



## *Attack Iran? Ask Congress to Declare War*

By Doug Bandow on 1.4.12 @ 6:08AM

It is time to end the era of executive war-making.

Listen to the presidential candidates and it sounds like war with Iran is around the corner. And not just the Republicans. Defense Secretary Leon Panetta declared: "If we get intelligence they are proceeding with developing a nuclear weapon, then we will take whatever steps necessary to deal with it."

The consequences of any war with Iran would be extraordinary. Probably far worse than resulted from the invasion of Iraq. The likely costs underscore the necessity of a congressional declaration of war before the president initiates any military action against Tehran.

Declarations of war have gone out of fashion. The last one was 70 years ago, in response to the Japanese attack on Pearl Harbor. Nevertheless, less formal authorizations of force are common. While not quite the same, Congress still voted on war with Iraq. And President George W. Bush did not deny that he was fighting a war. In contrast, President Obama channeled George Orwell in claiming the absence of hostilities in Libya as U.S. drones, missiles, and planes destroyed military materiel and killed military personnel.

It was an exquisite rhetorical performance. But also illegal and unconstitutional. This election the American people should insist that whoever is elected actually follow the Constitution.

The Founders were prepared to fight for their independence, but they feared the costs of war. They particularly worried about the consequences of investing the executive with the limitless power to engage in war, like the British king. Wrote James Madison, sometimes called the father of the Constitution: "Of all the enemies of true liberty, war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instrument for bringing the many under the domination of the few."

These sentiments animated the debates at the Constitutional Convention. Enthusiasts for expansive, unaccountable executive power were few. That reluctance included giving the president authority to take the new nation into war. The Constitution created barriers to executive war-making.

Contrary to conventional wisdom in today's White House, the Founders gave Congress several important war-making powers, including raising an army, approving military expenditures, ratifying treaties, setting rules of war, and issuing letters of marque. Moreover, the legislative branch was to decide whether there would be a war for the president to fight. According to Article 1, Sec. 8 (11), "Congress shall have the power... to declare war." James Madison explained: the "fundamental doctrine of the Constitution that the power to declare war is fully and exclusively vested in the legislature."

The convention delegates were not fools. Especially at a time when communication and transportation were slow, they recognized that the chief executive might have to respond to foreign attack. For that reason the Framers changed "make" to "declare." However, that did not mean that Congress could only declare as in "take note" of the fact that the president had, say, invaded another nation.

The Founders' objective was simple. They did not trust the executive to make this important decision alone. For instance, John Jay contended that dubious motives often led kings "to engage in wars not sanctified by justice or the voice and interests of his people." George Mason declared: the president "is not safely to be entrusted with" the power to start wars. Thus, Mason favored "clogging rather than facilitating war."

Similar was James Wilson, who said the Constitution "will not hurry us into war." Rather, he explained, the provision "is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is in the legislature at large."

Pierce Butler, an advocate of executive power at the convention, made a similar point when campaigning for the Constitution's ratification in South Carolina. Butler assured his skeptical brethren that the document did not give the president authority to start wars "as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction."

Similar was the understanding of influential leaders not directly involved in drafting the document. Thomas Jefferson was ambassador to France at the time, but he wrote approvingly of the proposed Constitution's "effectual check to the dog of war by transferring the power of letting him loose." Abraham Lincoln, no opponent of expansive executive power, lauded the Founders for recognizing war "to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

Of course, the Constitution named the president commander-in-chief of the military (but not the country). With that position comes important authority, primarily to conduct wars

*authorized by Congress.* Alexander Hamilton was an advocate of quasi-monarchy, but he only referred to the commander-in-chief as the "first general and admiral" of the armed services. He emphasized that the president's authority was "in substance much inferior to" that of the British monarch, and "would amount to nothing more than the supreme command and direction of the land and naval forces... while that of the British king extends to the declaring of war."

Over the years presidents often engaged in military action without congressional authority. Military maneuvers, attempts at intimidation, limited retaliation, and even isolated acts of war have been common, but remain qualitatively different than initiating full-scale hostilities. Not until President Harry Truman took America into the Korean War did a president claim the authority to unilaterally undertake large-scale combat, especially against a nation which had not assaulted or even threatened America. And he did not have the excuse of necessity, such as preempting a threatened Soviet nuclear attack. Truman could have called Congress together and made his pitch for war, while readying U.S. forces to use if he received legislative sanction.

Vietnam created a new precedent -- congressional authorization short of a war declaration, in this case the Gulf of Tonkin Resolution. Congress took a similar approach to the Persian Gulf War, attack on Afghanistan, and invasion of Iraq. My [Cato Institute](#) colleague [John Samples](#) categorizes these as conflicts which "involved (and were expected to involve) troops in combat and thus, casualties."

More common, however, are wars -- many frankly aggressive against nations which had done nothing against the U.S. or even an American ally -- which presidents conducted without even a nod in Congress' direction. Samples points to military action or threatened action in the Balkans, Somalia, Haiti, Iraq, and Libya. In frustration over the fact that two presidents fought the Vietnam War for years with limited congressional authorization, Congress passed the War Powers Resolution in an attempt to add statutory constraints to executive power. But unsurprisingly, most presidents have as little respect for the law as for the Constitution.

Particularly shocking was President Obama's claim that the war in Libya was not a war. He claimed unilateral authority to intervene in a civil war in North Africa while citing the War Powers Resolution. Even here he was on thin ground. The WPR authorizes introduction of troops pursuant "a national emergency created by attack on the United States, its territories or possessions, or its armed forces." Muammar Gaddafi had done none of these. (The bombing of PanAm flight 103 over Lockerbie, Scotland, might have qualified -- 23 years before.)

However, the WPR is unambiguous about requiring either withdrawal or congressional authorization after 60 days. When that deadline hit the president ignored the advice from his chief legal officials and simply announced that the U.S. was not involved in hostilities. Sounding a lot like the former president who quibbled over the definition of "is," President Obama explained America's role was "non-kinetic," "more limited," and "in support." One anonymous administration official declared that "the kinetic pieces of that

are intermittent." Even Defense Secretary Robert Gates appeared to be bemused by this argument, observing that Gaddafi probably thought differently.

Thankfully most of these wars turned out to impose only modest direct costs on the U.S., though sometimes the [unintended geopolitical consequences were serious](#). Of greater concern, however, was the legal breach. Observed Columbia law professor John Bassett Moore: "There can hardly be room for doubt that the Framers of the Constitution when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace."

Now the issue of Iran looms. There are many good reasons to fear a nuclear Iran, but also many good reasons to fear the consequences of launching a preventive military strike against Iran. If the president, whoever it is, wants to do the latter, he or she should -- indeed, under the Constitution, must -- go to Congress.

The question came up in the 2008 campaign, and then candidate Obama answered: "The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation." Vice President Joseph Biden, when serving in the Senate, advocated impeachment of President W. Bush if the latter bombed Iran without legislative authority. Biden explained that the Constitution denied the president "unfettered power to start wars" and granted "Congress the power to initiate all hostilities, even limited wars." Secretary of State Hillary Clinton, when running for president in 2008, announced: "I do not believe that the president can take military action -- including any kind of strategic bombing -- against Iran without congressional authorization."

Of course, that was then, this is now.

The Republican contenders have said nothing about the issue. Almost all are claiming that they would be tough and vigorous commanders-in-chief. But none have said if they would follow the clear legal and constitutional restraints on the commander-in-chief.

The question should be asked of every candidate for president. The fact that prior chief executives may have violated the law by deploying the military is no answer. Most of those instances offer little precedent for anything, usually having been limited actions, often carried out for arguably defensive purposes or under colorable legal authority, and sometimes even initiated without Washington's authorization. None justify attacking another sovereign nation half the world away which has not attacked or even threatened to attack the U.S.

Following the law does not make a president a pushover. For instance, President (and former General) Dwight Eisenhower announced that "I am not going to order any troops into anything that can be interpreted as war, until Congress directs it." He explained:

"When it comes to the matter of war, there is only one place that I would go, and that is to the Congress of the United States."

Eisenhower's respect for the Constitution reflected that of another general turned president, George Washington: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."

Americans have suffered for years under lawless government, with Congresses and presidents routinely acting without constitutional authorization whenever they desired. That should come to an end.

After all, when he first ran for president, Barack Obama declared: "No more ignoring the law when it's inconvenient." Republicans, who talk the most about restoring the Constitution, have an equal responsibility to reestablish the rule of law.

Hopefully there will be no cause for war with Iran. But if the president believes war is necessary, he or she has a constitutional obligation to go to Congress. It is time to end the era of executive war-making.

**Mr. Bandow is the author of *Foreign Follies: America's New Global Empire* (Xulon Press).**