

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Harold Hongju Koh, Testimony before the Senate Foreign Relations Committee*

June 28, 2011

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## TESTIMONY BY LEGAL ADVISER HAROLD HONGJU KOH

U.S. Department of State  
on  
Libya and War Powers  
Before the  
Senate Foreign Relations Committee  
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Thank you, Mr. Chairman, Ranking Member Lugar, and members of the Committee, for this opportunity to testify before you on Libya and war powers. By so doing, I continue nearly four decades of dialogue between Congress and Legal Advisers of the State Department, since the War Powers Resolution was enacted, regarding the Executive Branch's legal position on war powers.<sup>1</sup>

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<sup>1</sup> In 1975, shortly after the enactment of the War Powers Resolution, Legal Adviser Monroe Leigh testified before Congress, and then responded to written questions, regarding the meaning and application of the Resolution. See Letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann to Chairman Clement J. Zablocki (June 5, 1975), reprinted in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the H. Comm. on International Relations*, 94th Cong. (1975) [hereinafter "1975 Leigh-Hoffmann Letter"]. Subsequent Legal Advisers have carried on this tradition. See, e.g., *War Powers Resolution: Hearings Before the S. Comm. on Foreign Relations*, 95th Cong. (1977) (testimony of Legal Adviser Herbert J. Hansell); *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Security and Science of the H. Comm. on Foreign Affairs*, 99th Cong. (1986) (testimony of Legal Adviser Abraham D. Sofaer); *H. Con. Res. 82, Directing the President to Remove Armed Forces From Operations Against Yugoslavia, and H.J. Res. 44, Declaring War Between the United States and Yugoslavia: Markup Before the H. Comm. on Int'l Relations*, 106th Cong. (1999) (testimony of Principal Deputy Legal Adviser Michael J. Matheson). Cf. Legal Adviser Harold Hongju Koh, Statement Regarding the Use

We believe that the President is acting lawfully in Libya, consistent with both the Constitution and the War Powers Resolution, as well as with international law.<sup>2</sup> Our position is carefully limited to the facts of the present operation, supported by history, and respectful of both the letter of the Resolution and the spirit of consultation and collaboration that underlies it. We recognize that our approach has been a matter of important public debate, and that reasonable [\*2] minds can disagree. But surely none of us believes that the best result is for Qadhafi to wait NATO out, leaving the Libyan people again exposed to his brutality. Given that, we ask that you swiftly approve Senate Joint Resolution 20, the bipartisan measure recently introduced by eleven Senators, including three members of this Committee.<sup>3</sup> The best way to show a united front to Qadhafi, our NATO allies, and the Libyan people is for Congress now to authorize under that Joint Resolution continued, constrained operations in Libya to enforce United Nations Security Council Resolution 1973.

As Secretary Clinton testified in March, the United States' engagement in Libya followed the Administration's strategy of "using the combined assets of diplomacy, development, and defense to protect our interests and advance our values."<sup>4</sup> Faced with brutal attacks and explicit threats of further imminent attacks by Muammar Qadhafi against his own people,<sup>5</sup> the United States and its in-

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of Force in Libya, American Society of International Law Annual Meeting (Mar. 26, 2011) (discussing "the historical practice of the Legal Adviser publicly explaining the legal basis for United States military actions that might occur in the international realm").

<sup>2</sup> For explanation of the lawfulness of our Libya actions under international law, see Koh, *supra* note 1.

<sup>3</sup> S.J. Res. 20 (introduced by Senators Kerry, McCain, Levin, Kyl, Durbin, Feinstein, Graham, Lieberman, Blunt, Cardin, and Kirk).

<sup>4</sup> *Hearing on FY2012 State Department Budget Before the Subcomm. on State, Foreign Operations, and Related Programs of the S. Comm. on Appropriations*, 112th Cong. (Mar. 2, 2011).

<sup>5</sup> Qadhafi's actions demonstrate his ongoing intent to suppress the democratic movement against him by lawlessly attacking Libyan civilians. On February 22, 2011, Qadhafi pledged on Libyan National Television to lead "millions to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual until I purify this land." He called his opponents "rats," and said they would be executed. On March 17, 2011, in another televised address, Qadhafi promised, "We will come house by house, room by room. . . . We will find you in your closets. And we will have no mercy and no

ternational partners acted with unprecedented speed to secure a mandate, under [\*3] Resolution 1973, to mobilize a broad coalition to protect civilians against attack by an advancing army and to establish a no-fly zone. In so doing, President Obama helped prevent an imminent massacre in Benghazi, protected critical U.S. interests in the region, and sent a strong message to the people not just of Libya – but of the entire Middle East and North Africa – that America stands with them at this historic moment of transition.

From the start, the Administration made clear its commitment to acting consistently with both the Constitution and the War Powers Resolution. The President submitted a report to Congress, consistent with the War Powers Resolution, within 48 hours of the commencement of operations in Libya. He framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission – in an action involving no U.S. ground presence or, to this point, U.S. casualties – authorized by a carefully tailored U.N. Security Council Resolution. As the War Powers Resolution con-

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city.” Qadhafi’s widespread and systematic attacks against the civilian population led the United Nations Security Council, in Resolution 1970, to refer the situation in Libya to the Prosecutor of the International Criminal Court. The U.N. Human Rights Council’s Commission of Inquiry into Libya subsequently concluded that since February, “[human rights] violations and crimes have been committed in large part by the Government of Libya in accordance with the command and control system established by Colonel Qadhafi through the different military, para-military, security and popular forces that he has employed in pursuit of a systematic and widespread policy of repression against opponents of his regime and of his leadership.” At this moment, Qadhafi’s forces continue to fire indiscriminately at residential areas with shells and rockets. Defecting Qadhafi forces have recounted orders “to show no mercy” to prisoners, and some recent reports indicate that the Qadhafi regime has been using rape as a tool of war. See Secretary of State Hillary Rodham Clinton, Press Statement, Sexual Violence in Libya, the Middle East and North Africa (June 16, 2011), <http://www.state.gov/secretary/rm/2011/06/166369.htm>. For all of these reasons, President Obama declared on March 26, “[W]hen someone like Qadhafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save thousands of lives – then it’s in our national interest to act. And, it’s our responsibility. This is one of those times.”

templates, the Administration has consulted extensively with Congress about these operations, participating in more than ten hearings, thirty briefings, and dozens of additional exchanges since March 1 – an interbranch dialogue that my testimony today continues.

This background underscores the limits to our legal claims. Throughout the Libya episode, the President has never claimed the authority to take the nation to war without Congressional authorization, to violate the War Powers Resolution or any other statute, 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. The [\*4] Administration recognizes 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 and deliberation on these critical matters. The President has expressed his strong desire for Congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.

Together with our NATO and Arab partners, we have made great progress in protecting Libya's civilian population, and we have isolated Qadhafi and set the stage for his departure. Although since early April we have confined our military involvement in Libya to a supporting role, the limited military assistance that we provide has been critical to the success of the mission, as has our political and diplomatic leadership. If the United States were to drop out of, or curtail its contributions to, this mission, it could not only compromise our international relationships and alliances and threaten regional instability, but also permit an emboldened and vengeful Qadhafi to return to attacking the very civilians whom our intervention has protected.

Where, against this background, does the War Powers Resolution fit in? The legal debate has focused on the Resolution's 60-day clock, which directs the President – absent express Congressional authorization (or the applicability of other limited exceptions) and following an initial 48-hour reporting period – to remove United States Armed Forces within 60 days from "hostilities" or "situations

where imminent involvement in hostilities is clearly indicated by the circumstances.” But as virtually every lawyer recognizes, the operative term, “hostilities,” is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation. Indeed, the legislative history of the Resolution makes clear there was no fixed view on exactly what the [\*5] term “hostilities” would encompass.<sup>6</sup> Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the Resolution a “one size fits all” straitjacket that would operate mechanically, without regard to particular circumstances.

From the start, lawyers and legislators have disagreed about the meaning of this term and the scope of the Resolution’s 60-day pullout rule. Application of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a Resolution passed by a Congress that could not have en-

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<sup>6</sup> When the Resolution was first considered, one of its principal sponsors, Senator Jacob K. Javits, stated that “[t]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it.” *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971); see also *id.* (statement of Professor Henry Steele Commager) (agreeing with Senator Javits that “there is peril in trying to be too exact in definitions,” as “[s]omething must be left to the judgment, the intelligence, the wisdom, of those in command of the Congress, and of the President as well”). Asked at a House of Representatives hearing whether the term “hostilities” was problematic because of “the susceptibility of it to different interpretations,” making this “a very fuzzy area,” Senator Javits acknowledged the vagueness of the term but suggested that it was a necessary feature of the legislation: “There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority.” *War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 93d Cong. 22 (1973). We recognize that the House report suggested that “[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope,” but the report provided no clear direction on what either term was understood to mean. H.R. REP. NO. 93-287, at 7 (1973); see also *Lowry v. Reagan*, 676 F. Supp. 333, 340 n.53 (1997) (finding that “fixed legal standards were deliberately omitted from this statutory scheme,” as “the very absence of a definitional section in the [War Powers] Resolution [was] coupled with debate suggesting that determinations of ‘hostilities’ were intended to be political decisions made by the President and Congress”).

visioned many of the operations in which the United States has since become engaged. Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes “hostilities” for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions. Both branches have recognized that different situations may call for different responses, and that [\*6] an overly mechanical reading of the statute could lead to unintended automatic cutoffs of military involvement in cases where more flexibility is required.

In the nearly forty years since the Resolution’s enactment, successive Administrations have thus started from the premise that the term “hostilities” is “definable in a meaningful way only in the context of an actual set of facts.”<sup>7</sup> And successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law’s meaning over time. By adopting this approach, the two branches have sought to avoid construing the statute mechanically, divorced from the realities that face them.

In this case, leaders of the current Congress have stressed this very concern in indicating that they do not believe that U.S. military operations in Libya amount to the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day pullout provision.<sup>8</sup> The histor-

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<sup>7</sup> 1975 Leigh-Hoffmann Letter, *supra* note 1, at 38.

<sup>8</sup> Both before and after May 20, 2011, the 60th day following the President’s initial letter to Congress on operations in Libya, few Members of Congress asserted that our participation in the NATO mission would trigger or had triggered the War Powers Resolution’s pullout provision. House Speaker Boehner stated on June 1, 2011, that “[l]egally, [the Administration has] met the requirements of the War Powers Act.” House Minority Leader Pelosi stated on June 16, 2011, that “[t]he limited nature of this engagement allows the President to go forward,” as “the President has the authority he needs.” Senate Majority Leader Reid stated on June 17, 2011, that “[t]he War Powers Act has no application to what’s going on in Libya.” Senate Foreign Relations Committee Chairman Kerry stated on June 21, 2011, that “I do not think our limited involvement rises to the level of hostilities defined by the War Powers Resolution,” and on June 23, 2011, that “[w]e have not introduced our armed forces into hostilities. No American is being shot at. No American troop is at risk of being shot down today. That is not what we’re doing. We are refueling. We are supporting NATO.” Since May 20, the basic facts regarding the limited nature of our

ical practice supports this view. In 1975, Congress expressly invited the Executive Branch to provide its best understanding of the term “hostilities.” My predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann responded that, as a general matter, 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.”<sup>9</sup> On the other hand, as Leigh [\*7] and Hoffmann suggested, the term should not necessarily be read to include situations where the nature of the mission is limited (*i.e.*, situations that do not “involve the full military engagements with which the Resolution is primarily concerned”<sup>10</sup>); where the exposure of U.S. forces is limited (*e.g.*, situations involving “sporadic military or paramilitary attacks on our armed forces stationed abroad,” in which the overall threat faced by our military is low<sup>11</sup>); and where the risk of escalation is therefore limited. Subsequently, the Executive Branch has reiterated the distinction between full military encounters and more constrained operations, stating that “intermittent military engagements” do not require withdrawal of forces under the Resolution’s 60-day rule.<sup>12</sup> In the thirty-six years since Leigh and Hoffmann provided their analysis, the Executive Branch has repeatedly articulated and applied these foundational understandings. The President was thus operating within this longstanding tradition of Executive Branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011.

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mission in Libya have not materially changed.

<sup>9</sup> 1975 Leigh-Hoffmann Letter, *supra* note 1, at 38-39.

<sup>10</sup> The quoted language comes from the Department of Justice, which in 1980 reaffirmed the Leigh-Hoffmann analysis. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 194 (1980).

<sup>11</sup> *Id.*; see also Letter from Assistant Secretary of State J. Edward Fox to Chairman Dante B. Fascell (Mar. 30, 1988) (stating that “hostilities” determination must be “based on all the facts and circumstances as they would relate to the threat to U.S. forces at the time” (emphasis added)).

<sup>12</sup> Letter from Assistant Secretary of State for Legislative Affairs Wendy R. Sherman to Representative Benjamin Gilman, *reprinted in* 139 Cong. Rec. H7095 (daily ed. Sept. 28, 1993).

In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day automatic pullout provision.

First, the mission is limited: By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council Resolution tailored to that limited purpose. This is a very [\*8] unusual set of circumstances, not found in any of the historic situations in which the “hostilities” question was previously debated, from the deployment of U.S. armed forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993. Of course, NATO forces as a whole are more deeply engaged in Libya than are U.S. forces, but the War Powers Resolution’s 60-day pullout provision was designed to address the activities of the latter.<sup>13</sup>

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<sup>13</sup> A definitional section of the War Powers Resolution, 8(c), gives rise to a duty of Congressional notification, but not termination, upon the “assignment” of U.S. forces to command, coordinate, participate in the movement of, or accompany foreign forces that are themselves in hostilities. Section 8(c) is textually linked (through the term “introduction of United States Armed Forces”) not to the “hostilities” language in section 4 that triggers the automatic pullout provision in section 5(b), but rather, to a different clause later down in that section that triggers a reporting requirement. According to the Senate report, the purpose of section 8(c) was “to prevent secret, unauthorized military support activities [such as the secret assignment of U.S. military ‘advisers’ to South Vietnam and Laos] and to prevent a repetition of many of the most controversial and regrettable actions in Indochina,” S. REP. NO. 93-220, at 24 (1973) – actions that scarcely resemble NATO operations such as this one. Indeed, absurd results could ensue if section 8(c) were read to trigger the 60-day clock, as that could require termination of the “assignment” of even a single member of the U.S. military to assist a foreign government force, unless Congress passed legislation to authorize that one-person assignment. Moreover, section 8(c) must be read together with the immediately preceding section of the Resolution, 8(b). By grandfathering in pre-existing “high-level military commands,” section 8(b) not only shows that Congress knew how to reference NATO operations when it wanted to, but also suggests that Congress recognized that NATO operations are generally less likely to raise the kinds of policy concerns that animated the Resolution. If anything, the international framework of cooperation within which this military mission is taking place creates a far greater risk that by withdrawing prematurely from Libya, as opposed to staying the course, we would generate the very foreign policy problems that the War Powers Resolution was meant to counteract: for example, international condemnation and strained relationships with key allies.



Second, the *exposure* of our armed forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties. Nor do our current operations involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sustained confrontations of any kind with hostile forces.<sup>14</sup> Prior administrations have not found the 60-day rule to apply even in situations where [\*9] significant fighting plainly did occur, as in Lebanon and Grenada in 1983 and Somalia in 1993.<sup>15</sup> By highlighting this point, we in no way advocate a legal theory that is indifferent to the loss of non-American lives. But here, there can be little doubt that the greatest threat to Libyan civilians comes not from NATO or the United States military, but from Qadhafi. The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. *forces*,<sup>16</sup> and with the risk that the President would

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<sup>14</sup> The fact that the Defense Department has decided to provide extra “danger pay” to those U.S. service members who fly planes over Libya or serve on ships within 110 nautical miles of Libya’s shores does not mean that those service members are in “hostilities” for purposes of the War Powers Resolution. Similar danger pay is given to U.S. forces in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and dozens of other countries in which no one is seriously contending that “hostilities” are occurring under the War Powers Resolution.

<sup>15</sup> In Lebanon, the Reagan Administration argued that U.S. armed forces were not in “hostilities,” though there were roughly 1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those attacks. See Richard F. Grimmett, Congressional Research Service, *The War Powers Resolution: After Thirty Six Years* 13-15 (Apr. 22, 2010); John H. Kelly, *Lebanon: 1982-1984*, in U.S. AND RUSSIAN POLICYMAKING WITH RESPECT TO THE USE OF FORCE 85, 96-99 (Jeremy R. Azrael & Emily A. Payin eds., 1996). In Grenada, the Administration did not acknowledge that “hostilities” had begun under the War Powers Resolution after 1,900 members of the U.S. armed forces had landed on the island, leading to combat that claimed the lives of nearly twenty Americans and wounded nearly 100 more. See Grimmett, *supra*, at 15; Ben Bradlee, Jr., *A Chronology on Grenada*, BOSTON GLOBE, Nov. 6, 1983. In Somalia, 25,000 troops were initially dispatched by the President, without Congressional authorization and without reference to the War Powers Resolution, as part of Operation Restore Hope. See Grimmett, *supra*, at 27. By May 1993, several thousand U.S. forces remained in the country or on ships offshore, including a Quick Reaction Force of some 1,300 marines. During the summer and into the fall of that year, ground combat led to the deaths of more than two dozen U.S. soldiers. JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 112, 124-27 (1995).

<sup>16</sup> The text of the statute supports this widely held understanding, by linking the pullout

entangle them in an overseas conflict from which they could not readily be extricated. In this instance, the absence of U.S. ground troops, among other features of the Libya operation, significantly reduces both the risk to U.S. forces and the likelihood of a protracted entanglement that Congress may find itself practically powerless to end.<sup>17</sup> [\*10]

Third, the *risk of escalation* is limited: U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope. Contrast this with the 1991 Desert Storm operation, which although also authorized by a United Nations Security Council Resolution, presented “over 400,000 [U.S.] troops in the area – the same order of magnitude as Vietnam at its peak – together with concomitant numbers of ships, planes, and tanks.”<sup>18</sup> Prior administrations have found an absence of “hostilities” under the War Powers Resolution in situations ranging from Lebanon to Central America to Somalia to the Persian Gulf tanker controversy, although members of the United States Armed Forces were repeatedly engaged by the other side’s forces and sustained casualties in volatile geopolitical circumstances, in some cases running a greater risk of possible escalation than here.<sup>19</sup>

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provision to the “introduction” of United States Armed Forces “into hostilities,” suggesting that its primary focus is on the dangers confronted by members of our own military when deployed abroad into threatening circumstances. Section 5(c), by contrast, refers to United States Armed Forces who are “engaged in hostilities.”

<sup>17</sup> Cf. *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982) (“The War Powers Resolution, which was considered and enacted as the Vietnam war was coming to an end, was intended to prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop.”).

<sup>18</sup> JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 50 (1993).

<sup>19</sup> For example, in the Persian Gulf in 1987-88, the Reagan Administration found the War Powers Resolution’s pullout provision inapplicable to a reflagging program that was conducted in the shadow of the Iran-Iraq war; that was preceded by an accidental attack on a U.S. Navy ship that killed 37 crewmen; and that led to repeated instances of active combat with Iranian forces. See Grimmert, *supra* note 15, at 16-18.

Fourth and finally, the *military means* we are using are limited: This situation does not present the kind of “full military engagement[] with which the [War Powers] Resolution is primarily concerned.”<sup>20</sup> The violence that U.S. armed forces have directly inflicted or facilitated 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 in Libya are a far cry from the bombing campaign waged in Kosovo in 1999, which involved much more extensive and aggressive aerial [\*11] strike operations led by U.S. armed forces.<sup>21</sup> The U.S. contribution to NATO is likewise far smaller than it was in the Balkans in the mid-1990s, where U.S. forces contributed the vast majority of aircraft and air strike sorties to an operation that lasted over two and a half years, featured repeated violations of the no-fly zone and episodic firefights with Serb aircraft and gunners, and paved the way for approximately 20,000 U.S. ground troops.<sup>22</sup> Here, by contrast, the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets. A very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners. American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly

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<sup>20</sup> *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 194 (1980).

<sup>21</sup> In Kosovo, the NATO alliance set broader goals for its military mission and conducted a 78-day bombing campaign that involved more than 14,000 strike sorties, in which the United States provided two-thirds of the aircraft and delivered over 23,000 weapons. The NATO bombing campaign coincided with intensified fighting on the ground, and NATO forces, led by U.S. forces, “flew mission after mission into antiaircraft fire and in the face of over 700 missiles fired by Yugoslav air defense forces.” *Hearing Before the S. Armed Servs. Comm.*, 106th Cong. (1999) (statement of Gen. Wesley Clark, Admiral James Ellis, Jr. & Lt. Gen. Michael Short).

<sup>22</sup> See *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995); Dean Simmons et al., U.S. Naval Institute, *Air Operations over Bosnia*, PROCEEDINGS MAGAZINE, May 1997, available at <http://www.usni.org/magazines/proceedings/1997-05/air-operations-over-bosnia>; NATO Fact Sheet, Operation Deny Flight (July 18, 2003), <http://www.afsouth.nato.int/archives/operations/DenyFlight/DenyFlightFactSheet.htm>. U.S. air operations over Bosnia “were among the largest scale military operations other than war conducted by U.S. forces since the end of the Cold War.” Simmons et al., *supra*.

zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission; since the handoff to NATO, the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo. All NATO targets, moreover, have been clearly linked to the Qadhafi regime's systematic attacks on the Libyan population and populated areas, with target sets engaged only when strictly necessary and with maximal precision.

Had any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn. But the unusual confluence of these four [\*12] factors, in an operation that was expressly designed to be limited – limited in mission, exposure of U.S. troops, risk of escalation, and military means employed – led the President to conclude that the Libya operation did not fall within the War Powers Resolution's automatic 60-day pullout rule.

Nor is this action inconsistent with the spirit of the Resolution. Having studied this legislation for many years, I can confidently say that we are far from the core case that most Members of Congress had in mind in 1973. The Congress that passed the Resolution in that year had just been through a long, major, and searing war in Vietnam, with hundreds of thousands of boots on the ground, secret bombing campaigns, international condemnation, massive casualties, and no clear way out. In Libya, by contrast, we have been acting transparently and in close consultation with Congress for a brief period; with no casualties or ground troops; with international approval; and at the express request of and in cooperation with NATO, the Arab League, the Gulf Cooperation Council, and Libya's own Transitional National Council. We should not read into the 1973 Congress's adoption of what many have called a "No More Vietnams" resolution an intent to require the premature termination, nearly forty years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya. Given the limited risk of escalation, exchanges of fire, and U.S. casualties, we do not believe that the 1973 Congress intended that its Resolution be given such a rigid construction – absent a clear

Congressional stance – to stop the President from directing supporting actions in a NATO-led, Security Council-authorized operation, for the narrow purpose of preventing the slaughter of innocent civilians.<sup>23</sup> [\*13]

Nor are we in a “war” for purposes of Article I of the Constitution. As the Office of Legal Counsel concluded in its April 1, 2011 opinion,<sup>24</sup> under longstanding precedent the President had the constitutional authority to direct the use of force in Libya, for two main reasons. First, he could reasonably determine that U.S. operations in Libya would serve important national interests in preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. Second, the military operations that the President anticipated ordering were not sufficiently extensive in “nature, scope, and duration” to constitute a “war” requiring prior specific Congressional approval under the Declaration of War Clause. Although time has passed, the nature and scope of our operations have not evolved in a manner that would alter that conclusion. To the contrary, since the transfer to NATO command, the U.S. role in the mission has become even more limited.

Reasonable minds may read the Constitution and the War Powers Resolution differently – as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us, which 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? The President has repeatedly stated that it is better to take military action, even in limited scenarios such as this, with strong

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<sup>23</sup> As President Obama noted in his June 22, 2011 speech on Afghanistan: “When innocents are being slaughtered and global security endangered, we don’t have to choose between standing idly by or acting on our own. Instead, we must rally international action, which we’re doing in Libya, where we do not have a single soldier on the ground, but are supporting allies in protecting the Libyan people and giving them the chance to determine their own destiny.”

<sup>24</sup> Office of Legal Counsel, U.S. Dep’t of Justice, *President’s Authority to Use Military Force in Libya*, <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (Apr. 1, 2011).

Congressional engagement and support. However we construe the War Powers Resolution, we can all agree that it serves only Qadhafi's interest for the United States to withdraw from this NATO operation before it is finished. [\*14]

That is why, in closing, we ask all of you to take quick and decisive action to approve S.J. Res. 20, the bipartisan resolution introduced by Senators Kerry, McCain, Durbin, Cardin, and seven others to provide express Congressional authorization for continued, constrained operations in Libya to enforce U.N. Security Council Resolution 1973. Only by so doing, can this body affirm that the United States government is united in its commitment to support the NATO alliance, the safety and stability of this pivotal region, and the aspirations of the Libyan people for political reform and self-government.

Thank you. I look forward to answering your questions.