

Constitutional War Powers, and the First Use of Nuclear Weapons

The Founders of the American Republic, in the US Constitution, gave a central role to Congress in taking the United States into war. Professor Elaine Scarry of Harvard Universityⁱ points out that since World War II, Congressional power over war and peace has been greatly eroded. One reason is the new X factor in the balance of Executive versus Congressional power – i.e., nuclear weapons, where the President decides, a single man with the power of life or death over millions. Moreover, Presidents have used the threat of nuclear war more often than we'd like to admit.

Now we have a situation where the most that Congress has ventured, from Viet Nam to the Iraq and Afghanistan Wars, and numerous expansions of those wars, has been to pass an "AUMF", a so-called Authorization for Use of Military Force. In the cases of Syria, Libya, Niger, Yemen, et al., Congress has not even gone this far – not a good trend. And the 2001 "Al Qaeda AUMF" has been used to justify all these wars. Despite much discussion in the halls of Congress, no action has been taken.

These sobering facts lead to the inescapable conclusion that both Deputy Defense Scty. (ret.) Brian McKeon, in his testimony before the Senate Committee on Foreign Relations this Novemberⁱⁱ, and Professor Scarry are correct: that is, we need to clarify, and to pass laws to reaffirm, as the Founders intended, the power to "declare War and raise Armies" resides in the Congress. Only after, not before Congressional approval, under this reasoning, could the President launch a war of choice, and certainly, a nuclear war by means of a first strike, absent military attack by the opposing power.

Now, these are not new arguments. Senator J. William Fulbright, the iconic former chairman of the Senate Committee on Foreign Relations, argued that the Democratic Johnson Administration, had exceeded its own War Powers in the steep escalation of the Vietnam War. The 1974 War Powers Act was designed to try to rectify that serious misstep, and it was a bipartisan effort.

A new bipartisan effort is now needed. First, we face a current possibility of not one but two thermonuclear crises – with both Iran and North Korea. In each case, there have been threats of nuclear escalation; in the case of the Korean Peninsula, both sides have indulged in excessive rhetoric, including the unprecedented threat by the President of the United States to "destroy North Korea" if it threatens the United States; and Premier Kim Jong Un's threats against South Korea, Japan, Guam – and the US

mainland. Regarding Iran, the latter now faces threats from the US, Israel, and Saudi Arabia. Though Iran has not threatened the US with attack, it could well resume its nuclear program if pushed to the wall. All of these issues lead to a conclusion that, unless we take action, US foreign policy is seriously unravelling, and adding to destabilization, rather than to securing the peace.ⁱⁱⁱ

What will it take to right the checks and balances that the Founders built into Articles I and II, and that the postwar divide has seriously eroded? Most importantly, the understanding among the public that there really is almost no constraint on the President, under current law. We have always relied on basically trusting the person in the Oval Office not to make a colossal mistake, or error in judgment. That was never necessarily a wise assumption, and it isn't one today.

In fact, former Secretary of Defense William Perry has weighed in. Regarding the Markey-Lieu Bill, S. 200, which would restrict Presidential first nuclear use, Secretary Perry has said:

“During my period as Secretary of Defense, I never confronted a situation, or could even imagine a situation, in which I would recommend that the President make a first strike with nuclear weapons—understanding that such an action, whatever the provocation, would likely bring about the end of civilization.”^{iv}

Congress has, to a significant degree, sidelined itself by abdicating its responsibility even to issue an Authorization for the Use of Force in the noted cases, let alone a real Declaration of War, in the nuclear age. Only when the Senate and the House – and this is an area where the Senate has the greatest responsibility, under Article I – have asserted their Constitutional role in the War Powers of the United States, including not rubber-stamping spending for unwise wars, will we restore the separation of powers, the greatest check and balance to restore democracy in the USA. We can't forget that President Nixon in 1968 was elected on a promise to “end the war”, but it was only in 1974-75, when Congress cut off funding, that the Viet Nam War came to an end.

We first heard about the Imperial Presidency from Senator Fulbright in the 1960's; it was compounded at the time of Watergate. This leads to the final point.

President John F. Kennedy, who thought long and hard about the dangers inherent in the Nuclear Age, said that we were under a nuclear Sword of Damocles, always poised to fall upon humanity. He proposed and won agreement with both the USSR and the United Kingdom, for the Partial Test Ban Treaty of 1963, which he signed as one of his last official acts in foreign affairs.

A few years later, Lyndon Johnson's Secretary of State Paul Warnke negotiated the SALT Treaty Which stabilized nuclear weapons. In 1972, Richard Nixon achieved the Anti-Ballistic Missile Treaty, and signed the Start I Treaty. However, by 1973, that same President was in the throes of the Watergate scandal.

Depressed by Watergate, and drinking heavily, it is said that President Richard M. Nixon speculated about nuclear strikes on his enemies. Secretary of Defense James R. Schlesinger had further told the military commanders in 1973-1974, "If you get a strange order from the President, bring it to me first." Washington Post, August 22, 1974.

We also know that in October, 1973, Egypt and Syria teamed up to surprise-attack Israel. The reactions of Defense Minister Dayan, and Prime Minister Golda Meir (who overruled Dayan's idea for a "demonstration launch" of a nuclear weapon to turn the war around), are documented by Avner Cohen, a US, Israeli-born nuclear expert. They show the intense pressures of making decisions under conditions of attack-and-defense in a heated war situation, and how different personalities react to stress and national dangers.^v

We do not know what conditions we will find ourselves under in the coming months and years with this White House, and this State Department. We do know that leaders under siege (witness Dayan), whether under political or international pressures – may react very differently from how they would have under more normal circumstances. In the US case, both Schlesinger and Kissinger may have rescued President Nixon from some very bad decisions, had they been executed. Today, we have a number of psychological studies attempting to analyze, ponder, or predict how a personality such as President Trump's would respond to various extreme-case scenarios that might lead to a consideration of the President's powers to launch nuclear weapons unilaterally.

Unfortunately, none of those crystal balls are clear. In any case, psychological, theoretical "stress tests" by themselves will not serve to prevent the launch of a nuclear weapon, or many weapons, by accident, instability, or tragic miscalculation. We need an updated national security law, for a very real, not hypothetical, national security situation today. This should be the highest priority for Congress, and we hope that Senator Casey will seriously consider co-sponsoring the Markey-Lieu legislation, on Restricting Presidential Nuclear First-Use of Nuclear Weapons, S.B. 200.

Senator Chris Murphy’s bill would also be of great assistance in this struggle for diplomacy over a catastrophic war. This is S.B 2047, Preventing Preemptive War in North Korea Act of 2017, 115th, with seven co-sponsors. U.S. Congress | [Get alerts, S.B. 2047](#).^{vi}

“Murphy has been warning for weeks that he believes Trump is serious about wanting to go to war with Pyongyang. In an [interview](#) earlier this month with Vox’s Ezra Klein, Murphy said Pentagon officials are speaking about North Korea with a very different tone than they’d used in the past, a shift that has led him to conclude that armed conflict with the Kim Jong Un regime was a distinct and growing possibility.

See, <https://www.vox.com/world/2017/10/30/16561272/chris-murphy-trump-north-korea-war-senate>.^{vii}

Senate Bill to Stop Trump War in North Korea, 10/31/17.

Finally, this quote from our CFPA Regional Executive Director, Rev. Bob Moore, shows how much words matter:

North Korea has certainly engaged in very troubling behavior regarding both world peace and human rights over many years. But the critical and urgent need right now is how to deescalate and peacefully resolve the nuclear crisis involving them.

Piling on sanctions and name-calling, which have yet to deter or slow North Korea’s progress on its nuclear weapons program, is not the answer. In fact, George W. Bush’s labeling North Korea part of the “axis of evil” in 2002 was a key part of the undoing of the 1994 Agreement which had verifiably kept them from developing nuclear weapons for eight years.

Let us not repeat those mistakes again, and take a war of words, this time, to a war of the world.

Respectfully submitted,

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ⁱ Scarry, Elaine, *Thermonuclear Monarchy*, W.W. Norton and Co., 2014.

ⁱⁱ Testimony, Dep. Defense Secretary Brian P. McKeon (ret.), Senate Committee on Foreign Relations, November 14, 2017, *Hearing on Legislation Restricting Presidential First Use of Nuclear Weapons*.

iii The Nov. 30th NY Times report, that Secretary Tillerson may be ousted in favor of current CIA director Mike Pompeo, an ideological Trump loyalist, is not reassuring on this front. Some analysts view this as a preparation for war, or its likelihood.

iv *Ploughshares Fund, on the Bill to Restrict Presidential First Use of Nuclear Weapons: Tom Collina, Policy Director, said, "Within minutes, President Trump could unleash up to 1,000 nuclear weapons... Yet Congress has no voice in the most important decision the United States government can make. As it stands now, Congress has a larger role in deciding on the number of military bands than in preventing nuclear catastrophe."* See, bit.ly/2j1hKxx, for Scty. Perry's comments.

v Lewis, Jeffrey, and Cohen, Avner, <http://www.armscontrolwonk.com/archive/206909/israel-nuclear-weapons-and-the-1973-yom-kippur-war/> ArmsControlWonk.com, Israel, Nuclear Weapons and the 1973 Yom Kippur War, October 21, 2013.

vi. In fact, Senator Murphy has seven key co-sponsors on new legislation, taking away the ability of the President to start a war on his own. Senator Murphy's own thinking about how to stave off a conflict with North Korea has also been evolving. When he spoke to Klein on October 10, the senator said it would be extremely difficult to "pass legislation pre-constraining [Trump's] ability to manage foreign policy in the Korean Peninsula." Now, though, that's what Murphy and seven other colleagues want to do. The group of senators — which also includes 2016 presidential candidate Bernie Sanders and Democrats Elizabeth Warren and Cory Booker, both possible Democratic presidential candidates in 2020 — introduced new [legislation](#) Tuesday that would prevent Trump from launching an attack on North Korea, or from spending any money on a military strike, unless North Korea had struck first or Congress had given the White House the green light to do so." www.Vox.com , 10/31/17.
