



May 20, 2011

The Honorable Barack Obama
President of the United States
White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

RE: Avoid Violating the War Powers Resolution of 1973 Today

Dear President Obama:

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The American Civil Liberties Union expresses our profound concern that the continued use of United States military force in Libya beyond today constitutes a violation of the War Powers Resolution of 1973. Given the immediacy, gravity, and scope of the armed conflict that the United States entered into in Libya, Congress should have decided the question of whether to exercise the war powers reserved for it under Article I of the Constitution. However, as of this date, the House of Representatives is in recess, and the Congress has not authorized any military action in Libya. In the absence of any congressional authorization, there is no authority for the use of military force in Libya.

The decision to use military force in Libya without congressional authorization struck 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 ACLU urges you not to compound that error with a violation of the requirement in the War Powers Resolution for withdrawal of all forces within 60 days of your initial report to Congress on the use of military force. The 60-day deadline is today. There is a 30-day extension available under the War Powers Resolution, but only for the reason of ensuring the safety of American armed forces during the withdrawal period.

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 solely to the Congress.

As Thomas Jefferson once wrote, this 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.

However, without any authorization from Congress, the United States has already used significant military force in Libya. On March 19, 2011, you ordered 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, and a building in a compound regularly used by Qadhafi. On the first day of combat alone, more than 100 Tomahawk cruise missiles were fired into Libya from offshore naval vessels. Subsequently, U.S. bombers, fighter aircraft, and drones have attacked air defenses and ground forces across Libya, and even Libyan boats. 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. Moreover, the scope of the commitment made by the United States is unclear, possibly ranging from the protection of civilians to the ouster of the Qadhafi regime.

The Executive Branch's assertion of unilateral authority is incorrect. The decision of whether to use significant military force in Libya 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).

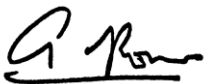
In *The Prize Cases*, 67 U.S. 635 (1863), the Supreme Court found that a “state of war” may exist without a declaration of war. But the peculiar context of the Civil War explains those cases. Indeed, the Court reaffirmed that, in contrast to the President's power to suppress insurrections, “By the Constitution,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

The power of the President to use military force without congressional authorization is very narrow. 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.” 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.

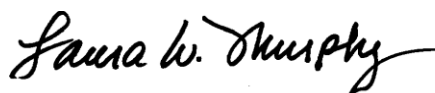
Finally, Executive Branch “consultations” with members of Congress or briefings of congressional staff may be useful for congressional oversight, but are not a substitute for the Congress authorizing the use of military force under Article I of the Constitution. No amount of letters, congressional testimony, or briefings can make up for the lack of congressional authorization on the question whether the United States may use military force in Libya.

Your earlier order already unleashed Jefferson’s “Dog of war” in Libya, without congressional authorization. That constitutional wrong has already happened. The ACLU urges that you not compound that wrong with a violation of the War Powers Resolution. Please do not hesitate to contact us if you have any questions regarding this matter.

Sincerely,



Anthony D. Romero
Executive Director



Laura W. Murphy
Director