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The Opinion Pages | OP-ED CONTRIBUTOR

Obama's Betrayal of the Constitution

By BRUCE ACKERMAN SEPT. 11, 2014

BERLIN — PRESIDENT OBAMA's declaration of war against the terrorist group known as the Islamic State in Iraq and Syria marks a decisive break in the American constitutional tradition. Nothing attempted by his predecessor, George W. Bush, remotely compares in imperial hubris.

Mr. Bush gained explicit congressional consent for his invasions of Afghanistan and Iraq. In contrast, the Obama administration has not even published a legal opinion attempting to justify the president's assertion of unilateral war-making authority. This is because no serious opinion can be written.

This became clear when White House officials briefed reporters before Mr. Obama's speech to the nation on Wednesday evening. They said a war against ISIS was justified by Congress's authorization of force against Al Qaeda after the Sept. 11, 2001, attacks, and that no new approval was needed.

But the 2001 authorization for the use of military force does not apply here. That resolution — scaled back from what Mr. Bush initially wanted — extended only to nations and organizations that “planned, authorized, committed or aided” the 9/11 attacks.

Mr. Obama is rightly proud of his success in killing Osama bin Laden in 2011 and dismantling the Qaeda network he built up. But it's preposterous to suggest that a congressional vote 13 years ago can be used to legalize new bombings in Syria and additional (noncombat) forces in Iraq. In justifying earlier bombing campaigns in Yemen and Somalia, the administration's lawyers claimed that the 2001 authorization covered terrorist groups that did not even exist back then. They

said it sufficed to show that these groups were “affiliated” with Al Qaeda.

Even this was a big stretch, and it is not big enough to encompass the war on ISIS. Not only was ISIS created long after 2001, but Al Qaeda publicly disavowed it earlier this year. It is Al Qaeda’s competitor, not its affiliate.

Mr. Obama may rightly be frustrated by gridlock in Washington, but his assault on the rule of law is a devastating setback for our constitutional order. His refusal even to ask the Justice Department to provide a formal legal pretext for the war on ISIS is astonishing.

Since ISIS poses a new problem for the president, the War Powers Resolution of 1973 requires him to seek a new mandate from Congress. The resolution, enacted over President Richard M. Nixon’s veto at the end of the Vietnam War, requires the president to obtain congressional assent within 60 days of commencing “hostilities”; if he fails, he must withdraw American forces within 30 days.

The administration gave Congress the requisite notice on Aug. 8 that it had begun bombing ISIS, and so the time for obtaining approval runs out on Oct. 7. But Mr. Obama and his lawyers haven’t even mentioned the War Powers Resolution in announcing the new offensive against ISIS — there is no indication that he intends to comply with this deadline.

Mr. Obama’s defenders may point to the precedent set by Bill Clinton, who continued the NATO-led bombing of Kosovo in 1999 beyond the 60-day limit without congressional assent. But Mr. Clinton halted the campaign before the 30-day withdrawal period ended.

In 2011, when Mr. Obama continued to bomb Libya after the 60-day limit, his lawyers argued that America’s supporting role in the NATO campaign was not substantial enough to qualify as “hostilities” under the 1973 resolution. This claim provoked howls in Congress and the legal community, but the death of the Libyan dictator, Col. Muammar el-Qaddafi, took the steam out of the debate before it could be resolved.

Even if the Obama line on Libya were accepted, however, it fails to justify his current move. Rather than “leading from behind” by backing NATO, Mr. Obama is now taking the lead in an open-ended campaign, extending from Iraq into Syria,

that could last years. If this isn't commencing "hostilities," what is?

Senators and representatives aren't eager to step up to the plate in October when, however they decide, their votes will alienate some constituents in November's midterm elections. They would prefer to let the president plunge ahead and blame him later if things go wrong. But this is precisely why the War Powers Resolution sets up its 60-day deadline: It rightly insists that unless Congress is willing to stand up and be counted, the war is not worth fighting in the name of the American people.

If Mr. Obama changes course, as he did last September, and submits to the commands of the War Powers Resolution, Congress can demonstrate that, despite all its dysfunction, it can still rise to the occasion. There are hawks and doves on both sides of the aisle, and leaders of both parties have signaled a willingness to engage in a serious debate.

But for now the president seems grimly determined to practice what Mr. Bush's lawyers only preached. He is acting on the proposition that the president, in his capacity as commander in chief, has unilateral authority to declare war.

In taking this step, Mr. Obama is not only betraying the electoral majorities who twice voted him into office on his promise to end Bush-era abuses of executive authority. He is also betraying the Constitution he swore to uphold.

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