

## Providing a legal basis to attack Iran

By Jeffrey H. Smith and John B. Bellinger III

The question of whether military force should be used to prevent, or at least delay, Iran from building a nuclear weapon is again on the front pages. Both President Obama and Mitt Romney have said they would consider a military strike against Iran. According to media reports, the necessary planning has been completed, and military options are “fully available.”

But there has been almost no discussion of whether an attack by the United States would be legal under domestic and international law. This should be a priority. Law is important, especially in issues of war and peace.

The United States has long maintained the right, under international law, to take unilateral, preemptive action to prevent an attack on the nation. We have, for example, never agreed to a “no-first-use” policy for our nuclear weapons.

However, presidents who have authorized military actions have generally tried to demonstrate that they are permissible under international law. Under the U.N. Charter, member states may use force against another country only if authorized by the U.N. Security Council or in self-defense against an “armed attack” (which most international lawyers agree includes the threat of such an attack). President George W. Bush relied on the right to self-defense and a Security Council resolution to invade Afghanistan after the Sept. 11 attacks. He cited Security Council resolutions dating from 1990 as authority to use force against Iraq in 2003. President Obama has relied on a self-defense rationale (or the consent of the country involved) to conduct drone strikes in Pakistan, Somalia and Yemen. The Security Council authorized the use of force against Libya in 2011.

Ideally, any military strike against Iran would also be authorized by the United Nations. But a Security Council resolution is likely to be vetoed by Russia and China. To act unilaterally, the United States would have to argue that an attack on Iran was justified as an act of anticipatory self-defense because the threat of a nuclear-armed Iran is so great that we cannot wait until an attack is imminent. But in the absence of U.N. authorization, many nations, including some of our allies, are likely to believe that a preemptive attack would violate international law, just as they believed the U.S. invasion of Iraq violated international law (despite the prior Security Council resolutions).

With respect to U.S. law, the president must rely on either congressional authorization or his constitutional authority as commander in chief. Although the 1973 War Powers Resolution purports to require the president to terminate the use of U.S. armed forces within 60 to 90 days in the absence of congressional approval, presidents of both parties have questioned the constitutionality of the resolution and have committed U.S. armed forces for longer periods without a congressional mandate.

Bush sought and received specific congressional authorizations to use military force against Afghanistan in 2001 and Iraq in 2003. Then-President Bill Clinton relied solely on constitutional powers to conduct the Kosovo bombing campaign in 1999. Obama has relied on congressional authority to continue using

force against al-Qaeda and the Taliban, but he used only his constitutional powers to conduct the Libya bombings in 2011.

The president could reasonably argue that he has constitutional authority to use force without congressional authorization because a nuclear-armed Iran is a real threat to the United States. But he would be on stronger legal and political ground if he first sought legislative approval. While many members of Congress might not object if the president were to proceed unilaterally, the Constitution gives Congress the responsibility “to declare war.”

Congressional approval is important. A military strike on Iranian nuclear facilities might require multiple sorties over several days and would surely be regarded by Iran as an act of war. Like all military actions, the outcome is not certain and where it leads is not within our control. Congress should hold hearings to consider the implications of an attack — which include possibly provoking terrorist attacks against the United States, a wider regional war and damaging the U.S. economy — as well as the resulting costs and how to pay for them. An explicit congressional mandate authorizing the use of force unless Iran meets specified requirements would demonstrate to all our resolve to prevent Tehran from developing nuclear weapons.

The threat posed by Iran’s aggressive pursuit of a nuclear weapon is grave. Obama and Romney are right to say that the United States is prepared to use force to defend the nation against this threat, if that is necessary after other means have been exhausted. But both men should also explain a clear legal basis for a military strike. They should publicly commit to seeking specific congressional authorization to bolster the president’s constitutional authority to defend the United States. And they should explain how using force against Iran would be justified under international law and under what circumstances.

© The Washington Post Company