

The Libyan intervention is not wholly legal

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Is President Obama's war against the Libyan [government](#) legal? It is arguably compliant with modern international law, because it has been authorized by the United Nations Security Council. Nothing in international law, however, can change the United States Constitution's procedures for when the United States can go to war — which require the consent of Congress.

It is preposterous to use a euphemism like “kinetic military action” and claim that the military campaign against the Gaddafi [regime](#) is not a “war.” If any nation sent hundreds of missiles and bombs into the United States, all of them aimed at the American armed forces, the American people would of course consider this to be an act of war. And the stakes have increased with the authorization of covert operations within [Libya](#) by the president.

The fact that U.S. ground forces are not involved, at least not officially, does not turn Libya into a non-war. When the Japanese attacked Pearl Harbor, they used only airplanes and submarines, not ground forces. The American people rightly understood Pearl Harbor as an act of war.

In the view of America's founders, international law permitted Just War, which included humanitarian intervention on behalf of rebels who had good cause to resist a foreign tyrant. All the international law philosophers to whom the founders looked for guidance — including Vattel, Puffendorf, and Grotius — thought so.

Nonetheless, the Constitution gives Congress, not the president, the power “To declare War.” Some persons claim that the president's commander-in-chief power includes unilateral authority to make war on his own initiative. The founders believed otherwise. For example, James Wilson, who would later be appointed by President George [Washington](#) to the Supreme Court, explained to the Pennsylvania ratifying convention:

“This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives. . .”

America's first war in Libya — two centuries ago — complied with the Constitution. The Barbary pirates, who were supported by the government of Tripoli, seized American ships in the Mediterranean because the Americans would not pay protection money. While President Thomas Jefferson dispatched the [American Navy](#) to guard the ships, he asked Congress for permission to take further action. As his message to Congress acknowledged, authorization for offensive war is an “important function confided by the Constitution to the Legislature exclusively.”

Congress passed two separate authorizations for military force in 1801 and 1802. A force of United States Marines, leading a coalition of North African allies, marched from Alexandria, Egypt in 1805, and captured the Tripolitanian port of Derna. The Bashaw of Tripoli quickly signed a peace treaty with the United States, ending the First Barbary War.

Today, some people prefer a “living Constitution” to originalism. If so, they should heed the 1973 War Powers Resolution, a federal law which requires the president to seek congressional consent upon introducing [American forces](#) into combat. If Congress does not consent, the forces must be withdrawn after, at most, 90 days.

Placing U.S. forces under a NATO command changes nothing. Even if the NATO Treaty could somehow authorize war, that treaty only requires nations to fight in response to an attack against the territory of a NATO member.

Regardless of whether one traces the need for congressional consent to original meaning or to a modern enactment, the requirement for consent of the legislative branch has the same salutary purposes. First, the debate over authorization clarifies the objectives of the war. Second, the consent of the people’s representatives makes it more likely that there will be public support to fight as long as necessary to achieve those objectives. Most importantly, the United States is a constitutional republic and not an empire, and therefore the decision to go to war cannot be lodged in a single man, except in cases of emergency.

President Obama should immediately ask the United States Congress to declare war against the Gaddafi regime, or to pass a resolution authorizing the use of military force.

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