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THE DECLARATION OF WAR: ONE FOR THE HISTORY BOOKS?

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THE DECLARATION OF WAR: ONE FOR THE HISTORY BOOKS?

The concept of the declaration of war has been a part of the American system of government since the Constitution was ratified in 1789. Its justification revolves around the requirement to manifest, via the legislative process, the backing of the American people regarding the involvement of U.S. combat forces. With such reasonable justification, one would expect to see the Congress approve a declaration of war in every application of U.S. military force. However, its history presents an inverse reality. Since 1798, the United States has involved its military forces in over 200 conflicts.(15:26) Upon closer examination of these specific conflicts, it is important to note that a formal declaration of war was issued on only five occasions.

In 1973, a major step was taken to finally prescribe how this nation would send its troops to war. The passage of the War Powers Resolution (WPR) was seen by many as an attempt to rein-in the authority of the Commander-in-Chief to commit U.S. military forces. In reality, the WPR solidified the often tenuous relationship between the executive and legislative branches regarding the accepted method of introducing American troops into a crisis. Our latest success in the Persian Gulf, initiated solely within the guidelines of the WPR, raises further questions about the role of the formal declaration of war in future conflicts characterized as being rapid, limited and relatively bloodless affairs (hopefully). Accordingly, the declaration of war, while originally thought of as

the preferred method in justifying the use of U.S. forces, is in reality a seldom-utilized concept whose utility has become increasingly diminished based on its infrequent use, the license granted the President by the WPR and the changing nature of modern warfare and the use of force.

At the time of the Constitutional Convention in 1787, a formal declaration of war was neither required by conventional international law nor practiced as customary international law. In *The Federalist Papers*, John Jay stated: "The founders were fully aware of the lack of power actually contained in the war declaration clause because hostilities were rarely preceded by formal declarations of war." (13:16, 4343-435) The record shows that from 1798 to 1997, there have been 217 instances of U.S. military hostilities without a declaration of war, 95 instances of hostilities with actual combat or ultimatums, 114 military actions lasting more than 30 days and 142 U.S. military actions outside the Western Hemisphere. (13:47-91) (15:126-155) (14:8) In our collective history, a declaration of solemn war, fully invoking the international law of war, has been issued on only five occasions: The War of 1812 (18 June 1812); the Mexican War (13 May 1846); the Spanish-American War (25 April 1898); World War I (6 April 1917); and World War II (8 Dec 1941 against Japan, 11 Dec 1941 against Germany and Italy).

A short summary of these five instances of actual declared war is helpful in understanding the occasions when this Constitutional tool was used. For years following the American Revolution, Britain sought opportunities to disrupt

American trade and incite unrest among the Indians. The impressment of U.S. sailors into service for the British was one such measure. Since 1803, 917 American ships were seized and approximately 7,000 American seamen were impressed into British service. (10:106) President Madison sent a resolution to Congress on 1 June 1812 requesting a declaration of war, citing Britain's impressment policy, port blockades and fomenting the Indians to serve as war proxies against the U.S. Congress went into secret session after receiving the war resolution and entered into an intense debate on the issue of declaring war. In a close vote, the Congress formally declared war against Britain on 18 June 1812.

Since the fall of the Alamo on 6 March 1836 and the subsequent rout of Santa Anna's army by Sam Houston, the dispute between Texas and Mexico regarding an accepted agreement over their border continued with no end in sight. When Texas entered the Union on 29 December 1845, Mexico responded by declaring war against the U.S. on 23 April 1846. When the news of a Mexican attack into Texas arrived, President Polk delivered a war message to Congress on 11 May 1846, asking for a declaration of war:

. .After reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war .by act of the Republic of Mexico, a state of war exists between that Government and the United States. (4:55)

Congress passed a declaration of war against Mexico on 13 May 1846. The Senate vote was 40 to 2 in favor. (7:18)

Based on extremely harsh treatment of Cuban nationals by Cuba's ruling Spanish government in 1895, a provisional government was constituted that proclaimed independence from Spain. Insurgents began attacking Spanish rule in Cuba - in return, the Cuban government imposed martial law and conducted a roundup of all guerillas, forcing them into concentration camps. Concern was growing regarding the safety of U.S. citizens living in Cuba and the surrounding islands. To provide a symbol of American concern, President McKinley ordered the battleship *U.S.S Maine* to Havana harbor, where she dropped anchor on 25 January 1898. On 15 February 1898, the U.S.S. *Maine* exploded, killing 266 of her crew of 354. Investigators concluded that the ship was sunk by a submarine mine. On 21 April 1898, the Navy established a blockade of Cuba. Cuba responded by declaring war on the U.S. on 24 April 1898. The following day, 25 April 1898, Congress formally declared war on Spain, drawing strong public support. (7:280)

On 31 January 1917, the German High Command informed the U.S. that all ships would be sunk on sight after 1 February 1917. On 12 March 1917, the American steamer *Algonquin* was sunk, followed four days later by the sinking of the freighters *Vigilancia*, *City of Memphis* and *Illinois* with loss of American lives. President Wilson advanced by two weeks the date for convening Congress, and, on 6 April 1917, Congress declared that a state of war existed between the United States and Germany. (11:4-5)

By 1941, the U.S. stance of neutrality concerned the European nations as the war widened. After the Atlantic Conference in August 1941, Winston Churchill said of Roosevelt:

The President had said that he would wage war but not declare it and that he would become more and more provocative he would look for an incident which would justify him in opening hostilities. If the U.S. continues to cling to its neutrality, the emergence of a New Order in Europe and Asia seemed assured. (2:141-142)

On 7 December 1941, the Japanese bombed the U.S. Naval Base at Pearl Harbor, Hawaii and Congress passed a resolution declaring war on Japan the next day. On 11 December, Germany and Italy, members of the Tripartite Pact with Japan, declared war on the U.S., who responded with a declaration of war against Germany and Japan that same day.

In a comparison of all five declared wars, three common issues stand out. First, all of these wars could be termed "popular wars." For this discussion, a popular war would be a war in which the majority of the American public supported and felt the reasons for each were worth a fight. These reasons included our national honor and right to free trade (War of 1812); protecting U.S. territory from foreign incursion (Mexican War); supporting humanity and the expansion of the American Empire overseas (Spanish-American War); defending the rights of a neutral country (WW I); and protecting our national security (WW II). The popular support of the people was present before Congress, reflecting the public's high fever to get the U.S. involved militarily, passed the actual declaration.

The second common factor in these declared wars is the fact that the President in power at the time the declaration of war was approved saw such a declaration as the last step in a long chain of events. Specifically, the President was reluctant to proceed with a formal declaration of war against an aggressor nation until a specific incident or incidents pushed him to ask Congress for the formal declaration of war. These incidents included the impressment of American sailors and the British arming of Indians (War of 1812); repeated incursions by Mexican General Santa Anna, resulting in American blood spilled on American soil (Mexican War); protection of U.S. citizens and the sinking of the *U.S.S. Maine* (Spanish-American War); the sinking of American vessels without warning while a neutral party to a European war (WW I); and the bombing of Pearl Harbor (WW II).

Finally, in only one of the five wars was the declaration of war approved by the Congress after a considerable congressional debate. (War of 1812: Senate voted 19 to 13 for; House voted 79 to 49 for) (9:9) In all other wars, the declaration of war reflected a Congress blindly following Presidential leadership in urging for a formal declaration of war. The declaration of war in these cases was the result of an assessment by Congress that the public wanted war to settle the serious nature of the problems facing the country at the time. The Congress merely instituted what had already been settled in the court of American public opinion and was eager to appear supportive of the President's desire to settle the issue by force. In sum, these few occasions where the declaration was used

were very unique: popular wars, started by an incident of unparalleled audacity, with little congressional debate and strong support for the President.

With the end of the last declared war in 1945, serious questions have arisen concerning the authority of the President to involve U.S. forces. For example, President Truman never received approval from Congress to employ American troops in Korea (5:204). The Vietnam War became the true watershed of this issue when the 93rd Congress intensely debated the issue of who can enter this country into hostilities with another nation. Their goal was to do what the Founding Fathers did not do - to determine the dividing line between the Constitutional power of Congress to declare war and of the President as Commander-in-Chief to commit U.S. troops. The result was passage of the War Powers Resolution (WPR) (Public Law 93-148) on 7 November 1973. By their vote, Congress agreed with Abraham Lincoln in this statement made in 1846:

The provision of the Constitution giving war-making powers to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our [Constitutional] Convention understood 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 oppression upon us (4:56)

Since the passage of the WPR in 1973, both Congress and the President have violated its provisions several times: the evacuation of Saigon, the *Mayaguez* recovery, and the Iranian hostage rescue mission. (13:35-96) Some see the WPR as an avenue for using troops to quell a problem quickly without the delay of Congressional debate over a formal declaration of war. Others, such

as President Nixon, saw the requirement to consult with Congress as a reduction of his authority as Commander-in-Chief. However, many observers see the WPR as an accepted and expedient method of introducing forces into hostilities without a declaration of war. Indeed, the unique wording of the WPR simultaneously reflects both a restrictive tone by the Congress and a permissive intent by the President.

Since the end of WW II, the limited war has become the standard warfare model. The initial definition of "limited" was developed during Korea and later Vietnam as the opposite of the global, unlimited conventional wars fought earlier in this century. The term "limited" now expands to include the dimension of time and casualties as well as the more traditional concepts of limited goals, objectives and geography. Modern limited wars, such as Desert Storm, set a standard and developed a perception that these wars can be conducted quickly with few casualties. In reflecting on the U.S. involvement in such operations as Grenada, Panama and Southwest Asia, the declaration of war may remain a seldom-used concept as these modern conflicts typify the today's use of force in limited war. This is further reinforced by the WPR that provides a legal recourse to rapidly employ forces without the requirement for a declaration of war.

The hard lesson from Vietnam was that this nation should not place its sons and daughters in harms way without the support of the American people. Colonel Harry Summers, Jr., in attempting to describe the value of the declaration of war, states:

The Constitutional requirement for a congressional declaration of war served a dual purpose. It insured public support at the outset, and through the legal sanctions against dealing with the enemy, it created impediments to public dissent. Legalistic arguments that the form of the declaration of war was out of date may have been technically correct, but they obscured the fact that this form was designed to be an outward manifestation of a critical substance- the support and commitment of the American people.. The failure to involve the national will was one of the major strategic failures of the Vietnam War. (12:16-17)

The 1991 conflict in Southwest Asia demonstrated that this critical support of the people could be obtained without a declaration of war. President Bush's ability to gain a Congressional resolution to support his commitment of U.S. forces to fighting in Iraq proved that a President can have both Congressional and public approval without a formal declaration of war (8:552). This fact shakes the very justification for the design of the declaration of war to unite the country for war. The low percentage of declared wars fought by this country casts further doubt on its applicability as the vast number of conflicts were settled through American troop deployments abroad without a declaration of war. The ability to rapidly introduce forces into combat through the provisions of the WPR further diminishes the opportunities to use the declaration of war again.

The truly infrequent use of the declaration of war contradicts the idea that it is appropriate for every use of American force. The great majority of military involvement was neither popular enough to win strong support of the public and Congress nor involved a strong enough incident to lead to a declared war as the ultimate manifestation of American anger and desire for retribution. Given the lessons from our increasingly unpopular involvement in Vietnam, it is

reasonable to expect Congress to subject any notion of a declared war to lengthy debate and to not side with the historic record of blind support for presidential leadership. As stated by Edwards and Wayne, "The types of presidential initiatives that the War Powers Resolution seems designed to prevent, the long-term conventional limited wars similar to Korea and Vietnam, seems to be those that are least likely to occur if the political climate that has existed in the United States since the mid-1970's persists." (3:456) Indeed, the declaration of war seems reserved for a type of conflict that may be passing from the scene - the long, protracted, unlimited and global war that modern theorists feel is the opposite of the type of conflicts indicative of modern warfare.

A strong message was sent by our conflict in Iraq about the future of the declaration of war. This conflict, executed under the mantle of the WPR, may have been the final nail in the coffin for a concept terminally ill from under use and poorly suited to deal with the current trend in modern warfare. Based on history, current legislation and the future of warfare, the declaration of war may indeed be a concept relegated to the history books.

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