

The Way To War

Congress has nearly given away its constitutional authority to declare war. Power lost is not easily regained.

By Mickey Edwards and David Skaggs

KINGS USED TO BE ABLE TO SEND their subjects off to war whenever it suited their purposes. In a dictatorship, that power persists. It is central to the American republic, however, that the chief executive is specifically denied that prerogative.

The authors of the Constitution declared that the president should be the commander in chief of the U.S. military, but they also provided for a system of shared authority in the area of war powers. The power to declare war is explicitly vested in Congress. Giving Congress this authority was a deliberate and strategic choice: The framers of the Constitution, fearful of the royal European tradition they fled, thought it essential that those who would do the fighting and dying should have some say—through their representatives—in the decision to go to war. This was to be a republic.

Since World War II, we have veered dangerously away from this constitutional division of powers and its critical checks and balances. When President Harry Truman sent U.S. troops into war in Korea, it was the first time in history that an American president had ordered a full-scale armed conflict abroad without first seeking a declaration of war or specific authorization from Congress. Truman's move violated our constitutional system of separation of powers.

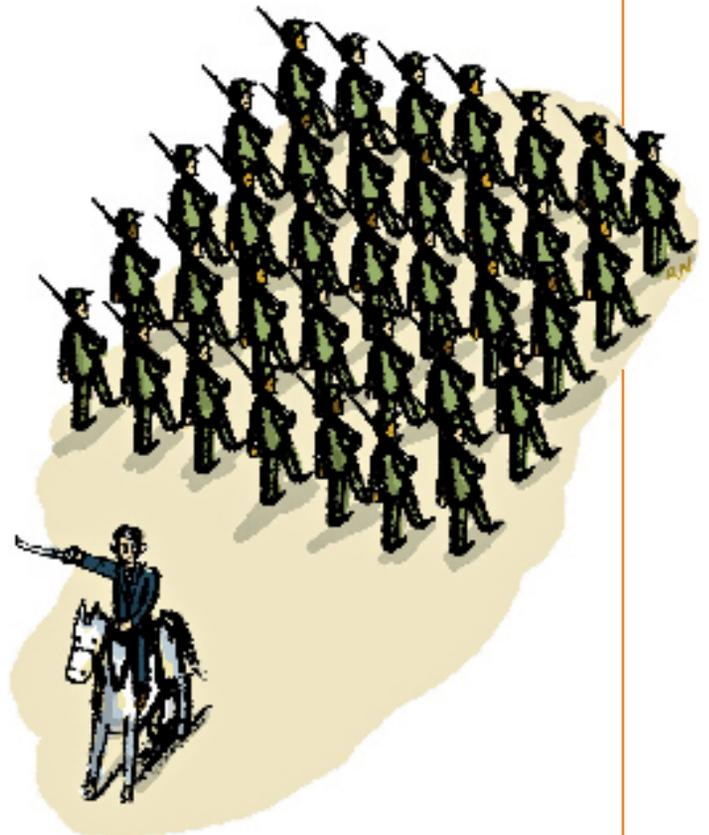
Over the past 60 years, the United States has sent troops into numerous armed conflicts, including several wars, without a single declaration of war by Congress. Truman, for example, relied in part on authorization from the United Nations Security Council. This argument has also been relied upon by President George H. W. Bush in deciding to use military force against Iraq and by President Bill Clinton in using military force against the Serbs in Bosnia.

Congress has passed legislation governing many of these military actions. But in practice, our nation's war powers have increasingly and perilously become concentrated in the hands of the president. If we wish to preserve the rule of law and our Constitution, we must restore the system of shared powers. We are encouraged that some members of Congress have called attention to the issue by introducing the Constitutional War Powers Resolution. Much work, however, is still to be done.

We recognize that international threats have changed dramatically since World War II and that the threat of international terrorism today requires different military strategies. But this change does not alter the Constitution's allocation of war powers, and we are troubled deeply by the ongoing efforts to usurp Congress's role.

We came together as cochairs of the Constitution Project's bipartisan War Powers Committee to respond to this disturbing trend and in 2005 issued a report entitled *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. We have agreed to testify in Congress about our findings. As we urge in that report, "While new threats may change the kind of force that is authorized, the identity of the enemy, or the optimal form of authorization, [these threats] require no change in the principles by which our government should decide whether to initiate the use of force abroad." The Constitution's system of checks and balances for the exercise of war powers may be even more important today than it was in 1789.

Prior to the current war in Iraq, we saw another example of an even more dangerous trend: the assertion of



exclusive executive authority to initiate war despite the absence of an attack against us and without need for any authorization by Congress or an international body. Whatever one's views on the merits of the decision to go to war in Iraq in 2003, the arguments made within the executive branch that the president had the unilateral authority to start a war were constitutionally absurd. Although President George W. Bush ultimately sought legislation "authorizing" him to send troops into Iraq, he did so without acknowledging the Constitution's assignment of war-making authority to the Congress and the concomitant strict limits on executive power to initiate military action absent an attack or imminent threat. Indeed, the president described his decision to seek congressional approval as a choice, not a necessity.

The correct question is not whether the authority to go to war is unilateral or shared with the Congress. The question is whether this is the president's call *at all*, or whether his role is simply to recommend an undertaking of war and, if the recommendation is approved by our elected representatives in Congress, to manage the conduct of the war as commander in chief.

The president and his advisers have contended that the presidential authority they assert rests both on the constitutional designation of the chief executive as commander in chief and on the War Powers Resolution. Clearly, the duty to prosecute a war as commander in chief is different from the power to decide whether or not to engage in war. Of course, the 1973 War Powers Resolution, as an act of Congress, does not trump the Constitution, and thus Congress retains the sole authority to decide whether or not we go to war. Further, the War Powers Resolution can be overturned, permanently or in a specific instance, if Congress so decides. In the decision to make war in Iraq, there was no superseding necessity involved—no invasion of one state by another, no treaty obligation to be fulfilled, no attack on an American fleet or fort, no immediate threat—that might be used as an argument to justify a violation of the constitutional order.

The Constitution dictates that the president must seek and obtain advance authorization from Congress for initiating the use of force abroad, except for a limited range of defensive purposes such as defending against an actual attack on the United States. The Constitution does not prescribe what form this congressional approval must take, but it does require that Congress act either by formal declaration or by statute. To comply with the declaration clause, the authorization for the use of force must be clear and explicit.

Moreover, Congress's war powers are not limited to the power to declare war. After

authorizing the use of force, Congress is also empowered and charged with the responsibility to conduct regular oversight of the use of force and, where necessary, to revise or rescind the authorization. In addition, the authority "to raise and support Armies" and "to provide and maintain a Navy" gives Congress a powerful check on the prosecution of war and the use of force, by giving it primary authority to fund the machines of war. The power of the purse not only enhances the check of requiring advance authorization by Congress, it also provides a subsequent check by enabling Congress to stop the use of force by cutting off its funding. Today, that check is augmented by the Anti-Deficiency Act,

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which prohibits an expenditure or obligation of funds not appropriated by Congress and by legislation that criminalizes violations of the act.

Absent attack or overwhelming urgency, if Congress fails to fulfill its constitutional role and yields to the president's claim of authority, it will have allowed the war-making power to be transferred away from the branch the Constitution prescribes. If such a pattern persists, one of the most important elements in the Constitution and of the American form of government will likely be rendered moot from disuse. Precedent is not easily overturned, and powers once lost are not easily regained.

That is why it is essential that the legislative leadership assert Congress's absolute right to decide whether to go to war. Failure to do so will be both an abdication of responsibility and a violation of the oath each took to uphold the Constitution. The practical consequence is this: If the leaders of Congress fail to assert congressional authority under the Constitution, the people will have lost the fundamental constitutional right to decide through their representatives whether to send their children to war.

Although it did ultimately seek congressional authorization, the Bush administration failed to respect this constitutional mandate in the deliberations that led to the war in Iraq. This attitude was reminiscent of the posture of George H. W. Bush, who, in signing the legislation authorizing the first Gulf War, claimed that it was not necessary.

New military threats loom in Iran, and sadly, in this post-September 11 world, the risk of new armed conflicts is always near. Last fall, Representatives Walter Jones (R-North Carolina) and William Delahunt (D-Massachusetts) introduced the Constitutional War Powers Resolution of 2007. Representatives Jones and Delahunt should be applauded for calling public attention to this issue and reasserting the war powers of Congress under our Constitution. We can be sure that our armed forces will be called to service again to face some new threat; we must ensure that the decision to send them is made by Congress.

The courts also have a critical role to play. The judicial power includes jurisdiction to hear cases concerning whether the use of force abroad has been constitutionally authorized, whether the terms of the authorization have been violated, and the extent and nature of actions within the scope of the authorization.

The U.S. Supreme Court has exercised its jurisdiction to assess the scope of authority granted by the Authorization for Use of Military Force passed by Congress in 2001, in such cases as *Hamdi v. Rumsfeld* (2004), where it held that the authorization included the right to detain citizens captured on the battlefield. However, in most cases judicial review has been thwarted by invoking such legal propositions as the "political question" doctrine and the "state secrets privilege." Federal courts have the constitutional power to decide whether the use of force has been lawfully authorized. This question is justiciable and should not be confused with the political question of whether America should go to war.

Congress must clearly reassert the constitutional principle that only the people's representatives have the authority to send American men and women to war, and courts should stand ready to assess whether these decisions have been lawfully made. Failure to do so may well result in a future president proceeding to exercise what by default has come to be seen as the president's unilateral authority.

Retrieving lost power is a difficult thing in politics. In this case, it requires the courage of Congress to take the most difficult decision a government can make and to be accountable for it. If we are to preserve our system of checks and balances and prevent the unilateral declaration of future wars, Congress must do its duty.

Mickey Edwards is a vice president of the Aspen Institute and author of Reclaiming Conservatism: How a Great American Political Movement Got Lost—And How It Can Find Its Way Back. He was a Republican congressman from Oklahoma from 1977 to 1993.

David Skaggs is executive director of the Colorado Department of Higher Education. He was a Democratic congressman from Colorado from 1987 to 1999.