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CONGRESSIONAL UNDERSIGHT

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INTRODUCTION

Despite the president's constitutional role as Commander-in-Chief of the armed forces, Article I, Section 8 of the Constitution places the authority "to declare War" squarely within the legislative branch. This "paradoxical mix of clearly defined war powers for Congress and implied prerogatives for the president" has resulted in overlapping war privileges and regular conflict between the two branches, particularly in recent decades.¹

Since America's founding, Congress has formally executed its war power 11 times, each at the president's explicit request, and most recently by a unanimous vote in 1942, which declared war against Romania during World War II.² But, of course, the United States has been involved in a number of military conflicts—most notably Vietnam, Korea and Iraq—since last declaring war, and this signals a shift in how presidents view and use their implied war powers. Instead of seeking formal congressional war declarations prior to

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

2. "Power to Declare War," United States House of Representatives, last accessed Oct. 24, 2019. <https://history.house.gov/Institution/Origins-Development/War-Powers>.

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taking military action, modern-era presidents have regularly sidestepped Congress's right to declare war and have committed U.S. troops across the globe.

In the 1970s, Congress attempted to regain their role as a check against the president's unilateral war-making power. Fearing their constitutional authority had been usurped by successive presidents' unilateral military actions, Congress passed the War Powers Resolution in 1973 over President Nixon's veto.³ The act aimed to give the president some discretion in how to respond to attacks or potential military threats, while simultaneously itemizing the legislature's rightful role in authorizing war or the use of military force.

Despite its best intentions, the War Powers Resolution has had scant effect on the president's military decision-making and the trend of president-led military actions continues to the present day largely through Congress-passed Authorizations for the Use of Military Force (AUMFs).⁴ Although originally intended to be used for narrow executions of military force, more recently, AUMFs have been used to grant presidents wide authority to carry out military operations from Southeast Asia to Lebanon—with limited congressional involvement. The most recent approved AUMFs came in response to the Sept. 11, 2011 terrorist attacks. The first was an authorization that granted President Bush authority "to use all necessary and appropriate force" against those responsible who planned, coordinated or carried out the attacks.⁵ The second was passed the following year and extended President Bush's military authority to protect the

3. P.L. 93-148 (Nov. 7, 2017). <https://www.congress.gov/bills/93rd-congress/house-joint-resolution/542>.

4. James A. Thurber, ed., *Rivals for Power: Presidential-Congressional Relations* (Rowman & Littlefield, 2002).

5. P. L. 107-40 (2001). <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

United States from national security threats posed by Iraq.⁶ Importantly, the Iraq AUMF does not include an automatic termination clause, which leaves the authorization of force valid until repealed (and troops on the ground under its authority).

And, although Congress has not passed any additional AUMFs in the intervening 17 years, Presidents Bush, Obama and Trump have claimed legal authority as Commander-in-Chief to extend military operations to Afghanistan, Libya and Syria under the pretext of protecting U.S. national interests, all without receiving formal congressional approval in the form of declarations of war or an AUMF.⁷ These actions have further removed Congress from its proper role in decisions to commit U.S. troops abroad, and granted the president even broader authority to engage militarily even in locations where specific authorizations were not approved.

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

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

6. P. L. 107-243 (Oct. 16, 2002). <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf>.

7. See Caroline D. Krass, "Authority to Use Military Force in Libya," *Opinions of the Office of Legal Counsel* 35 (April 1, 2011). https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf.

CAPACITY WITHIN CONGRESS'S FOREIGN AFFAIRS COMMITTEES

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

As with most of the substantive legislative work done in Congress, nearly all oversight is conducted at the committee level, the delineated jurisdictions of which create member and staff-level focus, specialization and issue-area expertise. Rule X, clause 2 of the Rules of the House of Representatives lays out the broad oversight prerogatives of the chamber in writing: "The various standing committees shall have general oversight responsibilities" as to "the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction"⁸ and "the organization and operation of Federal agencies and entities" under their jurisdiction.⁹ A similar structure is used within the Senate.

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

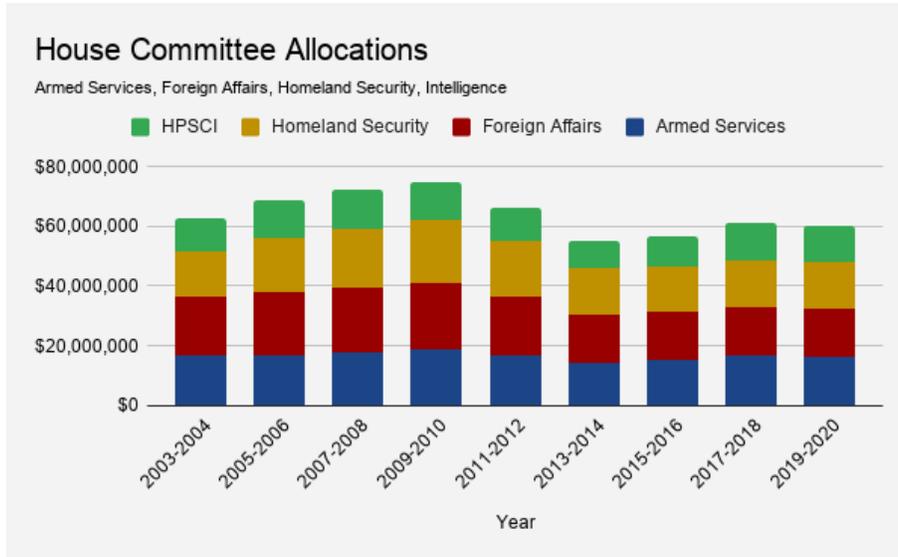
However, without the capacity and required expertise within committees, federal agencies operate more independently of their congressional overseers because they know committees struggle to maintain a watchful eye. In the words of oversight scholar Morton Rosenberg, "Experience has shown that in order to engage in successful oversight, committees must establish their credibility with the executive departments and agencies they oversee early, often, consistently, and in a matter that evokes respect, if not fear."¹⁰ The absence of staffing capacity within congressional committees does not allow

8. House Rules, Rule X, clause 2, section (b)(1)(A).

9. House Rules, Rule X, clause 2, section (b)(1)(B).

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

FIGURE I: HOUSE COMMITTEE ALLOCATIONS, 108TH-116TH CONGRESSES



SOURCE: Demand Progress. <https://docs.google.com/spreadsheets/d/1m621UdqL2xKldCg6TE7jOt2zw9zar1lZOZF3yNMtPUUY/edit#gid=1663298238>.

for these early, often, and consistent agency contacts, which has made regular and successful congressional oversight an exceedingly rare occurrence.

Stagnant Committee Capacity

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

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

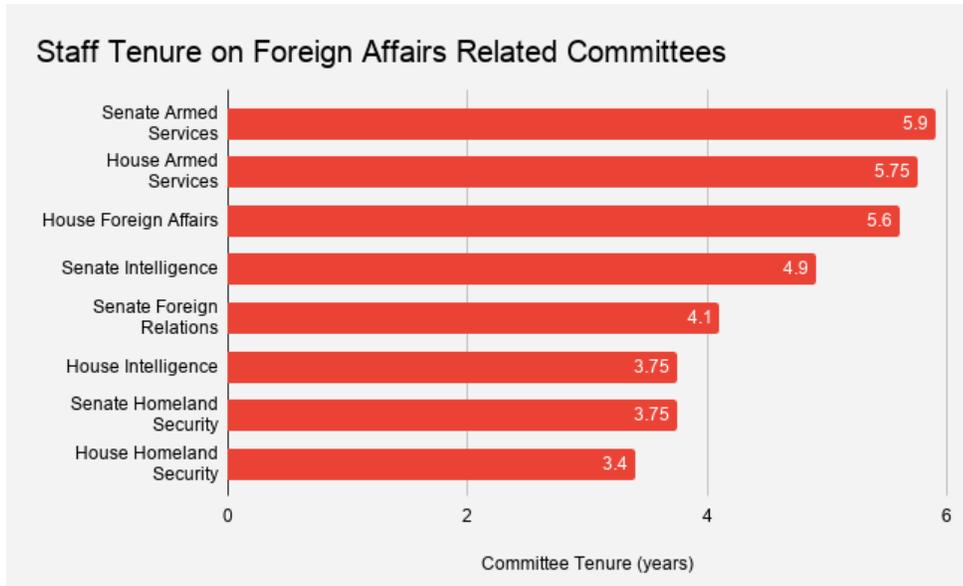
To get a baseline sense of committee capacity, the best place to begin is the amount of money Congress allocates to its respective committees. While a crude measure, these topline totals provide an indication of Congress’s priorities in that

increased funds allocated to an individual committee signals that committee’s work is of particular importance to the majority and chamber. More specifically, because the vast majority of committee funds are used for staffer salaries and committee aides are tasked with executing the day-to-day work of the committee, funding levels also provide a quick sense of how staffing levels vary over time, and with them, the committee’s ability to conduct its work, including oversight. This is particularly important given the constant increase in the size of the federal budget and government, as decreasing or even stagnant committee allocations signal that Congress is not keeping pace with the growth within the executive branch. And, as a result, it becomes less able to execute its oversight responsibilities with its own internal resources.

Figure 1 (above) presents the committee appropriations levels for the four House foreign affairs-related committees for the 108th-116th congresses (2003-2020) in constant 2019 dollars.¹¹ As is clear, despite regular increases from 2003 through 2010, the committee allocations of the four military and foreign affairs-related committees in the 108th Congress (about \$60 million) is very close to the number allocated in the 116th Congress (\$62 million). In fact, allocations have decreased over \$2 million during the period, and nearly \$15 million or 20 percent from their highwater mark during the 111th Congress. This drop is uniquely problematic given that the budgets for the federal agencies that the committees

11. House committee allotments are collected from House resolutions for each Congress. Data and the corresponding resolutions, are maintained by Demand Progress at: <https://docs.google.com/spreadsheets/d/1m621UdqL2xKldCg6TE7jOt2zw9zar1lZOZF3yNMtPUUY/edit#gid=1663298238>.

FIGURE 2: STAFF TENURE ON FOREIGN AFFAIRS-RELATED COMMITTEES, 115TH CONGRESS



SOURCE: Burgat and Dukeman. <https://www.rstreet.org/wp-content/uploads/2019/03/March-2019-Final-Committee-Sheet-Report.pdf>.

are supposed to oversee—the Departments of Defense and Homeland Security—increased over 60 percent during that same time period.¹² These trends highlight the reality that Congress is using the same number of staff to oversee agencies that have grown considerably since 2002.

Dearth of Staffer Experience

While vital, committee funding and staffing levels are not the only important measures of a committee’s ability to perform its required legislative and oversight duties. The experience and capability of the committee aides matter greatly, as well. From drafting legislation to holding hearings to conducting oversight, committee work demands issue-area expertise from the committee’s staffers. Committee subject matters are often so technical that experience dealing with the issues is paramount and can only be mastered, if ever, after spending years working on their intricacies firsthand. Moreover, longer tenures serving on a committee of jurisdiction not only allows aides to know who to ask for what type of information—again, skills learned primarily from doing the job—but they also grant committee staffers time to develop more fruitful informational and oversight relationships with counterparts within the executive agencies. Thus, staffer tenures on relevant committees provide another strong indicator of a committee’s capacity to conduct effective oversight. Simply put, longer stints within the committee, managing the committee’s issues and working with relevant agencies, provide better resources for the committee to execute its work.

12. Office of Management and Budget, “Table 5.2: Budget Authority By Agency: 1976-2024,” The White House, accessed Oct. 24, 2019. <https://www.whitehouse.gov/omb/historical-tables>.

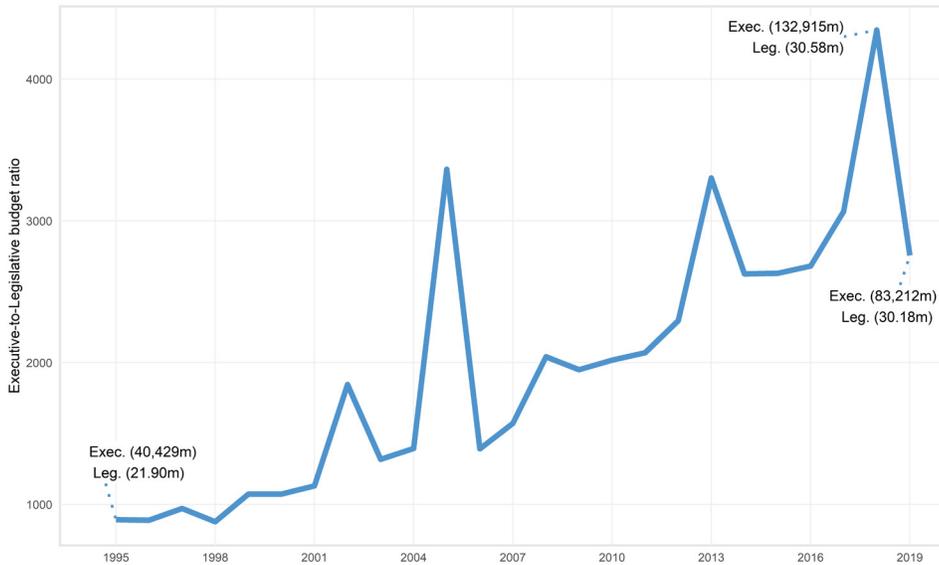
Accordingly, staffer tenures provide good insight into a committee’s capacity and to that end, the figure below (Fig. 2) provides the median staff tenure of the eight foreign affairs-related committees.¹³

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

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

13. Casey Burgat and Ryan Dukeman, “Who’s on the Hill: Staffing and Human Capital in Congress’s Legislative Committees,” R Street Institute, March 2019. <https://www.rstreet.org/wp-content/uploads/2019/03/March-2019-Final-Committee-Sheet-Report.pdf>.

FIGURE 3: EXECUTIVE VERSUS LEGISLATIVE BRANCH BUDGET RATIO, 1995-2019



SOURCE: Office of Management and Budget. <https://www.whitehouse.gov/omb/historical-tables>.

Why are tenures so short? As with its internal capacity problem, the legislative branch struggles to keep staffers in their positions for longer tenures largely because of its inability to match the pay of related but outside offices, including federal agencies and special interest groups. For example, according to FederalPay.org, the average salary at the Department of Homeland Security is about \$115,000.¹⁴ And, the committees' internal capacity, and Congress's as an institution, suffers as a consequence of the resultant short stints. As Rosenberg explains of the associated problems, "Congressional committees lack staff with expertise and incentives to stay on board for extended periods, and the ability to call upon adequately funded, reliable, and nonpartisan legislative research, analysis and informal support organizations."¹⁵ In short, committees are not resourced adequately to perform their legislative and oversight duties, and the president and the executive branch are often happy to pick up the administrative slack.

A CONGRESS OVERWHELMED

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

14. "Department of Homeland Security Headquarters Salaries of 2017," FederalPay.org, last accessed Oct. 25, 2019. <https://www.federalpay.org/employees/dhs-headquarters>.

15. Rosenberg, p. 7.

And, put simply, the legislative branch is overmatched—to say the least—on matters of foreign affairs.

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

But, although there are sizable disparities in size and scope between Congress and the executive branch, the former is still responsible for using its resources to conduct administrative, programmatic and financial oversight of the mammoth executive departments. Thus, funding level comparisons between the relevant committees and federal agencies provide a glimpse at the lopsided workload committee staffers face in attempting to monitor the agencies under their committee's jurisdiction. To that end, Figure 3 (below) plots the ratio of spending of two main executive departments involved in foreign affairs (Departments of Homeland Security and State)¹⁶ to the combined committee allocations for the four House committees referenced above (Armed Ser-

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

vices, Foreign Affairs, Homeland Security and Intelligence) from 1995 to 2019.¹⁷

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

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

Looking at discrepancies in staff sizes between the committees and their sister departments tells a similar story of a Congress overwhelmed. Take the Department of Homeland Security and the House and Senate Committees on Homeland Security, for example. In 2019, the two committees employ 70 and 97 staffers, respectively—about 75 percent of whom are substantive policy and investigative staffers and not responsible for administrative or communications duties. This leaves 56 House Homeland Security and 77 Senate Homeland Security aides available to the committee for *all legislative and oversight tasks*. For comparison, those 133 aides are responsible for the oversight of the more than 240,000 people employed by the Department of Homeland Security.¹⁸ And, this is an endeavor that includes an incredibly broad sweep of internal agencies and departments, such as the U.S. Customs and Border Protection, the Federal Emergency Management Agency (FEMA), the U.S. Secret Service and the Transportation Security Administration (TSA), among others.¹⁹ And all of this is in addition to the legislative demands of the committee itself. A similar narrative can be told of the other foreign affairs-related committees and the agencies within their jurisdiction. The bottom line? Congress is simply outmatched.

CONCLUSION

Despite holding oversight authority and responsibility, congressional committees are starved of the capacity and staff-

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

Importantly, Congress alone has the power to close this resource gap. But, to date, it has neglected to do so. Indeed, as explained by two expert oversight scholars: "The presidency is not solely responsible for this unconstitutional escalation. Congress has failed to check this abuse because it has failed to adapt its central power over the use of military force—the power of the purse—to the distinctive problem of limited war."²⁰ As a consequence, its ability to provide the all-important oversight check on the president and his agencies has only grown less potent, even on matters as critical as our national security or use of military force. To regain its constitutional war power authority and provide a vital check on presidential decision-making Congress, then, must combine reinvestment in its own internal resources with the political will to reign in increasing presidential power.

ABOUT THE AUTHOR

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17. Office of Management and Budget. <https://www.whitehouse.gov/omb/historical-tables>.

18. "About DHS," U.S. Dept. of Homeland Security, last accessed Oct. 25, 2019. <https://www.dhs.gov/about-dhs>.

19. To see a list of all agencies within the Dept. of Homeland Security, see: https://www.dhs.gov/sites/default/files/publications/19_0628_dhs-organizational-chart.pdf

20. Bruce Ackerman and Oona Hathaway, "Limited War and the Constitution: Iraq and the crisis of presidential legality," *Michigan Law Review* 109:4 (February 2011), pp. 447-517.