



Written by [Steve Byas](#) on May 5, 2016

## Army Captain Sues Obama Over War Powers

“My conscience bothered me. When I was commissioned by the President in May 2010, I took an oath to ‘preserve, protect, and defend’ the Constitution of the United States. The Constitution gives Congress the power to declare war.... How could I honor my oath when I am fighting a war, even a good war, that the Constitution does not allow or Congress has not approved?”



These are the words of Army Captain Nathan Michael Smith (shown in inset), who has filed suit in the U.S. District Court in Washington, D.C., against President Barack Obama. Captain Smith is challenging the president’s decision to deploy additional special operations forces to the Middle East, to combat ISIS.

The legal challenge was filed one day after a Navy SEAL was killed in combat in Iraq, the third since a coalition, led by the United States, began its military campaign against the “Islamic State” in 2014.

Smith actually supports military action against ISIS, calling them “an army of butchers.” But he believes it is unconstitutional for a president to go to war without authorization from Congress. And Smith contends that it is a violation of his own oath to the Constitution to fight such a war, without that authorization.

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The lawsuit complaint states, “Captain Smith suffers legal injury because, to provide support for an illegal war, he must violate his oath to ‘preserve, protect and defend’ the Constitution of the United States,” citing an 1804 Supreme Court decision, *Little v Barreme*. In that case, the court ruled, “A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.”

The *Little* case arose from the undeclared war with France during the presidency of John Adams. Congress gave Adams authority to seize ships sailing to France. Adams, however, ordered the capture of vessels coming from France, as well. After George Little seized a Danish ship coming from a French port, acting under the authority of President Adams, he was sued for damages. Chief Justice John Marshall opined that Captain Little could be sued for damages in the case. In plain words, Adams had exceeded the authority given him by Congress, which opened Little to legal jeopardy. This case provides a precedent for Smith to challenge Obama’s actions today.

Smith’s lawsuit contends that Obama’s actions in the Middle East have demonstrated a “pattern of lawlessness.”

Deployed to Kuwait as an intelligence officer at Camp Arifjan, Smith works in the headquarters of the



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Combined Task Force — Operation Inherent Resolve, which oversees the entire U.S. and Coalition counter-ISIS campaign in Iraq and Syria. While observing U.S. military operations at close range, Smith stated that he was happy to see attacks upon ISIS. But noting opposition to the operation back in the United States, he began to ask himself, “Is this the Administration’s war, or is it America’s war?”

The Constitution tells us that Congress is supposed to answer that question, Smith said, “but Congress is AWOL.”

Obama has relied on the Authorization for Use of Military Force, or AUMF, passed in the aftermath of the attacks of September 11, 2001, and a second act of Congress, the 2002 Iraq Authorization for Military Force (“2002 Iraq AUMF”) as the legal basis for air strikes in the region and now, for placing ground forces into the region.

Even members of Obama’s own Democratic Party are now expressing concern, as the president has now sent 250 additional soldiers — boots on the ground — into potential combat. Senator David Kaine said at a recent hearing of the Senate Armed Services Committee, “I am deeply concerned about the legal basis for this war, both domestic and international.”

In a 14-page complaint, Captain Smith cited the 1973 War Powers Act, which stipulates that when the president introduces armed forces into hostilities, “or into situations where hostilities are imminent, he must ... get approval from Congress within sixty days to continue the operation.” According to the War Powers Act, this authorization must come either in the form of a declaration of war, or specific statutory authorization. If not, he must “terminate the operation within thirty days after the sixty day period has expired.”

Because President Obama has failed to obtain the approval of Congress for his war against ISIS in Iraq or Syria, within the 60 days, and has also not terminated the war, the complaint argues the war “therefore is illegal.”

The complaint also cites the president’s failure to follow the “Take Care clause” of the Constitution. In Article II, Section 3 of the Constitution, the president is required to “take care that the laws be faithfully executed.” As a result of this failure by the president to “take care” that the War Powers Act be “faithfully executed,” Captain Smith has been unable “to determine whether he can reconcile his military actions as an officer with his oath to preserve, protect, and defend the Constitution.” The complaint notes, that in the past, presidents have published an opinion, prepared either by the Justice Department’s Office of Legal Counsel, or by the White House Counsel, to “justify” similar military actions, but Obama has not done so.

Another argument used by the Obama White House is that he has constitutional authority to conduct the war as “commander-in-chief,” citing Article II, Section 2 of the Constitution. Smith’s complaint, however, contends that such authority “does not override the War Powers Resolution’s requirement that the president must obtain the consent of Congress within the time specified by the Resolution before committing the country to on-going war.”

It is unfortunately common for Americans to refer to the president as the “commander-in-chief,” but that title is restricted to his role over the armed forces of the United States. In that role, the president and his subordinates are bound by the Constitution of the United States and the statutes of Congress. Article I, Section 1 of the Constitution is quite clear: “All legislative powers herein granted shall be vested in a Congress of the United States.” Among those powers “herein granted” by the Constitution to Congress, found in Article I, Section 8 of the Constitution is the power to declare war. Once Congress



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has declared war, the president then has legal authority to conduct that war as “commander-in-chief.” He has no independent power to go to war on his own, without prior authorization from Congress. And the president has no more authority over individual American citizens as “commander-in-chief” than any other American.

In a letter from James Madison to Thomas Jefferson, Madison explained why this is so important. “The Constitution supposes, what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature.”

The delegates at the Constitutional Convention clearly agreed with Madison. When Pierce Butler offered a motion to vest the power to “make war” in the hands of the president, his motion did not even get a second.

In an attempt to justify its present course of action, the Obama administration is arguing that he is using the authorization of force resolutions used in the wars in Afghanistan and in Iraq. But ISIS did not even exist during those wars, rendering that argument specious.

Presidents of both political parties have clearly exceeded their constitutional authority for decades in this area. Captain Smith’s lawsuit is needed to rein in the executive’s disregard for the constitutional requirement that only Congress can declare war. And Smith is also correct for the practical reason he alluded to. For a war to be “America’s war,” that war has to have authorization by Congress. Otherwise, it is simply the war of whatever person happens to be occupying the White House. In a republic, rather than a monarchy, that is the way it should be.

*Steve Byas is a professor of history at Randall University in Moore, Oklahoma. His book, History’s Greatest Libels, is a challenge to some of the great lies of history told against such persons as Christopher Columbus, Joseph McCarthy, and Marie Antoinette.*



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