by the President Upon Signing the Budget and Accounting Powers Act.” From Public Papers of the Presidents: Harry S Truman 1945-1953. September 12, 1950.

⁷² Pub.L. 99-177

offered in the case of *AFL-CIO v. American Petroleum Institute* to statements made by Justices Thomas and Scalia.⁷³

The prevalence of delegation has not been due to a change in the legal view of the constitution so much as it has been due to the necessities of a larger government that needs to perform more functions, the results of a larger nation, and the complexities of new policy areas and a rapidly changing world. The pragmatic needs of government have led to a vast increase in the amount of power delegated to the executive branch. Despite the separation of powers, this sort of delegation from one branch to another is not totally in opposition to the intentions and views of the framers of the constitution. This can be seen in #48 of The Federalist Papers where James Madison argued that the branches of government should not be completely separated, but should be interconnected. The underlying purpose of the separation of powers was to avoid excessive centralization, which could lead to tyranny. If delegation is not a threat of excessive concentrations of power and the appropriate checks and balances are maintained to assure a representative government that works for the people then this threat of delegation is minor. This explains the focus on delegation having at intelligibility principle.

Besides the legislative framework, there is also an existing framework of political actors and institutions. Congressional delegation is not a unilateral action. Even setting aside the two houses, competing political parties, and differing constituencies and law makers, one must take the president's wishes into effect. The president holds veto power over all bills and joint resolutions and thus can wield considerable power over how congress approaches a problem. He need not directly veto a law, but can use this power along with his other powers including his being the face of the government to bargain for his preferred solution or try to get traction for a view that he approves of. Furthermore when executive orders, signing statements, impoundment, and the president's control over the administration come in to play congress typically makes some effort to accommodate the wishes of the president. The president's interests diverge from those of congress when it comes to the issue of delegation. The president also has different motivating factors and is concerned about issues beyond just re-election, particularly if the president is in his they are in their second term and thus cannot run again due to the limit on presidential terms that is

⁷³ 448 U.S. 607 (1980)

imposed by the 22nd Constitutional Amendment. Thus with different motivations and payoffs the president will have a different set of preferences with regard to delegation which he will try to impose on the process by using the tolls in his power. A president may want the additional power and authority granted to the administration through delegation to an executive agency, however there is the potential for an unpopular law being created by one of these agencies and the president, fairly or not, taking blame for it. Thus the president too will be concerned with mitigating these risks. A clear example of this was President George H. W. Bush who prohibited executive agencies from creating new laws during the 90-day period preceding the 1992 elections.

While both Congress and the President have some general preferences on the topic of delegation, much is determined by the situation and by examining in what issues they tend to delegate and which they don't one can learn more about this tendency. For instance, the minimal amount of tax authority that has been delegated hints that congress likes to control the ability to create the laws that govern taxes as these enable members of congress to add tax breaks for powerful constituents that may prove grateful and reciprocate in some manner that will help in a congressional reelection. Likewise the structure and manner of the delegation can vary terrifically and with competing interests, differing groups will prefer differing methods and structures of delegation. By structures of delegation this paper refers to the constraints used and the parties to whom power is delegated and how it is overseen as well as how much power is delegated and for what purposes.

Along with the differing views of delegation held by those in the legislative branch and those in the executive, there is also a disparity of views between the political parties. The parties have differing views of key issues such as the role of government and its proper size. These have been rather consistent though the years and this too will likely affect the act of delegation. Republicans have typically been more disposed towards smaller government and fewer regulations than have the Democrats. This may make the Republicans less likely to create new agencies to deal with policy issues.

Some have viewed delegation as an action in which the main questions of policy that rely on judgments regarding broad policy decisions, morals, or the goals of the government are being done by congress while the power delegated are to specialized experts or technocrats that act on these broad policy guidance with targeted actions that enact these

main goals. However, in practice this does not appear to be the case. Laws that rely on delegation are not self-implementing but rather require significant discretion of agencies to make determinations to the best course of actions and not merely determinations of facts.

Delegation can be set forth with goals that give guidance on how to balance priorities such as when the Federal Reserve Board was given responsibility to, “promote effectively the goals of maximum employment and stable prices”.⁷⁴ Congress could have given the Federal Reserve a single focus such as keeping inflation in check, but it chose to set forth two contrasting goals that the Fed could then balance against each other. Often though, a specific end goal is given to an agency which is in some cases not achievable with the power and resources assigned to the agency. This can lead to members of congress implying to their constituents that there is an effective method of dealing with an issue that is not being properly dealt with and allows the agency to take the blame for not meeting goals that were set forth for them. This has the effect of breaking the link between cause and effect in people’s minds so that they lose sight of the tradeoffs in legislation and believe there are quick fixes to be had just by assigning the problem to some agency. Meanwhile lawmakers gain by casting blame as this appears to the public as the lawmakers championing the people against the bureaucracy and combatting government waste and inefficiency. This can lead to a deception of voters that makes making tough decisions and facing the nation’s problems even more of a challenge. This can also lead to self-deception where lawmakers underestimate the costs of dealing with a problem and do not take into account the aspects of laws that they do not see. Schoenbrod suggests that this helped exacerbate the Savings and Loan Crisis.⁷⁵

Delegation can have contrasting effects on the public’s view of government. It can both increase and decrease the public’s perception of the effectiveness and responsiveness of government. While perception is not paramount and can differ widely from the actual facts, it is an important criterion in determining the validity of government. Peoples’ views of the democratically elected congress reflect their sense of the government.

An increase in the number of laws can lead to a so called “nanny state” and one in which government oversteps what it does well and impinges on other areas. Government can be viewed as providing benefit by providing public goods and keeping individuals from

⁷⁴ Federal Reserve Act. Pub.L. 63-43. Section 2A.

⁷⁵ Schoenbrod. 128.

hurting each other. Other areas are perhaps not handled well by government and often can consist of congress doling out rewards to politically connected individuals from those with less power. This becomes rent seeking behavior and often includes transfers that are inefficient or which would generally be considered to be not fair.

The negotiations take place within a certain political framework and respond to the structure of power between various political players. The structure of the House's rules is an important factor in that it gives the majority party in the House additional capability to control the body and changes the capabilities and policy preferences of the House as a whole. The party in power changes these rules to meet their short-term interests rather than long-term partisan interest or the needs of the house.⁷⁶ Besides rules, the majority party has control over areas such as committee assignments and discharge petitions and these too alter the political playing field in which negotiations take place.

Divided government, such as was the case in these during the crisis, leads to lower discretion for both the executive and congressional branch. Delegation from the legislative branch under divided government leads to the delegation to actors that are farther from executive power and are freer and with greater discretion.⁷⁷

Delegating power to those more distance from executive power allows the power to be wielded to a greater extent by the bureaucracy. The goals of senior members at the agency differ from those of members of congress. They are happier with the status quo in terms of culture and political continuity whereas congress wants to ensure responsiveness and control, which would help them get votes. The heads of the agencies have their own agenda that can be to increase or safeguard the power of their fiefdom and thus can come into conflict with career bureaucrats at agencies as well as with congress. Agency heads also have a much different time horizon than career employees since political appointees are not around for very long and have goals they want to accomplish in a short time.

Agents for their part may want to gain more power to better accomplish their own goals. There are a number of methods by which an agent may accomplish this. Agents can

⁷⁶ Binder, Sarah. "The Partisan Basis of Procedural Choice: Allocating Parliamentary Rights in the House, 1789-1990." *American Political Science Review*. Vol. 90, No. 1 (Mar., 1996), pp. 8-20.

⁷⁷ Epstein, David and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge University Press. 1999.

seek to hide both their intentions and their actions from members of congress, the president, and others that seek to control them. This can improve the agent's freedom of action. In addition, those agents that are supposed to work independently can form a cartel with other executive agencies and the president which can help each other and keep power away from congress so that they are able to have freedom of action.

Many researchers have claimed that over the last 100 years there has been by in large an increase in the power of the president. While there may be periods of reversion such as when congress asserted its powers in the 1970s and attempted to place checks on presidential unilateralism, these individuals would argue that, "taken by and large, the history of the Presidency is a history of aggrandizement."⁷⁸ Or in Thomas Cronin's more recent assessment, "for almost 150 years the executive power of the presidency has steadily expanded".⁷⁹

The tendency to delegate is related to a convergence of interests and beliefs on the part of the delegator of the power and the person or body who is delegated to. Ogul found that, "A congressman of the president's political party is less likely to be concerned with oversight than a member of the opposition party."⁸⁰ This is not to say that delegation removes congress from having any role in policy creation, but it tends to relegate congress to the role of periodic overseer, which gives congress less power and is an area in which congress can struggle to make a mark.

Governments typically deal with crises in two phases. One deals with the immediate issue and tries to put a Band-Aid on the situation and try to staunch the bleeding. It works to stop the crisis from getting worse and tries to begin to improve the situation. The second phase tries to take steps to stop a similar crisis from happening in the future and solving any systematic weaknesses and giving the government the ability to deal with similar crises in the future. These two phases are not necessarily sequential in time. There is often a later phase that tries to undo the temporary extreme actions that were taken to deal with the crisis. Crisis, though they may be seen far off, are typically acute in that problems build fast

⁷⁸ Corwin, Edward S. *The President, Office and Powers, 1787-1957*. New York University Press. 1957. 238.

⁷⁹ Cronin, Thomas. *Inventing the American Presidency*. Lawrence, KS: University of Kansas Press. 1989. 204.

⁸⁰ Ogul, Morris S. *Congress Oversees the Bureaucracy*. University of Pittsburgh Press. 1976. 19-22.

and thus the crisis must be dealt with quickly and often with little planning in place already on how best to approach the problem.

Crises necessitate an increase in the amount of action needed in order to deal with the crisis as well as an increase in operational tempo and speed at which public policy must be created and government actions must be taken in order to deal with the crisis. The very nature of a crisis and its effects, which are out of the normal stream of events, open up the government to take extraordinary actions in response to rare and major events. The government thus increases the scope and breadth of actions that it takes and will take steps that it would not take in less dire circumstances. This readiness of the government to increase the uses of policy and the areas in which it pertains are conjoined with a willingness and even an eagerness of the populace at large to increase the intensity and scope of its actions. People typically clamor for more government intervention and action in the midst of the crisis and see the government as the body responsible to resolve the crisis whereas at other times, the populace may look more to private citizens, nonprofits, and the market to address issues of everyday concern. Individuals are also more understanding of actions which impinge on their individual rights or which adversely affect them during a crisis. They will give the government additional authorities, as people are willing to make short-term sacrifices for long-term stability. There is a rally round the flag effect in many crises that can silence the voice of dissent and allow for easier policy creation.⁸¹ There is also more incentive for those in the government to take action as it is expected of them and they will be electorally rewarded for taking action and appearing to be actively engaged in addressing the crisis.

Delegation can be an effective method of dealing with crises, but can also have some adverse or unintended effects. One of these effects is that agencies created to deal with a crisis or concern may continue past the point where they are needed and become encrusted as part of the bureaucracy. Alternatively the actions of the agent may overshoot the target and be excessively reactionary so that it ends up being poor long term policy and may even lead to other further crises. The exigencies of the day may not have much in common with

⁸¹ James, Patrick and John R. Oneal. "The Influence of Domestic and International Politics on the President's Use of Force." *Journal of Conflict Resolution*. June 1991 vol. 35 no. 2, pp 307-332.

the sustained needs of the nation. This risk is increased due to the fact that delegation allows for more vigorous governmental action.

To allow delegation to provide benefits while decreasing the potential negative effects of broad delegation, congress must structure the delegation intelligently and make sure to use constraints such as sunset provisions or limitations on power to best ensure a desired result. The form and manner of the delegation can tell us a great deal about congress' goals and implicit assumptions. Likewise the political process that is used to produce the delegation can also let us know how the delegation is viewed and whether it meets political ends, ideological ends, or is designed to improve the state of the nation and its ability to meet the crisis. The political process thus also enables us to test theories of delegation such as the abdication hypothesis, which states that the primary reason to delegate is to help individual members of congress achieve their goals, of which by far the most important for members of congress is reelection.

Economic crises have a particular dynamic that other crises such as political crises may not. Citizens may view the administration as responsible for economic problems and as such the opposition party may not find it in their political interest to help take actions to stimulate the economy or help the short-term economic picture, particularly if an election is approaching. The opposition would tend to justify their inaction and opposition for other reasons such as ideological reasons or by questioning the efficacy of the proposed action. An example of this is the Republican push for actions that they argued were necessary for long term fiscal responsibility, but which would pose a risk to the short term economic turnaround. The party in control of the White House by comparison would benefit from short-term moves that would improve the economy in the short term despite their long-term costs. They the president and to a lesser extent the administration will lobby for these short-term goals.

Economic crises do not completely stop other policy issues coming up, but the mere fact of there being a crisis can largely set the agenda. Nobody wants to be seen as sidetracking a potential solution or not responding to the needs of the nation and thus the space for policy creation in other areas is small. It never fully vanishes though as the nation always has multiple competing priorities even when faced with massive crises. During the

Great Depression, items such as the Indian Reorganization Act and the 21st Constitutional Amendment repealing prohibition were passed despite the fact that they were not directly related to the economic crisis affecting the nation. Likewise, during the 2007 financial crisis other priorities such as dealing with terrorism competed with the economy for space on the legislative and executive agendas. Delegation can help the government address many priorities simultaneously.

The agent that congress chooses to implement its plans points to congress' intentions and its goals. The amount of freedom of action granted to an agent is symptomatic of whether congress feels comfortable with the agent and how they want to balance the tradeoff between control of the agent and the ability of the agent to enact quick, efficient change in a manner that can best handle specifics and changing situations.

Crises change the actions of political actors. The decisions made during crises are more critical and time sensitive. They are also typically higher profile and have more of a spotlight and a different mix of constituents concerned with the actions of lawmakers. Rather than the typical political environment when those who follow the actions of congress are a select few political enthusiast and those such as lobbyists and pressure groups intimately intertwined in the political process, crises often raise the awareness of the issue in large swaths of the populace. This leads to additional pressure on members of congress to be seen acting on the issue. This can lead to law makers needing to be seen taking some action and often lead to the political need to embrace populism rather than rational decision making or embracing elite opinions and with the shortened timeframe it limits rational decision making as all the information. It also muddies calculations of political expediency, as new stakeholder's opinions need to be taken into account. These new pressures on decision-making can lead to delegation being a good option to ensure sensible policy making under these conditions that are not necessarily conducive to good public policy.

Delegation can help in this regard by allowing members of congress and the president to publicly speak and support populist points of view and pass laws that seem to enact the popular measures quickly during the crisis, but to craft the form of the bill to allow checks to be put into place to ensure that the proper amount of information is collected before action is made, and that the decision is made by those with expertise in the areas, to

ensure that rash, short term measures are not taken that will cause other problems or lead to poor long term effects. Often delegations are designed to look a certain way that is politically useful while being designed to give minimal real power. Procedural methods taken by the congress and the president to further weaken these acts often secretly. Examples such as the Clean Air Act allowed politicians to take a position that would help them politically while not requiring them to actually to take the actions they espouse and often to forestall these by their pretense of action.⁸² As stated, there is even more cause for politicians to do so during a crisis.

A fiscal crisis is distinct from other crises in so far as there are unique pressures at play and the views of individuals are quite strong and polarized on financial issues as their lives are typically quite impacted by the government's fiscal decisions and the economic state of the country. Furthermore there are significant differences of beliefs on what are appropriate goals for the country with regard to financial policy. Republicans and Democrats have different party planks and different populations from which they get their support. They thus have different political aims with regard to finances and this means that though they both will work together to avert and mitigate financial crises, the preferred manner and method of actions as well as the end state they endeavor to achieve. This can make coming up with policy to avert the crises a two player Battle of the Sexes game in which both sides want action taken to minimize the crisis and thus have reason to work together but also have opposing pay offs that lead them to bargain hard for their own goals. While this is true in other crises, those such as wars can lead to less division between the factions in congress and more agreement on how to handle the crisis.

Another factor affecting economic policy making is that the common citizen does not have a strong grasp of economic theory or competing school of economic thought. The actions taken by the government thus can often not be judged on their merits, but opinions are largely formed based on the postures taken by politicians and the cases that they make to the public through the media and other methods. This makes calculations of the political benefit of potential congressional action more difficult for lawmakers to judge and increases the risk involved with being seen either pushing for an action or forestalling action. In

⁸² Schoenbrod.

addition, their actions will likely be viewed in two time frames: the current and the future. In the moment, congress might need to be seen taking decisive action, however they want to insure that it will not be a political liability later in their career and they realize that often individuals will judge actions very differently when under the stress and immediacy of crisis than they will once the crisis is abated and can be judged calmly and rationally. In addition, often the steps taken by congress can forestall a crisis if taken early enough and this can lead to the problem of the full brunt of the crisis never coming to being. In these cases the fast, efficient, and prescient congress can be thought less well of since the crisis was not apparent to all and thus there are timing issues related to dealing with a crisis. An example of this was the Troubled Asset Relief Program, which was viewed by many economists at the time as being critical to forestall what could be a catastrophic collapse of the entire financial system. Congress took extraordinary steps to address this risk and by many accounts staved off a far more dire and protracted situation, but by doing so the need for this and other stimulus measure was not seen by voters who instead focused on the unpopular provisions in these congressional actions such as the apparent bailout of rich bankers and privileged others in the financial industry. Furthermore these actions, which were unpopular even when they were first being made, appeared to imply that congress was helping politically connected individuals at the expense of the so called everyman and that profits unfairly accrued to the individuals while losses were borne by society as a whole

There are a few common repeating patterns for economic crises. These often contain common characteristics such as a weakening of confidence in the economic system, a decrease in the consumer sentiment, and inefficiently utilized resources. They also fall into a few common categories such as periods of high unemployment or recessions. However, there is a great deal of difference between each crisis and the causes, responses, and effects of the crisis. Since the Great Depression since, when delegation really began to be commonly used as a policy making tool, there have been a series of economic crises that have precipitated actions by congress and its agents to deal with the crises and take actions they believe will strengthen the nation. Along with the Great Depression and the severe recession of the 1930s that followed it, examples of crises include the so called Nixon Shock, the severe inflation during the 1970s, the recession between 1973-1975, the Savings and loan crisis, Social Security depletion, and the financial crisis beginning in 2007.

These crises can be caused by previous actions of congress and can be exacerbated by congressional inaction or poorly thought out responses. This is one of the reasons that investigating delegation is such an important area. If short sighted action of congress lead to long term problems and sows the seeds of future crises this might be one argument for delegation to an agency or an independent body as these would be better able to adjust course over time, give it the appropriate lasting focus and attention, would have a longer period in view, and less pressure to act quickly even if the proper course of action is not clear and the actions that are being called for are not beneficial. Delegation can also be useful because it allows congress to deflect certain calls for immediate action and allows congress to come to a decision when factions within congress can agree on a general goal, but not on the specifics or how to proceed. This can help solve politically intractable situations.

There are a limited number of viable political possibilities that can be achieved with the political factions in play. Within those that are achievable, actors will try to achieve a result that is most congruent with their goals or the goals that can be achieved by working along with others in a party or other grouping. The president is a powerful component in the system and in a crisis he often uses his role and speaks to the public in order to initiate proposals. In these moments, people are more likely to look to the president than to congress or to their members of congress. The president is able to use this power along with his control over the bureaucracy to set the agenda. This can consist of working to shift popular opinion and prepare the way for certain desired political actions, bringing prewritten proposals to congress and having allied congress members submit it, or making proposals with certain provisions and thereby trying to convince or maneuver congress into doing as the president proposes. He also has first-mover advantage in so far as the cabinet and agencies that the president controls can quickly take steps to address issues as they arrive whereas congressional processes can take a considerable amount of time as a bill has to pass both houses, go through committee, have both houses pass the reconciled version and have the president sign it and this can even be slowed down if the president vetoes a bill or if congress is not in session.

As part of the law making process the two houses have to pass identical versions of the bill. This ensures that the two houses have to agree on what steps to take. This can

lead to bargaining between the two houses as there are differences between the average voter in the House of Representatives and in the Senate due in large part to the differences between the structures of the two houses, such as the size, the area represented, the length of the votes. The Senate for is typically viewed as being more civil and centrists compared to the more partisan House. The typically explanation for this trait is that because the Senate is smaller and has larger districts it avoids excessive partisanship due to gerrymandering and people's self-selection of where to live based on factors related to world view or politics. The houses also may be under control of different parties or factions with vastly different goals. This can lead to a stalemate where the houses have trouble passing legislation though both would prefer some law is passed to deal with the crisis.

Congress will try to select an agency with an area of expertise and general authority over the area on question. This limits the number of choices that congress can use for the delegation, however there is often a bit of overlap between agencies as well as offices and departments. Congress, however, has multiple choices of who to delegate to. In addition, congress always has the prerogative of making a new agency, office, or bureau. This option can be used to further isolate the agency from outside interference and help ensure its independence. It can also be used to focus the organization. If an office is created inside an existing agency or the new task is given to an existing entity this can lead to them having contrasting goals. If congress wants emphasis placed on an issue it will set the agency that oversees the issue area apart so that it would remain a priority over time. The separation of these goals from other larger goals of a bigger organization is important for the issue or goal to remain relevant and to continue to be given priority put on over time. Common group dynamics theories such as Tuckman's Group Development Model discuss the amount of time before a group such as a board work well together.⁸³ They suggest that it takes a while for a board to be prepared to address an issue and thus that creating a new agency is a good method for addressing issues that are not pressing and can be handled in the future while immediate whereas near-term solutions are best handled by agencies already in place.

Delegations to the president are also very common. These can take the form of explicit delegations in which congress passes a bill that vests responsibility for a decision

⁸³ Tuckman, Bruce W. and Mary C. Jensen. "Stages of Small-Group Development Revisited" *Group Organization Management*. Vol. 2, No. 4. December 1977.

with the president. Alternatively there can be an implicit delegation in which congress allows the president to make a decision and handle a situation which congress has formal authority over.

Congress has tried to change the framework on multiple occasions, meeting with mixed success. In the 1970s congress passed a number of constraints trying to limit the power of the president. An example is the Case-Zablocki Act, which was passed in 1972, and aimed at limiting the power of the president use of his ability to agree to executive agreements. The act required that all executive agreements must be submitted to the Senate. This would allow congress to take appropriate action with regard to executive agreements if they did not feel these agreements were beneficial, but in practice congress does not follow up on these and the president has pretty much free reign over such agreements. In addition the executive agreements, which this law requires are submitted to the Senate Foreign Relations Committee within sixty days of being executed, are quite often slow to be submitted to the senate. In practice only half of all executive agreements were submitted to the Senate at all.⁸⁴

Similarly the War Powers Act, which was passed in 1973, was a reaction to the power of the president to effectively enter or exit a war and commit American troops without congressional involvement. However, once again presidents have not felt constrained by this act and have largely continue to assert the right to unilateral action due to national need and due to the president's role as Commander-In-Chief. Presidents seem to have sought congress' blessings for actions when they knew they would receive it, but were prepared to work without congress otherwise, much as the U.S. will use the United Nations to add validity to its actions, but does not feel itself constrained to inaction if it is unable to convince the United Nations to take action.

Likewise, the 1974 Budget and Impoundment Control Act, sought to block the impoundments that Nixon had done to shape policy and undercut congressional actions. It had some success in this core goal, but presidents have continued to have significant

⁸⁴Caruson, Kiki. "International Agreement-Making and the Executive-Legislative Relationship." Presidency Research Group Report 25 (fall 2002). 23.

discretion in this arena and often use tools such as rescissions to much the same purpose.⁸⁵ Thus the actual constraints on presidential power were only slight.

Another law passed by the congress during this period was the National Emergencies Act⁸⁶ that was passed in 1976. It was designed to stop the president from abusing the presidential power to declare a state of national emergency and thereby granting himself/herself and the executive branch extraordinary powers such as the right to suspend habeas corpus. The act sought to give congress a voice in the process, to define what constitutes a national emergency, and to preclude the president from calling an extended state of emergency when this action was not actually needed. The law placed some limits on the president's ability to issue emergencies, but once again in practice the president has considerable leeway in this area and has had few actual limitations on his power. The most obvious indication of this being the fact that from September 14th 2001 through the time of this writing in 2014 there has existed a state of emergency. During this period that has lasted more than a decade, the president has held and exercised significantly increased powers over what would be available to the president if a state of emergency does not exist.

2. Policy Can Be Created At Many Levels

2.1 Direct Congressional Action

While there is more variety of action and procedural options open to the president and the bureaucracy than there had been previously, much policy is still enacted through the traditional means of congress passing a bill and it becoming a law. However, even with direct congressional action there is variety as a bill can take various routes on its way to becoming a law. The process a bill goes through to become a law affects the content of the resulting law. For instance if a bill goes through multiple committees in the House of Representatives, it will potentially be different than if the policy only went through one or than if it had been if it was not sent to a committee. These changes are not solely due to

⁸⁵ Shull, Steven A. 2006.

⁸⁶ Pub.L. 94-412

the preferences and suggestions that the committee has, but due to factors such as changes in the coalitions that will be required to pass the law. During a crisis, direct congressional action becomes less ideal for dealing with the immediate consequences of the crisis, but because of congress' unique ability to issue public laws it continues to play a part even if it works more closely with the executive branch to determine necessary policy changes. It also plays a big role in dealing with less immediate consequences to crises and making sure that laws are in place to avoid or deal with similar crises in the future.

The main pieces of legislation during this period dealing with this crisis were the Economic Stimulus Act of 2008, Housing & Economic Recovery Act of 2008, Emergency Economic Stabilization Act of 2008, American Recovery & Reinvestment Act of 2009, Helping Families Save Their Homes Act of 2009, Fraud Enforcement and Recovery Act of 2009, Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Budget Control Act of 2011. While these seem like sizable legislative accomplishments, many of these acts did little to set policy and mostly delegated policy creation and in instances where policy was set it was largely just to be seen to be doing something.

2.1.1 Drafting of Bills

Public support can lead to acceptance of a policy. Occasionally a call for a policy can come from the grassroots and then it is often promoted by an interest group and championed and submitted by sympathetic members of congress. In a crisis there will often be calls for populist actions. The time is often too short and the pain too acute for a deep investigation of causes and effects so the electorate exerts pressure for short-term solutions. Likewise the electorate is easier to lead as they are looking for a course of action that will ameliorate the situation and if a politician puts forth a proposal that they say will improve the situation, the public will more readily go along with his proposal.

Bills can be drafted by the Executive Office of the President, by congress, by agencies or others. The entity initially creating the bill has considerable ability to shape the bill and decide what options will be available to policy makers or discussed in the public discourse. This power is greater if the entity has the potential to go public and frame the policy,

increase the salience of the issue, or to gain acceptance from the public. In a crisis the period for public discourse is shortened and so the first proposal that gains the public's attention has a major leg up in getting passed. This usually will give the president an advantage and thus increase his ability to implement changes as he sees fit.

The Speaker of the House and other congressional power brokers make decisions as to how the bill becomes a law. Issues such as which house of congress the bill starts in, when in the session the bill goes to the floor, the rules that the bill is evaluated under, and which committees review the bill affect the likelihood the bills will pass, what actions will be taken by political actors, the provisions of the bill, and the blame or credit for its passage.

There are many options that political actors can use to meet their goals. Parties are one such tool that can be used for achieving political goals or societal ends. These are used because they are an easier and more effective tool to wield than other tools and because there is a long precedent of their use. The party can be a brand that a politician can use.

2.1.2 Reasons for Direct Congressional Action

Direct congressional action is perhaps still the default, status quo option available to members of congress. It gives members of congress the most control over policy and thus lets them enact their policy preferences. This can also include pork barrel politics in which the bill can be crafted in such a way as to provide benefits for key constituencies. This can increase the popularity and likelihood of election of members of congress that get the bill passed. Passing legislation also allows for credit claiming by members of congress so that they can turn popular actions into electoral goodwill.

For members of congress, the main alternative to direct congressional action that is available to them is delegation, which typically includes delegating to either the president or to executive agencies that the president is nominally in charge of. When the president and congress are of different parties this means ceding significant power to the president or an agent that he largely can control. While congress can design the delegation so that congress continues to have power over an agency, the president by virtue of his position and

resources that he can call to bear can readily compete with congress to control agencies that are given power. When power is directly delegated to the president, congress has even less control over the delegated power. In a crisis congress delegates more power, but they will tend to structure the delegation in ways that meet the political needs of congress.

Congress is often lobbied by other political actors to pass laws. This is particularly true in a crisis or when the president is trying to get a major initiative enacted. The president can use tactics such as going public to convince lawmakers that it makes sense to support a bill. The president frames an argument and makes a public case to the nation in hopes that their acceptance of the idea will convince the law makers to see the change is supported by their constituents and it is in the best interests of the law makers to go along with the president's proposed legislative agenda or public policy preferences. During a crisis when changes in policy can be more extreme there is more at stake and thus more reason for political actors to lobby for their position.

2.1.3 Types of Congressional Action

Congress' main method of creating public policy is by passing a bill that gets enacted and becomes a law. This method of policy creation makes the policy decisions of congress legally binding and this accounts for most of the official actions of congress, however it is not the only option available to congress and in some situations may not be the best. Bills may be private bills or public bills, the former of which affects a specified individual or entity while the latter is broadly applicable and create generalizable public policy.

Besides bills, congress has the option of issuing joint resolutions, concurrent resolutions, and simple resolutions as well as taking other actions such as holding conferences, ratifying treaties, or going public. Of the three types of resolutions listed above, the most powerful policy creation tool is the joint resolution, which unlike the other two types of resolutions is able to create legally binding public law that has as much force as the passage of a bill. In their form and in their process of implementation, joint resolutions are almost identical to bills. Both houses of congress must pass them, though not

necessarily at the same time, and generally both require the president's signature or a 2/3rds majority of a presidential veto.

Congress also has the option of taking no action and allowing another governmental body to take action and relegating the decision to later congresses or to another body effectively delegating the decision. Taking no action is effectively a policy decision. This is true both during crisis and at other times, but during crises there is an even greater inclination for congress to allow the president or an agency head to see policy.

2.2 Delegation

Contrary to the view that the American public has long had of U.S. Congresspersons as being power hungry individuals that always try to gain more power and authority, since the 1930s, the U.S. congress has consistently delegated much of their lawmaking power to others. This phenomenon is still in accordance with the belief that legislators will refuse to cede power to delegate unless convinced that the benefits outweigh adverse agency action.⁸⁷

The framers of the constitution believed that the branches would jealously guard their powers and would actively strive for self-aggrandizement. As James Madison said in the Federalist Papers, "Ambition must be made to counteract ambition."⁸⁸ He felt that the natural desire of those in power to try to increase their power was the best check on governmental abuse, stronger even than trusting to the morals of leaders and stating, "This policy of supplying, by opposite and rival interests, the defect of better motives".⁸⁹ The founders thus would be surprised by the tendency that congress has displayed to voluntarily transfer their power to another branch of government.

The ubiquity of delegation today contrasts sharply with the use of delegation in earlier eras. Prior to the 1930s there was very little delegation by the congress. When the Constitutional Convention adopted the U.S. Constitution in 1787, it separated the United

⁸⁷ Fiorina 1982; Hill and Williams 1993

⁸⁸ The Federalist Papers : No. 51

⁸⁹ The Federalist Papers : No. 51

States government into three branches: the executive, the legislative, and the judicial. Further it clearly enumerated and delineated the powers assigned to each of these branches as well as those reserved for the states. In article 1 section 8 of the constitution, the powers of congress are listed and in article 1 section 9, the constitution lists the limits of congress' power. While over time there were some shifts in which branch exercised certain powers, there was almost no delegation of authority from one branch to another. What is more, such delegation was generally believed to be unconstitutional as any such delegation would contradict the powers as laid out in the Enumerated Powers clause of the constitution. This apparent contradiction when coupled with the reverence that Americans held for their constitution limited the attempts to delegate power.

Congress has delegated its power to a number of different entities. Among those that are delegated to are the president, agencies in the executive branch, ad hoc commissions, states and local jurisdictions, as well as delegation internally to congressional committees. Most common of these is the delegation to the executive branch. In addition, congress often willingly ties its own hands and limits its power using methods such as indexing to remove unfavorable decisions that it does not wish to be on record as having made such as voting to increase their own salary. This is similar to delegation as it removes a decision from future congresses.

While it may seem to some almost natural that as the nation grew and became more complex that congress would transfer its authority in many areas to the bureaucracy and that the bureaucracy would perform many of the administrative functions that it now performs, this course of events was not inevitable. Many of the functions currently performed by various executive agencies such as United States Department of Health and Human Services, Department of Labor, and the Department of the Interior had previously been performed by congress. An example of this is that in Section 8 of Article I of the U.S. Constitution, where the specific powers of Congress are enumerated. Among these is that congress is given the power and authority to fix the Standard of Weights and Measures. Congress initially performed this role, but later delegated this power to the National Institute of Standards and Technology, an executive agency under the U.S. Department of Commerce, who currently perform this function. Likewise, the congress had numerous military, fiscal, and trade-related powers that are now routinely performed by the executive

branch. Congress still maintains the capabilities to perform many of these roles, but has voluntarily given up direct responsibility for them.

Bureaucracy can be a good thing and an efficient way to administer and govern. Max Weber sets out an ideal bureaucracy in which there are formalized, systematic rules that impersonally implied by professional public servants who perform a function and feel that it is the most efficient form of government. He argues that having this professional class of administrators that have spent their careers working in a field enables better decisions and leads to an efficient government. Of course this focus on efficiency is not the only goal of government, it also has a responsibility to ensure that its ends are just. There is a difference in efficiently achieving a goal and whether that goal is moral or not. In the U.S. system, congress first and foremost wants bureaucrats to do what is laid out in laws and to essentially do as they are told to do while politicians have a responsibility to decide the moral decisions, determine tradeoffs, and decide on the major policy. This viewing of bureaucracy keeps the role of congress as central to the proper functioning of government. To make an analogy to steering a boat, congress feels that it should act as a navigator setting a course while the bureaucracy should act as helmsman and make the maneuvers and small course corrections required to follow the course or destination that was laid out.

This paper will largely ignore the moral issues related to the content of the policy as well as effectiveness issues except where these relate to the scope or means of policy creation. This paper investigates the provisions of specific laws passed and policies created only in so far as these are affected by the manner that the policy is created or as they vary due to the environmental factor of a crisis being present. This paper tries to trace the cause of policy, but it is difficult to fully attribute results and responsibilities to individuals or even to bodies because of the complex political process has too many variables and there is always information that is not available or too subjective to analyze.

Delegation is often efficient and useful at least for lawmakers and thus has become increasingly common. Today it is a practical reality despite the apparent constitutional prohibitions against its use. Garry Lawson states it well when he says, "No one seriously doubts the outcome of a showdown, in any authoritative forum, between the Constitution

and the modern state. Quite simply, the nation has chosen administrative governance over a Constitution that was designed precisely to prevent any such outcome.”⁹⁰

While significant power is delegated to the executive branch this does not mean that the president, the head of the executive branch is able to wield this power. Statistical analysis has found that executive branch preferences vary from the presidents’. Furthermore the agency that receives power will often seek to keep this power for itself and for their own needs. As Lowi states, “parceling out policymaking power to the most interested parties tends strongly to destroy political responsibility. A program split off with a special imperium to govern itself is not merely an administrative unit; it is a structure of power with impressive capacities to resist central political control.”⁹¹

While there may be those that view the source of rules and regulations as unimportant and a mundane issue with little effect on the nation, the source of these rules and how they are made has significant effects on the content of the rules. Different policy outcomes are likely to be achieved through delegation than would be if congress decided the issues. These rules and regulations routinely affect the lives of those that live and work in the United States and frequently even those abroad. In addition, the root of the legitimacy of the government that is in place is wrapped up in the method of determining policy as well. As John Adams said, “As a good government is an empire of laws, the first question is, how shall the laws be made?”⁹²

While congress has long established agencies that perform specific functions, there is a vast scope of difference between an agency performing a function prescribed for it by congress and one on its own initiative creating far reaching public policy and law. Examples of the former of these are the United States Postal Service delivering mail or the Internal Revenue Service collecting taxes. While they do have some discretion such as on what mode of transportation to use to best deliver the mail, they do not have the ability to impinge on personal liberties or change the central policies of the nation. Many of agencies

⁹⁰ Lawson, Gary. “Delegation and the Constitution” *Regulation Magazine*. Cato Institute. Vol. 22, No. 2. Summer 1999.

⁹¹ Lowi. 59.

⁹² Adams, John. “To Hon. John Penn 1776”. 1776.

and departments have significant discretion that allowed them to play a big part during the recent financial crisis and during other past crises.

While much of the literature investigating political delegation focuses largely on the motivation of those who are delegating power, those that are delegated to often benefit from the power that is delegated to them. It gives them greater authority and importance which are much sought after in political circles. The president in particular is often viewed as seeking additional powers as this can allow him to accomplish more. Senator Byrd expressed this view thusly, “For decades, Presidential Administrations have sought to wrap their fingers around the purse strings, push away the Congress, and ignore the Constitution. It does not matter which Administration. It does not matter the political party of the President. What matters is nothing more than raw power. Congress has it. The Executive Branch wants it -- and will use any excuse to get it.”⁹³

Power can be explicitly delegated to the president or claimed by the president in what is essentially an implicit delegation. Considerable deference is generally given by congress to the president and this is even more the case during a crisis. Thus the actions that the president takes are generally not overturned by congress. The judiciary likewise rarely overturns the president or the bureaucracy’s actions.

Often the shaping of policy consists of multiple actions by multiple political actors. An example of this is that executive branch action can also serve to blaze a trail by using executive orders to lead the way for future congressional action. Shull gives an example of this with Executive Orders such as #11063 serving as a precursor to the Fair Housing Act of 1963.⁹⁴ Kerwin states that the bureaucracy also often takes action and makes policy choices that are then followed up by an executive order issued by the president.⁹⁵

The formation of policy becomes more complex in that it is not conducted in a vacuum, but is dependent on the prevailing political environment and these actors will thus seek to change the political environment for their own ends. For instance, the framing of a

⁹³ Byrd, Senator Robert. U.S. Congress Senate. Protecting the Constitutional Authorities of Congress, 108th Congress, 1st Session, 149 Cong Rec S5397, April 11 2003.

⁹⁴ Schull. 10.

⁹⁵ Kerwin, Cornelius. Rulemaking: How Government Agencies Write Law and Make Policy. Washington, DC. CQ Press, 2003.

political issue has significant effect on the policy that is adopted and the president often is the one that has the most power over the framing of an argument and the shaping of a response. This is especially true in a crisis where the public looks to the president to set national policy and take action. Crises also make the public pay more attention to the issue and thus make it easier for the president to shape opinion. The president also has a wider array of policy options available to him at such times, because the public feels that extraordinary measures may need to be taken to deal with the extraordinary circumstances threatening the nation. The president is accorded far more media coverage than any other political actor and if he wishes to focus that attention on an issue or a proposal of his it enables him to shift many opinions often before they hear the opposing side on the issue and have started to make opinions. This ability is even greater in light of diminishing public trust in members of congress since it is tougher for an opposing political actor to lay out an alternative that has broad national support.

There are other factors though such as structural factors which affect the amount of delegation between the branches and the use of constraints. Among these is the change in power of committee chairmen. Norman Ornstein states that, "Any description of congressional change in the 1970s begins with decentralization."⁹⁶ This decentralization leads to individual law makers having more ability to take actions to represent their individual preferences and thus their votes should better reflect their views on delegation. Among other changes the power and autonomy of the subcommittees and their chairpersons greatly increased in the 1970s. This increased the number of political actors with control over legislation and helped lead to increase in oversight committees and oversight in general. This function being in place greatly affects the willingness of congress to delegate power. Thus the 1970s ushered in a period in which there was a new normal with regard to delegation.

Most delegation performed by congress comes in the form of bills that have delegation provisions that pass both chambers of congress and become law. There are a wide variety of areas in which congress chooses to use delegation and there are few if any areas still untouched by the trend towards delegation that emerged in the last 75 years.

⁹⁶ Ornstein, Norman J. "The House and the Senate in a New Congress," in Thomas E. Mann and Norman J. Ornstein, eds., *The New Congress*. 378.

There are, however, some general trends in where delegation is more commonly found. Amongst these is legislation in certain complex issue areas such as science and technology. Delegation has become a commonplace method used by congress to address an issue. Congress delegates its legislative powers most typically to the executive branch. This can take the form of giving authority to the president or to an executive agency. More often than not the power ends up in the hands of the bureaucracy, which has some checks on its authority from congress and the president. The laws often give the authority to act and effectively legislate or regulate, but include constraints upon the actions of the agencies.

Delegation can allow for congress to deal with short-term crises through delegation. Congress is a deliberative body, but often its structure tends to make it slow to adapt to change and during a crisis this can be a liability.

2.2.1 History of Delegation

Delegation has increased over the years as has the federal government. In 1835, Alexis de Tocqueville wrote, “The nation participates in the making of its laws by the choice of its legislators, and in the execution of them by the choice of the agents of the executive government; it may almost be said to govern itself, so feeble and so restricted is the share left to the administration, so little do the authorities forget their popular origin and the power from which they emanate.”⁹⁷ This shows how small the government and bureaucracy were at the time. Most would find this statement to no longer be the case in contemporary America.

The size of the bureaucracy has grown over time. This was not solely due to the increase in the amount of delegation or its acceptance by the Supreme Court. Around the turn of the 20th century there was an ascendancy of the Republican reformers who advocated a scientific method of governance and public administration that would lead to better results. This was in part a reaction to the abuse of power and threats to individual

⁹⁷ De Tocqueville, Alexis. *Democracy in America*. Walker. 1847. Pg. 59.

liberties that had been perpetrated by some politicians.⁹⁸ This also led to changes to the bureaucracy such as the replacement of the spoils system with a more with a more meritocratic system. In the spoils system the winner of an election places key political supporters in political jobs as a reward for their support. Some, such as the Mugwumps and much of the population, viewed this in general, as a corrupt and inefficient system who in response wanted civil service reform. Those advocating this change saw it as a change that would allow disinterested experts to advance and make decisions and there by improve governance and its approval was in part due to President Garfield's assassination by a scorned spoils job seeker.

As part of this same trend was the Pendleton Civil Service Reform Act that enshrined the changes that merit should be the determinate of who receives jobs and disallowed other personnel moves based off of political reasons. At the time of the Pendleton Civil Service Reform Act only 10% percent of federal government workers were civil servants and thus would be covered under the act. However by the turn of the century the vast majority of federal jobs were civil service jobs where civil service jobs are defined as, "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services."⁹⁹

An important part of the Pendleton Civil Service Reform Act was the creation of the United States Civil Service Commission, which was a three-member commission that from 1883 to 1977 administered the federal civil service. This board in part ensured the changes in the act that depoliticize the bureaucracy as well as creating certain rules to ensure better governance such as exams to qualify for certain civil service positions. This board was designed to be an independent entity that could oversee the bureaucracy and would be apart from the president and his goals to help ensure political neutrality.

A number of cases questioned the use of delegation of legislative power. The 1921 Supreme Court case of *United States v. L. Cohen Grocery Co.*,¹⁰⁰ the court struck down a statute that criminalized price gouging on necessities. The opinion of the court justified this

⁹⁸ Schoenbrod. 32.

⁹⁹ 5 U.S.C. § 2101

¹⁰⁰ 255 US 81

by stating that, "Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country."

The 1920 case of *Knickerbocker Ice Co. v. Stewart*¹⁰¹ and the 1924 case *Washington v. W. C. Dawson*¹⁰² struck down statutes on the basis that they had delegated federal legislative power to state legislatures. As the court found in the *Knickerbocker* case, "The subject was entrusted to it to be dealt with according to its [congress'] discretion — not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated by actually established — it would defeat the very purpose of the grant... Congress cannot transfer its legislative power to the States — by nature this is non-delegable."

Once the question of whether congress could delegate power was settled, the question of whether the congress should delegate power arose. For the president and much of congress, they viewed the answer in the affirmative and saw many benefits to delegation.

2.2.2 Legal Framework

Article 1 of the United States Constitution explicitly states that all legislative powers of the government reside with the congress. The non-delegation doctrine, prohibiting the delegating of one branches' powers as laid out by the constitution to another branch was viewed as an iron clad prohibition. Montesquieu who helped shape the views of many of the framers of the constitution proclaimed that, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates".¹⁰³ By separating the powers of government into three branches, the government can help ensure that this tyranny or abuse of power does not come to fruition. Eventually over time

¹⁰¹ 253 U.S. 149 (1920)

¹⁰² 264 U.S. 219 (1924)

¹⁰³ Montesquieu, Baron de. *The Spirit of the Laws*. 1748.

the Supreme Court decided that limited delegation was allowable so long as Congress used a clear intelligible principle to guide the executive branch agency. The concept is that basic delegation was an implied power of congress which though not explicitly stated in the constitution was implied as a means to allow for congress to act upon its explicitly laid out powers. Thus congress, in keeping with the Necessary and Proper clause in the U.S. Constitution, could delegate so long as it was merely charging an agency to work on its behalf and it gives clear rules and guidance that limit the authority of the agency performing the work. This was a major constraint that initially eliminated almost all decision making authority from the agent that was delegated to. Thus there was so little discretion left in the hands of the agent that it effectively had no power delegated to it, but merely carried out orders. The U.S. Supreme Court upheld this division between the branches and ruled that delegating any power that included discretion of the agent to act on their own rather than merely interpreting laws was not acceptable. This can be seen in *Cargo of the Brig Aurora v. United States*.¹⁰⁴ Over time the Supreme Court began allowing delegation with continually less specific and more open-ended guidance.

Even in the early case of *Wayman v. Southard* from 1825,¹⁰⁵ Chief Justice Marshall said, “that there is some difficulty in discerning the exact limits,” and further stated the opinion that, “the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.” The specific place where the line is drawn has shifted over the years with the general trend being towards fewer restrictions on delegation. In the current legal environment almost any case of delegation will be accepted if there is even a small piece of guidance included in the accompanying legislation.

This prohibition however began to soften with the progressive movement during the beginning of the 20th century. An example of this is *United States v. Grimaud*,¹⁰⁶ in which the Supreme Court in a split decision upheld an instance of delegation from the congress to the Secretary of Agriculture disagreeing with the defendant’s claims that, “that the Acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to

¹⁰⁴ *The Aurora v. United States*: 11 U.S. 382 (1813).

¹⁰⁵ 23 U.S. 1 (1825)

¹⁰⁶ 220 U.S. 506 (1911)

delegate its legislative power to an administrative officer." and instead finding that the delegation was constitutional.

Delegation had been allowed if the power delegated was minor and the agency merely "filled up the details". An example of this is *In re Kollock*¹⁰⁷, where congress approved of the delegation of setting certain specifics of regulation of oleomargarine manufacturers since the major decisions about the delegation had already been decided by the congress.

Another key case in the history of the delegation doctrine is *Buttfield v. Stranahan*.¹⁰⁸ In this case, the Supreme Court allowed Secretary of Treasury to use powers delegated to him by the congress. This precedent of this case expanded the situations in which power can be delegated. This increased the scope that was allowed by *Field vs. Clark*, which allowed the executive branch to determine a fact that in turn affected the legislative consequences. In *Buttfield v. Stranahan*, the Supreme Court went so far as to allow the executive branch to carry out a policy that had been previously determined by an act of congress.

The increase in the types of delegations found allowable by the Supreme Court can be seen in 1928 case of *J. W. Hampton, Jr. & Co. v. United States*,¹⁰⁹ in which the court allowed the delegation despite it being outside the typical restrictions on delegation. In this case, the court gave its approval in a unanimous decision, and ruled that the Tariff Act of 1922 which gave the president considerable leeway in setting tariff rates. The court ruled that delegation was allowable and limited only by, "common sense and the inherent necessities". Chief Justice, and former president, Taft goes onto say that, "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations."

¹⁰⁷ 165 U. S. 526 (1897)

¹⁰⁸ 192 US 470 (1904)

¹⁰⁹ 276 U.S. 394 (1928)

In the case of *J. W. Hampton Jr. & Co v. United States*, Chief Justice Taft lays out the separation of powers and the idea of non-delegation thusly, “The Federal Constitution . . . divide[s] the governmental power into three branches.... [I]n carrying out that constitutional division . . . it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.” In addition, the court stated that, “There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.” This is consistent with long standing views of the idea of checks and balances.

This differed a great deal from the few early instances in which the congress tried to delegate power were generally brought before the United State Supreme Court. The Supreme Court overturned many of these attempts at delegation though they generally did so without actually referring back to the issue of delegation when deciding the cases. Rather they preferred to use more technical questions with a narrower scope to base their determinations upon. This continued to be the law of the land until the 1930s when the Great Depression caused Franklin Roosevelt to be in opposition to the Supreme Court over this issue. During the Great Depression, Franklin Roosevelt wanted congress to grant him and the executive branch additional powers with which to deal with the severe crisis the nation was facing. While both houses of Congress were roughly split between the Democratic and Republican parties by the end of President Herbert Hoover’s term, Roosevelt came to power with large majorities in both houses with over 61% of the Senate and 71% of the House of Representatives. Thus congress was inclined to yield some of their power to the president so that he could undertake his new deal agenda and deal with the severe financial problems that the nation was facing.

The Supreme Court initially was opposed to this delegation of power and followed in the tradition of previous Supreme Court rulings such as *United States v. Shreveport Grain & Elevator Co.*¹¹⁰ and *Field v. Clark*¹¹¹, in which the court ruled that the constitution prohibited congress from delegating its authority. At stake in the *Field v. Clark* case, was whether the president was given authority to temporarily reinstitute a duty on the import of sugar and other commodities, “for such time as he shall deem just” in response to other nations imposing duties on U.S. products. This was viewed as a delegation of power from congress to the president. As was stated by the Supreme Court in that case, “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” And the delegation was ruled unconstitutional.

Delegation became a key topic during the Great Depression. During this period, President Roosevelt argued for more delegation to the executive branch to deal with the financial challenges facing the country. However, the Supreme Court was initially unwilling to approve of Roosevelt’s desire to change the status quo and allow for more delegation. In 1935, the Supreme Court ruled took at a case regarding the regulation of the poultry legislation. *Schechter Poultry Corp. v. United States*,¹¹² the Supreme Court unanimously ruled that the delegation involved violated the non-delegation clause. The issue at question was not solely the poultry industry or even the use of the Commerce Clause that was ruled to have been violated. Rather the Supreme Court was targeting Roosevelt’s National Industrial Recovery Act and effectively overturned this key part of Roosevelt’s New Deal agenda. Despite the unanimous ruling, there was a political factor in play as 2/3rds of the justices were appointed by Republican presidents¹¹³ that disapproved of the aims of the Democrat, Roosevelt. In addition the view of jurisprudence was shifting at this period and many of the old guard serving on the court at the time were more hostile to Roosevelt’s proposal than later judges would be.

¹¹⁰ 287 U.S. 77, 85 (1932)

¹¹¹ 143 U.S. 649, 692 (1892)

¹¹² 295 U.S. 495 (1935)

¹¹³ Hughes, Van Devanter, Sutherland, Butler, Stone, Cardozo, Roberts

This ruling followed similar legal setbacks for New Deal legislation such as *Panama Refining Co. v. Ryan*,¹¹⁴ in which in a narrow decision, sections of the National Industrial Recovery Act were struck down due to improper delegation. The *Schechter* decision also led to a number of other legal defeats for new deal legislation. An example of this is the *Carter v. Carter Coal Co.*¹¹⁵, in which the *Schechter* case was cited as a precedent. In response to the acts of delegations that made up much of the New Deal legislation, the Supreme Court Justice Brandeis told the Assistant General Counsel to the president and close presidential advisor, Thomas Corcoran, "This is the end of the business of centralization, and I want you to go back and tell the President we're not going to let this government centralize everything. It's come to an end."

While much of the Hughes court was predisposed to oppose these cases, even justices that would typically be more supportive towards Roosevelt's agenda questioned the amount of delegation in National Industrial Recovery Act (NIRA). For instance Supreme Court Justice Cardozo while reviewing these cases, opposed NIRA down as, "delegation running riot."¹¹⁶ NIRA allowed the president the power to regulate numerous aspects of industry and these powers were used in practice by President Roosevelt. Similarly the use of the Agricultural Adjustment Act gave the president considerable powers to regulate agriculture which at the time accounted for a large part of the economy.

After continued battles with the Supreme Court, Roosevelt attempted to outmaneuver his critics in the Supreme Court by increasing the number of judges on the Supreme Court and thereby packing it with judges that would be more sympathetic to his viewpoint. The number of Supreme Court justices is not explicitly laid out in the constitution but rather was determined by congressional statutes that have changed the number of justices over time. He was unable to accomplish this aim due to a coalition consisting primarily of congressional Republicans and Southern Democrats who successfully thwarted the Judicial Procedures Reform Bill of 1937 that contained Roosevelt's proposal. However the attempt chastened the Supreme Court and after Roosevelt's appointment of Hugo Lafayette Black followed short upon by his appointments of Stanley Forman Reed,

¹¹⁴ 293 U.S. 388 (1935)

¹¹⁵ 298 U.S. 238 (1936)

¹¹⁶ Concurring with the ruling on *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935).

William Orville Douglas, and Felix Frankfurter by early 1939, the Supreme Court began to better align with Roosevelt's goals.

With Roosevelt eventually able to prevail, significant authority passed to the executive branch, which can be seen in the proliferation of the large number of New Deal agencies that came into being at that time. Most of these had very limited congressional guidance and largely lacked a driving intelligibility principle. Since the 1930s, there has been a continuous increase in the amount of delegation and most of these instances have very limited intelligibility principles and make little pretense to needing this. Delegation was first allowed to deal with crises. The long duration of the Great Depression, World War II, and the Korean War which followed shortly after, has led to delegation from the legislative branch to the executive branch and the growth in executive agencies that went hand and hand with to become firmly entrenched as a way of running the country by the time these crises has all subsided.

The floodgates of New Deal legislation and its accompanying delegation opened with the *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,¹¹⁷ in which the Supreme Court in a 5-4 split decision upheld the National Labor Relations Act as constitutional. This allowed for more delegation. It also allowed for additional powers of the federal government under the Commerce Clause, in which in the words of Chief Justice Charles Evans Hughes, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." This increase in the power of the federal government, while initially vested in the legislative branch has over time led to significant new powers being delegated to federal agencies.

Thus one can see that in response to crises, the method by which policy is created was permanently shifted in the 1930s and the effect of those crises still shapes our political system today. As Schick states, "The New Deal and World War II changed the relationship between the executive and legislative branches and made the president chief executive in his own right, not merely as the agent of Congress. These critical events fueled an

¹¹⁷ 301 U.S. 1 (1937)[1]

enormous expansion of the federal government and a redistribution of power between the two branches."¹¹⁸

The increase in delegation had a revolutionary effect on the separation of powers between the branches of government. Even Franklin Roosevelt, a major proponent and impetus for this increase in delegation to the executive branch, asserted that growth of the bureaucratic state, "threatens to develop a fourth branch of government for which there is no sanction in the Constitution."¹¹⁹

While the initial transfers of power were at the behest of the president, this increase of power to the executive branch was not a power grab by the executive branch, but fundamentally relied on the willingness of congress to cede this power to the executive branch. As John Bolton points out, "More ambitious attempts of the executive to act without congressional support have been uniformly and emphatically rejected by the Supreme Court, as in the cases concerning President Harry S Truman's seizure of the nation's steel mills and President Richard M. Nixon's secret White House tape recordings."¹²⁰ In the case of *Youngstown Sheet & Tube Co. v. Sawyer*,¹²¹ which John Bolton was referring to, Supreme Court Justice Black stated that, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." Since this case the Supreme Court has continued to be a bulwark against unilateral encroachment by the executive branch into the powers of the legislative branch and in recent cases such as *Youngstown in Medellín v. Texas*,¹²² Chief Justice Roberts in delivering the opinion of the court referenced the *Youngstown Sheet & Tube Co. v. Sawyer* case when he wrote, "Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'"

¹¹⁸ Schick. 160.

¹¹⁹ Roosevelt, Franklin D. "Presentation of Brownlow Report to Congress" January 12, 1937.

¹²⁰ Bolton, John R. *The Legislative Veto*. AEI Press. 1987. Page 8.

¹²¹ 343 U.S. 579 (1952)

¹²² 06-984 (2008)

There have been occasional challenges to the decrease in specificity of the intelligibility principles allowed in delegation. The D.C. Circuit ruled that the EPA's implementation of the Clean Air Act violated the intelligibility principle. The Supreme Court later overturned this ruling, but it shows the legality issue is still an active question. In addition, in *AFL-CIO v. American Petroleum Institute*,¹²³ the Supreme Court ruled that the regulation by OSHA which was in question in the case was not allowable in that congress did not provide an adequate intelligibility principal. More recently, in *Clinton v. City of New York*,¹²⁴ the Supreme Court ruled that the Line Item Veto Act of 1996 which delegated to the president the power to unilaterally amend laws, was unconstitutional as it violated the Presentiment Clause. However the trend towards progressively more delegation has continued.

The net effect of all this delegation is that agencies are now creating law and setting policy. There are three types of laws: the legislative law created by congress, the administrative laws created by an organization, and common law created through the congress. There is no difference in the validity of these three types of laws as far as the law is concerned. What is more, both legislative law and administrative law are tools that can and do get used to create public policy on behalf of the nation.

Delegation itself appears to run contrary to Article 1 Section 1 of the Unites States Constitution. That section contains the so called Vesting Clause that states that, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This clearly lays out that all legislative powers reside in congress and was initially interpreted as disallowing legislative powers to be exercised by executive agencies that have been delegated such powers by congress. It was felt that in many cases of delegation, the fundamental powers delegated were legislative rather than executive and thus were expressly forbidden by the text of the constitution. This interpretation was often supported by the Supreme Court who in the case of *Shreveport Grain & Elevator Co.*,¹²⁵ said, "the legislative power of Congress cannot be delegated".

¹²³ 448 U.S. 607 (1979)

¹²⁴ 524 U.S. 417 (1998)

¹²⁵ 287 U.S. 77, 85 (1932)

In the case of *Wayman v. Southard*,¹²⁶ Chief Justice Marshall argued that rule-making power was a legislative function. Thus delegation could not be justified by merely proclaiming that the regulations and rules propounded by agencies are merely the executive branch performing executive functions. While the executive branch is vested with the power to carry out and enforce the law, the creation of law, even administrative law remains a legislative power.

A subset of delegation in which congress gives away some of its power is contingent legislation. In this sort of delegation, congress determines actions to be taken, but gives the executive branch a role in which it often triggers these actions to take effect through the actions or determinations of the executive branch actor. An example of this is *The Brig Aurora case*.¹²⁷ In this 1813 Supreme Court case, congress legislated that after the expiration of restrictions on British trade, that they would be reinstated unless the president made the determination that Brittan had ceased to violate the United States neutrality. In this situation, whether these restrictions went into place or not were contingent upon presidential action. There have also cases been cases in which contingent delegation was upheld where the contingency rested upon the action of private individuals or groups. Thus those affected by congress' legislation are able to change the effects of the legislation and have authority essentially delegated to them due to this privileged position as a political actor.

Delegation is more common and viewed more favorably in the courts in certain policy areas such as those that are viewed as being shared areas of policy creation for the executive and legislative branches or ones in which the president is viewed to have primacy. An example of this is foreign affairs in which the president is typically viewed as having primacy. This can be seen in *United States v. Curtiss-Wright Export Corp.*,¹²⁸ in which the opinion of the court states, "In international relations, the President is the sole organ of the Federal Government. In view of the delicacy of foreign relations and of the power peculiar to the President in this regard, Congressional legislation which is to be made effective in the international field must often accord to him a degree of discretion and freedom which

¹²⁶ 23 U.S. 1 (1825)

¹²⁷ 11 U.S. (7 Cr.) 382 (1813)

¹²⁸ 299 U. S. 304 (1936)

would not be admissible were domestic affairs alone involved. The marked difference between foreign and domestic affairs in this respect is recognized in the dealings of the houses of Congress with executive departments.” Thus while the rules that govern what kind and amount of delegation are acceptable are for the most part not dependent on the specific issue to be decided, there are certain privileged areas in which courts have determined that more leeway is needed and can be given be congress to the president or other parts of the executive branch.

Another area in which the president and the congress share responsibility is oversight of the military. The Uniform Code of Military Justice (UCMJ) gives the president considerable power over the administration and running of the military. This was upheld in a court decision in *Loving v. United States*,¹²⁹ which allowed this delegation of the power to determine the standards for the military to impose capital punishment from the congress to the president. As the court concluded in this case, “The President's duties as Commander in Chief, however, require him to take responsible and continuing action to superintend the military, including the courts martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply, "where the entity exercising the delegated authority itself possesses independent authority over the subject matter.” Thus the conjoining of presidential and congressional power change the acceptability of delegation.

Conversely it has been found that some areas require a higher standard for delegation such as when there is direct impact on the rights of the people. An example of this is *Kent v. Dulles*,¹³⁰ in which the State Department’s restriction of the right to travel in this case was found to be an infringement upon personal liberty and ruled that the Secretary of State had exceeded the authority delegated to him by the congress.

Besides Article 1 of the U.S. Constitution, delegation must be in accordance with all other sections of the constitution as well for it to be constitutional. One area in which delegation may not be in strict accordance with the constitution is with regards to due process of law. The Fifth Amendment lays out that the government may not do harm to the

¹²⁹ 517 U.S. 748 (1996)

¹³⁰ 357 U.S. 116 (1958)

life, liberty, and property of a citizen without due process and this is once again reaffirmed in the Fourteenth Amendment. Thus if delegation does not provide for due process or is not in keeping with this tenant it would not be constitutional for it to impinge on life liberty or property. By mere dint of being a regulation upon action many agency regulations and pieces of administrative law are by their nature impingements upon liberty. Thus to assure ourselves of the constitutionality of these cases of delegation this paper investigates whether delegation complies with substantive and procedural provisions due process. This procedural due process can take the form of informing those whose rights will be limited or who otherwise will be adversely affected by an administrative law to be informed prior to the law taking affect and allowing the affected party or parties to have legal recourse to challenge the law. Substantive due process stops the government and in this case the agency or entity that has been delegated power from impinging upon any fundamental rights granted in the constitution such as those granted in the Bill of Rights as well as unenumerated rights that are viewed as fundamental such as privacy or self-dignity.

2.2.3 Types of Delegation

There are many types of delegation each with their own characteristics. Many of these types of delegation are forms of explicit delegation to other governmental entities such as when congress passes a bill that cedes its power to the executive branch. However, there is also implicit delegation when the executive branch asserts a power that was specifically reserved for congress and which congress does not question. This is delegation of power because one entity, the congress, has its power transferred to another entity, the executive branch, and neither body perceives a compelling need to stop this transfer of power.

In the delegation process, there are also multiple types of agents that can be the recipients of delegated authorities. Among these potential agents are the president, ad hoc commissions, cabinet members, and executive agencies. The latter categories includes such organizations as departments, independent regulatory commissions (e.g. Security and

Exchange Commission), agencies in the Executive Office of the President (e.g. Office of Management and Budget), and independent agencies each with differing levels of authority and freedom from congress and the president.

Departments such as the Department of Defense (DOD) are typically large organizations run by members of the president's cabinet. Due to the fact that executive agencies are headed by cabinet members who serve at the pleasure of the president, they tend to be more committed to the goals of the sitting president. They would thus be more likely to be whom the president favors having power delegated to in the event of a crisis.

Independent agencies, such as the Office of Personnel Management, are those organizations that are separated from the day-to-day oversight of the executive departments. Thus, they are not headed by members of the president's cabinet, but rather are run by agency heads who are harder for the president to dismiss. Therefore, these agencies have more freedom of action from the congress and are less tied to the president's agenda. Furthermore, these agencies are often led by a board or commission rather than a single leader. The board members or commissioners serve longer terms that are often staggered so that a president cannot stack the agency with his own partisans. In addition, many of these agencies are structured so that their board must be bipartisan. Congress also is limited with regard to what action it can take to influence independent agencies. For example, it cannot appoint commissioners. In addition, members of congress cannot serve as commissioners, or take part in the removal of commissioners except through the impeachment process. This isolates and protects these organizations from congress and thus congress has less ability to oversee these organizations. This can affect congress' willingness to delegate to agencies. Overall significant power has shifted to agencies. Agencies do not just hold hearings in which they make judicial decisions and potentially dole out punitive penalties; they also decide which cases to have hearings on. This prosecutorial power strengthens the judicial power that the agents hold.

These types of agencies have differing capabilities, inclinations, and political relations and therefore some are better suited for particular sorts of delegation than others. Due to their natures, some are innately more likely to be trusted by congress with greater delegated authority and fewer constraints. Likewise, the reasons for delegation will differ

between different agencies and consequently delegations to different actors will lead to varying results by the very nature of the agency delegated to regardless of their policy specialties. This is also true when the delegation is to actors other than agencies.

Delegation need not be to other national-level political actors. It can also be to individual states, local governments or even to privately owned entities. For instance, the Energy Policy Act of 2005 granted authority to a non-governmental nonprofit organization, the North American Electric Reliability Corporation, to create mandatory standards governing the operation and accreditation of electric power systems. There have been cases in which delegation to trade groups and other private entities have been overturned by the U.S. judicial system such as *Carter v. Carter Coal Co.*,¹³¹ which found the Bituminous Coal Conservation Act as being unconstitutional in nature. Typically though, the cases that have not upheld delegation have been overturned on other grounds than the specific delegation itself.

One type of implicit delegation is giving the president advisory or first mover role in the creation of legislation and other congressional powers. This has been done in areas such as devising the budget, war declarations, and treaty creation. Though the president's actions can be countermanded or ignored by congress, this power to act first often allows the president to effectively control the policy being made and is thereby delegation. In the words of Sundquist, "any delegation to the executive of authority to act on matters on which the Congress has customarily acted is a shift in power from the legislative to the executive branch. Even if Congress delegates to the president no more than the responsibility to recommend, to the extent that the recommendations are not seriously reviewed and therefore become controlling, the exercise of governmental power has moved between the branches."¹³² The sum total of all this delegation is a strengthening of the executive branch and an increasing of presidential power. As Huntington states, "the initiative in formulating legislation, in assigning legislative priorities, in arousing support for legislation, and in determining the final content of the legislation has clearly shifted to the

¹³¹ 298 U.S. 238 (1936)

¹³² Sundquist, James L. *The Decline and Resurgence of Congress*. Brookings Institution Press. 1981. 12

executive branch.”¹³³ This first mover power is used to the fullest by presidents when faced with a crisis and magnifies their other powers.

2.2.4 Principal Agent Theory

In principal agent theory, a principal delegates authority to act on their behalf to an agent. In the case of congressional delegation, the principal is the congress and the agent is the agency entrusted with the authority that congress is delegating. Congress itself is an agent acting on behalf of its constituents, the people. Even this picture is a major simplification as congress is made up of two houses each comprised of numerous individuals, who in the U.S. political system with relatively weak parties, are effectively free agents with their own goals. Further as congress’ membership and agency heads change over time the agents and principals are continually evolving and changing. In addition, complicating this picture is the role of the president. The president has a privileged position in this system.

Many scholarly works attempting to describe the actions of congress in delegating away its power have relied on principal-agent theory.¹³⁴ These works often come to differing conclusions. Typically they simplify the situation and presume a single principal and agent to accord with the research of the consequences of a principal agent situation. This gives a general framework to investigate the phenomena of congress’ willingness to delegate actions and the constraints it places on its agent, but it ignores much of the interlocking system of actors and thus its conclusions must be brought in to question.

There is a tradeoff between better agency leadership by the agent and increased responsiveness for the principals. A strong agency head will be able to lead the agency better than a weak one and a more encompassing delegation of authority to the agency is also likely to attract stronger candidates to the position, however a strong agency head will tend to be less responsive to both the congress and the president. Responsiveness is

¹³³ Huntington, Samuel P. “Political Development and Political Decay.” *World Politics*, Vol. 17, No. 3 (Apr., 1965).

¹³⁴ Kiewiet and McCubbins. 1991.

important for congress as it enables congress to do casework and helps ensure the agency does not deviate from congress' wishes. The president also benefits from agency responsiveness as it can improve the perception of his ability to lead the government and can help him or her implement new policy.

The principal has the objective of controlling those to whom they delegate power. They thus will often need to create a reward and punishment system to ensure that those with the delegated powers are incentivized to act in ways that the agent would want and have their interests aligned with those of the agent.

Institutions and methods of creating policy are used to provide benefit to politicians that built them. This can be by minimizing political risk to risk adverse politicians, channeling benefits to key constituencies, or improving perceptions of politicians. The goal of the agent is not always to create the best policy for the nation or their electorate and thus what oversight that congress provides might be geared towards keeping the agent on their own agenda and goals rather than on the agents or the electorate's.

Principal-agent theory has often used been used to analyze congress' delegation of authority to the bureaucracy. This theory however is overly simplistic as there are at least two principals in this case: the congress and the president. The bureaucracy acts at the behest of both the congress that initially grants the authority to the agency as well as the president that heads the executive branch to which executive agencies belong. Both the congress and president are interested in controlling the actions of the agency so that it corresponds to their preferred courses of action. The agency and its leaders however have their own goals and wish to maintain their freedom of action. Thus there is an interplay between these three actors who wish to each get their way and which thus consequently may have incentives to play the other organizations against each other. Likewise they must take into account the desired outcomes of the other entities. Thus the willingness of the congress to delegate authority to an agency and the constraints that it uses are dependent on the president's party and priorities. Likewise, conflict between the president and the legislative branch will lead to less delegation.

This leads to a multifaceted political situation in which actors must estimate the policy preferences and ability to enact changes of other political actors. Likewise even within congress there are different factions and furthermore congress and the president will change over time. The current congress is aware that it may have different preferences than a future congress and thus may wish to handcuff future congresses to follow the existing congress' preferences. Often a switch in the party in control of congress changes the actions of congress and its relation to the agency it delegated to. They also are aware of the fact that presidents change over time and thus they must factor this into their collective decision making. Thus congress sometime finds it in its best interest to lock in the status quo. This can be achieved many ways. One of these is relying on the bureaucracy. Typically bureaucracy likes to defend the status quo and resists change from the head of the agency, the president, or congress. Because agencies do not turn on a dime, congress can count on delegations to an agency to cement its wishes.

Gauging intentions can be difficult. Often what is stated publicly is not the whole picture or an actor's true intentions. Even congress may have differing goals during the policy formulation and legislation phases as it does during policy implementation. It can use legislation as a signaling method though it may wish to signal different policy preferences and actions than it in fact has. Congress can thus under the cover of bureaucratic action and the obscurity and disinterest in the process that this engenders, ensure their true policy preferences are followed despite their stated intentions.

The principals will vary in relative power and in other attributes that will affect their ability to shape agency actions. One way to think of this is Neustadt's description of presidential power coming not just innately from his position but also from the perception of the president both by congress and agents and by how they judge the populace at large to view the president. As he states it, "Effective influence for the man in the White House stems from three related sources: first are the bargaining advantages inherent in his job with which to persuade other men that what he wants of them is what their own responsibilities require them to do. Second are the expectations of those other men regarding his ability and will to use the various advantages they think he has. Third are those men's estimates of how his public views him and of how their publics may view them if they do what he wants. In short, his power is the product of his vantage points in government,

together with his reputation in the Washington community and his prestige outside.”¹³⁵ Thus different presidents will be at varying power differentials with regard to congress and will thus have greater or less influence on agency heads. Similarly over time as the political fortunes of a president wax and wane and perceptions of the job he or she is doing shift, the president will find a relative strengthening or weakening in his power to influence agency staff when compared to these abilities of congress.

Even accepting Kernell’s hypothesis that president have shifted to more of a confrontational rather than a bargaining approach to achieve their ends and influence other political players,¹³⁶ one can still see that the president’s political strength and consequent ability to prevail in his appeal will be heavily dependent on perceptions of him, his potential strength, and perceptions of how others view him. And even under this newer hypothesis, the assumption is kept that the president does not have coercive power to force his prescribed course of action, but rather must work with and influence others to achieve his ends. It can be seen from this that even though the president may technically lead the executive branch that in some instances the president may not have significant control over agency heads and may need to enlist others such as congress when attempting to assert authority over agencies.

Interest groups also battle to guide agency actions and shape policy. They lobby the agency, congress, and the president. Often they target their lobbying to where they feel they will get the most benefit for their expenditures. This will often lead them to lobby the agency head or congress members on the committee that oversees the agency. Thus they can affect the system as well. In some cases they may want to weaken agencies and decrease its ability to enact change or perform its duties. Terry Moe lays this out saying, “Opponents want structures that work against effective performance. They fear strong, coherent, centralized organization. They like fragmented authority, decentralization, federalism, checks and balance, and other structural means of promoting weakness, confusion, and delay.” He later goes on to sum up by stating that, “opposition groups are

¹³⁵ Neustadt, Richard. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press, 1990. P. 150.

¹³⁶ Kernell, Samuel. *Going Public*. CQ Press, 2006.

dedicated to crippling the bureaucracy.” Clearly this conjecture implies that factions do not always strive for efficiency and thus that agencies are not perfectly rational. In addition, members of Congress and agencies care about specific parts of the bureaucracy whereas the president would want the entire government to run better and to be more rational. Furthermore, “the president will try to ensure that agency behavior is consistent with broader presidential priorities.”¹³⁷

The president and congress both try to shape institutions to give themselves a lasting political advantage. The president for his part benefits from a centralization of power and the tendency of congress to delegate its authority to the executive agency. The president thus will try to reinforce these trends and further centralize power if possible. Starting with Franklin D. Roosevelt there was a shift in the president’s actions as the position became more politicized and in reaction as the president attempted to strengthen his position by shaping and stamping institutions to allow greater leverage over policy making through actions such as centralizing policy creation and politicizing the appointments of agency staff to ensure his preferences. The natural response of congress towards the president’s consolidation of power would be to strengthen its own position and to take steps to weaken the president’s new power base. The structure of the political environment can shape the interplay of the political actors in domestic politics such as these just as sharply as a multination power dynamics guides the actions of nation-states. The president does not solely seek to gain power to enact personal policy preferences, but has other goals such as reelection and carving out an impressive historical legacy and these goals also give president cause to try to increase his influence over the bureaucracy and his leverage over other political players. For one thing this strength is viewed as “presidential” and also it can be used to further these goals by enabling the president to achieve or appear to achieve popular initiatives. The president is judged by many factors and among these his ability to function as a legislator and get proposed laws passed and as an administrator in his role overseeing and leading the bureaucracy.

With multiple principals, it is often in congress’ interest to protect their agents from executive control by limiting action, by strengthening them, and giving them structural

¹³⁷ Moe, Terry. “The Politics of Bureaucratic Structure” in *Principles and Practice of American Politics: Classic and Contemporary Readings*. 5th Edition. CQ Press. 2012. Pg. 332.

advantages such that the agency head or the organization will have the ability to resist the president. There can also be attempts to change the climate or culture of an organization to resist executive interference. This goes hand in hand with Moe's argument that by instilling a culture of professionalism in an agency that this will buttress the agency and enable it and encourage it to better resist outside interference.¹³⁸

In addition, other agencies such as the appropriations committee, the so called guardian of the treasury, can have a big effect on actions of the agency. Though it typically does not have a large effect on the initial delegation of power, through its control of funds it can greatly affect the ability of an agency to perform the tasks assigned to it and its ability to overreach or to perform actions not approved of by congress. Likewise the budget committee and a number of subcommittees can affect the course of delegation and the actions of the agent.

The president has multiple ways to control agencies. He has the power to appoint and remove the head and senior members of the agency, he has the ability to restructure the executive agency and this can exert considerable pressure on agencies and also decrease the importance of an organization.

Congress for its part can threaten to eliminate an agency or program. This nuclear option can help keep the agency doing congress' will. Likewise the president under the Executive Reorganization Act can reorganize the executive branch and collapse or move functions to either mitigate unwanted behavior or as a punitive action. While this needs the approval of congress, it is a powerful tool that the president has at his disposal.

The president and the Office of Management and Budget also evaluate the budgets of agencies and he can take informal action or formal actions to curtail agency behavior. Beyond his or her ability to persuade and exact political leverage to sway an agency's actions, he or she can also issue an executive order that directly directs an agency or its staff.

The president can influence things through bargaining and trading favors. He is needed by many and is able to trade this need for the ability to influence others. Neustadt

¹³⁸ Moe. 1989.

argues that there are many things expected of the president that are not strictly within his control or legal powers. However, he must take steps to fulfill these roles that the public expects of him. These areas include the economics in which the president traditionally has little power to affect results. There are competing factions that each try to get their ideas enacted. Also the public looks to the president to be a leader and so he must come up with plans, try to set an agenda, and get his proposed solution enacted. Power is the ability to enact changes and get people to do what is wanted. Commanding can be used in some situations and persuading can be used in other situations, but each has its place and certain situations in which it is most appropriate. His power to persuade is bolstered by success, popularity, and strength. The president's reputation shapes how he is perceived and how others deal with him. This is affected both by the opinions of him in Washington as well as those in the country as a whole. Strong popularity can help stop resistance and build consensus for the president's plans. The president must use his power efficiently and ensure that his opinion stays strong so he will continue to be able to influence policy. The president can persuade the congress, interest groups, the public, and agencies.

The president can also take steps to shape the institutions and political climate around him. These are neither static nor stable and his actions are capable of affecting it in a number of ways both intentionally and unintentionally. The existing institutional structure affects its actions and so the president has to take those into account and tries to modify those to allow for better results. This can be brought about through the creation, closure, and modification of agencies and other entities. It can also be done through changing the relations between entities so that one influences another in ways positive to the president's goals. The president also benefits by centralizing decision making as well as power so that he has more levers he can press to get his policy enacted. Implementation of a specific policy is not the only goal of the president. He typically also wants an efficient government as well as one that is responsive and that he can control in a timely fashion. He thus also will attempt to achieve these goals as well since they reflect positively on him and lead to a better government. The president by himself is unable to completely reshape these institutions, and even with his attempting to persuade congress there are limitations to the scope of the change that is possible. Such divided government can encourage inter-branch governing, when the role of creating policy becomes a multiple entity affair.

Congress however does not always care that deeply about the details since these are typically not in the spotlight of the public eye. Making the common assumption that congress members are rational actors and that their main goal is reelection, they often have little reason to focus too intently or spend too much political capital on curbing future actions.

The head of an agency has many goals that they wish to achieve. Among these are increasing their discretionary budget, protecting the size of their fiefdom, and increasing their power. Thus the agent will seek to maximize these before working on the priorities of the president and congress. However, realizing this, congress and the president try to align these goals with their goals and can give a bigger budget as a reward for approved behavior or threaten cuts for an intractable agency head. In addition those who work for an agency have more knowledge about their actions as well as about causes and effects of policy. This can lead to an agent feeling that they know better than the principal about what is the correct course of action to take.

An agency can go beyond congress' intentions that were implicit in the bill that delegated power. As Niskanen argues, the agency is overseen by a committee whose members care more about the issue than congress in general, are happier with increased agency action, and are more willing to pursue an increased budget for agencies they oversee than the median floor voter.¹³⁹ Also due to the costs of oversight, members of congress will tend to freeride and under produce the common good of oversight and good governance. This only adds to the already difficult task of oversight in which there is an asymmetry of data that gives the agency being overseen several key advantages over those overseeing them. This lack of oversight contrasts with the tragedy of the commons of the pool of federal resources available to fund organizations. Deficit spending is a natural consequence of members of congress receiving little benefit from decreasing spending.

Time is another factor in analysis of the relation between the principals involved. It changes the relations between the political actors, the goals of the political actors, and the actors that are involved in the system. It is another type of uncertainty of which there are

¹³⁹ Niskanen, William A. "Bureaucrats and Politicians." *Journal of Law and Economics*. 18 (December): 617-43. 1975.

numerous distinct causes particularly in a system composed of the counterbalancing of numerous competing interests. Many actors such as agency heads, whether career professionals or politically appointed, seek to minimize their political uncertainty. House rules change as a result of short term political gain not to improve efficiency and this tendency of the political framework to change is a risk of keeping policy decisions with congress.¹⁴⁰ Many initiatives take many years to implement and the results of the policy may not be clear for a significant period while costs of the policy may. This can make it difficult for congress to create good policy, as it is liable to change a policy before it bears fruits. Examples of this sort of long term policy decision, is the adoption and fostering of a technology such as green technologies, a change in methodology of education, a transportation policy, or a border policy.

There are a number of ways that congress or the president can attempt to guide an agency. Among these are constraints, empathy, threat, reward, structural means, and cultural means. The agency for its part can resist these and push back in a number of ways. They can include bringing their views to the public by harnessing the media, by working with interests, or by playing one principal against another. They also sometimes employ a strategy of strategic avoidance in which the agent ignores what the principal says.

While delegation can improve efficiency and efficacy such as when a man hires a lawyer to defend him rather than defending himself, there are two types of losses that are intrinsic to delegation. The first of these is agency loss, which occurs due to a misalignment of the goals of the agent and the principal. In order to rectify agency loss, the principal has to take actions such as oversight and this too can lead to the second type of loss, which is inefficiency of having to perform these actions and oversight. This is known as agency cost.

An example of agency loss was the early history of the Office of Information and Regulatory Affairs (OIRA), which was established by the Paperwork Reduction Act of 1980 as an office within the OMB.¹⁴¹ OIRA was designed to manage and oversee how the government handled information. However through the use of Executive orders OIRA was

¹⁴⁰ Binder, Sarah. "The Partisan Basis of Procedural Choice: Allocating Parliamentary Rights in the House, 1789-1990." *American Political Science Review*. Vol. 90, No. 1 (Mar., 1996), pp. 8-20.

¹⁴¹ Kiewiet and McCubbins. 1991. P. 180.

directed to conduct cost-benefit analyses of regulations proposed by government agencies and became a central overseer of other agencies with the powers to conduct hearings and other data collection and analysis in order to gauge the desirability of the proposed regulation.¹⁴² In practice, OIRA used its privileged position as a central overseer of proposed rules and regulations to forestall proposed pieces of administrative law that though popular with the democratically controlled congress and its supporters, run contrary to the policy goals of the Republican administration. Thus congress created an agency to improve the effectiveness of government and a year later the new agency subverted its mission and began to run contrary to the wishes of congress. It effectively allowed for a backdoor veto of regulations and rules proposed by agencies.

It was not merely OIRA that had gained this power, but also in large part the president. The president is able to exert considerable influence on the Executive Office of the President and by extension OIRA that is part of the Executive Office of the President. This allowed him to pursue his own agenda and curtail government actions with which he disagreed. Ultimately the congress was able to reel in the rogue agency by cutting off agency funding and later by passing legislation that made the head of OIRA subject to Senate confirmation and by restricting the use of funds to behavior that congress found unobjectionable, but it has become a useful presidential asset.

This shows how oversight and constraints can be used by congress to keep agencies better aligned and in tune to the goals of congress and thereby to decrease the agency costs that can occur due to delegation. OIRA showed how a governmental entity can be used to decrease the effectiveness of another governmental entity and thereby lead to political gains for some set of political actors. While the blatentness of OIRAs actions decreased subsequent to congresses passing legislation to curb OIRA, there have continued to be executive orders that have led to trends in which during Republican presidencies the caseload of OIRA is increased and this adds additional workload and constraints to the agencies overseen, whereas during Democratic presidencies the number of regulations reviewed has decreased. This seems in keeping with the general trend of Republicans being

¹⁴² Executive Order 12291 and Executive Order 12498

more opposed to regulation than democrats and thus helping limit the amount of new rules and regulations by using OIRA as a tool to limit this amount of regulation.

The president can try to control the agency actions by using Office of Information and Regulatory Affairs (OIRA) and other tools to guide agencies. OIRA is designed to be a clearing house for new proposed regulation and thus can track agency actions and bring the information to the president and his surrogates. In 2001, OIRA began sending out “Prompt Letters” which do not have the force of law, but are a tool design by the OIRA administrator John D. Graham in order to direct agencies to focus on a specific area.

Agencies have many other influences such as recommendations from congressional committees, any of the roughly one thousand Federal Advisory Committees, and the vast number of interest groups. Corporations, individuals, nonprofits, trade and labor groups, and countless others have an interest in agency actions and thus have a reason to try to influence its actions.

In addition to the direct principals, agencies are also greatly affected by those that can affect those principals. Examples of these can be other countries, powerful individuals, or special interest groups. Moe argues that interest groups are pivotal to how agencies are shaped due to the power that they exert on congress.¹⁴³

The nature of delegation is determined by whether the relations between the Principal and the agent are clearly established and defined. Often laws are passed that give agencies considerable latitude or in which the agency asserts that they have powers under the act. Laws can be read literally, can be interpreted as to the intensions of the creators of the law, or interpreted how the agency believes is now best for the country. This can give an agency considerable freedom of action in some cases.

The dynamic between agent and principal changes if there is a repeating, continuous relationship between the two. In the case of agencies and the lawmakers this is typically a weak relationship. Within its sphere of expertise and authority, the agency typically takes the lead and sets priorities, taking initiatives and deciding on required action as it sees fit.

¹⁴³ Moe. 2012.

2.2.5 Other Methods of Analysis

There have been many other methods of modeling and analyzing delegation. There is a narrative approach that looks its specific forces and factors and tries to determine causes and effects based on looking at the specifics and then generalizing these results based off of their universality or the fact that they appear to have been repeated.

Delegation has also been viewed through the lens of game theory. The interaction among actors is reoccurring and thus cannot be modeled accurately by a single game theory game. Instead it must be viewed as a multiplayer repeated game. For simplicity's sake a three dimensional matrix can be created in which the agency has one play and set of payouts, the congress has one set and the president has one. The resulting payout for each of these comes out of the interplay amongst these.

2.3 Unilateral Executive Action

The president was long viewed as relying primarily on the power to persuade,¹⁴⁴ but in recent years there has been a shift in investigating the power of the president. Those such as Moe and Howell have looked into the unilateral powers that the president has.¹⁴⁵ These powers are used considerably more than they were even 100 years ago and are a key characteristic of the modern presidency. These powers are generally not laid out in the constitution, but presidents have argued these powers are implied by it and by now have become traditional powers of the president. Many presidents, such as Roosevelt and Nixon, tried to take steps to strengthen the role of the president as this allowed them to achieve more of their policy goals. The unilateral actions of the president come in a large number of forms such as presidential directives, executive orders, executive agreements, presidential memoranda, presidential proclamations, signing statements, and impoundment. The types

¹⁴⁴ Neustadt, Richard E. *Presidential Power: The Politics of Leadership from FDR to Carter*. New York: Macmillan. 1980.

¹⁴⁵ Howell. 2003.

of presidential unilateral action listed above all have the power to affect policy decisions. There are some other unilateral powers that the president has that are not able to affect policy such as the power of the president to pardon. This paper focuses on only those types of actions that were specified above which the president can use to affect or set policy. While these are unilateral actions that reflect the prerogatives of the president, the congress has mechanisms to stop or counter these actions of the president. The interaction between the congress and the president in these instances is a repeated game in which the two institutions, congress and the president, must work together over a time and thus in this tandem juxtaposition these two institutions have considerable ability to affect the actions of each other. Besides shaping policy, these actions of the president can also be used to allow for bargaining with the congress, to control the bureaucracy, and to help the president and their party politically. These combined abilities can change the political landscape allowing the president to better set the agenda, control political sentiment, and shape institutions.

The president can use these powers not only to accomplish specific goals, but can use them strategically for a wide range of ends and as a utility-maximizer, the president will use these powers when they are most beneficial to him and will most help him accomplish the goals that he is trying to accomplish. This of course would include when the president has less opportunity through other means to accomplish his aims be they political, policy, or otherwise. He will also choose his timing and scoping of these executive actions to best achieve these goals with the understood caveat that these actions are taken in a politically uncertain environment that continues to change, there are institutional constraints that limit the courses of action that the president can take, and the president has incomplete information.

Given those constraints, the president is able to take unilateral executive actions with considerable freedom of action.¹⁴⁶ These actions are also flexible in that they can be tailored to certain needs and can be easily modified or rescinded as needs change. Importantly, as these tools enable him to set policy in such a way as to deflect media attention, the public backlash and negative opinion are not that large a factor or constraint

¹⁴⁶ Warber, Adam L. *Executive Orders and the Modern Presidency: Legislating from the Oval Office*. Boulder, CO: Lynne Rienner, 2006. 38.

on most executive actions. The president can take steps such as timing the action so that it does not get covered by major media outlet, he can make it so that the actions coincide and are thus overshadowed by other major governmental actions or world events, and he can make the actions vague or indeterminate so that the focus on the actions of the president is minimal as is the political opposition and the negative repercussions. In addition, media outlets are less likely to cover such actions as they are to legislative accomplishments or political fights. However congress is typically acutely aware of the actions of the president and so the president will sometimes make allowances for the opinions of key members of congress' to keep his relationship with congress on a positive note even when he does not need their acceptance of his current action.

Not all of these unilateral presidential actions are unpopular with congress though. Occasionally congress will even state when passing a bill, that they would like an executive action executed in conjunction with the law in order to help it get implemented. In this case the president and congress would be working together, but in many cases the president and congress do not have the same goals. In these cases the president must make a cost benefit analysis of the tradeoffs between taking action himself, working to get congress to pass the bill, or taking no action. Even in cases in which congress can be lobbied by the president and convinced to pass a law itself rather than the president issuing an executive order or taking similar action. However, it can be far costlier politically for the president if the bill is enacted by congress because the president often has to use a significant amount of political capital to get a bill through congress whereas if he in essence enacts it himself/herself, the president can save that political capital and use it later for other purposes. On the other hand there can be significant political losses if the president, using an executive action, tries to push through policy that congress opposes.

Unilateral executive actions can also be a communication device to signal policy changes to congress and the bureaucracy. It can signal policy directives, the administration's resolve and intentions, and agenda as well as the action it expects from Federal agencies to support this aim. This can also boost the visibility of the president's policy proposals. Presidents want their place to be central in the policy making process rather than simply trying to convince congress of the rightness his proposals and using executive actions can help do this.

Different types of executive actions are useful in different policy domains and thus the president uses different types of executive actions for different needs. Executive agreements are useful for foreign policy and defense, while other tools such as signing statements and executive orders are useful for manipulating domestic policy.

The president has a very short period in which to affect policy. This window means that the president must prioritize his goals and work on those that matter most to him. Obama decided to focus on healthcare reform as his signature legislative achievement as opposed to addressing the chronic weakness in the economic market. He likely believed that action on healthcare would be fast and then he would be able to focus on other priorities like the economy, but due to solid opposition and strong party cohesion of the minority party, Republicans, the healthcare proposal ended up taking 14 months to get his enacted. By that point in his term the honeymoon period was over and the president faced a unified opposition in almost all his proposals and this would only intensify eight months later when the Republicans took control of the House of Representatives in the 2010 elections. The economy had worsened by that point making the challenge of resolving the crisis more difficult. The president had also used up a lot of political capital and his popularity had fallen during this period decreasing his power to enact change. It also allowed the president to be attacked with the accusation of having done nothing about the economy. The depth of the crisis made it unpopular for the president to be seen as ignoring the economic crisis. He began to use rhetoric to make his proposals more acceptable whereas the Republicans began to see how they could use the weak economy as a major issue with which to assail Obama and weaken his administration and his reelection potential.

Presidents are constrained by the law, but they also shape the law. One cannot judge a president's ability to act by the formal powers of the office alone. In the current era Presidents do not typically list the specific sources of power that enable their unilateral action as this allows their opponents to question the basis for presidential action more easily. Rather they assert a power and when they do list the source of their authority, the only list vague sources.

As Mayer points out, there is an, “expectation that presidents would prepare a comprehensive legislative agenda, which became common only in the twentieth century”.

¹⁴⁷ This expectation is a major pressure upon the president’s actions and fits into the president’s wishes to have an open field of action so they can press their agenda in all areas of potential political action. This desire to move in numerous areas leads the president to need a number of different political and legislative tools because passing laws in the normal manner is so slow and the bar for action is so high.

The president is able to use unilateral actions and his power to control and restructure the executive branch. This gave him significant control over the government actions and allowed him to lead them and guide their actions. They can shape the institution in one action rather than fight a series of little battles. There is still confrontation over control of the bureaucracy, but the president had advantages that enabled him to win most of these battles.

It has been argued that presidential powers are not fixed, but fluctuate according to whether the actions of the president are in accordance with congress’ stated or implied authorization or are in opposition to congress’ wishes and the actions that congress has taken.¹⁴⁸

As head of the executive branch, the president nominally has control over those in the branch who are his subordinates. The president has a number of tools that he can use to control the executive branch such as removing agency heads and other key senior leaders of the executive branch. The case of *Myers v. United States*,¹⁴⁹ solidified this power with Chief Justice of the United States and former president, William Howard Taft, delivered the opinion of the court which included key phrases such as, “in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.”

¹⁴⁷ Mayer, Kenneth. *With the Stroke of a Pen*. Princeton University Press, 2001. 20.

¹⁴⁸ Jackson, Justice Robert. Concurring Opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁴⁹ 272 U.S. 52 (1926)

Executive action is given considerable leeway by the courts. When the issue of Executive Order 12092, which gave significant power over the management of government property, was brought before the court, the appeals court ruled that the president's use of this authority was allowable because, "when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect. . . construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."¹⁵⁰

Presidents argue for expanded executive powers, particularly during a crisis. While many do not approve of these powers before they get into office, they tend to view such power better after they come to power.¹⁵¹ Presidents such as Lincoln and Franklin Delano Roosevelt used considerable executive powers to deal with crises. President George W Bush behaved similarly in response to 9/11 crisis and asserted considerable new executive powers to deal with it.

There is some justification to feel that executive powers are expanded during a crisis. Congress has passed many laws giving powers in such instances and even the U.S. Constitution makes allowances for an expanding of powers during times of crisis. An example is the Suspension Clause that states, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."¹⁵² While the Constitution does not state that it is the president that has the ability to suspend habeas corpus in such instances that was clearly the assertion made by President Lincoln during the Civil War. Likewise, presidents Grant and George W. Bush also used the constitution as a basis for action when they too suspended the writ of habeas corpus.

Besides taking direct executive action, the executive powers that the president has and even those that he just asserts that he has can be a powerful tool in negotiating with the congress and getting them to do what he wants. Franklin Delano Roosevelt said, "I ask the Congress to take this action by the first of October. Inaction on your part by that date

¹⁵⁰ American Federation of Labor and Congress of Industrial Organizations et al. v. Alfred E. Kahn, Chairman, Council on Wage and Price Stability, et al., Appellants., 618 F.2d at 790. 1979.

¹⁵¹ Mayer. 52.

¹⁵² U.S. Constitution. Article 1, Section 9.

will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos. In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do. The President has the powers, under the Constitution and under Congressional Acts, to take measures necessary to avert a disaster which would interfere with the winning of the war. I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress.”¹⁵³

He essentially gives congress an ultimatum and said that if it did not meet his demands that he would claim this power and on his own he would perform the same action he is requesting of congress. Congress had little choice then but to acquiesce to his demands. While the policy result may not have been in the interests of congress it did allow congress to keep the prestige and power of itself as an institution intact.

The power division between the branches of government is always in flux and it is up to congress to check power grabs from the president lest they become a permanent transfer of power from the legislative branch to the executive branch. Presidents have continually tried to increase their powers as this better enables them to accomplish their political and personal goals, but congress is often passive in stopping that practice and protecting their political turf. The continued usage of a power, even one that perhaps does not rightfully belong to the executive branch, gives more validity to future uses of such powers. Louis Fisher describes this phenomena thusly, “The boundaries between the three branches of government are strongly affected by the role of custom or acquiescence. When one branch engages in a certain practice and the other branches acquiesce, the practice gains legitimacy and can fix the meaning of the Constitution.”¹⁵⁴ Kenneth Mayer traced the foundation of this acquiescence doctrine to the 1915 Supreme Court case of *United States v. Midwest Oil Co.*¹⁵⁵ Edward S. Corwin voiced the view thusly, "What the Constitution does, and all that it does, is to confer on the President certain powers capable of affecting our foreign relations,

¹⁵³ Roosevelt, Franklin D. Speech Before Congress. September 7, 1942.

¹⁵⁴ Fisher, Louis. *American Constitutional Law*. New York: McGraw-Hill. 1990. 220.

¹⁵⁵ *United States v. Midwest Oil Co.* - 236 U.S. 459 (1915).

and certain other powers of the same general kind on the Senate, and still other such powers on Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve."¹⁵⁶

The president is not the only one who can use presidential power. The president had long had others in the administration act on his behalf using his powers and Congress formalized this ability of the president when it passed the Presidential Subdelegation Act of 1950.¹⁵⁷ Furthermore the presidency as an institution includes more than just the president, but also includes the Executive Office of the President, which the president and the congress have vested with power.

Congress has taken actions to limit the president's control over the bureaucracy. This included an amendment to a 1944 appropriations bill that any agency created by executive order could be funded for more than a year without the congress specifically appropriating funding for the agency.¹⁵⁸ This action makes it difficult for the president to restructure or grow the executive branch without the acceptance of congress.

The president has the ability both to set the legislative agenda and enact changes in one fell swoop. As Baron and others have argued there is strategic advantage to moving first in agenda setting.¹⁵⁹ Among other advantages it allows the president to gauge the popularity of the action and perform credit taking if it was well received and mitigation if it would be unpopular generally or across certain segments of the population. The president is often given credit or blame for the actions of government regardless who initiates them, how they are passed, or the methods used to get the policy enacted. Thus the president gains by getting more pieces of policy or more comprehensive enacted particularly when it is popular policy.

Individual legislators have few if any unilateral powers and must convince their colleagues and other political actors in order to get their desired policies enacted whereas the president has the ability to enact legislation without rallying a coalition and working

¹⁵⁶ Corwin. 1957.

¹⁵⁷ Schubert Jr., Glendon. "The Presidential Subdelegation Act of 1950." 13 *Journal of Politics*. 1951. 647.

¹⁵⁸ 58 Stat 387

¹⁵⁹ Baron, David. "A Dynamic Theory of Collective Goods Programs." *American Political Science Review* 90(2): 1996.

with others or even the ability to persuade. Howell argues that these unilateral powers are not formal powers since they are not delineated in the constitution, but neither are these powers coming solely from the president's personality or personal qualities as these powers have been exercised for decades and have been exercised by numerous presidents. They are more similar to institutional powers which have increased or decreased over time and are affected by the relative powers and disposition of the various branches.

Howell sums up the use of unilateral executive action by saying, "When congress is weak and the judiciary lenient, presidents' powers of unilateral action flourish; when Congress is unified and strong and the judiciary takes a restricted view of presidential power, presidents can accomplish relatively little."¹⁶⁰ The president can sometimes take steps that exceed the powers that the constitution or congress have specifically given to him. Locke describes this as saying, "There is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe."¹⁶¹

2.4 Interrelations between the Branches

Proposals put forward by the president are often proposals that had previously been submitted to congress, but which have not become law. Often the president will not form a whole legislative agenda from scratch on his own, but will take ideas or even entire bills from the vast array of legislative items that are submitted to congress each year, but are not addressed or otherwise fail to become law. This can also lead to there already being a contingent of supporters to the bill even before the president tries to lobby congress to pass the bill. As Mark Petersen describes it, Congress and the Presidency are tandem institutions.¹⁶² They are intertwined and the actions of one affects the actions of the other and both affect the shape of legislation. The president-centric view of legislation views the president as waging a battle to get key pieces of his agenda passed and he is to be judged a success if for the most part he succeeds in this endeavor. However, this neglects the role of

¹⁶⁰ Howell, William G. 2003. 176.

¹⁶¹ Locke, John. *Two Treatises of Government*. Cambridge University Press. 1988 [1689]. 375.

¹⁶² Peterson, Mark A. *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan*. Cambridge, MA: Harvard University Press. 1990.

Congress and merely repurposes it as a field of play rather than the principal governmental body empowered to create legislation. While the president can find surrogates in Congress to raise bills that he wants passed, Congress has even more ability to set the legislative agenda and see through major new laws. The president and Congress have a complex relationship that can shift from being cooperative to adversarial based on a number of factors. This is the situation Richard Neustadt refers to which he describes the idea of two separate institutions sharing power.¹⁶³ This becomes more complex when one looks at the number of factions or even individuals in Congress that cannot just be aggregated as a mass, but each have their own opinions of legislation proposed. The president can take a number of tacks with regard to pushing an agenda.

One extreme is that a president can try to force an agenda through Congress and not work with Congress to vet ideas for what they find acceptable. An example of this can be seen in the first two years of the Carter presidency where his view of the essential correctness of his proposals and his newness to Washington, D.C. caused him and his administration at first to try to unilaterally set the legislative agenda without input from Congress. This led to a number of failed efforts.

Lyndon Baines Johnson on the other hand was very focused on Congress and tried to take their opinion into account. He had some successes, however there is the risk that the bills will be so watered down that little of the president's agenda remains and that Congress essentially dictates its wishes. There are limits to what they can do alone and this ties the president and together and this generally precludes a scorched earth policy of negotiating. Besides actively opposing the president, Congress also has the strategic option of ignoring the president's proposal. Time sensitivity causes most bills to fail. Congress need only ensure that the president's proposal does not pass both houses by the end of the year and they can sidetrack his legislative proposals. Bills can be killed in committee, in conference, by a floor vote, or by the end of the legislative session. The opposition has significant power to stop votes it disapproves of. The president however has significant bargaining power on certain key issues and has spoils to dole out and can also trade off unrelated bills so as to achieve his desired ends.

¹⁶³ Neustadt. 1990.

The relationship between congress and the president is determined by a large number of factors such as the personalities, parties, and length of time in office of the political actors. Another factor that can have a considerable effect is whether the president is perceived to have a mandate. If a president was elected by a large margin or with a set agenda that is popular he has more ability to get legislation passed. When the president has a mandate or is popular, congress is more inclined to allow the president's prerogative of suggesting legislation and is more willing to take up his proposal and support. The same is true early in the president's term. In this honeymoon period the president's popularity is high and he has not expended much political capital or made enemies.

Another major factor that affects the relationship between the executive and legislative branches is the structure of the institutions themselves. For instance, a congress with much more centralized power allows for the president to deal with just a few key leaders and push through legislation by negotiating with just a few members. The more decentralized congress of today allows more players to be involved in the crafting of legislation. This challenge for the president is bolstered by the fact that congress has more resources such as bigger staffs and supporting agencies and thus can better put forth competing proposals. The institution of congress has been strengthened by acts such as the Budget and Accounting Act of 1921¹⁶⁴ and by the increase in staffs of committees and members. This makes members of congress more competitive in the legislative arena and thus less willing to adopt the president's proposals. Some of the changes that have decentralized power are restrictions that a member of the House of Representatives cannot chair more than one committee and the shift to strengthen subcommittees at the detriment to the power of committee chairs. There have been some tendencies toward centralization of power such as a renewed ability of House leadership to use the Rules committee to support their initiatives, however over all congress and in particular the House of Representatives have a far more decentralized power structure than they did back in the early 1970s before many of these changes came about.

Presidents can also lobby or pressure congress into implementing their preferred policies. Presidents use "going public" as a technique to push their policy by utilizing public

¹⁶⁴ Pub.L. 67-13.

pressure which he attempts to focus on congress in anticipation that it will help achieve his desired actions from congress and will shape public opinion about the policy. "Going public" can affect public opinion in the current context and allow for changes, but can also lay the foundation long term for the adoption of the technology and the incorporation of their viewpoints into the public view of the issue even after their term is over.¹⁶⁵ This can lead to these policies becoming entrenched, which is ideal for the president. Kernell however argues that going public is not costless. He also views going public as being in opposition to the use of inter-branch bargaining and argues that it is mostly of a threat for noncompliance. That assertion is likely not totally true as "going public" is not solely punishment for noncompliance, but serves other purposes as well. He also argues that it can make those involved less flexible because they effectively must posture and make a case in public and thus have less room to give when negotiating and thus going public makes it harder for the two sides to negotiate. Going public is particularly effective if it can be done as an outsider or man of the people railing against congressional and governmental inaction. President Obama was well placed to do this at the start of his term and had some successes with this tactic.

As power has devolved from party bosses and chairmen down to even freshman congresspersons¹⁶⁶ and with the decrease in party loyalty or cohesion, congress has moved towards pluralism in which each individual is a political power than must be deal with and who has their own goals that must be taken into effect. This situation makes negotiation too complex, as it is hard to negotiate with many individuals with their own ends and keep them on the ranch. However one cannot go public too often and become overexposed so that their future messages do not have much power. Also the president does not want to risk losing these public battles. In addition, going public can look desperate since if the president could accomplish their means without this extraordinary step they usually would.

In the words of Neustadt, "Effective influence for the man in the White House stems from three related sources: first are the bargaining advantages inherent in his job with which to persuade other men that what he wants of them is what their own responsibilities require them to do. Second are the expectations of those other men regarding his ability

¹⁶⁵ Kernell. 2006.

¹⁶⁶ Huntington, Samuel P. "Congressional Responses to the Twentieth Century" in *The Political Economy*. P 180-202. 1984.

and will to use the various advantages they think he has. Third are those men's estimates of how his public views him and of how their publics may view them if they do what he wants. In short, his power is the product of his vantage points in government, together with his reputation in the Washington community and his prestige outside. A President, himself, affects the flow of power from these sources, though whether they flow freely or run dry he never will decide alone. He makes his personal impact by the things he says and does. Accordingly, his choices of what he should say and do, and how and when, are his means to conserve and tap the sources of his power. Alternatively, choices are the means by which he dissipates his power. The outcome, case by case, will often turn on whether he perceives his risk in power terms and takes account of what he sees before he makes his choice. A President is so uniquely situated and his power so bound up with the uniqueness of his place, that he can count on no one else to be perceptive for him."¹⁶⁷

Public policy is generally the creation of multiple political actors and typically involves actors both from the executive branch and from the legislative branch. The interaction between those two branches greatly shapes the policy that is ultimately created. This interaction can rely on personal factors, but typically also has many structural factors that lead under certain circumstances to specific types of interaction and thus which shape policy in certain systematic ways. Over time the branches have developed strategies for dealing with the other branch that help them maximize their utility.

Among these strategies available are publicly committing to a policy. This commitment would entail staking out a position on an issue and publicly committing to it as a way of eliminating future alternative courses of actions. Ingberman and Yao argue that the president can better achieve his desired results by committing to a specific policy.¹⁶⁸ This can help the president ensure that congress will accommodate his/her preferences since he has veto power over the policy and if congress does not make the requisite allowances for his preferences, the president will veto the bill and congress will likely not get any of what they wanted. Often congress will not even attempt to pass a bill that the president does not want since he will be able to block it and it is difficult for congress to override the veto in today's partisan climate. The president can commit to a policy and

¹⁶⁷ Neustadt. 1990. Pg. 150.

¹⁶⁸ Ingberman, Daniel and Daniel Yao. "Presidential Commitment and the Veto." *American Journal of Political Science*. Vol. 35, No. 2 (May, 1991), pp. 357-389.

make it known that he has fixed views on an issue by going public and stating his position on-the-record. He can go even further by stating an unwillingness to waver from that position. This ability to go public and use a commitment strategy is greater in the current era in which press conference and other direct communication techniques are available to the president. This public commitment binds the hands of the president since he will in effect lose politically if he then backtracks and ultimately goes against the position he earlier went on record as supporting.

The use of going public as a method of policy commitment is not necessarily at odds with Kernell's view of going public where the act of going public is undertaken largely to affect public sentiment with the intent of altering congress' utility function and ultimately their votes.¹⁶⁹ Going public can and does serve both these purposes and can have major effects. Canes-Wrone argues that going public can change the policy that otherwise would be implemented.¹⁷⁰ The president must have a viewpoint that will be popular with people when it is framed a certain way if he hopes to gain politically from going public.

Ingberman and Yao view the use of commitment through the tools of game theory as a game played between congress and the president.¹⁷¹ In this game, congress takes the role of agenda setter whereas the president must decide whether to accept the agenda or whether to veto the proposal. Congress thus tries to make a bill more acceptable to the president so that he will not veto it even though this may entail congress parting with some favored provisions or adding some that the president favors that are less popular with congress. Congress can be forced by the political landscape to adapt to the president's position if the president has committed to a position and remains inflexible about it. There is a point at which the president will not veto the bill and he considers the policy acceptable. The president may know that point, but generally congress must guess and take that estimate into account when they craft the bill and potentially err on the side of being too generous due to the uncertainty about the exact location of this pivot point.

Presidents have multiple goals including reelection, getting their desired policy outcomes, making sure they maintain a good relationship with congress, raising funds, and

¹⁶⁹ Kernell. 2006.

¹⁷⁰ Canes-Wrone, Brandice. "The President's Legislative Influence from Public Appeals." *American Journal of Political Science*. 2001.

¹⁷¹ Ingberman and Yao. 1991.

ensuring their legacy. Members of congress also have similar goals that often are at odds with those of the president. The president has a utility function that takes all these goals into account. By going public this raises the importance and salience of an issue and makes it more of a focus. In some cases this is what the president would prefer, such as if the issue is likely to be popular or if a spotlight is needed to pass a bill. However, there are instances where the president's agenda would be better served by sweeping things under the rug and negotiating in secret without the scrutiny of public opinion and the media spotlight. The president also can frame an issue and lead the opinion of the public. He must look at the likelihood that the proposal will pass without his going public and without his cajoling. Going public can be done a number of ways. There are steps such as making the president's weekly address, the state of the union, and the regular attention they command as they try to push their policies. By virtue of their unitary and symbolic nature of the office, the president gets attention regarding many of their actions. Going public is the case when the president takes extraordinary actions such as going on television and making a plea for his viewpoint.

Divided government can make governance more challenging, but not impossible. It requires more inter-branch and interparty bargaining. The tools used and process are different. For instance, vetoes are unlikely when the same party controls both the presidency and the congress. There is a pivot point at the majority and the veto override points at which a certain number of floor voters in each house will override a president's veto. Thus there is not often just a take it or leave it situation. If congress can pass a bill, but cannot override the veto, then a presidential veto would lead to an inefficient outcome and lost utility for them and so they can trade away some of that utility to the president to convince him not to veto a bill. They try to either find a bill that the president does not dislike enough to veto or one in which he has uncertainty whether his veto can be overridden and he wishes to limit his losses by compromising. Vetoes occur more frequently under divided government and during election years.

The congress for its part often finds it beneficial to be inclusive and get the president involved in the decision at an early time before the bill was crafted or else it might harden positions and have less ability to negotiate with the president. If the president would veto a

bill, congress has the option of passing the initial bill that was proposed or else it makes amendments to accommodate the president's preferences. Compromise is not always possible. In a single-issue decision space, an issue can often be approximated on a left-right political spectrum and when the president's preference for change in policy is in the opposite direction of the status quo point than congress' then there is not much ground on which to compromise other than agreeing to avoid that policy dimension and keep the status quo. If a proposal is put forward under these situations, the hope of this proposal is that the proposal gets enacted by dominance rather than through concurrence or bargaining. There is uncertainty of course in most decisions and if the president has not publicized his views then they might not be known. In addition, while counts in congress are taken and can generally be assumed to be correct, the veto override pivot point may change over time as opinions and political calculations shift. Those involved must manage assumptions and may gain by hiding or misrepresenting their preferences. The president can use a veto to encourage congress to give him a better offer that better meets his needs. He can hide his true feelings about the status quo. Over time the president can create a reputation for himself for how he approaches these situations. He can appear to be a tough bargainer that will not compromise much and thus cause congress to be more willing to meet him more than halfway since they do not think they will be able to get a better deal from him. Cameron claims that veto bargaining tends to lead to policy that is more in the middle of the political spectrum and less extreme.¹⁷² Due to the election process, on most issues the citizenry are in the middle politically compared to the politicians that were elected.

Members of congress want to be re-elected. In fact, many theorists and practitioners consider this to be one of their main goals.¹⁷³ To this end politicians focus on credit claiming and position taking as these will typically help get them elected. They also engage in other actions such as casework and advertising with the goal of improving their electoral prospects. Creating public policy is not in itself necessarily a goal of the politicians, but rather a means to an end. Creating public policy is an ancillary goal and thus policy makers will negotiate on the substance of policy in order to secure their main goals.

¹⁷² Cameron, Charles M. *Veto Bargaining: Presidents and the Politics of Negative Power*. Cambridge University Press, 2000.

¹⁷³ Mayhew. 1974. Pg. 16.

This can sometimes lead to playacting or cheap talk in which political actors try to send signals to donors or the electorate by their political actions. An example of this is that Congress and the President bargain in the spotlight and want to be seen taking certain actions even if they do not correspond with their preferences without this spotlight. Several of the programs set up to deal with the crisis had minimal effect but seemed designed instead to be broadly popular. An example of this is the home mortgage restructuring provisions that were enacted. These seem to be designed to appear that government was working on behalf of Main Street and the nation's troubled borrowers, though the design of these programs was such that the number of people that were able to benefit from them was continually far smaller than politicians state and certainly far smaller than the potential need. These did however allow for political cover for bailouts and other programs that were unpopular and seemed by the general public to be primarily directed towards helping Wall Street.

Signaling can not only be used to convey messages to the public, but can also be used to convey information to other political actors. The parties in politics negotiate without full knowledge of what is going on. This leads in many situations to a conflict in which all sides will tend to be hard bargainers. Tougher bargaining is more likely to prevail in negotiations and those that do so are more likely to get their way or to a point closer to their ideal point. Neither side knows how hard the other is willing to negotiate. The willingness to bargain hard and the power this conveys ostensibly comes from positioning and from their having less to lose. The amount each side has to lose is tied up with how willing they are to accept the default or status quo as opposed to cooperating on a deal. If one side will only realize a small improvement by compromising, this will make them less interested in working together with the other side and thus better able to extract more from them. The sides will thus try to signal that they are comfortable with noncooperation and that the other side will need to give more ground. While this is done, the sides perform acts such as screening to determine the true utility functions of the other side, as well as their negotiating strategies and what they are willing to accept. One of the signs that a side can send to show that they do not need a deal is to hold out longer and not bend or compromise. This can help them extract more in negotiations, but it can also lead to a deal falling through even if both sides would prefer that there be a deal and would be better off

if there was one. In addition, when the public eye is on them, each is less willing to give in and appear weak.

An example of this was the first debt limit negotiation in which the Republicans stuck to their preferred policy and said that any increase in the debt ceiling needed to be paired with deep cuts in spending. They signaled their intransigence and unwillingness to compromise. Several went so far as to state that they did not think raising the debt ceiling was important or should be done at all though this would have meant the first ever U.S. default on sovereign debt and potentially vast negative repercussions. By taking such a hardline, they were able to get an agreement for deeper cuts out of the president and the Democrats in congress than they would have otherwise. However, by taking such a hardline they risked not coming to a debt ceiling agreement also led to a downgrading of the U.S. credit rating.

In negotiations there can be mutual intransigence if both sides play hardball and are unwilling to work together. This can occur as they feel that they are benefitting from tough bargaining and public posturing. Their constituents often judge them less highly if they give in and try to work with the other side than if they stick to their position and don't compromise. By not compromising a politician or group of politicians can come across both as not having principals and as not being effective. The Republicans have stuck to a key platform of not raising taxes while Democrats strongly resist cuts in entitlements. This leads to conflicts in which little gets done to solve long term problems, but each side appears to be doing what is right to their political base.

The interpretation of political actions and consequently the actions that a politician chooses to take can vary based on the party make up of their districts. The politicians view of the policy can change based on the fundamental parameters in the policy such as the timing of changes, the concentration of costs or benefits, and whether there is someone coalescing public opinion about that policy.

Trust is also an important variable and can affect outcomes of a political situation. The two sides in a negotiation need trust to be able to come to an agreement or even to negotiate in good faith. The U.S. political process has become more partisan, clannish, and

ideologue-based in recent years and this led to less ability to address crises or agree on policy. Presidents Obama and George W. Bush are the most divisive presidents in the history of America when determined by looking at the percent of their party that approves of them and the percentage of the other party that disapproves of them.¹⁷⁴ With little trust between the two parties and increased polarization of the political system, the risk of political positioning as being an attempt score political points by one side, makes it tough for the other side to take a politically unpopular position in case the negotiation was conducted for primarily political reasons. It is often the case that unpopular political actions need to be taken for the greater good or short term costs must be imposed for long-term benefits that will be discounted politically in the minds of the voters compared to the immediacy of the costs. A potential example of this from the financial crisis is the so-called bank bailout in which an unpopular vote was viewed as necessary to avoid massive economic hardship. However, despite the great need, the vote was not passed initially due to the tough political stand it would require. It was not until significant pork was included and key special deals were cut that enough votes could be collected for the bill to pass. In cases such as these where the nature of a policy response makes it tough for lawmakers to enact, delegation becomes a more compelling option because it allows tough decisions to be made without the unpopular policy being traced back to individual elected officials and because it can help minimize the effect that short-term politics has on shaping public policy. This was the idea behind the legislation introduced in 2009 to create a bi-partisan fiscal commission as well as the Simpson-Bowles commission that followed and which was charged with coming up with a credible, bipartisan plan to cut the budget.

In addition to the votes themselves, the parties compete in areas such as agenda setting and stirring public opinion in an attempt to shape the political landscape. The agenda can be used to avoid unwanted and unpopular votes. It also can be used to approve solutions in a de facto manner that otherwise would need to be voted for. Politicians use tools such as priming and narrative building for much the same purpose and these as well will be a space in which multiple sides and individuals compete. The conflict over these areas comes from logical self-interest as politicians can effectively get cherished policy as

¹⁷⁴ Jones, Jeffrey M. *Obama's Fifth Year Job Approval Ratings Among Most Polarized*. Gallup. January 23, 2014.

part of appropriations bill it can be very beneficial to a political party which can win a political battle without even fighting and risking looking partisan in the midst of a crisis. It also can be a useful end run around unwanted political fights and can avoid unwanted notice and attention on the actions that are taken. In the U.S., much of the media coverage of politics focuses on the battle between the parties rather than the details of public policy being created. This has more drama and is often easier to understand. Because of this media focus, politicians can often gain by doing an end run around the open political process by achieving their ends more discretely.

The majority party who has an institutional advantage due to having the majority of voters in that house and the chairmanships of the committees can generally control the agenda in a house of congress. In addition, in the House of Representatives the Speaker of the House and the rules committee have powerful agenda setting powers and are controlled by the party in the majority in the house. They will also have additional resources such as additional staff above that of the opposition party and this also helps the party in power set the agenda. The president however, even as an outsider, has at least as much power to set the agenda as the leaders in congress due to his visibility.

Bicameral legislatures, when compared with unicameral ones, increase stability and the so-called stickiness of the status quo. The ability to shape policy in congress depends on the relative power of the parties and houses as well as institutional constraints, political views, and cohesiveness that they can use this to affect the other house. This power can be modeled with a divide the dollar game since agreement or conflict is often along one dimension. The interaction between the two houses has an effect on the cumulative actions of the two houses, as does the structure of the two institutions. If there is potential for gridlock in one or both of the houses it can make delegation or executive action more attractive options for enacting policy.

The president never has complete control over policy though. Other individuals are also able to help shape the government's creation of public policy as well as its response to a crisis. Even individuals such as the two 2008 presidential nominees were able to help shape the policy used to deal with the crisis though they had relatively little formal power as individual senators. Yet when John McCain suspended his campaign to go back to Washington to help resolve the issue and Barack Obama followed suit, they became major

shapers of public opinion.¹⁷⁵ They acted as leaders of their party and thus their public stances caused shifts in public sentiment and in the actions of members of congress that supported them.

In addition, the president will often rely upon trusted advisors or those in key positions and allow them to shape much of the policy that gets enacted during their presidency. The president's support for and from his/his executive staff, agency heads, and other key member of the bureaucracy changes the dynamic between the executive branch and the congress and shifts how crises are responded to. In the case of the financial crisis the president said, "If Hank Paulson and Ben Bernanke say it's going to work and help stabilize the financial system, we are for it."¹⁷⁶ He backed up his verbal commitment by spending political capital supporting the policies drafted by the Federal Reserve and Treasury Department.

Policy comes about as an interplay between all these political actors. Policy is not an indivisible whole bursting forth fully formed, but rather a collection of ideas and opinions stitched together and the specifics of what it contains is a battlefield fought over by many forces. Inter-branch bargaining is one of the means used to shape policy, but there are a great many more that contribute as well.

There are benefits and drawbacks to having different factions controlling policy creation. Among the drawbacks is that this may lead to less beneficial policy or even to questions of government legitimacy and effectiveness. For instance, Members of Congress are limited in their potential to craft ideal policy by their provincial interests. In particular, they represent only a small subset of the nation. This is true of senators, who on average only represent 1/50th of the nation's population, but this is even truer of members of the House of Representatives, who represent one of 435 congressional districts. Thus they will be tied to their own narrow viewpoints though they will help shape the policy of the nation as a whole.

Presidential influence over congress has been greatest when the president has higher approval ratings. As stated by Richard Neustadt, "public standing is a source of

¹⁷⁵ Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus. 2010

¹⁷⁶ Paulson. 2010. 296.

influence for him, another factor bearing on their willingness to give him what he wants.”¹⁷⁷ This however does not always guarantee success or an easy path to enact changes. Obama came to power with a large mandate after winning 365 of the 538 electoral votes and the majority of the actual votes so it appeared that he would have some room for maneuvering. Obama’s ability to sway congress was also expected to be at its highest as this is during the early part of the president’s term, the so-called honeymoon period and this honeymoon period’s effect may well have been larger due to the historic nature of the presidency so one may have surmised that he would be able to push through a number of policy proposals. In actuality though, President Obama struggled to enact many of his proposals at first.

The dynamics of policy creation during a crisis differs from a non-crisis situation due to a number of distinct reasons. In a non-crisis situation a public defeat of a policy that is put forward can often have a severe negative political effect for the proposer of the bill and thus they will try to avoid a public defeat of a bill that they associated themselves with or which is viewed as being part of their agenda. This leads to hesitancy putting forward a bill that is liable to end in failure. During a crisis however, there is more political reward for taking action and often a severe political downside to holding up action. This makes the president and other political leaders more likely to put forward proposals to change policy. This can lead to competing proposals that often try to outdo each other in audaciousness in order to have the backers of these proposals be seen as a brave leader.

After proposing a policy, the author or chief proponent of the policy, often the president, will try to shepherd the policy through the process of adoption. The president does not only try to convince individual members of congress, but essentially becomes the head of a coalition supporting the bill. The coalition will also do what they can to shape the political space to help the bill end in a better solution. The administration has limited supply of resources including such key resources as the president’s time and legislative support and so like all rational actors they use their resources in a manner that is most effective for them. In cases in which the vote will already pass by a wide margin, there is little reason for the president or his staff to work hard to push the bill except for credit claiming. In part he

¹⁷⁷ Neustadt, Richard. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press. 1990. 64.

is able to enact changes by getting party leadership in congress to agree to his proposals. He can then count on congressional leadership to ensure that they have the necessary votes and to convince those that are unsure. Not all members are persuadable about an issue so the administration and congressional leadership focuses its efforts on those that are.

There are still many centers of power in the congress. While Committee Chairmen may not be as powerful as they were before the reforms of the 1970s, they can exert significant control over legislation. This is particularly true for legislation that falls in the province of the committee and these days with the Speaker of the House often sending a bill to multiple committees, the committee often has some control and influence over a large number of pieces of legislation. Bills can be killed or be amended in committee and a committee's recommendations can often have significant effect on shaping the final bill. During a crisis however, congress becomes more monolithic as bills are expedited through congress giving members of congress less time to even determine what is in the bill. The roles of committees changes during a crisis and in general become less powerful as time becomes scarcer and as salience increases.

There is also recourse for the president in that if he cannot push through legislation, he can often achieve many of the same ends other ways such as by using executive orders in which the president can change policy and the actions of government without a law being passed. This gives him some bargaining power with congress as he is not fully reliant on congress and can thus bargain and give away a small part of his agenda in return for congress being willing to work with him. This can increase the public's perception of the job that the president is doing. Legislation also can be used to allow for future executive orders and can give the president ability to pursue action.

Political actors have different views as to whether bureaucracy should function as a coherent whole. The president typically thinks so and has at least nominal control over the whole bureaucracy and endeavors to bring much of the power of the bureaucracy to bear on some large or intractable issues. Whereas members of congress typically can exert some control over parts of the bureaucracy and agency and department heads are likewise limited in their formal power to their own fiefdom and at best can work with others. Committee chairs and many other congressional leaders benefit by the fragmented nature of the

bureaucracy because it gives them control over their sphere without interference from the party leadership. During a crisis the president will make an increased appeal to control the bureaucracy. This attempt to centralize power can help it become more responsive and thus better capable of dealing with crises.

Even when congress attempts to curtail executive authorities, the president can often find ways around the restrictions. Furthermore the mere act of trying to impose limits on executive prerogative can inadvertently cause these powers to become strengthened as congress implicitly approved of powers. Mayer describes the reporting requirements imposed by the Hughes-Ryan amendments to the Foreign Assistance Act and the Intelligence Oversight Act in 1980 saying, "The mere fact that congress required the president to report on such activities was read by the courts as a congressional recognition of the president's right to conduct them."¹⁷⁸

One method the president has of increasing his ability to get his way is to go public and put pressure on congress to go along with his proposal. It can help the president get his agenda passed or to gain acceptance from congress particularly if their agenda is popular with the public. However, going public has a tendency to alienate congress and thus is relatively incompatible with bargaining. Therefore to be affective the president must decide whether to rely on going public and a more coercive approach to handling congress or whether to rely on bargaining and working together with congress. As it requires less compromise and working with congress, going public seems particularly enticing to presidents that do not have a long background in or ties to congress. For instance those that came to office as an outsider such as a governor would be less prepared and inclined to bargain.¹⁷⁹ They are thus more likely to go public and try to exert pressure on congress. In a crisis the temptation to go public is even higher since the issue often already has a high level of salience and often the public is looking to the president to lead during a crisis. This is especially true in areas such as foreign and defense policy in which the president can serve as a surrogate representing the country. In addition, lobbying congress and using negotiation can be slow especially with the historic devolution of power from a few powerful individuals to the current system in which most members of congress to chair

¹⁷⁸ Mayer. 25.

¹⁷⁹ Kernell, Samuel. 2006. Pg. 44.

either a committee or a subcommittee and thus is not always well suited to dealing with crises, which often evolve rapidly.¹⁸⁰

If the opposition party holds congress, it has little incentive to help the president achieve his agenda, but rather it will work diligently to thwart the president so that the president's policy does not get implemented. This both stops policies that congress does not approve of from being implemented and also can cause the president to look ineffectual. In 1985, House Republican Whip, Richard Cheney, said, "Polarization often has very beneficial results. If everything is handled through compromise and conciliation, if there are no real issues dividing us from the Democrats, why should the country change and make us the majority?"¹⁸¹ During the time period examined in this paper there are numerous instances of congress trying to sabotage or sideline presidential proposals. Crises can both be used by the president to regain the initiative as well as a pretext for congress to ignore the president's proposals.

The president derives considerable power advantage due to his informational advantages and the fact that he can keep information secret in a number of ways such as classifying it using the nation's classification system which was itself almost completely set up through presidential executive orders. The president also limits the dissemination of key information through using executive privilege. In addition to his ability to protect data, he has additional informal advantages due to his links and contacts and his unique position in the political hierarchy as well as having the advantages due to the vast resources he can bring to bear to find out relevant information. The president gains by having these informational advantages and takes steps to ensure that he maintains this advantage over congress and others. An example of this was President Bush ordering the Secretary of Health and Human Services not to make the costs of the president's proposal for a Medicare prescription drug plan public as the cost would lead to a weakening of support for the bill.¹⁸² In a crisis this advantage is maximized as the president and his staff is the natural coordination point and because the president has more opportunity to shield data from congress and other parties under the reasoning that this secrecy is required by the crisis.

¹⁸⁰ Kernell. 34.

¹⁸¹ Dickinson, Tim. "The Man Who Would Be Veep" *Mother Jones*. July 26, 2000.

¹⁸² Shull. 76.

There is a trend in politics to look more at short term politics than the long term needs of the nation and this can lead to the crafting less desirable policy. This is particularly true in crises when there is more public attention and thus public pressure on the president to deal with the imminent threat. Henry Kissinger said, "There is a problem that as the pressures of their electoral process have increased, governments have become more and more tactically oriented. The more tactically oriented they are, the more short-term their policies. The more short-term their policies, the less successful they are."¹⁸³ More complex problems or those that are less visible and comprehensible to the public often will get less emphasis than simple, symbolic actions that can be performed quickly.

Beryl Sprinkel, chair of Council of Economic Advisors under Reagan said, "It turns out that good economic policies that bring you better growth, better employment, lower inflation and higher levels of prosperity usually have short-run cost." Further saying, "You go through the pain first, and then you get the goodies later. If I could change something, I would certainly get the goodies up front because it would solve a lot of political problems." This leads to less desirable policy since it is unpopular in the short term.¹⁸⁴ Crises lead to an even shorter time horizon and thus the risk of poor policy meant to address the needs of a temporary situation is even more pronounced. It has been argued about many financial crises that the spark of their creation was legislation designed to deal with previous crises. For instance, mark to market accounting that seemed like a good idea during the Savings and Loan crisis deepened the 2007 financial crisis.

3. Hypotheses

Following the review of some of the theoretical framework, this paper looks to see form hypotheses based off of the framework this paper is working from and the previous research that has been done on delegation. While there are several potential questions that can be investigated, this paper will focus on five questions in particular with regard to crises

¹⁸³ Kernell. 1993. Pg. 190.

¹⁸⁴ Kernell. 2006. Pg. 232.

and the use of delegation: whether the abdication hypothesis is correct, what determines the agents that are delegated to, what determines the constraints that congresses uses, the extent of unilateral executive action during the crisis, and the extent that implicit delegation was used during the crisis.

The existence of a crisis can be viewed as an environmental variable and it is one with significant effects both on policy taken and also on the manner in which the policy is decided on and implemented. Delegation is often a needed tool to deal with crises. Often the slow, deliberate method of shaping policy that congress typically uses is not able to handle fast changing, complex situations that require immediate response. The president as a single decision maker is able to steer the ship of state far more nimbly than the often over politicized body of congress where parties battle for political position. Agencies also have advantages over congress in that they have and can gain specialized knowledge in key area, they have the size and scope to handle detailed issues, and they often have a structure in place to deal with these crises.

One would expect that the president will make a case for strengthening the authority of the executive branch and state that additional powers are warranted to deal with the crisis. Congress would also be expected for electoral reasons to take steps to address the crisis. As the crisis begins to subside the expectation would be that the government will begin to shift from simply being reactive to being more proactive the executive agencies and congress will work both alone and in conjunction to change the system so that the likelihood of a similar crisis occurring again in the future is decreased. With time, one would expect executive and legislative branches to rolls back some of the responses the government made to the crisis that are judged as too extreme or no longer needed after the crisis.

3.1 Abdication Hypothesis

There have been many attempts to determine whether congress delegates its authority to further its own political interests by avoiding difficult decisions or whether it uses delegation for more positive reasons. In all likelihood, congress's actions are likely far

more nuanced and do not lead to generalities. Congress is made up of hundreds of individuals making decisions for differing reasons. While the collective action of congress can be analyzed for general trends, a reasonable expectation based on the varying preferences of its members is that members of congress delegate both to avoid making the tough decisions as well as for more positive reasons such as a desire to create better policy. Members of congress typically have multiple goals such as to get elected and to help the public interest as they see it. While these may vary in importance to members of congress and the relative pull of these influences vary based on the political situation and the question being examined, they will all continue to affect the actions of individual members of congress and the body as a whole. It may be expected that in a crisis when their nation and its citizens are most at risk that members of congress would be more inclined to focus more on ensuring that the best policy is put in place and in the correct manner as opposed to being more focused on political issues. This belief in altruistic intentions in the face of a severe crisis is consistent with the belief in the rationality of members of congress. The assumption of bounded rationality implies that members of congress will chose the best options to meet their goal given the knowledge that they have, but it does not specify what their goals are or imply that they need be only their individual self-interest.

Likewise when faced with a crisis, the theory would predict that the president would likely be more inclined to delegate for altruistic reasons and the desire to have better policy created rather than political calculations. In addition, the president would be expected to take executive action even if it is unpopular. This is particularly true for those that do not need to be reelected since they have nothing to lose electorally. Even without election concerns, presidents' may focus on their legacy, however this tends to be less immediate and focused on short-term political scorekeeping and therefore more likely to delegate to produce good policy rather than to avoid blame.

Because of the severity of the crisis there was far more scrutiny of the actions of congress and the president. According to abdication theory this would give lawmakers a big reason to make sure not to take unpopular actions as these would be high profile and would carry a bigger cost than would be the case in usual situations.

3.2 Agents

The structure of delegation is important in that it can determine the actions government will take and this will affect the laws and regulations that result. One of the key determinants of the effects of delegation is who the agent will be that is delegated to. Agents have a host of factors that determine how they will act and in what situation it makes sense to delegate to them. Among these factors are the size of the agency, what issues they are focused on, how independent they are from the president, how immune they are to the threat of regulatory capture, their ideology, and their specialization. By assuming that congress and the agents will act rationally in their own best interests to the extent to which they are able to determine these, the choice of agents that congress delegates powers to will be strategically chosen to accomplish goals and to pursue a specific agenda. Congress thus looks at the specifics of various potential agents to make a determinate of which agency to delegate to or whether to create a new entity to be the receptacle of delegated power.

Congress will ideally choose an agent with some expertise in a field as expertise will generally lead to better policy since those with knowledge of a field are better situated to know what the proper actions to take are. Congress will thus tend to aim to delegate to an agent with expertise in a field so long as it wishes for an effective organization. There are however, often multiple potential offices, departments, and agencies that would serve well as a potential target for delegation. Congress can determine whom amongst these to delegate to based on congress' view of the competence of these entities. One can reason that congress will choose an agent that will best meet their needs and often this will be to effectively deal with a problem and create sensible rules. They would want an agent that had similar views on the issues on the table as congress did. While congress is a collection of different individuals, one can suppose a median floor voter or a median voter of the dominant coalition and it is this person that the agency would be expected to have similar views to. The agent will also be more likely to be selected as an agent if they hold similar political views to those held by congress and if they are of the same party that controls congress. Some agencies have political leanings in large part due to their employees self-selecting what agency to work for and choosing issues that interests them. For instance the

Environmental Protection Agency tends to be more left-leaning while those in the military tend to be more right-leaning. We hypothesize that a rational Congress also factors in the leanings of the agencies themselves as well as just their leaders.

Laws can be written in various ways and this too can affect the choices relating to delegation. An act that is vague can give more wiggle room for the agent whereas one that is more concrete limits freedom of action. Vague laws that delegate power can also lead to questions by the judiciary as to the acceptability of the law. This can cause legal complications and it can take a while for these to become accepted and this can slow down the adoption process for these new policies. This can be seen in the Credit Repair Organizations Act, which was Title IV of The Consumer Credit Protection Act, which was designed to protect buyers of credit repair services. However, the act was not clearly laid out so that key questions, such as whether consumers can sue credit card companies even if there is a clause in their contracts saying that all disputes, must be settled by arbitration. After the U.S. Court of Appeals for the 9th Circuit ruled in the CompuCredit Corp. v. Greenwood, that consumers did have this right, the Supreme Court took up the issue.¹⁸⁵ The Supreme Court in an 8-1 decision overturned the ruling of the lower court. Discussing the confusion the wording of the law create, Justice Scalia wrote a majority position that stated, “Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse.”

Agencies are not all created equal. Their structure, history, personnel, and numerous other factors can greatly affect their tendencies. For instance the Department of Defense and the Department of Housing and Urban Development will have differing views of their mandate, their mission, and their place in the political system. Often the decisions made when setting up the industry linger for many years after the agency was designed and created. Thus agencies can reflect the era and political climate in which they are first created. This can affect policy creation.

Among the ways to categorize agencies, they have been placed by some in categories such as regulatory agencies, redistributive agencies, constituency agencies, policy agencies. Individuals that choose to work in or lead one type of organization differ from

¹⁸⁵ 132 S.Ct. 665.

those at another. Likewise members of congress overseeing one of these types of agencies often differ from those on other types. As an example, members of Congress overseeing the United States Department of Agriculture, a constituency agency, are more likely to be in an advocacy role for programs and typically come from districts with a large number of farmers and farm interests.

This leads to competition between principals to influence the agent. Occasionally they work in tandem to have an outsized influence on agency actions and to work to resolve intractable issues. Often however the interests of the president and various members of congress do not align.

In instances where congress writes legislation delegating power, it is able to choose to whom to delegate these powers and it has numerous options. The choice of agent is a key factor in the act of delegating. As this paper assumes that congress is made up of rational political actors one would expect congress will select agents that best match their political goals, whether they be avoiding blame or creating optimal policy. The selection of an agent matters because different agents have different goals, capabilities, and freedom of action.

3.3 Constraints

The structure of the delegation combines with the target of the delegation to truly determine the nature of the delegation and the effects of it being the method used. Constraints greatly shape the dynamics of the delegation and the actions of those involved in the delegation. Constraints can be used by the principal doing the delegating to constrain the actions of the agent delegated the power. However, they can also be used to focus actions or ensure efficient action. By requiring the agent to work in conjunction with another agent, constraints can ensure proper coordination of all the individuals in the government with expertise in an area or a stake in the results. They can also ensure that the agent does not go too far from the typical policy responses that have been used in the past. There is a sizable contingent among governmental agencies that have a stake in the status quo and wish to preserve past decisions and will push back against excessive changes.

Constraints can make sure that a new agency or an agency entrusted with a new power does not deviate too far from congress' desired policy changes.

We would expect that because of the importance and scope of the legislation that was enacted in response to the economic crisis, that numerous constraints would be employed to keep agency actions aligned with the preferences of congress. In addition, this paper would expect that the types of constraints employed would be consistent with and dictated by the goals that congress is trying to achieve.

Constraints on time can also be used to ensure that a solution does not become open-ended, but rather the policy response to the crisis is designed to meet the current crisis. This is the case if power is given for a certain amount of time or an agency is designed to dissolve after a certain amount of time. Constrains can also slow down action if congress requires a certain amount of study or certain specific actions before it may take action. Time constraints can also speed up actions or ensure that certain steps are taken in a timeframe that congress feels is acceptable. Congress may want to show a credible commitment to resolving an issue and by enforcing milestones and fixed dates for actions such as findings and reports it can ensure the timeline is met. There is some loss in that the agent does not have the ability to make its own timelines. For instance, if congress requires a proposal and a report by a board by a certain time, it can cause inefficiencies if the agent has to prematurely take action. It may be able to produce better results with more time and would be able to solve the problem.

Spending limits also can assure that the agent's scope of action is constrained. For agencies to be able to enact sweeping changes, there is often a need for the agent to have the necessary resources to deal with the issue. One of the most important resources for an agency is funding which can be used by the agent a number of ways to achieve a goal. One of the other key resources that is needed by an agency is manpower. The more people that can be dedicated to a task, and the better fit they are for the task, the more likely they will be able to succeed at that task. Thus if congress delegates to a large, well-staffed agency it will better enable the agency to accomplish what was dedicated, but it would also be enabling the agency to push its own agenda. By having significant resources, including

people, and not needing to rely on others to supply these, the agency has less dependencies and more capabilities which can be leverage to pursue actions that it views as best.

Guidance is also an important tool of congress. Congress is able to give some guidance so that the agency knows what it is supposed to achieve and the aims of congress as the delegating power. Congress, by assigning goals in the delegation itself, can assure vigilance by the agency being delegated to. It can also lay out goals so that the agency knows what it is asked to accomplish and in the case of multiple or contrasting goals, congress' guidance can balance priorities or prioritize these. By including such guidance in the law delegating authority, the agency legally must be attuned to congress' desired goals. Thus by explicitly stating these goals, congress can make explicit what it is that they would like to achieve and make the agency focus on these. This guidance also helps to exclude other goals that the agency might otherwise focus on or substitute instead if congress only implies its goals.

Oversight is another method congress can use to set priorities and ensure that the agencies continue to focus on these rather than staking out their own goals. Congress can set up hearings and thus perform direct oversight. Hearings are a powerful way to adjust the course of an agency. Congress can harangue an administrator that congress feels is not doing a good job or is going against congress' wishes. The mere threat of these actions is enough to keep an agency in line. This threat to the agency and its heads can be used for leverage to allow lawmakers to achieve goals that they or their voters are interested in and allows for case work on behalf on their constituents. This case work helps members of congress politically.

Constraints can be designed in such a way that certain individuals, companies, or industries are specifically exempted from the actions on an agent. This can be done to decrease the resistance to the bill allowing it to pass since entrenched interests that are not threatened will not work hard to counter the bill as they have less at stake. Exempting groups or individuals is also useful for members of congress. If a member of congress can get a constituent or company in their district exempted from regulation this can garner them a great deal of good will which can lead to future votes and campaign contributions. Exemptions can also be used to stop an agency from being overzealous and creating poor

policy which does not take into account important factors or which is too universal and does not take into account or make allowances for the specifics of the situation. It can also allow members of congress help their key constituencies.

Along with the exceptions that congress makes in the law when it sets forth delegation, it can also set forth compensation that must be paid or allowances made for those organizations and people that are adversely affected by the actions of the agency. Like exemptions, making compensations can make the delegation less disruptive to the group regulated or affected by the agency's power. This makes the opposition to the new law less determined to combat the new bill and more likely to compromise. Compensations and exemptions often are the result of compromises in which law makers use it as a bone for other law makers or affected interest groups. They can be used to ensure that agency actions are not unnecessarily severe or disruptive. Thus congress can build in gradualism or mercy that will help companies adapt to new rules. This can be particularly important during economic crises since it takes time for markets to become efficient and congress does not wish to do more damage, which a particularly severe or far-reaching law can do even if it addresses a genuine national need. This is especially true because markets rest to a great extent on expectations of the future and confidence in the markets could be damaged if an agency took too aggressive a step.

Judicial review is a way to oversee the actions of an agency. It can be employed to ensure that an agency's actions are approved of by constituents. If there is significant unhappiness in the agency's actions or if an entity is adversely affected they have recourse to rectify the situation and effectively overturn the agency's actions. It is powerful in so far as individuals and organizations can bring a case and the vast legal system can deal with them as opposed to taking congress' limited time. This allows congress to provide oversight of the agencies at a low cost to itself. It is a fire alarm rather than police patrol method of overseeing the agency. This blunts the risk to congress of an unpopular decision that could have been traced back to congress. Often entities have access to the court system by general provisions such as those contained in the Administrative Procedure Act, but congress has the ability to make additional provisions for access to judicial review. These can be used for various purposes such as to protect entrenched interests. Judicial review can be particularly important in the case of economic regulation since it is often difficult to

know in advance the true effect of regulations and judicial review can ensure that adverse unintended consequences do not cause more harm than they do good. It can also be useful as regulation outlives its needs.

Serving a similar function as judicial review are provisions made to give those adversely affected by agency actions the right to appeals and which layout a formal appeals procedure. By making allowances for appeals, congress can give individuals and companies a way around the laws and regulations created by an agency. This can avoid an excessive action by an agency and assure that specifics are being taken into account and that the decision is not so politicized. It can also make the process have more of an appearance of being fair.

Congress also can make rulemaking requirements so that agencies must comply with the processes and procedures that congress lays out in the law. As with most constraints, rulemaking constraints limit the freedom of action of the agent. There are a vast array of rulemaking requirements that congress has the option of using when it delegates authority to an agent. These can require agents justify their actions. They might also give requirements for the agency to make a decision with an eye to a certain goal. This directs the agency and gives it a course of action far after the initial administrator of the agency has left or alternatively it can give a new agency direction before the culture of the agency is formed or its structure is truly set. This is a powerful, flexible power held by congress in that it can be used to address a variety of issues. It can limit the power of an agency, set the course of future action, change the means or ends of agency action and help determine in what situation the agent should take action and in what situations it should not.

Limits on delegation can also include limits to the appointment power of the agent. This can limit the ability of congress and the president to fully determine the people that will lead the agency. The leader of the agency or members of a board largely set the priorities for the entity in question and have final say over the actions of the agency. Thus the ability to determine who is a member of the agency can be an important power for an agency or others. There can be other appointment power limits such as congress determining how long someone can serve for. Setting time limits for appointments can change the strength, internal consistency, and actions of the agency. If the head of an agency is appointed for a

long period it will give them more independence so that they can chart the course of the agency with less oversight. Longer appointments are important because they can stop the president from selecting a specific individual for a position. Thus appointees who are appointed to positions with longer term will tend to be less tied politically to the president and they do not need to make their actions accord with the president's wishes in order to be reappointed. The appointment procedure also can determine whether the agency head serves at the pressure of the president or whether they cannot be easily replaced and it also determines who gets a say in the act of appointing an agency head. The Senate typically is given some role in the appointment process when the president appoints someone for that position. This is due to Article II, Section 2, paragraph 2 of the United States Constitution which states, "He [the president] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."¹⁸⁶ This passage clearly lays out that for many offices the congress is able to determine which person or persons are able to make appointments and the process used. There are often additional provisions laid out in legislation that gives other individuals the ability to role in the appointment process.

Delegation can also be designed in such a way that fully enacting an agent's proposal would require legislative action to be taken afterward to finalize the action of the agent. This is a weak form of delegation that vests limited power in the agent. This is useful for advisory panels and similar organizations which congress wishes to take initiative on an issue, but on which congress would like final decision making authority. The action needed by congress is not necessarily to decide about the issue at hand, but instead can be on related topics so that it is essentially a contingent delegation that depends on congress' actions. Alternatively the delegation may be a proposal that congress must specifically take action authorizing the agent proposed action. An example of this was the so called

¹⁸⁶ US Constitution Article II, Section 2, Paragraph 2

Supercommittee which has some agenda setting power, but which needed congress in order to implement their proposals.

Delegation requiring legislative action is closely related to the legislative veto. The legislative veto allowed congress to unilaterally nullify an action of an agency. It is a post hoc power of congress allowing it to stop actions this it disapproves of even after the agency creates them. Legislative vetoes were created in which only one chamber of congress is able to override the actions of the agency. This allows congress or a part of it oversee an agency and give it far less leeway in that all its actions can be easily overridden all without going through the normal process of law making. The Supreme Court however ruled that the ability of congress to use the legislative veto to overturn agency regulations was unconstitutional due to its circumventing the regular rules of law making. However, it is argued by some that implementations of a legislative veto are still in law and used today despite this type of constraint being ruled unconstitutional.

Congress, when it writes legislation that contains delegation, often includes transparency provisions. These can take the form of requiring public hearings, which are useful to members of congress in that they help gage public support for proposed courses of actions that the agency suggests. This can help members of congress determine stakeholders and either distance themselves from unpopular proposals or take credit and associate themselves with popular proposals. Public hearings thus serve the politician's interests by being an efficient information gathering technique in which there is very little congressional staff effort required. Public hearings serve an addition function beyond transparency and their political benefits to individual lawmakers in that they can help improve policy. These hearings garner feedback from people and these can lead to better information from which to develop a policy and may include counter suggestions that are better than the initial proposal. Public hearings also turn policy making into a two-way endeavor in which those that are governed can communicate with those making laws. This makes government more representative and responsive to the will of the people and thus broadly it becomes more democratic.

Constraints on delegated power greatly affect the manner of policy creation and are an important tool by which congress can ensure policy will remain consistent with certain

policy objectives that congress wishes pursued. This paper hypothesizes that constraints will form an important part of the delegation and that the types of delegation used would be consistent with goals that the enacting coalition is trying to achieve and the method of policy creation that they favor.

Agency heads are typically chosen in large part due to their association with one party. This political identification can help the president determine to what extent the interests of a potential agency head aligns with their own views. In the hectic time after an election, it is difficult for a president and their transition team to fully vet candidates to run an agency and so substituting for a full knowledge of a candidate's views, abilities, and willingness to do as directed by the president are an assessment of their party loyalty and past history. Delegation can be affected by specifics such as the length of time that an agency head or member of a board are appointed for and thus congress and the president will alter these and other factors in order to ensure the resulting policy better meets their preferences.

Limiting who can be appointed to head an agency or to another key position can help assure that the actions of the agency, which are largely set and controlled by the goals of the head of the agency, can in turn be influenced by congress. Congress tries to ensure that those who are given such power and responsibility have views that are within the mainstream of congress's views. In addition, the power to select the individual or to limit who the executive can choose for the position helps ensure that the allegiance of the appointed individual would be to those that helped in their nomination and would be directed towards congress in general rather than to the executive. This power over the nomination process can also help gain control even of those that are merely aspiring to one of these offices, but not currently up for an office. This occurs because office seekers know their actions may at a future time have their views and actions be questioned if they don't conform to congressional preferences.

Despite potentially not having much experience, the head of an agency has sizable control over an agency. An agency head has considerable power to help or hurt the career prospects of both other political appointees and career bureaucrats within the agency. Thus when congress uses its ability to affect appointments to leadership positions at a federal

agency, this can help ensure compliance by the agency to the desired actions and outcomes that congress prefers. It also gives members of congress power over that agency that can be beneficial for performing casework on behalf of constituencies.

Appointment power limits can also be used to dictate the manner of choosing a head of an agency, office, or board. They can be used to make sure the process is equitable to multiple parties such as by splitting appointments between different governmental bodies or powers. Alternatively they can be used to stack the deck and ensure that the agent or agents selected fit with congress' goals. For instance, there could be an appointment power limit in which the person appointed has to come from an industry or be accredited and thus their views and goals would more likely be tied toward the status quo. Alternatively a constraint on appointments could effectively require an activist who was pushing for change be appointed if congress designed the limit of delegation thusly.

Another type of appointment power limit is a limit on the length of time that an individual can serve in the role they are appointed to or a specified length of the term of the appointment. Serving a long time in a position can allow an agency head to gain their own power base and a chance to gain expertise in the area which both would tend to increase the independence of that political actor and allow them more leeway to pursue their own goals and to counter calls from congress for certain action. Similarly by having the term of appointment be short, the bureaucrat knows that they will require congress to help them get confirmed again to that or another position when their term is up. For those seeking to continue in government service, either in their current appointment or in a more powerful, more prestigious position they have a need to stay in the good graces of congress to accomplish these ends and thus they have a powerful incentive to be responsive to the desires of congress.

This difference can be seen in the appointment of the members of the Board of Governors of the Federal Reserve System who are appointed to 14-year terms. This long period gives them considerable flexibility and freedom to pursue sound monetary policy without resorting to short term political expediencies. Those on the board are able to increase the time frame they are focused on and make decisions based on the needs of the nation rather than on the needs of a political party or on their personal need to be

reappointed. This can also help ensure consistent policy as they do not need to shift policy every election to deal with new political realities. This independence is generally considered a good thing to have in a central bank and many other countries also have similarly isolated and protected central banks. However, there is a tradeoff between freedom of action and accountability and too much independence can lead to lax oversight.

The belief that congress will use constraints strategically is based off the idea that Congress will try to make sure it approves of the policy that is implemented and thus will want constraints over agent's actions. As there are a vast array of constraint types that could be used and ways to implement them, congress will use these to help to best achieve their goals. The choice of constraints and the way to structure the delegation go hand-in-hand with the decision to delegate and are part of the decision to delegate and how to structure the delegation.

One would expect that due to the nature of the crisis, constraints that could lead to policy being created quickly, such as time constraints, would be used significantly, whereas constraints that may slow implementation of agency regulations such as judicial review constraints would be used comparatively less often. It is also to be expected that congress will use reporting requirements and public hearing requirements significantly as large shifts in policy are able to be made quickly in a crisis and congress will want to ensure that it is aware of the policy that is being propounded, determine who the affected interest groups are, and ascertain the political ramifications of these policy changes.

3.4 Unilateral Executive Action

Policy can be created using a number of methods such as direct congressional action, delegation of policymaking authority to the administration, and unilateral executive action. This paper will investigate the use of unilateral executive action in response to the crisis. Due to the increased public scrutiny during crises and a tendency for the public to look to the president to lead in such circumstances one might expect significant unilateral executive action. Furthermore the existence of significant gridlock during this period and the importance of reacting swiftly to a financial crisis which can be exacerbated if confidence in

the financial system withers would also lead to expectations of extensive use of unilateral power.

The approach used to analyze unilateral actions is similar to that used by Warber when he set out five tenets of Unilateral Theory: “(1) presidents are rational actors who maximize their unilateral action powers to the fullest in order to enact their agendas, (2) unilateral powers are useful tools for presidents to use in achieving their policy agendas, (3) presidents are strategically motivated in deciding when and how to use unilateral powers, (4) presidents will be more successful in using unilateral powers to achieve results in certain policy domains than in pursuing their policy agendas through traditional legislative strategies, and (5) there are costs associated with the exercise of unilateral powers.”¹⁸⁷

These assumptions argue that the president will perform unilateral action when he feels the benefits of such an action exceed the costs.

In the words of William Howell, “It is impossible to articulate a theory of presidential power without having a theory of Congress and the judiciary. In this sense, the divisions between presidency, congressional, and judicial scholars appear entirely artificial. The influence each institution has over public policy depends on the check that others place upon it... A theory of direct presidential action, at base, must be a theory of political institutions.”¹⁸⁸ Therefore the paper will try to look at the context and the specifics of this period to see what may have influenced the president to decide whether to use unilateral executive action during this period to address the financial crisis or to modify the financial regulatory system.

All other things being equal, one should expect high levels of unilateral executive action during a crisis. There is a need for fast and decisive action, which is one characteristic of unilateral executive action. Additionally in a crisis there will be more pronounced calls for the president to take action to resolve the crisis and unilateral executive action is an effective way for the president to show that he is taking action to address the crisis.

¹⁸⁷ Warber, Adam L. *Executive Orders and the Modern Presidency: Legislating from the Oval Office*. Boulder, CO: Lynne Rienner. 2006. 13.

¹⁸⁸ Howell, William G. 2003. 113.

As Howell argues, “the president’s freedom to act unilaterally is defined by Congress’s ability, and the judiciary’s willingness, to subsequently overturn him.”¹⁸⁹

3.5 Implicit Delegation

While considerable delegation is explicit and takes the form of congress creating a law that delegates some of its power and authority to another body, some power is implicitly delegated. This can often take the form of an individual agency claiming a power that it was not explicitly given by the constitution or by a law. We would expect higher amounts of delegation during a financial crisis because time is such an important factor and policy needs to be created in a timely manner. It follows then that in the depth of the crisis when there is the greatest need there is likely to be more implicit delegation. In addition, with higher level of gridlock we would expect higher levels of implicit delegation as direct congressional action and explicit delegation becomes more difficult.

4. Case Study

Around December 2007 there began to be a major downturn in the economy. This downturn became a recession followed by a persistent economic slowdown punctuated by high unemployment rates and a low rate of GDP growth. To deal with the threat to the U.S. economy that was posed by a lingering economic malaise, the government took a number of actions to reinvigorate the economy and insulate individuals from the damage done to the economy. In this chapter the paper looks at the actions that congress took to examine how and when delegation was used. This paper also look at other implicit forms of delegation such as some far reaching executive orders taken by the congress with powers previously delegated to him by the congress. Among the large number of actions congress took are the Housing & Economic Recovery Act of 2008, the Emergency Economic Stabilization Act of 2008, the American Recovery and Reinvestment Act of 2009, the

¹⁸⁹ Howell, William G. 2003. XV.

American Recovery & Reinvestment Act of 2009, the Helping Families Save Their Homes Act of 2009, and the Dodd-Frank Wall Street Reform and Consumer Protection Act.

These individual actions are part of a collective attempt to deal with these financial challenges such as the increase in foreclosures and the large increase in unemployment. Many methods were used by congress to deal with this crisis and several of these relied heavily on delegation. Agencies lent each other personnel and supported each other's plans crafting more of a government-wide solution than a collection of small solutions. The executive branch worked largely as a network rather than a hierarchical body. It allowed them to address issues collectively as a team and bring more power and tools to bear on the issue in ways that they could not otherwise.

Different agencies needed to work with each other because they each have formal powers that could come into play and which could contribute to the shared goal. Many agencies had a stake in the stabilization of Fannie Mae and Freddie Mac and effort to stabilize these was part of a combined plan to address the financial crisis in America and boost faith in the financial markets. In order to do this many agencies were required to take actions such as the Federal Housing Finance Agency, which as the regulator over the GSEs, had considerable powers over them. Likewise the Treasury Department was delegated some authority in this arena that it too could bring as did the Department of Housing on Urban Development.

The issue of decreasing confidence in the market was taken up by Ben Bernanke, the Chairman of the Federal Reserve Board who said, "Rising credit risks and intense risk aversion have pushed credit spreads to unprecedented levels, and markets for securitized assets, except for mortgage securities with government guarantees, have shut down." The Fed and other agencies worked to secure markets in order to decrease this risk aversion. There was lost output and lost jobs due to the recession and the actions of congress sought to ameliorate these. As Ben Bernanke stated in a speech about the downturn, "Government policy responses around the world will be critical determinants of the speed and vigor of the recovery."¹⁹⁰

¹⁹⁰ Bernanke, Ben. At the Stamp Lecture, London School of Economics, London, England, January 13, 2009.

Throughout this period there were record high levels of partisanship.¹⁹¹ Midway through the financial crisis, the nation was presented with a decision on how to proceed to solve the crisis. This was manifested in the form of a presidential election that was ultimately won by the Democrat, Barack Obama. There were a large number of factors affecting the voting habits in the election, but for the Obama administration the election was viewed as a mandate on what policies he would pursue with regards to the crisis. The Republicans in congress, however, were less inclined to implement some of these proposals.

Veto players, political actors whose refusal is sufficient to forestall a policy change, were able to limit the types of available actions that congress could take. For instance during the 112th congress, which served during the second half of President Obama's 1st term, only 283 public laws were enacted.¹⁹² The motivations for the Republicans to work with the administration were slight and so they assessed their political options and determined it was in their interests or those of their supporters to support the administration's plans.

Typically as power shifts both political parties continue to find reasons to work together. Those that gain control of the House still have reason to compromise and not change the rules too much. This is due to a realization that they need to work with the other side and that in short order they may be in the minority. The minority has similar reasons to put up with any changes enacted by the majority since they may soon be in the majority and democratic institutions lead to a long term view of the situation. Due to electoral trends such as districts becoming more polarized, much of the impetus to work together had vanished.

Dealing with the crisis meant walking a fine line. The government needed to make the crisis seem dire enough to necessitate immediate and large-scale action, but did not want to risk spooking markets and adding to the problems or eroding faith in the economic system, which would make the crisis worse. In the context of the financial crisis, painting too bleak a picture might promote a run on banks, risk of negative pressure on big financial

¹⁹¹ Cillizza, Chris and Aaron Blake. "Obama: The Most Polarizing President Ever" *Washington Post*. January 30, 2012.

¹⁹² Library of Congress. *Congress.gov*.

companies, and hoarding of funds by individuals and companies and related paradox of thrift problems. A potential solution were closed hearings where those who are knowledgeable about the state of the crisis and the direction it is going can give honest assessments and advice without the information becoming publicly available to have adverse effects on the behavior of corporations or individuals. It also is in part why the minutes of the meetings of Board of Governors of the Federal Reserve System are sealed for years after the meeting.

Trust in the market has a positive, reinforcing cyclical effect that can help lift the markets from out of the crisis whereas negative events build upon themselves which helped contribute to the severity of the crisis. An example of this positive cycle is when Warren Buffet agreed to buy \$10 billion in shares and another \$5 billion worth of warrants. This signaled confidence in the markets and in Goldman Sachs, a major firm that was under serious financial stress, from one of the world richest and savviest investors. This positive step helped build confidence in one of the largest bank holding companies and thus had a positive reinforcing step. The investment itself was dependent on positive signs of government action. Mr. Buffet in discussing the thinking behind his investment said, "If I didn't think the government was going to act, I would not be doing anything this week."¹⁹³

Regulations were weak in large part due to the significant political power that the financial industry has and has used to decrease regulations upon the industry. Between 1999 and 2008, the financial industry reported \$2.7 billion in spending on lobbying the federal government, which was one of the largest lobbying efforts during that period.¹⁹⁴ Fannie Mae and Freddie Mac spent \$164 million during that period on lobbying and saw very favorable rules that enabled them to be very profitable.

The presidential race was unusually close in 2004, however the administration did not feel that it lacked a mandate and did not shrink from action that it felt was right and this tendency to strive for big policy change was reinforced by Republican control of the House and Senate. The president can lead opinion or follow opinion.

¹⁹³ Paulson. 284.

¹⁹⁴ Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. Public Affairs. 2011. XVIII.

The period this paper is investigating includes the end of George W. Bush's second term and all of President Obama's first term. President Obama came to power with a large majority of voters voting for him and his message of change. This at least would seem to give him a large mandate with which to work from. However, he choose to use the mandate to push through a bill that revamped the health insurance industry and the ensuing protracted fight in light of a weakening financial picture weakened his support among voters and in congress by the time he approached his economic proposals. President Bush by contrast by 2007 was very unpopular and had very little in the way of mandate and struggled to work with Democratic factions in the congress. The expectation on the eve of the financial crisis was that he and his new Treasury Secretary, Hank Paulson, would not be able to do much more than serve out the remainder of the president's term. Mark Peterson quotes a policy aide who worked in the Johnson White House, describing the power that comes from popularity, "when a president is less popular, he loses control over a department and its secretary. They will not help him on the Hill as much, and they have more of their own power."¹⁹⁵ Thus the president's ability to control agents can be impaired by a lack of popularity, which in turn can increase congress' ability to control agencies and enact changes upon them.

4.1 Nature of the Crisis

The financial crisis of 2007–08 was a severe economic pullback that began in 2007 in response to a housing bubble and then rippled out to many other parts of the economy. Much of the onset of the crisis was initially due to a weakening in the subprime mortgage market. This was a large market which by the end of 2006, accounted for 20 percent of all new mortgages."¹⁹⁶ This however did not stay merely a mortgage crisis, but had numerous spillover effects that in turn led to new causes of economic weakness. While many had

¹⁹⁵ Peterson. 1990. Pg. 136.

¹⁹⁶ Paulson, Jr., Henry M. 70.

predicted localized decreases in home prices, but there would not be a nationwide decrease in such prices.¹⁹⁷

The unexpectedly high number of defaults in subprime mortgages was largely due to an increase in the laxity of mortgage lending rules. Individual mortgage originators and financial firms were incentivized to create more loans and the focus was systematically moved away from managing risk. Securitization was part of the cause for this desire of banks to increase the number of loans they had and to be less concerned with the likelihood that the loan would be repaid rather than focusing on whether the loan were conforming and thus could be sold to Fannie Mae or Freddie Mac. As defaults began to rise, this took a toll on the earnings of financial firms that had bought tranches of home mortgage securities. These companies began having large losses in this class of assets that were also often difficult to sell. As investors began to sense weakness in some financial institutions they began to put financial pressure on those companies. This coupled with a drying up of funding sources put severe liquidity pressure on several large financial firms. Bear Sterns was able to be saved through a deal orchestrated by the government, however when Lehman Brothers, at the time the fourth largest investment bank in America, went bankrupt it led to a further tightening of credit markets and a further disintegration of trust in the financial system. This led to runs on banks and other financial companies. Other companies were endangered due to losses from the mortgage defaults or the Lehman bankruptcy or through loss transfer mechanisms such as credit default swaps or threats from counter party exposure.

Leading up to the crisis there had been significant deregulation for decades as it was often in congress' interests to deregulate as it often was for executive agencies. There was not a powerful interest group that gained by there being more restrictions and regulations on financial and housing industries. Regulations tended to cut into profits and salaries and thus the financial industry spent considerable funds trying to get the government to decrease regulations. This was true even after the savings & loan crisis that was in large part caused by deregulation. In fact the changes congress made to address the deteriorating competitive positions of Savings & Loans such as the Depository Institutions

¹⁹⁷ Kling, Arnold S. *Unchecked and Unbalanced: How the Discrepancy Between Knowledge and Power Caused the Financial Crisis and Threatens Democracy*. Rowman & Littlefield. 2010.

Deregulation and Monetary Control Act and the Garn-St. Germain Act contributed to the trend towards deregulation of the financial industry and to the crisis. The Garn-St. Germain Act, for instance, greatly increased the kinds of loans that banks and thrifts could issue. Many of the new types of loans that they could offer, such as adjustable-rate mortgages and interest-only loans, have had very high default rates during the economic crisis and in large part contributed to the mortgage crisis and the subsequent intertwined crises.

There was also significant interest by those in the industry to grow and become ever larger. These companies and industry pressure groups thus had reason to lobby congress to remove restrictions on growth of banks. In response to this, in 1999 congress passed the Gramm–Leach–Bliley Act¹⁹⁸ that effectively repealed Glass-Steagall Act provisions that had separated commercial banks, investment banks, and insurance companies. The Gramm–Leach–Bliley Act thus allowed companies in these areas to compete in these other fields and merge with other types of entities and thereby potentially grow larger. Another act of congress was the passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 that lets nationally chartered banks offer branches nationwide so long as the bank acquires branches in other states by means of a merger. These acts and other removals of regulations led to a wave of consolidations that led to the emergence of companies that are too large to fail and which due to their size complicated the response to the crisis. In addition to the growth in the number of too large to fail companies, the Gramm-Leach-Bliley Act made it more difficult for regulators to get a sense of the financial system in an area that they are not regulating. The act itself was a response to Citibank’s purchase of insurance giant, Traveler Group, and the divestiture that the Glass-Steagall Act would thus have necessitated if congress did not take action to remove the provisions that the Gramm-Leach-Bliley Act removed. From 1998 to 2007 the assets of the five largest U.S. banks increased from \$2.2 trillion to \$6.8 trillion and the assets of the five largest investment banks increased from \$1 trillion to \$4 trillion.¹⁹⁹

One of the main bodies designed to ensure liquidity and stability in the markets was the Federal Reserve that was created by congress in 1913 to deal with issues such as bank runs of which there had been a half dozen in the preceding 40 years. Ben Bernanke, the

¹⁹⁸ Pub.L. 106-102

¹⁹⁹ Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. 53.

Chairman of the Board of Governors of the Federal Reserve System, felt that the Fed had been lax in its regulation of the mortgage market and went further saying, “I think it was the most severe failure of the Fed in this particular episode.”²⁰⁰ Others such as the HUD Secretary, Alphonso Jackson, also felt that regulation was not all it should be and reflected on the period leading to the crisis by saying, “Everybody was making a great deal of money ... and there wasn’t a great deal of oversight going on.”²⁰¹

Regulation was not just weak at the national level, but was weak at the state level as well. This was because national regulators jealously protected their realms of authority. Both the Office of the Comptroller of the Currency and the Office of Thrift Saving issued rules that barred states from enforcing their regulations on thrifts and banks and left regulation of these to their national regulators and threatening state’ attorneys general not to try to interfere.²⁰² National regulators thought it was their prerogative to regulate nationally chartered entities and that states were specifically barred from that action. Those states that did try to regulate national banks also had to deal with banks arguing these jurisdictional issues as well. For instance, the Financial Crisis Inquiry Report mentions that Wachovia, a North Carolina-based bank, refused to abide by North Carolina regulations, because as a national bank it only fell under the regulatory jurisdiction of the Office of the Comptroller of the Currency (OCC).²⁰³ This led to a four-year legal confrontation with the Supreme Court ultimately siding with Wachovia and determining that the OCC was the sole regulator of mortgage lending with jurisdiction over Wachovia. The OCC and the OTS get a large percent of their funding from assessment from the banks and thrifts that they regulated. This made them concerned about continuing to be the regulator for the entities they regulate and this gives them perverse incentives such as a tendency to be easy on those they regulate so that they will continue to be selected as the regulator by these entities.

Credit ratings agencies also played a part in this crisis in that there were systematic problems with ratings. The Nationally Recognized Statistical Rating Organizations were given a special place in that the law contains several capital requirements, restrictions on

²⁰⁰ Reddy, Sudeep. “Bernanke Defends Record on Lehman” *Wall Street Journal*. September 3, 2010.

²⁰¹ Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. 13.

²⁰² Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. 13.

²⁰³ Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. 13.

purchasing certain assets, and other regulations that are dependent upon securities being rated a certain class of asset by one of the national ratings agencies. Laws such as the Secondary Mortgage Market Enhancement Act of 1984²⁰⁴ enhanced the power of these rating agencies and made them pivotal to the financial system. However, credit rating companies were paid by companies that created securities and as these companies benefitted by having better rated securities, agencies would be tempted to rate them better than they would be otherwise. This was combined with an increase in the number of CDOs. Mortgages were bundled together and securitized and the various tranches were rated. Often they were rated AAA even though the underlying assets that comprised these equities were far riskier. The rating agencies relied on unrealistic models and rated tens of thousands of securities AAA that within a year or two were downgraded significantly. This led to a worsening of the financial situation. These agencies had been mostly unregulated until the Credit Rating Agency Reform Act of 2006²⁰⁵ at which point there was some regulation of their methodologies.

Among the items that have been argued as being some of the causes of the crisis, many of these were government actions. These include the Gramm-Leach-Bliley Act²⁰⁶ which effectively repealed the Glass-Steagle act, the Commodity Futures Modernization Act of 2000²⁰⁷ which ensured that derivatives would not be regulated, and the Community Reinvestment Act²⁰⁸ and other actions taken by congress which led to greater lending to the poor and those with poor credit histories. In these instances congress took actions that were popular and had positive short term effects without focusing on potential problems that may occur down the line. In some instances, it may have been that these unintended consequences were unforeseen, but in others there was likely a decision made about the benefits that accrued to constituents now and this outweighed consideration of potential problems that might occur at some period in the future. The examples here are not to say that congress was the only part of government that took actions that contributed to the crisis. The Mark-to-Market rules put forward by the Securities and Exchange Commission, which government how financial companies value their assets, and the actions of Fannie

²⁰⁴ Pub.L. 98-440.

²⁰⁵ Pub.L. 109-291.

²⁰⁶ Pub.L. 106-102.

²⁰⁷ Pub.L. 106-554.

²⁰⁸ Pub.L. 95-128.

Mae and Freddie Mac have been put forward by many as causes of the crisis as well and in this latter case, the GSE's had a similar conflict between short term advantage and the potential for long term catastrophe to that of congress.

During the crisis the size of Federal Housing Association's balance sheet increased as a result of this and grew to over \$1 trillion.²⁰⁹ Due to a worsening mortgage market, this portfolio led to major losses and required hundreds of millions of additional funding from the Treasury Department to supply it with adequate capital. Most of these losses were due to the initial portfolio it insured shortly after the FHA Modernization Act of 2008 during the midst of the financial crisis of 2007–08.²¹⁰ This funding was partly recovered due to a \$25 billion out of court settlement with certain large banks that the federal and state governments alleged had acted improperly making foreclosures in a fraudulent manner and without taking the appropriate steps such as reading and signing the foreclosure documents. This resulting settlement of this so called the robo-signing crisis had up to \$1 billion in funds set aside to cover the FHA losses. The FHA emergency fund was legally required to equal at least 2% of the outstanding loans of the agency, but even this legal requirement, which is only half what private insurers need to hold, had not been upheld in practice.²¹¹ FHA can raise funds through the premiums it charges for its insurance services and it can raise its rates as the need arises. FHA picked up much of the slack in the mortgage insurance market that had previously been serviced by Fannie Mae and Freddie Mac. In part this increase in loans insured by FHA was due to congressional action taken in 2011 to make FHA loans more attractive than those of Fannie Mae and Freddie Mac.

Partisanship was intense during this period, but the leadership of the two parties saw the importance of working together on this important topic. In the words of Barney Frank, chairman of the House Committee on Financial Services, "...in this case the enactment of the Troubled Assets Relief Program (TARP), illustrate the importance of bipartisanship. The leadership of both parties in both houses accepted the need for action when Hank and Ben Bernanke outlined it to us."²¹² There were still a significant number of issues that needed to be decided during this period and often these involved significant

²⁰⁹ Needham, Vicki. "FHA's Balance Sheet Rebounds After Bailout" *The Hill*. November 16, 2015.

²¹⁰ Washington Post Editorial Board. "Bailout the FHA?" *Washington Post*. February 20, 2012.

²¹¹ Dennis.

²¹² Paulson. 2010. Pg. XIX.

conflict and differences of opinions and important issues tend to have more conflict. Thus there was a great deal of negotiation as there is negotiation in most political actions. The negotiations included negotiation between houses. Houses negotiate in conference committee and in deciding what to propose initially and when different parties with competing aims control them these negotiations can be quite bitter.

4.2 Actions Taken

As the crisis became deeper, those in government began to pay attention and started trying to come up with ways to improve the situation. In response to the crisis congress took some action itself ultimately passing some key laws. Initially efforts were focused on dealing with the subprime mortgage crisis. In 2007, the first major signs of the crisis appeared with large firms in the industry going bankrupt and then severe weakness faced by Fannie Mae and Freddie Mac. The first major action of congress to address the crisis did not come until mid-2008, by which point the housing crisis had already become pronounced though it was still not viewed as a systemic risk.

Policy creation during this period was largely piecemeal and did not form a consistent whole. The public policies created had different goals, methods, and enactors and were largely reactionary and therefore rapidly changed to respond to shifting events. In addition, the timeframe of the policies varied widely. Some policies were focused on the current crisis, some were focused on avoiding future crises, and some focused on pursuing goals unrelated to the crisis and were more opportunistic in their nature. While the financial crisis went on, political actors continued to try to advance their legislative agenda and they often found that using the financial crisis as cover helped advance their agenda. Thus the financial crisis was used to justify decreasing governmental expenditures, funding green companies, and health care reform, etc.

Industry groups and lobbyist also attempted to shape the policy responses that were being crafted. During the first nine months of 2009, the financial industry spent \$344

million on lobbying and as of October 2009, 1537 lobbyists representing the financial industry were registered to work on financial regulation proposals before congress.²¹³

4.2.1 Emergency Economic Stabilization Act of 2008

President George W. Bush signed the Emergency Economic Stabilization Act of 2008²¹⁴ into law on October 3, 2008. It was bundled together with the Energy Improvement and Extension Act of 2008 and the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 which comprise the other two sections of this law. However, the law is most widely known for establishing a \$700 billion fund to stabilize the economy by economically supporting banks and other U.S. financial institutions. This fund called the Troubled Asset Relief Fund (TARP) was a controversial provision that the president and most economists at the time felt was required in order to stave off a catastrophic threat to the U.S. financial system, but which was very unpopular with voters who saw it essentially as a way to bail out rich, over-privileged individuals that had made bad financial decisions and who now, it was believed, should take the losses. The fund was given authority to buy mortgage backed securities at a time when these financial instruments were struggling. This unpopularity of the bill made it difficult for members of congress to support it. Though most elites felt the bill was necessary, this was also acknowledged to be a tough political position to take for members of congress as it would greatly hurt their reelection chances. This, along with dissatisfaction of House Republicans, contributed to the initial version of the bill being rejected by the House of Representatives. Following this initial rejection of the bill The Dow Jones Industrial Average dropped 7% and The Nasdaq dropped 9.1%.²¹⁵ The two major party's nominees for president, Barack Obama and John McCain issued a joint statement saying that they supported the TARP legislation and they wanted congress to pass the bill.²¹⁶ Similarly President George W. Bush stated the importance of passing the bill and said that the economic market may suffer catastrophic failure if this is not addressed. Ultimately

²¹³ Johnson, Simon, and James Kwak. *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown*. Vintage Books USA, 2011. 192.

²¹⁴ Part of Pub.L. 110-343

²¹⁵ Lueck, Sarah, Damian Paletta, and Greg Hitt. "Bailout Plan Rejected, Markets Plunge, New Scramble to Solve Crisis" *The Wall Street Journal*. September 30, 2008.

²¹⁶ Paulson Jr., Henry M. "When Mr. McCain Came to Washington" *The Wall Street Journal*. February 6, 2010.

after a good deal of political wrangling the bill was passed though groups of lawmakers on both sides remained opposed to its provisions.

The bill did not originate in congress, but instead was initially proposed by the Secretary of the Treasury, Henry Paulson, and was supported and encouraged by the president. Congress did however shape this legislation to some extent. An example of this can be seen in the lessening of the discretion that was delegated to the Secretary of the Treasury in the enacted law when compared to the power delegated to the Treasury Secretary in Paulson's initial proposal. Specifically the clause stating, "Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency." which would have removed all oversight of the TARP program, was not included in the final legislation and thus led to move oversight an control of the activities of the Treasury Department with regard to administering TARP. TARP was initially a very open ended proposal when the Treasury gave their initial draft to the congress. Congress expanded and fleshed out the proposal, taking it from the three pages when it was first proposed to 169 pages when it ultimately was enacted.

Agencies bargain with congress both in a formal context and a more informal context. The Treasury department felt that they needed an effectively unlimited amount of money available to avert a major crisis and needed congress to approve this vast spending ability. Treasury went to congress and put forth a plan with a rough order of magnitude as an initial bargaining position. Knowing that congress would not approve spending authority in the trillions, the Treasury Secretary pushed for spending power on the order of several hundred billion dollars while still leaving vagueness in the request. This was put forward because it was a large sum that would have an effect without being close enough to the psychologically important figure of one trillion dollars so that it had a better chance of passing. The Treasury Secretary also took steps to set an aggressive timeline to pass this legislation.²¹⁷ He used the crisis as a call to action and an ultimatum. When prompted what

²¹⁷ Paulson. 261.

would happen if legislation was not passed that would provide for these powers, Secretary Paulson said, “May god help us all.”²¹⁸

The \$700 billion purchase authorization was given to the Treasury Department which was given the discretion of determining what actual assets to purchase. The hope was that the purchase of assets by this program would help solve the lack of liquidity in credit markets. It was also designed to boost investor confidence, and stabilize the economy. Ben Bernanke in his testimony before the Senate stated his support for TARP by saying, “Purchasing impaired assets will create liquidity and promote price discovery in the markets for these assets, while reducing investor uncertainty about the current value and prospects of financial institutions. More generally, removing these assets from institutions' balance sheets will help to restore confidence in our financial markets and enable banks and other institutions to raise capital and to expand credit to support economic growth.”²¹⁹

The TARP Funds were managed and invested by Office of Financial Stability, a new office within the Treasury Department that was established by the Emergency Economic Stabilization Act of 2008. The office was headed by the Assistant Secretary of the Treasury for Financial Stability, who is appointed by the president and confirmed by the senate. The actual specifics of the asset purchases were left to the Office of Financial Stability and the actual types of assets changed over time as the first head of the office, Neel Kashkari, saw fit to make changes. Initially the Office of Financial Stability ran the Capital Purchase Program which purchased primarily Mortgage backed Securities by buying preferred stock and equity warrants so as to have first claim over assets. Warrants are a type of call option that in this case allowed the government to have a potential upside if crisis subsided and the stock market improved. The Office of Financial Stability essentially forced institutions to take money in return for an equity stake in order to shore up cash poor financial institutions. After the initial Mortgage backed Securities purchase program, TARP expanded its focus to purchasing collateralized debt obligations (CDOs) which were hit very hard by the downturn in the housing market and it let the value of these assets to decrease and liquidity to dry up in this market. This helped define a price of these assets and increased liquidity which was

²¹⁸ Wallach, Philip A. *To the Edge: Legality, Legitimacy and the Responses to the 2008 Financial Crisis*. Brookings Institution Press. 2015. Pg. 81.

²¹⁹ Bernanke, Ben S. Testimony Before the Committee on Banking, Housing, and urban Affairs, U.S. Senate. September 23, 2008.

beneficial for banks that had balance books which contained significant amounts of CDOs that could neither be sold nor accounted for appropriately.

The TARP program, according to its administrator, Neel Kashkari, dealt with seven main areas and initiatives: the Mortgage-backed securities purchase program, an Insurance program, a loan purchase program, an equity purchase program, homeownership program, compliance, and executive compliance. It had relatively free range of how to spend the money it was entrusted with though the act did set up oversight agencies to ensure that the money was spent appropriately.

The Treasury Department was able to determine the criteria that financial institutions must meet in order to take part in the TARP program. It took advantage of this by disallowing golden parachute provisions in the compensation packages of senior executives and putting a number of other restrictions on the compensation for senior executives. This was in part a response to political requirements and resentment of the public over spending public money to pay the salaries of rich bankers, particularly when these bank executives had done such a poor job that they took their banks to the brink of bankruptcy. This desire not to be seen helping bankers was intensified due to the fact that the Treasury Secretary, Hank Paulson, had formerly been the head of one of these investment banks and that most of those that he brought in to address the crisis also had been investment bankers themselves. The Treasury Department realized that even the appearance of impropriety could incite backlash against the Treasury Department's actions to save the banks and imperil the financial rescue attempts being made. Neither was the Treasury Department alone in focusing on compensation. On February 5, 2009, the Senate voted to limit executive bonuses. Compensation, particularly when so many were suffering economically, is the sort of issue that could grab the public's attention and cause voter a revolt.

President Bush authorized the Treasury to use TARP funds for any purpose that the Treasury Secretary felt was needed to alleviate the crisis. On March 23, 2009, the Treasury Secretary took advantage of this authority by creating the Public-Private Investment

Program for Legacy Assets.²²⁰ This program was designed to buy toxic assets that were being held by banks and to do so with maximum impact by leveraging private assets. It was designed to share risk and to help determine the true asset price by having interested investors bid on the asset. This price discovery function is very useful in so far as illiquid markets had left banks unsure as to the true value of these assets. This plan, with its divergence from past initiatives, came about in part through the desires of Timothy Geithner, the new Secretary of the Treasury who has assumed office a little under two months previously. This shows how an administration can shift over time due to new leadership put in place by the president and senate which can spotlight both the consistency and the inconsistency of agencies depending on circumstances. This is an inherent effect that delegation needs to adapt to and which needs to be factored in when congress makes the decision to delegate.

Banks are categorized into 5 categories based on the CAMELS evaluation system, which in turn determined their likelihood to receive money TARP funds.²²¹ However the actual criteria methodology was kept secret. This lack of transparency was purposely designed into the system as it was intended to stop worry about specific banks that could lead to a bank run and also designed so that the system could not be gamed. However, with regard to the valuation of troubled assets, the Treasury is mandated that it must make public much of its methodology including the methods it used for pricing, purchasing, and valuing these assets. It also requires the Treasury Department to do this within two days of the purchase of their first assets. Furthermore this act requires disclosure and openness for those organizations that receive funding. The level of disclosure required of these organizations is at the discretion of the Treasury Department.

Congressional influence continued to play a role in the administration of the program. Congress by its nature continues to control some levers of powers over the administration. The Wall Street Journal suggested a negative influence of congress in that select members of congress tried to funnel money into troubled banks in their districts

²²⁰ Chen, Fannie. "Structuring Public-Private Investment Program for Legacy Securities" *Columbia Journal of Law and Social Problems*. Summer 2013, Vol. 46 Issue 4. June 2013.

²²¹ Lopez, Jose A. "Using CAMELS Ratings to Monitor Bank Conditions" *Economic Letters*. Federal Reserve Bank of San Francisco 1999-19. June 11, 1999.

despite the fact that by the standard rating system employed to evaluate which banks are in line to receive funds.²²²

Likewise, as head of the Executive Branch, the president was involved in many aspects of administering TARP. He also directly had power directly delegated to him by congress. As part of TARP, the president was made responsible for putting forward a rule that places a fee on banks to cover tax payer losses due to the program.

This provision to recoup TARP losses requires that five years after the end of the TARP program the head of the OMB must submit a report to congress detailing the net finances of the TARP program.²²³ Should this program show that TARP had lost money, the president is mandated to submit a proposal to congress on how to recoup the losses from those that benefitted by the program or for the financial industry in general. There is no requirement that congress institute the plan, but it does set the agenda and could be viewed as reassuring that at worst TARP would be revenue neutral and would not adversely affect the budget or contribute to the national debt. This provision, despite its lack of teeth, helped ensure passage for this law as it provided coverage for congress.

In the 2013 budget proposal submitted by the president, a provision was included to charge banks the \$61 billion that would be required to cover the cost of the TARP program. One of the requirements of the Emergency Economic Stabilization Act of 2008 was that by 2013 the president lay forth a plan, “that recoups from the financial industry an amount equal to the shortfall in order to ensure that the Troubled Asset Relief Program does not add to the deficit or national debt.”²²⁴ The president’s proposal, though required to be submitted, does not automatically get approved. It is congress that has the power to tax and the president’s proposal would only take effect if congress approves of it. In such a situation it behooves the president to suggest a popular course of action. The suggestions he made focused on recovering costs by placing a tax on large financial companies. There was a populist backlash that made just such a proposal immensely popular and which

²²² Paletta, Damian and David Enrich. “Political Interference Seen in Bank Bailout Decisions”. *Wall Street Journal*. January 22, 2009.

²²³ Congressional Budget Office. Cost Estimate on Emergency Economic Stabilization Act of 2008. September 28, 2008.

²²⁴ Congressional Oversight Panel. Written Testimony of Treasury Secretary Timothy F. Geithner. December 10, 2009.

helped counter accusations of bailing out rich bank executives with tax payer money. By making the president supply the plan, congress could avoid the political risks of either seeming too cozy with rich bankers or angering the powerful banking industry. There was significant uncertainty about how the public would view the proposal, which depended on a shift in public sentiment as well as additional unknowns such as the endurance of the issue's salience at such point as the proposal, needs to be submitted. Congress loses politically by raising taxes on the general populace and generally by cutting programs. They also do not want to vote to place new taxes on banks, which hurts those members that approve it because financial services firms are major contributors. The end date for the president to submit a proposal ensured that an action would be taken and that a plan to recoup the money would be written however it was far enough in the future as to let the topic become less partisan and to see the full effects of the TARP and determine its full costs. Whether the actual revenue matches the actual costs has no importance in terms of the economics of the situation and is an artificial construct, however there is significant symbolic value in it for congress.

The Treasury Department was able to use the power that was delegated to it and the money it was allocated by this act for a host of different initiatives. Among these, it created a Systemically Significant Failing Institutions program to help support key institutions that could pose a threat to take down other large financial institutions and create a domino situation. Primarily these funds went to AIG and were used to benefit AIG counterparties that would suffer significant financial losses in the event that AIG were forced to file for bankruptcy.²²⁵

Other programs that the Treasury Department enacted in response to powers and spending authority given in part of this act are the Automotive Industry Financing Program, the asset guarantee program, and the targeted investment program which is a designed to help ailing major banks that could threaten the stability of the banking system. Clearly from the breadth of activities that the Treasury engaged in with the funds and authority that this act provides, it is clear that the Treasury was given a great deal of latitude as to how to address the financial problems that the nation was having. In addition, the Treasury

²²⁵ ProPublica. Bailout Tracker: Emergency Economic Stabilization Act.
<https://projects.propublica.org/bailout/programs/2-systemically-significant-failing-institutions>

Department was also given authority to create standards for executive compensation for financial institutions that sell equity stakes to the Treasury.

TARP was similar to the Reconstruction Finance Corporation (RFC) that the congress and President Hoover created in the 1932 to deal with the Great Depression. It was an independent entity that made loans to financial institutions and other companies and gave funds to local and state government, which was ultimately merged with the FDIC during World War II. TARP was in part modelled off entities such as the RFC.

TARP also was used to fund a number of other types of entities such as auto companies and cities.²²⁶ Few individuals were even aware that the Treasury created a \$50 billion fund to help cities get funding or exactly what the restrictions were on how its funding could be put to use.

TARP is not an easily understood concept and its resonance with the public is largely at the emotional level of symbolism rather than as a reasoned rationed decision or long held beliefs. Considerable effort was expended by both political parties to frame the TARP bailout which in turn led to significant pressure being placed on politicians writing the law. Likewise when the law is implemented political pressure influenced how the law is implemented.

The Treasury initially argued for TARP by saying that it would be used to buy mortgages and mortgage-backed securities as well as other assets. However the actual implementation did not actually buy these assets, but focused on other types of assets instead. Initially Treasury pushed for there to be no judicial review of TARP, but this proposal did not meet with congress' approval.

There were different views of how quickly action should be taken with regard to TARP legislation. The president and many of the key agency heads thought that it was important to act quickly so as to support the market before a negatively reinforcing cycle began and the market began to decrease.²²⁷ On the other side were individuals such as Senator Richard Shelby, the ranking Republican on the Senate Committee on Banking,

²²⁶ Weisman, Jonathan. "U.S. Declares Bank and Auto Bailouts Over, and Profitable" The New York Times. December 19, 2014.

²²⁷ Paulson. 298.

Housing, and Urban Affairs, who felt more time should be spent deliberating about the plan and determining whether it would be beneficial or would hurt the economy.²²⁸ To show support for his plan he referred to a prominent petition signed by 192 economists that were opposed to TARP. Part of the TARP program was a program to insure troubled assets. This was a contentious issue with many politicians, even those that supported the bill, opposed to it. In the end, a compromise was reached and the insurance provision was included and made a mandatory provision that Treasury must provide a troubled asset insurance program.²²⁹ Ultimately, when TARP was passed, Treasury complied with this provision and complied with the letter of the law, but created an insurance program with such high premium rates that it would not be used by anyone and thus that piece of the law was effectively voided.

The Treasury Department and the president lobbied congress to release funds for TARP. TARP was structured so that the funding for it came in three tranches. The first two were released pretty easily, but the third slice of funds required congress' approval and congress was skeptical to take such a step due to the unpopularity of such an action. Congress, by keeping this power for themselves as opposed to creating some nonpartisan commission, put themselves in a tough position politically as TARP's unpopularity did not abate, but rather grew with its passage and use. The Treasury Secretary however felt that the money was needed because much of the previous funding had already been tied up in the Capital Purchase Program to prop up banks and in helping the critically important insurance company, AIG.²³⁰ There was still the potential for a need for major action by the government in response to new emergencies and Treasury Secretary Paulson wanted to be prepared for such an eventuality with adequate funding and authorities to deal with problems as they arose. The president agreed with this plan and so the administration lobbied congress to get access to the remaining TARP funds. The administration was not merely asking, but also was willing to negotiate to get a deal done. In order to get the funds released, the administration signaled their willingness to giving some of TARP money to the

²²⁸ Paulson. 298.

²²⁹ Section 102 of the Emergency Economic Stabilization Act of 2008

²³⁰ Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus, 2010.

automakers if congress approved the additional funds as well as homeowner relief.²³¹ This made the democrats who controlled both houses more likely to support the allocation of the funds under Bush rather than waiting for the next president who would be a Democrat. Initially the administration hoped to avoid the politically difficult move of having to ask for this last slice of TARP funding, but with the continued weakening of Citigroup and the huge shock it would be to the system if this financial giant fell and the likelihood that symbolically important GM would soon file for bankruptcy, the administration began to plan on how to request the funds in order to be prepared. Ultimately president-elect Obama also supported releasing funds before he came into power and this helped bolster the administration's position. However, due to politics, the action that congressional released the funds was done after the election.

After the presidential election the political dynamic changed and the lame duck congress had a dubious mandate for action. This is one of the structural factors that affected the actions performed during that period. With roughly 130 legislative days a year, Congress is not in session much of the year and this too can affect the ability of congress to formulate a response to a crisis since even during the crisis congress closed down for a while.²³²

TARP was initially designed to be used to directly purchase illiquid assets and build liquidity in the market and it was sold to congress and the public as being for that purpose. However, once TARP was enacted it became apparent to those in the Treasury that the illiquid asset program would take far longer to set up than expected and would have less effect due to the amount of money that could be invested in such a large market.²³³ It was thus decided to scrap the plan for an illiquid asset purchase program and focus on other areas in which TARP funds could have a larger and more immediate effect such as capital investments that provided more benefit for dollar spent.

²³¹ Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus, 2010.

²³² Saenz, Arlette and Erin Dooley. "Here's How Much Less Congress Works Than You Do" ABC News. August 4, 2014.

²³³ Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus, 2010.

Congress could not formally affect the direction set out by the Treasury Secretary about what to do with TARP funds. The delegation was very broad and was structured in such a way as to give the Treasury Department significant discretion as to the actions it would take. Congress could however take certain steps with regard oversight and could try to change agents' actions when they diverged from congresses intentions as they did with usage of the TARP fund. Hearings are one of the methods that congress relied upon the most and the Treasury Secretary and other administration officials certainly had to testify at these and were called to task by angry members of the congress. In his November 18th testimony before the House's Financial Services Committee Secretary Paulson received comments such as Representative Maxine Waters' accusation, "You, Mr. Paulson, took it upon yourself to absolutely ignore the authority and the direction that this Congress has given you."

Treasury Secretary Paulson argued that TARP was an attempt at a comprehensive solution and thus would be an improvement over the way the government had been approaching the crisis up to that point however others were less convinced that this would be an improvement over the status quo. The Ranking Member on the Senate Banking Committee, Richard Shelby stated his view of TARP thusly, "Rather than establishing a comprehensive, workable plan for resolving the crisis, I believe this legislation merely codifies Treasury's ad hoc approach."²³⁴

The Capital Assistance Program was part of this act and ended up replacing the Capital Purchase Program. This made a number of changes in the program itself such as requiring those that accepted money to agree to adopt standard loan foreclosure mitigation measures and increased reporting requirements.²³⁵

TARP was overseen by a number of entities. These were often quite critical of the Treasury Department and the Fed. SIGTARP for instance criticized the way the structure of the AIG assistance was organized and the multibillion dollar bailout of AIG's counterparties.

²³⁴ Shelby, Richard A. Senator Shelby's remarks before the Senate Committee on Banking, Housing, and Urban Affairs, Turmoil in U.S. Credit Markets: Recent Actions Regarding Government-Sponsored Entities, Investment Banks, and Other Financial Institutions. 110th Congress 2nd Session. September 23, 2008 transcript. 6.

²³⁵ Harris, Angelee and Ritesh Patel. Table Showing the Similarities and Differences Between TARP CPP & CAP for Publicly Traded Institutions. Manatt, Phelps & Phillips LLP.

However these reports were made far after the fact and had little ability to change the actions of the Treasury Department in its running of the TARP program.

In addition to TARP, the Emergency Economic Stabilization Act of 2008 also authorized the Federal Reserve to pay interest on reserve and excess reserve balances if the Federal Reserve felt such action was appropriate. This delegation gave it a new tool with which to stabilize the economy.

The Emergency Economic Stabilization Act was one of three sections of Public Law 110-343. The other two of which were the Energy Improvement and Extension Act of 2008 and the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. The first of these provided economic incentives designed to increase the adoption of green technologies. The president on numerous occasions attempted to tie the issue of environmentalism and the strength of the economy together. His rhetoric helped associate these goals together and this helped get green initiatives passed by offering the prospect of new green jobs. The second of these sections of the act functioned as a patch to stop the alternative minimum tax from affecting as many people as it would otherwise. It also included tax credits and breaks, and temporarily increased the FDIC deposit insurance limit from \$100,000 to \$250,000.

4.2.2 American Recovery & Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009²³⁶ was a piece of legislation designed to help bolster the flagging job market. It was signed into law February 2009 and authorized spending on education, health, infrastructure, energy, and tax initiatives designed to boost spending on key areas.²³⁷ It also expanded the unemployment insurance program to increase the amount of benefits given. In addition, the act included numerous congressional priorities that were not tied to fixing the current problem. These included popular provisions such as adding a cap to the amount of compensation to executives of

²³⁶ Pub.L. 111-5

²³⁷ Office of Management and Budget. "Frequently Asked Questions – American Recovery and Reinvestment Act of 2009" https://www.whitehouse.gov/omb/recovery_faqs

banks that received funds in the bailout that political popular with Main Street America.²³⁸

The central tenant of this act was that federal government spending would help prop up the economy and make up for decreased capital expenditures by businesses. Section 3 of the American Recovery & Reinvestment Act listed the reasons for the act. These include assisting those hardest hit by the recession, creating or preserving jobs, investing in areas that will improve efficiency or long term growth, and plugging gaps in state and local governments. The act, however, included provisions not directly related to these goals, but which were needed either to assure that the act passed or to achieve other political ends.

The act itself was written primarily by the Democratic Congressional committee leaders and their staffs. It was a very partisan bill with all 177 Republicans in the House of Representatives that voted, voted against it. Similarly 244 out of 255 House Democrats voting voted against the bill.²³⁹ In the Senate all Democrats voted for the bill whereas all but 3 of the Republicans voted against the bill. This shows how partisan this bill was. The majority party and the House Rules Committee used restrictive rules.

There were significant differences between the bills initially passed by the Senate and the House of Representatives. The Senate had considerable sway in the debate and while the two houses worked out the differences between the two bills, approximately \$150 billion from the House bill was modified or removed.

Among the funds allocated in this act, were \$48.6 billion to the State Fiscal Stabilization Fund.²⁴⁰ Besides its economic stimulus effects, this Department of Education controlled fund was an attempt to shore up state education programs and advance education reforms. State governors had significant access to this fund though there were numerous restrictions on the dispersal of these funds. The Department of Education was able to use its initiative to determine the amount of funds that would be dispersed. The intensity of the debate changed the actions of political actors. For instance, House Democrats had promised very publicly to allow a two day of public review and discussion before the final conference report came up for a vote, however they did not delay the vote this long.

²³⁸ DeVaro, Jed and Scott Fung. "Public Bailouts, Executive Compensation and Retention: A Structural Analysis" *Journal of Empirical Finance*. 26 (2014). Pgs. 131-149.

²³⁹ Govtrack. "H.R. 1 (111th): American Recovery and Reinvestment Act of 2009" <https://www.govtrack.us/congress/votes/111-2009/h46>

²⁴⁰ Dodaro, Gene L. *Recovery Act: Planned Efforts and Challenges in Evaluating Compliance with Maintenance of Effort and Similar Provisions*. DIANA Publishing. 2010.

4.2.3 Helping Families Save Their Homes Act of 2009

The Helping Families Save Their Homes Act of 2009²⁴¹ was signed into law on May 20, 2009. The bill was designed to make it easier for homeowners struggling to pay their mortgage to keep their homes. There are several sections of this bill that address this goal. In one section, the bill makes it easier for homeowners to declare chapter 13 bankruptcy. It gives considerable authority to the Secretary of Agriculture to authorize loan modifications and payouts to a financial institution that agrees to lower the amount of principal owed by the borrower. In addition, it amends the HOPE for Homeowners Program and among other changes gives authority to the Secretary of Housing and Urban Development. It also extended the Emergency Economic Stabilization Act of 2008 till December 31, 2013. The Helping Families Save Their Homes Act of 2009 also set the Comptroller General as an overseer of the TARP program.

The initial purpose of the act was designed to give federal judges authority to alter mortgage agreements on homes. However this controversial provision was dropped before the bill was approved and became law.²⁴²

4.2.4 Fraud Enforcement and Recovery Act of 2009

In 2009, congress overwhelmingly passed a bill that sought to battle fraud, which had become an issue during the financial and mortgage crisis, as fraud tends to increase at such times. Every Democrat from both houses voted for the bill as did as did many Republicans.²⁴³ The act had several effects including creating a more encompassing definition of fraud against the United States. Among the new actions that would now qualify as fraud against the U.S. would be fraud with regard to federal assistance, which

²⁴¹ Pub.L. 111-22

²⁴² Conyers, John Jr. "A Record of Progress: Detailed Congress-By-Congress Summary 1965-Present" <https://conyers.house.gov/sites/conyers.house.gov/files/A%20Record%20of%20Progress%20-%20114th%20Interim.pdf> Pg. 53.

²⁴³ Govtrack. "S. 386 (111th): FERA" <https://www.govtrack.us/congress/bills/111/s386>

includes grants and other government funds from many of the recently enacted programs such as the Troubled Asset Relief Program and the American Recovery and Reinvestment act of 2009. It thus helped provided oversight in the form of increased punishment in order to deter fraud which otherwise might increase in an environment of such government programs. Furthermore, by punishing those that engaged in this behavior more severely, it made the public feel better about the usage and oversight of federal dollars.

Additionally Section 5 of the Fraud Enforcement and Recovery Act of 2009 created the Financial Crisis Inquiry Commission to, "examine the causes of the current financial and economic crisis in the United States." It was also tasked with publishing a report at the end of the process and was told to refer any criminal wrong doing it uncovers to whichever attorney general has jurisdiction over the wrong doing. It was a temporary commission that was designed to disband within 60 days of submitting its final report. The commission was given authority to hold hearings and issue subpoenas. It was designed so that, "no member of Congress or officer or employee of the federal government or any state or local government may serve as a member of the Commission." This made it an ad hoc commission with ostensibly less politically invested in the results of the report and less reason to say or not say things due to political or career considerations.

The committee was important because it would be the most thorough governmental narrative of the crisis and would thus have a key role in shaping the historical understanding of the crisis much as the Pecora Commission did for the Great Depression. It also performed the important task of assigning blame. In addition, by listing causes of the crisis, it effectively argued for or against specific public policies by saying they had a positive or negative affect in the crisis. Even basic conclusions of the commission such as that the financial crisis was avoidable had political implications.

However when the congressional commission published a thorough report detailing its findings, it was largely split along party lines with Republican members writing dissenting statements. The commission consisted of five members selected by of each house of congress: three from the majority part and two from the minority party. Thus this legislation ensured that the Democrats would have a 6-4 majority on the commission which was otherwise supposed to be non-partisan and which allowed them to take steps such as

voting 6-4 to limit dissenting opinions in the official report to nine pages as compared to well over 400 for the commission's opinion. The commission was supposed to provide answers as to the cause of the crisis and to evaluate how the government dealt with the problem so as to give an accounting to the American people, but also to provide knowledge for more enlightened policy making in the future so future crises or the one that was continuing to linger on at that point could better be dealt with or avoided. However, the extent to which this information was or will be leveraged can be called into question. In fact, in his dissenting opinion, Peter Wallison, a member of the Financial Crisis Inquiry Commission, raised the question of why bother to have the commission at all since congress took major action such as the Dodd-Frank Act without waiting for the commission's report and recommendation to inform it as to whether such an act would be beneficial with regards to this sort of crisis and as it largely was political rather than investigative.²⁴⁴

The commission had a number of time constraints placed on it such that it was required to submit their report to the president and to the congress by December 15, 2010 though this did give the commission well over a year to achieve its end. Furthermore within 120 days of submitting that report, the commission was required to appear before the House Financial Services Committee and the Senate Banking Committee to answer questions about their findings.

4.2.5 Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act²⁴⁵ was a major piece of legislation which became law on July 21, 2010 and which greatly changed financial regulation in the United States. The act consolidated agencies charged with regulating financial companies. As part of its focus on improving financial regulation, it created a consumer financial protection agency and it delegated powers to the FDIC that enabled it to gradually shutdown banks. It also was designed to implement international standards and the so called Volcker Rule.

²⁴⁴ Wallison, Peter J. "The True Story of the Financial Crisis" *The American Spectator*. May 13, 2011.

²⁴⁵ Pub.L. 111-203

Not all members of congress approved of the delegation contained in the act. Sen. Richard Shelby described the bill as being, “a 2,300-page legislative monster...that expands the scope and the powers of ineffective bureaucracies.”²⁴⁶ The agencies and administration had differing motivations and differing views of the act. Hank Paulson, the Treasury Secretary, said about the act, “The new tools in this legislation will help mitigate and manage the next financial crisis, which is inevitable, probably within the next six to 10 years.”²⁴⁷

Congress acted in response to administration preferences. The bill initially came from a proposal from President Obama. After the bill was put forward, Obama later argued for it to also include the Volker Rule.²⁴⁸ The Volker Rule was eventually included in this act as well. The Volker rule prohibited banks from engaging in proprietary trading. Many economists, including in the administration, did not think proprietary trading played a part in the crisis and saw the Volker rule more as good politics that a way to address the weaknesses in the financial system that led crisis.²⁴⁹

Also in the bill is a section giving the SEC authority over whether certain shareholders can modify proxy statements to place desired directors of the company as nominees up for vote. This allows the SEC to regulate this important issue. Board membership is a key issue that affects topics such as governance and acceptable behavior for corporations.

The act created the Financial Stability Oversight Council that is tasked with assessing systematic risks to the U.S. financial system. The council also is supposed to promote discipline in the markets and decrease the risk of financial bubbles and moral hazard while at the same time also ensuring that investor confidence stays strong. They can also require large financial institutions, excluding banks, to submit reports to the council detailing their financial situation, their risk mitigation plans and methods, and the potential adverse effect that the agency’s actions can have on the U.S. financial system. The members of the council consist primarily of senior members of the executive branch. The Financial Stability

²⁴⁶ Paletta, Damian and Aaron Lucchetti. “Law Remakes U.S. Financial Landscape” *Wall Street Journal*. July 16, 2010.

²⁴⁷ Paletta, Damian and Aaron Lucchetti. 2010.

²⁴⁸ Drawbaugh, Kevin. “White House Recommits to ‘Volker Rule’ Bank Trade Ban” *Reuters*. February 23, 2010.

²⁴⁹ Geithner, Timothy F. *Stress Test: Reflections on Financial Crises*. Crown Publishers 2014. 414.

Oversight Council itself is overseen and can be audited by the Comptroller General of the United States.

The Dodd-Frank Wall Street Reform and Consumer Protection Act also created the Office of Financial Research, a Treasury office, which is designed to collect financial information from certain financial institutions. The director of the office has powers to facilitate the collection of this data including subpoena power. They use the information they gather to report to congress. The agency can determine the format of the data it is collecting and require agencies to adopt this format when providing it with data.

In Title II of Dodd-Frank Act, the authority is granted to the FDIC and the Securities Investor Protection Corporation (SIPC) to wind down operations for banks and other financial institutions. This section of the act also allows the Secretary of the Treasury, with the consultation of the president, to appoint an individual to run the company once it takes it over.

Prior to this act the FDIC and SIPC had some limited powers to wind down operations of certain companies. However, this act greatly enhanced these powers and increased the number of entities that these agencies are authorized to close down. Funds were set aside for this purpose in the form of the “Orderly Liquidation Fund.”²⁵⁰ The fund is able to be replenished by a fee on financial companies that varies depending on the risk that is posed by an institution and the status of the economy. A limit was placed on the amount that the Government is obligated to pay when a company is liquidated.

Title III, also called the “Enhancing Financial Institution Safety and Soundness Act of 2010”, was designed to transfer some delegated power from one agent to others. Financial institutions had engaged in effectively selecting their regulators. They tended to pick the least restrictive rules and this led to a situation where institutions would shop for regulators with lax rules and minimal requirements. This also gave regulators reason to further relax their rules to regulate more companies and thus reap more in the way of fees. As part of

²⁵⁰ Reuters. “Factbox: How Dodd-Frank’s Orderly Liquidation Regime Works” February 28,2011.

the attempt to reverse this trend, this act abolished the Office of Thrift Supervision (OTS) and merged it with the Office of the Comptroller of the Currency.²⁵¹

OTS performed particularly poorly as an oversight agency and many companies that it oversaw had catastrophic failures. These include Washington Mutual, American International Group (AIG), and IndyMac. It was even implicated in the stock backdating that IndyMac participated in. The poor regulatory performance of OTS during this period was partly due to the fact that funding for OTS came from fees paid by the institutions they regulate.²⁵² While this is in line with other regulators of financial institution, it led to the regulator and the regulated companies being tied together so that the regulator is reliant on the regulated and is thus incentivized to take it easy on institutions they regulate. OTS was particularly in need of institutions to regulate, as there had been a decrease in the number of thrifts and thus a decrease in the amount of funds that were coming in to the agency. This decrease in the number of thrifts also led to the existential question of what was the agency's purpose, which led to the agency trying to expand and define its role. The fear was that members of congress might begin to doubt the need for a separate agency to regulate so few entities. While there were some restrictions about who could use a specific agency to regulate them, all a company needed to do to have OTS as their primary regulator was to buy or open a thrift and many companies such as AIG did just that.

OTS was created as a response to the Savings & Loan Crisis of the 1980s in which many undercapitalized banks ultimately needed to be bailed out at tax payer expense. The day that the OTS was created, President George H. W. Bush remarked, "never again will America allow any insured institution to operate without enough money."²⁵³ The OTS and President Bush' remark were a direct result of the failure of the Federal Home Loan Bank which had prior to the creation of the OTS had regulated a similar area and had failed to a similar degree that OTS would fail two decades later. The confidence the president professed to have that there would no longer be undercapitalized banks operating in America proved to be ill-founded as the solution that was put in place to avoid this sort of result helped lead to the same result albeit through different means.

²⁵¹ O'Connor, Sarah. "Office of Thrift Supervision Staff Remain Defiant" *Financial Times*. June 19, 2009.

²⁵² The Financial Crisis Inquiry Commission. 2011. Pg. 173.

²⁵³ Bush, George. *George Bush, Public Papers of the Presidents of the United States*. 1989.

The Dodd-Frank Act also includes a provision that requires additional reporting from hedge funds and similar entities.²⁵⁴ Hedge funds and the shadow banking sector have grown as a percentage of financial activity taking place in America and in part this provision acknowledges this fact and puts the treatment of hedge funds more on par with other large financial entities. There was concern that the growth of the shadow banking system may eventually lead to an economic crisis in the future and this act took steps to minimize that risk.

Another provision that sought to minimize the risk of future economic crises was Title VI of the Dodd-Frank Act that amended the Bank Holding Company of 1956 to limit risky investments by large financial companies. It principally did this by limiting their ownership of hedge funds and private equity funds. This formed the basis for the highly contested Volker rule that ultimately was codified and fleshed out by more than 960 pages of agency rules and laws.

Another area that began to be regulated by the Dodd-Frank Act was the swaps industry. In Title VII of the act, the SEC and the Commodity Futures Trading Commission are given responsibility for regulating swaps and it also mandates that most swaps be traded through exchanges. This act is also called the Wall Street Transparency and Accountability Act of 2010 and was designed to rectify weakness in the financial regulatory market and exemptions that had been in place due to the Gramm-Leach-Bliley Act, which was enacted in November 1999. Swaps are a type of derivative in which two parties enter into a contract to “swap” terms of contracts such as interest rates. One type of swap called a Credit Default Swap, in which one party pays another party to assume a risk of a credit default, had a particularly deleterious effect on the economy during the crisis. Congress had specifically prohibited any oversight or regulation of the swap and options market to prohibit agencies that at the time were trying to assert an authority to regulate this industry.

Senator Blanche Lincoln after initially requesting fewer restrictions on banks use of derivatives and being opposed by the administration offered a populist amendment that would almost ban banks from all trading of derivatives.²⁵⁵ Geithner and others saw this as a

²⁵⁴ Brown, Stephen, Anthony Lynch, and Antti Petajisto. “Hedge Funds, Mutual Funds, and ETFs” in *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance*. Wiley. 2010.

²⁵⁵ Geithner. 419.

response to a tough election battle she was facing from an opponent attacking her from the left. Another proposed Dodd-Frank amendment was proposed by Senators Merkley and Levin and proposed a broader definition of proprietary trading in the hopes of having a tougher restrictions on bank's trading activities. It was a more expansive definition than the administration was pushing for, but had the support of Volker himself and many on the liberal wing of the Democratic Party.²⁵⁶

Several other areas were addressed by the act that sought to ensure adequate regulation of the financial market as a whole. For instance, the act created a new office called the Federal Insurance Office, which is a component of the Department of the Treasury. Along with responsibilities such as administering the Terrorism Insurance Program it was given responsibility for finding gaps in the regulation of the insurance industry and was charged with looking for problems in the insurance industry.

One of the widest pieces of delegation in this act gives power to the Federal Reserve Board to create standards that would limit the possibility of a major financial institution posing systematic risk.²⁵⁷ It can use the power delegated to it in this part of the act to set standards in a wide variety of areas.

The act also modifies the structure and authorities granted to the SEC as well as allowing it to regulate new entities such as credit rating agencies.²⁵⁸ The SEC is also given authority to issue rules requiring disclosure when retail investors make purchases and also gave authorities over broker-dealers and investment. In addition, Dodd-Frank Act gave additional enforcement powers to the SEC. This is an increase in the capabilities of the SEC and the actions it can take, but is not a delegation of congressional authority. The act also shielded the SEC from having to comply with freedom of information requests and this change made the SEC's actions less transparent. Another part of this section added regulations for asset-based securities, which were a contributing factor to the economic downturn. The SEC also is told to direct exchanges not to list securities of companies that do not meet the SEC rules on executive compensation. This gives stronger enforcement to the rules that the SEC comes up with. This action was required one year from the act being

²⁵⁶ Geithner. 420.

²⁵⁷ Title VIII of Dodd-Frank Wall Street Reform and Consumer Protection Act

²⁵⁸ Title IX of Dodd-Frank Wall Street Reform and Consumer Protection Act

passed. Another rule that the SEC was given responsibility for are those determining what types of members are acceptable on a company's compensation committee, which is used to determine pay of executives.

Another new area that the SEC is given responsibility for is overseeing credit rating agencies and in particular the Nationally Recognized Statistical Rating Organizations (NRSROs) that the U.S. Federal Code gives special authority to and whose ratings are relied on by various provisions of law. The crisis showed a weakness in the ability of these ratings agencies to issue ratings that accurately reflect the current state of companies and securities. This in part was viewed as a conflict of interest problem in which companies are incentivized to give better ratings to their clients in order to increase their revenue and profits. The SEC among other powers can revoke the designation of an NRSRO if there is a chronic problem with the integrity of its rating process. It also may issue rules that are designed to prevent a conflict of interest in the agency between sales and fair and honest ratings.

Title IX Subtitle F makes changes to the way the SEC operates in order to improve its efficiency and effectiveness. This includes management controls on actions as well as outlining new methods of oversight of the SEC by the GAO. This enables congress to change the actions of an agency and the method whereby it performs its functions. Typically these are powers that the president has as head of the executive branch. Another change contained in this subsection is that the SEC is now to be funded primarily by filing fees. This will help keep the agency's independence and avoid the potential for conflicts of interest. This title also creates a larger role for the Municipal Securities Rulemaking Board (MSRB) giving it authority to regulate municipal advisors. This act also restructures this board. While the MSRB already existed, the Public Company Accounting Oversight Board (PCAOB) was established by this title. The PCAOB is a subunit of the SEC and is given authority to regulate public accounting firms.

Many of the restrictions and regulations were laid out explicitly in the Act with existing regulatory agencies responsible for policing agencies based on the rules in the act. However, the regulators that were specifically assigned entities to regulate by function were given authority to create rules for various asset classes and may also offer exemptions. The

act itself also exempts specific asset classes such as Qualified Residential Mortgages from these oversight provisions.

One of the highest profile parts of the Dodd–Frank Wall Street Reform and Consumer Protection Act is that it established the Bureau of Consumer Financial Protection within the Federal Reserve. The bureau is responsible for regulating financial products and services that are targeted to individuals. The role of the bureau is, "to make markets for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products."²⁵⁹ Ideally this also would be how congress sees its role in this area, but in practice its mission is not always the same.

The Consumer Financial Protection Bureau used the power it was granted by the Dodd-Frank Act and made large policy changes. An example of this was on February 16, 2012 when the board proposed a rule to begin regulating large debt collectors and the major credit bureaus which had previously not been regulated entities.²⁶⁰ The bureau linked these issues to the financial crisis and stated that the need to regulate these entities was also due to the increased role these industries have in the lives of Americans. Besides making the proposal to regulate debt collectors and credit bureaus, the CFPB make numerous other policy decisions such as setting the cutoff of which companies to regulate. This can have major effects on its powers. The CFPB set the cut off for regulating consumer reporting agencies such that it will regulate all such agencies that have receipts with at least \$7 million per year. At this threshold, the agency will not only regulate the three major credit bureaus, Experian, Equifax and TransUnion, but also 30 or so minor companies that record information on individuals that are largely outside of the traditional financial system. The Act also gave the Consumer Financial Protection Bureau authority outlined in the Truth in Lending Act that had previously belonged to the Fed.

²⁵⁹ Slack, Megan. "Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog" The White House Blog. January 4, 2012. <https://www.whitehouse.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog>

²⁶⁰ Villafranco, John E. and Kristin A. McPartland. "New Agency, New Authority: An Update on the Consumer Financial Protection Bureau" The Antitrust Source. http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb12_villafranco_2_27f.authckdam.pdf Pg. 9.

The Mortgage Reform and Anti-Predatory Lending Act, Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also focuses on the Bureau of Consumer Financial Protection that was created during the crisis to protect individuals. This Title was broken up into eight subtitles. The act lays down restrictions on mortgage originators. Most of these restrictions were explicitly laid out in this subsection as was a definition of the term mortgage originator, but the board is left discretion to tighten standards on pay for the services of a mortgage originator.

The act explicitly limits actions of actors. It lays out standards for residential loans and requires certain minimum standards such as that the loan originator must believe that individual taking out the loan is able to repay it and that revenue of the borrower must be documented and it limits the terms of certain “high-cost” mortgages, changes requirements, and alters existing loans.

The Dodd-Frank Act was not loved by all. For instance the banking industry was not supportive of the changes that brought about tighter regulation of the banking industry. Though this was at the time an unpopular viewpoint to have, they did make some efforts to spin the issue and try to reframe the debate to help their side’s position. The president of the American Bankers Association said, “To some degree, it looks like they're just blowing up everything for the sake of change [...] [i]f this were to happen, the regulatory system would be in chaos for years. You have to look at the real-world impact of this.”²⁶¹ By comparison, the Securities Industry and Financial Markets Association, a major lobbying group for the financial industry, has stated support for the law ostensibly to stop a tougher law from being enacted instead.

The Dodd-Frank Act added a new officer to the Federal Reserve’s Board of Governors to advise the board and oversee the regulation of financial institutions as well as to report to congress. This position, which is called the “Vice Chairman for Supervision”, serves as the board chairman when the chairman is absent. It also lays out some new responsibilities for the GAO to oversee and audit the Federal Reserve and the emergency lending facilities that had been extended since December 1, 2007. The Federal Reserve is also given new

²⁶¹ Applebaum, Binyamin and Brady Dennis. “Legislation by Senator Dodd Would Overhaul Banking Regulators” *Washington Post*. November 11, 2009.

oversight responsibilities by the act and was mandated to develop standards for industries that they oversee. These standards were required in a number of areas including capital requirements, liquidity requirements, concentration requirements, risk management requirements, limits on the use of leverage, and reporting requirements related to an institution's credit exposure.

Title XIII amended the Emergency Economic Stabilization Act of 2008. This amendment greatly reduced the quantity of funds available for the Troubled Asset Relief Fund. It also amended the Housing and Economic Recovery Act of 2008 and the American Recovery and Reinvestment Act of 2009 so that money that was made by the program was set aside for deficit reduction. In practice, creating bulwarks between spending and revenue so that money is assigned for a purpose is usually more for show than it is an effective way of controlling national spending. This was used to show fiscal discipline in response to the accusations that TARP was a wasteful bail out in which the poor were subsidizing rich bankers. It was an ad hoc constraint on the delegation that was inherent in the TARP legislation.

Dodd-Frank also creates an office in the Department of Housing and Urban Development charged with counseling individuals about homeownership and renting houses. The director of this new office is authorized to appoint an advisory committee to coordinate media to educate on these topics. The law creates limits to the length of the term that can be served and the number of appointees. They are given certain powers such as the authority to provide education assistance as well as certain responsibilities such as tracking foreclosures and defaults. It also laid out rules governing escrow for the purchase of real estate, but also regulates the actions of mortgage servicers. In addition, limits are placed on the situations in which a creditor can extend credit in the case of a riskier mortgage. These mostly consisted of steps such as appraisals that needed to be done by a certified or licensed appraiser before a loan could be issued. To ensure that appraisals are meaningful, this subtitle charges a large number of agencies with working together to come up with standards for appraisals. In addition, this subtitle regulates the settlement process in an effort to make it more transparent.

These requirements in this subtitle were clearly a reaction to the systematic failure in ensuring that homes were worth more than loans and thus that default was unlikely. These changes were designed to stop future loans from having the same weaknesses as many loans during the housing crisis had and thus they aimed to stop the problem from reasserting itself. The solution however focused squarely on the loan originator and avoided placing any blame on individuals who took out loans despite an inability to pay back the loans. Blaming mortgage companies was a popular charge whereas demonizing those individuals that defaulted would have been very bad politically for the members of congress. Presumably however congress could create an entity or empower a body to better assure that individuals did not act in a reckless or fraudulent manner when taking out loans as they individual taking the loan is as much part of the broken system as those who issued the loans. With no stakes in the game the loan originators did not have an incentive to scrutinize the loans they make to see if they were likely to be paid back.

The Dodd-Frank Act also included a number of unconnected provisions that among other things task agencies to issue reports on areas of interest to congress. Some, but not all of these are related to the financial crises whereas others use the bill mostly as a vehicle to pass desired changes.

The Volker Rule has been one of the major provisions of the Dodd-Frank Act. It largely limits the ability of banks to make certain types of investments using their own money though it does contain numerous loopholes. It is also one of the more contentious provisions of the act as many individuals feel that it will make it harder for U.S. banks to compete with foreign banks. John Walsh, the acting Comptroller of the Currency, encapsulated this view in his remarks before the House Financial Services Committee when he stated, "United States banks competing with these foreign banks will operate at a competitive disadvantage,"²⁶² The rule was designed to go into effect July 21, 2012 so that there would be time for banks to adapt and the effect of the rule on commercial banks is not excessively onerous. The Volker Rule makes a policy tradeoff between bank profits and stability of the financial system. It is designed to deal with structural problems and systematic risks in the system and thus is a direct response to the financial crisis. However,

²⁶² Protess, Ben. "Regulators Concerned About How to Apply Volcker Rule." *New York Times*. January 18, 2012.

the financial firms that would be affected lobbied against this rule both before its becoming part of the law and after the Dodd-Frank Act was passed.

The Volker rule followed a complex route to becoming part of the law. The rule was initially proposed in the Senate as an amendment but was not put to a vote. A version of the Volker Rule was later encompassed in the Merkley-Levin Amendment, which was a somewhat stronger version of the Volker Rule and which put additional restrictions on banks. The amendment, however, was not voted on either. Instead it was attached to another amendment which in turn was then withdrawn by that amendment's sponsor, Sam Brownback. The bill was initially approved by the Senate without any version of the Volker rule being included. However, in conference committee when the House and Senate reconciled their versions of the bill, the Merkley-Levin amendment was included in resulting legislation. However, as the votes were incredibly tight in the Senate and hinged on a Republican, Scott Brown, voting for the bill, allowances had to be made so that he would vote yes for the bill and gave them a filibuster-proof majority in the Senate. These changes meant that the rule was loosened so that proprietary trading in many government-backed securities was exempted from the proprietary trading restrictions in the initial Merkley-Levin Amendment. The rule itself is in part a piece of delegation in that though it gives a general set of restrictions on actions, ultimately the specifics of how to implement the rule were left to the Financial Services Oversight Council (FSOC).

The FSOC sought public comment on the rule and how best to implement it. This enabled those involved to give their feedback and guide the resulting actions of the agency. This opportunity was taken advantage of by many corporations such as Goldman Sachs and Bank of America. After the Republican's retook the house, the Chairman of the House Financial Services Committee, Representative Spencer Bachus, stated his intention to slow implementation of the Volker Rule and questioned its usefulness in a statement he released which stated, "The U.S. capital markets are the deepest and most liquid of any in the world. The question for this Committee is whether implementation of the Volcker Rule in its current form represents a self-inflicted wound that will undermine the competitiveness of our markets and raise borrowing costs on a broad range of U.S. businesses, thereby

damaging our economy."²⁶³ By October 2011, a draft of regulations of the Volker rule had been put together, which due to consultation constraints on the delegation was then approved by the SEC, The Federal Reserve, The Office of the Comptroller of the Currency and the FDIC and three months later was approved by CFTC. The public had until Feb 13, 2012 to comment on the draft proposal. There was a good bit of complexity to the regulation that handled any details, but left less to judgment decisions. Paul Volker himself said, "I'd write a much simpler bill. I'd love to see a four-page bill that bans proprietary trading and makes the board and chief executive responsible for compliance. And I'd have strong regulators. If the banks didn't comply with the spirit of the bill, they'd go after them."²⁶⁴

While, Dodd-Frank set forth the Volker Rule, the actual rules and regulations of the Volker rule were laid out by agencies and ended up totaling more than 963 pages.²⁶⁵ There was considerable delegation involved with turning a hard-to-define rule into concrete requirements. In addition, the administration was able to set many specifics such as who the rule would affect and when it would take effect. There was a continual battle over the rules that were put in place and how they would be written and their implementation. To quote Timothy Geithner, "Reform is a 'forever war'."²⁶⁶

Since the enactment of Dodd-Frank and the Volker Rule that it contains, there have been numerous attempts by the financial industries, the Republican Party and others to weaken some of the restrictions and requirements that the Volker Rule imposed on financial institutions. There had been clashes about several provisions of the rules such as whether collateralized loan obligations (CLOs) would be exempt from these regulations. In January 2014, regulators acceded to some industry requests such as allowing banks to hold specific types of debt so long as these debt instruments were backed by trust preferred securities.²⁶⁷ Several court cases were also brought which slowed implementation of much of the Dodd-Frank Act. It was years for the regulations mandated by the Dodd-Frank Act to go into effect. For instance at the four year anniversary of Dodd-Frank, less than half the SEC rules

²⁶³ Committee on Financial Services. "Chairman Bachus Statement on Volcker Rule's Impact on Markets, Investors and Jobs." Press Release. January 18, 2012.

²⁶⁴ Stewart, James B. "Volker Rule, Once Simple, Now Boggles" *The New York Times*. October 21, 2011.

²⁶⁵ *The Economist*. "The Volker Rule: More Questions Than Answers" *The Economist*. December 14, 2013.

²⁶⁶ Geithner. 2014. Pg. 505.

²⁶⁷ Patterson, Scott and Stephanie Armour. "Street Hits Wall on 'Volker'." *The Wall Street Journal*. March 13, 2014.

were final.²⁶⁸ Nearly two dozen officials have a vote on the regulations that implement the Volker Rule.²⁶⁹ Kara Stein, one of the five SEC Commissioners, threatened to vote against the implementation of the Volker Rule due to its loose limits on hedging and because in the proposed rules are not on hook for rule violations. Because the two Republican Commissioners, Michael Piwowar and Daniel Gallagher, already planned to vote against the implementation, Ms. Stein's vote was needed to enact the SEC's regulations regarding the Volker Rule.²⁷⁰ Ultimately, the rules were changed so that hedging of a portfolio was not exempted from Volker Rule restrictions. This change in rules after J.P. Morgan Chase & Co. disclosed that it had lost billions in the so called London Whale, transactions that J.P. Morgan characterized as portfolio hedging. On the other side of the issue, Senators Manchin, Wicker, and Kirk sent a letter to Ben Bernanke and other regulators that they wanted the rules loosened and to exempt small banks.

To ensure that financial institutions had enough capital on hand to survive a financial downturn, a provision called the Collins Amendment was included in the Dodd-Frank Act which sets risk-based capital requirements and set maximum limits on leverage. In order to implement the Collins Amendment and other provisions of Dodd-Frank the Fed announced on December 20, 2011 a series of steps that were proposed, "to strengthen regulation and supervision of U.S. bank holding companies with consolidated assets of \$50 billion and nonbank financial firms that it deems as being systemically important."²⁷¹ Among the measures the board proposed were liquidity requirements, capital and leverage requirements based on a company's risk, mandatory periodic stress tests, limits on counterparty transactions in which there is a single counterparty, and early remediation requirements. This led to unintended consequences such as large foreign-based banks with U.S. presences, such as Barclays and Deutsche Bank, trying to skirt the rules by switching entity types. This potentially enables them to continue operating these large entities with minimal regulation and capital cushions. This leads to these forms taking higher risk and be more competitive than domestic companies.

²⁶⁸ Ackerman, Andrew and Alan Zibel. "Dodd-Frank Law Still Far From Done." *The Wall Street Journal*. July 21, 2014.

²⁶⁹ Patterson, Scott and Andrew Ackerman. "'Volker Rule' Faces New Hurdles." *The Wall Street Journal*. November 20, 2013.

²⁷⁰ Patterson and Ackerman.

²⁷¹ Board of Governors of Federal Reserve System. "FRB Press Release." December 20, 2011.

Other entities also created rules and policy to implement the broad goals and provisions in Dodd-Frank. For instance the FDIC took steps to implement the Volcker Rule, Section 619, and Section 165, which required stress tests of certain banks and created policy as part of this process of fleshing out the general policy. An example is the FDIC's determination of what is the process and the required pieces for the stress tests that the Section 165 of Dodd-Frank mandates.

The Dodd-Frank Wall Street Reform and Consumer Protection Act was a reaction to the crisis and was designed to take steps to avoid a future crises. It has been argued that, "politicians and political ideologues began to treat the hypotheses that confirmed their predilections as if they were established facts, and these theories eventually formed the conventional wisdom. Thus, conservatives were eager to blame the crisis on the government ... while liberals were eager to blame the crisis on capitalism ..." ²⁷²

Dodd-Frank enhanced the Fed's regulatory role despite the relatively poor job it had done as a regulatory agency previously. This increase in its regulatory powers is juxtaposed against plans prior to the crisis that had focused on changing regulatory agencies, which would have decreased the Fed's responsibilities in this area. ²⁷³ Despite its poor performance as a regulator, many felt that the Fed's relationships, experience, and authority would make it the best choice for a regulator to oversee the stability of the entire financial system. ²⁷⁴

Agencies tried to affect the course of the Dodd-Frank legislation. The Fed had only a five-member legislative affairs team, but it used those as well as its politically connected board members both in DC and at the 12 regional banks to curtail argue against several provisions that the Fed and its leaders did not think were in its best interests. At the period that Dodd-Frank was being debated, there was strong anti-fed fervor in congress as well as the public. This manifested itself as a push for more transparency as well as calls for the fed to be stripped of powers and its role as a regulator. In the end a compromise was

²⁷² Friedman, Jeffrey, and Wladimir Kraus. *Engineering the Financial Crisis: Systemic Risk and the Failure of Regulation*. University of Pennsylvania Press, 2011.

²⁷³ Calomiris, Charles W., and Stephen H. Haber. *Fragile by Design: The Political Origins of Banking Crises and Scarce Credit: The Political Origins of Banking Crises and Scarce Credit*. Princeton University Press, 2014. 279.

²⁷⁴ French, Kenneth, et al. "The Squam Lake Report: Fixing the Financial System." *Journal of Applied Corporate Finance* 22.3 (2010): 8-21.

hammered out which would increase transparency of the Fed's actions while still allowing the fed discretion in its day to day activities. The amendment passed the senate 96-0 and even Senator Bernie Sanders who had initially proposed a much stronger amendment supported the amendment. Other lobbying groups such as Community Bankers of America pushed for their own preferred policy. In the case of Community Bankers of America they wanted the Fed to remain the regulator for small banks. They were powerful because there were politically connected bankers in so many congressional districts and they used this to ensure political leverage.

Dodd-Frank also created a new Fed position, a vice-chair, who was put in charge of the Fed's regulation mission. However despite the creation of the role, the president never nominated an individual to fill this role.

Dodd-Frank called for stress tests that among other things can determine whether profits can be distributed to shareholders or buy back its stock. This was not a mere hypothetical power, but was used to stop distributions for several large banks that the Fed judged to be under-capitalized. Much of this power is in the hands of administrators rather than laid out in clear, concise rules.

4.2.6 National Commission on Fiscal Responsibility and Reform

To deal with long-term structural deficits, Republicans pushed for actions to deal with deficit spending and in particular pushed for spending cuts. Seeing that at that time the Republicans were on the politically popular side of this issue, the president embraced a failed senate proposal and issued Executive Order 13531 which created The National Commission on Fiscal Responsibility and Reform, commonly referred to as the Simpson-Bowles Commission. The commission was ostensibly set up to find a compromise of how to tackle long term debt reduction.²⁷⁵ It began its work in April 2010 and released its report and had its final vote in December of that year. It was structured as a presidential commission set up by President Obama in Executive Order 13531, but the majority of its 18

²⁷⁵ The White House Office of the Press Secretary "President Obama Establishes Bipartisan National Commission on Fiscal Responsibility and Reform" February 18, 2010. <https://www.whitehouse.gov/the-press-office/president-obama-establishes-bipartisan-national-commission-fiscal-responsibility-an>

members were members of congress. The commission was designed to create a blueprint for deficit reduction which could then be voted up or down by congress but not amended. However in order to be automatically introduced to congress to vote on, the proposal needed a 14 vote supermajority of commission members to support the proposal. In practice this did not happen and only 11 commissioners voted for the proposal and the proposal never made it to the floor of congress for a vote. The high number of votes required to meet the minimum number of votes needed to ensure action was a constraint as was the end date for the commission to report by. The commission met in secret and this allowed it to work out possible solutions without the limitations or immediacy of focusing on politically popular positions. While congress determined the ultimate say of whether to vote for the deal or against the deal, the fact that the details were worked out by another entity and the proposal has closed rules whereby it could not alter the agreement, made this a piece of delegation in an important topic area. The structure of this type of delegation is very similar to the BRAC commission or to treaties negotiated by the president under Fast Track authority. Ultimately the structure of the delegation hurt it. Because the commission was largely created by President Obama and he would receive credit for its accomplishments, this risked making some members to be less receptive to the process. One of the co-chairman believed he saw this tendency and stated the purpose of some of those that voted against the proposal, “was to stick it to the president.”²⁷⁶

4.2.7 Budget Control Act of 2011

In 2011, there was considerable fighting over whether to raise the debt ceiling and over other debt-related initiatives. The Republicans tried and in part succeeded on getting the Democrats to give ground on spending. Some of the capitulations they wrangled out of Democrats that came about during protracted negotiations on raising the federal debt limit, on continuing resolutions needed to keep the government open, and on the annual budget were implemented in the Budget Control Act of 2011.²⁷⁷ As part of the deal, a large percentage of these reductions were designed to be determined by a commission rather

²⁷⁶ Balz, Dan. “Obama’s Debt Commission Warns of Fiscal ‘Cancer” *Washington Post*. July 12, 2010.

²⁷⁷ Pub.L. 112-25

than by congress directly. Congress set up the Joint Select Committee on Deficit Reduction, also referred to as the Supercommittee.

This committee was required to come to an agreement to cut at least \$1.2 billion in federal spending, but many in both parties were urging for a grand compromise that would yield even deeper cuts and help limit the projected rise in the ratio of national debt to GDP.²⁷⁸ The way the bill was designed, the Supercommittee, congress and the president all had deadlines on their actions and if they fail to meet these deadlines, automatic cuts are triggered. The cuts were designed to be unappealing to both parties in order to increase the willingness of the parties on the panel to compromise. The initial agreement to delegate to the Supercommittee was an agreement to cut a predetermined amount from the budget; the details were left till later once the goal was determined. The Supercommittee was instructed on a minimum goal and were free to use whatever method they deemed appropriate to reach it. The design of the committee was such that it needed a majority in order to trigger the next phase where congress votes on the bill. The bill that the Supercommittee would propose could not be amended by either house of congress, could not be filibustered by the senate, and must be voted up or down. This ensured that the deal that the committee agreed to would either be accepted as agreed on or else tough cuts would be automatically enforced and thereby the committee's compromise would likely be accepted. Besides ensuring the deal was approved, the tough sanctions also encouraged a deal for the committee in the first place.

The members of the committee were members of congress, but the creation and empowering of this committee is still a delegation as the body was separate and distinct from congress as a body. In that sense, delegating to any congressional committee is a form of delegation, but to this joint, select committee this is even more so. While all members are part of congress and the committee is a congressional committee, there is nothing inherent to these characteristics that changes the nature of the delegation much. If the committee included a couple members that were not members of congress it would not change the nature of the decision or the resulting compromise. It also would not greatly threaten the legitimacy of the body or this method of creating policy. As for the committee

²⁷⁸ Thurber, James A. "Agony, Angst, and the Failure of the Supercommittee" *Extensions*. Summer 2012.

being a congressional committee rather than an advisory committee that has been used in other instances, either way the creation of the bill is done by a collection of individuals appointed to a role and the ultimate up and down decision will rest with congress. The committee itself is unlike most, in that it can write legislation. The members on a committee do have an effect on the committee process and more importantly on its results. In this case, the panel is composed of twelve members: three members from each party in each house. Thus the members reflect the interests of the party heads in both of the houses of congress as these chose the members of their party in their house that would represent the party on the panel. The members of the board thus vary depending on who appointed them. However, one general trend is that the members did not tend to be party leaders who typically lead their parties in congress. This lack of formal power makes creating a deal that much more of a challenge. Four members of the board were on the earlier Simpson-Bowles commission and all four voted against the deal created by that commission.

In the end, this piece of delegation was not effective in this situation. While the general belief is that neither side wanted the talks to break down and have severe automatic cuts kick in, neither side was willing to compromise enough for a deal to be reached. This led to a stalemate in which after months of discussion and negotiation, the committee was unable to create a series of cuts that would be acceptable to both parties. Thus what had initially been created in the hopes of bipartisan compromise broke down and ultimately led to partisan bickering. On November 21st, more than three and a half months after the committee was first established, its two co-chairs were forced to issue a statement saying, "After months of hard work and intense deliberations, we have come to the conclusion today that it will not be possible to make any bipartisan agreement available to the public before the committee's deadline."²⁷⁹ The deadline, which was put there to force an agreement, became an unattainable goal and well before that it became clear that no deal was likely to be reached. The chairs expressed regret that no deal was able to be reached, but others on the board try to use the failure politically and point blame at the other side. Near the end of the committee's deliberation, there came a shift in which an

²⁷⁹ Supercommittee. "Statement from Co-Chairs of the Joint Select Committee on Deficit Reduction" November 21, 2011. <http://www.murray.senate.gov/public/index.cfm/2011/11/statement-from-co-chairs-of-the-joint-select-committee-on-deficit-reduction>

alternative was presupposed in that congress could remove the automatic cuts that would kick in since they could just pass legislation vetoing that part of the bill. President Obama came out against such a move and stated that he would veto any such measures, but he did so after the panel conceded defeat so that this potential way out appeared viable while the panel was still negotiating.²⁸⁰ If his goal was to force a compromise, the appropriate time to state his unwillingness to accept a reversal of the automatic cuts would have been early in the process and so those negotiating could only have seen two alternatives: compromise or unacceptable cuts to areas that they particularly care about. One cannot however be sure of the president's policy preferences. The sequester cuts kicked in though the nature of the cuts was not desired by either side. Ultimately the Bipartisan Balanced Budget Act of 2013 decreased the size of the sequester cuts in 2014 and 2015. The decrease in cuts was paid for by other savings and by extending the sequester two additional years beyond 2020 when the sequester cuts were initially due to expire.

In negotiations such as this, those involved, including the president, are likely not to show their true policy preferences and thereby undercut their hand. He may well have wished for the automatic cuts, which trimmed what were typically very politically difficult areas to trim such as defense. As spending on defense had increased so much in the last decade and he tended to be more of a dovish president, it was possible that this was his preferred result. However for observers it looked like a failure of congress and the political process and when the news leaked out that the Supercommittee was going to announce later that day that the committee had been a failure and was not able to reach an agreement, the U.S. stock market reacted very unfavorably to the news and soon after Standard and Poor's downgraded the United States' credit rating thereby marking the first time that the debt had been downgraded less than AAA.

The committee members anticipating the way the failure of the committee would be perceived focused on pointing fingers and half the committee members went on Sunday political news shows to try to place the blame for the stalemate on member of the other party and there intractableness. This inability to come to an agreement was similar to many other instances of gridlock such as the Simpson-Bowles commission and the negotiations

²⁸⁰ Fontevecchia, Agustino. "Obama: I Will Veto Attempts To Get Rid of Automatic Spending Cuts" *Forbes*. November 21, 2011.

between Speaker of the House Boehner and President Obama over a grand bargain that would reduce 4 billion from the deficit over the course of 10 years. In all these cases, those involved stated a desire to solve the problem and that they saw the deficit as a major long-term crisis that required a bi-partisan solution. Thus those involved had reason to work together to solve these structural deficits, but despite this apparent agreement on the major goal, they were unable to determine the particulars of how to reach that goal.

One potential problem with this delegation is that congress continues to have the ability to countermand the negative repercussions that would kick in if no deal was reached. Congress can pass legislation rewriting the rules that the Budget Control Act of 2011 put in place. This tendency can be seen in the Gramm–Rudman–Hollings Balanced Budget Act of 1985²⁸¹ and the Budget and Emergency Deficit Control Reaffirmation Act of 1987²⁸² that was used in the 1980s to limit deficit spending by using the threat of automatic spending cuts. However, despite budgets through this era, the cuts were countered and eventually removed when the congress passed the Budget Enforcement Act of 1990²⁸³ and switched to the PAYGO method of limiting budgetary spending. The strongest method to guard against this is a prior public commitment or the framing of the issue by those who wish to ensure that congress does not skirt a tough issue by removing the punishment for inaction. The president in particular can set expectations for the board and raise its profile so that the public will not allow the taking of the easy course. The act also ensured a congressional vote on a balanced budget amendment. The amendment bill was not able to garner the required 2/3rd of votes in either the house or the senate and thus was never sent to the states to be ratified.

The act itself also included an increase in the debt ceiling that was needed for the U.S. to continue deficit spending. Thus it was viewed as imperative to pass the bill as the U.S. approached the debt ceiling and the potential of a debt default became more pronounced. The Republicans insisted on cuts, but the two sides could not fully work out the specifics. Instead some cuts were laid out in this act and went into effect and the

²⁸¹ Pub.L. 99-177

²⁸² Pub.L. 100-119

²⁸³ Pub.L. 101-508

second set was left up to the discretion of the panel. The act was similar to the SAFE Commission proposal that Representative Frank Wolf had proposed previously.

The Republicans were able to shift the debate from how much additional stimulus there would be and shifted it to a question of reducing the national debt. The Republicans in control of the House were most responsible for this change and in large part played a major role in blocking many of the proposals that Obama and the Democratically controlled Senate proposed. It was this change in public sentiment that allowed the Republicans to play hardball in the debt limit negotiations and thus were able to push through the Budget Control Act of 2011. This was in effect a pivot from a focus on the short term economic problems to a wider, more expansive look at the long term economic weakness faced by the country. Thus the short term crisis was used as a method to improve the long-term financial picture of the nation. The time-frame and definition were shifted in the minds of voters by tying together the short-term crises and the long-term crises. This is despite the fact that by cutting short-term spending in order to improve the deficit situation would, according to the common economic view, hurt the recovery. While not all economists agree that Keynesian stimulus will help the recession and questions about multiplier effects are common, the prevailing view is that economic stimulus is one way to help the economy.

By threatening to throw the country into sovereign default on its debt, the Republicans were able to maneuver the Democrats into going along with some of these changes. By using brinksmanship the Republican was able to push the Congress to agree to some cuts and to perform a delegation to cut additional spending. There was however some risks as the Democrats used this to paint the Republicans as being reckless and irresponsible. In addition, the hard line of the Republicans ran the risk of inadvertently actually leading to a debt default since neither side knew the actions the other side was willing to take.

The Budget Control Act was designed in such a way that there were three separate increases to the debt ceiling that could be authorized by the act. The second and third increases, which amounted to the bulk of the acts increases, required the president to request the money and had a provision so that congress could act to stop the debt ceiling increase. As congress could only stop the increase with a joint resolution, which would be

subject to veto by the president, congress could be pretty sure that the increases would be implemented. However, by implementing the bill this way, congress could tag the president with most of the responsibility with raising the debt ceiling. This was a political liability in that political environment.

On Nov 9, 2011, the president issued another executive order.²⁸⁴ This one attempted to cut government waste. By using an executive order the president was able to bypass a congress that was mired down in gridlock and had a large contingent that saw it as politically expedient to counter the president's proposals. The executive order sought to cut government spending on travel and technology by 20%. It does this by limiting the pieces of technology such as phones and laptops that are issued to government employees. Similarly it is designed on cutting back on the amount of official travel as well as items that are viewed as frivolous such as mugs or t-shirts.

President Obama suggested that he be given the power to consolidate agencies.²⁸⁵ Presidents had these powers for 52 years until 1984 at which point congress removed this provision. This power would force congress to have an up-down vote that would either approve or reject the president's proposal within 90 days of the proposal. This is a delegation and affects other delegations. The power the president requests currently resides with congress. Obama analysis of this delegation was that it allowed. He stated it thusly, "Congress first granted this authority to presidents in the midst of the Great Depression, so that they could swiftly reorganize the executive branch to meet the changing needs of the American people"²⁸⁶ If the president can reshuffle the bureaucracy then powers delegated to agencies can be changed by the president's actions. The president wanted to use this power to consolidate a number of agencies that he argued would get rid of duplication and would make the government more efficient and streamlined. He initially proposed consolidating six agencies: the Commerce Department, Export-Import Bank, the Office of the U.S. Trade Representative, the Overseas Private Investment Corporation, the Small Business Administration, and the Trade and Development Agency. The estimation

²⁸⁴ Executive Order 13589

²⁸⁵ Nakamura, David and Ed O'Keefe. "Obama Seeks More Power to Merge Agencies, Streamline Government". *Washington Post*. January 13, 2012

²⁸⁶ Klein, Ezra. "Reorganizing Government, Recapturing Executive Authority, and Criticizing Congress: The Highlights from President Obama's Speech" *The Washington Post*. January 13, 2012.

from the administration is that the consolidation would allow a cut in 1,000-2,000 jobs, which would save around \$3 billion over the decade.²⁸⁷ This consolidation was a shuffling of the structure of these organizations and by changing the structure it can change the resulting policies and preferences. For instance, the Office of the United States Trade Representative is currently under the Executive Office of the President of the United States and thus has a great deal of freedom from congressional actions. Furthermore the United States Trade Representative is currently a cabinet level position, but after the reshuffle once the trade representative will be under the head of the new agency and thus may eventually no longer be a cabinet level position despite President Obama's assurances that he does not intend to change this. This change in stature of the position would affect the amount of power that the organization has and would effectively deemphasize the project of trade liberalization. It would also complicate the USTR, which is already a very small streamlined organization. In part this request was likely to claim the popular position of cutting expenses and making government more efficient that the Republicans had previously been championing. Thus asking for and using this power would be largely a political action as would congress granting the power. The administration's position is well summed up by the Deputy Director for Management and Chief Performance Officer at the Office of Management and Budget when he states, "The government we have is not the government we need. The last reorganization of the whole government was done by Herbert Hoover. Since then, agencies have been layered on top."²⁸⁸ To push for this power President Obama implicitly compared the government to an inefficient company when he said, "This is the same sort of authority that every business owner has to make sure that his or her company keeps pace with the times." He further asked for this delegation by making the claim that he will use it well and thus will be self-policing. To this end he states, "Let me be clear, I will only use this authority for reforms that result in more efficiency, better service, and a leaner government."²⁸⁹

²⁸⁷ Nakamura and O'Keefe. 2012.

²⁸⁸ Tau, Byron. *Obama Seeks New Power to Merge Agencies*. Politico.com. January, 13 2013.

²⁸⁹ The White House Office of the Press Secretary. "Remarks by the President on Government Reform" January 13, 2012. <https://www.whitehouse.gov/the-press-office/2012/01/13/remarks-president-government-reform>

His proposal suggested making the Small Business Administration a cabinet level agency, which would give it more prominence. This change would imply administration support for and emphasis on small business and this is nearly universally approved of.

By giving the president the initiative to initially propose what to cut, he gains considerable ability to set the agenda. He will focus on issues of interest to him and cut funds to certain areas he is not happy with. Other groups of course would have different priorities. The right wing paper, the Wall Street Journal, proposed consolidating the nation's 47 job creation programs as a way to cut overlap and wasteful inefficiency. This suited their ideology as this cut programs that typically are popular with liberals and unpopular with conservatives and had a conservative president been in power they might propose such a change. Obama, being more left wing, was more interested in cutting trade and commerce agencies that are approved of by conservatives while liberals are less sure of their value. The proposal itself would not greatly affect the budget and thus was likely more of a symbolic and political move rather than a major change in policy. It was also not bipartisan or done in coordination with congress.

The restructuring however does not reflect where the government is spending its efforts. The Commerce Department is many times larger than any of the other agencies that are proposed getting merged with it both in terms of employees and budget. This means these other agencies are at risk of being subsumed into the whole and being deemphasized when the commerce entity in effect becomes the parent entity in this merger. Even though NOAA, a large part of the Commerce Department would be shifted to the Interior Department under the plan, the Commerce Department still would account for nearly 90% of the employees in the combined agency. By comparison, the agency will have 10 times as many employees as the Small Business Administration which Obama proposes making a Cabinet level agency.

These agencies do have closely related function, but currently serve distinct purposes and thus have been separate. While the Commerce Department handles a wide number of issues and areas related to commerce, the Export-Import bank focuses on the much more narrow task of helping US Businesses export their goods, OPIC helps the US get established overseas, USTR tries to push international trade policies, the small business

administration helps support and grow small business, and the Trade and Development agency focuses on opening emerging markets up to US exports

Of course not all proposals to delegate powers become law. A piece of proposed legislation that did not pass through congress was a proposal for a national infrastructure bank. This proposal was proposed in the Senate in 2007. The following year the President stated his support for the bill and it has reemerged a number of times since, including as a component of the American Jobs Act, but it has yet to become law.

An economics issue that congress largely handled itself were provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) which together are generally referred to as “the Bush tax cuts”. The tax cuts, which were created as a temporary act with a sunset provision, were scheduled to expire December 31st, 2010. This led to serious negotiation between both parties as that date approach to determine what structure the cuts should be. The three alternatives were to let the tax cuts expire, extend them for some length of time, and modify what tax rates are cut and pass this new tax cut. While letting the tax cuts expire would have gone a long way toward improving the long term debt problems the country faced. Due to the short term fiscal downturn, the Democrats wanted to keep the tax cuts in order to stimulate the economy. The Republicans meanwhile tend to like lower taxes and smaller government and thus also wanted to keep the taxes in place. In addition, neither side wanted to be branded as causing the largest single increase in taxes in the history of the United States. The temporary tax cut was in large part designed to be passed into law in part because it would appear to be a comparatively small cost however it was also designed so that those later would not find it easy to allow it to expire. Many other provisions with yearly adjustments, sunset provisions, and donut holes are designed similarly for this reason. Ultimately the Republicans took the position that the tax cuts should be extended in their current form while the Democrats said the tax cuts should only be extended for those that are not rich. Within a year of the initial tax cuts being passed, a significant effort was put forward to make the tax rebates permanent and multiple bills with that goal passed the Republican controlled House of Representatives. In practice, they wanted the tax cuts to expire on those whose yearly income was greater than \$250,000, but

would be extended for everyone else. Later after a lack of willingness of the Republicans to accede to this proposal, the cutoff was raised to \$1,000,000.

President Bush pushed for the tax cut publicly. In his 2003 State of the Union speech, President Bush laid out plans for a \$726 billion tax cut. The proposal was not popular with everyone as much of the cuts come from cuts to dividend taxes and thus was most beneficial to the rich and least beneficial to the poor and thus was not popular with some Democratic law makers. However the large size of the tax cut was alarming to some Republican law makers that were concerned with budget deficits. However, the economy was weak and the president made the case that tax cuts were needed to stimulate the economy saying, "To create economic growth and opportunity, we must put money back into the hands of the people who buy goods and create jobs."²⁹⁰ Congress ultimately passed the tax cut, but not to the size that the president wanted. There were future tax cuts in 2004 as the election year made cuts politically beneficial to both parties. The initial proposal had to be cut back in part because the democrats did not want Bush to have a political victory.²⁹¹

The Republicans wanted the focus to be on this issue and all 44 Republican senators threatened to stop all other legislation until the tax cut issues had been resolved. The Republicans had enough votes to stop a cloture vote and they were able to use these to get significant leverage. The Democrats were able twice to get their proposals passed the House of Representatives, but could not get the bills passed the Senate due to the coherence of the Republican delegation in the Senate. After these two failed attempts at changing the nature of the tax cut and with less than a month to go before the cuts would expire, the president interceded and was able to negotiate a deal with the Republican contingent. Throughout the process, the president had assigned a couple key aids, the Treasury Secretary and the head of the OMB to help nail down a compromise. The tax cuts were extended two years. As part of the package, the Alternative Minimum Tax (AMT) was adjusted so that it would affect less people, the estate tax rules were adjusted, and some stimulus was included. This allowed both sides to get something of interest to them and

²⁹⁰ Boaz, David. *The Politics of Freedom: Taking on the Left, the Right and Threats to Our Liberties*. Cato Institute. 2008. Pg. 131.

²⁹¹ CQ Press. *Congress and the Nation 2001-2004*. Pg 87.

was able to push off the contentious issue again until after the 2014 election. This benefitted the president since it might sidetrack his other priorities and was a high risk. While congress ultimately approved the deal and passed it as the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010,²⁹² it can be viewed as a sort of delegation as the president and his advisors largely stepped in and shaped the structure of the bill along with Republican Senators. Congress as a body was given an agreement to vote on that was essentially a fait accompli that could not really be altered and thus they could only accept or reject the treaty much as the case with foreign treaties that the president negotiates under the provisions of Fast Track.

Following the TARP legislation, The Treasury Department injected capital into all the major banks in the belief that many banks were all undercapitalized. The banks were effectively forced to accept the additional capital in return for preferred equity. However, during the crisis this was cheap capital. The TARP Congressional Oversight Panel estimated that these capital injections included a 22% subsidy to the banking sector.²⁹³

4.2.8 Other Responses to Economic Crises

The president and congress also took steps to decrease the government's costs by decreasing salaries and benefits for government employees. This includes freezing the pay of government workers other than members of the military, making government workers pay more towards their pensions, and making military veterans pay more for health care through the Federal Health care system. This was a relatively painless cut politically since freezing wages does not seem like a decrease in salary though with inflation it was a decrease in real economic terms. The difference between a standard salary increase of a little over 2% and no increase is far less of a gap psychologically than a difference between no increase and a 0.1% decrease. This sentiment of the populace has an effect on policy formation since it affects public sentiment. Government workers are relatively easy targets

²⁹² Pub.L. 111-312

²⁹³ TARP Congressional Oversight Panel. February Oversight Report: Valuing Treasury's Acquisition. February 6, 2009.

for cuts as there is a perception that government workers are overpaid and underworked.²⁹⁴ These perceptions were encouraged by Republicans, who typically prefer smaller government. This perception also has some truth in that Federal Government employees earn far more on average than the typical American worker. Also there is not much in terms of geographical distribution of government employees. The majority of Federal government workers live in Maryland, Virginia, or Washington, D.C., which are politically rather homogenous, and thus senators and the president are not too worried politically about getting reelected and they will not be that hurt by this action.

Steps were taken to provide a safety net such as extending unemployment insurance. This was relatively popular with voters and so congress enacted many of these changes themselves. Other steps taken during the downturn were to stimulate the economy in the hopes of stabilizing it and helping it begin to grow again. An example of a policy that was put in place for this second reason was a cut in the payroll tax. By its structure this act should help put money in the pockets of those that are most likely to spend it. Payroll tax is a relatively flat or regressive tax and so returning money will mean most of it ends up going to those that are relatively poor who were more likely to need the money and more likely to spend the money than the rich. This helps ensure a decent multiplier for that money that was returned to the economy and thus that it would have a bigger effect on the economy than other actions would. This was temporarily cut, with the cut being equivalent to an act with a sunset provision. There was enough reason to convince lawmakers to agree to extend the provision based on the continuing weakness in the economy. This temporary measure allowed the topic to be readdressed rather than becoming a permanent change. However, popular actions can continued to be patched rather than fixed long term. The extension was more complex than it could have been otherwise as the Republicans who were less in favor of extending this reduction in the payroll tax asked for considerations in return for their acceptance of their proposal and they were ultimately able. Among these was a decrease in the costs of federal pensions. Public opinion had also begun to move against congress as a whole for being perceived as dysfunctional and gridlocked. This was an additional motivator to get congress to agree on

²⁹⁴ Richwine, Jason. "Government Employees Work Less than Private-Sector Employees" The Heritage Foundation. September 11, 2012. <http://www.heritage.org/research/reports/2012/09/government-employees-work-less-than-private-sector-employees>

a deal so that both sides could be seen as doing the nation's work and effectively managing the crisis.

The president made policy based on certain assumptions and models, but could not be assured of their validity and had an even tougher time explaining them to the public or congress. The Obama administration released predictions that the stimulus would create or preserve up to 3.6 million jobs over a baseline in which the stimulus had not been implemented.²⁹⁵ As jobs continued to be lost and there was a net job loss in the United States it was hard for the public to see increasing unemployment and understand that the stimulus was creating jobs. This was not helped by the fact that the jobs created or those that were saved due to stimulus could not be counted and often the complex state of the economy made it so one could not be determined if a job was saved due to stimulus. Since the jobs were not countable, there was no way to verify that these jobs were saved or created. Rather the administration used the model that was used to predict the jobs saved and used it to say that it proved that they were saved. This was a theoretical approach rather than an empirical method. This is risky since the model could well be off which the administration model of unemployment certainly was. There were millions of jobs lost during the beginnings of the stimulus. Between October 2007 when the Troubled Asset Relief Program was signed into law and December 2008, roughly eight million jobs lost according to the Bureau of Labor Statistics.²⁹⁶ While there was a lag time between when TARP and other stimulus were passed and when they would begin to be implanted or begin to have an effect, the typical view of citizens does not take this into effect. The population also does not take into effect the long term growth in the U.S. labor force which required significant job creation just to keep the percentage of employable American employed the same. Politically it was in the interests of the politicians, and particularly the administration in power that will most be blamed if the economy is doing poorly, in powers to point out these factors and manage expectations. Unfortunately in a crisis the timeframe of people and thus also those of politicians are shortened and the tendency is to focus on the more immediate crisis. This leads to changes in how stimulus is structured as well as how to approach longer term issues tied up with the crisis. The president in particular must be

²⁹⁵ Bozzo, Albert. "Bad Labor Market A Good Election Barometer" CNBC. September 27, 2010.

²⁹⁶ Bureau of Labor Statistics. Labor Force Statistics from the Current Population Survey: Seasonally Adjusted Employment Level of those 16 and over. <http://data.bls.gov/timeseries/LNS14000000>

aware of this sentiment in this situation because even though he has very little control over the economy in the public imagination the president has extensive powers to control the economy and can effect change quickly. He thus gets blamed if the economy is weak. This is the reason that the Clinton campaign used its “It’s the economy, stupid” slogan when he campaigned against George H. W. Bush.

The unemployment rate was found by the Bureau of Labor Statistics to be around 4.7% in October 2007 when TARP passed and continued to rise for the following months until it was around 10%.²⁹⁷ The unemployment rate is a measure of the amount of the workforce that is looking for a job, but is currently unemployed. This measurement excludes a number of potential workers such as those that are “under-employed”, those that are employed at a part-time job that want a full-time job, and those that have given up looking for work. Thus the measure used by the Bureau of Labor Statistics greatly understated the effects on workers. Before the recession, the economy was in strong shape, being near full employment, and thus the comparison made by voters was even more of a stark contrast since the especially strong economy made the situation appear worse than it would otherwise. Unemployment is typically viewed as a lagging indicator so it will drop after the actual economy had already begun to suffer. In the crisis, the ratio of the working-age population that was employed to that which was not employed was the lowest since 1947. There were also vast disparities hidden in the unemployment rate. Certain geographic areas had a far higher than the average unemployment rates and certain groups such as African-Americans and men also were well above average and teen unemployment was a record high. While teens and African-Americans typically have higher rates of unemployment than society as a whole these already high rates of unemployment increased significantly during the crisis. Policy that the government creates would need to be aware and address these disparities to be fully effective and meet the needs and expectations of their constituencies.

The high unemployment rate had major direct effects such as increases in federal outlays for social spending and a decrease in taxes receipts. There are also follow on effects such as less revenue for businesses as the unemployed spend less. The biggest effect however is a decrease in trust in the system and a decrease in optimism about the future of

²⁹⁷ Bureau of Labor Statistics. Labor Force Statistics from the Current Population Survey: Seasonally Adjusted Employment Level of those 16 and over. <http://data.bls.gov/timeseries/LNS14000000>

the economy. Many of the aspects of the crisis also led to a decrease in confidence in the financial system, the political system, and a belief of how it will affect them. The modern economic system is predicated on trust and would grind to a halt without faith in the system. Banks, which thrive through lending or investing vast multiples of their assets, would not be able to lend or to avoid bank runs and bankruptcy. Businesses would not be able to get funds and avoid liquidity crisis. Businesses would have to cut back on investments and lay off people. More individuals would lose jobs and their houses thereby exacerbating the crisis. It would stop the dynamism of the U.S. economy. In addition, these all negatively affected the U.S. stock and bond markets which decreases the wealth effect which in turn decreases the tendency to spend and thus GDP as well as weakening the savings held by many and making it tougher for individuals to struggle along.

This severity of the crisis led to extraordinary actions. The president and the Treasury Secretary have significant emergency powers that enable them to deal with economic crises. Most of these powers initially came from Depression era legislation. These include regulatory powers over banks in the Federal Reserve System. Much of its power is informal powers and the power to persuade much as the president's power or other agency heads. In large part it is up to the administrator of an agency to define their role for themselves. The president also takes his own view of presidential powers and will assert powers that are not directly laid out in the congress.

Congress gives significant leeway to agencies during a crisis. Congress often wanted action taken on an issue, but could not take action itself or even delegate powers in a timely manner due to internal conflict, being adjourned, political unpopularity of the actions, or other reasons. During the Lehman Brothers crisis, the Treasury secretary mentioned to Barney Frank, who was the Chairman of the House Financial Services Committee, that he wanted additional powers to wind resolve the crisis. In the words of the Treasury Secretary, Congressman Frank, "encouraged the Fed and Treasury to interpret our existing powers broadly to protect the system, saying 'If you do so, I'm not going to raise legal issues.'"²⁹⁸

The Fed and Treasury were thus able to act quickly under powers they could assert they had. Congress in comparison was slow to act. Reform of the Housing market and Government Sponsored Enterprises that was the root cause of the crisis dragged on as no

²⁹⁸ Paulson. 139.

quick reforms were made. Congress is a deliberative body. In many situations it can be a good thing to act in a moderated, level headed way rather than rushing into decisions that may prove poor or ill thought out in the future. However, this does mean that its actions are often not immediate and GSE Reform, which was a major issue of debate in 2008, is still lingering several years later as lawmakers debate the ultimate shape of the reform and even whether it should be a piecemeal reform or more comprehensive. This slowness to act was of course not solely due to the processes of congress. Congress relies to a considerable extent on the administration and so they based reforms off of proposals such as those in Treasury's mandated report "Reforming America's Housing Finance market: A Report To Congress" which was issued in February 2011. This leads to the central point of the manner in which policy is created. In this instance, it was in direct response to the crisis even if not immediate in time to it and relied heavily on the administration and agencies to shape the public policy that eventually congress would formally adopt albeit with some modifications.

The Treasury pressed for significant new powers during the crisis such as the ability to buy equity in Fannie or Freddie, a temporary increase in the line of credit that Treasury was allowed to extend to these two housing entities, and allowing the Federal Reserve to get access to the GSE's financial data as a consultative regulator.²⁹⁹ It also pushed for significant spending power with Treasury head Paulson saying, "If you want to make sure it is used, make it small enough and it'll be a self-fulfilling prophecy... It would be self-defeating to start putting limitations on a plan... I think that if you have a squirt gun in your pocket you may have to take it out," Paulson said. He continued by saying, "If you have a bazooka in your pocket, and people know you have a bazooka, you may never have to take it out."³⁰⁰ Much of these powers that were requested were granted in the Housing and Economic Recovery Act (HERA) that was enacted July 30, 2008.

The president was able to use his veto and in conjunction with his party, he is able to force concessions to his view point. For instance during the crisis both sides wanted agencies to have emergency powers to support Fannie and Freddie and the housing market in general, however the Democrats were insisting on block grants to state and local governments which was disliked by both the president and the vast majority Republicans in

²⁹⁹ Paulson. 149.

³⁰⁰ Paulson. 151.

the House of Representatives.³⁰¹ Ultimately the president's position forced the Democrats agreed to structure the emergency power in a way that did not include these block grants.

Barney Frank wrote that, "Here, another important point about our government must be noted: in times like this, the initiative is inevitably and inescapably with the executive branch. Congress can respond to requests, modify them, and in some cases refuse to act, but it is virtually impossible for Congress to initiate action in a crisis of this sort."³⁰² Congress could however take steps to block action or counter the administration.

Congressman Frank also made the assertion that the Republicans initially understood the need to govern responsibly and address the crisis in a constructive way, but that once they lost the White House and the congress they no longer felt compulsion. Though Representative Frank was in the opposing political party, his comments were phrased as merely a political fact of life predicated on the structure of the political system and the balance of power and saying that had the situations been reversed that the Democrats would act the same. Frank's point can be seen in the Republicans refusing to raise the debt ceiling much as many Democrats had when George W. Bush was in office. Obama had voted against raising the debt limit when a Republican was president, but once he became president and wished to increase the debt limit he characterized votes against the measure as irresponsible and dangerous.

Other entities were involved in the creating policy and responding to the crisis as well such as New York State's Superintendent of Insurance, Eric Dinallo. Because of the centralization of much of the U.S. financial industry in the New York City area, the state level agency he led was the regulator for a large percentage of the nation's bond insurers. There was no federal regulator for these entities and so policies or emergency actions taken to deal with the huge losses of this group of monoline insurers due to losses incurred from residential mortgage-backed securities that they insured or from collateralized debt obligations they insured that were backed with residential mortgage-backed securities. Superintendent Dinallo was also required for cash strapped insurance company, American International Group or AIG, to raise by raising \$40 billion by selling off subsidiaries. AIG, as the largest underwriter of commercial insurance in America, was a systematically important financial entity that was severely undercapitalized. The abilities of various federal entities

³⁰¹ Paulson. 146.

³⁰² Paulson. XIX

to resolve this crisis were limited and so they required help at the state level. The Federal Reserve Board determined that it could not legally act to loan money to AIG because it was not a bank.³⁰³

In addition, other entities from the private trade association, International Swaps and Derivatives Association, to the UK's Financial Services Authority played some sort of role in response to the crisis. In addition, several lesser known government agencies played a part. For instance, OFHEO, the regulator for Fannie and Freddie, negotiated a deal to get them to raise more capital in return for a reduction in a surcharge that OFHEO had placed on these two GSEs.

The unwinding of Glass-Steagel and the gradual deregulation had left a patchwork of regulator each with their own rules and powers. This caused problems in cases such as Lehman Brothers since the Securities and Exchange Commission, which regulated investment banks, lacked the authority to take over one of these banks and wind down the bank. This power however was available for commercial banks and this power allowed their regulator, the FDIC, the ability to minimize the negative effects and minimize the threat of major financial havoc caused by the failure of one of these entities.

The new, updated regulatory framework was designed to deal with the systematic weaknesses of the prevailing system in order to minimize the chance of a similar crisis occurring again in the future. It was put together through a hodgepodge of competing plans and recommendations that through the political process ended up shaping what changes actually got implemented. While it is not easy to determine the cause of each action it is clear that most of these changes were due in large part to actors other than the congress. Proposals such as the Treasury Department's Blueprint for a Modernized Financial Regulatory System formed much of the basis of this reform. Likewise agencies strove to have changes that they liked enacted and thwart those that they didn't. The Fed fought to keep and expand its role.³⁰⁴

Similarly, the concept for the Troubled Asset Relief Program was brought to the congress from the Treasury. While the agency kept the initial proposal basic and left many of the details and legalese to congress to decide the major part of the plan was already structured by the time congress received it. In addition, TARP itself left almost full

³⁰³ Paulson. 204.

³⁰⁴ Horwitz, Steven. "The Fed: Firefighter or Arsonist?" *U.S. News & World Report*. May 20, 2013.

discretion over what to do with the vast amount of funds it entailed to the Treasury. The president was also involved on shaping TARP and made sure it had certain provisions as he pushed for its adoption.

HERA, while being an act of congress, actually gave the Treasury Department the ability to decide how the government would address the crisis. Contained in this legislation was an immense delegation of power which allowed the Treasury to spend funding however it though would best improve the financial situation. Even more unusual is that the act was essentially a blank check in that it contained no limit on the amount of funds that the Treasury Department could use for these initiatives. Rather the only practical limitation on Treasury's spending power was the national debt ceiling which as part of this act was itself increased \$800 billion.³⁰⁵

The heads of HUD, SEC, the Fed, the Treasury, FDIC, and other Government entities worked in conjunction on several big issues posed by the crisis. Agencies needed to work together and they face a coordination problem of working to find a solution. This is an area where the president and key staff members such as the President's Chief of Staff and the Executive Office of the President were needed interact to achieve desired aims.

Agencies that were delegated to often then attempted to stretch the delegation to allow them to take actions that were not strictly within the intended scope of the delegation. An example of this is the Treasury Department's backstopping of Fannie Mae and Freddie Mae's debt. They were given temporary authorization ending December 31, 2009 to use government funds to cover losses at these two entities, however the Treasury Department interpreted the delegation as meaning merely that they had that date to sign an agreement with these entities. Treasury structured these agreements as keepwell agreements that would be an open ended commitment that would commit the government to cover hundreds of billions of dollars in losses far into the future and beyond the initial time period authorized for delegation.³⁰⁶

Another emergency power of the Treasury Department is the Exchange Stabilization Fund. Under normal situations the Treasury and other agencies had little power to fund entities. However in a crisis the Treasury agency had significant powers under the Gold

³⁰⁵ Paulson. 155.

³⁰⁶ Paulson. 168.

Reserve Act of 1934.³⁰⁷ The Exchange Stabilization Fund gave the power to stabilize the dollar by “intervening in the foreign exchange market.” The agency once again had considerable power to determine what was a crisis and what actions count as intervening in foreign exchange markets and what actions meet the goal of stabilizing the dollar. Treasury could not act unilaterally, but instead in order to access the tens of billions of dollars in the fund the president had to sign off on it.³⁰⁸ Treasury, with the support of the president, used \$50 billion to guarantee deposits in money market funds. This was a response to the breaking of the buck and the worry in the financial markets that that had caused. Whether this strictly was required for the goal of stabilizing the dollar or this action was taken with a different goal in mind the authority for it was determined by the interpretation of the president and the Treasury. This was clearly an area where the administration had gained powers to set policy apart from congress. This can also be seen in the 1994 tapping of the Emergency Stabilization Fund during President Clinton. In which the Department of the Treasury and the president used the fund to supply \$20 billion to Mexico to deal with the Mexican Peso Crisis despite the fact that when the president had tried to get congress to act directly and give the financial support to Mexico by passing the Mexican Stabilization Act, congress voted against just such a measure. The money market guarantee was modified by the influence of Sheila Bair who convinced the Treasury Department to put date limits on the funds that can be insured so that it did not pose an undue risk to banks since there would be less reason for people to put money in banks since they could put their money in a money market fund and be protected and get larger returns. It was unintended consequences like this that fast legislation risked missing. All the details could not be worked out and the consequences not determined that quickly. The money market guarantee program was announced September 19 and was opened 10 days later.³⁰⁹

The FDIC had been given authority to give financial assistance to banks and thrifts so long as the assistance was less costly than liquidation and winding down the entity would be. However this least cost restriction could be set aside if it would protect the nation against systematic risk. The FDIC could not unilaterally act to void this provision, but rather in addition to two thirds of the FDIC board of directors, it is also required the approval of the

³⁰⁷ Pub.L. 73-87.

³⁰⁸ Paulson. 253.

³⁰⁹ Paulson. 263.

Treasury Secretary and two thirds of the Federal Reserve Board. This allowed the FDIC to give assistance to Wachovia to help put together a deal for it. In the actual case, with speed being imperative, the votes were not even collected in that the Treasury Secretary was not even asked for his acceptance as he was out of the office and instead an Assistant Secretary of the Treasury, David Nason, approved it instead.³¹⁰

The FDIC, with input from other agencies, put together the Temporary Liquidity Guarantee Program (TLGP) to guarantee certain types of unsecured debt. This would be useful to many large financial companies. It however was tied together with TARP investment in and capitalization of these companies. Thus companies would have to use both of these programs and would thus submit to the restrictions of TARP which include the maximum compensation that executives could receive, limitations on the size of dividends that could be paid for the next three years, limits on golden parachute payments, and also changed the tax treatment of yearly incomes in excess of \$500,000.

The FDIC pushed a loan modification proposal to stop those in houses from defaulting with the goal of decreasing the national foreclosure rate. While the so called IndyMac Protocol FDIC administrator, Sheila Bair, put forward was not enacted by George W. Bush, it was for the most part adopted by the Federal Housing Finance Agency as well as the Government Sponsored Enterprises which it regulated, Fannie Mae and Freddie Mac, as well as the Hope Now Alliance, a public-private partnership that was developed by the Departments of Housing and Urban Development and Treasury, and individual financial companies such as Citigroup. This was not as effective at stopping foreclosures as many may have wished, but it positively affected millions of individuals and was once again a major effort taken almost entirely by the executive branch despite the fact that the congress was ultimately able to pass the Housing and Economic Recovery Act.

The FDIC also created the Temporary Liquidity Guarantee Program to encourage interbank lending and thus allowed banks to better meet their liquidity needs. Later this program was extended to key nonbank companies such as GE Capital, the finance subsidiary of industrial giant General Electric.

America also worked in concert with other nations to address the economic crisis, which affected other areas, such as Europe, quite significantly as well. An example of this

³¹⁰ Paulson. 315.

was the October 10th agreement coming out of the G7 finance ministers meeting in which member nations agreed to a broad five point framework that included taking decisive action and using all available tools to support systematic financial institutions, unfreeze credit and money markets, ensure that financial institutions can raise capital, provide enough deposit insurance to restore confidence and prevent bank runs, and take appropriate steps to improve the mortgage and securitization market while improving financial transparency.³¹¹ These sorts of agreements are entered into by the Treasury Secretary on behalf of the nation, but do not need to be ratified by congress and thus are another form of executive power that can be used in crises. Though general in nature, this agreement was important for the United States and the world and this agreement was designed to minimize the tendency of beggar thy neighbor economic policies in which each nation tries to further its goals individually rather than coordinating with others to make the whole world better off. President Bush's comments after the meeting show the importance of such agreements, "As our nations carry out this plan, we must ensure the actions of one country do not contradict or undermine the actions of another. In our interconnected world, no nation will gain by driving down the fortunes of another. We're in this together. We will come through it together."³¹² This was an important point because without such agreements nations may look at their own individual needs and take actions that risk making the whole worse off. An example is the Financial Services Authority in the United Kingdom who as the U.K. regulator for Citigroup imposed a \$6.4 billion cash lockup that protected interests of U.K. though at a cost of greatly reducing liquidity and greatly increasing the chance that Citigroup would fail and damage the global banking system.³¹³

Congress was also at risk of taking action that might make the crisis worse by focusing on its own goals. Looking at the words of individual members, it appears congress tempted to play populist messages and demonize the banks though this would have risks of causing the situation to get worse as it could stigmatize programs that are set up to help financial systems since limitations on compensation and dividends would be unpopular with executives though it would score points with members of congress. Likewise, placing blame

³¹¹ G7. "G7 Finance Ministers and Central Bank Governors Plan of Action." Washington, DC. October 10, 2008.

³¹² Jackson, David. "Bush Vows Coordination with World Powers on Financial Crisis" *USA Today*. October 12, 2008.

³¹³ Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. 380.

and having hearings and other backward looking actions could be popular with people, but would take focus off of how to improve the current situation. Congress also is given addition leverage during a crisis and can get away with actions without looking at costs or how to allocate scarce resources. Thus congress gets the credit for programs such as Car Allowance Rebate System also known as the Cash for Clunkers program as well as some foreclosure programs that were popular, but not necessarily effective in combatting the crisis considering the costs of these programs.

Even more contentious, but more important, than the Cash for Clunkers program was the bailout of the auto companies. President Bush was opposed to an auto bailout on principal. It went against his free market convictions and he felt the car companies had brought their poor state of affairs upon themselves through years of poor decisions as opposed to it being solely caused by a shock to the system related to the housing crisis. Nor did he want his last major act in office to be a bailout.³¹⁴ Likewise others in the administration such as the Treasury Secretary opposed the auto bailout as well. However, it became clear that if a large auto company went under it would make the crisis more pronounced and increase suffering. President Bush thus announced a plan to use TARP funds to help support the three major U.S. car manufacturers from bankruptcy.³¹⁵ This was an executive action though the democratically controlled house largely viewed it positively with the minority Republicans opposed to it. However, a prior attempt of congress to enact an auto bailout was unsuccessful.³¹⁶ The auto bailout included a loan of \$9.4 billion in TARP funds to General Motors with an additional \$4 billion in loans if congress released the rest of the TARP funds. While the loans provided significant help to the car manufacturers, the help was structured in such a manner as to keep the pressure on these organizations to change and become more competitive. In order to ensure change. the executive branch added provisos such as that the car companies would within a couple months have to submit proposals on how to restructure and would have to meet certain criteria. If the criteria were not met, the government could collect on the loan. This would almost assuredly push General Motors into bankruptcy and thus this gave the government

³¹⁴ Paulson. Pg 424.

³¹⁵ Allen, Mike and David Rogers. "Bush Announces \$17.4 Billion Auto Bailout" Politico. December 19, 2008. <http://www.politico.com/story/2008/12/bush-announces-174-billion-auto-bailout-016740>

³¹⁶ Herszenhorn, David M. and David E. Sanger. "Senate Abandons Automaker Bailout Bid" *New York Times*. December 11, 2008.

tremendous leverage over the company to ensure that GM took the appropriate actions as viewed by the government. This also allowed the outgoing administration to put in place a framework that could constrain both the company's actions and even those of the next administration.

Another unpopular position that was taken during the crisis was the government accepting a share of losses from Bank of America's acquisition of Merrill Lynch. This allowed the deal to be consummated and Merrill Lynch was saved thereby avoiding a situation that would have further weakened the economy. This however was an action of the administration rather than congress or the president and thus did not receive much media attention or lead to criticism of those in power.

On December 6, 2007, in response to the crisis the president outlined a proposal to freeze interest rates for five years thereby minimizing the damage that ARMs were doing to home affordability for those with that class of loan.³¹⁷ This HOPE Now initiative was generally criticized as being ineffective and poor policy.³¹⁸ This was in part because it was a comparatively minor fix for the major mortgage crisis that ultimately unfolded and because there were minimal potential benefits to homeowners under the proposal since interest rates continued to fall throughout much of the crisis as the Fed cut its interest rates. Thus ARMs that would have been reset without Hope Now would not have gone up much or been that big a burden on borrowers.

There were numerous public-private responses to this crisis such as when the Treasury agency and other federal agencies worked to ensure that a private deal could be reached to rescue Bear Sterns from bankruptcy with the Treasury taking on some of the risk posed by Bear Stern's assets to ensure a deal could be reached. Another example is the creation of the Master Liquidity Enhancement Conduit, a proposed mechanism for helping Structured Investment Vehicles which were struggling to find funding and which it was worried would be forced to sell Asset backed Securities at bargain basement prices which would then exacerbate the crisis. The Master Liquidity Enhancement Conduit, which allowed these SIVs to sell their illiquid assets and create a market and help establish prices

³¹⁷ Crutsinger, Martin. "Bush Mortgage Plan Will Freeze Certain Subprime Interest Rates for 5 Years" *Memphis Daily News*. December 6, 2007.

³¹⁸ Immergluck, Dan. "Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark" *Housing Policy Debate*. Vol. 23, Iss. 1. 2013.

for these assets, was put forward and promoted by the Treasury Agency though the actual implementation was left to private banks and never fully came to fruition.³¹⁹

The Fed introduced the Term Auction Facility (TAF) in December 2007 to increase funding for the banking system by auctioning collateralized loans.³²⁰ The program largely helped U.S. branches foreign banks. Due to the way this would be viewed politically, the Fed and administration did not wish it known that the bulk of the money went to support foreign banks and so they made sure this remained secret.

4.2.9 Other Governmental Actions

In response to the large debts of GSEs, the government took over Fannie Mae and Freddie Mac. This was a major move as these entities had trillions of dollars on their balance sheets and together had 11,000 employees. These two companies racked up potentially huge losses that the United States government would ultimately be responsible for paying, whereas any gains would have accrued to shareholders and thus there was an asymmetry that led to systematic risks being ignored. Yet despite the structural problems of these organizations, they were essential for a well-functioning housing market. As the crisis unfolded, the housing finance market became less fluid and potential purchasers of homes had more trouble finding financing for their purchases. This housing crisis threatened to spread into the rest of the economy and threaten the strength and stability of the economy in general which the government hoped to forestall with their extraordinary actions. In the words of Treasury Secretary when announcing the government takeover of these two agencies, "Our economy will not recover until the bulk of this housing correction is behind us, Fannie Mae and Freddie Mac are critical to turning the corner on housing."³²¹

Prior to the federal takeover of GSEs Paulson had requested from congress the ability to use money to support Fannie Mae and Freddie Mac and congress had approved

³¹⁹ Enrich, David and Diya Gullapalli. "Banks Abandon Effort to Set Up Big Rescue Fund" *The Wall Street Journal*. December 22, 2007.

³²⁰ Weinberg, John. "Federal Reserve Credit Programs During the Meltdown" Federal Reserve History. <http://www.federalreservehistory.org/Events/DetailView/70>

³²¹ Paulson Jr., Henry M. "Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers" U.S. Department of the Treasury Press Release. September 7, 2008. <https://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>

this request.³²² This action was not approved of by all. Armando Falcon, the former head of OFHEO and one that began an early investigation of the agencies' actions, described the government takeover as, "a shareholder bailout financed by the U.S. taxpayers".³²³ Mr. Falcon is referring to the fact that by taking this action those that held the debt of these companies was backed up by the United States' government. This secured the rights of Asian central banks and other debt holders and at a potentially high cost to U. S. tax payers. This was popular with those that had their investments shored up. A Bank of China spokesman, Wang Zhaowen, stated his support for this U. S. action by saying, "We think it's a very positive action by the U.S. It has come from being an invisible regulator and to coming to the front lines to save the market".³²⁴ Those at the Treasury Department discussed their actions with major holders of debt insured by these two entities. Leading up to this action those at the Treasury gathered data and opinions from these stakeholders and also took steps to reassure them about the action. When the government took control of these entities, they also affected the actions of these agencies by appointing new heads for the agencies. Treasury Secretary Paulson proposed the idea of a cash infusion or takeover of Fannie Mae and Freddie Mac to the president during an August 28 Oval Office meeting with the President and senior administration officials. He was given approval to continue to pursue the plan. Thus the Department of the Treasury acted as an agent and the president in part acted as a principal. Paulson worked with several other members of the administration to draft the plan and determine the details. The heads of Fannie Mae and Freddie Mac, Daniel H. Mudd and Richard Syron respectively, were informed that the organizations they headed were being taken over, but though they did not approve there was little they could do to thwart the administration's intentions.

The takeover of these two agencies was not the only step taken by the government to shore up the housing market. Concurrent with the takeover of these government-sponsored enterprises, the government announced a program to buy up to \$5 billion worth

³²² The Associated Press. "Get On It, Congress! Treasury's Paulson Says Speed Crucial on Fannie, Freddie" *New York Daily News*. July 22, 2008. <http://www.nydailynews.com/news/world/congress-treasury-paulson-speed-crucial-fannie-freddie-article-1.349158>

³²³ Irwin, Neil and Zachary A. Goldfarb. "U.S. Seizes Control of Mortgage Giants" *The Washington Post*. September 8, 2008.

³²⁴ Irwin and Goldfarb. September 8, 2008.

of mortgage backed securities. This action was designed to subsidize mortgages and improve the liquidity of the mortgage market.

The Federal Reserve had intervened to keep the economy on solid footing when Bear Stearns was faced with significant economic challenges and had intervened when faced with the weakness of Fannie Mae and Freddie Mac. However, in order to avoid setting a precedent and enshrining moral hazard in place, neither the Fed nor the Treasury Department interceded when Lehman Brothers was on the point of failure to keep the major financial company viable. The Fed did however take steps to cushion the blow when Lehman Brothers declared bankruptcy such as announcing new lending procedures thereby decreasing the chances that the failure of one of the nation's largest investment banks. The Fed also took several other extraordinary steps such as lending \$85 billion to American International Group (AIG).³²⁵ This helped to keep the company afloat. In return for this loan, the government received almost 80% of AIG stock. Shortly after that move, the Federal Reserve worked in conjunction with central banks from Europe, Canada, and Japan to provide up to \$180 billion to lenders in those countries so that they could provide loans and liquidity and stabilize the economy.³²⁶

The Federal Open Market Committee (FOMC) had prior to this been delegated the authority to oversee the nation's open market operations which enables the FOMC to effectively set the monetary policy for the nation. This Federal Reserve committee used its control over interest rates and the money supply to help stimulate the economy and mitigate the liquidity crisis in the markets. While this power was not specifically delegated for this crisis, this authority had been delegated and was used to deal with this crisis. Many of these same powers had been used to respond to previous crises including the Great Depression.

There were a handful of executive orders issued by the president to deal with the financial crisis. In one week Obama created an initiative to spur job growth for veterans through the use of targeted tax credits, he also pushed for student loan relief in order to

³²⁵ Andrews, Edmund L., Michael J. de le Merced and Mary Williams Walsh. "Fed's \$85 Billion Loan Rescues Insurer" *The New York Times*. September 16, 2008.

³²⁶ Saltmarsh, Matthew and Keith Bradsher. "Fed Offers \$180 Billion for Ailing Money Markets" *The New York Times*. September 18, 2008.

decrease the long term burden of college loans on graduates, as well as making regulatory efficiency changes for small businesses.

An instance of delegation that was used to deal with the crisis was an emergency assessment of 20 basis points assessed by the Federal Deposit Insurance Committee (FDIC). This was used to recapitalize an insurance fund that had nearly been exhausted due to a large number of banks failures during the downturn.

In addition, the FDIC also created the Temporary Liquidity Guarantee Program which was designed to insure senior unsecured debt issued within a given date range to entities that meet certain criteria.³²⁷ Similar to the actions of the FDIC, the Farm Credit Administration, which oversees agricultural credit organizations, also took similar actions during the financial crisis for agricultural credit organizations.

Another piece of delegation that played a role in the crisis was the delegation of the creation of accounting rules and accepted practices to the Financial Accounting Standards Board (FASB), a nonprofit entity initially created by the Security and Exchange Commission. FASB issued Statements of Financial Accounting Standards No. 157 requiring institutions to mark to market. That is to say that the value they can claim for assets on their balance sheets must equal the fair market value that the asset can be sold for in the current market. This was designed to deal with a prior crisis, but this led to a weakening in the balance sheets of numerous financial companies, which in turn exacerbated the crisis as it, caused companies to face a shortfall of assets to liabilities. While the magnitude of the effect caused by this rule change has been greatly debated there are many who feel that this was a major contributor. An example of this is William Isaac, the former chair of the FDIC, who aired this criticism by saying, "The SEC has destroyed \$500 billion of bank capital by its senseless marking to market of these assets for which there is no marking to market, and that has destroyed \$5 trillion of bank lending. That's a major issue in the credit crunch we're in right now. The banks just don't have the capital to start lending right now, because of these horrendous markdowns that the SEC's approach required."³²⁸ In response to concerns about the effect of the mark to market rule, FASB has fast tracked a revision called

³²⁷ Bovenzi, John. *Inside the FDIC: Thirty Years of Bank Failures, Bailouts, and Regulatory Battles*. John Wiley & Sons. 2015. Pg. 191.

³²⁸ Sopelsa, Brooke. "Former FDIC Chair Blames SEC for Credit Crunch". CNBC. October 9, 2008.

Statements of Financial Accounting Standards No. 157-d that would rectify this change. Section 133 of the Emergency Economic Stabilization Act of 2008 requires the SEC in conjunction with Treasury and the Fed to investigate the effects of the mark to market accounting rule and section 132 of the act gives the SEC authority to suspend the rule if it believes that doing so is in the public interest.

The Federal Reserve created several programs designed at addressing areas of economic weakness. The Commercial Paper Funding Facility was design to increase liquidity in short term markets and thereby increase the amount and availability of funding for households and businesses.³²⁹ It was the Fed's first program focusing on the commercial paper market. The program was designed to purchase commercial paper from firms. It did not have many restrictions on the firms it would buy from and was used by several non-financial firms such as Harley-Davidson and McDonalds as well as by financial companies. It also allowed foreign companies to leverage this program and UBS, Dexia, and Barclays alone accounted for more than \$160 billion of the \$738 billion that was loaned out under this program.

On November 2011, the president announced a series of initiatives he referred to as "We Can't Wait" campaign" which was designed to get jobs for veterans.³³⁰ This was not a particularly well designed program in terms of decreasing unemployment, however is was politically very popular and could make the administration appear to be pro-veteran and working to create jobs, which are both important images to foster at this time. The first of these initiatives is the Returning Heroes credit which the White House is pushing and which would applies to all veterans not just recent veterans. Another program is the Veteran Gold Card which provides those that served since 9/11 a series of job tools and career support. The funding came from funds already dedicated to the Department of Labor and thus the president is able to sidestep congress. From the president's standpoint, if he can tie employment subsidies to a popular issue such as supporting U.S. veterans it can help him get a law passed and thus he has an incentive to pursue it though it may not be the best or most efficient solution to the problem.

³²⁹ Wallach, Philip A. *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis*. Brookings Institution Press. 2015. Pg. 95.

³³⁰ Jackson, David. "Obama's Latest Executive Orders Affect Veterans" *USA Today*. October 25, 2011.

However, historically tax breaks targeted in return for the hiring of certain groups are not an efficient way to bring down the total number of unemployed. It typically creates a substitution effect rather than an additive affect. At the time of the announcement, the unemployment rate for veterans was considerably lower than the unemployment rate at large and so the group was not a good candidate for segmenting the unemployed and providing benefits to some. However, there are other factors than just economic efficiency. Policy may be created to increase equity or provide benefits that may otherwise help society such as allocating funds for convict reform or drug treatment centers, which besides helping the targeted group may provide positive externalities.

5. Results

5.1 Abdication Hypothesis vs. Delegation Hypotheses

This case study can help us investigate whether the abdication hypothesis or the delegation hypothesis is more consistent with the actions of congress during this period or if the actual actions of the government are somewhere between these. That is to say whether congress makes its decision to delegate based on individual political considerations or in order to yield better public policy than could be achieved by congress. Congress took numerous actions during this period to deal with the crisis. By looking at the probable causes of congress' actions and the specifics of the examples of congressional delegation one can help see if the actions accord with one hypothesis or the other. It can be difficult to definitively determine what are the motivations of individual members of congress or of congress as a whole. However, by looking at general trends and looking at the actions of lawmakers as the actions of rational actors, this paper will attempt to come up with some reasonable explanations for their actions.

By their nature crises can have a profound effect upon the wellbeing of a nation. There is an optimistic belief by some that members of congress have a desire to take positive actions and do what they see as right despite significant research has reported to

show that congressmen first and foremost goal is to be reelected with secondary goals of gaining more power. This view says that the desire for power and reelection are not the sole motivations why congressmen run for office and serve their terms. The desire of members of congress to be elected in part is due to a desire to do what they feel is good for the nation. In a crisis, there is a call to do what matters and members of congress will in these pivotal moments be more drawn than normal to do an important, much needed act as opposed to focusing solely on reelection or feathering their nest. High media scrutiny accentuates this phenomenon, but in part it is also due to the concept of civil service and a wish to honor their position and do a good job.

Both those that subscribe to the abdication hypothesis and the delegation hypothesis ascribe the decision to delegate on a rational strategic choice. Where they differ is how the principal gains by delegation, but both hypotheses view the decision of whether to delegate as a strategic decision that is used to further the goals of the individuals or bodies delegating power.

Both the proponents of the abdication hypothesis and the delegation hypothesis also agree that congressional oversight of the bureaucracy is minimal. This concurs with the actions of congress during this period. The difference between these two hypotheses is that the delegation hypothesis assumes that congress still maintains control of the administration due to its powers such as appropriation and its power to appoint agency heads.

Delegation was very widely employed by congress during this period. The question becomes whether this delegation was used by congress to avoid making difficult political decisions that would hurt members of congress politically or whether it was used by congress to ensure that better policy is created than it would be if it was left to congress to decide. Key acts of delegation in the Dodd-Frank Act include the regulation of the consumer finance industry and the delegation of regulations

Different law makers had differing motivations and in the case of most lawmakers it is likely that they had multiple motivations and so this question boils down to determining the predominant motivation of members of congress as this can help determine what congress will do and how delegation can be used to improve the situation.

According to the delegation hypothesis one of the key reasons that the level of delegation was high during this period was that politicians did not want to be seen making unpopular decisions. The theory would expect that politicians would want to distance themselves from decisions that many felt equated to be bailing out rich Wall Street CEOs at the expense of those on Main Street. During this period the public was very focused on political events and this increase in salience of and interest in the issues made it particularly politically dangerous for politicians to go against the public's populism by promoting policy that might be good for the nation, but which did not play well on TV. This can be seen in the fact that TARP was initially voted down. By delegating, it also allowed members of congress members to rail against the actions of the government and to be seen representing their constituents while at the same time getting the policy that they want. There were certainly several politicians who supported governmental action in response to the crisis who nonetheless spoke to the constituents of their outrage about the actions being taken. This use of delegation is consistent with the abdication hypothesis.

Along a similar line, delegation minimizes uncertainty. Uncertainty of how the policy would turn out and how people would feel about the policies led to uncertainty about what actions to take or what bills it is in their best interest to be seen opposing. Position taking becomes complicated and downside risk increases. Politicians are interested in minimizing risk even if they are not fully able to capitalize on the upside if they happen to select a policy that ends up being popular. Thus politically it makes sense for most politicians to delegate to avoid these risks.

Many of the decisions made in response to the crisis by governmental agencies were very unpopular. It stands to reason that these policies would also have been very unpopular had they been made by congress. Decisions to use public money to bail out struggling banks, cutting spending on certain programs, propping up failing automakers, bailing out those who lost money on their home would all have hurt politicians' politically.

Many actions of congress seem consistent with the abdication hypothesis. Acts of delegation were largely consistent with the expectation this paper has in which congress will try to avoid tough political decisions. During this period, congress passed very few bills relating to the financial crisis and those that it did pass primarily delegated power to the

administration and bureaucracy. As the political environment made necessary responses such as financial support for the financial industry very unpopular, this lack of direct action by congress would seem to go along with the expectations that the abdication hypothesis would predict. Conversely, Congress is more willing to pass popular bills that give benefits to constituents and are broadly popular. The only major direct legislation during this period that didn't delegate the majority of the decision was the Economic Stimulus Act of 2008.

During this period the Federal Housing Finance Agency was given the power to lower the goals laid forth by congress on Fannie Mae and Freddie Mac. These goals include popular provisions such as requiring a certain amount of loans to go to poor or other individuals that would otherwise find it difficult to get a loan. However, this push towards lending to riskier individuals can contribute to housing market instability and economic losses. By delegating this decision, congress is able to get credit for setting these laudable and popular social goals while muting its effect on the economy during the crisis. It is able to rollback its provisions without taking criticism for doing so as it certainly would for direct action.

It appears that members of congress were not disinterested actors solely seeking to create efficient public policy and congress did not always approve of policy changes even ones that were viewed generally as being good. Fannie Mae and Freddie Mac had made very substantial donations to a large number of members of congress and had spent large sums on lobbying.³³¹ This had enabled these GSEs to get governments support when drafting legislation that had enabled them to be very profitable companies. The contributions that they had given and continued to give throughout the early part of the crisis made it so they had a lot of support in congress that would oppose the administration's proposal of nationalizing the entities to deal with the crisis. Congress was unwilling to act until well into the crisis to take actions that most viewed as in the public good.

On September 7, 2008, Director Lockhart of the Federal Housing Finance Association announced that Fannie Mae and Freddie Mac were being placed under Federal Housing

³³¹ Raum, Tom and Jim Drinkard. "Fannie Mae, Freddie Mac Spent Millions on Lobbying" *USA Today*. July 17, 2008.

Finance Association receivership and assumed the power of the board and management of these organizations.³³² This move by FHFA was part of the larger governmental effort to address this crisis. Hank Paulson went on record as saying that, “conservatorship was the only form in which I would commit taxpayer money to the GSEs.”³³³ This conservatorship had profound implications and included the appointment of Herbert Allison the following day as the Chief Executive of Fannie Mae. In addition, the FHFA authorized stronger backing for mortgage-backed securities which would protect the holders of these financial instruments. Similarly the Chief Executive of Freddie Mac was replaced with David Moffett.³³⁴ Also the actions of these two organizations were constrained so that all lobbying ceased, they would no longer pay dividends on their stock, and they adjusted pay packages for executives.

The authority to place these GSEs into conservatorship came from the passage of the Housing & Economic Recovery Act of 2008 which set up the FHFA as the oversight agency of the GSAs and granted FHFA the power to put them into conservatorship. Congress delegated this important power and responsibility to a new agency rather than making the important decision to place Fannie Mae and Freddie Mac into conservatorship themselves.

Congress received considerable funding and support from the GSEs which were known to have very strong lobbying machines and to be quite vindictive to politicians that opposed them. This likely contributed to the decision to delegate this power which was used just over a month after the law was enacted. The fact that the lag between delegating this power and the usage of it was so short, particularly as the agency was just starting up, points out that the economic fundamentals did not change in the intervening period. Nor did congress lack the ability to determine whether there was a need for conservatorship. That decision was in a less complex issue area and required less specialized knowledge than many during this period and was within congress’ capability. Congress seemed to want the GSEs placed into conservatorship as can be seen by their handing this power out at this time and they had the ability to do so, however rather than enacting this politically tough

³³² Federal Housing Finance Agency. “FHFA As Conservator of Fannie Mae and Freddie Mac”

<http://www.fhfa.gov/Conservatorship/pages/history-of-fannie-mae--freddie-conservatorships.aspx>

³³³ Paulson Jr., Henry M. C-SPAN. “Federal Takeover of Fannie Mae and Freddie Mac” September 7, 2008.

<https://www.c-span.org/video/?280948-1/federal-takeover-fannie-mae-freddie-mac>

³³⁴ Reuters. “Government Takes Control of Fannie, Freddie” CNBC. September 8, 2008.

<http://www.cnbc.com/id/26590793>

decision themselves they delegated it to an agency that had less politically to lose by this action. This appears to go along with the abdication hypothesis. However, it could also be viewed as congress realizing its own inability to address the problem, delegated the task to an agency as it knew the resulting policy and the new limitations on Fannie Mae and Freddie Mac would be good for the country.

The Dodd-Frank Act delegated away the powers and responsibilities associated with assuring that the financial system was stable. While this was popular with the general public, the regulatory burden that was placed upon financial institutions was very unpopular in the industry as were specific actions that eventually needed to be taken against various financial companies. Financial companies are major donors to congress and congress would wish to avoid the politically difficult act of imposing heavy regulatory costs upon this major industry. Congress however gets credit with the public for the laudable goal of passing legislation to ensure stability in the financial system, even though it sidestepped the costs associated with taking action themselves.

Similarly, the Consumer Financial Protection Bureau is given considerable power to regulate consumer financial products. This is seen as a worthwhile goal by the general public, but is incredibly unpopular among the financial companies that would be regulated. By delegating away this authority to the CFPB, congress get the political benefit of being seen as taking action to protect the public, but minimizes the ill-will from financial companies that see profits eroded or costs rise as a result of the new regulations mandated by the CFPB.

Once again the Troubled Asset Relief Program (TARP) is a good example as well. TARP was incredibly unpopular due to its supposed cost despite the fact that it was viewed by many economists as being necessary to forestall a much deeper crisis.³³⁵ Voting for TARP would have been viewed as hurting reelection chances for most members of. In the initial vote on this piece of legislation, it was voted down. This led to panic in the markets, heightening the crisis and driving home the stakes involved. After this initial rejection, congressional leadership and the president tried to shore up support for the legislation and

³³⁵ Johnson, Bridget. "Frank Reflects on TARP as Most Successful, Most Unpopular Program in U.S. History" PJ Media. December 31, 2012. <https://pjmedia.com/blog/frank-reflects-on-tarp-as-most-successful-most-unpopular-program-in-u-s-history/>

soon after it was passed. However this was in part due to the poor response to the initial rejection of the legislation that showed that rejecting the legislation would be a political risk as well.

TARP was also passed in part because of the sweeteners that convinced otherwise skeptical lawmakers to vote for it. These included popular tax provisions and other provisions that were popular such as an increase in the cap that the FDIC would insure banking deposits for. Many of these popular provisions were not directly related to addressing the crisis. Though congress was able to address the crisis with this bill, it required congress crafting a bill based on other issues to create a log roll as opposed to solely crafting policy to address the crisis that was unfolding.

The vote to set up the Troubled Asset Relief Fund initially failed which led to large declines in the stock market, which demonstrated how pervasive was the belief that the TARP bill needed to pass and that congress needed to take action. However, it did not initially pass because it was also an incredibly unpopular vote that it was believed would hurt those voting for it politically. However, as unpopular as this vote and its provisions to delegate to the administration the power to bailout financial institutions were, it would have been a far more unpopular vote for politicians to directly bail out the financial institutions themselves. Similarly votes such as to delegate the power to cut spending seem designed to avoid congress needing to take the blame for cuts which are necessary to keep the debt level manageable. Cutting spending and raising taxes, which were required in order to minimize the deficit, are generally very unpopular. Members of congress largely called for cuts, but did not put forward any specifics as to where the cuts would come from. The public is broadly accepting of cutting government spending in general, it is specific cuts that would require politicians putting forward a specific plan, that tend to be unpopular. To say that cuts must be made without laying out the specific cuts, congress was able to avoid tough political decisions. These actions are similar to when congress attempted on a couple instances to delegate away much of the responsibility for raising taxes or deciding what spending cuts should be implemented.

While it delegated away a lot of tough choices, congress took several popular actions itself. As part of the Housing & Economic Recovery Act of 2008, congress included a

provision that gave \$7,000 to first time homebuyers as well as some other types of homebuyers. The American Recovery & Reinvestment Act of 2009 later increased this to \$8,000.³³⁶ This part of the act did not delegate power, but instead specifically laid out how the credit should be structured. The tendency of congress to enact popular policies themselves while delegating those less popular would seem to support the abdication hypothesis. Homebuyers greatly benefited from the act whereas those that would need to pay for the program were dispersed and thus the program was popular with those that were benefitted without having many opponents. Congress also directly gave funds in some instances such as the \$400 per person refundable tax credit provision in the in the American Recovery and Reinvestment Act of 2009.

Similarly, in the Housing & Economic Recovery Act of 2008 is a provision that protects members of the military from being foreclosed on while they are out of the country. In this ultra-patriotic period, this was popular provision and avoided the potential bad press that such cases might make. This policy was also made directly by congress rather than being delegated. Similar provisions such as the provisions in the American Recovery & Reinvestment Act of 2009 which reimbursed service members for losses on the sale of their primary residence due to moves were also made directly by congress and would seem to be made for similar reasons.

Congress enacted certain provisions that were not necessarily approved of by those in the executive branch such as including a limit on executive compensation for companies receiving TARP funds. Some in the executive branch thought this limit would make companies less likely to use these programs that were being created to help companies and to add liquidity to financial markets. However, congress was attuned to the ear of the public and took action that they knew would make government support for these firms more publicly acceptable. The public did not want to support a corporate bailout, which was viewed by some as welfare for the rich, and so congress was being more responsive to the needs of the public and more democratic. However, as to the question of how well the law addresses the needs of the nation in preventing the crisis, factors such as the pay that companies pay their executives were mostly of a distraction and a populist issue, and did

³³⁶ Christie, Les. "Final Score: \$8,000 for Homebuyers" CNNMoney. February 17, 2009. http://money.cnn.com/2009/02/13/real_estate/homebuyer_tax_credit_finalized/

not address the root cause of the crisis or help ameliorate the crisis. The Democrats pushed for a number of provisions that would limit executive compensation and golden parachutes. These may have some symbolic value, but did not directly address the crisis itself and they held risks for the programs that were designed to diminish the crisis. The Treasury Secretary thought limits on executive compensation would stigmatize TARP and make it less likely to be successful as companies might be less willing to take TARP funds due to these provisions. Ultimately the power to limit executive compensation for companies that received government assistance was granted to Special Master for TARP Executive Compensation, more popularly known as the Pay Czar, rather than being set by congress or by using the \$500,000 salary cap that the Obama administration had initially been pushing.³³⁷

While many of the actions taken by congress during this period seem consistent with the abdication hypothesis, this is not to say that this was congress' only motivation and many of the acts of delegation that politically benefitted policy makers they also were consistent with an attempt to use delegation to achieve better policy. Due to hyper-partisanship, congress struggled for much of this period to pass bills and could objectively see delegating to an external body as increasing the likelihood of a positive policy outcome resulting. In addition, considerable time and effort was required to deal with all the consequences of the financial crisis and congress might have felt that it did not have the ability to deal with all of these especially during periods where its time and attention were focused on other issues such as reforming the United States health care systems.

During this period there was extensive gridlock and so getting bills passed took a considerable amount of time and effort. This means that policy created by congress would not be very adaptable and could not to be made by congress in a timely manner, however policy creation could potentially still be adaptable and implemented quickly if it were made by the bureaucracy. Responding in a timely manner was important during the crisis as confidence was weakening. Weakening confidence during a financial downturn leads to more individuals holding on to money rather than spending it. This situation is the so called Paradox of Thrift, in which the rational actions of individual market participants to conserve

³³⁷ Dennis, Brady. "Pay Czar Limits Salaries for Top Executives at 5 Firms" *The Washington Post*. March 24, 2010.

their money during a crisis leads to a drop in aggregate demand and consumption and that makes the economy weaker. Similarly and perhaps more dangerously is the fact that crises lead to bank runs and their modern day equivalents. Actions were taken to assure those lending money in swap markets, individuals and corporations holding funds in banks for fear of a bank run which could quickly bring down major financial institutions. A slow response to a crisis allows faith in the system to falter, which can allow the crisis to deepen. Congress and the president realized the need for vigorous action and used this as justification for taking action in the form of delegation to the agencies.

Another example where delegation made strategic sense to enact policy was The Consumer Financial Protection Bureau, which pitted the interests of financial corporations vs. those of individuals and often poor and less educated Americans. The concept of the CFPR had been a liberal goal pushed for years by Elizabeth Warren and others that could not get traction until the crisis and the change in public opinion that came with it. This was a major piece of delegation that began to regulate an area that had been largely unregulated previously. This appears to be an attempt to create new policy that one party viewed as beneficial since the political environment would finally allow it to pass. This delegation allowed these decisions to be made outside of the politically charged atmosphere of congress. This insulated this policy so that after the crisis, the pro-business lobby would have more difficulty undoing this policy decision. It was largely a popular action and congress, or at least the majority Democratic Party, would have gained by taking actions directly. However this would have risked the policy long term and also would have had congress dealing with complex financial situations. Thus congress appeared to have taken action to create policy that they viewed as worthwhile as opposed to focusing on political considerations.

Certain pieces of delegation seemed necessitated by a need of expertise, time, and attention that congress was not able to manage. An instance was the Dodd-Frank Act requiring financial regulatory agencies to create regulations governing the validation models used by the mortgage market.³³⁸ These rules were in a very complex policy area, may need

³³⁸ Pub.L. 111-203, Section 1473.

to be adjusted from time to time, and would take a long time to flesh out. These reasons would all lead to more delegation and be consistent with the delegation hypothesis.

Congress and the president can act on their own or else delegate decisions and authority to another entity. Assuming rational self-interest, if delegating better achieves congress' goals than direct action would then congress will delegate, whereas when direct action is in congress' self-interest congress tends to act itself. This appears largely to be what happened during the financial crisis. Whether delegation is in congress' interest is generally thought to depend on numerous factors such as whether congress is of the same party as the president and whether the decision is likely to be popular or not. The abdication hypothesis assumes that congress primarily tries to avoid decisions that will reflect poorly on members of congress and thereby hurt them politically. More positive theories view congress as wanting to delegate to arrive at better political solutions that better meet the nation's needs.

Ceteris paribus, for popular bills Congress would typically prefer to pass the bill directly so that they can have more control and get credit for the policy. Congress is however cognizant of the fact that on many national matters or in cases of emergencies, the population looks to the president to lead the nation and propose the appropriate national policies. Thus one may hypothesize that congress will tend to accede to the president's lead in such situations as it would be viewed as overstepping the bounds of their role by opposing the sole nationally elected leader. For unpopular bills, congress will choose to delegate power especially to a bureaucracy. This action also delegates power to the appropriate congressional committee or committees that oversees the agency since they will be able to do case work and gain politically from this role. This too is a form of delegation as those on the committee have a different set of interests than the average floor voter. When public scrutiny is highest such as during a crisis, congress will be especially risk adverse and try to delegate away decisions that will likely be unpopular.

5.2 The Selection of the Agents of Delegation

There are numerous instances of delegation during this period. A review of them shows that there were general trends in the agents that were selected for acts of delegation. We take as an axiom that the principals that delegated power acted rationally in their own perceived best interests and that the agents of delegation were strategically selected by congress. Thus we are able to look at the motivations of the choice of agent by looking at these trends that congress displayed in selecting agents.

The implementation of the major bills such as the Dodd-Frank Wall Street Reform and Consumer Protection Act left most of the major decisions in the hands of bureaucrats rather than enshrined in statutory law. The implementation of these bills comprised the most important governmental action during this period and were arguably more important than the broad-based rules set down by congress. These responses were instances in which “the devil is in the details” and the seemingly smaller choices made on how to implement some of these broad goals were what determined if they would be successful, who would be the beneficiaries and losers in any governmental actions, and the methods that would be used. These decisions comprise the bedrock of political action.

For instance, the text of the Emergency Economic Stabilization Act of 2008 is vague which allows for significant discretion by the Treasury and other organizations that are delegated powers under the act. One instance of this is that when defining eligibility for TARP program funds the act limits this eligibility to “financial institutions” with “significant operations” in the United States. As these phrases are not defined it allowed the Treasury to determine the meanings of what constitutes a “financial institution” and how large an operation constitutes “significant operations”. The Treasury Department used its authority to determine that “financial institution” was a broad and inclusive term that included a host of corporations outside of the scope of just banks. An example was the significant assistance provided to AIG, a large insurance company.

The vast majority of the major policy changes that resulted in response to the crisis were made by governmental agencies that were delegated powers. This is true both in the short term response to the crisis in which steps were taken to ameliorate the situation as well as years later when the financial regulatory system was getting restructured in order to forestall or mitigate potential future financial crises. It may seem somewhat intuitive that in

the depth of the crisis that additional power is delegated to executive agencies that can address the crisis more quickly than congress, have greater expertise in the financial services industry, and have more time and attention to dedicate to working on a crisis than does congress which is more limited in size. However, much of these reasons to delegate power to the bureaucracy in a crisis do not hold true when the need is less immediate and the focus of legislation is to improve the regulatory regime so as to better protect against future crises. In this situation, speed is less pivotal than taking the time to ensure that effective policy is created and the capabilities and expertise of congress are less of a detriment as they can rely on expertise from the GAO and the rest of the legislative branch as well as much of the executive branch which congress can have report or testify.

Fertile ground for exploring the choice of the agents that congress chooses to delegate to are those situations in which congress creates a new office or agency and delegates powers to the new entity that it set up. Investigating these situations is useful because congress has an opportunity to tailor the agent's characteristics to its preferences, which gives observers a change to see what characteristics congress preferred for the entity.

Congress gave certain authorities to specific agencies in its attempt to deal with the crisis. These were deliberate decisions and thus trends in these decisions show us what congress. There were reasons that congress delegated such vast powers to the Treasury Department and not to the Commerce Department. There appear to be a handful of motivations that appeared to determine the use of the agent or agents selected: ensuring agent independence, agent expertise, ensuring coordination, allowing for more vigorous action, and to ensure continued attention to an issue. Below this paper looks at the reasons for delegation and agency selection that appeared to present themselves most frequently.

5.2.1 To Ensure Agent Independence

Congress on repeated occasions during its response to the financial crisis appears to have focused on making sure the agent that power is delegates to is able to be independent of political considerations and pressure from various interested actors and that it is likely to remain so in the foreseeable future. This in part seems to be a response to regulatory

capture that took place at agencies such as the Office of Thrift Supervision and to a lesser extent the Securities and Exchange Commission. It also stems from the realization that there are powerful political interests that might be interested in meddling for political or economic gain. The financial industry is one of the largest industries in America and by lobbying it can have considerable sway in congress and with the administration. Several instances are listed below in which ensuring agency independence appears to be one of the prime motivations for the choice of agent. This is not to say that this is the only motivation, and certainly other factors such as expertise in the area were a factor as well, but independence is a significant factor in this decision.

The political process can exert influence on the policy making process and can lead to policy that is not as efficient or as beneficial to the nation as policy that was created without these influences. Thus if congress can select an agent that is isolated from political considerations, this could lead to better policy.

Cooper and West suggested a reason for the use of delegation was that agencies are less political than congress and consequently can make better policy since they could focus on what is the best policy for the nation rather than scoring political points.³³⁹ The crisis did seem to show agencies as being less political. Though agencies were largely led by political figures, the agencies still acted less political. Henry Paulson, who was the member of the bureaucracy who had the most control over the initial government responses to the crisis, acted more as a technocrat than a politician. In part this was due to his being new to the political world and instead coming from the financial world. In addition, when he ultimately entered the political world he was reluctant to do so and twice resisted the offer of being nominated as Treasury Secretary and took the position more from a sense of duty or giving back than from a wish to help his career or get into politics. There had long been a revolving door so that the key financial leaders such as the head of the Federal Reserve, the Treasury Secretary, and the Commerce Secretary would often come from the finance world, serve in politics briefly, and then go back to finance.

³³⁹ Cooper, Joseph and William F. West. "Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules" *Journal of Politics*. 50 (4): 864-95. 1988.

The president appointed the cabinet and many members had long political careers prior to joining the Bush administration. As these ran departments and agencies it would seem there was significant risk that the administration would be as political as congress. However before congress delegated power they would know who they were delegating to, at least who would initially wield those powers. This foreknowledge could allow the congress to avoid delegating to overly political agencies and individuals. In practice much of the delegation to deal with the financial crisis was to bureaucrats that were not political. Many of these were new to public service and were not planning to make a career in public service or were in positions that were insulated from political concerns so that they could or would act more as technocrats.

Much of the delegation was to executive agencies and so the question might arise about how much independence these agencies have since the president is the head of the executive branch. The administration however only has limited control over the executive branch agencies. An example of this can be seen in that much of the administration such as the Secretary For Housing and Urban Development, Shaun Donovan, wanted Fannie Mae and Freddie Mac to write down mortgages and help struggling home owners whereas the Acting Director of the Federal Housing Finance Agency (FHFA), which regulates these two entities, barred them from writing down loans as this would be expensive for taxpayers.³⁴⁰ This is despite the fact that President Obama appointed the Acting Director, Edward DeMarco.

When congress created the Office of Financial Research in response to the financial crisis, it built in some safeguards to ensure agent independence once the agency was up and running. For instance the director of the Office of Financial Research is appointed to the position for six years so that the director will have more independence from the executive branch than if it was a shorter period or expired in conjunction with the president's term. In addition, a provision in the bill that created the Office of Financial Research states that no agency can compel the director of the office to testify to them before he submits his report to congress. This helps ensure independence of this agency from the presidential administration.

³⁴⁰ Hallman, Ben "Shaun Donovan, HUD Chief, Hopes Fannie Mae and Freddie Mac Will Write Down Mortgages" *The Huffington Post*. February 16, 2012. http://www.huffingtonpost.com/2012/02/16/shaun-donovan-fannie-mae-freddie-mac-mortgage-write-down_n_1283020.html

Likewise, by setting up the Consumer Financial Protection Bureau as part of the Federal Reserve this help shields the CFPB from congressional and presidential tampering. The Federal Reserve, being a central bank, was specifically given far more independence than other agencies and thus by making the CFPB as an independent agency located inside the Federal Reserve, in turn gives it additional independence that it would not have if it was made a part of another organization. Subject-wise there is not much reason to place this bureau in the Fed as opposed to other agencies, however the structure of the Fed protects it from outside influences and that may be the reasoning of those that created it and made it part of the federal reserve. The CFPB is likely to be unpopular with business interests that often are politically connected and have concentrated interests when compared to the dispersed interests of consumers. Thus protecting the independence of the agency is important if congress wants to ensure that the administration and members of congress do not interfere with the bureau. The CFPB has ties to the executive branch in that the president appoints the director. However the 5-year term of the appointment does allow some freedom for the director.

Not only did congress take steps to shield the CFPB from outside from congressional and presidential interference, but it also created this agent so that it would not be unduly influenced by other agencies including the Federal Reserve, in which it resides. The Fed is prohibited from directing an employee of the board or trying to influence its director, impeding the bureau or changing the role of the bureau. This is unusual in that the Fed is the parent organization of this new board and yet it has little say in how this entity is run and the checks on this entity all come from other entities. This is similar to prior federal law that prohibits the Treasury Secretary, “from interfering with the specific actions of regulators like the Office of the Comptroller of the currency and the Office of Thrift Supervision, even though they are nominally part of the department.”³⁴¹

In addition, to designing delegation to protect an agency from the administration and congress, it also can be designed to protect the agency from the influence of special interests. Typically concentrated interests are more able to influence agencies and members of congress and can thus get the law amended to meet their desires. Consumers

³⁴¹ Paulson. 49.

as a whole are not a concentrated interest whereas financial industry trade groups and even large individual companies have significant power and considerable interest at stake in weakening regulations and consumer protections as weakening these may increase profits. As such, keeping this consumer protection function isolated from these special interests and pressure groups so that the interests of consumers would continue to be represented. There are countless similar examples of this such as agricultural marketing orders that help a handful of large agricultural firms, but which lead to higher prices, wasted products, and inefficiency in the markets. There are very few interest groups that represent consumer interests. Schlotzman and Tierney did a survey of 3,000 citizen groups and of these only one was focused primarily on consumer interests.³⁴² It is for this reason that the Fed is a good place for this new board since this protects is from congress, the president, and interests that put pressure on an agency.

For the Troubled Asset Relief Program, congress did not want the president to be directly in charge of financial decision-making. The president was not popular with congress and had political challenges that would make it difficult for him and his administration to make the appropriate changes that needed to be taken. Congress thus gained by delegating to an insulated technocratic individual.

Almost no authority was delegated to the president in the Dodd-Frank Act. Almost all authority that was delegated, was delegated to agencies and their heads. In part this seems this was in order to keep this power out of the hands of the president and future presidents. The president was still the head of the executive branch and thus could exert some nominal control over executive agencies. However, much of the delegation during this period seems to have been designed to minimize the ability of the president and other administrative officials from being able to affect policy.

Much of the authority delegated was to the Federal Reserve. This included much of the regulation of financial companies and much of the responsibility for the stability of the financial system. The Federal Reserve had specifically been designed to be insulated from the political considerations of the administration, which is viewed as a best practice for a

³⁴² Schlotzman, Kay Lehman and John T. Tierney. *Organized Interests and American Democracy at 251*. HarperCollins College Division. 1986.

central bank that needs to focus on long term issues and be willing to make unpopular decisions. One factor leading to its independence is that the term length for members of the Federal Reserve Board of Governors is 14 years so that while Governors are nominated by the president and confirmed by the senate, they do not have to worry about reappointment and other political considerations. This independence along with their expertise seems to be the key reasons they were given so much new authority after the crisis despite a mediocre showing in the run up to the crisis.

Independence is important in this context because financial institutions lobby for lesser restrictions on them as these impose a cost on these institutions and members of congress and the administration often champion the cause of such institutions when weighed against the slight potential of one of them failing or a threat to the financial crisis. The Fed can take a longer-term view and balance current costs against potentially devastating long-tail events that may occur in the future.

Similar to the additional powers given to the Federal Reserve, in response to the crisis and to avoid future crises, congress authorized and delegated extensive powers to the Financial Stability Oversight Council. As the FSOC represents the interests of a politically weak and dispersed interest group it is particularly at risk of political manipulation and ineffectiveness unless provisions are made for it to remain independent. To help ensure this, Congress designed it so that the council's power is not circumscribed by the Federal Advisory Committee Act as most Federal Advisory Committees are. It also has extensive funding sources and thus is relatively unconstrained financially. In addition, it also has power to direct the Office of Financial Research, which is another new organization that was created under this act and this gives it additional capabilities.

In contrast to these new agencies that were created in response to the crisis and which were delegated authority, the Office of Thrift Supervision had its authorities transferred to other organizations and was effectively shut down and merged into the OCC. The Dodd-Frank Act eliminated the Office of Thrift Supervision in part due to its poor regulatory culture in effect merging it with the Office of the Comptroller of the Currency. For years OTS had been known as a lax regulator and had used that to lure financial

companies to choose it as its regulatory agency.³⁴³ This was in OTS' interests as it received revenue from the companies it regulated. It had been the regulator of American Insurance Group (AIG), Washington Mutual, and IndyMac, who were three of the large financial companies that struggled the most during this period due to excessive risk-taking. OTS had repeatedly shown instances of regulatory capture and had in the minds of congress proven that in its current form and culture it could not be independent enough to make policy decisions or to regulate effectively.

Another key regulatory agency that congress created in response to the financial crisis and delegated extensive power to was the Consumer Financial Protection Board. The structure of the CFPB was determined by the interplay of various groups and it is a good example to show how important the structure of an agency and the choice of agent was to congress.³⁴⁴ Republican senators on the whole preferred a more decentralized organization, which is often a sign that they wanted a weaker regulator with less power. This design choice could be for other reasons and other organizations such as the SEC and FDIC do have a decentralized structure that are run by executive boards. However the assumption that its design was to weaken the board is supported, by the fact that those that pushing for a decentralized board also opposed the proposed nomination of Elizabeth Warren who was seen as wanting to strengthen the organization.

The Dodd-Frank Act was written in such a manner that the board could only perform its functions, such as regulating nonbank financial companies, if the agency had a head and it would not have this ability without one.³⁴⁵ As Richard Cordray stated in a blog post following his eventual appointment, "Now, with a director, the C.F.P.B. can exercise its full authorities — with respect to both banks and nonbanks — to help those markets operate fairly, transparently, and competitively."³⁴⁶ Elizabeth Warren, the president's initial choice for this position and one of the architects of the new agency, was never nominated due to her being viewed as too liberal and too likely to push for a strong, aggressive agency and thus

³⁴³ Joffe-Walt, Chana. "Regulating AIG: Who Fell Asleep on the Job?" NPR: *All Things Considered*. June 5, 2009.

³⁴⁴ Warren, Elizabeth "The Banking Industry's Transparent Attempt to Weaken the CFPB" *The Huffington Post*. October 20, 2015. http://www.huffingtonpost.com/elizabeth-warren/banking-industrys-attempt-weaken-cfpb_b_8340792.html

³⁴⁵ Wyatt, Edward. Appointment Clears the Way for Consumer Agency to Act. *New York Times*. January 4, 2012.

³⁴⁶ Cordray, Richard. Standing up for consumers. Consumer Financial Protection Bureau. January 4, 2012.

it was believe that the Senate would not approve her nomination. Instead he appointed her as a special assistant to the president, which allowed her to perform a key role in establishing the agency while not requiring a nomination. Though she helped initially shape the board, by being in that position rather than as the head of the board, it limited actions that the CFPB could take.

The Republicans also were unwilling to approve the president's nominee for this role and the nomination lingered. The unwillingness of the Republicans to approve the nomination was due to their playing hardball and trying to force a change in the structure of the agency in which the director would be replaced by a five-member board. In May 2011, 44 Republican senators signed a letter stating that they would not approve a nomination of an agency head and instead they would insist on a five-member board. As that was out of a total of 47 Republican senators it was clear that the party as a whole was very opposed to the structure of the board and they had enough support to filibuster and block any nomination. The structure of the board is important because it is harder to accomplish major changes with a board as there is not a singular person pressing for their vision to be realized and because the law was written in such a way as the head of the board was very powerful. The board still had some capabilities without a head and could exercise powers and authority that were given to by shifting existing powers from existing agencies such as the Federal Trade commission, it was limited as to what new policy agendas it could pursue or new restrictions it could enact.

With regard to President Obama's appointment of Richard Cordray to the Consumer Financial Protection Bureau, the president wrote, "I nominated Richard for this job last summer. And yet, Republicans in the Senate kept blocking his confirmation – not because they objected to him, but because they wanted to weaken his agency."³⁴⁷ He viewed the actions of congress as explicitly trying to weaken the agency so that it is less effective and thus is not as able to do what it is charged to do. Control of congress had changed from when the law had been enacted until the point when Obama went to nominate someone to head the agency. In the intervening period the Republicans had become the majority in the

³⁴⁷ Obama, Barack. "Weekly Address: Continuing to Grow the Economy in the New Year" White House Office of the Press Secretary. January 7, 2012. <https://www.whitehouse.gov/the-press-office/2012/01/07/weekly-address-continuing-grow-economy-new-year>

House and had deeply cut the Democrat's majority in the house to a point where the minority was able to block the majority. Obama and the Democrats frame this as the Republicans thwarting the will of the majority. Obama, for instance with respect to the Republican's stopping the appointment, stated, "I will not stand by while a minority in the Senate puts party ideology ahead of the people they were elected to serve,"³⁴⁸ These debates over the structure and leadership of agencies were not confined to the CFPB. It took 17 months after the creation of the Office of Financial Research for it to get a leader

The Federal Reserve was specifically designed to be insulated from political concerns. Long terms of office and little oversight by congress leads to those at the central bank not being overly influenced by congress and thus able to take a long term, disinterested view of the economic system and take the appropriate actions to improve the long term economic situation of the nation rather than focusing on short term political concerns. This has long been upheld as the ideal for central banks as it leads to better economic policy. However, congress is not always happy with the Fed doing as it sees fit and so during the crisis, some in congress tried to make political hay by demagoguery against the Federal Reserve and proposing more formal oversight of the Fed as a way of reining it in.

There is reason to believe that agencies acted less politically than congress during the crisis. Individuals such as Secretary of the Treasury Paulson acted in a manner that appeared that they were not interested in improving their political prospects or those of their party, but rather were more focused on mitigating the crisis. By comparison, congress' actions seemed very political. Examples of this were the negotiations over raising the debt limit and over passing a continuing regulation to fund the government where much of the debate seemed to be related to political positioning and improving the election prospects of individual members of congress. In addition, many votes seemed very partisan and political based off of the percent of members of congress that voted along party lines and seemed to be motivated by political reasoning. In these actions, members of congress spent considerable time and energy framing the debate so that the actions taken would be popular with their base. This was primarily due to electoral reasons rather than to affect

³⁴⁸ Nakamura, David and Felicia, Sonmez. "Obama Appoints Richard Cordray to Head Consumer Watchdog Bureau." *Washington Post*. January 4, 2012.

the text of the bill of itself though there was an aspect that by making an action unpopular it could force the actions of the other side and lead to more preferred political actions. However, even this view seems to show that there was partisanship as can be seen in that this framing was taken in part to use political considerations to force the hand of the other side whereas an insulated bureaucrat, such as the Chairman of the Federal Reserve, would not be much moved by these arguments.

Under the Emergency Economic Stabilization Act of 2008, the Treasury Department also was empowered to make determinations as to whether hedge funds and other non-traditional financial entities should qualify for federal assistance. This proposition is a politically charged one in that hedge funds are viewed as being tools of the rich, who have done well, while the poor have struggled. Congress would find it difficult to vote for a provision that is so unpopular and which appears as if the poor had to bail out the rich, however a more insulated agency has more political leeway to institute this if it felt that it would be broadly beneficial. Congress made a decision that delegating in this instance made the most sense.

5.2.2 Agency Expertise and Capabilities

The Treasury and the Federal Reserve were two of the organizations that were delegated to the most during this period. These were also the organizations with the greatest knowledge of the financial areas that required most governmental responses. Beyond just expertise in the subject matter, the delegation seemed to be to organizations that already had similar powers and were able to get things done. Comparatively little authority was delegated to the Commerce Department and the Labor Department during this period despite their missions of promoting economic growth and protecting workers being closely aligned with the needs during the crisis. This is largely due to the expertise of the former agencies when compared to those of the latter agencies. These latter organizations, like congress, did not have the depth of expertise in financial markets that congress would prefer.

There were several instances in which congress created broad goals, but left large parts of the policy creation up to agencies. A good example of this is the Volcker Rule, which was a section of the Dodd-Frank Act that tried to stop banks from engaging in proprietary trading, trading on behalf of themselves rather than their clients. When the rule actually was implemented it ended up being hundreds of additional pages of regulations. These covered the harder questions such as when exactly does trading count as proprietary trading, what restrictions to place on financial institutions, and what reporting and regulatory requirement would be implemented to deal with this. In addition, the agencies determined the timeline that the new rules were implemented. Thus though this may initially seem to some as congress determining policy and the agency merely filling in the details, in actuality many of the key decisions were made by the agencies rather than congress. These details ultimately determined the effect the policy would have, how it would be implemented, who would be affected, and the extent to which it changed the behavior of banks and other financial institutions. While Dodd-Frank was passed in June 2010, the regulations implementing the Volcker Rule were not written and approved until December 2013 and most of its the rules did not take effect until July 2015.³⁴⁹ Congress relied on agencies to set make most of the complex and involved policy decisions regarding the Volker Rule and numerous other policies.

A section of the Housing & Economic Recovery Act of 2008 that demonstrates the need for expertise and that congress looked for this when selecting agents is the Mortgage Disclosure Improvement Act of 2008, which amended the Truth in Lending Act making changes to mandatory waiting periods were put into place to ensure the process is working, due diligence is being done, and that those getting loans use loan information in an informed, considered manner. In order for this law to have an effect, the Federal Reserve published rule changes to Regulation Z that provide certain rules on timing of actions for creditors.³⁵⁰ This decision to delegate to the bureaucracy allowed expertise to be brought to bear when creating policy. It also allowed the proper timeframe and attention to be given to such a complex area.

³⁴⁹ Roberts, Daniel. "The Volker Rule Takes Effect Today After Years of Delays" *Fortune Magazine*. July 22, 2015.

³⁵⁰ Office of the Comptroller of the Currency. *Comptroller's Handbook: Truth in Lending Act*. December 2014.

Through reporting requirements and similar powers, congress had the capability to acquire the information and expertise it would need to make policy about financial regulation directly, however congress in the overwhelming number of instances delegated this authority and the responsibility for these decisions to governmental agencies and their heads. The SEC has already written several hundred pages of regulations and rules as a result of the Dodd-Frank Act and numerous other agencies have similarly set down numerous regulations. The majority of the new regulations necessitated by the Dodd-Frank Act were left to the SEC to determine and write. For instance, the SEC was given authority to exempt an issuer or class of issuer if the burden of the regulation falls disproportionately on small issuers.

The Emergency Economic Stabilization Act of 2008 authorized the Federal Reserve to start paying interest on reserves. This act of delegation, in which the Fed could determine what, if any, level of interest to pay, allowed for better public policy since the Federal Reserve was able to act quickly compared to congress and vary the rate as the need arises or as more information becomes available. The decision to delegate the power to set this interest rate rather than indexing it to a benchmark, appeared to be largely to allow for expertise to be used and to allow quick changes as the need arises. Ben Bernanke, the Chairman of Federal Reserve Board felt that the ability to pay interest on reserves would be a useful ability, but was unsure how to use it and so he experimented with different applications of this authority and tried three different rates within the first 40 days after the bill was enacted. He was quoted as saying, "We're not quite sure what we have to pay in order to get the market rate, which includes some credit risk, up to the target. We're going to experiment with this and try to find what the right spread is."³⁵¹ The ability to experiment in this way came because details such as rates that could be paid on deposits were left to the Federal Reserve to determine rather than being determined by congress. There was little to gain politically for congress by delegating since controlling the rates would allow congress to have significant leverage over the powerful banking industry and could allow members of congress to do favors for this group which would likely have brought increased donations. However, congress still opted to delegate this power to an organization better able to analyze economic data and make this decision.

³⁵¹ Bloomberg. "Fed to Pay More on Banks' Reserves" *The Economic Times International*. October 23, 2008.

The Emergency Economic Recovery Act of 2008 also delegated the power to the SEC. The SEC was given the authority to suspend mark-to-market accounting requirement. This delegated a complex decision that could not be as fully examined by congress as it could by this specialized agency. This complexity appears to be one of the main motivators for this action.

Along with expertise is the concept of an agencies capabilities being a reason to delegate to that agent. Part of the advantage of delegating to an agency is that it allows the agency to quickly try numerous different methods to solve the crisis at hand. This ability to try numerous solutions is an efficient way to find a solution rather than throwing money and placing hopes in only a couple initiatives. It also allows initiatives to be shut down if it turns out not to be successful or is no longer needed. In fast moving crises, it is good to have the adaptability that agencies provide.

Congressional action was difficult due to political gridlock, political unpopularity of actions that would prop up the market, and uncertainty over the depth of the financial downturn. However, agencies were better able to handle these and set policy to deal with the financial downturn. Some agencies are better at this task than others which led to them being delegated more power and responsibility. The Treasury Department in particular was able to try numerous methods of resolving the financial crisis. It was not know exactly what programs would be successful and which would not and so many were tried concurrently or in quick succession to stabilize various parts of the market.

5.2.3 Ensure Coordination

During the crisis there was a need for action on various fronts to adequately address the weakness in the economy and its effects on people's lives. To ensure the best results, policy needed to be coordinated, and in order for this to happen the various agencies needed to coordinate with each other. By designing delegation to ensure coordination, the government tried to avoid the gaps in oversight that contributed to this crisis.

Delegation during this period was structured in such a way as to facilitate various organizations to work together and the agents of delegation were selected or created accordingly. For instance Section 203 of the Dodd-Frank Wall Street Reform and Consumer Protection Act set forth procedures for agencies to make recommendations for the Financial Stability Oversight Council.

There was a good bit of coordination during this period. For instance, while the Central Bank is its own institution and thus in theory shielded from the administration and politics, in practice this separation gave way to coordination. The weekly breakfasts between the Treasury Secretary and Central Bank head during this time was one sign of this.³⁵²

Thus the Fed also coordinated with and took actions in conjunction with other nation's central banks as in this globalized, multipolar world, the U.S. cannot act unilaterally to address crises, but can produce better results by working with other nations. An example of this working with other nations was on October 8, 2008 when the Fed reduced their interest rates in conjunction with the Bank of Canada, the Bank of England, the European Central Bank, Sveriges Riksbank, and the Swiss National Bank.³⁵³ This was a new precedent for action in that the Fed had never decreased its rates in conjunction with other central banks prior to this action.³⁵⁴ Congress had delegated these authorities to the Fed.

The creation of agencies and offices is perhaps there area where you can see coordination of policy creation most exemplified. The Financial Stability Oversight Council is a prime example in that the members of the council include the Secretary of the Treasury, the Chairman of the Federal Reserve, the Comptroller of the Currency, the Chairman of the National Credit Union Administration board, and the directors of the CFPR, SEC, FDIC, CFTC, FHFA, OFR, and Federal Insurance Office. These are the key agencies that would need to coordinate during a financial crisis. By creating the council and delegating significant power to it, congress ensures that policy would be created in conjunction with various agencies and coordinated together. This contrasted with the immediate response to this crisis where the Treasury Secretary, Chairman of the Federal Reserve, and head of the Federal Reserve

³⁵² Paulson. 62.

³⁵³ <http://www.federalreserve.gov/newsevents/press/monetary/20081008a.htm>

³⁵⁴ Paulson. 339.

Bank of New York worked together to the exclusion of other agency heads and crafted the bulk of the policy response unilaterally. This led to situations where the decision was made to effectively guarantee money market funds without any thought as to how that would adversely affect the banking sector.

The Federal Insurance Office Act of 2010³⁵⁵ created an office in the Treasury Department to oversee the insurance market. The Federal Insurance Office was given preemption in some areas over state regulators who historically had been the main regulators of the insurance market. The act also alters insurance regulation such that with the change only an insurance company's home state can regulate or levy premium taxes on it. This helped harmonize the insurance regulations across states.

5.2.4 To Give Attention to an Issue

Congress does not have the time or inclination to focus on certain issues once they are out of the public spotlight. With this self-knowledge congress took action to delegate powers to agents that could keep a watchful eye on specific issues and craft policy accordingly. The choice of agents, and creation of agents in particular, were selected to ensure focus on a policy sphere far into the future and in some instances even if the coalition that passed the bill in congress is eventually replaced by one less appreciative of policy creation.

With the clear need for regulation of banks and seeing the way that the Federal Reserve neglected this responsibility in place of more glamorous responsibilities. The Dodd-Frank Act prohibited subdelegation of the Federal Reserve Board's authority and responsibility to create regulation and to supervise bank holding companies to a Federal Reserve Bank. This ensured that this role would be a main focus of the Federal Reserve.

In addition, as The Federal Reserve had always focused more on monetary policy to the exclusion of its responsibilities such as regulation, the Dodd-Frank Act altered its

³⁵⁵ Part of the Dodd-Frank Wall Street Reform and Consumer Protection Act

structure and created the position of Vice-Chairman for Supervision.³⁵⁶ The belief being that a senior official at the Fed with supervision and regulation as part of their explicit portfolio would lead to the Fed's regulatory functions being given the attention that congress felt they deserved. It was hoped that this change would help change the focus of the Federal Reserve Board which is a regulatory agency, but is one that has focused on its other areas or responsibility than on the less glamorous role of regulation.

The Dodd-Frank Act also required the SEC to create an Office of Credit Ratings to regulate nationally registered statistical rating organization (NRSRO). The act also amended several acts to remove the special place that credit ratings and that NRSROs had under the former law.³⁵⁷ This step was taken because credit ratings were viewed as being inaccurate and biased and further that the reliance on ratings was blamed by some as contributing to the crisis. Credit ratings are an area that was largely unregulated by the government prior to the crisis, but congress wanted to ensure that going forward that someone would pay attention to this neglected policy area. By keeping an entity followed on this area it would also allow for proactive responses to changes in the industry rather than reactive response that only occur after a problem has occurred.

There were different types of regulators that have different goals. The Fed and OCC focused on risk management focusing on soundness of the system and the entities that comprise it. Alternatively the SEC used rules and tests to ensure that the system is fair and that investors are protected.³⁵⁸ Congress delegated authority to each of these organizations, but the authorities delegated were different for the different bodies and were designed so that each of these spheres continued to be monitored.

The CFPB had a different mandate and was designed to protect a politically weak, diffuse interest, namely the public, from the powerful, entrenched powers in industry and congress. By delegating to an agency charged with this responsibility, congress can ensure that the agent would continue to focus on this core mission. Future congresses would be at risk of being pulled in by the powerful financial interests and so financial protection of

³⁵⁶ Ro, Sam. There Are Now TWO Federal Reserve Vice Chair Positions That Need To Be Filled. *Business Insider*. October 11, 2013. <http://www.businessinsider.com/dodd-frank-second-fed-vice-chair-2013-10>

³⁵⁷ Section 939 of Dodd-Frank Wall Street Reform and Consumer Protection Act

³⁵⁸ Financial Crisis Inquiry Report. 198.

consumers would be neglected as this is less politically valuable to legislators. This use of delegation to entrench the current congress' policy preferences in law and protect it also makes political sense as the issue was very partisan with the democrats generally preferring more regulation of Wall Street than the Republicans who in general tend to hold more free market, laissez faire views. At the time, the CFPB was established the Democrats held both houses of the congress and the presidency. However, they knew this situation would not last forever, particularly as the financial crisis at the time led most experts to expect that the Republicans would pick up a number of seats in both houses. The act was politically valuable in that it made it look like the president and the congress were protecting the common everyman though the actual actions of what would be done could not be told yet.

Another method that was used to ensure that attention continued to be paid to an issue was that in some instances congress delegated a power or authority to multiple agencies so that they each can use their decision making authority and independent judgment. An example of this is Section 213 of Dodd-Frank Wall Street Reform and Consumer Protection Act that gave both the FDIC and Federal Reserve Board the authority to, "ban certain activities by senior executives and directors."³⁵⁹

5.3 The Use of Constraints

The actions of congress appear consistent with the hypothesis that constraints are selected strategically. Constraints on delegation are used to allow congress to delegate power and achieve their goals while still assuring that the agent that is delegated to performs actions that are circumscribed such that they will be consistent with congress' preferences. There are numerous types of constraints that can be used and there are different situations in which each would be used. Congress seems to understand the constraints available to it and uses different ones as different needs present themselves.

Upon examining the use of constrains during and in response to the financial crisis it appears that certain types of constraints were used by congress more often than other

³⁵⁹ CRS Summary of Section 213 of Dodd-Frank Wall Street Reform and Consumer Protection Act

types of constraints. For instance time limit constraints and consultation requirements were used quite extensively during this period and had significant effects on the resulting policy that was created. This seems consistent with congress wanted to create policy quickly and to ensure that it was systematic and did not have significant holes where there was a lack of regulation. Other constraint types such as spending limit constraints and compensation constraints were used far less frequently and had minor effects on policy.

When this paper evaluates the actions during this crisis period it looks initially to see if additional powers and authority are delegated to the executive branch. In addition, it factors in whether additional constraints are placed on agents that limit their freedom of action. *Ceteris paribus*, the addition of new constraints upon the actions of agents that have been delegated power effectively decreases the power of the agent and thereby decreases the amount of delegation. There are a number of types of constraints that are used to constrain executive action which congress regularly applies.

Congress tends to use a number of constraints when it delegates its authority to act. By using these constraints it attempts to ensure that the actions of the executive branch or other agents it gives power to act on its behalf will be acceptable to it. This is all in accordance with principal-agent theory and has consistently been a key method of investigating congress' use of delegation. By limiting an agency's ability to act freely congress can better maintain influence over an agency and assure that actions that an agency pursues are not detrimental to congress' interests. There are a vast number of types of constraints that congress has available to it as a means of controlling agency actions. There are differing effects of each of these constraint types and thus varied reasons for congress to choose each of these constraints. This leads to congress employing various constraints at different times and with varying frequency.

Constraints are a common way to limit the power of the agent in order to minimize agency losses. Constraints can limit a number of problems involved in delegation such as adverse selection and moral hazard. Constraints can also resolve information disparity and add checks to limit the agent. These constraints can take place as part of the initial delegation such as in the case of agency design. Alternatively these could focus on actions that can continue to keep the agency in line with congress' wishes. These can be structural

in terms of the rule and framework that is used for the delegation. However, these constraints are not perfect tools and these limitations combined with the lack of complete information mean that these constraints while helpful, cannot completely eliminate agency loss. McCubbins and Page describe this situation as being similar to, “walking a dog with a rubber leash on a dark night.” They explain the analogy by pointing out that, “The leash is not a perfect instrument of control to begin with, and control is made more difficult by being able to see only shadows and fragments of what is going on.”³⁶⁰

A bill can be written in a very detailed way so as to limit the discretion of agencies. Huber and Shipan used word length as a way to measure the amount of discretion given.³⁶¹ Among their results is a finding that delegation decreases as congressional institutional capabilities increase. All delegation has a scope that defines what actions the agent can take. Typically this means there is a certain amount of power ceded and some constrains as to the means, manner, and method of its use. Congress is unaware of the full capability set of an agency as agencies may keep this hidden if the agency even knows this itself.

During the crisis there were vast amounts of delegation and along with this congress enshrined significant numbers of constraints in the law. These constraints came in many varieties and there were different causes and effects of each of them.

Below is a list the main types of constraints on delegation that were used to ensure that the bureaucracy acts in a manner consistent with the wishes of congress. The categories listed are broadly based on those laid out by Epstein and O’Halloran and come from their investigation of the literature on the topic.³⁶² This paper has made a few changes to their list, grouping those together that have considerable commonality and deemphasizing those, such as the use of the legislative veto, that are less applicable to the current U.S. political environment.

This paper analyzed the six key laws that were passed during this period and which had a major effect on economic policy: The Housing & Economic Recovery Act of 2008, The Emergency Stabilization Act of 2008, The American Recovery & Reinvestment Act of 2009,

³⁶⁰ McCubbins, Matthew D., and Talbot Page. “A Theory of Congressional Delegation” in *Congress: Structure and Policy*. CUP Archive, 1987. 410.

³⁶¹ Huber and Shipan. 2002.

³⁶² Epstein and O’Halloran. 1999.

Helping Families Save Their Homes Act of 2009, The Dodd-Frank Wall Street Reform and Consumer Protection Act, and The Budget Control Act of 2011. This paper then looks at the relative frequency of constraints.

The use of specific types of constraints can tell us what congress is trying to accomplish with their use and what its motivations are. For instance, congress used time limit constraints a significant amount during the crisis in ways that appeared primarily to ensure that action was taken by the bureaucracy quickly and that many actions that were taken and bodies created to deal with the crisis would not continue beyond the immediate need for them, but would rather be phased out at such time as the current crisis had been responded to adequately. The use of constraints can also tell us about the preferred methods congress has for ensuring agency actions are in accordance with congress' goals.

Certain types of constraints were more often used than others during this period. In particular rulemaking constraints, reporting requirements and consultation requirements accounted for the majority of the constraints used. Other constraint types such as appointment powers, restraints requiring executive or legislative action, spending limits, compensation constraints and appointment power limits were used far more sparingly during this period.

5.3.1 Time Limits

Time limits are constraints that limit the duration of the delegation and which expire at a given time. Sunset provisions are another name for time limits. These can take the form of a program only being authorized for a certain period, but can also take the form of other time limits. Time limits such as these may be modified later if the need arises.

Time limits can help congress address short-term issues without permanently giving up the power. Furthermore they can ensure that solutions that are of value in a certain situation don't outlive their usefulness and lead to unnecessary, permanent laws or to an office or agency that were designed to deal with the present situation end up becoming a

permanent part of the bureaucracy. There is certainly always this potential otherwise and scholars have pointed to a number of instances of this.

Sunset provisions ensure that laws are systematically reviewed and reauthorized if they are still valuable or cancelled if they are no longer deemed relevant or beneficial. A strengthened form of this was seen in a provision championed by Senator Edmund S. Muskie in the 1970s.³⁶³ This proposal would have cancelled all laws after a certain amount of time. This would have led to a systematic reauthorization of entire classes of spending on a periodic basis allowing for programs to be evaluated against each other and for money to be redistributed if need be. This forced reexamination of laws and programs can be useful when dealing with a crisis. It often requires vigorous action to deal with the crisis, but many of these steps taken to counter the crisis may not be beneficial once the crisis has passed. Thus congress will sometimes structure these responses as temporary provisions.

This Housing & Economic Recovery Act had a sunset provision so that it would only stay in place for three years. This act guarantees new subprime mortgage loans. This provision would be useful to calm distressed markets, but would be an expensive market-bending subsidy that would lead to inefficiencies and extra governmental costs. Thus it could help deal with the current crisis, but would make for an expensive giveaway over time. This explains why the sunset provision was included since it could allow the act to help solve the current crisis while not being an open-ended authorization.

The TARP program was authorized to spend the money for a fixed period that expired October 2, 2010. This was shortly after the bill was passed. The close end date was used to ensure that the money was spent to prop up the market during the crisis since the need was immediate. By the end of this period the TARP program had committed \$470 billion and disbursed \$387.³⁶⁴

The Dodd-Frank Act gave the SEC the ability to create disclosure regulations on issuers of asset-backed securities and also required the SEC to issue regulations limiting the ways that these securities can be marketed. This limit on marketing, which covers details such as warranties that can be claimed by the seller of the security, must be implemented

³⁶³ Mooney, Chris. "A Short History of Sunsets" *Legal Affairs*. January/February 2004.

³⁶⁴ New York Times. Credit Crisis — Bailout Plan (TARP)

by the SEC within six months of the law being enacted. This is a constraint on the SEC that requires a specific set of actions by a certain date. This ensures that the issue is being tackled and thus congress can also claim credit for solving the issue. There is however a tradeoff if the timeframe does not allow for the agency to fully investigate and propose the best set of regulations that it might otherwise implement. On the positive side a set date can ensure that the perfect is not the enemy of the good.

The Emergency Economic Stabilization Act of 2008 was written in such a way that the authorities given to the Treasury Department with regard to TARP expired December 31, 2009. This ensured that this program and the vast delegation of power to the executive branch would be close-ended and would not be a permanent shift of power to this executive agency.

Another example of an act of delegation with a time limit constraint is the American Recovery & Reinvestment Act of 2008 delegated authority to the SBA to establish a Secondary Market Lending Authority to make loans to the systematically important secondary market broker-dealers, but this was only for two years until the emergency was over.

Several entities that were created during the economic downturn had built in end dates when they were created. For instance the Recovery Accountability and Transparency Board and the Recovery Independent Advisory Council were designed to terminate September 30, 2013.³⁶⁵

5.3.2 Consultation Requirements

Congress can require that an agency consult with one or more other agencies or other key actors as part of the agency's policy making process. This can be used as a way to gather information and get interest groups that might oppose the policy to state their preferences and bring pressure to bear on the issue. This can also stop the problem of the

³⁶⁵ Office of the Vice President. "Vice President Biden Announces New Chairman for the Recovery Accountability and Transparency Board" December 23, 2011. <https://www.whitehouse.gov/the-press-office/2011/12/23/vice-president-biden-announces-new-chairman-recovery-accountability-and->

policy being implemented before congress and others know about it and thus avoid surprises. This in turn can help congress avoid negative political consequences and can help stop agencies from being political free agents. Consultation requirements can be used to enfranchise favored constituents.³⁶⁶ Finally, it can assure good communication such as between two agencies that need to work in conjunction and in this way could be a component of good governance depending on its use.

Congress sometimes writes legislation that requires the approval of other executive branch actors before a certain agency's proposal is enacted. Congress can often design delegation in such a way that the agency cannot unilaterally make decisions on key issue areas. This allows congress to ensure that the agency does not diverge too far from the wishes of the administration. It requires agreement of the agency and whatever actor needed to approve the decision whether this is an executive agency, the president, or an agency head.

By having multiple actors involved, congress effectively sets up checks and balances in the system to ensure that monitoring is performed and corrective action can be applied without direct intervention of congress itself. This is particularly true when congress designs the system so one agency is motivated often through contrasted interests to check the actions of another. This can effectively set up a comparatively costless form of oversight in which one executive agency often with a contrasting goal is put in a position in which it is incentivized to monitor another organization and ensure that the agency's actions do not circumventing congress' wishes. It can also set interests against interests and thereby ensure that little gets done that is not unobjectionable.

This action can create and institutionalize veto players which can increase the tendency towards the status quo and which can decrease the size and pace of change. This in turn tends to lead to more political stability and to a tendency for proposals that are more ideologically mainstream to have a greater chance of passing. In addition, this new agency can be one over which congress has considerable control and thus can help determine what policy is allowed to be created by the agency that has power delegated to it.

³⁶⁶ Huber and Shipan. 2002.

A consultation constraint that was put in place on TARP funds is that the Treasury Department was ordered to consult with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Secretary of Housing and Urban Development in its administration of the program. This requirement to consult with other agencies can limit the actions that the Treasury Department can take in their running of the TARP program. It also can help ensure that all the key government agencies were on the same page and Treasury was not determining the entire government response to this crisis without the input of other key governmental agencies.

The Financial Stability Oversight Council, which was created by the Dodd-Frank Act, is able under certain circumstances to set the Federal Reserve to oversee institutions that the council views as a risk to the financial system. This is accomplished through the actions of the Secretary of the Treasury and the approval of at least 2/3rd of the members of the council. Thus the approval of multiple actors is required. The council was comprised of the heads of several agencies that had a role to play in ensuring financial stability.

The Bureau of Financial Consumer Protection has significant power, but it also has a number of checks on its power such as reports it must file and the fact that its actions may be vetoed by a 2/3rd vote by the Financial Stability Oversight Council. The need to get the FSOC to approve the bureau's action weakens the ability of the bureau to act and strike out on its own and engage in policy freelancing rather than following the wishes of the administration.

The Housing & Economic Recovery Act of 2008 creates the Federal Housing Finance Agency and delegates to it and its director significant authority. Among the checks on it are a requirement that, "Requires the Director, before issuing any regulations about the exercise of additional authority regarding prudential management and operations standards, safe and sound operations of, and capital requirements and portfolio standards, to consider the views of the Chairman of the Board of Governors of the Federal Reserve System regarding risks posed to the financial system by the regulated entities."³⁶⁷

³⁶⁷ CRS Summary of Housing & Economic Recovery Act of 2008 Section 1118

Under the American Recovery and Reinvestment Act of 2009, Trade Adjustment Assistance eligibility is increased. The Secretary of Labor is able to make ruling that can end up providing significant assistance, however congress put in a consultation requirement that the secretary must consult with certain congressional committees.³⁶⁸

Dodd-Frank included a provision for the Board of the FDIC to the fullest extent possible to, “rely on the examination reports of other federal or state regulatory agencies, and other specified required reports, relating to a savings and loan holding company and any subsidiary” and “coordinate with other federal and state regulators”.³⁶⁹ These requirements aim to avoid a duplication of effort and minimize additional overlapping regulatory burdens. In addition, the law helps resolve territorial disputes between agencies which see themselves as regulators for bank holding companies since working together can help speed and coordinate responses which are useful during the crisis and after.

The Wall Street Transparency and Accountability Act of 2010 created a consultation requirement that the Securities and Exchange Commission and Commodity Futures Trading Commission to consult with each other before making any regulation regarding swaps, swap dealers, and swap participants. Likewise, the act requires the Commodity Futures Trading Commission and the Federal Energy Regulatory Commission to agree to a memorandum of understanding about how the two organizations would use their overlapping regulatory authorities.³⁷⁰ Furthermore, it requires this memorandum of understanding to be submitted to congress.

Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the CFTC and the SEC are required to consult with international regulators regarding swap regulation.³⁷¹ Whereas Section 813 of the Dodd-Frank Act requires, “the CFTC and the SEC to coordinate with the Board to develop jointly risk management

³⁶⁸ Pub.L. 111-5, Section 1857

³⁶⁹ CRS Summary of Section of 604 of Dodd-Frank Wall Street Reform and Consumer Protection Act

³⁷⁰ Memorandum of Understanding Between The U.S. Securities and Exchange Commission and The U.S. Commodity Futures Trading Commission Regarding Coordination In Areas of Common Regulatory Interest. <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftc-sec-mou030608.pdf>

³⁷¹ Memorandum of Understanding Between The Federal Energy Regulatory Commission and the Commodity Futures Trading Commission. <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercmou2014.pdf>

supervision programs for designated clearing entities.”³⁷² The Dodd-Frank Act also required the banking regulators to work in conjunction with the SEC to set rules that would require a securitizer to remain a portion of the underlying asset or credit list.

In addition, the Dodd-Frank Act requires that certain regulations be prescribed jointly. This coordinates and harmonizes the rules of various regulators with regard to these regulation areas. These areas include limiting incentive payments if they encourage excessive risk or excessive payments.³⁷³ These consultation requirements in this act make sure that viewpoints and knowledge from multiple agencies were represented in policy creation. In the crisis there were several situations in which one agency went off to address a crisis, but did not adequately consult other agencies to see how they would be impacted or to see if there was a piece of the picture that they were missing.

TARP was implemented in such a way that if there was uncertainty as to whether a bank was viable long term and thus whether it was a candidate that would receive funds from TARP the issue would be decided by a panel comprised of representatives from the four major regulators of financial institutions, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve, and the Office of the Comptroller of the Currency. This was another example of executive agencies working together to address the crisis with little intervention from congress.

Section 805 of the Dodd-Frank Act “authorizes the CFTC and the SEC, subject to review and challenge by the Federal Reserve Board and the Council, to prescribe risk management standards for the respective designated clearing entities and financial institutions.” The rule delegates a key power to these two agencies, but adds a check in that if they take actions that seem unwarranted that the Federal Reserve can keep the regulatory agencies in line.

5.3.3 Reporting Requirements

³⁷² CRS Summary of Section of 813 of Dodd-Frank Wall Street Reform and Consumer Protection Act

³⁷³ Pub.L. 111-203, Section 956.

Congress often requires that an agency reports in a certain manner or at a certain time. An example of this is the requirements of Administrative Procedure Act (APA),³⁷⁴ which requires agencies to report before they perform actions and execute policy directives. This is ostensibly to allow those with a stake in the agencies' proposed regulations to voice their concerns, but conveniently it also gives congress a chance to address potential problems and assure that the agency's actions are consistent with congress's wishes and the needs of key constituencies and advocacy groups. The APA requires a notice of proposed rulemaking that must be published in the Federal Register. There is usually a 90-day waiting period in which the public can learn about and comment on the proposed rule. In certain emergency situations this process can be bypassed, but it is required in the vast majority of situations and there are often stronger reporting requirements than just those required by the APA reporting requirements. These reporting requirements help avoid a fait accompli in which an agency acts and marshals support for an action and turns public opinion in favor of their plan before congress is able to stop. This can in effect force congress into accepting the action despite misgivings because it is too late to form a coalition to oppose the change or to do so would be politically damaging once the agency has shaped the political landscape in favor of the agency action. It also allows deals to be made with the agency or allows for force to be brought to bear on the agency in order to change their position.

Excessive and burdensome reporting requirements can also undermine organizational effectiveness. As stated earlier it can be the intention of congress to overwhelm and limit the capabilities of an organization so that it is unable to do much outside of activities that congress advocates and so that the agency is unable to take actions it feels are warranted. This can be good for congress if the law that was passed is broadly popular and perhaps required by circumstances, but congress in practice does not wish much action. An example of this is additional financial regulation which often sounds good to a wide swath of the electorate, but which in practice often goes against the powerful entrenched interests of the industry and which has tangible costs that many members of congress would like to avoid.

³⁷⁴ Pub.L. 79-404

An example of a reporting requirement is that the Secretary of the Treasury is required to report to congress with 24 hours of taking over a financial institution. Furthermore within 60 days of taking over the company, the Secretary must issue a report to be made available to the public which will lay out key information about the state of the company and the actions that the Treasury Department intends to take.

Reporting requirements can be a good way for congress members to ensure that agencies do not take actions that congress will not approve of. These requirements allow for oversight and can take time away from the agency and thus limit its ability to tackle problems. They also act as an effective information gathering mechanism for congress. This is especially important in areas that it would be hard for congress to gather much insight about otherwise due to either their complexity or their hidden nature. An example of this is the TARP program, which was very important, but was also very secretive and was difficult to understand to the average congressperson. Thus congress created reporting requirements to ensure they received the information needed so that they could assess the program and take any needed actions to address any shortcomings.

In addition, the Dodd-Frank Act requires the SEC and the Comptroller General to submit annual reports to congress about the SEC's internal controls and financial reporting procedures. By requiring both these entities to submit separate reports it ensured different perspectives and ensured independent viewpoints. The comptroller is also told to look at the actions and structure of other entities such as the Governmental Accounting Standards Board (GASB). There are 81 studies and 93 congressional reports mandated by the Dodd-Frank Act alone.³⁷⁵

5.3.4 Public Hearings

There are multiple types of public hearings including primary purpose oversight hearings, reauthorization hearings, and those to amend existing statutes. This is another instance in which the Administrative Procedure Act (APA),³⁷⁶ requires specific actions for

³⁷⁵ U.S. Chamber of Commerce. 2010.

³⁷⁶ Pub.L. 79-404

executive agencies in order to ensure that potential actions are performed in accordance to the will of congress. Public hearings are a good way to determine individuals and groups that would be affected by the regulations passed by and actions of an executive agency. It can help make clear the relative intensity of interests, the strength of these political coalitions, and the political landscape. This can better help congress to take positions that meet their constituents' wishes. These also give members of congress considerable leverage over the agency which can allow for members of congress to perform casework on behalf of their constituents and other constituencies and thus help their electoral prospect in future elections.

It also allows congress to sanction agencies and their heads that are not following congress' wishes. Congress can question and fact-find and often publicly berate the head of an agency and thereby get them to fall in line if they have veered off of congress' preferred course. This can also serve as a deterrent to agency heads taking political initiative and this helps congress maintain control of the agency.

The transparency of public hearings can make for good governance as well and is part of a participatory democracy that brings disenfranchised individuals into the political system. This can allow a back and forth in which the public comments on a proposed rule and the agency responds to the public. This allows for a free flow of information among those concerned about the issue and the agency so that issues that might have been overlooked by the agency are brought to light by those that focus on the issue. The agency also makes a record of public comment and this is made available.

Among other reporting requirements, the proposed regulation is required to be posted in the Federal Register. Congress may keep to these and other requirements that form a base level for public hearing, but they may also add additional requirements in certain cases in order to further constrain the actions of the executive branch.

5.3.5 Rule-Making Requirements

Congress can mandate that an executive body that is delegated power must use a specific process or specific methodology when deciding to make an action. The APA is one example of a rule-making requirement in so far as it requires regulatory agencies to announce their decision-making reasons. In the case of the APA this ensures that there is a justifiable reason for an agency's decision and helps keep them in line with congress' desires since they will need to justify any deviations. By requiring an agency to use a methodology this makes agency heads easier to control as they need a justifiable reason for their actions and it is harder for them to be a political free agent. These constraints can also slow down agency action and help assure that congress is apprised before any far reaching change in policy is enacted. It can also help keep the agency confined to more evolutionary policy rather than revolutionary policy, as it is easier to justify minor changes.

This type of constraint can also ensure that a certain methodology is used, that the public is listened to, and that various interest and viewpoints are accommodated or taken into account. This can in certain instances lead to better, more inclusive policy. These rule making requirements are subject to judicial review and this too can help ensure compliance with the mandate given by congress and can limit the tendency of an agent trying to substitute in their own preferences for those of congress.

These rules can be very constraining and intricate in detail or can be more general in nature. An example of a broad constraint would be the directive that the agency should work in the public interest. These general delegations give the agent more freedom of action.

The authority that was delegated to the FDIC and the Securities Investor Protection Corporation (SIPC) to wind down operations for banks and other financial institutions came with some limitations including that certain criteria must be met for the winding down process to begin.

The act that authorized the FDIC to take over a failing institution also gives it a set of rules to follow during the liquidation phase, which limits its options and also give it goals that it is asked to prioritize such as performing actions that will help ensure the financial stability of the country as opposed to actions done on behalf of the company that is in receivership.

Any asset purchases made by TARP were mandated by congress to take place in only a manner that would protect public finances so that taxpayers would not be on the hook. One example of the restrictions that was put in place on purchases is that the act only allowed TARP funds to make purchases in return for warrants. Congress wrote the act in a way that would give the agency wide discretion in certain areas while keeping agency actions quite constrained in other areas.

The Dodd-Frank Act allowed regulators to create additional rules regulating asset-based securities beyond those explicitly laid out in the act, however it only allows rules that are limited in their goals in that they must either, “help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization” or “encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors.” By stating a goal it keeps the agencies eyes fixed on the purpose of the rules it enacts and ensure that its reasoning matches that of congress. This can help prevent against excess regulation or the SEC creating its own ends and goals.

Rulemaking requirements were used by congress to avoid negative symbolism that could lead to political problems. For instance, in the Emergency Economic Stabilization Act of 2008, congress used rulemaking constraints to limit the Treasury Department to buy a troubled asset for more than the owner of the asset initially paid to buy it. This could have been viewed as spending taxpayer funds in order to enrich the financial companies that caused the financial crisis.

The Helping Families Save Their Home Act of 2009 has several rulemaking requirements that act as constraints. The Secretary of HUD is given authority to set up a program to help homeowners pay their mortgages. However there are several restrictions upon the specific program and terms that the Secretary can use to achieve this aim. For instance, the act has a requirement that requires the mortgager to agree in writing that they are, “liable to repay to the Secretary any direct financial benefit achieved from the reduction of indebtedness on the existing mortgage”.³⁷⁷ Congress thus helped avoid

³⁷⁷ CRS Summary of Helping Families Save Their Home Act of 2009

potential political problems that might arise if individuals who didn't pay their mortgages were enriched during this program at taxpayer expense.

The Bureau of Consumer Financial Protection has rule-making requirements in that it is required to, "take specified considerations into account before prescribing a final regulation..."³⁷⁸

Section 604 of The Dodd-Frank Act amends the Bank Holding Company Act of 1956 such that the board of the FDIC is directed, "to take into consideration the extent to which a proposed bank acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the U.S. banking or financial system."

In the Dodd-Frank Act, the appropriate regulatory agencies are given the ability to set minimum capital requirements for bank holding companies and savings and loan companies.³⁷⁹ This authority came with the rule-making requirement that the agencies seek to make capital requirements counter-cyclical such that requirements are highest during strong economic periods and are less during a financial downturn.

In Section 718 of the Dodd-Frank Act sets forth procedures for the Securities and Exchange Commission and Commodities Futures Trading Commission for how to evaluate new derivative products. Meanwhile Section 723 of the Dodd-Frank Act adds rule-making requirements that constrain the Secretary of the Treasury's powers to exempt foreign swaps from regulation by the United States government.

In the Dodd-Frank act, the secretary of HUD is assigned the task of establishing a program to protect tenants of mid to large size rental properties as well as the properties themselves. The criteria for the program are optionally laid out by congress in the law, but left to the discretion of the Secretary. Meanwhile this subtitle directs the Treasury Secretary to post information online as part of an emphasis on transparency.

Also under the Dodd-Frank Act, the Federal Reserve is empowered to, but not required to, create standards that regulate the contingent capital required, additional public disclosure requirements, and limits on short-term debt. The act constrains the Fed's ability

³⁷⁸ CRS Summary of Section 1041 of Dodd-Frank Wall Street Reform and Consumer Protection Act

³⁷⁹ Section 616.

to decide on rules for capital requirements. It mandates that the Fed must take into account off-balance-sheet activities and enumerates several such activities that the Fed must include as part of their requirement rule.

5.3.6 Recommendations

Similar to rule-making requirement constraints described above, congress also made recommendations for agencies that it delegated powers to. These did not have the force of law that rule-making requirements do, but still could direct the actions of the agency that was delegated to toward congress' desired course of action.

The Dodd-Frank Act recommends the SEC use its authority to create general rules governing conflicts of interest covering a much wider scope of issues. By recommending a course of action for an agency, congress can guide the agency to what it believes is an important issue to address while leaving the experts at the SEC full range of action. It also allows for inaction if the agency deems that that is best or that the issue that it is asked to propose rules for is not a priority and can wait till a later period.

Congress delegated authority to the Secretary of the Treasury and entrusted him to spend a significant amount of money to improve the economy. In the Helping Families Save Their Home Act of 2009, congress included the recommendation that the Secretary of the Treasury should use the money authorized in the act to purchase mortgage revenue bonds for single-family housing. There were other similar recommendations in the act such as the recommendation that the Department of Justice should set up a Mortgage Fraud Task Force and a recommendation that foreclosures against mortgagors not occur until foreclosure mitigation provisions are put into place. Ultimately these were not explicit requirements, but merely the feelings or suggestions of congress. These suggestions had some weight, but allowed flexibility to the agencies that were delegated to.

Section 1124 of the Housing & Economic Recovery Act of 2008 includes a section stating congress' belief that securitization of mortgages add liquidity to the market and the exhortation that Fannie Mae and Freddie Mac should securitize mortgages acquired under

the act. Congress also included the recommendation that mortgage requirements and rules should not interfere with local rules that the holder of a foreclosed property maintain the property.³⁸⁰

With the Federal Insurance Office Act of 2010, Congress preempted some state law regarding the insurance industry. However, congress still deferred to the states on many several key points. It did however include in this act that it intends states to adopt nationwide, uniform requirements and procedures.³⁸¹

In the Dodd-Frank Act Section 939H, congress states its desire that the, “SEC should exercise specified rulemaking authority to prevent improper conflicts of interest arising from employees of NRSROs providing services to issuers of securities...” Congress did not have specific policy recommendations to deal with the fact that NRSROs had a conflict of interest in that they sold services to the organizations whose securities they are rating. It however let the SEC know that it would like the conflict of interest addressed.

In Section 1079A of the Dodd-Frank Act had the U.S. Sentencing Commission review and potentially amend sentencing guidelines for securities fraud under the guidance of congress’ recommendation that penalties and sentences should reflect the damage these do to the public and to financial markets and that they should ensure the appropriate amount of jail time. In this act congress was able to push for tougher sentences to these crimes without actually taking any action. It is able to position itself as being tough on financial crime and being with Main Street against the abuses of Wall Street.

Congress also included a provision in the Dodd-Frank Act that stated congress’ view that a fix to mortgage credit practices would not be complete without an overhaul of Fannie Mae and Freddie Mac. Politically however it was difficult for congress to act directly as they had received substantial donations from Fannie Mae and Freddie Mac and who were at risk for severe retributions if individual members of congress went against Fannie Mae and Freddie Mac. Thu congress states its view that Fannie Mae and Freddie Mac require major structural reforms to address problems of the organizations, yet no action is taken directly by congress to restructure these agencies.

³⁸⁰ CRS summary of Housing & Economic Recovery Act of 2008 Section 1605

³⁸¹ CRS Summary of Section 521 of Dodd-Frank Wall Street Reform and Consumer Protection Act

5.3.7 Exemptions

Exemptions are when Congress specifically exempts an entity from regulation or limits the facets in which it can be regulated for a certain amount of time. This allows congress to exempt certain favored groups from the adverse effects of regulation. This is a powerful ability that can make these groups becoming indebted to the members of congress who helped exempt them and thus can lead to campaign contributions, votes, and advocacy. It also allows for congress to avoid certain negative repercussions of regulation and to ensure the agency limits its actions to certain acceptable channels. In addition, it can be used in special circumstances or special cases to make allowances as specific circumstances demand. Exemptions can also enable a law to be passed that otherwise would meet with too much opposition from entrenched interests.

By specifically exempting a company, industry, or other favored group, congress ties the hand of the agency that it delegated to and limits its freedom of action. So doing can allow for distributional benefits to key constituents, which have positive electoral ramifications for members of congress who ensure the exemption gets implemented and thereby ensures that the agency cannot threaten the protected interest group.

During the crisis, there were several pieces of delegation that included exemption constraints. An example of an exemption constraint during this period was a provision in the Dodd-Frank Act, in which the ability to set capital requirements for financial institutions was delegated to regulatory agencies however Section 619 of the act exempts a number of activities such as the purchase of US securities and certain hedging activities.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 113 created the Financial Stability Oversight Council and delegated significant powers, but it placed limitations on these such as restricting the Board's supervision to the company's financial activities only.³⁸²

Section 763 of the Dodd-Frank Act exempts, "a security-based swap from clearing requirements if one of its counterparties is not a financial entity" or if the counterparty "is

³⁸² Pub.L. 111-203, Section 113

using such swaps to hedge or mitigate commercial risk”.³⁸³ The Dodd-Frank Act also included a section that exempts state-registered investment advisers from “certain restrictions on investment advisory contracts.”³⁸⁴

Exemptions from regulation were also given for loans that are guaranteed by the Farm Credit Administration. These loans did not have the requirement that securitizers keep a portion of the credit risk that congress placed on securitizers of other residential mortgages.

The Consumer Financial Protection Bureau is given vast domain, but areas such as real estate brokers, accountants, lawyers, auto dealers, and charities are all expressly exempted from the bureau’s purview. This keeps these industries from being adversely affected by new requirements. These industries had faced relatively little federal regulation and this exemption attempted to maintain this status quo. These are politically powerful constituencies that appear within most congressional district, which in part may be one of the reasons they had exemptions.

By way of comparison, compensation constraints, in which congress mandates that agencies compensate those adversely affected by new rules and regulation, were used far less and had much smaller effects on the final policy than their exemption constraints despite their similarity and the similar instances in which they would typically be used.

5.3.8 Oversight

Congress uses oversight of agencies and the other parts of the executive branch to help avoid an agent from setting a course that congress does not approve of. It also is used to ensure good government and avoid surprises. During the crisis Congress formalized oversight of a number of agencies by enshrining oversight provisions in the law.

Included in the section of the Housing & Economic Recovery Act of 2008 that created the FHFA were checks to ensure that the agency performed well and in a manner consistent

³⁸³ CRS Summary of Section 763 of Dodd-Frank Wall Street Reform and Consumer Protection Act

³⁸⁴ CRS Summary of Section 928 of Dodd-Frank Wall Street Reform and Consumer Protection Act

with congress' wishes. Amongst these checks is that this act created an Office of the Inspector General which is a position appointed by the president which must be confirmed by the senate.

Among other delegations of authority during this period was the increase in the authority of the Comptroller General, who is the head of the Government Accountability Office. This helped constrain the actions of agencies that were delegated additional powers during the financial crisis. In addition, there was a Special Inspector General for TARP (SIGTARP) that was created to allow for increased scrutiny of TARP. Other oversight included a Congressional Oversight Panel, the Financial Stability Oversight Board (FSOB), and additional requirements for the Government Accountability Office (GAO) and the Congressional Budget Office (CBO). This series of organizations and agencies helped ensure that the considerable funds used for TARP were expended in a manner consistent with congress' wishes. These oversight agencies have a number of different forms.

The Financial Stability Oversight Board (FSOB) was created to oversee the Department of the Treasury's actions vis-à-vis the TARP program. It was mostly charged with looking for waste and abuse and recommending changes to minimize these. However it also has more than just an advisory role; it has the power to ensure that its actions are in accordance with the needs of the United States economy. It issues a quarterly report to congress and to the Congressional Oversight Panel. The FSOB is a temporary board that was set up to deal with this one specific task. The members of the board are prominent members of the administration and they head executive branch agencies. In particular they are the Chairman of the Board of the Federal Reserve, the Secretary of the Treasury, Director of the Federal Housing Finance Agency, Chairman of the Securities and Exchange Commission, and the Secretary of the Department of Housing and Urban Development. This delegation by congress thus also helps assure that agencies are working together.

The Congressional Oversight Panel (COP) was also established by the TARP Act. It is constituted of members of congress and is given a role in ensuring a proper management of TARP funds, overseeing financial markets, and ensuring the regulatory system for these troubled assets and those that participate in the market contribute to the emergence of healthy, long term market for these securities. This panel was charged with issuing a

monthly report to congress stating their findings. This helps ensure that TARP gets continued attention and oversight from congress. The congress assigned five experts to this board in a roughly non-partisan manner that has representatives appointed by both the Senate and the House of Representatives. In addition, this panel was charged with creating a one-time report regarding regulation by January 20, 2009 detailing potential reforms to the regulatory scheme that was in place that might prove beneficial.

The Congressional Oversight Panel was a temporary panel that congress designed to terminate on or before December 31, 2009. Some members of this panel were members of congress and others were outside experts. Thus this ad hoc panel was not completely nonpolitical. On February 6, 2009 the COP issued a report stating its finding that the Treasury Department had paid far more than market value for the assets that it purchased. This overpayment of \$78 billion for an estimated \$176 billion worth of assets was opposed to the Emergency Economic Stabilization Act of 2008 and the explicit mandate of TARP which is required to safeguard public funds rather than to subsidize financial institutions. The COP summarized its view on TARP by saying, "In particular, the Panel sees no evidence that the U.S. Treasury has used TARP funds to support the housing market by avoiding preventable foreclosures."³⁸⁵ They also said, "Although half the money has not yet been received by the banks, hundreds of billions of dollars have been injected into the marketplace with no demonstrable effects on lending."³⁸⁶ This criticism focuses on the program's value and is a broader criticism than whether it had lax control that allowed fraud. This sort of oversight can be important though little ultimately came from the concerns that were voiced by the COP.

Another body in the legislative branch tasked with overseeing TARP funds was the Governmental Accountability Office (GAO). The GAO oversees the actions of much of the executive branch, but they, and in particular the head of the GAO, were given specific guidance as to the oversight of the administration of the TARP program. The head of the GAO, who is the Comptroller General, is mandated to do an annual audit of TARP. This legislation required the Treasury to make the relevant data and documents related to the

³⁸⁵ Congressional Oversight Panel. The Second Report of the Congressional Oversight Panel: Accountability for the Troubled Asset Relief Program. January 9, 2009. Pg. 10.

³⁸⁶ Congressional Oversight Panel. The Second Report of the Congressional Oversight Panel: Accountability for the Troubled Asset Relief Program. January 9, 2009. Pg. 20.

TARP program available to the GAO to perform the necessary analysis and oversight. The GAO's role is to keep congress apprised as to TARP's activities and oversee them. In this sense it acts to gather and compile data, and to act as a source of fire alarms for congress on the issue. However, the ability of GAO to actually enact changes is quite limited. It suggested a number of changes to the TARP program which could help rectify a perceived lack of controls in place on the program. Some of these suggestions were accepted and some were rejected by the Office of Financial Stability. Neel Kashkari, the chairman of the OFS, rejected the GAO's key suggestion of adding additional reporting requirements for banks. This did not allow congress to have the level of control and influence that congress wanted. Members of congress such as Rep. Elijah Cummings and Speaker of the House Nancy Pelosi agreed with the GAO's findings and wished additional auditing mechanisms and financial controls were put in place. Speaker of the house Pelosi went so far as to say that the TARP program, "is not accountable to American taxpayers."³⁸⁷

This act also created a Special Inspector General for TARP (SIGTARP) to help with oversight of the TARP program. This position like so many others was designed so that it would be appointed by the president and approved by congress. This enables both the president and the congress to have some influence on this individual and to make sure that the individual selected generally has the same general position on key issues as do the president and the congress. The Special Inspector General is charged with investigating and monitoring the actions of the OFS in administering the TARP program. Similar to the GAO, part of SIGTARP's responsibility is to report their findings to congress. In the case of SIGTARP they are required to report on the TARP program once per quarter. This position is separate and distinct from the position of the Inspector General of the U.S. Department of the Treasury. By creating a new position it helped keep constant focus on the TARP program even after some of the media spotlight had lessened. The Special Investigator General for TARP was confirmed on December 8, 2008. The job of overseeing such a large program required significant resources that were available to the Special Investigator General by using the resources of the Office of the Special Inspector General for the Troubled Asset Relief Program. This office has a number of agents authorized to make arrests. It thus serves as a law enforcement agency as well as its oversight function. The

³⁸⁷ Kelley, Matt. "GAO calls for more details on use of bailout funds." *USA Today*. December 13, 2008.

SIGTARP in some instances has been able to stop malfeasance, has recovered over \$150 million in assets, and has led to the conviction of 14 individuals for fraud. Having numerous overseers led to various viewpoints being voiced. For instance Neil Barofsky, the Special Investigator General of the Troubled Asset Release Program, was very critical of the bailout of the American Insurance Group (AIG) which raised the prominence of that decision in the public discourse.³⁸⁸

The SIGTARP stated that, "Inadequate oversight and insufficient information about what companies are doing with the money leaves the program open to fraud, including conflicts of interest facing fund managers, collusion between participants and vulnerabilities to money laundering".³⁸⁹

Dodd-Frank Act creates an ombudsman to act as a liaison between a retail investor and the Securities and Exchange Commission. The ombudsman acts as an advocate, but also acts in an oversight role. The Dodd-Frank Act also added new whistle-blower protections that helped produce additional oversight of the industry and the administration with relative low cost in terms of time of government resources.

5.3.9 Spending Limits

Epstein and O'Halloran define an act as having spending limits if it defines, "a maximum amount that the agency can allocate to any activity or set of activities, either stated explicitly or in a formula"³⁹⁰ this limit is important as it can limit the scope of an agency's programs and can also help prioritize actions. This can help congress protect constituents or allow it to be seen to tackle the issues of the day without giving too much authority to executive agents. It can keep executive agencies in check by effectively setting their agenda and capabilities. It can also handicap agencies and make them dependent on activist groups or industry. This can lead to agency capture or a weak ineffectual agency which may be what congress wishes such as when creating a regulating agency that is

³⁸⁸ Wagner, Daniel. "Lawmakers Seeks Fed Audit after Critical AIG Report" *The Memphis News*. November 19, 2009.

³⁸⁹ Duthel, Heinz. *European Debt Crisis 2011*. IAC Society. 2010. Pg. 39.

³⁹⁰ Epstein and O'Halloran. 101.

popular, but that congress does not wish to have too much ability to regulate an industry. Congress can put a cap on spending to ensure that the agency does not change priorities. It also limits the amount of discretion that the agency has to make case-by-case decisions on spending priorities which is one of the main powers that agencies typically have. Spending limits and budgets can be an ex ante control device that principals can use to control agents.

Despite their ability to constrain actions and set priorities, there was relatively little use of spending limit constraints during this period. The most notable use of spending limit constraints was Title XIII Dodd-Frank Act, which was also known as the Pay It Back Act. This act limited the amount of TARP funds that the Secretary of the Treasury was authorized to have outstanding at any given time to \$475 billion. Similarly, it included a rescission of used funds from the American Recovery and Reinvestment Act of 2009. However, other than this act, this type of constraint was largely unused.

5.3.10 Appointment Power Limits

Appointment power limits are constraints on who can be appointed to positions. There are some minor constraints on appointments that had already been in place such as that many positions require the advice and consent of the Senate. The president with the advice and consent of the senate appoints the heads of each of the cabinet level agencies as well as other key positions such as deputy secretaries and undersecretaries. This comes from the Appointments Clause³⁹¹ of the U.S. Constitution that gives the president the authority to appoint all “Officers of the United States”. The phrase “consent of the senate” as laid out in the constitution in practice means that when the presidential nominates his nominees for these positions they must be voted on and approved by the Senate. While this is certainly a limit on the president it is required of many appointments. This paper is focused primarily on new appointment power limits that go beyond this low threshold to constrain the agent even further during this period.

³⁹¹ United States Constitution, Article II, Section 2, Clause 2.

Appointment power constraints are another type of constraint that were used sparingly during the crisis and in the period following it. Some restrictions were laid out for the new offices and agencies created during the crisis, such as that one of the voting members of the Financial Stability Oversight Council needs to have knowledge of the insurance industry. However, the net effect of the constraints was relatively minimal and did not greatly affect the policy created during this period.

Other appointment power constraints were included in The Housing and Economic Recovery Act of 2008 and decreased the number of board members on the boards of Fannie Mae and Freddie Mac from 18 down to 13 with the director of the Federal Housing Finance Agency able to change this number at their discretion. The act also strips the president of appointment power for the boards of Fannie Mae and Freddie Mac. Which was perhaps one of the most significant of these constraints. But these in practice were minor changes as these organizations were placed under the conservatorship of the Federal Housing Finance Agency in September 2008 which effectively stripped the board of its authority and in November the FHFA reconstituted Fannie Mae's board. Due to the conservatorship, the boards of Fannie Mae and Freddie Mac work at the behest of the FHFA.³⁹²

5.3.11 Judicial Review

In the U.S. legal system a court can look at the statutes proposed by an agency and determine if the delegation is within the scope of the authority granted to the executive branch by the initial law that vested the agency with power. If it is found to exceed the authority delegated and to be Ultra Vires, then the courts can overturn the legislation.

The Judiciary also has taken steps to ensure the executive actions are appropriate and it can overturn executive actions that it judges are not constitutional. This sort of judicial review started to increase around the time that there began to be an increase in delegation. This is an understandable trend since a shift of power to the executive requires

³⁹² Fannie Mae.

some assurance for other branches that there is neither too great a concentration of power nor a misuse of power.

In many cases, congress wishes to limit judicial power and authority. Vaguely written laws give the judicial branch the ability to interpret laws and place their own stamp on these laws. Congress thus formulates laws in a manner so that the judicial branch cannot set itself up as a competing power with sway over the agency.

Judicial review can be used to ensure the decision making process was fair and followed established guidelines. A judge in this case would have a check on executive action. It differs from many other constraints in that it can give relief or recourse to an individual person or entity. Many other constraints are broad-brush attempts to constraint agency action, but are less focused on individual cases and details.

Typically even for a person or group with legal standing, they must have followed a process before asking for judicial review and be consistent with the exhaustion of remedies doctrine. Furthermore the issue at hand must be a general controversy worthy of adjudication and meet the ripeness requirements to be heard. In practice, it is often the case that cases are dismissed due to a ruling that the plaintive lacked standing in the case and thus did not have a right to bring the case before the court.

If a court vacates an agency's rule or regulation, it will typically grant the agency the prerogative of reissuing the rule in a manner that addresses the legal problems that the court found in the rule.

By judicial review constraint, this paper refers to something beyond this basic form of review. Constraints of this sort would be provisions created by congress that specifically provided a method of judicial review for an agency's actions. In this way, judicial constraints serve a role similar to traditional oversight. This serves as a constraint in that it can limit the actions an agency takes and allow constituencies that are unhappy with agency actions to seek remediation.

One of the key sections of this act creates a provision to allow for judicial review of the actions performed by the Treasury Department under the Emergency Economic Stimulus Act. The liquidation provisions under Title II of the Dodd-Frank Act specifically list

judicial review provisions for the financial companies to be liquidated if the company's directors do not agree to liquidate. The authority granted to the FDIC and the Securities Investor Protection Corporation (SIPC) by the Dodd Frank Act to wind down operations of banks and other financial institutions was specifically designed to be subject to judicial review if the board of directors of the company that is to be liquidated does not agree to the liquidation.

A special judicial panel was also created as part of the United States Bankruptcy Court for the District of Delaware. The panel must concur with the Secretary of the Treasury before a company can be taken over by the FDIC or SIPC or else the Treasury can appeal to an appeals court that can further be appealed to the Supreme Court. The panel that makes the initial decision, the Orderly Liquidation Authority Panel, is designed so that it ensures that the members of the panel have the necessary understanding of the financial system to evaluate the situation.

By designing such a judicial review methods congress was attempting to place a check on the authority given to the Treasury Department and FDIC while still allowing a case-by-case decision which congress would have trouble overseeing. The use of judicial review also is useful in showing the rule of law in the liquidation of these companies. It legitimizes the process more than if an agency could just liquidate a company against its wishes without any recourse.

Another instance of Judicial Review being specifically included in an act of delegation was the Dodd-Frank act. In the Dodd-Frank Act, state attorneys general are specifically given authority to bring court cases on behalf of their state if they feel the act is not being enforced.³⁹³ This was designed to ensure that parts of the federal government did not neglect to write and implement the rules and regulations necessary to implement the act.

Like judicial review, appeals procedures can help keep an agency monitored and thus in line with congresses wishes and less likely to create negative surprises. Steps such as giving standing to a group in the law can help limit agency action and can appease interest

³⁹³ CRS Summary of Section 1042 and Section 1422 of Dodd-Frank Wall Street Reform and Consumer Protection Act

groups hurt by the policy, as congress can seem to be on the side of the constituents and against the “rogue” agency.

The use of judicial review constraints were comparatively minor and have had had minor overt effect of policy thus far. While it has been employed in the instances mentioned above, it was used less consulting and reporting requirements and had less affect than other constraints such as time limits constraints.

5.3.12 Summary of Constraints Used

Due to the vast amount of delegation that occurred in response to the financial crisis, most every type of constraint was used multiple times during this period, however there were differences in prevalence and effect of different types of constraints. Types of constraints used during this period included time limit constraints, consultation constraints, reporting requirements, public hearings, rule-making requirements, exemption constraints, compensation constraints, spending limit constrains, appointment power limits, and judicial review constraints.

The types of constraints that were used most during this period were time limit constraints, consultation and reporting requirements, as well as rule-making requirements and recommendations. These seemed aimed at making sure that a policy was created quickly, but that the policy would not outlive the need for it and would be phased out when it was no longer needed. These constraint types also helped ensure that congress and the public was kept aware of proposed changes to public policy and allowed course corrections by congress if policy seemed to be moving in a direction that congress did not approve of.

Other constraint types such as compensation constraints, spending limits, appointment power limits, constraints requiring legislative action, and judicial review constraints were used less frequently and to less effect. They had less benefits with regard to dealing with a crisis and making sure that effective policy that congress could approve of was enacted.

5.4 Use of Unilateral Executive Action

Surprisingly little substantive unilateral executive action was taken by the president in response to this crisis. When there are large unilateral policy shifts, they are typically enacted by means of executive orders, which are perhaps the most powerful tool the president has to shift domestic, non-defense policy. They can also allow the president to take action even when congress does not approve of the proposed policy change. However, during the crisis the use of executive orders relating to the crisis was minor as was their results.

Historically there have been times when presidents have taken unilateral executive action at times where it could be argued they did not have the authority based on the powers laid out in constitution or through explicit delegation of power by congress. During the depth of the crisis congress was relatively unlikely to try to curb assertion of power by the president, however both President Bush and President Obama took relatively little executive action. This is somewhat surprising juxtaposed against some of the executive actions that took place in other policy areas.

A rational president will be more likely to work with congress rather than take unilateral action if he is likely to get the policy he wants enacted anyways. However, having a hostile congress will lead the president to attempt unilateral action. A hostile congress can be caused by numerous factors including the result of the president and congress being of opposing parties, a president that has used unilateral action too often and has neglected congress, or a weak president plagued by failures or scandal. During a crisis or another time-sensitive situation many have hypothesized that there would be more presidential unilateral action than there would be otherwise. Besides allowing for quick policy changes and the enacting of policy without much risk of failure, unilateral executive action can also be used to make the president look effective and decisive.

The main executive orders that were issued in response to this crisis primarily created boards and task forces, which primarily served in advisory roles wherein they could suggest policy, but could not create or implement policy. The boards created by these

executive orders were the President's Economic Recovery Advisory Board,³⁹⁴ the Financial Fraud Enforcement Task Force,³⁹⁵ the National Commission on Fiscal Responsibility and Reform,³⁹⁶ the President's Council on Jobs and Competitiveness,³⁹⁷ and the President's Advisory Council on Financial Literacy.³⁹⁸

Most of these boards were limited in scope and were also limited in length in that the majority of these boards had 2-year sunset provisions. The actual tangible results from these boards were relatively minor with regard to the sum of government action that was taken in response to the crisis.

In addition, almost no policy focused on the financial crisis or financial regulation was created by unilateral executive action. The president has a number of tools that he can use to unilaterally create and shape policy such as executive actions, executive agreements, presidential directives, presidential proclamations, and signing statements. Many of these can be quite powerful and can allow the president to essentially create policy without the need to work with congress. This can be useful for creating effective and timely policy especially during periods of high polarization between the parties. During President Bush's second term and for much of President Obama's time in office there was considerable gridlock with congress often struggling to pass bills and not always able or willing to push forward the president's proposals. With high polarization we would expect executive actions such as executive orders to be a more compelling way to create policy for these presidents and would consequently have expected several executive orders meant to address the system of financial regulation in America. However, neither president employed such executive actions and instead left the responsibility to create the relevant law to congress, which was in turn delegated to governmental agencies. This is juxtaposed against the fact that both these presidents used extensive use of unilateral executive action in numerous areas such as terrorism, foreign policy, minimum wage, stem cell research, national security, and immigration. The only major executive orders that came about due to the financial crisis were those focused on deficit reduction, the debt limit, and spending

³⁹⁴ Created by Executive Order 13501 which was issued on February 6, 2009

³⁹⁵ Created by Executive Order 13519 which was issued on November 17, 2009

³⁹⁶ Created by Executive Order 13531 which was issued on February 18, 2010

³⁹⁷ Created by Executive Order 13564 which was issued on January 31, 2011

³⁹⁸ Created by Executive Order 13455 which was issued on January 23, 2008

cuts. While these were focused on fiscal policy, they were not related to the financial regulatory system, but instead were targeted to a separate issue that became high profile in the years following the financial crisis.

As stated above, the steps that were taken during the financial crisis, were minor executive orders that presidents Bush and Obama issued in order to address the economic problems the nation was facing. The main example of this was Executive Order 13501 which was issued by President Barack Obama on February 6, 2009. This executive order established President's Economic Recovery Advisory Board as an entity within the Department of the Treasury. This board was designed to be a temporary board that would advise the president on how to address the financial crisis. This ability to establish a sub-entity under the treasury is usually a power that congress would wield, but in this case, the president was wielding this power. A similar body was established by President Obama by Executive Order 13564 on January 31, 2011. That executive order established the President's Council on Jobs and Competitiveness in order to advise the president on bolstering the economy and the prosperity of Americans. Other executive orders during this period take steps to increase the efficiency of government or national competitiveness established the Performance Improvement Council,³⁹⁹ National Commission on Fiscal Responsibility and Reform,⁴⁰⁰ the President's Advisory Council on Financial Capability,⁴⁰¹ Intellectual Property Enforcement Advisory Committees,⁴⁰² the President's Advisory Council on Financial Literacy,⁴⁰³ and an executive order to stop earmarks.⁴⁰⁴ Another attempt to boost the USA's competitiveness is the SelectUSA Initiative, which seeks to have both foreign and domestic business choose to invest in America. This initiative was established by Executive Order 13577 and includes many provisions in which the president utilizes powers that typically are used by congress such as assigning funds and staff from the Commerce agency for this initiative. This executive order also required giving new responsibilities to the Director of the Office of Management and Budget to help implement the other provisions in the order. Often these executive orders tie the authority to issue

³⁹⁹ Executive Order 13450

⁴⁰⁰ Executive Order 13531

⁴⁰¹ Executive Order 13530

⁴⁰² Executive Order 13565

⁴⁰³ Executive Order 13455

⁴⁰⁴ Executive Order 13457

executive orders to specific laws. For instance the National Export Initiative that Obama established in Executive Order 13534 was authorized through the Export Enhancement Act of 1992.⁴⁰⁵ This Export Enhancement Act explicitly delegated authority to the president to take the steps in this act and gave him other general powers to promote U.S. exports.

Many of these executive orders touched upon financial policy, but none had far reaching consequences or was directly focused on reforming the financial regulatory environment or on responding to the crisis.

Thus though the president could have taken unilateral action to create new policy, the bulk of the policy creation taken in response to the financial crisis was created directly by congress, was formally delegated by congress, or was asserted by the executive agencies.

This lack of unilateral executive action appears in large part due to the fact that there was considerable public sentiment for reform and around the period of Dodd-Frank Act, when much of the financial reform was being decided, Democrats controlled the House, the Senate, and the presidency. Thus they were able to enact much of their preferred policy changes in legislation rather than needing to use executive orders. Many of the changes that Dodd-Frank brought are more popular with liberal rather than conservative groups. Many typically right-leaning organizations, such as the U.S. Chamber of Commerce, came out against many of the new requirements, while many left-leaning groups have lauded the additional regulation. Lawmakers also emphasizes the political divide on this issue. Senator Dodd, who was at the time the Chairman of The Senate Committee on Banking, Housing, and Urban Affairs and was one of the namesakes of the Dodd-Frank Act, said, "I could have tried to draft something that was, sort of, already a compromise of ideas here, but I think you make a huge mistake by doing that. You're given very few moments in history to make this kind of a difference, and we're trying to do that."⁴⁰⁶ The bill passed in a very partisan vote with essentially no Republican support. Furthermore the president put forward some of the provisions such as the Volker Rule that later became law.

Early in the crisis, when President Bush was still in office, hesitancy to take executive action seemed in part an attempt to distance the policy responses from himself because he

⁴⁰⁵ Public Law 102-429

⁴⁰⁶ Applebaum and Denis. 2009.

had a realization that his legacy was tarnished and policy that he created to handle the crisis would start out stigmatized and potentially without the adequate trust that was needed during that period to settle markets and boost public sentiment. Henry Paulson in his memoir of the crisis essentially ascribed these motivations for the reason much of the policy creation was delegated either explicitly or implicitly.⁴⁰⁷ It seems likely that motivations for delegating would also be a reasonable explanation for forgoing unilateral executive action. Timothy Geithner's assessment of Bush's role in the financial crisis seems largely consistent with that of Henry Paulson's and thus it lends credibility to the attribution of these motivations since unlike Paulson, Geithner was far more liberal and less likely to paint President Bush in a flattering light.

5.5 Use of Implicit Delegation

There were numerous instances of delegation that took place during this period. These delegations did not all take place in the same way. There were a profusion of methods of delegation. There were both acts of explicit delegation where congress passed a law giving power and authority to bureaucrats and implicit delegation where the administration asserted a power that had not been explicitly delegated or which came from the constitution and the congress did not take action to question this potential transfer of authority.

By implicit delegation, this paper refers to instances where the administration or a governmental entity declares that they have a power and use this power to affect policy despite the fact that the power was not explicitly delegated to that political entity. This paper will refer to this as delegation because the congress and the courts did not challenge these transfers of power from the legislative to the executive branch and these powers become informally solidified in the new branch so that even after the crisis, remnants of these new powers remain with their new wielders. In so far as congress, which has the

⁴⁰⁷ Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus, 2010.

power to forestall such transfers of power, takes no steps to do so, they are affectively letting power be transferred to an agent to act on their behalf or in other words are effectively delegating to the other entity.

There were several types of implicit delegation during this period. An example was when the Fed and Treasury Department took extraordinary actions to stop financial companies from failing though they had not formally been given some of the powers they exercised. Still congress gave them slack and did not question this declaration of authority though it certainly could have controlled the power this way. In fact, the acceptance of congress' acceptance of the transfer of power to the administration can be seen in Barney Frank, Chairman of the House Committee on Financial Services, told Secretary of the Treasury that he should stretch the authorities that he had in his position in order to resolve the crisis and that he would not be questioned.⁴⁰⁸ This led to a quick response to the crisis and allowed for a more vigorous government response than if the Secretary of the Treasury stayed within more established powers.

When congress is at odds with the bureaucracy or the president, congress holds the final say. Almost all actions of agencies or unilateral actions of the president can be undone by congress. Congress has the final word in legislative matters and when a law passed by congress conflicts with agency regulations or the unilateral actions of the president, the actions of congress have the force of law and the other actions are effectively countermanded. Thus assertions of power that are not contained in the constitution and which had not been previously delegated by the administration or the bureaucracy are effectively an implicit delegation.

Once the depth of the crises had passed and government began to focus on regulatory reform and avoiding future crises. The type of delegation that was used for the bulk of the policy creation relating to the overhaul of the financial regulatory system is explicit delegation. A common example of this is when congress passes a law that transfers power to the executive branch. Explicit delegation was one of the key methods used during the crisis.

⁴⁰⁸ Paulson. 2010. Pg. XIX.

In instances such as TARP or the creation of Consumer Finance Protection Bureau there was an explicit delegation to an agency and members of the administration that was written into law. In other cases such as the actions of the Treasury Secretary to prop up banks or the Federal Reserve lending to organizations that had not been approved of.

The Term Asset-Backed Securities Loan Facility (TALF) was another program that was created to deal with the crisis. In this case, the Federal Reserve was the agency behind the program and with it the Federal Reserve attempted to increase lending. Because the funds for the program did not come from the Treasury Department, congress did not have to approve the funding. However, congress did pass an act forcing the Federal Reserve to show how the money was used. This program helped increase credit availability for asset backed securities and thereby increase liquidity in these secondary securities markets. This program was shut down well before it had spent the amount it was initially designed to spend. By having the Federal Reserve determine that it had authority to implement this program and it was able to self-fund the program, it was able to take action without getting approval from congress. Ultimately congress passed a law that gave it oversight of this program.

While this paper has mostly focused on more formal methods that congress has used to control or constrain those that were delegated to, Congress can also use informal methods to set the focus of an agency. For instance, in June 2008, the Speaker of the House, Nancy Pelosi, wanted the Commodity Futures Trading Commission to limit speculation in the energy market and sent a letter to the president asking him to guide the CFTC to use its powers to enact this change. The democrats also attempted a more formal approach as well and proposed a similar measure in the Energy Markets Emergency Act of 2008 though the Republicans, despite being in the minority had enough votes to prevent cloture and thus a vote on the measure.

An extensive view of its own power can allow an agency to expand its actions beyond the limits of its formal powers. This is particularly true where the exact extent or boundaries of delegation were not specific. An example of this was FDIC insuring foreign deposits. This was a useful power that enabled it to support Citibank, which was on the verge of collapse and had a high percentage of its funds coming from foreigners. Because of

Citibank's reliance on foreign deposits, it would be more at risk of a bank run if it could not insure these funds since the money could be taken out and deposited in another country where the deposits would be insured.

In addition, a considerable amount of power had been previously delegated in such a way that powers were realized once there was a crisis. The definition of emergency was ill-defined so that the administration and agencies could make their own determination on their powers. Many of these powers were given by prior laws, but had never before been used. These powers were given in case a need would eventually arise in much the way that supplies are prepositioned before a storm to be there when needed.

Substantial powers had previously been delegated and could be used by members of the administration when an emergency called for these powers to be used. However, as the president and bureaucracy were the main individuals that could declare a state of emergency, these powers were in essence delegated to the administration as the administration saw fit. In order to give the administration significant powers these delegations were broadly written and gave considerable leeway to the administration. These prior delegated powers were used extensively during the crisis.

6. Conclusion

Congress, the president, and the bureaucracy all can craft and shape public policy as can other entities as well. The method by which policy is created can explain some of the results of the public policy such as the political results for those involved, the structure of the policy and what that means for its distributive benefits, its adaptability and responsiveness, as well as to what extent it meets the needs of the nation in the present and moving forward.

There are many avenues of policy adoption open to multiple political actors. Each of these avenues has its own particular characteristics such as who may utilize it, whether there are checks on the action, the timeframe the policy deals with, its flexibility, its ability

to leverage expertise in a field, the time frame for its adoption, and its effect on popularity and political factors. There has been an increase in the capabilities and responsibilities of the bureaucracy and that has led to much policy making getting shifted to executive agencies as well as other entities such as ad hoc committees and private entities. This paper investigated the manner in which policy was created to address a severe financial crisis in hopes of learning the consequences of these methods.

In a crisis there are often many factors that are not in effect when enacting policy in other periods where policy can be created in more deliberative way. When not in a crisis, political actors make determinations about what policy areas they want to approach and they can craft a bill and gain support often over years for a specific course of action. Likewise, when they are not in the midst of a crisis, agencies can study an issue until they have a full understanding and are prepared to issue new policy. In a crisis, due both to the crisis and to higher scrutiny by the public, this is no longer possible and action needs to be taken quickly and often without all the facts. This is not ideal and can lead to poor policy being created. Thus by delegating to an executive agency, congress is able to avoid a rushed policy response to an important issue area and allow an agency with more available resources and expertise to determine policy in a more deliberate manner. Even when the policy to be created deals with future crises, congress still feels a need to act quickly to quell the clamor of the public. Congress thus can comply with the wishes of the people for action without rushing into policy creation without the necessary grasp of the consequences of that policy.

The president has a number of policy-making tools such as executive orders and executive agreements. However, as we have seen, the president played a relatively minor direct role during the financial crisis in that he neither took significant unilateral executive action nor was the president delegated significant new powers by congress to deal with the crisis. Rather, in response to the crisis, the president relied largely on his power of persuasion to shape policy and acted in a manner similar to that described by Neustadt.

We also saw that there were significant amounts of implicit delegation early in the crisis. In these cases, members of the bureaucracy asserted powers and made policy decisions without explicitly being granted powers by the constitution, congress, or the

president. The amount of implicit delegation decreased as the crisis receded and the focus of government shifted from forestalling the deepening crisis to preventing future crises.

Delegation, both implicit and explicit, was used to create a large percentage of the financial policy during this period. This appeared in part to be due to congress looking to delegate away difficult decisions to executive agencies. As we saw, there was considerable support during this period for the abdication hypothesis. Congress on multiple occasions made a strategic decision to delegate away authority and responsibility in order to help its members politically.

The acts of delegation during this period were also made in a strategic way in which the agents of delegation and the constraints on the agent's new power were made with specific ends in mind. Agents were selected or created for a variety of reasons, the most common of which during this period were to ensure agent independence, to leverage agency expertise, to ensure coordination, and to focus attention on a specific issue or policy sphere.

The use of constraints varied quite widely, with different types of constraints being used for different purposes as well as for different circumstances. Among the most common constraints used were time limits. These were used both to ensure that actions were taken in a timely manner by those that were delegated powers as well as to provide end dates after which additional powers that were delegated to deal with the crisis, but which were not needed beyond that period, would revert back to congress.

There are often different time horizons for policy in dealing with a crisis. There may be policy designed to deal with the immediate effects of the crisis, policy with a slightly longer term that seeks to deal with the underlying causes of the crisis and stop the current crisis, and a long term time horizon that seeks to stop similar crises from occurring in the future, fix systematic weaknesses, or provide safety nets should similar crises arise. The needs of the moment are not always the long term needs and there is always the potential for overreaction in which for political reasons or short sightedness policy is created that serves the current interests, but will be unneeded long term or could potentially have negative long term ramifications. These policies can be created and enshrined in law and are hard to undo going forward. Congress seems to have tackled this challenge by relying

heavily on time constraints and sunset provisions on the powers that it delegated during the crisis.

Another common constraint type used during this period were consultation requirements that ensured that agencies were working together to deal with the crisis and were not making unilateral decisions and that they were informing counterparts or proposed policy changes in a timely manner. This was designed to ensure that input from multiple political actors were taken into account and a more holistic response could be crafted to deal with the financial crisis.

Rule-making requirements and recommendations were also used extensively during this period and helped congress shape the direction of policy even when much of the lawmaking had been delegated to other actors. Rule-making requirements allowed the agent of delegation to use their judgment and take action, but it limited the scope of the action or prescribed methods by which policy should be created.

By way of contrast, other types of constraints such as spending limit constraints, appointment power limits, compensation constraints, and judicial review constraints were used relatively infrequently during this period. Furthermore their use had relatively minor effects on policy creation. In part their disuse was because they were less focused on the need to immediately create policy and the requirements of having multiple actor work together to craft a cohesive regulatory system, the way that time limits and consultation requirements were.

The implications of this study can be used in determining how best policy should be made during a crisis and the structure and features that would be appropriate to accomplish the nation's goals. It also lays out the often more complex interplay between various political actors which can be investigated more generally in future papers. In addition, a quantitative study of a larger period may find trends and tendencies that would be more generalizable than in the case study based approach this paper put forward. In addition this paper has mostly looked at a recent timeframe, but an investigation could be done to see how policy making in crisis situations has changed over time or if indeed there are similarities between other crises such as the response to World War II, the Great

Depression, and the terrorist attacks of September 11th and the recession that began in 2007.

This paper tries to answer some questions, but it also leads to additional questions. One area for potential further study is to investigate other types of crises to see if policy responses had similar characteristics. It could be useful in determining the extent of similarities between the government's response to various types of crises, be they political, economic, social, defense, environmental, etc. For instance the governmental response to this crisis seemed to have a parallel in the government response dealing with the aftermath of the September 11th, 2001 terrorist attacks. It was vast and consisted of a vast number of governmental actions taken in several policy spaces and by a large number of political actors. This in particular could be a good case study that would allow for a good comparison.

Bibliography

1. Aberbach, Joel D. *Keeping a Watchful Eye*. Washington, DC. The Brookings Institution, 1990.
2. Aberbach, Joel D. and Bert Rockman. "Image IV Revisited: Executive and Political Roles" *Governance*. Vol 1, Iss. 1. Pages 1-25. 1988.
3. Ackerman, Andrew and Alan Zibel. "Dodd-Frank Law Still Far From Done." *The Wall Street Journal*. July 21, 2014.
4. Adams, John. "To Hon. John Penn 1776". 1776.
5. Akerlof, George A., and Robert J. Shiller. *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism*. Princeton University Press, 2010.
6. Alden, William. "For Wall Street Overseer, Progress Comes at a Crawl." *New York Times* 3 January 2012.
7. Allen, Mike and David Rogers. "Bush Announces \$17.4 Billion Auto Bailout" Politico. December 19, 2008. <http://www.politico.com/story/2008/12/bush-announces-174-billion-auto-bailout-016740>
8. *B. Altman & Co. v United States*: 224 US 583 (1912).
9. American Federation of Labor and Congress of Industrial Organizations et al. v. Alfred E. Kahn, Chairman, Council on Wage and Price Stability, et al., Appellants., 618 F.2d at 790. 1979.
10. Andrews, Edmund L., Michael J. de le Merced and Mary Williams Walsh. "Fed's \$85 Billion Loan Rescues Insurer" *The New York Times*. September 16, 2008.
11. Applebaum, Binyamin and Brady Dennis. "Legislation by Senator Dodd Would Overhaul Banking Regulators." *Washington Post*. 11 Nov 2009.
12. Aranson, Peter H. , Ernest Gellhorn, and Glen O. Robinson. "Theory of Legislative Delegation" *Cornell Law Review* 68:1. 1982.
13. Arneson, Richard J. "Democracy is Not Intrinsically Just" *Justice and Democracy*. Cambridge University Press. 2004.
14. Arnold, R. Douglas. *The Logic of Congressional Action*. Yale University Press, 1992.
15. Arthur, W. Brian. "Beyond Rational Expectations: Indeterminacy in Economic and Financial Markets." In *The Frontiers of the New Institutional Economics*. Academic Press. 1997.
16. The Associated Press. "Get On It, Congress! Treasury's Paulson Says Speed Crucial on Fannie, Freddie" *New York Daily News*. July 22, 2008. <http://www.nydailynews.com/news/world/congress-treasury-paulson-speed-crucial-fannie-freddie-article-1.349158>
17. *The Aurora v. United States*: 11 U.S. 382 (1813).
18. Bair, Sheila. *Bull by the Horns*. Simon & Schuster, 2013.

19. Balz, Dan. "Obama's Debt Commission Warns of Fiscal 'Cancer'" *Washington Post*. July 12, 2010.
20. Barnard, Kevin F. and Alan W Avery. "Basel III v Dodd-Frank: What Does it mean for US Banks." *Who's Who Legal*. January 2011.
<http://www.whoswholegal.com/news/features/article/28829/basel-iii-v-dodd-frank-does-mean-us-banks/>
21. Barofsky, Neil. *Bailout: How Washington Abandoned Main Street While Rescuing Wall Street*. Simon and Schuster. 2013.
22. Baron, David. "A Dynamic Theory of Collective Goods Programs." *American Political Science Review* 90(2): 1996.
23. Bass, Janet. "Congress is a Frustrating Place." *Lodi-News Sentinel*. Nov 28, 1989.
24. Bernanke, Ben S. Testimony Before the Committee on Banking, Housing, and urban Affairs, U.S. Senate. September 23, 2008.
25. Bernanke, Ben. At the Stamp Lecture, London School of Economics, London, England, January 13, 2009.
26. Bernanke, Ben S. *The Federal Reserve and the Financial Crisis*. Princeton University Press, 2013.
27. Binder, Sarah. "The Partisan Basis of Procedural Choice: Allocating Parliamentary Rights in the House, 1789-1990." *American Political Science Review*. Vol. 90, No. 1 (Mar., 1996), pp. 8-20.
28. Blinder, Alan S. *After the Music Stopped: The Financial Crisis, the Response, and the Work Ahead*. Penguin. 2013.
29. Board of Governors of Federal Reserve System. "Joint Statement by Central Bankers." October 8, 2008.
30. Board of Governors of Federal Reserve System. "FRB Press Release." December 20, 2011.
31. Board of Governors of Federal Reserve System. "Credit and Liquidity Programs and the Balance Sheet."
http://www.federalreserve.gov/monetarypolicy/bst_crisisresponse.htm Accessed June 14, 2015.
32. Boaz, David. *Cato Handbook for Policy Makers: 7th Edition*. Cato Institute. 2009.
33. Boaz, David. *The Politics of Freedom: Taking on the Left, the Right and Threats to Our Liberties*. Cato Institute. 2008.
34. Bolton, John R. *The Legislative Veto*. AEI Press, 1987.
35. Bond, Jon R. and Richard Fleisher. *The President in the Legislative Arena*. The University of Chicago Press, 1990.
36. Bovenzi, John. *Inside the FDIC: Thirty Years of Bank Failures, Bailouts, and Regulatory Battles*. John Wiley & Sons. 2015.
37. Bozzo, Albert. "Bad Labor Market A Good Election Barometer" *CNBC*. September 27, 2010.

38. Brown, Stephen, Anthony Lynch, and Antti Petajisto. "Hedge Funds, Mutual Funds, and ETFs" in *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance*. Wiley. 2010.
39. Bureau of Labor Statistics. Labor Force Statistics from the Current Population Survey: Seasonally Adjusted Employment Level of those 16 and over.
40. Bush, George. George Bush, Public Papers of the Presidents of the United States. 1989.
41. Bush, George W. *Decision Points*. Broadway Paperbacks, 2010.
42. Bybee, Jay S. "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment". *Northwestern University Law Review*. 91: 505. 1997.
43. Byrd, Senator Robert. U.S. Congress Senate. Protecting the Constitutional Authorities of Congress, 108th Congress, 1st Session, 149 Cong Rec S5397, April 11 2003.
44. Calomiris, Charles W., and Stephen H. Haber. *Fragile by Design: The Political Origins of Banking Crises and Scarce Credit: The Political Origins of Banking Crises and Scarce Credit*. Princeton University Press, 2014.
45. Calvert, Randall, Mike Moran and Barry Weingast. "Congressional Influence Over Policymaking: The Case of the FTC" in *Congress: Structure and Policy* by Matthew McCubbins and Terry Sullivan. Cambridge University Press. 1987.
46. Cameron, Charles M. *Veto Bargaining: Presidents and the Politics of Negative Power*. Cambridge University Press, 2000.
47. Campbell, Colton C. "Creating an Angel: Congressional Delegation to Ad Hoc Commissions". *Congress & the Presidency*. Vol. 25, Iss. 2. 1998.
48. Campbell, Colton C. *Discharging Congress: Government by Commission*. Greenwood Publishing Group, 2002.
49. Canes-Wrone, Brandice. "The President's Legislative Influence from Public Appeals." *American Journal of Political Science*. 2001.
50. Caruson, Kiki. "International Agreement-Making and the Executive-Legislative Relationship." Presidency Research Group Report 25 (fall 2002): 21–28.
51. Cato Institute. "Delegating Legislative Powers." Cato Handbook for Policymakers 105-4.
52. Chen, Fannie. "Structuring Public-Private Investment Program for Legacy Securities" *Columbia Journal of Law and Social Problems*. Summer 2013, Vol. 46 Issue 4. June 2013.
53. Christie, Les. "Final Score: \$8,000 for Homebuyers" CNNMoney. February 17, 2009. http://money.cnn.com/2009/02/13/real_estate/homebuyer_tax_credit_finalized/
54. Cillizza, Chris and Aaron Blake. "Obama: The Most Polarizing President Ever" *Washington Post*. January 30, 2012.
55. *Clinton v. City of New York*, 524 U.S. 417 (1998).

56. Cohan, William D. *House of cards: A tale of hubris and wretched excess on Wall Street*. Anchor, 2010.
57. Committee on Financial Services. "Chairman Bachus Statement on Volcker Rule's Impact on Markets, Investors and Jobs." Press Release. January 18, 2012.
58. Congleton, Roger D. and Wendell Sweester. "Political Deadlocks and Distributional Information: The Value of the Veil" *Public Choice*. 1992. 73:1.
59. Congressional Budget Office. Cost Estimate on Emergency Economic Stabilization Act of 2008. September 28, 2008.
60. Congressional Oversight Panel. Written Testimony of Treasury Secretary Timothy F. Geithner. December 10, 2009.
61. Congressional Oversight Panel. The Second Report of the Congressional Oversight Panel: Accountability for the Troubled Asset Relief Program. January 9, 2009. Pg. 10. <http://www.washingtonpost.com/wp-srv/investigations/documents/tarp-010908.pdf>
62. The Constitution of the United States.
63. Conyers, John Jr. "A Record of Progress: Detailed Congress-By-Congress Summary 1965-Present"
<https://conyers.house.gov/sites/conyers.house.gov/files/A%20Record%20of%20Progress%20-%20114th%20Interim.pdf> Pg. 53.
64. Cooper, Phillip J. "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing statements." *Presidential Studies Quarterly*. 35(3), 515-532. 2005.
65. Cooper, Phillip J. *By Order of the President: The Use and Abuse of Executive Direct Action*. Lawrence, KS: University Press of Kansas, 2002.
66. Cooper, Joseph and William F. West. "Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules" *Journal of Politics*. 50 (4): 864-95. 1988.
67. Cordray, Richard. Standing up for consumers. Consumer Financial Protection Bureau. January 4, 2012. <http://www.consumerfinance.gov/standing-up-for-consumers/>
68. Corwin, Edward S. *The President, Office and Powers, 1787-1957*. New York University Press, 1957.
69. Cox, James H. *Reviewing Delegation: An Analysis of the Congressional Reauthorization Process*. Greenwood Publishing Group, 2004.
70. Cox, Gary W., and Mathew D. McCubbins. *Legislative Leviathan: Party Government in the House*. Cambridge University Press, 2007.
71. Cox, Gary W., and Mathew D. McCubbins. *Setting the Agenda: Responsible Party Government in the US House of Representatives*. Cambridge University Press, 2005.
72. CQ Press. Congress and the Nation 2005-2008. 2010.
73. CQ Press. CQ Almanac 2010. 2011

74. Craig, Barbara Hinkson. *The Legislative Veto: Congressional Control of Regulation*. Westview Press, 1983.
75. Cronin, Thomas. *Inventing the American Presidency*. Lawrence, KS: University of Kansas Press. 1989.
76. CRS Summary of Dodd-Frank Wall Street Reform and Consumer Protection Act. Congressional Research Service.
77. CRS summary of Emergency Economic Stabilization Act of 2008. Congressional Research Service.
78. CRS Summary of Helping Families Save Their Home Act of 2009. Congressional Research Service.
79. CRS Summary of Housing & Economic Recovery Act of 2008. Congressional Research Service.
80. Crutsinger, Martin. "Bush Mortgage Plan Will Freeze Certain Subprime Interest Rates for 5 Years" *Memphis Daily News*. December 6, 2007.
81. De Tocqueville, Alexis. *Democracy in America*. Walker. 1847. Pg. 59.
82. Declaration of Independence (US). 1776.
83. Dennis, Brady. "Pay Czar Limits Salaries for Top Executives at 5 Firms" *The Washington Post*. March 24, 2010.
84. Dennis, Brady. "FHA is a \$1 Billion Beneficiary in Settlement with Banks Over Foreclosure Fraud." *Washington Post* 13 February 2012.
85. DeVaro, Jed and Scott Fung. "Public Bailouts, Executive Compensation and Retention: A Structural Analysis" *Journal of Empirical Finance*. 26 (2014). Pgs. 131-149.
86. Dickinson, Tim. "The Man Who Would Be Veep" *Mother Jones*. July 26, 2000.
87. Drawbaugh, Kevin. "White House Recommits to 'Volker Rule' Bank Trade Ban" *Reuters*. February 23, 2010.
88. Duthel, Heinz. *European Debt Crisis 2011*. IAC Society. 2010.
89. Dyson, Kenneth. *The State Tradition in Western Europe: The Study of an Idea and Institution*. ECPR Press. 1980.
90. *The Economist*. "The Munificent Seven: The Federal Reserve Extends Operation Twist." June 23, 2012.
91. *The Economist*. "The Volker Rule: More Questions Than Answers" December 14, 2013.
92. Enrich, David and Diya Gullapalli. "Banks Abandon Effort to Set Up Big Rescue Fund" *The Wall Street Journal*. December 22, 2007.
93. Epstein, David and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge University Press, 1999.
94. Evans, Kevin A. "Challenging Law: Presidential Signing Statements and the Maintenance of Executive Power." *Congress & the Presidency*. Vol. 38, No. 2, May 2011.

95. Executive Order 8248. Section II 2. Subsections c,d,e,h
96. Executive Order 12291 and Executive Order 12498.
97. Executive Order 11246.
98. Fannie Mae. "Board of Directors" <http://www.fanniemae.com/portal/about-us/governance/board-directors.html>
99. Farrier, Jasmine. *Congressional Ambivalence: The Political Burdens of Constitutional Authority*. University Press of Kentucky, 2010.
100. Federal Housing Finance Agency. "FHFA As Conservator of Fannie Mae and Freddie Mac" <http://www.fhfa.gov/Conservatorship/pages/history-of-fannie-mae--freddie-conservatorships.aspx>
101. *The Federalist Papers*. No. 51.
102. *The Federalist Papers*. No. 62.
103. Federation of American Scientists. Presidential Directives and Executive Orders. Online Database. <http://www.fas.org/irp/offdocs/direct.htm>
104. Financial Crisis Inquiry Commission. *Financial Crisis Inquiry Report*. Public Affairs, 2011.
105. Financial Crisis Inquiry Commission. FCIC Interview with Daniel H. Mudd, former CEO of Fannie Mae.
106. Fiorina, Morris P. "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39(1):33.
107. Fisher, Louis. *American Constitutional Law*. New York: McGraw-Hill, 1990.
108. Fisher, Louis. *Constitutional conflicts between Congress and the President*. University Press of Kansas, 2007.
109. Fisher, Louis. "Laws Congress Never Made". *Constitution*. Vol. 5, No. 3, Fall 1993, pp. 59-66.
110. Fletcher, Michael A. "Disability claims rising sharply at Social Security." *Washington Post* 14 September 2010.
111. Foster, John Bellamy, and Fred Magdoff. *The Great Financial Crisis: Causes and Consequences*. NYU Press, 2009.
112. French, Kenneth, et al. "The Squam Lake Report: Fixing the Financial System." *Journal of Applied Corporate Finance* 22.3 (2010): 8-21.
113. Friedman, Jeffrey, and Wladimir Kraus. *Engineering the Financial Crisis: Systemic Risk and the Failure of Regulation*. University of Pennsylvania Press, 2011.
114. G7. "G7 Finance Ministers and Central Bank Governors Plan of Action." Washington, DC. October 10, 2008.
115. Galbraith, James K. *The Predator State*. New York: The Free Press. 2008.
116. Geithner, Timothy. *Stress Test: Reflections on Financial Crises*. Random House, 2014.
117. Gigerenzer, Gerd, and Reinhard Selten. *Bounded Rationality: The Adaptive Toolbox*. MIT Press, 2002.

118. Gintis, Herbert. *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences*. Princeton University Press, 2009.
119. Gintis, Hebert. "The Evolution of Strong Reciprocity: Cooperation in Heterogeneous Populations." *Theoretical Population Biology*, 65: 17–28. 2004.
120. Golden, Marissa. *What Motivates Bureaucrats? Politics and Administration during the Reagan Years*. New York: Columbia University Press. 2000.
121. Goldfarb, Zachary A., David Cho and Binyamin Appelbaum. "Treasury to Rescue Fannie and Freddie: Regulators Seek to Keep Firms' Troubles From Setting Off Wave of Bank Failures." *Washington Post* 7 September 2008.
122. Goldfarb, Zachary A. "U.S., European Efforts to Steady Economies Remain Mired in Political Tangles." *Washington Post* 11 June 2012.
123. Govtrack. "H.R. 1 (111th): American Recovery and Reinvestment Act of 2009" <https://www.govtrack.us/congress/votes/111-2009/h46>
124. Govtrack. "Statistics and Historical Comparison" <https://www.govtrack.us/congress/bills/statistics>
125. Govtrack. "S. 386 (111th): FERA" <https://www.govtrack.us/congress/bills/111/s386>
126. Graber, Doris A. *Mass Media & American Politics*. Congressional Quarterly. 2002.
127. Greenspan, Alan. *The Age of Turbulence: Adventures in a New World*. Penguin, 2008.
128. Greif, and Christopher Kingston. "Institutions: Rules or Equilibria" in *Political Economy of Institutions, Democracy and Voting*. 2011.
129. Guerrera, Francesco. "Banking on Move By Fed as Top Cop." *The Wall Street Journal*. February 25, 2014.
130. Hall, Peter A. and Rosemary C. R. Taylor. *Political Science and the Three New Institutionalisms*. 1996.
131. Hallman, Ben "Shaun Donovan, HUD Chief, Hopes Fannie Mae and Freddie Mac Will Write Down Mortgages" *The Huffington Post*. February 16, 2012. http://www.huffingtonpost.com/2012/02/16/shaun-donovan-fannie-mae-freddie-mac-mortgage-write-down_n_1283020.html
132. Hargreaves, Steve. "Disability Claims Skyrocket: Here's Why" CNN. 4/11/2013.
133. Harris, Angelee and Ritesh Patel. Table Showing the Similarities and Differences Between TARP CPP & CAP for Publicly Traded Institutions. Manatt, Phelps & Phillips LLP. http://www.manatt.com/uploadedFiles/Resource_Center/Newsletters/CAP.pdf
134. Harris, Richard A., and Sidney M. Milkis. *The Politics of Regulatory Change: A Tale of Two Agencies*. Oxford University Press, USA, 1989.
135. Hawkins, Darren G., et al., eds. *Delegation and Agency in International Organizations*. Cambridge University Press, 2006.

136. Henninger, Daniel. "Congress' Broken Windows". *Wall Street Journal* 6 January 2011.
137. Herszenhorn, David M. and David E. Sanger. "Senate Abandons Automaker Bailout Bid" *New York Times*. December 11, 2008.
138. Herszenhorn, David M. "Bill Passed in Senate Greatly Expands Oversight of Wall St." *New York Times*. May 20, 2010.
139. Hill, Jeffrey S. and Kenneth C. Williams. "The Decline of Private Bills: Resource Allocation, Credit Claiming, and the Decision to Delegate." *American Journal of Political Science*. 37:1008. 1993.
140. Hindmoor, Andrew. *Rational Choice*. Palgrave MacMillan. 2006.
141. Hoover, Herbert. *The Memoirs of Herbert Hoover: The Great Depression 1929-1941*. New York: Macmillan, 1952.
142. Horwitz, Steven. "The Fed: Firefighter or Arsonist?" *U.S. News & World Report*. May 20, 2013.
143. House of Lords Briefing. "Delegating Legislation: Look At the Small Print."
144. Howell, William G. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton University Press, 2003.
145. Huber, John D., and Charles R. Shipan. *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy*. Cambridge University Press. 2002.
146. Huntington, Samuel P. "Congressional Responses to the Twentieth Century" in *The Political Economy*. P. 180-202. 1984.
147. Huntington, Samuel P. "Political Development and Political Decay." *World Politics*, Vol. 17, No. 3 (Apr., 1965).
148. Immergluck, Dan. "Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark" *Housing Policy Debate*. Vol. 23, Iss. 1. 2013.
149. Ingberman, Daniel and Daniel Yao. "Presidential Commitment and the Veto." *American Journal of Political Science*. Vol. 35, No. 2 (May, 1991), pp. 357-389.
150. Irwin, Neil and Zachary A. Goldfarb. "U.S. Seizes Control of Mortgage Giants" *The Washington Post*. September 8, 2008.
151. Irwin, Neil. *The Alchemists: Three Central Bankers and a World on Fire*. Penguin. 2013.
152. Jackson, David. "Obama's Latest Executive Orders Affect Veterans" *USA Today*. October 25, 2011.
153. Jackson, Justice Robert. Concurring Opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
154. James, Patrick and John R. Oneal. "The Influence of Domestic and International Politics on the President's Use of Force." *Journal of Conflict Resolution*. June 1991 vol. 35 no. 2, pp 307-332.

155. Johnson, Andrew R. "The Volker Rule Gets A Tweak." *The Wall Street Journal*. January 15, 2014
156. Johnson, Bridget. "Frank Reflects on TARP as Most Successful, Most Unpopular Program in U.S. History" PJ Media. December 31, 2012. <https://pjmedia.com/blog/frank-reflects-on-tarp-as-most-successful-most-unpopular-program-in-u-s-history/>
157. Johnson, Simon, and James Kwak. *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown*. Vintage Books USA, 2011.
158. Jones, Jeffrey M. *Obama's Fifth Year Job Approval Ratings Among Most Polarized*. Gallup. January 23, 2014. <http://www.gallup.com/poll/167006/obama-fifth-year-job-approval-ratings-among-polarized.aspx>
159. Katznelson, Ira, and Barry R. Weingast, eds. *Preferences and Situations: Points of Intersection Between Historical and Rational Choice Institutionalism*. Russell Sage Foundation, 2005.
160. Kelley, Matt. "GAO Calls for More Details on Use of Bailout Funds." *USA Today*. December 13, 2008.
161. Kernell, Samuel. *Going Public*. CQ Press, 2006.
162. Kerwin, Cornelius. *Rulemaking: How Government Agencies Write Law and Make Policy*. Washington, DC. CQ Press, 2003.
163. Kiewiet, D. Roderick and Mathew D. McCubbins. *The Logic of Delegation: Congressional Parties and the Appropriations Process*. University of Chicago Press. 1991.
164. Kindleberger, Charles P. and Robert Aliber. *Manias, Panics, and Crashes: A History of Financial Crises*. John Wiley & Sons, Inc. 2005.
165. Klein, Ezra. "Reorganizing Government, Recapturing Executive Authority, and Criticizing Congress: The Highlights from President Obama's Speech" *The Washington Post*. January 13, 2012.
166. Kling, Arnold S. *Unchecked and Unbalanced: How the Discrepancy Between Knowledge and Power Caused the Financial Crisis and Threatens Democracy*. Rowman & Littlefield. 2010.
167. Korn, Jessica. *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*. Princeton University Press, 1998.
168. Krugman, Paul R. *The Return of Depression Economics*. W. W. Norton & Company, 1999.
169. Lawson, Gary. "Delegation and the Constitution" *Regulation Magazine*. Cato Institute. Vol. 22, No. 2. Summer 1999.
170. Library of Congress. *Congress.gov*
171. Lippi, Francesco. *Central Bank Independence, Targets, and Credibility: Political and Economic Aspects of Delegation Arrangements for Monetary Policy*. Edward Elgar Publishing, 1999.

172. Lipset, Seymore Martin. *Political Man: The Social Bases of Politics*. Doubleday. 1960.
173. Locke, John. *Two Treatises of Government*. Cambridge University Press. 1988 [1689].
174. Lopez, Jose A. "Using CAMELS Ratings to Monitor Bank Conditions" *Economic Letters*. Federal Reserve Bank of San Francisco 1999-19. June 11, 1999.
175. Lowenstein, Roger. *The End of Wall Street*. Penguin, 2010.
176. Lowi, Theodore J. *The End of Liberalism: The Second Republic of the United States*. New York, NY: W. W. Norton and Co, 1979.
177. Lueck, Sarah, Damian Paletta, and Greg Hitt. "Bailout Plan Rejected, Markets Plunge, New Scramble to Solve Crisis" *The Wall Street Journal*. September 30, 2008.
178. Margolis, Lawrence. *Executive Agreements and Presidential Power in Foreign Policy*. New York: Praeger, 1986.
179. Marshall, William P. "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters" *Boston University Law Review* Vol 88, Number 2: 505-522. 2008.
180. Mayer, Kenneth R. "Closing Military Bases (Finally): Solving Collective Dilemmas through Delegation," *Legislative Studies Quarterly* 20(3): 393-413. 1995.
181. Mayer, Kenneth R. *With the Stroke of a Pen*. Princeton University Press, 2001.
182. Mayhew, David R. *America's Congress: Actions in the Public Sphere, James Madison through Newt Gingrich*. Yale University Press, 2002.
183. Mayhew, David R. *Congress: The Electoral Connection*. Yale University Press. 1974.
184. McCarty, Nolan M. "Presidential Pork: Executive Veto Power and Distributive Politics." *American Political Science Review*. 94: 117-130. 2000.
185. McCubbins, Matthew D., and Talbot Page. "A Theory of Congressional Delegation" in *Congress: Structure and Policy*. CUP Archive, 1987.
186. McCubbins, Matthew D., and Thomas Schwartz. "Congressional Oversight Overlooked: Police Patrols and Fire Alarms." *American Journal of Political Science*. 28 (1): 165-79. 1984.
187. McGrane, Victoria. "Dodd-Frank Targeted By House Republicans." *The Wall Street Journal*. July 21, 2014.
188. McLean, Bethany, and Joe Nocera. *All the Devils Are Here: The Hidden History of the Financial Crisis*. Penguin, 2011.
189. Memorandum of Understanding Between The U.S. Securities and Exchange Commission and The U.S. Commodity Futures Trading Commission Regarding Coordination In Areas of Common Regulatory Interest.
<http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftc-sec-mou030608.pdf>

190. Memorandum of Understanding Between The Federal Energy Regulatory Commission and the Commodity Futures Trading Commission.
<http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercjmou2014.pdf>
191. Moe Terry. "An Assessment of the Positive Theory of Congressional Dominance" *Legislative Studies Quarterly*. 12 (4): 475-520. 1987.
192. Moe, Terry. "The Politics of Bureaucratic Structure" in *Principles and Practice of American Politics: Classic and Contemporary Readings*. 5th Edition. Pg. 318-332. CQ Press. 2012.
193. Montesquieu, Baron de. *The Spirit of the Laws*. 1748.
194. Morgenson, Gretchen, and Joshua Rosner. *Reckless Endangerment: How Outsized Ambition, Greed, and Corruption Led to Economic Armageddon*. Macmillan. 2011.
195. Nakamura, David and Ed O'Keefe. "Obama Seeks More Power to Merge Agencies, Streamline Government". *Washington Post* 13 January 2012.
196. Nakamura, David and Felicia, Sonmez. "Obama Appoints Richard Cordray to Head Consumer Watchdog Bureau." *Washington Post* 4 January 2012.
197. Nathan, Richard. *The Administrative Presidency*. John Wiley and Sons. 1983.
198. Needham, Vicki. "FHA's Balance Sheet Rebounds After Bailout" *The Hill*. November 16, 2015.
199. Neustadt, Richard E. *Presidential Power: The Politics of Leadership from FDR to Carter*. New York: Macmillan, 1980.
200. Neustadt, Richard. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press, 1990.
201. New York Times. "Credit Crisis — Bailout Plan (TARP)"
202. New York Times. "Major Parts of the Financial Regulation Overhaul." 20 May 2010.
203. Niskanen, William A. "Bureaucrats and Politicians." *Journal of Law and Economics*. 18 (December): 617-43. 1975.
204. O'Connor, Sarah. "Office of Thrift Supervision Staff Remain Defiant" *Financial Times*. June 19, 2009.
205. Obama, Barack. "Weekly Address: Continuing to Grow the Economy in the New Year" White House Office of the Press Secretary. January 7, 2012.
<https://www.whitehouse.gov/the-press-office/2012/01/07/weekly-address-continuing-grow-economy-new-year>
206. Office of the Comptroller of the Currency. *Comptroller's Handbook: Truth in Lending Act*. December 2014.
207. Office of Management and Budget. "Frequently Asked Questions – American Recovery and Reinvestment Act of 2009"
https://www.whitehouse.gov/omb/recovery_faqs

208. Office of the Vice President. "Vice President Biden Announces New Chairman for the Recovery Accountability and Transparency Board" December 23, 2011. <https://www.whitehouse.gov/the-press-office/2011/12/23/vice-president-biden-announces-new-chairman-recovery-accountability-and->
209. Olson, Mancur. *The Logic of Collective Action*. Vol. 124. Harvard University Press, 2009.
210. Ogul, Morris S. *Congress Oversees the Bureaucracy*. University of Pittsburgh Press, 1976.
211. Ornstein, Norman J. "The House and the Senate in a New Congress," in Thomas E. Mann and Norman J. Ornstein, eds., *The New Congress*, pp. 378.
212. Ostrom, Charles W. and Dennis M. Simon. "Promise and Performance: A Dynamic Model of Presidential Popularity." *American Political Science Review*. 79: 334-58. 1985.
213. Paletta, Damian and Aaron Lucchetti. "Law Remakes U.S. Financial Landscape" *Wall Street Journal*. July 16, 2010.
214. Paletta, Damian and David Enrich. "Political Interference Seen in Bank Bailout Decisions". *Wall Street Journal* 22 January 2009.
215. Patterson, Scott and Andrew Ackerman. "'Volker Rule' Faces New Hurdles." *The Wall Street Journal*. November 20, 2013.
216. Patterson, Scott and Stephanie Armour. "Street Hits Wall on 'Volker'." *The Wall Street Journal*. March 13, 2014.
217. Patterson, Scott and Justin Baer. "Banks Get Setback In Volcker Provision." *The Wall Street Journal*. December 5, 2013.
218. Paulson, Jr., Henry M. *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*. New York: Business Plus, 2010.
219. Paulson Jr., Henry M. "When Mr. McCain Came to Washington" *The Wall Street Journal*. February 6, 2010.
220. Paulson Jr., Henry M. "Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers" U.S. Department of the Treasury Press Release. September 7, 2008. <https://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>
221. Paulson Jr., Henry M. C-SPAN. "Federal Takeover of Fannie Mae and Freddie Mac" September 7, 2008. <https://www.c-span.org/video/?280948-1/federal-takeover-fannie-mae-freddie-mac>
222. Peterson, Mark A. *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan*. Cambridge, MA: Harvard University Press, 1990.
223. Pfiffner, James P. *The Strategic Presidency: Hitting the Ground Running*. University Press of Kansas. 1996.
224. Pierce, Richard. The Federalist Society's Administrative Law and Regulation Practice Group's panel discussion at the 1998 National Lawyers Convention. 1998.

225. Porter, Roger B. *Presidential decision making: The economic policy board*. Cambridge University Press, 1982.
226. ProPublica. Bailout Tracker: Emergency Economic Stabilization Act. <https://projects.propublica.org/bailout/programs/2-systemically-significant-failing-institutions>
227. Protes, Ben. "New Limits on Commodity Trades Are Approved." *New York Times* 4 January 2012.
228. Protes, Ben. "Regulators Concerned About How to Apply Volcker Rule." *New York Times* 18 January 2012.
229. Public Law Number 63-43. Federal Reserve Act.
230. Public Law Number 79-404. Administrative Procedures Act.
231. Public Law Number 88-408. Gulf of Tonkin Resolution.
232. Public Law Number 94-412. The National Emergencies Act.
233. Public Law Number 110-185. Economic Stimulus Act of 2008
234. Public Law Number 111-5. American Recovery and Reinvestment Act of 2009.
235. Public Law Number 111-203. Dodd-Frank Wall Street Reform and Consumer Protection.
236. Public Law Number 111-312. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.
237. Public Law Number 112-25. Budget Control Act of 2011.
238. Rajan, Raghuram G. *Fault Lines*. Princeton University Press. 2010.
239. Rattner, Steven. *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry*. Houghton Mifflin Harcourt. 2010.
240. Raum, Tom and Jim Drinkard. "Fannie Mae, Freddie Mac Spent Millions on Lobbying" *USA Today*. July 17, 2008.
241. Reddy, Sudeep. "Bernanke Defends Record on Lehman" *Wall Street Journal*. September 3, 2010.
242. Redman, Eric. *The Dance of Legislation*. University of Washington Press, 2011.
243. Reuters. "Government Takes Control of Fannie, Freddie" CNBC. September 8, 2008. <http://www.cnbc.com/id/26590793>
244. Ro, Sam. There Are Now TWO Federal Reserve Vice Chair Positions That Need To Be Filled. *Business Insider*. October 11, 2013. <http://www.businessinsider.com/dodd-frank-second-fed-vice-chair-2013-10>
245. Roberts, Daniel. "The Volker Rule Takes Effect Today After Years of Delays" *Fortune Magazine*. July 22, 2015.
246. Roosevelt, Franklin D. "Message to Congress Recommending Reorganization of the Executive Branch" January 12, 1937.
247. Roosevelt, Franklin D. Speech Before Congress. September 7, 1942.

248. Roosevelt, Franklin D. "Presentation of Brownlow Report to Congress" January 12, 1937.
249. Rosen, Bernard. *Holding Government Bureaucracies Accountable*. Greenwood Publishing Group. 1998.
250. Rousseau, Jean-Jacques. *The Social Contract: & Discourses*. No. 660. JM Dent & Sons, Limited, 1920.
251. Rudalevige, Andrew. *Managing the President's Program: Presidential Leadership and Legislative Policy Formation*. Princeton University Press, 2002.
252. Saad, Lydia. "Obama Retains Strong Edge Over Congress in Job Approval" Gallup. 4/25/2016.
253. Saenz, Arlette and Erin Dooley. "Here's How Much Less Congress Works Than You Do" ABC News. August 4, 2014.
254. Saltmarsh, Matthew and Keith Bradsher. "Fed Offers \$180 Billion for Ailing Money Markets" *The New York Times*. September 18, 2008.
255. Schick, Allen. "Politics through Law: Congressional Limitations on Executive Action." in Anthony King ed., *Both Ends of the Avenue*. AEI Press, 1983.
256. Schlozman, Kay Lehman and John T. Tierney. *Organized Interests and American Democracy at 251*. HarperCollins College Division, 1986.
257. Schoenbrod, David. *Power Without Responsibility: How Congress Abuses the People Through Delegation*. Yale University Press, 2008.
258. Schoenbrod, David. The Federalist Society's Administrative Law and Regulation Practice Group's panel discussion at the 1998 National Lawyers Convention. 1998.
259. Schubert Jr., Glendon. "The Presidential Subdelegation Act of 1950." 13 *Journal of Politics*. 1951. 647.
260. Securities and Exchange Commission. "SEC Adopts Net Worth Standard for Accredited Investors Under Dodd-Frank Act." Press Release. December 21, 2011.
261. Seib, Gerald F. "In Crisis, Opportunity for Obama." *Wall Street Journal* 21 November 2008.
262. Shelby, Richard A. Senator Shelby's remarks before the Senate Committee on Banking, Housing, and Urban Affairs, Turmoil in U.S. Credit Markets: Recent Actions Regarding Government-Sponsored Entities, Investment Banks, and Other Financial Institutions. 110th Congress 2nd Session. September 23, 2008 transcript. 6.
263. Shiller, Robert J. *The Subprime Solution: How Today's Global Financial Crisis Happened, and What To Do About It*. Princeton University Press, 2012.
264. Shull, Steven A. *Policy by Other Means*. Texas A & M University Press, 2006.
265. Siegel, Lawrence B. "A Riskless Society is 'Unattainable and Infinitely Expensive.'" In *Insights into the Global Financial Crisis*. The Research Foundation of CFA Institute. 2009.
266. Sinclair, Barbara. *Unorthodox lawmaking: New legislative processes in the US Congress*. SAGE, 2011.

267. Slack, Megan. "Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog" The White House Blog. January 4, 2012. <https://www.whitehouse.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog>
268. Sollenberger, Mitchel A. and Mark J. Rozell. *The President's Czars: Undermining Congress and the Constitution*. University Press of Kansas. 2012.
269. Sopelsa, Brooke. "Former FDIC Chair Blames SEC for Credit Crunch". CNBC 9 October 2008.
270. Sorkin, Andrew Ross. *Too Big to Fail*. Aware Journalism, 2010.
271. Soros, George. *The New Paradigm for Financial Markets: the Credit Crisis of 2008 and What it Means*. Basic Books, 2008.
272. Soros, George. *Financial Turmoil in Europe and the United States: Essays*. PublicAffairs, 2012.
273. Sowell, Thomas. *The Housing Boom and Bust*. Basic Books. 2009.
274. Stewart, James B. "Volker Rule, Once Simple, Now Boggles" *The New York Times*. October 21, 2011.
275. Stiglitz, Joseph E. *Freefall: America, Free Markets, and the Sinking of the World Economy*. WW Norton & Company, 2010.
276. Sullivan, Paul. "Deciding Who's Rich (or Smart) Enough for High-Risk Investments." *New York Times* 13 January 2012.
277. Sundquist, James L. *The Decline and Resurgence of Congress*. Brookings Institution Press, 1981.
278. Supercommittee. "Statement from Co-Chairs of the Joint Select Committee on Deficit Reduction" November 21, 2011. <http://www.murray.senate.gov/public/index.cfm/2011/11/statement-from-co-chairs-of-the-joint-select-committee-on-deficit-reduction>
279. Suskind, Ron. *Confidence Men: Wall Street, Washington, and the Education of a President*. Harper Perennial. 2011
280. TARP Congressional Oversight Panel. February Oversight Report: Valuing Treasury's Acquisition. February 6, 2009.
281. Tau, Byron. *Obama Seeks New Power to Merge Agencies*. Politico.com. January, 13 2013. <http://www.politico.com/politico44/2012/01/obama-seeks-new-power-to-merge-agencies-110740.html>
282. Thurber, James A. "Agony, Angst, and the Failure of the Supercommittee" *Extensions*. Summer 2012.
283. Thurber, James A. *Rivals for Power: Presidential-Congressional Relations*. Boulder, CO: Rowman & Littlefield Publishers, Inc., 2002.
284. Timiraos, Nick and Deborah Soloman. "U.S. Backs Off Tight Mortgage Rules." *Wall Street Rules*. May 14, 2014
285. Tracy, Ryan. "Regulators' Guidance on Volcker Rule Offers Little Relief on Debt." *The Wall Street Journal*. December 20, 2013.

286. Tracy, Ryan. "Regulators Rethinking Rule on Bank Debt." *The Wall Street Journal*. December 19, 2013.
287. Truman, Harry S. "Statement by the President Upon Signing the Budget and Accounting Powers Act." From Public Papers of the Presidents: Harry S Truman 1945-1953. September 12, 1950.
288. Tsebelis, George. *Veto Players: How Political Institutions Work*. Princeton University Press, 2002.
289. Tuckman, Bruce W. and Mary C. Jensen. "Stages of Small-Group Development Revisited" *Group Organization Management*. Vol. 2, No. 4. December 1977.
290. Tullock, Gordon, Authur Seldon, and Gordon L. Brady. *Government Failure: A Primer In Public Choice*. Cato Institute. 2002.
291. 2000 Social Capital Community Benchmark Survey.
http://thearda.com/Archive/Files/Downloads/SCCBS_DL2.asp
292. U.S. Chamber of Commerce, "Financial Reform will Create Uncertainty Not Jobs." 20 July 2010. <https://www.uschamber.com/press-release/financial-reform-law-will-create-uncertainty-not-jobs>
293. U.S. Constitution
294. United States v. Midwest Oil Co. - 236 U.S. 459 (1915)
295. Villafranco, John E. and Kristin A. McPartland. "New Agency, New Authority: An Update on the Consumer Financial Protection Bureau" *The Antitrust Source*.
http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb12_villafranco_2_27f.authcheckdam.pdf
296. Wagner, Daniel. "Lawmakers Seeks Fed Audit after Critical AIG Report" *The Memphis News*. November 19, 2009.
297. Walker, David. *Comeback America: Turning the Country around and Restoring Fiscal Responsibility*. Random House Trade Paperbacks. 2010.
298. Wallach, Philip A. *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis*. Brookings Institution Press. 2015.
299. Warber, Adam L. *Executive Orders and the Modern Presidency: Legislating from the Oval Office*. Boulder, CO: Lynne Rienner, 2006.
300. Warren, Elizabeth "The Banking Industry's Transparent Attempt to Weaken the CFPB" *The Huffington Post*. October 20, 2015.
http://www.huffingtonpost.com/elizabeth-warren/banking-industrys-attempt-weaken-cfpb_b_8340792.html
301. Watson, Richard Abernathy. *Presidential Vetoes and Public Policy*. Lawrence, KS: University Press of Kansas. 1993.
302. Washington Post Editorial Board. "Bailout the FHA?" *Washington Post* 20 February 2012.

303. Weaver R. Kent and Bert A. Rockman. "When and How Do Institutions Matter?" in "Do Institutions Matter? Government Capabilities in the United States and Abroad." The Brookings Institution. 1993.
304. Weber, Max. *Wirtschaft und Gesellschaft*. Tübingen, J.C.B. Mohr (P. Siebeck). 1925.
305. Weingast, Barry and Moran, Mark/ "Bureaucratic Discretion or Congressional Control?" *Journal of Political Economy* 91:765-800. 1983.
306. Weisman, Jonathan. "U.S. Declares Bank and Auto Bailouts Over, and Profitable" The New York Times. December 19, 2014.
307. Wessel, David. *In Fed We Trust: Ben Bernanke's War on the Great Panic*. Crown Pub, 2010.
308. The White House Office of the Press Secretary "President Obama Establishes Bipartisan National Commission on Fiscal Responsibility and Reform" February 18, 2010. <https://www.whitehouse.gov/the-press-office/president-obama-establishes-bipartisan-national-commission-fiscal-responsibility-an>
309. The White House Office of the Press Secretary. "Remarks by the President on Government Reform" January 13, 2012. <https://www.whitehouse.gov/the-press-office/2012/01/13/remarks-president-government-reform>
310. Wilson, James Q. *Bureaucracy: What Government Agencies Do and Why They Do It*. Basic Books, 1989.
311. Wilson, Woodrow. *Congressional Government*. 1885.
312. Wolfinger, Raymond E., and Steven J. Rosenstone. *Who votes?*. Vol. 22. Yale University Press, 1980.
313. Wyatt, Edward. Appointment Clears the Way for Consumer Agency to Act. *New York Times* 4 January 2012.
314. Zandi, Mark. *Financial shock: A 360° Look at the Subprime Mortgage Implosion, and How to Avoid the Next Financial Crisis*. FT Press. 2008.