

The non-war war in Libya

By [John Samples](#) 1:27 PM 06/17/2011

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The war in Libya is starting to be a political mess for the Obama administration. Speaker John Boehner has sent the White House a [letter](#) demanding some justification for the war in light of the War Powers Resolution (but not, unfortunately, in light of Article I of the Constitution).

Some of the administration's lawyers have [replied](#) that the War Powers Resolution (and by implication, the Constitution) does not apply in the case of Libya because the war there is not a war and, in any case, U.S. intervention in Libya does not require Congressional authorization because it has already been authorized by the relevant institution (emphasis added):

The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. 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.

Consider the "non-war war" argument first. This justification for presidential discretion in declaring war goes back to one of the first humanitarian wars of the post-Cold War era: the invasion and occupation of Haiti by the United States in 1994. The Clinton administration [justified](#) that invasion by arguing that the War Powers Resolution was designed to preclude unauthorized major wars like Vietnam and not minor wars where "the risk of sustained military conflict was negligible." As for Article I of the Constitution: "'war' does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of 'war.'"

The current White House (though [perhaps not the Department of Justice](#)) argues that the war in Libya might have been a war prior to April 7th but since then U.S. forces have dropped back to helping N.A.T.O. allies make war and to firing the occasional drone at Libyan targets. Apparently killing people and destroying property on behalf of one side in a civil war does not rise to the level of war for the purposes of the Obama administration, at least. Speaker Boehner noted [yesterday](#) that this argument "just doesn't pass the straight-face test in my view that we're not in the midst of hostilities."

Notice also that compared to the Haiti case, the current administration has abandoned the 1994 argument that the United States is making war at the behest of the "fully legitimate government" of Libya. That suggests to me that the administration is concerned that our allies in this civil war will turn out to be people whose defense will be indefensible. What does that say about the Libyan undertaking?

Now consider the argument that the Libyan war is "...*legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force...*" The New Oxford American Dictionary says the verb "legitimate" means "to justify or make lawful." Article I, Section 8 of the fundamental law of the United States, the Constitution, states that Congress shall have the power to declare war (for more on the meaning of that phrase in regard to Libya, go [here](#)). That would mean a legitimate war in the United States is one authorized by Congress. The Obama administration, at least in the case of Libya, clearly disagrees. For them, the United

Nations Security Council has the power to confer legitimacy, to make lawful, the American war-making in Libya.

Consider the implications of the administration's view. The United Nations Security Council will hold a veto over the use of force by the United States, at least in those cases where the president has declared a non-war war.

Congress is to blame in part for this situation. It refused to resist the Clinton administration's expansive claims to a presidential power to make small wars without legal justification. Now the Obama administration proposes again to expand that power, subject only to an effective veto by the United Nations Security Council.

One of the greatest Americans once [wrote](#) of our system of government:

The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

Congress has the means and motives to restrain this president. Do members of Congress have the ambition and courage to do their constitutional duty?

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