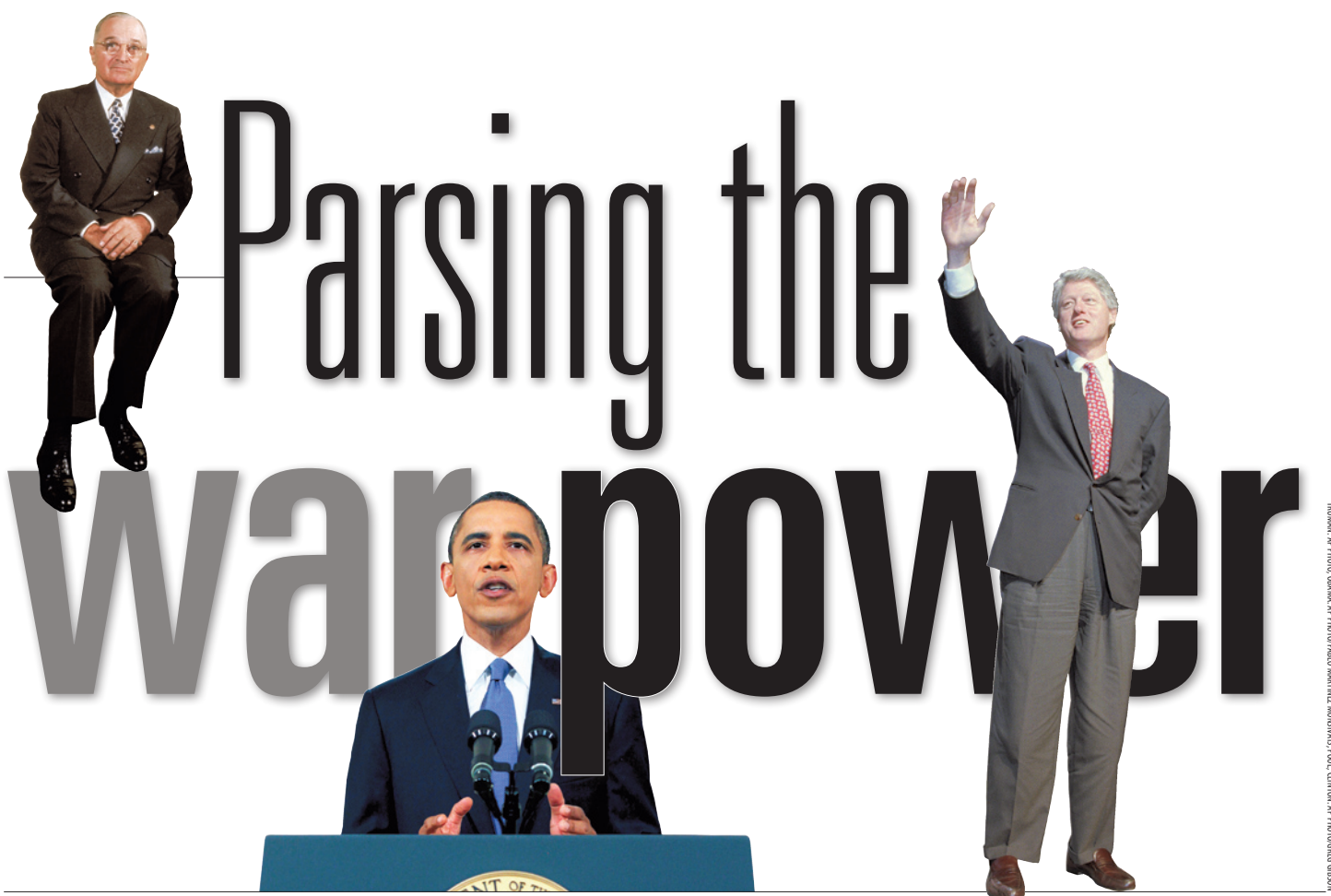


OPINION



TRUMAN: AP PHOTO; OBAMA: AP PHOTO/FRANCO MARRINER; CLINTON: AP PHOTO/ERIC GRISON

Presidents Truman, Clinton and Obama have all gone to great lengths to argue to Congress and the public that clearly hostile military operations are neither wars nor hostilities.

BY LOUIS FISHER

To expand their control over the war power, presidents and their aides go to great lengths to explain to Congress and the public that what they are doing is not what they are doing. When President Harry Truman went to war against North Korea in 1950 without coming to Congress for

authority, he was asked at a news conference if the nation was at war. He responded: "We are not at war." A reporter inquired if it would be more correct to call the military operations "a police action under the United Nations." Truman quickly agreed: "That is exactly what it amounts to."

There are many precedents for being duplicitous with words and a price to be

paid for it. Korea became "Truman's war." In August 1964, President Lyndon Johnson told the nation about a "second attack" in the Gulf of Tonkin, a claim that was doubted at the time and we now know was false. Johnson used stealth and deception to escalate the war, forever damaging his presidency and domestic agenda.

In 1998, during a visit to Tennessee

State University, Secretary of State Madeleine Albright took a question from a student who wanted to know how President Bill Clinton could go to war against Iraq without obtaining authority from Congress. Albright said: "We are talking about using military force, but we are not talking about a war. That is an important distinction." Iraqis subjected to repeated and heavy bombings from U.S. cruise missiles understood it as war.

The Obama administration has been preoccupied with efforts to interpret words beyond their ordinary and plain meaning. On April 1, the Office of Legal Counsel reasoned that "a planned military engagement that constitutes a 'war' within the meaning of the Declaration of War Clause may require prior congressional authorization." But it decided that the existence of "war" is satisfied "only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a significant period." Under that analysis, the operations in Libya did not meet the administration's definition of "war."

If U.S. casualties can be kept low, no matter the extent of physical destruction to another nation and loss of life, war to the Office of Legal Counsel would not exist within the meaning of the Constitution. If another nation bombed the United States without suffering significant casualties, would we call it war? Of course we would. Rep. Dennis Kucinich (D-Ohio) and nine other members of the House filed a lawsuit on June 15, challenging the legality of the war in Libya.

CLAIMING NO 'HOSTILITIES'

In response to a House resolution passed on June 3, the Obama administration, also on June 15, submitted a report to Congress. A section on legal analysis determined that the word "hostilities" in the War Powers Resolution should be interpreted to mean that hostilities do not exist with respect to the U.S. military effort in Libya: "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."



It was Obama's obligation to seek authorization from Congress in February.

According to this reasoning, if the United States conducted military operations by bombing at 30,000 feet, launching Tomahawk missiles from ships in the Mediterranean and using armed drones, there would be no "hostilities" in Libya under the terms of the War Powers Resolution, provided U.S. casualties are minimal or nonexistent. In short, a nation with superior military force could pulverize another country (perhaps with nuclear weapons) and there would be neither hostilities nor war. The administration advised House Speaker John Boehner (R-Ohio) on June 15 that "the United States supports NATO military operations." By its own words, the Obama administration is supporting hostilities.

It is interesting that various administrations, eager to press the limits of presidential power, seem to understand that they may not—legally and politically—use the words "war" or "hostilities." Apparently they recognize that using words in their normal sense, particularly as understood by members of Congress, federal judges and the general public, would acknowledge what the framers believed. Other than repelling sudden attacks and protecting American lives overseas, presidents may not take the country from a state of peace to a state of war without seeking and obtaining congressional authority.

President Barack Obama and his legal advisers repeatedly state that he received

"authorization" from the U.N. Security Council to conduct military operations in Libya. On March 21, he informed Congress that U.S. military forces commenced military initiatives in Libya as "authorized by the United Nations (U.N.) Security Council." His administration regularly speaks of "authorization" received from the Security Council. The June 15 submission to Congress claims that he acted "with a mandate from the United Nations." As I explained in an earlier piece ["Obama's U.N. Authority?," NLJ, April 18], it is legally and constitutionally impermissible to transfer the powers of Congress to an international (U.N.) or regional (NATO) body. The president and the Senate through the treaty process may not surrender power vested in the House of Representatives and the Senate by Art. I. Treaties may not amend the Constitution.

In a May 20 letter to Congress, Obama spoke again about "authorization by the United Nations Security Council." He said that congressional action supporting the military action in Libya "would underline the U.S. commitment to this remarkable international effort." Moreover, a resolution by Congress "is also important in the context of our constitutional framework, as it would demonstrate a unity of purpose among the political branches on this important national security matter. It has always been my view that it is better to take military action, even in limited actions such as this, with congressional engagement, consultation, and support." If that has always been his view, it was his obligation to come to Congress in February to seek legislative authorization.

*Louis Fisher is scholar in residence at the Constitution Project. For four decades he served Congress as senior specialist in separation of powers and specialist in constitutional law. On June 28, he testified before the Senate Committee on Foreign Relations on the justifications for U.S. military operations in Libya. His new book, to be published in August, is *Defending Congress and the Constitution*. A Web page, www.loufisher.org, provides links to his articles and congressional testimony.*