



WILL THE FUN EVER START?

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JURISPRUDENCE

## Bomb Away, Mr. President

Legally and constitutionally, Obama's Libya policy is on firm ground.

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Does the War Powers Resolution support Obama's Libya campaign?

What did the president do, and when did he do it? Critics of President Obama's use of air power over Libya are posing [sharp questions](#), with some detractors likening Obama's actions to the lawlessness of [Watergate](#) and [Abu Ghraib](#). The detractors are wrong.

On March 19, [Obama authorized airstrikes](#) to ground Libya's planes and thereby prevent what he reasonably feared might be a massacre of Libyan civilians. Though this deployment occurred without specific congressional authorization, for centuries American presidents have unilaterally used armed forces in emergency situations. In 1962, President Kennedy used the Navy to quarantine Cuba and prevent nuclear blackmail. In 1983, President Reagan sent troops to Grenada to undo a murderous coup and protect American students on the island. In 1994 President Clinton sent the military into Haiti to restore order and prevent an international refugee crisis. By its general design and actual language, the Constitution empowers presidents to react to fast-breaking events. When bad stuff happens, Congress might not even be in session.

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Counterbalancing the president's "executive power" to address emergencies, the Constitution empowers Congress to "declare war" and regulate America's armed forces. When time permits deliberation without harm to America's vital interests, only Congress can decide whether to initiate a war of choice. Presidents may nonetheless act unilaterally in small-scale ways unlikely to trigger full-blown war; and may also react unilaterally to neutralize our foes' aggressive actions when time is of the essence.

Obama's March actions plausibly fall on the presidential side of this line. Events were unfolding rapidly. Had he not acted, there could have been mass murders and a refugee crisis, destabilizing the region and mocking basic principles and institutions of international human rights. Obama acted only after both [the United Nations](#) and the [League of Arab States](#) invited the United States to help avert disaster.

But why didn't Obama ask Congress—then in session—to authorize air power in late February or early March, well before the crisis climaxed? Partly because the situation was delicate, tactically and diplomatically. Obama did not want the world to think the United States was trigger happy, and any congressional resolution that occurred before an international consensus crystallized might have made it far more difficult to persuade the world of America's benign intentions. Only after an alliance of Arab and world leaders requested America's help would a congressional resolution have been appropriate—and by then massacres seemed imminent. Thus, even when Congress is able to act quickly, it is not always able to act at just the right moment, internationally.

Beyond the Constitution, the War Powers Resolution must also be considered. Enacted in 1973, the resolution aims to clarify the line between executive and legislative power. Alas, the act obscures as much as it clarifies. Its [opening section](#), which purports to itemize the “only” occasions for presidential unilateralism under the Constitution, oddly mentions protecting America’s “possessions” abroad but not its citizens abroad. This section defines the president’s powers as “commander-in-chief” but says nothing about his powers under other constitutional clauses—or powers derived from statutory implications and customary practices, which undergird what lawyers call “federal common law.” This section does not use the ordinary legal language of “shall” or “shall not,” and presidents of both parties have consistently treated this itemization as nonexhaustive.

[Another section of the law](#) requires presidents to report to Congress in various situations when armed forces are introduced “into hostilities” or into foreign “territory, airspace, or waters.” Consistent with this section, Obama submitted [a letter to Congress](#) less than 48 hours after the Libya mission began. The report explained that U.S. airstrikes were “limited in their nature, duration, and scope,” and would “set the stage for further action by other coalition partners.”

Over the next few weeks, Obama handed off the Libya mission to NATO and slashed the number of American sorties. As a result, the president now claims that American air raids can continue indefinitely, notwithstanding [yet another section of the War Powers Act](#) that requires that certain presidential military initiatives end within 60 days (with an additional 30-day grace period if an earlier ending would imperil troop safety).

Therein lies the rub. More than 90 days have elapsed since the Libya mission began, and Congress has not passed a law authorizing the mission or extending the 90-day clock. But the clock starts to tick only when troops have been “introduced into hostilities,” and this statutory phrase is hardly self-defining. True, American planes and drones are dropping bombs. But they are not taking fire. There are no American body bags. American forces are arguably not so much “into” hostilities as “above” them.

The War Powers Resolution itself, in the very subsection setting out the 60-90 day clock, emphasizes “the safety of United States Armed Forces.” Shortly after the resolution was enacted, [a key executive-branch document](#) (PDF) defined the “into hostilities” phrase as involving situations “in which there is a serious risk from hostile fire to the safety of United States forces.”

Also, the WPR's clock makes more sense in a classic Vietnam-style ground war—the context in which the act arose. The act is silent about whether a president may ever reinitiate hostilities on, say, Day 93—perhaps in response to a fresh provocation—after withdrawing on Day 89. In a typical ground-troops operation, this sort of complete cessation and quick renewal of hostilities is hard to imagine. By contrast, in the kind of nimble multilateral air operation over Libya, the basic premises of the law are less applicable. U.S. planes can leave enemy airspace in a matter of minutes; other coalition partners can carry on strikes for several days, and then U.S. planes could re-enter—all in strict compliance with the letter of the law.

The ambiguities and oddities of the War Powers Act invite a second look at the Constitution, whose basic vision the law purports to implement. Interestingly enough, the Constitution distinguishes between armies and navies, and regulates armies more strictly. (For example, army appropriations must be re-voted every two years; not so for navy appropriations.) This distinction exists because the Framers believed that armies posed a greater threat to American lives and liberty than did navies. Today, the air power is likewise less of a threat to American lives and limbs.

Of course, there are non-American lives and limbs at stake in Libya as well, and as diplomat-in-chief, the president is well-positioned to respond to world opinion about our Libya mission. Obama's daily duties require him to keep close tabs on Cairo, Egypt, as well as Cairo, Illinois. Is the same true of House Speaker John Boehner? Because the Libya mission poses little threat to Americans, one of the central purposes of the War Powers Resolution—to prevent Vietnam-style risks to Americans unless America's elected legislators have specifically approved these risks—is not implicated.

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