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...or was that "not intended to be a factual statement"?

"What, You Thought The U.S. Was Done Bombing Libya?" Wired's Spencer Ackerman asks. Turns out we're not--we've hit Libyan air defenses three times in the last week. Ackerman quotes a DoD spokesman: "We do not characterize those as 'strikes,' because [air defense suppression] is considered a defensive... mission." So there you have it.

This is interesting, because one of the arguments President Obama's Office of Legal Counsel advances in its brief for the legality of the president's Libyan adventure is that, basically, it's constitutional because it'll be short.

Obama's lawyers write that "Congress itself has implicitly recognized this presidential authority" for committing US forces to hostilities abroad in the 1973 War Powers Resolution. The argument is that the WPR, by contemplating a 60-90 day period in which the president can exercise force without congressional authorization, essentially gives the president a "free pass," for frolic-and-detour bombing runs like Operation Odyssey Dawn.

Last week, at a Cato Institute Capitol Hill Briefing, (video below) Rep. Tom McClintock (R-CA) and I both addressed the WPR argument (my colleague John Samples handled the argument that UN Authorization is a substitute for congressional approval).



We pointed out that:

1. the WPR itself says

“the constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities... are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

Clearly, none of that applies here.

2. the WPR also says

Nothing in this joint resolution--(1) is intended to alter the constitutional authority of the Congress or of the President” and that nothing in it “shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities”

...so it doesn't purport to add anything to the constitutional powers of the president. Not that it could, anyway: the Constitution trumps a statute, and if the Constitution doesn't give him the power to commit the country to nondefensive wars—and it doesn't—then the WPR doesn't change anything legally.

(Though the supposed ambiguity OLC has seized upon may itself be a good argument for repealing the WPR [.pdf], some have argued).

Interestingly, as Charlie Savage pointed out recently in the *New York Times*, the 60-day clock runs out in mid-May. If we're still bombing Libya at that time, then even OLC would have to admit that the administration is in violation of the very statute it sees as authorization for its allegedly “limited” war.

Beltway Confidential

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