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Congress' Role in National Security Decision Making and the Executive-Legislative Dynamic

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Executive-Legislative Dynamic**

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Executive Summary

Most Americans are unfamiliar with the way Congress conducts its business, the authorities it enjoys under the Constitution, the tools it has at its disposal to shape U.S. policy in both the foreign and domestic spheres, and the impact its decisions have on the security of the country. Yet, the Congress can have a significant impact on U.S. national security – sometimes greater than that of the president – so understanding what Congress does, how it does it, and why is critically important.

Former Princeton University professor Edwin S. Corwin described the Constitution as “an invitation to struggle for the privilege of directing American foreign policy.” That struggle continues to this day, with the executive and legislative branches of government often at odds over the proper authorities and responsibilities of each, including in the national security realm. On occasion, Congress has been deferential to executive branch desires and actions – some would say too deferential. However, examples abound where Congress has not only been assertive but has successfully driven the national security policy agenda in ways that conflict with the preferred outcomes, policies, and priorities of the administration in power.

For all this, the public’s dim view of Congress and Congress’ reputation for inaction are not fully justified by the record. Examples abound of congressional initiatives with significant national security implications, and where members of Congress drove an issue that had major consequences for U.S. defense policy, with or without the support of the administration.

One of the most contentious areas of national security policy where the executive and legislative branches of government frequently clash is over the use of military force abroad. Under the Constitution, Congress has the sole

*This Occasional Paper is adapted from the author’s book, *The Lawgivers’ Struggle: How Congress Wields Power in National Security Decision Making* (National Institute Press, 2020).*

authority to declare war but has only done so a handful of times, while the president has sent U.S. troops into harm's way around the globe more than a hundred times. As U.S. foreign and national security policies adapt to the different priorities and worldviews of a new president, and the Congress seeks to assert itself more aggressively in the national security decision making process, a vigorous debate over war powers can be expected to continue and will once again likely take center stage in the political tug-of-war between the White House and Capitol Hill.

Tension between the executive and legislative branches is also evident in how the laws passed by Congress are to be interpreted and implemented. Although the Constitution directs the president to "take care that the laws be faithfully executed," there is often disagreement as to how the law should be applied. In recent years, the debate between what the Congress intended and how the executive branch interprets it has increasingly played out through the president's use of "signing statements." While signing statements are not legally binding, the law is.

The most significant way Congress exercises its legitimate oversight role of the military and the military budget is through the annual National Defense Authorization Act (NDAA) process. This is the main vehicle for establishing or modifying important national security policies. Controversial issues involving export controls and technology transfers, nonproliferation, weapons of mass destruction, sanctions, and general military policy also play out in the NDAA.

Clearly, the Congress can wield enormous power when it comes to crafting or changing U.S. national security policy. Using the numerous tools at its disposal, Congress can work its will either in support of executive branch priorities or in opposition to them.

There are those who argue that Congress has ceded too much of its authority and power to the executive branch.

Others believe that the Congress meddles too much in areas that are wholly and properly within the purview of executive branch prerogatives. This debate was not settled in the Trump Administration and it will not be settled in the Biden Administration. But Congress' role in setting national security priorities will continue to be an item of significant controversy as decisions on major national security issues are made and as the new administration seeks to work with Congress in efforts to solve the most urgent and pressing national security challenges this country faces. Given the partisan divide that characterizes American politics today, achieving consensus on critical defense and national security issues will be challenging. But it is important to understand the essential role that Congress plays in this process. The executive-legislative tug-of-war will continue, but that same "invitation to struggle" is at the heart of the American political system.

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Introduction

The United States today faces a period of unprecedented challenges. The country has weathered unusual political, economic, and health crises, from the two impeachments of a sitting president (only the third and fourth time in American history—and the first time a president was impeached twice) to the seemingly unrelenting advance of a global pandemic that continues to threaten the health, safety, and livelihood of all Americans. The spread of the coronavirus (COVID-19) has severely disrupted daily life and economic activity worldwide, including in the United States. A new administration and a new Congress are being challenged to put partisan differences aside and to work together for the good of the country. However, in light of a highly charged political atmosphere that has reinforced deep divisions among the electorate, rallying together to defeat a common and lethal threat has proven to be easier said than done.

Disagreements between Democrats and Republicans in Congress and between some Congressional leaders and the White House over the best courses of action to take in response to the pandemic have again raised concerns over whether the executive and legislative branches of government can work together for the common good. The highly partisan nature of President Trump's impeachments also divided the nation and heightened concern over whether the Congress is playing a productive or destructive role by not focusing its attention on issues that may matter more to Americans or that may be of greater significance to U.S. national security and global stability.

Perhaps in part as a consequence of these events, the Congress again failed to pass a budget on time to fund the operation of the federal government. Under the U.S. Constitution, Congress has the responsibility to appropriate funds so that the government can conduct its business.

Until year's end, however, when an omnibus budget resolution was finally passed by the Congress and signed into law by the president, the government was operating under what is termed a "Continuing Resolution" or "CR," that allows the government to remain open until such time that a budget can be approved and enacted. In recent years, the lack of a budget has led to personnel furloughs, government shutdowns, and significant hardship for much of the federal workforce. Failure to pass a budget on time also leads to significant disruption in spending plans that affect important programs. In the area of defense and national security, this can have devastating consequences. As former Secretary of Defense Mark Esper stated: "Every day that we have a Continuing Resolution means it's a day in which our training, our maintenance, our modernization and everything is impaired..."¹

Most Americans are unfamiliar with the way Congress conducts its business, the authorities it enjoys under the Constitution, the tools it has at its disposal to shape U.S. policy in both the foreign and domestic spheres, and the impact its decisions have on the future security of the country. Indeed, most Americans may not care. Public opinion surveys repeatedly indicate a vast majority of Americans see Congress as dysfunctional, overly partisan, responsible for gridlock, and generally unwilling or incapable of adequately addressing the country's needs. Yet, the Congress can have a significant impact on U.S. national security—sometimes greater than that of the president—so understanding what Congress does, how it does it, and why is critically important.

¹ Secretary of Defense Mark T. Esper, "Transcript of Press Briefing in Norfolk, Virginia," 25 September 2019, available at <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1971526/secretary-of-defense-esper-press-briefing-in-norfolk-virginia/>.

Former Princeton University professor Edwin S. Corwin described the Constitution as “an invitation to struggle for the privilege of directing American foreign policy.”² That struggle continues to this day, with the executive and legislative branches of government often at odds over the proper authorities and responsibilities of each, including in the national security realm. On occasion, Congress has been deferential to executive branch desires and actions—some would say too deferential. However, examples abound where Congress has not only been assertive but has successfully driven the national security policy agenda in ways that conflict with the preferred outcomes, policies, and priorities of the administration in power.

The Role of Congress in National Security Affairs

National security policy practitioners today often lack an understanding of how the legislative branch of government affects U.S. foreign and defense policy. This lack of understanding of the congressional role in setting the nation’s foreign and defense policy agenda is due to a variety of factors, including the arcane and seemingly byzantine rules under which Congress operates; the scarcity of higher-level education courses that explain the authorities and responsibilities of the legislative branch; the low regard in which the general public holds Congress as an institution; a prevalent belief that national security policy

² Cited in James M. Lindsay, “Invitation to Struggle: Congress, the President, and U.S. Foreign Policy,” in Daniel S. Hamilton and Teija Tiilikainen, Editors, *Domestic Determinants of Foreign Policy in the European Union and the United States*, (Center for Transatlantic Relations, The Paul H. Nitze School of Advanced International Studies, and the Finnish Institute of International Affairs, Washington, D.C., 2018), p. 145, available at https://archive.transatlanticrelations.org/wp-content/uploads/2018/01/ch07_Lindsay.pdf.

issues fall almost exclusively within the purview of the executive branch of government; and a corollary view that Congress is an impediment to, rather than a facilitator of, sound policy.

Moreover, there is no academic curriculum at the nation's colleges and universities – including U.S. military academies – that teaches the role of the legislative branch and its interactions with the executive (the last engagement most students have with the topic is in elementary or high school, which generally provides an incomplete exposition of the workings of Congress).

Unfortunately, most students or professionals seeking careers in the federal government focus exclusively on the executive branch, i.e., the Departments of State and Defense, and the intelligence agencies. Few consider working on Capitol Hill, even though the experience can provide significant policy experience and serve as a major steppingstone to other government positions and agencies.

This lack of understanding risks complicating and making more inefficient the workings of government at a time when threats to the nation require greater collaboration and “whole-of-government” solutions. For those interested in public service in support of the nation's defense, an understanding of the role the legislative branch of government plays in critical national security issues is essential.

Policy must be implemented for it to be successful. And the successful implementation of policy requires resources. Without the necessary fiscal/budgetary resources to take the required actions, no policy will succeed. The role of the Congress is to provide the necessary monetary resources and to ensure they are used prudently. The role of the executive branch is to “execute” policy, which necessitates a strong partnership with Congress—made more difficult when congressional processes are not well understood and when Congress is viewed in an adversarial role.

Knowledge of the processes by which Congress establishes and shapes U.S. foreign and defense policy, and the means by which it appropriates funding for critical national security activities, is essential to understanding the impact of congressional actions on an agency's workforce, policies, programs, and budgets. Understanding how the majority and minority parties use congressional rules and tools to advance their own legislative agendas will not only lead to a greater appreciation of the Congress' important role but can help agencies plan and execute strategies for successfully implementing their own agendas.

Public Perceptions of Congress

Congress is held in generally low esteem by the public, which sees lawmakers as overly partisan and more focused on winning re-election than solving the nation's problems. Opinion polls occasionally show Congress' approval rating dipping into single digits. A recent Gallup Poll shows Congress' approval at less than 20 percent.³ Trend analysis indicates that Congress has not seen approval ratings above 30 percent in more than a decade – the longest such stretch since polling on the matter started.⁴ One organization even created a “legislative futility index” to track the lack of useful congressional action over the years, looking at indicators such as time in session, bills passed, and votes taken. According to its analysis, “Congress set a record for legislative futility by accomplishing less in 2011 than any

³ See Gallup Poll data, *Congress and the Public*, available at <https://news.gallup.com/poll/1600/congress-public.aspx>.

⁴ Harry Enten, “Congress' Approval Rating Hasn't Hit 30% in 10 Years. That's a Record,” CNN, 1 June 2019, available at <https://www.cnn.com/2019/06/01/politics/poll-of-the-week-congress-approval-rating/index.html>.

other year in history.”⁵ Another more recent analysis concluded that “2019 was a record-breaker for Senate futility.”⁶

Typically, foreign and defense policy matters are not front and center in the public eye, and most members of Congress do not campaign or get elected on national security issues.⁷ As former Speaker of the House Tip O’Neill famously said, “All politics is local.” And local politics are generally focused on pocketbook issues like jobs and the economy. To quote James Carville, campaign strategist for former President Bill Clinton, “It’s the economy, stupid.” There are, of course, exceptions to every rule, such as after the September 11, 2001 terrorist attacks, but in general foreign policy concerns are not determinative in U.S. congressional elections.

The relationship between the executive and legislative branches of government is often seen as adversarial. This is especially, though not exclusively, true when the White House and Congress are controlled by different political parties. Political partisanship and acrimony are increasingly viewed as the norm by the electorate, and even by members of Congress themselves. The longest-serving

⁵ Stephen Dinan, “Congress Logs Most Futile Legislative Year on Record,” *The Washington Times*, 15 January 2012, available at <https://www.washingtontimes.com/news/2012/jan/15/congress-logs-most-futile-legislative-year-on-reco/>.

⁶ Jonathan Miller, “Key Votes 2019: Amid partisan acrimony, legislative wins in Congress were hard to come by,” *Roll Call*, 28 January 2020, available at <https://www.rollcall.com/2020/01/28/key-votes-2019-amid-partisan-acrimony-legislative-wins-in-congress-were-hard-to-come-by/>.

⁷ For the purposes of this article, references to “members of Congress” include both members of the U.S. House of Representatives and the U.S. Senate.

member of Congress, Rep. John Dingell (D-MI), retired in 2014, saying, "I find serving in the House to be obnoxious."⁸

Commentators frequently refer to a "do-nothing Congress," or opine that the rancor between political parties within Congress or between the executive and legislative branches is without precedent. As an article in *Politico* noted a few years ago, "Google 'worst Congress ever,' and you'll get nearly 5.4 million results – many of them scathing takes on two years of dysfunction, partisan warfare and all-around mayhem on Capitol Hill."⁹ Yet, history demonstrates that the mechanics of legislating and policy making were not intended by the Founders to be easy.

Historical Foundations of Congressional Authority

The impact of Congress on U.S. national security is far-reaching and often rivals the influence of the executive branch. Nevertheless, its role and functions are poorly understood not only by Americans in general but by many government officials entrusted with developing policy solutions or executing the decisions of policy makers.

Armed with a better understanding of how Congress operates and the ways in which it impacts U.S. national security decisions, executive branch policy makers will be

⁸ See Carl Hulse and Ashley Parker, "John Dingell to Retire After Nearly 60 Years in House," *The New York Times*, February 24, 2014, available at <https://www.nytimes.com/2014/02/25/us/politics/dingell-to-retire-from-congress.html>. Also see Sean Sullivan, "Longest-Serving Rep. John Dingell To Retire," *The Washington Post*, February 24, 2014, available at <https://www.washingtonpost.com/news/post-politics/wp/2014/02/24/longest-serving-rep-john-dingell-to-retire/>.

⁹ Jonathan Topaz, "'Worst Congress Ever,' By the Numbers," *Politico*, December 17, 2014, available at <https://www.politico.com/story/2014/12/congress-numbers-113658>.

better equipped to work with Congress to negotiate solutions to the vexing problems facing the nation. Given the dynamic nature of today's international security environment, ensuring these co-equal branches of government work collaboratively together has arguably never been more important.

Understanding the role and influence of Congress on national security policy requires a serious examination of the foundational documents created by the Founding Fathers, in particular, the U.S. Constitution and *The Federalist Papers*.

The Constitution establishes the authorities and responsibilities of the three branches of government. That the Founding Fathers devoted the first Article of the Constitution to the role of the legislative branch of government was not an accident. In fact, most of the authorities explicitly enunciated by the Constitution in the area of foreign and defense policy fall to the Congress. These include the ability to regulate commerce with other countries, to "raise and support" the Army, and to "provide and maintain" a Navy. Perhaps the most significant power explicitly granted to the Congress is the power to declare war.

The Constitution gives the president relatively few specific powers related to national security policy; yet those powers are significant. For example, Article II, Section 2 designates the president as "Commander in Chief of the Army and Navy of the United States." However, how the president exercises this role and whether or not the concurrence of Congress is required in the exercise of this role have been sources of frequent disputes between the executive and legislative branches, including whether the president can unilaterally deploy the U.S. armed forces abroad in combat situations. In cases such as this, the Constitution does not provide specific guidance. In some

instances, Congress has sought to legislate a role for itself;¹⁰ in other instances, the courts have been asked to rule on how this constitutional authority is exercised.

The struggle for primacy in national security decision making is not only ongoing but is a deliberate feature of the way our government was organized. The Founders did not want a government where governing was easy or consensus was commonplace; rather, it is through the conflict of ideas and the power of arguments that the best courses of action would rise to the top.

Congressional National Security Initiatives

For all this, the public's dim view of Congress and Congress' reputation for inaction are not fully justified by the record. Examples abound of congressional initiatives with significant national security implications, and where members of Congress drove an issue that had major consequences for U.S. defense policy, with or without the support of the administration.

One of the most far-reaching changes to U.S. defense policy occurred with the passage of the "Department of Defense Reorganization Act of 1986." Though almost unknown by its official title, national security scholars and practitioners know the law by its more commonly recognized name, the "Goldwater-Nichols Act."

The Goldwater-Nichols legislation completely directed a major overhaul of the command structure of the U.S. military and is often said to be the most sweeping change to DoD since its creation by the National Security Act of 1947. The legislation was the result of a bipartisan push in Congress, led by its co-sponsors Sen. Barry Goldwater (R-AZ) and Rep. Bill Nichols (D-AL), to correct problems associated with the lack of service interoperability and

¹⁰ The 1973 War Powers Resolution is a case in point.

complicated command arrangements. It streamlined the military chain of command and was the genesis of what has come to be known as “jointness,” or the ability to plan and operate across the military services as a unified force.¹¹

The concept of a “joint staff” and development of the “joint force” evolved from Goldwater-Nichols. The legislation is considered to have been so successful at integrating the various separate armed services into a unified joint service that it has spawned successor efforts, including a push for a “Goldwater-Nichols 2.0” that would make additional changes to the combatant command structure, military personnel system, and Joint Staff.¹²

Another major congressional initiative was the 1991 “Soviet Threat Reduction Act,” which created the Cooperative Threat Reduction (CTR) Program, a DoD-funded effort to secure, dismantle, and eliminate former Soviet weapons of mass destruction (WMD) in the wake of the dissolution of the Soviet Union and heightened concern over the potential for “loose nukes.” This bipartisan legislation was co-sponsored by Senators Sam Nunn (D-GA), former Chairman of the Senate Armed Services Committee, and Richard Lugar (D-IN), former Chairman of the Senate Foreign Relations Committee, and came to be known as the “Nunn-Lugar” program.

¹¹ The need for “jointness,” where elements of each military service are effectively integrated into a joint fighting force, was popularized in the 1986 movie “Heartbreak Ridge,” starring Clint Eastwood, a fictionalized account of “Operation Urgent Fury,” the October 1983 U.S. invasion of Grenada. A scene in the movie shows a U.S. Marine in Grenada calling in an air strike by phoning Camp Lejeune, which then routed the call to the appropriate Service. Though the account has achieved the status of folklore legend, it is generally accepted that the inability of the Services to communicate directly with each other presented significant problems which Goldwater-Nichols sought to address.

¹² See, for example, Mark F. Cancian, “Goldwater-Nichols 2.0,” Center for Strategic and International Studies, 4 March 2016, available at <https://www.csis.org/analysis/goldwater-nichols-20>.

Since its establishment, the Nunn-Lugar program has expanded in scope to include the control over and elimination of nuclear, chemical, and biological weapons outside the former Soviet states, including in Europe, Africa, Asia, and the Middle East. It has also expanded to include funding and programs by other federal entities, including the Departments of State and Energy.¹³ Although the Nunn-Lugar program is generally considered a successful example of U.S. nonproliferation policy, it was extremely controversial in its early days, with concerns raised over its funding, timelines, and responsibility for specific projects.

One more example of congressional influence over U.S. national security policy is instructive. In this case, Congress and the administration were at loggerheads over the issue of missile defense. On March 23, 1983, President Ronald Reagan announced his Strategic Defense Initiative (SDI) program, which he hoped would make nuclear weapons “impotent and obsolete” by developing missile defenses that could protect the country against a Soviet nuclear attack.¹⁴ At the time, however, the United States was constrained by the 1972 U.S.-Soviet Anti-Ballistic Missile (ABM) Treaty, which prohibited large-scale missile defenses to protect the homeland.

¹³ For background on the CTR program, see, for example, Justin Bresolin and Brenna Gautam, “Fact Sheet: The Nunn-Lugar Cooperative Threat Reduction Program,” Center for Arms Control and Non-Proliferation, available at <https://armscontrolcenter.org/fact-sheet-the-nunn-lugar-cooperative-threat-reduction-program/>. Also see “The Evolution of Cooperative Threat Reduction: Issues for Congress,” Congressional Research Service, 23 November 2015, available at https://www.everycrsreport.com/files/20151123_R43143_ea9728ba69f622015c04aa39537330b196ec0da9.pdf.

¹⁴ President Ronald Reagan, “Address to the Nation on Defense and National Security,” 23 March 1983, available at <https://www.reaganlibrary.gov/research/speeches/32383d>.

U.S. policy during the Cold War was based on the theory of a “balance of terror” that would leave both the United States and Soviet Union vulnerable to missile attack. It was thought this mutual vulnerability would be stabilizing by providing a disincentive for either side to strike the other first, the essence of deterrence.¹⁵

Reagan disliked the idea of leaving the United States vulnerable to nuclear attack and recognized that the ABM Treaty stood in the way of developing a robust missile defense program to protect Americans. So, he initiated a legal review of the treaty, which determined that its provisions could actually allow certain advanced research and development on missile defense capabilities to proceed under a “broad interpretation” of the treaty’s language. This led to a huge controversy over the next couple of years, with some in Congress taking the lead in challenging the Reagan Administration’s interpretation. Sen. Nunn in particular led the opposition.

Nunn argued that the administration’s “broad interpretation” of the ABM Treaty infringed on the Senate’s constitutional “advice and consent” role regarding treaties.¹⁶ In a series of speeches on the Senate floor, he argued that when the Senate approved the ABM Treaty in 1972, it did so with the understanding that the treaty prohibited the kinds of research and development the Reagan Administration now argued were actually permissible, and that reinterpreting the treaty unilaterally

¹⁵ For an excellent description of Cold War deterrence theory and practice, see Keith B. Payne, *The Great American Gamble: Deterrence Theory and Practice From the Cold War to the Twenty-First Century*, National Institute Press, Fairfax, Virginia, 2008.

¹⁶ Michael R. Gordon, “Reagan Is Warned By Senator Nunn Over ABM Treaty,” *The New York Times*, 7 February 1987, available at <https://www.nytimes.com/1987/02/07/us/reagan-is-warned-by-senator-nunn-over-abm-treaty.html>.

by the executive branch without the consent of the legislative branch was unconstitutional.¹⁷

In the end, the Reagan Administration backed down and the justification for the SDI program was shifted; it was scaled back, Congress cut its budget, and the program was refocused to support much more modest objectives.¹⁸

In sum, Congress' impact on defense and national security policy can be substantial, and the role of congressional staffers in helping members shape and mold that policy can likewise be significant. Because of this, a position on Capitol Hill as a committee Professional Staff Member (PSM) can not only be immensely rewarding but a steppingstone to other positions in government or the private sector. Working in the Congress may provide staffers with a "birds-eye view" of how national security policy is made and a unique opportunity to help craft such policies. There are few similar opportunities elsewhere to influence the course of important events.

The Push and Pull of Executive-Legislative Branch Tensions

From the early days of the Republic, the relationship between the president and the Congress has veered from cooperative and conciliatory to combative and confrontational. In some instances, the disagreements

¹⁷ "Nunn: Reagan Wrong on ABM, Senator Says Treaty Bans Star Wars Expansion," *The Washington Post*, 14 March 1987, available at <https://www.orlandosentinel.com/news/os-xpm-1987-03-14-0110400069-story.html>.

¹⁸ Although Congressional opposition led to a scaling back of the SDI program, the effort was part of a robust U.S. strategic modernization program that served as a catalyst to unprecedented arms control agreements. Its political impact, along with the economic and technological pressures it placed on the Soviet leadership, also helped hasten the ultimate demise of the Soviet Union.

became so sharp that the relatively straightforward process of passing a budget became an uphill struggle. In the area of national security, failure to pass a budget on time can have disastrous consequences.

Many policy makers lack basic knowledge of the various inputs that drive congressional actions and behavior. They also do not fully comprehend the importance of engaging Congress proactively in support of executive branch priorities. Often, executive branch officials respond to congressional actions rather than attempt to shape them in ways more favorable to their desired outcome.

The Treaty Process

One of the most significant and substantive ways Congress can influence foreign and national security policy is through its role in the treaty process. International treaties carry the force of law, so they bind the United States legally. Arms control treaties, like other types of treaties, are negotiated by the executive branch but require the “advice and consent” of the Senate. This means that Senators can have an outsized influence on major administration foreign policy initiatives.

After President Obama signed the U.S.-Russian New START arms control treaty in 2010, the Senate, in its Resolution of Ratification, included numerous conditions, declarations, and understandings defining its interpretation of the treaty and how it should be implemented. In order to obtain the necessary Senate votes for approval in the face of strong Senate concern over the health and status of the U.S. nuclear weapons program, the administration pledged to carry out an extensive nuclear modernization effort. In

the end, the Senate approved the treaty by a vote of 71-26.¹⁹ Unlike the actual treaty text, a Senate Resolution of Ratification is not legally binding, though the conditions and interpretations the Senate places on its consent to ratification may lead to legal challenges down the road if the administration acts in a manner that conflicts with the Senate's understanding of the agreement.

Only the Senate was given the power to vote on the ratification of treaties. The House was considered to be too lacking in stature and too subject to the whims of popular opinion to be entrusted with this grave responsibility. In *Federalist 64*, John Jay argued that treaty-making power should "be exercised by men the best qualified for the purpose" and that Senators, "whose reputation for integrity inspires and merits confidence," were best suited to the task. "With such men the power of making treaties may be safely lodged," Jay argued.²⁰

As a matter of practice, it is generally difficult to withdraw from a legally binding treaty once ratified. Most treaties, including arms control treaties, contain a "supreme interests" clause that allows a party to withdraw from its obligations if conditions change such that its supreme interests are jeopardized by continued adherence. However, this clause is infrequently exercised. With more than 1,500 treaties approved since the nation's early days, there are only three instances in recent years where the United States withdrew from arms control treaties. The first is when President George W. Bush withdrew from the 1972 U.S.-Soviet ABM Treaty in 2002; the second is when President Trump withdrew from the Intermediate-Range

¹⁹ The Resolution of Ratification, passed on 22 December 2010, can be found at <https://2009-2017.state.gov/documents/organization/154123.pdf>.

²⁰ John Jay, *Federalist 64*, "The Powers of the Senate From the New York Packet," 7 March 1788, available at https://avalon.law.yale.edu/18th_century/fed64.asp.

Nuclear Forces (INF) Treaty in 2019. And the third is when President Trump withdrew from the Open Skies Treaty in 2020. In none of these cases did the United States abrogate the agreement or violate its terms. Instead, the United States complied with the withdrawal provisions as stipulated in the treaties by giving six months' advance notice to the other party or parties.

Although the Constitution requires Senatorial consent to treaties, it is silent on the process for withdrawing from them. In the cases mentioned above, some in Congress argued that if the Senate has a constitutional right to weigh in before a treaty can enter into force, it should also have the right to do so before a president can unilaterally withdraw from it. Those who subscribe to this view sometimes cite Thomas Jefferson's statement that "Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded." This argument, however, does not enjoy universal acceptance among legal scholars and has not been upheld by the courts.²¹

Similarly, some have criticized presidential decisions to make unilateral agreements on national security issues by arguing such agreements can only be made as a consequence of the Senate's treaty-making power. For example, some in Congress were highly critical of the Clinton Administration's 1994 "Agreed Framework" with North Korea, which was intended to prevent Pyongyang from developing nuclear weapons but was not a formal

²¹ See, for example, Russell Feingold, "Donald Trump can unilaterally withdraw from treaties because Congress abdicated responsibility," NBC Think, 7 May 2018, available at <https://www.nbcnews.com/think/opinion/donald-trump-can-unilaterally-withdraw-treaties-because-congress-abdicated-responsibility-ncna870866>.

treaty.²² Critics of the Obama Administration's 2015 Iran nuclear deal argued that the agreement not only was flawed but should have been submitted to the Senate for its advice and consent. Two prominent critics of the Obama Administration's national security policies argued:

...agreements that extend beyond a president's time in office or make long-term commitments of U.S. sovereignty must undergo the Article II treaty process. An enduring non-aggression pact, or even a unilateral commitment not to use American force on a lasting basis, demands the participation of other branches of government. Together with ending economic sanctions (which Iran will demand), these commitments would work a significant change in the U.S.-Iran relationship that is tantamount to a peace treaty. Peace agreements should receive Senate approval. Only the cooperation of the executive and legislative branches of government over time can ensure that the U.S. will live up to restrictions on its sovereignty.²³

In a 2013 letter to Vice President Joe Biden, Chairman of the House Armed Services Committee's Strategic Forces Subcommittee, Rep. Mike Rogers (R-AL), wrote that the Obama Administration's plans for additional nuclear weapons reductions required congressional consent. He

²² Glenn Kessler, "History lesson: Why did Bill Clinton's North Korea deal fail?," *The Washington Post*, 9 August 2017, available at <https://www.washingtonpost.com/news/fact-checker/wp/2017/08/09/history-lesson-why-did-bill-clintons-north-korea-deal-fail/>.

²³ John R. Bolton and John Yoo, "Advice on 'Advice and Consent,'" *National Review*, 31 December 2014, available at <https://www.nationalreview.com/2014/12/advice-advice-and-consent-john-r-bolton-john-yoo/>.

noted that years before, then-Senator Biden had stated “with the exception of the SALT 1 agreement, every significant arms control agreement during the past three decades has been transmitted to the Senate pursuant to the Treaty Clause of the Constitution” and that “we see no reason whatsoever to alter this practice.”²⁴

The Ebb and Flow of Congressional Activism

Discerning which branch of government predominates in crafting U.S. national security policy is not always easy. Much depends on the specific issues under consideration. On various issues and at various times, Congress has sought to be more assertive in exercising its authorities on key national security questions, though greater assertiveness has not always translated into greater influence.

For members of Congress, there is always some risk in challenging the president on national security policy. In part, this is due to a popular belief that the president knows best what is in the national security interest. Moreover, the cacophony of competing voices on Capitol Hill does not engender confidence among the general public that Congress is a more capable arbiter of American national security interests than the president. However, members who challenge the president on foreign and national security policy may do so in the belief that disagreements on such weighty issues with which the public is generally unfamiliar will place them at less risk than disagreements on domestic policy, which is usually of more interest to constituents.

In the formulation and guidance of foreign and national security policy, the president is generally assumed to hold

²⁴ Cited in Josh Rogin, “No Word From Russia as Obama Will Announce U.S. Nuclear Reductions,” *Daily Beast*, 11 July 2017, available at <https://www.thedailybeast.com/no-word-from-russia-as-obama-will-announce-us-nuclear-reductions?ref=scroll>.

an advantage over Congress. In President Theodore Roosevelt's words, the president commands the "bully pulpit," a phrase coined to express the president's ability to drive an agenda.²⁵ As the Commander in Chief of the nation's armed forces, the president is considered to be the single authority responsible for the affairs of state and the security of the country. As the head of state and the head of government, the president can initiate foreign policy decisions, including those involving the use of military force abroad.

The importance of leaving such weighty decisions in the hands of a single authority was articulated by Alexander Hamilton in *Federalist 70* where he wrote, "That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."²⁶ As President Woodrow Wilson would later note: "The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely."²⁷

Congress' ability to influence national security policy has ebbed and flowed depending on the circumstances and

²⁵ See "Federal Power: Theodore Roosevelt," Bill of Rights Institute, available at <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/presidents-constitution/federal-power-theodore-roosevelt/>.

²⁶ Alexander Hamilton, "The Executive Department Further Considered," *Federalist 70*, available at https://avalon.law.yale.edu/18th_century/fed70.asp.

²⁷ Cited in Donald R. Wolfensberger, "Woodrow Wilson, Congress & Foreign Policy: The Education of a Neophyte - An Introductory Essay," Seminar at the Woodrow Wilson International Center for Scholars, 17 October 2011, available at <https://www.wilsoncenter.org/sites/default/files/Cong-FP-intro-essay.pdf>.

the issue under consideration. Some scholars believe the passage of the Gulf of Tonkin Resolution in 1964 was “the nadir of congressional influence over foreign policy.”²⁸ This resolution stated: “Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”²⁹ This action essentially gave the president a free hand to build up U.S. forces in Vietnam. In the 1970s, however, Congress began to exercise its foreign and defense policy authority more aggressively.

Congressional activism in arms control policy, for example, ebbed and flowed in the 1970s, as the Senate debated the first two strategic arms limitation treaties (SALT I and SALT II). SALT I, concluded by the Nixon Administration in 1972, was overwhelmingly approved by the Senate by a vote of 88 to 2. The Carter Administration’s SALT II, however, was extremely controversial and President Carter withdrew it from Senate consideration after the Soviet invasion of Afghanistan in 1979, though opponents of the treaty, including Senator Henry “Scoop” Jackson (D-WA), concluded that it did not have the votes to pass anyway. Jackson called SALT II “a license for a massive [Soviet] buildup in strategic arms” that placed the United States at a strategic disadvantage vis-à-vis the Soviet Union. In a report on the treaty, the Senate Armed Services Committee concluded it “is not in the national security interests of the United States.”³⁰

²⁸ Lindsay, *Congress and the Politics of U.S. Foreign Policy*, The Johns Hopkins University Press (Baltimore and London, 1994), p. 23.

²⁹ Transcript of Tonkin Gulf Resolution (1964), available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=98&page=transcript>.

³⁰ Robert G. Kaiser, “Senate Committee Says SALT Not in America’s Best Interest,” *The Washington Post*, 21 December 1979, available at <https://www.washingtonpost.com/archive/politics/1979/12/21/sena>

Other strategic nuclear force issues garnered significant congressional attention. For example, U.S. nuclear targeting policy in the 1970s was an issue that generated significant interest in the Senate. One analyst stated that the Senate “attempted to become informed about the details of proposed U.S. [nuclear] policy” and “did not passively support the executive’s proposals but actively debated, questioned, and challenged them.”³¹ Decades later, the Senate again demonstrated it was not a “rubber stamp” for executive branch arms control priorities when in 1999 it voted down the Comprehensive Test Ban Treaty (CTBT) – an agreement that would have permanently banned nuclear testing. Sen. Jesse A. Helms (R-NC) called the CTBT “the most egregious treaty ever submitted to the Senate for advice and consent,” while then-Senate Minority Leader Thomas A. Daschle (D-SD) called the rejection “a terrible, terrible mistake.”³²

More recently, however, concerns have again been raised over the appropriate balance of power between the executive and legislative branches. In a February 2020 open letter to the Senate, a bipartisan group of 70 former Senators argued that “Congress is not fulfilling its constitutional duties” and is “ceding its powers to the executive.” They blamed the “partisan gridlock that is all too routine in recent decades” for allowing the executive branch “to effectively ‘legislate’ on its own terms through executive order and administrative regulation,” noting, “The Senate’s abdication of its legislative and oversight responsibilities

te-committee-says-salt-not-in-americas-best-interest/4052ff7e-8ddd-465a-b586-2533449e0a2e/.

³¹ Alan Platt, *The U.S. Senate and Strategic Arms Policy, 1969-1977*, (Westview Press, Boulder, Colorado), 1978, pp. 91-92.

³² Helen Dewar, “Senate Rejects Test Ban Treaty,” *The Washington Post*, 14 October 1999, p. A1, available at <https://www.washingtonpost.com/wp-srv/politics/daily/oct99/senate14.htm>.

erodes the checks and balances of the separate powers that are designed to protect the liberties on which our democracy depends.”³³

War Powers

One of the most contentious areas of national security policy where the executive and legislative branches of government frequently clash is over the use of military force abroad. Congress has the sole authority to declare war but has only done so a handful of times, while the president has sent U.S. troops into harm’s way around the globe more than a hundred times. As a new president and a new Congress take office, the issue of war powers may once again take center stage in the political tug-of-war between the White House and Capitol Hill.

In debate during the Constitutional Convention in 1787, James Madison argued that the Constitution should grant Congress the authority to “declare war,” and not to “make war,” since the president should have the power “to repel sudden attacks.”³⁴ Almost two and a half centuries later, the issue of who has authority to commit U.S. military forces to hostilities remains hotly debated. For example, the struggle to ensure the lasting defeat of the Islamic State of Iraq and Syria (ISIS) was waged under congressional authorizations for the use of military force dating back to 2001 and 2002. Various members of Congress have complained that those resolutions, adopted after the

³³ “70 former U.S. senators: The Senate is failing to perform its constitutional duties,” *The Washington Post*, 25 February 2020, available at https://www.washingtonpost.com/opinions/former-us-senators-the-senate-is-failing-to-perform-its-constitutional-duties/2020/02/25/b9bdd22a-5743-11ea-9000-f3cffee23036_story.html.

³⁴ See “The Heritage Guide to the Constitution,” available at <https://www.heritage.org/constitution/#!/articles/1/essays/49/declare-war>.

September 11, 2001 terrorist attacks, were intended to authorize military actions against al-Qaeda, not ISIS, and that the ongoing war against terrorism should be approved by Congress through a new Authorization for the Use of Military Force (AUMF) resolution.³⁵

Opposition to the president's use of military force without prior congressional authorization has often been bipartisan, with many in Congress seeing such action as usurping Congress' constitutional mandate to declare war. President Obama's decision to conduct air strikes against Libya in 2011, intended to prevent a potential massacre of civilians by Libyan strongman Col. Muammar Gadhafi's forces, prompted a bipartisan lawsuit by Reps. Walter Jones (R-NC), Dennis Kucinich (D-OH), and eight other members of Congress. Rep. Kucinich argued that President Obama should be impeached as a result.³⁶ The air strikes also led the House to pass various resolutions of disapproval, including H. Res. 292, which declared that the "President has failed to provide Congress with a compelling rationale" for military intervention in Libya and stated that the "President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya unless the purpose of the

³⁵ Senators Tim Kaine (D-VA) and Rand Paul (R-KY) have been among the Senate's most vocal supporters of a new AUMF that would give congressional blessing to ongoing U.S. military operations against ISIS. See "Kaine Statement On 17th Anniversary of 2002 AUMF," available at <https://www.kaine.senate.gov/press-releases/kaine-statement-on-17th-anniversary-of-2002-aumf>, and statement by Sen. Paul during debate on the National Defense Authorization Act for Fiscal Year 2018, available at https://fas.org/irp/congress/2017_cr/paul-aumf.html.

³⁶ Jennifer Epstein, "Kucinich: Libya action 'impeachable,'" *Politico*, 21 March 2011, available at <https://www.politico.com/story/2011/03/kucinich-libya-action-impeachable-051668>.

presence is to rescue a member of the Armed Forces from imminent danger.”³⁷

Support for the president’s action was also notably bipartisan, with former George W. Bush Administration lawyer John Yoo arguing that President Obama’s action was “firmly in the tradition of American foreign policy. Throughout our history, neither presidents nor Congress have acted under the belief that the Constitution requires a declaration of war before the U.S. can conduct military hostilities abroad.... For once, Mr. Obama has the Constitution about right.”³⁸

In an attempt to wrest power from the executive branch during what was seen as President Nixon’s “imperial presidency,” Congress passed the War Powers Resolution in 1973, overriding President Nixon’s veto with the necessary two-thirds majority in both chambers. Some believed this legislation would restore a balance of power between Congress and the president on matters of war and peace. Yet even today, nearly half a century after its passage, the War Powers Act remains highly controversial. Some argue it is unconstitutional; that it is imprecise and lacks clarity; and that it has failed to live up to its billing as a result of the failure of multiple presidents to abide by its requirements. Former Senate Armed Services Committee Chairman Sam Nunn stated that “The War Powers Act has never worked, will not work. My general thinking is we need to move much more to a consultative mechanism so

³⁷ H. Res. 292, “Declaring that the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes,” 3 June 2011, available at <https://www.congress.gov/bill/112th-congress/house-resolution/292>.

³⁸ John Yoo, “Antiwar Senator, War-Powers President,” *The Wall Street Journal*, 25 March 2011, available at <https://www.wsj.com/articles/SB10001424052748704050204576218540505216146>.

that the President consults with the Congress before making these decisions and not after that.”³⁹

In general, the act does not prevent the president from deploying U.S. troops overseas. Its basic provisions, however, require Congress to be notified within 48 hours of the president introducing military forces into an area of “hostilities” (undefined) or where hostilities are “imminent.” The president must remove those forces after 60 days (extendable for another 30 days) if the Congress does not declare war, with certain exceptions.⁴⁰

The statutory requirement to remove U.S. forces according to the timetable established by the War Powers Act has traditionally not been adhered to by presidents of either party. After President Reagan sent U.S. Marines to Lebanon in 1982 it took Congress nine months to direct the president to “obtain statutory authorization from Congress” for any substantial increase in their numbers.⁴¹ After the bombing of the Marine barracks in Beirut in October 1983, Congress finally invoked the War Powers Act in an effort to reassert congressional prerogatives regarding the deployment of U.S. forces abroad. However, enforcement of the act has always been difficult.

There are numerous examples where Congress has failed to prevent the president from introducing U.S. forces into hostilities or failed to obtain their withdrawal. President Harry Truman introduced U.S. forces to Korea without obtaining prior congressional approval. The Bay of

³⁹ Adam Clymer, “Democrats Study Amending War Powers Act,” *The New York Times*, 24 October 1993, available at <https://www.nytimes.com/1993/10/24/world/democrats-study-amending-war-powers-act.html>.

⁴⁰ The War Powers Resolution is available at https://avalon.law.yale.edu/20th_century/warpower.asp.

⁴¹ See S. 639, Lebanon Emergency Assistance Act of 1983, 27 June 1983, available at <https://www.congress.gov/bill/98th-congress/senate-bill/639>.

Pigs invasion of Cuba in 1961 and the invasion of Cambodia in 1970 followed a similar pattern. Indeed, during times of crisis or national emergency, the president often has the upper hand when it comes to the use of military force, as the Congress is often reluctant to second-guess the president.

In the 1991 Persian Gulf War, President George H. W. Bush requested congressional authorization to use force to expel Saddam Hussein from Kuwait only after a five-month troop buildup in Saudi Arabia had occurred. At the same time, however, he argued such authorization was unnecessary, stating, "If I don't get the votes, I'm going to do it anyway. And if I get impeached, so be it."⁴² Congressional criticism was muted by the success of Operation Desert Storm.

Strong congressional support was also evident for President George W. Bush's decision to respond to the September 11, 2001 terrorist attacks. A joint resolution passed by Congress authorized the president "to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks... or harbored such organizations or persons."⁴³ This 2001 AUMF was followed in 2002 by another AUMF authorizing the president to use the U.S. armed forces "as he determines to be necessary and appropriate" to "defend the national security of the United States against the continuing threat

⁴² Quoted in Kate Keller, "An Unlikely Hardliner, George H. W. Bush Was Ready to Push Presidential Powers," *Smithsonian Magazine*, 14 May 2018, available at

<https://www.smithsonianmag.com/history/unlikely-hardliner-george-h-w-bush-was-ready-push-presidential-powers-180969017/>.

⁴³ Public Law 107-40, "Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States," available at

<https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

posed by Iraq.”⁴⁴ An opinion by the Bush Administration’s Office of Legal Counsel in 2002 stated:

the President’s constitutional authority to undertake military action to protect the national security interests of the United States is firmly established in the text and structure of the Constitution and in executive branch practice. Thus, to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary.⁴⁵

These and other examples demonstrate the difficulty Congress has had in constraining the president’s freedom of action to deploy U.S. forces abroad. The effectiveness of the War Powers Act has been undermined by Congress’ general reluctance to second-guess the president on critical national security issues; the executive branch’s assertion that the act is an unconstitutional infringement on the president’s constitutional authorities as Commander in Chief; the lack of definitional clarity in the act itself; and the general deference of the judicial branch to presidential prerogatives.

Despite these difficulties, some in Congress continue to insist that congressional authorization is necessary prior to deploying U.S. troops in harm’s way. This, however, is a fundamental misreading of both law and practice. In

⁴⁴ Public Law 107-243, “Authorization For Use of Military Force Against Iraq Resolution of 2002,” available at <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf>.

⁴⁵ Jack Goldsmith, “The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea,” *Lawfare*, 14 September 2017, available at <https://www.lawfareblog.com/ease-writing-olc-opinion-support-military-action-against-north-korea>.

defending President Donald Trump's decision to bomb Syrian chemical weapons sites in retaliation for the Bashar Hafez al-Assad regime's use of chemical weapons on its own citizens, the Department of Justice's Office of Legal Counsel stated, "The President could lawfully direct airstrikes on facilities associated with Syria's chemical weapons capability because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense."⁴⁶ This was challenged by Sen. Tim Kaine (D-VA), who argued, "The ludicrous claim that this president can magically assert 'national interest' and redefine war to exclude missile attacks and thereby bypass Congress should alarm us all. This is further proof that Congress must finally take back its authority when it comes to war."⁴⁷

The January 2020 U.S. airstrike in Iraq that killed Qassem Soleimani, the military leader of Iran's Islamic Revolutionary Guard Corps Quds Force, again brought congressional concerns over war powers into stark relief. Sen. Richard Blumenthal (D-CT) stated, "The present authorizations for use of military force in no way cover starting a possible new war."⁴⁸ Sen. Tom Udall (D-NM)

⁴⁶ See Steven A. Engel, Office of Legal Counsel, Department of Justice, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," 31 May 2018, available at <https://www.justice.gov/olc/opinion/file/1067551/download>.

⁴⁷ Charlie Savage, "Trump Had Power to Attack Syria Without Congress, Justice Dept. Memo Says," *The New York Times*, 1 June 2018, available at <https://www.nytimes.com/2018/06/01/us/politics/trump-war-powers-syria-congress.html>.

⁴⁸ Leo Shane III, "Killing of top Iranian military commander elicits praise, worry from Congress," *Military Times*, 2 January 2020, available at <https://www.militarytimes.com/news/pentagon-congress/2020/01/03/killing-of-top-iranian-leader-elicits-praise-worry-from-congress/>.

accused President Trump of “bringing our nation to the brink of an illegal war with Iran without any congressional approval as required under the Constitution of the United States. Such a reckless escalation of hostilities is likely a violation of Congress’ war making authority....”⁴⁹ Sen. Rand Paul (R-KY) took to Twitter to comment, “If we are to go to war w/Iran the Constitution dictates that we declare war. A war without a Congressional declaration is a recipe for feckless intermittent eruptions of violence w/ no clear mission for our soldiers.”⁵⁰ And House Speaker Nancy Pelosi (D-CA) criticized the president’s action, saying it was conducted “without an Authorization for Use of Military Force (AUMF) against Iran. Further, this action was taken without the consultation of the Congress.”⁵¹

In response to the president’s action, Sen. Kaine introduced a resolution, supported by Sen. Mike Lee (R-UT), that would require a congressional authorization or formal declaration of war before the United States initiates any hostilities with Iran. He stated that the resolution “would not prevent the United States from defending itself from imminent attack, nor would it prevent us from authorizing military action against Iran. It would merely require that war against Iran cannot occur until there are a public debate and congressional vote in favor of it.”⁵² A

⁴⁹ Ibid.

⁵⁰ Paul Kane and Mike DeBonis, “Lawmakers reignite old debate over war powers,” *The Washington Post*, 4 January 2020, available at <http://thewashingtonpost.newspaperdirect.com/epaper/viewer.aspx>.

⁵¹ Statement by House Speaker Nancy Pelosi, 2 January 2020, available at <https://www.speaker.gov/newsroom/1220>.

⁵² Sen. Tim Kaine, “Congress needs to show some courage, follow the Constitution and vote on war with Iran,” *FoxNews.com*, 8 January 2020, available at <https://www.foxnews.com/opinion/tim-kaine-congress-constitution-vote-iran>. A modified version of this resolution passed the Senate on February 13, 2020 with rare bipartisan support by a 55-45 vote, demonstrating that the assertion of congressional prerogatives occasionally trumps partisan politics. See Catie Edmondson, “In

non-binding resolution to limit the actions of the president on Iran, filed by Rep. Elissa Slotkin (D-MI), passed the House on January 9, 2020 along mostly partisan lines by a 224-194 vote. On January 30, 2020, the House passed another resolution sponsored by Rep. Ro Khanna (D-CA) that would prohibit the president from spending federal funds to carry out military strikes against Iran (except in self-defense or to prevent an imminent attack on the United States) without prior congressional approval.⁵³ The same day, a separate resolution introduced by Rep. Barbara Lee (D-CA) that would repeal the 2002 AUMF also passed the House along mostly partisan lines, despite a White House veto threat should it pass the Senate and wind up on the president's desk.⁵⁴

On May 6, 2020, President Trump vetoed S.J. Res. 68, sponsored by Sen. Kaine, which declared U.S. armed forces to be in a state of "hostilities" with Iran, and which directed the president to "terminate" the use of U.S. forces "unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran."⁵⁵ The

Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution," *The New York Times*, 13 February 2020, available at <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>.

⁵³ Catie Edmondson, "House Votes to Repeal 2002 Military Authorization in Bid to Rein in Trump on Iran," *The New York Times*, 30 January 2020, available at <https://www.nytimes.com/2020/01/30/us/politics/House-military-authorization-iran-trump.html>.

⁵⁴ Office of Management and Budget, The White House, "Statement of Administration Policy: H.R. 2456 (House Amendment to Senate Amendment to H.R. 550) - Repeal of the Authorization for Use of Military Force Against Iraq of 2002," 27 January 2020, available at https://www.whitehouse.gov/wp-content/uploads/2020/01/SAP_HR-2456.pdf.

⁵⁵ See S.J. Res. 68, available at <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68/text>. Also see The White House, "Presidential Veto Message to the Senate for S.J. Res. 68," 6 May 2020,

following day, the Senate, by a 49-44 vote, failed to achieve the necessary two-thirds majority to override the president's veto.

Also in the Senate, a resolution introduced by Sens. Rand Paul and Jeff Merkley (D-OR) stated, "Neither the [2001] Authorization for Use of Military Force... nor the Authorization for Use of Military Force Against Iraq Resolution of 2002... may be interpreted as a statutory authorization for the use of military force against the Islamic Republic of Iran."⁵⁶ Senate Minority Leader Chuck Schumer (D-NY) stated, "The president does not have the authority for a war with Iran. If he plans a large increase in troops and potential hostility over a longer time, the administration will require congressional approval and the approval of the American people."⁵⁷ Sen. Tammy Duckworth (D-IL) stated there is "no question that the President—any President—does not have Constitutional authority to draw the United States into a war without prior Congressional approval. This solemn duty is solely for Congress to decide..."⁵⁸

On the other hand, some in Congress praised the airstrike as justified given Soleimani's involvement in military attacks on Americans in the region. Sen. Lindsay Graham called it a "bold action" against "one of the most

available at <https://www.whitehouse.gov/briefings-statements/presidential-veto-message-senate-s-j-res-68/>.

⁵⁶ See text at

<https://www.merkley.senate.gov/imo/media/doc/Merkley%20Iran%20Resolution.pdf>.

⁵⁷ Cited in Alexander Bolton, "Kaine introduces resolution to block war with Iran," *The Hill*, 3 January 2020, available at <https://thehill.com/homenews/senate/476702-kaine-introduces-resolution-to-block-war-with-iran>.

⁵⁸ WICS/WRSP Staff, "Illinois lawmakers respond to U.S. killing of Iranian general," NewsChannel 20, available at <https://newschannel20.com/news/local/illinois-lawmakers-respond-to-us-killing-of-iranian-general>.

ruthless and vicious members of the Ayatollah's regime. He had American blood on his hands."⁵⁹ Sen. Ben Sasse (R-NE) declared, "Gen. Soleimani has killed hundreds and hundreds of Americans, and was actively plotting more. This commander-in-chief — any C-in-C. — has an obligation to defend America by killing this bastard."⁶⁰ Some analysts argued that Soleimani's killing was "a lawful act, wholly compatible with President Trump's responsibilities as commander-in-chief. Trump had no obligation to consult Congress before ordering the operation" because the action was "overt and narrowly defined in scope" and "that authorization isn't necessary where a credible near-term threat exists."⁶¹ The Editorial Board of *The Wall Street Journal* also weighed in, arguing that critics of the president's action are "wrong on the law and Constitution" and that the long-standing prohibition on assassinations "has never applied to terrorists."⁶² "Mr. Trump also has the power, as Commander in Chief, to use

⁵⁹ Ryan Saavedra, "Lindsey Graham Signals America's Next Move Against Iran," *The Daily Wire*, 2 January 2020, available at <https://www.dailywire.com/news/breaking-lindsey-graham-drops-hint-at-americas-next-move-against-iran>.

⁶⁰ Tal Axelrod, "Congress reacts to US assassination of Iranian general," *The Hill*, 2 January 2020, available at <https://thehill.com/policy/defense/476612-congress-reacts-to-us-assassination-of-iranian-general>.

⁶¹ Tom Rogan, "Why Trump didn't need congressional approval to kill Qassim Soleimani," *Washington Examiner*, 3 January 2020, available at <https://www.washingtonexaminer.com/opinion/why-trump-didnt-need-congressional-approval-to-kill-qassem-soleimani>.

⁶² The ban on assassinations is contained in Executive Order (E.O.) 12333, dating from 1981. A summary of E.O. 12333 and the context for its issuance can be found at "Assassination Ban and E.O. 12333: A Brief Summary," Congressional Research Service, CRS Report RS21037, 4 January 2002, available at https://www.everycrsreport.com/files/20020104_RS21037_b53d9101bd1e6e57b98fb3058e000663015f55cb.pdf.

military force against anyone waging war against the U.S.," they argued.⁶³

Former Obama Administration Secretary of Homeland Security Jeh Johnson argued that the War Powers Act "is outdated, plain and simple" and "should be repealed and replaced." He stated, "The intended executive/legislative balance is—in a word—broken," asserting, "The current scope of the executive's authority in this space is indeed the product of decades of 'unilateralist presidencies and submissive legislatures.' Essentially, Congress has abandoned this space, and the executive, in the national security real or perceived, has filled it... Collectively, members of Congress no longer want to take a hard vote on whether to go to war if they can avoid it."⁶⁴ Former Trump Administration National Security Advisor John Bolton declared the War Powers Act "unconstitutional," arguing, "It reflects a fundamental misunderstanding of how the Constitution allocated foreign affairs authority between the President and Congress. The Resolution should be repealed."⁶⁵

Most presidents have considered the War Powers Act unconstitutional and have notified Congress of major military actions more as a courtesy than as a legal requirement. The language of these notifications has been relatively uniform throughout multiple administrations,

⁶³ "Trump's Legal Authority," *The Wall Street Journal*, 3 January 2020, available at <https://www.wsj.com/articles/trumps-legal-authority-11578095410>.

⁶⁴ Jeh Johnson, "War Powers: The Broken Balance Between the Branches," Speech before the American Constitution Society Symposium at the Georgetown University Law Center, 6 February 2020, available at <https://www.lawfareblog.com/war-powers-broken-balance-between-branches>.

⁶⁵ Justine Coleman, "Bolton says war powers resolution should be repealed," *The Hill*, 9 January 2020, available at <https://thehill.com/homenews/administration/477498-bolton-says-war-powers-resolution-should-be-repealed>.

stating that notification is being made “consistent with” the War Powers Act rather than “pursuant to” the act, which could suggest a legal requirement to do so.⁶⁶ President Trump notified Congress of the airstrike that killed Soleimani, though his notification was classified.⁶⁷ Subsequently, he tweeted, “These Media Posts will serve as notification to the United States Congress that should Iran strike any U.S. person or target, the United States will quickly & fully strike back, & perhaps in a disproportionate manner. Such legal notice is not required, but is given nevertheless!” The House Foreign Affairs Committee tweeted back, “This Media Post will serve as a reminder that war powers reside in the Congress under the United States Constitution. And that you should read the War Powers Act. And that you’re not a dictator.”⁶⁸

As history repeatedly shows, the end of an administration does not mean the end of arguments over which branch of government has the power and authority to commit U.S. forces to hostilities abroad. Recently, five House members—including the chairmen of the Intelligence, Rules, and Foreign Affairs committees—wrote to President Biden requesting he support congressional

⁶⁶ See “War Powers Act,” *Encyclopædia Britannica*, available at <https://www.britannica.com/topic/War-Powers-Act>.

⁶⁷ Seung Min Kim, “The White House has formally notified Congress of the Soleimani strike,” *The Washington Post*, 4 January 2020, available at https://www.washingtonpost.com/politics/the-white-house-has-formally-notified-congress-of-the-soleimani-strike/2020/01/04/1cc60090-2f3f-11ea-be79-83e793dbcaef_story.html.

⁶⁸ Shawn Snow and Leo Shane III, “Trump says Tweet serves as ‘notification’ to Congress that U.S. may ‘quickly & fully strike back’ against Iran,” *Military Times*, 5 January 2020, available at https://www.militarytimes.com/flashpoints/2020/01/05/trump-says-tweet-serves-as-notification-to-congress-that-us-may-quickly-fully-strike-back-against-iran/?utm_source=Sailthru&utm_medium=email&utm_campaign=EBB%2001.06.20&utm_term=Editorial%20-%20Early%20Bird%20Brief.

action to repeal the 2002 AUMF and replace the 2001 AUMF with language that defines the president's war powers authorities more narrowly and ensures greater congressional oversight. As Rep. Barbara Lee (D-CA) noted, "Congress has been missing in action, and President Joe Biden knows that."⁶⁹ And in a February 2021 letter, 25 non-governmental organizations called on Congress to "seize the opportunity to reassert its constitutional authority over war powers," noting that "Congress should sunset the 2001 AUMF eight months after a law is enacted and immediately repeal the 2002 Iraq AUMF."⁷⁰ In a similar letter, 23 of these groups called on President Biden to "obtain prior authorization from Congress" before using military force abroad and in order to chart "a new course that moves the nation off a perpetual war-based approach to security."⁷¹ As U.S. foreign and national security policies adapt to the different priorities and worldviews of a new president, and the Congress seeks to assert itself more aggressively in the national security decision making process, a vigorous debate over war powers can be expected to continue.

⁶⁹ Jennifer Scholtes and Connor O'Brien, "Adios AUMF? Democrats press Biden for help in revoking old war powers," *Politico*, 21 January 2021, available at <https://www.politico.com/news/2021/01/21/democrats-biden-war-powers-aumf-460915>.

⁷⁰ Letter dated 17 February 2021, available at https://winwithoutwar.org/wp-content/uploads/2021/02/2020.02.17_2001-AUMF-Letter.pdf.

⁷¹ Letter dated 17 February 2021, available at <https://winwithoutwar.org/wp-content/uploads/2021/02/Forever-Wars-Letter-to-President-Biden-2.17.2021.pdf>.

Signing Statements

Tension between the executive and legislative branches is also evident in how the laws passed by Congress are to be interpreted and implemented. Although the Constitution directs the president to “take care that the laws be faithfully executed,” there is often disagreement as to how the law should be executed. In recent years, the debate between what the Congress intended and how the executive branch interprets it has increasingly played out through the president’s use of “signing statements.”

Signing statements reflect the president’s views on legislation signed into law. They generally describe the positive provisions contained in the legislation and how the legislation’s enactment will benefit the American people. However, presidents have come to use signing statements more frequently to identify those provisions in the bill they object to and to specify how they intend to implement them. Occasionally these statements suggest an interpretation of the law at variance with what its congressional supporters intended.

Unlike the law itself, the accompanying signing statements carry no legal weight and have no legal standing. They are neither authorized nor prohibited by anything in the Constitution, but have become general practice, nevertheless. President James Monroe was the first to issue signing statements, which at that time were mostly for ceremonial or political proclamations. Over time, however, they have become more substantive in nature.

President Ronald Reagan significantly expanded the use of signing statements, using them as a tool to assert his presidential authority. During his administration, he issued 250 signing statements, of which more than one-third expressed objections to particular provisions of the

legislation he signed.⁷² Nearly one-half of the signing statements issued by President George H.W. Bush raised legal or constitutional objections to the laws he signed. President Clinton issued 381 signing statements, yet only a modest percentage of these were critical of legislative provisions. Although President George W. Bush issued only 161 signing statements, 79 percent of those statements raised legal or constitutional objections to more than 1,000 specific provisions of law.⁷³

In 2006, the American Bar Association (ABA) criticized President George W. Bush's actions, saying, "The President's constitutional duty is to enforce laws he has signed into being unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is."⁷⁴ The ABA declared that signing statements "undermine the rule of law and our constitutional system of separation of powers."⁷⁵ The Bush Administration's Office of Legal Counsel defended President Bush's use of signing statements by noting they "are indistinguishable from those issued by past Presidents" and that they are "an

⁷² "Presidential Signing Statements: Constitutional and Institutional Implications," Congressional Research Service, CRS Report RL33667, 4 January 2012, p. 2, available at https://www.everycrsreport.com/files/20120104_RL33667_8e67dd21b7737fb5a72093f92955fd92ad2bb91b.pdf.

⁷³ *Ibid.*, pp.2-9.

⁷⁴ See American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, August 2006, pp. 23-24, available at <https://balkin.blogspot.com/aba.signing.statments.report.pdf>.

⁷⁵ American Bar Association Press Release, "Blue-Ribbon Task Force Finds President Bush's Signing Statements Undermine Separation of Powers," 24 July 2006, available at <https://web.archive.org/web/20120615163547/http://www.abanow.org/2006/07/blue-ribbon-task-force-finds-president-bushs-signing-statements-undermine-separation-of-powers/>.

essential part of the constitutional dialogue between the Branches that has been a part of the etiquette of government since the early days of the Republic" and "an attempt to preserve the enduring balance between coordinate Branches of Government."⁷⁶

Then-Senator Barack Obama called President Bush's use of signing statements a "clear abuse of power"⁷⁷ and pledged during his presidential campaign, "I will not use signing statements to nullify or undermine congressional instructions as enacted into law."⁷⁸ President Obama issued his first signing statement on March 11, 2009, attached to an omnibus spending bill. As of January 2012, one-half of the signing statements issued by President Obama challenged the constitutionality of legal provisions he signed into law.⁷⁹ In one signing statement on the National Defense Authorization Act (NDAA) for Fiscal Year 2013, he challenged more than 20 separate provisions of the law.⁸⁰

In that particular NDAA signing statement, President Obama criticized provisions regarding the transfer of detainees at the U.S. detention facility at Guantanamo Bay, Cuba, stating, "In the event that the restrictions on the

⁷⁶ John P. Elwood, "Statement Before the House Committee on the Judiciary," 31 January 2007, pp. 1-2, available at <https://www.justice.gov/sites/default/files/olc/opinions/2007/01/31/presidential-signing-stmt.pdf>.

⁷⁷ Michael McConnell, "President Obama's Signing Statement on 'Czars,'" The Hoover Institution, 3 May 2011, available at <https://www.hoover.org/research/president-obamas-signing-statement-czars>.

⁷⁸ Charlie Savage, "Barack Obama's Q&A," *The Boston Globe*, 20 December 2007, available at <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

⁷⁹ Congressional Research Service, Report RL33667, op. cit., p. 10.

⁸⁰ "Statement by the President on H.R. 4310," 3 January 2013, available at <https://obamawhitehouse.archives.gov/the-press-office/2013/01/03/statement-president-hr-4310>.

transfer of Guantanamo detainees in sections 1034 and 1035 operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.”⁸¹ Similarly, in a signing statement on the fiscal year 2012 NDAA, President Obama stated, “Other provisions in this bill above could interfere with my constitutional foreign affairs powers... should any application of these provisions conflict with my constitutional authorities, I will treat the provisions as non-binding.”⁸²

The Trump Administration also made use of signing statements to express its opposition to various congressional actions. For example, on June 17, 2020, President Trump signed the “Uyghur Human Rights Policy Act of 2020,” a bill that would impose sanctions on entities and individuals that commit human rights abuses in the Xinjiang Uyghur Autonomous region of China. In signing the legislation, the president took issue with some of the bill’s provisions, noting they could be “inconsistent with my constitutional authorities.” Accordingly, the president stated that those provisions would be treated “as advisory and non-binding.” One section of the bill requires the president to notify Congress before ending sanctions, but the president declared that his administration “will not treat the provision’s requirement for advance notice as binding to the extent that it interferes with the President’s conduct of diplomacy.”⁸³

⁸¹ “Statement by the President on H.R. 3304,” 26 December 2013, available at <https://obamawhitehouse.archives.gov/the-press-office/2013/12/26/statement-president-hr-3304>.

⁸² “Statement by the President on H.R. 1540,” 31 December 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁸³ The White House, “Statement by the President,” 17 June 2020, available at <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-41/>.

While signing statements are not legally binding, the law is. Certainly, statements such as those above raise important constitutional questions and are another example of how the struggle between the executive and legislative branches for the privilege of directing American foreign policy plays out.

In response to controversies over the impact and legitimacy of signing statements, then-Sen. Arlen Specter (R-PA) introduced the "Presidential Signing Statements Act of 2006." The bill would have directed the courts to reject signing statements as lacking authority and would have instructed the Supreme Court to allow congressional lawsuits challenging their constitutionality.⁸⁴ Despite Sen. Specter's former chairmanship of the Senate Judiciary Committee, the bill died in committee.

Certainly, the balance of power between the executive and legislative branches waxes and wanes depending on the issue. The issue of war powers is a perennial topic of controversy on which the president and Congress struggle for primacy. Signing statements are also a tool in the tug of war between the branches of government. In the national security realm, much of this power struggle plays out in the annual ritual of crafting and negotiating the National Defense Authorization Act and the Department of Defense Appropriations Act. These are the two bills that have the most impact on U.S. national security and which are the most significant tools Congress has at its disposal to influence the course of American national security policy.

Managing the Military

The Department of Defense (DoD) is the largest federal agency both in terms of size and fiscal resources. It

⁸⁴ S. 3731, "Presidential Signing Statements Act of 2006," available at <https://www.congress.gov/bill/109th-congress/senate-bill/3731/text>.

comprises nearly two million men and women in uniform representing all of the military services and a civilian workforce numbering in the hundreds of thousands. With an annual budget in excess of \$700 billion, DoD is considered the nation's largest employer with a presence and impact in every state of the Union, including military bases and installations and contractor facilities. The Pentagon is said to be the world's largest office building and is home to roughly 25,000 employees. Consequently, oversight of DoD and the nation's military apparatus is a major endeavor and one on which Congress can have the most impact on national security policy.

Congressional management of the nation's military and military budget follows a traditional cyclical pattern. That pattern is in evidence during the annual process of developing the National Defense Authorization Act and the Department of Defense Appropriations Act. The NDAA and appropriations processes afford Congress the opportunity to weigh its national defense priorities against those of the administration and to make whatever adjustments and modifications it believes are necessary to ensure national security.

Disagreements between the executive and legislative branches over provisions in the NDAA occur regularly. Major disagreements between the Republican-controlled Congress and the White House led President Clinton to veto the Fiscal Year 1996 NDAA, in part because of provisions supporting a robust national missile defense program. In December 2020, President Trump vetoed the Fiscal Year 2021 NDAA because of provisions mandating the renaming of certain U.S. military bases, restricting the president's ability to withdraw U.S. military forces from a number of overseas deployments, and failing to repeal existing law

that was seen as allowing internet companies to facilitate “the spread of foreign disinformation online.”⁸⁵

Congress also is responsible for passing a dozen annual appropriations bills to fund the activities of the federal government. In recent years, this has proven to be easier said than done. Occasionally, some appropriations bills are passed on time while others are not. This can lead to a temporary shutdown of agency activities or passage of a Continuing Resolution (CR). Sometimes a number of appropriations bills funding multiple agencies are rolled into one “omnibus” appropriations bill. In fiscal year 2020, Congress failed to pass the necessary appropriations bills on time and instead passed two CRs funding the government through December 20, 2019, when Congress completed its work and President Trump signed the final appropriations measures into law.⁸⁶

Ideally, the entire process is supposed to be completed before the start of the new fiscal year on October 1 but is often delayed by partisan political wrangling over controversial issues. The process is basically the same for consideration of both the NDAA and the annual defense appropriations bill; however, because the appropriations bill focuses on spending amounts rather than policy guidance for DoD, it is often less encumbered by controversy and completed in less time than the NDAA.⁸⁷

⁸⁵ See The White House, “Presidential Veto Message to the House of Representatives for H.R. 6395,” 23 December 2020, available at <https://www.whitehouse.gov/briefings-statements/presidential-veto-message-house-representatives-h-r-6395/>.

⁸⁶ Committee for a Responsible Federal Budget, “Appropriations Watch: FY 2020,” 24 December 2019, available at <http://www.crfb.org/blogs/appropriations-watch-fy-2020>.

⁸⁷ Controversial policy issues addressed in this year’s NDAA included whether to remove Confederate names from military bases; how to address emerging technologies like biotechnology, advanced communications, and quantum information science; artificial

The NDAA process is the most significant way Congress exercises its legitimate oversight role of the military and the military budget. Yet other committees have jurisdiction over important national security issues that affect the U.S. military as well. This includes the House Foreign Affairs Committee; Senate Foreign Relations Committee; House Homeland Security Committee; Senate Homeland Security and Governmental Affairs Committee; House Oversight and Reform Committee; House Veterans' Affairs Committee; and Senate Veterans' Affairs Committee. Congressional oversight of the military also involves the intelligence committees of Congress, which may not be as public in their activities as the armed services committees, but whose actions are arguably just as important and consequential to the nation's security.

Congressional Muscle Flexing on Export Controls and Sanctions

In addition to the national security issues already mentioned, Congress has been an active player in establishing or modifying other important national security policies. For example, the issue of export controls is an area where Congress has legislated repeatedly. Export controls are intended to ensure that the transfer of military or dual-use items and materials (those that can be used in either civilian or military applications) to other parties is properly approved and licensed in accordance with established rules and regulations. This includes the transfer of defense services and information. Keeping sensitive military or military-related systems and technologies out of the hands of bad actors is a challenging but essential task. Various multilateral export control regimes exist to try to harmonize

intelligence; naval shipbuilding; U.S. force posture overseas; cybersecurity threats; and space issues.

the national export policies of other countries so that illicit transfers are blocked, and legitimate transfers are conducted with full transparency.

In the United States, all transfers of export-controlled items must be licensed by the government. Different agencies are responsible for the licensing process, depending on whether the item is considered a dual-use item or a munition. The State Department licenses munitions, and the Commerce Department handles the export of dual-use goods and technologies.

The George W. Bush Administration sought to revise and restructure the export control process to improve its efficiency. The Obama Administration initiated another substantial restructuring of the U.S. export control process that was implemented in several “waves.” And the Trump Administration also advocated for export control reforms in order to improve interoperability with U.S. allies, in accordance with the priorities established in the 2018 *National Defense Strategy*.

Attempts by Congress to adapt and update the U.S. export control system to contemporary realities have had mixed results. The “Export Control Reform Act of 2018” (ECRA) and the “Foreign Investment Risk Review Modernization Act of 2018” (FIRRMA) were both incorporated into the FY 2019 NDAA and reflected congressional efforts to impose tighter controls on the export of certain dual-use technologies, especially to countries like China. Some in Congress clearly believe the United States must aggressively challenge competitors like China in these areas while working to strengthen our defense partnerships. Sen. James M. Inhofe (R-OK), Chairman of the SASC, has noted, “We must remove unnecessary barriers to industrial cooperation that degrade our collective competitive edge.... It’s in our best interest to

ensure our allies can leverage our technological advantages and we can leverage theirs.”⁸⁸

In the 1990s, Congress acted forcefully to limit the Clinton Administration’s authority to export high-performance computers (so-called “supercomputers”) to countries of concern after the Russian Ministry of Atomic Energy announced that it had received five U.S. supercomputers made by IBM and Silicon Graphics for use in maintaining the safety and reliability of Russia’s nuclear arsenal. Russian Minister of Atomic Energy Viktor Mikhailov stated that the supercomputers were up to 10 times more powerful than anything Russia had previously acquired and would be used at Russia’s nuclear weapons laboratories.⁸⁹ Mikhailov’s revelations led Congress to conduct hearings, where it was revealed that the United States had exported more than 1,400 supercomputers between January 1996 and March 1997, including 47 to China and 10 to Russia.⁹⁰

The revelation of China’s acquisition of U.S. supercomputers also was investigated by the congressional

⁸⁸ Sen. James Inhofe, “We Must Build the National Security Innovation Base Our Defense Strategy Requires,” *DefenseNews*, 2 December 2019, available at <https://www.defensenews.com/outlook/2019/12/02/sasc-chairman-we-must-build-the-national-security-innovation-base-our-defense-strategy-requires/>.

⁸⁹ Michael R. Gordon, “Russia Atom Aides Buy I.B.M. Supercomputer Despite U.S. Curbs,” *The New York Times*, 25 February 1997, available at <https://www.nytimes.com/1997/02/25/world/russia-atom-aides-buy-ibm-supercomputer-despite-us-curbs.html>. Also see testimony of Gary Milhollin before the House Committee on National Security Subcommittee on Military Procurement, 15 April 1997, available at <https://www.wisconsinproject.org/selling-us-supercomputers/>.

⁹⁰ Testimony of William Reinsch, Under Secretary of Commerce for Export Administration, before the House National Security Committee, 13 November 1997, available at http://commdocs.house.gov/committees/security/has317000.000/has317000_1.HTM.

Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China (the "Cox Commission"), chaired by then-Rep. Christopher Cox (R-CA). The commission concluded that China "has been using HPCs [high-performance computers] for nuclear weapons applications" and noted that the computers obtained from the United States "represent a major increase in [China's] computing power."⁹¹

Congress also acted to overturn the Clinton Administration's Executive Order shifting the licensing responsibility for commercial satellite exports from the State Department to the Commerce Department after a Chinese "Long March" rocket carrying a U.S.-built commercial communications satellite crashed after launch. The subsequent investigation of the launch failure discovered that militarily sensitive encryption chips in the satellite were missing. As a result of the investigation, a post-crash report was provided to the Chinese, and the satellite manufacturers, Loral and Hughes, were accused of sharing secret technology with China that could be used to improve the accuracy of its nuclear missiles.⁹²

As a result, responsibility for the licensing of commercial satellite exports was returned to the State Department in the Fiscal Year 1999 NDAA. For the next 14 years, all U.S. commercial satellite exports were treated as though they were munitions, subjecting them to the more rigorous licensing procedures of the Department of State.

⁹¹ Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, Report 105-851, 3 January 1999, p. 99, available at <https://www.govinfo.gov/content/pkg/GPO-CRPT-105hrpt851/pdf/GPO-CRPT-105hrpt851.pdf>.

⁹² Roberto Suro and John Mintz, "Bureaucracy, Bungled Report Collide at Loral," *The Washington Post*, 31 May 1998, p. A16, available at <https://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/loral053198.htm>.

The issue of sanctions is another area where Congress has acted aggressively to penalize other countries and entities for violating U.S. laws or acting against U.S. national security interests. Nearly two dozen laws currently in force contain sanctions provisions for certain violations of nonproliferation rules, including the “Otto Warmbier North Korea Nuclear Sanctions and Enforcement Act of 2019” and the “Countering America’s Adversaries Through Sanctions Act” (CAATSA), which has been a source of tension between the executive and legislative branches.

Some have argued that sanctions are a way for Congress to reassert its predominance over the executive branch when it comes to foreign and national security policy. As one analyst has argued:

Sanctions are a foreign policy tool uniquely entrusted to Congress by the Constitution, which provides that Congress shall “regulate commerce with foreign nations.” Unlike the other major levers of U.S. foreign policy—diplomacy and military force, over which the Constitution divides control between Congress and the executive—the president has no inherent power to impose sanctions or to refuse to implement congressionally mandated sanctions. As sanctions continue to grow in importance, becoming the default U.S. policy response to a range of international crises, Congress will enjoy newfound potential to shape U.S. foreign policy in ways that have eluded it for decades.⁹³

⁹³ Benjamin Alter, “Sanctions Are Congress’s Path Back to Foreign Policy Relevance,” *Lawfare*, 27 March 2018, available at <https://www.lawfareblog.com/sanctions-are-congresss-path-back-foreign-policy-relevance>.

Although Congress can, and often does impose its own sanctions, the president also has legal authority – as a result of legislation Congress has passed – to impose sanctions. In the wake of Russia's annexation of Crimea (never recognized by the United States), the Obama Administration imposed sanctions restricting the transfer of military items to Russia. The Trump Administration imposed multiple sanctions on Russia in connection with its invasion of Ukraine, support for the Nicolas Maduro regime in Venezuela, various cyberattacks, interference in the 2016 U.S. elections, and the chemical weapons attack on the Skripals in the UK.⁹⁴

Sanctions continue to be heavily relied upon by the executive branch and are generally seen as a useful tool by the Congress, despite continued concern among some that they are useless at best and counterproductive at worst. Moreover, the imposition of sanctions by Congress has not always been viewed favorably by the executive branch, as some believe they tie the president's hands in the exercise of U.S. foreign policy and national security interests. Nevertheless, despite lingering concerns over their effectiveness, Congress still views sanctions as a useful tool of American foreign policy.

Conclusion

Clearly, the Congress can wield enormous power when it comes to crafting or changing U.S. national security policy. Using the numerous tools at its disposal, Congress can work

⁹⁴ For a partial list of sanctions imposed by the Trump Administration on Russia, see Alina Polyakova and Filippos Letsas, "On the record: The U.S. administration's actions on Russia," The Brookings Institution, 3 June 2019, available at <https://www.brookings.edu/blog/order-from-chaos/2018/09/25/on-the-record-the-u-s-administrations-actions-on-russia/>.

its will either in support of executive branch priorities or in opposition to them.

Many factors come into play in determining when and how Congress exercises its authorities on national security matters. From personal beliefs and political party loyalties to external pressures and electoral considerations, members seek to balance their views of what is in the national security interest with the desires of their constituents. By requiring various executive branch reports, Congress can obtain information that allows it to conduct its oversight responsibilities more effectively. Through the use of the Government Accountability Office (GAO), Congress can investigate issues it believes need greater attention and, in so doing, can challenge administration policies. By legislating the creation of executive branch positions, it can focus the administration's actions on areas that Congress believes require greater prioritization. And by exercising its "power of the purse," Congress can approve, restrict, condition, or deny funding for national security initiatives. In short, by legislating actions, it can shape and mold national security policy to its liking.

There are those who argue that Congress has ceded too much of its authority and power to the executive branch. Others believe that the Congress meddles too much in areas that are wholly and properly within the purview of executive branch prerogatives. This debate was not settled in the Trump Administration and it will not be settled in the Biden Administration. But Congress' role in setting national security priorities will continue to be an item of significant controversy as decisions on major national security issues are made and as the new administration seeks to work with Congress in efforts to solve the most urgent and pressing national security challenges this country faces. Given the partisan divide that characterizes American politics today, achieving consensus on critical defense and national security issues will be challenging.

But it is important to understand the essential role that Congress plays in this process. The executive-legislative tug-of-war will continue, but that same "invitation to struggle" is at the heart of the American political system.

Of course, history will be the ultimate arbiter of Ben Franklin's observation that the new government of the United States would be a Republic "if you can keep it." This task falls to the policy makers charged with doing so and the American people. Whether they succeed or fail depends on whether they continue to appreciate the wisdom of the Founders in creating a system of government that was intended to make governing difficult.

As Teddy Roosevelt once said, "Nothing in the world is worth having or worth doing unless it means effort, pain, difficulty." In my view, preserving our constitutional form of government is worth doing, despite the effort it requires and the difficulty it causes. Americans are certainly up to the challenge and the "American experiment" is certainly worth preserving.

About the Author

David J. Trachtenberg is Vice President of the National Institute for Public Policy, a nonprofit research center in Fairfax, Virginia. He was confirmed by the U.S. Senate on October 17, 2017 as Deputy Under Secretary of Defense for Policy and served in this capacity until his retirement from government service in July 2019. Until January 2018, he also served as the Acting Under Secretary of Defense for Policy, the principal civilian adviser to the Secretary of Defense on defense policy matters. He was also the senior Department of Defense civilian official responsible for DoD policy on civilian casualties resulting from military operations.

Prior to his confirmation, Mr. Trachtenberg was President and CEO of Shortwaver Consulting, LLC. Earlier, he was a Vice President at CACI and Senior Vice President for Homeland Security at National Security Research, Inc. Prior to joining NSR, Mr. Trachtenberg was Principal Deputy Assistant Secretary of Defense for International Security Policy and Acting Deputy Assistant Secretary of Defense for Forces Policy.

From 1995-2001, Mr. Trachtenberg was a Professional Staff Member with the House Committee on Armed Services (HASC) in Washington, D.C, serving as head of the committee's policy staff and staff lead for the HASC Special Oversight Panel on Terrorism.

Mr. Trachtenberg is a two-time recipient of the Department of Defense Medal for Distinguished Public Service. He holds an A.B. in International Relations from the University of Southern California and a M.S. degree in Foreign Service from Georgetown University. He currently teaches graduate seminars in nuclear deterrence and strategy and the role of Congress in national security policy at the Fairfax, Virginia campus of Missouri State University's Defense and Strategic Studies Program.

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