Thank you, Mr. Chairman. Good afternoon to you,

Senator Lugar, and members of the committee. Thank you for the

opportunity to testify before you today on the issue of Libya and

war powers.

In my view, U.S. participation in the Libya operation has been

lawful. The President had constitutional authority to initiate U.S.

participation in this operation without advanced congressional

authorization.

That participation continues to be lawful. The administration’s

interpretation of hostilities under the War Powers Resolution is a

plausible one, although not free from doubt. I understand concerns

on the part of Members of Congress with respect to this interpretation.

Congressional participation in war powers decisionmaking is important

to the successful execution of our national foreign relations.

However, in my view, the War Powers Resolution does not supply

a useful vehicle for facilitating interbranch cooperation.

Should I continue, Senator? Yes.

The War Powers Resolution does not supply a useful vehicle for

facilitating interbranch cooperation. Congress and the President

should leave aside their differences on the War Powers Resolution

and work toward mutually acceptable terms for continued United

States participation in the Libya operation.

For all its notoriety, the War Powers Resolution has had little

effect on war powers practice. The operative core of the resolution

is the 60-day termination provision of section 5(b). The most notable

episode implicating the 60-day clock was President Clinton’s

participation in the NATO bombing campaign in Kosovo. Participation

in that operation continued more than 60 days after its initiation,

notwithstanding the lack of specific statutory authorization.

The Clinton administration asserted that congressional funding

for the operation satisfied the requirements of the War Powers

Resolution. This was a questionable argument on its own terms,

but Congress and other actors accepted the continuation of the

bombing past the 60-day window.

In the absence of specific appropriations for the Libya operation,

President Obama lacks that sort of argument. Instead, the administration

argues that participation in the Libya operation does not

rise to the level of ‘‘hostilities’’ for purposes of the act and the section

5(b) trigger.

I have three observations with respect to this question. First, and

here I echo the Legal Adviser, plain language approaches to textural

meanings seem particularly inappropriate in the context of

war powers. As with parallel constitutional understandings, statutory

measures relating to national security and military force are

likely to be interpreted in light of practice and historical precedent,

as much as through language.

Second, practice relating to the War Powers Act renders the administration’s

interpretation a plausible one. As the Legal Adviser

has detailed for you this morning, there are historical precedents

suggesting a narrower interpretation of hostilities than might be

expected from an everyday understanding of the term.

Third, that is not to say that the administration’s position is necessarily

the better one. Members of this committee and the Senate

as a whole do not have to accept that position. The contrary position

is also reasonable. There is insufficient practice and other evidence

definitively to resolve the question either way as applied to

the Libya operation. Congress could make clear through a formal

institutional pronouncement that it rejects the administration’s

interpretation of hostilities.

But finally, it is not clear how pressing the hostilities question

serves the institutional self-interest of the legislative branch. On

the one hand, I believe that any President faced with the winding

down of the 60-day clock would identify some justification for

avoiding the terms of section 5(b). No responsible chief executive

would terminate a military operation deemed in the national interest

in the face of congressional inaction.

If not authorization gleaned from a funding measure, if not an

argument relating to the definition of hostilities, then some other

avenue would present itself to evade the termination provision.

Section 5(b) is unlikely ever to be given effect, nor will the judiciary

ever enforce it.

Does this mean that section 5(b) is unconstitutional? That may

be a question better left to the court of history. Presidents have

good cause to avoid constitutional showdowns where more minimalist

arguments will serve the same ends. It is my understanding

that the administration has not affirmed the constitutionality of

the War Powers Resolution. It’s been quite careful, in fact, not to

concede the question.

On the other hand, Congress has no real need of the section 5(b)

provision or the rest of the War Powers Act for that matter. Congress

has ample tools with which to control Presidential deployments

of U.S. Armed Forces. In any event, devising a position of

the Congress with respect to the operation in Libya should be the

primary task at hand. Disputes relating to the War Powers Resolution

are likely to distract from that undertaking. The persistent

cloud over the act underlines the perception among some that Congress

is ill-equipped in this realm. Congress would be better served

by focusing on other institutional tools for participating in the full

spectrum of military deployment and use of force decisions.

Thank you, Mr. Ranking Member.