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Where Does the Tea Party Stand on Declaring War?

by Jacob G. Hornberger

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Given their commitment to the Constitution, members of the Tea Party must confront the legality of the invasions and occupations of Afghanistan and Iraq.

I'm referring to the declaration of war provision in the Constitution. It delegates the power to declare war to the Congress and the power to wage war to the president. Pursuant to this provision, the president is legally prohibited from waging war without first securing a declaration of war from Congress.

We all know where conservatives and neo-conservatives stand on this issue. They say that that is nothing more than a technicality that the president is free to ignore. They point to precedent, such as the Korean War and the Vietnam War, and say that since the presidents in those wars didn't secure a congressional declaration of war, future presidents are no longer legally required to do so.

But conservatives and neo-conservatives are wrong. The Constitution is the law, one that we the people impose on federal officials, including the president. Just as the citizenry is expected to comply with laws enacted by the federal government, federal officials are expected to comply with the law that we the people impose on them, which is the Constitution. And the fact that previous presidents have broken the law does not serve as a legal justification for succeeding presidents to do so.

The Framers chose not to entrust the president with both the power to declare war and the power to wage war. They wanted the war power to be divided because they understood that the presidency would inevitably attract the type of people who would use military force to go after foreign rulers they didn't like.

Conservatives and neo-cons argue that the resolution that they enacted which gave President George W. Bush authorization to use force against Iraq was the equivalent of a congressional declaration of war. They are wrong. In effect, that resolution delegated to the president the power to declare war, something the Constitution does not permit. The responsibility for declaring lies solely with Congress.

When Bush wanted to wage war against Iraq, the law required him to ask Congress for a formal declaration of war. The Congress would have required Bush to explain the reasons for his request. It is entirely possible that in the congressional deliberations, Congress would have determined that Bush's WMD scares were bogus and nothing more than a smokescreen to effect a regime-change operation in Iraq intended simply to bring down Saddam Hussein and replace him with a U.S.-approved regime, something that 11 years of pre-9/11 sanctions on Iraq had failed to do.

It is no different with respect to Afghanistan. When Congress authorized Bush to use military force to go after 9/11 conspirators, that was not a declaration of war against Afghanistan. The Constitution required Bush to approach Congress and show why the Congress should issue a declaration of war against Afghanistan. It is entirely possible that Congress would have considered the Taliban's refusal to extradite Osama bin Laden to be an insufficient justification for declaring war against Afghanistan, a war that has taken the lives of countless people who had absolutely nothing to do with 9/11, not to mention the fact that the principal suspect in the 9/11 attacks, Osama bin Laden, is still on the lam.

The point the Tea Party must confront is very simple: The Constitution requires a congressional declaration of war as a prerequisite for the president's waging of war. The Congress never issued a declaration of war against Iraq or Afghanistan. That makes the wars on these two countries, and the resulting occupations, illegal under our form of constitutional government.

Will the Tea Party take the same position as conservatives and neo-cons — that constitutional provisions are nothing more than technicalities that the president is free to ignore whenever he wants? Or will the Tea Party move in a different direction, one that requires the president to adhere to the Constitution by securing the constitutionally required congressional declaration of war before he wages war?