

OPINION



Libyans inspect the wreckage of a U.S. F-15 fighter jet after it crashed in an open field, east of Benghazi, Libya, on March 22, with both crew members ejecting safely.

OBAMA'S U.N. AUTHORITY?

BY LOUIS FISHER

President Obama has yet to explain to Congress and the American people how he received authority from the United Nations Security Council to initiate military operations against Libya. On March 21, he informed Congress that “at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council.” An April 1 memo by the Office of Legal Counsel states that Security Council Resolution 1973 “imposed a no-fly zone and authorized the use of military force to protect civilians.” Because Libya did not comply

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with the resolution, the OLC concluded that President Obama was justified in using military force against Libya to maintain “the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security.”

May the U.N., rather than the elected representatives of Congress, authorize the United States to use military force against

another nation? Is it possible to transfer the constitutional power of Congress to an international body? The answer to both questions: No. Authority under law and the Constitution must come from Congress. Statutory law, dating to 1945, speaks unambiguously about the use of American troops in a U.N. military operation: “The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution.” 22 U.S.C. 287d.

What is the history of this law? Why was it ignored when President Harry Truman went to war against North Korea

in 1950 without seeking or obtaining authority from Congress? The record plainly demonstrates that he violated the Constitution, the 1945 statute and his own public pledge to the Senate. The record also shows that members of Congress have failed to protect the Constitution, their own institutional powers and the rights of citizens who elected them to office.

During World War II, the United States and allied nations agreed to create an international body to act against military aggression. The result was the U.N. Charter of 1945. The drafters of that document appreciated the need to protect the war powers of Congress. They knew why the United States had failed to join the League of Nations. The Versailles Treaty was rejected by the Senate in 1919 and again in 1920 because President Woodrow Wilson refused to accept reservations offered by Sen. Henry Cabot Lodge. A key amendment stated that the United States assumed no obligation to engage in wars authorized by the League unless "Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide."

Wilson opposed the Lodge reservations, claiming that they "cut out the heart of this Covenant" and represented "nullification" of the treaty. Personal spite and rigidity caused Wilson to dig in his heels. As newspapers reported, "The President has strangled his own child." Wilson had no principled objection to Lodge's language on the war power. On March 8, 1920, Wilson wrote to Sen. Gilbert Hitchcock, acknowledging that whatever obligations the U.S. government undertook in a League military action "would of course have to be fulfilled by its usual and established constitutional methods of action." The Constitution, Wilson said, requires that "Congress alone can declare war or determine the causes or occasions for war, and that it alone can authorize the use of the armed forces of the United States on land or on the sea."

Those who drafted the U.N. Charter did not want a repeat of the Versailles Treaty. The charter provides that whenever member states agree to participate in a U.N. mil-

itary operation, nations must act in accordance with their "constitutional processes." During Senate debate on the charter, Truman from Potsdam wired this note to Sen. Kenneth McKellar on July 27, 1945, pledging: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."

To implement the charter, it was necessary for Congress to pass legislation that satisfied U.S. constitutional processes. The language in § 6 of the U.N. Participation Act of 1945 did precisely that. Agreements "shall be subject to the approval of the Congress by appropriate



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Act or joint resolution." Statutory language could not be written more clearly. The legislative history of this provision, including hearings, committee reports and floor debate, all point to the same result: The president must seek congressional approval in advance.

With these safeguards in place to protect the Constitution and congressional powers, Truman on June 26, 1950, announced that the U.N. Security Council had acted to order a withdrawal of North Korean forces to positions north of the 38th parallel, and that "in accordance with the resolutions of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace." At that point he made no commitment of U.S. military forces.

On the following day, he informed the nation that the Security Council had called upon all U.N. members to provide assistance and that he had "ordered United States air and sea forces to give the [South]

Korean Government troops cover and support." The military commitment deepened. At no time did Truman seek authority from Congress. Secretary of State Dean Acheson claimed that Truman had done his "utmost to uphold the sanctity of the Charter of the United Nations and the rule of law." In fact, Truman had violated the Constitution, the U.N. Participation Act and his own pledge to the Senate five years earlier.

Other presidents have built on Truman's precedent. In November 1990, President George H.W. Bush obtained a U.N. resolution to act militarily against Iraq after its invasion of Kuwait, claiming that he did not need congressional authority. Nevertheless, Congress passed authorizing legislation in January 1991. President Bill Clinton used U.N. resolutions to act militarily against Haiti and Bosnia. At no time did he seek authority from Congress.

Presidents have some discretion to use military force without advance congressional authorization, including repelling sudden attacks and rescuing American citizens. None of those justifications apply to Libya. America was not threatened or attacked by Libya. Obama has called the military operation a humanitarian intervention that serves the national interest. Yet launching hundreds of Tomahawk missiles and ordering air strikes against Libyan ground forces, for the purpose of helping rebels overthrow Col. Moammar Gadhafi, constitutes war. Under the U.S. Constitution, there is only one source for authorizing war. It is not the Security Council or NATO. It is Congress. responsibility, however, fell to the elected branches. They were the driving force in identifying the problem, to hear from those in the private sector who wanted to put an end to crush videos, and to pursue whatever legislative language was needed to achieve the legislative purpose.

Louis Fisher worked at the Library of Congress for four decades and is the author of many books, including The Constitution and 9/11: Recurring Threats to America's Freedoms.