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Is U.S. Attack on Libya Legal? Rep. Dennis Kucinich Debates Former Reagan Attorney Robert Turner

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On Wednesday, a bipartisan group of 10 members of Congress sued President Obama for violating the War Powers Act of 1973 by failing to obtain congressional approval for military operations in Libya longer than 60 days. We host a debate between Democratic Rep. Dennis Kucinich of Ohio, one of the Congress members suing President Obama, and Robert Turner, who worked as an attorney in the Reagan White House and is a longtime critic of the War Powers Act. “President Obama’s position is absolutely clear: we are not engaged in war in Libya, and thus, if the War Powers Resolution were constitutional, it still would not apply,” Turner says. “I ask you, if another country sent 2,000 planes over the United States, and some of those missions dropped bombs on us, would that be an act of war against the United States?” says Kucinich. “That’s exactly what we’ve done in Libya.”

AMY GOODMAN: We turn to the war in Libya and the intensifying debate in Washington over the legality of the war. On Wednesday, a bipartisan group of 10 members of Congress sued President Obama for violating the War Powers Resolution by failing to obtain congressional approval for the Libya operation after 60 days. The lawsuit was filed one day after the Republican-controlled House passed a measure that would bar funding for the U.S. role in the

attack on Libya.

On Wednesday, the White House responded to the criticism by issuing a 38-page report that argued the War Powers Resolution does not apply because the U.S. role in Libya is limited, and thus does not require congressional approval. The report asserts, quote, “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops,” unquote.

During a news conference on Wednesday, White House Press Secretary Jay Carney warned members of Congress not to send mixed messages about the U.S. military efforts in Libya.

PRESS SECRETARY JAY CARNEY: We believe that the support for the overall mission, the support for the goal of protecting Libyan civilians and holding Colonel Gaddafi accountable, will continue. It is support that we’ve had from Congress in the past, and we expect it to continue, because now is not the time to send mixed messages, as we’ve had the success that we’ve had in that mission.

AMY GOODMAN: We’re joined now by two guests. Democratic Congressman Dennis Kucinich of Ohio is with us in Washington, one of 10 members of Congress who sued President Obama Wednesday. And joining us from Charlottesville, Virginia, Robert Turner is with us. He worked as an attorney in the Reagan White House, co-founder of the University of Virginia’s Center for National Security Law, longtime critic of the War Powers Resolution, author of two books and many articles on the subject.

Well, we’ll start with you, Congressmember Kucinich. Why have you sued President Obama?

REP. DENNIS KUCINICH: Because his actions taking the United States into war against Libya were in violation of Article I, Section 8, of the Constitution, which makes it very clear, right from the foundation of this country, that Congress has the power to declare war. And the President did not go to Congress for this action against Libya. We are attempting to correct an imbalance that has occurred, not only during this administration, but over the years, where executives have appropriated for themselves the war power without checking with Congress. And, of course, in our lawsuit we also address the War Powers Act, which the President is in violation of. And we

also state that neither the approval of NATO nor the U.N. Security Council supersedes the Constitution of the United States. And finally, Amy, where's this money coming from? Who's paying for this? There's been no appropriation for Libya. We need to get some answers on that, as well.

AMY GOODMAN: And who has sued? Can you talk about this bipartisan group, Congressman Kucinich?

REP. DENNIS KUCINICH: Well, yes. I mean, this is a nonpartisan issue that relates to the imperative of our Constitution to be able to withstand the buffeting that happens from both directions, left and right. This coalition, made up of members — Walter Jones, who is a Republican from North Carolina, who started off in favor of the war in Iraq and has become a very strong supporter not only of withdrawing our troops from these areas, but also a strong supporter of the constitutional imperative to have Congress involved in this decision making; Ron Paul is very involved in this; Dan Burton; John Conyers, who's the former chair of the Judiciary Committee and a Democrat from Michigan. We have a coalition that includes Mike Capuano from — a Democrat from Massachusetts. It's a coalition that's as broad as this country, and it's a coalition that is quite diverse politically.

And I think that needs to be said, because it points to the fact that there's growing opposition in this country not simply to the war in Libya, but there's growing opposition to the United States inserting itself, alone or with NATO, as kind of a global cop, while our priorities here at home are getting ignored. And that's something that needs to be said right now. With 14 million Americans out of work, with 50 million Americans still without decent healthcare, with so many Americans losing their jobs and their retirement security, with people not being able to send their children to the schools they envisioned they'd be able to send them to, with our environment deteriorating, we are still prosecuting wars and trying to play global cop.

I mean, there's other issues here, but I'm — in the court, though, we're focusing very sharply on this issue of what Article I, Section 8, really means. And I'm hopeful that if we get standing, we'll be able to create a classic resetting of the pointer, as far as rebalancing the power relationships in this country that have gone askew since executives have been appropriating the war power.

AMY GOODMAN: Robert Turner, your response to this lawsuit of Congressman Kucinich and other members of Congress, Democrat and Republican, saying that President Obama is violating the War Powers Act?

ROBERT TURNER: President Obama's position is absolutely clear: we are not engaged in war in Libya, and thus, if the War Powers Resolution were constitutional, it still would not apply. On August 17th, 1787, James Madison introduced an amendment in the Constitutional Convention that changed the power to be given in Congress from the power to make war to the power to declare war. That was a term from the Law of Nations. It was understood by all of the publicists who wrote about, by Grotius, Vattel, men whose writings were cited by the Founding Fathers that you only declare war when you were launching an all-out, what today we would call an aggressive war. That kind of war has been outlawed. No country has declared war since the U.N. Charter went into force in 1945. That clause is as much an anachronism today as the power given to Congress, in the same sentence, to grant letters of marque and reprisal, which were outlawed in 1856 in the Pact of Paris.

I've been writing about this since the War Powers Resolution went into force. I worked in the Senate for the first five years. I served as acting assistant secretary of state for legislative affairs during the Reagan administration. And just in 19— sorry, in 2008, we had a national bipartisan War Powers Commission, that included Lee Hamilton, Slade Gorton and a number of other congressional liberals, former congressional liberals. They unanimously said the War Powers Resolution is unconstitutional. George Mitchell, former majority leader, on May 19th, 1988, said on the Senate floor that the War Powers Resolution brings Congress into force short of war, expanding its power into the power of the president. It is true the War Powers Resolution tries to control this, but as Chief Justice John Marshall told us in perhaps the most famous Supreme Court case of all, *Marbury v. Madison*, "an act of the legislature, repugnant to the Constitution, is void." If it's void, it's not law. If it's not law, the president has no duty to see it faithfully executed.

AMY GOODMAN: Congressman Kucinich?

REP. DENNIS KUCINICH: Well, I would like to ask Mr. Turner if he's read the filing.

AMY GOODMAN: Have you read the filing?

ROBERT TURNER: I glanced through the filing. This is political theater. The congressman certainly knows, because he was involved in the Campbell lawsuit during the Kosovo operation, and he knows from history that back during Vietnam the courts always dismiss these suits for

lack of standing. The Article

III of the Constitution —

REP. DENNIS KUCINICH: Well, I - you know, I beg -

ROBERT TURNER: — requires a case or controversy.

REP. DENNIS KUCINICH: I beg the gentleman's pardon. I take an oath to defend the Constitution. This isn't theater. I was the second person on that complaint that Congressman Campbell filed in 1999. I see this as a serious question of whether or not the Founders intended the power to declare war to reside in the legislative branch. Did they really mean it when they wrote that in Article I, Section 8, Clause 11? Or did they mean, when they went to the — to Article II of the Constitution and called the president the commander-in-chief, that he could could summon forth the troops without the ability — or without having to go to Congress? Our lawsuit is attempting to establish that, once and for all, that Congress does have the sole power to declare war.

The War Powers Act, you know, we may — there may — I'm not going to say there's no debate about the War Powers Act. We include that in our filing. And the gentleman who has written extensively about it is aware of the defects of the War Powers Act. We're trying to get some clarification from a court on that. But I will say, if we are able to get standing on this, if the court will go beyond what the Supreme Court did in 1999 in saying that, you know, this was just a political question and dismissing it, and saying Congress ultimately has the power of the purse — if we get beyond that and go to the real deep meaning of Article I, Section 8, we may see a whole new day here, where no executive will in the future will be able to go and declare war without checking with Congress. The Founders were very clear about not wanting the power of war to be put in the hands of an executive solely. And so, they balanced it by making sure that Article I, Section 8, defined that Congress has this power.

Now, one more thing. The gentleman said it's not a war. Now, I ask you, if another country sent 2,000 planes over our — missions over the United States, and some of those missions dropped bombs on us, would that be an act of war against the United States? Because that's exactly what we've done in Libya.

AMY GOODMAN: Robert Turner?

ROBERT TURNER: Well, you're missing a number of — you're missing a number of things. First, the Founding Fathers understood the concept of force short of war. When Thomas Jefferson was president, at his first cabinet meeting on March 15th, 1801, he and his cabinet members decided to send two-thirds of the American Navy halfway around the known world to the Mediterranean, with instructions that if, upon arrival, they found the Barbary powers had declared war on the United States, they were to so disperse the force under their command to sink, burn and destroy their ships wherever they found them. The fleet sailed on June 1st. On December 8th, Jefferson finally reported it to Congress. No one in Congress complained the president had acted improperly.

Remember, you keep saying this is a NATO operation. This is an operation under Chapter 7 of the U.N. Security Council. When the Senate passed or consented to the ratification of the U.N. Charter in 1945, their unanimous report said the use of American forces to carry out a Chapter 7 decision of the Security Council would not be an act of war, but an act for preserving the peace, and therefore, would not affect the exclusive power of Congress to declare war. When the U.N. Participation Act was before the Senate in December of 1945, Senator Burton Wheeler of Montana introduced an amendment that provided that the president could not send U.S. military forces to carry out a Chapter 7 decision of the Security Council without first getting the approval of Congress by joint resolution in the specific case where the Security Council wanted to act. That was defeated by more than a seven-to-one majority, getting fewer than 10 votes, and leaders of both parties said this violates the obligation we have made under the U.N. Charter to assist in the keeping of peace.

And remember, you talk about the president's duty to see the laws faithfully executed. In Article VI of the Constitution, the Supremacy Clause says this Constitution, laws made pursuant to the Constitution and treaties made under the authority of the United States shall be the supreme law of the land. The president has a power and a duty to carry out the international obligations of the United States under treaties. So, this is not a new issue.

You know, neither Vietnam nor Korea were presidential wars. We can talk about that if you would like. In Korea, Truman repeatedly asked to go to a joint session of Congress and actually had the State Department draft what today we would call an authorization to use military force. And members of Congress, he personally consulted, repeatedly. Members of Congress said, "Stay away from Congress. You've got the power to do this under the Constitution and the Charter." In Vietnam, Congress passed a statute, an AUMF, by a 99.6 margin, percent margin, authorizing the president to use force. During that debate, Senate Foreign Relations Committee Chairman J. William Fulbright was asked, "Are we giving the president authority that could lead into war?" He said, "That is the way I would interpret it." So, you know, it is a myth — it was a

popular myth that gave Congress cover, when the people turned against the war, to suggest that Congress was not a full partner in getting us into Vietnam.

AMY GOODMAN: It's interesting that we have a Reagan attorney who is defending President Obama right now, and we have Dennis Kucinich, one of the most progressive members of Congress, who is suing the President of the United States, who happens to be a Democratic president. But I wanted to go back to Wednesday's White House press briefing. Secretary Jay Carney was questioned about President Obama's stance on the War Powers Act.

REPORTER: You're probably familiar with the quote from Candidate Obama in December 2007 in response to a questioner from the *Boston Globe*, I believe it was: "History has shown" — I'm quoting — "History has shown us time and time again, however, that military action is most successful when it's authorized and supported by the legislative branch. It is always preferable to have the informed consent of Congress prior to any military action." My question is, in compliance with the War Powers Resolution, will the President begin withdrawal of American forces in the action against Libya this weekend after the 90-day period is up?

PRESS SECRETARY JAY CARNEY: Well, first of all, as you know, there are no forces to withdraw from Libya. Let's just make that clear. Secondly, the President has acted in a manner that is consistent with the War Powers Resolution. I will point you to, not being a lawyer, to the legal analysis that will be part of the packet of information provided to Congress this afternoon.

REPORTER: Can I point to one specific point, please? The time line, the 60-day time line —

PRESS SECRETARY JAY CARNEY: Again, you're talking about the War Powers —

REPORTER: There's no congressional resolution in support of this military action.

PRESS SECRETARY JAY CARNEY: You're talking about the War Powers Resolution. You're talking about a constitutional debate that has existed in this country for a long, long time, volumes of which have been written about.

REPORTER: The President supports the War Powers Resolution.

PRESS SECRETARY JAY CARNEY: And the — and the reasoning that we have put forward will appear and is being provided to Congress about why he has acted in a manner that's consistent with the War Powers Resolution. I don't want to get into that here. I will point you to the analysis written by actual attorneys and not just ones who play them on TV.

AMY GOODMAN: Congressman Kucinich, your response? And also, the fact that Press Secretary Jay Carney was warning Congress members not to send mixed messages about the U.S. military efforts in Libya?

REP. DENNIS KUCINICH: I thought it was interesting that he said that we have “no forces to withdraw.” Those were his exact words. Yet, *The Guardian* U.K., if you go to their

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and you look at their data that they've assembled, pursuant to their study of all the different nations that have played a role in this attack on Libya, the United States has 8,507 personnel of 12,909 involved in the Libyan mission; 153 of 309 aircraft; sorties that have been flown, which include parts of bombing raids, 2,000 of [5,857] raids; 228 of 246 cruise missiles fired by the U.S. Now, these were figures that were as of May 5th. To say that we don't — as Mr. Carney said, that we don't have any forces to withdraw is mystifying. I hope he wasn't being disingenuous. I hope that he understands that we are, according to the administration's own reports, on target to spend over a billion dollars in this war against Libya.

I also want to point out that when he says that they're consistent with the War Powers Act, if you — if they recognize the War Powers Act, then at the outermost marker, they're in violation by the end of this week. If they don't recognize the War Powers Act, then that's the reason why we're in court, to see if the War Powers Act is viable at all anymore. That is a — that's a legal

question. But beyond the statutory questions here, there's a constitutional question. And I would just like to say to the professor, with all due respect — and I suppose that you probably know more about these issues than most people, because you've written books about it — that there is nowhere in the Constitution where it says that our treaty obligations trump bedrock constitutional principles, which are enshrined in Article I, Section 8, with respect to the role of the Congress, established in Article I, first among equals, to declare war. We do not give up our congressional right, as determined by the Founders, who wrote that in there, that the Congress shall have the power to declare war. We don't give that right up simply because we have assumed obligations under Chapter 7. The U.N. Security Council and our obligations under NATO

do not trump the Constitution of the United States. And that's the point we're trying to make in going in with this lawsuit, which I hope that the gentleman will have a chance to study, because you may see that if we are able to get standing, that this suit will have the potential for being able to reset the imbalance which has occurred on this question of the war power.

AMY GOODMAN: Finally, Professor Turner, this question that Congressman Kucinich put to you. If a country dropped bombs on us, would you call it war? Would you say the U.S. is at war in Libya right now?

ROBERT TURNER: Let me, almost as a point of personal privilege, emphasize I'm not defending President Obama, nor am I attacking him. I'm defending the Constitution, as it's been understood for years. I would say, in the defense of the White House spokesman, that he did not say "withdraw U.S. forces." He said, "withdraw U.S." — he said we have no forces in Libya, which is not the same thing as having forces taking part in this U.N. operation.

I certainly agree with the congressman that neither the U.N. Charter nor any other treaty can trump the Constitution. The problem is, the Constitution gives Congress a narrow negative on the general executive control of external relations. A declaration of war was understood to be an all-out war — today, an illegal war — operating under the unanimous — reports of both the Senate and House Foreign Affairs Committees acknowledged that the president was authorized to implement our obligations under the Charter, and they don't affect the power of Congress to declare war. You know, obviously, there's a big difference between the U.N. Security Council acting under Chapter 7, authorizing the use of force to deal with a threat to the peace, and some other country launching thousands of planes against us without cause.

You know, but one other point is very important. The White House keeps saying, "Oh, you're going to undermine our operation. You're going to encourage the enemy." I was — followed very closely the 1983 debates on the Beirut deployment, and I watched as members of

Congress, in a very partisan way — I think two Democrats in the Senate voted to support President Reagan on this multilateral deployment. And at the end of it, or during the hearings, P.X. Kelley, the commandant of the Marine Corps, went to the Senate Foreign Relations Committee and pleaded with them that their partisan debate was endangering the lives of our Marines. And now, Vice President Joe Biden got up on the 29th of September, 1983, in the Senate debate, floor debate, and he said, “You’ve all heard that by even having this debate we’re endangering our Marines. Well, that may be true, but we’ll never know until we have one of these debates.” On October 23rd, terrorists — or shortly thereafter, we intercepted a message between two of the radical Islamic terrorist groups saying, “If we kill 15 Marines, the rest will go home, or the rest will leave.” And on the 23rd of October, early morning on Sunday, a terrorist bomb killed 241 Marines. Why did that happen? Normally you don’t want to kill American Marines, because by morning a lot more will be there with a real bad attitude. But in this case, Congress had inadvertently put a bounty on the lives of those Marines by saying — in fact, Chuck Percy, the Republican chairman of the Foreign Relations Committee, actually said, “We’re not washing our hands. We’ve authorized this for 18 months. If there are any more casualties, we can reconsider this vote at any time.” And it was right after that that the terrorists said, “Let’s kill 15 Marines. The rest will go.” They killed 241. And I place a large deal of blame for that right on the foot of a partisan United States Congress.

AMY GOODMAN: Well, Congressman Kucinich, we just have 10 seconds. Can you respond?

REP. DENNIS KUCINICH: Yeah, historians should be very careful about putting blood on anybody’s hands.

AMY GOODMAN: Well, we’re going to leave it there. Robert Turner, co-founder of the University of Virginia’s Center for National Security Law, joining us from the University of Virginia, thanks so much for being with us. And Congressman Dennis Kucinich, who has joined with 10 other members of Congress in suing President Obama over the War Powers Act.