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 straitjacket

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.

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.

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.

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 antiaircraft 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.

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, I believe this argument. I think it is correct.

I would not be here if I did not believe that.

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.

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, 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.

Yes; we do.

That is correct.

The President took the position and that is the position——

Well, Senator——

I cannot comment on——

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.

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——

Well, Senator, nobody is saying that something replicating

Vietnam at this moment would not be——

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——

Well, Senator, we are trying to hold them responsible——

And the reason for that——

The relations have been suspended.

That is correct.

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.

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.

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.

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.

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——

Please.

Well, the President has complied with the reporting

provisions and, in fact, past administrations have, by and large,

responded——

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.

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.

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.

Thank you, Senator.

Well, the key word is ‘‘military attack.’’ Is that from

the Boston Globe, Senator?

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.

No, Senator. ‘‘Make war’’ has particular meaning under

Article 1 of the Constitution.

We are not, not for purposes of the Constitution, and

I set that forth on page 13 of my testimony.

The position of the President with regard to this action

is set forth in my testimony in the position we’re taking here.

Well, the—I didn’t hear the quote clearly enough,

so——

I don’t think that’s legally correct, and I don’t think

that’s——

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.

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.

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.

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, 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.

The more dialogue and debate on these matters of life

and death, I think the better for all of us.

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.

Most of it is focused in the operational terms as I understand

it, Senator, on the destruction of equipment, radar, antiaircraft.

Antiaircraft 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.

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.

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.

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.