



April 1, 2011

RE: Cosponsor and Support H.R. 1212, the RECLAIM Act, Which Will Reassert the Sole Constitutional Authority of Congress to Decide Whether the President May Use Military Force in Libya

Dear Representative:

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The American Civil Liberties Union strongly urges you to cosponsor—and urge prompt committee and floor consideration of—H.R. 1212, the Restoring Essential Constitutional Constraints for Libyan Action Involving the Military Act (“RECLAIM Act”), introduced by Congressmen Justin Amash (R-MI) and Timothy Johnson (R-IL), which would block further United States military action in Libya until and unless the Congress exercises its exclusive constitutional authority to authorize military action. Given the immediacy, gravity, and scope of the armed conflict that the United States entered into in Libya, Congress should no longer shirk its constitutional responsibility to decide whether and when the United States should use significant military force in Libya.

Delay in taking up this fundamental question of whether the President may continue to use military force in Libya would mark an abdication by Congress of the war powers reserved for the Congress under Article I of the Constitution. The failure of Congress to act would strike at the very heart of the fundamental principle of separation of powers that is at the core of the Constitution and is the undergirding of our democratic form of government. The RECLAIM Act would appropriately reassert the authority and responsibility assigned to the Congress by the Constitution.

The ACLU does not take a position on whether military force should be used in Libya. However, we have been steadfast in insisting, from Vietnam through both wars in Iraq, that decisions on whether to use military force require Congress's specific, advance authorization. Absent a sudden attack on the United States that requires the President to take immediate action to repel the attack, the President does not have the power under the Constitution to decide to take the United States into war. Such power belongs to the Congress. Consistent with this position, the RECLAIM act prohibits further military action in Libya until and unless authorized by the Congress, but does not assert any position on whether the Congress should authorize further military action.

As Thomas Jefferson once wrote, the allocation of war power to Congress provides an “effectual check to the Dog of war” by “transferring the power of letting him loose from the Executive to the Legislative body . . . .” Letter from Jefferson to Madison (Sept. 6, 1789). Congress alone has the authority to say yes or no on whether the United States can use military force in Libya or anywhere else.

But it is now clear that President Obama has already used significant military force in Libya. On March 19, 2011, the President took the United States into an armed conflict in Libya that has, to date, included a significant commitment of American military force, with targets that have included Libyan air defenses, ground forces loyal to Muammar Qadhafi, a building in a compound regularly used by Qadhafi, and even Libyan boats. On the first day of combat alone, more than 100 Tomahawk cruise missiles were fired into Libya from offshore naval vessels. During the first several days, U.S. bombers and fighter aircraft attacked air defenses and ground forces across Libya. Although there are no reports of U.S. service members killed in action, an Air Force fighter plane and its crew of two Air Force pilots went down over Libya on March 21. According to *Marine Times*, the rescue of the pilots required seven Marine aircraft and the dropping of two bombs near bystanders. Numerous media outlets report significant casualties among Libyans, including civilian casualties.

During the past week, the United States dramatically ramped up its attacks in Libya. According to several media reports, the United States is now using low-flying AC-130 flying gunships and A-10 attack aircraft, which are typically used to attack ground troops and supply lines, and which also carry greater risk of casualty to aircraft crews. Also, the CIA has reportedly deployed teams of operative to Libya, who will be serving on the ground. Other media reports have even reported attacks on Libyan boats. These stepped up attacks are consistent with a broadened scope of the commitment made by the United States, which appears to extend well beyond solely protecting civilians from harm. Although the government reportedly is in the process of turning some operational command over to NATO, the United States alone decides the scope of its own commitment, and the Congress still has the sole constitutional authority to decide whether military force may be used.

The Executive Branch’s assertions of unilateral authority to enter the armed conflict in Libya cannot and should not go unchallenged by the Congress. The decision whether to go to war does not lie with the President, but with Congress. Congress's power over decisions involving the use of military force derives from the Constitution. Article 1, Section 8 provides that only the Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” among other war powers.

The structure of the Constitution reflects the framers' mistrust of concentrations of power and their consequent separation of those powers into the three branches of our government. The framers well understood the danger of combining powers into the hands of a single person, even one who is elected, particularly a person given command of the armed forces. In order to prevent such an accumulation in times of war or emergency, the framers split the war powers between the Executive and Legislative branches, giving the Congress the power to declare war, i.e., make the decision whether to initiate hostilities, while putting the armed forces under the command of the President.

In giving the power of deciding whether to go to war to Congress alone, the framers made clear that the President's powers as Commander in Chief, while "nominally the same [as] that of the king of Great Britain . . . in substance [is] much inferior to it." The Federalist No. 69 (Alexander Hamilton). As Alexander Hamilton explained, the power of Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all of which, by the Constitution under consideration, would appertain to the legislature." *Id.*

Chief Justice Marshall made clear, as early as 1801, that the Executive Branch did not have the power to decide whether the country will use military force. In a series of cases involving the seizure of vessels during an undeclared naval war with France, the Supreme Court made clear that Congress, not the President, was the ultimate repository of the power to authorize military force. See *Little v. Barreme*, 6 U.S. 170 (1804), *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *Bas v. Tingy*, 4 U.S. 37 (1800). As Marshall made clear, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." *Talbot*, 5 U.S. at 28 (1801).

In *The Prize Cases*, 67 U.S. 635 (1863), the Supreme Court found that a "state of war" may exist without a declaration of war. But the peculiar context of the Civil War explains those cases. Indeed, the Court reaffirmed that, in contrast to the President's power to suppress insurrections, "By the Constitution, Congress alone has the power to declare a national or foreign war." *Id.* at 668.

Although some supporters of unlimited Presidential war making power argue that the President, as Commander in Chief, has the ability to use military force whenever he deems it necessary in the "national interest" and need not obtain either a declaration of war or Congressional approval, this view is based on a misreading of history. Proponents of this view make much of the fact that the drafters of the Constitution had considered giving Congress the sole power to "make War," but in the end decided its power would be to "declare War." Some supporters of Executive power claim this means the President has the power to make war regardless whether Congress has acted. However, James Madison explained that this change was made simply to leave "to the Executive the power to repel sudden attacks." Debates in the Federal Convention, Aug. 17, 1787. According to Hamilton, "anything beyond" such use of military force "must fall under the idea of reprisals and requires the sanction of that Department [i.e., the Congress] which is to declare or make war." Letter from Hamilton to Sec. of War James McHenry. May 17, 1798.

As this history makes clear, the correct view of the Constitution, and the unbroken view of Congress, has been that the President's power to engage in large-scale military operations without Congressional approval is limited to the power "to repel sudden attacks." Any other use of military force requires a declaration of war or other Congressional authorization.

Another defense of unilateral presidential decisions to take the United States into war is the claim that the War Powers Act, which was enacted in 1973 as a response to presidential overreaching in expanding and extending the Vietnam War, somehow gives a president a 90-day


free pass to go to war without congressional authorization. The War Powers Act provides that, if Congress does not consent to the use of military force within 60 days of the President first reporting to Congress on a military action, then the President must withdraw American forces within 30 days. 50 U.S.C § 1544(b). But the timetable in the War Powers Act is a statutory safeguard and not a free pass to get around the Constitution. It is a backstop for remedying presidential wrongs, and does not override the Constitution's allocation of war powers between the Executive Branch and the Congress.

Another defense of unilateral presidential decisions to join an armed conflict is a claim that a United Nations resolution provides authority to intervene, or somehow NATO operational command provides its own source of authority to intervene. While a particular United Nations resolution may or may not be sufficient to permit the use of force under international law, such resolution does not constitute *congressional* approval of the use of force and therefore provides no authority for the use of force under the Constitution. Similarly, the United States decides the scope of its commitment to NATO operations, not NATO. Congress reinforced this position against any international body having the power to commit the United States to war when, in Section 8(a) of the War Powers Act, it specifically rejected the idea that power to commit troops may be “inferred . . . from any treaty heretofor or hereafter ratified” without separate congressional authorization.

Finally, Executive Branch “consultations” with members of Congress, briefings of congressional staff, or testimony at hearings may be useful for congressional oversight, but are not a substitute for the Congress carrying out its obligations under Article I of the Constitution. No amount of letters, congressional testimony, or Situation Room briefings can make up for the House and Senate standing idly by while the President usurps the authority that the Constitution reserves for the Congress, to decide whether the United States should use force in Libya.

President Obama has already unleashed Jefferson's “Dog of war” in Libya, without congressional authorization. That constitutional wrong has already happened. It is now up to the Congress, as representatives of the American citizenry, to exercise its exclusive authority under the Constitution to decide whether the President may continue to use military force there. We urge you to cosponsor the RECLAIM Act, H.R. 1212, and urge prompt committee and floor consideration of the bill, in order for Congress to reassert the most important power that the Constitution assigns to it. Please do not hesitate to contact us if you have any questions regarding this matter.

Sincerely,



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