

## SPECIAL REPORT

# Unconstitutional Authority

By Doug Bandow on 6.17.11 @ 6:08AM

Presidents routinely claim the authority to take America into war. Congresses just as routinely fail to prevent presidents from doing so. President Barack Obama, a one-time law professor, is proving to be no different.

First he ignored the Constitution's clear division of powers. Article 1, Sec. 8 (11) of the Constitution states that "Congress shall have the power... to declare war." Declare means initiate.

The Founders were unambiguous. John Jay complained that dubious motives often led kings "to engage in wars not sanctified by justice or the voice and interests of his people."

However, the Constitution solved this problem. The president's authority was "in substance much inferior" to that of the English monarch, declared Alexander Hamilton: "It 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." James Wilson explained that the power to start wars had been transferred to Congress: "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."

For good reason the Founders intended to allow presidents to repel sudden attacks. The president also may initiate limited military action not intended to create a state of war -- killing Osama bin Laden, attempting to rescue hostages in Iran.

There will be some gray areas between the two poles, but most cases are easy to judge. Three years of brutal conflict with North Korea and China was not a "police action." It was a war. Similarly, three months of attempting to overthrow the Libyan government of Muammar Gaddafi is not a "kinetic military action." It is a war.

President Obama had an obligation to go to Congress before he intervened in Libya.

Nevertheless, he ordered the bombing of Libyan military forces and installations without legislative approval. Still, he acted to comply with the War Powers Resolution, which set the clock ticking on March 19. The alarm went off two months later, when the WPR required the president either to end hostilities or win congressional authorization.

The U.S. had spent two months killing Libyan personnel, destroying Libyan materiel, and attempting to overthrow the Libyan government. The secretary of defense had admitted that if he was a Libyan being targeted by American weapons, he probably would perceive it as a war. The secretary of state extolled Washington's contribution to the war effort while lobbying the Europeans to do more.

However, the president explained to Congress that the U.S. wasn't actually doing much at all -- just some "limited" operations in a "supporting" role. Really nothing to worry about or even notice. Certainly not enough to call a war. Legislators should just go back to their offices and let him get on with his splendid little kinetic military action!

In a rare bipartisan moment, legislators fought back. Plans for a pro-war resolution in the Senate foundered when support proved lacking. The House nearly passed a resolution by Rep. Dennis Kucinich (D-Ohio) demanding withdrawal. House Speaker John Boehner diverted votes to a sickly substitute that still criticized the president. Moreover, on Tuesday the speaker challenged President Obama to comply with the WPR.

The president has responded with more obfuscation. The White House released a 32-page report, a propaganda document filled with unintended humor. For instance, it restated the unfounded claim of impending massacres -- essentially the humanitarian equivalent of WMDs in Iraq. The president claimed that intervention in the civil war shows "the people of the Middle East and North Africa that America stands with them at a time of momentous transition," even though the administration merely scolded the government of Bahrain and hesitated to do even that to the government of Syria.

Moreover, the document warned of the possible "spread of violence and instability in a region pivotal to our security interests." If North Africa is "pivotal to our security interests," is there any place which is not? Libya has a small population, poor economy, and modest oil reserves. It is located between two other unstable nations which had their own popular revolutions earlier this year. To the south lies a continent where even Washington policymakers have trouble concocting alleged "security" interests. No wonder outgoing Secretary of Defense Robert Gates acknowledged that America had no "vital interests" at stake in Libya's civil war.

The administration glossed over the fact that it used a clear bait and switch: the United Nations resolution authorized action to protect civilians and the president asserted that the U.S. was not engaged in regime change. Indeed, he explained: The experience in Iraq "is not something we can afford to repeat in Libya." Now, however, he is demanding Gaddafi's ouster. As Paul Pillar notes, it is "nonsensical" to try to divorce the supposed military goal of protecting civilians from the overriding diplomatic goal of ousting Gaddafi.

Worse, after having put American and alliance credibility on the line for at best peripheral, even frivolous interests, the administration claimed that "NATO's credibility would be damaged with significant consequences for U.S., European, and global security" if Congress terminated Washington's participation. Actually, it isn't clear what those consequences would be, since NATO has little credibility apart from America's role. The real problem of credibility is the fact that the Europeans want to play act as a world power, but don't want to spend the money or risk the casualties necessary to do so.

As for the Constitution, the report emphasized "congressional consultation," providing a long list

of meetings and briefings where administration officials told legislators what the president was doing. The report devoted only two paragraphs to analyzing the constitutional and legal issues his acting unilaterally.

Explained the White House, because of "the limited nature, scope and duration of the anticipated actions, the President had constitutional authority" to act. Moreover, "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground forces, nor do they involve the presence of or any significant chance of escalation into a conflict characterized by those factors." With an apparently straight face, State Department legal adviser Harold H. Koh, who criticized previous unilateral Republican war-making, declared: "We are not saying the president can take the country into war on his own."

Of course, that is precisely what he is saying. The White House memo offers well-calculated sophistry. Noted Rep. Scott Garrett (R-N.J.), chairman of the Constitutional Caucus: "a progress report from the White House is no substitute for congressional authorization."

The U.S. government is working with allies to overthrow another government which, until now, was recognized as "legitimate" within the international system. Washington used aircraft and missiles to destroy Libyan air defenses and attack Libyan ground forces. The administration then used equally deadly drones to destroy command-and-control facilities and combat forces. A quarter of the combat sorties have been American. The report noted that U.S. forces are providing 70 percent of the intelligence-gathering and a majority of the refueling in support of treaty allies thereby "enabling coalition aircraft to stay in the air longer and undertake more strikes." U.S. aircraft (and drones) have avoided "exchanges of fire" because the Libyan forces are weak, not because they are unarmed.

But the administration says America is not at war!

Ten congressmen have sued the president, though the courts are likely to dismiss the case on jurisdictional grounds. So Congress must act. The legislature has a clear constitutional and legal obligation to act. Congress also has an institutional interest in doing so. Despite the attempt by extreme centralists to turn the president into something akin to an elective dictator, the Constitution gives more foreign policy powers to Congress than to the president.

Congress is to create and fund the military, write the rules of war, decide when the nation goes to war, approve treaties, and confirm ambassadors. The president's power is formally much more limited: he commands the military created by Congress in peace and in wars authorized by Congress. Yet modern American presidents take for granted that they have the powers of past British monarchs. Legislators should disabuse this president and his successors of such a heretical constitutional notion.

President Barack Obama has violated the Constitution and law. Congress has a responsibility to act. It's as simple as that.

**Doug Bandow** is a Senior Fellow at the Cato Institute and the Senior Fellow in International Religious Persecution at the Institute on Religion and Public Policy. A former Special Assistant to President Ronald Reagan, he is author of *Beyond Good Intentions: A Biblical View of Politics* (Crossway).