

To War or Not to War

That is still the question for Congress, not the president.

BY LOUIS FISHER

The 2008 presidential campaign has a garbled theme. Candidates say the election is not about them. It is about you, the voters. Nothing can change from the top. It must come from the bottom. All that sounds very respectful of constitutional democracy and self-government. Sovereignty resides with the people, not the president—or so they seem to say.

But then the candidates begin to talk about what they'll do once they're in the Oval Office exercising the power of commander in chief. And suddenly it's all about them, acting alone. I will do this. I will do that. Little mention is made of working jointly with Congress or obtaining statutory authority to support military operations.

In deciding which branch of government should hold the power of war, the Framers deliberately embraced democratic values. They studied the British monarchical model, which concentrated the war power in the executive, and they wholly rejected it. Instead, they agreed that the authority to take the country from a state of peace to a state of war must be vested in Congress.

Unfortunately, this constitutional principle has been largely ignored in the years since World War II. The fear of outside enemies with long arms has permitted presidents to wrest away the war power. But if we wish to continue as a democratic country guided by the rule of law and the Constitution, the power must be returned to where it belongs: with Congress, the branch closest to the people.

THE FRAMERS' MODEL

On matters of constitutional law, the Framers looked for guidance to Sir William Blackstone, author of the *Commentaries on the Laws of England*. His chapter on the war power defined the king's prerogatives as "those rights and capacities which the king enjoys alone." Chief among these prerogatives was the power to make war. Every other power associated with national defense and foreign affairs was also vested

in the king, including the right to raise and regulate armies and navies, make treaties, appoint ambassadors, and issue letters of marque and reprisal (authorizing private citizens to undertake military actions). In exercising those prerogatives, the king "is, and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him."

The Framers of our Constitution thoroughly repudiated that model. Not a single one of Blackstone's national security "rights and capacities" were granted to the U.S. president. The powers to declare war, raise and regulate armed forces, and issue letters of marque and reprisal are vested exclusively in Congress. The powers to make treaties and appoint ambassadors are shared between the president and the Senate. Instead of control over war and foreign affairs being centered in the executive alone, the president is subject to a series of checks and balances from Congress and the judiciary.

Why did the Framers hand Congress the power to initiate war? From their study of history, they saw that executives have a long record of involving their people in disastrous military adventures that lose lives and squander treasure. In their search for fame and glory, executives have a natural appetite for war.

John Jay warned in *Federalist No. 4* that "absolute monarchs 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, ambition, or private compacts to aggrandize or support their particular families or partisans." Those and other motives, "which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or by the voice and interests of his people."

Even after the Constitution was ratified, the Founding Fathers continued to write about how the strong passions of executives push countries into war. In 1793, James Madison observed that war is "the true nurse of executive aggrandizement." In war, "laurels are to be gathered; and it is the executive brow they are to encircle." Five years later, in a letter to Thomas Jefferson, Madison wrote that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most

prone to it. It has accordingly with studied care, vested the question of war in the Legisl.’

ASK THE UNITED NATIONS?

From 1789 to 1950, the Framers’ plan was honored. All wars, big and small, were either declared or authorized by Congress. No president claimed that he alone could order the country to war. And then matters changed fundamentally when President Harry Truman took the country to war in Korea without ever going to Congress for authority. He argued that he had obtained “authority” from the United Nations Security Council. Years later, President George H.W. Bush would point to the Security Council for his “authority” to order a war against Iraq, and President Bill Clinton would resort to the same argument when sending military force against the Serbs and threatening to invade Haiti.

To those focused on convenience and short-term results, that argument enables presidents to quickly engage in war without seeking congressional understanding or approval. However, the long-term health of constitutional government has suffered. No one can plausibly contend that the president, as commander in chief, and the Senate, as confirmer of treaties, may eliminate the role of the House of Representatives in matters of war. Such an argument flatly violates the sovereignty that is placed in the people and their representatives. And lest we forget, the House most closely reflects the people’s will.

During debate over ratification of the United Nations Charter in 1945, no one claimed that the president would be free to circumvent Congress and seek authority to go to war from the Security Council. Truman cabled the Senate from the Potsdam Conference to pledge that when any agreements to use military force were negotiated with the United Nations, “it will be my purpose to ask Congress for appropriate legislation to approve them.” The United Nations Participation Act of 1945 expressly incorporated that understanding in Section 6, which provides that American agreements to assist in U.N. military actions “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”

Yet five years later, Truman single-handedly took the country to war. His action violated the U.N. Charter, the participation statute, the Constitution, and his own solemn pledge to the Senate. Similar violations were committed by Bush I and Clinton. The same unconstitutional conduct occurs whenever presidents invoke mutual security treaties to circumvent Congress.

‘EXPERT’ ADVICE

When not pointing to the United Nations, those trying to justify a president’s unilateral military action will sometimes cite the presumed expertise of the executive branch. And no doubt there are military and diplomatic whizzes in the departments and agencies. But the Framers did not turn the Constitution over to experts. They placed the war power with elected leaders.

Moreover, there is no assurance that presidents deciding to use military force will actually be guided or controlled by the wisdom of experts in the executive branch. The record clearly shows otherwise: Experts have been grievously mis-

taken in their judgments, and their advice has been repeatedly subordinated to the will of presidential aides who have no valid claim to expertise in national security.

In recent decades, presidents driven by more than the national interest have made military commitments that fully confirm the fears of Jay, Madison, and other Framers. Congress, for its part, has been too willing to go along with the president-knows-best argument.

President Lyndon Johnson, for example, took the country to war in Vietnam on the basis of a second attack in the Gulf of Tonkin that, we know today, never occurred. Yet without receiving reliable evidence of aggression by North Vietnam, Congress approved the Gulf of Tonkin Resolution in 1964.

Similarly, Congress failed in 2002 to independently evaluate assertions by President George W. Bush that Iraq had weapons of mass destruction. Not one of the claims about nuclear weapons, aluminum tubes, uranium ore, mobile labs, drones, and chemical and biological weapons has stood up to scrutiny. But again Congress let itself be stampeded into voting for war.

A LAWMAKER’S OATH

Both in Vietnam and Iraq, the executive and legislative branches allowed a perceived threat—first communism and now al-Qaida—to override informed judgment. The Democrats used that false threat to gain electoral advantage in 1964. Republicans did the same in 2002.

The costs are great when the two branches and the two parties decide to subordinate the Constitution to immediate political ends. Democrats paid a heavy price for Vietnam; the Republicans are now paying at the ballot box for Iraq. Heavier losses can be measured in terms of human lives, financial commitments, American prestige, social rupture, individual liberties, and the rule of law.

Members of Congress take an oath to defend the Constitution. Their allegiance and loyalty are to that document, not to the president. They salute the flag, not the chief executive. When they too easily defer to the president’s will and acquiesce to alleged executive expertise, lawmakers are no longer representing the voters or democratic values. Only by independently exercising their own informed judgment can they be faithful to their constitutional duties.

In the Steel Seizure Case of 1952, Justice Robert Jackson pointed to a defining constitutional principle. Writing as one who had served in the executive branch (as solicitor general and attorney general), he stated: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”

Whether debating the next steps in Iraq or considering future military entanglements, our democracy cannot remain true to constitutional principles unless the next president looks to Congress for direction and authority.

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