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Are U.S. actions in Libya subject to the War Powers Resolution? A review of the evidence

By [Angie Drobnic Holan](#), [Louis Jacobson](#)

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***Editors's note:** We originally intended to publish this research as a fact-check, but as you'll see, we decided it wasn't a checkable fact. Did we make the right call? What would you have rated the administration's statement? E-mail us at truthometer@politifact.com.*

When is dropping bombs on another country not considered "hostilities"? That question is at the heart of a debate about whether the War Powers Resolution requires President Barack Obama to keep Congress informed about U.S. military activities in Libya.

The Obama administration is claiming that actions in Libya aren't subject to the War Powers Resolution because they don't meet the definition of "hostilities." We wanted to fact-check this statement, but experts we spoke with -- even those who disagreed with the Obama administration -- told us this is a complicated case and perhaps not a checkable fact. Rather, it's a legal claim that will be settled by either the courts or the political process.

Still, we decided it would be useful to readers to lay out all the evidence we've gathered here. And we want to be clear: The Obama administration's argument violates our standards of common sense, and we didn't find one independent expert who whole-heartedly supported the claim that actions in Libya are not "hostilities."

Libya and the War Powers Resolution

U.S. involvement in Libya began on March 19, 2011, as part of a NATO mission to support rebels attempting to overthrow the long-serving authoritarian leader Muammar Gadhafi. Obama said Gadhafi was launching military actions that were causing civilian deaths and forcing ordinary Libyans to escape to neighboring countries, threatening a humanitarian crisis within Libya and instability for its neighbors, Egypt and Tunisia. The NATO coalition initiated a bombing campaign and set up a no-fly zone designed to restrain Gadhafi.

"Left unaddressed, the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States," Obama said.

Under the War Powers Resolution, a president can initiate military action but must receive approval from Congress to continue the operation within 60 days. If approval is not granted and the president deems it an emergency, then an additional 30 days are granted for ending operations.

But since NATO action in Libya began, Obama has not sought or received approval from Congress. In fact, individual members of Congress have warned Obama that he can't continue military action unilaterally. That's what has caused the current face-off between the White House and Congress.

On paper, the War Powers Resolution seems clear-cut. But in practice, Congress and the White House have skirmished repeatedly over it.

While the Constitution (Article I, Section 8) assigns the right to declare war to Congress, the last time that actually happened was at the beginning of World War II, when Franklin D. Roosevelt was president. Since then, presidents have generally initiated military activities using their constitutionally granted powers as commander-in-chief without an official declaration of war to support their actions. In some cases, such as the wars in Iraq and Afghanistan, Congress has complied with a presidential request for specific approval, short of a formal declaration of war.

The War Powers Resolution, passed in the wake of the Vietnam War, was intended to stop presidents from fighting wars without input from Congress. However, presidents from both parties have regularly ignored it, and Congress has often been reluctant to assert itself. Some critics have suggested that the resolution has functioned so poorly that it should be scrapped.

"It is ineffective at best and unconstitutional at worst. No president has recognized its constitutionality, and Congress has never pressed the issue. Nor has the Supreme Court ever ruled on its constitutionality. In fact, courts have largely shied away from refereeing war-powers disputes between the two political branches," [wrote](#) James Baker and Warren Christopher in 2008. The two

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former secretaries of state, one a Republican and one a Democrat, studied the issue for a year and then recommended that it be replaced.

But for now, the law remains in force. So, earlier this month, butting up against the 90-day mark since action in Libya began, the Obama administration released a report summarizing its actions in Libya. The administration did not claim that the War Powers Resolution was unconstitutional but argued instead that its actions in Libya didn't meet the definition of "hostilities," so the War Powers Resolution did not apply.

"U.S. military operations are distinct from the kind of 'hostilities' contemplated by the Resolution's 60-day termination provision," the report said. "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors."

The report also argued that NATO was leading the efforts in Libya and that U.S. strikes rely on remotely piloted drone planes for its attacks.

Members of Congress from both parties expressed skepticism.

"You know, the White House says there are no hostilities taking place," said U.S. House Speaker John Boehner, a Republican. "Yet we've got drone attacks underway. They're spending \$10 million a day, part of an effort to drop bombs on Gadhafi's compounds. It just doesn't pass the straight-face test in my view, that we're not in the midst of hostilities."

Rep. Brad Sherman, D-Calif., also rejected the administration's argument. "The War Powers Act is the law of the land," Sherman told Glenn Greenwald, a liberal blogger with Salon. "It says if the president deploys forces, he's got to seek Congressional authorization or begin pulling out after 60 days. Too many presidents have simply ignored the law."

Sherman argued that "when you're flying Air Force bombers over enemy territory, you are engaged in combat."

What the law says

To research the administration's claim, we first turned to the law itself. The War Powers Resolution, passed in 1973, is not long; you can [read it here](#). The resolution doesn't define "hostilities," but it does say that the president must go to Congress under three possible conditions if there is no formal declaration of war:

"In any case in which United States Armed Forces are introduced—

- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
- (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."

By our reading, dropping bombs on a country would fall under the second point. We then turned to a range of experts on military affairs, international relations and the law to see what the consensus was.

What the experts say

Most of the experts we talked to said that what is happening in Libya does, in fact, constitute hostilities and that to claim otherwise -- as the White House is doing -- is false.

"The U.S. has deployed manned and unmanned aircraft to fire missiles and drop bombs — the type of weapons only permissible for use in armed conflict hostilities," said Mary Ellen O'Connell, a University of Notre Dame law professor.

Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute, said that "this is akin to the argument that what we're doing isn't war but 'kinetic military action.' Now, the War Powers Act itself is problematic constitutionally, but you absolutely cannot say that what we're doing in Libya isn't 'hostilities,' in the lay or technical sense."

And legal commentator Stuart Taylor Jr. said it's "not a close call, in my opinion. Our military has been dropping bombs and killing people in Libya over a period of several months."

As we noted earlier, the administration gave two specific rationales for why U.S. actions didn't fall under the War Powers Resolution. First, U.S. efforts aren't putting forces at risk because those efforts are relying on unmanned aircraft. Second, they argue, NATO is leading the effort.

Jack Goldsmith -- a Harvard University law professor who was a top government lawyer in the George W. Bush administration and wrote a book, *The Terror Presidency*, detailing his internal opposition to what he considered the administration's overly broad views of executive authority -- has written the most [detailed critique](#) we found on both those arguments. He found it unconvincing that drone attacks wouldn't constitute hostilities. He also [noted](#) that the administration has been ambiguous in its public statements about whether it's using only drones or both drones and piloted aircraft.

As for the NATO argument, Goldsmith pointed out that members of the U.S. Armed Forces hold leadership positions in NATO, and the United States provides significant funding for NATO. "The fact that this command and participation happens via NATO seems irrelevant; the fact is that U.S. Armed Forces are helping those nations engage in military hostilities," he wrote.

[Resurrecting the WPR? \(Probably Not\)](#), June 16, 2011

E-mail interview with Mary Ellen O'Connell, University of Notre Dame law professor, June 17, 2011

E-mail interview with Kal Raustiala, UCLA law professor, June 17, 2011

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A few experts, though, told us they see the question as more nuanced. Whether the actions constitute hostilities, they said, is a question either for the courts or for the political process to work out.

"This is not an easy case, and [news reports](#) suggest that this was fought over internally in the administration," said Kal Raustiala, a University of California at Los Angeles law professor. Personally, he said, he thinks it's "a bit of a stretch to say that Libya doesn't count for the War Powers Resolution. But it is not crazy. The bottom line is the resolution is a struggle between Congress and the president, and there is no 'right' answer to what hostilities mean — until Congress defines it better."

Even those experts who believe the U.S. is indeed engaged in hostilities think it's unlikely that courts will be willing to intervene in a high-stakes disagreement over the meaning of the separation of powers. It's more likely the courts would throw out the case on technical grounds, they said.

The War Powers Resolution is "an old statute filled with uncertainties," Goldsmith wrote. "There is no definitive judicial construction of it and little likelihood of judicial review. The President is making an aggressive and narrowing interpretation of the statute. Whether the interpretation succeeds will depend entirely on Congress's reaction. If Congress disagrees with the president's construction, only it can vindicate its view."

Congress is considering a number of measures that would both authorize and limit U.S. military actions in Libya. The final outcome of their actions remains to be seen.

The administration's position

We asked the White House directly about the administration's position. Spokesman Eric Schultz sent us this statement:

"Our conclusion that these constrained and limited operations do not amount to 'hostilities' under the WPR is consistent with WPR interpretations put forward by administrations of both political parties dating back to the statute's 1973 enactment. But what is beyond dispute is the fact that we have averted a massacre, saved thousands of lives and reversed the advance of Gadhafi's forces, giving the Libyan people a chance to determine their future. We have also kept the president's commitment to transfer responsibility to our coalition partners for the enforcement of the civilian protection mission and are now in a support role."

Schultz also reiterated the arguments from the administration's brief, which we've already described, and he referred us to [additional analysis](#) from Robert Chesney on the Lawfare blog, which cataloged the reasons previous presidents have given for why certain military activities were not subject to the War Powers Resolution and found that the Obama administration's arguments were similar to some of those of previous administrations.

"From that perspective," Chesney wrote, "it's not hard to see how the administration comes to the view that the current state of U.S. involvement in Libya -- i.e., no boots on the ground, no manned aircraft flying combat missions and thus putting pilots in harm's way as a theoretical matter, [unmanned aerial vehicles] conducting combat missions only sporadically and with seemingly low intensity (isolated strikes on specific vehicles, that sort of thing), and manned aircraft otherwise conducting only support missions like refueling and jamming -- taken as a whole fails to come within the scope of the WPR's requirements."

But even Chesney acknowledges in his post, "That's not to say it's an unassailable argument. For one thing, some, no doubt, would not give as much weight to executive branch interpretations as would, well, the executive branch. And there is the complication of (Adm. James G. Stavridis, the Supreme Allied Commander, Europe), an American officer in command of NATO forces from other countries that are engaged on a much more sustained basis in 'exchanges of fire.'"

Finally, Schultz pointed us to statements from Sen. Harry Reid, D-Nev., and Rep. Nancy Pelosi, D-Calif., leaders of the Democrats in Congress. Reid said the War Powers Resolution didn't apply because "we have no troops on the ground there, and this thing's going to be over before you know it anyway, so I think it's not necessary." Pelosi said the actions were limited, and she believed the president had the authority he needed to go forward. "I don't think they should stop the support that they're giving to NATO to stop the humanitarian disaster," she said.

Our view

We agree that prior administrations have taken similar approaches as the Obama Administration in analogous situations. But just because the administration's approach to defining "hostilities" has been allowed to proceed historically -- whether for political reasons or for convenience -- doesn't mean that the definition is legally justified.


The War Powers Resolution says it applies in any case in which United States Armed Forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat." We don't see the use of drone aircraft as an escape clause, since dropping bombs from a foreign nation's airspace is a textbook definition of hostilities. And as we said earlier, the administration's argument violates our standards of common sense, and we didn't find one independent expert who wholeheartedly supported the claim that actions in Libya are not "hostilities."


We'll be watching to see how the president and Congress handle the issue in the days ahead and whether their actions produce an answer about whether U.S. actions are hostilities that fall under the War Powers Resolution.

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