



June 24, 2011

RE: Opposition to H.J. Res. 68 and H.R. 2278—Unless Amended to Identify the Enemy, Define the Scope of the Conflict, and Specify the Objectives of the United States

Dear Representative:

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As you consider two measures authorizing the use of military force in Libya, the American Civil Liberties Union strongly urges you to amend, presumably through a motion to recommit, H.J. Res. 68 and H.R. 2278 to: specify the countries or persons against whom the use of force is authorized, and specify the scope of the conflict and the objectives of the United States. *Unless the Committee amends H.J. Res. 68 and H.R. 2278 to clarify their ambiguous provisions, the ACLU will oppose both measures on final passage.*

Without additional specificity in H.J. Res. 68 and H.R. 2278, Congress will be unable to fulfill its constitutional role as a check on the Executive Branch. The decision to initiate war is perhaps the gravest and most consequential decision Congress can make. Only by specifically identifying an enemy, limiting the scope of the conflict, and specifying clear objectives for the President to meet, can Congress both ensure that all Americans can understand the consequences of any war decision and participate in the debate, and avoid an open-ended delegation of its constitutional war authority to the Executive Branch.

Both the President and Congress have failed to meet their legal obligations with respect to authorization for the United States to enter into armed conflict. The President commenced military action against Libya without constitutionally-required authorization by Congress, and then compounded that wrong by violating the War Powers Resolution's statutory bar on continuing to prosecute the military action beyond 90 days without congressional authorization. But Congress failed as well. The ACLU appreciates the decision by Speaker John Boehner to bring both of these measures to the House floor today, but more than three months have passed since the start of the military campaign against Libya. Even now, because neither measure is open to amendment, except by a motion to recommit, members do not have the opportunity to improve either measure by either clarifying the authorization or denying any and all authority. For more than three months, Congress--by its own inaction--has abdicated the war powers reserved for it under Article I of the Constitution. The President's actions and Congress's inaction combine to strike at the very heart of the

fundamental principle of separation of powers that is at the core of the Constitution and our democratic form of government.

The ACLU does not take a position on whether military force should be used in Libya. However, we have been steadfast in insisting, from Vietnam through both wars in Iraq, that decisions on whether to use military force require Congress's specific, advance authorization. Absent a sudden attack on the United States that requires the President to take immediate action to repel the attack, the President does not have the power under the Constitution to decide to take the United States into war. That power belongs solely to Congress.

As Thomas Jefferson once wrote, this allocation of war power to Congress provides an “effectual check to the Dog of war” by “transferring the power of letting him loose from the Executive to the Legislative body” Letter from Jefferson to Madison (Sept. 6, 1789). Congress alone has the authority to say yes or no on whether the United States can use military force in Libya or anywhere else.

The Executive Branch’s assertions of unilateral authority to enter the armed conflict in Libya cannot and should not go unchallenged by the Congress. The decision whether to go to war does not lie with the President, but with Congress. Congress's power over decisions involving the use of military force derives from the Constitution. Article 1, Section 8 provides that only the Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” among other war powers.

However, without any authorization from Congress, the United States has already used significant military force in Libya. On March 19, 2011, the President ordered the United States into an armed conflict in Libya that has, to date, included a significant commitment of American military force, with targets that have included Libyan air defenses, ground forces loyal to Muammar Qadhafi, and a building in a compound regularly used by Qadhafi. On the first day of combat alone, more than 100 Tomahawk cruise missiles were fired into Libya from offshore naval vessels. Subsequently, U.S. bombers, fighter aircraft, and armed drones have attacked air defenses and ground forces across Libya, and even Libyan boats. Although there are no reports of U.S. service members killed in action, an Air Force fighter plane and its crew of two Air Force pilots went down over Libya on March 21. According to *Marine Times*, the rescue of the pilots required seven Marine aircraft and the dropping of two bombs near bystanders. Numerous media outlets report significant casualties among Libyans, including civilian casualties. *The New York Times* reported this week that, since the turnover of control of the air war to NATO, American-piloted U.S. warplanes have carried out 60 strikes in Libya and unmanned U.S. drones have carried out an additional 30 strikes. Moreover, the scope of the commitment made by the United States is unclear, possibly ranging from the protection of civilians to the ouster of the Qadhafi regime.

The legal arguments the President advanced to support circumventing the Constitution’s and the War Power Resolution’s congressional authorization requirements are unpersuasive. The President originally told Congress in a March 21, 2011 letter that U.S. armed intervention in Libya would be limited in its “nature, duration, and scope.” On that basis, the Office of Legal Counsel (“OLC”) of the Department of Justice concluded that “the use of force by the United States in Libya [did not rise] to the level of a ‘war’ in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress.” Even if that reasoning were legally sound, the prolonged and significant nature of U.S. military operations in Libya, described above, makes clear that the factual basis for the OLC’s conclusion has changed.

The legal conclusion OLC reached in support of the President's unilateral decision to use military force in Libya can no longer be supported.

More recently and troublingly, faced with the War Powers Resolution's 90-day deadline for the cessation of "hostilities" conducted without congressional authorization, the President made the determination that U.S. military operations in Libya do not constitute "hostilities" for the purposes of the War Powers Resolution because "U.S. forces are playing a constrained and supporting role in a multinational coalition," and U.S. military operations are not sustained and do not involve "active exchanges of fire with hostile forces," or the presence of ground troops on Libyan soil. The President's determination is contradicted by the plain language of the War Powers Resolution, which applies broadly both to actual hostilities, as well as to situations in which hostilities are imminent, and contains no carve-out for multinational operations, intermittent military operations, or operations in which no ground forces are deployed. Indeed, the legislative history of the War Powers Resolution makes clear that a House of Representatives subcommittee specifically chose to insert the term "hostilities" in the statute, instead of the narrower term "armed conflict," to broaden the War Powers Resolution's scope to include even situations where "no shots had been fired, but where there is a clear and present danger of armed conflict." The President's determination is also contradicted by the laws of war, which form the backdrop against which the term "hostilities" as used in the constitutional context must be understood; under international humanitarian law, U.S. military operations in Libya unquestionably constitute "hostilities," a fact that the administration has not denied. The legally unsound nature of the President's determination is highlighted by the fact that, according to news reports, neither the OLC nor the General Counsel to the Department of Defense agreed with it.

Although the ACLU does not take a position on the underlying question of whether the United States should continue its military action in Libya, we are concerned that H.J. Res. 68 and H.R. 2278 do not have sufficient specificity to carry out the role of Congress as a check on the Executive Branch in taking the country to war in Libya. The ACLU urges you to vote "NO" on both H.J. Res. 68 and H.R. 2278 unless amended in the following ways:

1. H.J. Res. 68 and H.R. 2278 fail to specify the countries and persons against whom the use of force is authorized.

Section 1(a) of H.J. Res. 68 authorizes military force "in Libya, in support of United States national security policy interests, as part of the NATO mission to enforce United Nations Security Resolution 1973 (2011) as requested by the Transitional National Council, the Gulf Cooperation Council, and the Arab League." The authorization for military force in Libya "in support of United States national security policy interests" is overly broad and vague. Similarly, H.R. 2278 bars funding in support of the NATO operation in Libya, but then at least implicitly authorizes, "search and rescue; intelligence, surveillance, and reconnaissance; aerial refueling; and operational planning"—which are all part of a large-scale military campaign and are largely carried out in a zone of active hostilities. The resolution and the bill do not make clear whether the only persons who are subject to U.S. force are those Libyan forces loyal to Qadhafi who are interfering with enforcement of the no-fly zone or are threatening civilians. Congress should specify whether the President can carry out any of the military activities authorized by section 1(a) of H.J. Res. 68 or by section 1(b) of H.R. 2278 against: any other non-Qadhafi Libyan militias or groups, any non-Libyan foreign forces allied with Qadhafi, any foreign country supporting the Qadhafi regime, any successor regime to the Qadhafi

regime, or against any country or person violating any arms blockade of Libya. Without this specificity, Congress will be turning over to the President alone important decisions on the scope of the war.

2. **H.J. Res. 68 and H.R. 2278 fail to specify the objectives for the use of force. Specificity in the objective is important because, once the specific objectives are met, the authorization for use of military force no longer has effect.**

Although U.N. Security Resolution 1973 is limited to authorizing a no-fly zone, protection of civilians, and an arms blockade of Libya, H.J. Res. 68 and H.R. 2278 are not clear that those are the only objectives that can be served by the use of military force in Libya. Congress should specify the objectives of the use of force; only by doing so can it then act as a check on Executive Branch action and also ensure that the authorization for use of military force terminates when the objectives are met (or at the end of one year, for H.J. Res. 68). In particular, confusion on the objectives are caused by the use of the ambiguous clause “in support of United States national security policy interests” in section 1(a) of H.J. Res. 68, and by a generic reference to the NATO operation in section 1(a) of H.R. 2278. The confusion is compounded by statements from the President stating that a regime change in Libya is a goal of the United States, which raise important questions of what are the military objectives of the United States in Libya. Congress should be specific in both H.J. Res. 68 and H.R. 2278 on whether either measure authorizes the President to use the U.S. military to achieve any goals that are outside the specific objectives of U.N. Security Council Resolution 1973 of a no-fly zone, protection of civilians, and an arms blockade of Libya.

Unless the House somehow amends H.J. Res. 68 and H.R. 2278 to clarify their ambiguous provisions, the ACLU opposes both measures.

The President has already unleashed Jefferson’s “Dog of war” in Libya, without congressional authorization. That constitutional wrong has already happened. It is now up to the Congress, as representatives of the American citizenry, to exercise its exclusive authority under the Constitution to decide whether and how the President may continue to use military force in Libya. If Congress authorizes the use of the military in Libya, it should do so with specificity. With the nation now more than three months into its third simultaneous war, these fundamental questions should take precedence on the House floor over all other issues, until Congress decides the issue with finality. Please do not hesitate to contact us if you have any questions regarding this matter.

Sincerely,



Laura W. Murphy
Director



Christopher E. Anders
Senior Legislative Counsel