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.

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.

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.

Thank you, Senator Lugar.

Senator Casey.

Thank you, Senator Casey.

Senator Corker.

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.

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.

Well, you are not being honest.

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.

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.

I will give you time. These are important issues.

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——

Thanks. I appreciate it. [Laughter.]

Senator Lee.

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.

Thank you very much, Mr. Fisher, a very effective

summary. Thank you.

Mr. Spiro.

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.