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President Obama's Illegal War

David Boaz - May 31, 2011



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In 2007 presidential candidate [Barack Obama](#) told [Charlie Savage](#) of the *Boston Globe*,

The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.

On March 19, 2011, President Barack Obama authorized [military strikes on Libya](#) to take out Libyan air defenses and protect rebels from attack. He told congressional leaders that the involvement would last “days, not weeks,” and he [claimed the authority](#) of the UN Security Council for his assault. But [the UN can't authorize American military intervention](#). As candidate—and senator and former professor of constitutional law—Obama understood in 2007, Congress must authorize the use of military force.



Credit: Pete Souza/The White House

The administration offered various explanations of why it didn't need authority from Congress. It had the authority of the UN. He “[could reasonably determine that such use of force was in the national interest](#),” a rather sweeping justification for any exercise of presidential authority. And everybody's favorite: It wasn't war, it was “[kinetic military action](#).” Gene Healy addresses many of these issues [here](#).

Article I, Section 8, Clause 11 of the Constitution vests in Congress the power to declare war. What about cases of imminent danger? The president may feel that there is no time to ask Congress about responding to an attack or an imminent threat. Well, in 1973 Congress tried to come up with a rule to deal with that eventuality. Over President Richard Nixon's veto, Congress passed the War Powers Resolution, which provided that that the president can send U.S. armed forces into action abroad only by authorization of Congress or in case of “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” The resolution requires the president to notify Congress within 48 hours of committing armed forces to military action and forbids armed forces from remaining for more than 60 days without an authorization for the use of military force or a declaration of war.

There was no imminent threat in Libya. In the first place, Libya posed no threat to the United States. No “threat to the nation” was at issue. And in the second place, people had been [discussing military intervention since late February](#). President Obama had plenty of time to ask Congress for an authorization for use of military force if he wanted legal authority. He chose not to seek such authority, despite [warnings](#) from senior members of Congress like Sen. Richard Lugar (R-IN) that he should not proceed without congressional debate and authorization.

Now the 60-day clock has run out. Even if we conceded the “national emergency” point, the president should have obtained congressional authorization within 60 days. Members of Congress from both parties [are complaining](#):

“The undeniable conclusion is that the president is breaking the law by continuing the unilateral offensive war against Libya,” said Rep. Justin Amash (R-Mich.), a conservative freshman testifying before the House Foreign Affairs Committee....

But some legislators from both parties have begun to criticize the administration. In the Senate, they include a titan on foreign affairs—Sen. Richard G. Lugar (R-Ind.)—and a tea-party-influenced freshman, Sen. Mike Lee (R-Utah).

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"I think you cross an important threshold the minute you've got your military carrying out military strikes on the soil of a foreign, sovereign country" without congressional approval, Lee said in a telephone interview Wednesday. "The longer it rolls on, the more likely it is to come to a head in the Senate."

At the House hearing Wednesday, several lawmakers blasted Obama as ignoring the resolution — and, by extension, ignoring Congress.

"They won't even acknowledge the 60th day ... the day on which they began violating the law," said Rep. Brad Sherman (D-Calif.). "The fault is also here with Congress. So many of us would like to evade the tough decisions."

Rep. Thomas J. Rooney (R-Fla.) testified before the committee about his own proposed resolution, which would express the "sense of Congress" that Obama should seek explicit authorization for the operation in Libya.

"If you're going to go to war and send our troops into harm's way, you need us — and the American people — on board," Rooney said, summing up the idea behind the War Powers Resolution. "What we're asking for is simple — that the president respect our role."

But President Obama and congressional leaders are resolute in their determination not to address the legality of the president's actions:

Republican and Democratic leaders, who agree on little else, seem united in their desire to not say much about the War Powers Resolution.

"We've had good discussions on Libya," Senate Majority Leader Harry M. Reid (D-Nev.) said in a news conference Tuesday. Senate Minority Leader Mitch McConnell (R-Ky.) also was noncommittal: "Discussions continue."

























White House officials, too, have sought to play down the importance of the deadline. Asked whether the president still has the authority to continue operations in Libya, Obama spokesman Ben Rhodes did not mention the resolution specifically.

"I think we addressed that through the letter the president sent up to Congress at the end of last week, again reaffirming our ongoing efforts in Libya," Rhodes said. "So we believe we have the authorities we need."

Presidents have never liked the War Powers Resolution and have tried to ignore it, in cases such as Ronald Reagan's sending Marines into Lebanon and Bill Clinton's bombing of Yugoslavia. But law professor Peter Spiro *says*, "President Obama has clearly violated the letter of the law," and unlike his predecessors he's "not even bothering to go through the motions."

Presidents have an obligation to obey the Constitution and the law. But one of the ways that separation of powers works is that each branch of government is supposed to jealously guard its prerogatives from usurpation by the other branches. Too often Congress ducks that responsibility, preferring to let presidents make decisions, *make law*, and make war without the involvement of Congress. As Arthur M. Schlesinger, Jr., explained in his book *The Imperial Presidency*, the expansion of presidential war-making power has been "as much a matter of congressional abdication as of presidential usurpation."

The president is derelict in his duty to obey the Constitution and the War Powers Resolution. And Congress is derelict in its duty to assert its constitutional authority. And I'm still wondering *what's happened to the antiwar movement*, which ought to be loudly protesting not just the continuing wars in Iraq and Afghanistan but the newborn war in Libya.

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