

White House Defends Continuing U.S. Role in Libya Operation

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WASHINGTON The White House, pushing hard against criticism in Congress over the deepening air war in Libya, asserted Wednesday that President Obama had the authority to continue the military campaign without Congressional approval because American involvement fell short of full-blown hostilities.

In a 38-page report sent to lawmakers describing and defending the NATO-led operation, the White House said the mission was prying loose Col. Muammar el-Qaddafi's grip on power.

In contending that the limited American role did not oblige the administration to ask for authorization under the War Powers Resolution, the report asserted that "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops." Still, the White House acknowledged, the operation has cost the Pentagon \$716 million in its first two months and will have cost \$1.1 billion by September at the current scale of operations.

The report came one day after the House Speaker, John A. Boehner, Republican of Ohio, had sent a letter to Mr. Obama warning him that he appeared to be out of time under the Vietnam-era law that says presidents must terminate a mission 60 or 90 days after notifying Congress that troops have been deployed into hostilities, unless lawmakers authorize the operation to continue.

Mr. Boehner had demanded that Mr. Obama explain his legal justification for passing the deadline. On Wednesday, Brendan Buck, a spokesman for Mr. Boehner, said he was still reviewing the documents, adding that "the creative arguments made by the White House raise a number of questions that must be further explored."

The escalating confrontation with Congress reflects the radically altered political landscape in Washington: a Democratic president asserting sweeping executive powers to deploy American forces overseas, while Republicans call for stricter oversight and voice fears about executive-branch power getting the United States bogged down in a foreign war.

"We are acting lawfully," said Harold H. Koh, the State Department legal adviser, who expanded on the administration's reasoning in a joint interview with the White House counsel, Robert Bauer.

The two senior administration lawyers contended that American forces had not been in "hostilities" at least since early April, when NATO took over the responsibility for the no-fly zone and the United States shifted to primarily a supporting role "providing refueling and

surveillance to allied warplanes, although remotely piloted drones operated by the United States periodically fire missiles, too.

They argued that United States forces are at little risk because there are no troops on the ground and Libyan forces are unable to exchange fire with them meaningfully. And they said the military mission was constrained by a United Nations Security Council resolution, which authorized air power for the purpose of defending civilians.

“We are not saying the president can take the country into war on his own,” said Mr. Koh, a former Yale Law School dean and outspoken critic of the Bush administration’s expansive theories of executive power. “We are not saying the War Powers Resolution is unconstitutional or should be scrapped or that we can refuse to consult Congress. We are saying the limited nature of this particular mission is not the kind of ‘hostilities’ envisioned by the War Powers Resolution.”

Jack L. Goldsmith, who led the Justice Department’s Office of Legal Counsel during the Bush administration, said the Obama theory would set a precedent expanding future presidents’ unauthorized war-making powers, especially given the rise of remote-controlled combat technology.

“The administration’s theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits,” Mr. Goldsmith said.

It remains to be seen whether majorities in Congress will acquiesce to the administration’s argument, defusing the confrontation, or if the theory will fuel greater criticism. Either way, because the statute does not define hostilities and the Supreme Court has never ruled on the issue, the debate is likely to be resolved politically, said Richard H. Pildes, a New York University law professor.

Also on Wednesday, 10 lawmakers led by Representative Dennis J. Kucinich, Democrat of Ohio, and Representative Walter B. Jones, Republican of North Carolina filed a lawsuit asking a judge to order Mr. Obama to pull out of the Libya operation because Congress did not authorize it. That lawsuit faces steep challenges, however, because courts in the past have dismissed similar cases on technical grounds.

The administration had earlier argued that Mr. Obama could initiate the intervention on his own authority as commander in chief because its anticipated nature, scope and duration fell short of a “war” in the constitutional sense. Since then, the conflict has dragged on for longer than expected, and the goal of the NATO allies has all but openly shifted from merely defending civilians to forcing the Libyan leader, Colonel Qaddafi, from power. But Mr. Koh and Mr. Bauer said that while regime change in Libya might be a diplomatic goal, the military’s mission was separate and remained limited to protecting civilians.

While many presidents have challenged the constitutionality of other aspects of the War Powers

Resolution, which Congress enacted over President Richard M. Nixon's veto, no administration has declared that the section imposing the 60-day clock is unconstitutional, and in 1980, the Justice Department's Office of Legal Counsel concluded that it was within Congress's power to enact such a limit.

Mr. Bauer and Mr. Koh said that the 1980 memorandum remained in force, but that their legal argument was not invoking any constitutional challenge to bolster their interpretation of hostilities.

It was not clear whether the Justice Department had endorsed the White House's interpretation of hostilities. Mr. Bauer declined to say whether it had signed off on the theory, saying he would not discuss interagency deliberations. In his letter on Tuesday, Mr. Boehner demanded to know whether there was internal dissent about the administration's legal stance.

Mr. Koh noted that there had been disputes about whether the 60-day clock of the War Powers Resolution (a deadline that can be extended for 30 days under some circumstances) applied to deployments in which "unlike in Libya" there were troops on the ground and American casualties.

Still, such previous cases involved peacekeeping missions in which the United States had been invited in, and there were only infrequent outbreaks of violence -- as in Lebanon, Somalia and Bosnia. The Libyan operation, by contrast, is an offensive mission involving sustained bombardments of a government's forces.

Jennifer Steinhauer contributed reporting.