

On Executive Power, Is "Hostility" Barack Obama's "Torture"?

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Barack Obama ran for president on a platform of more limited executive power. "No more ignoring the law when it is inconvenient," he said in August of 2007. "The law is not subject to the whims of stubborn rulers." Candidate Obama also introduced a resolution declaring that President Bush required Congressional permission before bombing Iran. "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation," he [told](#) the *Boston Globe*.

As the current debate over the War Powers Act and Libya shows, this is not how President Obama has carried out his job. Obama's knock against Bush's executive power overreach in 2007 had two major strands: The first was that Bush had not consulted Congress enough. The second was that Bush had misinterpreted the intent of Congress to meet his own ends, in one case by redefining a term, "torture," and in one case by threatening to ignore the advice of his own Office of Legal Counsel during a debate over warrantless wiretapping. Though the issues of wiretapping and torture are off the table, both criticisms can now be leveled against Obama.

In 2002, Bush's Justice Department lawyers came up with a [novel definition](#) of "torture," over the objections of several military attorneys, that green-lighted the president's plans for a harsh interrogation program. Obama's in-house and State Department attorneys have come up with a novel definition of "hostilities," [over the objection](#) of Pentagon and Justice Department attorneys, that allows U.S. forces to continue bombing Libya without seeking Congressional approval, as required by the [1973 War Powers Act](#).

Furthermore, by seeking to avoid Congressional authorization of the Libyan campaign, Obama is distancing himself from his own position during the 2007 campaign, which required Congressional authorization for a bombing of Iran. "Any offensive military action taken by the United States against Iran must be explicitly authorized by Congress," read the text of [S.J.Res. 23](#), which Obama introduced on November 1, 2007. There is no question that the bombing of Libya, which Obama argues does not count as a "hostility," at least meets the standard of "any offensive military action."

During the campaign, Obama argued that the President had more leeway in taking unilateral military action in cases where U.S. self-defense was an issue. "As Commander-in-Chief, the President does have a duty to protect and defend the United States," Obama [told](#) the *Globe*. "In instances of self-defense, the President would be within his constitutional authority to act before advising Congress or seeking its consent." In the case of Iran, which is suspected of developing nuclear weapons that could be used against U.S. interests, there is a case for self-defense. In the case of Libya, no one has argued that U.S. self-defense is directly at issue.

Obama is by no means the first president to try to find a way around the War Powers Act. As a senior Administration official pointed out last week, presidents have long tried to argue around the plain language of the law to define bombing campaigns and other military offensives as non-hostile. "There have been numerous instances where the United States has supported or been engaged in some form of military activity, which has not been viewed as rising to the level of hostilities," the official explained. But the Obama argument, which contends that use of unmanned drones to drop bombs is not hostile whereas live pilots dropping bombs may be, is nonetheless novel.

The central issue for Obama is not a legal one. The courts, by precedent, are unlikely to question his interpretation, and the House and Senate are unlikely to agree on a course of action that would formally object to Obama's legal reasoning. This issue is between the Obama of 2007 and the Obama of 2011, which are difficult to reconcile. Under Obama's current formulation, a sustained, unilateral, unmanned bombing of Iran with international cooperation would be allowed without Congressional approval, something candidate Obama would have surely objected to four years ago.

The situation calls to mind a joke Seth Meyers told a few weeks back at the White House Correspondents' Association dinner, while standing next to Obama. "Who knows if they can beat you in 2012," Myers told the president. "But I tell you who could definitely beat you Mr. President? 2008 Barack Obama. You would have loved him. So charismatic; so charming. Was he a little too idealistic? Maybe. But you would have loved him."

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