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# Congress and Foreign Affairs: Reasserting the Power of First Branch

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# FOREWORD

*by* KEVIN KOSAR

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Article I of the U.S. Constitution assigns Congress many significant authorities over foreign policy. The legislature may “regulate commerce with foreign nations,” and “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” Although the president is deemed “commander in chief,” Congress also has “the power to declare war,” and has immense authorities over the military. For example, it is legislators who may: “raise and support Armies [...] provide and maintain a Navy [...] and] make rules for the [...] regulation of the land and naval forces.”<sup>1</sup> In fact, the departments that engage in diplomacy—the Department of State chief among them—exist because Congress enacted them into law and funds them annually from the U.S. Treasury.

Yet, for all this power, today’s Congress undeniably plays second fiddle to the executive in foreign affairs. The legislature has not declared war since 1942 when it issued a call to arms against Bulgaria, Hungary and Rumania.<sup>2</sup> Moreover, it has delegated various discretionary

aspects of trade policy to the president, and has enacted “fast track” legislative procedures to curb its own influence on these agreements.<sup>3</sup> When it comes to dealing with international bodies, such as the World Health Organization and the United Nations, it is the executive branch that now leads on policy issues.<sup>4</sup>

On those occasions when Congress does act, its efforts are increasingly symbolic. The legislature has sent war powers and weapons sales resolutions to the White House five times in the past two years; each time the measures were vetoed and the chambers failed to override.<sup>5</sup> Policies objected to by a majority of legislators continue.

This diminution of Congress’s role in foreign affairs and the attendant attenuation of popular direction over America’s role in the world are concerning, and prompted the R Street Institute’s Governance program to study the matter, which resulted in four short policy studies and a meeting of its Legislative Branch Capacity Working Group.<sup>6</sup>

<sup>1</sup> Art. I, Sec. 8.

<sup>2</sup> U.S. Senate, “Official declarations of war by Congress,” last accessed July 16, 2020.

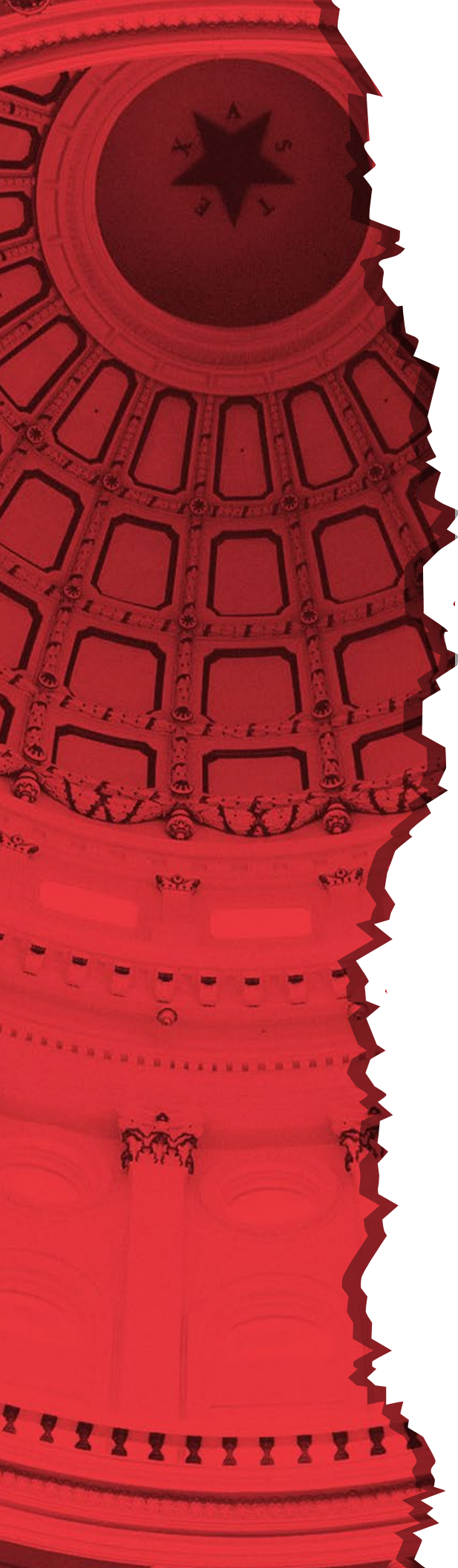
<sup>3</sup> Philip Wallach and Clark Packard, “Restraining the president: Congress and trade policy,” R Street Policy Study No. 158, November 2018.

<sup>4</sup> For example, President Donald J. Trump has threatened to withhold money appropriated by Congress for the World Health Organization over its handling of the coronavirus outbreak. See, e.g., Teo Armus, “Trump threatens to permanently cut WHO funding, leave body if changes aren’t made within 30 days,” The Washington Post, May 19, 2020.

<sup>5</sup> The 2019 resolutions were: S.J.Res. 36, S.J.Res. 37, S.J.Res. 38 and H.J.Res. 46; and the 2020 resolution was S.J.Res. 68. See: “Vetoes by President Donald J. Trump,” U.S. Senate, last accessed July 16, 2020.

<sup>6</sup> Publications and events may be found at: [www.legbranch.org](http://www.legbranch.org)





This collection of essays herein were produced for an autumn 2019 conference. They consider different facets of the issue, and were written by scholars of differing academic training and expertise. Collectively, they depict a Congress that is largely at sea in foreign affairs, and is uncertain how to return to port.

Casey Burgat's analysis exposes reduced congressional capacity as a key factor in Congress's weakness in foreign affairs. He writes: "When it comes to the committees most responsible for foreign affairs and military programs and operations, Congress is outmatched by the president's agency on a host of measures." Despite having the authority to fund itself at whatever level it desires, Congress has operated on the cheap, leaving it with staff that are too few and too junior in experience.

James Wallner's article shows how despite their limited authorities, presidents have been able to aggrandize their power over foreign affairs. As a first mover, the president can simply do things that Congress must then amass a majority to stop. "In recent years," Wallner writes, "the legislative branch has increasingly become more representative of American society, and more individualistic members have been elected to the body." These developments have made it more difficult for Congress to act collectively. Additionally, the executive also can "go public" and appeal to the public for support of a course of action which, if given, can intimidate the legislative branch into silence. Nevertheless, Congress's legislative authorities remain formidable, and if legislators individually and collectively are willing to use them, they can influence policy.

Anthony Marcum's essay makes clear that Congress should not turn to federal courts when it has disputes with executive actions in foreign affairs. "Suits challenging the president's overreach in foreign relations," he notes, "have largely failed in federal court. This is because courts have been consistently unwilling to second guess the executive branch's military decision-making, and have instilled common law barriers that firmly limit judicial engagement." Indeed, filing lawsuits against the executive tends almost inevitably to involve legal wrangling that takes years to resolve, often long after the political controversy has subsided.

That the Third Branch has been no friend to the First is a truth further borne out in Louis Fisher's historical analysis. He notes that the 1936 Curtiss-Wright case, which involved a private company that violated a federal ban on international arms dealing, erroneously aggrandized the executive vis-a-vis Congress. The executive branch gladly received this gift from the court, and subsequently used the decision to accrete additional powers in foreign affairs. Fisher's essay also underscores the importance of mindset among legislatures. In politics, one is only as powerful as one imagines oneself to be, and Congress errantly imagines itself second to the president.

Congressional acquiescence in foreign affairs is complex and has roots in various factors, including the differing incentive structures for legislators versus presidents, the assets and capacity the branches have to conduct policy, and policies and political choices made long ago. These essays are but a small step in a long path to understanding both how this state of affairs came to be, and how the country may restore more constitutional governance over foreign affairs.

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# CONGRESSIONAL UNDERSIGHT

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*by* CASEY BURGAT

## INTRODUCTION

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**D**espite the president's constitutional role as Commander-in-Chief of the armed forces, Article I, Section 8 of the Constitution places the authority "to declare War" squarely within the legislative branch. This "paradoxical mix of clearly defined war powers for Congress and implied prerogatives for the president" has resulted in overlapping war privileges and regular conflict between the two branches, particularly in recent decades.<sup>7</sup>

Since America's founding, Congress has formally executed its war power 11 times, each at the president's explicit request, and most recently by a unanimous vote in 1942, which declared war against Romania during World War II.<sup>8</sup> But, of course, the United States has been involved in a number of military conflicts—most notably Vietnam, Korea and Iraq—since last declaring war, and this signals a shift in how presidents view and use their implied war powers. Instead of seeking formal congressional war declarations prior to taking military action, modern-era presidents have regularly sidestepped Congress's right to declare war and have committed U.S. troops across the globe.

In the 1970s, Congress attempted to regain their role as a check against the president's unilateral war-making power. Fearing their constitutional authority had been usurped by successive presidents' unilateral military actions, Congress passed the War Powers Resolution in 1973 over President Nixon's veto.<sup>9</sup> The act aimed to give the president some discretion in how to respond to attacks or potential military threats, while simultaneously itemizing the legislature's rightful role in authorizing war or the use of military force.

Despite its best intentions, the War Powers Resolution has had scant effect on the president's military decision-making and the trend of president-led military actions continues to the present day largely through Congress-passed Authorizations for the Use of Military Force (AMUFs).<sup>10</sup> Although originally intended to be used for narrow executions of military force, more recently, AUMFs have been used to grant presidents wide authority to carry out military operations from Southeast Asia to Lebanon—with limited congressional involvement. The most recent approved AUMFs came in response to the Sept. 11, 2011 terrorist attacks. The first

<sup>7</sup> Linda L. Fowler, "Congressional War Powers," in *The Oxford Handbook of the American Congress*, ed. Eric Schickler and Frances E. Lee (Oxford University Press, 2011), p. 813.

<sup>8</sup> "Power to Declare War," United States House of Representatives, last accessed Oct 28, 2019.

<sup>9</sup> P.L. 93-148 (Nov. 7, 1973).

<sup>10</sup> James A. Thurber, ed., *Rivals for Power: Presidential-Congressional Relations* (Rowman & Littlefield, 2002).

was an authorization that granted President Bush authority “to use all necessary and appropriate force” against those responsible who planned, coordinated or carried out the attacks.<sup>11</sup> The second was passed the following year and extended President Bush's military authority to protect the United States from national security threats posed by Iraq.<sup>12</sup> Importantly, the Iraq AUMF does not include an automatic termination clause, which leaves the authorization of force valid until repealed (and troops on the ground under its authority).

And, although Congress has not passed any additional AUMFs in the intervening 17 years, Presidents Bush, Obama and Trump have claimed legal authority as Commander-in-Chief to extend military operations to Afghanistan, Libya and Syria under the pretext of protecting U.S. national interests, all without receiving formal congressional approval in the form of declarations of war or an AUMF.<sup>13</sup> These actions have further removed Congress from its proper role in decisions to commit U.S. troops abroad, and granted the president even broader authority to engage militarily even in locations where specific authorizations were not approved.

But despite the weightiness of deciding whether to declare war or passing an authorization of military force, either path is only the first of Congress's obligations when it comes to foreign affairs and military action. Once operations begin, Congress becomes constitutionally responsible for conducting oversight of the executive branch, its military decision-making and its missions. Effective oversight ensures that Congress remains informed and involved enough not only to provide a prospective check on the president's authority to commit U.S. troops, but also to make knowledgeable choices regarding appropriations levels that ultimately fund the military and its missions.

Currently, however, Congress's oversight capacity is alarmingly lacking. The legislative branch simply does not have the levels of staff resources, funding or expertise to conduct effective oversight of the executive branch, including—and perhaps even especially—on matters of foreign affairs, intelligence and national security. Congressional committees are supremely overmatched by the resources of the executive agencies they are tasked with overseeing, and as a result, they cannot reasonably keep up with the decisions, plans and results produced by the sprawling military bureaucracy. This dynamic is compounded by the reality that the president enjoys near unilateral authority over military and intelligence operations, ultimately leaving Congress with little insight into the day-to-day operations of the people, programs and agencies they are expected to oversee and fund. Instead of providing an independent check on the president's military authorities through oversight, such a lack of capacity has rendered Congress dependent upon the information provided by the very agencies they monitor.

<sup>11</sup> P. L. 107-40 (2001).

<sup>12</sup> P. L. 107-243 (Oct. 16, 2002).

<sup>13</sup> See Caroline D. Krass, “Authority to Use Military Force in Libya,” *Opinions of the Office of Legal Counsel* 35 (April 1, 2011).



# CAPACITY WITHIN CONGRESS'S FOREIGN AFFAIRS COMMITTEES

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The overarching goal of congressional oversight is to provide Congress with the necessary information for it to more effectively legislate and surveil federal agency implementation of its passed policies. More specifically, Congress has a multitude of soft and hard oversight tools—including hearings, document requests and subpoenas—that allow the legislative branch to investigate and monitor governmental actions in hopes of maximizing legislative efficiency, minimizing waste and ensuring compliance by the executive branch.

As with most of the substantive legislative work done in Congress, nearly all oversight is conducted at the committee level, the delineated jurisdictions of which create member and staff-level focus, specialization and issue-area expertise. Rule X, clause 2 of the Rules of the House of Representatives lays out the broad oversight prerogatives of the chamber in writing: “The various standing committees shall have general oversight responsibilities” as to “the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction”<sup>14</sup> and “the organization and operation of Federal agencies and entities” under their jurisdiction.<sup>15</sup> A similar structure is used within the Senate.

But despite their extensive oversight prerogatives, congressional committees have long been starved for the personnel resources that are required to carry out the day-to-day tasks of legislative inquiry. The lack of adequate staffing resources, especially those with tailored investigative specialties, has left committees doing the bare minimum when it comes to overseeing the executive departments and programs within their purview. Effective oversight requires true issue-area expertise. Technical knowledge allows committees and their staff to more effectually monitor agencies, triage the endless possibilities of congressional inquiries and develop the essential agency relationships that foster the sharing of information between the two branches.

However, without the capacity and required expertise within committees, federal agencies operate more independently of their congressional overseers because they know committees struggle to maintain a watchful eye. In the words of oversight scholar Morton Rosenberg, “Experience has shown that in order to engage in successful oversight, committees must establish their credibility with the executive departments and agencies they oversee early, often, consistently, and in a matter that evokes respect, if not fear.”<sup>16</sup> The absence of staffing capacity within congressional committees does not allow for these early, often, and consistent agency contacts, which has made regular and successful congressional oversight an exceedingly rare occurrence.

<sup>14</sup> House Rules, Rule X, clause 2, section (b)(1)(A).

<sup>15</sup> House Rules, Rule X, clause 2, section (b)(1)(B).

<sup>16</sup> Morton Rosenberg, *When Congress Comes Calling: A study on the principals, practices, and pragmatics of legislative inquiry* (The Constitution Project, 2016), p. 7.



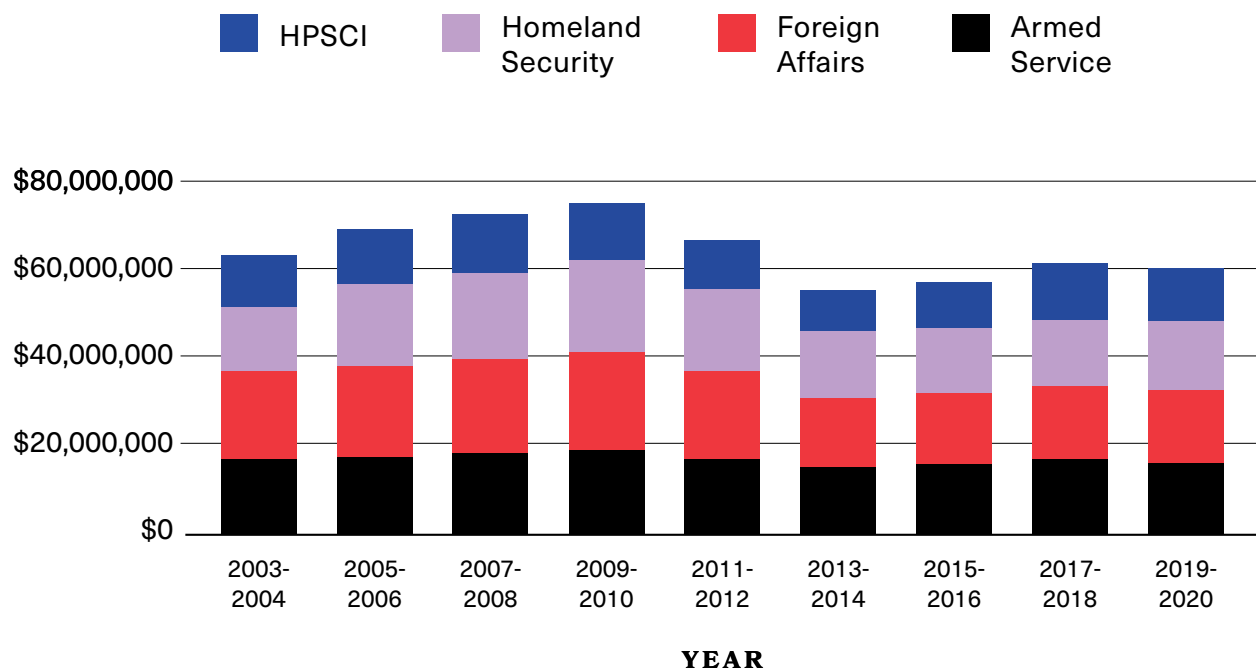
## STAGNANT COMMITTEE CAPACITY

To provide context about Congress's capacity to perform oversight on matters of foreign affairs, the remainder of this report focuses on the staffing capacity of the congressional committees whose jurisdictions include foreign affairs or federal agencies that deal with military matters. These committees include:

- » **House Armed Services Committee**
- » **House Foreign Affairs Committee**
- » **House Homeland Security Committee**
- » **House Permanent Select Committee on Intelligence**
- » **Senate Armed Services Committee**
- » **Senate Foreign Relations Committee**
- » **Senate Homeland Security and Governmental Affairs Committee**
- » **Senate Intelligence Committee**

To get a baseline sense of committee capacity, the best place to begin is the amount of money Congress allocates to its respective committees. While a crude measure, these topline totals provide an indication of Congress's priorities in that increased funds allocated to an individual committee signals that committee's work is of particular importance to the majority and chamber. More specifically, because the vast majority of committee funds are used for staffer salaries and committee aides are tasked with executing the day-to-day work of the committee, funding levels

also provide a quick sense of how staffing levels vary over time, and with them, the committee's ability to conduct its work, including oversight. This is particularly important given the constant increase in the size of the federal budget and government, as decreasing or even stagnant committee allocations signal that Congress is not keeping pace with the growth within the executive branch. And, as a result, it becomes less able to execute its oversight responsibilities with its own internal resources.

**FIGURE 1** House committee allocations, 108<sup>th</sup>-116<sup>th</sup> Congress

**SOURCE** Demand Progress.

Figure 1 (above) presents the committee appropriations levels for the four House foreign affairs-related committees for the 108th-116th congresses (2003-2020) in constant 2019 dollars.<sup>17</sup> As is clear, despite regular increases from 2003 through 2010, the committee allocations of the four military and foreign affairs-related committees in the 108th Congress (about \$60 million) is very close to the number allocated in the 116th Congress (\$62 million). In fact, allocations have decreased over \$2 million during the period, and nearly \$15 million or 20 percent from their highwater mark during the 111th Congress.

This drop is uniquely problematic given that the budgets for the federal agencies that the committees are supposed to oversee—the Departments of Defense and Homeland Security—increased over 60 percent during that same time period.<sup>18</sup> These trends highlight the reality that Congress is using the same number of staff to oversee agencies that have grown considerably since 2002.

<sup>17</sup> House committee allotments are collected from House resolutions for each Congress. Data and the corresponding resolutions, are maintained by Demand Progress.

<sup>18</sup> Office of Management and Budget, "Table 5.2: Budget Authority By Agency: 1976-2024," The White House, accessed Oct. 24, 2019.

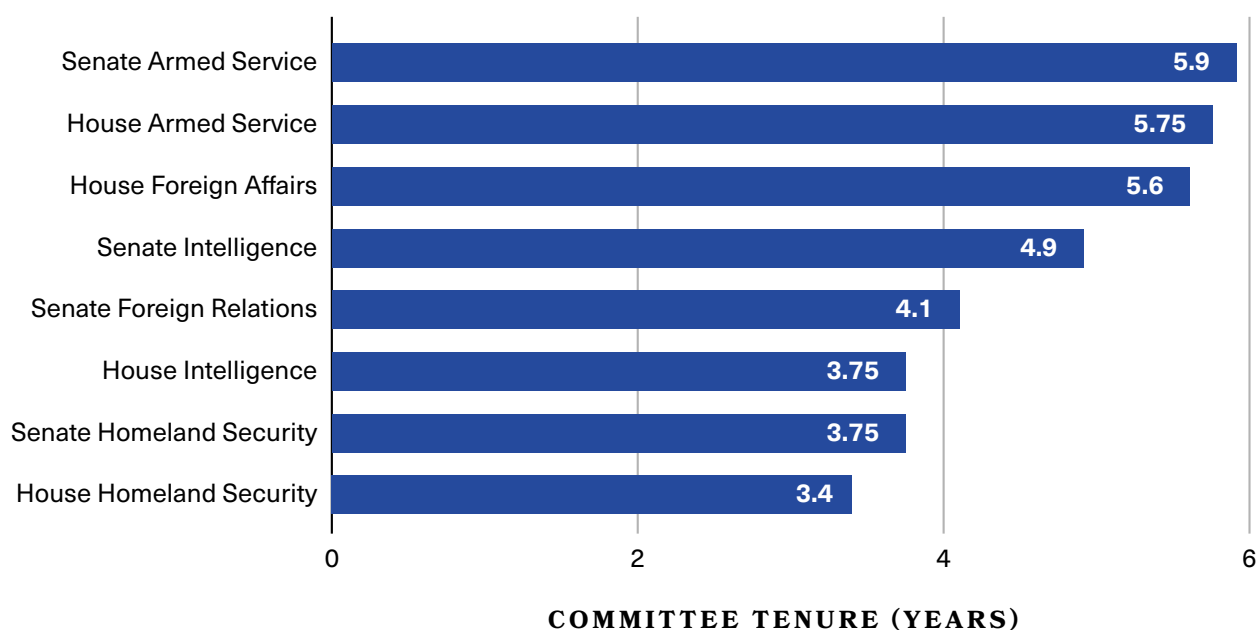


## DEARTH OF STAFFER EXPERIENCE

While vital, committee funding and staffing levels are not the only important measures of a committee's ability to perform its required legislative and oversight duties. The experience and capability of the committee aides matter greatly, as well. From drafting legislation to holding hearings to conducting oversight, committee work demands issue-area expertise from the committee's staffers. Committee subject matters are often so technical that experience dealing with the issues is paramount and can only be mastered, if ever, after spending years working on their intricacies firsthand. Moreover, longer tenures serving on a committee of jurisdiction not only allows aides to know who to ask for what type of information—again, skills learned

primarily from doing the job—but they also grant committee staffers time to develop more fruitful informational and oversight relationships with counterparts within the executive agencies. Thus, staffer tenures on relevant committees provide another strong indicator of a committee's capacity to conduct effective oversight. Simply put, longer stints within the committee, managing the committee's issues and working with relevant agencies, provide better resources for the committee to execute its work. Accordingly, staffer tenures provide good insight into a committee's capacity and to that end, the figure below (Fig. 2) provides the median staff tenure of the eight foreign affairs-related committees.<sup>19</sup>

**FIGURE 2** Staff tenure on foreign affairs-related committees, 115<sup>th</sup> Congress



**SOURCE:** Burgat and Dukeman.

<sup>19</sup> Casey Burgat and Ryan Dukeman, "Who's on the Hill: Staffing and Human Capital in Congress's Legislative Committees," R Street Institute, March 2019.

Overall, in these committees as within Congress, it is a bleak picture. None of the eight committees boast a median tenure of longer than six years. The Senate Armed Services Committee has, on average, the longest serving staffers of the eight committees of interest with a median of 5.9 years, and this number also represents the second-longest average tenure of any Senate committee, trailing only the Senate Appropriations Committee's median tenure of 7.1 years. On the other end of the spectrum, the House Homeland Security committee has the shortest average tenure of the eight, and shortest of all committees in the House, at 3.4 years.

To place these numbers in context, this means that the average committee staffer responsible for issues relating to the wars in Iraq and Afghanistan, as well as the military operations in Libya, Syria and beyond, was not on the committee more than five years ago, and thus is over a decade removed from working on the committee when the most recent AUMF was approved by Congress. More directly, nearly all aides were not serving on one of the relevant committees—or in Congress at all—the last time it explicitly voted on whether or not to approve military force.

Why are tenures so short? As with its internal capacity problem, the legislative branch struggles to keep staffers in their positions for longer tenures largely because of its inability to match the pay of related but outside offices, including federal agencies and special interest groups. For example, according to FederalPay.org, the average salary at the Department of Homeland Security is about \$115,000.<sup>20</sup> And, the committees' internal capacity, and Congress's as an institution, suffers as a consequence of the resultant short stints. As Rosenberg explains of the associated problems, "Congressional committees lack staff with expertise and incentives to stay on board for extended periods, and the ability to call upon adequately funded, reliable, and nonpartisan legislative research, analysis and informal support organizations."<sup>21</sup> In short, committees are not resourced adequately to perform their legislative and oversight duties, and the president and the executive branch are often happy to pick up the administrative slack.

<sup>20</sup> "Department of Homeland Security Headquarters Salaries of 2017," FederalPay.org, last accessed Oct. 25, 2019.

<sup>21</sup> Rosenberg, p. 7.

# A CONGRESS OVERWHELMED

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Congress's own resource shortcomings are one problem, but when the increasing size and scope of the agencies under the committees' jurisdictions are included in the capacity calculations, the disparity in capabilities between the two branches become strikingly stark. In other words, it is helpful to know that committee funding and staff sizes are stagnant, but it is also important to compare Congress's capacity levels to those of the executive branch during the same period. And, put simply, the legislative branch is overmatched—to say the least—on matters of foreign affairs.

Direct branch-to-branch comparisons are difficult for a variety of reasons, not the least of which is precisely because executive agencies are incredibly big compared to Congress, given their administrative and programmatic responsibilities. This is particularly true in departments that relate to military and defense, such as the Department of Defense (DOD), the employment ranks of which include all members of the armed forces and the budget of which comprises all military equipment across the globe.

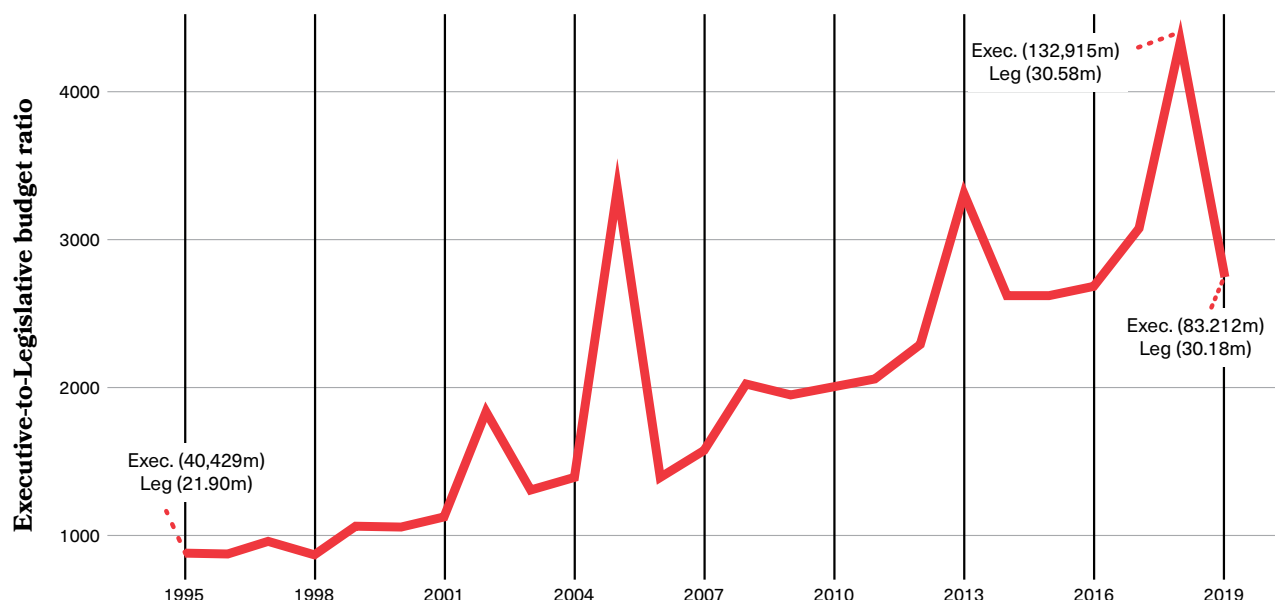
But, although there are sizable disparities in size and scope between Congress and the executive branch, the former is still responsible for using its resources to conduct administrative, programmatic and financial oversight of the mammoth executive departments. Thus, funding level comparisons between the relevant committees and federal agencies provide a glimpse at the lopsided workload committee staffers face in attempting to monitor the agencies under their committee's jurisdiction. To that end, Figure 3 (next page) plots the ratio of spending of two main executive departments involved in foreign affairs (Departments of Homeland Security and State)<sup>22</sup> to the combined committee allocations for the four House committees referenced above (Armed Services, Foreign Affairs, Homeland Security and Intelligence) from 1995 to 2019.<sup>23</sup>

This ratio shows how many times bigger the agency budgets are compared to the combined budgets of the relevant House committees, and makes clear that the committees' staffers are overwhelmed in their oversight responsibilities just by the sheer size of the agencies they oversee.

<sup>22</sup> The DOD's budget (\$693 billion for 2019) was not included in the agency calculations because of its dominating size and incomparable programs and expenses. But, the main point remains: the congressional committees tasked with monitoring the Defense Department and the House and Senate Committees on Armed Services face enormous capacity disparities that reduce their ability to perform effective oversight. In fact, given the sprawling contract economy involved in defense operations, a strong argument can be made that this committee faces the most lopsided oversight capacity challenge.

<sup>23</sup> Office of Management and Budget.



**FIGURE 3** Executive versus legislative branch budget ration, 1995-2019

**SOURCE:** Office of Management and Budget.

Moreover, as the figure also shows, the investment disparities are getting worse over time. For example, in 1995, the two departments enjoyed a combined budget authority nearly 1,000 times that of congresses four committees. By 2018, that ratio reached a high mark with the agency budget authorities being over 4,300 times that of the committees. With static staff sizes within the committees, this increased executive spending equates to a huge increase in workload for the committee aides, and in all likelihood, a reduced capacity for fruitful oversight.

Looking at discrepancies in staff sizes between the committees and their sister departments tells a similar story of a Congress overwhelmed. Take the Department of Homeland Security and the House and Senate Committees on Homeland Security, for example. In 2019, the two committees employ 70 and 97 staffers, respectively—about 75 percent of whom are substantive policy and investigative

staffers and not responsible for administrative or communications duties. This leaves 56 House Homeland Security and 77 Senate Homeland Security aides available to the committee for *all legislative and oversight tasks*. For comparison, those 133 aides are responsible for the oversight of the more than 240,000 people employed by the Department of Homeland Security.<sup>24</sup> And, this is an endeavor that includes an incredibly broad sweep of internal agencies and departments, such as the U.S. Customs and Border Protection, the Federal Emergency Management Agency (FEMA), the U.S. Secret Service and the Transportation Security Administration (TSA), among others.<sup>25</sup> And all of this is in addition to the legislative demands of the committee itself. A similar narrative can be told of the other foreign affairs-related committees and the agencies within their jurisdiction. The bottom line? Congress is simply outmatched.

<sup>24</sup> "About DHS," U.S. Dept. of Homeland Security, last accessed Oct. 25, 2019.

<sup>25</sup> List of all agencies within the Dept. of Homeland Security.

## CONCLUSION

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**D**espite holding oversight authority and responsibility, congressional committees are starved of the capacity and staffing resources necessary to effectively monitor the operations of the executive branch. When it comes to the committees most responsible for foreign affairs and military programs and operations, Congress is outmatched by the president's agency on a host of measures, including the funding levels appropriated to the departments, as compared to the committees responsible for providing oversight; the number of aides conducting the day-to-day work on committee and within the agencies; and the experience and tenure levels of the staffers doing the job.

Importantly, Congress alone has the power to close this resource gap. But, to date, it has neglected to do so. Indeed, as explained by two expert oversight scholars: “The presidency is not solely responsible for this unconstitutional escalation. Congress has failed to check this abuse because it has failed to adapt its central power over the use of military force—the power of the purse—to the distinctive problem of limited war.”<sup>26</sup> As a consequence, its ability to provide the all-important oversight check on the president and his agencies has only grown less potent, even on matters as critical as our national security or use of military force. To regain its constitutional war power authority and provide a vital check on presidential decision-making Congress, then, must combine reinvestment in its own internal resources with the political will to reign in increasing presidential power.

<sup>26</sup> Bruce Ackerman and Oona Hathaway, “Limited War and the Constitution: Iraq and the crisis of presidential legality,” *Michigan Law Review* 109:4 (February 2011), pp. 447-517.



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# **A DYNAMIC RELATIONSHIP:** How Congress and President Shape Foreign Policy

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*by* JAMES WALLNER



## INTRODUCTION

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Franklin D. Roosevelt once remarked: “It is the duty of the president to propose and it is the privilege of Congress to dispose.”<sup>27</sup> A few years later, the political scientist Edward S. Corwin affirmed Roosevelt’s observation, writing that, “actual practice under the Constitution has shown that while the president is usually in a position to propose, the Senate and Congress are often in a technical position at least to dispose.”<sup>28</sup> Roosevelt’s remark was prompted by questions from reporters about his attempts to persuade Alben Barkley (D-Ky.) to lead the effort inside the Senate to pass legislation expanding the size of the Supreme Court. In a string of rulings, the Court’s conservative majority declared parts of Roosevelt’s New Deal agenda unconstitutional.<sup>29</sup> In response, the president asserted that the Constitution gave the legislative branch, not the judiciary, the power to make law. Moreover, he cast his subsequent effort to dilute the power of the Court’s conservative justices by increasing the number of justices who sat on it as protecting Congress’s constitutional powers.

However, Roosevelt left unsaid the extent to which he too had encroached on Congress’s prerogative to make law during his time in office. Roosevelt’s efforts to pressure Congress to approve his court-packing plan, albeit unsuccessful, are illustrative of his tendency to intervene directly in the deliberations of Congress to ensure that his preferred policy outcome prevailed. In doing so, Roosevelt altered the relationship between Congress and the president in the policy process, especially regarding questions of foreign policy. Before his tenure, presidents had generally tried to influence that process by blocking policies with which they disagreed. After it, presidents tried to influence them proactively by intervening in Congress’s internal operations.

However, despite this shift, the balance of power between Congress and the president in the policy process remains dynamic. That is, the relationship is always in flux, even regarding foreign policy, which observers have generally considered as dominated by the president. This is because “the power to determine the substantive content of American foreign policy is a divided

<sup>27</sup> Franklin D. Roosevelt “Press Conference No. 382,” July 20, 1937.

<sup>28</sup> Edward S. Corwin, *The President, Office and Powers, 1787-1948: History and Analysis of Practice and Opinion* (Fourth edition: New York University Press, 1957), p. 171.

<sup>29</sup> In 1935, the Supreme Court ruled in two separate cases that the National Recovery Administration and the Agricultural Adjustment Administration were unconstitutional.

power.”<sup>30</sup> Specifically, the Constitution empowers both Congress and the president to participate in the foreign policymaking process, albeit in different ways. This leads to institutionalized competition between the two branches of government, an arrangement Corwin cast as “an invitation to struggle for the privilege of directing American foreign policy.”<sup>31</sup> Lee Hamilton, a long-time member of the House of Representatives and widely acknowledged expert on foreign policy, calls the struggle between Congress and the president: “an-going tug of war to determine the appropriate balance of power for making policy.”<sup>32</sup> Another scholar and former State Department official characterizes the shifting locus of power in foreign policymaking as a pendulum that swings back and forth between the two branches.<sup>33</sup>

Which branch prevails in the struggle, or where that pendulum stops, depends ultimately on how effectively Congress and the president use their constitutional powers amidst domestic and international environments that are continually changing. For example, the president’s dominance of the foreign policymaking process after World War II succumbed to resurgent congressional activism in the 1970s, as the willingness of both Democrats and Republicans to assert themselves increased in response to presidential failures in Vietnam, as well as growing public concern about security policy more broadly. By 1986, one former State Department official observed that: “congressional activism on foreign policy is now a fact of life.”<sup>34</sup> A decade earlier, Henry Kissinger, then-Secretary of State, a former National Security Advisor and a long-time foreign policy maven proclaimed: “The decade-long struggle in this

country over executive dominance in foreign affairs is over. The recognition that Congress is a co-equal branch of government is the dominant fact of national politics today.”<sup>35</sup>

However, beginning in 2001, the pendulum began to swing back toward the president, as Congress deferred to George W. Bush’s formulation of foreign policy and the war on terror in the aftermath of the September 11 attacks.<sup>36</sup> Most recently, bipartisan opposition to President Trump’s decision to withdraw U.S. forces from Syria, as well as concern among Democrats and Republicans about his foreign policy more generally, suggest that the pendulum could, once again, swing back toward Congress in the years ahead.

To better understand what happens when the pendulum of power swings back and forth between Congress and the president, this paper examines the procedural and strategic dynamics that underlie the struggle between the two branches in the foreign policymaking process. It begins by surveying the constitutional framework in which Congress and the president compete for influence. It then details each branch’s respective powers under the Constitution and details two strategies presidents have used to compensate for their relative lack of formal power to influence the foreign policymaking process. The paper then examines how the struggle over foreign policy has impacted the general nature of policy outcomes more generally, and concludes by considering the internal challenges Congress must overcome to reassert itself in foreign policymaking in the years ahead.

<sup>30</sup> Corwin, p. 171.

<sup>31</sup> Ibid.

<sup>32</sup> Lee H. Hamilton, “Congress and Foreign Policy,” *Presidential Studies Quarterly* 12:2 (Spring 1982), p. 133.

<sup>33</sup> See Alvin Paul Drischler, “The Activist Congress and Foreign Policy,” *SAIS Review* 6:2 (Summer-Fall 1986), pp. 193-204.

<sup>34</sup> Ibid., p. 199.

<sup>35</sup> Henry Kissinger, *The Department of State Bulletin* LXXII:1871 (May 5, 1975), p. 562.

<sup>36</sup> On Sept. 14, 2001, Congress passed a resolution (Pubic Law 107-40) authorizing the use of military force against “those responsible” for the attacks and any associated actors. The resolution gave the president significant discretion to wage war on terror. The authorization does not expire.

## CONSTITUTIONAL FRAMEWORK

The Constitution establishes a framework for institutionalized competition between Congress and the president in foreign policymaking. The reason for this is that the delegates to the Federal Convention who gathered in Philadelphia during the summer of 1787 to deliberate on a new governing charter to replace the Articles of Confederation wanted to empower the national government in a number of areas, including foreign policy, while simultaneously ensuring that it did not abuse its powers.

These two contradictory goals—to both empower and limit the new government—were necessitated by the Framers’ concern about tyrannical government. James Madison articulated what his fellow delegates had in mind in *Federalist* 47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>37</sup>

The Framers’ solution to the problem was the related doctrines of separation of powers and checks and balances. The Constitution established three distinct branches, each of which corresponded to an inherent function of government. In *Federalist* 9, Alexander Hamilton acknowledged that these doctrines were central to overcoming the problems that had previously plagued the republican form of government.<sup>38</sup> With the ratification of the Constitution, Hamilton argued, “the enlightened friends to liberty” had reason to hope that the republican form of government may finally be sustainable because “[t]he science of politics [. . .] has received great improvement.”<sup>39</sup> Hamilton continued:

“The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior [. . .] these are wholly new discoveries [. . .] They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.”<sup>40</sup>

<sup>37</sup> James Madison, “The Federalist 47,” in *The Federalist: Gideon Edition*, ed. George W. Carey and James McClellan (Liberty Fund, 2001), p. 249 [hereinafter: *The Federalist*].

<sup>38</sup> Alexander Hamilton, “Federalist 9,” in *The Federalist*, p. 38.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*



In *Federalist 49*, Madison described this arrangement as: “several departments being perfectly co-ordinate by the terms of their common commission,” as stipulated in the “constitutional charter.”<sup>41</sup> Note that separation here does not mean that all three branches are equally powerful. Instead, it means that they are of the same rank, or coordinate.

The doctrine of the separation of powers requires the three branches of government to be separate and independent from each other; separation was perfunctory without independence. According to Madison: “In order to lay a due foundation for the separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own.”<sup>42</sup>

Once the Framers embraced separation in principle, they wrestled with the complex question of how best to maintain it and to preserve the independent branches of government upon which it depended. For their solution, the Framers turned to the concept of institutional checks to ensure that political branches (i.e., Congress and the president) did not encroach on each other. In contrast to the logic underpinning the doctrine of the separation of powers, however, the concept of institutional checks requires the co-mingling of powers. This is because a branch of government cannot prevent encroachments on its power by another branch merely by using the power associated with its essential functions. Instead, the branches need additional powers to defend themselves. Madison affirmed this understanding during the Federal Convention’s debate over the Council of Revision:

“ If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. [sic] encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate.”<sup>43</sup>

<sup>41</sup> James Madison, “Federalist 49,” in *The Federalist*, p. 261.

<sup>42</sup> James Madison, “Federalist 51,” in *The Federalist*, p. 268.

<sup>43</sup> Quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press, 1911), Vol. II, p. 77.

Moreover, in *Federalist 51*, Madison similarly asserted that “the great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>44</sup> The “necessary constitutional means” Madison mentions refer to the president’s veto power and the super-majoritarian vote requirement in Congress to override the president. This comingling of the legislative function with the executive branch explicitly violates the separation of powers. Nevertheless, the president would be unable to resist legislative intrusion into his sphere of responsibility without such a means of self-defense.

In the same way, the Appointments Clause gives the Senate a share of the president’s executive power to select officers to serve in the government, and the Treaty Clause empowers the president to negotiate treaties with foreign nations subject to ratification by the Senate (Article II, section 2, clause 2). Just as the president’s discretion to exercise his veto power is not circumscribed in any way other than that stipulated in the Constitution, so too is the Senate free to determine how it will exercise power delegated to it to confirm those nominated by the president.<sup>45</sup> This constitutional framework ensured that the legislative and executive branches would remain dependent on each other in the foreign policymaking process. The nature of that relationship, however, depends upon how effectively each branch leverages its powers under the Constitution in response to developments at home and abroad.

<sup>44</sup> “Federalist 51,” p. 268.

<sup>45</sup> When viewed from this perspective, it makes more sense why the Framers placed the Veto Clause in Article I of the Constitution, which established the legislative branch, and the Appointments Clause in Article II, which established the executive branch. The power, or check, is located in the article to which its function most closely aligns.

# CONGRESSIONAL POWERS

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Under the Constitution's framework of separate institutions sharing powers, Congress is the dominant branch of government. As Madison noted in *Federalist 51*: "in republican government the legislative authority, necessarily, predominates."<sup>46</sup> Underpinning this dominance is the fact that the Constitution gives the House and Senate plenary power to legislate in the Legislative Vesting Clause (Article I, section 1). In the past, Congress has used this power to weave "a fabric of 'restraints, restrictions, and reports'"<sup>47</sup> to constrain presidential initiative in foreign policymaking. The Spending Clause (Article I, section 8, clause 1) gives Congress the exclusive power to raise revenue "to pay the Debts and provide for the Common Defence and general Welfare of the United States." Madison called the power of the purse "the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."<sup>48</sup> He further observed that the combination of the Spending Clause and the Origination Clause (Article I, section 7, clause 1) gave the House of Representatives power to "accomplish their just purposes" by virtue of the fact that they "can not only refuse, but they alone can propose the supplies requisite for the support of government."<sup>49</sup>

The Constitution's Commerce with Foreign Nations Clause (Article I, section 8, clause 3) empowers Congress to regulate trade. Article I,

section 8, clause 10, gives it the power to "define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations." Furthermore, Article I, section 8, clause 11, stipulates that Congress has the power to declare war or otherwise authorize the use of military force, grant Letters of Marque and Reprisal, and make rules concerning captures on land and water.

The Constitution also empowers Congress to "raise and support Armies" (Article I, section 8, clause 12), make military regulations (Article I, section 8, clause 14) and to call forth the militia to "repel invasions" (Article I, section 8, clause 15). The Necessary and Proper Clause (Article I, section 8, clause 18) empowers Congress "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

As noted, the Constitution gives the Senate a share of the president's executive powers. Specifically, the Treaty Clause stipulates that two-thirds of senators present and voting must approve all treaties signed by the president before they take effect, and the Appointments Clause requires the Senate to confirm "Ambassadors [...] other public Ministers and Consuls [...] and all other Officers of the United States whose Appointments are not herein provided for, and which shall be established by Law" (Article II, section 2, clause 2).<sup>50</sup>

<sup>46</sup> "Federalist 51," p. 269.

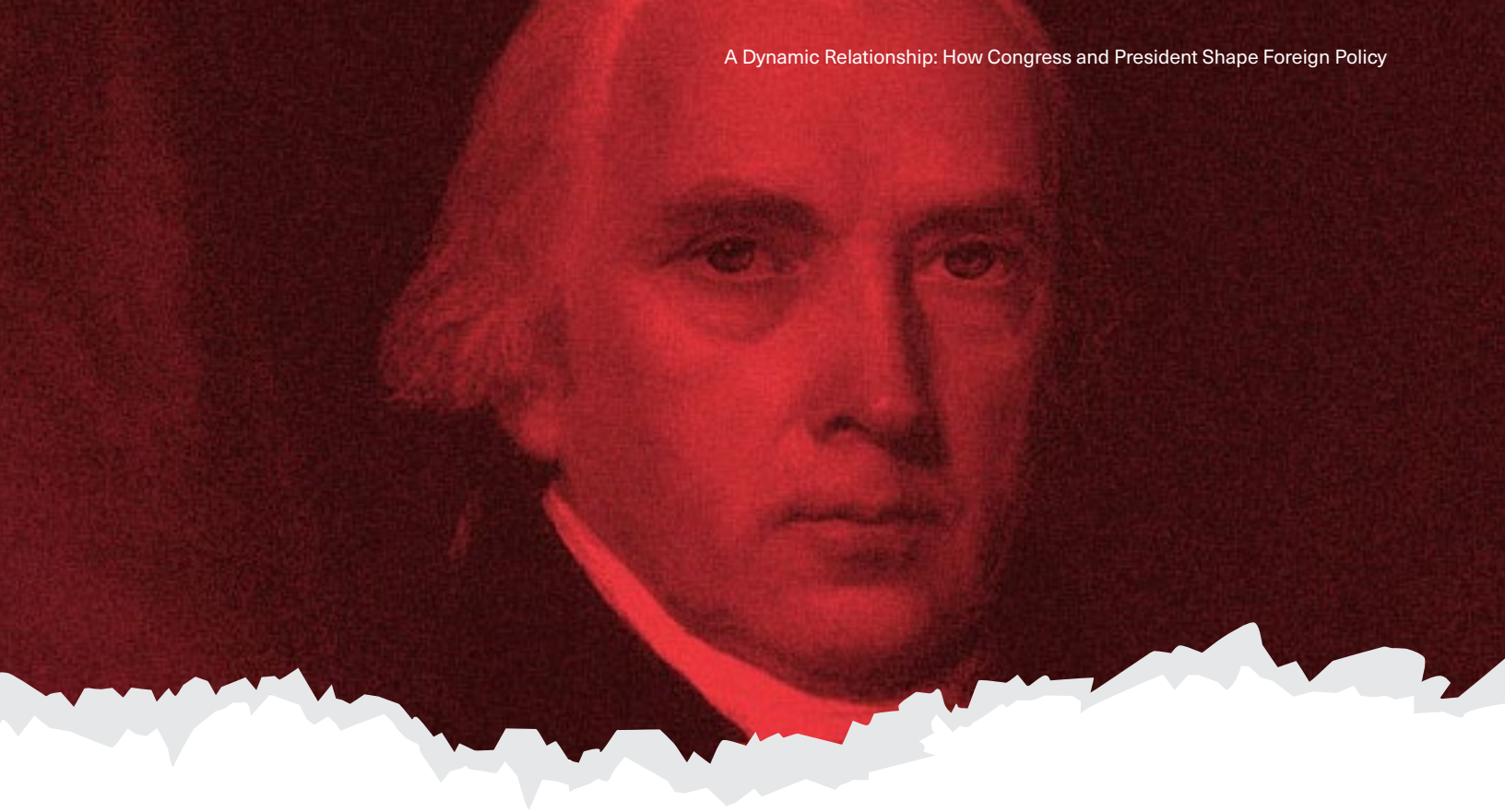
<sup>47</sup> Drischler, p. 198.

<sup>48</sup> James Madison, "Federalist 58," in *The Federalist*, p. 303.

<sup>49</sup> The Origination Clause stipulates: "All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills."

<sup>50</sup> The Recess Appointments Clause (Article II, section 2, clause 3) gives the president the power to "fill up Vacancies that may happen during the Recess of the Senate." However, Congress can refuse to adjourn for the requisite period, thereby precluding the president from making recess appointments.





Congress may use its plenary power over legislation to influence foreign policy by changing the law or by changing the procedures that govern the process by which foreign policy is made. Congress may also threaten to use its powers in these two ways in order to “extract policy concessions from the Executive branch.”<sup>51</sup> According to former Attorney General and Under Secretary of State Nicholas Katzenbach, “Congress can, and sometimes does, cripple and frustrate a particular foreign policy through legislative restriction or refusal to appropriate funds.”<sup>52</sup> For example, Congress could refuse to fund a foreign policy initiative or military engagement. Lawmakers could also attach riders to appropriations bills or other legislation considered to be must-pass, restricting the president’s ability to engage in particular activities (i.e., limits on covert activities or arms sales in

particular countries). Congress can also require the president and executive branch agencies to report regularly to House and Senate committees on their activities. Congress may create new agencies and positions within the executive branch, as well as joint legislative-executive commissions, to inject congressional preferences into the administration’s deliberations over foreign policy.<sup>53</sup> It may also encourage the executive branch to advance policies more in line with the preferences of its members by creating new procedural and substantive requirements for negotiations with foreign nations. Furthermore, the Senate may use its constitutionally mandated role in the confirmation process to ensure that the administration officials who formulate and implement foreign policy reflect its preferences.<sup>54</sup>

<sup>51</sup> See, e.g., Louis Fisher, *Presidential War Power* (Second revised edition: University Press of Kansas, 2004), pp. 7 and 10-12; James M. Lindsay, *Congress and the Politics of U.S. Foreign Policy* (The Johns Hopkins Press Ltd., 1994), pp. 77, 84-87 and 97; Lee H. Hamilton and Jordan Tama, *A Creative Tension: The Foreign Policy Roles of the President and Congress* (Woodrow Wilson Center Press, 2002), p. 64.

<sup>52</sup> Nicholas Katzenbach, *Congress and Foreign Policy*, Irvine Lecture Delivered at the Cornell Law School, May 9, 1969, p. 34.

<sup>53</sup> For example, in 1976, Congress created a joint legislative-executive Commission on Security and Cooperation in Europe to facilitate lawmakers’ participation in the policymaking process inside the executive branch.

<sup>54</sup> As a practical matter, the view that the president is entitled to pick the people who work in his administration dilutes the Senate’s ability to use the confirmation process as a tool to influence foreign policy.

Congress had come to rely on the legislative veto to limit presidential decision-making in foreign policy before the Supreme Court's decision in *INS v. Chadha*, which declared the procedure unconstitutional. After that ruling, lawmakers developed Chadha-compliant mechanisms, such as resolutions of disapproval or approval to reverse presidential actions after they had been taken. However, in recent years, the disproportionate number of disapproval mechanisms compared to approval ones suggests that Congress is unwilling to reassert itself in foreign policymaking. Whereas the passage of an approval resolution is required before a president's proposed action can take effect (and therefore requires Congress to proactively support the president), Congress must wait for the president to act before it can pass a disapproval resolution reversing the action (retroactively). For that reason, the president remains advantaged in the process because technically, it only requires a simple majority to pass legislation in the House and Senate. However, if they pass a disapproval resolution, the president can veto it, which raises the threshold to stop the president's actions from a simple majority to the super majority required to override a veto. In contrast, approval mechanisms advantage Congress by requiring the House and Senate to pass a resolution supporting the president's action before it can take effect.

The Constitution's Rules and Expulsion Clause (Article I, Section 5, clause 2) gives Congress the power to "determine the Rules of its Proceedings." The House and Senate have used this power to alter their internal structures and decision-making processes to facilitate (or restrict) congressional activism in foreign policy. For example, both houses created select committees on intelligence in 1975. The new panels made it easier for Congress to assert itself vis-à-vis the president and the intelligence community. Moreover, in 1978, the committees' oversight activities helped to pass the Foreign Surveillance Act (Public Law 95-511), which reformed how the government collected intelligence overseas. More generally, structural changes inside the House and Senate empowered junior lawmakers to push their colleagues to adopt a more activist posture in the foreign policymaking process.<sup>55</sup>

<sup>55</sup> According to Drischler, "Congressional activism in the early 1970s was as much a generational revolt against congressional floor and committee leadership as it was a seizure of foreign-policy reins from the executive branch" (p. 204).



## PRESIDENTIAL POWERS

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The Constitution gives the president few enumerated powers with which to influence the foreign policymaking process. The Executive Vesting Clause (Article II, section 1, clause 1) gives the president the “executive power,” and Article II, section 3 stipulates that he or she “shall receive Ambassadors and other public Ministers.” The Take Care Clause (Article II, section 3) charges the president with ensuring that the laws approved by Congress are “faithfully executed.” The Presentment Clause (Article I, section 7, clause 2) gives the president a share of the legislative power to veto bills. Its requirement for a two-thirds majority to override a veto in the House and Senate gives the president a powerful tool to preserve the status quo in foreign policy against an activist Congress.<sup>56</sup>

The Constitution also stipulates that the president “shall be the Commander and Chief of the Army and Navy of the United States, and the Militia of the several states, when called into the actual Service of the United States” (Article II, section 2, clause 1). It gives he or she the power to “make Treaties” and to nominate government officials with the “advice and consent of the Senate” (Article II, section 2, clause 2).<sup>57</sup>

However, while the president has few formal powers to shape foreign policy, he nevertheless has considerable informal power to do so. Principal among these is what Teddy Roosevelt referred to as the “bully pulpit.”

<sup>56</sup> The president may use a statement of administration policy to issue a veto threat. For a description of veto bargaining, see: C. Lawrence Evans and Stephen Ng, “The Institutional Context of Veto Bargaining,” in *Rivals for Power: Presidential-Congressional Relations*, ed. James A. Thurber (Rowman & Littlefield Publishers, Inc., 2006), pp. 183-208.

<sup>57</sup> The Framers did not intend for this to take away the president’s ability to repel sudden attacks. However, it should be noted that they construed this ability as an emergency power only to be used to defend the United States from foreign aggression. See Fisher, pp. 2, 6-9 and 12-14.



## GOING PUBLIC

A direct appeal to the people enables the president to harness public opinion in support of his foreign policy initiatives. Moreover, the ongoing revolution in communication and transportation technology has assisted the president in taking his case directly to the people. Furthermore, the president's position atop the vast administrative state, primarily since Franklin Roosevelt's presidency in the 1930s, provides him with the information, resources and general wherewithal to quickly formulate a detailed foreign policy and to advocate for it aggressively.

The political scientist Samuel Kernell dubs this strategy "going public."<sup>58</sup> According to Kernell, presidents since Roosevelt have also tried to overcome the difficulties inherent with a bargaining strategy by relying on the bully pulpit. He argues that bypassing Congress and appealing directly to the people allows the president to play an active role in congressional deliberations. A successful presidential appeal for support will prompt the American public to press their congressional delegations to enact the president's preferences into law.<sup>59</sup>

A presidential preference for going public instead of bargaining has increased over the years, as incumbents build upon the precedents set by their predecessors. Moreover, the revolution in communication and transportation technology that occurred in the second half of the twentieth century facilitated the strategy. Lawmakers also became more susceptible to it, as the ease of information exchange and travel strengthened the accountability link between lawmakers and their constituents, and made lawmakers less likely to support policies their constituencies opposed in return for support elsewhere (i.e., made them less reliable bargaining partners). By appealing directly to the people in this manner, the president can set the foreign policy agenda and play a role in Congress's subsequent deliberations. Public addresses, appearances, political travel (and tweets!) are how presidents go public today.

<sup>58</sup> Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (Fourth edition: CQ Press, 2007), pp. 29-34.

<sup>59</sup> *Ibid.*, pp. 38-45.

## THE POWER TO PERSUADE

The political scientist Richard Neustadt details an alternative strategy, as he observes that the president influences policy outcomes through an energetic understanding of presidential power and a determination to wield it.<sup>60</sup> Neustadt acknowledges that presidents can set the foreign policy agenda, however, their ability to control the lawmaking process inside Congress is dependent upon how well they understand and use their powers.<sup>61</sup>

Neustadt broadly defines presidential power as either formal or informal and defines the latter as the ability to persuade. Persuasion is accomplished through bargaining. There is no guarantee that the president's preferences will be enacted into law by Congress; success does not automatically follow from being able to set the agenda. While perhaps supportive of the president's general agenda, individual lawmakers do not share his or her specific preferences on every issue. This is because the two parties are not as cohesive as commonly thought. Intra-party differences between Congress and the president arise out of the differing status, obligations and rights that follow from their different constituencies and institutional responsibilities.<sup>62</sup>

In order to ensure success, the president must persuade lawmakers that not only is her preference good policy but that supporting it is also in their interest. The authority and status of the office enhance the president's ability to do so—that is, the president's support can help them achieve their goals (either regarding policy or reelection). Moreover, lawmakers typically

have interests outside of the specific policy area with which they are immediately concerned, and the president may offer to support them in those areas in exchange for support of her foreign policy priorities. Consequently, lawmakers can be persuaded to assist the president by supporting her policies in Congress.

According to Neustadt, a popular president is perceived to be powerful, which makes him a better bargaining partner for lawmakers, who are less likely to support the president if he is perceived to be unable to help them achieve their goals. Also, the bully pulpit is of little use if the president does not enjoy widespread public support. Successful appeals from an unpopular president are likely to fall on deaf ears.<sup>63</sup>

For that reason, a successful president will try to protect his influence so that he minimizes the instances in which he is unable to persuade lawmakers. He does so by making decisions that protect his reputation within the Washington, D.C. policy community and maintains the approval of the American people. Success or failure in any one issue area, at any given time in office, can enhance or diminish the president's ability to succeed in other areas. If the president is believed to be weak by the Washington policy community or if his approval rating is low, he will be less able to dominate the foreign policymaking process. In such circumstances, the president will be forced to assume a reactive course of action and will resort to negative strategies like the veto to ensure that policies he opposes are not successful.<sup>64</sup>

<sup>60</sup> Neustadt was initially writing in the 1950s, and thus his work was reflective of “mid-century” conditions. However, subsequent editions have continued to support his thesis. Richard E. Neustadt, *Presidential Power, and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (Free Press, 1990), p. 7.

<sup>61</sup> *Ibid.*, p. 155.

<sup>62</sup> *Ibid.*, pp. 8, 37-38.

<sup>63</sup> *Ibid.*, pp. 47, 51. Also, see Neustadt, pp. 50-72 for an in-depth analysis of how presidents protect their reputation in D.C. For an in-depth description of how presidents protect their public approval, see Neustadt, pp. 73-90.

<sup>64</sup> *Ibid.*, pp. 48, 52, 54 and 76.



## PRESIDENTIAL POWER IN PRACTICE

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**A**lthough the aforementioned informal powers enable the president to set the foreign policy agenda, their utility is limited whenever Congress considers foreign policy legislation. For example, the president cannot introduce policy initiatives directly. Moreover, he cannot prohibit Congress from considering alternative proposals in such debates. While the president may threaten to veto alternatives that he opposes, actually using the veto is a reactive strategy that is unable to control what Congress considers in the

first place. Congressional support for a foreign policy that the president opposes may increase, paradoxically, once he issues a veto threat. In such circumstances, the president's allies in Congress are free to vote for popular legislation because they expect the president to veto it. In theory, presidential vetoes can solidify lawmakers in support of the proposal that the president vetoed. And, the success or failure of any presidential strategy differs according to the partisan composition of Congress.



## IN A DIVIDED GOVERNMENT

Neustadtian bargaining initially appears suited to the president during periods of divided government.<sup>65</sup> A president that faces a Congress controlled by another party will have to persuade some lawmakers to support her foreign policies. Given this, divided party control of government has, in the past, created a give-and-take atmosphere in which bargaining can be successful. Scholarship has demonstrated that Congress and the president often agree on important legislation during periods of divided government.<sup>66</sup>

However, divided party control adds a particular motivation for lawmakers to oppose the president: partisanship. This enhances the likelihood that it will be harder to persuade individual members that supporting the president's agenda is in their best interest. As a result, the bargaining stakes will increase.

If the opposition cannot be persuaded to adopt the president's preferences or if the costs are too high, a strategy of going public represents an attractive alternative to one based on bargaining. If the powers of persuasion prove unconvincing, then a direct appeal to individual members' constituencies may change the context in which bargaining occurs. Such a change may induce

lawmakers to view supporting the president's preferences as in their best interest. Public support may also impact the bargaining process by encouraging lawmakers to extract a lower cost from the president in exchange for their support. Finally, going public may result in a new congressional majority, which may be more supportive of the president.<sup>67</sup>

However, presidents should go public with care. Such an appeal, if unsuccessful, may yield an environment in which bargaining becomes impossible. An unsuccessful appeal to a member's constituents could strengthen the member's position and embolden their resistance. Such a situation may make the price of persuasion prohibitively high or even preclude bargaining altogether. This situation is likely in a closely divided Congress in which partisans are continually battling for majority control.<sup>68</sup> For these reasons, the blunt tool of going public is often ill-suited to ensure that the president's specific policy alternatives are ultimately enacted into law during divided-party control of the government. However, once the president sets the agenda by going public, bargaining may still represent a strategy ideally suited for success during congressional deliberations.

<sup>65</sup> Neustadt's original case studies examined the Truman administration during Republican control of the 80th Congress, and the Eisenhower administration during its second term when Democrats controlled Congress.

<sup>66</sup> For example, see David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002* (Second edition: Yale University Press, 2005).

<sup>67</sup> Kernell, pp. 58 and 60.

<sup>68</sup> James P. Pfiffner, "Partisan Polarization, Politics, and the Presidency: Structured Sources of Conflict," in *Rivals for Power: Presidential-Congressional Relations*, pp. 33-58.

## IN A UNIFIED GOVERNMENT

Unified party control of government makes it considerably easier for presidents to set the agenda and ensure that their preferences are ultimately enacted into law. However, it should be noted that a unified government alone does not enable the president to control either the agenda or the alternative specification process. Consequently, the president must employ the bargaining strategy or the going public strategy (or a combination thereof) to dominate foreign policymaking at both the agenda-setting stages and in congressional deliberations. As in conditions of divided government, a unique mix of bargaining and going public is the best strategy with which to ensure that the president's preferences become law.

Unified government does not preclude the necessity of bargaining. As mentioned earlier, individual lawmakers do not always share the president's policy views. Different constituencies and institutional responsibilities create disparate perspectives and preferences. However,

ideological similarity and common partisan interests mean that the stakes in bargaining will likely be lower. It should, therefore, be easier for the president to persuade members of his party that supporting his preferences is in their interest. Persuasion is enhanced if the president is popular; unpopular presidents near the end of their terms may be unable to convince their fellow partisans that supporting them is worthwhile. The president should also be less likely to issue overt appeals to the people to set the foreign policy agenda and dominate congressional deliberations during unified party control of the government. This is because Congress should support the president's general agenda in most cases if the same political party controls it. In such circumstances, the two branches are more likely to agree on broad foreign policy issues, and lawmakers believe that supporting the president's policies helps them win reelection. However, unified party control of government does not preclude the president from attempting to go public to set the foreign policy agenda and achieve his goals inside Congress.

# THE BALANCE OF POWER THROUGHOUT HISTORY

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The pendulum of power in the foreign policymaking process has swung back and forth between Congress and the president throughout American history. In the past, the location of that pendulum corresponded to the nature of the underlying policy. For example, presidents throughout history have interpreted their constitutional powers broadly, especially the power they derive from being commander-in-chief of the armed services. President Washington provoked the first controversy surrounding the issue of presidential power in the nation's history with his response to the outbreak of hostilities between Great Britain and France. He issued a Proclamation of Neutrality, stating that the United States would refrain from becoming a party to the conflict. Washington's decision sparked a debate between the existing political parties (the Federalists and the Republicans) over the power of Congress and the president to decide questions of war and peace. In what would come to be known as the Pacificus-Helvidius debate, Alexander Hamilton argued that while Congress alone has the power to take the nation to war, the president may take action to preserve the peace until Congress has decided upon a course of action.<sup>69</sup>

President Jefferson emulated Washington's example of unilateral presidential action in the foreign policy realm, albeit in different ways. In 1801, Jefferson sent a small naval force to the Mediterranean Sea without congressional authorization to confront Barbary pirates who were raiding American vessels.<sup>70</sup> President Polk also deployed American forces unilaterally without consulting Congress. Forty-five years after Jefferson acted in the Mediterranean, Polk deployed the army to the Mexican border.<sup>71</sup> Actions like these served as precedents for those who wanted to expand presidential power further. As such, they undermined congressional prerogatives to decide when American forces can be used in hostile actions.<sup>72</sup>

After a period of congressional activism in the second half of the nineteenth century, the pendulum of power swung back toward the president in the twentieth. Amidst a changing international environment, the president used his powers—both formal and informal—to, at best, lead Congress to war and, at worst, to intervene unilaterally without congressional approval under the guise of protecting Americans abroad and their property.

<sup>69</sup> Ibid., pp. 26-31.

<sup>70</sup> Jefferson waited to notify Congress of his action until his first annual address to Congress.

<sup>71</sup> Polk's decision ultimately sparked the Mexican-American War.

<sup>72</sup> Fisher, pp. 32-37.

After World War II, the president cited United Nations resolutions and international treaties to authorize the use of military force without congressional approval. For example, President Truman argued that U.N. action empowered him to send American forces to participate in the civil war on the Korean peninsula. In the 1990s, President Clinton used the same rationalization to intervene in the Balkan wars. He claimed that mutual security treaties obligated the United States to commit the American military abroad and, therefore, gave him the power to authorize such actions without prior congressional approval.

However, when Congress approved the U.N. Charter, it stipulated that any involvement of the United States in U.N. actions must be in accordance with the constitutional processes of the nation. In other words, Congress had to approve the use of American forces abroad, even if such forces were to operate under the rubric of a U.N. mandate. Moreover, international treaties do not exclude the constitutional requirement that the House of Representatives must add its consent to the use of military force abroad.<sup>73</sup>

## TRENDS IN FOREIGN POLICY ACTIVISM

The United States has embraced both an activist foreign policy and a more reserved policy at various points in its history and these contradictory dispositions can be broadly interpreted as manifestations of the ascendancy of presidential or congressional power in the policymaking process.



### Congressional Reservation—

Generally speaking, the power of the executive constrains the ability of Congress to pursue an activist foreign policy. The Constitution designates the president as commander-in-chief. Despite the clear evidentiary record, past presidents have cited this as a source of their inherent and independent authority and have relied on a distorted interpretation of John Marshall's "sole organ" doctrine to legitimize expansive presidential power in the foreign policymaking process. Acceptance of this view in the judiciary, Congress and among the American people has shifted the balance of power away from the legislative branch where the founding fathers intended for it to reside.<sup>74</sup>

Several factors internal to Congress also serve to constrain the institution's ability to pursue an activist foreign policy. While Congress generally acquiesces to the president in foreign policy because of the broad powers of the executive,

<sup>73</sup> Ibid., pp. 91-95 and 198.

<sup>74</sup> Louis Fisher, "Studies on Presidential Power in Foreign Policy: The 'Sole Organ' Doctrine," Law Library of Congress, August 2006, p. 2.



when it does act, it generally assumes a reactive rather than a proactive posture. This is largely because fragmentation in Congress has made it difficult for the institution to marshal the expertise, develop the priorities and build the consensus required to develop an activist foreign policy.

In recent years, the legislative branch has increasingly become more representative of American society, and more individualistic members have been elected to the body. This has both added to the number of foreign policy

issues under consideration and increased the difficulty of finding a compromise on the majority of those issues, especially when using centralized structures that restrict deliberation. The expansion of issues has also diluted the decision-making process by increasing the number of committees with jurisdiction over foreign policy which, in turn, has increased the number of overall participants. For that reason, decision-making is now centered in party leaders in the House and Senate, who, in the past, have supported presidential dominance in foreign policymaking.

### **Presidential Interventionism—**

If the various constraints on Congress's foreign policy activism lead to a more reserved foreign policy stance, presidential dominance encourages interventionist policy. Executive power is enhanced during times of war or other crisis, and attacks on the United States either at home or abroad are likely to precipitate a shift in public sentiment away from a reserved view, at least in the short term.

The pressures working against a reserved foreign policy were particularly evident in the years proceeding American entry into World War II. Despite widespread popular and congressional opposition to American involvement in the war, Roosevelt skillfully used his available powers to steer the United States gradually toward eventual involvement on the side of the allies. Also, the public's disinterest in a reserved foreign policy during times of crisis is illustrated by the rapid shift in opinion on American involvement in the war after the Japanese attack on Pearl Harbor. The September 11 attacks similarly reinvigorated popular and congressional support for an interventionist foreign policy. In doing so, the attacks caused the pendulum of power to swing back toward the supremacy of the president's role in foreign policymaking that is evident today.



## CONCLUSION

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Over the past two centuries, the relationship between Congress and the president in the foreign policymaking process has changed significantly. In many respects, the status quo bears little resemblance to the constitutional framework erected by the Framers in 1787. The president has dominated the foreign policymaking process since Roosevelt. The general strategies of bargaining and going public illustrate how the executive has compensated for his relative lack of enumerated powers to exercise such influence in areas of traditional congressional dominance.

Notwithstanding the president's dominance over foreign policymaking, it is essential to remember that the pendulum can swing back toward Congress. The president is dependent upon the legislature to approve his foreign policy preferences and to provide the necessary funding, and thus the ability to make law and the power of the purse gives Congress significant leverage to set the tone of American foreign policy—if they choose to use it.







# WHY CONGRESS CAN'T SUE TO END MILITARY CONFLICTS

*by* ANTHONY MARCUM

## INTRODUCTION

Two months after the United States entered into World War II, President Franklin D. Roosevelt signed Executive Order 9066, which effectively relocated any resident of Japanese ancestry from the western United States and led to the detention of tens of thousands of Japanese-Americans throughout the duration of the war.<sup>75</sup>

Fred Korematsu was one of the many Americans ordered to relocate. He refused, however, and was later convicted for violating the president's wartime order.<sup>76</sup> He then challenged the constitutionality of his conviction. In the meantime, he lived at an "assembly center" for Japanese Americans in San Bruno, California (a former horse track) and a temporary detention camp in Topaz, Utah.

Two years after his conviction—sixth months before Nazi Germany's formal surrender and ten months before Japan's own surrender—Korematsu's claim reached the U.S. Supreme Court, but it upheld the conviction. Justice

Hugo Black's majority opinion reasoned that: "Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."<sup>77</sup> Justice Black further rationalized that courts could not judge the government's actions by "the calm perspective of hindsight" and later "say that at that time these actions were unjustified."<sup>78</sup> Before *Korematsu* was published, it had been popularly retold that, while the justices debated the case in conference, Justice Black argued that "somebody has to run this war, either us or Roosevelt. And we can't, so Roosevelt has to."<sup>79</sup>

Of course, time has been unkind to Justice Black's *Korematsu* decision. Even then, Justice Robert Jackson was troubled by the majority's logic. He argued that "once a judicial opinion rationalizes such an order [...] The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>80</sup> And, for decades since, scholars and popular writers have

<sup>75</sup> "Japanese Relocation During World War II," National Archives, April 10, 2019.

<sup>76</sup> "Fred T. Korematsu: Abbreviated Biography," Fred T. Korematsu Institute, accessed Oct. 9, 2019. <http://www.korematsuinstitute.org/fred-t-korematsu-lifetime>.

<sup>77</sup> *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

<sup>78</sup> *Ibid.*, 224.

<sup>79</sup> See, e.g., Ashish Joshi, "A Report from the Front: An Interview with Justice Stephen G. Breyer," *Litigation Journal* 43:2 (Winter 2017), p. 21.

<sup>80</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).



routinely criticized the opinion.<sup>81</sup> Indeed, just last year in *Trump v. Hawaii*, Chief Justice John Roberts declared that “Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”<sup>82</sup>

However, despite such a repudiation, some of the questions underscoring Justice Black’s core concerns may still hold true. For example, what is the judiciary’s role in war? Is it unable to adjudicate foreign affairs disputes from the “calm perspective of hindsight?”<sup>83</sup> Indeed, current federal court practice suggests that Justice Black’s view has ultimately prevailed. Consider the United States’ recent engagements in Afghanistan and Syria.

Enacted shortly after the Sept. 11 terrorist attacks, the 2001 Authorization for Use of Military Force gave the president the authority “to use all necessary and appropriate force” against any entity “he determines planned, authorized, committed, or aided” in the attacks, or harbored “such organizations or persons.”<sup>84</sup> The next year, Congress passed a second Authorization for the Use of Military Force, which allowed the president “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq.”<sup>85</sup>

<sup>81</sup> See, e.g., Adam Liptak, “A Discredited Supreme Court Ruling That Still, Technically, Stands,” *The New York Times*, Jan. 27, 2014.; Erwin Chemerinsky, “Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated,” *Pepperdine Law Review* 39:1 (2013).; Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011).

<sup>82</sup> 138 S. Ct. 2392, 2423 (2018) (quotations marks omitted).

<sup>83</sup> *Korematsu*, 323 U.S. at 224.

<sup>84</sup> *Authorization for Use of Military Force*, Public Law 107-40 (2001).

<sup>85</sup> *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Public Law 107-243 (Oct. 16, 2002).



In the seventeen years since, Congress has not approved any additional uses of force. However, the United States continues to engage in hostilities in Afghanistan, Iraq and beyond. In April 2018, for instance, the United States and allies launched airstrikes in Syria, targeting “research, storage and military targets” as punishment for “a suspected chemical attack near Damascus [...] that killed more than 40 people.”<sup>86</sup>

In a memo released a month later, the Office of Legal Counsel (OLC) concluded that the Syria air strike was legal. The OLC reasoned that congressional approval was unnecessary because the president had “determined that the use of force would be in the national interest” and the limited scope of operations were “sufficiently limited that they did not amount to war in the constitutional sense.”<sup>87</sup>

These arguments follow many of the OLC’s prior arguments supporting the Obama administration’s prolonged 2011 air campaign in Libya.<sup>88</sup> In Libya, the Obama administration concluded that “an extensive bombing campaign that included striking 100 targets in just 24 hours, was [...] not ‘hostilities’ and therefore not subject to the War

Powers Resolution.”<sup>89</sup> This decision was recently referred to by Professor Oona Hathaway as “a death blow” to the War Powers Resolution’s effectiveness as a congressional check on the president’s war powers.

Despite significant military engagement, Congress did not directly authorize hostilities in either Libya or Syria. And both instances were criticized by scholars and members of Congress as an exceedingly broad view of the president’s constitutional powers.<sup>90</sup> But, if Congress wanted to stop these military actions, would they have recourse in court? Likely not. Suits challenging the president’s overreach in foreign relations have largely failed in federal court. This is because courts have been consistently unwilling to second-guess the executive branch’s military decision-making, and have instilled common law barriers that firmly limit judicial engagement. Two of the more common legal barriers barring Congress’s success in federal court include the doctrines of standing and political question.

<sup>86</sup> Helene Cooper et al., “U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack,” *The New York Times*, April 13, 2018.

<sup>87</sup> See Steven A. Engel, “April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities,” *Opinions of the Office of Legal Counsel* 42 (May 31, 2018).

<sup>88</sup> See Caroline D. Krass, “Authority to Use Military Force in Libya,” *Opinions of the Office of Legal Counsel* 35 (April 1, 2011).

<sup>89</sup> Oona A. Hathaway, “How to Revive Congress’s War Powers,” SSRN, Sept. 10, 2019.

<sup>90</sup> See, e.g., Jack Goldsmith and Oona Hathaway, “The Downsides of Bombing Syria,” *Just Security*, April 10, 2018.; Charlie Savage, “Attack Renews Debate Over Congressional Consent,” *The New York Times*, March 21, 2011.

## CONGRESSIONAL STANDING

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Article III of the Constitution limits judicial power to only “cases” and “controversies.”<sup>91</sup> It is not, however, limited to strictly domestic affairs. Article III, for example, states that judicial power extends to treaties and cases affecting ambassadors, admiralty and maritime jurisdiction and suits between domestic and foreign citizens.<sup>92</sup>

Nevertheless, regardless of subject, a claim must be justiciable, meaning “it is a claim that may be resolved by the courts.”<sup>93</sup> Ripeness and mootness are common bars to justiciability. Ripeness, for one, is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.”<sup>94</sup> An example of ripeness is: “when a federal court is asked to render a declaratory judgment that a statute or regulation is invalid or unconstitutional, yet it is unlikely that the plaintiff will suffer a hardship without pre-enforcement review of that law.”<sup>95</sup> Mootness, on the other hand, considers a case that was once ripe for adjudication but—due to a potential variety of circumstances—has changed to one wherein “a federal court can no longer grant effective relief.”<sup>96</sup>

For example, in one case, a prisoner attempted to challenge the constitutionality of his transfer to a maximum security facility, but during the litigation, was transferred back to a minimum security facility and thus the Court determined the case was moot.<sup>97</sup>

Beyond ripeness and mootness, standing is perhaps the most challenging bar to overcome. In short, to show standing, a plaintiff must show a “personal stake in the outcome of the controversy.”<sup>98</sup> This is satisfied by showing an “injury fairly traceable to the defendant’s allegedly unlawful conduct” that is “likely to be redressed by the requested relief.”<sup>99</sup> This requirement is often more challenging to show in the realm of foreign affairs. After all, plaintiffs “often lack the concrete and particularized injury that is required in order to have standing to challenge the legality of government action.”<sup>100</sup> Being a taxpayer or merely interested in a government act is not enough to show standing.<sup>101</sup>

<sup>91</sup> U.S. Const. art. III, § 2.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Nixon v. United States*, 506 U.S. 224, 226 (1993).

<sup>94</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

<sup>95</sup> *Mootness: An Explanation of the Justiciability Doctrine*, Congressional Research Service, Feb. 7, 2007.

<sup>96</sup> *Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005) (quotation marks omitted).

<sup>97</sup> *Preiser v. Newkirk*, 422 U.S. 395 (1975).

<sup>98</sup> *Warth v. Seldin*, 422 U.S. 490, 525 (1975).

<sup>99</sup> *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>100</sup> *Curtis A. Bradley and Jack L. Goldsmith*, *Foreign Relations Law* 51 (6th ed., 2017).

<sup>101</sup> *Ibid.* (citing cases).

## RAINES V. BYRD

Standing is often even more challenging for individual members of Congress. The seminal case *Raines v. Byrd* helps to explain why. In *Raines*, four Senators and two House members voted against the 1996 Line Item Veto Act. The Act, however, passed both chambers and was signed by the president. The day after the law went into effect, the six members sued in federal court, arguing the Act unconstitutionally infringed on Congress's Article I powers.<sup>102</sup>

The Supreme Court concluded that the congressional members lacked “legislative standing” to challenge the Act. It noted that the “standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>103</sup> With this in mind, the Court emphasized the distinction between personal and institutional injury.

Standing, according to the Court, requires a “particularized” injury. In other words, “the injury must affect the plaintiff in a personal and individual way.”<sup>104</sup> For example, in an earlier case, the Court found that a member of Congress had standing because the dispute concerned his expulsion

from the House and loss of salary.<sup>105</sup> In *Raines*, though, the Court reasoned that the congressional members were not asserting a particularized, personal injury. Instead, they were asserting an *institutional* injury because their actual injury was the loss of legislative power, “which necessarily damages all Members of Congress and both Houses of Congress equally.”<sup>106</sup>

At the same time, the Court clarified that the result might be different in the instance where there are enough legislators to enact or defeat a legislative act. Under those facts, there may be standing because the members’ votes would “have been completely nullified.”<sup>107</sup> Here, in contrast, the members’ “votes were given full effect. They simply lost that vote.”<sup>108</sup>

With this in mind, the Court reminded the members that they still have “an adequate remedy” outside of the federal courts.<sup>109</sup> They can garner enough votes to repeal the Act or alter its effect through appropriation. The Act also remained open to challenge by someone who directly suffered a “judicially cognizable injury as a result of the Act.”<sup>110</sup>

<sup>102</sup> 521 U.S. 811, 814 (1997).

<sup>103</sup> *Ibid.*, 819-20.

<sup>104</sup> *Ibid.*, 819.

<sup>105</sup> *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>106</sup> *Raines*, 521 U.S. 811 at 821.

<sup>107</sup> *Ibid.*, 823.

<sup>108</sup> *Ibid.*, 824.

<sup>109</sup> *Ibid.*, 829.

<sup>110</sup> *Ibid.* Holding true, in a suit later brought by New York City, the Court later held that the plaintiffs had standing to sue and the Line Item Veto Act violated the Constitution’s Presentment Clause. See *Clinton v. City of New York*, 524 U.S. 417 (1998).



## AFTER RAINES

Suits by members of congress against executive actions did not end after *Raines*, including suits protesting certain military actions. In 1999, for example, 31 members of Congress sued, arguing that President Clinton violated the War Powers Resolution and the Constitution's War Powers Clause by singlehandedly directing American involvement in NATO air and cruise missile attacks in Yugoslavia.<sup>111</sup> The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed the lower court's decision.

Looking to *Raines*, the circuit court explained that "Congress has a broad range of legislative authority it can use to stop a President's war making [...] and therefore under *Raines* congressmen may not challenge the President's war-making powers in federal court."<sup>112</sup> The D.C. Circuit noted that "Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign," but a similar measure was already soundly defeated.<sup>113</sup> The circuit court also observed that "Congress always retains appropriations authority and could have cut off funds for the American role in the conflict."<sup>114</sup> Yet Congress had already authorized appropriations. Finally, the circuit court noted that "there always remains the possibility of impeachment" if the president openly defied Congress.<sup>115</sup>

Similar attempts continue to fail in federal court. In 2011, after President Obama ordered military strikes against Libya, ten members of Congress sued, arguing the strikes unconstitutionally sidestepped congressional consent.<sup>116</sup> Citing *Raines* and others, the district court found that "injuries that affect all members of Congress in the same broad and undifferentiated manner are not sufficiently 'personal' or 'particularized,' but rather are institutional, and too widely dispersed to confer standing."<sup>117</sup>

The district court also noted that, like *Raines*, the members of Congress "did not initiate their lawsuit on behalf of their respective legislative bodies."<sup>118</sup> Three years later, this fact became key in a federal suit by the Arizona state legislature. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court held that the state legislature had standing because it asserted an institutional injury—losing legislative redistricting power—and it sued only after authorizing votes in both of its chambers.<sup>119</sup>

Today, it is more likely for a congressional litigant to gain standing if they are asserting an institutional injury with the support of the institution—in this case, Congress. Nevertheless, past cases demonstrate that open legislative options (such as additional votes, appropriations and impeachment) often blunt a congressional litigants' success in court.<sup>120</sup>

<sup>111</sup> *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000).

<sup>112</sup> *Ibid.*, 23.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

<sup>117</sup> *Ibid.*, 118.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015).

<sup>120</sup> See, e.g., *Congressional Participation in Litigation: Article III and Legislative Standing*, Congressional Research Service, March 28, 2019.

# POLITICAL QUESTION DOCTRINE

In addition to standing, the political question doctrine frequently bars litigating foreign affairs disputes in the courts. The doctrine has a long history, arguably beginning as early as Chief Justice John Marshall's opinion in *Marbury v. Madison*. In *Marbury*, Marshall famously wrote:

"It is emphatically the province and duty of the judicial department to say what the law is."<sup>121</sup> The opinion, however, also concedes that "mere political act[s]" may not "be examinable in a court of justice" and "must always depend on the nature of that act."<sup>122</sup>

## BAKER V. CARR

Whether a "mere political act" is justiciable is a fact-specific inquiry that has gone through many revisions. *Baker v. Carr* is the most relevant modern application of the doctrine and offers several factors for courts (and potential litigants) to consider.

In that case, Tennessee citizens challenged the state's method of redistricting. In determining whether the state residents had standing, the Court identified six factors that may trigger a nonjusticiable political question:

- “ (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) an unusual need for unquestioning adherence to a political decision already made;” (6) “or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>123</sup>



<sup>121</sup> 5 U.S. 137, 177 (1803).

<sup>122</sup> *Ibid.*, 164-65.

<sup>123</sup> 369 U.S. 186, 217.

Given the ambiguity of these factors, *Baker* specifically addressed whether “all questions touching foreign relations are political questions.”<sup>124</sup> The Court acknowledged that, often, foreign affairs cases “involve the exercise of a discretion demonstrably committed to the executive or legislature” and “such questions uniquely demand single-voiced statement of the Government’s views.”<sup>125</sup> At the same time, the

Court emphasized, “it is error” to believe “that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>126</sup> Accordingly, this balance falls on “the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”<sup>127</sup>

## AFTER BAKER

The 1979 case *Goldwater v. Carter* considered the factors established by *Baker* seventeen years earlier. In this case, eight senators and sixteen House members argued that President Carter unconstitutionally planned to terminate the United States’ mutual defense treaty with Taiwan without consent from Congress. The Supreme Court accepted the case, but before oral arguments and without a majority opinion, remanded it to the district court with direction to dismiss the complaint.<sup>128</sup>

This was because a plurality of the Court agreed that the dispute was a nonjusticiable political question because the case concerned “the authority of the President in the conduct of our country’s foreign relations” against “the extent to which [...] Congress is authorized to negate the action of the President.”<sup>129</sup> Justice Lewis Powell, writing separately, agreed that the case should not be decided, not because it was permanently barred from review, but simply because the case was not ripe. Citing the *Baker* factors, Justice

Powell argued that the case was “not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.”<sup>130</sup> Only when the government was “brought to a halt because of the mutual intransigence,” would the Court need to step in to decide the constitutional question.<sup>131</sup>

But if *Goldwater* shut the door for Congress to litigate foreign affairs disputes, *Zivotofsky v. Clinton* ever so slightly reopened it. Zivotofsky was an American citizen born in Jerusalem. His parents filed an application for his passport to list his place of birth as “Jerusalem, Israel.” But State Department policy barred adding “Israel or Jordan” on passports where Jerusalem was the place of birth.<sup>132</sup> Congress disagreed with the State Department. And in 2003, Congress included in the Foreign Relations Authorization Act a provision that “sought to override this instruction by allowing citizens born in Jerusalem to have ‘Israel’ recorded on their passports if they wish.”<sup>133</sup>

<sup>124</sup> Ibid., 211.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid., 211-12.

<sup>128</sup> 444 U.S. 996.

<sup>129</sup> Ibid., 1002 (Rehnquist, J., concurring).

<sup>130</sup> Ibid., 996 (Powell, J., concurring).

<sup>131</sup> Ibid., 1001 (Powell, J., concurring).

<sup>132</sup> 132 S. Ct. 1421, 1425-26 (2012).

<sup>133</sup> Ibid., 1425.

Lower courts concluded the issue was a nonjusticiable political question. But the Supreme Court reversed, explaining that it was “not being asked to supplant a foreign policy decision” about the political status of Jerusalem, it was instead deciding whether “the statute is constitutional,” which “is a familiar judicial exercise.”<sup>134</sup> Citing *Baker*, the Court claimed it had sufficient “discoverable and manageable standards” for resolving the issue because the question concerned the constitutionality of a statute rather than finding who had the power to decide the political status of a foreign city.<sup>135</sup>

Yet even after *Zivotofsky*, many courts still continue to dismiss a number of foreign affairs claims pursuant to the political question doctrine. One survey of relevant circuit cases concluded, for example, that “[m]any appellate judges still use the prudential *Baker* factors to dispose of cases under the political question doctrine, notwithstanding *Zivotofsky*.”<sup>136</sup> The author speculated a number of potential reasons why. For one *Zivotofsky* did not overrule *Baker*. Additionally, in *Zivotofsky*, the “President and Congress had seemed to reach what Justice Powell described in a related context in *Goldwater v. Carter* as ‘a constitutional impasse.’”<sup>137</sup> In any event, the doctrine is often—and successfully—raised by the executive branch to curb suits protesting military action.

<sup>134</sup> Ibid., 1427.

<sup>135</sup> Ibid., 1428.

<sup>136</sup> See Alex Loomis, “Why Are the Lower Courts (Mostly) Ignoring *Zivotofsky* I’s Political Question Analysis?”, *Lawfare*, May 19, 2016.

<sup>137</sup> Ibid.





## CONCLUSION

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Individual members of Congress have little chance of successfully suing to block an executive military action. And Congress—even citing institutional concerns—often fares no better under the political question doctrine. These doctrines emulate Justice Black’s concerns as far back as World War II. Judges cannot run wars. And when it comes to foreign affairs, courts are more than happy to leave it to the political branches to decide.

So, in light of this, what is Congress to do? Courts have offered some advice: use their institutional power. As the Supreme Court has reminded the legislature: “Congress has a broad range of legislative authority it can use to stop a President’s war making.”<sup>138</sup> Oversight, appropriations and legislation, for instance, always remain tools in the legislature’s toolkit. And when it comes to the current conflicts in Afghanistan, Syria and beyond, Congress will see more results on the floor than in the courtroom.

<sup>138</sup> Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000).



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# CONGRESS MUST PROTECT ITS CONSTITUTIONAL POWER OVER WAR

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*by* LOUIS FISHER



## INTRODUCTION

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**B**eginning with President Truman's commitment of U.S. troops to Korea in 1950, the constitutional system that vests the war power with Congress has been regularly violated. Subsequent presidents have acted unilaterally in ordering military force against other countries. At times, lawmakers have raised objections but Congress as an institution has not protected its constitutional authority. From 1936 forward, through a series of clear misrepresentations and errors, the Supreme Court has promoted exclusive and plenary presidential power over external affairs. There have been many irresponsible parties in undermining our constitutional system, but Congress has the power and the duty to preserve its powers and the system of self-government.

The Framers recognized that presidents need to repel sudden attacks but insisted that they must come to Congress and seek prior approval for other military actions. The "Quasi War" against France in 1798 was not declared by Congress. Instead, President John Adams urged lawmakers

to pass "effectual measures of defense"<sup>139</sup> and Congress passed several dozen bills to support military operations. The Quasi War precipitated judicial rulings that underscored the constitutional authority of Congress over military initiatives. In 1800, the Supreme Court agreed that Congress could authorize hostilities either by a formal declaration of war or by statutory action, as against France.<sup>140</sup> A year later, Chief Justice John Marshall wrote for the Court: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."<sup>141</sup>

In drafting the Constitution, the Framers broke with the British model that placed the war power with the executive. In 1690, John Locke referred to three categories of government: legislative, executive and federative. The latter covered "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth." For Locke, the powers of executive and federative "are always almost united."<sup>142</sup> In 1765, the British jurist

<sup>139</sup> James D. Richardson, ed., *A Compilation of the Messages and Papers of the President* (Bureau of National Literature, 1897-1925), Vol. 1, p. 226 [hereinafter "Richardson"].

<sup>140</sup> *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

<sup>141</sup> *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801).

<sup>142</sup> John Locke, *Two Treatises of Civil Government* (E. P. Dutton & Co., Inc., 1962), Book II, Ch. XII, §§ 146-47.

William Blackstone agreed that external powers had to be placed with the executive: making treaties, sending and receiving ambassadors, the “sole prerogative of making war and peace,” issuing letters of marque and reprisal (authorizing private citizens to engage in military action), and “the sole power of raising and regulating fleets and armies.”<sup>143</sup>

Article I of the U.S. Constitution places these powers expressly in Congress: the power to declare war, grant letters of marque and reprisal, raise and support armies, and provide and maintain a navy. Treaties must be approved by the Senate. Article I also empowers Congress to regulate commerce with foreign nations, to define and punish piracies and felonies committed on the high seas, to decide rules concerning

captures on land and water, and to make rules for the government and regulation of the land and naval forces.

Nothing in Article II places any exclusive power in the president over external affairs. He is the Commander in Chief of the army and navy and of the militia of the several states, “when called into the actual Service of the United States.” Article I empowers Congress to call forth “the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.” Congress is empowered by the Constitution to “make Rules for the Government and Regulation of the land and naval Forces.”

<sup>143</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford, 2016), Book I, pp. 243-45, 249-50, 254 and 267.





# THE FRAMERS' INTENT

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During debate at the Philadelphia Convention, the Framers placed in Congress many of the powers that Locke and Blackstone had reserved to the executive. Instead of vesting the war power with a single official, collective decision-making would proceed by legislative deliberation. John Rutledge agreed on June 1, 1787, that the executive power needed to be placed in a single person, but “he was not for giving him the power of war and peace.”<sup>144</sup> James Wilson preferred “a single magistrate” but did not consider “the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.” Some of those prerogatives, he said, were of “a Legislative nature,” including “that of war & peace.”<sup>145</sup> Edmund Randolph expressed concern about executive power, calling it “the foetus of monarchy.” He did not want America “governed by the British Governmt. as our prototype.”<sup>146</sup>

On Aug. 17, 1787, the Framers offered a number of reasons to reject the British model. On a motion to vest in Congress the power to “make war,” Charles Pinckney objected that the proceedings of the legislative branch “were too slow” and Congress would meet “but once a year.” In his judgment, it would be better to vest that power in the Senate, “being more acquainted with foreign

affairs, and most capable of proper resolutions.”<sup>147</sup> Pierce Butler wanted to vest the war power in the president “who will have all the requisite qualities, and will not make war but when the Nation will support it.”<sup>148</sup>

During subsequent debate, James Madison and Elbridge Gerry recommended that the language be changed from “make war” to “declare war,” leaving with the president “the power to repel sudden attacks.”<sup>149</sup> Roger Sherman supported their proposal, insisting that the president “shd. be able to repel and not to commence war.” Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason was “agst giving the power of war to the Executive, because not <safely> to be trusted with it [...] He was for clogging rather than facilitating war; but for facilitating peace.”<sup>150</sup> The amendment by Madison and Gerry was accepted.

<sup>144</sup> Max Farrand, ed., *The Records of the Federal Convention of 1789* (Yale University Press, 1966), Vol. 1, p. 65.

<sup>145</sup> *Ibid.*, pp. 65-66.

<sup>146</sup> *Ibid.*, p. 66.

<sup>147</sup> *The Records of the Federal Convention of 1789*, Vol. 2, p. 318.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*, p. 319.

Objections to presidential wars were also voiced at state ratifying conventions. In Pennsylvania, James Wilson offered his view that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress.”<sup>151</sup> In South Carolina, Charles Pinckney explained that the president’s power “did not permit him to declare war.”<sup>152</sup> John Jay developed these constitutional values in *Federalist* No. 4, which issued this warning: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it.” Absolute monarchs, he said:

“*will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.*

Those and other motives, he said, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”<sup>153</sup>



<sup>151</sup> Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836-1845), Vol. 2, p. 528.

<sup>152</sup> Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836-1845), Vol. 4, p. 287.

<sup>153</sup> Benjamin F. Wright, ed., *The Federalist* (Metro Books, 2002), p. 101.

# IMPLEMENTING CONSTITUTIONAL PRINCIPLES

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In the years following ratification of the Constitution, the three branches understood that presidential military initiatives were limited to repelling sudden attacks. All other actions required congressional support either by express declaration or statutory support. An interesting example of a president stepping over the line and being forced to retreat was the Neutrality Proclamation issued by President Washington on April 22, 1793. In it, he instructed citizens to remain neutral in the war between England and France, and warned that a failure to abide by his policy could result in prosecution.<sup>154</sup>

The check in this case came not from Congress or the judiciary but from jurors, who rebelled against the idea of convicting someone for a crime established by an executive proclamation. Making it clear that criminal law in the United States could be made only by Congress, not by the president, they vowed to dismiss all charges brought by the administration.<sup>155</sup> Faced with this blunt challenge, the administration dropped plans to prosecute. Washington told lawmakers that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy set forth in his proclamation, recommending that the legal code be changed to give federal courts jurisdiction over issues of neutrality.<sup>156</sup> The Neutrality Act of 1794 gave the administration authority to prosecute violators. On this issue, jurors had a better understanding of the Constitution than Washington and his circle of legal advisers. Private citizens were willing to uphold self-government and constitutional principles.

The Quasi War helped clarify the limits of presidential power during military operations. In passing legislation to support military action against France, Congress authorized the president to seize vessels sailing to French ports. Yet, President John Adams issued an order directing American ships to capture vessels sailing *to or from* French ports. In a unanimous decision in 1804, Chief Justice John Marshall held that Adams exceeded his statutory authority.<sup>157</sup> This demonstrated that presidential actions were subject to limits imposed by Congress and those limits were enforced in court.

Thomas Jefferson understood constitutional limits when he became president in 1801. He had to pay annual bribes (“tributes”) to four states of North Africa: Morocco, Algiers, Tunis and Tripoli. In receiving those payments, they pledged not to interfere with American merchantmen. However, on May 14, 1801, the Pasha of Tripoli insisted on a larger sum of money and declared war on the United States. Jefferson informed Congress about this demand and said he had sent a small squadron of vessels to the Mediterranean to protect against attacks but asked Congress for further guidance, stating he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” It was necessary for Congress to authorize “measures of offense also.”<sup>158</sup>

<sup>154</sup> Henry Steele Commager, ed., *Documents of American History* (Seventh edition: Appleton-Century-Crofts, 1963), p. 162.

<sup>155</sup> *Henfield’s Case*, 11 Fed. Cas. 1099 (C.C. Pa. 1793) (No. 6,360).

<sup>156</sup> *Annals of Congress*, 3d Cong., 1-2 Sess. 11 (1793).

<sup>157</sup> *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804).

<sup>158</sup> *Richardson*, Vol. 1, p. 315.

In 1805, with new military conflicts developing, Jefferson advised Congress about the problem and spoke clearly about legal principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.”<sup>159</sup> According to subsequent studies by the Justice Department and statements by members of Congress, Jefferson acted militarily against the Barbary powers without seeking statutory authority.<sup>160</sup> Yet, Congress passed at least ten statutes authorizing military action by Presidents Jefferson and Madison and against the Barbary powers.<sup>161</sup> In 1812, Congress declared its first war, responding to a series of actions by England.

A second declared war against Mexico in 1846 led to congressional sanctions against President James Polk. Tensions along the border led to military conflicts between American and Mexican forces, prompting Polk to tell Congress that Mexico “has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil.” He notified Congress that “war exists.”<sup>162</sup> Part of the boundary, however, was subject to dispute. Senator John Middleton Clayton rebuked Polk for his actions:

“ I do not see on what principle it can be shown that the President, without consulting Congress and obtaining its sanction for the procedure, has a right to send an army to take up a position, where, as it must have been foreseen, the inevitable consequence would be war.”<sup>163</sup>



<sup>159</sup> Annals of Congress, 9th Cong., 1st Sess. 19 (1805).

<sup>160</sup> 4A Op. O.L.C. 185, 187 (1980); 140 Cong. Rec. 19809 (1994).

<sup>161</sup> Louis Fisher, *Presidential War Power* (Third edition: University Press of Kansas, 2013), pp. 35-37.

<sup>162</sup> Richardson, Vol. 5, p. 2292.

<sup>163</sup> Cong. Globe, 29th Cong., 1st Sess. 786 (1846).



On May 23, 1846, Congress declared war on Mexico.<sup>164</sup> Two years later, Polk's action was censured by the House of Representatives on the ground that the war had been "unnecessarily and unconstitutionally begun by the President of the United States."<sup>165</sup> One of the members voting for censure was Abraham Lincoln, who later wrote that allowing the president "to invade a neighboring nation, whenever *he* shall deem it necessary to repel invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure."<sup>166</sup>

In April 1861, with Congress in recess, President Lincoln responded to the internal rebellion by issuing proclamations to call forth the state militia, suspend the writ of habeas corpus and place a blockade on the southern states. He did not claim full authority to act as he did. When Congress returned, he explained that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now ,

that Congress would readily ratify them."<sup>167</sup> The superior body was therefore Congress, not the president. Members of Congress supported legislation with the explicit understanding that his acts were illegal.<sup>168</sup>

Congress declared war a third time in 1898 against Spain. The next two declared wars were worldwide conflicts: in 1917 and 1941. There soon developed the notion of independent presidential power in external affairs. A big step in that direction came in 1936 when the Supreme Court upheld a delegation of legislative power to the president to place an arms embargo in a region in South America. The decision went far beyond the necessities of the case by describing the president as "sole organ" in external affairs, equipped with "plenary and exclusive" power. Anyone reading the constitutional text of Articles I and II would understand the Court's errors, but the sole-organ doctrine survived from one decade to the next until it was finally jettisoned by the Court in 2015.

<sup>164</sup> 9 Stat. 9 (1846).

<sup>165</sup> Cong. Globe, 30th Cong., 1st Sess. 95 (1848).

<sup>166</sup> Roy Basler, ed., *The Collected Works of Abraham Lincoln* (1953), Vol. 1, pp. 451-52. (Emphasis in original.)

<sup>167</sup> Richardson, Vol. 7, p. 3225.

<sup>168</sup> Cong. Globe, 37th Cong., 1st Sess. 393 (1861) (Senator Howe).

## THE PRESIDENT AS A “SOLE ORGAN”

In 1934, Congress passed legislation to authorize the president to prohibit the sale of military arms in the Chaco region of South America whenever he found “it may contribute to the reestablishment of peace” between belligerents.<sup>169</sup> When President Franklin Roosevelt imposed the embargo, he relied exclusively on statutory authority. In his proclamation prohibiting the sale of arms and munitions, he stated: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting and by virtue of the authority conferred in me by the said joint resolution of Congress...”<sup>170</sup> Nothing in the statutory language, legislative history or executive statements said anything about the existence of plenary and exclusive power for the president in external affairs.<sup>171</sup> None of the briefs submitted to the courts in this case said anything about the availability of such powers for the president.<sup>172</sup> The source of authority was plainly legislative.

Writing for the Court, Justice George Sutherland upheld the delegation but the inclusion of extensive extraneous matter (“dicta”) introduced numerous errors and misconceptions. Scholars immediately criticized him for twisting historical and constitutional precedents.<sup>173</sup> For example, Sutherland claimed that the Constitution commits treaty negotiation exclusively to the president: “He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the

field of negotiation the Senate cannot intrude; and Congress is powerless to invade it.”<sup>174</sup> That was pure dicta. Nothing in the case before the Supreme Court had anything to do with treaties or treaty negotiation. Moreover, it was *erroneous* dicta. The record demonstrates that presidents have often invited not only Senators to engage in treaty negotiations but members of the House as well. The purpose was to build legislative support for authorization and appropriation bills needed to implement treaties.<sup>175</sup>

If one wants a particularly devastating critique of the belief that presidents possess exclusive power over treaty negotiation, it would be a book published in 1919 by someone who reflected on his twelve years as a U.S. senator. He acknowledged that his colleagues participated in the treaty negotiation phase and that presidents regularly agreed to this “practical construction.” The right of senators to participate in treaty negotiation “has been again and again recognized and acted upon by the Executive.” The author of this book? George Sutherland.<sup>176</sup> How could he insert into his decision such a plain error? It is likely that he was persuaded to incorporate that material by Chief Justice Charles Evans Hughes, who served as Secretary of State under President Warren Harding and in various speeches endorsed the notion of the president as sole negotiator of treaties.<sup>177</sup>

<sup>169</sup> 48 Stat. 811 (1934).

<sup>170</sup> *Ibid.*, 1745.

<sup>171</sup> For details on this statute and the Curtiss-Wright case, see Chapter 6 of Louis Fisher, *Reconsidering Judicial Finality: Why the President is Not the Last Word on the Constitution* (University Press of Kansas, 2019), pp. 101-20.

<sup>172</sup> *Ibid.*, p. 104, Notes 24-27.

<sup>173</sup> Louis Fisher, “The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky,” *Constitutional Commentary* 31 (Summer 2016), pp. 149, 186-99.

<sup>174</sup> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319. (Emphasis in original.)

<sup>175</sup> Louis Fisher, “Congressional Participation in the Treaty Process,” *University of Pennsylvania Law Review* 137 (1989), pp. 1511-22.

<sup>176</sup> George Sutherland, *Constitutional Power and World Affairs* (Columbia University Press, 1919), p. 123.

<sup>177</sup> *Reconsidering Judicial Finality*, p. 106.

Justice Sutherland's major error in *Curtiss-Wright* was to completely misrepresent and misinterpret a speech that John Marshall delivered in 1800 as a member of the House of Representatives. With Thomas Jefferson in that election year attempting to defeat President John Adams, Jeffersonians in the House urged that Adams be either impeached or censured for turning over to England an individual charged with murder. Jeffersonians thought the individual was an American under the name of Jonathan Robbins, but in fact he was Thomas Nash, a native Irishman.<sup>178</sup>

In his speech, Marshall rejected the move for impeachment or censure by explaining that President Adams was not acting in some illegal or unconstitutional way. Instead, he was carrying out a provision of the Jay Treaty with England that authorized each country to deliver up to each other any person charged with murder or forgery.<sup>179</sup> Nash, being British, would be turned over to England for trial. President Adams was not acting unilaterally with regard to external affairs or claiming some type of independent executive power. He was fulfilling his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed.

In the course of delivering his speech, Marshall included this sentence: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>180</sup> The phrase "sole organ" is susceptible to different interpretations. "Sole" means exclusive but what is "organ?" Is it merely the president's duty to communicate to other nations U.S. policy established by the elected branches? Reading the entire speech makes clear that Marshall intended that meaning. He was merely defending Adams for carrying out the extradition provision of the Jay Treaty. After he completed his speech, the Jeffersonians considered his argument so well reasoned that they dropped efforts to either impeach or censure Adams.

Nevertheless, in his opinion for the Court, Justice Sutherland announced that the president possessed "plenary and exclusive" power over foreign policy and served as the "sole organ" in external affairs.<sup>181</sup> In doing so, he completely misrepresented Marshall's speech. Nevertheless, executive officials from one decade to the next relied on *Curtiss-Wright* to expand presidential power. In 1941, Attorney General Robert Jackson described the opinion as "a Christmas present to the President."<sup>182</sup> Executive branch attorneys relied heavily on the opinion. As explained by Harold Koh, Justice Sutherland's "lavish" description of presidential power in external affairs was quoted with such frequency that it came to be known as the "*Curtiss-Wright*, so I'm right cite."<sup>183</sup>

<sup>178</sup> Ibid., p. 107.

<sup>179</sup> 8 Stat. 129 (1794).

<sup>180</sup> 10 Annals of Congress 613 (1800).

<sup>181</sup> United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936).

<sup>182</sup> Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (Vintage Books, 1941), p. 201.

<sup>183</sup> Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, 1990), p. 94.

# CHALLENGES TO ERRONEOUS DICTA

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Starting in the George W. Bush administration, litigation led the Supreme Court to review some of the *Curtiss-Wright* dicta that greatly expanded presidential power in external affairs. In 2002, Congress passed legislation covering passports to U.S. citizens born in Jerusalem. In his signing statement, President Bush objected that some provisions “impermissibly interfere with the constitutional functions of the presidency in foreign affairs.” By referring to the president’s constitutional authority to “speak for the Nation in international affairs,” he implicitly, if not explicitly, relied on *Curtiss-Wright* dicta.<sup>184</sup>

Legal challenges preoccupied all levels of the federal judiciary, starting in 2004 and reaching the Supreme Court in 2012, which rejected the position that the case presented a nonjusticiable political question.<sup>185</sup> At that point, the D.C. Circuit held on July 23, 2013, that the president “exclusively holds the constitutional power to determine whether to recognize a foreign government,” and that language in the 2002 statute “impermissibly intrudes on the President’s recognition power and is therefore unconstitutional.”<sup>186</sup> On five occasions, the D.C. Circuit relied on the sole-organ doctrine in *Curtiss-Wright*, claiming that the Supreme Court “echoed” the words of John Marshall by describing the president as the “sole organ of the nation in its external relations.”<sup>187</sup>

Thus, echoing Marshall’s words but not his meaning, the D.C. Circuit demonstrated no understanding that the sole-organ doctrine was not merely dicta but erroneous dicta. To them, Supreme Court dicta was especially authoritative if “reiterated.”<sup>188</sup> However, dicta can be repeated many times and still be false, as with the sole-organ doctrine. The D.C. Circuit opinion prompted me to file an amicus brief with the Supreme Court on July 17, 2014, analyzing a variety of erroneous dicta in *Curtiss-Wright*.<sup>189</sup> While the Supreme Court is in session, the *National Law Journal* runs a column called “Brief of the Week,” selecting a particular brief out of the thousands filed each year. On Nov. 3, 2014, it chose mine. The story carried a provocative title: “Can the Supreme Court Correct Erroneous Dicta?”<sup>190</sup>

On June 8, 2015, the Supreme Court rejected the erroneous sole-organ dicta that had magnified presidential power in external affairs for seventy-nine years.<sup>191</sup> The Court never explained how the statutory issue at question had anything to do with the president’s recognition power; nor did the Court acknowledge that the D.C. Circuit relied five times on the erroneous sole-organ dicta in *Curtiss-Wright*. The Court offered no explanation how Justice Sutherland flagrantly misinterpreted John Marshall’s speech. Moreover, it left in place the erroneous dicta about the president possessing sole power to negotiate treaties, and even added

<sup>184</sup> Public Papers of the Presidents (2002), Vol. II, pp. 1697-99.

<sup>185</sup> Reconsidering Judicial Finality, p. 112.

<sup>186</sup> *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

<sup>187</sup> *Ibid.*, 211.

<sup>188</sup> *Ibid.*, 212.

<sup>189</sup> “Brief Amicus Curiae of Louis Fisher in Support of Petitioner,” *Zivotofsky v. Kerry*, No. 13-628, U.S. Supreme Court, July 17, 2014, p. 2. For a summary, see *Reconsidering Judicial Finality*, pp. 114-15.

<sup>190</sup> Jamie Schuman, “Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?,” *National Law Journal*, Nov. 3, 2014.

<sup>191</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2089 (2015).



its blessing to this error, stating that the president “has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936).”<sup>192</sup>

After finally jettisoning the sole-organ doctrine, the Court proceeded to create a substitute that promotes exclusive presidential power in external affairs. It insisted that recognition of foreign nations requires the federal government to “speak . . . with one voice” and that voice “must be the President’s.”<sup>193</sup> In the Court’s judgment, between the two elected branches “only the Executive has the characteristic of unity at all times.”<sup>194</sup> Evidently that claim has little to do with the record of presidents. Administrations regularly display inconsistency, conflict, disorder and confusion. One need only read memoirs of top officials who, upon retirement, chronicle the infighting and disagreements within an administration, including in foreign affairs.

The Court decided to add four other characteristics for the president: decision, activity, secrecy and dispatch, borrowing those qualities from Alexander Hamilton’s *Federalist* No. 70. On what possible grounds would the Court assume that unity plus those four qualities are inevitably positive, constructive and consistent with constitutional government? Certainly decisions, activity, secrecy and dispatch can produce negative consequences. Consider these presidential initiatives from 1950 to the present time: Truman allowing U.S. troops in Korea to travel northward, provoking Chinese troops to enter in large numbers and result in heavy casualties to both sides; Johnson’s decision to escalate the war in Vietnam; Nixon and Watergate; Reagan’s involvement in Iran-Contra; Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction, with all claims found to be erroneous; and Obama ordering military action against Libya in 2011, leaving behind a country damaged legally, economically and politically, providing a fertile ground for terrorism.<sup>195</sup>

<sup>192</sup> Ibid., 2086.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Presidential War Power, pp. 100-03, 132-37, 209-32 and 238-47.



Three Justices issued strong dissents in the Jerusalem passport case. Chief Justice John Roberts, joined by Justice Samuel Alito, began with this critique:

“Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “or what is at stake is the equilibrium established by our constitutional system.”<sup>196</sup>

Roberts pointed out that for the first 225 years “no President prevailed when contradicting a statute in the field of foreign affairs.” Moreover, he noted that the statute at issue before the Court “does not implicate recognition.”<sup>197</sup>

A dissent by Justice Antonin Scalia, joined by Roberts and Alito, agreed that the statute had nothing to do with recognizing foreign governments.<sup>198</sup> To Scalia, the Court’s decision:

“does not rest on text or history or precedent. It instead comes down to “functional considerations” – principally the Court’s perception that the Nation “must speak with one voice” about the status of Jerusalem [...] The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will systematically favor the unitary President over the plural Congress in disputes involving foreign affairs.”<sup>199</sup>

Scholars also criticized the Court in this case for promoting independent and exclusive presidential power in external affairs.<sup>200</sup>

<sup>196</sup> Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2113.

<sup>197</sup> Ibid., 2113, 2114. (Emphasis in original.)

<sup>198</sup> Ibid., 2118.

<sup>199</sup> Ibid., 2123. (Emphasis in original.)

<sup>200</sup> See, e.g., Jack Goldsmith, “Zivotofsky II as Precedent in the Executive Branch,” Harvard Law Review 129 (2015), p. 112; and Esam Ibrahim, “The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers,” Harvard Law and Policy Review 11 (2017), p. 585.

# PRESIDENTIAL MILITARY INITIATIVES FROM TRUMAN FORWARD

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In a public statement on July 27, 1945, President Harry Truman pledged that if agreements were ever negotiated with the U.N. Security Council to use military force against another country “it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>201</sup> Under the U.N. Charter, when nations agree to contribute troops, equipment and financial support to a U.N. military action, they must act in accordance with the “constitutional processes” of each country. The U.S. meaning of “constitutional processes” is contained in the U.N. Participation Act of 1945, which requires presidents to seek congressional support before involving the nation in a U.N. war.<sup>202</sup>

With statutory safeguards in place to protect constitutional principles and congressional authority, in June 1950, Truman ordered U.S. air and sea forces to defend South Korea against aggression by North Korea. At a news conference on June 29, he was asked whether the country was at war. He replied: “We are not at war.” He was then asked whether it would be more correct to call the conflict “a police action under the United Nations.” He agreed: “That is exactly what it amounts to.”<sup>203</sup> Federal and state courts had no difficulty in defining the hostilities in Korea as war.<sup>204</sup> During

hearings in June 1951 regarding military actions in Korea, Secretary of State Acheson conceded the obvious by admitting “in the usual sense of the word there is a war.”<sup>205</sup>

Truman’s decision to violate his own personal pledge in 1945 and the U.N. Participation Act met with little resistance from members of Congress. Senator Scott Lucas (D-III.) offered the following defense:

“*history will show on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war without seeking congressional consent.*”<sup>206</sup>

Those precedents provide no justification for Truman’s initiative in Korea. As Edward S. Corwin observed, the list by Senator Lucas consisted largely of fighting with pirates, chasing bandits or cattle rustlers across the Mexican border, and other similar actions.<sup>207</sup>

<sup>201</sup> 91 Cong. Rec. 8185 (1945).

<sup>202</sup> Presidential War Power, pp. 90-94

<sup>203</sup> Public Papers of the Presidents, p. 504.

<sup>204</sup> Presidential War Power, p. 114.

<sup>205</sup> “Military Situation in the Far East” (Part 3), hearings before the Senate Committees on Armed Services and Foreign Relations, 82d Cong., 1st Sess. 2014 (1951).

<sup>206</sup> 96 Cong. Rec. 9229 (1950).

<sup>207</sup> Edward S. Corwin, “The President’s Power,” New Republic, Jan. 29, 1951, p. 16.

The Korean War proved costly to President Truman and the Democratic Party. Although General Douglas MacArthur predicted on Nov. 24, 1950, that allied troops would be home by Christmas, his decision to direct troops north of the 38th parallel prompted Chinese troops to enter in large numbers, pushing allied troops south of the 38th parallel. The war continued for several years, resulting in heavy casualties on both sides. 53,000 Americans died in the Korean War.<sup>208</sup> And for this reason, a decisive point in the 1952 presidential campaign was the pledge by Dwight D. Eisenhower that he would “go to Korea” to end the war.<sup>209</sup> The war marked an important step in putting an end to 20 years of Democratic control of the White House. As Stephen Ambrose explained, “Korea, not crooks or Communists, was the major concern of the voters.”<sup>210</sup>

Congress enacted the War Powers Resolution (WPR) in 1973, allowing the president to take military action for up to 60 days without any statutory authority. The WPR reflected a compromise between a relatively strong Senate bill and a weak House version. The Framers recognized the need for presidents to repel sudden attacks but certainly not to independently use military force throughout the world for up to 60 days.

As with Truman, President Bill Clinton saw no need to seek congressional approval for his military actions abroad. Instead, he sought support from the Security Council and NATO allies. He used military force in Iraq, Somalia, Haiti, Bosnia, Afghanistan, Sudan and Kosovo without once receiving statutory support for his initiatives.<sup>211</sup> In 1995, he explained that his bombing attacks in Bosnia had been “authorized by the United Nations.”<sup>212</sup> An analysis by the Office of Legal Counsel (OLC) concluded that his military initiatives did not require statutory authority because they did not constitute “war.”<sup>213</sup> After a peace agreement was reached, Clinton announced that “America’s role will not be about fighting a war.”<sup>214</sup> With full inconsistency he added: “Now the war is over,” describing the conflict in Bosnia as “this terrible war.”<sup>215</sup>

President Barack Obama followed the same practice of using military force abroad by seeking support not from Congress but from the United Nations and NATO allies. On March 21, 2011, he explained that the United States was taking military action in Libya to enforce U.N. Security Council Resolution 1973, anticipating that operations would conclude “in a matter of days and not a matter of weeks.”<sup>216</sup> In fact, that military force would last seven months, thereby exceeding the 60-90 day limit of the War Powers Resolution.

<sup>208</sup> James P. Terry, *The Commander in Chief* (Carolina Academic Press, 2015), p. 52.

<sup>209</sup> Stephen Ambrose, *Eisenhower: Soldier, General of the Army, President-Elect 1890-1952* (Simon & Schuster, 1983), Vol. 1, p. 569.

<sup>210</sup> *Ibid.*

<sup>211</sup> Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (University Press of Kansas, 2017) pp. 221-36.

<sup>212</sup> *Public Papers of the Presidents* (1995), Vol. II, p. 1353.

<sup>213</sup> 19 Op. O.L.C. 327, 329 (1995).

<sup>214</sup> *Public Papers of the Presidents* (1995), Vol. II, p. 1784.

<sup>215</sup> *Ibid.*, pp. 1785, 1787.

<sup>216</sup> *Public Papers of the Presidents* (2011), Vol. I, pp. 266, 271.



In a message to Congress on March 21, Obama stated that U.S. forces operating under the U.N. resolution had begun a series of strikes against Libyan air defense systems and military airfields in order to prepare “a no-fly zone.” He predicted that the strikes would “be limited in their nature, duration, and scope.”<sup>217</sup> No matter how executive officials attempt to interpret and minimize a no-fly zone, the use of military force against another country that has not threatened the United States should be called in straight terms what former Secretary of Defense Robert Gates has called it: an “act of war.”<sup>218</sup>

A memo by the Office of Legal Council on April 1, 2011 concluded that the operations against Libya did not constitute “war” because of the limited “nature, scope, and duration” of the military actions.<sup>219</sup> By early June, however, having exceeded the 60-day limit of the War Powers Resolution,

Obama now wanted another memo from the OLC stating that “hostilities” did not exist, but it declined to provide that memo. Jeh Johnson, General Counsel for the Defense Department, also refused to comply with Obama’s request.<sup>220</sup>

It is argued at times that when a president receives a Security Council resolution providing support for military action, there is compliance with international law. Nothing in that procedure, however, satisfies the Constitution. Through the treaty process (as with the U.N. Charter and NATO), the Senate may not transfer the Article I authority of Congress to international and regional organizations. Put simply, it may not unilaterally amend the Constitution, and thus the authorizing body for military actions against other countries must be Congress.

<sup>217</sup> Ibid., p. 280.

<sup>218</sup> Robert M. Gates, *Duty: Memoirs of a Secretary at War* (Vintage Books, 2015), p. 513.

<sup>219</sup> Office of Legal Counsel, “*Authority to Use Military Force in Libya*,” U.S. Dept. of Justice, April 1, 2011.

<sup>220</sup> For further details on military operations against Libya, see *Supreme Court Expansion of Presidential Power*, pp. 287-91.



## CONCLUSION

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**F**rom President Truman forward, presidents have engaged in numerous unilateral military actions, including Eisenhower's covert operations in Iran and Guatemala. With the ill-fated Bay of Pigs, Kennedy supported a unilateral invasion of Cuba. Reagan became involved in Iran-Contra, directly against statutory policy. Acting

independently, Trump bombed Syria after its use of nerve gas, assisted Saudi Arabia with its military actions in Yemen and claimed the right to use military force against Iraq if it bombed Saudi oil facilities. All of these actions involve authority that the Constitution places in both elected branches, not the executive alone.





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## ABOUT R STREET

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We work extensively on both state and national policy, focusing on issues that other groups tend to neglect. Our specialty is tackling issues that are complex, but do not necessarily grab major headlines. These are the areas where we think we can have a real impact. We believe free markets work better than the alternatives. At the same time, we recognize the legislative process calls out for practical responses to current problems. Toward that end, our motto is “Free markets. Real solutions.”

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