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The Test Case for Presidential War Power: North Korea and Trump

by [Deborah Pearlstein](#)

August 15, 2017

My friend Marty Lederman has a characteristically useful [post](#) up about one of many important legal questions surrounding options in the current stand-off between the United States and North Korea. As he puts it: “Would it be lawful under the U.S. Constitution for Trump to use force, including nuclear weapons, as a ‘first strike’ against North Korea, in an effort to degrade that nation’s nuclear capabilities, absent evidence that Korea has already decided to strike the United States and is going to do so with no time for legislative deliberation?”

Marty and I have long argued in blogs and otherwise about the wisdom and scope of presidential power to use force without congressional authorization—but we both certainly agree that the most recent, formal executive branch view of the scope of that power may be found in the [2011 Justice Department OLC memorandum](#) explaining why the President had constitutional authority to use force in Libya without prior congressional authorization, which rests, in large measure, on a pair of opinions written by Walter Dellinger in the Clinton Administration, respecting the use of force in [Haiti](#) (1994) and [Bosnia](#) (1995). According to the 2011 OLC view, the President has power to use force under Article II of the Constitution if two conditions are met: if a significant national interest is at stake, and if the anticipated “nature, scope, and duration” of the operation would make it something less than “war” within the meaning of the constitutional clause giving Congress the power to declare it.

In the Libya case, the President contemplated no use of ground troops, anticipated a short-term “and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster,” and foresaw minimal to no risk to U.S. troops. As OLC put it, “although it might not be true here that ‘the risk of sustained military conflict was negligible’”—in other words, while it wasn’t actually clear ex ante what kind of conflict was likely to ensue—the absence of any planned preparation for

ground invasion and past practice of substantial, sustained bombing campaigns without congressional authorization, was sufficient to satisfy the criterion that the *anticipated* hostilities would be something less than “war.” In addition, OLC recognized significant national interests in promoting regional stability and in supporting the UN system (in particular, a UN Security Council Resolution that had authorized (as a matter of international law) the use of force to protect Libyan civilians then subject to brutal attack). The OLC memo of course did not limit the kind of “national interests” that could justify unilateral presidential action to those particular interests; indeed, other presidents have used force unilaterally to achieve different purposes entirely (most common of all – protection of U.S. persons and property).

This broad OLC concept of presidential authority notwithstanding, Marty now argues that it “must be wrong” that the President could act against North Korea under the circumstances he specifies here without congressional authorization for two primary reasons. First, because “unilateral use of force” in this scenario would put the United States “in breach of its treaty obligations – and a strike here would almost certainly violate Article 2(4) of the U.N. Charter” – it would also violate our own Constitution, which itself makes treaties part of the “supreme law of the land” under Article VI, which the President must “take care” to faithfully execute. Second, the President could not be understood to have Article II power to use force to a degree that would amount to “war in the constitutional sense,” for that power – the power to declare “war” per se – is textually committed to Congress alone. Where, as here, the President seems to have in mind using force in “a manner that threatens to lead to the sort of conflagration we can expect in this case,” it should be apparent that “[n]o one individual, let alone the one presently in the West Wing, should be afforded the unilateral power to so radically transform the world.”

I find it much harder than Marty to square OLC’s broad conception of presidential power in the post-Truman era with a denial of presidential power to act here. Indeed, it is precisely because of a case like this—a President who has ample grounds for asserting national interests at stake, and who might actually begin with a relatively limited use of force, well within the scope of past presidential practice (for it would not take our own use of nuclear weapons to “degrade” North Korea’s capacity to threaten the United States with nuclear weapons of their own), but who is in fact starting something much

bigger—that I have argued the Clinton/Obama OLC standard is insufficiently limiting as a matter of constitutional law. In other words, it is precisely because the result Marty reaches here should be right, but is in fact not compelled by the OLC standard, that the OLC standard must be wrong. So let me explain.

Why might one argue under the Dellinger/Krass OLC test that the President could act alone in Libya but not North Korea? One possibility is the notion that U.S. action here would violate the prohibition against the use of force contained in art. 2(4) of the UN Charter; the UN had expressly authorized the use of force in Libya, it has taken no such comparable action here. I quite agree with Marty that presidential action in violation of U.S. treaty obligations is problematic not only as a matter of international law, but also under our own Constitution. But OLC itself didn't make quite so clear that compliance with the UN Charter was a limitation on its rule, and indeed U.S. action in Kosovo in the 1990s (among presidential practice on which the 2011 memo relied) famously ran afoul of the letter of Art. 2(4). Moreover, depending greatly on the conditions under which the United States elects to act, it is far from apparent that the United States might not have an alternative explanation for the legality of its actions under the UN Charter — namely, the right (preserved by the Charter) of national or collective self-defense. For defending the U.S. mainland against Korean nuclear attack is hardly the only defensive interest the United States has on the peninsula (defensive interests far closer to the core of historic executive power to use force without congressional engagement). Some 200,000 U.S. nationals (including our military forces) face the direct threat of conventional bombardment by North Korea, and the United States (among treaty obligations it must be taking into account) has mutual defense agreements in place with both Japan and South Korea of (what should be) acute concern. Even a modest conventional North Korean attack on the South (such attacks have occurred with some regularity in the past 60 years) would trigger a right of collective self-defense. That initial response must, of course, be proportional under international law, but the point is that one can readily imagine scenarios rendering some form of U.S. military action lawful under the Charter far short of “evidence that Korea has already decided to strike the United States” proper.

The more obvious distinction is thus the one Marty points to first – that it is not reasonable here to anticipate the same slight threat to U.S. forces, and the same unlikelihood of an escalation of violence, that past presidents faced in other settings

(such as [Clinton in Haiti](#)). Indeed, no reasonable person could look at the security situation between the United States and North Korea (and South Korea and Japan, etc.) today and conclude the risks posed by U.S. action in the region are remotely comparable. So, Marty might quite reasonably respond, it would not be remotely reasonable for a President to conclude that the use of force here would not seriously risk “war in the constitutional sense.”

Which brings us to the rub about not only the 2011 OLC theory of presidential power but the entire post-Truman expectation within the Executive branch that Congress might be regularly avoided: it imposes no requirement of (subjective or objective) of *presidential* reasonableness about the consequences that are anticipated follow. On the contrary, theories of presidential power to use force unilaterally (including but hardly limited to OLC’s), depend on more and less tacit assumptions that the President, any President, is more likely than Congress to make a reasonable judgment on such matters. Presidents have a claim to both popular legitimacy and access to professional military and intelligence expertise, the theory goes, that no other branch can match. These advantages are so great, the theory goes, that they justify changing the constitutional default setting, at least under certain circumstances – flipping it from one in which presidents cannot deploy military force abroad without congressional permission, to one in which presidents can deploy military force abroad unless and until Congress (overcoming all political incentives against undermining U.S. forces already on the attack) acts to stop them.

This President is an object lesson in the fragility of these assumptions. This President was elected by just 25% of eligible voters, less than a majority of actual voters, and today finds a substantially greater percentage of the population approving of his impeachment than approving of his performance in office. This President disdains bedrock checks on accountability, challenging the legitimacy of the federal courts and the value of a free press. This President has proven equally resistant to executive branch expertise, rejecting the findings of the entire national security community on Russia, leaving hundreds of key executive branch posts unfilled (not least the position of U.S. Ambassador to South Korea), and earning the opposition of dozens of senior national security officials of his own party. This President is the reason why the framers thought even war should be limited by constitutional law.

In short, the theory of presidential power that was born in Korea 60 years ago has now come home to roost. The authors of intervening OLC opinions authorizing successive departures from the separation of powers rule may well have, in their own minds, imagined that a case on the facts of North Korea and Trump would exceed all bounds. But on OLC's actual terms, as they have evolved in the decades since Truman first split the constitutional atom of military force and "war," this President, in this situation, now has non-frivolous grounds to claim a frightening amount of power all his own.

Image credit: [Cappan](#)/Getty

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