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THE US CONGRESS AND DECISION-MAKING ON WAR

DEBATES ON WAR POWERS
IN THE SEPARATION OF POWERS SYSTEM



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EXECUTIVE SUMMARY

Debates on the war-making powers of the US Congress and the President have been topical of late. President Barack Obama's actions in relation to Libya (2011), Syria (2013), and more recently the "targeted" actions against ISIL in Iraq and Syria, have raised discussions about the powers of the President as the Commander-in-Chief vis-à-vis the powers of Congress. If and when should the President seek congressional authorization for the use of US armed forces?

This paper argues that Congress has constitutionally established but contingently manifest powers when it comes to decision-making on war. To examine this, the paper explicates the procedures of congressional involvement in the decision-making process on war and illustrates congressional debates on the war powers between the branches of government. The recent cases of Libya and Syria are examined in more detail to indicate the (aspired) role of Congress.

The powers between the branches of government are not static but rather (re)interpreted and (re)defined in different political contexts. War powers are one example to explicate the constitutional powers of the US Congress and the President that are divided, and to examine how these powers are considered and debated. While the debates are considered against the backdrop of the Constitution, the question to consider is how they relate to the political realities and power relations in changing political settings.

The paper also explicates the role of Congress in the broader perspective rather than through the legislative record and voting only, even though the members of Congress have particularly emphasized debate (and voting) in the decision-making process. Concepts such as collective judgment, popular sovereignty and separation of powers are used in this context to indicate the role of Congress in this field. The changing nature of war and the concept of war pose new challenges for understanding and defining the powers related to "war making", and are reflected in the continuing debates concerning the scope and relevancy of the power of Congress (and the President) when it comes to decision-making on the use of US armed forces.

Introduction¹

The alignment of US foreign policy has been the subject of much discussion recently. The rebalancing towards Asia, the current events in the Middle East and the situation in Ukraine, debates on the NSA and intelligence gathering, and the use of drones in counter-terrorism have drawn attention to US foreign policy under the administration of President Barack Obama.

Foreign policy decision-making is often seen as a set of executive actions, yet the executive dominance of US foreign policy and the congressional involvement in making it seem to be at odds. The tension between the branches of government in the foreign policy context is nothing new, however.² The trend for increasing the powers of the President in relation to foreign policy has been evident in the United States since the Second World War.³

Despite the certain executive dominance in foreign affairs, the legislature should be, and is, often involved. Recently, the US Congress has, for numerous reasons, taken an active role in foreign policy discussions. The cooperation between the branches of government in foreign policy is often actualized in the measures related to funding, treaties and legislation.⁴

Recent examples of the President seeking support from Congress for his actions and US foreign policy priorities during the 113th Congress include Obama's appeal for congressional support for the Counterterrorism Partnership Fund (up to 5 billion) launched in his speech at the Military Academy Commencement Ceremony on May 28, 2014, as well as the announcement made by the President on June 3, 2014 during his visit to Poland, stating that he would request congressional approval for funding (one billion) to support the effort to bolster the security of US NATO allies in Europe.⁵ After the 2014 midterm elections, President Obama also referred to the appropriateness of the engagement of Congress with both additional funding and a new Authorization to Use Military Force (AUMF) against ISIL.⁶

1 I would like to thank a colleague of mine, Juha Käpylä, for his comments on earlier drafts of this Working Paper.

2 R. B. Zoellick, Congress and the Making of US Foreign Policy. *Survival*, 41–4, Winter 1999–2000, 20.

3 See for example Schlesinger's *The Imperial Presidency* (1973).

4 See e.g. the enacted measure "To impose sanctions with respect to the Russian Federation, to provide additional assistance to Ukraine, and for other purposes" (H.R.5859). <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.5859>

5 See Obama's remarks at the Military Academy Commencement Ceremony, May 28, 2014: <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony>. See Obama's remarks in Poland, June 3, 2014: <http://www.whitehouse.gov/the-press-office/2014/06/03/remarks-president-obama-and-president-komorowski-poland-joint-press-conf>

6 Remarks by the President at a Press Conference, November 5, 2014: <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>. Senate Foreign Relations passed the authorization for three years at the end of the 113th Congress (no boots on the ground) but neither the Senate nor the House acted upon it before Congress adjourned (Matishak, 2015).

The powers of Congress⁷ are examined in this paper from a specific war and emergency powers perspective.⁸ The paper draws on both theoretical and empirical aspects of the role of Congress in the decision-making on war.⁹ The aim is not to encompass all conceivable contingencies or developments, but to consider congressional involvement in the decision-making on war in the separation of powers system. The more historical aspects of the paper relate to the framing of a certain turning point by Congress in the early 1970s to reassert its powers by enacting the *War Powers Resolution* (WPR) in 1973 and the *National Emergencies Act* (NEA) in 1976. The more recent developments in the decision-making on war are selectively discussed to explicate the debates on the powers exerted between the branches of government in exceptional situations.

While US foreign policy and conducting war is often actualized in the measures taken by the President, there is a certain role for Congress to play that is also actualized in the congressional debates on the powers exerted between the branches of government. The first part of the paper sets the framework for the Working Paper by introducing the constitutional and legislative frameworks of war powers. The following part of the paper indicates the war powers of Congress in the separation of powers system and the problematique of the declaration of war. What will be considered in particular is the constitutional interpretation of war powers and the contingent nature of these powers. In the latter part of the paper the practice of war-making is analyzed by taking a closer look at the congressional debates on war powers, also in relation to the question of the use of US military force in respect of Libya in 2011 and Syria in 2013.

Framework of the Working Paper

There are numerous studies on the US Congress and foreign policy.¹⁰ The main emphasis here is to take a more thematic approach to the topic and to look at it largely from the separation of powers system and Congress's perspective as exemplified in the debates on war and emergency powers. The debates on the executive-legislative relations regarding the decision-making on war can be examined through three lenses in particular: the Constitutional framework, political realities and historical precedents, and the statutory legislation. The distinction is not explicit in the sense that the categories often overlap. The Constitutional interpretation is commonly connected to the historical and political precedents, or to the enactment of measures such as the War Powers Resolution of 1973.

7 It should be noted that many of the congressional proceedings discussed in this Working Paper fall within the time frame of the 113th Congress, which met between 3.1.2013 and 3.1.2015. Some proposals may be reintroduced in the 114th Congress, while others may not.

8 By congressional involvement in war-making this paper refers in particular to the introduction of armed forces by congressional declaration of war and/or authorizing the President to act through resolutions such as AUMF 2001 or AUMF 2002. It should be mentioned, however, that the other powers of Congress, such as the power of the purse, are important to note in this context. The writer recognizes, but does not consider in detail, the debates revolving around the concept of war-making and the problematique of the question of authority related to the conflicts that do not necessarily fulfil the description of "war" as such.

9 The writer recognizes the wider perspective of US foreign policy and Congress's role in it, but due to the focus of this paper questions such as foreign aid or diplomatic efforts, sanctions, trade negotiations (TTIP) and so forth are excluded from it. It should also be mentioned that the Supreme Court has considered cases related to the powers of Congress and the President in exceptional situations, such as in *Youngstown vs. Sawyer* (1952), but the court cases are not considered in detail here.

10 See, e.g. J. M. Lindsay, *Congress and Foreign Policy: Why Hill Matters*. *Political Science Quarterly*. Vol. 107, no. 4, 1992; Zoellick, 2000.

By enacting the resolution, Congress not only considered the constitutional war powers but also set a political precedent.

The Constitutional framework establishes the foundation for a discussion on the war powers. The US Constitution is based on the twin ideas of separation of powers, and checks and balances. The constitutionally established framework defines the powers of the President and Congress but the relationship between the branches of government is not unaltered. The powers exerted between the branches of government are dependent, for example, on the contemporary political context, power relations within and between the executive and legislature, and public opinion and the current political agenda, to mention just a few key factors.

The war powers of Congress and the President are defined in the Constitution, namely in Articles I and II. The Constitution grants Congress the power to declare war, but defines the executive branch as the Commander-in-Chief. Congress also has other related powers enumerated in Article I, including the power “*to grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; and To provide for organizing, arming, and disciplining, the Militia*”. Most importantly, Congress has the power to legislate.¹¹

The Commander-in-Chief powers are not explicated in further detail in Article II of the Constitution. It has been acknowledged, however, that the US president has the power to respond to sudden attacks. The debates on presidential war powers have focused on the question of whether the President can unilaterally commit US Armed Forces to hostilities when the power to declare war is constitutionally granted only to Congress. As an institution, the President is generally considered better suited to respond to the different situations requiring swift and decisive action.¹² For example, former Defence Secretary Donald Rumsfeld referred to the ideas of the Founding Fathers and the constitutional framework when describing the institutional differences between the branches of government in conducting war as follows:

By Constitutional design, Congress is intended to be slow – to promote deliberation and the weeding out of ideas that may be popular for a moment, but imprudent. Congress was not intended or organized to meet the demands of operation decision-making in a crisis. America’s founding fathers knew what they were doing when they put the powers to conduct war in the hands of a single commander-in-chief, not those of a committee composed of the 535 members of the national legislature.¹³

The debates on war powers between the President and Congress are generally divided into three different categorizations: the “presidentialists” refer to the prerogatives of the President under the Commander-in-Chief clause; the “congressionalists” refer to the constitutional power of Congress to declare war; and the “shared power” group includes

11 See the US Constitution 1787, Article I, sections 8 and 1.

12 See e.g. Alexander Hamilton’s arguments in the Federalist Papers no. 74, 1788.

13 D. Rumsfeld, *Known and Unknown. A Memoir*. Sentinel Penguin Books, New York, 2011, 603.

those who argue that both Congress and the President have a significant role in war-making.¹⁴ While the powers between the executive and legislature are constitutionally established, there is some room for interpretation.

Constitutionally granted war powers in theory and practice

While the Constitution establishes the formal legal framework between the branches of government when it comes to the decision-making on war, the question is to what extent the Constitution should be read taking into account the political realities of the time. The conception of the act of declaring war has changed significantly since it was established in the Philadelphia Convention in 1787, not least because the practice of war itself has transformed over the years.

The core principles of the Constitution are still considered valid and meaningful, as exemplified in the following argument during the Senate debate on authorization for use of military force against Iraq in 2002: *“The subsequent 204 years have demonstrated many times the wisdom and foresight of our Constitution. Its principles should give special pause to this body when being admonished by the President, by any President, not to ‘tie my hands’”. Those words indicate a regrettable lack of regard for Congress and for our constitutional standing as a coequal branch of Government. Our Nation’s Founders darn well wanted to tie a President’s hands”*.¹⁵

While the conception of declaring war has changed, so have the powers of the branches of government. According to former US President Woodrow Wilson (1913–1921), by the early 20th century the presidency had already changed compared to the idea espoused by the Founding Fathers. He argued in his book *Constitutional Government* in 1917 [1908] that the presidency had come to wield a certain amount of law-making power in addition to its traditional power to execute established law:

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his ‘check’ on Congress, – was a power of restraint not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the national political purpose, and therefore in legal action. The Constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it. The influence of the Presidents have varied with the men who have been presidents and with the circumstances of their times, but the tendency has been unmistakably disclosed, and springs out of the very nature of government itself. It is merely the proof that our government is a living, organic thing, and must like every other government, work out the close

14 The categorization relies on Katzmman’s 1990 wording. Phelps and Boylan (2002, 647–648) have identified four different groups in the War Powers Resolution debates that they refer to as “congressionalists”, “presidentialists”, “legalists” and “realists”.

15 Senator Mark Dayton (D-MN), S. J. Res. 45, Congressional Record, October 10, 2002, S10244.

synthesis of active parts which can exist only when leadership is lodged in some one man or group of men.¹⁶

Wilson's argument above refers to the flexibility of the Constitution, which has enabled, for example, the expansion of the powers of the President, particularly in foreign policy matters. This interpretation has been widely disseminated – but also criticized – ever since. In the following illustrative argument by Representative Mark Kirk (R-IL),¹⁷ the changes to presidential war power and the power of Congress to declare war are located in the 1950s and 1960s, primarily in relation to the Korean and Vietnam Wars:

With regard to military force, our founding fathers debated the proper place for the power to make war at the constitutional convention and feared it most in a new democracy. They specifically rejected proposals to give such a power to the President and directed that only the elected representatives of the American people in our Congress could declare war. For most of our history, Presidents followed the restrictions of the Constitution when going to war. In the 1950s and 1960s, we deviated from the clear requirements of the Constitution to our profound detriment.¹⁸

Congress has responded to this trend towards increasing executive powers. To reassert its constitutional powers in foreign policy matters, Congress has enacted measures such as *the War Powers Resolution of 1973* and *the National Emergencies Act of 1976*.¹⁹ The War Powers Resolution, which was enacted over President Richard Nixon's veto and required a two-thirds majority, was considered important at the time. The debates on the resolution raised many controversial questions regarding, for example, the interpretation of the Constitution, political realities, power relations and substance, as well as the meaning and significance of the resolution.

The opponents, for example, questioned the timing of passing the resolution directly after the Vietnam War, and because the majority of Congress was controlled by the Democrats, and the White House by the Republican Party. Proponents of the resolution, however, also referred to timing, indicating the actual imbalance of powers and the support of the resolution in Congress, which was indicated by the two-thirds majority to override President Nixon's veto.²⁰

The War Powers Resolution has been heavily criticized since its enactment. The idea behind the resolution was to restore the constitutionally envisaged "collective judgment" concerning the use of US armed forces in hostilities. The consultation and reporting requirements included in the resolution provided Congress with a role in war-making. But in practice these parts have not really fulfilled their purpose. The purpose and policy section of the joint resolution indicated that the Commander-in-Chief powers of the President to introduce US armed forces into hostilities should be used only when

16 W. Wilson, *Constitutional Government in the United States*. Columbia University Press, New York, 1917 [1908], 59–60.

17 Each name of a member of the US Congress is followed by a code, where the first letter indicates either Democrat (D) or Republican (R), while the latter two letters indicate the Congress member's home state.

18 H. J. Res. 114, Congressional Record, October 8, 2002, H7273.

19 Congress also passed the International Emergency Economic Powers Act (P.L.95–223) in 1977.

20 See A. Kronlund, "Parliamentary Control of the Exceptional Situations. Debating the Reassertion of the Constitutional Powers of the US Congress". University of Jyväskylä, Jyväskylä, 2013, (dissertation).

there is a declaration of war, other statutory authorization, or a national emergency. The President is required to submit a report to Congress after introducing US armed forces into hostilities, thereby setting a time limit of 60 days for the use of such forces. After the 60 days (and a possible 30-day extension), the President should withdraw the use of force unless Congress declares war, provides other statutory authorization, or is unable to meet because of a national emergency (see P. L. 93-148 for details).

Presidents have reported under the War Powers Resolution, without specifically citing the provision of the resolution, and have thus avoided triggering the 60-day timeline for the use of troops without a congressional declaration of war or other statutory authorization.²¹ For example, President Obama reported to Congress in compliance with the War Powers Resolution in June 2014 in order to keep Congress informed about US military actions in relation, for example, to “military operations in support of U.S. counterterrorism objectives”, and more recently related to actions against ISIL in Syria and Iraq.²²

Due to the problematique related to the resolution, members of Congress have proposed amending or even repealing it. For example in 1989, Senators John Danforth (R-MO), George Mitchell (D-ME), Robert Byrd (D-VW), David Boren (D-OK), John Warner (R-VA), Samuel Nunn (D-GA) and William Cohen (R-ME) proposed an amendment that would have terminated the provision requiring the withdrawal of troops after 60 days of submitting the report under provision 4 (1). The amendment would have required affirmative action from Congress either to authorize or to demand the withdrawal of the armed forces.²³ The question of affirmative action on the part of Congress was discussed as early as the 1970s. In 2008, the War Powers Commission proposed that the War Powers Resolution should be repealed and replaced by the War Powers Consultation Act.²⁴

In addition to war powers, the subject of emergency powers sparked debates in the United States in the 1970s. Generally speaking, emergency power provisions of some sort have been included in the constitutions of most modern democracies.²⁵ To some extent, the United States has been an exception to this trend. The US Constitution does

21 There are numerous studies on the War Powers Resolution, its substance and meaning, related constitutional questions, and its “usability”. See e.g. Grimmet 2010b, Spong 1975, Glennon 1984a & Glennon 1984b, and Fisher & Adler 1998.

22 See <http://www.whitehouse.gov/the-press-office/2014/06/12/letter-president-war-powers-resolution> Recently, there have been discussions on the reporting requirement related to War Powers Resolution letters to Congress in relation to US air strikes in Iraq (Goldsmith, 2014).

23 R. A. Katzmann, War Powers: Toward A New Accommodation. In Thomas E. Mann (ed.) *A Question of Balance: The President, the Congress, and Foreign Policy*. The Brookings Institution Press, Washington, 1990, 67.

24 See the National War Powers Commission Report 2008.

25 See J. Ferejohn & P. Pasquino, “The Law of the Exception: A typology of Emergency Powers”, *ICON – International Journal of Constitutional Law*, Vol. 2, Issue 2, April 2004, 210.

not recognize any explicit emergency power provision.²⁶ The purpose of the *National Emergencies Act* passed in Congress in 1976 was to ensure that the constitutional separation of powers would not be overlooked in the event of emergency circumstances. By creating statutory guidelines for national emergencies – including their proclamation, execution, and termination – Congress proceeded to restore the distinction between normal and exceptional situations, which had become blurred due to the continued emergencies and statutory granted emergency power provisions available for use at any given time.

This legislation is still valid. After the 9/11 terrorist attacks, President George W. Bush declared through a proclamation (7463) that a national emergency existed according to the National Emergencies Act of 1976. Most recently, in September 2014, President Obama, in a notice of continuation of the National Emergencies message, announced that the threat that had led to the proclamation of a national emergency after 9/11 still remained, and the emergency proclamation was duly extended for one year.²⁷

The reforms of the 1970s were not only about new legislation. The institutional changes in the early 1970s enhanced the possibilities of Congress to be part of foreign policy decision-making. The seniority and Committee systems were reorganized in addition to the information system in order to provide more possibilities for Congress to stay up-to-date in respect of foreign policy matters.²⁸ In the decades following the Vietnam War, Congress altered the procedures and structures of decision-making concerning foreign policy and defence in several ways.²⁹

Studies on the role of parliaments in relation to war have largely been bypassed in the comparative research on parliaments, as argued by Dieterich et al (2008).³⁰ The US Congress has been an exception to this trend, although the focus has not really been

26 There is no explicit emergency power provision in the Constitution. This should be compared, however, with the following two provisions of the Constitution, which are considered to refer to “emergency”. (On the constitutional emergency power provisions, see e.g. Gross & Aoláin Ní 2006.) Article I, Section 8: “The Congress shall have Power [...] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Article I, Section 9: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The following two references could be mentioned as well: Article IV, Section 4: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.” Article II, Section 4: “[The President] ... may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper;”

27 See <http://fas.org/irp/news/2001/09/fr091801.html> for President Bush’s proclamation. On the continuation for one year, see <http://www.whitehouse.gov/the-press-office/2014/09/04/continuation-national-emergency-notice>. More recently, President Obama also continued “the national emergency with respect to persons who commit, threaten to commit, or support terrorism”, which was declared by President George W. Bush on September 23, 2001 on the basis of the International Economic Emergency Powers Act <http://www.whitehouse.gov/the-press-office/2014/09/17/notice-congress-terrorism>

28 Zoellick, 2000; W. Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970. Legislative Studies Quarterly*, Vol. 15, No. 3. Aug. 1990.

29 See J. M. Lindsay, 1994, 285–288.

30 There are, however, studies on debates conducted on the “war powers” of parliaments, see e.g. T. Häkkinen, “The Royal Prerogative Redefined: Parliamentary Debate on the Role of the British Parliament in Large-scale Military Deployments, 1982–2003.” University of Jyväskylä, Jyväskylä, 2014 (dissertation).

on the actual congressional debates as such.³¹ The US Congress has been seen as an example of a “parliament” (legislature) with considerable “war powers”, particularly after it enacted the War Powers Resolution in 1973.³² However, the role of the US Congress in decision-making on war is ambiguous in part because of the experienced controversiality of the War Powers Resolution after its enactment.³³ So far, the Supreme Court has not decided on the constitutionality of the resolution. Further, there are also differing opinions among constitutional lawyers concerning the congressional war powers. What is also different when compared to the parliamentary system is that in the US system both the legislature and the executive are responsible to the people.³⁴

In the framework of the presidential system, Congress does not have the same possibilities to control the executive branch as, for example, parliaments in a cabinet government system. Congress can act rather independently, however. “[As] the president is not electorally dependent on the assembly ... [it] allows legislators to challenge the executive to a far greater degree than in other advanced industrial democracies, almost all of which are parliamentary systems”.³⁵ Further, the powers of Congress to legislate, investigate and fund/defund (i.e. the power of the purse) have been regarded as superior to any other national legislative branch.³⁶

Whereas there is a certain independency between the branches of government, war powers are one of the constitutionally divided powers. As the division of war-making powers between Congress and the President indicates, the interrelations between the branches of government are part of the decision-making processes in the United States. In relation to the dependencies, Robert B. Zoellick writes that the executive branch of government cannot uphold extended policies without support from Congress.³⁷ The actual decision-making process, namely how disagreements are

31 As an exception, see G. A. Phelps and T. S. Boylan, *Discourses of War: The Landscape of Congressional Rhetoric. Armed Forces & Society*. Vol. 28, No. 4, 2002; Kronlund, 2013.

32 See Dieterich, et al. “Strengthening Parliamentary ‘War Powers’ in Europe: Lessons from 25 National Parliaments”. DCAF Policy Papers, 2008, 6–7. An example of the differences between Congress and the British parliament in relation to the war against Iraq, particularly from the committee perspective, is provided by MP Andrew Tyrie. According to him, in the US Congress the main debates on Iraq took place in the committees, which differed from Westminster (see Tyrie, 2004, 29). In relation to the Iraq war, the “more substantive and generally accepted” role of the committees in Congress had two follow-ups. First, the committees and Congress have access to intelligence materials at regular intervals. Second, compared to the committees in Westminster, Congressional committees are more active and involved with the executive branch. This is exemplified by the argument of the Chairman of the House Armed Services Committee in September 2003 according to which during the preceding 12 months, either in the Committee rooms or on the House floor, 44 distinguished classified briefings were conducted, “where members can engage directly with either the Secretary of Defense personally or his senior civilian and uniformed advisers” (Tyrie, 2004, 30). It should be mentioned, however, that congressional committees are considered to have a different role in the first place (see e.g. Pradshaw and Pring, 1972). Nonetheless, Mann and Ornstein (2006, 74–75) have criticized the lack of oversight activities of Congress related to the Iraq war.

33 Dieterich et al., 2008, 6–7.

34 Ibid.

35 T. Power & N. C. Rae (eds.) *Exporting Congress? The Influence of the U.S. Congress on World Legislatures*. University of Pittsburgh Press, Pittsburg, 2006, 5. See also Dieterich et al.’s 2008 & 2010 comparison of the war-making powers of the US Congress with the war powers of parliaments.

36 S. Huntington, *American Ideals Versus American Institutions*. In Ikenberry John G. (ed.) *American Foreign Policy Theoretical Essays*, 5th edition. Houghton Mifflin Company, New York, Boston, 2005, 241.

37 Zoellick, 2000, 23.

settled and compromises made, can be seen as a complex and controversial procedure. Related to this, it has been pointed out by Zoellick that, “*Those from parliamentary systems sometimes do not recognize how America’s separation of powers produces a distinctive process of governance*”.³⁸

As discussed, the role of Congress in either supporting and/or overseeing is relevant. The political setting and the power relations, as well as the party dynamics in Congress and between Congress and the White House, are pertinent in this context. In times of unified government, the role of Congress as a separate branch of government and its oversight duties have sometimes been questioned (compare this, for example, with the debates after 9/11).³⁹

The support of the President’s party can also play a meaningful role even when it does not control the majority of Congress. In relation to George W. Bush’s government, the then Secretary of Defence, Robert Gates, commented on the strategy concerning the debate on the surge related to the war in Iraq by saying: “*We knew we were in a precarious position with Congress. Everything depended on the Republican minority in the Senate holding firm in using that body’s rules to prevent legislative action by a now Democratic-controlled Congress to impose deadlines and timelines that would tie the president’s hands*”.⁴⁰ The argument indicates the role of the Republican party at the time even in the minority position.

Congress has been also criticized for the “rally ’round the flag” phenomenon.⁴¹ During the Bush administration, Gates described the congressional procedures during the war against Iraq as follows:

Almost immediately after the president’s January 10 announcement of the surge, both Republican and Democratic members of Congress began looking for ways to reverse it or at least express their disapproval. In the Senate, Republican John Warner put forward a bipartisan resolution opposing the surge but supporting the forces going after al-Qaeda in Anbar province. The Democratic leadership supported Warner’s nonbinding resolution, believing that if they could get that passed, they could then move toward stronger steps, such as attaching conditions to war spending. But Warner could not rally the necessary sixty votes to prevent a filibuster, so the resolution quietly died. Too many senators just couldn’t bring themselves to support a bill that seemed to undercut the troops.⁴²

38 Ibid.

39 For example, Howell & Pevehouse (2007, 96) have argued that partisan politics has an effect on the support or opposition of Congress for presidents’ “calls for war”.

40 R. M. Gates, *Duty: Memoirs of a Secretary at War*. Alfred A. Knopf, New York, 2014, 50.

41 The question of national unity is often connected to foreign policy-making. Senator Richard Durbin (D-IL), during the discussion on the measure “to support sovereignty and democracy in Ukraine, and for other purposes”, referred to the expectation of the unity in foreign policy decision-making as follows: “*There are some differences between us. There are some differences between the parties. There comes a moment—and there always has, at least in the past—where we decide we are going to stand together as a nation, particularly when it comes to issues of foreign policy*”. Congressional Record, Support for the sovereignty, integrity, democracy, and economic stability of Ukraine Act of 2014 – motion to proceed, March 24, 2014, S1684.

42 Gates, 2014, 53–54. For further details on the legislative efforts of Congress, see “to use war funding bill to force a change in strategy”, Gates, 2014, 55.

The above argument indicates Congress's problematique in challenging the executive actions, but also distinguishes the elements of Congressional powers, such as the power of the purse and passing (non-binding) resolutions, which will be considered later in this paper.

Congressional authorization of war and its problems

Congress has formally declared war on only 11 occasions in US history, the last instance of which was in 1942.⁴³ It has, however, authorized the President to use the armed forces, for example in 1964 related to the Tonkin Gulf incident, after 9/11 for the so-called Global War on Terror (GWOT), and in 2002 for the purposes of intervening in Iraq.⁴⁴ In 2001, by a vote of 98 to 0 in the Senate and 420 to 1 in the House, Congress authorized President George W. Bush to “*use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons [...]*”.⁴⁵

In 2002, Congress passed a measure with a vote of 77–23 in the Senate and 296–133 in the House stating that “*The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq*”. The language of the resolution indicates it is consistent with the War Powers Resolution: “Nothing in this joint resolution supersedes any requirement of the War Powers Resolution”.⁴⁶

The authorizations for the use of military force have been considered problematic for two reasons. First, they have remained valid for a long time. Unlike the Tonkin Gulf Resolution, which was eventually repealed in 1971, the 2001 and 2002 AUMFs are still valid and have been referred to in the current discussions concerning the authority to act against ISIS (see the discussion on p. 24). Second, the resolutions are sometimes seen as problematic because of their substance and wording.⁴⁷ The 9/11 AUMF, in particular,

43 See declarations of war by Congress https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm

44 Declarations of War and Authorizations of the use of force by Benjamin Wittes are listed in the Lawfare blog (Jan. 18, 2013). The classification is based on the article “*Congressional Authorization and the War on Terrorism*” by Curtis A. Bradley and Jack L. Goldsmith <http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/declarations-of-war-and-authorizations-of-military-force/>. See also CRS Report for Congress (April 18, 2014) *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* and CRS Report for Congress (January 27, 2010) *Instances of Use of United States Armed Forces Abroad, 1789–2009*. The estimated number provided by the State Department is 125 for the use of military force in hostilities, whereas the Congressional Research Service number is 215 (Zeisberg 2013, 17). Zeisberg (ibid. 18) also refers to the fact that while few wars have actually been declared, many of them have been authorized or supported with the resolutions.

45 S.J.Res. 23 (P.L.107–40), <https://www.govtrack.us/congress/bills/107/sjres23> ; <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.j.res.00023>:

46 See H.J.Res. 114 (P.L.107–243). <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.j.res.00114>; <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/html/PLAW-107publ243.htm>

47 On the AUMF 2001, see e.g. Bradley and Goldsmith, 2005.

is often seen as unprecedented in US history as its precise meaning seems to remain unresolved even today.⁴⁸

According to a recent study, there have been more than 30 instances during the presidencies of George W. Bush and Barack Obama to undertake or to continue to undertake military or involved activities under the authority of the 2001 AUMF. For example, President Bush relied on the AUMF to deploy US armed forces in Afghanistan in 2001 to remove the Taliban from power and to close down the “training sites and safe harbors” of al-Qaeda.⁴⁹ However, while ambiguous, the resolutions are not blank cheques as such; by authorizing powers, Congress usually also sets limitations on the available executive powers.⁵⁰ At the minimum, the actions taken by the President can be evaluated in the future against the background of the authorization.

The question related to declaring or authorizing war is also a question of terminating war because the Constitution is silent on the issue.⁵¹ Returning to the state of peace in the United States has been possible in three different ways: through legislation ending the conflict; via a proclamation by the President; and in accordance with a treaty that has been negotiated and signed by the President and ratified after the advice and consent of the Senate. The Supreme Court has recognized the legitimacy of all three of the above.⁵²

The authority of the resolutions could therefore be repealed. On the part of Congress there have been proposals to repeal the AUMF of 2001 (see for instance a proposal by Representative Barbara Lee (D-CA) in 2011 (H.R.2859) and 2013 (H.R.198). In addition, Representative Adam Schiff (D-CA) introduced an amendment to the *FY2014 military appropriations* bill that would have cut funding for the purposes to be used under AUMF 2001. But the amendment failed.⁵³

The possibility to repeal the AUMF of 2001 was also mentioned by President Obama in a 2013 speech when he considered that there should be a return to normalcy in respect of war: “*So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands*”.⁵⁴

48 R. F. Grimmet, *The War Powers Resolution After Thirty-Six Years*. CRS Report for Congress, April 22, 2010, 40.

49 See the list of actions, M. Weed, *The 2001 Authorization for Use of Military Force: Background in Brief*. Congressional Research Service memorandum July 10, 2013.

50 For more on “the laws of war as a source of authorized powers, as a limitation on authorized powers” and “as a prohibition on presidential action”, see Bradley & Goldsmith, 2005.

51 To indicate the related actions in Congress, for example, the Senate Committee on the Judiciary organized a hearing on the issue of “Exercising Congress’s Constitutional Power to End a War” on January 30, 2007. See the record of the hearings at http://fas.org/irp/congress/2007_hr/endwar.pdf

52 J. K. Elsea et al. *Congressional Authority to Limit Military Operations*. CRS Report for Congress, February 19, 2013, 15.

53 A. Schiff, House Narrowly Defeats Rep. Schiff Amendment Sunsetting 9/11 Authorization for Use of Military Force (Press release), May 22, 2014. See also Schiff’s sunsetting amendment to the annual defense authorization bill (H.R.4435).

54 Remarks by President Obama at the National Defense College, May 23, 2013.

At the beginning of 2014, Senator Rand Paul (R-KY), along with a group of Senators from both parties, introduced a bill (S.1919) to repeal the AUMF of 2002. If passed, the law would have formally ended the war in Iraq. According to Senator Paul, “[t]his bipartisan piece of legislation [...] ensures that our military involvement in Iraq is officially closed and that any future engagement will require congressional authorization and support, as required by the Constitution”.⁵⁵ Further, in May 2014, Senators Robert Menendez (D-NJ), Barbara Boxer (D-CA), Ben Cardin (D-MD), and Tim Kaine (D-VA) introduced legislation that would have repealed the 2002 AUMF Against Iraq.⁵⁶ Similarly, there have also been efforts to repeal the authorization in the House.⁵⁷

Congress has also refused to authorize measures. The 1999 US armed forces participation in the NATO operation in Yugoslavia indicated not only the possible options for Congress to act, but also the often-contradictory nature of these actions. In 1999, the members of Congress had several votes on the issue and by two votes the House declined a joint resolution to authorize the war and the air strike in Yugoslavia (in opposition to the Senate concurrent resolution authorizing air strikes). However, it also voted against the concurrent resolution to end US involvement in the NATO operation, but passed a bill to prevent certain funds from being used to finance the involvement without certain authorization.⁵⁸

The main duty and power of Congress is to legislate. The control exerted over time and the agenda should be mentioned in this context. Much more action is conducted in Congress than merely voting or legislating, however. The public and the President can be influenced by organizing hearings or through letters or resolutions, or by speeches on the floor and in the media.⁵⁹ The power of the purse and the appropriation process is often mentioned as the most important mechanism for Congress to control the executive

55 Quoted in <http://thehill.com/blogs/floor-action/defense/195501-paul-bill-ends-use-military-force-in-iraq>. Senator Paul also proposed an amendment to the National Defense Authorization bill (FY 2012) “To repeal the Authorization for the Use of Military Force Against Iraq Resolution of 2002”. The amendment failed by a vote of 30 to 67. http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00211

56 See *Resolution Authorizing Use of Military Force Against Iraq* (press release), May 22, 2014: <http://www.foreign.senate.gov/press/chair/release/senators-introduce-legislation-to-repeal-2002-resolution-authorizing-use-of-military-force-against-iraq>

57 In June 2014, the House Appropriations Committee voted down an amendment to the defence spending bill (FY 2015) proposed by Representative Barbara Lee, whose purpose was to ban funding for the 2002 AUMF in Iraq. The second amendment, also proposed by Lee, concerned the AUMF of 2001, and would have called for reports from the administration for Congress on the actions taken under the AUMF of 2001. <http://thehill.com/policy/defense/208813-lawmakers-reject-official-legal-end-to-iraq-war>

58 See Silberman, Circuit Judge, *Campbell v. Clinton* 2000. A group of members of Congress filed a case against the President arguing that the “president violated the War Powers Resolution and the War Power Clause of the Constitution by directing U.S. forces’ participation in the recent NATO campaign in Yugoslavia” (see *Campbell v. Clinton* 2000). See also Garcia, 2012, 8.

59 Zoellick, 2000, 34. In respect of the War Powers Resolution, it could also be mentioned that the members of Congress have challenged the executive branch in court in relation to the War Powers Resolution and otherwise. For example, in *Dellums vs. Bush* (1990) a group of members of Congress challenged the possibility to use US military force against Iraq in court before Congress declared or authorized the war. For further details and other congressional litigation after the enactment of the War Powers Resolution, see CRS report for Congress, M. J. Garcia, 2012.

branch.⁶⁰ For example, Congress passed a resolution in 1973 including the Church-Cooper amendment to deny the use of any funds in Southeast Asia after a certain date.⁶¹

The 1973 War Powers Resolution and the politics of interpretation

The War Powers Resolution enacted in 1973 has not worked as intended. Even though the resolution itself has not been highly appreciated, the thinking behind it is still upheld and continues to define discussions on war powers exerted between the branches of US government. Senators John McCain (R-AZ) and Tim Kaine (D-VA) proposed legislation viz. “The War Powers Consultations Act of 2014” (introduced January 16, 2014, read twice and referred to in the Committee on Foreign Relations) which, if passed, would have revised the 1973 WPR by reasserting the “consultative process” between the President and Congress concerning when and where the US armed forces should be introduced in military action.⁶² Senators Kaine and McCain referred to the need to reform the WPR by dubbing it “*ineffective at establishing a consultative process between the executive and legislative branches of government over our nation’s most important decision – whether or not to send our men and women in uniform into harm’s way*”.⁶³

The premise for introducing new legislation is that the constitutional provision granting the power to Congress to declare war would not only appear to be ineffectual due to the lack of a congressional declaration, but also outdated due to changes in warfare. As Senator McCain has argued, “[t]he Constitution gives the power to declare war to Congress, but Congress has not formally declared war since June 1942, even though our nation has been involved in dozens of military actions of one scale or another since that time. There is a reason for this: The nature of war is changing. It is increasingly unlikely that the combat operations that our nation will be involved in will resemble those of rival nation-states on clearly-defined fields of battle”.

In the aftermath of 9/11, questions were raised on how to define the circumstances and requisite authorities (compare this with the conception of the “war on terror”). McCain refers to this shift in US foreign policy by saying that, “*after the September 11th attack, we embarked on an expansive foreign policy. Spending on defense and foreign assistance went up, and energy shifted to the executive. Now, things are changing. [...] The desire to curb presidential powers across the board is growing. And the political momentum is shifting toward the Congress*”.⁶⁴

60 See the procedural matters on appropriations to limit military operations in Elsea et al., 2013; and war and appropriations in A. Fletcher & F. Shen, “War and Appropriations”. Harvard Law School, Federal Budget Policy Seminar. Briefing Paper, No. 9. Final Draft, May 4, 2005.

61 Zelizer, J. 2007. How Congress Helped End the Vietnam War, *The American Prospect*, February 6, 2007.

62 The idea is not new. The National War Powers Commission proposed a law viz. “the War Powers Consultation Act of 2009”. (For further details, see the National War Powers Commission report 2008). See also a proposal by Chris Gibson (R-NY) “War Powers Reform Act” on January 24, 2013. <http://gibson.house.gov/news/documentsingle.aspx?DocumentID=317675>. The Subcommittee on International Organizations, Human Rights, and Oversight, House Committee on Foreign Affairs held a hearing on the issue of “War Powers for the 21st Century: The Executive Branch Perspective” on April 28, 2008 and “War Powers for the 21st Century: the Constitutional Perspective” on April 10, 2008.

63 See Kaine’s press release of January 16, 2014 for further details.

64 Congressional Record, January 16, 2014, S441–S442.

As far back as the debates conducted in the 1970s on the War Powers Resolution, it was considered problematic as to whether and to what extent the constitutionally established war powers were relevant in relation to the political realities of the time. The changing nature of war and conflicts calls for updating the procedures and powers. Hence, the idea behind the War Powers Consultation Act of 2014 was that Congress and the President should establish “a new war powers consultative arrangement” that would be in accordance with the Constitution but would, if passed, also reflect the characteristics of contemporary conflicts.⁶⁵

While the actual provision of declaring war seems to be problematic in the contemporary context, the idea that Congress should be involved in the decision-making on war is not: “*The challenge for all of us serving in the Congress is this: How do we reconcile the changing nature of war with Congress’s proper role in the declaration of war? This is not exactly a new question, but it is a profound one – for unless we in Congress are prepared to cede our constitutional authority over matters of war to the executive, we need a workable arrangement for consultation and decision-making between the executive and legislative*”.⁶⁶ Senator McCain also implied that he sees the introduction of the bill “*as the start of an important congressional and national debate, not the final word in that debate*”.⁶⁷

According to Senator Kaine, the *War Powers Consultation Act of 2014* would, if passed, include two improvements to the War Powers Resolution. First, Congress would establish a permanent consultation committee, including the majority and minority leaders of the Senate and the House, as well as the chairs and ranking members of key committees (armed service, foreign relations, intelligence and appropriations).⁶⁸

The second improvement would be the requirement to have a vote within seven days of the commitment of a military force. The vote would be on the resolution authorizing the use of force drafted by the consultation committee. Akin to Senator McCain, Senator Kaine maintained that the reason for having the new resolution is related to the changing nature of war, namely that the very concept of war has changed. The new bill would provide an opportunity for regular consultation between the legislative and executive branches of government in relation to the use of the armed forces in hostilities.⁶⁹

The consultation part was already included in the War Powers Resolution of 1973, but has remained problematic because the resolution does not define the consultation in more detail, namely who should be consulted, what the consultation should actually entail, and who could feasibly review whether the consultation requirement has been fulfilled.⁷⁰

65 Ibid.

66 Ibid. 441.

67 Congressional Record, January 16, 2014, S441.

68 This idea has been proposed before. In the 1970s the then Secretary of State, William P. Rogers, proposed establishing a joint congressional committee, which could act as a consultative body with the executive in emergency situations (Department of State Publications 8591, 1971, 8; Rogers 1971, 1213).

69 Congressional Record, January 16, 2014, S442–S444.

70 See the text of the resolution P.L.93–148. On the consultation problematique, see e.g. J. H. Ely, Suppose Congress Wanted a War Powers Act that Worked. *Columbia Law Review*. Vol. 88, No. 7, 1988.

Examples of war powers debates – the cases of Libya and Syria

The cases of Libya in 2011 and Syria in 2013 are considered here in chronological order to explain and indicate the procedures for the decision-making on war, and for introducing US armed forces into hostilities. Despite the shared war powers, President Obama did not seek authorization from Congress regarding the actions taken in Libya. The administration considered that the situation did not constitute “hostilities” in the meaning of the War Powers Resolution.⁷¹ Instead of Congressional authorization, the government referred to the NATO operation and the UN Security Council resolution for legal support.⁷²

The lack of congressional authorization in regard to Libya does not mean that the issue was not considered in Congress.⁷³ The Libya example again shows that the measures of Congress often seem contingent and contradictory. The resolutions are introduced but they often fail either to authorize or terminate (or both) the actions taken by the President (see the example of 1999 on p. 16). Libya proposals considered in Congress included, for example, a supporting resolution enacted by the Senate “calling for the Security Council to impose a Libyan no-fly zone” (see fn. 71).

In addition to the supporting view, the members also opposed the unilateral action taken by the President. Members of Congress addressed the fact in the House by considering a measure (H.Con.Res.31) that would have required President Obama to seek congressional approval. The measure did not, however, proceed from the committee.⁷⁴ The House of Representatives managed to approve a resolution (H.Res. 292) which criticized President Obama for not seeking authorization from Congress. The resolution also imposed a time limit of 14 days for President Obama to explicate the strategy in Libya and to argue to the members that the operation was justified and in line with the interests of the United

71 See White House Report on United States Activities in Libya (June 25, 2011). According to Gates (2014, 520), within the administration there were differing opinions on whether the President had the authority to act without congressional action. The Senate passed a resolution (S.Res. 85) in 2011 that “urges the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory”. (<http://thomas.loc.gov/cgi-bin/query/z?c112:S.RES.85>) Further, Fisher (2012, 184) wrote that the Office of Legal Council “relied in part on legislative support from the Senate” in its report “Authority to Use Military Force in Libya”.

72 L. Fisher, *The Law Military Operations in Libya: No War? No Hostilities?* *Presidential Studies Quarterly*, 42, no. 1 March 2012, 176. Similarly, former US presidents have referred to the “authorization from the Security Council”. Fisher (2012, 179) gives the following examples: “Truman in Korea, Bush I in Iraq, and Clinton in Haiti and Bosnia”.

73 The examples of congressional involvement in hostilities are selectively chosen to indicate the different kinds of examples in regard to Libya and Syria. For a more comprehensive list, see e.g. CRS Report for Congress (February 19, 2013), *Congressional Authority to Limit Military Operations*; CRS Report for Congress (February 17, 2012), *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*. See also, CRS Report for Congress (January 16, 2007), *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and non-funding approaches*.

74 See also a proposal H.Con.Res. 32 “Expressing the sense of Congress that the President should adhere to the War Powers Resolution and obtain specific statutory authorization for the use of United States Armed Forces in Libya”. <https://www.congress.gov/bill/112th-congress/house-concurrent-resolution/32>. For further details on the Libya resolutions in Congress and related authority, see e.g. Zeisberg, 2013; Gates, 2014.

States.⁷⁵ The House, however, rejected a measure by Dennis Kucinich (D-OH) that would have set a time limit of 15 days for the President to withdraw from the Libya Operation.⁷⁶

Congressional actions aside, Representative Dennis Kucinich, together with nine other members of the House of Representatives, filed a lawsuit against President Obama on violating the War Powers Resolution with regard to continuing the deployment of US armed forces in Libya without authorization by Congress.⁷⁷ There have been similar efforts before, but they have not been that successful.⁷⁸

When it comes to authorizations, the question of binding or non-binding resolutions also comes into play. For example, both of the measures H.Con.Res. 31 and H.Res. 292 that the House considered in relation to Libya were non-binding. This does not, however, indicate that non-binding resolutions do not have any effect. During the House debate on the Libya Resolution, the format of the measures was raised, namely whether it is purposeful to have debates on non-binding resolutions. It was also pointed out that the WPR is not a “bill” and does not have the force of law as such. For example, Representative David Dreier (R-CA) stated during the House debate on the Libya Resolution that “[...] *there is no such thing as the ‘War Powers Act’*. *There was a War Powers Resolution that passed that does not have the power and the strength of an enacted law*”.⁷⁹ It seems that the “War Powers Act” is often used to refer to the resolution because it was the title of the Senate version of the measure: “*The law is frequently referred to as the ‘War Powers Act’, the title of the measure passed by the Senate. Although the latter is not technically correct, it does serve to emphasize that the War Powers Resolution, embodied in a joint resolution which complies with constitutional requirements for lawmaking, is a law*”.⁸⁰ The joint resolutions that become public laws are often adopted in this context, however; compare, for example, the AUMF of 2001 and the AUMF of 2002.

75 See H.Res. 292 (112th Congress) <https://www.govtrack.us/congress/bills/112/hres292/text>. Simple resolutions such as the H.Res. 292 constitute “a legislative proposal that addresses matters entirely within the prerogative of one house or the other” and they do not have the force of law. But they can be used to “give ‘advice’ on foreign policy or other executive business”. For more on the definitions of different types of legislation, see http://www.gpo.gov/help/about_congressional_bills.htm

76 See H.Con.Res. 51 “Directing the President, pursuant to section 5(c) of the War Powers Resolution, to remove the United States Armed Forces from Libya”. See also Fahrenthold, 2011. Also in the Senate, S.J.Res. 18 (112th Congress) “Prohibiting the deployment, establishment, or maintenance of a presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes” was introduced but the Senate Committee on Foreign Relations did not report it. <https://www.govtrack.us/congress/bills/112/sjres18>. The Committee on Foreign Relations (United States Senate First Session, 112th Congress) held hearings on Libya and War Powers on June 28, 2011. <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg68241/pdf/CHRG-112shrg68241.pdf>

77 See F. Sonmez, “Kucinich, other House members file lawsuit against Obama on military mission, *The Washington Post*, June 15, 2011: http://www.washingtonpost.com/blogs/2chambers/post/kucinich-other-house-members-file-lawsuit-against-obama-on-libya-military-mission/2011/06/15/AGrzd6VH_blog.html. For example, President Bill Clinton was also sued in 1999 on the basis of violating the War Powers Resolution regarding the use of military force in Kosovo. (See Campbell vs. Clinton; R. F. Grimmet, Richard F. *War Powers Resolution: Presidential Compliance*. CRS Issue Brief for Congress, November 15, 2004, 5–6.)

78 For more on the court cases, see e.g. Grimmet, 2010b.

79 H.Res. 292 & H.Con.Res. 51 June 3, 2011, H3993.

80 See Grimmet, 2010b, 1. Joint Resolutions are passed by both chambers and presented to the President (as are bills), apart from constitutional amendments.

A more recent example of the possible use of US armed forces in Syria indicates a different course of action. President Obama decided to seek congressional authorization, but in the end the vote was withdrawn when the matter proceeded through diplomatic rather than military channels. The decision has sparked debates on whether there has been a change in war-making powers or whether the decision was a “political gambit” instead, in the words of Douglas L. Kriner (see the discussion on p. 24). The reasons for seeking congressional authorization could be, for example, the lack of a UN Security Council resolution and extensive international support for the actions, as well as the lack of a direct, imminent threat to US national security. The Senate considered the possible resolution on September 9 and 10, 2013. The Syria Resolution drafted by the Senate Foreign Relations Committee included a 60-day time limit for the authorization of the use of US armed forces. The resolution also included an optional 30 days if certain conditions were fulfilled, unless Congress passed a law beforehand specifically prohibiting the extension of the authority.⁸¹

Senator Mitch McConnell (R-KY) characterized the role of Congress in the decision-making process and the importance of the issue with regard to the potential use of military force in Syria as follows: “*It is often said that of all the questions we face as lawmakers, none is more serious or indeed more difficult than the question of whether to commit ourselves to military action. That is why it is so important for us to have this debate, to lay out the arguments for and against military action in Syria, to let the public know where we stand on this issue and why*”.⁸² The congressional vote was considered even more important because of the lack of UN and international support as mentioned by Bernard Sanders (I-VT) during the Senate debate on Syria: [Because of unknown long-term implications and consequences] “[...] *the American people are extremely concerned about the United States unilaterally going into Syria without the support of the international community and without the support of the United Nations*”.⁸³

The power of the executive branch to respond to sudden attacks in the US context has always been approved of. Senator Richard Durbin (D-IL) noted during his comment of the presidential leadership that: “*This President could make a unilateral decision and attack without even consulting Congress and thereby maintain the element of surprise or he could do as this President has done and follow what he considers to be our constitutional requirement of a national debate before we engage in military action*”.⁸⁴ The argumentation in the debates about whether the President should seek prior authorization from Congress often refers to the different interpretations of whether there is an imminent threat or danger, in which case the President can act as the Commander-in-Chief (see Senator Barbara Boxer’s (D-CA) argument of September 10, 2013, S6314).

81 The text for the Foreign Relations Committee joint resolution (S.J.Res. 21): <http://www.foreign.senate.gov/imo/media/doc/DAV13973.pdf>. It seems that the resolution was more limited compared to the proposal by the administration prepared together with Congress. See J. Bresnahan, *New Senate Syria plan limits President Obama*. *Politico*, September 2, 2013.

82 Congressional Record, September 10, 2013, S6302.

83 Congressional Record, September 10, 2013, S6315.

84 Congressional Record, September 10, 2013, S6305.

Senator Tammy Baldwin (D-WI) considered that the President should seek an authorization from Congress, particularly as there was no such imminent threat in respect of Syria: *“The gravity of these issues before us is significant and they deserve a full debate. President Obama should be praised for understanding and appreciating that fact. We must demand that all Presidents – not just this President – come to Congress to get approval before taking military action in another country in instances where we are not facing an imminent threat. I have made that case with both Republican and Democratic Presidents”*.⁸⁵

The President usually benefits from congressional cooperation as indicated by the following comment by Senator Tom Udall (D-NM): *“The President’s mandate is stronger with congressional approval, and the mandate of the United States is stronger with international support”*.⁸⁶ The day before, during the motion to proceed with the debate, Senator Daniel Coats (R-IN) also stressed the need to have public support for a possible action: *“We all know that taking America to war without support from the people is the surest path to disaster”*.⁸⁷

One of the aspects of debates in the legislature is informing and educating the public (see McConnell’s argument on p. 21 and Kaine’s argument on p. 23). During the Senate debate on the Syria Resolution, Senator Sanders referred to public opinion by questioning whether there should be support for the use of military force: *“We have a very divided Nation politically, but on this issue it appears the vast majority of Democrats, Republicans, Independents, the vast majority of progressives [...] conservatives, moderates, have all come together to express deep concern about the United States being involved in the third military intervention in the Middle East in 12 years”*.⁸⁸ The Senator’s argument challenges the traditional view of the ‘rallying ’round the flag’ phenomenon and the unity of the nation with regard to the making of foreign policy.

The question of war powers is also a question of sustaining the checks and balances and the separation of powers. Senator Benjamin Cardin (D-MD) brought up the division of power in this context by stressing the role of Congress and referring both to the War Powers Resolution and the Constitution in respect of the authorization: *“The Constitution envisions that both the President and Congress are involved in the deploying of U.S. military. Certainly the President as Commander-in-Chief, and the Congress, under the War Powers Act, have responsibility to authorize the use of force”*.⁸⁹ What is important to note in the previous argument is that the members of Congress use several expressions to indicate the possible actions and congressional involvement in the decision-making on war. Senator Udall, for example, emphasized the meaning of the authorization with the following words: *“Let’s be clear: This is a vote to authorize an act of war”*.⁹⁰

85 Congressional Record, September 10, 2013, S6319. Senator Joe Manchin (D-WV) also introduced, together with Senator Heitkamp, S.J.Res. 22 “a joint resolution to promote a diplomatic solution in Syria, and for other purposes” to the Committee on Foreign Relations (see September 10, 2013, S6330).

86 Congressional Record, September 10, 2013, S6316.

87 Congressional Record, September 9, 2013, S6275.

88 Congressional Record, September 10, 2013, S6314.

89 Congressional Record, September 10, 2013, S6317.

90 Congressional Record, September 10, 2013, S6316.

Congressional action and the actual processes of Congress regarding the authorization of the use of force was indicated by Harry Reid (D-NV) by emphasizing the committee-level action as well as plenary session debates: “*Since President Obama announced he would seek congressional approval for the limited military action against Syria, the Senate has held many committee hearings and briefings as well as five classified all-Members briefings. There are more briefings and much debate to come this week—including open debate here in the Senate*”.⁹¹ As the aforementioned quotes – especially by Reid and Baldwin – indicate, debate is considered an essential part of the decision-making process. Similarly to Senator Reid, Senator Kaine, while commenting in a *New York Times* op-ed on the fight against ISIS, mentioned that “*The Constitutional involvement of Congress is not a dry constitutional principle*”. The Senator further referred to the role of Congress in debating and voting on the issue as follows: “*By debating and voting on the initiation of war, Congress educates the public about the national interests, clarifies and refines the scope of the conflict, and reinforces the core value of political consensus*”.⁹²

During the debate on the Syria resolution in the Senate, Senator Dan Coats (R-IN) also exemplified the significance of the resolution and the outcome for executive-legislative relations if Congress did not authorize the use of force:

This is a deeply historic and profound moment for our Nation. It carries an importance that goes well beyond Syria or even the Middle East. This debate carries important consequences for the relationship between the executive and legislative branches of our government. To refuse the Commander-in-Chief war-making authorities when he has asked for them is not a decision any of us can take lightly. We must all balance the views of the people we represent – even when they have been nearly unanimous – with other elements, such as the abstract, unknowable geostrategic factors that could carry profound consequences not just for this year or next year, but for many generations; and such as the compelling moral arguments that resonate with special strength in our unique Nation guided from birth by moral principles; and now even the constitutional challenges that could affect the delicate balance we have maintained for two centuries.⁹³

Before the actual announcement by President Obama that he would seek congressional authorization, the members of Congress referred to the need to secure authorization before any action was taken. In June 2013, Representatives Tom Rooney (R-FL) and Michael McCaul (R-TX) introduced a “Congressional Accountability and Oversight in Syria Act” (H.R.2501) that was assigned to a Foreign Affairs committee. The resolution, if passed, would have been able to “*prohibit the President from Providing Weapons, and Military Support without Congressional Authorization*”.⁹⁴ In a letter (sent in August 2013) to President Obama, the members of Congress indicated with reference to the

91 Congressional Record, September 9, 2013, S6274.

92 T. Kaine, Obama Must Get Congress’s Backing for the Fight Against ISIS. *The New York Times*, September 15, 2014: http://www.nytimes.com/2014/09/16/opinion/obama-must-get-congresss-backing-for-the-fight-against-isis.html?_r=1. See also House Majority Leader John Boehner’s (R-OH) argument that if the administration wants “ISIS authorization”, it should seek a new authorization (Matishak, 2015). See also Obama’s remarks in 2015 State of the Union calling Congress to pass new authorization.

93 Congressional Record, September 9, 2013, S6276.

94 <https://www.congress.gov/bill/113th-congress/house-bill/2501>

Constitution and the War Powers Resolution that the President should consult and seek authorization from Congress before commanding the use of armed forces in Syria.⁹⁵ The letter was signed by members of both parties.

Congress, however, authorized the training and arming of the Syrian opposition in September 2014 (House Sept. 17, 2014 and the Senate Sept. 18, 2014). The measure was regarded as an amendment to H.J.Res. 124 Continuing Appropriations Resolution 2015.⁹⁶ Recently, there have been proposals to provide authorization for the President for actions against ISIL in Iraq and Syria, and the possibility was also mentioned by the President after the midterm elections.⁹⁷ Common to these proposals introduced both in the House and in the Senate has been the idea of limited action, no boots on the ground, and also repealing the AUMF of 2002 (and 2001). Senator Kaine, for example, has proposed that Congress should take action because neither the AUMF of 2001 nor that of 2002 are applicable “in the current Iraq crisis”.⁹⁸

As discussed, congressional support is essential vis-à-vis political legitimacy for the President’s actions in the longer perspective.⁹⁹ Some commentators have referred to President Obama’s decision to seek congressional support for possible use of military force against Syria in 2013 as an indication that Congress has a role to play in making US foreign policy by informal means: “*While much foreign policy scholarship has downplayed Congress’s importance in shaping the nation’s military affairs, presidential actions, such as President Obama’s decision to seek congressional authorization before using force against Syria, speak to the continued influence that Congress exerts in foreign affairs through informal means*”.¹⁰⁰

Even if Congress no longer formally “declares” war, it seems that presidents usually benefit from seeking authorization because of the long-term support to be gained from members.¹⁰¹ According to Kriner, for example, President Obama’s decision to seek congressional authorization in relation to Syria is significant not because it is legally consequential, but because of the political value of these kinds of authorizations. The members of Congress do not seem to change their votes even if military actions fail, do not go as planned, or if the cost is higher than envisaged.¹⁰² What Kriner does argue, however, is that the decision to seek congressional authorization should not be regarded

95 See S. Rigell et al. Letter to the President of the United States, August 28, 2013.

96 See <https://www.congress.gov/bill/113th-congress/house-joint-resolution/124>. See also fn. 6 p. XXXX (2). The support was continued in the Defence bill for the fiscal year 2015.

97 For more details on some of the proposals, see Poplin’s comments in the Lawfare blog: <http://www.lawfareblog.com/2014/09/some-of-the-would-be-isis-aumfs/>. See also the proposals by Representative Adam Schiff (D-CA) (Sept. 15, 2014) and Senator Tim Kaine (Sept. 17, 2014). <http://www.lawfareblog.com/2014/09/rep-adam-schiffs-isis-aumf/> <http://www.lawfareblog.com/2014/09/senator-kaines-isis-aumf/>. Senator Rand Paul has also proposed a new AUMF against ISIL, as well as a declaration of war. See Messinger, 2014.

98 Kaine’s opinion in *The Washington Post*, June 24, 2014.

99 See e.g. R. Chesney et al. *A Statutory Framework for Next-Generation Terrorist Threats*. Jean Perkins Task Force on National Security and Law, Congressional Research Service Library of Congress, Hoover Institution, Stanford University 2013; D. L. Kriner, Obama’s Authorization Paradox: Syria and Congress’s Continued Relevance in Military Affairs. *Presidential Studies Quarterly*, vol. 44, no. 2, 2014.

100 Kriner, 2014, 324.

101 The declarations of war also take the form of a resolution.

102 Kriner, 2014, 312.

as a change in the practice of war powers, but rather as an act of finding the best political option under the circumstances.¹⁰³

Relying on a quantitative approach, Kriner has claimed that the most significant examples of the use of force since 1945 indicate that numerous actions taken by Congress do have an effect on the course of US military interventions.¹⁰⁴ Measures that were mentioned include proposing and voting on legislative procedures to limit the use of the armed forces (even if they are not enacted), conducting hearings and investigations at the committee level, and commenting publicly for or against the use of the armed forces.¹⁰⁵ Items that could be added to the list vis-à-vis the overall influence of the US Congress include, for example, the power of the purse and the appropriation process, the repealing and/or amending of legislation, constitutional amendments, and institutional or procedural changes (as, for example, Lindsay 1992 & 1994 has emphasized). In addition, in terms of the structural aspect, Congress has the power “*to regulate the military, and to create the structure of the executive bureaucracy, including security-related bureaus*”, as pointed out by Mariah Zeisberg.¹⁰⁶ Further, many of the powers of the branches of government become “war powers” when they are used in this context.¹⁰⁷

As mentioned, the measures taken may be indirect rather than direct, however. In respect of the less obvious aspects of congressional influence, Kriner gives the following example: “*Rather than legislatively barring the president from deploying troops abroad or cutting off funds for their continued use once deployed, members of Congress most often seek to constrain the commander-in-chief by ratcheting up the political costs of pursuing his preferred military policy course*”.¹⁰⁸ What the members of Congress have emphasized, however, is the aspect of educating the public in the debates on the floor regarding the use of US military force (see Senator Kaine’s argument on p. 23).

Concluding remarks

The debates conducted on the powers exerted between the branches of government in exceptional situations is one way of studying the tension between domestic and foreign policy, and exploring the ways in which domestic actors have an impact on foreign policy and vice versa. The growth of the powers of the executive branch of government in foreign policy has been considered by questioning the constitutional framework of the separation of powers, and checks and balances. The powers have taken different forms, however. For example, the US Congress has not actually declared war since 1942, but it has authorized the President to use military force, for example after 9/11, and against Iraq by enacting resolutions.¹⁰⁹ Further, as the quotes by the members of Congress show,

103 Ibid. 309.

104 Ibid. 311.

105 Kriner, 2014.

106 Zeisberg, 2013, 6.

107 Ibid. 50.

108 Kriner, 2014, 324–325.

109 See the AUMF of 2001 and the AUMF of 2002.

particularly during the debate in the Senate when considering the Syria resolution, the President will usually benefit from seeking congressional support.¹¹⁰

The debates on war powers demonstrate that, despite the increase in the powers of the President, the members of Congress still consider that collective judgment should also apply in respect of decision-making on war. The purely legalistic interpretation of war powers is problematic because the powers are interpreted and defined in different political contexts. The changing nature of war and conflicts, and therefore the debates on the concepts, such as war itself and the related powers, indicate that the debate on the congressional role in the decision-making processes is likely to continue. As indicated by Senator John McCain during the introduction of the War Powers Consultation Act of 2014, there is a need to have a debate in Congress on the future of Congress's war powers, what is constituted by war, and therefore the possibilities for congressional involvement in the decision-making process. The introduction of the bill should have marked the beginning of this debate rather than the end (see McCain's argument on p. 18). What was also indicated in this paper is that the role of Congress in foreign policy, and particularly vis-à-vis decision-making on war, can be looked at from very different perspectives other than through the legislative record alone. That said, the congressional debates (followed by votes) are considered essential by the congressional members in securing Congress's role in the decision-making process concerning the introduction of US armed forces into hostilities.

110 See Kriner, 2014.

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