

Analysis No. 229, January 2014

## “AN INVITATION TO STRUGGLE?” CONGRESS AND U.S. FOREIGN POLICY

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The essay outlines the U.S. Congress' role in foreign policy-making and its prerogatives in a constitutional context that attributes the same power to the President. First, it describes how Congress has historically interpreted the power sharing provided by the Constitution. Then, it points out the political background of Congress' emergence as an autonomous and challenging actor. The conclusions briefly examine the dynamics and contradictions of the relationship between Congress and the Presidency in a contemporary scenario characterized by political polarization and ideological struggle.

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No later than the 1950s, one of the most important American constitutionalists of the 20<sup>th</sup> century, Edwin Corwin, highlighted how contradictory the constitutional text was as far as foreign policy was concerned. Corwin claimed that “the relations of President and Congress in the diplomatic field have, first and, last, presented a varied picture of alternate cooperation and tension, from which emerge two outstanding facts: first, the overwhelming importance of Presidential initiative in this area of power; secondly, the ever increasing dependence of foreign policy on Congressional cooperation and support”<sup>1</sup>. According to the American Constitution, in fact, both the President and Congress are supposed to have jurisdiction over foreign policy and Corwin thought it meant an “invitation to struggle.” Since the origins, foreign policy has provided a field for negotiation and competition between the President and Congress. In 1793, for the first time a clash took place between the President, George Washington, and Thomas Jefferson concerning the conflict between Great Britain and France. The first was in favor of neutrality, whereas in the Congress Thomas Jefferson, leader of the Republican faction, supported France and the Revolution.

Going back to the constitutional text, Article 1 gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”, “to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; furthermore “to raise and support Armies”, “to provide and maintain a Navy”, “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”. Article 2, which instead concerns the executive power, states that “he shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”.

The majority of historians have underlined that the Constitution outlines a sharing of powers; however, it does not explain clearly who should lead the decisional process.

According to James Madison, one of the Founding Fathers, not the President, but Congress had “[to] stand at the helm of the ship of state in wartime”<sup>2</sup>. However, the historical events which determined the growing power of the executive led to the emergence of the President as the central figure of American foreign policy – at least after the US turned into a world power at the end of the 19<sup>th</sup> century. The two World Wars first and

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<sup>1</sup> E. CORWIN, *The Constitution of the United States of America: Analysis and Interpretation*, 1955 [http://www.gutenberg.org/catalog/world/readfile?fk\\_files=1513202](http://www.gutenberg.org/catalog/world/readfile?fk_files=1513202) p. 470

<sup>2</sup> D.L. KRINER, *After the Rubicon. Congress, Presidents, and the Politics of Waging War*, Chicago and London, The University of Chicago Press, 2010, p. 1.

the Cold War later exalted the figure of the President as a “Commander in Chief” and provided the legitimizing base of his supremacy over Congress. This is evident, above all, when it came to decisions concerning armed interventions.

During its history, the US declared war five times. The first time was in 1812, when the second conflict against Great Britain broke out. However, the country was involved in military interventions almost 130 times. In some cases they occurred with the approval of Congress, in others without. Harry Truman thought he did not need any legislative authorization to send American troops to Korea in 1950, nor did George H. W. Bush Sr. during the first Gulf War.

What, then, has been the role of Congress in the making of foreign policy and what are its prerogatives in a context in which the President appears to be “at the center of the foreign policy process,” even though “he does not act alone”<sup>3</sup>?

### **The tension between Congress and the President in the foreign policy process**

The building of the National Security State after the Second World War and the creation of a bureaucratic machine, within the presidency, dealing both with international policy and security issues, contributed to centralizing decisional processes in the hands of the President. However, that meant neither that Congress was downsized nor that it underwent a complete abdication of the role the Constitution attributed to it. If the rise of the so called “imperial presidency” – how Lyndon Johnson and Richard Nixon’s administrations were defined – was the result of an excessive delegation of powers by Congress, after approval of the Tonkin Gulf Resolution in 1964, which gave rise to the escalation of the Vietnam War, Congress proved to be able to resume its own constitutional powers in 1973 when it passed the War Powers Act that limited presidential autonomy in the use of the military abroad.

In addition, the crucial role of Congress in creating the security machine (starting from the National Security Act, which was passed in 1947) demonstrates how the power to reorganize the executive eventually became one of the instruments Congress has to influence American foreign policy. The Goldwater-Nichols Act in 1986, which consolidated the chairman role of the Joint Chiefs of Staff - the representative body of the

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<sup>3</sup> M.H. HALPERIN and P.A. CLAPP with A. KANTER, *Bureaucratic Politics and Foreign Policy*, Washington, D.C., Brookings Institution Press, 2006, p. 16.

armed forces within the presidency – and the creation of a Human Rights Office in the Department of State are only two examples of Congress' ability to affect foreign policy.

From this point of view, the War Powers Act marked the beginning of a new, more dialectical phase, not only in the relationship between the President and Congress, but also in the actions of Congress in foreign policy. On the one hand, the War Powers Act showed the capability of the legislative power to restore the balance of power concerning the President; on the other, the fact that the law was often disregarded stressed that all political changes, often characterized by the ideological conflict between the parties, have had a strong impact on Congress' ability to act as an independent interlocutor. The end of the liberal consensus that had characterized the American political debate during the first Cold War, the changes resulting from the more and more frequent presence of a “divided Government” (the executive and the legislative powers represented by different political majorities), the ever growing political polarization, the tendency, within Congress, of individual senators or representatives, to act solely for the benefit of their own constituencies, all these elements must be taken into consideration if we want to understand the role of Congress in foreign policy dynamics.

Within this context, the way Congress proved itself able to use the three powers invested in it by the Constitution – the war-making power, the power of the purse and the power of oversight and investigation –<sup>4</sup>, can be defined according to four reference models: a) a competitive Congress, characterized by high levels of activism and assertiveness; b) a disengaged Congress, always compliant with the President's directives; c) a supportive Congress, capable of establishing a co-operative relationship with the presidency and, finally, d) a strategic Congress, which combines a reduced activism with a stronger assertiveness, because its action is selective<sup>5</sup>. After the Second World War until 1958 Congress stood out for its support to the President and was, in fact, a “supportive” Congress, whereas from 1958 to 1967, while growing more in assertiveness, Congress became “strategic”. The collapse of the liberal consensus after the Democratic defeat in 1968, the rise of the new Conservatism, which strongly criticized both *Realpolitik* and Nixon and Kissinger's détente policy, were some of the factors which determined a competitive phase and strong congressional activism. Since the mid-1980s, within the hegemonic Conservative course – in addition to the rising frequency in the

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<sup>4</sup> A.M. SCHLESINGER, Jr., *War and the Presidency*, New York-London, Norton, 2004, p. 53.

<sup>5</sup> See R.G. CARTER - J.M. SCOTT, *Striking a Balance. Congress and U.S. Foreign Policy*, in S.W. HOOK - J.M. SCOTT, eds., *U.S. Foreign Policy Today. American Renewal?*, Washington, D.C., CQPress, 2011, p. 39.

congressional majority of alternate governments – as some scholars have pointed out, we have had “a less active but still assertive Congress, indicating a return to the ‘strategic Congress’ model. This pattern is consistent with the post-Cold War conception of a Congress generally less interested in foreign policy but willing to challenge the president when it chooses to address key issues”<sup>6</sup>.

### Congress as a foreign policy actor

Congressional support for a “strategic” model was certainly part of the post-Cold War period, but it also marked the end of the “two presidencies” phase, which meant, on the one hand, being deeply immersed in the political conflict that characterized domestic policy, and on the other being strongly bipartisan in foreign policy<sup>7</sup>. It was solely because of growing conflict and political polarization that Congress did not abdicate its role on behalf of the terrorist emergency, even when George W. Bush Jr. imposed a centralized vision of the presidency (a “unitary presidency”) which, according to the Conservative pundit John Yoo<sup>8</sup>, – one of the Bush administration consultants – represented a practice that must be acknowledged. We must consider, however that Congress is becoming a more and more complex political and institutional “actor”. Owing to a number of reforms passed in the 1970s, congressional procedures are more open and inclusive. The decisional process implies the involvement of a higher number of legislators, interest groups or activists. This is an expansion that, paradoxically, did not contribute to increasing Congress’ popularity ratings among American citizens, since they have been falling lower and lower. From this point of view, then, Congress’ choices are the result of a complex interaction that concerns party structures and a series of committees and subcommittees, some of them influenced by both formal and informal caucuses dealing with specific issues. We must add to all this individual members’ initiatives – both senators and representatives. For their part they must account for their decisions to pressure groups, public groups and associations, to many and various constituencies. Those positions also reflect regional and sectarian differences, often neglected in many accounts<sup>9</sup>. The George W. Bush administration and its relationship with Congress is a case in point. On the one hand, in 2001 Congress recognized the power of the president as Commander in Chief and

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<sup>6</sup> *Ibidem*, p. 40.

<sup>7</sup> S. W. HOOK - J. M. SCOTT, Seeking Renewal. American Foreign Policy in the Obama Era, in S. W. HOOK - J. M. SCOTT, *U.S. Foreign Policy Today*, cit., p. 9.

<sup>8</sup> J. YOO, *The Powers of War and Peace. The Constitution and Foreign Affairs after 9/11*, Chicago and London, The University of Chicago Press, 2005

<sup>9</sup> See, P. TRUBOWITZ, *Defining the National Interest. Conflict and Change in American Foreign Policy*, Chicago and London, The University of Chicago Press, 1998.

authorized the use of force against al-Qaeda terrorists and their supporters. On the other, this approval did not give the President the authority for a widespread use of force to prevent future terrorists attacks or aggressions against the United States, even though that had been requested by Bush. Actually, according to Congress, they had to avoid a new Tonkin Gulf Resolution. The same happened when, by using “the power of the purse,” Congress reduced Department of Defense funding while approving an allocation for Homeland Security. Even though in 2001 Congress passed the Patriot Act, it also established that many of the act’s provisions should expire in 2005. That autonomy obviously grew after the Democratic victory in the 2006 elections. In 2008 Congress passed a bill approving sanctions against the Sudanese government, in spite of the President’s opposition. The previous year it had granted a fund increase for the Homeland Security Agency, in a higher amount than that asked by the President.

The same occurred last year during the inauguration of Obama’s second term, even though the presence of a Democratic majority in Congress might have granted a more cooperative perspective. However, the 2008 elections had led to a more polarized Congress, especially within the House, as it included a more radical component of the Republican Party. Obama’s “renewal” agenda was constantly challenged by a part of Congress, even by means of indirect or not openly legislative forms of activism or, again, through Congress members’ direct access to the “new media”.

Many Democratic members of Congress voted in agreement with Republicans, especially when at stake were issues of foreign policy not strictly connected with national security exigencies (for instance in the ratification of trade treaties or environmental policies), as happened when moderate Democrats joined Republicans in opposing more restrictive rules on fossil fuel emissions. In addition, a sort of congressional foreign policy entrepreneurship can be found in the House as well as in the Senate. When the Israeli leader Benjamin Netanyahu was in Washington in 2009, the Democratic Speaker of the House, Nancy Pelosi, declared herself in favour of Israel, in even more enthusiastic terms than the Republicans themselves, in contrast with the coldness that had characterized the relationship between the Israeli leader and Obama. Moreover, in a context in which budget issues are at the centre of the burning American political debate, it is regarding expenditure, even more than national security issues, where Congress can intervene and take a more assertive position. Keeping in mind electoral-political exigencies, individual members of Congress are, in particular, more inclined to allocate funds to defense policy rather than foreign policy (allocations are kept separate) since funds in favour of defense can be invested in local

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contracts and businesses. As has been pointed out, “most members think that voting for less funding for foreign aid advances their political interests”<sup>10</sup>.

From this standpoint, a topic like foreign aid, proves to be paradigmatic of Congress’ abilities to broadly influence foreign policy by means of financing and expenditure. Policies concerning China, Eastern Europe, the Middle East or Latin American countries were discussed and became negotiation fields “through the foreign assistance authorization bill”<sup>11</sup>. By reducing presidential requests, in some cases by favouring multilateral rather than bilateral programs, by forbidding economic aid to enterprises that might prove to be competitive with American products – just to provide a few examples – Congress can set the guidelines for American foreign policy.

### Conclusion: a “Congressional foreign policy”?

In conclusion, can we state that even the United States is undergoing a “parliamentarization” of foreign policy?

I believe that it is actually the “pluralization” of the American political system, together with a political polarization seeming not to decrease, that creates a state of permanent conflict, rather than a change in the political shift of balance. The tug of war between the President and Congress about the budgetary deficit – a situation that caused last October’s shutdown – makes us wonder about the governance capability of the system as shaped by the Constitution.

Undoubtedly the President, seen as a Commander-in-Chief with longstanding presidential practice, has strengthened the concept of unitary executive, the idea of the President as the person the Constitution invested with the power to control the entire executive. Or better, with a “strong” interpretation of such a doctrine.

The “invitation to struggle” seems to have been accepted. Its evidence is given by Congress’ opposition (hence its will to leave a mark) to the two redefining sectors of foreign policy: the use of force and the ratification of treaties. Obama’s choice of using drones to fight terrorism (which raises many a doubt concerning the involvement even of American citizens) and the recent unfreezing of the relationship with Iran have raised quite a number of oppositions within a Congress where even the Democratic members are not ready to accept the President’s positions uncritically. As

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<sup>10</sup> See M.H. HALPERIN and P.A. CLAPP with A. KANTER, *Bureaucratic Politics and Foreign Policy*, cit., p. 341ff.

<sup>11</sup> B. HINCKLEY, *Less than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress*, Chicago, The University of Chicago Press, 1994, p. 101.

far as the drones policy is concerned, at the beginning of 2013 the Democratic senator Chris Coon declared that “It has to be in the agenda of this Congress to reconsider the scope of action of drones and use of deadly force by the United States around the world because the original authorization of use of force, I think, is being strained to its limits”<sup>12</sup>. From this point of view it seems that Obama must have learnt the same lesson as Truman and Jimmy Carter before him, that is to say that “foreign policy making under conditions of unified government is still quite difficult”<sup>13</sup>.

Both the President and Congress share power more than ever and, as has been stated, “there is no constitutional power provided to the President that the Congress does not share in some way”<sup>14</sup>. What is desirable within an international scenario characterized by different dynamics from the past – marked by the Cold War – is a return to a post-partisan foreign policy, also considering the emergence of new global actors that seem to challenge America’s leadership. We must therefore seize the opportunity to help policy prevail over politics or, even worse, bipartisan politics. Will the next Congress, after the mid-term elections next year, be able and willing to take up the gauntlet?

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<sup>12</sup> P. WEBER, *Will Congress curb Obama’s drone strikes?*, «The Week», 6 February 2013 <http://theweek.com/article/index/239716/will-congress-curb-obamas-drone-strikes>.

<sup>13</sup> R.G. CARTER - J.M. SCOTT, *Striking a Balance. Congress and U.S. Foreign Policy*, cit., p. 53.

<sup>14</sup> S.W. HOOK - J.M. SCOTT, *Seeking Renewal. American Foreign Policy in the Obama Era*, cit. p. 9.