



## Biden Shreds the Constitution and Goes to War in Yemen

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**Glenn Greenwald (GG):** The idea that presidents have no limitation on their power is one that came not from Donald Trump, but from the Bush-Cheney administration. They exploited 9/11 in order to usher in these radical theories of executive power under Article II, which I know about because they're the reason I started writing about politics. I was practising constitutional law at the time, and felt that there was not nearly enough attention in the media paid to these dangerous, radical theories that were consuming civil liberties in the United States, and checks and balances. And I began writing about those. And that's one of the reasons why it sickens me so much to watch the very people, not just who cheer at it from the sidelines, but who implemented it while in power, now posture and fain as though they're offended by the very theories that they themselves played such a key role in ushering into our political life. Now that is the context for what has just happened, where on Thursday, the Biden administration decided that it was going to bomb 16 different sites in Yemen. We haven't been bombing Yemen for over a year. There's a ceasefire that has been somewhat informal, but nonetheless been holding between the Saudis, who were originally fighting with the Houthis in Yemen, that was a war that began under President Obama. President Obama extensively helped the Saudis in that war in bombing the Houthis, we were bombing them for many years. We created the worst humanitarian crisis before Gaza in Yemen, where millions of Yemenis were on the brink of starvation. We decimated that country, helping the Saudis bomb Yemen. But it hasn't been happening for quite some time.

And so the decision by the United States, in partnership with the British, to bomb Yemen is essentially a new escalation. It's a new war in the Middle East that was not previously underway. And it obviously emanates from the original conflict that the United States involved itself in, which is the war between Israel and Gaza. Here is how The New York Times yesterday decided to describe what happened in its headline, quote, *The Regional War No One Wanted Is Here. How Wide Will It Get?* Now, of course, the Biden administration has been saying we don't want a regional war. The Israelis have clearly wanted one. They've been attempting to escalate the war with Hezbollah, and Hezbollah has been playing its role, but clearly been restrained thus far. The Israelis clearly want to use the opportunity of what they're doing in Gaza to also go to war with their enemy and Hezbollah. Early on in the

conflict, back in October, mid-October, the Biden administration deployed to that region two gigantic aircraft carriers and a whole bunch of other new military assets that they specifically said were there to, in the first place, try and deter other attacks on Israel, but in the event that that was unsuccessful, to then protect Israel with our military hardware there, with our combat troops. This is a deliberate decision to involve the United States in the very high likelihood of a new war, not just the one in Gaza, but any escalation. And there was no attempt to go to Congress and request from Congress any kind of authorisation. Over the last month, the United States has been threatening the Houthis that if they continue their attacks on ships in retaliation for the destruction of Gaza, then the United States will begin bombing Yemen. So this isn't an emergency, this wasn't something that was a shock. There wasn't an attack on the American military that Biden had to respond to in an emergency way, without time to go to Congress. This is something that the Constitution is specifically contemplating, Congress needs to approve. If the United States, the Biden administration, the presidency wants to involve our country in the very high likelihood of a new war, or an escalation of a current war, Congress needs to ascend to it, because that's the way the American people ascend to being involved in a new war. And yet that did not happen here.

Here's what The New York Times said: "With the U.S.-led attacks in Yemen, there is no longer a question of whether the Israel-Hamas war will escalate into a wider conflict. The question is whether it can be contained." That is exactly right, that part. We have been talking from the beginning of this war about all the different reasons why, as an American, you ought to be concerned about the full scale support given by the United States government to Israel, not just because of the costs to American citizens, the financial costs, the security cost, the moral cost to helping the Israelis destroy Gaza, but also to the American standing in the world, but as well as the risk of escalation. That's one of the things we've been emphasising, is that this war can very easily spiral to include many other countries in the region. That's an extremely dangerous thing to do. Remember, we've all been saying we're done with endless war in the Middle East. And yet we now have a clear escalation. The question is, how far will this escalation go? Quote, "From the outbreak of the Israel-Hamas war nearly 100 days ago, President Biden and his aides have struggled to keep the war contained, fearful that a regional escalation could quickly draw in American forces. Now, with the American-led strike on 16 sites in Yemen on Thursday, there is no longer a question of whether there will be a regional conflict. It has already begun. The biggest questions now are the conflict's intensity and whether it can be contained. This is exactly the outcome no one wanted, presumably including Iran". Quote, "This is already a regional war, no longer limited to Gaza, but already spread to Lebanon, Iraq, Syria and Yemen", said Hugh Lovatt, a Mideast expert for the European Council on Foreign Relations".

And I think that's a crucial thing to note as well, as we've been covering this for almost two weeks now, that before this bombing on Yemen, there was a bombing near Baghdad that infuriated the Iraqi government and blamed the United States for, there has been repeated bombing campaigns by the Israelis in Syria, as well as attempts by the American military bases in Syria and Iraq to launch what they call retaliatory strikes against Iranian assets in the Middle East that they say are attacking our bases in Syria and Iraq. Why do we have bases in

Syria and Iraq?! And then obviously, there has been a flare up involving Beirut and northern Israel between the Israelis and Hezbollah. So there has already been escalation. But this is now a direct engagement of American combat troops in this war. "Washington, he added, wanted to demonstrate that it was ready to deter Iranian provocations, so it conspicuously placed its aircraft carriers and fighters in position to respond quickly. But those same positions leave the United States more exposed." The Houthis have been fighting a war now for many years. They are very battle tested. It's a lot like the Russians, whose military has been fortified by two years of hard core fighting. They don't seem afraid of engaging the United States. In fact, they continue to attack ships, they haven't killed anybody, by the way, but they have attacked ships. They have seized the boats, they have taken the crews hostage. And they're obviously trying to make it difficult to pass through the Red Sea for any ships that are linked to either Israel, United States; any country they blame for the destruction of Gaza. They're doing it in the name of solidarity with the Palestinians, whether that's their actual cause or not, that's their stated cause. And it is a powder keg in the Middle East and always is. And we are now involved primarily due to Israel in yet another Middle East war.

Now, as I said, we're going to debate the merits of this. Republicans are overwhelmingly, yet again cheering President Biden, just like they cheered his policy in Ukraine to involve the US in a proxy war there, just like they cheered his policy of supporting Israel, just like they cheered his antagonism toward Beijing. Republicans are largely on the merits, cheering President Biden yet again. But there are some members of Congress objecting on what seems, again to be this legalistic, annoying ground that President Biden didn't go to Congress and get congressional approval, but which in fact goes to the heart of how our constitutional republic and our structure of government actually functions. Here is Congressman Ro Khanna, the Democrat from California, quote, "The president needs to come to Congress before launching a strike against the Houthis in Yemen and involving us in another Middle East conflict. That is Article I of the Constitution. I will stand up for that regardless of whether there's a Democrat or Republican in the White House". Senator Mike Lee, the Republican of Utah, said, quote, "I totally agree with Ro Khanna. The Constitution matters, regardless of party affiliation". Senator Rand Paul, the Republican senator from Kentucky, said, quote, "Once again, President Biden is acting without congressional authority. Only Congress can authorize military action like this". Now I'm going to get to what I know a lot of people believe allows President Biden to do this, which is a law called the War Powers Resolution, which cannot override the Constitution, obviously, acts of Congress and laws cannot override the Constitution. But if you actually look at what the War Powers Resolution said, there is almost no doubt that even if you want to give it all the credit in the world as valid law, it does not authorize President Biden to out of the blue bomb Yemen with no congressional approval.

One of the ways that you can know that is to look at what Democrats, including Joe Biden and Kamala Harris, said about this very question, when it came to the question of whether President Trump in 2020 was permitted to engage in similar bombing campaigns, including in Iran. Here is Joe Biden on February 7th, 2020. Quote, "As president, I will use military power responsibly and as a last resort. We will not go back to forever wars in the Middle East". That's what he said as part of the Democratic debate. "We will not go back to forever

wars in the Middle East". Here is what he said when it came to the question of whether Trump could bomb Iran in January. Quote, "Let's be clear Donald Trump does not have the authority to take us into war with Iran without congressional approval. A president should never take the nation to war without the informed consent of the American people". Here's Kamala Harris in February of 2020. Quote, "For too long, Congress has abdicated its responsibility to authorize the use of military force. We can't afford to let that continue and allow Trump to further escalate tensions with Iran. I voted YES earlier today to restrain Trump's authority on military conflict with Iran". So when Democrats were seeking power, Biden and Kamala Harris, they were essentially saying that the War Powers Resolution does not permit the kind of bombing that they just ended up doing without congressional approval.

One of the most principled members of Congress when it came to constitutional authority was the former Republican Congressman Justin Amash, who served as a Republican for Michigan for a decade in Congress. And here's what he wrote earlier today, quote, "One of the most frequently misrepresented federal statutes – often falsely used to justify unconstitutional presidential war powers– is the War Powers Resolution (or Act). If only more people would read it. Contrary to what you may have heard about the War Powers Resolution, it does not allow the president to take military action for any reason for 60 to 90 days without congressional approval so long as the president notifies Congress within 48 hours". That is the claim that you constantly hear that the War Powers Resolution allows the president to just a 60 to 90 day free shot of using the military however he wants. Remember, it was Article I of the Constitution which defines the power of the legislative branch of the Congress that says only Congress has the power to declare war. And that makes the President Commander in Chief of the Armed Forces in Article II that defines executive power. But only when there's an actual war when there is a military that's convened. We weren't supposed to have a standing army in the United States. They were petrified, the founders were of a permanent standing army. And I'm about to show you that this is one of the things the founders most eagerly wanted to avoid. And so the idea of presidents as Commander in Chief simply meant that when Congress authorized a war, it was the president who then executed it. You need one Commander in Chief of the military once there's a war, but only Congress can authorize the use of military force. The president can't start a war and then execute it, as has now become the norm in the United States for reasons that are very dangerous.

Amash goes on, "the War Powers Resolution states clearly: The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces. Of the three cited authorities, not one indicates a presidential power to take unilateral offensive military action. The first two authorities allowed the president to take military action, but only with Congress's express approval. And then the third authority, the emergency, allows the president to take defensive military action without Congress's approval in the event of a specific type of national emergency, such as a sudden, unforeseen attack on the United States, that happens too quickly for Congress to

meet, necessitating immediate action to protect Americans. It is that last situation that the War Powers Resolution provides for the aforementioned 48 hour report."

Now, think about what that means. It's very common-sensical. If a foreign military attacks the United States homeland or just suddenly starts attacking military bases or ships overseas, the president can't just allow those attacks to continue because he doesn't have time to convene Congress. Imagine if Congress were on vacation, if Congress couldn't be convened, of course, the president, in an emergency situation for a limited amount of time, has to be able to order the Armed Forces to defend the United States until Congress can convene. But that is only supposed to be in an emergency situation where there's no time to convene Congress. That is not what happened here. The United States has been threatening Yemen for weeks with this kind of an attack, if these attacks didn't stop. They've been planning it. They've been gathering an international coalition. There was more than enough time to go to Congress and get congressional approval. And yet they specifically chose not to do that. It is illegal and unconstitutional.

Now you can write that off as being unimportant. And I'm going to show you why that is not a rational or cogent response. What I will concede is that in general the solution to this, when the president starts a war without the authorisation from Congress required by the Constitution, is the branch of government whose prerogatives are being violated, is the one that's supposed to defend those powers. So Congress does have a solution. Instead of just going on CNN and whining and complaining or posting grievances on Twitter, they could, for example, cut off funding for any further operations in Yemen to prevent Biden from proceeding with this military action. The reality is that the reason Congress is happy for the President to fight wars without authorization from Congress is that Congress doesn't actually want this responsibility. They don't want to have to run for re-election having cast hard votes about whether or not we should go to war. They're more than happy to let the president make that decision on his own while they sit back and complain and chirp, Oh, they should have come to Congress to do it. And that in itself is a major problem in our government that Congress has basically abdicated its responsibilities and its powers to the president. But basically what we have now is exactly what the founders were desperate to avoid, a standing military, so we have a permanent military, not one that is convened and assembled through conscript involuntary fighting in the event of a war, that Congress authorises and funds and then the president executes; that was the vision. We have a permanent army. Obviously, it's not going anywhere. There's an army automatically and every year, not just funded, but funded to almost \$1 trillion a year, infinitely more than any other country on the planet spends. And then not only do we have this permanent military under the president's command, but then he gets to decide which wars are fought and how those wars are fought, almost with no input or checks from any other branch. The exact kind of concentration of power in the executive branch that began in earnest after the war on terror and has really now become the normal way of doing business in Washington, because Congress doesn't want this responsibility.

Now, I want to show you a few of the reasons why this matters so much, and why the design of our country depended upon avoiding exactly this situation. So here, back in 2005, on the blog that I started called Unclaimed Territory, to write about these issues, I started it in late October of 2005. This article is December 17th, 2005, so less than two months after I first began writing about politics. The title was: *Bush's Unchecked Executive Power versus the Founding Principles of the US*. And the article was designed essentially to say that the unlimited presidential powers that Bush and Cheney were claiming in the name of the war on terror was a core violation of everything the founders warned about. Quote, "Underlying all the excesses and abuses of executive power claimed by the Bush Administration is a theory of absolute unchecked power vested in the Presidency, which literally could not be more at odds with the central founding principles of this country." Quote, "The notion that one of the three branches of our government can claim power unchecked by the other two branches is precisely what the Founders sought, first and foremost to preclude. And the fear that a U.S. President would attempt to seize power unchecked by the law or by the other branches, i.e., that the Executive would seize the powers of the British King – was the driving force behind the clear numerous constitutional limitations placed on Executive power. It is these very limitations which the Bush Administration is claiming that it has the power to disregard, because the need for enhanced national security in time of war vest the President with unchecked power. But that theory of the Executive, unconstrained by law, is completely repulsive to the founding principles of the country, as well as to the promises made by the Founders in order to extract consent from a monarchy-fearing public to the creation of executive power vested in a single individual. The notion that all of that can be just whimsically tossed aside whenever the nation experiences external threats is as contrary to the country's founding principles as it is dangerous. James Madison emphasised in Federalist 51 that liberty could be preserved only if the laws enacted by the people through the Congress were supreme and universally binding: Quote, 'But it is not possible to give each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates.' An extremely potent demonstration that the Bush Administration's claim to unchecked Executive Power is fundamentally inconsistent with the most basic constitutional safeguards come from one of the unlikeliest corners – Antonin Scalia's dissent in *Hamdi v. Rumsfeld* in 2004."

Now, this was the dissent in this case, but he wasn't dissenting on the grounds of these principles, which he laid out. I want you to really listen, because this is Antonin Scalia, a defender of broad, robust Executive Power, talking about how crucial it is that we avoid a situation where the President commands a standing army, and then can exercise the powers of the military without congressional approval. This is what Scalia wrote, and he wrote it in 2004: "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the, quote, 'blessings of liberty' were threatened by, quote, 'those military establishments which gradually poisoned its very fountain'", quoting the Federalist No. 45, written by James Madison. Then Scalia said this, quote: "No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorisation of standing armies in peacetime.

Many safeguards in the Constitution reflect these concerns, Congress's authority, quote, 'to raise and support Armies' with heads, with the proviso that, quote, 'no Appropriation of Money to that Use shall be for a longer Term than two Years'. Except for the actual command of the military forces, all authorisation for their maintenance and all explicit authorisation for their use, is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be, quote, 'much inferior to that of the British King: Quote, "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while the British King extends to the declaring of war, and to the raising and regulating of fleets and armies; all of which by the Constitution would pertain to the legislator.", the Federalist No. 69. A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions."

The whole point was that there's no more consequential decision that can be made by a government than whether to go to war. Typically, it means that the citizens of the country may be called upon to fight that war, and they certainly are going to be called upon to pay for it. And the only way that decision could be just, said the Founders, as recognised by Scalia, as through pervades all the Federalist Papers, was if the citizens give their consent to that war through their elected representatives in Congress. That was the whole design of the Constitution and how the separation of powers was the function. Now, just to underscore how it was the Bush and Cheney administration where all of this became really called into question for the first time in a long time, which is why it sickens me to watch Bush-Cheney operatives and their supporters or their liberal allies pretend that they're the ones defending these principles when they were the ones who waged war on them, here's a New York Times news article, December of 2005: *Behind Power, One Principle as Bush Pushes Prerogatives*. "A single, fiercely debated legal principle lies behind nearly every major initiative in the Bush administration's war on terror, scholars say: the sweeping assertion of the powers of the presidency. From the government's detention of Americans as 'enemy combatants', to the just disclosed eavesdropping in the United States without court warrants, the administration has relied on the unusually expansive interpretation of the president's authority. That stance has given the administration leeway for decisive action, but it has come under severe criticism from some scholars and the courts. With the strong support of Vice President Dick Cheney, legal theories in the White House and the Justice Department have argued that previous presidents unjustifiably gave up some of their legitimate power of their office. The attacks of September 11th, 2001, made it especially critical that the full power of the executive be restored and exercised, they said."

That's where this all comes from. From the very neocons and Bush-Cheney operatives that we are now told are the defenders and guardians of the rule of law. Here is James Madison in the Federalist Papers, No. 47, quote, "The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts", that's what he was writing about. Quote, "The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may

justly be pronounced the very definition of tyranny." That more than anything, is what they were seeking to avoid, that one part of government made all the decisions, such as when to assemble the military, how to assemble it, whether to start new wars and then how to fight it.

Here's an article I wrote from early 2007, where I said, *Our Supreme General has spoken*. And this is so fundamental to the debate that people were having at the time that has now been forgotten. Quote, "The idea that Americans should refrain from debating the propriety of using military force"— and I was responding there to a interview that Dick Cheney had given about the unpopularity of the Iraq war, where he said, Look, we don't care if the American public turned against the war, it's our decision whether to continue to fight it. It's not for the American public to decide. And so that's what I was talking about. And I said, "The idea that Americans should refrain from debating the propriety of using military force is about as foreign to our political traditions as anything can be. The Constitution – while making the President the top General in directing how citizens-approved wars are fought – ties the use of military force to the approval of the American citizenry in multiple ways, not only by prohibiting wars in the absence of a Congressional declaration, but also by requiring Congressional approval every two years merely to have an army. Public opposition is the key check on the ill-advised use of military force. In Federalist 24, Hamilton explained that the requirement of constant democratic deliberation over the American military is, quote, 'a great and real security against military establishments without evident necessity'. Finding a way to impose checks on the President's war-making abilities was a key objective of the Founders. In Federalist 4, John Jay identified as a principal threat to the Republic, the fact that insufficiently restrained leaders, quote, 'will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambitions, or private compacts to aggrandise or support their particular families or partisans. These and a variety of other motives which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people'."

I know when you talk about the Federalist Papers and all the court rulings it seems crusty, it seems archaic, it seems like it doesn't matter in the face of what people might think is an important and legitimate bombing of Yemen, but it matters a lot in terms of the kind of country we have. And John Jay is explaining why, that there are all kinds of corrupt motives that presidents have to start wars without the consent of the American people. That's the reason why it's so much more than just some sort of legalistic obligation or ceremonial requirement, that Congress openly debate whether this war is actually worth having, whether the risk of escalations are worth it, whether it's worth putting American lives in harm's way, what the likely retaliatory effects of the war will be, how long we're going to stay in this war, what the purpose of it is, what the outcome is, what the mission is, how to define success when it's going to be over, those are all things that get examined when you actually debate the war in Congress that you don't have when the president just gets to decide on his own to deploy the military and start bombing and then justify it afterwards. And this is what we have lost completely, to the point that now Biden can start a new war, which is what he just did in Yemen yesterday, and very few people, you have a handful of members of Congress, are



willing to stand up and object because it's treated as though it is just a bureaucratic and annoying requirement when it's actually fundamental to everything that the Republic is.

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