

Trump Must Get Congress's O.K. on Syria

Op-Ed – Bruce Ackerman (Yale)

NEW HAVEN — President Trump's airstrike on Syria represents a foreign policy U-turn. The destruction of the Islamic State, not President Bashar al-Assad, had been Mr. Trump's overriding objective. But this turnaround also has **profound constitutional consequences.**

It is up to Congress, not the president, to declare war; in 1973, Congress passed the War Powers Resolution to maintain its final say over the matter. Once a president initiates "hostilities" against a new enemy, the resolution gives him 60 days to gain congressional approval to continue his military initiative. If he fails to gain the approval of the House and Senate, he must stop his campaign within the next 30 days.

The president's airstrike has set off the 60-day period. The resolution requires him to notify Congress and explain the attack's significance. Is it a solitary action provoked by a terrible war crime, or is it a warning that President Trump will respond with future attacks when he believes, **as he put it Thursday night**, that a "vital national security interest of the United States" is at stake?

If the latter, the burden is on the president to convince Congress, and the country, that they should support his new war in the Middle East.

This is the first time President Trump has been obliged to squarely confront the War Powers Resolution. Up to now, he has simply been ordering attacks against enemies like the Islamic State that first became targets of President Barack Obama in 2014. In doing so, he has sidestepped the question of whether Mr. **Obama's military campaign against the Islamic State complied with the resolution.**

Many legal experts say that it did not. I am part of a team challenging President Obama's war initiatives in a case before the United States Court of Appeals for the District of Columbia Circuit. The case was brought by Capt. Nathan Smith while serving in Kuwait at the command headquarters of American military operations against the Islamic State. Captain Smith is asking the courts to reject the Obama administration's argument that Congress's approval of President George W. Bush's wars against Afghanistan in 2001 and Iraq in 2002 sufficed to authorize its war of 2014.

President Obama's claims of compliance fail to confront the fact that the authorization of force in 2001 was explicitly limited to organizations that participated in the Sept. 11 attacks, but that the Islamic State came into existence later; and that the authorization in 2002 focused on the threat to the United States posed by Saddam Hussein's alleged possession of "weapons of mass destruction," which later proved bogus.

Captain Smith lost the first round of his legal battle in Federal District Court, which ruled that judges have no business deciding “political questions” involving the president’s use of force. But it will be up to the Court of Appeals or the Supreme Court to ultimately decide whether the judiciary will indeed serve as a serious check on unilateral presidential war making. Given Judge Neil M. Gorsuch’s elevation to the Supreme Court, the Smith case may well serve as an early opportunity for him to establish that he takes the founding system of checks and balances seriously, even when it puts him at odds with the White House.

In the meantime, the Trump administration is within its rights, because of the district court’s opinion in the Smith case, in continuing Mr. Obama’s war against the Islamic State. But it does not have this luxury in Syria. President Assad, too, is fighting the Islamic State. None of President Obama’s rationales for his war against the Islamic State have the slightest applicability to a military campaign against Syria, should President Trump pursue that course.

As a consequence, Senator Tim Kaine, Democrat of Virginia, has already called for a bipartisan coalition in defense of Congress’s authority under the War Powers Resolution. This would provide a perfect opportunity for the Senate majority leader, Mitch McConnell, and the House speaker, Paul Ryan, to extend an olive branch in the wake of the partisan acrimony over Judge Gorsuch’s nomination. After all, there is a strong bipartisan majority in support of a strong response to President Assad.

The big question is how long the new authorization should last and how large should be its scope. If Congress takes the lead, perhaps President Trump will call it a success when he wins the express consent of the House and Senate for his first effort to transform American foreign policy.

But if political polarization continues to prevail on Capitol Hill, the sudden airstrike will serve as the shocking herald of a moment of constitutional truth. It will be up to President Trump to tell us whether he will **comply with the Constitution and the War Powers Resolution**, or assert his power as commander in chief to attack any country or organization he considers a threat to the “vital national security interest of the United States.”

We have been here before. In his torture memos, John Yoo, a lawyer for the Bush administration, notoriously asserted the authority of the commander in chief to violate statutory commands — only to see Presidents Bush and Obama repudiate his extreme assertions. But the present case is even more serious. However terrible torture may be, its victims number in the thousands. If the commander in chief may unilaterally begin new wars against new enemies whenever he wants, the resulting carnage can mount into the millions.

President Trump has no popular mandate to take this step. Throughout his campaign, he made it clear that it was “radical Islamic terrorists,” not secular autocrats like President Assad, who represented the great threat to national security. There is only one way for him to carry the country with him down a different path. This to obey the Constitution and the War Powers Resolution — and spend the next 60 days hammering out, in collaboration with

Congress, the terms of a carefully considered authorization for the use of force against our new enemy.

If President Trump disdains this difficult task of democratic persuasion, and plunges ahead on his own authority, he will be forcing the country to the verge of a profound constitutional crisis.