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Cato's Letter

A Bipartisan Bill to Restore Constitutional War Powers

CHRIS MURPHY

Thanks to my friends at the Cato Institute for hosting me here today. I'm grateful to be joined by Gene Healy and Jordan Cohen, and I greatly respect their work. I want to thank Cato for highlighting what I believe to be a very broken balance of power on national security matters between Congress and the executive branch.

Currently, we have a Congress that's more engaged on this issue than at any time during my service. It may be a little hackneyed to start with a discussion of our Founders when we are talking about who is in charge of declaring war, but how can you start anywhere else?



CHRIS MURPHY is a Democratic senator from Connecticut. He spoke at a Cato Institute policy forum in December.

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In 1793, Alexander Hamilton and James Madison wrote a series of essays back and forth contesting their different visions of the balance between the legislative branch and the executive branch. In one essay, Madison, who gets a lot of credit as maybe the primary driver of the ideas behind the Constitution, talks about what happens when an emergency arises that necessitates quick, rapid executive action. And he concedes that there may be limited moments in which the president has to act to use the military to defend the nation when we're under attack. But he cautions that these instances should really be few and far between, because he believes, as most of the Founders did, that it's really important for Congress to have this power to decide when America interferes in the world. But he said that these emergencies "are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States."

“The Founders believed that there was one branch where the great public debates were supposed to happen.”

It would pain a lot of presidents to hear them described as a "limited organ of the national will." But it shows that the Founders believed that there was one branch where the great public debates were supposed to happen. The big decisions, especially decisions about national security and foreign entanglements, needed to happen in Congress. In another essay in that same exchange, Madison says, "Those who are to conduct a war cannot in the nature of things, be proper and safe judges, whether a war ought to be commenced, continued, or concluded." Another fascinating idea: That those who are in the business of conducting the war don't have the proper perspective. They don't have the proper distance to be able to make sound judgments about whether the war should be started, whether the war should be continued, or whether the war should be concluded.

Our Founding Fathers believed that the executive branch and the legislative branch needed to share foreign policymaking but that starting and ending wars needed to be vested in the people's representatives. And in our early

years, presidents most often respected this investment of national security powers in Congress. Some of the earliest military engagements, the Quasi-War with France in 1798, conflicts with the Barbary states, some of our wars with Native American tribes, were all declared or approved by Congress. Presidents withheld the decision to commit U.S. forces and resources until Congress decided. In other national security matters beyond formal war-making in those early years, presidents and Congresses also respected this balance. Take the question of alliances. In our early years, alliances were entered into mostly through formal treaties, again requiring congressional consent.

“The pace of U.S. military activity today is fairly breathtaking.”

Unfortunately, over the years, there has been a shift from legislative power to executive power with respect to national security matters that has been substantial. Modern presidents, for instance, are using increasingly creative means to enter into war without consulting Congress. The pace of U.S. military activity today is fairly breathtaking. Americans might tell you that we were at war in Afghanistan until very recently and that we still are at war in Iraq. But in fact, we've deployed combat troops to no less than 20 nations since 2001. We've conducted at least 14,000 unmanned airstrikes in every corner of the world. Our country's military has killed almost 50,000 civilians through both unmanned and manned airstrikes since 2001.

Presidents over the past 20 to 30 years have used a few methods to escape from Madison's requirement that war be declared by the people's branch of government. And these methods are becoming more frequent and more nuanced.

First, presidents often will decide that the military actions they've ordered do not constitute war. You find that most recently with the case in Yemen. You often see it with unmanned airstrikes. Second, presidents often declare that the circumstances are so exigent that the president cannot come to Congress in time. Again, this was contemplated by Madison. But now these emergencies, whether they are connected to an imminent attack or are necessary to retaliate against an attack on U.S. forces, seem to come monthly. And lastly,

presidents now often decide that the proposed action is covered by an existing war authorization. That's part of the reason that some of my colleagues and I are pushing to get at least two war authorizations off the books. But we have seen over and over how other authorizations—in particular the 2001 authorization passed after 9/11—have been stretched beyond their reasonable interpretation to cover more and more action abroad.

When it comes to our alliance structure, I would argue that presidents today rarely enter into treaties because they have found other ways to cement



alliances that don't necessitate coming to Congress. Why go through all the trouble of negotiating a treaty and getting the Senate to sign off on it when you can just sell a couple billion dollars in arms and have those arms sales bind that nation to you just as effectively as a treaty? We don't have mutual defense treaties with the United Arab Emirates or Saudi Arabia or Morocco,

but they are bound to us by a dizzying array of arm sales, highlighted by the hundred-billion-dollar sales to Saudi Arabia and Morocco proposed by then President Donald Trump, or the massively expensive F-35 fighter jet and MQ-9 Reaper drone sale to the UAE that President Biden greenlit. Congressional approval isn't required for these sales, and thus, the executive branch can do the business of building alliances without congressional approval.

This brings us to the National Security Powers Act of 2021, which Sen. Mike Lee (R-UT), Sen. Bernie Sanders (I-VT), and I introduced. Our belief is that this piece of legislation can reset this balance. On war-making, first and foremost, it makes explicit what I believe to be implicit in the construction of the war-making power in the Constitution: if the president does not have authorization for a particular military activity, then he cannot use public funds to carry out that activity. I would argue that both the Constitution and the War Powers Act already stipulate that, but they've been ignored. Our National

Security Powers Act makes it absolutely clear that without authorization from Congress, the executive branch cannot act. In fact, it loses funding authority.

We also shorten the timelines in the War Powers Act to make sure that Congress gets in the game earlier. Right now, the War Powers Act gives the president some significant leeway to begin substantial military activity without ever going to Congress. We also offer a stricter definition of war. Right now, that is left to almost the completely open interpretation of the executive branch. The National Security Powers Act says we're going to define in statute what hostilities are, so you can never again get a situation like Yemen, where refueling planes and giving targeting advice does not constitute hostilities in the administration's mind.

“There's no reason for this to be a Republican issue or a Democratic issue.”

On arms sales, the change we make is simple, but it is incredibly meaningful. Right now, the president doesn't need congressional approval to sign off on an arm's sale, but Congress has the power to disapprove. But that resolution of disapproval, as you all know, must be passed by both houses and then signed by the very president who is proposing the sale. That means in effect that you need a two-thirds majority in both the House and the Senate, because it is inevitably going to be vetoed by the president. Instead, for the most important arms sales, we reverse that presumption. Not for every arms sale, but for big arms sales, especially to the non-treaty allies, to the nations where the sale is effectively binding the United States to that country, we require that the president get proactive congressional assent, just like he or she would need for a treaty or for a declaration of war. It would be the same for the big arms sales, because in practice and in principle, they have the same impact often as a treaty.

I'm looking forward to continuing to broaden the coalition of interest groups and members of Congress who are working on this legislation. There's no reason for this to be a Republican issue or a Democratic issue. I'm proudly introducing this piece of legislation in the middle of a Democratic presidency, because I believe that this balance needs to be reset no matter who's in the White House. ■



CATO PROFILE

Justin Logan

Justin Logan is a senior fellow at the Cato Institute. He is an expert on U.S. grand strategy, international relations theory, and American foreign policy. He has a master's degree in international relations from the University of Chicago and a bachelor's degree in international relations from American University.

What attracted you to working on international relations, and how did you come to Cato?

I interned at Cato in 2001 as an international relations undergrad, but I was a libertarian before I was an international security specialist. 9/11 and the policy responses to it stimulated my interest in security issues, and after I came back to Cato in 2003 to run the intern program, I moved on to a research assistant position in foreign policy studies.

How concerned should we be about the rising tensions between Russia and Ukraine and the possibility that the United States will be entangled in a war there?

A fair bit. A few things seem clear: Ukraine is more important to Russia than it is to the United States (or France, Germany, or the United Kingdom); a war in Ukraine would be devastating for Ukraine and quite dangerous for Russia, the United States, and Europe; and Ukraine becoming a member of NATO is almost certainly a fantasy. The best possible outcome is probably negotiated Ukrainian neutrality. International politics is a nasty business, and smaller, weaker countries that border stronger ones frequently find themselves pushed around. As

Thucydides wrote, "The strong do what they can, and the weak suffer what they must."

How about rising tensions with China? How should we think about that?

In a 2013 paper for Cato, I predicted that U.S.-China relations were headed for big trouble. If China continues to grow, it is likely to continue pushing the United States away from its shores. That Chinese growth is a function of its size and its engagement in the global economy, which by and large U.S. politicians still support. But if you don't like increasing Chinese military power, it's tough to see how you can stop it without cutting China off from the global economy, which seems unthinkable at this point.

In recent years, there has been a resurgence of restraint and realism. What would a U.S. foreign policy marked by restraint and realism look like in practice?

Fewer wars, fewer enemies, fewer allies, lower defense spending, less pathological civil-military relations, less deference to the executive, and a more decentralized, more Madisonian politics. So yes—there's been tremendous progress, but we haven't worked ourselves out of our jobs yet. ■

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