

Who Declares a War?

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STANFORD, Calif. - Last week's Senate hearings on military action against Iraq mark a welcome step toward maintaining constitutional government in a time of national emergency. But this process will be incomplete if Congress shirks the two fundamental questions it must ultimately face: Can the Bush administration unilaterally decide when to go to war against Iraq without seeking the assent of Congress? And can a Congress in which each party narrowly controls one house effectively discharge its constitutional duties?

Since 1973, most discussions about the powers of the executive and Congress on the question of military interventions have been framed by the War Powers Act. That law was designed to prevent presidents from exploiting or creating situations in which Congress would be able only to accede to military actions that had already been taken without its approval. The remedy was to require American forces to withdraw within 60 days, extendable to 90 days, if Congress did not quickly vote its approval.

But the debate now unfolding raises a more profound constitutional dilemma than the one Congress addressed in 1973. An invasion of Iraq would amount to war in its fullest scope, in the extent of the preparations required and especially in its object, which involves crushing a regime and its army and liberating a nation. It will not be a humanitarian intervention on the model of Somalia or Kosovo, or a military lark like Grenada or Panama, but an offensive that will reveal far more about the new world order of the 21st century than did our last war against Iraq a decade ago. Perhaps most important, it will not take place suddenly, without advance notice, under conditions that preclude prior Congressional consultation.

In the Persian Gulf war, the first Bush administration was poised to act without Congressional approval. In the end, cooler heads prevailed, and approval was sought and granted. But prominent members of both Bush administrations seem to regard that gesture as superfluous. The current administration has not yet stated its view. But its unilateralist attitude on foreign relations and the war on terrorism may well carry over to its policies on Iraq. Vice President Dick Cheney, in particular, has long held that there is an "inherent presidential power to act" in defense of "vital national interests" that "comes directly from the Constitution and not from Congress."

Yet the Constitution offers very little support to this view. Most of the national security powers -- for example, the power to raise and support an army -- that the Constitution vests in the national government are delegated to Congress, not the president. Nor does the maddeningly brief debate of August 17, 1787, when the framers substituted "to declare war" for "to make war" in the clause establishing Congressional war power, support the idea that the president can unilaterally initiate hostilities. As James Madison noted, the president retains the power to repel sudden attacks when it would be absurd to wait for Congress to assemble. Once the nation is attacked -- as at Pearl Harbor -- it is at

war, and a Congressional declaration only facilitates its conduct.

Had the Constitution's framers viewed executive power generously, they would have allowed the president, not Congress, to grant letters of marque and reprisal. We no longer charter private boat owners to prey on enemy shipping. Yet letters of marque and reprisal are the closest 18th-century analogue to the methods of retaliation that might be used in the low intensity conflicts that the War Powers Act sought to regulate. The fact that the framers withheld even this minimal power from the president shows their reservations about unrestrained executive war-making.

Finally, the case for unilateral presidential authority loses all force when our intention to take military action has already been declared far in advance. Nothing in the Constitution or the history of its adoption suggests that a president can carry the nation into war when Congress has time for deliberation. Were President Bush to launch a massive attack on Iraq during Congress's August recess on the general ground that Saddam Hussein is a menace, it is a fair bet that the framers would have regarded impeachment, rather than a vote of thanks, as the appropriate response when Congress returned.

Of course, a sense of constitutional duty alone does not necessarily give Congress the confidence and backbone to insist that a military action of this nature must receive its prior approval. Republicans have a natural inclination to support giving President Bush broad authority, and Democrats a natural caution about challenging a popular president on major questions of national security.

Yet this is clearly a time when members of both parties in Congress must take their constitutional duties seriously. For in the open-ended emergency that looms before us, the abdication of Congressional responsibility risks erasing every constitutional standard against which the military decisions of any president can be judged. If an invasion of Iraq on the scale contemplated does not represent a decision for war within the meaning of the Constitution, it is hard to imagine any other military action that would ever again be subject to Congressional approval or restraint.