The Constitution and Presidential War Making against Libya

Lieutenant David L. Hall, U.S. Naval Reserve

Since the Vietnam war, U.S. military operations have been followed by intensive but short-lived debates about the constitutionality of the unilateral use of military force by the President.[1] The tone of these debates became especially urgent during the development of what has been called a "compellent diplomacy"[2] under President Reagan. Opponents of presidential war making have argued that since Congress alone is empowered to declare war,[3] the President exceeds the scope of his constitutional authority by employing force abroad without a declaration of war. Proponents of the President's actions have claimed that his authority as the nation's chief executive and as commander in chief[4] of the armed forces justifies his actions. Superimposed over these constitutional debates have been statutory wrangles about the President's compliance with the requirements of the War Powers Resolution,[5] which was enacted in 1973. Some observers have found the legal issues to be either overwhelming or irrelevant: after the Grenada intervention, *The Wall Street Journal* wished the lawyers would "shut up."[6] Nevertheless, the stakes in these debates are quite high: at issue is not only the question of which branch of government is constitutionally empowered to make war, but also the broader question of how seriously the Constitution is to be treated in determining the distribution of war powers.

One source of confusion and incoherence in the post-Vietnam war powers debates has been the failure of many participants to distinguish the question of whether the President's actions were lawful from the question of whether they were wise.[7] This article is about the former: it seeks to determine whether the circumstances under which the Constitution permits the President to use military force, wisely or not, were present during the 14 April 1986 air strikes against Libya.

Lieutenant Hall serves as an air intelligence officer with Naval Reserve Patrol Wing 0593, NAS Willow Grove, Pennsylvania. He received an A.B. degree from Dartmouth College, an M.P.P.M. from Yale University and holds an M.A. and a J.D. from the University of Pennsylvania.

The Libya Mission as a Case Study

On more than a hundred occasions since the Constitutional Convention of 1787, Presidents have waged war without a congressional declaration.[8] During one such undeclared war in Vietnam, some commentators insisted that the President's use of force was not lawful.[9] Others, including several courts,[10] argued that the President's use of force in Vietnam was authorized by the Tonkin Gulf Resolution,[11] as well as numerous appropriations and draft enactments. Even those who contend that the Vietnam War was unconstitutional acknowledge that at least some aspects of the war, such as its financing, were authorized by Congress. For these critics, the argument that the Vietnam War was unconstitutional is based solely on the absence of a declaration of war.

In spite of this criticism, post-Vietnam presidential war making has been accompanied by less congressional authorization than was the Vietnam War. The introduction of U.S. Marines into Lebanon in 1982, for example, was only authorized by Congress in 1983 by the Multinational Force in Lebanon Resolution.[12] The 1983 intervention in Grenada[13] was also preceded by no express congressional authorization. Similarly, the only formal contact between the President and Congress on the question of the 1986 air strikes against Libya took place several hours before commencement of operations and did not result in any form of congressional approval, either express or implied. The Libya mission[14] thus provides an unambiguous factual situation against which to test the scope of the President's constitutional war-making authority. If some form of prestrike congressional authorization (whether or not a declaration of war) was required by the Constitution, then the President's conduct on 14 April 1986 was clearly unconstitutional. If not, then the President's action was undertaken within the bounds of his constitutional authority.

The Libya Mission[15]

On the morning of 27 December 1985, terrorists attacked and killed civilians, including five Americans, in the Vienna and Rome airports.[16] The Abu Nidal terrorist group was widely suspected of executing the attack. Abu Nidal was linked by a 31 December 1985 State Department study to the government of Libya.[17] Specifically, the study found a "likelihood" of support from Libya in the form of "financing, safehaven and logistical assistance."[18] Libya denied involvement in the Rome and Vienna attacks,[19] even as it praised them. On 29 December, the Libyan press agency, JANA, termed the Rome and Vienna attacks "heroic."[20] By contrast, Yasir Arafat, chairman of the Palestinian Liberation Organization, condemned the attacks.[21]

Despite Libya's denial, the United States accused Libya of participation.[22] A State Department report issued 8 January 1986, stated: "[Colonel Muammar el-] Qaddafi has used terrorism as one of the primary instruments of his foreign policy and supports radical groups which use terrorist tactics. . . . Qaddafi has provided safe haven, money and arms to these groups—including the notorious Abu Nidal group. . . . Libya's support has broadened to include logistical support for terrorist operations. For example, Libya provided passports to the Abu Nidal members responsible for the [27 December 1985] attack on the El Al counter in Vienna."[23] Although Qaddafi at first denied the State Department's allegations, he later proclaimed, "I declare that we shall train [certain groups] . . . for terrorist and suicide missions and . . . place all weapons needed for such missions at their disposal. . . . Libya is a base for the liberation of Palestine."[24]

The United States brought punitive measures against Libya, imposing trade restrictions and freezing Libyan government assets held by U.S. banks.[25] Rumors ran high about the possibility of military operations. Secretary of State George P. Shultz and Secretary of Defense Caspar W. Weinberger disagreeing over the advisability of such action. Secretary Weinberger disputed the suggestion of Secretary Shultz that military action against Libya should be undertaken in the absence of data absolutely confirming a direct connection between specific terrorist acts and Libya.[26] Secretary Shultz said that the United States "cannot wait for absolute certainty and clarity" as a precondition for military action.[27] He added, "A nation attacked by terrorists is permitted [by international law] to use force to prevent or preempt future attacks, to seize terrorists or to rescue its citizens when no other means is available."[28] Secretary Weinberger, on the other hand, criticized those pursuing "instant gratification from some kind of bombing attack without being too worried about the details."[29] He raised "the basic question of whether what we are doing will discourage and diminish terrorism in the future."[30]

By the end of March, three U.S. aircraft carriers, the *Coral Sea*, the *Saratoga*, and the *America*, and their battle groups were operating in the Mediterranean, and the Pentagon announced plans for naval air operations over the Gulf of Sidra.[31] Libya considered these activities to be provocative because it claimed the entire 150,000-square-mile Gulf as part of Libyan territorial waters. This territorial dispute had led, in August of 1981, to the downing of two Libyan SU-22 fighters by two U.S. Navy F-14 fighters. On 24 March 1986, during U.S. naval air operations over the Gulf of Sidra, Libyan shore batteries launched surface-to-air missiles (SAMs) against U.S. aircraft. The missiles missed, and U.S. naval forces retaliated by attacking the radar installation at the SAM site with HARM antiradiation missiles from naval aircraft. Later that day, naval aircraft launched Harpoon missiles

against a Libyan *La Combattante*-class fast-attack craft, sinking it. U.S. Navy aircraft also attacked a Libyan Nanuchka-class corvette proceeding toward the carrier task force.[32] In addition, the guided missile cruiser U.S.S. *Yorktown* launched missiles against a second *La Combattante* fast-attack craft that had proceeded to within ten miles of the task force. On 25 March, Navy aircraft attacked a second Nanuchka-class corvette, leaving the vessel dead in the water and afire.[33] Former Secretary of the Navy John Lehman has reported that a total of three Libyan craft were destroyed.[34] On 27 March, President Reagan reported to Congress by letter that the naval exercises in the Gulf of Sidra had ended.[35] That same day, the Arab League's Council of Ministers denounced U.S. actions in the Gulf of Sidra.[36] Colonel Qaddafi claimed victory.[37]

On 5 April, terrorists bombed a West Berlin nightclub frequented by U.S. military personnel, killing a civilian woman and an American soldier, Army Sergeant Kenneth T. Ford, and wounding scores of other Americans.[38] American officials in West Berlin declared a "definite, clear connection" between the bombing and Libya.[39] Robert B. Oakley, head of the State Department's counterterrorism office, stated that the bombing "fit the pattern" of Libya-sponsored terrorism.[40] West German officials focused their investigation on reports that the Libyan People's Bureau in East Berlin had used its embassy status to provide logistical support to terrorists operating in West Berlin.[41] France expelled two Libyan diplomats accused of participating in the planning of terrorist attacks against Americans in Europe.[42] On 9 April, President Reagan held a press conference during which he announced that the United States had "considerable evidence" indicating Libyan support for terrorism against Americans.[43] The President announced his intention to act militarily if further intelligence established a direct connection between Libya and the terrorists. "We're going to defend ourselves," he said.[44]

Early on 14 April (15 April local) 1986, U.S. forces executed air strikes against Libyan targets. Air Force F-111 aircraft bombed targets in and around Tripoli: the military side of the Tripoli airport, the Libyan External Security building, the el-Azziziya military barracks (including the compound of Libyan leader Colonel Muammar el-Qaddafi), and the Libyan commando training center of Sidi Bilal.[45] Navy attack aircraft bombed military targets in and around Benghazi, including the Benina air base and the Jamahiriya barracks.[46] These targets had been selected to "stop Qaddafi's direction of and support of international terrorism."[47] U.S. aircraft encountered significant resistance from SAM batteries and antiaircraft artillery.[48] For undetermined reasons, one F-111 was lost, as were its two crewmen, Air Force Captains Paul F. Lorence and Fernando L. Ribas-Dominicci. Some residential neighborhoods in Tripoli were damaged in the attack,[49] although

accounts differed as to whether the damage was caused by U.S. bombs or Libyan SAMs returning to earth undetonated.[50]

Secretary Shultz stated at the press conference announcing the operation that the strikes had been ordered as the result of "irrefutable" evidence of Libyan involvement in the bombing of the West Berlin club.[51] He said that the strike was necessary to deter future Libyan support of terrorism.[52] "If you raise the costs [of terrorism]," he stated, "you do something that should eventually act as a deterrent. And that is the primary objective, to defend ourselves both in the immediate sense and prospectively."[53] President Reagan addressed the nation to confirm that Libya had played a "direct" role in the Berlin bombing; he said that "Libya's agents . . . planted the bomb."[54] President Reagan stated that the air strikes were conducted in retaliation for the Libyan role in the Berlin bombing and were "preemptive" in nature.[55] "Self-defense is not only our right, it is our duty," he said.[56]

The Libya Mission and the U.S. Constitution

The Constitution's Framers did not want the President to be the King.[57] Indeed, the Articles of Confederation, ratified just six years before the Constitutional Convention of 1787, did not provide for a national executive at all. It is clear, then, that the Framers did not mean to render the President omnipotent. It is equally clear, however, that they did not mean for the President to be an impotent, titular executive. The Framers did name the President commander in chief of all military forces, grant the President executive power, and designate him the primary agent for the conduct of foreign affairs. On the other hand, the Framers granted Congress the powers to declare war and to ratify or withhold ratification of the President's treaties, thus inviting a "struggle for power"[58] in the area of foreign relations.[59] The fact is that the record of the Framers' debate on war powers is so wide-ranging and inconclusive that proponents of each view can find significant support in the record. Supreme Court Justice Jackson noted in 1952: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be derived from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[60]

The spare record of the constitutional debate does not contain a definition of the powers of the commander in chief. This silence is consistent with the collective ambivalence expressed by the Framers about the war powers in general: the President, on the one hand, should not have unfettered war-making power and, on the other, should be able to respond to crises affecting

national security. Alexander Hamilton, who favored a strong executive, attempted to reconcile the tension in the Framers' ambivalent view by stating that the President was "to have the direction of war when authorized or begun."[61] This remark can be taken to mean that the President can direct a war "only after it has been commenced"[62] by congressional declaration. Indeed, James Madison emphasized the distinction between the President's power "to conduct a war" and Congress' power to decide "whether a war ought to be commenced, continued, or concluded."[63] But Hamilton's statement contemplates the possibility of congressionally unauthorized war by establishing the disjunction, "authorized" or otherwise "begun." Hamilton expressed his position more clearly when he wrote: "[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares or openly and outwardly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary."[64]

Hamilton and the other Framers did not consider war to be unlawful in the absence of express legislative authorization; undeclared war was well known to the Framers. Indeed, between "1700 and 1870, declarations of war prior to hostilities only occurred in one case out of ten. . . ."[65] The issue of whether to wage undeclared war arose in the early years of the nation. In 1798, for example, President Adams embraced the suggestion of Secretary of War James McHenry to not seek a congressional declaration of war against France and instead to engage in a "qualified hostility," which, "while it secures the objects essential and preparatory to a state of open war, involves in it the fewest evils. . . ."[66]

So the Framers' collective point of view lies away from the extremes: war is not necessarily illegal when undeclared[67] and the President is neither omnipotent nor impotent. From this context emerges the rule that, regardless of whether the President may engage lawfully in offensive,[68] sustained war, he may act unilaterally in an emergency to defend the security of the United States without congressional approval.[69] The validity of this generalization is not subject to serious doubt. Indeed, it was James Madison, otherwise disinclined to grant the President war-making power, who moved the Constitutional Convention to delete language in the draft Constitution empowering Congress to "make" war and to replace it with language granting Congress the power to "declare" war. Such a change, said Madison, would leave "to the Executive the power to repel sudden attacks."[70] Madison's motion carried, indicating that even in withholding from the President the royal prerogative to declare war, the Framers granted the

President some measure of power to defend the national security without a congressional declaration of war.

Although this power to defend[71] was not conferred on the President by the express language of the Constitution, it has been recognized by the courts. In *Durand v. Hollins*,[72] the federal District Court ruled on the lawfulness of President Pierce's approval in 1854 of the naval bombardment of Greytown, Nicaragua, in response to the failure of the revolutionary government to make reparations to Americans harmed by recent violence. "The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant [naval officer] in the execution of his orders given through the secretary of the navy."

In the *Prize Cases*, the Supreme Court found President Lincoln's naval blockade of Southern ports to be lawful and stated: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[73] The Supreme Court's interpretation in the *Prize Cases* is consistent with Hamilton's view of the President's war-making power. It is now axiomatic that another nation's initiation of hostilities against the United States (including U.S. citizens and their property) justifies unilateral defensive war making by the President. As a corollary, the President is constitutionally authorized to determine whether or not the United States is involved in a situation justifying the use of force for defensive purposes.[74]

One indication of how the Founding Fathers viewed presidential war making is the manner in which the early Presidents exercised their war-making power. President Washington was provoked in 1794 by the establishment by the British of a fort twenty miles inside the western boundary of the United States. Without consulting Congress, he caused the following order to be issued to General Wayne, Commander of the Western Department: "If, therefore, in the course of your operations against the Indian enemy, it should become necessary to dislodge the [British] party at the [fort located at the] rapids of the Miami [River], you are hereby authorized, in the name of the President of the United States, to do it."[75]

Early in his presidency, Thomas Jefferson, who viewed the congressional power to declare war as an "effectual check to the Dog of war,"[76] ordered the Navy to defend American commercial vessels in the Mediterranean against the Barbary pirates without congressional declaration of war.

Consequently, the 12-gun tender U.S.S. *Enterprise* engaged and captured a 14-gun corsair of the Bey of Tripoli. On 8 December 1801, President Jefferson reported to Congress in his First Annual Message: "I sent a small squadron of frigates into the Mediterranean, with assurances to that Power [the Bey of Tripoli] of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. . . . The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers, having fallen in with and engaged the small schooner *Enterprise*, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [Tripolitan] vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight."[7]

This message suggests no doubt in President Jefferson's mind about his authority to commit naval forces to combat for defensive purposes in the face of *de facto* war without a congressional declaration of war. It also suggests that President Jefferson recognized a prohibition against presidential war making beyond the scope of tactical self-defense in an engagement commenced by the enemy. This latter appearance, however, is misleading. What President Jefferson did not report to Congress is that, without congressional authorization, he had ordered the squadron to which the *Enterprise* was attached to engage Barbary naval forces. On President Jefferson's behalf, General Samuel Smith, Acting Secretary of the Navy, wrote to Commodore Richard Dale on 30 May 1801: "Recent accounts received from the consul of the United States, employed near the regencies of Algiers, Tunis and Tripoli, give cause to fear, that they will attack our commerce, if unprotected, within the Mediterranean; but particularly, such apprehension is justified by absolute threats on the part of the Dey* of Tripoli.

"Under such circumstances, it is thought probable, that a small squadron of well appointed frigates appearing before their ports, will have a tendency

*Bey and Dey are interchangeable.

to prevent their breaking the peace which has been made, and which has subsisted for some years, between them and the United States.

"It is also thought, that such a squadron, commanded by some of our most gallant officers, known to be stationed in the Mediterranean, will give confidence to our merchants, and tend greatly to increase the commerce of the country within those seas.

"I am therefore instructed by the President to direct, that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean.

" . . . [S]hould you find on your arrival at Gibraltar, that all the Barbary powers have declared war against the United States, you will then distribute your force in such a manner, as your judgment shall direct, so as best to protect our commerce and chastise their insolence—by sinking, burning, or destroying their ships and vessels wherever you shall find them. The better to enable you to form a just determination, you are herewith furnished with a correct state of the strength and situation of each of the Barbary powers. The principal strength you will see, is that of Algiers. The force of Tunis and Tripoli is contemptible, and might be crushed with any one of the frigates under your command.

"Should Algiers alone have declared war against the United States, you will cruise off that port so as effectually to prevent anything from going in or coming out, and you will sink, burn, or otherwise destroy their ships and vessels wherever you find them.

"Should the Dey of Tripoli have declared war, (as he has threatened) against the United States, you will then proceed direct to that port, where you will lay your ship in such a position as effectually to prevent any of their vessels from going in or out."[78]

If anything is clear from the message from Secretary Smith to Commodore Dale, it is that President Jefferson viewed his authority as extending to preemptive war making against foreign powers that had displayed hostile intent. President Jefferson's view thus appears similar to President Reagan's. Neither President was required to obtain congressional authorization prior to the employment of armed force to defend U.S. citizens or property from imminent threat.

The rationale for this rule is that the exigency[79] of circumstances justifies the President's action. Interpreting the Militia Act of 1795, the Supreme Court stated in 1827: "We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself. . . . The power itself is to be exercised upon sudden emergencies, upon great

occasions of state, and under circumstances which may be vital to the existence of the Union."[80]

The Court's reference to "power" is not free from ambiguity. On the one hand, the Court held that the Militia Act of 1795 conferred on the President statutory power to determine the existence of a national emergency. Thus the Court may have intended to limit its holding to the President's statutory powers, granted by Congress. On the other hand, the Court found that the President as chief executive and commander in chief "is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts."[81] The most natural interpretation of the opinion is that the Court found the President so empowered under both the Militia Act of 1795 and the Constitution. The Supreme Court was more clear in 1863 when the same question arose in the context of the Civil War: "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*. . . ."[82] Thus the President is constitutionally authorized not only to defend against an imminent threat to the lives or property of U.S. citizens, but also to determine whether a threat is sufficiently imminent to justify the use of force without a congressional declaration of war.[83]

The pronouncements of the courts do not suggest, however, that the President's power to wage defensive war unilaterally is without limit. Since Congress exercises the power of appropriation,[84] Congress can refuse to fund disapproved military activity undertaken by the President.[85] Moreover, Congress possesses the ultimate weapon: impeachment of the President for "high crimes and misdemeanors."[86] However, although a few commentators have read Congress' power to declare war as incorporating a veto-like power to "declare *against* a war,"[87] no authoritative source supports such a conclusion. Indeed, the Framers unanimously rejected a proposal to grant Congress the power to declare war "and peace."[88]

This balance of power is not altogether satisfying to those concerned about the practical effectiveness of congressional checks on the President. Professor Louis Henkin has remarked: "No one can disentangle the war powers of the two branches, including their powers to act towards the enemy . . . [But such an arrangement of] power often begets a race for initiative and the President will usually 'get there first.'"[89] A guileful President would experience little difficulty identifying or even creating a threatening incident abroad that would be sufficiently provocative to justify the use of force. Similarly, a cynical President might find it expedient to undertake an offensive military campaign and simply label it a defensive, preemptive action. Although Congress might have the power under such

circumstances to bar the use of federal funds for combat, it might also lack the political will to do so. The President's power to commit forces to combat in the name of national defense thus would present Congress with a *fait accompli*, a war to be terminated by congressional vote for withdrawal short of victory.[90] War would become, in such a situation, as Madison noted, "the true nurse of executive aggrandizement."[91]

The Supreme Court addressed this concern in *Martin v. Mott* by rejecting the presumption of presidential guilt and emphasizing the penalties for abuse of power: "It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation of wanton tyranny."[92] In short, the *Mott* Court was not willing to assume an abuse of power by virtue of the exercise of power. To the contrary, the Court found that as a matter of law, as opposed to politics, the presumption worked in the President's favor.

The Constitution was not designed to predetermine a politically satisfying balance of power. Rather, the constitutional allocation was meant to establish the legal limits within which the political process might produce such an equilibrium. This is to say that the Constitution set boundaries beyond which the President and Congress may not stray during a political clash over the propriety of the use of force. The political questions raised by President Reagan's unilateral decision to use military force against Libya in 1986 included whether the decision was morally sound, whether it would enjoy domestic popular support, and whether it would serve the strategic and diplomatic interests of the United States. The constitutional issue was much more narrow: whether the President acted within the bounds of his authority to make war unilaterally, a question that can be answered without reference to whether the President's actions were politic or wise.[93]

By 1986, President Reagan had been advised that the government of Libya had supported terrorist attacks on Americans in Vienna, Rome, and West Berlin. This pattern of aggression by Libya against American citizens arguably established a state of *de facto* war between Libya and the United States. Whether or not a state of war existed, the President's information supported the inference that Libya had undertaken a course of action that had harmed Americans. This course of conduct suggested a continuing threat to Americans from Libya. The President could have presented this information to Congress, seeking a declaration of war. But he did not,

considering the threat to Americans sufficiently imminent to justify the use of force without a congressional declaration of war.

Critics of the President's decision to use force against Libya might argue that the President's determination of imminent threat was too tenuous to be entitled to constitutional sanctification. The President, they would claim, did not have in hand any indication of a specific terrorist attack to be executed against Americans on any specific future date. They would say that what the President had, at most, was a generalized indication that a terrorist attack against Americans might be executed sometime in the future. The critics would argue that for the President to characterize such a future attack as imminent because inevitable, would be hyperbolic justification; a standard of inevitability would grant the President carte blanche to use his defensive powers to initiate a military offense. The air strikes against Libya, they would conclude, were labelled defensive but were in fact offensive and therefore unconstitutional.

The answer to this criticism is that the Constitution does not assign a specific deadline or minimum probability level as the standard to determine when a threat is sufficiently imminent to justify presidential war making. The Constitution did not require the President to certify to Congress that Libya would have attacked Americans abroad in May of 1986, for example, but for his preemptive strike in April. If anything is clear from the Framers' debates and the courts' infrequent clarifications of the constitutional war-making powers, it is that the Constitution establishes no such fixed standard to mark the limit of presidential war-making authority. No authoritative source suggests that the President must resolve uncertainty in favor of a potentially hostile force by doing nothing. Rather, the Constitution allows the President wide latitude to decide if an imminent threat, however manifested, is too grave to await a congressional declaration of war and to determine whether the actions of a foreign state have created a situation requiring a military response.[94] What this means is that critics of President Reagan's actions against Libya in 1986 misdirect their criticism when they argue that the air strikes were unconstitutional: to the extent that they oppose the President's use of force, they should focus their objections on the wisdom of his actions.

Just as President Reagan was authorized to identify the threat posed by Libya in 1986 and to order a defensive action, so he was empowered to choose the tactics best suited to achieve his objectives. President Reagan chose to respond to Libya's support of terrorism by means of air strikes against command, control, and communication (C^3) facilities used by Libya to conduct terrorist operations. He sought to accomplish two stated purposes: deterrence, in the form of retaliation for past attacks, and preemption, in the form of neutralizing the terrorists' C^3 capability. Critics could argue that such purposes are actually offensive and therefore unauthorized. The

critics would have a point to the extent that a legally meaningful distinction between offensive and defensive force is not self-evident. Indeed, the Navy's Maritime Strategy[55] is itself a good example of how a defensive strategy can yield ostensibly offensive tactics. By taking the fight to the enemy to defend U.S. allies, pursuant to the Maritime Strategy, the Navy would engage in apparently offensive operations against Soviet targets. Thus might a defensive military operation appear, in isolation, to be offensive.

However, as the Supreme Court noted in the *Prize Cases*,[56] the Constitution resolves this ambiguity in the President's favor: it is the President who decides when the national security is jeopardized; it is the President who decides on the appropriate defensive reaction. The ability to make this sort of decision is the very essence of the constitutional power and duty to defend. President Reagan's decision to employ air power to the ends of deterrence and preemption of terrorism was a decision to use military force to address a threat to national security. His actions were therefore undertaken within the limits of his constitutional authority.

The Framers of the Constitution did not establish a clear boundary to mark the limits of presidential war-making authority. They did not foresee the Vietnam War, the deaths of 241 U.S. Marines in their Beirut barracks in 1983, or the deaths of 37 sailors aboard the U.S.S. *Stark* in the Persian Gulf in 1987. Lacking perfect foresight, they left the hard question of whether a war should be fought to the realm of political, as distinct from legal, debate. They knew that even in triumph, war is tragic. They did not seek to encumber with legal doctrine the political issue of whether to fight.

The Constitution does not tell Congress, the President, or the people when war should be waged. It reserves to the political process the question of whether the exercise of military force is good and right, addressing instead the question of how the legal power to wage war should be allocated. To say that the President may wage war under certain circumstances is not, therefore, to say that he should.

In the spring of 1986, the President believed that Libya would continue its campaign to harm U.S. citizens. He sought to defend against such attacks by means of a preemptive strike on 14 April 1986. As a defensive measure undertaken without a declaration of war by Congress, the strike against Libya was within the scope of the President's constitutional war-making authority.

Notes

1. Such a debate also took place, of course, during the Vietnam war. *See e.g.* Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," 121 U. PA. L. REV. 1 (1972); Berger, "War-Making By The President," 121 U. PA. L. REV. 29 (1972); Rehnquist, "The Constitutional Issue—Administration Position," 45 N.Y.U. L. REV. 628 (1970); Note, "Congress, the President, and the Power to Commit Forces to Combat," 81 HARV. L. REV. 1771 (1968); Moore, "International Law

and the United States' Role in Viet Nam: A Reply," 26 YALE L. J. 1051 (1967); Falk, "International Law and the United States' Role in the Viet Nam War," 75 YALE L. J. 1122 (1966); Wright, "Legal Aspects of the Viet-Nam Situation," 60 AM. J. INT'L L. 750 (1966).

2. Huntington, "Coping with the Lippmann Gap," 66 *Foreign Affairs* 453, 463 (1988).

3. U.S. CONST., Art. I, Sec. 8, Cl. 11. *See, e.g.*, Chayes, "Grenada was Illegally Invaded," *N.Y. Times*, Nov. 15, 1983, at 35; Schlesinger, "Grenada — Again: Living Within the Law," *Wall Street Journal*, Dec. 14, 1983, at 30.

4. U.S. CONST., Art. II, Sec. 2, Cl. 1; *See, e.g.*, Rostow, "Law Is Not a Suicide Pact," *N.Y. Times*, Nov. 15, 1983, at 35; J. MOORE, LAW AND THE GRENADA MISSION (1984).

5. 50 U.S.C. secs. 1541–1548. *See, e.g.*, R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); Torricelli, "The War Powers Resolution After the Libya Crisis," 7 PACE L. REV. 647 (1987); Comment, "Congressional Control of Presidential War-making: under the War Powers Act: The Status of a Legislative Veto After *Chadha*," 132 U. PA. L. REV. 1217 (1984); Carter, "The Constitutionality of the War Powers Resolution," 70 U. VA. L. REV. 101 (1984); Note, "The Future of the War Powers Resolution," 36 STAN. L. REV. 1407 (1984).

6. "Harvard Decides Grenada," *Wall Street Journal*, Nov. 2, 1983, at 30.

7. This sort of confusion has been exhibited by such respected figures as former Secretary of State Cyrus R. Vance. Vance, "Striking the Balance: Congress and the President Under the War Powers Resolution," 13 U. PA. L. REV. 79 (1984).

8. *See, e.g.*, "War Without Declaration: A Chronological List of 199 Military Hostilities Abroad Without Declaration of War, 1798–1972," 119 CONG. REC. 25,066–25,076 (1973).

9. *See, e.g.*, A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973). For a vigorous debate on the question, *see* CONGRESS, THE PRESIDENT, & FOREIGN POLICY, (ABA Standing Committee on Law and National Security) (1984) (S. Soper, ed.).

10. *Commonwealth of Mass. v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971); *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2nd Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir.), *cert. denied*, 404 U.S. 869 (1971); *Drinan v. Nixon*, 364 F. Supp. 854, 862 (D. Mass. 1973).

11. P.L. 88–408, 78 Stat. 384 (August 10, 1964). *See generally* J. MOORE, LAW AND THE INDOCHINA WAR 553–598 (1972).

12. P.L. 98–119, 97 Stat. 805 (October 12, 1983). *See also* Lebanon Emergency Assistance Act of 1983, P.L. 98–43, 97 Stat. 214 (June 27, 1983).

13. *See generally* J. MOORE, LAW AND THE GRENADA MISSION (1986).

14. For testimony on whether the air strikes were lawful, *see* WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORIST: HEARINGS BEFORE THE SUBCOMMITTEE ON ARMS CONTROL, INTERNATIONAL SECURITY, AND SCIENCE OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, 99th Cong., 2d Sess. (1986).

15. All facts presented are derived from unclassified, public, published sources.

16. *N.Y. Times*, Dec. 28, 1985, at 1, col. 5. The airport massacres followed the October 3, 1985 hijacking of the cruise ship *Achille Lauro*, during which an American, Leon Klinghoffer, was murdered, the November 23, 1985 hijacking of an Egyptian airliner, during which an American was murdered, and the November 24, 1985 bombing of a Frankfurt, West Germany discotheque, which injured 23 Americans. J. LEHMAN, COMMAND OF THE SEAS 366–367 (1988).

17. *N.Y. Times*, Jan. 1, 1986, at 1, col. 3.

18. *Id.*, Jan. 1, 1986, at 4, col. 4 (Text of State Department Report).

19. *Id.*, Jan. 1, 1986, at 5, col. 1; *Id.*, Jan. 6, 1986, at 1, col. 4.

20. *Id.*, Jan. 1, 1986, at 6, col. 1.

21. *Id.*, Jan. 1, 1986, at 6, col. 2.

22. *Id.*, Jan. 9, 1986, at 6 col. 1; Mar. 25, 1986, at 1, col. 5.

23. *Id.*, Jan. 9, 1986, at 6, col. 1 (Text of State Department Report).

24. *Id.*, Jan. 16, 1986, at 9, col. 1.

25. *Id.*, Jan. 9, 1986, at 1, col. 4.

26. *Id.*, Jan. 17, 1986, at 1, col. 4.

27. *Id.*, Jan. 16, 1986, at 1, col. 5.

28. *Id.*, Jan. 16, 1986, at 8, col. 2.

29. *Id.*, Jan. 17, 1986, at 1, col. 4.

30. *Id.*, Jan. 17, 1986, at 1, col. 4.

31. *Id.*, Mar. 19, 1986, at 1, col. 5; Mar. 20, 1986, at 7, col. 1; Mar. 22, 1986, at 3, col. 2.

32. *Id.*, Mar. 25, 1986, at 1, col. 6. *See* text of Secretary Weinberger's statement at *Id.*, Mar. 25, 1986, at 10, col. 1.

33. *Id.*, Mar. 26, 1986, at 8, col. 1; Mar. 27, 1986, at 8, col. 1.

34. J. LEHMAN, COMMAND OF THE SEAS 370 (1988).

35. *N.Y. Times*, Mar. 28, 1986, at 1, col. 2.
36. *Id.*, Mar. 28, 1986, at 12, col. 4.
37. *Id.*, Mar. 29, 1986, at 3, col. 1.
38. *Id.*, Apr. 6, 1986, at 1, col. 5-6.
39. *Id.*, Apr. 6, 1986, at 1, col. 6.
40. *Id.*, Apr. 7, 1986, at 6, col. 2.
41. *Id.*, Apr. 6, 1986, at 1, col. 5-6.
42. *Id.*, Apr. 6, 1986, at 10, col. 1.
43. *Id.*, Apr. 10, 1986, at 1, col. 6; *id.*, Apr. 10, 1986, at 22, col. 1.
44. *Id.*, Apr. 10, 1986, at 1, col. 6.
45. *Id.*, Apr. 15, 1986, at 1, col. 5. *See* transcript of Weinberger/Shultz press conference, *id.*, Apr. 15, 1986, at 13, col. 1.
46. *Id.*, Apr. 15, 1986, at 1, col. 5; *id.*, Apr. 16, 1986, at 15, col. 3 (remarks of Vice Admiral Frank Kelso, Jr., USN); *id.*, Apr. 15, 1986, at 1, col. 3.
47. *Id.*, Apr. 16, 1986, at 20, col. 5 (remarks of State Department spokesman Bernard Kalb). *See also* J. LEHMAN, COMMAND OF THE SEAS 371-374 (1988).
48. N.Y. *Times*, Apr. 16, 1986, at 15, col. 3.
49. *Id.*, Apr. 16, 1986, at 1, col. 5.
50. *Id.*, Apr. 16, 1986, at 1, col. 6; Apr. 16, 1986, at 15, col. 3; April 17, 1986, at 22, col. 1 (report that SAMs supplied to Libya by Soviet Union are obsolescent in air, so unlikely to explode on ground impact).
51. *Id.*, Apr. 15, 1986, at 10, col. 1. *See also* transcript of Press Secretary Speakes' press conference, *id.*, Apr. 15, 1986, at 13, col. 1. *See also* President Reagan's Address to American Business Conference, *id.*, Apr. 16, 1986, at 20, col. 1.
52. *Id.*, Apr. 15, 1986, at 1, col. 3.
53. *Id.*
54. *Id.*, Apr. 15, 1986, at 10, col. 1.
55. *Id.*, Apr. 15, 1986, at 11, col. 3.
56. *Id.*
57. "Point of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the States from the beginning of the Revolution." C. WARREN, THE MAKING OF THE CONSTITUTION 173 (1928).
58. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, 255 (1984).
59. *See U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-635 (1952) (Jackson, J., concurring).
61. M. FARRAND, ed., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 292 (1911) ("RECORDS").
62. Logan, "War-Making Under the Constitution: The Original Understanding," 81 YALE L. J. 672, 680 (1972).
63. "Helvidius" Number 1 (24 August 1793), 15 THE PAPERS OF JAMES MADISON 73 (1985) (T. Mason, R. Rutland, J. Sisson, ed.).
64. 7 WORKS OF ALEXANDER HAMILTON 746-747 (1857) (J. Hamilton, ed.) (emphasis original).
65. E. CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY 96 (1954).
66. ADAMS PAPERS, Massachusetts Historical Society microfilm (as quoted in Sofaer, "The Presidency, War and Foreign Affairs: Practice Under the Framers," 40 L. & CONT. PROB. 12, 19-20 (1976)). *See also* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS, 139-167 (1976).
67. *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1 (1801); *Bas v. Tingly*, 4 U.S. (4 Dall.) 37 (1800).
68. *See* E. KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER (1982). *See also* Testimony of John Norton Moore, "Congress, the President, and the War Powers: Hearing Before the Committee on Foreign Affairs, House of Representatives," 91st Congress, 2d Session (June 25, 1970); Moore, "The National Executive and the Use of the Armed Forces Abroad," 23 NAVAL WAR COLLEGE REV. 28 (1969).
69. *See, e.g.*, Emerson, "The War Powers Resolution Tested: The President's Independent Defense Power," 51 NOTRE DAME LAWYER 187, 192 (1975).
70. II RECORDS at 318.
71. *See generally* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 58-77 (1921).
72. 8 F.Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1849).
73. *The Prize Cases*, 67 U.S. 635, 668 (1863) (upholding President Lincoln's blockade of Confederate ports). *See also U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-320 (1936); *Myers v. U.S.*, 272 U.S. 52 (1926).

74. *The Prize Cases*, 67 U.S. 635, 670 (1863). *See also In re Neagle*, 135 U.S. 1, 64 (1890).

75. C. BERTHAM, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 62-63 (1921) (quoting; FISH, AMERICAN DIPLOMACY 83-84). This action by President Washington exceeded the bounds of the Act of September 29, 1789, ch. 25, 1 Stat. 95, 96, granting the President authority to call forth the militia to protect frontier settlers from Indians.

76. Letter to James Madison, September 6, 1789, 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (1958) (J. Boyd, ed.).

77. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 326-327 (1899) (J. Richardson, ed.). *See* 2 Stat. 129 (1802).

78. W. GOLDSMITH, 1 GROWTH OF PRESIDENTIAL POWER: A DOCUMENTARY HISTORY 323-374 (1974) (citing 1 STATE PAPERS AND DOCUMENTS OF THE UNITED STATES 75-78 (1814)); *See* Lee, "The Presidency, War and Foreign Affairs: Practice Under the Framers," 40 L. & CONT. PROB. 12, 25 (1976) (citing 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS, 465-467 (1939))

79. The Constitution expressly grants the individual states an analogous power to act militarily under exigent circumstances. U.S. CONST., Art. 1, Sec. 10, cl. 3 ("No state shall, without the consent of Congress. . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."). *See also* Articles of Confederation, Art. VI ("No state shall engage in any war without the consent of . . . Congress . . . . unless such a state be actually invaded by enemies, or shall have received advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the . . . Congress . . . can be consulted . . . .")

80. *Martin v. Mott*, 25 U.S. (12 Wheat.) 1, 28 (1827).

81. *Id.* at 31.

82. *The Prize Cases*, 67 U.S. 635, 670 (1863) (emphasis original).

83. *Id.*

84. U.S. CONST., Art. 1, Sec. 8. *See* Glennon, "Statutorizing the War Powers Resolution: The Case For Purse-Strings Restrictions," 61 MINN. L. REV. 1 (1975).

85. Congress did this on several occasions during the Vietnam war. *See, e.g.*, Defense Procurement Authorization Act, P.L. 91-121, 83 Stat. 204 (1969); Defense Appropriation Act 1970, P.L. 91-171, 83 Stat. 469 (1969); Defense Procurement Act, P.L. 91-441, 84 Stat. 905 (1970); Special Foreign Assistance Act, P.L. 91-652, 84 Stat. 1942 (1970); Foreign Military Sales Act Extension, P.L. 91-672, 84 Stat. 2053 (1970); Supplemental Appropriations Act of 1973, P.L. 93-50, 87 Stat. 99 (1973); Supplemental Appropriations Act, P.L. 93-52, 87 Stat. 130 (1973).

86. U.S. CONST., Art. 2, Sec. 4.

87. Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," 121 U. PA. L. REV. 1, 5 (1972); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 81 (1972).

88. 11 RECORDS at 319.

89. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 105 (1972).

90. This is the problem the War Powers Resolution was intended to solve. However, the War Powers Resolution's only pre-conflict requirement on the President is "consultation" with Congress. *See* Hall, "War Powers By The Clock," 113 U.S. NAVAL INSTITUTE PROCEEDINGS 36 (September 1987).

91. "Helvidius" Number 4 (14 September 1793), 15 THE PAPERS OF JAMES MADISON 308 (1985) (T. Mason, R. Rutland, J. Sisson, ed.).

92. 25 U.S. at 32.

93. One commentator has suggested that the President "should obtain congressional support in advance for military action that will probably require congressional action, as by appropriations, before it is completed." Wright, "The Power of the Executive to Use Military Forces Abroad," 10 VA. J. INT. L. 1, 49 (1966). The political wisdom of this statement is self-evident. However, nothing in the Constitution suggests that such a step is legally necessary. Professor Wright has also argued that congressional approval is necessary if the President wishes to use force in violation of international law, that is, for political purposes such as "military pressure in aid of diplomacy, territorial acquisition, or intervention to influence the policy or ideology of a foreign government." *Id. See also* Lobel, "Covert War and Congressional Authority: Hidden War and Forgotten Power," 134 U. PA. L. REV. 1035, 1071 (1986).

94. *The Prize Cases*, 67 U.S. 635, 670 (1863).

95. Watkins, "The Maritime Strategy," U.S. NAVAL INSTITUTE PROCEEDINGS Supplement (January 1986).

96. 67 U.S. at 670.