Well, thank you very much, Mr. Chairman, for

calling this meeting to consider the legal and constitutional basis

for ongoing United States military operations in Libya. The President

declined to seek congressional authorization before initiating

hostilities. Subsequently he has carried them out for more than 3

months without seeking or receiving congressional authorization.

This state of affairs is at odds with the Constitution, and it is

at odds with the President’s own pronouncements on war powers

during his Presidential candidacy. For example, in December 2007,

he responded to a Boston Globe question by saying ‘‘The President

does not have power under the Constitution to unilaterally authorize

a military attack in a situation that does not involve stopping

an actual or imminent threat to the Nation.’’

Before our discussion turns to constitutional and legal issues, I

believe it is important to make a more fundamental point. Even if

one believes the President somehow had the legal authority to initiate

and continue United States military operations in Libya, it

does not mean that going to war without Congress was either wise

or helpful to the operation.

The vast majority of Members of Congress, constitutional scholars,

and military authorities would endorse the view that Presidents

should seek congressional authorization for war when circumstances

allow. There is a near uniformity of opinion that the

chances for success in a war are enhanced by the unity, clarity of

mission, and constitutional certainty that such an authorization

and debate provide.

There was no good reason why President Obama should have

failed to seek congressional authorization to go to war in Libya. A

few excuses have been offered, ranging from an impending congressional

recess, to the authority provided by a U.N. Security Council

resolution. But these excuses do not justify the President’s lack of

constitutional discipline. Twelve days before the United States

launched hostilities, I called for the President to seek a declaration

of war before taking military action. The Arab League resolution,

which is cited as a key event in calculations on the war, was

passed a full week before we started launching cruise missiles.

There was time to seek congressional approval, and Congress

would have debated a war resolution if the President had presented

one.

This debate would not have been easy. But Presidents should not

be able to avoid constitutional responsibilities merely because

engaging the people’s representatives is inconvenient or uncertain.

If the outcome of a congressional vote on war is in doubt, it is all

the more reason why a President should seek a debate. If he does

not, he is taking the extraordinary position that his plans for war

are too important to be upset by a disapproving vote in Congress.

The Founders believed that Presidents alone should not be

trusted with warmaking authority, and they constructed checks

against executive unilateralism. James Madison, in a 1797 letter to

Thomas Jefferson, stated ‘‘The Constitution supposes, what the

History of all Governments demonstrates, that the Executive is the

branch of power most interested in war, and most prone to it. It

has accordingly with studied care, vested the question of war in the

legislature.’’

Clearly, there are circumstances under which a President might

be justified in employing military force without congressional authorization.

But as Senator Webb has pointed out systematically,

none of the reasons apply to the Libyan case. Our country was not

attacked or threatened with an attack. We were not obligated

under a treaty to defend the Libyan people. We were not rescuing

Americans or launching a one-time punitive retaliation. Nor did the

operation require surprise that would have made a public debate

impractical.

In this case, President Obama made a deliberate decision not to

seek a congressional authorization of his action, either before it

commenced or during the last 3 months. This was a fundamental

failure of leadership that placed expedience above constitutional

responsibility.

Now, some will say that President Obama is not the first President

to employ American forces overseas in controversial circumstances

without a congressional authorization. But saying that

Presidents have exceeded their constitutional authority before is

little comfort. Moreover, the highly dubious arguments offered by

the Obama administration for not needing congressional approval

break new ground in justifying a unilateral Presidential decision to

use force. The accrual of even more warmaking authority in the

hands of the Executive is not in our country’s best interest, especially

at a time when our Nation is deeply in debt and our military

is heavily committed overseas.

At the outset of this conflict, the President asserted that U.S.

military operations in Libya would be ‘‘limited in their nature,

duration, and scope.’’ On this basis, the administration asserted

that the actions did not require a declaration of war. Three months

later, these assurances 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.

Most recently, the administration has sought to avoid its obligations

under the War Powers Resolution by making the incredible

assertion that U.S. military operations in Libya do not constitute

hostilities. Even some prominent supporters of the war have refused

to accept this claim.

The administration’s own description of the operations in Libya

underscores the fallacy of this position. United States war planes

have reportedly struck Libya air defenses some 60 times since

NATO assumed the lead role in the Libya campaign. Predator

drones reportedly have fired missiles on some 30 occasions. Most

significantly, the broader range of airstrikes being carried out by

other NATO forces depend on the essential support functions provided

by the United States.

The War Powers Resolution required the President to terminate

the introduction of U.S. forces into hostilities in Libya on May 20,

60 days after he notified Congress of the commencement of the

operation. The administration declined to offer any explanation of

its view that United States Forces were not engaged in hostilities

in Libya until nearly a month later on June 15. Even at that point,

the administration’s explanation was limited to four perfunctory

sentences in a 32-page report on the Libyan operations.

Administration analysis focuses on the question of whether U.S.

casualties are likely to occur, thereby minimizing other considerations

relevant to the use of force. If this definition of hostilities

were accepted, Presidents would have significant scope to conduct

warfare through remote means such as missiles and drones. It

would deny Congress a say in other questions implicated in decisions

to go to war, including the war’s impact on U.S. strategic

interests, on our relations with other countries, and on our ability

to meet competing national security priorities.

The administration’s report also implies that because allied

nations are flying most of the missions over Libya, the United

States operations are not significant enough to require congressional

authorization. This characterization underplays the centrality

of the United States contributions to the NATO operations

in Libya. We are contributing 70 percent of the coalition’s intelligence

capabilities and the majority of its refueling assets. The fact

that we are leaving most of the shooting to other countries does not

mean the United States is not involved in acts of war. If the United

States encountered persons performing similar activities in support

of al-Qaeda or Taliban operations, we certainly would deem them

to be participating in hostilities against us. Moreover, the language

of the War Powers Resolution clearly encompasses the kinds of operations

U.S. military forces are performing in support of other

NATO countries.

These concerns are compounded by indications that the administration’s

legal position was the result of a disputed decision process.

According to press reports, the President made the decision to

adopt this position without the Department of Justice having the

opportunity to develop a unified legal opinion. It is regrettable that

the administration has refused our requests to make witnesses

from the Departments of Defense and Justice available for today’s

hearing.

Finally, one would expect the administration to be fully forthcoming

on consultations about Libya to compensate, in some measure,

for the lack of congressional authorization for the war.

Although consultations in no way substitute for formal authorization,

a view corroborated in this legal scholarship today of Mr. Koh,

they serve a vital purpose in unifying the Government and providing

Congress with a basis for decisionmaking on the war. For

the most part, for example, the Clinton administration and President

Clinton himself consulted meaningfully with Congress during

the United States intervention in the Balkans.

In sharp contrast, the Obama administration’s efforts to consult

with Congress have been perfunctory, incomplete, and dismissive of

reasonable requests. This committee alone has experienced at least

three occasions when briefings were canceled or relevant witnesses

were denied without explanation. As Senator Corker has pointed

out, very basic questions about the operation have gone unanswered.

Deputy Secretary of State Steinberg declined to address

certain questions on the basis they could only be answered by the

military, and yet the administration has refused to provide the

committee with Defense Department witnesses. This inexplicable

behavior contributes to the damage that the Libya precedent might

create in the future.

I do not doubt that President Obama elected to launch this war

because of altruistic impulses. But that does not make the United

States intervention in Libya any less of a war of election. Nor does

the fig leaf that American pilots are flying a minority of the missions

within the coalition justify the contention we are not engaged

in hostilities, especially since United States participation enables

most of the operations underway.

The President does not have the authority to substitute his judgment

for constitutional process when there is no emergency that

threatens the United States and our vital interests. The world is

full of examples of local and regional violence, to which the United

States military could be applied for some altruistic purpose. Under

the Constitution, the Congress is vested with the authority to

determine which, if any, of these circumstances justify the consequences

of American military intervention.

I thank the chairman for the opportunity to make this statement.

Mr. Koh, one of the reasons why it is important

to have this hearing and likewise debate on this issue is that

throughout the Middle East, but even throughout the world, there

are a number of situations in which the United States and other

nations have severe disapproval of the governments of those countries.

As a matter of fact, from time to time, we make speeches. We

editorialize. We work with others in the United Nations to attempt

to bring about conditions that are better for the people of countries

that we believe are under a totalitarian or very authoritarian

misrule.

Now, in this particular instance, the Libyan situation arose following

uprisings in Tunisia and Egypt, which certainly caught the

attention of the United States and the world, quite apart from the

Arab League and the United Nations and NATO.

In the case of Libya, however, the Arab League and the United

Nations and NATO and what have you and ultimately the United

States made a decision to intervene in a civil war. There was shooting

going on in Libya. It could very well be that persons who were

innocent might be caught in the crossfire. This is the tragedy of

civil wars, I suspect, wherever they may be held on this earth.

In this particular instance, our decision was to intervene in a

civil war, and we are continuing to intervene in a civil war. And

despite the fact that we talk about limited hostilities, we also talk

openly as a Government about the end of the Muammar Qadhafi

rule, about the importance of Qadhafi leaving the country, and we

even send out rumors that he may be entertaining such thoughts.

My basic question is if we do not have some ground rules, the

War Powers Act may be one area where we try to work this thing

out or a more formal declaration of war. And this country could

decide to intervene in numerous civil wars. It could decide really

to affect the governance of peoples all over the world that we feel

is unfair.

What is your general comment about this predicament? In other

words, you may feel very strongly that the Qadhafi rule is so egregiously

out of line as opposed to all the other dictators that we

have witnessed all over the earth that there is no doubt that we

should intervene to prevent him from winning, to prevent him from

shooting at people who may be opposing him and who may be

shooting at him and his forces. What is the ground rule for dealing

with civil war wherever we may find it all over the earth?

Well, obviously, I raise the question because I

fear that there may be circumstances in which we make a decision

based upon the Security Council or somebody else to intervene in

other situations. I would like our own war powers declaration to be

clarified before we get to that point.

I raise one more point, and this may require more hearings, and

that is, although we say that the force that we are offering is limited—

and this could include the missiles that we fire or drone

strikes or what have you—my guess is that if another country were

employing such methods against us without employing any troops

on the ground in the United States or any of the so-called conventional

means of war, we would see this as an act that was hostile.

This would clearly be hostilities. Very clearly, we would say that

is grounds for us to be at war with whoever is firing at us in these

situations.

This is why I think perhaps the administration needs to work

with the Congress to try to think through in this era of drone warfare

or long-distance warfare. That is not a question simply of

whether American casualties occur or there are hostilities on the

ground. A war in the future may be fought in an entirely different

way, perhaps not encompassed by the War Powers Act, but surely

needing to be encompassed by all of us who are thoughtful about

the evolution of these hostilities.

Thank you.

Thank you very much, Senator Lee.

Senator Coons.

Thank you, Senator Coons.

Senator Risch.

Thank you very much, Senator Risch.

Senator Shaheen.

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.