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Corker-Kaine Would Make Executive Abuse of the War Power Official

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Much to their credit, Senators Tim Kaine (D., Va.) and Bob Corker (R., Tenn.) have spoken out for years against the executive's adoption of the power to engage in undeclared war. Kaine even gave a speech about undeclared war at the Cato Institute while his own party held the White House. The pair ought to be commended for this, and for being examples of that rare bird: a member of Congress who recognizes his essential constitutional role in the conduct of war.

For years, both senators have called attention to one of the most blatant legal fictions in American politics: the notion that the 2001 Authorization for Use of Military Force (AUMF), which granted authorization to conduct operations against the perpetrators of the September 11 terrorist attacks, is a free-for-all war pass, even after the killing of Osama bin Laden in 2011.

To this end, they have advocated a new AUMF to replace the existing one and provide sanction to the currently unconstitutional military operations that are now underway. This is essential. And yet, as ever, the devil is in the details. The Corker-Caine AUMF provides a blank check for the executive branch to start wars without authorization from Congress. While this arrangement has been the status quo for several years now, it has been easy to argue the de jure illegality of such wars, because the language of the 2001 AUMF is so specific that it could not possibly apply to the new wars.

The Corker-Kaine legislation blows that language open. Despite the best intentions of its authors, the new law contains open-ended language that would allow presidents to launch new wars, ostensibly through the proper channels. It would grant congressional authorization for war *in form but not function*. Tim Kaine rightly pilloried Congress for treating the 2001 war authorization as a blank check, but his own legislation is an *actual* blank check for future wars. The Corker-Kaine legislation provides authorization for the military operations currently underway, but it also creates an avenue for a president seeking to pursue a new war to sidestep the process. The executive would simply have to issue a report on the relevant country or group

and provide it to the relevant congressional committees, and it would be added to the grandfathered-in authorization. This makes a mockery of the constitutional war power.

The traditional understanding of the legislature, as articulated by Locke, holds that the legislative power cannot transfer "to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others." Congress simply does not have the power to formally grant its own power to the presidency. Constitutionally, the executive does have the right to inform Congress about the idea of war — but this is not meant to constitute authorization. Under the proposed legislation, however, authorization would be automatic.

James Madison, responding to a controversy over the president's ability to unilaterally make a foreign-policy decision (in this case, a proclamation of neutrality) in 1793, argued that

the power to declare war including the power of judging of the causes of war is *fully*and *exclusively* vested in the legislature: that the executive has no right, in any case to decide the question, whether there is or is not cause for declaring war: that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper: and that for such more than for any other contingency, this right was specially given to the executive.

In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.

Which is to say that the president may raise the question of war and peace, but only Congress can decide what the United States will do. Madison not only argues in terms of legality under the constitution, but also lays out how the incentive structure of the presidency is inherently unsuited to decide the question of war.

It is the executive branch that directs the physical force of the military, spends the money that has been allocated to it, and provides "honors and emoluments of office" during the course of war. The sheer scope of all this underlines why the executive branch is not allowed to declare war — for war allows it to behave like a patron on a grand scale.

Senators Kaine and Corker have correctly identified a jarring and repeated case of lawless executive-branch behavior. However, their proposed solution would actually grant congressional backing to the status quo and hamper the exercise of an essential congressional war power going forward. They should revisit the legislation with their own critique of the status quo in mind.

Constitutionalists' mantra in this case should be "Repeal, don't replace." Madison observed the "axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." Instead of the Kaine-Corker AUMF, which gives presidents leeway to go to war however they see fit, Congress should jealously guard its war power and authorize only specific operations. And when the executive exceeds the authority of the authorization, as successive presidencies have done with the 2001 version, it should be, as Madison said, disarmed.