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# Dennis Kucinich and expansion of the chief executive's war power: A unique legacy of checking the commander in chief

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Since the Second World War, many analysts agree that the influence and power of the United States' commander in chief has grown substantially. This trend of presidential empowerment continues in the Post-Cold War presidency and into the aftermath of the terrorist strikes on September 11, 2001, as commanders in chief have continued to assert wide and nearly unilateral war authority. Few members of congress have challenged this movement, and in fact, a number have worked to advance an even more empowered chief executive. Standing apart from this trend is former member of Congress Dennis Kucinich (D-Oh.), who served in Congress from 1997 to 2013. Over the course of his sixteen years in the House of Representatives, Kucinich, in a non-partisan fashion, challenged his commanders in chief and called upon members of Congress to assert their constitutional war powers to check presidents in their military actions. This article examines Congressman Kucinich's legacy related to war powers, and argues that Kucinich consistently made the case for an actively engaged Congress on all decisions related to the use of force abroad. Indeed, since Kucinich's departure, the Obama administration has waged its own new war in the Middle East, striking hundreds of targets on the Islamic State in Iraq and the Levant (ISIL). Senior congressional leaders continue to find reasons not to bring a war resolution up for a vote.

**Key words:** American foreign policy, military force, war powers.

## INTRODUCTION

Since the Second World War, many analysts agree that the influence and power of the United States' commander in chief has grown substantially (Fisher, 2013; Griffin, 2013; Zeisberg, 2013). Despite the Constitution's provision that the U.S. Congress shall be the branch to declare war, the decision to use American military forces abroad has increasingly rested with the president alone

(Moss, 2008; Silverstein, 1997; Hart Ely, 1990; Koh, 1990). In 1973, Congress passed the War Powers Resolution in an effort to restore some constitutional balance, though most analysts agree that this effort resulted in another expansion of the president's influence as commander in chief, relegating Congress to a bystander in war-making decisions (Burgin, 2014; Corn,

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2010; Boylan and Phelps, 2001; Fisher and Adler, 1998; Glennon, 1995; Keynes, 1992; Katzmman, 1990; Hart Ely, 1988; Krotowski, 1989; Wormuth and Firmage, 1989). The trend of presidential empowerment continues in the Post Cold War presidency and into the aftermath of the terrorist strikes on September 11, 2001, as commanders in chief have continued to assert wide and nearly unilateral war authority (Adler, 2006; Schonberg, 2004; Kassop, 2003; Hendrickson, 2002). Few members of Congress have challenged this movement, and in fact, a number have worked to advance an even more empowered chief executive (Bowling et al., 2008).

Standing apart from this trend is former member of Congress Dennis Kucinich (D-Oh.), who served in Congress from 1997 to 2013. Kucinich generated national attention because of his generally consistent liberal views as one of the most left-leaning and outspoken members of Congress, and also due to his two candidacies for the American presidency in 2004 and 2008. However, over the course of his sixteen years in the House of Representatives, Kucinich, in a non-partisan fashion, challenged his commanders in chief and called upon members of Congress to assert their constitutional war powers to check presidents in their military actions. This article examines Congressman Kucinich's legacy related to war powers, and argues that Kucinich consistently made the case for an actively engaged Congress on all decisions related to the use of force abroad. Indeed, since Kucinich's departure, the Obama administration waged its own new war in the Middle East, striking hundreds of targets on the Islamic State in Iraq and the Levant (ISIL) (Obama, 2014). Senior congressional leaders continued to find reasons not to bring a war resolution up for a vote (Dinan, 2015). Presidential candidate and now President-elect Donald Trump is also threatening to substantially increase American military involvement aimed against ISIL--with little mention of any checking role for Congress. In an era when Congress continues to abdicate its war powers authority away to the commander in chief, Kucinich's non-partisan constitutional principles and activism on war powers are missed sorely and may be increasingly relevant in a Trump presidency. This article examines how Kucinich utilized his role in Congress and the federal courts to seek a restoration of a balance of power between the commander in chief and the legislative branch during his tenure in the House of Representatives.

## WAR AND THREATS TO USE FORCE IN THE KUCINICH ERA

Dennis Kucinich served in the House of Representatives in an era when the United States often resorted to military action. This time period has been referred to as an era of "perpetual war," which involved American military operations Kosovo, Iraq, Afghanistan and Libya, as well as hundreds of drone strikes in Pakistan, Yemen and Somalia (Bacevich, 2011). Presidents Bill Clinton, George W. Bush

and Barack Obama all utilized military action as a foreign policy tool to seek political objectives. Across all of these major operations and presidencies, Kucinich took clear, consistent non-partisan positions that reflected his belief in the necessity in checking the commander in chief. In this analysis, we examined four different conflicts across three presidencies to examine the extent to which Kucinich challenged the commander in chief. These brief cases include President Clinton's military action against Serbian leader Slobodan Milosevic in 1999, President George W. Bush's movement to use force against Iran in 2006, and President Obama's use of drone warfare and his war in Libya.

### Kosovo

On March 24, 1999, with an explicit endorsement from the North Atlantic Treaty Organization (NATO), the Clinton administration joined with its NATO allies to conduct a 78 day military campaign aimed at Serbian leader, Slobodan Milosevic. Milosevic had actively suppressed the ethnic Albanian majority in Kosovo during the entirety of his leadership tenure, and had been using Serbian militias to actively punish independence movements beginning in 1998 (Judah, 2000). As a body, Congress did not authorize this military operation, despite President Clinton's request for legislative approval to act.<sup>1</sup>

As the bombing operation proceeded, the lead voice who challenged the constitutionality of the president's military actions was Congressman Thomas Campbell (R-Ca.), who had been actively engaged in war powers challenges against the president before. Campbell maintained that Clinton was acting without constitutional authority in this conflict, and that Congress was failing to fulfill its constitutional duty to check the commander in chief. Campbell's efforts culminated when he requested a vote to withdraw all military forces from the conflict, which failed to pass. He then requested a vote to declare war on Milosevic, which also failed. In effect, Congress voted to continue American participation in the war, but failed to openly endorse or authorize it (Hendrickson, 2002: 95-98, 130-133). Campbell followed by leading a court challenge against the president, similarly argued that Clinton's military actions were unconstitutional, which initially garnered the support of 17 members of the House of Representatives (Bessonette, 1999). An amendment of the suit later included a total of 31 members of the House, including three House Democrats.<sup>2</sup>

Among those who supported Campbell's efforts was Dennis Kucinich, one of our four democrats to sign onto the court challenge, which provided an early indication that Kucinich in his congressional career was committed to protecting Congress's war powers. Though the case was eventually dismissed, Kucinich demonstrated a non-

<sup>1</sup> *Congressional Record*, (March 23, 1999): S3101.

<sup>2</sup> 203 F.3d 19.

partisan commitment to protecting Congress's war powers (Boylan, 2000; Hahn, 2001).

When speaking openly about the Clinton administration's use of force, Kucinich's views were consistent and direct. For example, he noted: "The Constitution put that war power in the hands of the people to avoid an abuse of power" (Federal News Service, 1999; Sievert, 2001). More explicitly, Kucinich stated: The United States involved in the participation of NATO is an illegal war, and that in fact, the constitution provides for Congress alone to have the power to declare war. The War Powers Act is significant because it requires the president to terminate war which he would prosecute without congressional consent (Federal News Service, 1999).<sup>3</sup> Kucinich followed these remarks with equally clear criticisms of Clinton's constitutional claims to use force in Yugoslavia.<sup>4</sup>

After the conflict, Kucinich (2000) spoke at the Loyola Law School of Loyola Marymount University on the constitutionality of use of force and war powers, which was later published as an essay in their law journal. In doing so, Kucinich (2000, 63-64) made a vigorous case that Congress must protect its constitutional war powers, which in his view, squared closely with the founding fathers' intent, as well as Presidents George Washington, Thomas Jefferson and James Madison. Kucinich (2000, 65) also made the case that the War Powers Resolution, whose intent was to check the commander in chief, actually ended up empowering the executive branch by allowing the president to wage war for 60 days without congressional approval. At the same time, he also noted that even though it does have flaws, it remains the law, and that presidents are not permitted to use force without congressional approval after 60 days (Kucinich, 2000, 66). Moreover, Kucinich (2000, 67-67) lamented that Congress failed to make a clear vote on Kosovo, and that the House of Representatives never fully voted to authorize the war. Across the essay, his views are unequivocal in advancing the argument that Congress must exercise its war powers, which is a theme he reiterated for the duration of his tenure in the House of Representatives.

## Iran

In 2006, journalist, Seymour M. Hersh published an essay in the *New Yorker*, which brought to light the George W. Bush administration's military plans for a possible strike on Iran (Hersh, 2006). The article, which generated national attention, alleged that the Pentagon was engaged in extensive and comprehensive military planning for such a military incursion, which entailed the deployment of covert operatives in Iran in an effort to locate strategic targets (Baker et al., 2006; Schmitt, 2006).

Among those who spoke out against President Bush's

foreign policy direction toward Iran, as well as on the potential for Bush's military strikes on Iran, Kucinich was clear in asserting Congress's authority to check the commander in chief.<sup>5</sup> He made similar points on another occasion, when he noted: "We must not allow the President to remain unchallenged while he continues to use the media to create a pretext for an illegal war. Congress must insist the President come to the full Congress for permission to take any action against Iran."<sup>6</sup> Kucinich continued to advance this view on another occasion, when he maintained: "This House cannot avoid its constitutionally authorized responsibility to restrain the abuse of executive power. The administration has been preparing for an aggressive war against Iran...This administration has openly threatened aggression against Iran in violation of the U.S. Constitution and the U.N. Charter."<sup>7</sup>

Near the end of 2007, Congressman Kucinich made a brief statement on this issue, arguing that President Bush's administration had mislead Congress on Iran throughout the year, noting : "It is time for diplomatic relations, but it is also time for Congress to hold this administration accountable for trying to lead us into a war against Iran"<sup>8</sup>. Thus, Kucinich's views on Congress's constitutional war powers authority and oversight on Iran were consistent and sustained, and again made clear his view that Congress has the constitutional duty to check the commander in chief.

## DRONE WARFARE

Over the entirety of the Obama administration, drone warfare became a staple of military and political options, which had been previously initiated in the administration of George W. Bush (Sanger, 2012). By the end of Obama's first term in office, which coincided with Kucinich's final term in the House of Representatives, the Obama administration had carried out some 337 drone strikes on Pakistan and Yemen.<sup>9</sup> The use of air power and drone warfare persisted in Obama's second administration in the same areas, and expanded with the use of force against ISIL targets. By March 19, 2015, the United States had conducted 2,320 airstrikes on ISIL, and had deployed 2,875 troops to Iraq as part of this mission (Pellerin, 2015). Despite this rapid expansion of military air power, a number of analysts have argued that Congress played a minimal oversight and checking role of the commander, especially with regard to the use of drones, and has thus far failed to authorize or vote on military operations against ISIL (Benen, 2015; Starks, 2013; Zenko, 2013).

Despite the general trend of Congress's acquiescence

<sup>3</sup> See also Congressional Record (1999): H3611.

<sup>4</sup> Congressional Record (1999): H4018.

<sup>5</sup> Congressional Record (2007): H1673.

<sup>6</sup> Congressional Record (2007): H2042.

<sup>7</sup> Congressional Record (2007): H2573.

<sup>8</sup> Congressional Record (2007): H14227.

<sup>9</sup> See The Long War Journal at <http://www.longwarjournal.org/yemen-strikes>.

to the president and overall abdication of its war powers to the commander in chief, Kucinich was one of the few members of Congress who consistently challenged Obama's constitutional authority to wage war. On the use of drone and missile strikes, as well as covert special operations, Kucinich complained about "little to no oversight from Congress."<sup>10</sup> He also argued that Obama was carrying out "unrestricted use of drones that has taken us into undeclared wars in Pakistan, Somalia, Sudan and who knows where else."<sup>11</sup> His views were unabashedly clear when he noted: "The drone program has thus far been conducted with no oversight from Congress or any judicial body"<sup>12</sup>.

In a final constitutional challenge to both the executive branch and his colleagues in Congress, Kucinich joined with Congressman Ron Paul (R-Texas) to challenge Obama. This partnership is quite interesting, given that Ron Paul represented the libertarian/Tea Party arm of the Republican party, while Kucinich often sided with the most liberal members of the Democratic party. However, Paul, like Kucinich, has a sustained record of challenging the commander in chief's stated authority to wage war. Both called upon then Attorney General Eric Holder to release any executive branch documents related to Obama's legal authority to conduct drone strikes. Kucinich and Paul, then both retiring members of Congress also appealed to the House Judiciary Committee as a forum for advancing their issue vis-à-vis the Obama administration (Hendrickson, 2015: 36). Their efforts, however, failed as Judiciary Committee members of both parties felt that they were already actively engaged in such oversight, and thus Kucinich and Paul's efforts were unnecessary (Wolverton, 2012).

In sum, Kucinich was often a lonely voice in calling for greater congressional oversight on drone military operations, but nonetheless demonstrated, again, his non-partisan commitment to the exercise of Congress's war powers. As drone military operations expanded, so too did his concern for the constitutionality of such conduct, which also entailed direct challenges to his colleagues in the Congress to become more assertive on this issue. His advocacy for similar positions was also evident in the military strikes in Libya.

### Obama's strikes on Libya

On March 19, 2011, the United States, France, and the United Kingdom began a bombing operation in Libya, aimed at limiting Libyan leader Muammar Qaddafi from wantonly killing citizens who were protesting his rule. At the onset of the strikes, President Obama made the case that through his authority as commander in chief, he was

authorized to conduct this operation without Congress's approval (The White House, 2011). As the operation progressed, his administration made the case that the War Powers Resolution did not apply in this case, and thus did not require explicit approval from Congress after the Resolution's 60 day window to use force without explicit congressional approval (Krass, 2011). Obama officials made the argument that they were not at war, and at the same time were using force to protect America's "national interests, and therefore not subject to the requirements of the War Powers Resolution" (Krass, 2011, 12-13). The argument has been made that these executive branch claims stretched considerably the basic principle of checks and balances in favor of a nearly omnipotent commander in chief (Hendrickson, 2015; Fisher, 2012).

Much like he did with the wars in previous military operations, Congressman Kucinich again provided critical leadership in Congress in challenging President Obama's stated authority to use force in Libya. These stands were significant in that Kucinich established himself as the lead voice in Congress in challenging the commander in chief, but also challenged the president of his own political party. His set of challenges to the commander in chief essentially came in three forms; his initial verbal opposition to the president, his legislative activism, and then his utilization of the federal courts.

Kucinich's concerns with the abuse of power and the need to check the commander in chief were expressed at the onset of the strikes, in which he was viewed as a leading opposition voice to Obama's asserted war power (Berman, 2011). Kucinich, noting his long history in challenging the abuse of commanders in chief who go to war without congress's approval, stated: I am making a principled challenge to the actions of the administration, and I can't tell you that I'm doing it with any enthusiasm because it's not easy to challenge individuals who you otherwise have an affection for....I was active in challenging what I felt was an abuse of war powers by the Clinton administration... It's not as though I've taken a partisan approach to this (Brady, 2011).

In the weeks that followed, and certainly as the 60 Day War Powers Resolution deadline approached, which was May 20, 2011, Kucinich's opposition remained so strong that he carried in his pocket a quote from then-Senator Barack Obama, who stated in 2007 that the president may not enter war unilaterally (Fahrenheit, 2011). His efforts culminated with his proposed legislation that called upon the President to remove all American military forces from the Libya operation within 15 days of the legislation's passing. In the days that preceded this vote, considerable momentum built for it, as a mix of liberal democrats and tea-party, oriented members of Congress had coalesced around Kucinich's proposal, so much so that Speaker of the House John Boehner (R-Oh) received strong signals that the legislation may in fact pass. When the bill was finally advanced for a vote on the House floor, Boehner took the unusual step of advancing his own legislation on Libya, which clearly challenged the president to explain

<sup>10</sup> Congressional Record (2011): H6326.

<sup>11</sup> Congressional Record (2012): H3278. See also Congressional Record (2012): E1158 and Congressional Record (2012): H6078.

<sup>12</sup> Congressional Record (2012): H6377.

the mission and its costs, but otherwise had none of the strong policy implications akin to Kucinich's efforts (Fahrenthold, 2011). Kucinich's proposal lost 148 to 265, which generated meaningful bipartisan backing, though came nowhere near the 268 to 148 vote Boehner gathered, which has been interpreted as a very successful legislative effort to co-opt Kucinich's proposal (Steinhauer, 2011). In effect, Congress managed to criticize Obama, without taking political or constitutional responsibility for the operation.

Upon the failure of Kucinich's legislative effort, he and nine other members of Congress turned to the federal district court, arguing that Obama's actions represented a violation of the Constitution's war power clause and that Obama had not complied with the War Powers Resolution.<sup>13</sup> This case was eventually dismissed by Federal District Court Judge in the District of Columbia, Reggie Walton, who argued that the case had no standing.<sup>14</sup> Though Kucinich was again on the losing side, he demonstrated a consistent pattern of challenging a commander in chief and leading another effort in congress against a president who was carrying out a military operation absent congressional approval (Fisher, 2012, 176-189).

### Why Kucinich matters

Since Dennis Kucinich has left office, President Obama's war against ISIL has again showed that the United States' commander in chief exercises a great deal of political and military leverage, absent meaningful oversight from the legislative branch. Indeed, while there are some members of Congress, including Senator Tim Kaine (D-Va.), Senator Rand Paul (R-Ky.) and Congressman Adam Schick (D-Ca.) who have called upon Congress to formally debate and vote on this war, these members have not exercised a similar degree of constitutional and political influence that Kucinich had while in the House of Representatives (Williams, 2014; Schiff, 2014). As was demonstrated above, Kucinich used a variety of political and legal tactics, which included the use of the federal courts, direct challenges to congressional committees, and in his closest effort to end a war led a bipartisan effort on the House floor to reign in President Obama and his war in Libya. Kucinich exercised leadership on war powers that few others have matched in their legislative careers. His assertions of Congress's war powers were non-partisan, but always on the side of the legislative branch, which the founding fathers would quite likely concur (Alder, 1988; Lofgren, 1972).

Kucinich's efforts did not fundamentally impact the use

of American force abroad, nor did his actions significantly alter the current imbalance of power weighted in favor of the commander in chief. The courts have largely proven to be a poor route for providing a judicial remedy to this imbalance; courts have often ruled against intervening in these issues, which are often deemed "political" rather than "legal," and thus defer to the political branches to resolve these debates, which clearly favors the commander in chief. Moreover, Congress's senior leaders, in bipartisan fashion, have often feigned interest in exercising substantial checking authority, much preferring to abdicate all of the political and constitutional responsibility for the use of force with the president (Hendrickson, 2015). In 2008, partly in response to the debacle in Iraq, former secretaries of state, James Baker and Warren Christopher called upon Congress to act upon this imbalance of power, which generated some legislative attention to war powers, though their actual proposal did little to rectify Congress's back seat role (Fisher, 2009; Wolfensberger, 2008, 8-9). Although, public opinion polls indicate that the American public wants Congress to exercise its war powers authority, at the same time, the electorate also seems to prefer presidents and presidential candidates who assert and then exercise increasingly broad authority as commander in chief (Baker and Christopher, 2008). Thus, it is difficult to envision a political climate that will generate a heightened legislative role in the decision to use force abroad. Increased public attention to this issue, and knowledge of the risk of this power imbalance is needed in order to generate additional political pressure on Congress's senior leaders to accept their constitutional duty and lead Congress in checking the commander in chief.

Nonetheless, it is clear that Kucinich was a voice for legislative checks on presidential military actions abroad, and at times was a leader who could marshal significant minorities against the president and Congress's senior leaders who preferred to abdicate their authority to the commander in chief. Though it is impossible to know what kind of impact Kucinich would have on the current Congress and its lack of constitutional debate over President Obama's war on ISIL, there is little doubt that he would have been pressing the legislative branch to check the commander in chief as the United States' military actions only increase in Iraq and Syria: his presence is sorely missed. As Fisher (2013: 310) maintains, it is essential for Congress to play this checking and oversight role of the commander in chief, who cannot be permitted to act as a unilateral decision maker for American military matters.

Kucinich's views may be increasingly relevant in a Trump presidency, which based upon campaign promises, suggests a more hawkish foreign policy orientation than President Obama (Friedman, 2016). In this respect, Kucinich's actions may serve as a historical guide for efforts to check the commander in chief. Though Kucinich did not necessarily shift the foreign policy direction of the president, it is clear that he did manage to build legislative collations, especially against Obama's use of force in

<sup>13</sup> The other members of Congress involved in this suit were Howard Coble (R-N.C.), John Duncan (R-Tn), Roscoe Bartlett (R-Md.), Walter Jones (R-N.C.), Ron Paul (R-Tx.) Tim Johnson (R-Il), Dan Burton (R-In.) John Conyers (D-Mich) and Michael Capuano (D-Mass.)

<sup>14</sup> 821 F. Supp 2d 110 (October 20, 2011).

Libya. Though members of Congress are often unwilling to vote on war powers legislation, the Trump presidency certainly invites new levels of activism, and in this respect, Kucinich may serve as a model for current activism rather than as an outlier in American history.

## CONFLICT OF INTERESTS

The authors have not declared any conflict of interests.

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