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Anna Kronlund & Teemu Mäkinen

TOPICALITY OF THE SEPARATION OF POWERS

THE US CONGRESS AND FOREIGN POLICY PROCESSES



ULKOPOLIITTINEN INSTITUUTTI
UTRIKESPOLITISKA INSTITUTET
THE FINNISH INSTITUTE OF INTERNATIONAL AFFAIRS

Anna Kronlund
Senior Research Fellow
The Finnish Institute of International Affairs

Teemu Mäkinen
PhD student
University of Tampere

The Finnish Institute of International Affairs
Kruunuvuorenkatu 4
FI-00160 Helsinki
tel. +358 9 432 7000
fax. +358 9 432 7799
www.fia.fi

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SUMMARY

Together with its own domestic politics priorities, the US Congress has an impact on US foreign policy both indirectly and directly, and plays a part in the decision-making process in US foreign policy. The placement of NATO soldiers in Estonia and the negotiations over the TTIP agreement are examples of US foreign policy discussions and decision-making being a part of the more concrete procedure, also in discussions held at the European level. The sanctions passed by Congress are one example of the way in which domestic actors have an effect on the shaping of US foreign policy and how sanctions are possibly used in part for domestic politics purposes.

This working paper aims to consider the effect of the US Congress on American foreign policy decision-making both from the separation of powers and theoretical frameworks perspective and through practical examples. Even though the constitutional framework grants the President commander-in-chief powers, the US Congress has the power to be party to the decision-making process on committing US armed forces to hostilities. Topical discussions concerning the separation of powers and war-making have included the Libyan and Syrian crises as well as the more recent possible authorization for the use of force against ISIL.

The working paper illustrates the multidimensional role of the US Congress in US foreign policy-making, which is based on the constitutional powers of Congress and the political culture in the United States. Congress can, through direct or indirect means, exert an influence on the government's foreign policy procedure and the President's ability to act in certain circumstances. As a result of partisan polarization, domestic politics also have an increasing effect on the relations between Congress and the President in foreign policy-making. These relations will be mapped in more detail in the working paper by explicating the topical questions surrounding the separation of powers problematique.

Introduction

The United States Congress is the law-making and representative body of American government. It consists of two chambers: the Senate and the House of Representatives. A two-year term limit ties the House of Representatives closer to the electorate, making it more responsive to popular opinion compared to the Senate, where the term limit is six years. Both the House of Representatives and the Senate hold constitutional, institutional and informal power in the formation of American foreign policy.

Questions concerning the separation of powers are often complex and multidimensional. The President of the United States has traditionally wielded great power over American foreign policy. Although the American system grants considerable power to the executive branch of the government, one must bear in mind domestic factors affecting the President's decision-making, either directly or indirectly. These domestic issues often stem from congressional actors, and can have far-reaching consequences for American foreign policy, especially since foreign and domestic politics have become ever-more intertwined. This working paper aims to exemplify the different aspects of the separation of powers problematique from the perspective of US Congress and foreign policy. The influence of the United States Congress over security policy issues may not appear self-evident, but Congress exercises power in several issues that affect regional security concerns. The security policy topics that fall under congressional oversight range from arms exports and troop deployments to large-scale treaty obligations and the use of armed forces.

Given the current regional and international setting, all aspects of congressional powers in foreign policy mentioned above are also relevant, for example, to the security of the Nordic-Baltic region. Under the Arms Export Control Act (AECA), the President is obliged to formally inform Congress prior to concluding a foreign arms trade deal, thereby risking congressional veto.¹ The House of Representatives also has the constitutional authority "...to raise and support Armies...", giving it power over long-term troop deployments.² The US Department of Defense's January 2015 announcement of base closures in Europe³ was preceded by Congress's rejection of the Pentagon's budget proposal for base closures in the US.⁴ Thus the Pentagon had to balance its budget by closing 15 military bases or facilities in Europe. For example, the recent troop deployments to the Baltic countries were subject to congressional approval. For non-NATO countries in the area, the US Senate's constitutional power to ratify treaties⁵ would

1 See 22 U.S. Code § 2776 (b) (1) – Reports and certifications to Congress on military exports.

2 U.S. Const. Art. I Sec. 8.

3 Pentagon announces base closures in Europe. *The Hill*. <http://thehill.com/policy/defense/228867-pentagon-announces-base-closures-in-europe>.

4 Senate to reject base closures. *The Hill*. <http://thehill.com/policy/defense/206706-senate-to-reject-base-closures>.

5 U.S. Const. Art. II Sec. 2.

come into play if they ever decided to apply for full membership.⁶ Further, Congress has played an important role in respect of the Ukraine crisis through appropriation bills and sanctions legislation, of which the Ukraine Support Act of 2014 is but the latest example with its sanctions on Russian energy and the defence industry.⁷

To fully understand the relations between the executive (President) and legislative (Congress) branches of the US government in matters of foreign policy, the first part of this working paper will concentrate on the constitutional, institutional and historical aspects of the executive-legislative relationship in US foreign policy. Despite the established division of powers between the branches of government, institutional differences, changing political contexts and power relations have an effect on how these powers are considered. In the latter part of the working paper, the focus is more on contemporary debates on the separation of powers and Congress's ability to influence US foreign policy through legislation and other means. The idea is not to systematically analyze all the possible developments of the given examples but to selectively discuss different responses and reactions by Congress.

The constitutional framework

The United States constitution is supposed to codify the separation of powers, which functions as a hallmark of the Madisonian model of democracy.⁸ In terms of foreign policy decision-making, it would be wiser to describe the constitution as an institution that *shares* rather than *separates* power between the executive and legislative branches of the American government. One needs the other. Due to the complexity of the modern-day global flow of politics, the executive seems to be better suited to lead American foreign policy. However, as a safeguard against the abuse of executive power, the constitution was framed in such a way that the executive needs to take account of the legislature when formulating and practising foreign policy. This means at least some level of bipartisan compromise must be reached to effectively conduct America's foreign relations.

One of the most prominent constitutional scholars of all time, Edward Samuel Corwin, described the American constitution as an "invitation to struggle"⁹ as far as US foreign policy is concerned. The constitution defines the institutional roles and specific responsibilities of each governmental branch loosely enough, so that both the legislative and executive branches can argue for a role in American foreign policy decision-making.

6 See also The NATO Freedom Consolidation Act of 2007: "A bill to endorse further enlargement of the North Atlantic Treaty Organization (NATO) and to facilitate the timely admission of new members to NATO, and for other purposes".

7 H.R.5859. Ukraine Freedom Support Act of 2014.

8 The Madisonian model of democracy refers to the separation of powers into three governmental branches: legislative, executive, and judicial. The constitutional separation of powers was formed to fight the dreaded tyranny of the majority by balancing the powers and by forcing cooperation between the branches.

9 E. S. Corwin, *The President, Office and Powers: 1787-1957, History and Analysis of Practice and Opinion*. New York University Press, New York, NY, 1957.

According to the constitution, “the executive Power shall be vested in a President of the United States of America,”¹⁰ making the President the chief executive. The President is also the commander-in-chief and has power over the US armed forces,¹¹ giving him the power to exert American military strength abroad. The limits of presidential executive privilege as well as the President’s right to deploy American forces without the consent of Congress have been contested to this day. Although suspicious of executive power, as early as 1788 John Jay wrote in *The Federalist no. 64* that its sources of information and capacity for secrecy give the executive charge over foreign policy, compared to the Congress “composed of members constantly coming and going in quick succession”.¹² The constitution, however, was constructed to keep the executive in check even when it comes to foreign policy.

Constitutionally, the Senate has more say in American foreign policy. The constitution has vested in the Senate the power to ratify all international treaties.¹³ The President requires a two-thirds vote in the Senate to ratify any treaties he has negotiated. Given the fact that neither party controls two-thirds of the Senate, international treaties are often contested on a partisan basis, giving Congress a strong veto power over the President. The President has sometimes bypassed the Senate treaty power by signing executive agreements with foreign nations. Executive agreements do not require a congressional vote but are still legally binding on the United States and future presidents.¹⁴ The Senate is also responsible for ratifying presidential nominees for federal positions, such as cabinet members and key administrative positions. As a recent example, former secretary of defence Chuck Hagel had to endure threats of filibuster and partisanship before being ratified by the Senate. As polarization in the Congress has become more pronounced, even routine ratification processes can be turned into a partisan political theatre.

The House of Representatives was meant to comply more closely with the will of the constituencies. Two-year term limits significantly affect how much time individual representatives have at their disposal to ponder foreign policy issues. Conventionally, the House of Representatives tends to focus on short-term gains instead of the wider strategic implications of foreign-policy decisions, whereas issues closer to the immediate interests of their electorate, such as trade, international regulation and defence procurement, carry more weight than strategic reflection.¹⁵ Nevertheless, the constitution grants the House the power of the purse as it “shall have the power to

10 U.S. Const. Art. II Sec. 1.

11 U.S. Const. Art. II Sec. 2.

12 T. Ball, *The Federalist: With Letters of Brutus*. Cambridge University Press. West Nyack, NY, 2003.

13 U.S. Const. Art. II Sec. 2.

14 R. H. Davidson, W. J. Oleszek & F. E. Lee. *Congress and Its Members*. CQ Press, cop, 2012. Washington, D.C., 2011, p. 458.

15 D. R. Kelley et al. *Divided Power: The Presidency, Congress and the Formation of American Foreign Policy*. The University of Arkansas Press. Fayetteville, AZ, 2005, pp. 24–26.

lay and collect taxes”,¹⁶ and “all Bills raising Revenue shall originate in the House of Representatives”.¹⁷

The House is also constitutionally responsible for raising and supporting the United States military. In times of partisan polarization in the US, less popular foreign policy issues such as development aid and United Nations funding could possibly be threatened by the House.

The constitution also grants Congress the power to declare war, but this is of little consequence. The United States has not formally declared war against a foreign nation since the Second World War, and such a declaration seems unlikely in the near future. Instead of using its constitutional prerogative to declare war, Congress manifests its war powers via war resolutions that it passes to authorize the use of the US military globally, as seen in the two Gulf wars and the war in Afghanistan.

The changing executive–legislative relationship

The current executive–legislative relationship in the sphere of American foreign policy is an amalgam of several institutional and historical aspects, but the American War of Independence and the constitution are still of consequence in the interpretation of this relationship. The actual form that the executive–legislative relationship has adopted is a result of changes in both the domestic and external influences on Congress as well as the President. A gradual change has been evident since the end of the Second World War and its immediate aftermath, during which time domestic factors seemed to have less effect on American foreign policy, up to the current decade, which has seen the rise of political polarization and the fusion of domestic and foreign policy spheres.

After World War II, a new world order, later to be known as the Cold War, emerged. The world order had become bipolar, as Eastern Europe fell under the Soviet sphere of influence and Mao defeated his opponents to declare a communist China in 1949. After 1947, the congressional literature recognizes three separate time periods in the executive–legislative relationship. From the end of World War II up until 1967, one could talk about the “Cold War Consensus”. From 1967 until 1990 this consensus gave way to the “Cold War Dissensus”, which didn’t end until the end of the Cold War, paving the way for the “Post-Cold War” era in the executive–legislative relationship.¹⁸

At the beginning of the Cold War, the threat of communism was seen as an existential threat to the American way of life, and President Harry S. Truman’s policies to fight the spread of communism were accepted with great bipartisan support. In this setting, any senator and representative had to think twice before going public with anything that could be interpreted as being soft on communism or undermining the President’s efforts to fight global communism.

16 U.S. Const Art. I Sec. 8.

17 U.S. Const. Art. I Sec. 7.

18 R. Carter, J. Scott & C. Rowling. “Setting a Course: Congressional Foreign Policy Entrepreneurs in Post-World War II U.S. Foreign Policy”, *International Studies Perspectives*, 5(3), pp. 151–152.

A good example of consensus and bipartisanship in American foreign policy was in evidence in the executive-legislative cooperation that created the North Atlantic Treaty Organization in 1949. In 1948 the US Senate approved the so-called Vanderberg Resolution, in which the Senate advised President Harry Truman to seek mutual defence agreements within the United Nations, but outside the UN Security Council.¹⁹

A year later, Truman asked the Senate for its consent and ratification of the North Atlantic Treaty. During the debate in the Senate and Senate Committee on Foreign Relations, it was agreed that any new admission would be interpreted as signifying a new treaty and was thus subject to congressional approval: “Consequently, the committee was fully satisfied by the commitment of the President, delivered by the Secretary of State, that he would consider the admission of a new member to the pact as the conclusion of a new treaty with that member and would seek the advice and consent of the Senate to each such admission. The committee considers this an obligation binding upon the Presidential office”.²⁰ All new admissions to NATO have since been approved by the US Senate.

Another example of bipartisan executive-legislative cooperation was President Dwight D. Eisenhower’s decision in 1954 to seek advice from a group of congressmen about possible air and naval strikes against North Vietnam. Eisenhower sent his Secretary of State, Allen Dulles, to meet with three Republican and five Democratic congressmen about his administration’s plan to involve US armed forces in Vietnam, but was confronted with unanimous opposition by the congressmen. After obtaining advice from this bipartisan group of high profile congressmen, Eisenhower decided against involvement in Vietnam.²¹

Until the early 1970s, American foreign policy decisions appeared to have been made with a relatively high level of consensus. One must bear in mind, however, that such consensus is only a relative concept, perhaps with the exception of President Dwight D. Eisenhower’s administration. For example, roll call votes between 1953 and 1972 pertaining to matters of foreign and defence policies saw the President’s initiatives gaining bipartisan support in 56 per cent of all votes. 56 per cent can be interpreted as representing an abnormally high level of consensus, especially considering that from Richard Nixon’s re-election in 1972 to 2001, presidential foreign and defence policy initiatives were approved on a bipartisan basis in 24 per cent of all roll call votes.²²

Conventional wisdom tends to attribute the pre-Vietnam consensus to the perceived threat of global communism and the Soviet Union. One might assume that change in the executive-legislative relationship requires some sort of external shock impacting the international setting and creating friction between congressional and presidential

19 See S.Res.239 “Vanderberg Resolution”, http://avalon.law.yale.edu/20th_century/decad040.asp.

20 M. J. Garcia. “NATO Enlargement: Senate Advice and Consent”, CRS Reports for Congress, January 19, 2009, 2–3.

21 C. M. Roberts. “The Day We Didn’t Go to War”. *The Reporter*, September 14, 1954, pp. 31–35.

22 B. Prins, B. Marshall. “Congressional Support for the President: A comparison of foreign, defense and domestic policy decision-making during and after the cold war”, *Presidential Studies Quarterly*, 31, 2001, p. 668.

goals in foreign policy. The end of bipartisanship in foreign policy decision-making cannot satisfactorily be explained by changes in the international setting alone. Despite superpower détente in the late 1960s and 1970s, the perceived threat of global communism didn't change significantly. In 1968 the Soviet Union occupied Czechoslovakia, 1975 witnessed North Vietnam taking over South Vietnam and the spread of communism in Southeast Asia, and in 1979 the Soviet Union invaded Afghanistan.²³

An example of Congress deferring war powers to the President was the Korean War, for which President Harry Truman went not to Congress but to the UN Security Council for the authorization to conduct a "police operation" against North Korea, while Congress's main responsibility was to fund the expedition.²⁴ A debate on the President's authority to bypass Congress and deploy the US military with UN or NATO authorization has been ongoing ever since.

On August 10 1964, Congress approved the "Gulf of Tonkin Resolution", giving President Lyndon B. Johnson as commander-in-chief the right to "...take all necessary steps, including use of armed forces, to assist any member or protocol state of the South East Asia Collective Defense Treaty requesting assistance in defense of its freedom".²⁵ As the President negotiated with congressional leaders for their approval, he assured them that the conflict in Vietnam would not escalate into a wider conflict and would not require a larger deployment of American troops. The resolution was a watershed in executive-legislative relations since it marked a new kind of interpretation of the President's right as commander-in-chief to deploy American forces in large-scale military operations without the declaration of war.

Key domestic events included the cultural changes of the 1960s and the restructuring of the American political field after the passing of the civil rights legislation, as well as reforms in Congress and in congressional committees. In Congress, the Legislative Reorganization Act of 1970 engendered a series of reforms aimed at limiting the power of committee chairs and senior congressmen and making committee work more open and transparent.²⁶ Modern political polarization began to take shape after the rise of the civil rights movement and the Democratic Party's decision to fully support equal rights for African-Americans at the federal level. The political map of the Southern United States saw radical changes, as President Johnson and the Democratic Party approved the Civil Rights Act of 1964 and the Voting Rights Act of 1965, while Republican presidential candidate Barry Goldwater took a stand against civil rights reform. As a consequence, African-American voters in the south identified themselves with the Democrats, while

23 M. Souva, D. Rohde. "Elite Opinion Differences and Partisanship in Congressional Foreign Policy, 1975-1996", *Political Research Quarterly*, Vol. 60, 2007, p. 114.

24 L. Fisher, R. Hendrickson & S. R. Weissman, "Congress at War", *Foreign Affairs*, May/June 2008. <http://www.foreignaffairs.com/articles/64297/louis-fisher-ryan-hendrickson-and-stephen-r-weissman/congress-at-war>.

25 Government Printing Office. H. J. Res. 1145. <http://www.gpo.gov/fdsys/pkg/STATUTE-78/pdf/STATUTE-78-Pg384.pdf>.

26 C. Deering & S. Smith, 1997.

the conservatives, who had traditionally voted for the pro-segregationist Democrats, switched camps to the Republicans. If the two parties were seen as rather heterogeneous internally, this change in the makeup of the partisan political map made both parties more homogeneous and diminished the number of bipartisan interests uniting both parties.²⁷

A major legal reform of the 1970s was the War Powers Resolution of 1973, which effectively gives the President a 90-day period to use the armed forces before having to request congressional war authorization. Since the days of declaring war seemed to be long gone, the War Powers Resolution was a congressional answer to unchecked presidential power. The Resolution was an effort to “ensure that the collective judgment of both the Congress and the president will apply to the introduction of United States Armed Forces into hostilities”.²⁸ No American president has admitted the constitutionality of the War Powers Resolution nor surrendered their power over the military as the commander-in-chief, although, for example, President Barack Obama has reported consistent with the War Powers Resolution to Congress.

Nevertheless, the issue of the necessity for congressional authorization to use the US armed forces and the very definition of war has been contested ever since and is one of the defining elements of executive-legislative relations. Congress had to be taken into account when explaining American foreign policy decision-making, but with its more assertive role came increasing polarization and factionalism. Since Congress is more closely attached to its electorate, domestic issues and partisan politics began to influence American foreign policy up to the levels seen today.

Topicality of the separation of powers problematique

The relations between Congress and the President in foreign policy issues can be examined at different levels and from different perspectives. One of the topics indicating the separation of powers in relation to foreign policy is war power, namely how the United States goes to war. The lawmakers and the President often interpret the powers between the branches of government by emphasizing their own powers in relation to war. Recently, debates on whether and on what occasions the President can introduce US armed forces into hostilities without seeking approval from Congress have been topical in the United States.²⁹ As discussed above, the executive branch of government has some leeway, particularly in foreign policy issues. Further, it has been the general understanding that the President has the right to respond to sudden attacks (See

27 See Souva & Rohde 2007, p. 114. “Obama Far From Approval on Syria Vote”, *Bloomberg*, <http://www.bloomberg.com/infographics/2013-09-06/obama-seeks-congressional-vote-on-syria-strike.html>. See also “Support for President Obama’s call for military airstrikes in Syria is sliding on Capitol Hill”. *USA Today*, 10 September, 2013. <http://www.usatoday.com/story/news/politics/2013/09/09/obama-congress-syria-vote-in-doubt/2788597/>.

28 J. E. Finn, G. J. Jacobsohn, & D. P. Kommers, *American Constitutional Law: Essays, Cases and Comparative Notes*. Rowman & Littlefield Publishers. Lanham, Maryland, 2004, p. 175.

29 See A. Kronlund. “The US Congress and the decision-making on war: debates on war powers in the separation of powers system”. FIIA Working paper (83), 2015.

Representative Hoeffel's argument on p. 13, compared, for example, to the text of the War Powers Resolution).

Until the outbreak of the Korean War in 1950, Congress declared or authorized all wars.³⁰ Despite the constitutional powers of Congress to declare war, there are many examples of the introduction of US armed forces without congressional authorization. The use of force has also relied on UN Security Council resolutions or NATO operations. As mentioned earlier, President Truman's action to seek a UN resolution³¹ to indicate the legitimacy of military actions in respect of Korea has been regarded as a kind of precedent to bypass Congress when introducing US armed forces.³² The circumstances were termed a "police action", as famously agreed by the President in an interview.³³ One recent example where the President did not seek authorization from Congress was the establishment of a no-fly zone and naval blockade in Libya in 2011. The action taken by the Obama administration was considered consistent with "both the Constitution and the War Powers Resolutions, as well as with international law".³⁴

Instead of formally declaring war, Congress has passed authorization for the use of military force (AUMF), for example after the terrorist attacks in September 2001 and against Iraq in 2002, when it became public law in December.³⁵ Congress can also decide not to pass an authorization. For example, related to a recent request by President Obama on authorizations for the use of force against ISIL, Congress has not taken action,³⁶ although there have been some activities on the issue in both houses. One recent example in the Senate was introduced by Senators Tim Kaine (D-VA) and Jeff

30 L. Fisher, R. Hendrickson & S. R. Weissman, 2008.

31 Compare the practice to other events also reliant on NATO operations.

32 Senate Foreign Relations Committee Statement by Louis Fisher, the Constitution Project, before the Senate Foreign Relations Committee, "Libya and War Powers", 28 June, 2011, http://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf.

33 See public papers of Harry S. Truman June 29, 1950. <http://www.trumanlibrary.org/publicpapers/index.php?pid=806&st=&st1>.

34 H. Koh. "Libya and War Powers". Testimony Before the Senate Foreign Relations Committee. Washington, June 28, 2011. <http://www.state.gov/s/l/releases/remarks/167250.htm>.

35 See P.L. 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" and P.L.107-243 Joint Resolution "To authorize the use of United States Armed Forces against Iraq".

36 The resolution proposal has faced opposing views because of its substance. See, for example, the remarks of the Majority Leader Kevin McCarthy on Obama's ISIL proposal on the use of force against ISIL <http://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead>.

Flake (R-AZ)³⁷ and was offered as an amendment to a bill of State Department policy. The amendment was ultimately withdrawn.³⁸

According to the members, Congress is failing its constitutional responsibilities in not taking up the authorization against ISIL: “The House Appropriations Committee, in a bipartisan vote, supported an amendment by the honorable gentlewoman from California, Congresswoman Barbara Lee, that says: ‘Congress has a constitutional duty to debate and determine whether or not to authorize the use of military force against ISIL’”.³⁹

The role of Congress in US foreign policy has been conceptualized in many ways, with the war powers debates being just one example of the tensions. For example, John Owens speaks about the “congressional dominance theory”, implying that Congress may not only control the executive, but indeed does so.⁴⁰ Jordan Tama has also differentiated between two “schools of thought” on the role of Congress in foreign policy that clearly implies that there is no “scholarly consensus” per se indicating the capability or willingness of Congress to command US foreign policy. First, there is the argument that Congress acts modestly in foreign policy and too politely with respect to presidents. The aspect of allowing presidents to take actions abroad without authorizations could be mentioned here.

Furthermore, there is a similar type of argument that the shift of balance of powers is related not only to the institutional differences but also to the expansion of the President’s powers, especially in foreign policy. The second approach emphasizes more the role of Congress actually having an effect on US foreign policy. One example of this school of thought concerns war powers. While Congress does not tend to declare war anymore, it has authorized war on many occasions and has significant related powers, such as the power to fund or defund.⁴¹ While the scholarly schools of thought differ with respect to the powers of Congress and the President and partisanship, this indicates at the same time that there is room for dissenting views and that the powers are not definitive as such.⁴²

37 The abbreviations after the name of a member of Congress refer to the party, Democrat (D) / Republican (R), and the state.

38 N. Toosi. Congress moves to restart Islamic State war debate. *Politico*, June 9 2015. <http://www.politico.com/story/2015/06/congress-starts-islamic-state-war-debate-118792.html>.

39 Representative James McGovern (D-MA), Congressional Record June 10, 2015, H4022.

40 See J. E. Owens. “Congressional Acquiescence to Presidentialism in the US ‘War on Terror’”. *The Journal of Legislative Studies*, Vol. 15, Nos. 2–3, 2009, pp. 147–190.

41 J. Tama. “Bipartisanship in a Polarized Age: The U.S., Congress and Foreign Policy Sanctions”. Working Paper Series Paper No. 2015–2, January 21, 2015. School of International Service American University, 2–3.

42 Compare also to Owens (2009), who argues that Congress “acquiesced” to the President after 9/11 in many respects despite the partisanship and divided government. It should be noted, however, that the political context is particularly relevant here.

While the idea here is not to concentrate on party politics, it should be noted that it has some effect on foreign policy as well.⁴³ It has been recognized that partisanship has always had a relevant role in formulating US foreign policy and that the “domestic conflicts” are interrelated with the national security issues.⁴⁴ Not only the President but also Congress has significant powers in issues related to national security: “In some cases, Congress has decisively driven debates and policies”.⁴⁵

In the parliamentary systems, the opposition is relevant in checking the executive actions. Therefore, special emphasis has, for example, been placed on the rights of the minority party “in the context of control resources”.⁴⁶ The congressional committees and their role in investigating and holding hearings on the issues are essential from this perspective as well. What is also often misunderstood is the “opposition role” of the members of Congress, which is also related to the question of partisan politics in Congress. The legislative record only gives a one-sided view of Congress’s powers in relation to the decision-making on war.⁴⁷ Historically, however, it seems that the “partisan composition of Congress” has been a pivotal factor in deciding whether the members of Congress will oppose or assent to the “calls for war” by the President. By relying on the powers of Congress – “legislation, appropriations, hearings and public appeals” – its members may significantly extend the “political costs” of military operations.⁴⁸

What seems to be missing in the contemporary debates is how the oversight role of Congress in regard to the use of executive war powers could be enhanced and strengthened. The general criticism has been that the President as an institution is more prominent in responding. The role of Congress is often *ex post facto* (for example, in respect of funding the implications are often subsequent). Congress’s debating (and voting) feature is one way to influence the public and the executive. In addition, Congress can organize hearings and investigations through committees and other means (compare, for example, the 9/11 commission, which was established by the President and Congress by public law 107-306)⁴⁹ to adopt (non-binding) resolutions and legislation, or to reject treaties, such as the league of national proposal in 1919 when President

43 Compare, for instance, the examples on Sanctions studied by Tama (2015).

44 For further details about the interface of foreign affairs and domestic politics since the Second World War, see J. E. Zelizer. *Arsenal of Democracy: The Politics of National Security – From World War II to the War on Terrorism*. Basic Books. New York, 2010.

45 Zelizer 2010, 3.

46 S. Dieterich, H. Hummel & S. Marschall, “Strengthening Parliamentary ‘War Powers’ in Europe: Lessons from 25 National Parliaments”. DCAF Policy Papers, (27), 2008, pp. 6–7, 17.

47 W. G. Howell & J. C. Pevehouse, “When Congress Stops Wars”. *Foreign Affairs*, September/October, 2007, 95–96.

48 Ibid. 97.

49 The Senate Foreign Relations committee, for example, held hearings related to ISIS in Congress on Dec 9 2014, Feb 25, 2014 and March 11 2015.

Wilson faced the Republican opposition in the Senate.⁵⁰ Another example that could be mentioned here is the kind of “report and wait” practice that indicates Congress’s right to review issues before enforcement (see the Iran Nuclear deal discussion on page 14). Whereas the President may proceed, for example, to introduce US armed forces into hostilities, congressional support has been regarded as relevant for long-term efforts.⁵¹

The increase in the powers of the President has sparked actions by Congress. For example, in relation to the First World War, members of both parties were concerned about the growth of the powers of the President in pursuance of the war. As a result, by January 1918 Congress was managing a total of five investigations into the administration’s programmes.⁵² While the increase in presidential power over foreign policy in particular has been taken for granted, there is no reason why Congress could not proceed to reassert its powers as it considered necessary in the 1970s by enacting the War Powers Resolution.

Despite the problems related to the War Powers Resolution, it should be noted that it continues to play a part in the debates on the war powers of Congress and the President. For example, the War Powers Resolution was still applicable with respect to the recent proposal H.Con. Res. 55 in the US House of Representatives.⁵³ The vote, however, failed by 139 to 288. The House also voted on an amendment (which was not passed) to the defence spending bill. The amendment was intended to prohibit funding for military operations against ISIL after a certain date unless Congress authorized it. In addition, Representative Barbara Lee (D-CA), again, suggested the repeal of the AUMF of 2001 and 2002 in the amendments to the defence spending bill, but this did not go through.⁵⁴

In respect of the authorization measures, the War Powers Resolution came up in the debates on the AUMF after the 9/11 terrorist attacks, when the Resolution was referenced in the debates for both practical and more idealistic reasons.⁵⁵ The Authorization for use of military force (AUMF of 2001) was considered to be consistent with the War Powers

50 The example is particularly interesting because the agreement was resisted in the Senate by some members primarily because it “violated the constitutional right of Congress to declare war and placed decisions over military deployments in the hands of an international alliance” (Zelizer 2010, 35).

51 See the argument by Representative Spratt p. 12. See also D. L. Kriner. “Obama’s Authorization Paradox: Syria and Congress’s Continued Relevance in Military Affairs”. *Presidential Studies Quarterly*, vol. 44, no. 2. 2014. 309–327.

52 Zelizer 2010, 29.

53 “Directing the President, pursuant to section 5(c) of the War Powers Resolution, to remove United States Armed Forces deployed to Iraq or Syria on or after August 7, 2014 other than Armed Forces required to protect United States diplomatic facilities and personnel, from Iraq and Syria”.

54 C. Marcos. House to Vote on withdrawing troops from Iraq, Syria. *The Hill*, June 17, 2015. See also the proposed amendments to the measure concerning the limitations to use funds in respect of assisting the Syrian opposition and for supporting Iraqi forces (ibid.).

55 See more about (debates on) the National Emergencies Act and the War Powers Resolution in the post-9/11 context, e.g. Kronlund 2013.

Resolution, but “legislators failed to include language providing for congressional accountability, or scrutiny, as the war powers legislation had intended”.⁵⁶ In the House, Representative John Tierney (D-MA) proceeded with a motion to recommit the resolution to the committee and “require the president to make additional reports to the Congress every 60 days, in accordance with the War Powers Resolution”.⁵⁷ The motion was overruled.

During the House debate on the AUMF, Representative Jan Schakowsky (D-IL) also noted that the resolution should not be read as “a blank check” and indicates the WPR’s reporting and consultation requirements:

This Resolution gives awesome responsibility to the President of the United States, but it should not be interpreted as unlimited power to use force or commit troops. This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanche for the use of force. This resolution requires compliance with the war powers resolution which directs the President to report to the Congress and to consult whenever possible. These requirements and this power must not be taken lightly.⁵⁸

Not everyone considered the authorization to be that limited, however. Jesse Jackson (D-IL), for example, claimed that the resolution was at once too narrow and too broad.⁵⁹ The arguments referred to above imply the problematique of these types of resolutions in respect not only of their substance and scope but also with regard to the possibilities for congressional oversight.

The question of whether Congress needs to grant authority to the President was also brought up in the 2001 AUMF debates. Representative Joseph Hoeffel (D-PA) raised the question by arguing as follows: “It may be we do not need to grant this authority. Under the War Powers Act, the President has the ability to use force when America is attacked, as we have been in this week. But it is good for Congress to add our voice of support and to specifically grant this authority to the President”.⁶⁰ Representative John Spratt (D-SC) argued in the same way that the resolution is not necessarily needed but he also mentioned that the President is “stronger” with Congressional support.⁶¹

The relations between Congress and the President in foreign affairs and concerning the decision-making on war have been conceptualized to include engagement, support, and consultation, but the question remains as to what these actually mean in practice and whether and by whom these requirements are fulfilled and reviewed. A special

56 Owens 2009, 157.

57 See Congressional Record, September 14 2001 (House), in Owens 2009, 157.

58 AUMF debate House, September 14, 2001, H5663.

59 AUMF debate House, September 14, 2001, H5675.

60 AUMF debate House, September 14, 2001, H5640.

61 AUMF debate House, September 14, 2001, H5649. Compare, for example, Kriner’s (2014) argument.

committee to oversee governmental actions has also been used in the foreign policy field. For example, the Church Committee was a Senate select committee set up to study governmental operations in regard to intelligence activities in the mid-1970s. Further, in the 1980s both the Senate and House select committees held hearings on the Iran-Contra issue (See Report of the Congressional Committees Investigating the Iran-Contra Affair).⁶² The War Powers Consultation Committee that was proposed by Senators John McCain (R-AZ) and Tim Kaine as a part of the War Powers Consultation Act of 2014 (not proceeding from the committee) during the 113th Congress could also be an example of a platform to discuss the future needs and content of war power.⁶³

Recent congressional actions and US foreign policy

While the change in majority in Congress in the 2014 midterm elections may have had some impact on US foreign policy priorities,⁶⁴ the sphere of US interests is shaped by many factors. The overall public opinion on the issues has some effect on the leeway of the US president. President Obama's intention has been to move the United States away from the permanent war footing and to some extent the public's war wariness has corresponded with the idea of not doing "stupid things".⁶⁵ President Obama has recently been criticized, however, for his use of executive orders and unilateral actions, which also appears to be party politics-related in some respects.⁶⁶ In many ways, Congress and the President have, however, found common ground in tackling the issues and foreign policy lines, for example in respect of the Iran Nuclear deal where Congress secured the vote on the issue by enacting the Iran Nuclear Agreement Review Act of 2015 114th Congress. Congress is expected to vote on the issue later this autumn. President Obama signed a bill, granting Congress the possibility to review the nuclear deal with Iran in May 2015.⁶⁷

62 See report by the Congressional Committees Investigating the Iran-Contra Affair (appendix B: volume 11 Depositions), 100th Congress, 1st session, Washington 1988, http://www.loc.gov/law/find/nominations/gates/003_excerpt.pdf.

63 See Senator Kaine's and Senator John McCain's remarks on the proposal when introducing it in the Senate. "Congressional Record a bill to repeal the War Powers Resolution and to provide for proper war powers consultation, and for other purposes; to the Committee on Foreign Relations (S. 1939)". *Congressional Record (Senate)*, January 16, 2014, pp. 441-442.

64 M. Aaltola. "The Republicans gain the upper hand: the US Congress and President Obama may find some common ground in foreign policy issues", 2014, http://www.fia.fi/fi/publication/452/the_republicans_gain_the_upper_hand/.

65 D. Rothkopf. "Obama's 'Don't Do Stupid Shit' Foreign Policy". *Foreign Policy*, June 4, 2014. <http://foreignpolicy.com/2014/06/04/obamas-dont-do-stupid-shit-foreign-policy/>.

66 See e.g. T. Cruz, "The Imperial Presidency of Barack Obama". *The Wall Street Journal*. January 28, 2014, <http://www.wsj.com/articles/SB10001424052702304632204579338793559838308>.

67 See <https://www.whitehouse.gov/briefing-room/signed-legislation>.

The following section deals with two recent cases of US foreign policy and focuses on the powers of Congress not only to legislate but also to impose sanctions. The latter have become an essential part of the Obama administration's foreign policy: "It is sometimes said that financial sanctions are a 'new form of warfare'," undersecretary for Terrorism and Financial Intelligence David Cohen has argued.⁶⁸ But sanctions are not only a foreign policy tool of the executive. As will be discussed, the role of Congress is essential in imposing sanctions and to some extent also in terminating existing ones.

In regard to sanctions, Congress plays a meaningful but often also dissenting role with the President in shaping US foreign policy, as Jordan Tama has argued. There is still room for bipartisanship in US foreign policy not only because several foreign policy issues do not fall through party lines but also because the lawmakers from both parties and the President have different views.⁶⁹ What is interestingly brought to the fore is that not only can Congress challenge the President in respect of foreign policy, but also that the motivation for Congress to act on sanctions is not only affected by outside party pressure but also by "ideational differences" in Congress's and the President's approaches to foreign policy.⁷⁰

Repealing or lifting the sanctions is related to the authority according to which they were passed in the first place. Some of the sanctions issued by congressional statutes grant the President the power to use his or her discretion "to tighten and relax restrictions". On the other hand, there are some limitations in respect of the executive orders: "In some instances, Congress has enacted restrictions on the President's unilateral authority to revoke an order, and the economic restrictions therein, until specific conditions are met".⁷¹ Congress also has a possibility to influence the efficacy and length of these orders.⁷²

One recent example of sanctions is in relation to the Ukraine situation. According to former Secretary of State Hillary Clinton, "for many Americans, the crisis in Ukraine and the Russian invasion of Crimea in early 2014 was a wake-up call. A part of the world that many had not thought much about since the end of the Cold War was suddenly back on the radar".⁷³ The situation in Ukraine has been addressed by both executive

68 Quoted in L. Johnson. "Amid Shift From War, Obama Embraces Sanctions As Tool of Foreign Policy", June 3, 2014. Radio Free Europe, Radio Free Liberty, <http://www.rferl.org/content/shift-from-war-obama-embraces-sanctions-as-tool-of-foreign-policy/25408059.html>.

69 See Tama 2015.

70 Ibid., ii. The examples studied by Tama in his working paper are the sanctions related to China and its currency policies, the Magnitsky Act and the nuclear policies of Iran.

71 However, the President has the authority to "renew, alter and revoke" orders that are issued on the basis of the NEA or IEEPA. See D. Rennack, "Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions". CRS Report for Congress, February 26, 2015, 2, 5. <https://fas.org/sgp/crs/mideast/R43311.pdf>.

72 V. S. Chu, T. Garvey. "Executive Orders: Issuance, Modification, and Revocation". CRS Report for Congress, April 16, 2014, 9. <https://www.fas.org/sgp/crs/misc/RS20846.pdf>.

73 H. Clinton Hard Choices. Simon & Schuster. London, 2014, 239.

and congressional action. The measures taken so far have been “diplomatic isolation” and “economic sanctions”.⁷⁴ Extended sanctions recently had an impact on Finland when new names that the US added to the sanctions list included Finnish citizens and companies.⁷⁵

The sanctions issued by the Obama administration in relation to the situation in Ukraine were carried out by executive orders in March and December 2014. But the measures are based on many legal authorities including statutes passed by Congress. The legal framework mentioned in this context comprises the International Emergency Economic Powers Act, which Congress passed in 1977, and the National Emergencies Act, passed in 1976.⁷⁶ The passed sanctions have both diplomatic and financial implications.⁷⁷

Further, in December 2014 Congress passed, and President Obama signed, legislation entitled the “Ukraine Freedom Support Act of 2014”, which authorized the President to provide military assistance to Ukraine for defensive purposes. By passing the bill in 2014, Congress provided the President with not only an authorization but also budgetary resources.⁷⁸ The legislation went one step further “To impose sanctions with respect to the Russian Federation, to provide additional assistance to Ukraine, and for other purposes”. The bill states that “it is the policy of the United States to further assist the Government in Ukraine [...] that policy shall be carried into the effect, among other things, through a comprehensive effort, in coordination with allies and partners of the United States where appropriate, that includes economic sanctions, diplomacy, assistance for the people of Ukraine, and the provision of military capabilities to the government of Ukraine [...]”. The legislation covers sanctions related to the energy and defence sectors and economic sanctions on Russian and other foreign financial institutions. It also includes sections for increased military assistance for the Ukraine government (for defensive purposes) and expanded non-military assistance.⁷⁹

74 See Representative Edward Royce's argument (R-CA). See Congressional Record March 23, 2015, H1827.

75 See the Ukraine related sanctions at: <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20150730.aspx>. These were designed under existing Executive orders.

76 President Obama also referred to these two in the national emergency proclamation of March 6, 2014 “Blocking Property of Certain Persons Contributing to the Situation in Ukraine”. <https://www.whitehouse.gov/the-press-office/2014/03/06/executive-order-blocking-property-certain-persons-contributing-situation>.

77 See <http://www.state.gov/e/eb/tfs/spi/ukrainerussia/>. See also the executive order of March 6, 2014 <http://www.whitehouse.gov/the-press-office/2014/03/06/executive-order-blocking-property-certain-persons-contributing-situation>.

78 The vote was “without objection” in the House and “voice vote” in the Senate so there are no individual records of votes.

79 See H.R.5859, 113th Congress. <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.5859>. See also presidential remarks at: <https://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act>.

In his statement on the legislation, President Obama noted that at the current time the administration is not imposing new sanctions but reserves the right to do so in the future. The President also emphasized the diplomatic solution that seems to be consistent with his foreign policy line⁸⁰ as well as continuing cooperation with allies and partners in Europe and internationally.⁸¹ It should also be noted that in respect of the sanctions included in the bill there is also room for discretion.⁸²

In 2015 the House passed a resolution “Calling on the President to provide Ukraine with military assistance to defend its sovereignty and territorial integrity”, with votes of 348 to 48, implying that the House “strongly urges the President to fully and immediately exercise the authorities provided by Congress”.⁸³ In the Senate, a proposal entitled “Defence of Ukraine Act of 2015” has also been referred to the Committee on Foreign Affairs. The effort is similar in nature to the House resolution.⁸⁴ There has also been bipartisan support in the Senate for the measure to provide Ukraine with security assistance as a part of the National Defence Authorization Act. The idea has been to connect the funding to the provision of “weaponry”.⁸⁵ As pointed out in the Congressional Research Service (CRS) report for Congress, the issue of whether or not to provide Ukraine with defensive weapons has raised debates in Congress.⁸⁶ In February 2015, President Obama received a letter from a bipartisan group of Senators prompting him to take action on the basis of authorizations provided by Congress by the “Ukraine Freedom Act”.⁸⁷

In addition to the Ukraine Freedom Act, there have been other examples of Congressional actions in respect of Ukraine. In summer 2014 the Senate passed a resolution “expressing support for the Ukrainian people in light of President Yanukovich’s decision not to sign an Association Agreement with the European Union”. The House passed a resolution expressing ideas similar to those of the Senate resolution, but it also passed an amended and updated proposal in January. Further measures by the House include approved measures establishing loan guarantees. The amended measure was passed in the Senate

80 P. Trubowitz, 2014. <http://blogs.lse.ac.uk/usappblog/2014/12/29/in-foreign-policy-obama-has-begun-his-fourth-quarter-rally/>.

81 See Obama’s remarks at: <http://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act>.

82 See the content of H.R.5859. S

83 See Congressional Record March 23, 2015, H1824.

84 See the content of the bill: <https://www.congress.gov/bill/114th-congress/senate-bill/452/cosponsors>.

85 J. Carney. Push to arm Ukraine roars back in Senate. *The Hill*, June 16, 2015.

86 See more details and specific intentions of the proposal. S. Woehrel. “Ukraine: Current Issues and U.S. Policy”. CRS Report for Congress February 12, 2015. <https://www.fas.org/sgp/crs/row/RL33460.pdf>.

87 Ibid. 17.

by a voice vote, which was further passed in the House. The bill was signed by President Obama on April 3 2015.⁸⁸

As previously discussed, the divided government has some effect on policymaking, but despite the current claims of partisanship and party-line voting, the parties have worked together in several respects on certain foreign policy issues.⁸⁹ Apart from the above-mentioned cases, significant bipartisan congressional combinations have appeared in relation to defence expenditure, committing armed forces on account of Syria, NSA surveillance, and the mandate for economic sanctions against China due to the currency policies.⁹⁰ Other examples of both parties acting together in taking a stand at odds with the Obama administration have included actions related, for example, to the transferring of suspects from Guantanamo and enforcing more restrictive sanctions than preferred by Obama on Iran.⁹¹

Conclusion

The powers of Congress in US foreign policy are not unambiguous. As discussed, Congress has a specific role in formulating US foreign policy, for example in relation to sanctions, as pointed out by Jordan Tama (2015). However, Congress's role is often contradictory, as pointed out by John Owens (2009) in respect of the executive-legislative relations in the aftermath of 9/11. While Congress conducted oversight after 9/11 and also restricted the powers of the President, it also seemed to fail to effectively check the executive powers.⁹² The powers of the President, even in foreign policy issues, are at least indirectly restricted by congressional powers. The domestic policy actors are also actors when it comes to US foreign policy. Further, domestic policy has an influence on US foreign policy through the political setting and power relations in the US Congress and the White House.

The debates on the “right balance of powers” are an integral part of the US system. Executive dominance and bypassing Congress have been seen as problematic, however, from the perspective of the separation of powers. Since the Vietnam War, Congress has asserted its role in foreign policy decision-making as highlighted by the passage of the War Powers Resolution in 1973. But the struggle rages on as both sides push their constitutional and traditional powers. Debates over war powers and differing interpretations of the War Powers Resolution demonstrate the complexity of the American foreign policy decision-making process and congressional influence on the

88 See more details and specific intentions of the proposal in Woehrel 2015.

89 See more details in Tama 2015.

90 Ibid.

91 Ibid., 1.

92 Consider, for example, the War Powers Resolution. President Bush took action in respect of the “military involvements” in both Georgia and the Philippines, despite the limitations of the language of the AUMF. But Congress has not taken action to sustain the collective judgment central to the WPR in these instances. See Owens 2009, 158.

President's policy options. Further, the example of Ukraine sanctions indicates the line of action addressing both branches of government through their own powers and premises (legislative measures and executive orders).

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