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STEPS CONGRESS CAN TAKE TO REASSERT ITS WAR, SPENDING AND EMERGENCY POWERS IN THE 117th CONGRESS

By Anthony Marcum

INTRODUCTION

Roughly 80 percent of Americans disapprove of how Congress does its job.¹ Yet the public's frustrations are not a recent phenomenon. Aside from a few brief spikes, congressional approval rates rarely rise above 50 percent and have not gone above 30 percent in 10 years.² Similarly, Congressional leaders routinely poll lower than the president—even leaders from the same political party.³ These numbers are even more discouraging compared to their federal counterparts. Few presidents, even in their darkest days, have reached similar lows.⁴ And the Supreme

1. "Congress and the Public," Gallup, last visited Jan. 11, 2021. <https://news.gallup.com/poll/1600/congress-public.aspx>.

2. Ibid.

3. "Favorability Ratings: Political Leaders," *RealClear Politics*. <https://www.realclear-politics.com/epolls/other/other/FavorabilityRatingsPoliticalLeaders.html>.

4. "Presidential Job Approval Center," Gallup, last visited Jan. 11, 2021. <https://news.gallup.com/interactives/185273/presidential-job-approval-center.aspx>.

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Court routinely stays above 50 percent approval and has surpassed 60 percent several times in the last 20 years.⁵

An unpopular branch of government comes with increasing pessimism, and fewer expectations that it is up to the job of serving the American people. Regrettably, the 116th Congress will go down as one of the least-productive Congresses in recent history.⁶ Indeed, President Trump's impeachment and the COVID-19 pandemic significantly impacted Congress's productivity, but its decreasing accomplishments have followed an unfortunate and recognizable trend. But irrespective of Congress's struggles, public enthusiasm for economic growth, maintained security and even political change remains. If Congress abdicates from its responsibility, Americans will look elsewhere for help.

It is perhaps no surprise, then, that voters named Supreme Court appointments as the third most important issue for the 2020 Presidential election, only behind health care and the economy. Shockingly, the concern over future Supreme Court seats even beat out the government's handling of the coronavirus outbreak.⁷

The rhetoric of lawmakers themselves often suggests that the Supreme Court enjoys more say in legislating than the legislature itself. Last year, Sen. Mitch McConnell (R-Ky.) remarked that his "top priority" as Senate Majority Leader—a decisive role that sets the legislative agenda for the Senate—was "changing the court system" through judicial confirmations.⁸ During the recent confirmation of Justice Amy Coney

5. "Supreme Court," Gallup, last visited Jan. 11, 2021. <https://news.gallup.com/poll/4732/supreme-court.aspx>.

6. Rey Mashayekhi, "The current Congress has been the least productive in decades, a warning sign for Biden if the Senate stays red," *Fortune*, Dec. 10, 2020. <https://fortune.com/2020/12/10/biden-divided-congress-senate-georgia-runoff-mcconnell-gop-republican-majority>.

7. "Important issues in the 2020 election," Pew Research Center, Aug. 13, 2020. <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election>.

8. Sen. Mitch McConnell, "McConnell on Fox News Channel's 'Special Report with Bret Baier,'" Press Release, Feb. 2, 2020. <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-on-fox-news-channels-special-report-with-bret-baier>.

Barrett, Senate Minority Leader Chuck Schumer (D-N.Y.) remarked that her confirmation could “turn back the clock” on a number of topics, including health care, employee rights and environmental protections.⁹ Read together, these statements would suggest that congressional leaders believe that Congress is near powerless to enact new laws or improve ones successfully challenged in federal courts.

An absent legislature not only helps to politicize the judiciary, but it also disproportionately empowers the Executive Branch. Take two issues recently discussed on the 2020 campaign trail: guns and immigration. As a Senator and presidential candidate, now Vice President Kamala Harris pledged that she would give Congress 100 days to “pass reasonable gun safety laws” or—as President—she would “take executive action” to do so, supplanting the congressional role in the debate.¹⁰ Similarly, the Deferred Action for Childhood Arrivals (DACA) program, an often-debated topic in immigration policy, was created by the Department of Homeland Security (DHS) during the Obama administration, notably without congressional approval. The Trump administration attempted to unilaterally end the DACA program but was unsuccessful. In June, the Supreme Court found that the DHS’s attempt to rescind DACA violated the Administrative Procedure Act. But the decision was narrow, and there is no dispute that the Executive has the power to rescind DACA.¹¹ The Biden administration is expected to restore DACA to Obama-era protections by executive order. Here, in each instance, there was little discussion of a more permanent legislative solution. Instead, these laws are more commonly perceived to be written and enforced by the stroke of an executive’s pen.

The continued minimization of Congress’s institutional role leads to an out-of-balance reliance on other parts of our government. Courts often face the political brunt of policy debates that are more appropriately settled on legislative floors than courtrooms. All the while, the Executive Branch grows in power, leading to an outsized reliance on the president to solve all our nation’s woes and singularly dictate political priorities, setting the groundwork for abuse and insufficient debate.

One of the most prominent examples of congressional minimization is how the nation conducts its foreign policy and overly defers responsibility to the president in times of

crisis. Today, the president dictates nearly all foreign policy—including whether to go to war or enter agreements with foreign nations—while Congress is expected to follow behind and offer post hoc approval. Not only is this lack of political collaboration poor strategy, but it is also constitutionally unsound. Indeed, although the president is the commander in chief, Congress has the power to declare war and raise and support armies.¹²

Similarly, while Congress holds the “power of the purse,” defense spending and arms sales are insufficiently scrutinized. And when controversies do emerge, Congress often finds itself unable to push back against executive action, largely due to legal roadblocks Congress itself has previously established.

On the domestic front, the president enjoys significant powers to revert resources and congressional appropriations simply by declaring a national emergency—which is often undefined and determined solely by the Executive. And although emergency powers are commonly viewed as a temporary and unforeseen instance, several emergency declarations have lasted for decades and history is ripe with instances where presidents have used emergency powers to bypass Congress and enact preferred policies.

This paper introduces several important steps Congress has taken to reassert some of its vital institutional powers. It begins by discussing recent steps Congress has taken to highlight why it must reassert a greater role in emergency declarations and foreign affairs. Next, it discusses several avenues Congress can take to reassert a louder voice in how the Executive dictates foreign policy, defense spending and the uses (and potential abuses) of its emergency powers. Finally, it identifies some legislative solutions, all of which have garnered recent bipartisan support.

REASONS FOR OPTIMISM

Rebalancing our separation of powers system is a long-term effort. The first step is congressional recognition that institutional reform is necessary, regardless of what party controls Congress or the White House. On this front, there is some good news to report from an otherwise tumultuous 116th Congress, including the establishment of the Select Committee on the Modernization of Congress.

For some time, scholars and congressional observers have supported the idea of a select committee to examine itself: how Congress can improve its capacity, make it more effective and serve as a more proper counterweight in our

9. Senate Democrats, “A vote for Judge Amy Coney Barrett is a vote to eliminate health care for millions in the middle of a pandemic,” Press Release, Sept. 26, 2020. <https://www.democrats.senate.gov/newsroom/press-releases/schumer-a-vote-for-judge-amy-coney-barrett-is-a-vote-to-eliminate-health-care-for-millions-in-the-middle-of-a-pandemic>.

10. “Kamala Harris: I’ll give Congress 100 days to pass gun laws,” YouTube, CNN, April 22, 2019. https://youtu.be/rNzur_RQe4k?t=90.

11. *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020).

12. U.S. Const. arts. I, II.

separation of powers system. In January 2019, a Select Committee was finally established by a House Resolution.¹³

The structure of the Select Committee and how it would operate were deliberately unique. Unlike most congressional committees where the majority party enjoys more members and full control of the committee's agenda, the Select Committee was composed of 12 members, six from each political party. Additionally, the committee was not given legislative jurisdiction but rather tasked with investigating and providing recommendations on subjects, including "rules to promote a more modern and efficient Congress." The Select Committee was instructed to offer findings and recommendations in subsequent reports to the full House.¹⁴

The Select Committee's final report was published in October 2020. In its introduction, the Select Committee acknowledged that its "guiding principle was to make Congress work better for the American people."¹⁵ Notably, the proposed reforms included "reclaim[ing] Congress' Article One responsibilities."¹⁶ As the report found: "Congress' standing as a co-equal branch of government has softened. The executive branch has expanded in size and scope of power."¹⁷ Consequently, Congress has damaged its own "ability to effectively perform its policymaking, oversight, and representational responsibilities."¹⁸

In this area, many of the recommendations concerned strengthening congressional capacity and offering new ways to improve policy debate. While seemingly modest, these reforms serve a crucial purpose. A well-resourced Congress is a more empowered Congress, that is more capable of conducting its core legislative functions. After all, even an ambitious legislature would still struggle to fulfill its role if it lacked the necessary tools to do so.

The Select Committee's work has already served as a successful committee model, and its emphasis on Congress reclaiming many of its Article One powers has inspired other corners of Congress to take up this important mantle. In March 2020, the House Rules Committee held a hearing, jointly announced by Committee Chairman Rep. Jim McGovern (D-Ma) and Ranking Member Tom Cole (R-Ok), that offered to examine how Congress's current state:

13. H.R. Res. 6, 1116th Congress. § 201 (2019); See, e.g., "The Select Committee on the Modernization of Congress: Final Report," U.S. House of Representatives, October 2020, p. 46. [https://modernizecongress.house.gov/imo/media/doc/ModernizationCommittee_10152020r1Compressed%20\(newest%20gpo%20report\).pdf](https://modernizecongress.house.gov/imo/media/doc/ModernizationCommittee_10152020r1Compressed%20(newest%20gpo%20report).pdf) (hereinafter "Select Committee Report").

14. H.R. Res. 6, 1116th Congress. § 201 (a)-(c).

15. "Select Committee Report," p. 2. [https://modernizecongress.house.gov/imo/media/doc/ModernizationCommittee_10152020r1Compressed%20\(newest%20gpo%20report\).pdf](https://modernizecongress.house.gov/imo/media/doc/ModernizationCommittee_10152020r1Compressed%20(newest%20gpo%20report).pdf).

16. *Ibid.*, p. 215.

17. *Ibid.*, p. 217.

18. *Ibid.*

compares to what the Founders intended, how the role of the branches of government has changed over time, and how the authority of the legislative branch has diminished as a result – all with the goal of identifying opportunities to reassert congressional authority.¹⁹

Although little watched at the time, the House Rules Committee offered one of the more hopeful events of the past Congress. To begin, consider the context of when the hearing was held. In November 2019, the House Judiciary Committee announced it would hold impeachment hearings against President Trump.²⁰ After a series of dramatic hearings and partisan fighting in late December, the House impeached the President.²¹ The next month, the President was acquitted by the Senate.²² The month after, the Rules Committee met to discuss the importance of reasserting its Article One powers.

In addition to the otherwise tumultuous time to examine bipartisan ways to strengthen the First Branch, the hearing, as was written at the time: "was extraordinary for its form, its substance and its energy."²³ For starters, it adopted many of the recommendations of the Select Committee, collaboratively selecting hearing witnesses and allowing members unlimited time to sufficiently dive into the matters at hand. Next was the hearing's substance, focusing on how Congress can reassert national security and emergency authorities today almost solely controlled and directed by the president. The witnesses—falling across the ideological spectrum—identified a similar concern: Congress has shied away from policy questions touching on the military, foreign policy and domestic emergencies.²⁴

POTENTIAL LEGISLATIVE SOLUTIONS IN THE 117TH CONGRESS

Any legislation—especially legislation that reinstates some of Congress's authority by chipping away at the Executive's

19. House Committee on Rules, "Chairman McGovern, Ranking Member Cole Announce Rules Committee Hearing Examining Ways to Reassert Congress' Constitutional Authority," Press Release, Feb. 25, 2020. <https://rules.house.gov/press-releases/chairman-mcGovern-ranking-member-cole-announce-rules-committee-hearing-examining-ways>.

20. Dareh Gregorian, "House Judiciary Committee announces first impeachment hearing, invites Trump to attend," NBC News, Nov. 26, 2019. <https://www.nbcnews.com/politics/trump-impeachment-inquiry/house-judiciary-committee-announces-first-impeachment-hearing-invites-trump-attend-n1091861>.

21. Nicholas Fandos and Michael D. Shear, "Trump Impeached for Abuse of Power and Obstruction of Congress," *The New York Times*, Dec. 18, 2019. <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html>.

22. "How senators voted on Trump's impeachment," *Politico*, Feb. 5, 2020. <https://www.politico.com/interactives/2019/trump-impeachment-vote-count-senate-results>.

23. Soren Dayton and Anthony Marcum, "Some good news from the Hill: Congress is standing up for itself, together," *The Fulcrum*, March 12, 2020. <https://thefulcrum.us/congress/some-good-news-from-the-hill-congress-is-standing-up-for-itself-together>.

24. See, e.g., "Witnesses," House Committee on Rules, March 3, 2020. <https://rules.house.gov/hearing/article-i-constitutional-perspectives>.

growing powers—requires bipartisan resolve. But this is difficult to achieve due to the sizeable influence of political parties and varying institutional incentives among each party. For instance, if the president is a Democrat, congressional Democrats would be less inclined to seek legislation shrinking the president’s power. The same for congressional Republicans if a Republican lived in the White House. In either illustration, Congress’s incentive—as an institution—to strengthen itself falls by the wayside. After all, congressional members of the president’s party will have sizable influence over Executive Branch policymaking, possibly more so than in their elected role as a legislator. Accordingly, there is little incentive to award the rival party a larger seat at the policymaking table. As a result, the congressional version of the prisoner’s dilemma marches on.

Nevertheless, there is room for bipartisan optimism in the 117th Congress. Congressional momentum for discussing and considering bipartisan ways to strengthen Congress has the potential to continue for this Congress. Many of the members who have consistently discussed and considered these issues secured re-election, including prominent committee roles. The current political configuration in Congress also offers a potential opportunity. Slim margins in either chamber suggest any legislative success will be dependent on overwhelming bipartisan majorities. This may encourage Republicans (who may be eager to reign in a Democratic president) and Democrats (who expressed many frustrations with the Trump administration’s use of certain powers) to identify narrow issues of agreement.²⁵

The next step is identifying specific issues that could be addressed and legislatively corrected by Congress. The following issues addressed below—national emergencies, war powers, arms sales and defense spending—are well within Congress’s purview and all areas where the Executive Branch has enjoyed outsized control. The last Congress discussed and introduced multiple pieces of bipartisan legislation to reign in these Executive powers, but there are still opportunities for the 117th Congress to expand upon these efforts.

Emergency Powers

The post-Watergate era saw an abundance of congressional reforms, including changes in campaign finance, ethics, war powers, oversight and new scrutiny on the president’s use of emergency powers. In 1976, Congress passed the National Emergencies Act (NEA). The NEA followed a 1973 Senate Report that found “470 provisions of federal law” that “taken together, confer enough authority to rule the country

25. See, e.g., Todd Ruger and Lindsey McPherson, “To constrain a presidency, House Democrats seek Republican support,” *Roll Call*, Dec. 15, 2020. <https://www.rollcall.com/2020/12/15/to-constrain-a-presidency-house-democrats-seek-republican-support>.

without reference to normal constitutional processes.”²⁶ The same report concluded that “a legislative formula needs to be devised which will provide a regular and consistent procedure by which any emergency provisions are called into force” as well as “effective oversight” and “a regular and consistent procedure for the termination of such grants of authority.”²⁷

The NEA was designed to resolve some of these concerns. As summarized by the Brennan Center’s Elizabeth Goitein:

Under this law, the president still has complete discretion to issue an emergency declaration—but he must specify in the declaration which powers he intends to use, issue public updates if he decides to invoke additional powers, and report to Congress on the government’s emergency-related expenditures every six months. The state of emergency expires after a year unless the president renews it, and the Senate and the House must meet every six months while the emergency is in effect “to consider a vote” on termination.²⁸

The most significant tool Congress enjoyed under the original version of the NEA was the “legislative veto,” meaning Congress could terminate any national emergency by concurrent resolution and without the president’s signature.²⁹

But despite its good intentions, the NEA struggled to reign in the potential abuse of emergency powers. The largest setback was the Supreme Court’s 1983 decision in *INS v. Chadha*, which held the legislative veto unconstitutional.³⁰ As a result, under the modern version of the NEA, if Congress wishes to terminate an emergency, it must gain the president’s support (typically the same president who declared the emergency in the first place) or enough votes to override a veto. Other elements of the NEA have, too, lost their teeth. The requirement that Congress meet every six months to consider emergency declarations has been largely ignored, and presidents routinely renew emergency declarations with little fanfare or public criticism. Under the NEA, numerous declared emergencies—spanning decades—are routinely

26. Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency*, U.S. Senate, Nov. 19, 1973, p. iii. <https://ia802500.us.archive.org/3/items/senate-report-93-549/senate-report-93-549.pdf>.

27. *Ibid.*, p. 14.

28. Elizabeth Goitein, “The Alarming Scope of the President’s Emergency Powers,” *The Atlantic*, January 2019. <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

29. Pub. L. No. 94-412, § 202(a), 90 Stat. 1255, 1256 (1976).

30. 462 U.S. 919 (1983).

renewed by the Executive Branch.³¹ The earliest ongoing declaration, announced amid the Iranian Hostage Crisis in 1979, blocks certain Iranian government property in the United States.³² Over 30 ongoing emergencies still remain today.³³

Consequently, the current regime designed to check the potential abuse of emergency declarations is nearly as fragile as it was 45 years ago. Today, over 120 statutory powers are potentially available to the president after an emergency is declared.³⁴ In recent history, the vast majority of emergency declarations have relied on the International Emergency Economic Powers Act (IEEPA), which is “generally used to impose economic sanctions on foreign adversaries.” But other statutes easily available to the president offer a number of drastic powers. For example, a Section of the Communications Act, which “authorizes the president to take over or shut down wire communications facilities, which could be interpreted to give the president control over U.S. Internet traffic.”³⁵

The latest example of how the current emergency power regime can be used to bypass Congress’s will was President Trump’s 2019 declaration of a national emergency at the southern border. As widely known, a key tenet of President Trump’s 2016 campaign platform was constructing a wall along the nation’s southern border. After the election, Congress and the Trump administration could not agree on appropriations for a wall. To bypass Congress’s resistance to appropriating funds, President Trump declared a national emergency, citing the NEA and a few, now unlocked statutes which offered the president the authority to order new “military construction projects” with funds originally appropriated by Congress for other projects.³⁶

In response, a majority of lawmakers in both the House and Senate voted to terminate the declared national emergency. In the Senate, 12 GOP lawmakers supported a reso-

lution to end the emergency. Sen. Roger Wicker (R-Miss.), for instance, supported President Trump’s efforts “to secure our nation’s border,” but cautioned the “precedent we set this year might empower a future liberal President to declare emergencies to enact gun control or to address ‘climate emergencies,’ or even to tear down the wall we are building today.”³⁷ Sen. Rob Portman (R-OH) similarly argued that the president’s use of the NEA was unprecedented and “opens the door for future presidents to implement just about any policy they want and to take funding from other areas Congress has already decided on without Congress’ approval.”³⁸ Nevertheless, under the modern version of the NEA, Congress could not gain a veto-proof majority to override the president’s inevitable veto.

In response, Congress has since considered several pieces of legislation that would take back some of its authority during genuine emergencies. Interestingly, although nearly all Democrats were critical of President Trump’s emergency declaration, most bills seeking to reform the NEA were introduced by congressional Republicans. For example, Reps. Andy Biggs (R-AZ) and Chip Roy (R-TX) introduced legislation that would terminate emergency declarations after 30 days unless extended by Congress.³⁹ Rep. Mike Gallagher (R-WI) and Sens. Rand Paul (R-KY) and Ron Wyden (D-OR) all introduced bills similarly seeking to amend the NEA.⁴⁰

The bill that saw the most progress during the 116th Congress was Sen. Mike Lee’s (R-UT) ARTICLE ONE Act.⁴¹ Like other bills, the Act would end any future emergency declaration after 30 days, unless Congress extended the emergency by joint resolution. Past emergency declarations would expire in one year unless renewed by Congress.⁴² Before the end of the 116th Congress, the ARTICLE ONE Act had 19 co-sponsors. In July 2019, the bill was reported out of the Senate Homeland Security and Governmental Affairs Committee, but it did not reach the floor before the 116th Congress ended in January.

However, support most likely remains for the bill and it is one of the more promising reforms the 117th Congress could consider. In addition, there appears to be growing inter-

31. See, e.g., “Declared National Emergencies Under the National Emergencies Act, 1978-2018,” Brennan Center for Justice, Dec. 5, 2018. <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

32. President Jimmy Carter, “Executive Order 12170,” National Archives, Nov. 14, 1979. <https://www.archives.gov/federal-register/codification/executive-order/12170.html>.

33. Ryan Struyk, “Trump’s wall would be the 32nd active national emergency,” CNN, Jan. 10, 2019. <https://www.cnn.com/2019/01/07/politics/trump-wall-active-national-emergency/index.html>.

34. See, e.g., “A Guide to Emergency Powers and Their Use,” Brennan Center for Justice, Dec. 5, 2018. <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

35. Elizabeth Goitein, “How Congress is pushing back against Trump’s unprecedented use of emergency powers,” *The Washington Post*, Sept. 25, 2020. <https://www.washingtonpost.com/politics/2020/09/25/how-congress-is-pushing-back-against-trumps-unprecedented-use-emergency-powers/>.

36. See Pres. Proc. No. 9844, 84 FR 34; 10 U.S.C. § 2808(a). <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states>.

37. Sen. Roger Wicker, “Wicker Statement on Efforts to Build the Wall and Preserve the Separation of Powers,” Press Release, March 12, 2019. <https://www.wicker.senate.gov/public/index.cfm/press-releases?ID=C8526B40-AC27-46D4-B431-E9D1D27405E4>.

38. Colby Itkowitz, “These 12 Republicans defied Trump and voted to overturn his declaration of an emergency at the border,” *The Washington Post*, March 14, 2019. https://www.washingtonpost.com/politics/these-12-republicans-defied-trump-and-voted-to-overturn-his-declaration-of-an-emergency-at-the-border/2019/03/14/3fd67890-4682-11e9-90f0-0ccfeec87a61_story.html.

39. H.R. 1720, 116th Cong; H.R. 1755, 116th Congress.

40. H.R. 1843, 116th Congress; S. 1809, 116th Congress.

41. Act, S. 765, 116th Congress; See, e.g., § 204.

42. Id. at § 202(b).

est in reforming the NEA in the House. Last Congress, the Republican Study Committee—an influential caucus of House Republicans—released a report listing the recommendation to “achieve greater efficiency, accountability and reform in the federal government.”⁴³ The report joined a growing bipartisan perspective that “the NEA be modified to restore the ability of Congress to act as a co-equal branch to the executive, even and especially during times of crisis.”⁴⁴ Even more, in April 2020, 14 House Democrats sponsored the “Congressional Power of the Purse Act,” which in one section borrowed heavily from the ARTICLE ONE Act.⁴⁵

War Powers and the 2001 and 2002 AUMFs

While the Constitution designates the president as the “commander in chief,” Congress is tasked with several vital military and wartime responsibilities. These include the ability to declare war; raise and support armies; provide and maintain a navy; make rules for the government and regulation of the land and naval forces; and “provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.”⁴⁶

Although the Constitution envisions shared war powers between Congress and the Executive, the debate over the scope of Congress’s role is as old as the nation itself. In *Federalist* No. 69, Alexander Hamilton reassured 18th century Americans that the president “would amount to nothing more than [...] first General and admiral of the Confederacy.” However, by the Civil War, “Lincoln wielded wartime powers [...] that would have shocked most founders.”⁴⁷ Yet Congress was still extensively involved in the war effort—at times to the president’s likely annoyance. In one example, during the Civil War, Congress established the Joint Committee on the Conduct of the War, deemed by one columnist as: “a mischievous organization.”⁴⁸ But the committee would ultimately serve as “the driving engine of congressional war policy, prodding and pressuring the president toward more decisive action against slavery and more aggressive military action.”⁴⁹

Slowly over time, the president’s war powers have vastly expanded to the detriment of adequate congressional consultation and oversight. Although the Framers believed presidents had the sole authority to order the military “to ‘repel sudden attacks,’” the rationale has been expanded by the Executive Branch in recent times include any instance “that doing so would serve the ‘national interests,’ loosely conceived, as long as the force does not pose a great risk of American casualties or significant escalation.”⁵⁰ Indeed, modern American history is replete with examples of presidents using military force abroad without congressional authorization. The Congressional Research Service, for example, has identified dozens of instances where armed forces were used “abroad in situations of military conflict or potential conflict” without congressional approval.⁵¹

Yet, by the time of the Vietnam War, Congressional appetite to curb some of the president’s wartime powers had grown. And in 1973, Congress passed the War Powers Resolution (WPR), its most ambitious attempt to curb the Executive’s expanding war powers. The WPR requires the president, “in every possible instance,” to consult with Congress when armed forces are sent “into hostilities or into situations where imminent involvement in hostilities is clearly indicated.”⁵² The president must also provide a report, detailing the “circumstances necessitating the introduction” of forces, the legal authority to do so, and “the estimated scope and duration of hostilities.”⁵³ From there, unless Congress approves further action, the president must “terminate any use of the [...] Armed Forces” after 60 (or sometimes 90) days.⁵⁴

Unsurprisingly, President Nixon vetoed the WPR, arguing it was unconstitutional and would “undermine” the country’s ability “to act decisively and convincingly in times of international crisis.”⁵⁵ But Congress gained the necessary two-thirds majority which overrode the president’s veto, and the WPR became law in November 1973. Yet ever since, presidents across administrations have effectively undermined the WPR. One strategy has been to interpret the termination deadline “as an effective authorization to use force within that window.”⁵⁶ Another is to broadly stretch the meaning of “hostilities,” which is not defined in the WPR. The Obama

43. Rep. Mike Johnson et al., “Power, Practices, Personnel: 100+ Commonsense Solutions to a Better Government,” Republican Study Committee, p. 5. https://rsc-johnson.house.gov/sites/republicanstudycommittee.house.gov/files/GEAR%20Report_Single%20Spread%20FINAL.pdf.

44. *Ibid.*, pp. 18-19.

45. H.R. 6628, 116th Congress.

46. U.S. Const. art. I, § 8.

47. Matthew Waxman, “Presidents and War Powers,” *Lawfare*, Nov. 15, 2018. <https://www.lawfareblog.com/presidents-and-war-powers>.

48. “Joint Committee on the Conduct of the War,” U.S. Senate, last visited Jan 11, 2021. <https://www.senate.gov/about/powers-procedures/investigations/joint-committee-conduct-of-war.htm>.

49. Fergus M. Bordewich, *Congress at War: How Republican Reformers Fought the Civil War, Defied Lincoln, Ended Slavery, and Remade America* (Alfred A. Knopf, 2020), p. 102.

50. Bob Bauer and Jack Goldsmith, *After Trump: Reconstructing the Presidency* (Lawfare Press, 2020), pp. 282-84.

51. Barbara Salazar Torreon, *Instances of Use of United States Armed Forces Abroad, 1798-2020*, Congressional Research Service, July 20, 2020, p. 1. <https://fas.org/sgp/crs/natsec/R42738.pdf>.

52. 50 U.S.C. § 1542.

53. 50 U.S.C. § 1543.

54. 50 U.S.C. § 1544.

55. President Richard Nixon, “Message from the President of the United States Vetoing House Joint Resolution 542, A Joint Resolution Concerning War Powers of Congress and the President,” The White House, Oct. 24, 1973. <https://www.senate.gov/legislative/vetoes/messages/NixonR/HJRes542-Hdoc-93-171.pdf>.

56. Bauer and Goldsmith, p. 287.

administration, for instance, concluded that the U.S. military's involvement in Libya—which included a four-day air campaign that saw the destruction of 100 Libyan targets—did not count as “hostilities” under the law.⁵⁷

Contributing to the WPR's increasing ineffectiveness, Congress has only in recent years attempted to use the WPR to try and end an executive-led military action abroad.⁵⁸ Notably, within the last two years, President Trump was forced to veto two bipartisan attempts to block the use of military force. The first—led by Sens. Mike Lee (R-UT), Bernie Sanders (I-VT) and Chris Murphy (D-CT)—sought “to end U.S. support for the Saudi-led military campaign in Yemen.”⁵⁹ The second instance followed the ordered killing of Iranian military leader Qasem Soleimani, where a bipartisan group of lawmakers tried to direct the president to terminate hostilities against Iran “unless explicitly authorized” to do so by Congress.⁶⁰

The WPR does not give Congress enough resources to object to military actions overseas. And given the bipartisan coalitions formed in the 116th Congress, more members may consider amending or replacing the WPR in the 117th Congress. One immediate and modest step would be to define “hostilities” under the statute, ending legal ambiguity and overly broad interpretations by the Executive Branch.⁶¹ This measure was previously proposed by Rep. Mike Gallagher (R-WI), who, while voting against the Iran WPR, argued that Congress should replace the WPR “with something that better defines “hostilities” and more fully reclaims Article One responsibilities.”⁶²

In the end, amending the WPR may address some problems. But Congress must also examine other broad permissions given to the Executive to conduct military action overseas with little consultation or oversight. For nearly twenty years, Presidents across three administrations have primarily used

the 2001 and 2002 congressional Authorizations for the Use of Military Force (AUMF) to carry out most overseas military actions.

The 2001 AUMF broadly authorizes the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the” the Sept. 11 terrorist attacks.⁶³ Since it was passed, the 2001 AUMF has been used by three administrations as the legal justification for military action in nearly 20 countries.⁶⁴ Each time, there was no debate or vote in Congress.

Today's Congress is vastly different from the one in 2001. The youngest member of the 117th Congress was six years old when the 2001 AUMF was passed.⁶⁵ And only one in six House members who voted for it are still in Congress today.⁶⁶ No one who was in Congress twenty years ago could imagine how the AUMF would be used today, and this Congress should assert their constitutional voice and seriously debate repealing and replacing the 2001 AUMF.

Fortunately, like other Article One reforms, modernizing the 2001 AUMF gained bipartisan interest in the 116th Congress. Last year, 14 House members joined a bipartisan bill to limit the expansion of the 2001 AUMF, which would have barred authorization for the use of force “in any country in which the [U.S.] Armed Forces are not engaged in hostilities.”⁶⁷ Similar bipartisan ideas in the 117th Congress should also consider additional specificity and sunsets, so that Congress may end broad, multi-decade military authorizations to the Executive Branch.

Unlike the 2001 AUMF, the 2002 AUMF should likely be repealed and not replaced. Passed on the eve of war against Iraq, the 2002 AUMF authorized the President:

to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to [...] defend the national security of the United States against the continuing threat posed by Iraq.⁶⁸

57. Anthony Marcum, “It's time to amend the War Powers Resolution,” LegBranch.org, Jan. 14, 2020. <https://www.legbranch.org/its-time-to-amend-the-war-powers-resolution>.

58. See, e.g., Sarah Binder, “The Republican Senate just rebuked Trump using the War Powers Act — for the third time. That's remarkable,” *The Washington Post*, Feb. 14, 2020. <https://www.washingtonpost.com/politics/2020/02/14/republican-senate-just-rebuked-trump-using-war-powers-act-third-time-thats-remarkable>.

59. S.J. Res. 7, 116th Congress; Karoun Demirjian, “Senate rebukes Trump with vote ordering U.S. military to end support for Saudi-led war in Yemen,” *The Washington Post*, March 13, 2019. https://www.washingtonpost.com/powerpost/senate-rebukes-trump-with-vote-ordering-us-military-to-end-support-for-saudi-led-war-in-yemen/2019/03/13/da6a24a8-45c2-11e9-8aab-95b8d80a1e4f_story.html; “Roll Call, Bill Number: S. J. Res. 7,” Clerk, U.S. House of Representatives, April 4, 2019. <https://clerk.house.gov/Votes/2019153>.

60. S.J. Res. 68, 116th Congress; “Roll Call, Bill Number: S. J. Res. 68,” Clerk, U.S. House of Representatives, March 11, 2020. <https://clerk.house.gov/Votes/2020101>.

61. See, e.g., Oona A. Hathaway, “How to Revive Congress's War Powers,” Oct. 22, 2019. <https://ssrn.com/abstract=3436924>.

62. Rep. Mike Gallagher, “Gallagher Statement on War Powers Resolution,” Press Release, Jan. 9, 2020. <https://gallagher.house.gov/media/press-releases/gallagher-statement-war-powers-resolution>.

63. 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

64. Matthew Weed, *Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress*, Congressional Research Service, Feb. 16, 2018. <https://fas.org/spp/crs/natsec/pres-aumf.pdf>.

65. Katie Shepherd, “North Carolina Republican Madison Cawthorn, 25, will be the youngest member of Congress,” *The Washington Post*, Nov. 4, 2020. <https://www.washingtonpost.com/nation/2020/11/04/north-carolina-madison-cawthorn-election>.

66. Rep. Anthony Brown, et al., “Bipartisan lawmakers introduce bill to limit further expansion of 2001 Authorization for Use of Military Force,” July 9, 2020. <https://thehill.com/blogs/congress-blog/politics/506621-bipartisan-lawmakers-introduce-bill-to-limit-further-expansion>.

67. H.R. 7500, 116th Congress.

68. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

But like the 2001 AUMF, the 2002 AUMF has been used to justify a broad number of military actions—inside and outside Iraq. In 2014, for example, the Obama administration cited the 2002 AUMF as partial justification for airstrikes against the Islamic State of Iraq and Syria.⁶⁹ Last January, the Trump administration also cited the 2002 AUMF as one legal basis for killing Iranian official Qasem Soleimani.⁷⁰

Like the 2001 AUMF, a bipartisan group has emerged in Congress seeking to finally address its broadening scope and loose military deference to the Executive Branch. In March 2019, Sens. Todd Young (R-IN) and Tim Kaine (D-VA) introduced legislation to repeal the 2002 AUMF.⁷¹ In a separate statement, the Senators argued that legislation was necessary for “reasserting Congress’ vital role in not only declaring wars, but in ending them.”⁷²

Defense Spending and Arms Sales

The Constitution is clear: Congress has the federal “power of the purse.” Article One, Section Seven discusses how Congress may introduce “bills for raising revenue.” Section Nine says: “no money shall be drawn from the Treasury, but in consequence of appropriations made by law.” Section Eight specifies Congress’s financial power in several areas of foreign policy, including “to regulate commerce with foreign nations,” “to raise and support armies,” “to provide and maintain a navy,” “make rules for the government and regulation of the land and naval forces,” and “to make all laws which shall be necessary and proper for carrying into execution” these powers.⁷³ Yet when it comes to defense spending and arms sales, Congress often takes a backseat and allows the Executive to take the wheel.

For starters, defense spending is often the least scrutinized aspect of the federal budget. But in the wake of multi-trillion-dollar stimulus packages to offset the economic damage of the COVID-19 pandemic and consistently greater spending and deficits every fiscal year, no area of the budget should be considered entirely off-limits. Some Republicans

have recently discussed addressing the nation’s spending and debt woes more seriously in the next Congress.⁷⁴

Of course, even if some of the renewed interest in spending and debt is politically designed to combat the new Biden administration, the rhetoric is nevertheless welcome. And when it comes to defense spending, plenty of bipartisan reforms from the 116th Congress are already on the table. For example, in the Senate, Sens. Rand Paul (R-KY) and Bernie Sanders (I-VT) have consistently argued for more restrained Pentagon spending, and some Republican Senators—including Sens. Chuck Grassley (R-Iowa), Mike Enzi (R-Wyo.), and Mike Braun (R-Ind.)—have recently taken “steps to improve [the Department of Defense’s] inconsistent audit efforts.”⁷⁵

If Congress shies away from significant budget cuts, it still has plenty of avenues to reassert its voice in defense spending debates. For instance, Congress should take steps to more directly scrutinize defense spending and ensure that its extraordinary budget is not padded with inefficiency or waste. Unfortunately, in 2020, Congress took a significant step back by eliminating the Defense Department’s Chief Management Officer (CMO), a role that was created in 2018 to “slash spending and prune the Pentagon’s unwieldy bureaucracy.”⁷⁶ In two years, the office claims to “have validated \$37 billion in savings, eliminated hundreds of unnecessary regulations, and created the first unified Fourth Estate budget in history.”⁷⁷ In a September 2020 letter, 13 bipartisan members of Congress pleaded with the National Defense Authorization Act conferees to save the position.⁷⁸ But despite the CMO’s success, Congress’s most recent defense authorization bill dismantled the office. The 117th Congress should again seek bipartisan support to re-establish the position.

In addition to providing greater scrutiny of defense spending, Congress should be more active in where—and to whom—the United States sells military weapons. Under the Arms Export Control Act (AECA), the president must usually give Congress 30-days’ notice before the United States sells

69. Charlie Savage, “Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says,” Sept. 12, 2014, *The New York Times*, <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>.

70. Maggie Haberman and Catie Edmondson, “White House Notifies Congress of Suleimani Strike Under War Powers Act,” *The New York Times*, Jan. 6, 2020. <https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html>.

71. S.J. Res. 13, 116th Congress.

72. Sen. Tim Kaine, “Kaine & Young Introduce Bill To Repeal 1991 & 2002 AUMFs, Formalizing End Of Gulf & Iraq Wars,” Press Release, March 6, 2019. <https://www.kaine.senate.gov/press-releases/kaine-and-young-introduce-bill-to-repeal-1991-2002-aumfs-formalizing-end-of-gulf--iraq-wars>.

73. U.S. Const. art. I, §§ 7-9.

74. See, e.g., Jordain Carney, “Republicans ready to become deficit hawks again under a President Biden,” *The Hill*, Nov. 27, 2020. <https://thehill.com/homenews/news/527197-republicans-ready-to-become-deficit-hawks-again-under-a-president-biden>.

75. Andrew Lutz and Jonathan Bydtek, “Defund the Pentagon: The Conservative Case,” *Politico*, July 16, 2020. <https://www.politico.com/amp/news/magazine/2020/07/16/defund-the-pentagon-the-conservative-case-366066>.

76. Travis J. Tritten, “Congress to End Attempt at Managing Pentagon Like a Business,” *Bloomberg*, Dec. 10, 2020. <https://about.bgov.com/news/congress-to-end-experiment-in-managing-pentagon-like-a-business>.

77. Aaron Mehta, “‘They need to answer to this’: Pentagon CMO pushes back as Congress moves to shutter office,” *Defense News*, Dec. 4, 2020. <https://www.defense-news.com/pentagon/2020/12/04/they-need-to-answer-to-this-pentagon-cmo-says-as-congress-moves-to-shutter-office>.

78. Sen. Todd Young, “Young, Manchin Lead Call for NDAA Conferees To Save DoD Chief Management Officer Position Held by Hoosier Lisa Hershman,” Press Release, Sept. 25, 2020. <https://www.young.senate.gov/newsroom/press-releases/young-manchin-lead-call-for-ndaa-conferees-to-save-dod-chief-management-officer-position-held-by-hoosier-lisa-hershman>.

military weapons to another government.⁷⁹ Within that time, Congress may “[pass] legislation prohibiting or modifying the proposed sale.”⁸⁰ However, in May 2019, the State Department announced an “emergency notification” of immediate arms sales to “Jordan, the United Arab Emirates, and Saudi Arabia totaling approximately \$8.1 billion.”⁸¹ To bypass Congress, the Trump administration used an emergency exception in the AECA, which allows the president to ignore the typical waiting period for arms sales if he declares the sale is “in the national security interest of the United States.”⁸²

Lawmakers—across the ideological spectrum—were frustrated. During a hearing with a State Department official, House Foreign Affairs Committee Chairman Eliot Engel (D-NY) called the move “phony” and “an abuse of the law.”⁸³ Sen. Lindsey Graham (R-SC) argued that Congress should “do away with the emergency exception.”⁸⁴ Days later, Congress passed three bipartisan resolutions objecting to the arms sales.⁸⁵ The resolutions were—expectedly—vetoed by President Trump.⁸⁶

Among the lessons learned from the 116th Congress, the Legislative Branch should examine how to gain a more significant voice in blocking arms sales it disapproves. As indicated by Sen. Graham, one method is to eliminate (or significantly revise) the emergency exception to the AECA. Importantly, as when Congress failed to override President Trump’s emergency declaration at the southern border, Congress must look to procedures that sidestep the two-thirds vote requirement to override presidential vetoes. One proposal is “flipping the script,” which requires “an affirmative vote, or a joint resolution of approval” by Congress before finalizing any arms sale.⁸⁷ Indeed, “had such procedures been in place in 2019, Congress could have acted on its bipartisan consen-

sus to block bomb sales to Saudi Arabia.”⁸⁸ The same bipartisan group that objected to the 2019 sale would certainly be interested in seeking such reforms.

CONCLUSION

Gridlock, partisan rhetoric and last-minute emergency bills often appear as the hallmarks of Congress. But now and then, it is prudent to see the glass as half full. For all the drama in the 116th Congress, the First Branch took serious and substantive steps to reclaim several of its wartime and emergency authorities. Reforms such as amending the National Emergencies Act and War Powers Resolution, revising the 2001 and 2002 AUMFs, and placing more controls on Pentagon spending and arms sales were all issues seriously discussed and advocated for in the 116th Congress. Encouragingly, each plan was bipartisan, offering a more hopeful forecast for the 117th Congress.

ABOUT THE AUTHOR

Anthony Marcum is a fellow for the R Street Institute’s Governance Program, where he focuses on the United States separation-of-powers system. Previously, he was an attorney and federal law clerk.

79. Ian F. Fergusson, *The U.S. Export Control System and the Export Control Reform Initiative*, Congressional Research Service, Jan. 28, 2020, p. 5. <https://crsreports.congress.gov/product/pdf/R/R41916>.

80. *Ibid.*

81. Michael R. Pompeo, “Emergency Notification of Arms Sales to Jordan, the United Arab Emirates, and Saudi Arabia,” Press Statement, U.S. Department of State, May 24, 2019. <https://www.state.gov/emergency-notification-of-arms-sales-to-jordan-the-united-arab-emirates-and-saudi-arabia>.

82. 22 U.S.C. § 2776(b)(1).

83. Karoun Kemirjian, “Trump ally Lindsey Graham ready to revoke president’s emergency power on arms sales,” *The Washington Post*, June 12, 2019. https://www.washingtonpost.com/world/national-security/house-lawmakers-to-grill-state-department-over-trumps-arms-sales-to-saudi-arabia-uae/2019/06/12/9bbc148e-8d05-11e9-adf3-f70f78c156e8_story.html.

84. *Ibid.*

85. See, e.g., S.J. Res. 36, 37, & 38, 116th Congress.

86. Merrit Kennedy, “Trump Vetoes Bills Intended To Block Arms Sales To Saudi Arabia,” NPR, July 25, 2019. <https://www.npr.org/2019/07/25/745200244/trump-vetoes-bills-intended-to-block-arms-sales-to-saudi-arabia>.

87. Dan Mahanty and Annie Shiel, “Time to flip the script on congressional arms sales powers,” *The Hill*, March 15, 2020. <https://thehill.com/opinion/national-security/487347-time-to-flip-the-script-on-congressional-arms-sales-powers>.

88. *Ibid.*