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Foreign Policy and the Constitution

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U.S. Senator from Arkansas



TOM COTTON was elected to the U.S. Senate from Arkansas in 2014, following one term in the U.S. House of Representatives. He serves on the Senate Banking Committee, the Senate Intelligence Committee, and the Senate Armed Services Committee. A graduate of Harvard College, he studied government at the Claremont Graduate School and received his J.D. from Harvard Law School in 2002. In 2005, he was commissioned as a 2nd Lieutenant in the U.S. Army, rose to 1st Lieutenant, and served deployments in Iraq with the 101st Airborne and in Afghanistan with a Provincial Reconstruction Team. His military decorations include the Bronze Star Medal, Combat Infantry Badge, and Ranger Tab.

The following is adapted from a speech delivered on September 15, 2015, at Hillsdale College's Sixth Annual Constitution Day Celebration in Washington, D.C.

In the last week, President Obama moved ahead with a nuclear-arms control agreement with a mortal and unrepentant enemy, having the support only of a rump, partisan minority in Congress. This dangerous turn of events offers an occasion to reflect on the state of American foreign policy today and on the Constitution's place in our foreign policy.

Over the past 25 years, a major preoccupation of foreign-policy elites has been to forge a new grand strategy for the United States. Scholars and practitioners tend to see a foreign policy adrift after the fall of the Soviet Union, when containment of Soviet expansion became obsolete overnight. Seeing no major ideological or military rival, some believed the Owl of Minerva had taken flight, and that the end of history had reduced the need for strategic thinking. Alas, that fantasy came crashing down along with two big towers 14 years ago this month. Again, foreign-policy elites searched for a new strategy, this time for the age of Islamic terror.

Circumstances do change, and foreign policy, often a matter of prudence, must change with them to achieve the same ends. Too often, however, the search for a new strategy simply becomes the search for something *new*. This way of thinking carries a hint of disdain for the principles and foreign-policy traditions of our past—and disdaining those principles and traditions is a mistake. When the makers of breakfast cereals roll out a new product, after all, they say it’s “new *and* improved,” because the former doesn’t necessarily imply the latter.

Likewise, every new and fashionable idea in foreign policy isn’t necessarily an improvement. To the contrary, we ought to pay some respect to older foreign policy ideas—the ideas that took us from a small and weak colonial outpost to the greatest superpower in history in just 170 years. With that track record, common sense would suggest there’s something special we can learn from the Constitution—and the strategies that arose from it—to help us chart our way in the world.

* * *

Our Founders gave us a constitutional democracy, a system of government that informs our foreign policy just as it does our domestic policy. For many foreign-policy elites, especially those abroad, this is a serious problem for U.S. foreign policy. The Constitution empowers the people, these critics say, and the people, they believe, can be ignorant, emotional, and fickle, swinging

wildly from war mongering to isolationism, from moralism to callousness. Far better, they say, is what Walter Mead has called the “auteur theory of foreign policy”—a foreign policy guided by a brilliant strategist, insulated from the unruly masses.

One hears an echo of this viewpoint in the praise for what these critics see as the coherent and decisive strategic thinking of Russia’s Vladimir Putin and China’s Xi Jinping. Putin is praised as a brilliant strategist who is redefining 21st-century warfare. Xi has been called a game-changer in China’s rise, one whose ambitions and power rival those of Mao Zedong and Deng Xiaoping.

I’ll admit that Putin and Xi may have stolen a march on our president here and there. But that’s an indictment of President Obama’s particular abilities and policies, not of our system. By the traditional measures of international influence—economic might, per capita measures of well-

being, military and trade cooperation agreements, cultural weight—the United States far outpaces both Russia and China, as well as the rest of the world.

And while a brooding auteur may in fact have strategic foresight, intellect, and prudence, no man is infallible, no matter how talented. Napoleon, brilliant general that he was, still marched the Grand Armée across the Nieman River into Russia. Otto von Bismarck toiled for decades to unify the German states, only to see his fragile work undone a few years later by Wilhelm II’s militarism and adventurism. In the

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[Latin]: in the first place

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same way, I believe that over time Putin and Xi—to say nothing of North Korea’s Kim Jong Un or the ayatollahs in Tehran—will also miscalculate and suffer strategic setbacks.

But the United States is different from these regimes. Our constitutional system doesn’t depend on brilliant leaders. “Enlightened statesmen,” as Madison wrote in *Federalist* 10, “will not always be at the helm.” Our system is based on individual rights, safeguarded by well crafted, ultimately democratic institutions. While we always hope for wise leaders, our Constitution works in their absence by filtering the wisdom of the people through those institutions.

This approach couldn’t be more at odds with the auteur theory of foreign policy. From that perspective, our system looks like some kind of policy-making Frankenstein. Authority is divided between the executive and the legislature, and the executive itself is divided among competing departments. The president and secretary of state serve short tenures compared to the kings and ministers of the Old World. Equal representation of states in the Senate gives considerable influence to regional interests. The arcane rules of the Senate, along with the separation of powers itself, slow the whole process down. How could this ever work?

Yet it does, again and again. The talent of a single leader or a small group with outsized control over foreign policy can never match the moderation, prudence, and self-correcting capability of our constitutional democracy over the long term. And in international relations, it’s the long term that counts.

In the realm of domestic policy, these ideas are familiar. Our constitutional system works to ensure that all the individuals, interests, factions, lobbies, and others who influence and are influenced by domestic policy are more or less satisfied—or perhaps minimally dissatisfied. And the same thing plays out in foreign policy. America’s foreign policy tradition is flexible, agile, and

multifaceted, and it therefore tends to produce positive results for us in a complicated world.

Again, I cannot stress enough how alien and unfashionable this way of thinking is in Foggy Bottom and in the West Wing, not to mention European ministries. Among many foreign-policy elites, these democratic influences are something to be suffered and overcome—as we’ve seen most recently in the debate about the Iran nuclear deal. In the end, though, we usually survive mistakes by particular leaders because leaders are not the foundation of our system. The foundation of U.S. foreign policy is the views and values of the American people, filtered by elected representatives through democratic institutions, proven by time.

This foreign policy tradition is not an accident. When designing the Constitution, the Founders were very conscious of the need to invest the federal government with strong foreign-affairs powers, while accounting for the interests of the states and the people.

A driving force behind the Constitutional Convention was the failure of the Continental Congress to manage the foreign affairs of the young republic. This imperative was clear in the ratification debates. The first five papers of *The Federalist* are devoted to the necessity of blunting the influence of foreign powers and to the organization of U.S. military power. Fifteen additional papers focus on international relations and civilian control of the military.

Against this background, the Constitution could be understood not only as a national charter, but also as a strategic document. The institutions established by the Constitution to channel the conduct of foreign policy imply certain principles of foreign policy. We ought to keep these timeless principles in mind as we craft strategy for today’s world.

One principle we find in the Constitution is so simple it’s usually overlooked: the states are stronger as

a Union than as separate powers. A Union of the states overcame divisions of culture, economic interest, and military capacity—divisions that would have been exploited by foreign powers to turn one state against another, and to weaken and cow the American continent into submitting to their designs.

A Union strengthened the collective power of the states in their foreign relations. It allowed them to pool their various resources to create advantages of scale and scope in military and economic power. As *Federalist* 4 states, “The people of America . . . consider union and a good national government as necessary to put and keep them in such a situation as, instead of inviting war, will tend to repress and discourage it.” Further, “If [foreign powers] see that our national government is efficient . . . our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment.” Conversely, if the states remained divided, the U.S. would earn not only the “contempt” of foreign nations, but their “outrage.”

This principle came under threat—but survived—during the Civil War. In his First Annual Message to Congress, President Lincoln sent a clear warning to foreign powers to refrain from interfering in the war. At the same time, he acknowledged that “factious domestic division” exposed the nation to “disrespect abroad.”

We may take this principle for granted today, but it’s very much in play around the world. The European Union, for example, has a greater combined population and economy than the U.S. But political division greatly reduces the EU’s role in world affairs. The smaller nation-states of Central and Eastern Europe, in particular, find themselves at risk from—or perhaps at the mercy of—Russia. Likewise, the countries of the Asia-Pacific region,

from South Korea to India, worry about China’s aggressive drive for regional hegemony. Yet they struggle, due to their own enmity and rivalries, to form a united strategy to counter China.

The primacy of Union gives rise to a second, subsidiary principle: treaties with foreign powers are very serious business, ought not be entered into lightly, and must be widely supported across the country.

The Founders believed the violation of major foreign commitments was a chief source of friction and war in international relations. In fact, *Federalist* 3 recognized only two sources of war: direct violence and the breach of treaties. Thus the Constitution requires that a major foreign commitment that binds our nation have a broad consensus among the people, and not result from the parochial interests of a minority or even a narrow majority. As matters of war and peace, treaties should reflect a strong Union, not a divided nation.

This principle led to the Treaty Clause, which empowers the president to negotiate treaties, but requires two-thirds of the Senate to approve them and—if necessary—to demand changes. This extraordinary requirement is really just an ongoing expression of the original decision to form a Union. And it has produced a system in which treaties routinely go through many iterations and rounds of negotiations, even after initial signature by the president. Treaties throughout our history carry scores of conditions, reservations, and amendments added by Congress, precisely to ensure widespread acceptance among the people.

This was in fact how the first treaty ratified under the Treaty Clause played out. The Jay Treaty with Britain—negotiated by a co-author of *The Federalist*—only gained Senate approval on the condition that Jay rework the treaty to add a clause regarding trade between the United States and the British West Indies.

Another principle of foreign policy rooted in the Constitution is that the

Union must have a strong military, but one that is at the same time restrained and subject to the control of the people.

At the time of the Founding, a powerful and restrained military was something of an oxymoron. *Federalist* 11, for instance, states that a strong military—and in particular a strong navy—is vital not only to deter aggression, but also to secure and expand international trade. Yet *Federalist* 26 recognizes that military might has historically posed a grave threat to individual liberty. This presented what seemed to be a Hobson’s choice between a strong military and a weak military, both of which would threaten liberty over time.

But our Founders charted a way out of this dilemma. The Constitution empowered the president, as commander-in-chief, to defend against attack and take decisive military action where necessary. At the same time, it entrusted the people’s representatives in Congress with a wide range of foreign affairs powers as a means of fostering prudence, democratic control, and protection against tyranny. Thus only Congress can raise and support armies; only Congress may declare war and invoke the legal obligations and protections that this state of international relations confers; only Congress regulates foreign commerce, and with it control over important levers of influence with foreign nations in order to better relations, exact costs, and prevent war.

* * *

Under President Obama, there has been considerable drift away from all three of these principles. And that drift has contributed to the general drift of U.S. foreign policy. Even former President Carter has said, “I can’t think of many nations in the world where we have a better relationship now than when he took over.” Our interests are threatened, our alliances are stressed, our honor is stained, and our adversaries

are increasingly tempted into new episodes of adventurism and aggression.

The most recent example of this drift is the Iran nuclear deal. This is a major arms-control agreement with a mortal enemy—an enemy with the blood of thousands of Americans on its hands, and for whom “death to America” is a foreign-policy bedrock. And the agreement goes to the heart of the gravest threat facing the world: a terror-sponsoring state armed with nuclear weapons. It is precisely the type of agreement that the Founders intended to be tested and refined by the treaty process. It is precisely the type of agreement implicating matters of war and peace that must be supported by a widespread consensus of the American people.

But the President didn’t submit the Iran nuclear deal as a treaty. From the beginning, his intention was to circumvent the people’s representatives and obligate the U.S. to the ayatollahs by a mere executive agreement. Instead of rallying two-thirds of the Senate to support the deal, he relied on a tiny, partisan minority to protect his executive agreement from the judgment of the American people.

This is dangerous and nearly unprecedented. Executive agreements are and should be reserved for technical matters. Among the first executive agreements in our history were the 1792 agreements between the United States and other nations to coordinate mail delivery. Executive agreements have also traditionally been used to assign claims and debts between nations. These issues are low-stakes, and are not breeding grounds for armed conflict. They are akin to deciding whether cars will drive on the right or left side of the road. That’s why they do not need to be tested by a supermajority vote.

Nuclear weapons agreements are different. The dividing line between subjects reserved for treaties and subjects reserved for less formal scrutiny is not precise at the margins. But this isn’t anywhere near the margins.

Historically, major arms control agreements that bind the U.S. have almost invariably been reached through treaty. One notable exception was the Agreed Framework with North Korea negotiated under President Clinton in 1994, which aimed at keeping North Korea from becoming a nuclear power. I doubt President Obama would like to cite the North Korea case as precedent—although it surely is a precedent in its contempt for Congress, and likely in its failure as well.

Why did President Obama ignore the Treaty Clause? The answer is stunning. Secretary of State Kerry lamented in testimony to Congress that it is “physically impossible” to get a treaty through the Senate in these polarized times. Of course, this logic could apply to any politically inconvenient part of the Constitution. Moreover, Secretary Kerry must have forgotten that, as chairman of the Senate Foreign Relations Committee, he guided a nuclear arms control treaty with Russia to ratification less than five years ago.

The simple fact is that the President ignored the Constitution because he knew the Senate would reject his deal. This disregard for the Treaty Clause is the height of hubris. It mistakes tunnel vision for principle, closed-mindedness for superior wisdom, and personal legacy for the vital national interest. The nuclear deal with Iran is a travesty, one that betrays our close friend Israel, provides billions for Iran’s campaign of terror, and paves the way for Iran to obtain nuclear weapons capability.

Besides the immediate damage to our national security, the deal also damages the foundational principle that major foreign commitments should be backed by a broad consensus of the people as reflected by Congress. This episode, added to the North Korea example, will make it extremely tempting for future presidents to avoid the expenditure of political capital required to pass a treaty. Presidents will be tempted to reach expedient

deals on momentous issues, deals that divide rather than unite the nation.

* * *

While the Iran deal is the latest blow to our foreign policy tradition, a long-festering wound is the decline of our military might. Our military has endured 15 years of war and six years of repeated budget cuts. It is now breaking under the burden of a mindless sequestration that indiscriminately cuts across the board and treats every dollar of federal spending equally—whether for defense or for pork. As a consequence, our military is facing a crisis. The Navy has 260 ships—the smallest number since the end of the Cold War. Our Air Force is the smallest and oldest force in our history. The Army and the Marine Corps are on track to drop below 450,000 and 190,000 personnel, respectively—the bare minimum levels our commanders say we need to fulfill our missions.

These unwise cuts to our military call into question U.S. resolve and security commitments. It’s not a coincidence that, in the span of a few years, we have seen a revisionist Russia exert its will in Ukraine and in the Middle East, radical Jihadism metastasize across the Middle East and North Africa, China project power over more and more aerial and maritime territories, and Iran out-negotiate us while it spreads chaos across the Middle East through its proxies and clients.

This picture isn’t pretty, but as I said earlier, the American foreign policy tradition has a knack for self-correction, for turning the ship around and reversing past mistakes. To make that happen, however, we need to look back to the foundational principles of our Constitution. To restore respect for the Treaty Clause, we must make every effort over the next year to isolate and impugn the President’s nuclear deal with Iran as a singular, one-off agreement that ought never to be repeated. We must put every nation and every business on notice that this deal is

temporary and unique. They must understand that U.S. sanctions on Iran—either through new legislation or through a new president—will return. We must work to elect a new president who will rescind the Iran nuclear deal—and who will restore the credible threat of force.

Put simply, our allies and our adversaries must understand that this nuclear arms control deal reached by executive agreement is not secure. They have to understand that it is in our interest and in their interest to conclude stable and long-lasting agreements by way of treaties. And all future presidents should see that building consensus through the constitutionally mandated advice and consent of the Senate will afford them a genuine, lasting legacy.

A restoration of the Treaty Clause must be accompanied by a restoration of our military might. Frederick the Great said, “Diplomacy without arms is like music without instruments”—in other words, inert, inaudible, and ineffective. If we want our diplomacy to be effective and our agreements to be strong, we must rebuild our military.

The American tradition has never been to seek war, or to seek it first in a dispute. Lincoln, again in his First Annual Message to Congress, prized diplomacy as a means of defusing tensions with foreign powers and maintaining our “rights and honor.” But he also called for a military build-up. “Aggressions,” said his Secretary of War Simon Cameron, “are seldom made upon a nation ever ready to defend its honor and to repel insults.”

To ensure that we are ready to defend our national honor today, we will need significantly more defense spending than Congress and the President have managed to agree upon in recent years. Our current defense budget is little more than a political compromise, which may be appropriate for highway funding or tax policy, but which is no way

to fund a military or to counter rising threats. Congress and the President must return to the foundational principle that our military edge must not be challenged. We must give our fighting men and women the resources they need to deter, fight, and win wars.

* * *

The Founders and generations of statesmen since have recognized the unique advantages with which the United States is blessed. We are a continental nation, and we enjoy the protection of two oceans that separate us from the historic cauldrons of conflict in Europe and Asia. We have abundant natural resources and an industrious society, making us a powerful trading partner. Ours is a people slow to anger, but imbued with a martial tradition and a fighting spirit. Our democratic culture is vigorous, resilient, and cherished by the people. These strengths are channeled by the Constitution into our foreign policy tradition. U.S. strategy abroad—while not successful in every instance—has brought us from being a world-affairs backwater to being the world’s superpower.

As we think about our future and new strategies, it would serve us well to look back at old truths. We must hold fast to foundational principles. We must continue our rich foreign policy tradition, and vigorously fight any efforts to undermine it. While each Congress and president will have particular differences, we should all share the same goal: a world of peace and freedom, of prosperity and opportunity, of hope. We have a duty to be true to our beliefs, to use our great power wisely on behalf of freedom, guided by constitutional principle. As Ronald

Reagan admonished in his speech to the British Parliament in 1982, “Let us go to our strength. Let us offer hope. Let us tell the world that a new age is not only possible but probable.”



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DID YOU KNOW?

On September 23, the Hillsdale College women’s cross country team was ranked number one in NCAA Division II in the U.S. Track and Field and Cross Country Coaches Association national poll.