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So Far, Obama More Like Bush, Than Carter, on War Powers Authority

By Jeremy B. White

In the last three months, the U.S. has rained down missiles on pro-Gaddafi forces in Libya and moved to enact a greatly expanded mission of covert drone strikes in Yemen.

Congress did not vote on either campaign.

While neither situation is entirely unprecedented, they illustrate in different ways the Obama administration's embrace of an expansive view of executive power, one in which the president has broad authority to initiate military action without Congressional approval.

The War Powers Act requires the president to remove U.S. forces from hostilities after 90 days if Congress has not authorized continued military action, but President Barack Obama prompted outrage and incredulity when he [overrode his legal advisers](#) and claimed that strikes against Libyan autocrat Muammar al-Gaddafi's forces do not constitute hostilities. House Speaker John Boehner, R-Ohio, has led a Congressional [backlash against](#) what members on both sides of the aisle see as Obama's overstepping his powers, and the Senate has [scrambled](#) to pass a resolution.

Obama is not the first president to violate the War Powers Act, which Congress passed over President Nixon's veto in 1973 to establish a counterweight to presidential discretion to wage war. Congress has since had little success in enforcing the law or issuing legal challenges to presidents who deploy forces abroad. Once a conflict is underway, it becomes very difficult for Congress to intervene.

"Congress for the most part is in a difficult position when the president commits force," said Miami University of Ohio professor Chris Kelley. "Congress can stop funding the troops. But by doing that it places itself in a very difficult political position when an election occurs and Congress is seen to have taken a vote whereby they put American forces in harm's way."

But Obama is the first to exceed the 90 day deadline, asserting that the limitations imposed by the War Powers Act do not apply. Obama has had to rely on such contortions to support his contention that he remains within the law, something that seems at odds with his [rejection in 2007](#) of the idea that the president cannot authorize a military attack without Congressional consent unless it involves "stopping an actual or imminent threat to the nation."

"What I think is unusual about this particular instance and their particular legal posture is the boldfaced absurdity of it," said the Cato Institute's Gene Healy. "The legal rationale that they've offered is brazenly unconvincing. It really boils down to the idea that you're not in hostilities within the meaning of the War Powers Act if the other guy can't hit you back when you're hitting him."

Reports emerged last week that the Central Intelligence Agency is moving forward with [a campaign](#) of unmanned drone strikes against Yemeni Al-Qaeda affiliates who have become both more assertive and more vulnerable as chaos has engulfed the country. Congress did not vote explicitly to authorize that plan - it is justified under an [Authorization for Use of Military Force](#), passed shortly after Sept. 11, 2001, that granted the president the ability to employ "all necessary and appropriate force" against anyone who planned or aided the attacks of Sept. 11, or harbored the perpetrators.

"The further and further we get away from 9/11, with the core of Al Qaeda decimated and Bin Laden dead, the way the original Authorization for Use of Military Force is drafted, it gets more and more tenuous," Healy said. "They are treating it like a permanent delegation by the Congress to the president of a generalized war power to launch attacks worldwide."

Obama has been lambasted by campaign supporters for their perception that he has reneged on campaign promises and sustained the same Bush era abuses of executive power that he once criticized. He has come under fire for invoking the state secrets privilege to block government actions from being revealed in court, for authorizing the assassination of terrorism suspects even if they are U.S. citizens, and for continuing the practice of indefinitely detaining terror suspects without trial.

University of Michigan Law Professor Julian Davis Mortenson said charges that Obama is simply continuing Bush's practices are for the most part "a dramatic overstatement," pointing to Congressional restrictions that blocked Obama from moving to try terrorism suspects in court or from closing Guantanamo Bay. But Mortenson said that with Yemen, Obama is picking up where his predecessor left off.

"The strikes in Yemen are nothing different from what's been done since the Authorization for Use of Military Force has been passed," Mortenson said. "There are problems with interpreting it this way to authorize conflict in perpetuity but it's been broadly viewed this way, the courts have viewed it this way, two administrations have viewed it this way. What Obama is doing is nothing new."

In the same sense, Obama's actions fit into a larger historical trend, as Congress' waning capacity to halt presidential warmaking has led commanders in chief to more easily expend the nation's blood and treasure.

"One check would be if more members of Congress were what I call institutionalists - they cared about their institution and checks and balances - but there are very few of those around," said Lou Fisher, a scholar in residence at the Constitution Project who spent 40 years working for Congress. "After Nixon got into trouble Ford was more on the modest level and followed by Carter more at the modest level but from Reagan on it's been the big presidency again going everywhere, without Congressional approval."