



Obama's Request for a War Authorization and the Ongoing Abdication of Constitutional Responsibility by Congress

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On Wednesday, February 11, 2015, President Barack Obama sent to Congress a draft request for an Authorization to Use Military Force against the Islamic State in the Levant. So far, Congress has not acted to approve, modify, or reject the President's request. The conflict with the Islamic State goes on, just as other recent full-scale U.S. military engagements have proceeded without Congress declaring war under the Constitution. Beyond temporary deadlock in Washington, we may be witnessing a full and final abdication of Congressional responsibility in this vital area.

A Political Move

The U.S. Constitution empowers the Congress "to declare war" rather than merely "authorize the use of military force." But in the wake of the terrorist attacks of September 11, 2001, former President George W. Bush settled for merely asking Congress to "authorize" force for his invasion of Iraq. Years later, President Obama is both continuing and modifying this extra-Constitutional approach. He is asking for another Congressional authorization to use force in the Middle East, with several specifics included in the draft request: to authorize force while still preventing any "enduring offensive ground combat operations"; to limit the current "authorization" to three years; and to repeal the earlier 2002 "authorization" for George W. Bush's invasion of Iraq.

The request for a repeal and replacement amounts to tidying up, because President Bush's 2002 authorization has long lost relevance. Meanwhile, the first and second aspects of Obama's request are clearly politically astute moves, an attempt to implicate Congress as fully as the President in the current deployment of U.S. force against the Islamic State. In addition, the U.S. public would presumably be reassured by a degree of bipartisan consultation and agreement.

Unusual Delay for Obama's Request

Under normal circumstances, President Obama's simple request for an authorization to use force would have sailed through the 114th Congress expeditiously. Similar requests have been made by previous presidents, and Congress has handled all without delay. In one of many examples, President George W. Bush sent Congress a draft request for authorization to use force against Iraq on Thursday, September 19, 2002, and the 107th Congress promptly returned the authorization to him on Friday, October 11, 2002 by a vote of 296 to 133 in the House and 77 to 23 in the Senate. Historically, expeditious handling of authorizations to use military force has occurred within days or weeks, because Congress has taken war seriously, realizing that issues of war or peace are uniquely important and do not admit of delay.

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Obama must cope with the 114th Congress, however, a body that marches to its own drummer. Without

precedent, President Obama's request has not been handled in either days or weeks. As of spring 2015, it still languishes in committee, while Congress moves ahead instead on symbolic or futile domestic political battles, such as voting to repeal the Affordable Care Act or challenging presidential authority to manage immigration enforcement or implement environmental regulations.

Although the end of this story remains to be written, President Obama's request may very well fall victim to gridlock – and to divisions within both parties about how to react to a new Middle East conflict. Critically, his request may not simply be disapproved by Congressional vote; instead, it may run aground due to disinterest, distraction, and internal divisions that prevent the request from moving out of committee to any vote on the floor of Congress.

If, in fact, the President's request simply dies in committee, this abdication of responsibility will mark what could come to be seen as the final negation of the Congressional war powers in our time. For the Congress to allow a president to wage ongoing battles without authorization after that president has officially requested an authorization is virtually unprecedented. Perhaps the 114th Congress will end up voting on an authorization. But the mere prospect of no vote at all suggests that deeper and more fundamental problems exist in the present-day exercise of Congress's responsibility under the U.S. Constitution to declare war and authorize force.

Legal Precedent and Constitutional Evasions

Legally, Obama's request is in the spirit of the 1973 War Powers Resolution, which was about "consultation" by the president and Congress to form "a common judgment." Yet that long-ago War Powers Resolution called for that consultation to occur either *before* military operations commenced or within sixty days of the deployment of force. Given that President Obama officially announced the beginning of operations against the Islamic State on September 5, 2014, that sixty-day War Powers deadline had already been missed when he requested the present authorization on February 11.

More broadly, this sort of presidential request for authorization to deploy force is not so much unconstitutional as extra-constitutional. Under the U.S. Constitution, Congress is always free to authorize anything it likes. But the actual text of the Constitution nowhere speaks of Congress authorizing the use of American military force. Instead, Article I, Section 8 directly empowers Congress to declare war. Some may claim that a Congressional "authorization" is functionally equivalent to an official declaration of war, but that is mistaken.

Given that an official declaration by Congress is actually the only constitutionally legal way for the United States to make war, we need to wonder and worry about Congress's evident reluctance to fully debate and regulate executive war making. Could such Congressional abdication in recent times be a contributing cause of one U.S. military quagmire after another, from Vietnam to Afghanistan?

This question takes on new urgency as presidentially ordered deployments send the U.S. military back into a region from which many were delighted to see it withdraw just a few years ago. In the name of countering the horrors of the Islamic State, must we slide yet further from the values of the U.S. Constitution? The Founding Fathers understood how dangerous it could be in a republic to allow national leaders to go to war without full legislative debate and assent. That, however, is exactly what is happening in our time, with Congress fully
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action.

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Read more in Brien Hallett, *Declaring War: Congress, the President, and What the Constitution Does Not Say* (Cambridge University Press, 2012).