



Free markets. Real solutions.

R STREET POLICY STUDY NO. 186
October 2019

A DYNAMIC RELATIONSHIP: HOW CONGRESS AND THE PRESIDENT SHAPE FOREIGN POLICY

By James Wallner

INTRODUCTION

Franklin D. Roosevelt once remarked: “It is the duty of the president to propose and it is the privilege of Congress to dispose.”¹ A few years later, the political scientist Edward S. Corwin affirmed Roosevelt’s observation, writing that, “actual practice under the Constitution has shown that while the president is usually in a position to propose, the Senate and Congress are often in a technical position at least to dispose.”² Roosevelt’s remark was prompted by questions from reporters about his attempts to persuade Alben Barkley (D-Ky.) to lead the effort inside the Senate to pass legislation expanding the size of the Supreme Court. In a string of rulings, the Court’s conservative majority declared parts of Roosevelt’s New Deal agenda unconstitutional.³ In

1. Franklin D. Roosevelt “Press Conference No. 382,” July 20, 1937. http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0051.pdf.

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

3. In 1935, the Supreme Court ruled in two separate cases that the National Recovery Administration and the Agricultural Adjustment Administration were unconstitutional.

CONTENTS	
Introduction	1
Constitutional Framework	2
Congressional Powers	3
Presidential Powers	5
Going Public	5
The Power to Persuade	6
Presidential Power in Practice	6
In a Divided Government	6
In a Unified Government	7
The Balance of Power Throughout History	7
Trends in Foreign Policy Activism	8
Conclusion	9
About the Author	9

response, the president asserted that the Constitution gave the legislative branch, not the judiciary, the power to make law. Moreover, he cast his subsequent effort to dilute the power of the Court’s conservative justices by increasing the number of justices who sat on it as protecting Congress’s constitutional powers.

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

However, despite this shift, the balance of power between Congress and the president in the policy process remains dynamic. That is, the relationship is always in flux, even regarding foreign policy, which observers have generally considered as dominated by the president. This is because “the power to determine the substantive content of American foreign policy is a divided power.”⁴ Specifically, the Constitution empowers both Congress and the president to participate in the foreign policymaking process, albeit in different ways. This leads to institutionalized competition between the two branches of government, an arrangement Corwin cast as “an invitation to struggle for the privilege of directing American foreign policy.”⁵ Lee Hamilton, a long-time member of the House of Representatives and widely acknowledged expert on foreign policy, calls the struggle between Congress and the president: “an-going tug of war

4. Corwin, p. 171.

5. *Ibid.*

to determine the appropriate balance of power for making policy.”⁶ Another scholar and former State Department official characterizes the shifting locus of power in foreign policymaking as a pendulum that swings back and forth between the two branches.⁷

Which branch prevails in the struggle, or where that pendulum stops, depends ultimately on how effectively Congress and the president use their constitutional powers amidst domestic and international environments that are continually changing. For example, the president’s dominance of the foreign policymaking process after World War II succumbed to resurgent congressional activism in the 1970s, as the willingness of both Democrats and Republicans to assert themselves increased in response to presidential failures in Vietnam, as well as growing public concern about security policy more broadly. By 1986, one former State Department official observed that: “congressional activism on foreign policy is now a fact of life.”⁸ A decade earlier, Henry Kissinger, then-Secretary of State, a former National Security Advisor and a long-time foreign policy maven proclaimed: “The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that Congress is a co-equal branch of government is the dominant fact of national politics today.”⁹

However, beginning in 2001, the pendulum began to swing back toward the president, as Congress deferred to George W. Bush’s formulation of foreign policy and the war on terror in the aftermath of the September 11 attacks.¹⁰ Most recently, bipartisan opposition to President Trump’s decision to withdraw U.S. forces from Syria, as well as concern among Democrats and Republicans about his foreign policy more generally, suggest that the pendulum could, once again, swing back toward Congress in the years ahead.

To better understand what happens when the pendulum of power swings back and forth between Congress and the president, this paper examines the procedural and strategic dynamics that underlie the struggle between the two branches in the foreign policymaking process. It begins by surveying the constitutional framework in which Congress and the president compete for influence. It then details each branch’s respective powers under the Constitution and details two

strategies presidents have used to compensate for their relative lack of formal power to influence the foreign policy-making process. The paper then examines how the struggle over foreign policy has impacted the general nature of policy outcomes more generally, and concludes by considering the internal challenges Congress must overcome to reassert itself in foreign policymaking in the years ahead.

CONSTITUTIONAL FRAMEWORK

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

These two contradictory goals—to both empower and limit the new government—were necessitated by the Framers’ concern about tyrannical government. James Madison articulated what his fellow delegates had in mind in *Federalist 47*: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹¹

The Framers’ solution to the problem was the related doctrines of separation of powers and checks and balances. The Constitution established three distinct branches, each of which corresponded to an inherent function of government. In *Federalist 9*, Alexander Hamilton acknowledged that these doctrines were central to overcoming the problems that had previously plagued the republican form of government.¹² With the ratification of the Constitution, Hamilton argued, “the enlightened friends to liberty” had reason to hope that the republican form of government may finally be sustainable because “[t]he science of politics [. . .] has received great improvement.”¹³ Hamilton continued:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior [. . .] these are wholly new discoveries [. . .] They are means, and powerful means, by which the excellences

6. Lee H. Hamilton, “Congress and Foreign Policy,” *Presidential Studies Quarterly* 12:2 (Spring 1982), p. 133. https://www.jstor.org/stable/27547797?seq=1#page_scan_tab_contents.

7. See Alvin Paul Drischler, “The Activist Congress and Foreign Policy,” *SAIS Review* 6:2 (Summer-Fall, 1986), pp. 193-204. <https://muse.jhu.edu/article/434991/pdf>.

8. *Ibid.*, p. 199.

9. Henry Kissinger, *The Department of State Bulletin* LXXII:1871 (May 5, 1975), p. 562.

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

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

12. Alexander Hamilton, “Federalist 9,” in *The Federalist*, p. 38.

13. *Ibid.*

of republican government may be retained and its imperfections lessened or avoided.¹⁴

In *Federalist 49*, Madison described this arrangement as: “several departments being perfectly co-ordinate by the terms of their common commission,” as stipulated in the “constitutional charter.”¹⁵ Note that separation here does not mean that all three branches are equally powerful. Instead, it means that they are of the same rank, or coordinate.

The doctrine of the separation of powers requires the three branches of government to be separate and independent from each other; separation was perfunctory without independence. According to Madison: “In order to lay a due foundation for the separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own.”¹⁶

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

If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. [sic] encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate.¹⁷

14. Ibid.

15. James Madison, “Federalist 49” in *The Federalist*, p. 261.

16. James Madison, “Federalist 51” in *The Federalist*, p. 268.

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

Moreover, in *Federalist 51*, Madison similarly asserted that “the great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁸ The “necessary constitutional means” Madison mentions refer to the president’s veto power and the super-majoritarian vote requirement in Congress to override the president. This co-mingling of the legislative function with the executive branch explicitly violates the separation of powers. Nevertheless, the president would be unable to resist legislative intrusion into his sphere of responsibility without such a means of self-defense.

In the same way, the Appointments Clause gives the Senate a share of the president’s executive power to select officers to serve in the government, and the Treaty Clause empowers the president to negotiate treaties with foreign nations subject to ratification by the Senate (Article II, section 2, clause 2). Just as the president’s discretion to exercise his veto power is not circumscribed in any way other than that stipulated in the Constitution, so too is the Senate free to determine how it will exercise power delegated to it to confirm those nominated by the president.¹⁹ This constitutional framework ensured that the legislative and executive branches would remain dependent on each other in the foreign policymaking process. The nature of that relationship, however, depends upon how effectively each branch leverages its powers under the Constitution in response to developments at home and abroad.

CONGRESSIONAL POWERS

Under the Constitution’s framework of separate institutions sharing powers, Congress is the dominant branch of government. As Madison noted in *Federalist 51*: “in republican government the legislative authority, necessarily, predominates.”²⁰ Underpinning this dominance is the fact that the Constitution gives the House and Senate plenary power to legislate in the Legislative Vesting Clause (Article I, section 1). In the past, Congress has used this power to weave “a fabric of ‘restraints, restrictions, and reports’”²¹ to constrain presidential initiative in foreign policymaking. The Spending Clause (Article I, section 8, clause 1) gives Congress the exclusive power to raise revenue “to pay the Debts and provide for the Common Defence and general Welfare of the

18. James Madison, “Federalist 51” in *The Federalist*, p. 268.

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

20. James Madison, “Federalist 51” in *The Federalist*, p. 269.

21. Drischler, p. 198.

United States.” Madison called the power of the purse “the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”²² He further observed that the combination of the Spending Clause and the Origination Clause (Article I, section 7, clause 1) gave the House of Representatives power to “accomplish their just purposes” by virtue of the fact that they “can not only refuse, but they alone can propose the supplies requisite for the support of government.”²³

The Constitution’s Commerce with Foreign Nations Clause (Article I, section 8, clause 3) empowers Congress to regulate trade. Article I, section 8, clause 10, gives it the power to “define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations.” Furthermore, Article I, section 8, clause 11, stipulates that Congress has the power to declare war or otherwise authorize the use of military force, grant Letters of Marque and Reprisal, and make rules concerning captures on land and water.

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

As noted, the Constitution gives the Senate a share of the president’s executive powers. Specifically, the Treaty Clause stipulates that two-thirds of senators present and voting must approve all treaties signed by the president before they take effect, and the Appointments Clause requires the Senate to confirm “Ambassadors [...] other public Ministers and Consuls [...] and all other Officers of the United States whose Appointments are not herein provided for, and which shall be established by Law” (Article II, section 2, clause 2).²⁴

Congress may use its plenary power over legislation to influence foreign policy by changing the law or by changing the procedures that govern the process by which foreign policy is made. Congress may also threaten to use its pow-

ers in these two ways in order to “extract policy concessions from the Executive branch.”²⁵ According to former Attorney General and Under Secretary of State Nicholas Katzenbach, “Congress can, and sometimes does, cripple and frustrate a particular foreign policy through legislative restriction or refusal to appropriate funds.”²⁶ For example, Congress could refuse to fund a foreign policy initiative or military engagement. Lawmakers could also attach riders to appropriations bills or other legislation considered to be must-pass, restricting the president’s ability to engage in particular activities (i.e., limits on covert activities or arms sales in particular countries). Congress can also require the president and executive branch agencies to report regularly to House and Senate committees on their activities.

Congress may create new agencies and positions within the executive branch, as well as joint legislative-executive commissions, to inject congressional preferences into the administration’s deliberations over foreign policy.²⁷ It may also encourage the executive branch to advance policies more in line with the preferences of its members by creating new procedural and substantive requirements for negotiations with foreign nations. Furthermore, the Senate may use its constitutionally mandated role in the confirmation process to ensure that the administration officials who formulate and implement foreign policy reflect its preferences.²⁸

Congress had come to rely on the legislative veto to limit presidential decision-making in foreign policy before the Supreme Court’s decision in *INS v. Chadha*, which declared the procedure unconstitutional. After that ruling, lawmakers developed Chadha-compliant mechanisms, such as resolutions of disapproval or approval to reverse presidential actions after they had been taken. However, in recent years, the disproportionate number of disapproval mechanisms compared to approval ones suggests that Congress is unwilling to reassert itself in foreign policymaking. Whereas the passage of an approval resolution is required before a president’s proposed action can take effect (and therefore requires Congress to proactively support the president), Congress must wait for the president to act before it can pass a disapproval resolution reversing the action (retroactively). For that reason, the president remains advantaged in the pro-

22. James Madison, “Federalist 58” in *The Federalist*, p. 303.

23. The Origination Clause stipulates: “All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills.”

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

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

26. Nicholas Katzenbach, *Congress and Foreign Policy*, Irvine Lecture Delivered at the Cornell Law School, May 9, 1969, p. 34.

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

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

cess because technically, it only requires a simple majority to pass legislation in the House and Senate. However, if they pass a disapproval resolution, the president can veto it, which raises the threshold to stop the president's actions from a simple majority to the super majority required to override a veto. In contrast, approval mechanisms advantage Congress by requiring the House and Senate to pass a resolution supporting the president's action before it can take effect.

The Constitution's Rules and Expulsion Clause (Article I, Section 5, clause 2) gives Congress the power to "determine the Rules of its Proceedings." The House and Senate have used this power to alter their internal structures and decision-making processes to facilitate (or restrict) congressional activism in foreign policy. For example, both houses created select committees on intelligence in 1975. The new panels made it easier for Congress to assert itself vis-à-vis the president and the intelligence community. Moreover, in 1978, the committees' oversight activities helped to pass the Foreign Surveillance Act (Public Law 95-511), which reformed how the government collected intelligence overseas. More generally, structural changes inside the House and Senate empowered junior lawmakers to push their colleagues to adopt a more activist posture in the foreign policymaking process.²⁹

PRESIDENTIAL POWERS

The Constitution gives the president few enumerated powers with which to influence the foreign policymaking process. The Executive Vesting Clause (Article II, section 1, clause 1) gives the president the "executive power;" and Article II, section 3 stipulates that he or she "shall receive Ambassadors and other public Ministers." The Take Care Clause (Article II, section 3) charges the president with ensuring that the laws approved by Congress are "faithfully executed." The Presentment Clause (Article I, section 7, clause 2) gives the president a share of the legislative power to veto bills. Its requirement for a two-thirds majority to override a veto in the House and Senate gives the president a powerful tool to preserve the status quo in foreign policy against an activist Congress.³⁰

The Constitution also stipulates that the president "shall be the Commander and Chief of the Army and Navy of the United States, and the Militia of the several states, when called into the actual Service of the United States" (Article II, section 2, clause 1). It gives he or she the power to "make Trea-

ties" and to nominate government officials with the "advice and consent of the Senate" (Article II, section 2, clause 2).³¹

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

Going Public

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

The political scientist Samuel Kernell dubs this strategy "going public."³² According to Kernell, presidents since Roosevelt have also tried to overcome the difficulties inherent with a bargaining strategy by relying on the bully pulpit. He argues that bypassing Congress and appealing directly to the people allows the president to play an active role in congressional deliberations. A successful presidential appeal for support will prompt the American public to press their congressional delegations to enact the president's preferences into law.³³

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

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

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

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

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

33. *Ibid.*, pp. 38-45.

appearances, political travel (and tweets!) are how presidents go public today.

The Power to Persuade

The political scientist Richard Neustadt details an alternative strategy, as he observes that the president influences policy outcomes through an energetic understanding of presidential power and a determination to wield it.³⁴ Neustadt acknowledges that presidents can set the foreign policy agenda, however, their ability to control the lawmaking process inside Congress is dependent upon how well they understand and use their powers.³⁵

Neustadt broadly defines presidential power as either formal or informal and defines the latter as the ability to persuade. Persuasion is accomplished through bargaining. There is no guarantee that the president's preferences will be enacted into law by Congress; success does not automatically follow from being able to set the agenda. While perhaps supportive of the president's general agenda, individual lawmakers do not share his or her specific preferences on every issue. This is because the two parties are not as cohesive as commonly thought. Intra-party differences between Congress and the president arise out of the differing status, obligations and rights that follow from their different constituencies and institutional responsibilities.³⁶

In order to ensure success, the president must persuade lawmakers that not only is her preference good policy but that supporting it is also in their interest. The authority and status of the office enhance the president's ability to do so—that is, the president's support can help them achieve their goals (either regarding policy or reelection). Moreover, lawmakers typically have interests outside of the specific policy area with which they are immediately concerned, and the president may offer to support them in those areas in exchange for support of her foreign policy priorities. Consequently, lawmakers can be persuaded to assist the president by supporting her policies in Congress.

According to Neustadt, a popular president is perceived to be powerful, which makes him a better bargaining partner for lawmakers, who are less likely to support the president if he is perceived to be unable to help them achieve their goals. Also, the bully pulpit is of little use if the president does not

enjoy widespread public support. Successful appeals from an unpopular president are likely to fall on deaf ears.³⁷

For that reason, a successful president will try to protect his influence so that he minimizes the instances in which he is unable to persuade lawmakers. He does so by making decisions that protect his reputation within the Washington, D.C. policy community and maintains the approval of the American people. Success or failure in any one issue area, at any given time in office, can enhance or diminish the president's ability to succeed in other areas. If the president is believed to be weak by the Washington policy community or if his approval rating is low, he will be less able to dominate the foreign policymaking process. In such circumstances, the president will be forced to assume a reactive course of action and will resort to negative strategies like the veto to ensure that policies he opposes are not successful.³⁸

PRESIDENTIAL POWER IN PRACTICE

Although the aforementioned informal powers enable the president to set the foreign policy agenda, their utility is limited whenever Congress considers foreign policy legislation. For example, the president cannot introduce policy initiatives directly. Moreover, he cannot prohibit Congress from considering alternative proposals in such debates. While the president may threaten to veto alternatives that he opposes, actually using the veto is a reactive strategy that is unable to control what Congress considers in the first place. Congressional support for a foreign policy that the president opposes may increase, paradoxically, once he issues a veto threat. In such circumstances, the president's allies in Congress are free to vote for popular legislation because they expect the president to veto it. In theory, presidential vetoes can solidify lawmakers in support of the proposal that the president vetoed. And, the success or failure of any presidential strategy differs according to the partisan composition of Congress.

In a Divided Government

Neustadtian bargaining initially appears suited to the president during periods of divided government.³⁹ A president that faces a Congress controlled by another party will have to persuade some lawmakers to support her foreign policies. Given this, divided party control of government has, in the past, created a give-and-take atmosphere in which bargaining can be successful. Scholarship has demonstrated that

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

35. *Ibid.*, p. 155.

36. *Ibid.*, pp. 8, 37-38.

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

38. *Ibid.*, pp. 48, 52, 54 and 76.

39. Neustadt's original case studies examined the Truman administration during Republican Control of the 80th Congress, and the Eisenhower administration during its second term when Democrats controlled Congress.

Congress and the president often agree on important legislation during periods of divided government.⁴⁰

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

If the opposition cannot be persuaded to adopt the president's preferences or if the costs are too high, a strategy of going public represents an attractive alternative to one based on bargaining. If the powers of persuasion prove unconvincing, then a direct appeal to individual members' constituencies may change the context in which bargaining occurs. Such a change may induce lawmakers to view supporting the president's preferences as in their best interest. Public support may also impact the bargaining process by encouraging lawmakers to extract a lower cost from the president in exchange for their support. Finally, going public may result in a new congressional majority, which may be more supportive of the president.⁴¹

However, presidents should go public with care. Such an appeal, if unsuccessful, may yield an environment in which bargaining becomes impossible. An unsuccessful appeal to a member's constituents could strengthen the member's position and embolden their resistance. Such a situation may make the price of persuasion prohibitively high or even preclude bargaining altogether. This situation is likely in a closely divided Congress in which partisans are continually battling for majority control.⁴² For these reasons, the blunt tool of going public is often ill-suited to ensure that the president's specific policy alternatives are ultimately enacted into law during divided-party control of the government. However, once the president sets the agenda by going public, bargaining may still represent a strategy ideally suited for success during congressional deliberations.

In a Unified Government

Unified party control of government makes it considerably easier for presidents to set the agenda and ensure that their preferences are ultimately enacted into law. However, it should be noted that a unified government alone does not enable the president to control either the agenda or the alternative specification process. Consequently, the presi-

dent must employ the bargaining strategy or the going public strategy (or a combination thereof) to dominate foreign policymaking at both the agenda-setting stages and in congressional deliberations. As in conditions of divided government, a unique mix of bargaining and going public is the best strategy with which to ensure that the president's preferences become law.

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

THE BALANCE OF POWER THROUGHOUT HISTORY

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

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

41. Kernell, pp. 58 and 60.

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

president may take action to preserve the peace until Congress has decided upon a course of action.⁴³

President Jefferson emulated Washington's example of unilateral presidential action in the foreign policy realm, albeit in different ways. In 1801, Jefferson sent a small naval force to the Mediterranean Sea without congressional authorization to confront Barbary pirates who were raiding American vessels.⁴⁴ President Polk also deployed American forces unilaterally without consulting Congress. Forty-five years after Jefferson acted in the Mediterranean, Polk deployed the army to the Mexican border.⁴⁵ Actions like these served as precedents for those who wanted to expand presidential power further. As such, they undermined congressional prerogatives to decide when American forces can be used in hostile actions.⁴⁶

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

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

However, when Congress approved the U.N. Charter, it stipulated that any involvement of the United States in U.N. actions must be in accordance with the constitutional processes of the nation. In other words, Congress had to approve the use of American forces abroad, even if such forces were to operate under the rubric of a U.N. mandate. Moreover, international treaties do not exclude the constitutional requirement that the House of Representatives must add its consent to the use of military force abroad.⁴⁷

43. *Ibid.*, pp. 26-31.

44. Jefferson waited to notify Congress of his action until his first annual address to Congress.

45. Polk's decision ultimately sparked the Mexican-American War.

46. Fisher, pp. 32-37.

47. *Ibid.*, pp. 91-95 and 198.

Trends in Foreign Policy Activism

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

Congressional Reservation—Generally speaking, the power of the executive constrains the ability of Congress to pursue an activist foreign policy. The Constitution designates the president as commander-in-chief. Despite the clear evidentiary record, past presidents have cited this as a source of their inherent and independent authority and have relied on a distorted interpretation of John Marshall's "sole organ" doctrine to legitimize expansive presidential power in the foreign policymaking process. Acceptance of this view in the judiciary, Congress and among the American people has shifted the balance of power away from the legislative branch where the founding fathers intended for it to reside.⁴⁸

Several factors internal to Congress also serve to constrain the institution's ability to pursue an activist foreign policy. While Congress generally acquiesces to the president in foreign policy because of the broad powers of the executive, when it does act, it generally assumes a reactive rather than a proactive posture. This is largely because fragmentation in Congress has made it difficult for the institution to marshal the expertise, develop the priorities and build the consensus required to develop an activist foreign policy.

In recent years, the legislative branch has increasingly become more representative of American society, and more individualistic members have been elected to the body. This has both added to the number of foreign policy issues under consideration and increased the difficulty of finding a compromise on the majority of those issues, especially when using centralized structures that restrict deliberation. The expansion of issues has also diluted the decision-making process by increasing the number of committees with jurisdiction over foreign policy which, in turn, has increased the number of overall participants. For that reason, decision-making is now centered in party leaders in the House and Senate, who, in the past, have supported presidential dominance in foreign policymaking.

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

48. Louis Fisher, "Studies on Presidential Power in Foreign Policy: The 'Sole Organ' Doctrine," Law Library of Congress, August 2006, p. 2. <https://fas.org/sgp/eprint/fisher.pdf>.

public sentiment away from a reserved view, at least in the short term.

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

CONCLUSION

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

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

ABOUT THE AUTHOR

James Wallner is a senior fellow at the R Street Institute, where he researches and writes about Congress, especially the Senate, the separation of powers, legislative procedure and the federal policy process. He also serves as a professorial lecturer in the Dept. of Government at American University, and is a fellow at American University's Center of Congressional and Presidential Studies.