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LIBYA AND WAR POWERS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

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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 "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."

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 with 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 United 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 Protectora—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.

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[3] Senator 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/.