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?

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?

Thank you for your testimony today, and I look

forward to continuing to work with you on these very difficult

issues.