

Resolving the Impasse on Libya

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Background

After nearly three months of operations in Libya, the argument with Congress about the legal basis of U.S. action has become a problem for the White House. Last week, the House of Representatives took two votes on Libya with what appear to be contradictory outcomes. In the first, the House refused to authorize U.S. military operations in Libya under the War Powers Act. In the second, the House refused to use its most significant weapon—the power of the purse—to limit the operations it had moments before refused to authorize. Clearly, there are some Members who are unhappy with the current authorization but who support some elements of the mission.

There is a middle path between the demands from some in Congress to cut off funds for the effort and the White House insistence that the War Powers Act does not apply. Like Presidents Reagan and Clinton before him, President Obama should go to Congress now—after the action is underway—to seek authorization for a consensus mission in Libya. This would help prevent further protest votes, which signal uncertainty to our NATO allies and could slow passage of the Department of Defense appropriations bill.

Congressional Concern

After the 60 day period allowed by the War Powers Resolution had elapsed, the House of Representatives passed language requesting the White House to provide information about U.S. efforts in Libya as well as a legal justification for U.S. involvement. In response, the White House sent a letter arguing that congressional approval of operations in Libya was not required because those operations did not rise to the level of “hostilities” envisioned in the War Powers

Resolution.¹ Many legal experts inside and outside the government have found this explanation lacking.²

Beyond disagreement over the White House legal justification, Members of Congress believe the administration has generally failed to provide adequate consultation. Before the vote, Representative Buck McKeon indicated the House vote could have been avoided with better consultation, saying, "It's crazy that we're fighting over this the way we are."³ And Rep. Steny Hoyer said he believed "that President Obama could and should have done a better job of consulting with Congress at the outset of hostilities."⁴

After the House votes, the situation looks difficult for the administration. While the White House can point out that the House is not willing to cut off funding, it is clear that the current Libya policy lacks support, and the current legal framework is uncertain. Moreover, there is no guarantee that such votes will remain consistent. The conduct of offensive operations against Libya without congressional authorization will remain politically perilous because Congress knows it could be used as a precedent for unilateral action by future presidents.

A Way Out

The Obama administration should seek *ex post facto* statutory authorization. Such an effort is not without precedent. As Jack Goldsmith, the former head of the Justice Department's Office of Legal Counsel, has noted, previous military operations have been authorized after the fact: Lebanon in 1982 and Somalia in 1993.⁵ If intervention in Libya is in our national interest, as the President has stated, the formalities of meeting the War Powers Act should not be used to foreclose action. Statutory authorization would preserve the roles of both branches in national security decision-making, would provide the President with the political support he needs for the ongoing mission, and would reassure our NATO allies of U.S. commitment.

A close reading of last week's votes and the accompanying debate suggest that there is congressional support for authorizing some kind of U.S. operation in Libya. The President starts with 123 House members who support the current mission. There are 36 Democrats who would support a scaled-down NATO mission, and 89 Republicans who refused to cut off funds.

In order to gain statutory authorization, the White House may need to modify the mission. To gain support from additional Democrats, the mission might have to be scaled back to an operation only in support of NATO. Some Republicans indicated they might support a more robust mission.⁶ The negotiations may not be clear cut, but there is room to seek a consensus mission. And while there may be some temptation to hope that Qaddafi steps down, allowing the operation to end, and rendering moot the debate, this wishful thinking leaves a bad constitutional precedent.

To be sure, after the White House's public declaration that it needs no congressional action, returning to Congress will be a bit more difficult. Fortunately, the President has a Secretary of Defense who is a skilled negotiator and has deep relationships in the House. Choosing the center path to resolve this dispute with authorization will avoid one of the biggest challenges to the national security powers of both branches in a decade, and it will provide our allies—and our enemies—with the certainty that the U.S. will not abandon the fight before it's done.

END NOTES

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