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.