

LIBYA AND WAR POWERS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

—————
JUNE 28, 2011
—————

Printed for the use of the Committee on Foreign Relations



Available via the World Wide Web: <http://www.gpo.gov/fdsys/>

U.S. GOVERNMENT PRINTING OFFICE

68-241 PDF

WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON FOREIGN RELATIONS

JOHN F. KERRY, Massachusetts, *Chairman*

| | |
|------------------------------------|----------------------------|
| BARBARA BOXER, California | RICHARD G. LUGAR, Indiana |
| ROBERT MENENDEZ, New Jersey | BOB CORKER, Tennessee |
| BENJAMIN L. CARDIN, Maryland | JAMES E. RISCH, Idaho |
| ROBERT P. CASEY, JR., Pennsylvania | MARCO RUBIO, Florida |
| JIM WEBB, Virginia | JAMES M. INHOFE, Oklahoma |
| JEANNE SHAHEEN, New Hampshire | JIM DEMINT, South Carolina |
| CHRISTOPHER A. COONS, Delaware | JOHNNY ISAKSON, Georgia |
| RICHARD J. DURBIN, Illinois | JOHN BARRASSO, Wyoming |
| TOM UDALL, New Mexico | MIKE LEE, Utah |

FRANK G. LOWENSTEIN, *Staff Director*

KENNETH A. MYERS, JR., *Republican Staff Director*

CONTENTS

| | Page |
|--|------|
| Fisher, Louis, Scholar in Residence, The Constitution Project, Silver Spring, MD | 40 |
| Prepared statement | 42 |
| Kerry, Hon. John F., U.S. Senator from Massachusetts, opening statement | 1 |
| Koh, Hon. Harold, Legal Adviser, U.S. Department of State, Washington, DC | 7 |
| Prepared statement | 11 |
| Responses to questions submitted for the record by Senator Richard G. Lugar | 53 |
| Responses to questions submitted for the record by Senator James E. Risch | 58 |
| Lugar, Hon. Richard G., U.S. Senator from Indiana, opening statement | 4 |
| Spiro, Peter, Charles R. Weiner Professor of Law, Temple University, Easley School of Law, Philadelphia, PA | 48 |
| Prepared statement | 50 |

LIBYA AND WAR POWERS

TUESDAY, JUNE 28, 2011

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SD-419, Dirksen Senate Office Building, Hon. John F. Kerry (chairman of the committee) presiding.

Present: Senators Kerry, Casey, Webb, Shaheen, Coons, Lugar, Corker, Risch, Isakson, Barrasso, and Lee.

OPENING STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

The CHAIRMAN. The hearing will come to order.

Thank you very much for being here this morning. I apologize for starting a few minutes late.

We are here this morning to further examine an issue that we have been debating since the War Powers Resolution was passed. I think this is a debate of decades now since the 1970s, and certainly it has been debated over the course of the last weeks with respect to the War Powers Resolution and its role in America's use of force in Libya.

I want to thank all of my colleagues for the very constructive manner in which we have conducted that discussion over these past weeks, and this afternoon the committee will meet again—and I would ask all of the members who are here, as you run into other members, if we can begin that meeting punctually. I think there is a fair amount of business and it is obviously important business. We want to try to consider it as expeditiously as possible, and that is with respect to the proposed resolution regarding the limited operations in support of the NATO mission in Libya.

It is my personal firm belief that America's values and interests compelled us to join other nations in establishing the no-fly zone over Libya. By keeping Qadhafi's most potent weapons out of the fight, I am positively convinced—and I would reiterate that 2 days ago Senator McCain and I were in Cairo meeting with General Tantawi and others, and they affirmed the conviction that the actions of the United Nations with respect to the no-fly zone, indeed, saved many thousands of people from being massacred by Qadhafi. There is no question in my mind about that.

We also sent a message about something that matters to the American people as a matter of our values and that is about whether or not leaders should be permitted willy-nilly to turn their

armies on their own citizens, the citizens they are supposed to serve and protect.

I have made clear my belief that the 60-day restriction contained in the War Powers Resolution does not apply in this situation, particularly since we handed the operations over to NATO. But some people, obviously, can draw different interpretations and will. And we will have a good discussion about that today.

It is important, in my judgment, to remember that the War Powers Resolution was a direct reaction to a particular kind of a war, to a particular set of events, the Vietnam war, which at that time was the longest conflict in our history and which resulted, without any declaration in war, in the loss of over 58,000 American lives, spanning three administrations. And during those three administrations, Congress never declared war or, I might add, authorized it. They funded but there was no formal authorization.

Now, understandably Congress after that wanted to ensure that in the future it would have an opportunity to assert its constitutional prerogatives, which I do agree with and do believe in when America sends its soldiers abroad.

But our involvement in Libya is, obviously, clearly different from our fight in Vietnam. It is a very limited operation, and the War Powers Resolution applies to the use of armed forces in—and here I quote—“hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances,” referring to American Armed Forces.

But for 40 years, Presidents have taken the view that this language does not include every single military operation. Presidents from both parties have undertaken military operations without express authorization from Congress. I will emphasize, particularly for my friends, that does not make it right, and I am not suggesting that it does. It still begs the analysis each time of whether or not it fits a particular situation. But certainly Panama, Grenada, Haiti, Bosnia, Kosovo, Lebanon—I mean, the list is long where Presidents have deemed it necessary to take a particular action. In some cases, those actions ended in less than 60 days, but in a number of them and some of the most recent and prominent ones, they went well beyond the 60 days. In fact, on one occasion, I believe Lebanon, Congress actually authorized action a year later.

We have never amended the War Powers Resolution, and we have never amended the resolution in terms of this particular authorization that came through the United Nations.

The Ford administration, for example, defined “hostilities” only as those situations where U.S. troops were exchanging fire with hostile forces. And subsequent administrations, Republican and Democrat alike, built on that interpretation. But in Libya today no American is being shot at. No American troops are on the ground, and we are not going to put them there.

It is true, of course, that the War Powers Resolution was not drafted with drones in mind. As our military technology becomes more and more advanced, it may well be that the language that I just read needs further clarification. Maybe it is up to us now to redefine it in the context of this more modern and changed warfare and threat.

I certainly recognize that there can be very reasonable differences of opinion on this point as it applies to Libya today. So I am glad we are having this hearing. I think it is important.

Many of us have met with members of the Libyan opposition, and I know Senators are eager to get to know them better and to learn about their plans and goals. I see this morning we are joined here by Ali Aujali. He was Libya's Ambassador to the United States but he resigned during the uprising and is now the diplomatic representative of the Transitional National Council which only recently Germany moved, Angela Merkel, moved to actually recognize.

Like Ambassador Aujali, we would all like to see a brighter future for Libya, and that is why, when it comes to America's involvement, we need to look beyond the definition of hostilities to the bigger picture. A Senate resolution authorizing the limited use of force in Libya will, I think, show the world, in particular Muammar Qadhafi, at a time when most people make a judgment that the noose is tightening, the vice is squeezing, the opposition is advancing, the regime is under enormous pressure, that Congress and the President are committed to this critical endeavor. The United States is always strongest when we speak with one strong voice on foreign policy, and that is why I hope this afternoon we could find our way to an agreement on a bipartisan resolution.

Endorsing our supporting role in this conflict, also sends a message to our allies and NATO. Secretary Gates, prior to departing in recent days, made a very strong speech about NATO, the need for NATO to do more. The fact is NATO is doing more in this effort, and they are in the lead on this effort. And we have asked in the past for the alliance to take the lead in many conflicts, and too often they have declined. In this case, they have stepped up, and I believe that for us to, all of a sudden, turn on our own words and hopes and urgings of the last years and pull the rug out from under them would have far-reaching consequences.

With that said, it is a great pleasure for me to welcome here Harold Koh, the State Department's Legal Adviser. He is an extremely distinguished scholar of constitutional law and international law. He has a long career of service in the Government, as well as in academia.

We had also, I might add, invited some witnesses from the Pentagon and the Department of Justice to testify this morning, but they declined to appear.

On the second panel, we have two witnesses. Louis Fisher is Scholar in Residence at The Constitution Project, and he previously worked for 4 decades at the Library of Congress as the senior specialist in separation of powers and as a specialist in constitutional law. And Professor Spiro is the Charles R. Weiner Professor of Law at Temple University, and he has served in the State Department and on the National Security Council staff and has written extensively on foreign relations law of the United States.

So we appreciate all of our witnesses taking time to be here today.

Senator Lugar.

**OPENING STATEMENT OF HON. RICHARD G. LUGAR,
U.S. SENATOR FROM INDIANA**

Senator LUGAR. Well, thank you very much, Mr. Chairman, for calling this meeting to consider the legal and constitutional basis for ongoing United States military operations in Libya. The President declined to seek congressional authorization before initiating hostilities. Subsequently he has carried them out for more than 3 months without seeking or receiving congressional authorization.

This state of affairs is at odds with the Constitution, and it is at odds with the President's own pronouncements on war powers during his Presidential candidacy. For example, in December 2007, he responded to a Boston Globe question by saying "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the Nation."

Before our discussion turns to constitutional and legal issues, I believe it is important to make a more fundamental point. Even if one believes the President somehow had the legal authority to initiate and continue United States military operations in Libya, it does not mean that going to war without Congress was either wise or helpful to the operation.

The vast majority of Members of Congress, constitutional scholars, and military authorities would endorse the view that Presidents should seek congressional authorization for war when circumstances allow. There is a near uniformity of opinion that the chances for success in a war are enhanced by the unity, clarity of mission, and constitutional certainty that such an authorization and debate provide.

There was no good reason why President Obama should have failed to seek congressional authorization to go to war in Libya. A few excuses have been offered, ranging from an impending congressional recess, to the authority provided by a U.N. Security Council resolution. But these excuses do not justify the President's lack of constitutional discipline. Twelve days before the United States launched hostilities, I called for the President to seek a declaration of war before taking military action. The Arab League resolution, which is cited as a key event in calculations on the war, was passed a full week before we started launching cruise missiles. There was time to seek congressional approval, and Congress would have debated a war resolution if the President had presented one.

This debate would not have been easy. But Presidents should not be able to avoid constitutional responsibilities merely because engaging the people's representatives is inconvenient or uncertain. If the outcome of a congressional vote on war is in doubt, it is all the more reason why a President should seek a debate. If he does not, he is taking the extraordinary position that his plans for war are too important to be upset by a disapproving vote in Congress.

The Founders believed that Presidents alone should not be trusted with warmaking authority, and they constructed checks against executive unilateralism. James Madison, in a 1797 letter to Thomas Jefferson, stated "The Constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It

has accordingly with studied care, vested the question of war in the legislature.”

Clearly, there are circumstances under which a President might be justified in employing military force without congressional authorization. But as Senator Webb has pointed out systematically, none of the reasons apply to the Libyan case. Our country was not attacked or threatened with an attack. We were not obligated under a treaty to defend the Libyan people. We were not rescuing Americans or launching a one-time punitive retaliation. Nor did the operation require surprise that would have made a public debate impractical.

In this case, President Obama made a deliberate decision not to seek a congressional authorization of his action, either before it commenced or during the last 3 months. This was a fundamental failure of leadership that placed expedience above constitutional responsibility.

Now, some will say that President Obama is not the first President to employ American forces overseas in controversial circumstances without a congressional authorization. But saying that Presidents have exceeded their constitutional authority before is little comfort. Moreover, the highly dubious arguments offered by the Obama administration for not needing congressional approval break new ground in justifying a unilateral Presidential decision to use force. The accrual of even more warmaking authority in the hands of the Executive is not in our country’s best interest, especially at a time when our Nation is deeply in debt and our military is heavily committed overseas.

At the outset of this conflict, the President asserted that U.S. military operations in Libya would be “limited in their nature, duration, and scope.” On this basis, the administration asserted that the actions did not require a declaration of war. Three months later, these assurances ring hollow. American and coalition military activities have expanded to an all but declared campaign to drive Qadhafi from power. The administration is unable to specify any applicable limits to the duration of the operations. And the scope has grown from efforts to protect civilians under imminent threat to obliterating Libya’s military arsenal, command and control structure, and leadership apparatus.

Most recently, the administration has sought to avoid its obligations under the War Powers Resolution by making the incredible assertion that U.S. military operations in Libya do not constitute hostilities. Even some prominent supporters of the war have refused to accept this claim.

The administration’s own description of the operations in Libya underscores the fallacy of this position. United States war planes have reportedly struck Libya air defenses some 60 times since NATO assumed the lead role in the Libya campaign. Predator drones reportedly have fired missiles on some 30 occasions. Most significantly, the broader range of airstrikes being carried out by other NATO forces depend on the essential support functions provided by the United States.

The War Powers Resolution required the President to terminate the introduction of U.S. forces into hostilities in Libya on May 20, 60 days after he notified Congress of the commencement of the

operation. The administration declined to offer any explanation of its view that United States Forces were not engaged in hostilities in Libya until nearly a month later on June 15. Even at that point, the administration's explanation was limited to four perfunctory sentences in a 32-page report on the Libyan operations.

Administration analysis focuses on the question of whether U.S. casualties are likely to occur, thereby minimizing other considerations relevant to the use of force. If this definition of hostilities were accepted, Presidents would have significant scope to conduct warfare through remote means such as missiles and drones. It would deny Congress a say in other questions implicated in decisions to go to war, including the war's impact on U.S. strategic interests, on our relations with other countries, and on our ability to meet competing national security priorities.

The administration's report also implies that because allied nations are flying most of the missions over Libya, the United States operations are not significant enough to require congressional authorization. This characterization underplays the centrality of the United States contributions to the NATO operations in Libya. We are contributing 70 percent of the coalition's intelligence capabilities and the majority of its refueling assets. The fact that we are leaving most of the shooting to other countries does not mean the United States is not involved in acts of war. If the United States encountered persons performing similar activities in support of al-Qaeda or Taliban operations, we certainly would deem them to be participating in hostilities against us. Moreover, the language of the War Powers Resolution clearly encompasses the kinds of operations U.S. military forces are performing in support of other NATO countries.

These concerns are compounded by indications that the administration's legal position was the result of a disputed decision process. According to press reports, the President made the decision to adopt this position without the Department of Justice having the opportunity to develop a unified legal opinion. It is regrettable that the administration has refused our requests to make witnesses from the Departments of Defense and Justice available for today's hearing.

Finally, one would expect the administration to be fully forthcoming on consultations about Libya to compensate, in some measure, for the lack of congressional authorization for the war. Although consultations in no way substitute for formal authorization, a view corroborated in this legal scholarship today of Mr. Koh, they serve a vital purpose in unifying the Government and providing Congress with a basis for decisionmaking on the war. For the most part, for example, the Clinton administration and President Clinton himself consulted meaningfully with Congress during the United States intervention in the Balkans.

In sharp contrast, the Obama administration's efforts to consult with Congress have been perfunctory, incomplete, and dismissive of reasonable requests. This committee alone has experienced at least three occasions when briefings were canceled or relevant witnesses were denied without explanation. As Senator Corker has pointed out, very basic questions about the operation have gone unanswered. Deputy Secretary of State Steinberg declined to address

certain questions on the basis they could only be answered by the military, and yet the administration has refused to provide the committee with Defense Department witnesses. This inexplicable behavior contributes to the damage that the Libya precedent might create in the future.

I do not doubt that President Obama elected to launch this war because of altruistic impulses. But that does not make the United States intervention in Libya any less of a war of election. Nor does the fig leaf that American pilots are flying a minority of the missions within the coalition justify the contention we are not engaged in hostilities, especially since United States participation enables most of the operations underway.

The President does not have the authority to substitute his judgment for constitutional process when there is no emergency that threatens the United States and our vital interests. The world is full of examples of local and regional violence, to which the United States military could be applied for some altruistic purpose. Under the Constitution, the Congress is vested with the authority to determine which, if any, of these circumstances justify the consequences of American military intervention.

I thank the chairman for the opportunity to make this statement.

The CHAIRMAN. Thank you very much.

So there, legal counsel, there you have it, sir. The stage is set, two differing views reflecting over 50 years of service on this committee, and we are still not sure what the answer is. So your task this morning is an interesting one, and I think we will not only have a good dialogue, but maybe it will be fun. Have at it. You are on.

**STATEMENT OF HON. HAROLD KOH, LEGAL ADVISER, U.S.
DEPARTMENT OF STATE, WASHINGTON, DC**

Mr. KOH. Thank you, Mr. Chairman, Senator Lugar, members of the committee, for this important hearing. It is good to be back before you. Like past legal advisers, I am honored to appear to explain the administration's legal position on the war powers. I have submitted detailed testimony, which you have before you, which reviews the brutality visited by Qadhafi on the people of Libya and the urgent but restrained steps this administration has taken to stop it as part of a supporting role within a NATO-led, Security Council-authorized civilian protection mission that is limited with respect to design, exposure of U.S. troops, risk of escalation, and choice of military means.

Today let me make three points.

First, this administration is acting lawfully, consistent with both the letter and spirit of the Constitution and the War Powers Resolution. Contrary to what some have claimed, we are not asserting sweeping constitutional power to bypass Congress. The President has never claimed the authority to take the Nation to war without congressional authorization. He has never claimed authority to violate the War Powers Resolution or any other statute. He has not claimed the right to violate international law to use force abroad when doing so would not serve important national interests or to refuse to consult with Congress on important war powers issues.

We recognize that Congress has powers to regulate and terminate uses of force and that the War Powers Resolution plays an important role in promoting interbranch dialogue. Indeed, my testimony today continues that dialogue which now includes more than 10 hearings, 30 briefings, and dozens of exchanges with Congress on these issues.

From the start, we have sought to obey the law. I would not serve an administration that did not. The President reported to Congress, consistent with the War Powers Resolution, within 48 hours of commencing operations in Libya. He framed our military mission narrowly, directing among other things, that no ground troops would be deployed and that on April 4, U.S. forces would transition responsibility to NATO command, shifting to a constrained and supporting role within a multinational civilian protection mission.

And from the outset, we noted that the situation in Libya does not constitute a war requiring specific congressional approval under the Declaration of War Clause of the Constitution. As my testimony notes on page 13, the President has constitutional authority, long recognized, to direct the use of force to serve important national interests and preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. The nature, scope, and duration of the military operations he ordered here did not rise to the level of war for constitutional purposes.

So my second point. We do not believe that the War Powers Resolution's 60-day automatic pullout provision applies to the limited Libya mission. As Senator Kerry quoted, absent express congressional authorization, the resolution directs the President to remove U.S. Armed Forces within 60 days from the date that hostilities or situations where imminent involvement in hostilities is clearly indicated.

But as everyone recognizes, the legal trigger for the automatic pullout clock, "hostilities" is an ambiguous term of art that is defined nowhere in the statute. The legislative history, which we cite, makes clear there was no agreed-upon view of exactly what the term "hostilities" would encompass, nor has that standard ever been defined by any court or by Congress itself.

From the start, legislators disagreed about the meaning of the term and the scope of the 60-day pullout rule and whether a particular set of facts constitutes hostilities for purposes of the resolution has been determined less by a narrow parsing of dictionary definitions than by interbranch practice.

The Members of Congress who drafted the War Powers Resolution understood that this resolution is not like the Internal Revenue Code. Reading the War Powers Resolution should not be a mechanical exercise. The term "hostilities" was vague but they declined to give it more concrete meaning in part to avoid hampering future Presidents by making the resolution a one-size-fits-all strait-jacket that would operate mechanically without regard to the facts.

As my testimony recounts and as Senator Kerry has himself noted, there are various leaders of this Congress who have indicated that they do not believe that the United States military operations in Libya amount to the kind of hostilities envisioned by the

60-day pullout provision. We believe that view is correct and confirmed by historical practice. And the historical practice, which I summarize in my testimony, suggests that when U.S. forces engage in a limited military mission that involves limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means, we are not in hostilities of the kind envisioned by the War Powers Resolution that was intended to trigger an automatic 60-day pullout.

Let me say just a word about each of these four limitations.

First, the nature of the mission is unusually limited. By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led, multinational civilian protection mission charged with enforcing a Security Council resolution. This circumstance is virtually unique, not found in any of the recent historic situations in which the hostilities questions has been debated from the Iranian hostages crisis to El Salvador, to Lebanon, to Grenada, to the fighting with Iran in the Persian Gulf, or to the use of ground troops in Somalia.

Second, the exposure of our Armed Forces is limited. From the transition date of March 31 forward, there have been no U.S. casualties, no threat of significant U.S. casualties, no active exchanges of fire with hostile forces, no significant armed confrontation or sustained confrontation of any kind with hostile forces. And as my testimony describes on page 9, past administrations have not found the 60-day rule to apply even in a situation where far more significant fighting plainly did occur such as in Lebanon and Grenada in 1983 and Somalia in 1993.

Third, the risk of escalation here is limited. In contrast to the U.N.-authorized Desert Storm operation, which presented over 400,000 troops, the same order of magnitude as Vietnam at its peak, Libya has not involved any significant chance of escalation into a full-fledged conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or an expanding geographic scope. In this respect, Libya contrasts with other recent cases, Lebanon, Central America, Somalia, the Persian Gulf tanker controversy, discussed on page 10 of my testimony, where past administrations declined to find hostilities under the War Powers Resolution, even though United States Armed Forces were repeatedly engaged by other sides' forces and sustained significant casualties.

And fourth and finally, Senators, we are using limited military means, not the kind of full military engagements with which the War Powers Resolution is primarily concerned. And there I quote from a statement by my predecessor, the legal adviser of 1975, in response to a request from the Congress about an incident during the Ford administration. The violence U.S. Armed Forces are directly inflicting or facilitating after the handoff to NATO has been modest in terms of its frequency, intensity, and severity. The air-to-ground strikes conducted by the United States are a far cry from the extensive aerial strike operations led by United States Armed Forces in Kosovo in 1999 or the NATO operations in the Balkans in the 1990s, to which the United States forces contributed the vast majority of aircraft and airstrike sorties.

To be specific, the bulk of U.S. contributions has been providing intelligence capabilities and refueling assets to the NATO effort. A very significant majority of the overall sorties, 75 percent, are being flown by our coalition partners. The overwhelming majority of strike sorties, 90 percent, are being flown by our partners. American strikes have been limited on an as-needed basis to the suppression of enemy air defenses to enforce the no-fly zone and limited strikes by Predator unmanned aerial vehicles against discrete targets to support the civilian protection mission. By our best estimate, Senators, since the handoff to NATO, the total number of United States munitions dropped in Libya has been less than 1 percent of those dropped in Kosovo.

Now, we acknowledge that had any of these elements been absent in Libya or present in different degrees, you could draw a different legal conclusion, but it was this unusual confluence of these four limitations, an operation that is limited in mission, limited in exposure, limited in risk of escalation, and limited in choice of military means, that led the President to conclude that the Libya operation did not fall under the automatic 60-day pullout rule.

As Chairman Kerry suggested, we are far from the core case that most Members of Congress had in mind when they passed the resolution in 1973. They were concerned there about no more Vietnams. But given the limited military means, risk of escalation, exchanges of fire, and United States casualties, we do not believe that the 1973 Congress intended that its resolution should be construed so rigidly to stop the President from directing supporting action in a NATO-led, Security Council-authorized operation with international approval at the express request of NATO, the Arab League, the Gulf Cooperation Council, and Libya's own Transitional National Council for the narrow but urgent purpose of preventing the slaughter of innocent civilians in Libya.

Third and finally, Senators, we fully recognize reasonable minds may read the resolution differently. That would not be a surprise. They have since their inception. Scholars have spent their entire careers debating these issues. These questions of interpretation are matters of important public debate. Reasonable minds can certainly differ. And we acknowledge that there were perhaps steps we should have taken or could have taken to foster better communication on these very difficult legal questions.

But none of us believes that the best way forward now is for Qadhafi to prevail and to resume his attacks on his own people. Were the United States now to drop out of this collective civilian protection mission or to sharply curtail its contributions would not only compromise our international relationships and destabilize the region but would undo NATO's progress by permitting Qadhafi to return to brutal attacks on the very civilians whom our intervention has protected. However we may construe the War Powers Resolution, we can all agree it would only serve Qadhafi's interests for the United States to withdraw from this NATO operation before it is finished.

And so the urgent question before you is not one of law but of policy. Will Congress provide its support for NATO's mission in Libya at this pivotal juncture, ensuring that Qadhafi does not regain the upper hand against the people of Libya?

And so in closing, I ask that you take quick and decisive action to approve Senate Joint Resolution 20, the bipartisan resolution introduced by Senators Kerry, McCain, Durbin, Cardin, and seven others of your colleagues to provide congressional authorization for continued operations in Libya to enforce the purposes of Security Council Resolution 1973. Only by so doing can this body affirm that the United States Government is united in its support of the NATO alliance and the aspirations of the Libyan people.

Thank you, Senator, and I look forward to answering your questions.

[The prepared statement of Mr. Koh follows:]

PREPARED STATEMENT OF HAROLD HONGJU KOH

Thank you, Mr. Chairman, Ranking Member Lugar, and members of the committee, for this opportunity to testify before you on Libya and war powers. By so doing, I continue nearly four decades of dialogue between Congress and Legal Advisers of the State Department, since the War Powers Resolution was enacted, regarding the executive branch's legal position on war powers.¹

We believe that the President is acting lawfully in Libya, consistent with both the Constitution and the War Powers Resolution, as well as with international law.² Our position is carefully limited to the facts of the present operation, supported by history, and respectful of both the letter of the resolution and the spirit of consultation and collaboration that underlies it. We recognize that our approach has been a matter of important public debate, and that reasonable minds can disagree. But surely none of us believes that the best result is for Qadhafi to wait NATO out, leaving the Libyan people again exposed to his brutality. Given that, we ask that you swiftly approve Senate Joint Resolution 20, the bipartisan measure recently introduced by 11 Senators, including 3 members of this committee.³ The best way to show a united front to Qadhafi, our NATO allies, and the Libyan people is for Congress now to authorize under that joint resolution continued, constrained operations in Libya to enforce United Nations Security Council Resolution 1973.

As Secretary Clinton testified in March, the United States engagement in Libya followed the administration's strategy of "using the combined assets of diplomacy, development, and defense to protect our interests and advance our values."⁴ Faced with brutal attacks and explicit threats of further imminent attacks by Muammar Qadhafi against his own people,⁵ the United States and its international partners

¹In 1975, shortly after the enactment of the War Powers Resolution, Legal Adviser Monroe Leigh testified before Congress, and then responded to written questions, regarding the meaning and application of the resolution. See Letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann to Chairman Clement J. Zablocki (June 5, 1975), reprinted in "War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident": Hearings Before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong. (1975) [hereinafter "1975 Leigh-Hoffmann Letter"]. Subsequent Legal Advisers have carried on this tradition. See, e.g., "War Powers Resolution": Hearings Before the Senate Committee on Foreign Relations, 95th Cong. (1977) (testimony of Legal Adviser Herbert J. Hansell); "War Powers, Libya, and State-Sponsored Terrorism": Hearings Before the Subcommittee on Arms Control, Int'l Security and Science of the House Committee on Foreign Affairs, 99th Cong. (1986) (testimony of Legal Adviser Abraham D. Sofaer); "H. Con. Res. 82, Directing the President to Remove Armed Forces From Operations Against Yugoslavia, and H.J. Res. 44, Declaring War Between the United States and Yugoslavia": Markup Before the House Committee on Int'l Relations, 106th Cong. (1999) (testimony of Principal Deputy Legal Adviser Michael J. Matheson). Cf. Legal Adviser Harold Hongju Koh, Statement Regarding the Use of Force in Libya, American Society of International Law Annual Meeting (Mar. 26, 2011) (discussing "the historical practice of the Legal Adviser publicly explaining the legal basis for United States military actions that might occur in the international realm").

²For explanation of the lawfulness of our Libya actions under international law, see Koh, *supra* note 1.

³S.J. Res. 20 (introduced by Senators Kerry, McCain, Levin, Kyl, Durbin, Feinstein, Graham, Lieberman, Blunt, Cardin, and Kirk).

⁴Hearing on FY 2012 State Department Budget Before the Subcommittee on State, Foreign Operations, and Related Programs of the Senate Committee on Appropriations, 112th Cong. (Mar. 2, 2011).

⁵Qadhafi's actions demonstrate his ongoing intent to suppress the democratic movement against him by lawlessly attacking Libyan civilians. On February 22, 2011, Qadhafi pledged on

Continued

acted with unprecedented speed to secure a mandate, under Resolution 1973, to mobilize a broad coalition to protect civilians against attack by an advancing army and to establish a no-fly zone. In so doing, President Obama helped prevent an imminent massacre in Benghazi, protected critical U.S. interests in the region, and sent a strong message to the people not just of Libya—but of the entire Middle East and North Africa—that America stands with them at this historic moment of transition.

From the start, the administration made clear its commitment to acting consistently with both the Constitution and the War Powers Resolution. The President submitted a report to Congress, consistent with the War Powers Resolution, within 48 hours of the commencement of operations in Libya. He framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. Armed Forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission—in an action involving no U.S. ground presence or, to this point, U.S. casualties—authorized by a carefully tailored U.N. Security Council Resolution. As the War Powers Resolution contemplates, the administration has consulted extensively with Congress about these operations, participating in more than 10 hearings, 30 briefings, and dozens of additional exchanges since March 1—an interbranch dialogue that my testimony today continues.

This background underscores the limits to our legal claims. Throughout the Libya episode, the President has never claimed the authority to take the Nation to war without congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers issues. The administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.

Together with our NATO and Arab partners, we have made great progress in protecting Libya's civilian population, and we have isolated Qadhafi and set the stage for his departure. Although since early April we have confined our military involvement in Libya to a supporting role, the limited military assistance that we provide has been critical to the success of the mission, as has our political and diplomatic leadership. If the United States were to drop out of, or curtail its contributions to, this mission, it could not only compromise our international relationships and alliances and threaten regional instability, but also permit an emboldened and vengeful Qadhafi to return to attacking the very civilians whom our intervention has protected.

Where, against this background, does the War Powers Resolution fit in? The legal debate has focused on the resolution's 60-day clock, which directs the President—absent express congressional authorization (or the applicability of other limited exceptions) and following an initial 48-hour reporting period—to remove United States Armed Forces within 60 days from “hostilities” or “situations where imminent in-

Libyan National Television to lead “millions to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual until I purify this land.” He called his opponents “rats,” and said they would be executed. On March 17, 2011, in another televised address, Qadhafi promised, “We will come house by house, room by room. . . . We will find you in your closets. And we will have no mercy and no pity.” Qadhafi's widespread and systematic attacks against the civilian population led the United Nations Security Council, in Resolution 1970, to refer the situation in Libya to the Prosecutor of the International Criminal Court. The U.N. Human Rights Council's Commission of Inquiry into Libya subsequently concluded that since February, “[human rights] violations and crimes have been committed in large part by the Government of Libya in accordance with the command and control system established by Colonel Qadhafi through the different military, para-military, security and popular forces that he has employed in pursuit of a systematic and widespread policy of repression against opponents of his regime and of his leadership.” At this moment, Qadhafi's forces continue to fire indiscriminately at residential areas with shells and rockets. Defecting Qadhafi forces have recounted orders “to show no mercy” to prisoners, and some recent reports indicate that the Qadhafi regime has been using rape as a tool of war. See Secretary of State Hillary Rodham Clinton, Press Statement, Sexual Violence in Libya, the Middle East and North Africa (June 16, 2011), <http://www.state.gov/secretary/rm/2011/06/166369.htm>. For all of these reasons, President Obama declared on March 26, “[W]hen someone like Qadhafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save thousands of lives—then it's in our national interest to act. And, it's our responsibility. This is one of those times.”

volvement in hostilities is clearly indicated by the circumstances.” But as virtually every lawyer recognizes, the operative term, “hostilities,” is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation. Indeed, the legislative history of the resolution makes clear there was no fixed view on exactly what the term “hostilities” would encompass.⁶ Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the resolution a “one size fits all” straitjacket that would operate mechanically, without regard to particular circumstances.

From the start, lawyers and legislators have disagreed about the meaning of this term and the scope of the resolution’s 60-day pullout rule. Application of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a resolution passed by a Congress that could not have envisioned many of the operations in which the United States has since become engaged. Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes “hostilities” for purposes of the resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions. Both branches have recognized that different situations may call for different responses, and that an overly mechanical reading of the statute could lead to unintended automatic cutoffs of military involvement in cases where more flexibility is required.

In the nearly 40 years since the resolution’s enactment, successive administrations have thus started from the premise that the term “hostilities” is “definable in a meaningful way only in the context of an actual set of facts.”⁷ And successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law’s meaning over time. By adopting this approach, the two branches have sought to avoid construing the statute mechanically, divorced from the realities that face them.

In this case, leaders of the current Congress have stressed this very concern in indicating that they do not believe that U.S. military operations in Libya amount to the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day pullout provision.⁸ The historical practice supports this view. In 1975, Congress expressly

⁶When the resolution was first considered, one of its principal sponsors, Senator Jacob K. Javits, stated that “[t]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it.” “War Powers Legislation”: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Committee on Foreign Relations, 92d Cong. 28 (1971); see also *id.* (statement of Professor Henry Steele Commager) (agreeing with Senator Javits that “there is peril in trying to be too exact in definitions,” as “[s]omething must be left to the judgment, the intelligence, the wisdom, of those in command of the Congress, and of the President as well”). Asked at a House of Representatives hearing whether the term “hostilities” was problematic because of “the susceptibility of it to different interpretations,” making this “a very fuzzy area,” Senator Javits acknowledged the vagueness of the term but suggested that it was a necessary feature of the legislation: “There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority.” “War Powers”: Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, 93d Cong. 22 (1973). We recognize that the House report suggested that “[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope,” but the report provided no clear direction on what either term was understood to mean. H.R. Rept. No. 93–287, at 7 (1973); see also *Lowry v. Reagan*, 676 F. Supp. 333, 340 n.53 (1997) (finding that “fixed legal standards were deliberately omitted from this statutory scheme,” as “the very absence of a definitional section in the [War Powers] resolution [was] coupled with debate suggesting that determinations of ‘hostilities’ were intended to be political decisions made by the President and Congress”).

⁷1975 Leigh-Hoffmann Letter, *supra* note 1, at 38.

⁸Both before and after May 20, 2011, the 60th day following the President’s initial letter to Congress on operations in Libya, few Members of Congress asserted that our participation in the NATO mission would trigger or had triggered the War Powers Resolution’s pullout provision. House Speaker Boehner stated on June 1, 2011, that “[l]egally, [the Administration has] met the requirements of the War Powers Act.” House Minority Leader Pelosi stated on June 16, 2011, that “[t]he limited nature of this engagement allows the President to go forward,” as “the President has the authority he needs.” Senate Majority Leader Reid stated on June 17, 2011, that “[t]he War Powers Act has no application to what’s going on in Libya.” Senate Foreign Relations Committee Chairman Kerry stated on June 21, 2011, that “I do not think our limited involvement rises to the level of hostilities defined by the War Powers Resolution,” and on June 23, 2011, that “[w]e have not introduced our armed forces into hostilities. No American is being shot at. No American troop is at risk of being shot down today. That is not what we’re

invited the executive branch to provide its best understanding of the term “hostilities.” My predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann responded that, as a general matter, the executive branch understands the term “to mean a situation in which units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces.”⁹ On the other hand, as Leigh and Hoffmann suggested, the term should not necessarily be read to include situations where the nature of the mission is limited (i.e., situations that do not “involve the full military engagements with which the resolution is primarily concerned”¹⁰); where the exposure of U.S. forces is limited (e.g., situations involving “sporadic military or paramilitary attacks on our Armed Forces stationed abroad,” in which the overall threat faced by our military is low¹¹); and where the risk of escalation is therefore limited. Subsequently, the executive branch has reiterated the distinction between full military encounters and more constrained operations, stating that “intermittent military engagements” do not require withdrawal of forces under the resolution’s 60-day rule.¹² In the 36 years since Leigh and Hoffmann provided their analysis, the executive branch has repeatedly articulated and applied these foundational understandings. The President was thus operating within this longstanding tradition of executive branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011.

In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day automatic pullout provision.

First, the mission is limited: By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council resolution tailored to that limited purpose. This is a very unusual set of circumstances, not found in any of the historic situations in which the “hostilities” question was previously debated, from the deployment of U.S. Armed Forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993. Of course, NATO forces as a whole are more deeply engaged in Libya than are U.S. forces, but the War Powers Resolution’s 60-day pullout provision was designed to address the activities of the latter.¹³

Second, the exposure of our Armed Forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties. Nor do our current operations involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sus-

doing. We are refueling. We are supporting NATO.” Since May 20, the basic facts regarding the limited nature of our mission in Libya have not materially changed.

⁹ 1975 Leigh-Hoffmann Letter, *supra* note 1, at 38–39.

¹⁰ The quoted language comes from the Department of Justice, which in 1980 reaffirmed the Leigh-Hoffmann analysis. “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization,” 4A Op. O.L.C. 185, 194 (1980).

¹¹ *Id.*; see also Letter from Assistant Secretary of State J. Edward Fox to Chairman Dante B. Fascell (Mar. 30, 1988) (stating that “hostilities” determination must be “based on all the facts and circumstances *as they would relate to the threat to U.S. forces at the time*” (emphasis added)).

¹² Letter from Assistant Secretary of State for Legislative Affairs Wendy R. Sherman to Representative Benjamin Gilman, reprinted in 139 Cong. Rec. H7095 (daily ed. Sept. 28, 1993).

¹³ A definitional section of the War Powers Resolution, 8(c), gives rise to a duty of congressional notification, but not termination, upon the “assignment” of U.S. forces to command, coordinate, participate in the movement of, or accompany foreign forces that are themselves in hostilities. Section 8(c) is textually linked (through the term “introduction of United States Armed Forces”) not to the “hostilities” language in section 4 that triggers the automatic pullout provision in section 5(b), but rather, to a different clause later down in that section that triggers a reporting requirement. According to the Senate report, the purpose of section 8(c) was “to prevent secret, unauthorized military support activities [such as the secret assignment of U.S. military ‘advisers’ to South Vietnam and Laos] and to prevent a repetition of many of the most controversial and regrettable actions in Indochina,” S. Rept. No. 93–220, at 24 (1973) actions that scarcely resemble NATO operations such as this one. Indeed, absurd results could ensue if section 8(c) were read to trigger the 60-day clock, as that could require termination of the “assignment” of even a single member of the U.S. military to assist a foreign government force, unless Congress passed legislation to authorize that one-person assignment. Moreover, section 8(c) must be read together with the immediately preceding section of the resolution, 8(b). By grandfathering in preexisting “high-level military commands,” section 8(b) not only shows that Congress knew how to reference NATO operations when it wanted to, but also suggests that Congress recognized that NATO operations are generally less likely to raise the kinds of policy concerns that animated the resolution. If anything, the international framework of cooperation within which this military mission is taking place creates a far greater risk that by withdrawing prematurely from Libya, as opposed to staying the course, we would generate the very foreign policy problems that the War Powers Resolution was meant to counteract: for example, international condemnation and strained relationships with key allies.

tained confrontations of any kind with hostile forces.¹⁴ Prior administrations have not found the 60-day rule to apply even in situations where significant fighting plainly did occur, as in Lebanon and Grenada in 1983 and Somalia in 1993.¹⁵ By highlighting this point, we in no way advocate a legal theory that is indifferent to the loss of non-American lives. But here, there can be little doubt that the greatest threat to Libyan civilians comes not from NATO or the United States military, but from Qadhafi. The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. forces,¹⁶ and with the risk that the President would entangle them in an overseas conflict from which they could not readily be extricated. In this instance, the absence of U.S. ground troops, among other features of the Libya operation, significantly reduces both the risk to U.S. forces and the likelihood of a protracted entanglement that Congress may find itself practically powerless to end.¹⁷

Third, the risk of escalation is limited: U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope. Contrast this with the 1991 Desert Storm operation, which although also authorized by a United Nations Security Council resolution, presented “over 400,000 [U.S.] troops in the area—the same order of magnitude as Vietnam at its peak—together with concomitant numbers of ships, planes, and tanks.”¹⁸ Prior administrations have found an absence of “hostilities” under the War Powers Resolution in situations ranging from Lebanon to Central America to Somalia to the Persian Gulf tanker controversy, although members of the United States Armed Forces were repeatedly engaged by the other side’s forces and sustained casualties in volatile geopolitical circumstances, in some cases running a greater risk of possible escalation than here.¹⁹

Fourth and finally, the military means we are using are limited: This situation does not present the kind of “full military engagement[] with which the [War Pow-

¹⁴The fact that the Defense Department has decided to provide extra “danger pay” to those U.S. service members who fly planes over Libya or serve on ships within 110 nautical miles of Libya’s shores does not mean that those service members are in “hostilities” for purposes of the War Powers Resolution. Similar danger pay is given to U.S. forces in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and dozens of other countries in which no one is seriously contending that “hostilities” are occurring under the War Powers Resolution.

¹⁵In Lebanon, the Reagan administration argued that U.S. Armed Forces were not in “hostilities,” though there were roughly 1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those attacks. See Richard F. Grimmett, Congressional Research Service, “The War Powers Resolution: After Thirty Six Years” 13–15 (Apr. 22, 2010); John H. Kelly, Lebanon: 1982–1984, in “U.S. and Russian Policy-making With Respect to the Use of Force” 85, 96–99 (Jeremy R. Azrael & Emily A. Payin eds., 1996). In Grenada, the administration did not acknowledge that “hostilities” had begun under the War Powers Resolution after 1,900 members of the U.S. Armed Forces had landed on the island, leading to combat that claimed the lives of nearly 20 Americans and wounded nearly 100 more. See Grimmett, *supra*, at 15; Ben Bradlee, Jr., “A Chronology on Grenada,” *Boston Globe*, Nov. 6, 1983. In Somalia, 25,000 troops were initially dispatched by the President, without congressional authorization and without reference to the War Powers Resolution, as part of Operation Restore Hope. See Grimmett, *supra*, at 27. By May 1993, several thousand U.S. forces remained in the country or on ships offshore, including a Quick Reaction Force of some 1,300 marines. During the summer and into the fall of that year, ground combat led to the deaths of more than two dozen U.S. soldiers. John L. Hirsch & Robert B. Oakley, “Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping” 112, 124–27 (1995).

¹⁶The text of the statute supports this widely held understanding, by linking the pullout provision to the “introduction” of United States Armed Forces “into hostilities,” suggesting that its primary focus is on the dangers confronted by members of our own military when deployed abroad into threatening circumstances. section 5(c), by contrast, refers to United States Armed Forces who are “engaged in hostilities.”

¹⁷*Cf. Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982) (“The War Powers Resolution, which was considered and enacted as the Vietnam war was coming to an end, was intended to prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop.”).

¹⁸John Hart Ely “War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath” 50 (1993).

¹⁹For example, in the Persian Gulf in 1987–88, the Reagan administration found the War Powers Resolution’s pullout provision inapplicable to a reflagging program that was conducted in the shadow of the Iran-Iraq war; that was preceded by an accidental attack on a U.S. Navy ship that killed 37 crewmen; and that led to repeated instances of active combat with Iranian forces. See Grimmett, *supra* note 15, at 16–18.

ers] resolution is primarily concerned.”²⁰ The violence that U.S. Armed Forces have directly inflicted or facilitated after the handoff to NATO has been modest in terms of its frequency, intensity, and severity. The air-to-ground strikes conducted by the United States in Libya are a far cry from the bombing campaign waged in Kosovo in 1999, which involved much more extensive and aggressive aerial strike operations led by U.S. Armed Forces.²¹ The U.S. contribution to NATO is likewise far smaller than it was in the Balkans in the mid-1990s, where U.S. forces contributed the vast majority of aircraft and air strike sorties to an operation that lasted over 2½ years, featured repeated violations of the no-fly zone and episodic firefights with Serb aircraft and gunners, and paved the way for approximately 20,000 U.S. ground troops.²² Here, by contrast, the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets. A very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners. American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission; since the handoff to NATO, the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo. All NATO targets, moreover, have been clearly linked to the Qadhafi regime’s systematic attacks on the Libyan population and populated areas, with target sets engaged only when strictly necessary and with maximal precision.

Had any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn. But the unusual confluence of these four factors, in an operation that was expressly designed to be limited—limited in mission, exposure of U.S. troops, risk of escalation, and military means employed—led the President to conclude that the Libya operation did not fall within the War Powers Resolution’s automatic 60-day pullout rule.

Nor is this action inconsistent with the spirit of the resolution. Having studied this legislation for many years, I can confidently say that we are far from the core case that most Members of Congress had in mind in 1973. The Congress that passed the resolution in that year had just been through a long, major, and searing war in Vietnam, with hundreds of thousands of boots on the ground, secret bombing campaigns, international condemnation, massive casualties, and no clear way out. In Libya, by contrast, we have been acting transparently and in close consultation with Congress for a brief period; with no casualties or ground troops; with international approval; and at the express request of and in cooperation with NATO, the Arab League, the Gulf Cooperation Council, and Libya’s own Transitional National Council. We should not read into the 1973 Congress’ adoption of what many have called a “No More Vietnams” resolution an intent to require the premature termination, nearly 40 years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya. Given the limited risk of escalation, exchanges of fire, and U.S. casualties, we do not believe that the 1973 Congress intended that its resolution be given such a rigid construction—absent a clear congressional stance—to stop the President from directing supporting actions in a NATO-led, Security Council-authorized operation, for the narrow purpose of preventing the slaughter of innocent civilians.²³

²⁰“Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization,” 4A Op. O.L.C. 185, 194 (1980).

²¹In Kosovo, the NATO alliance set broader goals for its military mission and conducted a 78-day bombing campaign that involved more than 14,000 strike sorties, in which the United States provided two-thirds of the aircraft and delivered over 23,000 weapons. The NATO bombing campaign coincided with intensified fighting on the ground, and NATO forces, led by U.S. forces, “flew mission after mission into anti-aircraft fire and in the face of over 700 missiles fired by Yugoslav air defense forces.” Hearing Before the S. Armed Servs. Comm., 106th Cong. (1999) (statement of Gen. Wesley Clark, Admiral James Ellis, Jr. & Lt. Gen. Michael Short).

²²See “Proposed Deployment of United States Armed Forces into Bosnia,” 19 Op. O.L.C. 327 (1995); Dean Simmons et al., U.S. Naval Institute, *Air Operations over Bosnia*, Proceedings Magazine, May 1997, available at <http://www.usni.org/magazines/proceedings/1997-05/air-operations-over-bosnia>; NATO Fact Sheet, Operation Deny Flight (July 18, 2003), <http://www.afsouth.nato.int/archives/operations/DenyFlight/DenyFlightFactSheet.htm>. U.S. air operations over Bosnia “were among the largest scale military operations other than war conducted by U.S. forces since the end of the cold war.” Simmons et al., *supra*.

²³As President Obama noted in his June 22, 2011, speech on Afghanistan: “When innocents are being slaughtered and global security endangered, we don’t have to choose between standing idly by or acting on our own. Instead, we must rally international action, which we’re doing in Libya, where we do not have a single soldier on the ground, but are supporting allies in protecting the Libyan people and giving them the chance to determine their own destiny.”

Nor are we in a "war" for purposes of Article I of the Constitution. As the Office of Legal Counsel concluded in its April 1, 2011, opinion,²⁴ under longstanding precedent the President had the constitutional authority to direct the use of force in Libya, for two main reasons. First, he could reasonably determine that U.S. operations in Libya would serve important national interests in preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. Second, the military operations that the President anticipated ordering were not sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause. Although time has passed, the nature and scope of our operations have not evolved in a manner that would alter that conclusion. To the contrary, since the transfer to NATO command, the U.S. role in the mission has become even more limited.

Reasonable minds may read the Constitution and the War Powers Resolution differently—as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy: Will Congress provide its support for NATO's mission in Libya at this pivotal juncture, ensuring that Qadhafi does not regain the upper hand against the people of Libya? The President has repeatedly stated that it is better to take military action, even in limited scenarios such as this, with strong congressional engagement and support. However we construe the War Powers Resolution, we can all agree that it serves only Qadhafi's interest for the United States to withdraw from this NATO operation before it is finished.

That is why, in closing, we ask all of you to take quick and decisive action to approve S.J. Res. 20, the bipartisan resolution introduced by Senators Kerry, McCain, Durbin, Cardin, and seven others to provide express congressional authorization for continued, constrained operations in Libya to enforce U.N. Security Council Resolution 1973. Only by so doing, can this body affirm that the United States Government is united in its commitment to support the NATO alliance, the safety and stability of this pivotal region, and the aspirations of the Libyan people for political reform and self-government.

Thank you. I look forward to answering your questions.

The CHAIRMAN. Thank you very much, Harold Koh. We appreciate the testimony enormously.

I am going to reserve my time for such time as I may want to intervene with my questions, and I will turn to Senator Lugar to start.

Senator LUGAR. Mr. Koh, one of the reasons why it is important to have this hearing and likewise debate on this issue is that throughout the Middle East, but even throughout the world, there are a number of situations in which the United States and other nations have severe disapproval of the governments of those countries. As a matter of fact, from time to time, we make speeches. We editorialize. We work with others in the United Nations to attempt to bring about conditions that are better for the people of countries that we believe are under a totalitarian or very authoritarian misrule.

Now, in this particular instance, the Libyan situation arose following uprisings in Tunisia and Egypt, which certainly caught the attention of the United States and the world, quite apart from the Arab League and the United Nations and NATO.

In the case of Libya, however, the Arab League and the United Nations and NATO and what have you and ultimately the United States made a decision to intervene in a civil war. There was shooting going on in Libya. It could very well be that persons who were innocent might be caught in the crossfire. This is the tragedy of civil wars, I suspect, wherever they may be held on this earth.

²⁴Office of Legal Counsel, U.S. Dep't of Justice, President's Authority to Use Military Force in Libya, <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (Apr. 1, 2011).

In this particular instance, our decision was to intervene in a civil war, and we are continuing to intervene in a civil war. And despite the fact that we talk about limited hostilities, we also talk openly as a Government about the end of the Muammar Qadhafi rule, about the importance of Qadhafi leaving the country, and we even send out rumors that he may be entertaining such thoughts.

My basic question is if we do not have some ground rules, the War Powers Act may be one area where we try to work this thing out or a more formal declaration of war. And this country could decide to intervene in numerous civil wars. It could decide really to affect the governance of peoples all over the world that we feel is unfair.

What is your general comment about this predicament? In other words, you may feel very strongly that the Qadhafi rule is so egregiously out of line as opposed to all the other dictators that we have witnessed all over the earth that there is no doubt that we should intervene to prevent him from winning, to prevent him from shooting at people who may be opposing him and who may be shooting at him and his forces. What is the ground rule for dealing with civil war wherever we may find it all over the earth?

Mr. KOH. Senator, thank you for that very thoughtful question. You have, over your career, been one of the most thoughtful defenders of the Constitution in foreign affairs. And I recognize the difference of view between what I have expressed and what you have expressed is from a good faith disagreement. I understand the concern that you have.

But throughout the Middle East, there is only one situation in which there is a U.N. Security Council resolution narrowly drawn in which NATO has agreed to take command of the operation, in which the Arab League supported the operation, in which four Muslim countries were ready to join the coalition, have been flying flights, and in which the President was, as I have suggested, able to structure the mission so that it was of limited nature, so the United States would move very quickly into a limited supporting role, where there would be no ground troops so that there would be a limited exposure, where the risk of escalation would be low, and where the United States after the transition would narrow the means being employed so that only its unique capabilities could be used to prevent Qadhafi from using the tools of command and control to kill his own people. So that is a very unusual set of circumstances. And what we are saying is in that set of circumstances, the President acted lawfully in proceeding as he did.

Now, the wisdom of proceeding in other countries is, obviously, a subject of substantial discussion. It would be complicated, I am sure, to replicate that unusually narrow set of facts.

But I say this because I think that our theory and legal approach has been dramatically misunderstood. There is some suggestion that we are flouting the Constitution. In fact, we have made it clear that we are not challenging the constitutionality of the resolution. What we are arguing about is whether a very unusual situation fits within a resolution that has been on the books now for almost 40 years and which was designed to play a particular role and will have to be adapted to play that role effectively in this century.

Senator LUGAR. Well, obviously, I raise the question because I fear that there may be circumstances in which we make a decision based upon the Security Council or somebody else to intervene in other situations. I would like our own war powers declaration to be clarified before we get to that point.

I raise one more point, and this may require more hearings, and that is, although we say that the force that we are offering is limited—and this could include the missiles that we fire or drone strikes or what have you—my guess is that if another country were employing such methods against us without employing any troops on the ground in the United States or any of the so-called conventional means of war, we would see this as an act that was hostile. This would clearly be hostilities. Very clearly, we would say that is grounds for us to be at war with whoever is firing at us in these situations.

This is why I think perhaps the administration needs to work with the Congress to try to think through in this era of drone warfare or long-distance warfare. That is not a question simply of whether American casualties occur or there are hostilities on the ground. A war in the future may be fought in an entirely different way, perhaps not encompassed by the War Powers Act, but surely needing to be encompassed by all of us who are thoughtful about the evolution of these hostilities.

Mr. KOH. Well, Senator, you make two points.

I was thinking this morning, as I was coming up here, that the first time I testified before the Senate on war powers issues was in January 1991 as Desert Shield was about to become Desert Storm. There was a U.N. Security Council resolution there. But the question was did you also need an authorization of use of military force. And my position there, which remains the same, is that in that circumstance, despite the fact of a multinational coalition authorized by a Security Council resolution, the proposal for 400,000 U.S. troops and comparable vessels and accompanying forces which was the number of forces in Vietnam at its height. So a U.N. Security Council resolution alone does not absolve a situation of requiring approval.

What makes this situation unusual is not the existence of a Security Council resolution, but the fact that the mission that has been structured under it is so limited with the U.S. playing such a narrow and supporting role and with such limited exposure. We are talking about, as Senator Kerry said, no casualties, no threat of casualties, no significant armed engagements.

Now, another point that has been made by some about our legal approach is that we are somehow suggesting that drones get a free pass under the War Powers Resolution. That is not at all what we are saying. But you make the key point which is when the statute talks about the introduction of U.S. Armed Forces into hostilities and what you are sending in is an unmanned aerial vehicle high in the sky, it is not clear that that provision was intended to apply to that particular weapon.

Now, it does lead to the question of how to update the War Powers Resolution for modern conflict. There will be situations of cyber conflict and other kinds of modern technologies coming into play which Senators and Members of Congress never envisioned in

1973. So it may well be—and I think you make the point well—that there was an effort here in the wake of Vietnam to draw a kind of framework statute that would allocate authorities, call for reporting, try to promote dialogue. That has existed for nearly 40 years. But many of the provisions, particularly the mechanical ones such as the automatic pullout provision, may turn out to be poorly suited for the current situation.

Senator LUGAR. Thank you.

The CHAIRMAN. Thank you, Senator Lugar.

Senator CASEY.

Senator CASEY. Thanks very much.

I wanted to pursue some of the same line of questioning, and I appreciate the fact that this is difficult as a matter of constitutional law but also difficult as a matter of policy and perception.

I hear a lot from people in Pennsylvania that have real concerns about this policy not only on some of the constitutional debates we are having but just in terms of the clear impression that has been created that we are engaged in hostilities of one kind or another. It gets very difficult for people to separate from that perception.

There are reports we know, at least according to the New York Times, that since this handoff took place, that United States warplanes have struck, according to this one report, 60 Libyan targets and, at the same time, unmanned drones, according to this report, fired at Libyan forces roughly 30 times.

So in the context of that reporting, I would ask you about this broader question, I guess—or it is actually a more pointed question—as it relates to the administration's justification of armed drone attacks and so-called nonhostile operations. How do you get there just as a matter of law?

Mr. KOH. Thank you, Senator. I appreciate again the thoughtfulness of the question, which I think is a very good one.

In the early days of the Libyan action, as Secretary Gates described, the goal was to create a no-fly zone to prevent Qadhafi from attacking his own people. As we point out in footnote 5 of my testimony, Qadhafi appears to have rules of engagement that call for indiscriminate attacks on his own people, no mercy rules, rape as a weapon of war. These have led to both the commission of inquiry and yesterday an arrest warrant against him at the International Criminal Court.

So the question of what kind of military mission to structure—to respond—and the core of it was, first, the establishment of the no-fly zone, and then, second, for the United States to shift from a lead role into a support role. And the bulk of the contributions, as I have suggested, has been primarily intelligence, refueling, search and rescues, flyovers, and the like with no fire at all.

But there are two elements that have been added to the picture. One is enemy air defenses. If Qadhafi's command and control existed and if initial efforts have been made to destroy that command and control and he shifts those operations to other command and control, he can replicate his capacity to kill civilians. And so to move from one and then stop is simply allowing Qadhafi in a game of Whac-A-Mole to return to the very acts that led to the intervention in the first place.

That has been the basis of the notion that American strikes should be authorized on an as-needed basis to suppress enemy air defenses, to enforce the no-fly zone, and then the unique capabilities that American military forces have been requested by the NATO allies to hit particular discrete targets to support the civilian protection mission, particularly command and control or other kinds of anti-aircraft which are difficult to reach by other means.

Now, let me emphasize again some numbers that I gave earlier because I think they are important. In the overall number of sorties that have been flown, the United States is flying a quarter, but in the strike sorties that are being flown, the United States is flying only 10 percent. The Predator strikes, as you suggested, are a relatively small number. And the total number of munitions dropped by either manned or Predators at this moment, according to our best information, is less than 1 percent of the amount that was dropped in Kosovo, in which there was a substantial debate over the application of the War Powers Resolution.

So you came back to the question, are we engaged in hostilities? This is, as I said, not a parsing of dictionary terms. It is a statutory provision. Congress passes provisions all the time that have terms of art like "emergency." The word "treaty" in one statute was recently read to mean "executive agreement." I am sure the Foreign Relations Committee might have some questions about that, but that is the ruling of the Supreme Court. Here the word chosen was "hostilities," and over time hostilities has been defined through executive and congressional practice to encompass some level of strikes with a major focus, as I have suggested, being on whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained. And it is within that set of four limitations that apply here that it was our conclusion that we are well within the scope of the kinds of activity that in the past have not been deemed to be hostilities for purposes of the War Powers Resolution.

Senator CASEY. I will ask you some other questions by way of supplemental written questions.

But I would ask you as well, in connection with this, are you concerned about the precedent here as it relates to Executive power. Do you have any concerns about that? Do you think that this is breaking new ground?

Mr. KOH. Well, there are two different questions, Senator.

Of course, I am concerned about the precedent. I have spent much of my academic career writing about the balance of powers between Congress and the Executive in foreign affairs. In 1990, my first book on this subject, I pointed out that the basic structural flaw of the War Powers Resolution, which has a number of virtues—one of the virtues is it promotes dialogue through a blunt time limit. But one of its structural flaws is that it requires an automatic pullout with Congress ever having made a specific judgment about whether or not they approve or disapprove of an action. And that could lead in certain circumstances to atrocities resuming because of the lack of a clear congressional stance. The goal in the Vietnam era was to try to find a single congressional position that could be applied.

Now, I agree that there have been cases in which the executive branch has overreached. I have written about this in my academic work for many years, which is precisely why the precedent here we think has been narrowly drawn. As I said, we are not challenging the constitutionality of the resolution, which a number of administrations have. We are not saying the War Powers Resolution should be scrapped, whether it is constitutional or not. What we are simply saying is that when the mission is limited, the risk of escalation is limited, the threat to troops is limited particularly because of no ground troops, and when the tools being used are extremely limited, that that does not trigger the 60-day clock.

And in doing so, we look to Executive and congressional precedents dating back to 1975, the Persian Gulf tanker controversy, Lebanon, Somalia, Grenada, to see where it fit. And when you have a situation in which something like Kosovo or Bosnia where campaigns on a very large scale—and we are talking here about a zero casualty, little or no risk of escalation situation and 1 percent of the munitions, that strikes us as a difference that ought to be reflected in whether it fits within the scope of the statute.

So the very rationale that I am presenting today is limited. If any of those elements are not present, none of what I have said necessarily applies. You would have to redo the analysis.

Senator CASEY. Thank you.

The CHAIRMAN. Thank you, Senator Casey.

Senator Corker.

Senator CORKER. Thank you, Mr. Chairman.

And thank you for your testimony. I do want to say that in many cases I have heard certainly you today, but the administration try to justify sort of the ends—or the means for the end. I know that you have talked a little bit about Libya and Qadhafi and your handling of this. I just want to say that those are two very, very separate issues, and I am sure that up here there are people who have very differing opinions about our involvement in Libya but still have strong concerns about the way the administration has handled the actual process itself. So I do not think it is very helpful to try to meld the two together, and I think it really waters down the issue at hand.

I will say then that I find it humorous sitting here on the Foreign Relations Committee, the most deliberative body in the world some say, and basically you guys have not provided witnesses from the Department of Justice or the Pentagon. We seem to take that as a humorous thing. You know, the administration has basically said there is no reason for us to get any kind of resolution from Congress, and yet the Senate today in its urge to be “relevant” is rushing to give the administration a resolution even though it is basically saying in this case the Senate is irrelevant.

So I would ask you this one question. Now that you have taken this argument and seen the response that you have gotten from people on both sides of the aisle, are you still glad that you traveled this route as it relates to making the argument you have made about the War Powers Act?

Mr. KOH. Senator, I believe this argument. I think it is correct. I would not be here if I did not believe that.

Senator CORKER. I did not ask that. Are you glad that you basically created an issue where no issue had to exist by taking this narrowly defined route and basically sticking a stick in the eye of Congress? I mean, is that something that you are glad you have done?

Mr. KOH. Senator, that was not our intent, and if you felt that a stick was stuck, that was not the goal.

You said a number of things which I thought I should include in my answer.

One, the War Powers Resolution is not a mechanical device. It has to be construed in light of the facts at the time. Otherwise, the 1973 Congress would be making decisions instead of the Congress of 2011. So it has to take account of the circumstance.

Second, with regard to witnesses, I am the legal adviser of the State Department. Footnote 1 of my testimony reviews the many times that the legal adviser has appeared before this and other committees to present on the War Powers Resolution. This is my committee of jurisdiction. You voted my confirmation, and so I am here for the conversation.

Third, it was our position from the beginning that we were acting consistently with the War Powers Resolution, but that we would welcome support because, as Senator Lugar said, the President would always value a bipartisan support for this kind of effort or mission.

And finally, you asked whether we have made errors. I think that this controversy has probably not played out exactly as some would have expected. If we had to roll the tape back, I am sure there are many places where some would have urged—and I would have been among them—coming up earlier for more briefings and to lay out these legal positions. For my part of that, I take responsibility.

But I do believe that at the end of the day, the last thing we are saying, Senator—in fact, the thing we are not saying is that the Senate is irrelevant. To the contrary.

Senator CORKER. We are making ourselves irrelevant.

Let me do this. This is a long answer. I would like to have just a—I wanted to give you the respect of answering. I did not really want you to answer everything I just said, but since you have, I would like to have a couple extra minutes. Do you want to say any more regarding my opening comments?

Mr. KOH. I think the point of my testimony is however the legal question is addressed, there is still fundamentally the question of what to do about the civilians in Libya. And that is a decision on which the Senate can make a decision this afternoon. This committee.

Senator CORKER. Well, I do not think we are really making any decisions than are different than what you are carrying out. So we are rushing to make ourselves irrelevant this afternoon by virtue of passing something out that basically says—you know what it says.

So let me ask you this. The chairman mentioned that since no American is being shot, there are no hostilities. Of course, by that reasoning, we could drop a nuclear bomb on Tripoli and we would

not be involved in hostilities. It just goes to the sort of preposterous argument that is being made.

But I do think one of the issues of precedence that you are setting is that Predators now—and I do want to remind you the Justice Department of this administration has spent lots of time trying to deal with people's rights as it relates to terrorism and that kind of thing. And yet, basically what you all are doing by arguing this narrow case is saying that any President of the United States, Republican or Democrat, can order Predator strikes in any country and that is not hostilities. And of course, we know what Predators do. I think you know what they do, and lots of times human beings are not alive after they finish their work.

So basically what you are doing is arguing that a President can order Predator strikes in any place in the world by virtue of this narrow argument that you have taken and that is not hostilities and Congress plays no role in that.

Mr. KOH. Senator, that is not what I am arguing. Obviously, if Predator strikes were at a particular level or if we were carpet bombing a country using Predators, that would create a dramatically different situation. But the scenario that I have described to Senator Casey is a very different one. Within the constraints of this particular mission without ground troops, the Predators are playing a particular role with regard to the elimination of certain kinds of assets of Qadhafi that are being used to kill his own civilians. Even the numbers that Senator Casey mentioned are not close to the kind of level that we would consider to be ones that would trigger the pullout provision.

So I think the important thing—and the question that had been asked was are we presenting a limited position. Yes, because all four limitations are what bring it within the line of the statute. We do not say that any element at all by itself could not be expanded out of shape and require a reexamination under the War Powers Resolution. I gave the example of a U.N. Security Council situation, Desert Storm, that required approval because of the scale of the operation.

Senator CORKER. I think you have established a precedent. This administration has established a precedent for this country by taking this argument that any President, Republican or Democrat, can use Predators in any country they wish because that is limited hostilities without Congress being involved.

I am going to probably come to a close quicker than I wanted to because of the time.

But we do have aircraft flying over Libyan airspace. Do we not? That is yes or no.

Mr. KOH. Yes; we do.

Senator CORKER. And we do know that there are numbers of types of weapons that they have that could, in fact, take down our aircraft that are not necessarily in fixed positions. Is that correct?

Mr. KOH. That is correct.

Senator CORKER. So to say that our men and women in uniform are not in a position to encounter hostilities or involved hostilities is really pretty incredible.

You know, you cite the fact that hostilities has never been defined. I went back and read the House conference which basically

reported out the War Powers Act. As a matter of fact, they tried to make it a lesser level. They started out with "armed conflict," and then they used the word "hostilities." And they did so in such a manner to certainly talk about the kinds of conditions that exist today on the ground. So when you say that these are not hostilities, that is just patently not the intent of Congress when they passed the War Powers Act.

Now, you have introduced something unique, a mathematical formula. And I am sure future Presidents will use a mathematical formula. In other words, if we are only doing X percent of the bombing, then we are not involved in hostilities. But I find that not in any way to jibe with what the House sent out in its reporting language.

I am just going to close with this because my time is up, and I know the chairman is getting impatient.

I did not support your nomination. I thought you are a very intelligent person obviously, very well learned. But I felt that you had the likelihood to subject U.S. law or to cause it to be lesser important than international law. And while I made no statement to that effect publicly, I told you that privately when we met in our office. And that is exactly what you have done. You basically said the United Nations has authorized this and there is no need for Congress to act and we are going to narrowly define hostilities.

I would guess at night, however people of your category give high fives, you are talking to other academics about this cute argument that has been utilized. But I would say to you that I think you have undermined the credibility of this administration. I think you have undermined the integrity of the War Powers Act. And I think by taking this very narrow approach, you have done a great disservice to our country.

And I do hope—I do hope—that at some point we will look at the War Powers Act in light of new technology, in light of new conflicts, and define it in a way that someone using these narrow and what I would call cute arguments does not have the ability to work around Congress.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Corker.

I think it is important, obviously, to have these views out. I was not growing at all impatient. I am happy to give you extra time. I think this is an important discussion. As I think you know, Senator, I value my friendship and our relationship a lot.

But I do have to tell you, based on what you just said, that your facts are just incorrect. I mean, your basic facts on which you are basing your judgment is incorrect. Let me tell you why.

First of all, the President of the United States accepts the constitutionality of the War Powers Act and sought to live by it. No President has done that yet.

Senator CORKER. I did not argue that. So that is not a fact—

The CHAIRMAN. Well, but it is a fact because you come to the next point. Having done that, the President sent us a letter before the expiration of the time period. And in the letter—and I am going to put the letter in the record—he says: "Dear Mr. Speaker and Mr. President, the President Pro Tem in the Senate, on March 21, I reported to the Congress that the United States, pursuant to a

request from the Arab League and authorization by the United Nations Security Council, had acted 2 days earlier to prevent a humanitarian catastrophe by deploying U.S. forces to protect the people of Libya.”

He then goes on. I am not going to read the whole thing. But then he says: “Thus, pursuant to our ongoing consultations, I wish to express my support for the bipartisan resolution drafted by Senators Kerry, McCain, Levin, Feinstein, Graham, Lieberman which would confirm that the Congress supports the U.S. mission in Libya and that both branches are united in their commitment to supporting the aspirations of the Libyan people.”

Now, he asked us to do that before the expiration of the 60 days. But we did not do it. Do not blame the President. The Congress of the United States did not do it, and let me tell you why bluntly. Because both leaders in both Houses were unwilling at that point in time to do it. You know, let us be honest about this.

Senator CORKER. Well, I am being very honest, and I think that parsing words—

The CHAIRMAN. Well, you are not being honest.

Senator CORKER. And I have the ability to express my opinion just like you do and to use facts just like you do. And if you want to get into a debate about this right now, I am glad to do that. I would like—

The CHAIRMAN. Senator, you are not letting me finish my point which is that you are saying the President violated the process here and did not come to the Congress. He did come to the Congress. He sent us a letter requesting us to do the authorization and we did not do it. That is the simple fact here.

Moreover, there is a constitutional question here because in paragraph (b) of the War Powers Act, it says that the President shall terminate any use of the United States Armed Forces with respect to such report submitted unless the Congress has either declared war or has enacted a specific authorization within the 60-day period. So if Congress does not act, Congress can, in effect, by its lack of action challenge the constitutional right of the President to do something. That is, in effect, a constitutional standoff.

And any Senator could have gone to the floor of the U.S. Senate with a resolution during those 60 days. No Senator chose to do so.

So all I am saying is I am not going to sit here and let everybody throw the dart at the White House saying the President violated this and that when he was the first President to ever say I accept the constitutionality of the War Powers Act. Second, he sent us a letter before the expiration of the time asking us to pass the authorization. And third, I will say this to you as the chairman. I went to the leaders. Nobody wanted to do it. So here we are.

So the real relevant question here is whether or not—I agree with you. I think there are some serious constitutional questions about Predators, how do they fit, and I think Legal Adviser Koh has accepted that. We need to exercise our responsibility to modernize this.

But the mere fact that hostilities are taking place—and they are—does not per se mean United States Armed Forces have been introduced into those hostilities if they are not being shot at, if

they are not at risk of being shot at, if there is no risk of escalation, if the mission is narrowly defined.

So I know none of us want to get trapped in the legalese here and we want to try to do this in the right way. But it is just wrong to suggest that somehow the President went outside the constitutional process here when, in fact, Congress—us—have done nothing within those 60 days to either authorize it or declare war or not.

[The May 20, 2011, letter from the President on the War Powers Resolution follows:]

Dear Mr. Speaker and President Pro Tem: On March 21, I reported to the Congress that the United States, pursuant to a request from the Arab League and authorization by the United Nations Security Council, had acted 2 days earlier to prevent a humanitarian catastrophe by deploying U.S. forces to protect the people of Libya from the Qaddafi regime. As you know, over these last 2 months, the U.S. role in this operation to enforce U.N. Security Council Resolution 1973 has become more limited, yet remains important. Thus, pursuant to our ongoing consultations, I wish to express my support for the bipartisan resolution drafted by Senators Kerry, McCain, Levin, Feinstein, Graham, and Lieberman, which would confirm that the Congress supports the U.S. mission in Libya and that both branches are united in their commitment to supporting the aspirations of the Libyan people for political reform and self-government.

The initial phase of U.S. military involvement in Libya was conducted under the command of the United States Africa Command. By April 4, however, the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the coalition's efforts. Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation, including intelligence, logistical support, and search and rescue assistance; (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone; and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition's efforts.

While we are no longer in the lead, U.S. support for the NATO-based coalition remains crucial to assuring the success of international efforts to protect civilians from the actions of the Qaddafi regime. I am grateful for the support you and other Members in Congress have demonstrated for this mission and for our brave service members, as well as your strong condemnation of the Qaddafi regime. Congressional action in support of the mission would underline the U.S. commitment to this remarkable international effort. Such a Resolution 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.

Sincerely,

BARACK OBAMA.

Senator CORKER. Well, Mr. Chairman, I would just respond that I think the central element of my argument to Mr. Koh who, by the way, I very much respect his intellect—I do not respect his judgment in this particular case. My argument is around the issue of hostilities. That is what the focus of my argument was, and by narrowly defining that or being cute where you say I support the constitutionality of the War Powers Act, but on the other hand, since we are not really involved in hostilities—wink, wink—we really do not need to deal with Congress. That is the part. That just happened on the 15th.

I do not think anybody in this body had any idea that the President would take such a narrow, narrow interpretation of hostilities. I do not think anybody knew that. I think it has been a shock to all. I think the President wishes he had handled this differently because what has happened is by being cute, they have introduced a whole other debate here that should not be taking place. And my

guess is they might have gotten overwhelming support for a limited operation, whether I support it or not. What they have done by trying to have it both ways, which is what they did with the June 15 letter, is interject a debate that has to do with credibility, has to do with integrity, and to me is a great disservice to this country.

So I stand by what I just said. It is factual. And I will be glad to debate this all day long.

The CHAIRMAN. Well, hopefully, we do not have to do that at 2:30 this afternoon. I am sure that we can do it without debating it all day long.

But I do think that it is important. I did hear you say, quote, rushing to give a resolution and I heard you say the Senate is irrelevant. And I think that when you measure those things against the reality of what the President asked us to do, any of this issue is really because the Senate has been having a very difficult time getting anything done lately.

Senator Webb.

Senator WEBB. Thank you, Mr. Chairman.

I would like to express my admiration for Senator Corker showing me how to turn 7 minutes into 25 minutes. [Laughter.]

I have been trying to figure out how to get more time on this committee for 4½ years.

I would just like to say a couple things very quickly in reaction to the exchange that just took place. One of them is that whether or not the President consulted with certain people in the Senate, and whether or not there was a request for us to validate the actions, the issue before us right now is this administration is coming forward and saying the War Powers Act does not apply in this situation because of their very narrow and, in my opinion, contorted legal definition of "hostilities." That is the issue that is before us—not the other one.

I would just like to say I think the most unusual part of this decision was not simply the issue that Senator Corker raised, which is a very important issue in terms of the use of indirect fire, but the use by a President of a very vague standard that he or she can unilaterally inject military force into situations around the world based on a vague standard of humanitarian assistance. We have not seen that before. And that is something that demands a certain amount of accountability. This was the major reason that I started to become concerned with the way this operation was unfolding.

But I will say when you have an operation that goes on for months, costs billions of dollars, where the United States is providing two-thirds of the troops even under the NATO fig leaf, where they are dropping bombs that are killing people, where you are paying your troops offshore combat pay—and there is a prospect of escalation. It has something I have been trying to get a clear answer from with this administration for several weeks now, and that is the possibility of a ground presence in some form or another once the Qadhafi regime expires. I would say that is hostilities.

Now, Mr. Koh, there was a debate inside the administration on this definition. Was there not?

Mr. KOH. The President took the position and that is the position—

Senator WEBB. Yes, but there was a debate as to the issue of whether this constituted hostilities, and we have read about it in the paper.

Mr. KOH. Well, Senator—

Senator WEBB. Just yes or no.

Mr. KOH. I cannot comment on—

Senator WEBB. Well, for the record, there is plenty of reporting that there was a good bit of debate as to whether this was the right way to go.

What do you make of the fact that military offshore are receiving combat pay?

Mr. KOH. They are also receiving it in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and dozens of other countries under the same provision. It does not mention hostilities, and I do not think anybody believes that we are in a War Powers Resolution situation in those countries. We are talking about something different.

I think the point, Senator, which—these are hard questions.

Senator WEBB. I do not mean to interrupt you, but I really only have about 7 minutes here.

The CHAIRMAN. I will give you time. These are important issues.

Senator WEBB. All right. Then go ahead and finish your thought.

Mr. KOH. Imminent danger pay is given on a different basis than hostilities. And so one statute applies to one and one applies to the other.

At the end of the day, this is a question of statutory interpretation. It is not the administration that is saying that drones are not covered. The question is whether when you have an unmanned aerial vehicle, that is an introduction of a U.S. armed force in a statute that was drafted by Congress. So if that language no longer works, then—

Senator WEBB. Well, in general, because if you are engaged in a Vietnam type military operation, which I was, you have certain support elements that are providing indirect assistance to the people who are putting bullets on the battlefield. I really do not see any distinction here in the Vietnam environment, or a journalist in Afghanistan, or if was a journalist in Beirut. Not everybody is a trigger puller. The definition that you are using that makes a distinction between aircraft that are refueling the bombers or conducting intelligence activities or surveillance is an artificial distinction.

Mr. KOH. Well, Senator, nobody is saying that something replicating Vietnam at this moment would not be—

Senator WEBB. No; I am not talking about Vietnam per se. I am talking about multiple environments: Afghanistan, same. Beirut—same thing.

Mr. KOH. I think you make the most important point of all, Senator. These are questions of judgment. In your role in the Navy, you played that role of exercising that judgment. It is not a mechanical formula. And the question is whether the mission, when it has been shaped this particular way in this particular setting

with this particular risk of escalation, exposure, which are very low—

Senator WEBB. You have repeated that language several times today. I understand your point on that language.

Let me ask you another question because it is very important.

We still have not severed relations with the Qadhafi government. Or have we? If we have, it has been in the last week or so. We have suspended our relations with Qadhafi regime, but we have not severed relations. So technically we still recognize this government. Would that be a correct interpretation?

Mr. KOH. Well, Senator, we are trying to hold them responsible—

Senator WEBB. No, no. Give me a legal answer. We have not severed relations. Is that correct?

Mr. KOH. And the reason for that—

Senator WEBB. No. Is that correct?

Mr. KOH. The relations have been suspended.

Senator WEBB. They are suspended but they have not been severed.

Mr. KOH. That is correct.

Senator WEBB. So what is the constitutional limitation on the assassination of a head of state?

Mr. KOH. The assassination of a head of state is restricted by Executive order. That Executive order is enforced. Admiral Locklear has made clear that despite press reports, he has not expressed a view.

Senator WEBB. So the Executive order would say that there is preclusion against the assassination of a head of state.

Mr. KOH. Well, the wording of it is an unlawful act, and the interpretation of the assassination ban would depend on the facts of the situation.

But I think the reason for the lack of severing is so that the Qadhafi government can remain responsible under international law for those things that Qadhafi is doing by using the forces of the government.

Senator WEBB. I understand that. I understand that. You cannot distinguish that out on this point any more, quite frankly, I think it is relevant to distinguish out hostilities based on these other realities. And, there are people who are going to have differences of opinion about that. But I wanted to make that clear because there is a lot of talk up here about the way in which Qadhafi should exit. Nobody up here wants him to remain, but the moral standard that we set on issues like this is the same one that we should expect and it is a point we need to be thinking about.

Thank you, Mr. Chairman.

The CHAIRMAN. I think it is a good point, Senator Webb, and I am glad you raised it and I appreciate the line of questioning.

I do not want you to feel cut off because there are only two other Senators. Obviously, the purpose of having the limitation is when everybody is here, but if there are four or five of us, I am very happy to let Senators go longer. So I want to make sure you feel—

Senator WEBB. Thank you, Mr. Chairman. I feel well taken care of today. Thank you.

The CHAIRMAN. Thanks. I appreciate it. [Laughter.]

The CHAIRMAN. Senator Lee.

Senator LEE. Thank you so much for joining us today.

I want to start out by thanking the members of our Armed Forces, those who sacrifice much in order to place themselves in harm's way to stand up for American national security. I appreciate them.

The issue we are discussing today does implicate a number of questions that are important to American national security especially when we consider the fact that there are lots of places in the world where our national security is in one way or another placed in jeopardy by some of the things that people are doing and things that people are saying. So I think it is appropriate that we have this discussion because we want to make sure that when we deploy these people, these brave young men and women who serve us and serve us so well, that we are doing so in a way that maximizes their utility to protecting Americans at home.

The first question I would like to ask you relates to the definition of the term "hostilities" as used in section 1541 and elsewhere in the War Powers Resolution. How do you define the term "hostilities" as used in the War Powers Resolution?

Mr. KOH. As our testimony sets forth, the effort to define it—and this is described in the descriptions of the conversations of Senator Javits, the sponsor, et cetera, was to leave the matter for subsequent executive practice.

Senator Corker had mentioned the House conference report had originally proposed the term "armed conflict." There was an irony in the question which is that "armed conflict" is a term of international law. They deliberately did not import that term into this statute precisely so that international law would not be the controlling factor.

And the net result was that in 1975 under the Ford administration—and you know it well because of service that your own family did in that administration—the Congress—and this is in the first footnote of my testimony—invited the legal adviser, my predecessor, Monroe Leigh, to come forward with a definition of hostilities from the executive branch, applying exactly the judgments that we are describing here. And in my testimony, I describe the response that was given by Mr. Leigh and his coauthor in which they essentially set forth a standard—and this is on page 6 of the testimony—in which they said the executive branch understands the term "to mean a situation in which units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces," and then said that the term should not include situations which were ones in which the nature of the mission is limited, where the exposure of U.S. forces is limited, where the risk of escalation is limited, or when they are conducting something less than full military encounters as opposed to surgical military activities.

Senator LEE. Where is that from, Mr. Koh?

Mr. KOH. It is described on page 6 of my testimony and it is in the first footnote, the letter from State Department Legal Adviser Monroe Leigh with regard to the Mayaguez incident to the Inter-

national Security and Scientific Affairs of the House Committee on International Relations.

It is an important document, Senator, because Congress acknowledged that it did not know what hostilities meant from the legislative history alone, and so they invited the executive branch to give clarification.

Senator LEE. And I do not disagree with the broader definition, but like so many definitions, that one has been severely undermined and here, I believe arguably, vitiated by the exceptions to it. Does it not strike you as something that is a little bit dangerous to say? Even when we have our own armed services or armed personnel firing upon the military establishment, the radar systems, and other components of a foreign nation's defense system on their foreign soil, regardless of whether we have got boots on the ground, it seems to me to be hard to say that that does not involve hostilities.

Given the limitations on our time, though, I would love to take a step in a different direction and then come back to this, if we have got time afterward.

In your opinion, is this question, the question of the constitutionality of the War Powers Resolution, one that logically could or ever would be resolved in any Article III court proceeding in light of, A, the nonjusticiable political question doctrine and, B, immunity that might be enjoyed by one or more parties to any suit that might be brought?

Mr. KOH. I think, Senator, it is a good question. I think it is highly unlikely that it would be justiciable. There was in the Vietnam era a number of famous cases, *Holtzman v. Schlesinger*, where some cases did get into court. But the general pattern of the case law since then has been that these suits have been dismissed on some preliminary ground.

But going to the earlier point which you made, which is when someone is firing, when there are boots on the ground, does that per se rise to the level of hostilities, the testimony that I gave points to in prior administrations in situations in Lebanon, Grenada, the Persian Gulf tanker controversy, Bosnia, Kosovo, all were circumstances in which there were more casualties, more boots on the ground, many, many hundreds of more munitions dropped, and those were not deemed, under those circumstances to be hostilities. It is on that basis that we have come here saying that we think that this factual situation, unique factual situation, limited in these ways fits within the frame of hostilities as has been understood that therefore it does not trigger the 60-day limit.

A final point, and I think it is an important one to emphasize. We are not here—

Senator LEE. Actually, I know you have got a final point that you want to make. I do have a final question that I really want to ask.

Mr. KOH. Please.

Senator LEE. Let us assume for purposes of the discussion here that we are dealing with hostilities. If we were dealing with hostilities, if you agreed with me that we were dealing with hostilities, under section 41, would the President not have to justify, in addition to the 60-day requirement, the other timing-related requirements, the reporting requirements, consultation and so forth—

wouldn't the President also have to articulate a military justification for our involvement in those hostilities based on the language of section 1541, meaning that they are justified either by some form of statutory authorization from Congress, by declaration of war, or by a national emergency, not just any national emergency but one created by an attack on the United States, on its territories or possessions or on its armed forces? Wouldn't that be the President's duty?

Mr. KOH. Well, the President has complied with the reporting provisions and, in fact, past administrations have, by and large, responded—

Senator LEE. Yes, sir, but I'm not talking about the reporting obligations. I am talking about the 1540, the requirement in section 1541 that recognizes that the constitutional power of the President, the Article 2 Commander in Chief power of the President as Commander in Chief to introduce the United States Armed Forces into hostilities, are exercised only pursuant to a declaration of war, statutory authorization, or just national security emergency created by an attack. That's what I'm talking about.

Mr. KOH. Well, Senator, as you can imagine, these are questions that have been debated for years. That is a statement by the 1973 Congress about what it thinks are the limitations of the President's capacity to introduce forces. Take, for example, Professor Louis Hankin of Columbia Law School. In his book "Foreign Affairs and the Constitution" describes a range of military actions less than hostilities and less than war which have been done outside the scope of that. So the question has always been, is that an exhaustive list or is it not an exhaustive list?

But I think the critical point here is that what we are arguing here simply is the provisions of the statute from our perspective are not triggered, therefore we don't even get to the question of whether the constitutionality of the statute is in play. We have no intention in this situation to raise that issue, and we are operating as a matter of good faith statutory interpretation based on the very unusual facts present here.

Senator LUGAR [presiding]. Thank you very much, Senator Lee. Senator Coons.

Senator COONS. Thank you. I want to thank Chairman Kerry for his leadership in convening now five different hearings since February on the actions in Libya, and I want to thank Senator Lugar and others for raising, I think, critical questions surrounding our engagement in Libya and the questions that pertain to the War Powers Resolution.

In the face of the atrocities committed by Qadhafi earlier this year, the United States I believe did have an obligation to protect the Libyan people from the very real threat of massacre, and I supported and applauded the passage of U.N. Resolution 1973 to protect Libyan civilians, and was encouraged by the strong international consensus surrounding this issue and have so far supported U.S. military engagement as one component of a broad multilateral commitment led by NATO.

At the same time, I have real and growing concerns about the approach to the war powers issue, and in particular about the precedent that may be set here.

So, Mr. Koh, it's wonderful to be with you again. I have, as always, found you an able and compelling advocate today. I am reminded of an old saw in legal practice. When the law is on your side, argue the law. When the facts are on your side, argue the facts. When neither is on your side, pound the table. And I note that today you've argued the facts. You have, I think, as ably as one possibly could, explained a very narrow reading of hostilities, and a number of the Senators who have spoken before me have reflected the fact that our constituents are finding very real tension between a commonsense understanding of hostilities and the exercise of statutory construction in which you are engaged, appropriately in your role, to define these four narrowing factors of mission, exposure, means, and risk of escalation.

The only part of Senator Corker's comments to you that I would in any way agree with would be the concern about statistics and the use of a percentage justification. Other than that, I frankly find your focus on the unique facts of this current Libyan situation largely compelling, and I am hopeful that later today our committee will move to make appropriate resolution to this ongoing impasse between the administration and the Senate.

You repeatedly refer to one of the good outcomes of the War Powers Resolution being that it promotes interbranch dialogue, and I suspect you've gotten a great deal of that dialogue today. I have a few questions I'd be interested in hearing your input on, understanding and respecting the difference in our constitutional roles.

One would be just—and I'd urge you to answer this in the context of the other two. What else could we and should we have been doing between the branches to more effectively foster that dialogue? As you know through your able scholarship in this field, the War Powers Resolution is a rough-hewn artifact of its time. I have been very concerned that through a lack of respect and application it has drifted into near irrelevance, and I was encouraged to hear the chairman's comment and your testimony that strongly suggests that this administration affirms its constitutionality, its relevance going forward, and I hope would like to work in partnership to find ways to make it an effective tool of interbranch dialogue.

So first, in your response to Senator Lugar, you said that drones don't get a pass under the War Powers Resolution. You also made, I think, telling reference to cyber warfare. The Department of Defense just issued a new statement on cyber warfare policy. Since you've obviously given great thought to these questions over many years, how might you suggest that we update the War Powers Resolution to reflect the reality of modern warfare, one in which many of the factors cited by your predecessor in your current role could not have anticipated, and to reflect some of the points raised by Senator Webb, ones in which American soldiers would not be exchanging fire, would not be directly at risk, where the threat of escalation might be quite limited but where nonetheless, not just in a commonsense understanding of hostilities but in a very real understanding of hostilities, we would be engaged in war?

That is my main concern of the, I think, strained and somewhat narrow reading of hostilities that we have in front of us today. How would you update it to take account of these very modern developments in the war capabilities of our Nation?

Mr. KOH. Thank you, Senator Coons, and I appreciate your, as always, thoughtful remarks.

No. 1, obviously, if we are concerned about unmanned uses of weapons that can deliver huge volumes of violence, a statute which only deals with the introduction of U.S. Armed Forces does not address that situation. I don't blame anybody. At the time the law was passed, they were thinking about Vietnam. They weren't thinking about drones or cyber. So that would be one possibility to change the law to address realities of modern conflict.

Second, the War Powers Resolution functions in a way to promote dialogue by a deadline. While it's unclear what triggers the deadline, and where the state of affairs that's supposed to trigger the deadline, namely hostilities, is deliberately vague, which puts a later Congress and President in a position of trying to figure out when the clock began and what the conditions are, and then to decide whether the urgency of a deadline actually promotes a dialogue.

In a book I wrote a number of years ago, I actually addressed that by saying you could have a statute that directly requires dialogue between Congress and the executive branch, particularly, say, a group of senior leaders of Congress, the Group of 16. That was, in fact, embodied in the Byrd-Nunn-Warner-Mitchell bill, which was discussed for a long period of time.

Quite recently, a very distinguished commission led by former Secretary of State Jim Baker, former Secretary of State Warren Christopher, who then passed away, and Lee Hamilton, proposed another way to consider the question.

A final point is, as much as any of you, including Senator Corker, I agree that this is not a mathematical calculating machine or a mechanical approach. It requires judgment, and that therefore it is important, I think, to try to get away from triggers that rely on false metrics toward things that actually reflect judgments made through interbranch dialogue. And I do think the process here is putting us to the question. If the legal issue is resolved one way or the other, the choice still remains what to do about the civilians in Libya.

Did the 1973 Congress really intend that they be left unprotected after 60 days, or did they not think about the situation? This goes back to the point that I quoted from my own writing. The major structural flaw of the War Powers Resolution has been that it requires an automatic termination after 60 days without Congress ever making a specific judgment in a particular case as to whether this is a case in which they'd like to authorize force or like affirmatively not to authorize force, and you cannot run these kinds of things by auto-pilot. It has to be done through judgment, political judgment of the kind that you exercise every day.

Senator COONS. If I might, I think that particular provision within the act, after just 6 months here, one that compels an action through the inaction of the Senate, may seem to have wisely reflected the inclination toward inaction rather than action in this particular body.

I have one other question I'd like to get to, if I might, Senator, which is just on the question of expropriating funds, or taking funds of the regime with which we have suspended relations but

where we haven't yet recognized the TNC. What in your view is the legal precedent for expropriating the funds? What's the foreign policy implications?

I was struck by the fact that counsel who serves me on the Judiciary Committee identified a provision of the Patriot Act with which I was previously unfamiliar that claims it is legal for the United States to expropriate foreign assets if we're involved in armed hostilities with a foreign sovereign. And what, if any, tensions do you see between the definition of hostilities here in the War Powers Resolution and under the Patriot Act, and what do you think are the challenges we might be raising for the United States in the future given—excuse me, Senator—given the likelihood that we're going to proceed to in some ways expropriate and reallocate funds that are currently, at least legally, controlled by the Qadhafi regime?

Mr. KOH. It's an excellent question, Senator. The vesting legislation that has been proposed is designed to address the question precisely because under the International Emergency Economic Powers Act was designed as a freeze, not seize. Were there congressional authorization of the action here, arguably you could proceed under the provision you've described for vesting. There's still a question under international law about vesting because expropriations, as you know from the Cuban example and others, raise questions of international challenge.

I do think that the best approach is to enact the vesting legislation, which I think, instead of putting it again into a past historical frame, is a specific application of congressional judgment to deal with this situation that's before you now and which clearly calls for some consideration of how to give resources to the TNC and the people of Libya.

Senator COONS. Thank you for your testimony today, and I look forward to continuing to work with you on these very difficult issues.

Mr. KOH. Thank you, Senator.

Senator LUGAR. Thank you, Senator Coons.

Senator Risch.

Senator RISCH. Thank you, Mr. Chairman.

Mr. Koh, I've been watching the fray from afar on the TV broadcast, and I'm intrigued by the creative explanations that we've had here today.

Let me ask you this. I want to give you a quote from then-Senator Obama in December of 2007, and he said, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

Now, I've heard the discussion of that. Can you give me a simple answer? Is that still his position?

Mr. KOH. Well, the key word is "military attack." Is that from the Boston Globe, Senator?

Senator RISCH. You know, this was widely disseminated at the time. It wasn't just one publication. It may have originated there; I'm not sure. But you're right, this is how many angels can dance on the head of a pin when you're talking about, well, is it military attack, is it hostilities, is it—whatever you want to call it. But it

seems to me he was pretty clear in this statement. Is this still his position?

Mr. KOH. Well, Senator, as I understand it, there were a series of questions posed to various candidates and answered by their campaigns. My own view of that phrase—I was not involved with the campaign—is that it is an overly limited statement of the President’s constitutional authorities. I think if instead of the word “military attack” it says “make war,” that would clearly be a correct statement of law.

Senator RISCH. Make war? Hostilities? Military attack? This is all the same thing, isn’t it?

Mr. KOH. No, Senator. “Make war” has particular meaning under Article 1 of the Constitution.

Senator RISCH. Are we making war on Libya?

Mr. KOH. We are not, not for purposes of the Constitution, and I set that forth on page 13 of my testimony.

Senator RISCH. Is this or is this not the President’s position at this time, this statement?

Mr. KOH. The position of the President with regard to this action is set forth in my testimony in the position we’re taking here.

Senator RISCH. Can you give me a yes or no? Is this or is this not the President’s position at this time?

Mr. KOH. Well, the—I didn’t hear the quote clearly enough, so—

Senator RISCH. All right. Let me try it again. “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual imminent threat to the Nation.”

Mr. KOH. I don’t think that’s legally correct, and I don’t think that’s—

Senator RISCH. No, no. Mr. Koh, I’m not asking about legally correct. Is this or is this not the President’s position today?

Mr. KOH. I have not asked, but I would be very surprised if it’s his position because I do not believe it to be legally correct or shared by those in the administration who are legal experts on this issue.

Senator RISCH. I’m not talking about that. I’m talking about the President of the United States. Is this or is this not his position today?

Mr. KOH. I don’t know, Senator Risch. I haven’t asked him that question. I do believe that the same rules apply to Presidents of both parties, and I do believe that the general understanding of the constitutional structure would be that that is too limited a statement for whoever is President.

Senator RISCH. As you know, President Obama’s predecessor, for every conflict that occurred under his watch, he came to Congress and asked for authorization. You’re aware of that, of course.

Mr. KOH. I think the President George W. Bush came with regard to 9/11, the authorization of use of military force with respect to al-Qaeda/Taliban-associated forces, and he came with regard to Iraq.

Senator RISCH. Notwithstanding all these other explanations and arguments you’ve made, don’t you agree with me that that would

be a really, really good idea, to come to Congress and ask for that authorization under the circumstances?

Mr. KOH. My understanding, Senator, is that the administration has gone back to March 23, expressed that it would welcome the support. It has also taken the position from the beginning that it's acting consistently with the War Powers Resolution.

I do think you are putting your finger on the important question, which is the debate over the law can go on forever, but there is an important and urgent question, which is what happens to the civilians of Libya, and that's a decision that can be made by this body, this committee, and then by the Senate as a whole.

Senator RISCH. Well, and of course, you know, you can go beyond that, too. You've talked about the citizens of Libya, but we've also got a really serious situation in Syria right now. Indeed, the Syrians aren't even armed and they're being attacked by their government, versus Libya, where there's actually armed conflict going on. You would agree with that, correct?

Mr. KOH. Senator, this is an exciting time at the State Department. What can I say? There is only one of these countries with respect to which there is a U.N. Security Council and a NATO mission of this level of detail with this kind of designed roles. And so the analysis that we're describing applies to the Libyan situation.

Senator RISCH. And my point is it deserves a debate that the American people can hear. Is that fair enough?

Mr. KOH. The more dialogue and debate on these matters of life and death, I think the better for all of us.

Senator RISCH. Thank you. Thank you, Mr. Chairman.

Senator LUGAR. Thank you very much, Senator Risch.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman, and thank you to you and Senator Kerry for holding this hearing today.

Mr. Koh, we appreciate your being here. I think I'm last, so hopefully there's not too much additional time that you'll be required.

It was recently reported that the U.S. admiral in charge of NATO Joint Operations Command stated—and I'm not stating this exactly, but he essentially said that the removal of the chain of command was consistent with the justification to protect citizens. Do you believe that that statement is consistent with the U.N. Security Council resolution, and that NATO troops, if they're actively seeking to topple Qadhafi militarily, that that's consistent with the U.N. resolution?

Mr. KOH. Senator, the U.N. resolution calls for the protection of civilians in civilian-populated areas. As I understand it, NATO does not target individuals. They've made it clear that they are not targeting individuals.

Earlier, I think it may have been before you came in, I pointed out that there was a report that an admiral had made a comment about the real mission being to target Qadhafi. The admiral has on the record in a public affairs statement made it clear that he did not say that, and that's not, in fact, the rules of engagement that they're following.

Senator SHAHEEN. OK. Just to follow that point a little further, though, how would you differentiate between degrading the

Qadhafi regime's ability to attack civilians and actively targeting Qadhafi himself? Is there a line there that you can draw, or—

Mr. KOH. Most of it is focused in the operational terms as I understand it, Senator, on the destruction of equipment, radar, anti-aircraft. Anti-aircraft can be mounted on both fixed and mobile devices, and that the targeting has been directed at that command and control.

I note in my own testimony on footnote 5 that Qadhafi's own forces' rules of engagement seem to authorize them to indiscriminately attack civilians, and that therefore if they have the apparatus by which they can do that, large numbers of civilians would be killed and we would not be serving our mission, which is to protect the civilians in the civilian-populated areas.

But with regard to the question of targeting of leaders, I think the important point to emphasize from the beginning has been that this is a multitool operation involving diplomacy, development, assets freezes, and a unanimous referral of this to the international criminal court, and that in fact arrest warrants were issued yesterday.

So as was the case with Slobodan Milosevic, a possibility of removal is through an international criminal trial, not necessarily through the tools of conflict, and that President Milosevic, sometime after the Kosovo episode, went to The Hague, where he was tried, and that is in fact where he died while a prisoner.

Senator SHAHEEN. Thank you. I'd like to ask some questions now relative to the TNC, the Transitional National Council, and what the thinking is of the Justice Department relative to recognizing the TNC formally. If we were to do that, does this have an impact on our policy, our legal policies with respect to Libya; for example, how we might deal with any assets?

Mr. KOH. Well, Senator, international law focuses on the question of recognition, and recognition tends to follow facts on the ground, particularly control over territory. As a general rule, we are reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and we're reluctant to derecognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control.

So, but recognition is not the only tool. There are ways to acknowledge that a particular entity is the legitimate representative of the people, which we have done and other NATO partners have done, and that will obviously then go to the question ultimately of the extent to which the various frozen assets can be made available for the new Libya as opposed to Qadhafi's old regime and way of doing business.

Senator SHAHEEN. And with respect to those frozen assets, how are we dealing with those assets and the TNC? Are there any restrictions that we've placed on whether they could be used by the TNC, either now or should the TNC gain control of the country?

Mr. KOH. As you know, Senator, before you is vesting legislation, which was a particular proposal to try to address that question. Meanwhile, there are regular contact group meetings attended by the Secretary in which other countries have made available resources to the TNC bank accounts, et cetera. So the process of

supporting the TNC is a long-term process that requires close cooperation among allies, just as this military mission does.

Senator SHAHEEN. And the access to the bank accounts that you refer to, are those bank accounts that would be considered to be part of the frozen assets?

Mr. KOH. Well, it's always a complicated situation when bank accounts are held by one regime but they appear to be for the purpose of a broader group of individuals. Senator Lugar faced this issue in the Philippines. It happens in many circumstances. And so exactly sorting out who is entitled to gain access to the frozen resources is an exercise in which we're actively engaged.

Senator SHAHEEN. Thank you.

The CHAIRMAN [presiding]. Thank you, Senator Shaheen.

We are running up against a couple of time conflicts here. So there is going to be a vote, perhaps several votes. Some of them may turn into voice votes around 12:10.

So, Legal Adviser Koh, we are going to excuse you at this point in time, to your chagrin and everlasting sorrow, I know. [Laughter.]

And we're going to try and get both of our scholars, Professor Spiro and Louis Fisher, to be able to get through their opening testimonies, and then—and you can begin if you want to collect your papers, Legal Adviser, and we'll try to do the transition as seamlessly as we can here.

I want to say to both of our members of Panel 2, first of all, I apologize on behalf of the committee for the length of time the first panel took. But as you both understand, this is obviously an important topic and we don't want to give short change to your testimonies.

Therefore, what we'd like to do I think today is get your testimony on the record following Harold Koh. I notice one of you is in Philadelphia; the other is nearby. If we could and need to call you back in order to do this, perhaps after the break and finish it, leading off with your panel, we would like to do that, unless the Senate floor process cooperates in a way that lets people get back here after the vote and opening, and we won't know that until we know what happens on the floor.

So if you could bear with us on that, we'd like you to come to the table now. And, Legal Adviser Koh, thank you for coming up today and being part of this discussion. It's a very important one. We appreciate it.

So, Mr. Louis Fisher and Mr. Peter Spiro, if you would both take your places. We look forward to your testimony. As you know, you can place your full testimony in the record as if read in full and summarize. And again, very much we are grateful for your patience and for taking time to be with us.

I don't know if you have an arrangement as to who is going to lead off, but however you want to go. Go ahead. Thanks.

Mr. Fisher.

**STATEMENT OF LOUIS FISHER, SCHOLAR IN RESIDENCE, THE
CONSTITUTION PROJECT, SILVER SPRING, MD**

Mr. FISHER. Thank you very much for a very productive last 2 hours. I learned quite a bit.

I have a number of things I'll say to summarize my statement. I wanted to pick up from what Senator Lugar said about what the Framers were concerned about Executive wars, that they had an incentive and a motivation. And many people today think that whatever the Framers thought in the 18th century has no application to the 20th and 21st centuries. My judgment is that what the Framers were worried about, Executives getting into wars that were damaging to the country in terms of lives lost and fortunes squandered, is particularly relevant today after we've seen some of the wars, the very costly ones, Vietnam, Korea, and I think the second war in Iraq.

So I think the Framers had a judgment about human nature, and human nature hasn't changed over that period of time. So I'm very much for the proposal that the decision to use military force against another nation that has not attacked us and has not threatened us is for Congress, and I'll underscore that.

And I also want to say that Michael Glennon, who served this committee for many, many years as legal adviser, basically did an analysis of the war in Libya and said that the Constitution "places the decision to go to war in the hands of Congress." So that's my position. And, in fact, that was the position from 1789 to 1950. All major wars were either declared by Congress or authorized by Congress, and 1950, of course, is when that was broken when President Truman went to war, never coming to Congress, against Korea. So it's a recent departure from the Constitution.

I give some examples in the first part of my paper about Presidents not talking straight. I say, which many people may find offensive, Presidential double-talk, but in fact that's what Presidents do. As you know, Truman said it's not a war, it's a police action. We've seen this for many, many decades, Presidents not talking straight.

One thing that was not said this morning I don't believe at all which concerns me is the position by the Obama administration that they received authorization from the U.N. Security Council. My position is that the Security Council cannot authorize any military action, cannot mandate any military action. If you believe that, then you would have to say that the U.N. Charter or Treaty transferred Article 1 power from Congress, not just from future Senates but from the House of Representatives, and gave it off to some outside body. I think that's an unconstitutional theme, and I don't think that you can get any authorization from the Security Council. So then you have to ask what authorization did President Obama have for this military activity?

In a May 20 letter to Congress, President Obama said, "It has always been my view"—this is not the Boston Globe. This is May 20, this year. "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." So that has always been his view.

I think in February, when this began to unwind in Libya, I think it was his obligation in February to come to Congress and get that authorization.

The second part of my paper is authorization from NATO. For the same reason, NATO countries, NATO allies cannot authorize

the United States to take military action. It's the same problem. NATO is a treaty. Treaties cannot amend the Constitution, cannot take congressional power and give it to outside bodies.

I think we've talked a lot here about whether Libya is a war and whether Libya has any hostilities. In both cases, the administration takes the position that if U.S. casualties are low, there's neither war nor hostilities, and that to me is a very unappealing theory because it means that if you have a superior force like the United States, you could pulverize a country, have very few or no hostilities, and there would be neither war nor hostilities.

That's the position of the administration. I just think it's an untenable position for any administration to develop that. If it were, then you could have, once you get rid of your air defense systems on the ground in Libya, you could bomb from 30,000 feet, you could send in drones, you could do all the mayhem possible, and you then say no war, no hostilities. If anyone did that to us, after day one there would be war and hostilities, which is Pearl Harbor. We didn't ask in Pearl Harbor whether the Japanese suffered any casualties. We knew from the first day that that was war.

The last part of my paper gets into this, which is new to me, the nonkinetic assistance. I think there is kinetic assistance, and once you give a supporting role to NATO, which is the administration's position, you are supporting hostilities. I don't think you can get around that.

The last two things, I talked about S. Res. 85. The Office of Legal Counsel relied on that. It took 35 seconds to support on the floor, and a lot of Senators objected that they did not know how S. Res. 85 had been modified, particularly the no-fly zone.

And my last comment is again this notion of a mandate. The administration talks about an international mandate, talks about the mandate from the Arab League, mandate from the Security Council, et cetera. President Obama said he acted militarily in Libya "with a mandate from the United Nations." To me, there is only one permitted mandate under the U.S. Constitution for the use of military force against another nation that has not attacked or threatened us, and that mandate must come from Congress.

Thank you.

[The prepared statement of Mr. Fisher follows:]

PREPARED STATEMENT OF LOUIS FISHER

Chairman Kerry, Ranking Member Lugar, and members of the committee, thank you for the invitation to testify on the Obama administration's legal and constitutional justifications for military operations in Libya. I start by examining four claims by the administration: (1) the President may obtain "authorization" not from Congress but from the U.N. Security Council, (2) the President may rely on NATO for additional "authorization," (3) military operations in Libya do not amount to "war," and (4) those operations do not constitute "hostilities" within the meaning of the War Powers Resolution. My statement concludes by turning to (5) the administration's reliance on S. Res. 85 for legislative support, (6) references to "non-kinetic assistance," and (7) the claim that the administration received a "mandate" to act militarily from such sources as the Security Council, the "Libyan people," and a "broad coalition" including the Arab League.

Fundamental to the Constitution is the Framers' determination that Congress alone can initiate and authorize war. To secure the principle of self-government and popular sovereignty, the decision to take the country from a state of peace to a state of war is reserved to the elected Members of Congress. The Framers recognized that the President could exercise defensive powers "to repel sudden attacks."² John Jay expressed the Framers' intent with these words: "It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."³ Professor Michael J. Glennon, who previously served this committee as Legal Counsel, recently underscored that the Constitution "places the decision to go to war in the hands of Congress."⁴

From 1789 to 1950, all wars were either authorized or declared by Congress. That pattern of 160 years changed abruptly when President Harry Truman unilaterally took the country to war against North Korea. Unlike all previous Presidents, he did not go to Congress to seek statutory authority. He and his aides did what other Presidents have done to expand their control over the war power. They go to great lengths to explain to Congress and the public that what they are doing is not what they are doing. President Truman 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."⁵ There are many examples of Presidents and executive officials being duplicitous with words. A price is paid for that conduct, both for the President and the country. Korea became "Truman's War."

During Senate hearings in June 1951 on the military conflict in Korea, Secretary of State Dean Acheson conceded the obvious by admitting "in the usual sense of the word there is a war."⁶ What sense of the word had he been using? Federal and state courts had no difficulty in defining the hostilities in Korea as war. They were tasked with interpreting insurance policies that contained the phrase "in time of war." A federal district court noted in 1953: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."⁷

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.⁸ In 2005, the National Security Council released a study that concluded there was no second attack. What had been reported as a second attack consisted of late signals coming from the first.⁹ Johnson used stealth and deception to escalate

¹For readers who may regard this subhead as disrespectful of Presidents, doubletalk is defined as "language that appears to be earnest and meaningful but in fact is a mixture of sense and nonsense; inflated, involved, and often deliberately ambiguous language." For Presidential deception on war powers from James Polk to the present, see Louis Fisher, "When Wars Begin: Misleading Statements by Presidents," 40 *Pres. Stud. Q.* 171 (2010), available at <http://www.loufisher.org/docs/wi/432.pdf>.

²The Records of the Federal Convention of 1787, at 318–19 (Max Farrand, ed. 1966).

³John Jay, *Federalist No. 4*, *The Federalist* 101 (Benjamin F. Wright, ed., MetroBooks 2002).

⁴Michael J. Glennon, "The Cost of 'Empty Words': A Comment on the Justice Department's Libya Opinion," *Harv. Sec. J. Forum*, April 14, 2011, at 7, available at <http://harvardnsj.com/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion>.

⁵Public Papers of the Presidents, 1950, at 504. On July 13, at a news conference, President Truman again called the Korean war a "police action." *Id.* at 522.

⁶"Military Situation in the Far East" (Part 3), hearings before the Senate Committees on Armed Services and Foreign Relations, 82d Cong., 1st Sess. 2014 (1951).

⁷*Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953). See also *Gagliomella v. Metropolitan Life Ins. Co.*, 122 F.Supp. 246 (D. Mass. 1954); *Carius v. New York Life Insurance Co.*, 124 F.Supp. 388 (D. Ill. 1954); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554 (Tex. 1953); and A. Kenneth Pye, "The Legal Status of the Korean Hostilities," 45 *Geo. L. J.* 45 (1956).

⁸Louis Fisher, *Presidential War Power* 129–33 (2d ed. 2004).

⁹Robert J. Hanyok, "Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964," *Cryptologic Quarterly*, declassified by the National Security Agency on November 3, 2005, available at http://www.nsa.gov/public_info/_files/gulf_of_tonkin/articles/re11_skunks_bogies.pdf.

the war, forever damaging his Presidency. He learned that being a War President is not the same as being a Great President.

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. She explained: “We are talking about using military force, but we are not talking about a war. That is an important distinction.”¹⁰ Iraqis subjected to repeated and heavy bombings from U.S. cruise missiles understood the military operation as war. These distinctions can be easily manipulated to meet the political needs of the moment.

The above examples provide some context for understanding the efforts of the Obama administration to define and redefine such words as “authorization,” “war,” “hostilities,” “nonkinetic,” and “mandate.”

1. “AUTHORIZATION” FROM THE SECURITY COUNCIL

President 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. . . .”¹¹ His administration regularly speaks of “authorization” received from the Security Council. As I have explained in earlier studies, it is legally and constitutionally impermissible to transfer the powers of Congress to an international (U.N.) or regional (NATO) body.¹² The President and the Senate through the treaty process may not surrender power vested in the House of Representatives and the Senate by Article I. Treaties may not amend the Constitution.

In a May 20 letter to Congress, President 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.

2. “AUTHORIZATION” FROM NATO

On March 28, in an address to the Nation, President Obama announced that after U.S. military operations had been carried out against Libyan troops and air defenses, he would “transfer responsibilities to our allies and partners.” NATO “has taken command of the enforcement of the arms embargo and the no-fly zone.”¹³ Two days earlier, State Department Legal Adviser Harold Koh spoke of this transfer to NATO: “All 28 allies have also now authorized military authorities to develop an operations plan for NATO to take on the broader civilian protection mission under Resolution 1973.”¹⁴ The May 20 letter from President Obama to Congress explained that by April 4 “the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the coalition’s efforts.”

Nothing in these or any other communications from the administration can identify a source of authorization from NATO for military operations. Like the U.N. Charter, NATO was created by treaty. The President and the Senate through the

¹⁰ Barton Gellman, “Students Receive Albright Politely,” *Washington Post*, February 20, 1998, at A19.

¹¹ Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, March 21, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

¹² Louis Fisher, “Obama’s U.N. Authority?,” *National Law Journal*, April 18, 2011, available at <http://www.loufisher.org/docs/wp/authority.pdf>; Louis Fisher, “Sidestepping Congress: Presidents Acting Under the U.N. and NATO,” 47 *Case Western Res. L. Rev.* 1237 (1997), available at <http://www.loufisher.org/docs/wp/424.pdf>; Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?,” 89 *Am. J. Int’l L.* 21 (1995), available at <http://www.loufisher.org/docs/wp/425.pdf>.

¹³ Remarks by the President in Address to the Nation on Libya, March 28, 2011, at 2, available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

¹⁴ Harold Hongju Koh, Legal Adviser U.S. Department of State, “Statement Regarding Use of Force in Libya,” March 26, 2011, appearing before the American Society of International Law Annual Meeting, at 2, available at <http://www.state.gov/s/l/releases/remarks/159201.htm>.

treaty process may not shift the authorizing function from Congress to outside bodies, whether the Security Council or NATO. Section 8 of the War Powers Resolution specifically states that authority to introduce U.S. Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances “shall not be inferred . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.”¹⁵ The authorizing body is always Congress, not the Security Council or NATO.

3. MILITARY OPERATIONS IN LIBYA: NOT A “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.”¹⁶ Under that analysis, OLC concluded that 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 OLC 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? Obviously we would. When Pearl Harbor was attacked on December 7, 1941, the United States immediately knew it was at war regardless of the extent of military losses by Japan.

4. NO “HOSTILITIES” UNDER THE WPR

In response to a House resolution passed on June 3, the Obama administration on June 15 submitted a report to Congress. A section on legal analysis (p. 25) determined that the word “hostilities” in the War Powers Resolution should be interpreted to mean that hostilities do not exist with 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.”

This interpretation ignores the political context for the War Powers Resolution. Part of the momentum behind passage of the statute concerned the decision by the Nixon administration to bomb Cambodia.¹⁷ The massive air campaign did not involve “sustained fighting or active exchanges of fire with hostile forces,” the presence of U.S. ground troops, or substantial U.S. casualties. However, it was understood that the bombing constituted hostilities.

According to the administration’s June 15 report, 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 that U.S. casualties were minimal or nonexistent. Under the administration’s June 15 report, 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 Speaker John Boehner on June 15 that “the United States supports NATO military operations pursuant to UNSCR 1973. . . .”¹⁸ By its own words, the Obama administration is supporting hostilities.

Although OLC in its April 1 memo supported President Obama’s military actions in Libya, despite the lack of statutory authorization, it did not agree that “hostilities” (as used in the War Powers Resolution) were absent in Libya. Deprived of OLC support, President Obama turned to White House Counsel Robert Bauer and

¹⁵ 87 Stat. 555, 558, sec. 8(a)(2) (1973).

¹⁶ U.S. Justice Department, Office of Legal Counsel, “Authority to Use Military Force in Libya,” April 1, 2011, at 8, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

¹⁷ Thomas F. Eagleton, War and Presidential Power: A Chronicle of Congressional Surrender 150–83 (1974).

¹⁸ Letter from the Department of State and Department of Defense to Speaker John A. Boehner, June 15, 2011, at 1.

State Department Legal Adviser Harold Koh for supportive legal analysis.¹⁹ It would have been difficult for OLC to credibly offer its legal justification. The April 1 memo defended the “use of force” in Libya because President Obama “could reasonably determine that such use of force was in the national interest.” OLC also advised that prior congressional approval was not constitutionally required “to use military force” in the limited operations under consideration.²⁰ The memo referred to the “destruction of Libyan military assets.”²¹

It has been recently reported that the Pentagon is giving extra pay to U.S. troops assisting with military actions in Libya because they are serving in “imminent danger.” The Defense Department decided in April to pay an extra \$225 a month in “imminent danger pay” to service members who fly planes over Libya or serve on ships within 110 nautical miles of its shores. To authorize such pay, the Pentagon must decide that troops in those places are “subject to the threat of physical harm or imminent danger because of civil insurrection, civil war, terrorism or wartime conditions.”²² Senator Richard Durbin has noted that “hostilities by remote control are still hostilities.” The Obama administration chose to kill with armed drones “what we would otherwise be killing with fighter planes.”²³

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.

5. NONKINETIC ASSISTANCE

The Obama administration has distinguished between “kinetic” and “nonkinetic” actions, with the latter apparently referring to no military force. The March 21 letter from President Obama to Congress spoke of clearly kinetic activities. U.S. forces had “targeted the Qadhafi regime’s air defense systems, command and control structures, and other capabilities of Qadhafi’s armed forces used to attack civilians and civilian populated areas.”²⁴ By May 20, in a letter to Congress, President Obama stated: “Since April 4, U.S. participation has consisted of: (1) nonkinetic support to the NATO-led operation. . . .” Elements not directly using military force are listed: intelligence, logistical support, and search and rescue missions. However, the letter identified these continued applications of military force: “aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone” and “since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition’s efforts.”²⁵

6. SUPPORT FROM S. RES. 85

OLC in its April 1 memo relied in part on legislative support from the Senate: “On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution ‘strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms,’ ‘call[ed] on Muammar Gadhafi to desist from further violence,’ and ‘urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.’”²⁶ Action by “unanimous consent” suggests strong Senate approval for the resolution, but the legislative record provides no support for that impression. Even if there were evidence of strong involvement by Senators in drafting, debating, and adopting this language, a resolution passed by a single Chamber contains no statutory support.

¹⁹ Charlie Savage, “2 Top Lawyers Lose Argument on War Power,” *New York Times*, June 18, 2011, at A1.

²⁰ OLC Opinion, supra note 16, at 1.

²¹ *Id.* at 6.

²² David A. Fahrenthold, “Obama’s Reasoning on Libya Criticized,” *Washington Post*, June 21, 2011, at A8.

²³ *Id.*

²⁴ March 21, 2011, letter, supra note 11, at 2.

²⁵ President Obama’s Letter About Efforts in Libya, May 20, 2011, sent to Senate and House leaders John A. Boehner, Nancy Pelosi, Harry Reid, and Mitch McConnell, at 1.

²⁶ OLC Opinion, supra note 16, at 2.

In addition, passage of S. Res. 85 reveals little other than marginal involvement by a few Senators.

Resolution 7 of S. Res. 85 urged the Security Council “to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.” When was the no-fly language added to the resolution? Were Senators adequately informed of this amendment? There is evidence that they were not. The legislative history of S. Res. 85 is sparse. There were no hearings and no committee report. The resolution was not referred to a particular committee. Sponsors of the resolution included 10 Democrats (Bob Menendez, Frank Lautenberg, Dick Durbin, Kirsten Gillibrand, Bernie Sanders, Sheldon Whitehouse, Chuck Schumer, Bob Casey, Ron Wyden, and Benjamin Cardin) and one Republican (Mark Kirk).

There was no debate on S. Res. 85. There is no evidence of any Senator on the floor at that time other than Senator Schumer and the presiding officer. Schumer asked for unanimous consent to take up the resolution. No one objected, possibly because there was no one present to object. Senate “deliberation” took less than a minute. When one watches Senate action on C-SPAN, consideration of the resolution began at 4:13:44 and ended at 4:14:19—after 35 seconds. On March 30, Senator John Ensign objected that S. Res. 85 “received the same amount of consideration that a bill to name a post office has. This legislation was hotlined.”²⁷ That is, Senate offices were notified by automated phone calls and e-mails of pending action on the resolution, often late in the evening when few Senators are present. According to some Senate aides, “almost no Members knew about the no-fly zone language” that had been added to the resolution.²⁸ At 4:03 pm, through the hotlined procedure, Senate offices received S. Res. 85 with the no-fly zone provision but without flagging the significant change.²⁹ Senator Mike Lee noted: “Clearly, the process was abused. You don’t use a hotline to bait and switch the country into a military conflict.”³⁰ Senator Jeff Sessions remarked: “I am also not happy at the way some resolution was passed here that seemed to have authorized force in some way that nobody I know of in the Senate was aware that it was in the resolution when it passed.”³¹

7. THE “MANDATE” FOR MILITARY ACTION IN LIBYA

President Obama’s speech to the Nation on March 28 stated that “the United States has not acted alone. Instead, we have been joined by a strong and growing coalition. This includes our closest allies—nations like the United Kingdom, France, Canada, Denmark, Norway, Italy, Spain, Greece, and Turkey—all of whom have fought by our side for decades. And it includes Arab partners like Qatar and the United Arab Emirates, who have chosen to meet their responsibilities to defend the Libyan people.” Over the month of March, “the United States has worked with our international partners to mobilize a broad coalition, secure an international mandate to protect civilians, stop an advancing army, prevent a massacre, and establish a no-fly zone with our allies and partners.”³² Missing from this coalition and mandate was the institution of Congress. President Obama in this speech spoke of “a plea for help from the Libyan people themselves.”³³ He offered his support “for a set of universal rights, including the freedom for people to express themselves” and for governments “that are ultimately responsive to the aspirations of the people.”³⁴ Yet throughout this period there had been no effort by the President or his administration to listen to the American people or secure their support.

On May 20, in a letter to Congress, President Obama said that he acted militarily against Libya “pursuant to a request from the Arab League and authorization by the United Nations Security Council.” The administration’s June 15 submission to Congress claims that President Obama acted militarily in Libya “with a mandate from the United Nations.” There is only one permitted mandate under the U.S. Constitution for the use of military force against another nation that has not attacked or threatened the United States. That mandate must come from Congress.

²⁷ 157 Cong. Rec. S1952 (daily ed. March 30, 2011).

²⁸ Conn Carroll, “How the Senate Was Bait and Switched Into War,” <http://washingtonexaminer.com/print/blogs/beltway-confidential/2011/04-how-senate-was-bait-and-switched-war>.

²⁹ *Id.*

³⁰ *Id.*

³¹ 157 Cong. Rec. S2010 (daily ed. March 31, 2011).

³² Remarks by the President in Address to the Nation on Libya, March 28, 2011, at 2, *supra* note 13.

³³ *Id.* at 3.

³⁴ *Id.* at 4.

Senate Joint Resolution 20, introduced on June 21, is designed to authorize the use of U.S. armed force in Libya. In two places the resolution uses the word "mandate." Security Council Resolution 1970 "mandates international economic sanctions and an arms embargo." Security Council Resolution 1973 "mandates 'all necessary measures' to protect civilians in Libya, implement a 'no-fly zone', and enforce an arms embargo against the Qaddafi regime." The Security Council cannot mandate, order, or command the United States. Under the U.S. Constitution, mandates come from laws enacted by Congress.

The CHAIRMAN. Thank you very much, Mr. Fisher, a very effective summary. Thank you.

Mr. Spiro.

STATEMENT OF PETER SPIRO, CHARLES R. WEINER PROFESSOR OF LAW, TEMPLE UNIVERSITY, BEASLEY SCHOOL OF LAW, PHILADELPHIA, PA

Mr. SPIRO. Thank you, Mr. Chairman. Good afternoon to you, Senator Lugar, and members of the committee. Thank you for the opportunity to testify before you today on the issue of Libya and war powers.

In my view, U.S. participation in the Libya operation has been lawful. The President had constitutional authority to initiate U.S. participation in this operation without advanced congressional authorization.

That participation continues to be lawful. The administration's interpretation of hostilities under the War Powers Resolution is a plausible one, although not free from doubt. I understand concerns on the part of Members of Congress with respect to this interpretation.

Congressional participation in war powers decisionmaking is important to the successful execution of our national foreign relations. However, in my view, the War Powers Resolution does not supply a useful vehicle for facilitating interbranch cooperation.

The CHAIRMAN. Mr. Spiro, if I could just interrupt you, I apologize. The vote started. I'm going to go over there and try to get them to prolong it a little bit so that you can finish your testimony, and Senator Lugar will have time, and Senator Shaheen, to get over. I'll try to back it up. I appreciate it.

I did have some questions. I want to follow up, obviously. So they will certainly be part of the record, and we'll make a decision on when we'll be able to reconvene. I thank you.

Mr. SPIRO. Should I continue, Senator? Yes.

The War Powers Resolution does not supply a useful vehicle for facilitating interbranch cooperation. Congress and the President should leave aside their differences on the War Powers Resolution and work toward mutually acceptable terms for continued United States participation in the Libya operation.

For all its notoriety, the War Powers Resolution has had little effect on war powers practice. The operative core of the resolution is the 60-day termination provision of section 5(b). The most notable episode implicating the 60-day clock was President Clinton's participation in the NATO bombing campaign in Kosovo. Participation in that operation continued more than 60 days after its initiation, notwithstanding the lack of specific statutory authorization.

The Clinton administration asserted that congressional funding for the operation satisfied the requirements of the War Powers

Resolution. This was a questionable argument on its own terms, but Congress and other actors accepted the continuation of the bombing past the 60-day window.

In the absence of specific appropriations for the Libya operation, President Obama lacks that sort of argument. Instead, the administration argues that participation in the Libya operation does not rise to the level of “hostilities” for purposes of the act and the section 5(b) trigger.

I have three observations with respect to this question. First, and here I echo the Legal Adviser, plain language approaches to textual meanings seem particularly inappropriate in the context of war powers. As with parallel constitutional understandings, statutory measures relating to national security and military force are likely to be interpreted in light of practice and historical precedent, as much as through language.

Second, practice relating to the War Powers Act renders the administration’s interpretation a plausible one. As the Legal Adviser has detailed for you this morning, there are historical precedents suggesting a narrower interpretation of hostilities than might be expected from an everyday understanding of the term.

Third, that is not to say that the administration’s position is necessarily the better one. Members of this committee and the Senate as a whole do not have to accept that position. The contrary position is also reasonable. There is insufficient practice and other evidence definitively to resolve the question either way as applied to the Libya operation. Congress could make clear through a formal institutional pronouncement that it rejects the administration’s interpretation of hostilities.

But finally, it is not clear how pressing the hostilities question serves the institutional self-interest of the legislative branch. On the one hand, I believe that any President faced with the winding down of the 60-day clock would identify some justification for avoiding the terms of section 5(b). No responsible chief executive would terminate a military operation deemed in the national interest in the face of congressional inaction.

If not authorization gleaned from a funding measure, if not an argument relating to the definition of hostilities, then some other avenue would present itself to evade the termination provision. Section 5(b) is unlikely ever to be given effect, nor will the judiciary ever enforce it.

Does this mean that section 5(b) is unconstitutional? That may be a question better left to the court of history. Presidents have good cause to avoid constitutional showdowns where more minimalist arguments will serve the same ends. It is my understanding that the administration has not affirmed the constitutionality of the War Powers Resolution. It’s been quite careful, in fact, not to concede the question.

On the other hand, Congress has no real need of the section 5(b) provision or the rest of the War Powers Act for that matter. Congress has ample tools with which to control Presidential deployments of U.S. Armed Forces. In any event, devising a position of the Congress with respect to the operation in Libya should be the primary task at hand. Disputes relating to the War Powers Resolution are likely to distract from that undertaking. The persistent

cloud over the act underlines the perception among some that Congress is ill-equipped in this realm. Congress would be better served by focusing on other institutional tools for participating in the full spectrum of military deployment and use of force decisions.

Thank you, Mr. Ranking Member.

[The prepared statement of Mr. Spiro follows:]

PREPARED STATEMENT OF PETER J. SPIRO

Good morning, Mr. Chairman, Senator Lugar, and members of the committee. Thank you for the opportunity to testify before you today on the issue of Libya and war powers.

For the record, I am the Charles Weiner Professor of Law at Temple University Law School, where I teach subjects relating to international and constitutional law. From 2004–2006, I was Rusk Professor of International Law at the University of Georgia Law School. I am a former law clerk to Judge Stephen F. Williams on the U.S. Court of Appeals for the D.C. Circuit and to Justice David H. Souter of the Supreme Court of the United States. I have also served as an Attorney-Adviser in the Office of the Legal Adviser, U.S. Department of State, as well as Director for Democracy on the staff of the National Security Council. I am currently a member of the Advisory Committee on Historical Diplomatic Documentation, U.S. Department of State. Among other subjects, I have published widely on matters relating to foreign affairs and the Constitution.

In my view, U.S. participation in NATO operations in Libya has been lawful. The President had constitutional authority to initiate U.S. participation in these operations without advance congressional authorization. That participation continues to be lawful. The administration's interpretation of "hostilities" under the War Powers Resolution is a plausible one, although not free from doubt. I understand concerns on the part of members of Congress with respect to this interpretation. In my view, however, it is not clear that the definition of "hostilities"—which becomes operable only through the contested 60-day termination provision of section 5(b)—meaningfully bears on the legality of the U.S. participation in the NATO campaign.

The legality of the Libya operation in the absence of congressional authorization is not to diminish the importance of congressional participation in war powers decisionmaking. Nor does it mean that war powers comprises a constitutional black hole. The rule of law is a central feature of our system for addressing questions relating to the use of force. There are important respects in which congressional participation is constitutionally demanded. However, I do not believe that the War Powers Resolution affects the constitutional balance of powers with respect to the use of force. WPR-related disputes such as the one you are considering today distract from key decisions on which the collective judgment of the executive and legislative branches remains essential. Congress and the President should leave aside their differences on the War Powers Resolution and work toward mutually acceptable terms for continued U.S. participation in NATO operations in Libya.

CONSTITUTIONAL PARAMETERS

The constitutional division of war powers cannot be measured with calipers. The courts have largely absented themselves from matters implicating war powers. Judicial nonparticipation makes sense as a matter of institutional capacity. It does, however, lead to a paucity of authoritative pronouncements on the division of war powers. Against this landscape, historical practice supplies the precedents that guide our contemporary understandings of war powers. As Justice Frankfurter famously observed in the *Steel Seizure* case, these precedents add to the written Constitution "a gloss which life has written upon them."

While not unchanging, historical practice relating to war powers has proved remarkably consistent. This practice can be reduced to three basic principles.

1. For major engagements, the President must as a constitutional matter secure congressional authorization in advance. This explains why both George W. Bush and George H.W. Bush sought congressional authorization before initiating military action in Kuwait and Iraq. This was not simply a matter of politics; it was a matter of constitutional necessity. Where the use of U.S. Armed Forces is likely to implicate a major commitment of resources over an extended period of time with a risk of substantial casualties, our constitutional system demands the prior assent of the legislative branch.

2. For less significant engagements, on the other hand, the President is constitutionally empowered to deploy U.S. forces without congressional authorization. On

numerous occasions throughout U.S. history, Presidents have undertaken deployments involving the use or potential use of force without congressional approval. From recent decades, we have examples including Kosovo, Bosnia, Haiti, Panama, the so-called Tanker war of the mid-1980s, the 1986 bombing of Tripoli, Lebanon, and Grenada, among others. This practice is consistent and has been engaged in with the knowledge and acquiescence of the legislative branch. It establishes a clear constitutional standard with respect to the division of war power. This standard reflects the imperatives of the use of force against the landscape of foreign relations and the national interest: the need for dispatch and flexibility that conforms to the institutional capacities of the Presidency.

The practice supports the constitutionality of President Obama's decision to participate in the Libya operation without advance congressional authorization. Because the operation is limited in nature, scope, and duration, it fits comfortably within the practice relating to the use of force short of "real war." In my view, the opinion of the Office Legal Counsel of April 1, 2011, on this question is persuasive. This conclusion is confirmed by the lack of any persistent institutional opposition to the initial decision.

The distinction between major and lesser engagements also explains why comparisons between the approaches of Presidents Bush and Obama to Iraq and Libya respectively are misplaced. The two episodes are constitutional apples and oranges. Iraq involved a massive commitment of resources, with grave risks to U.S. Armed Forces. Though hardly trivial, Libya lies toward the other end of the constitutional spectrum. The distinction is material for constitutional purposes.

3. Finally, Congress has the power to terminate or condition particular military engagements through engagement-specific, affirmative legislation. This power is exercised subject to the President's exclusive authorities as Commander in Chief over military decisionmaking, reasonably conceived. Joint resolutions respecting U.S. deployments in Lebanon and Somalia supply recent historical examples in which Congress imposed temporal limitations on the use of U.S. Armed Forces. Congress could impose such limitations with respect to the Libya operation. Congress also has the power to issue institutional pronouncements through nonbinding pronouncements. These institutional statements are of constitutional consequence. For instance, the formal condemnation by the House of Representatives of President Polk's initiation of the conflict with Mexico in 1848 evidenced its rejection of the constitutionality of that engagement.

As in any area of constitutional law, but especially in the absence of judicial decisions, these categories supply only an outline of the law. The boundaries of these categories are unstable and subject to revision and evolution, especially in the face of changing background conditions. However, there is a remarkable consistency to the practice. This consistency suggests workability. The consistency also suggests an acceptance of the practice as legitimate by all relevant constitutional actors, the Congress and President centered among them.

THE WAR POWERS RESOLUTION

For all its notoriety, the War Powers Resolution has had little effect on war powers practice. From appearances, the act has marked the front lines of contests between Congress and the President over war powers. In reality, disputes relating to the War Powers Resolution are better characterized as skirmishes. The act has not materially affected the terms of continuing struggles between the executive and legislative branches relating to war powers.

Nor should it. The act reflected the moment of its creation in 1973, an anomalous one marking a nadir in congressional-executive relations. The act has changed Presidential behavior in only one notable respect, through the reporting requirement of section 4. It is now a routine and accepted practice for Presidents to report uses of force as well as substantial combat deployments to the congressional leadership. This requirement is unexceptional and advances important transparency values. In section 3, the act also codifies a historical tradition of consultation by the President with Congress in all possible instances.

But in other respects, the act has proved unable to shift constitutional understandings as developed through the practice.

This works in both directions. By its terms, the act ostensibly gives the President a 60-day window in which to undertake any use of force, regardless of magnitude, without congressional authorization. Both George H.W. Bush and George W. Bush could have, consistent with the War Powers Resolution, undertaken major military engagements against Iraq without prior congressional authorization. And yet the failure to secure advance congressional authorization in those cases would have vio-

lated prevailing constitutional standards. The War Powers Resolution, in other words, cannot validate what would otherwise constitute Presidential overreaching.

On the other side, the act has not subtracted from Presidential powers. In its policy statement, for instance, the act fails to recognize the protection of U.S. citizens as a justification for the use of military force. That has not stopped Presidents from justifying military engagements on that basis, consistent with longstanding practice. Nor have subsequent Congresses rejected that justification.

The 60-day termination provision of section 5(b) comprises the act's most controversial provision. It has been accepted as constitutional only by President Carter (and then only in passing, in a single paragraph of an OLC opinion). Section 5(b) was tested by President Clinton in the context of the 1992-93 Somalia deployment. On only one occasion has Congress acted to authorize a deployment on its understanding of a section 5(b) deadline, with respect to the 1982-83 Lebanon peacekeeping deployment.

The most notable episode implicating the 60-day clock was President Clinton's participation in the NATO bombing campaign in Kosovo. Participation in that operation, as with the Libya operation, continued more than 60 days after its initiation in the absence of specific statutory authorization. In that case the Office of Legal Counsel asserted that congressional funding for the operation satisfied the requirements of the War Powers Resolution, notwithstanding the section 8(a) requirement that authorization not be inferred from appropriations. This was a questionable argument on its own terms. It was a central objective of the War Powers Resolution to end authorization through appropriations measures, on the theory that Congress would never cut off the funding of U.S. troops in the field. Bills to extend specific authorization for the Kosovo operation consistent with section 8(a) failed to pass. In the end Congress and other actors accepted the continuation of the bombing past the 60-day window.

That was as it should have been. I will not rehearse here at length the structural arguments against the termination provision of section 5(b). Suffice it to say that inaction may not equate with disapproval, as demonstrated by contradictory actions on Congress' part during the Kosovo operation (and in the House last week with respect to Libya). Military decisionmaking should not be driven on a prospective basis by legislative default devices. The stakes are too high to be governed by the dead hand of legislation enacted to address the difficulties of another era.

"Hostilities" Under the War Powers Resolution

In the absence of funding specific to the Libya operation, President Obama lacks the sort of argument that President Clinton made with respect to the Kosovo campaign. Instead, the administration argues that the participation in the Libya operation does not rise to the level of "hostilities" for purposes of the act and the section 5(b) trigger. I have three observations with respect to this question.

First, plain language approaches to textual meanings seem particularly inappropriate in the context of war powers. In parallel to the evolution of constitutional understandings, statutory measures relating to national security and military force are likely to be interpreted in light of practice and historical precedent as much as through language. The War Powers Resolution should not be addressed in the way one would address the tax code.

Second, practice relating to the War Powers Act renders the administration's interpretation a plausible one. As the Legal Adviser has detailed for you this morning, there are historical precedents suggesting a narrower interpretation of the term "hostilities" than might be expected from an everyday understanding of the term. (It is unfortunate that this full explanation has waited until today, however, to the extent that others have been able to fill an explanatory vacuum.)

Third, that is not to say that the administration's position is necessarily the better one. Members of this committee and the Senate as a whole do not have to accept that position. The contrary position is also reasonable. There is insufficient practice and other evidence definitively to resolve the question either way as applied to the particulars of U.S. participation in NATO operations in Libya. To the extent that Congress makes clear, through a formal institutional pronouncement (as opposed to isolated statements of particular members), that it rejects the administration's interpretation of "hostilities," then the case will stand at best as a contested precedent, one to be resolved, perhaps, in future episodes.

But, finally, it is not clear how pressing the "hostilities" question buys Congress anything as an institution. In my view, it is not obviously in Congress' institutional self-interest to press the point. On the one hand, I believe that any President faced with the winding down of the 60-day clock would identify some justification for avoiding the terms of section 5(b). No responsible Chief Executive would terminate a military operation in the national interest in the face of congressional inaction. If not authorization gleaned from a funding measure, if not an argument relating

to “hostilities,” then some other avenue would present itself to evade the termination provision. Section 5(b) is unlikely ever to be given effect. Nor will the judiciary ever enforce it.

Call it death by a thousand cuts. Does this mean that section 5(b) is unconstitutional? That question may better be left to the court of history. Although Presidents may not declare the act unconstitutional, from the Reagan administration onward they have been careful not to concede the point. They have good cause to avoid the distraction of constitutional confrontation where a more minimalist argument will serve the same end.

On the other hand, Congress has no real need of the provision, lack of respect for which reflects poorly on the institution. Congress has ample tools with which to control Presidential deployments of U.S. Armed Forces. As the nature of military engagement migrates away from the use of ground forces, at least in limited conflicts, Congress will be able to use the appropriation mechanism with less fear of leaving U.S. forces in harm’s way. The nature of these engagements, often in the name of the international community, will also give Congress more latitude to constrain Presidential action. In coming years we may well witness a trend toward greater congressional participation in decisions relating to the use of U.S. Armed Forces.

In any event, devising a position of the Congress with respect to the operation in Libya should be the primary task at hand. Disputes relating to the War Powers Resolution are likely to distract from that undertaking. I believe we would be having the same sort of discussion today even if the War Powers Resolution had not been enacted. The persistent cloud over the act underlines the perception of some that Congress is ill-equipped in this realm. Congress would be better served by focusing on other institutional tools for participating in the full spectrum of use-of-force decisions.

Thank you, Mr. Chairman, for the opportunity to present my views to you on this important subject. This is a critical juncture in the history of constitutional war powers. It is important that the Senate give these questions its closest consideration.

Senator LUGAR [presiding]. Well, on behalf of the committee, I thank both of you for very important testimony, both your written testimony as well as these oral presentations this morning. I appreciate so much hearing both of you, and we will study carefully your papers.

The hearing is adjourned.

[Whereupon, at 12:18 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

RESPONSES OF LEGAL ADVISER HAROLD KOH TO QUESTIONS SUBMITTED BY SENATOR RICHARD G. LUGAR

Question. In a 1980 opinion regarding the War Powers Resolution, the Justice Department’s Office of Legal Counsel wrote the following:

We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our Armed Forces as required by the provisions of § 1544(b) of the resolution. The resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of “unavoidable military necessity.”

This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander in Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our Armed Forces abroad.

We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

Does this opinion continue to reflect the views of the executive branch with regard to the constitutionality of section 1544 (b) of the War Powers Resolution? If not, please indicate in what respects the views of the executive branch on this question have changed.

Answer. Yes, the opinion continues to reflect the views of the executive branch.

Question. The 1973 House committee report on the bill that became the War Powers Resolution states that, in the resolution's text, "the word 'hostilities' was substituted for the phrase 'armed conflict' during the subcommittee drafting process because it was considered to be somewhat broader in scope."

- Does the administration believe that U.S. forces are engaged in armed conflict in Libya?

Answer. For purposes of international law, U.S. and NATO forces are engaged in an armed conflict in Libya. We are committed to complying with the laws of armed conflict, and we hold other belligerents in the conflict, including the Qadhafi regime, to the same standards. With regard to the language quoted from the House report, as I noted in my testimony, the report and the statute do not specifically define the term "hostilities." My testimony cited other legislative history that reflects that, in the words of Senate sponsor Jacob Javits, Congress chose a term that "accepts a whole body of experience and precedent without endeavoring specifically to define it." As a matter of established practice, "hostilities" determinations under the War Powers Resolution have been understood as requiring a factual inquiry into the circumstances and conditions of the military action in question, and particularly the expected dangers that confront U.S. forces. For the reasons set forth in my testimony, the administration believes that the United States supporting role in NATO Operation Unified Protector—which is limited in the nature of the mission, limited in the risk of exposure to United States Armed Forces, limited in the risk of escalation, and limited in the choice of military means—has not constituted the kind of "hostilities" envisioned by the resolution's 60-day pullout rule. This is a distinct inquiry from the legal tests for determining what constitutes an "armed conflict" under international law.

Moreover, as I explained in my testimony, the definition of "hostilities" that we have used in this instance is consistent with the definition that one of my predecessors, Monroe Leigh, offered to Congress on behalf of the executive branch in 1975. The discussion between our two branches of government regarding the meaning of "hostilities" has been ongoing, but throughout, the Executive has not departed significantly from the understanding we supplied at that time.

Question. Among the assistance U.S. forces are providing to enable NATO airstrikes in Libya are electronic warfare support, aerial refueling, and intelligence, surveillance and reconnaissance support.

- If U.S. forces encountered persons providing assistance of this sort to Taliban or al-Qaeda forces in Afghanistan, would the administration consider that such persons were directly participating in hostilities against the United States under the laws of armed conflict?

Answer. The laws of war provide that civilians, who as such are generally immune from attack in an armed conflict, can be targeted if and for such time as they take a direct part in hostilities. The precise contours of the concept of "direct participation in hostilities"—reflected in Common Article 3 of the 1949 Geneva Conventions, Article 51 of Additional Protocol I of 1977, and Article 13 of Additional Protocol II of 1977—remain subject to considerable debate, and specific determinations as to when an individual is taking a direct part in hostilities are highly fact-dependent. This international law of war concept has not, however, generally been applied to determine whether U.S. forces are engaged in "hostilities," as a matter of domestic law, for purposes of the War Powers Resolution.

Question. At the outset of the Libya operations, the Department of Justice opined that the operations were anticipated to be limited in their "nature, scope, and duration." On this basis, it concluded that the President did not require prior congressional authorization to initiate them.

As I indicated in my opening statement, 3 months into our military involvement in Libya, the administration's assurances about the limited nature of the involvement ring hollow. American and coalition military activities have expanded to an all but declared campaign to drive Qadhafi from power. The administration is unable to specify any applicable limits to the duration of the operations. And the scope has grown from efforts to protect civilians under imminent threat to obliterating Libya's military arsenal, command and control structure, and leadership apparatus.

Is it still the administration's view that the Libya operations are limited in their nature, scope, and duration? If so, please identify

- The specific limits that apply to the nature of U.S. military operations in Libya;
- The specific limits that apply to the scope of U.S. military operations in Libya, and
- The specific limits that apply to the duration of U.S. military operations in Libya.

Answer. It remains the administration's view that the Libya operations are limited in their nature, scope, and duration, such that prior congressional authorization was not constitutionally required for the President to direct this military action. These same limitations inform our analysis of the War Powers Resolution: As my testimony explained in detail, the combination of four limitations—the limited nature of (1) our military mission (playing a supporting role in a NATO-led coalition to enforce a United Nations Security Council Resolution that authorizes Member States to engage in civilian protection); (2) the exposure to our Armed Forces (who have not to date suffered casualties or been engaged in active exchanges of fire); (3) the risk of escalation (which is reduced by the absence of U.S. ground troops or regional opposition and by the existence of U.N. authorization, among other factors); and (4) the military means we have been using (confined to a discrete set of military tools, most of them nonkinetic)—all contributed to the President's determination that the 60-day pullout rule does not apply. The administration will continue to monitor the nature of U.S. involvement in the NATO operation to determine whether any further steps within the War Powers Resolution framework would be appropriate.

Question. Some have suggested that if the administration were to acknowledge that the War Powers Resolution's definition of "hostilities" includes strikes by [unmanned] drones, the President would be constrained in his ability to carry out such strikes against members of al-Qaeda, including in Somalia.

- Does the administration believe that the post-September 11 Authorization for the Use of Military Force (Pub. Law 107-40) provides congressional authorization for the use of force, including strikes by unarmed drones, against members of al-Qaeda in whatever foreign country they may be located?

Answer. Following the horrific attacks of 9/11, the United States has been in an armed conflict with al-Qaeda and associated forces. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force against al-Qaeda, the Taliban, and associated forces in the 2001 Authorization for Use of Military Force. As I stated in a speech that I gave before the American Society of International Law on March 25, 2010, "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses." See <http://www.state.gov/s/l/releases/remarks/139119.htm>. The choice of weaponry in a particular use of force is subject to a number of considerations; and in all cases, this administration reviews the rules governing targeting operations to ensure that U.S. operations are conducted consistent with law of war principles, including the principles of distinction and proportionality.

Question. Section 2(b) of Public Law 107-40 states "Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." In light of this provision, does the administration believe there is any doubt that applicable requirements under the War Powers Resolution for congressional authorization have been satisfied with respect to the use of military force, including strikes by [unmanned] drones, against members of al-Qaeda?

Answer. The Administration does not believe there is any doubt that the 2001 congressional authorization for the Use of Military Force against al-Qaeda and associated forces authorizes all necessary and appropriate military force including the use of drones against members of al-Qaeda, consistent with the laws of armed conflict, and that such authorization is sufficient for purposes of the War Powers Resolution.

Question. In a March 26 statement addressing the President's authority to initiate military operations in Libya, you stated that the Senate had passed a resolution, S. Res. 85, calling for a no-fly zone in Libya. The relevant language in the resolution "urgel[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory."

Some have read your statement to suggest that the administration believes that S. Res. 85 authorized the President to use military force in Libya. This would be a puzzling interpretation given that the language in question was addressed to the U.N. Security Council, not the President, that it made no mention of any use of military force by the United States, and that it was contained in a nonbinding resolution of the Senate rather than a law enacted with the approval of the full Congress.

- To avoid further confusion on this point, is it the administration's position that S. Res. 85 provided the President legal authorization to use force in Libya?

Answer. I believed on March 26, as I do now, that S. Res. 85 was a significant measure, inasmuch as it reflected the Senate's unanimous recognition of the seriousness of the situation in Libya and of the potential value of establishing a no-fly zone, which the United States then helped to do. But it is not the administration's position—and I have never suggested—that S. Res. 85 provided the President legal authorization to use force in Libya.

Question. Do you believe the President has been well served by not seeking congressional authorization for the Libya operations? What advantages do you perceive the President to have gained by proceeding without congressional authorization?

Answer. While the President has concluded that congressional authorization was not legally required for U.S. participation in the Libya operations as they have progressed to date, he has also made clear that he would welcome such authorization, as it would present the world with a unified position of the U.S. Government, strengthen our ability to shape the course of events in Libya, and dispel any lingering legal concerns. More specifically, the President has expressed his strong support for S.J. Res. 20, as introduced by Chairman Kerry and 10 original cosponsors on June 21. He has also sought to ensure that the administration consult with Congress extensively throughout the operation.

Question. On March 11, 2011, I wrote to Secretary Clinton to seek answers to questions about the administration's March 7 statement with regard to Article 75 of Additional Protocol I of the Geneva Conventions of 1949. That statement indicated that "The U.S. Government will . . . choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well."

On May 18, 2011, I received a letter signed by the Acting Assistant Secretary of State for Legislative Affairs purporting to respond to my questions. The information contained within this letter was not responsive to my questions.

Please respond to the following questions with regard to the administration's March 7 statement:

- a. The statement indicates that the U.S. Government will "choose *out of a sense of legal obligation*" to treat the principles set forth in Article 75 as applicable in specified circumstances. (emphasis added) Please describe the source of the legal obligation referred to in the statement and the considerations that led the administration to conclude that such a legal obligation exists.
- b. The statement indicates that the United States will treat the principles set forth in Article 75 as applicable "to any individual it detains in an *international armed conflict*." (emphasis added) Does the administration regard these principles also to apply to noninternational armed conflicts, including the current armed conflict with al-Qaeda? If not, which of the considerations that led the administration to conclude that a legal obligation exists to apply Article 75 principles in international armed conflicts does the administration believe are inapplicable to noninternational armed conflicts?
- c. Please explain the administration's understanding of the effect of the statement as a matter of international law, including any international legal obligations that may arise as a result of the statement.
- d. Please explain the administration's understanding of the effect of the statement as a matter of U.S. law.

Answer. The administration's statement of March 7, 2011, resulted from a comprehensive interagency review, including the Departments of Defense, Justice, and State, of current U.S. law and military practice. The statement also reflects the longstanding view of the United States that Article 75 contains fundamental guarantees of humane treatment (e.g., prohibitions against torture) to which all persons in the power of a party to an international armed conflict are entitled. In 1987, President Reagan informed the Senate that although the United States had serious concerns with Additional Protocol I, "this agreement has certain meritorious elements . . . that could be of real humanitarian benefit if generally observed by parties to international armed conflicts." For this reason, he noted, the United States was in the process of developing appropriate methods for "incorporating these positive provisions into the rules that govern our military operations, and as customary international law." As a general matter, the executive branch previously has taken the position that certain norms, including those reflected in treaties to which the United States is not a party (e.g., the Law of the Sea Convention, the Vienna Convention on the Law of Treaties), constitute customary international law.

a. The administration determined that existing U.S. treaty obligations, domestic law, and regulations related to the treatment of detainees in armed conflict substantially overlap with the obligations that Article 75 imposes on States Party to Additional Protocol I. Examples of where many of the provisions of Article 75 are already reflected in existing U.S. law and regulations include: Common Article 3 of the 1949 Geneva Conventions; the 1949 Geneva Convention Relative to the Treatment of Prisoners of War; the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War; the War Crimes Act of 1996, as amended; the Detainee Treatment Act of 2005; the Military Commissions Act of 2009; the Uniform Code of Military Justice; DOD Directive 2310.01E (“The Department of Defense Detainee Program”); and Army Regulation 190–8 (“Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees”). Consistent with this set of existing and overlapping requirements in U.S. law, the administration also determined that current U.S. military practices are fully consistent with the requirements of Article 75. Accordingly, the administration considered it appropriate to state that the United States will choose to abide by the principles set forth in Article 75 applicable to detainees in international armed conflicts out of a sense of legal obligation, and that we would expect other states to do the same.

b. Following our March 7 statement, there was some speculation as to why we referred to the application of Article 75 specifically in the context of “international armed conflict.” The simple explanation is that Article 75 of Additional Protocol I, like all of Additional Protocol I, is intended by its terms to be applied to international armed conflict. Our statement should not be taken to suggest that similar protections should not apply in noninternational armed conflict. It only reflects the fact that corresponding protections with respect to noninternational armed conflict are memorialized elsewhere—in particular, in Common Article 3 of the 1949 Geneva Conventions and Articles 4 through 6 of Additional Protocol II, both of which apply to noninternational armed conflicts.

Although the United States is not yet party to Additional Protocol II, as part of the review process described above, the administration, including the Departments of State, Defense, and Justice, also reviewed its current practices with respect to Additional Protocol II, and found them to be fully consistent with those provisions, subject to reservations, understandings, and declarations that were submitted to the Senate in 1987, along with refinements and additions that we will submit. Accordingly, on March 7, 2011, the administration also announced its intent to seek Senate advice and consent to ratification of Additional Protocol II as soon as practicable. We believe that ratification of Additional Protocol II will be an important complement to the step we have taken with respect to Article 75. We look forward to working with you, as ranking member of the Senate Foreign Relations Committee, on this most important matter.

c. As a matter of international law, the administration’s statement is likely to be received as a statement of the U.S. Government’s *opinio juris* as well as a reaffirmation of U.S. practice in this area. The statement is therefore also likely to be received as a significant contribution to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict.

Determining that a principle has become customary international law requires a rigorous legal analysis to determine whether such principle is supported by a general and consistent practice of states followed by them from a sense of legal obligation. Although there is no precise formula to indicate how widespread a practice must be, one frequently used standard is that state practice must be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States). The U.S. statement, coupled with a sufficient density of State practice and *opinio juris*, would contribute to creation of the principles reflected in Article 75 as rules of customary international law, which all States would be obligated to apply in international armed conflict. (The 168 States that are party to Protocol I are of course already required to comply with Article 75 as a matter of treaty law.)

e. As discussed above, the administration’s statement followed from a determination that existing U.S. law and regulations impose requirements on U.S. officials that substantially overlap with the requirements of Article 75. The statement does not alter those statutory and regulatory requirements. If Article 75 were determined to be customary international law, it would have the same effect on U.S. law as other customary international legal norms. The United States has long recognized customary international law, whether reflected in treaty provisions or otherwise, as

U.S. law (see, e.g., the Supreme Court's discussion of customary international law in *The Paquete Habana* 175 U.S. 677 (1900)).

RESPONSES OF LEGAL ADVISER HAROLD KOH TO QUESTIONS SUBMITTED BY
SENATOR JAMES E. RISCH

Question. Were U.S. actions during Operation Odyssey Dawn considered “hostilities” under your definition?

Answer. During the initial phase of the Libya operation, under Operation Odyssey Dawn, our military actions in Libya were significantly more intensive, sustained, and dangerous than they have been since the handover to NATO's Operation Unified Protector. Had Odyssey Dawn lasted for more than 60 days, it may well have constituted “hostilities” under the War Powers Resolution's pullout provision.

Question. Were any actions the United States took during Operation Unified Protector considered “hostilities” under your definition?

Answer. For the reasons set forth in my testimony, the administration believes that the United States constrained, supporting role in Operation Unified Protector—which is limited in the nature of the mission, limited in the risk of exposure to U.S. Armed Forces, limited in the risk of escalation, and limited in the choice of military means—has not constituted the kind of “hostilities” envisioned by the War Powers Resolution's 60-day pullout rule.

Question. You testified that “no casualties, no threat of casualties, no significant engagement” of the U.S. military affirms your opinion that U.S. actions in Libya do not amount to “hostilities” envisioned by the War Powers Resolution. This position implies a threshold for a conflict to qualify as “hostilities” as contemplated by the War Powers Resolution. Please define that threshold?

- You referenced in your testimony that the United States has dropped a limited number of munitions during strike missions, does your threshold of “hostilities” take into consideration the improved lethality of the individual ordinance used?
- Does the amount of damage inflicted by U.S. forces matter in this equation?
- Does the size of the force (manpower) trigger the invocation of the term “hostilities”?

Answer. My testimony explained the administration's position as to why the United States current military operations in Libya—which are limited in the nature of the mission, limited in the risk of exposure to United States Armed Forces, limited in the risk of escalation, and limited in the choice of military means—do not fall within the War Powers Resolution's automatic 60-day pullout rule. My testimony further explained that Congress in 1973 did not attempt to define a rigid threshold for “hostilities” to be applied mechanically to all situations. Nevertheless, our analysis does take into consideration the lethality of ordnance used, the damage inflicted by U.S. forces, and the size of the U.S. force, as reflected in its discussion of three factors: the military means, the nature of the mission, and the risk of escalation. As I explained during my testimony, if any of the critical facts regarding the underlying mission were substantially different, it might warrant reaching a different conclusion regarding the existence of “hostilities.”

Question. You testified that we were not “carpet bombing” Libya and that the current number of drone strikes were insignificant to the threshold of “hostilities.” Beyond what you see as these clear lanes, what is the amount of force necessary to trigger the resolution's 60-day pullout requirement?

Answer. With regard to drones, I stated unambiguously in my oral testimony that they do not get a “free pass” under the War Powers Resolution. The resolution, which by its terms focuses on the “introduction of United States Armed Forces” into “hostilities,” was not designed with unmanned aerial vehicles in mind, but that does not mean that drone strikes are insignificant to the threshold of hostilities, or that they can never trigger the 60-day rule. To the contrary, both the number and nature of U.S. drone strikes are significant to the “hostilities” determination, although in the abstract, it is difficult to state precisely what level of U.S. kinetic force, standing alone, would be sufficient to trigger the pullout provision in any given situation. Taking into account all of the factors in the current Libya operation that are identified in my testimony, the current use of drones in itself does not, in the administration's view, compel the conclusion that the resolution's automatic pullout provision is triggered.

Question. You testified that the conflict has presented new military technology that was not envisioned by the drafters of the original bill. However, aerial refuel-

ing, ISR, and support flights are not new elements of conflict and were in use, in various forms, when the War Powers Resolution was debated and enacted in 1973. The War Powers Resolution specifically allows for an exception for activities supporting the command structure of organizations like NATO, but the activities listed above were not exempted out of the resolution's application. Doesn't the use of non-exempted forces mean, by implication, that the military is involved in hostilities outside of the exempted forces?

Answer. I believe this question refers to sections 8(b) and 8(c) of the War Powers Resolution. As explained in footnote 13 of my testimony, sections 8(b) and 8(c) do not imply that all NATO activities in which the United States participates, no matter how modestly, must be subjected in their entirety to the 60-day clock. Those provisions set out certain parameters for when U.S. participation in the military activities of foreign forces would come within the ambit of the resolution. While the United States participation in this NATO operation is not exempted from the requirements of the resolution, my point in that footnote was that the U.S. forces in Libya—not the whole of NATO forces—are the proper subject for the “hostilities” analysis required by the resolution's language. I agree that support activities such as aerial refueling and ISR were known to the drafters of the War Powers Resolution, but I have not seen evidence to suggest that such nonkinetic activities would trigger the 60-day clock in the context of a NATO operation such as this.

Question. Before the Libyan conflict began, U.S. military personnel serving on ships within 110 nautical miles of Libyan shores did not receive Hostile Fire and Imminent Danger pay for reasons linked to Libya. Today they do. So, too, do U.S. Air Force pilots flying sorties over Libya. If, in fact, the U.S. military is not engaged in “hostilities,” what is the administration's legal reason for giving \$225 per month in extra pay to U.S. forces assisting with military actions associated with Operation Odyssey Dawn and Operation Unified Protector?

Answer. As I explained in footnote 14 of my written testimony, the executive branch has long understood its application of the “danger pay” statute to be distinct from its application of the War Powers Resolution. Similar danger pay is being given to U.S. forces in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and many other countries in which no one is seriously contending that “hostilities” are occurring for purposes of the War Powers Resolution.

Question. On what day did you reach your final conclusion that the United States was no longer engaged in “hostilities”? When was it adopted by the President as the position of the administration?

Answer. As you can understand, I cannot comment on the internal decision-making procedures of the President and the administration with respect to legal matters. However, it is a matter of public record, as Chairman Kerry noted in the hearing, that from the beginning of the Libya operation the administration stated that it intended to act consistently with the War Powers Resolution and has maintained that position throughout the operation.

Question. Would you consider the bombing (attempted or actual) of a U.S. embassy by another nation-state “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces” under the war powers act?

Answer. Yes, I believe that an attempted or actual bombing of a United States embassy certainly could rise to that level, although no such event has occurred in Libya. I note, however, that the “national emergency” standard articulated in section 2(c) of the War Powers Resolution is not linked, either textually or logically, to the separate question of whether U.S. forces are in a situation of “hostilities” under sections 4(a)(1) and 5(b) of the resolution. By its plain terms, section 2(c) is also precatory in nature, and it has never been treated by the executive branch as having binding legal force.

Question. Does President Obama ignoring the War Powers Resolution simply add to the history of “a consistent pattern of executive circumvention of legislative constraint in foreign affairs,” as you observed on page 38 of your book, “The National Security Constitution”?

Answer. I do not accept the premise that “President Obama [is] ignoring the War Powers Resolution” or otherwise trying to circumvent the legislative branch. To the contrary, as my testimony explained, throughout the Libya operation, the President has never claimed the authority to take the nation to war without congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers

issues. The administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for congressional support, and has made clear his commitment to acting consistently with the resolution. Of critical importance in an area where the law is unsettled, he has done so transparently and in a manner that allows Congress to respond if it disagrees with his reading of the resolution.

Question. Previous administrations have used an interagency process led by the Department of Justice’s Office of Legal Counsel (OLC) to receive credible and objective legal advice, particularly regarding constitutional matters. During this process, OLC seeks input from multiple agencies before arriving at a conclusion. In order to justify continuing kinetic operations in Libya without congressional authorization, it appears President Obama decided truncate this process and associate himself with your legal opinion. Why did the administration choose this course of action? What precedent is he setting regarding the Executive’s process for attaining credible and objective legal advice?

Answer. As I explained during my testimony, I cannot comment on the internal decisionmaking procedures of the President or the administration. No one disputes two basic facts here—that President Obama made this decision, and that in the end it was the President’s decision to make.

Question. During your nomination hearing in April 2009, you testified before this committee that, because the U.N. “soundly defeated” a resolution calling NATO’s action in Kosovo unlawful that was a de facto authorization of the NATO mission.¹ Last week, the House of Representatives soundly rejected authorizing the President’s use of force in Libya. Under your legal reasoning, shouldn’t Congress’s rejection of force also imply the President has no authority to be in Libya?

Answer. No. To date, Congress has not acted in a way that would amount to “rejection of force” in Libya. Nor has Congress acted either to authorize or deauthorize the Libya operation. While the President has taken the position that congressional authorization was not legally required for the Libya operation as it has progressed thus far, he has also made clear that he would welcome such authorization. At my nomination hearing, I cited the overwhelming Security Council vote rejecting a resolution that would have deemed the use of force in Kosovo unlawful as one piece of evidence, among others, that the Kosovo intervention enjoyed international support—as the Libya operation clearly does by virtue of U.N. Security Council Resolution 1973 and the support of NATO, the Arab League, and the Gulf Cooperation Council, as well as Libya’s own Transitional National Council. The House of Representatives’ vote against a particular resolution authorizing the President to use force in Libya does not imply that the President lacks the domestic legal authority to be in Libya.

Question. In response to questions in your nomination hearing, you criticized the Bush administration for not seeking a new U.N. resolution specifically authorizing the use of force in Iraq. You stated that “I believe that one consequence of this lack of consensus as to whether the resolutions provided the necessary support was that it hindered U.S. efforts to attract as broad political support for our military actions in Iraq as we would have liked.”²

- Do you believe broad international support is sufficient to justify U.S. engagement in Libya?
- Even if, as you argue, congressional authorization is not necessary, is it not prudent for the President to seek congressional authorization in order to ensure “broad political support” from the American people?

Answer. As my testimony made clear, I do not believe that broad international support is alone sufficient to justify the legality of our engagement in Libya, although the nature and degree of international support might bear on factors that are relevant to the War Powers analysis in this case, such as the limited object and scope of our military mission and the limited risk of escalation. While the President has concluded that congressional authorization was not legally required for the Libya operation as it has progressed to date, he has also made clear that he would welcome such authorization, as it would present the world with a unified position of the U.S. Government, strengthen our ability to shape the course of events in Libya, and dispel any lingering legal concerns. More specifically, the President has

¹ Senator Jim DeMint, Question for the Record #10, April 28, 2009.

² Senator Jim DeMint, Question for the Record #7, April 28, 2009.

expressed his strong support for S.J. Res. 20, as introduced by Chairman Kerry and 10 original cosponsors on June 21. He has also sought to ensure that the administration consult with Congress extensively throughout the operation.

Question. Referring to President Bush and the prospect for war with Iran, on December 4, 2007, then-Senator Joe Biden said, “the President has no constitutional authority to take this Nation to war against a country of 70 million people, unless we’re attacked or unless there is proof that we are about to be attacked. And if he does—if he does—I would move to impeach him. The House obviously has to do that, but I would lead an effort to impeach him.”³ Do you agree that it is an impeachable offense for the President to use force without prior congressional authorization unless we are attacked or under imminent threat of attack, as then-Senator Biden asserted in his statement?

Answer. I believe that the question of an “impeachable offense” is highly fact-dependent and cannot be answered in such a general fashion. I would simply emphasize that both Republican and Democratic administrations have consistently taken the position over the past several decades that the President has constitutional authority to direct certain uses of force abroad to protect important national interests without prior congressional authorization, even in the absence of an attack or an imminent threat of attack.



³Senator Joseph R. Biden Interviewed on MSNBC by Chris Matthews, Dec. 4, 2007, 2007, transcript accessed at http://www.msnbc.msn.com/id/22114621/ns/msnbc_tv-hardball_with_chris_matthews/.