



## Why the U.S. Congress Cannot Really Declare War - And What Might be Done about It

**Brien Hallett**, University of Hawaii at Manoa

In civics class, Americans learn that our Constitution assigns Congress the power to declare war – purportedly a clear break from British tradition, where the monarch has this authority. But, instead, in two centuries of practice, presidents have regularly started wars – and they have usually also made the public announcements. A good example occurred at 7:20 am on Wednesday December 20, 1989, when President George H. W. Bush appeared on national television to announce, “My fellow citizens, last night I ordered U.S. military forces to Panama. No president takes such action lightly. This morning I want to tell you what I did and why I did it.”

### A Glitch – Or a Constitutional Flaw?

Since at least 1973, when Arthur Schlesinger, Jr. published his influential book on the *Imperial Presidency*, scholars have excused Congressional failures to declare war by blaming external factors such as the maintenance of a large standing military, the Cold War, the atomic bomb, and America's leadership role in the modern world. But this misses a fundamental flaw in the U.S. Constitution itself. Article I, section 8 says, “The Congress shall have the *power*. . . to declare war.” But does the power reside in making the public announcement? Or does the power reside in taking the decision?

As President Bush did in 1989, U.S. presidents over two centuries have usually both taken the decision to go to war and announced it publicly. On four special occasions in 1812, 1898, 1917, and 1941, Presidents James Madison, William McKinley, Woodrow Wilson, and Franklin D. Roosevelt requested the Congress to make the public announcement. But this happened only *after* these presidents made the actual decision to take the United States into war. Congress functioned as a sort of glorified town crier.

How do we make sense of the incongruity that Congress is supposed to decide about waging wars but in reality does not? The simplest way to understand what happened is to realize that when the Founding Fathers drafted the Constitution, the legislature they knew functioned very differently from the post-1789 legislature they established. The early American Second Continental Congress was a small, unicameral body almost exclusively focused on foreign affairs. It was able to declare war in 1776 – but this capacity has eluded the large, bicameral U.S. Congress, which has primarily focused on domestic affairs over the past two centuries.

Small, relatively simple organizations focused on foreign affairs are able to do things that very large, enormously complex organizations focused on domestic affairs cannot do. The U.S. presidency has become imperial on matters of waging war primarily because foreign affairs are functionally different and distinct from domestic affairs. The drafters of the U.S. Constitution assigned Congress a function it cannot perform, while creating a presidential commander in chief who can and does perform the function of waging war.

## The War Powers Resolution of 1973 is Not a Remedy

Twentieth-century U.S. legislators looking for a way to correct the systematic failure of Congress to exercise its purported power "to declare war" passed the War Powers Resolution of 1973. This convoluted measure recognizes that presidents regularly get out ahead of Congress and says that "Within sixty calendar days... the President shall terminate any use of United States Armed Forces... unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces" or "(2) has extended by law such sixty-day period..."

But this leaves matters tied up in incongruous knots. Kicking the can down the road by extending the president's sixty-day grace period – most probably malfeasance, if not dereliction of duty, while enacting an "authorization" – is extra-constitutional. Nowhere in the Constitution are "specific authorizations" called for. Beyond all doubt, if the United States Armed Forces are to be used, the constitutionally approved way to do this is with an open and determined congressional declaration of war. On the face of it, a "specific authorization" looks very much like a way to circumvent the clear constitutional duty of the Congress "to declare war."

It would be better to recognize that the Congress is simply incapable of discharging its constitutional responsibility "to declare war." In theory, the War Powers Resolution was supposed to remedy this incapacity. In practice, the resolution has only reinforced this congressional incapacity.

## A Constitutional Amendment May be Necessary

If our imperial presidency is ever to be put in its place, a thoughtful amendment may be needed to remedy a glaring and dangerous flaw in the U.S. Constitution. Two very different kinds of amendments could create the remedy:

- The power to declare war could be given to the president who actually exercises that power.
- Alternatively, if we really want a legislative body to be in charge, the power "to declare war" could be given to a newly devised body that actually has the purview and organizational resources to discharge this responsibility. Through a Constitutional amendment, we could create a small, unicameral body modeled on the Second Continental Congress and charge it with guiding the nation's foreign policy, including making of declarations of war.

Should we decide to take the second route, creating a new legislative body capable of making the decision to take the nation to war might realize the hopes of the Founders – and correct for the fact that the Constitution they actually wrote assigned the power to declare war to a bicameral legislative branch of U.S. government that lacks the focus and capacity to meet the challenge.

**Read more in Brien Hallett, *Declaring War: Congress, the President, and What the Constitution Does Not Say* (Cambridge University Press, 2012).**