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Obama Must Pay for His Illegal War

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The rebels' looming triumph over Libyan dictator Muammar Qaddafi has caused supporters of the Obama administration to do a victory lap, but the conflict is not yet over—and the impact on America has just begun.

However, the imminent end of U.S. military action provides Congress with an opportunity to confront the president's apparent predilection to conduct illegal wars. When President Barack Obama took the United States into Libya's civil war in March, it was yet another war of choice that served no American security interests. To the contrary, bombing a government that had abandoned its nuclear program and dropped plans for long-range missiles made peaceful denuclearization of other nations, such as Iran and North Korea, well nigh impossible.

At the same time, Washington unleashed unpredictable political forces in Libya. Qaddafi's imminent demise is welcome, but a liberal, democratic future for the North African nation is not certain, and perhaps not even likely. Events in Egypt next door show the many barriers to creating a genuinely free society.

Nor did the administration succeed in its alleged humanitarian mission to protect the Libyan people. The initial claims of prospective massacres were propaganda, a la George W. Bush's WMDs in Iraq. In fact, Qaddafi had slaughtered no civilians in any of the cities he had earlier retaken from the rebels, and his incendiary rhetoric was directed against armed insurgents.

Worse, by adopting a minimalist military policy, the administration prolonged the conflict, resulting in far more deaths. Low-tech civil wars are usually bloody: the administration turned a potentially quick victory into more than five months of arduous fighting. Having allegedly gotten involved to save lives, President Obama prosecuted the war in a manner almost designed to maximize civilian casualties.

Still, unwisely going to war is hardly unique to this president. The good news, so far at least, is that Libya is far less consequential than Iraq. President Bush's war blunder was catastrophic. President Obama's has been modest.

Where this administration outshone its predecessor was in ostentatiously conducting an illegal war, treating the U.S. Congress and, more important, the American people as idiots. At least President Bush sought congressional authorization, if not a formal declaration, and never denied that he was fighting a war. President Obama played George Orwell and claimed that no hostilities were occurring even as American planes, missiles, and drones killed Libyan military personnel and destroyed Libyan military materiel.

For a brief moment Congress flared in indignation, but it quickly retreated, in part cowed by the claim that it would be irresponsible to undercut the administration's ongoing non-hostile hostilities.

Now that U.S. and NATO participation is largely over—with limited strikes backing rebel advances on the final Qaddafi strongholds in the south—Congress should revisit the issue and stand by the Constitution. President Obama once taught constitutional law, but he obviously should have been a student again.

The Founders wrote the Constitution as they did to stop precisely such a unilateral war. Indeed, one of their greatest fears was that America's president would act like the British king, launching unnecessary wars on no one's authority but his own. The early Americans consciously tried to make U.S. participation in war less likely. Article 1, Sec. 8 (11) states that "Congress shall have the power . . . to declare war." Observed James Madison: the "fundamental doctrine of the Constitution that the power to declare war is fully and exclusively vested in the legislature."

In fact, the Founders gave other important war-making powers to Congress as well, including raising an army, approving military expenditures, ratifying treaties, setting rules of war and issuing letters of marquee. The Constitution only made the president commander-in-chief of the military, which primarily empowered him to manage wars authorized by Congress.

Alexander Hamilton, perhaps the constitutional convention's strongest fan of executive power, nevertheless called the commander-in-chief the "first general and admiral" of the armed services. The president's authority, said Hamilton, was "in substance much inferior to" that of Britain's king, the model against which the convention delegates were reacting. The president's power "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."

The Framers did change “make” to “declare” to highlight the fact that the president could respond to foreign attack. Contrary to the claims of today’s fans of presidential war making, however, the Founders did not intend to limit the legislature’s power to noting that the president had started a war.

Support for presidential war making has been minimal throughout American history. George Mason bluntly charged that the president "is not safely to be entrusted with" the authority to start wars. Thus, Mason favored "clogging rather than facilitating war." Pierce Butler reassured skeptical citizens of South Carolina that the convention rejected giving the president authority to start wars “as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.” James Wilson was equally blunt. The new Constitution, he explained, "will not hurry us into war." Rather, the provision “is calculated to guard against it. 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.” Off in Paris, Thomas Jefferson approved of the "effectual check to the dog of war by transferring the power of letting him loose." Decades later, Abraham Lincoln praised the Framers for recognizing war “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 this oppression upon us.”

To his credit, President Obama did not make any of these discredited arguments. When candidate Obama was asked whether he could bomb Iran, he answered: “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.”

Candidate, now Secretary of State, Hillary Clinton took a similar position: “I do not believe that the president can take military action—including any kind of strategic bombing—against Iran without congressional authorization.”

Then-Senator, now Vice President Joseph Biden even advocated impeachment of President Bush if the latter bombed Iran without congressional authority. The convention delegates, said Biden, “were determined to deny the president” the “unfettered power to start wars.” Indeed, the “Framers intended to grant to Congress the power to initiate all hostilities, even limited wars.”

Yet on the latter point President Obama apparently disagrees with his vice president—and with many of his own legal advisers. When it came to Libya, the president announced that little wars don’t count under the Constitution. If the adversaries aren’t downing any of our airplanes, then it doesn’t count as a war.

Advocates of investing the president with monarchical war-making power long have pointed to prior chief executives who deployed the military without congressional authority. The list of examples is long, but none of them offer a precedent for attempting to oust the internationally recognized government of another nation that has neither attacked nor threatened the United States or any American ally. Most were limited actions, many were carried out under colorable legal authority, some were undertaken for arguable defensive reasons, and others were initiated

without Washington's authorization. Even if these operations were acts of war, they weren't waging war.

Equally important, the fact that other presidents acted unlawfully does not give President Obama authority to do the same. Presumably he recognizes this fact. So he came up with an entirely different argument: In March, he notified Congress pursuant the War Powers Resolution that he had sent U.S. forces into combat. Two months later, when the WPR required that he withdraw or seek congressional approval, he said: Never mind. The American military was not engaged in hostilities. Rather, U.S. personnel apparently were doing something else—perhaps vacationing in the Mediterranean.

President Obama explained that Congress need not concern itself with Washington's participation in Libya's war since America's role was "non-kinetic," "more limited" and "in support." An anonymous administration official declared that "the kinetic pieces of that are intermittent."

The argument was not just nonsense, but nonsense on stilts, as philosopher Jeremy Bentham once characterized an opposing claim.

The Justice Department and Pentagon's General Counsel concluded the war was illegal. Even then defense secretary Robert Gates admitted that if he was "in Qaddafi's shoes" he would think America was at war.

The administration's decision to scale back U.S. participation did not change the character of America's participation in the Libyan civil war. Compare President Dwight Eisenhower, who would not ignore the Constitution. He announced that "I am not going to order any troops into anything that can be interpreted as war, until Congress directs it."

While President Bush never let the Constitution get in the way of his preferred policies, even he always made a colorable claim to be living up to America's fundamental law. President Obama's argument was risible.

Moreover, noted Jack Goldsmith, who for a time headed the Bush Justice Department's Office of Legal Counsel: "this appears to be the first time that a president has violated the War Powers Resolution's requirement either to terminate the use of armed forces within 60 days after the initiation of hostilities or get Congress's support."

Columbia law professor John Bassett Moore is equally dismissive of the president's claim:

There can hardly be room for doubt that the Framers of the Constitution when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.

Although Congress did nothing earlier in response to President Obama's contemptuous dismissal of its role under the Constitution, legislators now can act without fear of compromising ongoing military operations. Congress should bar use of any federal funds for future military action in Libya. Moreover, it should exact a price for presidential lawlessness. Impeachment, as then-Sen. Biden recognized, would be the appropriate legal remedy, even if today politically inconceivable. At the very least the legislative branch should retaliate against the administration: one possibility would be to defund positions held by officials, such as Harold Koh at the State Department, who advanced the president's dishonest legal claim.

Candidate Obama promised the American people: "No more ignoring the law when it's inconvenient." Alas, Congress obviously must insist that he obey the law. The war in Libya is no great administration victory. Even if it were, it would be a prize too dearly bought. For the Constitution limits presidential authority to protect our liberty. And every time a president ignores a constitutional restraint, another legal guarantee for our freedom is effectively erased from America's governing document.