

Congressional Administration

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Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 **Va. L. Rev.** __ (forthcoming, 2019), available at [SSRN](#).

In *Congressional Administration of Foreign Affairs*, [Rebecca Ingber](#) directly challenges deep-seated assumptions about presidential power in the field of foreign affairs. Her account should prompt a rethinking of reigning assumptions about presidential power over administration of domestic affairs as well.

Ingber demonstrates that Congress can shape the President's foreign policy and national security policies without constraining the President directly or dictating the substantive terms of foreign policy, but rather by structuring and reorienting the decision-making processes and relative powers of executive branch actors. She argues that Congressional input on matters of foreign affairs is normatively desirable, but there are legal, constitutional, and political hurdles to Congress substantively mandating foreign policy. Congressional administration avoids these hurdles and, according to Ingber, actually can be more effective than direct confrontation with the President.

Ingber defines Congressional administration as "the management and manipulation of internal executive branch decisionmaking processes for the purpose of advancing a substantive agenda." (P. 4.) Congress uses many tools to "administer" foreign affairs, including: agency design; procedural requirements; designation of decision-makers within the executive branch and definition of their employment status and relationship to the President; earmarking of appropriations to agencies and offices; and strategic requests for Congressional testimony by particular executive branch officials at particular moments during the policy-making process. Using these tools, Congress can force executive branch officials to make decisions they might wish to avoid, delay disfavored decisions by stoking internal executive branch tensions, or place a thumb on the scale in favor of Congress' preferred outcomes by advantaging a particular set of actors engaged in intra-executive branch conflict.

Ingber notes that intra-executive branch conflict is key to the success of Congressional administration strategies to influence Presidential foreign policy prerogatives. These strategies depend largely on Congress' ability to aggrandize the power of executive branch officials who flatly disagree with the President's policy preferences or who bring a different set of policy orientations and substantive expertise to bear on certain foreign policy problems. So, for instance, Congress thwarted President Obama's pledge to close Guantanamo Bay by leveraging opposition to the policy among many Department of Defense officials. Similarly, Congress sometimes empowers State Department officials to weigh in on certain foreign policy decisions in order to ensure consideration of perspectives focused on the soft power of diplomacy rather than hard military power.

Ingber provides several examples to illustrate her arguments. She recounts how Congress maintained the funding levels for the Department of State, including specific specialized offices within the Department, in direct opposition to President Trump's requests to cut their funding. Ingber explains this maneuver as Congress maintaining "fora for particular types of decisionmaking and ensuring that they remain populated with personnel devoted to a particular mandate." (P. 19.) She argues that this is an effective means of controlling presidential prerogatives because it "creates path dependencies and presumptions that favor continuity of particular policy objectives and hurdles to significant change." (P. 19.)

She also describes the process controls enacted by Congress to constrain President Obama from closing the military prison at Guantanamo Bay. Congress attached riders to defense appropriations bills containing onerous procedural

restrictions on the President's ability to transfer detainees from facilities abroad. Among the requirements was a mandate that no detainee could be transferred to a foreign country unless the Secretary of Defense certified that the government of the destination country could provide adequate assurances that the individual would not be able to take any action to threaten the United States, its citizens, or its allies in the future. For obvious reasons, the Secretary of Defense was loathe to publicly make such certifications. This procedural requirement effectively halted Guantanamo transfers even before Congress took more pointed action to prohibit funding for transfers or for closure of the prison.

Based on this analysis, Ingber concludes: "The fact that the President usually 'wins' in foreign affairs does not mean that the position the President ultimately chooses to take is preordained." (P. ii.) Diverse components of the executive branch are engaged in questions of national security. Different agencies and actors have different and often conflicting sets of priorities, expertise, and biases. These must coalesce into a single executive branch position. Consequently, the decision-making context, the decision-making process, and the distribution of authority among decision-makers shape the position that the President ultimately takes. And Congress has many tools to control all of these things.

Of course, for any of this to work, one must take seriously the specific statutory delegations of authority Congress makes to designated officials. If executive branch officials with decision-making authority are seen as mere arms and eyes of a unitary executive who can order them to reach the President's preferred outcomes, Congress' careful calibration of decision-making processes amounts to little more than tinkering. Ingber recognizes that the President has broad authority over administration generally and particularly over the foreign policy functions of the executive branch. Yet, she insists that officials within the foreign policy bureaucracy maintain some independent decision-making authority. Indeed, Ingber contends that Congress often allocates national security decision-making in ways calculated to remove certain decisions from political control.

This is, perhaps, the most provocative claim in the paper, largely because it is not clear that this is true in the realm of domestic administration. In the realm of domestic affairs, the President has long claimed the prerogative to direct executive officials exercising delegated statutory authority to reach specific policy outcomes, and there is broad scholarly, political, and jurisprudential consensus that the President may do so when the ostensible aim is to ensure that administrative policies maximize welfare based on cost-benefit criteria. Moreover, in the realm of domestic affairs there is an institutional apparatus, centered in the Office of Information and Regulatory Affairs, effectively equipped to ensure that the President's policy priorities are achieved. Taken together, the legal endorsement of executive regulatory review and the powerful institutional apparatus for effectuating it significantly constrain the ability of agency officials implementing domestic policy to resist the President's policy demands. Could it be that the President enjoys greater power over administration in the realm of domestic affairs than in the realm of foreign affairs?

There are many reasons to doubt that this should be the case. Presidential primacy is well established in the realm of foreign affairs for a variety of reasons that have no applicability in the domestic sphere. First, the President's unfettered and real time access to intelligence resources affords an information advantage in the realm of foreign affairs. Not so in the administration of domestic policy. The President is unlikely to have an expertise advantage in the regulation of, say, the environment or U.S. capital markets. Second, in the realm of foreign affairs, the President has the institutional advantage of being able to speak with one voice on the world stage. This particular institutional competence has no relevance to the administration of domestic policy. Third, as a practical matter, the President often has the resources to act unilaterally in defiance of substantive Congressional constraints on foreign policy—for instance, by mobilizing the military or entering into executive agreements. Such power is lacking in domestic administration (or, at least, has yet to be broadly validated by the courts).

Thus, it is curious to contemplate that the President might actually exercise *less* power over the foreign policy bureaucracy than over the domestic policy bureaucracy. Ingber could go further to explain this seeming paradox in the paper. However, I do not believe that this puzzle ultimately undercuts her argument. Rather, it places the onus on proponents of presidential administration in domestic affairs to explain how it could be that we can tolerate independent bureaucratic decision-making in the realm of foreign policy but not in the realm of domestic policy. Why not Congressional administration for all affairs?

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