

*Section IV*

**Institutional and Personal Factors  
Influencing Foreign Policy in Europe  
and the United States**



## Chapter 7

# Invitation to Struggle: Congress, the President, and U.S. Foreign Policy

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The legal scholar Edward S. Corwin famously wrote that the U.S. Constitution “is an invitation to struggle for the privilege of directing American foreign policy.”<sup>1</sup> Corwin’s dictum highlights two critical points about executive-legislative relations. First, both the president and Congress possess significant foreign policy powers. These powers overlap, laying the groundwork for conflict and competition. Second, the Constitution’s invitation to struggle is just that, an invitation. It by no means mandates that presidents and Congress will struggle to direct American foreign policy. Whether they do or not is a matter of politics and not of law.

Which branch of government holds the upper hand in directing foreign policy has changed substantially over the course of American history. Before World War II, Congress typically did. Americans of that era worried more about the dangers strong presidents might create than about the harm they might prevent. That changed when the United States faced first the Nazi, and then the Soviet, threat. Presidential power expanded, and congressional authority contracted, as Americans came to believe their security required presidents who could act decisively abroad. Vietnam shook that belief, leaving many Americans skeptical that an “imperial presidency” made them safer. Congress regained some of the ground it had ceded to the president as a result, but the balance of power remained in the president’s favor.

Today most Americans—and most members of Congress—still accept the idea that presidents should lead on foreign policy. As a result, Congress typically reacts to White House initiatives rather than launching its own. Members have strong political incentives to ignore foreign policy. After all, voters usually worry more about what is happening nearby than far

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<sup>1</sup> Edwin S. Corwin, *The President: Office and Powers, 1787-1957*, 5<sup>th</sup> rev. ed. (New York: New York University Press, 1984), p. 201.

away. That said, a mix of institutional, political, and personal factors can and do push members to tackle foreign policy issues. Congress has a constitutional responsibility to pass budgets and review how federal agencies operate. Challenging the White House on foreign policy can be a winning electoral strategy at times, especially when a president hails from the opposing party or his policies are seen to be failing. And for some members, foreign policy is their primary passion and reason for seeking a seat in Congress.

Congress can shape foreign policy in three main ways. First, it can pass (or block) laws that specify what U.S. foreign policy will be, such as who Americans can trade with or what weapons the Pentagon can buy. Second, it passes laws creating executive branch agencies and revamping how the executive branch operates. Here Congress calculates that changing who makes decisions and how they are made will change what decisions are made. Third, Congress can seek to change public opinion, and thereby potentially change the choices presidents make.

However Congress may seek to challenge presidents, activity doesn't guarantee success and inaction doesn't always indicate irrelevance. Factors ranging from whether the president's party controls Congress to the depth of the presidential commitment to the policy in question shape which end of Pennsylvania prevails when they struggle over foreign policy. Most broadly, Congress is most likely to succeed in putting its mark on foreign policy when it seeks to constrain presidential action and the Constitution requires presidents to get congressional approval before acting. Congress is far less likely to constrain presidents when they are free to act unless and until Congress stops them. And Congress is at its weakest when it tries to compel rather than constrain the White House. Presidents have ample ways to frustrate and ignore congressional calls to pursue new or different initiatives, a political reality that Donald Trump's presidency in particular has illustrated.

The potential for presidents and Congress to struggle over the direction of foreign policy complicates transatlantic relations. In a parliamentary democracy, prime ministers can set government policy with confidence. In the U.S. political system, however, Congress may block or overrule the president. Whether this uncertainty serves or hurts U.S. foreign policy and transatlantic relations more broadly lies in the eyes of the beholder. Anger at Congress's opposition to favored policies has to be balanced against gratitude for Congress's resistance to disfavored ones. What is clear, however, is that the struggle between the two ends of Pennsylvania Avenue will not abate any time soon.

## What the Constitution Does and Does Not Say

The Constitution assigns Congress numerous specific (or enumerated) foreign policy powers. Article I, Section 8 gives Congress the power to “provide for the common Defence,” “to regulate Commerce with foreign Nations,” “to declare war,” “to raise and support Armies,” and “to provide and maintain a Navy” among other authorities. Article 2, Section 2 states that the Senate must approve all cabinet and ambassadorial appointments by a majority vote, and that it must consent to all treaties by a two-thirds vote. Finally, Congress wields the power of the purse, that is, it must approve all government spending.

In contrast, the Constitution assigns few specific foreign policy powers to the president. Article 2, Section 2 designates the president “Commander in Chief of the Army and Navy of the United States” and specifies that, subject to the approval of the Senate, the president has the power “to make Treaties” and “appoint Ambassadors.” Article 2, Section 3 states that the president “shall receive Ambassadors and other public Ministers.” Presidents also hold general (and undefined) “executive power.”

As important as what the Constitution says is what it does not say. It says nothing about which branch has the authority to negotiate on behalf of the United States, decide when a war should be ended, terminate treaties, or declare neutrality, among other possible foreign policy powers. Although the Constitution makes the president commander in chief of the U.S. military, it does not define that power—or even describe it as a power at all.<sup>2</sup> And the Constitution says nothing about which branch should prevail when their powers conflict or when it is unclear which has the power to act.

The Constitution’s silences and tensions created problems almost immediately. In 1793, George Washington declared the United States neutral in the war between Great Britain and France. Questions immediately arose over whether he had exceeded his authority. James Madison and Alexander Hamilton, both of whom had served at the Constitutional Convention and who had (along with John Jay) written the Federalist Papers urging the Constitution’s adoption, disagreed on the answer. Madison insisted that presidents must give wide deference to Congress’s foreign

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<sup>2</sup> See Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, 2<sup>nd</sup> ed. (Urbana, Ill.: University of Illinois Press, 1989), chap. 7.

affairs powers. Hamilton countered that presidents should read those powers narrowly, as “exceptions out of the general ‘executive power.’”<sup>3</sup> These divergent readings of the constitutional design continue to echo in American foreign policy disputes more than two centuries later.

In theory, the courts could decide the boundaries between the foreign policy powers of Congress and the president. In practice, they have been reluctant to do so. They often dismiss co-called separation-of-powers cases in foreign policy on the grounds that they raise political and not legal questions, are not ripe for decision, or involve plaintiffs that have no legal standing to sue.<sup>4</sup> Even when the courts do decide cases, their holdings may be unclear. For instance, the Supreme Court’s famed 1936 ruling in the *Curtiss-Wright* case suggested that presidents have extraconstitutional powers in foreign policy.<sup>5</sup> Subsequent Supreme Court decisions disavowed that idea as contrary to the basic conception of the Constitution.<sup>6</sup> Nonetheless, executive branch lawyers regularly cite *Curtiss-Wright* to justify expansive presidential foreign policy powers.

Many of the silences in the Constitution have been filled in over the decades by case law and customary practice.<sup>7</sup> For instance, it is now well established that only the president can negotiate on behalf of the United States. Even so, the American constitutional design remains one in which the president and Congress have distinct powers but also ones that can overlap and conflict. This has created a system, as Richard Neustadt famously put it, of “separated institutions *sharing* power.”<sup>8</sup> One conse-

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<sup>3</sup> Quoted in Jean E. Smith, *The Constitution and American Foreign Policy* (St. Paul, Minn.: West Publishing, 1989), p. 52.

<sup>4</sup> See Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs* (Princeton: Princeton University Press, 1992), and James M. Lindsay, “Is Operation Odyssey Dawn Constitutional? Part V,” <https://www.cfr.org/blog/operation-odyssey-dawn-constitutional-part-v>, April 5, 2011.

<sup>5</sup> *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936).

<sup>6</sup> For example, Justice Robert Jackson wrote in his concurring opinion to the famed 1952 *Steel Seizure Case* that “much of the [*Curtiss-Wright*] opinion is dictum.” *Youngstown Sheet & Tube Co. v. Sawyer*, [4] U.S. 579, 636 n.2 (1952). Also Louis Fisher, “The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*,” *Constitutional Commentary*, 19 (2016), <http://scholarship.law.umn.edu/concomm/19>.

<sup>7</sup> The literature on the foreign policy powers of Congress and the president is vast. Among others, see Louis Fisher, *Constitutional Conflicts between Congress and the President*, 5th ed., rev. (Lawrence: University of Kansas Press, 2014); Louis Henkin, *Foreign Affairs and the United States Constitution*, 2d ed. (Oxford: Clarendon Press, 1996); and Michael D. Ramsey, *The Constitution’s Text in Foreign Affairs* (Cambridge: Harvard University Press, 2007).

<sup>8</sup> Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1990), p. 29.

quence of this constitutional design is that presidents and Congress frequently need the other's cooperation to accomplish their objectives. A prime minister, for instance, can decide what legislation a parliament will consider. Presidents, however, can only suggest which bills Congress should take up. Likewise, Congress may have strong opinions on how presidents should conduct diplomacy. It cannot, however, conduct negotiations itself.

A second consequence of the American constitutional design is that most executive–legislative disputes in foreign affairs do not turn on constitutional questions. To be sure, at times presidents can rightfully claim that Congress has exceeded its constitutional authority and vice versa. But most struggles over the direction of U.S. foreign policy turn on different visions of the national interest and of the effectiveness of specific policies, rather than on who has the power to act. As a result, understanding whether Congress and the president will clash on foreign policy and which side will prevail when they do requires leaving the realm of law and entering the realm of politics.

## **The Constitutional Struggle in Practice**

The balance of power on foreign policy between the two ends of Pennsylvania Avenue has varied over the course of American history. Before World War II, it tilted toward Congress. Notwithstanding George Washington's tussle with Congress over neutrality, early presidents generally deferred to congressional authority.<sup>9</sup> Congress so dominated foreign policy (and domestic policy for that matter) in the second half of the nineteenth century that the era has been called the era of "congressional government," "congressional supremacy," and "government-by-Congress."<sup>10</sup> When William McKinley asked Congress to declare war on Spain in 1898, he was catching up to, rather than leading, Capitol Hill.<sup>11</sup> The same was true nearly two decades later when a reluctant Woodrow

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<sup>9</sup> See Louis Fisher, *Presidential War Power* (Lawrence: University of Kansas Press, 1995), chaps. 1-2; Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* (Cambridge, Mass.: Ballinger, 1976).

<sup>10</sup> See James M. Lindsay, *Congress and the Politics of U.S. Foreign Policy* (Baltimore: Johns Hopkins University Press, 1994), p. 15.

<sup>11</sup> See George C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (New York: Oxford University Press, 2008), pp. 311-14.

Wilson finally asked Congress to declare war on Germany.<sup>12</sup> Two decades after that, Franklin Delano Roosevelt moved cautiously to confront the Nazi threat because many members of Congress feared he was dragging the country into a war they did not think it should fight and potentially might not win.<sup>13</sup> Only Japan's surprise attack on Pearl Harbor broke the back of isolationist opposition.

Congress held the upper hand in foreign policy in the century and a half before World War II for two reasons. The first was that foreign policy seldom figured prominently in American politics. Recognizing that the United States was a small and fragile country, Americans embraced George Washington's advice to stand apart from the affairs of Europe. Their energies were instead focused on taming a continent (and subjugating Native Americans). Second, presidents generally took a narrow view of their own powers. For instance, during his presidency James Madison once rejected a Senate move to authorize him to order the Navy to protect U.S. merchant shipping against attack as an unconstitutional delegation of congressional authority to declare war.<sup>14</sup> Not all pre-World War II presidents were as fastidious as Madison; James Polk provoked the Mexican-American war by sending U.S. troops into disputed border territory. But to a degree unimaginable today, they took a far narrower view of what the Constitution empowered them to do.

The balance of power shifted decisively in the president's favor after World War II. The threat posed by a nuclear-armed Soviet Union convinced the American public and members of Congress that only strong, decisive presidential power would keep the United States safe. The sentiment was so strong that some lawmakers openly wondered whether an eighteenth century constitution endangered the country.<sup>15</sup> In response, presidents eagerly pushed the boundaries of their powers.

Just how far the balance of power had shifted away from Congress became clear in 1950 when Harry Truman took the United States to war

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<sup>12</sup> See John Milton Cooper, *Woodrow Wilson: A Biography* (New York: Knopf, 2009), chap. 17.

<sup>13</sup> See Susan Dunn, *1940: FDR, Wilkie, Lindbergh, Hitler—the Election amid the Storm* (New Haven: Yale University Press, 2013), and Lynne Olson, *Those Angry Days: Roosevelt, Lindbergh, and America's Fight Over World War II, 1939-1941* (New York: Random House, 2014).

<sup>14</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1989), pp. 28-29.

<sup>15</sup> See, for example, J. W. Fulbright, "American Foreign Policy in the Twentieth Century Under an Eighteenth Century Constitution," *Cornell Law Review* 47 (Fall 1961), pp. 1-13.



in Korea without seeking Congress's authorization.<sup>16</sup> Over the next dozen years, Congress passed a succession of laws that gave presidents considerable statutory authority to conduct foreign policy as they saw fit. The willingness to defer to the White House was so ingrained that one senator complained in the mid-1960s that his colleagues reacted to even the most far-reaching presidential foreign policy decisions by "stumbling over each other to see who can say 'yea' the quickest and loudest."<sup>17</sup>

This imperial presidency came to a crashing halt in the early 1970s with the public's backlash against the Vietnam War. It has returned for brief moments since, most notably after the attacks of September 11, 2001, when a near unanimous Congress effectively voted for war but left it up to George W. Bush to decide on the enemy.<sup>18</sup> A year later, Congress voted overwhelmingly to authorize the invasion of Iraq, even though many lawmakers (and especially Democrats) privately doubted the wisdom of the idea.<sup>19</sup>

These examples notwithstanding, Congress has generally sought over the past half century to reclaim its say over foreign policy. It sought to do so in the immediate aftermath of Vietnam by repealing statutory authorities it had previously delegated to the executive branch and by trying to set boundaries on presidential authority. In doing so, however, Congress wasn't seeking to prevent presidents from acting abroad; rather it was seeking to prevent them from acting unwisely. That objective created a dilemma Congress has never solved: how to both empower and constrain the president at the same time.

Efforts to rein in presidential warmaking illustrate the problem. The sponsors of the 1973 War Powers Resolution, which Congress passed over Richard Nixon's veto, wanted to reassert Congress's traditional claim

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<sup>16</sup> See Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W.W. Norton, 1969), pp. 408-13.

<sup>17</sup> Quoted in James L. Sundquist, *The Decline and Resurgence of Congress* (Washington, D.C.: Brookings Institution, 1981), p. 125.

<sup>18</sup> Specifically, the 2001 Authorization to Use Military Force states that "the president is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." P.L. 107-40. Sept. 18, 2001, <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

<sup>19</sup> See James M. Lindsay, "The Shifting Pendulum of Power: Executive-Legislative Relations on American Foreign Policy" in James M. McCormick, ed., *The Domestic Sources of American Foreign Policy: Insights and Evidence*, 6<sup>th</sup> ed. (Lanham, Md: Rowman and Littlefield, 2012), p. 223.

to that only it could declare war. They recognized, however, that insisting that presidents receive congressional approval before initiating the use of military force could be dangerous; perils might multiply before Congress said yes. So they gave presidents up to ninety days after initiating hostilities to gain that approval. But that effectively empowered presidents to initiate force and dare Congress to stop them. The U.S. air war against Serbia in 1998 and the air war against Libya in 2011 showed that Congress finds it politically difficult to do so, even when majorities of lawmakers oppose administration policy. More recently, congressional efforts to replace the 2001 Authorization to Use Military Force, which successive administrations have pointed to as part of the legal basis for U.S. military operations against the Islamic State and al-Qaeda in the Arabian Peninsula even though neither group existed at the time, have foundered in part because of disagreements over how to write legislation that won't produce perverse unintended consequences.

Thus, while the imperial presidency has faded, the general balance of power continues to favor presidents. Take the case of trade policy. The U.S. Constitution explicitly lodges the power to regulate trade with Congress. As a result, Congress can block presidents from initiating new trade negotiations by refusing to grant the White House trade promotion authority. In this legislative vehicle, Congress agrees to hold a straight up-or-down vote on any trade agreement the president negotiates provided that the deal meets objectives that Congress specifies. Over the years, however, Congress has passed a variety of laws that delegate vast authority to presidents to interpret and enforce *existing* U.S. trade deals. Presidents can impose tariffs and quotas, suspend foreign commerce, freeze foreign assets, and even rip up trade agreements without having to get Congress's consent.<sup>20</sup>

The presidential advantage is aided by the fact that presidents generally read their constitutional and statutory powers broadly. They also regularly use the advantages of "decision, activity, secrecy, and dispatch" that Alexander Hamilton hailed long ago to seize the initiative to try to create political and diplomatic conditions that will force Congress to follow their lead.<sup>21</sup> This tilt toward the White House will persist as long as law-

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<sup>20</sup> See Gary C. Hufbauer, "As President Trump Can Shackle Trade, But Will He?" Peterson Institute for International Economics, January 5, 2017, <https://piie.com/blogs/trade-investment-policy-watch/president-trump-can-shackle-trade-will-he>.

<sup>21</sup> Alexander Hamilton, "Federalist No. 70," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Garry Wills (New York: Bantam Books, 1982), p. 356.

makers, and the broader public, believe that America's security is best served by having a president who can act without first having to get permission from Congress.

## **Incentives for Congress to Join the Struggle**

To say that Congress can contest foreign policy is not to say it necessarily will. Domestic issues figure far more prominently in why members are elected. To the extent that voters see foreign affairs as a presidential prerogative, lawmakers have reason to ignore events overseas. When Congress does turn to foreign policy, its actions are driven by a mix of institutional, political, and personal incentives.

Congress's institutional incentives stem from its constitutional responsibilities. The Senate, for instance, is charged with providing its advice and consent to treaties. More broadly, the U.S. government cannot spend monies unless appropriated by law. As a result, Congress has an extensive committee system that reviews the budgets and operations of federal agencies, a process commonly referred to as congressional oversight. The House and Senate Appropriations committees, the House and Senate Armed Services committees, the Senate Foreign Relations Committee, the House Foreign Affairs Committee, and the House and Senate Intelligence committees are the most obvious congressional overseers of foreign policy. However, because events overseas affect virtually every issue, almost every congressional committee can claim jurisdiction over some slice of foreign policy. The House Ways and Means Committee and the Senate Finance Committee have jurisdiction over trade policy, the House and Senate Finance committees oversee contributions to the International Monetary Fund, and the House and Senate Agriculture committees oversee commodity-export programs. The normal course of discharging these appropriations and oversight duties provides multiple opportunities for discord and disagreement between Congress and the president.

Politics also shapes Congress's involvement in foreign policy. As much as Americans love to say that politics stops at the water's edge, it doesn't. The desire to win reelection encourages members of Congress to follow their constituents' sentiments on whether the president's foreign policies are succeeding or failing. It's unsurprising that Congress endorsed George W. Bush's policies in the wake of 9/11 and challenged them as the U.S. death toll in Iraq mounted. Of course, each member's constituency is made up of many groups. Members may respond to what they are hearing

from average voters, business leaders, union heads, ethnic groups, public interest lobbies, or financial supporters, among others. Members also respond to calls for party loyalty, calls that have become harder to ignore as political polarization has intensified in the United States. Partisanship explains why both George W. Bush and Barack Obama found it harder to lead after their parties lost control of Congress during their terms in office. Partisanship also explains why most Republican members of Congress attacked Obama's proposed airstrikes against Syria in 2013 but hailed Donald Trump's airstrikes on Syria four years later.<sup>22</sup>

Last, congressional activity in foreign affairs reflects the personal judgments and passions of individual members. Many if not most lawmakers have only passing interest in foreign policy. For some, though, it's a personal priority. Senators John McCain (R-AZ) and Lindsey Graham (R-S.C.) are classic examples. Personal passions matter most when they are held by senior lawmakers who can command committee or institutional resources to push their agendas (McCain, for instance, chairs the Senate Armed Services Committee.) At the same time, the nature of events overseas may override partisan differences and generate a groundswell of agreement on the need to act. Congress's vote in 2012 to pass the Magnitsky Act to punish Russian officials implicated in the death of a Russian accountant in a Moscow prison and its vote in 2017 to toughen sanctions on Russia in retaliation for Moscow's interference in the U.S. presidential election offer two examples.

## How Congress Can Set Foreign Policy

Congress can influence foreign policy in three ways: by its decisions on substantive legislation; by its decisions on procedural legislation; and by shaping public opinion.<sup>23</sup>

With substantive legislation Congress specifies the content of American foreign policy. The most common vehicle Congress uses to do so is appropriations. Dollars are policy, and presidents cannot spend money unless Congress appropriates it. Thus, by funding some programs and not others, Congress can impose its preferences, as it did in early 2017 by declining

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<sup>22</sup> Jennifer Steinhauer, "G.O.P. Lawmakers, Once Skeptical of Obama Plan to Hit Syria, Back Trump," *New York Times*, April 7, 2017, <https://www.nytimes.com/2017/04/07/us/politics/syria-bombing-republicans-trump.html>.

<sup>23</sup> See Lindsay, *Congress and the Politics of U.S. Foreign Policy*, op. cit., chaps. 4-6.

to appropriate funds Donald Trump had requested to begin building a wall along the U.S.-Mexican border.<sup>24</sup> Congress can similarly specify the substance of foreign policy by regulating foreign trade, as it did by toughening sanctions on Russia in 2017. The Senate can specify the substance of foreign policy by approving treaties, as it did with the New START Treaty in 2011; rejecting them, as it did with the Comprehensive Test Ban Treaty (CTBT) in 1999; or ignoring them, as it has done with the UN Convention on the Law of the Sea (UNCLOS) since 1982.

Congress can also influence foreign policy by passing (or refusing to pass) laws that create (or abolish) government offices and agencies and that dictate the procedures the executive branch uses to make decisions. Efforts to pass such procedural legislation rest on the premise that changing who makes decisions and how those decisions are reached will change what decisions get made. In 1976 Congress created the Helsinki Commission to elevate the importance of the Helsinki Accords in U.S. foreign policy, and in 1998 it created the position of the ambassador-at-large for international religious freedom to give more prominence to the persecution of religious minorities. Likewise, Congress has passed laws requiring the executive branch to consult with a range of consumer, industry, and labor groups whenever it negotiates a trade agreement. With these and other procedural innovations, members of Congress seek to increase the likelihood that the executive branch will address issues that matter to them.

The third way Congress can influence foreign policy is by changing public opinion. When public opinion changes, presidential policies frequently do as well. Here Congress, or more accurately individual members of Congress, seek to shape policy by pressuring presidents to change course. Thus, in 2014 and 2015, members of Congress opposed to the Iran nuclear negotiations used hearings, speeches, TV appearances, op-eds, and tweets in a (failed) bid to discourage President Obama from concluding a deal. Much the same thing happened in 2017 after President Trump failed to affirm his commitment to Article V of the North Atlantic Treaty at the May 2017 NATO summit. Members of Congress on both sides of the aisle denounced the omission in the (successful) hope that their criticism would persuade Trump to change course. All such efforts

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<sup>24</sup> Burgess Everett, John Bresnahan, and Sarah Ferris, "Congress Strikes Budget Deal that Shortchanges Trump," *Politico.com*, May 1, 2015, <http://www.politico.com/story/2017/04/30/budget-deal-congress-shutdown-237822>.

share a common goal—to set the terms of debate in ways that increase support for some policy options and decrease support for others.

### **Activity Doesn't Guarantee Influence, Inactivity Doesn't Necessarily Mean Irrelevance**

The connection between congressional activity and congressional influence on foreign policy is not direct. Congressional challenges to presidential authority may change nothing. For instance, in 2007 Congress voted to withdraw U.S. troops from Iraq. President Bush vetoed the bill, however, and surged more troops into the country. Conversely, congressional *inactivity* may be consequential. Presidents generally anticipate congressional reactions and avoid initiatives that will be dead on arrival on Capitol Hill. The Obama administration, for example, hoped to persuade the Senate to vote to approve UNCLOS and CTBT. It abandoned both efforts because it did not have the necessary votes.

Many factors influence who prevails when Congress and the president take up the Constitution's invitation to struggle. These include the president's popularity, the depth of his commitment to the policy in question, whether his policy is seen to be working, and whether his party controls either or both houses of Congress. The single most important factor, though, is whether Congress wants to constrain the president or compel him to act.

Congress is best positioned when it seeks to constrain presidents. Its likelihood of success depends on the specific constitutional rules governing the issue in contention. Congress's bargaining leverage is strongest when the president needs its consent to act, as is the case with appropriations, new trade agreements, and treaties. In these situations, nothing happens unless and until Congress agrees to pass legislation. But it may refuse to even hold a vote. The Republican-controlled Congress, for instance, ignored President Obama's call for a vote on the Trans-Pacific Partnership (TPP). Even if congressional leaders agree to hold a vote, presidents may face daunting odds of success. The congressional legislative process is relatively open, providing multiple veto points that individual members, committee chairs, and congressional leaders can use to derail a bill. Moreover, while a simple majority is sufficient to pass legislation in the House, passing legislation in the Senate typically requires a supermajority. That's because longstanding Senate rules allow senators to block most legislation by filibustering it. Filibusters can be broken only if at least sixty senators

agree to end debate. The threshold to pass a treaty, a process from which the House is excluded, is even higher: two-thirds of senators must vote affirmatively. Because passing laws can be so difficult, presidents have strong incentives to agree to, and their congressional opponents have opportunities to demand, concessions in pending legislation. This gives Congress significant leverage to shape policy more to its liking.

Conversely, Congress is less likely to constrain presidents when they are free to act (or are seen as being free to act) unless Congress stops them. Here the burden of overcoming the many obstacles to passing a bill switches to lawmakers. Even if they succeed, the president will likely veto their handiwork. Congress can, of course, override a presidential veto. Congress did just that in 2016 with the Justice Against Sponsors of Terrorism Act (JASTA), which allowed lawsuits to proceed against Saudi Arabia for its alleged complicity in the September 11 attacks. And in 2017 President Donald Trump declined to veto a bill he opposed that tightened sanctions on Russia because Congress was certain to override it.<sup>25</sup> But these examples are exceptions rather than the rule. JASTA was the first time that Congress overrode a presidential foreign policy veto since it overrode Ronald Reagan's veto of comprehensive trade sanctions against South Africa in 1985.

In turning back congressional efforts to constrain them, presidents often use the Constitution's ambiguities to their advantage. Take the showdown between Congress and President Obama in 2015 over the Iran nuclear deal. Opponents argued it should be handled as a treaty. That meant that the deal could not go into effect unless the two-thirds of the Senate voted for it. Recognizing that the Republican-controlled Senate would not give its consent, Obama insisted the deal was an executive agreement. Executive agreements are legally binding, like treaties, but can be executed on the president's sole authority. The Constitution says nothing about which matters must be treated as treaties, and the courts have never settled the matter. In the end, Obama's position carried the day. This shifted the burden of stopping the deal to Congress. Unable to force the issue onto favorable legislative terrain, congressional opponents accepted a measure creating an opportunity to vote to disapprove the deal. But that resolution could be vetoed. As it turned out, Obama did not have

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<sup>25</sup> See Nicole Gauette and Jeremy Herb, "White House: Trump to Russia Sanctions Bill," CNN.com, July 29, 2017, <http://www.cnn.com/2017/07/28/politics/white-house-russia-sanctions/index.html>.

to wield his veto pen. Democrats blocked the resolution of disapproval from coming to a vote in the Senate.<sup>26</sup>

Presidents can also use their responsibility to implement policy to frustrate congressional attempts to constrain them. Beginning with Ronald Reagan, presidents have increasingly issued so-called signing statements to signal their disagreement with elements of laws they have signed. Thus upon signing the Russian sanctions bill, President Trump stated: “In its haste to pass this legislation, the Congress included a number of clearly unconstitutional provisions.”<sup>27</sup> The constitutional validity of signing statements is dubious—the Constitution says nothing to indicate that presidents can ignore parts of the bills they sign and the American Bar Association has called signing statements “contrary to the rule of law and our constitutional system of separation of powers.”<sup>28</sup> But their use highlights a practical political reality: Congress relies on the executive branch to implement policies, and administrations can use their discretion to skirt congressional directives.

As hard as it is for Congress to constrain the president when the constitutional rules favor the president, Congress finds it even harder to compel presidents to act. Part of the problem is that some powers crucial to the conduct of foreign policy lie beyond its reach. Presidents alone decide when U.S. treaty commitments like NATO’s Article V come into effect. They alone decide with whom to negotiate, what negotiations will cover, and whether a deal has been reached. They can terminate treaties without the input of either the Senate or Congress. And they alone speak for the United States in deciding what leaders or events overseas to condemn or to praise. Thus, members of Congress who believed that President Obama should have done more to stop the Syria civil war confronted an intractable problem. They could hold hearings, give speeches, and cast sense-of-Congress resolutions, thereby raises the political costs to Obama of inaction. But they couldn’t force him to change his mind.

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<sup>26</sup> Jennifer Steinhauer, “Democrats Hand Victory to Obama on Iran Nuclear Deal,” *New York Times*, September 10, 2015, <https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html>.

<sup>27</sup> “Statement by President Donald J. Trump on the Signing of H.R. 3364,” The White House, August 2, 2017, <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-hr-3364>.

<sup>28</sup> “Signing Statements Contrary to Separation of Powers, Says ABA,” American Bar Association, January 3, 2012, [https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/signing\\_statementsc.html](https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/signing_statementsc.html).



The flip side of the challenge is that many of Congress's foreign powers are inadequate to force presidents to pursue policies they oppose. James Madison hailed the appropriations power as "the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people."<sup>29</sup> But that presumes presidents want to spend money; the power of the purse quickly becomes incomplete and ineffectual when faced with a president willing to return funds unspent to the U.S. Treasury. Likewise, the Senate's treaty power becomes irrelevant if a president isn't interested in negotiating one.

The fact that Congress is at its weakest trying to compel presidents to act could prove significant during the Trump presidency. Discussions about executive-legislative relations on foreign policy typically presume that presidents wish to do *more* abroad than Congress prefers. President Trump, however, might try to do *less* than Congress wants. He has been ambivalent about the value of American alliances, hostile to trade agreements, and skeptical of the value of promoting American values overseas.

Congress got a glimpse of the challenges it might face early in Trump's presidency. Nine months into his term, he had nominated far fewer people to fill senior foreign policy across his administration than his predecessors had at the same point in their presidencies. In particular, he had named nominees for just nine of the top thirty-one positions in the State Department. In a testament to the limits of the appropriations power, his administration declined to spend \$80 million Congress had appropriated to fund efforts to counter propaganda campaigns by ISIS and Russia.<sup>30</sup> He also decertified Iranian compliance with the 2015 Joint Comprehensive Plan of Action (JCPOA) and left it to Congress to decide how the United States should handle the nuclear deal. He took this step even though he could have ended or conditioned U.S. participation in the agreement on his own authority. Trump also raised doubts about how he would interpret U.S. alliance commitments, suggested he would withdraw from NAFTA and other trade agreements, and made clear he would not champion America's democratic values overseas. Congressional opponents of these actual and potential policy moves criticized Trump, but they had no easy way to compel him to hew to their preferred policies.

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<sup>29</sup> James Madison, "Federalist No. 70," in *Federalist Papers*, 297.

<sup>30</sup> Nahal Toosi, "Tillerson Spurns \$80 Million to Counter ISIS, Russia Propaganda," Politico.com, August 2, 2017, <http://www.politico.com/story/2017/08/02/tillerson-isis-russia-propaganda-241218>.

This is not to say that Trump will always get his way on foreign policy. Congress overruled him on Russia sanctions and it will likely significantly revise his budgetary plans. But if America First means doing less abroad rather than more, Congress will discover how ineffectual its foreign policy powers can be.

## **Implications for Transatlantic Relations**

The U.S. Constitution's invitation to presidents and Congress to struggle over the direction of foreign policy injects uncertainty and friction into transatlantic relations. To be sure, it is not the only source of tension between the United States and its allies, and it is likely far from the greatest. The sometimes seismic shifts in U.S. policy as one presidency gives way to another probably creates more tension, as the transition from Jimmy Carter to Ronald Reagan, from Bill Clinton to George W. Bush, and from Barack Obama to Donald Trump all attest. Nonetheless, the fact that a president and Congress may diverge over America's policy priorities can complicate transatlantic cooperation.

Presidents sometimes use the Constitution's invitation to struggle to extract concessions from others or to dodge their demands. When congressional opposition is plausible, presidents can engage in good cop-bad cop tactics. They can argue that unless America's partners do more, Congress will block action. Knowing that Congress might indeed say no, America's partners may revise their positions. President Trump appeared to be trying just this gambit with his decision to decertify Iranian compliance with the JCPOA. Of course, the good cop-bad cop dynamic flows the other way as well. Presidents who don't want to heed allied calls to act many times can blame Congress for their inaction, as President Obama often did when faced with calls to do more in the Middle East.

More often, however, the struggle between presidents and Congress reflect genuine differences over what constitutes good policy rather than strategic calculations. When the two branches genuinely disagree, Congress is probably less sensitive than presidents to how their policy preferences might strain transatlantic relations. Presidents have to balance multiple foreign policy priorities. Members of Congress don't. It's unsurprising, then, that Congress has been more enthusiastic than the White House about asserting U.S. laws extraterritorially, over the objections of U.S. friends and allies, as it has done with the Iran-Libya Sanctions Act,

the Helms-Burton Act, and other sanctions legislation.<sup>31</sup> Likewise, early versions of the legislation Congress drafted in 2017 to toughen sanctions on Russia would have harmed European companies involved in Russia pipeline projects while possibly benefiting American natural-gas exporters. The legislation was revised before final passage to address these concerns, though perhaps not far enough in the eyes of many Europeans.<sup>32</sup> In addition, it should be noted that because the West's economic and security systems are so deeply integrated, Congress can also inject tensions into transatlantic relations when it legislates on matters that U.S. lawmakers would consider domestic policy.

Whether the struggle between presidents and Congress over foreign policy benefits or harms transatlantic relations on balance is debatable. America's friends and allies tend to be delighted when Congress opposes policies they dislike and angered when it resists policies they support. In that respect, their attitude toward Congress mirrors that of a former U.S. national security official who wrote, "I have been a 'strong president man' when in the executive branch and a 'strong Congress man' when out of the government in political opposition."<sup>33</sup> What isn't debatable is that however the transatlantic community may assess the merits of the U.S. political system, Congress and the president are destined to continue their centuries-old struggle for the privilege of directing American foreign policy.

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<sup>31</sup> See among others, Joy Gordon, "Extraterritoriality: Issues of Overbreadth and the Chilling Effect in the Cases of Cuba and Iran," *Harvard International Law Journal Online* 57 (January 2016), pp. 1-12, [http://www.harvardilj.org/wp-content/uploads/January-2016\\_Vol-57\\_Gordon.pdf](http://www.harvardilj.org/wp-content/uploads/January-2016_Vol-57_Gordon.pdf).

<sup>32</sup> See Michael Birnbaum, "U.S. Lawmakers' Attempt to Handcuff Trump on Russia Could Backfire, Europe Says," *Washington Post*, July 26, 2017, [https://www.washingtonpost.com/world/europe/eu-warns-congress-russia-sanctions-effort-could-backfire/2017/07/25/79329f10-7140-11e7-8c17-533c52b2f014\\_story.html](https://www.washingtonpost.com/world/europe/eu-warns-congress-russia-sanctions-effort-could-backfire/2017/07/25/79329f10-7140-11e7-8c17-533c52b2f014_story.html), and Yasmeen Serhan, "Why Europe Opposes America's New Russia Sanctions," *Atlantic.com*, August 2, 2017. <https://www.theatlantic.com/international/archive/2017/08/why-europe-opposes-the-uss-new-russia-sanctions/535722/>.

<sup>33</sup> John Lehman, *Making War: The 200-Year-Old Battle between the President and Congress over How America Goes to War* (New York: Scribner, 1992), p. xii.

