

# “HOSTILITIES”

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The inspiration for this second edition of *Pub. L. Misc.* is the Obama Administration’s legal defense of the ongoing U.S. military involvement in Libya, and in particular its claim that the operation does not rise to the level of “hostilities” under the War Powers Resolution.

On March 21, 2011, President Obama notified Congress that the U.S. military and various allied forces had commenced airstrikes against the Qadhafi regime in Libya. The stated aim was to avert a humanitarian crisis arising out of the regime’s violent attempt to put down the growing popular rebellion within Libya. The air campaign was undertaken in furtherance of a United Nations Security Council Resolution but not pursuant to any domestic statutory authority.

The President’s announcement raised questions in some quarters about whether he had the legal authority to direct this use of military force. In response, the Administration released an April 1, 2011 memorandum by the Justice Department’s Office of Legal Counsel (OLC), memorializing oral advice OLC had given before the start of the Libya operation. We reproduce that memorandum here.

OLC took the position that, given what it understood to be the limited nature of the Libya operation, the President had the power to order its commencement without prior congressional approval. OLC placed great weight on historical practice, asserting that “[o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval” and that the Libya operation was comparable to many of those past engagements.

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Reactions in Congress were mixed. A small contingent objected so strongly that it filed suit in federal court seeking to enjoin the operation. In the main, however, congressional leaders appeared to accept that the President had the inherent constitutional authority to commence the action. For example, in a March 23, 2011 letter to the President (reproduced here), Speaker Boehner raised numerous policy-based questions about the operation, but did not question the President's constitutional authority to commence it.

But there were other legal issues. The War Powers Resolution (WPR) provides that when the President directs the U.S. military to engage in "hostilities" without advance congressional authorization, the operation must cease within 60 days unless Congress authorizes it in the meantime. Passed in 1973 as a response to Vietnam and over President Nixon's veto, the WPR has long been controversial. Much of the controversy has focused on other parts of the WPR, including a provision specifying a limited set of circumstances in which the President may introduce armed forces into hostilities. As for the 60-day clock in particular, its status has been uncertain. Presidents following Nixon have not consistently conceded or denied its constitutionality, and executive offices like OLC have sent mixed signals.<sup>1</sup>

As the Libya operation approached and then passed the 60-day mark in mid-May 2011, the hostilities question took center stage. Was the U.S. military engaged in hostilities in Libya? If so, was the Obama Administration prepared to declare the 60-day clock uncon-

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<sup>1</sup> Compare *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980) ("The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.") with John C. Yoo, *Applying the War Powers Resolution to the War on Terror*, 6 GREEN BAG 2D 175, 175 (2003) (reprinting 2002 testimony as Deputy Assistant Attorney General before the Senate Subcommittee on the Constitution, stating that "the President's power to engage U.S. Armed Forces in military hostilities is not limited by the War Powers Resolution"); see also *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 House Comm. on Int'l Relations*, 106th Cong. 37 (1999) (statement of State Department Legal Adviser Mike Matheson) ("This Administration has not taken a formal stance on the constitutionality of the 60-day provision to this point, but has taken the view that it is unwise and should be repealed.").

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stitutional? Or did it take the position that the U.S. military’s involvement in Libya was not hostilities?

The Administration chose the latter path. It maintained that when NATO assumed leadership of the operation in early April, the U.S. involvement receded to a supporting role that did not rise to the level of hostilities. This was met with incredulity in some quarters, especially in light of press reports that by mid-June, “American war-planes ha[d] struck at Libyan air defenses about 60 times, and remotely operated drones ha[d] fired missiles at Libyan forces about 30 times” since early April.<sup>2</sup>

A complete defense of the Administration’s position came a few weeks later, in the form of testimony from State Department Legal Adviser Harold Koh before the Senate Foreign Relations Committee.<sup>3</sup> We reproduce it here. Koh underscored “the Administration[’s] commitment to acting consistently with the Constitution and the War Powers Resolution,” but did not quite explicitly concede the constitutionality of the WPR in all respects. Instead, he elaborated on the reasons why the Administration deemed the 60-day clock not to apply. The WPR, Koh argued, was intended largely to ensure that unilateral presidential action did not lead the country into another Vietnam. He concluded that “hostilities” should therefore be understood in reference to that purpose, and that the Libya operation was simply nothing like Vietnam. The Libya operation, Koh emphasized, was nothing of the sort. Instead it was limited in four key respects – mission, exposure of U.S. troops to danger, risk of escalation, and military means deployed – that, Koh concluded, kept the operation below the hostilities level.

Congress was skeptical. We reproduce some of its responses here. Perhaps most notably, after hearing Koh’s testimony a bipartisan majority of the Senate Foreign Relations Committee approved a

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<sup>2</sup> Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8.

<sup>3</sup> The process by which the Obama Administration arrived at its position on the hostilities issue raised its own questions, given press reports that OLC had concluded that the operation did constitute hostilities and that the White House had rejected that position in favor of the one advocated by the State Department. See Trevor W. Morrison, *Libya, “Hostilities,” and the Process of Executive Branch Legal Interpretations*, 124 HARV. L. REV. F. 62 (2011).

resolution that provided statutory authorization for the Libya operation while also expressly declaring that it “constitute[d] hostilities within the meaning of the War Powers Resolution.” That resolution never received a full Senate vote, nor did any other on this topic. So the Libya operation continued on, but without any clear legislative-executive agreement on the hostilities issue.

What *does* “hostilities” mean? The WPR itself does not define the term, and no court decision or subsequent legislation has done so. But there are some materials bearing on the question. We reproduce a small selection of them here, mindful that this is by no means a complete catalog.

At the time of the WPR’s passage, some in Congress evidently read hostilities quite expansively. The House Report accompanying the WPR, for example, stated 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.” At the same time, colloquies in hearings suggested that some of the sponsors of the WPR could not agree, even after the fact, about when hostilities began in Vietnam.

Two years after the WPR was passed, Congress invited State Department Legal Adviser Monroe Leigh and Defense Department General Counsel Martin Hoffmann to provide their best understanding of hostilities. In their letter, Leigh and Hoffmann said that the Executive Branch understood 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,” but that it did not include “irregular or infrequent violence which may occur in a particular area.” In his testimony this past summer, Koh claimed that in the 36 years since the Leigh-Hoffmann letter, “the Executive Branch has repeatedly articulated and applied th[e] foundational understandings” articulated in it.

As with so many separation of powers issues, the practice over time of the Executive and Legislative Branches may indeed provide the best evidence of what hostilities has come to mean. The Libya episode is now part of that history. Precisely what meaning it assigns

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to hostilities – and what life it leaves in the WPR – is sure to be debated the next time around.