



# PUB. L. MISC.

Volume 1, Number 2, 2011

# PUB. L. MISC.

---

*James C. Ho & Trevor W. Morrison, editors*

---

## TABLE OF CONTENTS

“Hostilities” by Trevor W. Morrison .....	233
Jonathan Bingham – Jacob Javits colloquy, Mar. 7, 1973.....	239
James Fulbright, Senate Foreign Relation Committee Report, June 14, 1973.....	242
Clement Zablocki, House Foreign Affairs Committee Report, June 15, 1963.....	247
Monroe Leigh – Clement Zablocki correspondence, May 9 & June 3, 1975 .....	249
John A. Boehner to Barack Obama, Mar. 23, 2011.....	256
Caroline D. Krass to Eric H. Holder, Jr., Apr. 1, 2011.....	260
John A. Boehner, House Resolution, June 2, 2011.....	282
John F. Kerry et al., Senate Joint Resolution 20, June 21, 2011 .....	287
Harold Hongju Koh, Testimony before the Senate Foreign Relations Committee, June 28, 2011 .....	292
Richard G. Lugar, Senate Joint Resolution 20 amendment, no date .....	306
Cumulative Indexes	
Index 1: Chronological .....	308
Index 2: Authors.....	309
Index 3: Recipients .....	310
Index 4: Topics.....	311

---

*Pub. L. Misc.* operates on the same terms as the *Journal of Law*. Please write to us at [jho@gibsondunn.com](mailto:jho@gibsondunn.com) and [tmorri@law.columbia.edu](mailto:tmorri@law.columbia.edu), and visit us at [www.journaloflaw.us](http://www.journaloflaw.us). Copyright © 2011 by The Green Bag, Inc., except where otherwise indicated and for U.S. governmental works. ISSN 2157-9067 (print) and 2157-9075 (online). The cover of this issue is an aerial view of the Vietnam Veterans Memorial in Washington, DC. Library of Congress, Prints & Photo. Div., repro. no. LC-DIG-highsm-04921 (Apr. 30, 2007).

# “HOSTILITIES”

*Trevor W. Morrison*<sup>†</sup>

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.

---

<sup>†</sup> Isidor and Seville Sulzbacher Professor of Law, Columbia Law School.

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-

---

<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.").

## “HOSTILITIES”

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

---

<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

*"HOSTILITIES"*

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





# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Jonathan Bingham – Jacob Javits colloquy (excerpt)*

March 7, 1973

---

## HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY  
POLICY AND SCIENTIFIC DEVELOPMENTS

OF THE

COMMITTEE ON FOREIGN AFFAIRS  
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

MARCH 7, 8, 13, 14, 15, 20, 1973

[\*16]

PRESIDENT'S POWERS TO MAKE WAR ON HIS OWN

Mr. BINGHAM. Thank you very much.

Senator, I would like to compliment you most profoundly for your leadership in this field and for the eloquent way you have stated again and again your conviction that Congress must act and act in such a way that the President's powers to make war on his own are restrained effectively.

Having said that, I must confess that I have great reservations about the approach of your bill and the principal reservation I have is the requirement for a rigid 30-day period within which Congress must act affirmatively.

If such a bill as this requires that Congress act affirmatively to approve Presidential action initiating hostilities, then a deadline must be imposed. You cannot leave that open.

I see a lot of trouble and grief in the 30-day provision. First of all, the question may well arise in many cases, when does the 30-day period start. May I ask you this question: Assuming that bill had been in effect during the period of the Vietnam hostilities, when did our hostilities in Vietnam begin so as to start the 30-day period running?

Senator JAVITS. In my judgment the hostilities in Vietnam began when President Johnson deployed our forces in the combat situation to bail out the South Vietnamese which my best recollection is March 1965.

Mr. BINGHAM. You don't think that when President Kennedy sent 20,000 advisers to take part in the operations that that was the commencement?

Senator JAVITS. No. My initial reaction is that if I were President I would not define that as committing us to hostilities or imminent danger of hostilities. What it might have committed us to was having Americans in the area who could become involved with the imminent threat of hostilities and we might have to come to their rescue. However, my mind is not closed on this evaluation. Perhaps the best bench-[\*17]mark would be the days President Kennedy ordered U.S. advisers to accompany the ARVN units on combat patrols, with orders to shoot back if attacked.

#### WHEN DO HOSTILITIES BEGIN?

Mr. BINGHAM. What about President Johnson's ordering of American planes into action against North Vietnam. Was that not the beginning of hostilities?

Senator JAVITS. I don't remember now whether that preceded –  
Mr. BINGHAM. That preceded.

Senator JAVITS. If it did precede, I would say yes. I think that you are making a very important point in that regard. I think that it is ascertainable when you are in hostilities or imminent danger of hostilities.

For example, take the Cuban crisis. I think when President Kennedy sent planes over Cuba to take pictures, we were not in hostilities or in imminent danger of hostilities, but when we insisted on

inspecting ships, we may have been in imminent danger of hostilities, although it turned out that way because the Soviet ships were not stopped by us but stopped of their own accord.

I think historically there is enough of a line so you can fix the time. As you say yourself, Congressman, you have done a lot of thinking about this. You have a very interesting war powers bill of your own, and I am very gratified you are involved in this issue. I compliment you for participating in such an activity.

We have tried very hard in respect of the 30-day provision to develop some standards. I would be the first to affirm that by no means are we stripping the President of his constitutional powers in S. 440. There still remains great authority in the Office of the Presidency. For example, he can still deploy our forces generally at his discretion. Some have argued against this bill saying, for example, "Well, when the 7-day war occurred he moved the Navy closer to the theater of action." So what? He has a right to deploy them in international waters and put them in a position where they would be better postured if they are to be put into hostilities.

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Senate Foreign Relations Committee Report, submitted by James Fulbright  
(excerpt, reproduced as an appendix to Hearings before the Committee on Foreign Relations,  
United States Senate, Ninety-Fifth Congress, On a Review of the Operation and  
Effectiveness of the War Powers Resolution, July 13, 14 and 15, 1977, Senate Report  
No. 220, 93rd Congress, 1st Session)*

June 14, 1973

---

[\*238]

## WAR POWERS

JUNE 14, 1973 – Ordered to be printed

Mr. Fulbright, from the Committee on Foreign Relations,  
submitted the following

### REPORT

together with

### SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass. . . .

[\*265]

### 30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so

comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practices in our history and, climatically, in recent decades.

Section 5 provides that actions taken under the provisions of section 3: “shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.”

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length in time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that Congress’s actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit – or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day – and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the [page 266] President would not be required or expected to order the troops to lay down their arms.

The President would, however, be under statutory compulsion to begin to disengage in good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: “he shall take care that the laws be faithfully executed.”

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnel engaged. Moreover, it requires the President’s certification in writing that any such contingency had arisen from “unavoidable military necessity.”

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event “Congress is physically unable to meet as a result of an armed attack upon the United States.”

The question has been raised whether there can or should be any time limitation on the President’s emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the alleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose – and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don’t.

Section 5(3) provides for: “the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.” It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for “continued use.” Moreover, just as the Congress [\*267] under the Constitution is not intended to be under any obligation to declare war against its own better judgment,

so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.



# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*House Foreign Affairs Committee Report, submitted by Clement Zablocki  
(excerpt, reproduced as an appendix to Hearings before the Committee on Foreign Relations,  
United States Senate, Ninety-Fifth Congress, On a Review of the Operation and  
Effectiveness of the War Powers Resolution, July 13, 14 and 15, 1977)*

June 15, 1963 [sic]

---

[\*282]

## WAR POWERS RESOLUTION OF 1973

---

June 15, 1963 [sic]. – Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

---

Mr. ZABLOCKI, from the Committee on Foreign Affairs, submitted  
the following

### REPORT

### TOGETHER WITH MINORITY AND SUPPLEMENTAL VIEWS

[To accompany H.J. Res. 542] . . .

[\*page number unknown]

### SECTION-BY-SECTION ANALYSIS. . . .

[\*page number unknown]

*Section 2. Consultation. . . .*

[\*288]

The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered

to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. “*Imminent hostilities*” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Monroe Leigh – Clement Zablocki correspondence*

*(excerpt, War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident)*

May 9 & June 3, 1975

---

[\*37] COMMITTEE ON FOREIGN AFFAIRS  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C. May 9, 1975*

Hon. MONROE LEIGH,<sup>1</sup>  
*Legal, Adviser, Department of State,*  
*Washington, D.C.*

DEAR MR. LEIGH: Your testimony before the Subcommittee on International Security and Scientific Affairs Wednesday was most enlightening and helpful to the Subcommittee's purposes. Please accept my thanks for your cooperation.

As indicated at the close of the hearing, I would appreciate your answers to the following additional questions for inclusion in the hearing record:

(1) As you know, only those reports filed pursuant to Section 4(a)(1) trigger the balance of the Act, involving Congressional action. The obvious key word in section 4(a)(1) is "HOSTILITIES."

Can you tell us what your working definition of that word is as it related to each of the 3 reports which have been filed? Also, can you tell us what your working definition of "imminent" hostilities is?

[NOTE. – See p. 23 of Committee print regarding House Foreign Affairs Committee report definition of "hostilities"]

(2) Again in terms of relating the report of April 30 to your working definition of "hostilities," how precisely did the four U.S.

---

<sup>1</sup> Same letter sent to Hon. Martin R. Hoffmann.

casualties noted in that report figure in to make it a Section 4 – and only a Section 4 – report?

REGARDING PRESIDENT'S AUTHORITY TO EVACUATE  
AMERICANS AND NON-AMERICANS:

(3) The three War Powers reports use essentially the same language in describing the President's authority for the action he took in committing troops. Basically, they all say the operations were ordered "pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of United States Armed Forces." There is a great deal of dispute over what that term "Commander-in-Chief" means – especially within the context of the War Powers Resolution.

Would you give us briefly your legal interpretation of what precisely the President's authority is as Commander-in-Chief? [\*38]

REGARDING REPORT OF APRIL 12 –  
EVACUATION OF PHNOM PENH:

(4) The President's report of April 12 said that "the last elements of the force to leave received hostile recoilless rifle fire." Was that "hostilities" and if not, why not?

REGARDING REPORT OF APRIL 30 –  
EVACUATION OF SAIGON:

(5) The report of April 30 also indicates that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters." It also notes that ground security forces "returned fire during the course of the evacuation operation." Did not those two incidents clearly constitute hostilities thereby necessitating a Section 4(a)(1) report?

(6) Did you or did you not consider the two Marines who were killed at Tan Son Nhut airport a part of the evacuation force? Were they not actually assisting directly in the evacuation operation?

(7) What were the detailed circumstances surrounding the loss of a Navy helicopter in which two crew members lost their lives? Were they directly assisting or participating in the evacuation operation?

(8) Does the phrase “taking note of . . .” appearing in each of the 3 reports suggest anything other than a full binding legal responsibility upon the President?

Sincerely,

CLEMENT J. ZABLOCKI,  
*Chairman, Subcommittee on International  
Security and Scientific Affairs.*

---

DEPARTMENT OF STATE,  
*Washington, D.C., June 3[, ] 1975.*

Hon. CLEMENT J. ZABLOCKI,  
*Chairman, Subcommittee on International Security and Scientific Affairs,  
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: We are writing in response to your letters to us of May 9, 1975, requesting amplification of our testimony before your Subcommittee on May 7.

Enclosed is a memorandum<sup>2</sup> which responds to questions asked by members of the Subcommittee during our testimony. Although this memorandum may also answer a few of the questions raised in your recent letter, we shall also address each of your questions individually.

1. Your first question inquires as to our working definition of the word “hostilities” in section 4(a)(1) of the War Powers Resolution. We are, of course aware of the comments made by the Committee on page 7 of H. Report 93-287, wherein the Committee attempted a general definition of that word, which had its origin in the Senate version of the Resolution. Even as so defined, however, there is of necessity a large measure of judgement [sic] which is required. We note in this connection that even when measured against certain past events, differing views as to when hostilities commence were expressed during the Hearings before the Committee in 1973. See for example the colloquies between Representatives Bingham and Du Pont and Senator Javits on pages 16-17 and 21-22 of the Hearings. You will also recall Professor Bickel’s response to Mr. Du Pont with

---

<sup>2</sup> Memorandum appears on p. 29.

respect to the definition of "hostilities" that:

"There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law." (Hearings, at 185)

Whether "imminent involvement in hostilities" is clearly indicated by the circumstances is similarly, in our view, definable in a meaningful way only in the context of an actual set of facts. To speculate about hypothetical situations is possible but would not seem desirable. Reasonable men might well differ as to the implications to be drawn from any such hypothetical situation. In this connection, you will no doubt recall the uncertainty of some members of the Congress as to whether the military alert of October 24, 1973 triggered the reporting provisions of the War Powers Resolution, and the conclusion expressed by you on the Floor on April 9, 1974 (Congressional Record, at H. 2726) that hostilities had not been imminent and that a report had not been required.

Subject to the foregoing caveats, we turn to our working definitions of these terms. As applied in the first three war powers reports, "hostilities" was used to [page 39] 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 "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

You also ask which of the first three war powers reports referred to situations involving hostilities. In our view, the April 30, 1975 report refers to a situation where at least one incident of hostilities existed (see point 5 below); and in the Cambodia evacuation referred to in the April 12, 1975 report, an imminent involvement in hostilities may have existed (as to the factors that would enable one to reach a conclusion on whether hostilities did in fact exist see point 4 below). The April 4, 1975 report concerning the Danang evacuation, however, does not refer to a situation where hostilities existed.

2. Your letter uses the term, “a Section 4 report.” As we read the War Powers Resolution, section 4 does not call for different types of reports depending on whether U.S. armed forces are introduced under subparagraphs (1), (2) or (3) of section 4(a). Instead, section 4 seems to require only that “a report” be filed in any of the subparagraphs (1), (2) or (3) situations, and that such report merely contain the information specified in subparagraphs (A), (B) and (C).

It seems that the real thrust of the question is why the President in his April 30, 1975 report referred to section 4 in general, and not to any particular subparagraphs in that section. We presume that the President did so because the events giving rise to that report did not seem to be limited to just one of the three subparagraphs in section 4(a).

Thus, although the events as known at that time indicated that hostilities may have existed between U.S. and communist forces, U.S. forces “equipped for combat” were also introduced in the “territory, airspace or waters” of South Vietnam – the situation apparently provided for in section 4(a)(2).

Furthermore, since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to 4(a)(1) was not needed to call attention to possible action under section 5.

3. Your letter refers to the President’s authority as Commander-in-Chief. The three war powers reports you referred to all cite two sources of authority: Article II, Section 1 of the Constitution which provides that the “executive Power shall be vested” in the President, and the Commander-in-Chief clause (Article II, Section 2).

With respect to the Commander-in-Chief clause, we do not believe that any single definitional sentence could clearly encompass every aspect of the Commander-in-Chief authority. This authority would include such diverse things as the power to make armistices, to negotiate and conclude cease-fires, to effect deployments of the armed forces, to order the occupation of surrendered territory in time of war, to protect U.S. embassies and legations, to defend the United States against attack, to suppress civil insurrection, and the

like.

With respect to the specific question of protecting and rescuing U.S. citizens, the enclosed memorandum contains a discussion of both court opinions and historical precedents on this subject.

4. You refer to a portion of the April 12, 1975 report on the Cambodia evacuation which notes that the "last elements of the force to leave received hostile recoilless rifle fire." Whether or not this rifle fire constituted hostilities would seem to us to depend upon the nature of the source of this rifle fire – i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat. Our information concerning the source of this rifle fire is not sufficiently detailed to enable one to draw a conclusion as to whether this clearly amounted to "hostilities."

5. Your letter notes that the April 30, 1975 report relating to the Saigon evacuation indicates (a) that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters," and (b) that U.S. ground forces returned fire during the course of the evacuation. The first situation on its face constituted "hostilities." The evidence concerning the second situation is inconclusive as to whether the fire was of sufficient intensity so as to be part of a purposeful confrontation by opposing military forces; but in view of the actions of the U.S. fighter aircraft, a characterization of the second situation [page 40] may be academic. In any event, as discussed under point number 2 above, there were other circumstances present in the evacuation operation which precluded a conclusion that section 4(a)(1) alone, and no other provision of section 4, pertained to the operation.

6. The two marines who were killed at Tan Son Nhut airport that day before U.S. forces entered South Vietnamese airspace were not a part of the evacuation force. They were members of the marine guard at the American Embassy and were, at the time of their death, on regular duty in the compound of the Defense Attaché Office which was located at the airport. As you know, an evacuation



effort not involving our combat troops had been conducted for some time prior to the introduction of the evacuation forces. The fact that these marines, rather than civilian members of the Embassy, were killed was fortuitous and not a consequence of the introduction of the evacuation force.

7. The loss of the Navy helicopter was not directly related to the evacuation operation. Our understanding is that the helicopter was at the time, in accordance with standard operating procedures, involved in an ordinary search and rescue holding pattern near its home aircraft carrier. The purpose of its mission was to provide assistance to aircraft and helicopters that were participating in the evacuation operation, should such assistance become necessary. The helicopter crashed in the immediate vicinity of the carrier. The cause of the crash is not known, and the bodies of the crew were not recovered.

8. Your letter notes that the first three war powers reports contain the phrase “taking note of . . . .” You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

We hope we have covered each of the points raised not only in your letter, but also during our testimony before the Subcommittee on May 7. Please accept again our appreciation for the Subcommittee’s careful inquiry into these very complex legal and constitutional questions.

Sincerely,

MONROE LEIGH,  
*Legal Adviser, Department of State.*

MARTIN R. HOFFMAN,  
*General Counsel, Department of Defense.*

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Letter from John A. Boehner to Barack Obama*

March 23, 2011

---

JOHN A. BOEHNER

OHIO  
SPEAKER

WASHINGTON OFFICE  
H-232 U.S. CAPITOL BUILDING  
WASHINGTON, DC 20515  
(202) 225-0600



Congress of the United States  
House of Representatives

March 23, 2011

President Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. President:

Thank you for your letter dated March 21, 2011, outlining your Administration's actions regarding Libya and Operation Odyssey Dawn. The United States has long stood with those who seek freedom from oppression through self-government and an underlying structure of basic human rights. The news yesterday that a U.S. fighter jet involved in this operation crashed is a reminder of the high stakes of any military action abroad and the high price our Nation has paid in blood and treasure to advance the cause of freedom through our history.

I respect your authority as Commander-in-Chief and support our troops as they carry out their mission. But I and many other members of the House of Representatives are troubled that U.S. military resources were committed to war without clearly defining for the American people, the Congress, and our troops what the mission in Libya is and what America's role is in achieving that mission. In fact, the limited, sometimes contradictory, case made to the American people by members of your Administration has left some fundamental questions about our engagement unanswered. At the same time, by contrast, it appears your Administration has consulted extensively on these same matters with foreign entities such as the United Nations and the Arab League.

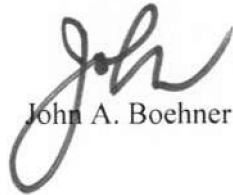
It is my hope that you will provide the American people and Congress a clear and robust assessment of the scope, objective, and purpose of our mission in Libya and how it will be achieved. Here are some of the questions I believe must be answered:

- A United Nations Security Council resolution does not substitute for a U.S. political and military strategy. You have stated that Libyan leader Muammar Qadhafi must go, consistent with U.S. policy goals. But the U.N. resolution the U.S. helped develop and signed onto makes clear that regime change is not part of this mission. In light of this contradiction, is it an acceptable outcome for Qadhafi to remain in power after the military effort concludes in Libya? If not, how will he be removed from power? Why would the U.S. commit American resources to enforcing a U.N. resolution that is inconsistent with our stated policy goals and national interests?
- In announcing that our Armed Forces would lead the preliminary strikes in Libya, you said it was necessary to “enable the enforcement of a no-fly zone that will be led by our [\*2] international partners.” Do we know which partners will be taking the lead? Are there clear lines of authority and responsibility and a chain of command? Operationally, does enforcement of a no-fly zone require U.S. forces to attack non-air or command and control operations for land-based battlefield activities, such as armored vehicles, tanks, and combatants?

- You have said that the support of the international community was critical to your decision to strike Libya. But, like many Americans, it appears many of our coalition partners are themselves unclear on the policy goals of this mission. If the coalition dissolves or partners continue to disengage, will the American military take on an increased role? Will we disengage?
- Since the stated U.S. policy goal is removing Qadhafi from power, do you have an engagement strategy for the opposition forces? If the strife in Libya becomes a protracted conflict, what are your Administration's objectives for engaging with opposition forces, and what standards must a new regime meet to be recognized by our government?
- Your Administration has repeatedly said our engagement in this military action will be a matter of "days, not weeks." After four days of U.S. military action, how soon do you expect to hand control to these other nations? After the transition to coalition forces is completed, how long will American military forces remain engaged in this action? If Qadhafi remains in power, how long will a no-fly zone will [sic] be enforced?
- We are currently in the process of setting priorities for the coming year in the budget. Has the Department of Defense estimated the total cost, direct and indirect, associated with this mission? While you said yesterday that the cost of this mission could be paid for out of already-appropriated funds, do you anticipate requesting any supplemental funds from Congress to pay for ongoing operations in Libya?
- Because of the conflicting messages from the Administration and our coalition partners, there is a lack of clarity over the objectives of this mission, what our national security interests are, and how it fits into our overarching policy for the Middle East. The American people deserve answers to these questions. And all of these concerns point to a fundamental question: what is your benchmark for success in Libya?

The American people take the use of military action seriously, as does the House of Representatives. It is regrettable that no opportunity was afforded to consult with Congressional leaders, as was the custom of your predecessors, before your decision as Commander-in-Chief to deploy into combat the men and women of our Armed Forces. Understanding some information required to respond may be classified, I look forward to a complete response.

Sincerely,

A handwritten signature in black ink, appearing to read 'John A. Boehner', with a large, stylized initial 'J' and 'B'.

John A. Boehner

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Letter from Caroline D. Krass to Eric H. Holder, Jr.*

April 1, 2011

---

## AUTHORITY TO USE MILITARY FORCE IN LIBYA

*The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest.*

*Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.*

April 1, 2011

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President's legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

### I.

In mid-February 2011, amid widespread popular demonstrations seeking governmental reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa, protests began in Libya against the autocratic government of Colonel Muammar Qadhafi, who has ruled Libya since taking power

in a 1969 coup. Qadhafi moved swiftly in an attempt to end the protests using military force. Some Libyan government officials and elements of the Libyan military left the Qadhafi regime, and by early March, Qadhafi had lost control over much of the eastern part of the country, including the city of Benghazi. The Libyan government's operations against its opponents reportedly included strafing of protesters and shelling, bombing, and other violence deliberately targeting civilians. Many refugees fled to Egypt and other neighboring countries to escape the violence, creating a serious crisis in the region.

On February 26, 2011, the United Nations Security Council ("UNSC") unanimously adopted Resolution 1970, which "[e]xpress[ed] grave concern at the situation in the Libyan Arab Jamahiriya," "condemn[ed] the violence and use of force against civilians," and "[d]eplor[ed] the gross and systematic violation of human rights" in Libya. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev. 1 (Feb. 26, 2011). The resolution called upon member states, among other things, to take "the necessary measures" to prevent arms transfers "from or through their territories or by their nationals, or using their flag vessels or aircraft"; to freeze the assets of Qadhafi and certain other close associates of the regime; and to "facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance" in Libya. S.C. Res. 1970, ¶¶ 9, 17, 26. The resolution did not, however, authorize members of the United Nations to use military force in Libya. [\*2]

The Libyan government's violence against civilians continued, and even escalated, despite condemnation by the UNSC and strong expressions of disapproval from other regional and international bodies. *See, e.g.*, African Union, Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011) (describing the "prevailing situation in Libya" as "pos[ing] a serious threat to peace and security in that country and in

the region as a whole” and “[r]eiterat[ing] AU’s strong and unequivocal condemnation of the indiscriminate use of force and lethal weapons”); News Release, Organization of the Islamic Conference, OIC General Secretariat Condemns Strongly the Excessive Use of Force Against Civilians in the Libyan Jamahiriya (Feb. 22, 2011), available at [http://www.oic-oci.org/topic\\_detail.asp?t\\_id=4947&x\\_key=](http://www.oic-oci.org/topic_detail.asp?t_id=4947&x_key=) (reporting that “the General Secretariat of the Organization of the Islamic Conference (OIC) voiced its strong condemnation of the excessive use of force against civilians in the Arab Libyan Jamahiriya”). On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution “strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms,” “call[ed] on Muammar Gadhafi to desist from further violence,” and “urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.” S. Res. 85, 112th Cong. §§ 2, 3, 7 (as passed by Senate, Mar. 1, 2011). On March 12, the Council of the League of Arab States similarly called on the UNSC “to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation” and “to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States.” League of Arab States, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position, Res. No. 7360, ¶ 1 (Mar. 12, 2011).

By March 17, 2011, Qadhafi’s forces were preparing to retake the city of Benghazi. Pledging that his forces would begin an assault on the city that night and show “no mercy and no pity” to those who would not give up resistance, Qadhafi stated in a radio address: “We will come house by house, room by room. It’s over. The issue has been decided.” See Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. Times, Mar. 18, 2011, at A1.



Qadhafi, President Obama later noted, “compared [his people] to rats, and threatened to go door to door to inflict punishment. . . . We knew that if we . . . waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.” Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) (“Obama March 28, 2011 Address”), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

Later the same day, the UNSC addressed the situation in Libya again by adopting, by a vote of 10-0 (with five members abstaining), Resolution 1973, which imposed a no-fly zone and authorized the use of military force to protect civilians. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); Press Release, Security Council, Security Council Approves ‘No- Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011). In this resolution, [\*3] the UNSC determined that the “situation” in Libya “continues to constitute a threat to international peace and security” and “demand[ed] the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.” S.C. Res. 1973. Resolution 1973 authorized member states, acting individually or through regional organizations, “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.” *Id.* ¶ 4. The resolution also specifically authorized member states to enforce “a ban on all [unauthorized] flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians” and to take “all measures commensurate to the specific circumstances” to inspect vessels on the high seas suspected of violating the arms embargo imposed on Libya by Resolution 1970. *Id.* ¶¶ 6-8, 13.

In remarks on March 18, 2011, President Obama stated that, to avoid military intervention to enforce Resolution 1973, Qadhafi

needed to: implement an immediate ceasefire, including by ending all attacks on civilians; halt his troops' advance on Benghazi; pull his troops back from three other cities; and establish water, electricity, and gas supplies to all areas. Press Release, Office of the Press Secretary, The White House, Remarks by the President on the Situation in Libya (Mar. 18, 2011) ("Obama March 18, 2011 Remarks"), available at <http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya>. The President also identified several national interests supporting United States involvement in the planned operations:

Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qaddafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.

*Id.* President Obama further noted the broader context of the Libyan uprising, describing it as "just one more chapter in the change that is unfolding across the Middle East and North Africa." *Id.*

Despite a statement from Libya's Foreign Minister that Libya would honor the requested ceasefire, the Libyan government continued to conduct offensive operations, including attacks on civilians and civilian-populated areas. See Press Release, Office of the Press Secretary, The White House, Letter from the President Regarding Commencement of Operations in Libya: Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011) ("Obama March 21, 2011 Report to Congress"), available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>. In response, on March 19, 2011, the United States, with the support of a number of its coalition partners, launched airstrikes against Libyan targets to enforce Resolution 1973. Consistent with the reporting provisions of the

War Powers Resolution, 50 U.S.C. § 1543(a) (2006), President Obama provided a report to Congress less than forty-eight hours later, on March 21, 2011. The President explained: [\*4]

At approximately 3:00 p.m. Eastern Daylight Time, on March 19, 2011, at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya. As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces, under the command of Commander, U.S. Africa Command, began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone. These strikes will be limited in their nature, duration, and scope. Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms of U.N. Security Council Resolution 1973. These limited U.S. actions will set the stage for further action by other coalition partners.

Obama March 21, 2011 Report to Congress. The report then described the background to the strikes, including UNSC Resolution 1973, the demand for a ceasefire, and Qadhafi's continued attacks.

The March 21 report also identified the risks to regional and international peace and security that, in the President's judgment, had justified military intervention:

Qadhafi's continued attacks and threats against civilians and civilian populated areas are of grave concern to neighboring Arab nations and, as expressly stated in U.N. Security Council Resolution 1973, constitute a threat to the region and to international peace and security. His illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries, thereby destabilizing the peace and security of the region. Left unaddressed, the growing instability in Libya could ignite wid-

er instability in the Middle East, with dangerous consequences to the national security interests of the United States. Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. Qadhafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection, with any delay only putting more civilians at risk.

*Id.* Emphasizing that “[t]he United States has not deployed ground forces into Libya,” the President explained that “United States forces are conducting a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster” and [\*5] thus had targeted only “the Qadhafi regime’s air defense systems, command and control structures, and other capabilities of Qadhafi’s armed forces used to attack civilians and civilian populated areas.” *Id.* The President also indicated that “[w]e will seek a rapid, but responsible, transition of operations to coalition, regional, or international organizations that are postured to continue activities as may be necessary to realize the objectives of U.N. Security Council Resolutions 1970 and 1973.” *Id.* As authority for the military operations in Libya, President Obama invoked his “constitutional authority to conduct U.S. foreign relations” and his authority “as Commander in Chief and Chief Executive.” *Id.*

Before the initiation of military operations in Libya, White House and other executive branch officials conducted multiple meetings and briefings on Libya with members of Congress and testified on the Administration’s policy at congressional hearings. See Press Release, Office of the Press Secretary, Press Gaggle by Press Secretary Jay Carney (Mar. 24, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/24/press-gaggle-press-secretary-jay-carney-3242011>. President Obama invited Republican and Democratic leaders of Congress to the White House for consultation on March 18, 2011 before launching United States military operations, see *id.*, and personally briefed members of Congress on the ongoing operations on March 25, 2011. Press Release, Office of the

Press Secretary, Readout of the President's Meeting with Members of Congress on Libya (Mar. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/25/readout-presidents-meeting-members-congress-libya>. Senior executive branch officials are continuing to brief Senators and members of Congress on U.S. operations and events in Libya as they develop.

On March 28, 2011, President Obama addressed the nation regarding the situation in Libya. The President stated that the coalition had succeeded in averting a massacre in Libya and that the United States was now transferring “the lead in enforcing the no-fly zone and protecting civilians on the ground . . . to our allies and partners.” Obama March 28, 2011 Address. In future coalition operations in Libya, the President continued, “the United States will play a supporting role – including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications.” *Id.* The President also reiterated the national interests supporting military action by the United States. “[G]iven the costs and risks of intervention,” he explained, “we must always measure our interests against the need for action.” *Id.* But, “[i]n this particular country – Libya – at this particular moment, we were faced with the prospect of violence on a horrific scale,” and “[w]e had a unique ability to stop that violence.” *Id.* Failure to prevent a slaughter would have disregarded America’s “important strategic interest in preventing Qaddafi from overrunning those who oppose him”:

A massacre would have driven thousands of additional refugees across Libya’s borders, putting enormous strains on the peaceful – yet fragile – transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power. The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security. So while I will never minimize the costs involved in military action, I am [\*6] convinced that a failure to act in Libya would have carried a far greater price for America.

*Id.* As of March 31, 2011, the United States had transferred responsibility for all ongoing coalition military operations in Libya to the North Atlantic Treaty Alliance (“NATO”).

## II.

The President explained in his March 21, 2011 report to Congress that the use of military force in Libya serves important U.S. interests in preventing instability in the Middle East and preserving the credibility and effectiveness of the United Nations Security Council. The President also stated that he intended the anticipated United States military operations in Libya to be limited in nature, scope, and duration. The goal of action by the United States was to “set the stage” for further action by coalition partners in implementing UNSC Resolution 1973, particularly through destruction of Libyan military assets that could either threaten coalition aircraft policing the UNSC-declared no-fly zone or engage in attacks on civilians and civilian-populated areas. In addition, no U.S. ground forces would be deployed, except possibly for any search and rescue missions, and the risk of substantial casualties for U.S. forces would be low. As we advised you prior to the commencement of military operations, we believe that, under these circumstances, the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.

### A.

Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office “have concluded that the President has the power to commit United States troops abroad,” as well as to “take military action,” “for the purpose of protecting important national interests,” even without specific prior authorization from Congress. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992) (“*Military Forces in Somalia*”). This independent authority of the President, which exists at least insofar as

Congress has not specifically restricted it, see *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 n.4, 178 (1994) (“*Haiti Deployment*”), derives from the President’s “unique responsibility,” as Commander in Chief and Chief Executive, for “foreign and military affairs,” as well as national security. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); U.S. Const. art. II, § 1, cl. 1, § 2, cl. 2.

The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to “declare War,” “raise and support Armies,” and “provide and maintain a Navy,” as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const. art. I, § 8, cl. 1, 11-14. Yet, under “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution,” the President bears the “vast share of responsibility for the conduct of our foreign relations,” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and accordingly holds “independent authority ‘in the areas of foreign policy and national security.’” *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); see also, e.g., *Youngstown Sheet & Tube Co.*, 343 U.S. [\*7] at 635-36 n.2 (Jackson, J., concurring) (noting President’s constitutional power to “act in external affairs without congressional authority”). Moreover, the President as Commander in Chief “superintend[s] the military,” *Loving v. United States*, 517 U.S. 748, 772 (1996), and “is authorized to direct the movements of the naval and military forces placed by law at his command.” *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); see also *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 184 (1996). The President also holds “the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action,” given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authoriza-*

tion, 4A Op. O.L.C. 185, 187 (1980) (“*Presidential Power*”); see also *Haig*, 453 U.S. at 292 (noting “the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature” (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965))). Accordingly, as Attorney General (later Justice) Robert Jackson observed over half a century ago, “the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941).

This understanding of the President’s constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the “historical gloss” placed on the Constitution by two centuries of practice. *Garamendi*, 539 U.S. at 414. “Our history,” this Office observed in 1980, “is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.” *Presidential Power*, 4A Op. O.L.C. at 187; see generally Richard F. Grimmert, Cong. Research Serv., R41677, *Instances of Use of United States Armed Forces Abroad, 1798-2010* (2011). Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation. See Grimmert, *supra*, at 13-31. This historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense, and because “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Haig*, 453 U.S. at 292. In this con-



text, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power.’” *Haiti Deployment*, 18 Op. O.L.C. at 178 (quoting *Presidential Power*, 4A Op. O.L.C. at 187); see also *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 330-31 (1995) (“*Proposed Bosnia Deployment*”) (noting that “[t]he scope and limits” of Congress’s power to declare war “are not well defined by constitutional text, case law, or statute,” but the relationship between that power and the President’s authority as Commander in Chief and Chief Executive has been instead “clarified by 200 years of practice”). [\*8]

Indeed, Congress itself has implicitly recognized this presidential authority. The War Powers Resolution (“WPR”), 50 U.S.C. §§ 1541-1548 (2006), a statute Congress described as intended “to fulfill the intent of the framers of the Constitution of the United States,” *id.* § 1541(a), provides that, in the absence of a declaration of war, the President must report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” *Id.* § 1543(a). The Resolution further provides that the President generally must terminate such use of force within 60 days (or 90 days for military necessity) unless Congress extends this deadline, declares war, or “enact[s] a specific authorization.” *Id.* § 1544(b). As this Office has explained, although the WPR does not itself provide affirmative statutory authority for military operations, see *id.* § 1547(d)(2), the Resolution’s “structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces” into hostilities or circumstances presenting an imminent risk of hostilities. *Haiti Deployment*, 18 Op. O.L.C. at 175; see also *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334. That structure – requiring a report within 48 hours after the start of hostilities and their termination within 60 days after that – “makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.” *Haiti Deployment*, 18 Op.

O.L.C. at 175-76; *see also Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334-35.<sup>1</sup>

We have acknowledged one possible constitutionally-based limit on this presidential authority to employ military force in defense of important national interests – a planned military engagement that constitutes a “war” within the meaning of the Declaration of War Clause may require prior congressional authorization. *See Proposed Bosnia Deployment*, 19 Op. O.L.C. at 331; *Haiti Deployment*, 18 Op. O.L.C. at 177. But the historical practice of presidential military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates. In our view, determining whether a particular planned engagement constitutes a “war” for constitutional purposes instead requires a fact-specific assessment of the “anticipated nature, scope, and duration” of the planned military operations. *Haiti Deployment*, 18 Op. O.L.C. at 179. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period. Again, Congress’s own key enactment on the subject reflects this understanding. By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it

---

<sup>1</sup> A policy statement in the WPR states that “[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” 50 U.S.C. § 1541(c). But this policy statement “is not to be viewed as limiting presidential action in any substantive manner.” *Presidential Power*, 4A Op. O.L.C. at 190. The conference committee report accompanying the WPR made clear that “[s]ubsequent sections of the [Resolution] are not dependent upon the language of” the policy statement. H.R. Rep. No. 93-547, at 8 (1973). Moreover, in a later, operative provision, the Resolution makes clear that nothing in it “is intended to alter the constitutional authority . . . of the President.” 50 U.S.C. § 1547(d). As demonstrated by U.S. military interventions in Somalia, Haiti, Bosnia, and Kosovo, among many other examples, “the President’s power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 335; *see also Haiti Deployment*, 18 Op. O.L.C. at 176 & n.3.

considers congressional authorization most critical [\*9] for “major, prolonged conflicts such as the wars in Vietnam and Korea,” not more limited engagements. *Id.* at 176.

Applying this fact-specific analysis, we concluded in 1994 that a planned deployment of up to 20,000 United States troops to Haiti to oust military leaders and reinstall Haiti’s legitimate government was not a “war” requiring advance congressional approval. *Id.* at 174 n.1, 178-79 & n.10; *see also Address to the Nation on Haiti*, 30 Weekly Comp. Pres. Doc. 1799 (Sept. 18, 1994); Maureen Taft-Morales & Clare Ribando Seelke, Cong. Research Serv., RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns* 4 (2008). “In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary,” we observed, “the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.” *Haiti Deployment*, 18 Op. O.L.C. at 179. Similarly, a year later we concluded that a proposed deployment of approximately 20,000 ground troops to enforce a peace agreement in Bosnia and Herzegovina also was not a “war,” even though this deployment involved some “risk that the United States [would] incur (and inflict) casualties.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. For more than two years preceding this deployment, the United States had undertaken air operations over Bosnia to enforce a UNSC-declared “no-fly zone,” protect United Nations peacekeeping forces, and secure “safe areas” for civilians, including one two-week operation in which NATO attacked hundreds of targets and the United States alone flew over 2300 sorties – all based on the President’s “constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive,” without a declaration of war or other specific prior approval from Congress. *Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina*, 1995 Pub. Papers of William J. Clinton 1279, 1280 (Sept. 1, 1995); *see also, e.g., Letter to Congressional Leaders on Bosnia*,

30 Weekly Comp. Pres. Doc. 2431, 2431 (Nov. 22, 1994); *Letter to Congressional Leaders on Bosnia- Herzegovina*, 30 Weekly Comp. Pres. Doc. 1699, 1700 (Aug. 22, 1994); *Letter to Congressional Leaders on Protection of United Nations Personnel in Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 793, 793 (Apr. 12, 1994); *Letter to Congressional Leaders Reporting on NATO Action in Bosnia*, 30 Weekly Comp. Pres. Doc. 406, 406 (Mar. 1, 1994); *Letter to Congressional Leaders on the Conflict in the Former Yugoslavia*, 30 Weekly Comp. Pres. Doc. 324, 325 (Feb. 17, 1994); *Letter to Congressional Leaders Reporting on the No-Fly Zone Over Bosnia*, 29 Weekly Comp. Pres. Doc. 586, 586 (Apr. 13, 1993); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 328-29; *Deliberate Force: A Case Study in Effective Air Campaigning* 334, 341-44 (Col. Robert C. Owen, ed., 2000), available at <http://purl.access.gpo.gov/GPO/LPS20446>. This Office acknowledged that “deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention,” than air or naval operations because of the increased risk of United States casualties and the far greater difficulty of withdrawing United States ground forces. But we nonetheless concluded that the anticipated risks were not sufficient to make the deployment a “‘war’ in any sense of the word.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333-34. [\*10]

B.

Under the framework of these precedents, the President’s legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President’s action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in “nature, scope, and duration” to constitute a “war” requiring prior specific congressional approval under the Declaration of War Clause.

In prior opinions, this Office has identified a variety of national interests that, alone or in combination, may justify use of military force by the President. In 2004, for example, we found adequate

legal authority for the deployment of U.S. forces to Haiti based on national interests in protecting the lives and property of Americans in the country, preserving “regional stability,” and maintaining the credibility of United Nations Security Council mandates. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Deployment of United States Armed Forces to Haiti* at 3-4 (Mar. 17, 2004) (“2004 Haiti Opinion”), available at [http://www.justice.gov/olc/\[The original piece includes a space here, which I believe is a typo\]opinions.htm](http://www.justice.gov/olc/[The original piece includes a space here, which I believe is a typo]opinions.htm). In 1995, we similarly concluded that the President’s authority to deploy approximately 20,000 ground troops to Bosnia, for purposes of enforcing a peace agreement ending the civil war there, rested on national interests in completing a “pattern of inter-allied cooperation and assistance” established by prior U.S. participation in NATO air and naval support for peacekeeping efforts, “preserving peace in the region and forestalling the threat of a wider conflict,” and maintaining the credibility of the UNSC. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 332-33. And in 1992, we explained the President’s authority to deploy troops in Somalia in terms of national interests in providing security for American civilians and military personnel involved in UNSC- supported humanitarian relief efforts and (once again) enforcing UNSC mandates. *Military Forces in Somalia*, 16 Op. O.L.C. at 10-12.<sup>2</sup>

In our view, the combination of at least two national interests that the President reasonably determined were at stake here – preserving regional stability and supporting the UNSC’s credibility and effectiveness – provided a sufficient basis for the President’s exercise of his constitutional authority to order the use of military force.<sup>3</sup> First, the United States has a strong national security and

---

<sup>2</sup> As these examples make clear, defense of the United States to repel a direct and immediate military attack is by no means the only basis on which the President may use military force without congressional authorization. Accordingly, the absence of an immediate self-defense interest does not mean that the President lacked authority for the military operations in Libya.

<sup>3</sup> Although President Obama has expressed opposition to Qadhafi’s continued leadership of Libya, we understand that regime change is not an objective of the coalition’s military operations. See Obama March 28, 2011 Address (“Of course, there is no question that

foreign policy interest in security and stability in the Middle East that was threatened by Qadhafi's actions in Libya. As noted, we recognized similar regional stability interests as justifications for presidential military actions in Haiti and Bosnia. With respect to Haiti, we found "an obvious interest in maintaining peace and stability," "[g]iven the [\*11] proximity of Haiti to the United States," and particularly considering that "past instances of unrest in Haiti have led to the mass emigration of refugees attempting to reach the United States." 2004 Haiti Opinion at 3. In the case of Bosnia, we noted (quoting prior statements by President Clinton justifying military action) the longstanding commitment of the United States to the "principle that the security and stability of Europe is of fundamental interest to the United States," and we identified, as justification for the military action, the President's determination that "[i]f the war in the former Yugoslavia resumes, 'there is a very real risk that it could spread beyond Bosnia, and involve Europe's new democracies as well as our NATO allies.'" *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. In addition, in another important precedent, President Clinton justified extensive airstrikes in the Federal Republic of Yugoslavia ("FRY") in 1999 – military action later ratified by Congress but initially conducted without specific authorization, see *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327 (2000) – based on concerns about the threat to regional security created by that government's repressive treatment of the ethnic Albanian population in Kosovo. "The FRY government's violence," President Clinton explained, "creates a conflict with no natural boundaries, pushing refugees across borders and potentially drawing in neighboring countries. The Kosovo region is a tinderbox that could ignite a wider European war with dangerous consequences to the United States." *Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and*

---

Libya – and the world – would be better off with Qaddafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake."). We therefore do not consider any national interests relating to regime change in assessing the President's legal authority to order military operations in Libya.

*Montenegro*), 35 Weekly Comp. Pres. Doc. 527, 527 (Mar. 26, 1999).

As his statements make clear, President Obama determined in this case that the Libyan government's actions posed similar risks to regional peace and security. Much as violence in Bosnia and Kosovo in the 1990s risked creating large refugee movements, destabilizing neighboring countries, and inviting wider conflict, here the Libyan government's "illegitimate use of force . . . [was] forcing many [civilians] to flee to neighboring countries, thereby destabilizing the peace and security of the region." Obama March 21, 2011 Report to Congress. "Left unaddressed," the President noted in his report to Congress, "the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States." *Id.* Without outside intervention, Libya's civilian population faced a "humanitarian catastrophe," *id.*; as the President put it on another occasion, "innocent people" in Libya were "being brutalized" and Qadhafi "threaten[ed] a bloodbath that could destabilize an entire region." Press Release, Office of the Press Secretary, The White House, Weekly Address: President Obama Says the Mission in Libya is Succeeding (Mar. 26, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/26/weekly-address-president-obama-says-mission-libya-succeeding>. The risk of regional destabilization in this case was also recognized by the UNSC, which determined in Resolution 1973 that the "situation" in Libya "constitute[d] a threat to international peace and security." S.C. Res. 1973. As this Office has previously observed, "[t]he President is entitled to rely on" such UNSC findings "in making his determination that the interests of the United States justify providing the military assistance that [the UNSC resolution] calls for." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.<sup>4</sup> [\*12]

Qadhafi's actions not only endangered regional stability by in-

---

<sup>4</sup> We note, however, that, at least for purposes of domestic law, a Security Council resolution is "not required as a precondition for Presidential action." *Military Forces in Somalia*, 16 Op. O.L.C. at 7. Rather, as we explained in 2004, "in exercising his authority as Commander in Chief and Chief Executive, the President [may] choose to take" the UNSC resolution into account "in evaluating the foreign policy and national security interests of the United States that are at stake." 2004 Haiti Opinion at 4.

creasing refugee flows and creating a humanitarian crisis, but, if unchecked, also could have encouraged the repression of other democratic uprisings that were part of a larger movement in the Middle East, thereby further undermining United States foreign policy goals in the region. Against the background of widespread popular unrest in the region, events in Libya formed “just one more chapter in the change that is unfolding across the Middle East and North Africa.” Obama March 18, 2011 Remarks. Qadhafi’s campaign of violence against his own country’s citizens thus might have set an example for others in the region, causing “[t]he democratic impulses that are dawning across the region [to] be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power.” Obama March 28, 2011 Address. At a minimum, a massacre in Libya could have imperiled transitions to democratic government underway in neighboring Egypt and Tunisia by driving “thousands of additional refugees across Libya’s borders.” *Id.* Based on these factors, we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.

The second important national interest implicated here, which reinforces the first, is the longstanding U.S. commitment to maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security. Since at least the Korean War, the United States government has recognized that “[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest.” *Military Forces in Somalia*, 16 Op. O.L.C. at 11 (quoting *Authority of the President to Repel the Attack in Korea*, 23 Dep’t St. Bull. 173, 177 (1950)). Accordingly, although of course the President is not required to direct the use of military force simply because the UNSC has authorized it, this Office has recognized that “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peace-keeping operations can be considered a vital national interest” on which the President may rely in determining that U.S. interests jus-



tify the use of military force. *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333 (quoting *Military Forces in Somalia*, 16 Op. O.L.C. at 11). Here, the UNSC's credibility and effectiveness as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians – particularly after Qadhafi's forces ignored the UNSC's call for a cease fire and for the cessation of attacks on civilians. As President Obama noted, without military action to stop Qadhafi's repression, "[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security." Obama March 28, 2011 Address; see also Obama March 21, 2011 Report to Congress ("Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region."). We think the President could legitimately find that military action by the United States to assist the international coalition in giving effect to UNSC Resolution 1973 was needed to secure "a substantial national foreign policy objective." *Military Forces in Somalia*, 16 Op. O.L.C. at 12.

We conclude, therefore, that the use of military force in Libya was supported by sufficiently important national interests to fall within the President's constitutional power. At the same time, turning to the second element of the analysis, we do not believe that [\*13] anticipated United States operations in Libya amounted to a "war" in the constitutional sense necessitating congressional approval under the Declaration of War Clause. This inquiry, as noted, is highly fact-specific and turns on no single factor. See *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 334 (reaching conclusion based on specific "circumstances"); *Haiti Deployment*, 18 Op. O.L.C. at 178 (same). Here, considering all the relevant circumstances, we believe applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a "war" for constitutional purposes.

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the

NATO bombing campaign in connection with the Kosovo conflict in 1999 – two military campaigns initiated without a prior declaration of war or other specific congressional authorization – President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions; the President made clear that “[t]he United States is not going to deploy ground troops in Libya.” Obama March 18, 2011 Remarks. The planned operations thus avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces – two factors that this Office has identified as “arguably” indicating “a greater need for approval [from Congress] at the outset,” to avoid creating a situation in which “Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. Furthermore, also as in prior operations conducted without a declaration of war or other specific authorizing legislation, the anticipated operations here served a “limited mission” and did not “aim at the conquest or occupation of territory.” *Id.* at 332. President Obama directed United States forces to “conduct[] a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster”; American airstrikes accordingly were to be “limited in their nature, duration, and scope.” Obama March 21, 2011 Report to Congress. As the President explained, “we are not going to use force to go beyond [this] well-defined goal.” Obama March 18, 2011 Remarks. And although it might not be true here that “the risk of sustained military conflict was negligible,” the anticipated operations also did not involve a “preparatory bombardment” in anticipation of a ground invasion – a form of military operation we distinguished from the deployment (without preparatory bombing) of 20,000 U.S. troops to Haiti in concluding that the latter operation did not require advance congressional approval. *Haiti Deployment*, 18 Op. O.L.C. at 176, 179. Considering the historical practice of even intensive military action – such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999 – without specific prior congressional approval, as

well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the “anticipated nature, scope, and duration” of the use of force by the United States in Libya rose to the level of a “war” in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress. [\*14]

Accordingly, we conclude that President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya – which were limited in their nature, scope, and duration – without prior congressional authorization.

/s/

CAROLINE D. KRASS

Principal Deputy Assistant Attorney General

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*John A. Boehner, House of Representatives Resolution*

June 2, 2011\*

---

.....  
(Original Signature of Member)

112TH CONGRESS  
1ST SESSION

## H. RES. \_\_\_\_

Declaring that the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes.

---

### IN THE HOUSE OF REPRESENTATIVES

Mr. BOEHNER submitted the following resolution; which was referred to the Committee on \_\_\_\_\_

---

### RESOLUTION

Declaring that the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya, and for other purposes.

*Resolved,*

---

\* Editors' note: The running header in the original is "F:\M12\BOEHNE\BOEHNE\_002.XML" and the running footer is "f:\VHLC\060211\060211.193.xml (499207|2) June 2, 2011 (4:33 p.m.)".

**SECTION 1. STATEMENTS OF POLICY.**

The House of Representatives makes the following statements of policy:

(1) The United States Armed Forces shall be used exclusively to defend and advance the national security interests of the United States. [\*2]

(2) The President has failed to provide Congress with a compelling rationale based upon United States national security interests for current United States military activities regarding Libya.

(3) The President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya unless the purpose of the presence is to rescue a member of the Armed Forces from imminent danger.

**SEC. 2. TRANSMITTAL OF EXECUTIVE BRANCH INFORMATION RELATING TO OPERATION ODYSSEY DAWN AND OPERATION UNIFIED PROTECTOR.**

The House of Representatives directs the Secretary of State, the Secretary of Defense, and the Attorney General, respectively, to transmit to the House of Representatives, not later than 14 days after the date of the adoption of this resolution, copies of any official document, record, memo, correspondence, or other communication in the possession of each officer that was created on or after February 15, 2011, and refers or relates to—

(1) consultation or communication with Congress regarding the employment or deployment of the United States Armed Forces for Operation Od-[\*3]yssey Dawn or NATO Operation Unified Protector; or

(2) the War Powers Resolution and Operation Odyssey Dawn or Operation Unified Protector.

**SEC. 3. REPORT TO HOUSE OF REPRESENTATIVES.**

(a) CONTENTS.—Not later than 14 days after the date of the adop-

tion of this resolution, the President shall transmit to the House of Representatives a report describing in detail United States security interests and objectives, and the activities of United States Armed Forces, in Libya since March 19, 2011, including a description of the following:

(1) The President's justification for not seeking authorization by Congress for the use of military force in Libya.

(2) United States political and military objectives regarding Libya, including the relationship between the intended objectives and the operational means being employed to achieve them.

(3) Changes in United States political and military objectives following the assumption of command by the North Atlantic Treaty Organization (NATO).

(4) Differences between United States political and military objectives regarding Libya and those of [\*4] other NATO member states engaged in military activities.

(5) The specific commitments by the United States to ongoing NATO activities regarding Libya.

(6) The anticipated scope and duration of continued United States military involvement in support of NATO activities regarding Libya.

(7) The costs of United States military, political, and humanitarian efforts concerning Libya as of June 3, 2011.

(8) The total projected costs of United States military, political, and humanitarian efforts concerning Libya.

(9) The impact on United States activities in Iraq and Afghanistan.

(10) The role of the United States in the establishment of a political structure to succeed the current Libyan regime.

(11) An assessment of the current military capacity of opposition forces in Libya.

(12) An assessment of the ability of opposition forces in Libya to establish effective military and political control of Libya and a practicable timetable for accomplishing these objectives. [\*5]

(13) An assessment of the consequences of a cessation of United States military activities on the viability of continued NATO operations regarding Libya and on the continued viability of groups opposing the Libyan regime.

(14) The composition and political agenda of the Interim Transitional National Council (ITNC) and its representation of the views of the Libyan people as a whole.

(15) The criteria to be used to determine United States recognition of the ITNC as the representative of the Libyan people, including the role of current and former members of the existing regime.

(16) Financial resources currently available to opposition groups and United States plans to facilitate their access to seized assets of the Libyan regime and proceeds from the sale of Libyan petroleum.

(17) The relationship between the ITNC and the Muslim Brotherhood, the members of the Libyan Islamic Fighting Group, al-Qaeda, Hezbollah, and any other group that has promoted an agenda that would negatively impact United States interests. [\*6]

(18) Weapons acquired for use, and operations initiated, in Libya by the Muslim Brotherhood, the members of the Libyan Islamic Fighting Group, al-Qaeda, Hezbollah, and any other group that has promoted an agenda that would negatively impact United States interests.

(19) The status of the 20,000 MANPADS cited by the Commander of the U.S. Africa Command, as well as Libya's SCUD-Bs and chemical munitions, including mustard gas.

(20) Material, communication, coordination, financing and other forms of support between and among al-Qaeda operatives, its affiliates, and supporters in Yemen, the Horn of Africa, and North Africa.

(21) Contributions by Jordan, the United Arab Emirates, Qatar, and other regional states in support of NATO activities in Libya.

(b) TRANSMITTAL.—The report required by this section shall be

submitted in unclassified form, with a classified annex, as deemed necessary.

**SEC. 4. FINDINGS.**

(a) The President has not sought, and Congress has not provided, authorization for the introduction or contin-[\*7]ued involvement of the United States Armed Forces in Libya.

(b) Congress has the constitutional prerogative to withhold funding for any unauthorized use of the United States Armed Forces, including for unauthorized activities regarding Libya.



# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*John F. Kerry et al., Senate Joint Resolution 20*

June 21, 2011

---

.....  
(Original Signature of Member)

112TH CONGRESS  
1ST SESSION

## S.J. RES. 20

Authorizing the limited use of the United States Armed Forces  
in support of the NATO mission in Libya.

---

### IN THE SENATE OF THE UNITED STATES

JUNE 21 (legislative day, JUNE 16), 2011

Mr. KERRY (for himself, Mr. MCCAIN, Mr. LEVIN, Mr. KYL, Mr. DURBIN, Mrs. FEINSTEIN, Mr. GRAHAM, Mr. LIEBERMAN, Mr. BLUNT, Mr. CARDIN, and Mr. KIRK) introduced the following joint resolution; which was read twice and referred to the Committee on Foreign Relations

---

### JOINT RESOLUTION

Authorizing the limited use of the United States Armed Forces  
in support of the NATO mission in Libya.

Whereas peaceful demonstrations that began in Libya, inspired by similar movements in Tunisia, Egypt, and elsewhere in the Middle East, quickly spread to cities around the country, calling for greater political reform, opportunity, justice, and the rule of law.

Whereas Muammar Qaddafi, his sons, and forces loyal to them re-

sponded to the peaceful demonstrations by authorizing and initiating violence against civilian non-combatants in Libya, including the use of airpower and foreign mercenaries; [\*2]

Whereas, on February 25, 2011, President Barack Obama imposed unilateral economic sanctions on, and froze the assets of, Muammar Qaddafi and his family, as well as the Government of Libya and its agencies to hold the Qaddafi regime accountable for its continued use of violence against unarmed civilians and its human rights abuses and to safeguard the assets of the people of Libya;

Whereas, on February 26, 2011, the United Nations Security Council passed Resolution 1970, which mandates international economic sanctions and an arms embargo;

Whereas, in response to Qaddafi's assault on civilians in Libya, a "no-fly zone" in Libya was called for by the Gulf Cooperation Council on March 7, 2011; by the head of the Organization of the Islamic Conference on March 8, 2011; and by the Arab League on March 12, 2011;

Whereas Qaddafi's advancing forces, after recapturing cities in eastern Libya that had been liberated by the Libyan opposition, were preparing to attack Benghazi, a city of 700,000 people and the seat of the opposition government in Libya, the Interim Transitional National Council;

Whereas Qaddafi stated that he would show "no mercy" to his opponents in Benghazi, and that his forces would go "door to door" to find and kill dissidents;

Whereas, on March 17, 2011, the United Nations Security Council passed Resolution 1973, which mandates "all necessary measures" to protect civilians in Libya, implement a "no-fly zone", and enforce an arms embargo against the Qaddafi regime; [\*3]

Whereas President Obama notified key congressional leaders in a meeting at the White House on March 18, 2011, of his intent to begin targeted military operations in Libya and made clear that the United States "is not going to deploy ground troops into Libya";

- Whereas the United States Armed Forces, together with coalition partners, launched Operation Odyssey Dawn in Libya on March 19, 2011, to protect civilians in Libya from immediate danger and enforce an arms embargo and a “no-fly zone”;
- Whereas, on March 28, 2011, President Obama stated, “America has an important strategic interest in preventing Qaddafi from overrunning those who oppose him. A massacre would have driven thousands of additional refugees across Libya’s borders, putting enormous strains on the peaceful – yet fragile – transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power . . . So while I will never minimize the costs involved in military action, I am convinced that a failure to act in Libya would have carried a far greater price for America.”;
- Whereas, on March 31, 2011, the United States transferred authority for Operation Odyssey Dawn in Libya to NATO command, with the mission continuing as Operation Unified Protector;
- Whereas, in a letter to joint bipartisan congressional leaders on May 20, 2011, President Obama expressed support for a Senate resolution on the use of force in Libya and stated that, “Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation, including intelligence, logistical support, and search and rescue assistance (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition’s efforts.”; and
- Whereas, on June 9, 2011, Secretary of State Hillary Clinton recognized the Transitional National Council “as the legitimate interlocutor for the Libyan people during this interim period.”: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SENSE OF CONGRESS.**

It is the sense of Congress that—

(1) the men and women of the United States Armed Forces and coalition partners who are engaged in military operations to protect the people of Libya have demonstrated extraordinary bravery and should be commended;

(2) the United States Government should continue to support the aspirations of the people of Libya for political reform and self-government based on democratic and human rights;

(3) the goal of United States policy in Libya, as stated by the President, is to achieve the departure from power of Muammar Qaddafi and his family, including through the use of diplomatic and economic pressure, so that a peaceful transition can begin to an inclusive government that ensures freedom, opportunity, and justice for the people of Libya; and

(4) the funds of the Qaddafi regime that have been frozen by the United States should be returned to the people of Libya for their benefit, including humanitarian and reconstruction assistance, and the President should explore the possibility with the Transitional National Council of using some of such funds to reimburse NATO countries for expenses incurred in Operation Odyssey Dawn and Operation Unified Protector.

**SEC. 2. AUTHORIZATION FOR THE LIMITED USE OF UNITED STATES ARMED FORCES IN LIBYA.**

(a) **AUTHORITY.**—The President is authorized to continue the limited use of the United States Armed Forces in Libya, in support of United States national security policy interests, as part of the NATO mission to enforce United Nations Security Council Resolution 1973 (2011) as requested by the Transitional National Council, the Gulf Cooperation Council, and the Arab League.

(b) EXPIRATION OF AUTHORITY.—The authorization for such limited use of United States Armed Forces in [\*6] Libya expires one year after the date of the enactment of this joint resolution.

### **SEC. 3. OPPOSITION TO THE USE OF UNITED STATES GROUND TROOPS.**

Consistent with the policy and statements of the President, Congress does not support deploying, establishing, or maintaining the presence of units and members of the United States Armed Forces on the ground in Libya unless the purpose of the presence is limited to the immediate personal defense of United States Government officials (including diplomatic representatives) or to rescuing members of NATO forces from imminent danger.

### **SEC. 4. REPORTS TO CONGRESS.**

The President shall consult frequently with Congress regarding United States efforts in Libya, including by providing regular briefings and reports as requested, and responding to inquiries promptly. Such briefings and reports shall include the following elements:

(1) An updated description of United States national security interests in Libya.

(2) An updated statement of United States policy objectives in Libya, both during and after Qaddafi's rule, and a detailed plan to achieve them. [\*7]

(3) An updated and comprehensive list of the activities of the United States Armed Forces in Libya.

(4) An updated and detailed assessment of the groups in Libya that are opposed to the Qaddafi regime, including potential successor governments.

(5) A full and updated explanation of the President's legal and constitutional rationale for conducting military operations in Libya consistent with the War Powers Resolution (50 U.S.C. 1541 et seq.).

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

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

June 28, 2011

---

## TESTIMONY BY LEGAL ADVISER HAROLD HONGJU KOH

U.S. Department of State  
on  
Libya and War Powers  
Before the  
Senate Foreign Relations Committee  
June 28, 2011

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>

---

<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-

---

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-

---

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-

---

<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-

---

<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.

---

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>

---

<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

---

<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>

---

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

---

<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

---

<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.

# PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Richard G. Lugar, Senate Joint Resolution 20 Amendment*

no date

---

AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To declare that the authority for the limited use of United States Armed Forces is intended to constitute specific statutory authorization under the War Powers Resolution.

IN THE SENATE OF THE UNITED STATES—112th Cong., 1st Sess.

## S.J. RES. 20

Authorizing the limited use of the United States Armed Forces  
in support of the NATO mission in Libya.

Referred to the Committee on \_\_\_\_\_ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. LUGAR

Viz:

On page 6, between lines 2 and 3, insert the following:

(c) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—

Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)). [\*2]

(2) APPLICABILITY OF OTHER REQUIREMENTS.—

(A) RULE OF CONSTRUCTION.— Nothing in this joint

resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(B) ENGAGEMENT IN HOSTILITIES.— United States military operations in Libya since April 4, 2011, which have included non-kinetic support to the NATO-led operations, including intelligence, logistical support, and search and rescue assistance, United States aircraft assisting in the suppression and destruction of air defenses in support of the no-fly zone, and precision strikes by unmanned aerial vehicles, constitute hostilities within the meaning of the War Powers Resolution, and may be carried out only under the conditions specified in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

# CUMULATIVE INDEX 1: CHRONOLOGICAL

<b>Date; Cite</b>	<b>Author</b>	<b>Recipient</b>	<b>Topic</b>
1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239	Bingham, Jonathan; Javits, Jacob	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1973-6-14; 1 J.L. (1 Pub. L. Misc.) 242	Fulbright, James	Senate Foreign Relations Committee	Presidential Powers – Hostilities and War Powers
1963-6-15 [sic]; 1 J.L. (1 Pub. L. Misc.) 247	Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1975-5-9 & 6-3; 1 J.L. (1 Pub. L. Misc.) 249	Leigh, Monroe; Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19	Fois, Andrew	Hatch, Orrin G.	Duty to Defend – National Defense Authorization Act, 110 Stat. 186
1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30	Hertling, Richard A.	Leahy, Patrick J.	Duty to Defend – Department of Justice Oversight
2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47	McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	Potential Constitutional Problems with the “Nebraska Compromise” <sup>8</sup>
2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51	Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	Potential Constitutional Problems with H.R. 3590
2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59	Harris, Kamala D.	Hudson, Henry E.	Constitutionality of the Individual Mandate
2011-3-23; 1 J.L. (1 Pub. L. Misc.) 256	Boehner, John A.	Obama, Barack	Presidential Powers – Hostilities and War Powers
2011-4-1; 1 J.L. (1 Pub. L. Misc.) 260	Krass, Caroline D.	Holder, Eric H.	Presidential Powers – Hostilities and War Powers
2011-6-2; 1 J.L. (1 Pub. L. Misc.) 282	Boehner, John A.	House of Representatives	Presidential Powers – Hostilities and War Powers
2011-6-21; 1 J.L. (1 Pub. L. Misc.) 287	Kerry, John F.	Senate	Presidential Powers – Hostilities and War Powers
2011-6-28; 1 J.L. (1 Pub. L. Misc.) 292	Koh, Harold Hongju	Senate Foreign Relations Committee	Presidential Powers – Hostilities and War Powers
no date; 1 J.L. (1 Pub. L. Misc.) 306	Lugar, Richard C.	Senate	Presidential Powers – Hostilities and War Powers

INDEXES

## CUMULATIVE INDEX 2: AUTHORS

Author	Recipient	Topic	Date; Cite
Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	Potential Constitutional Problems with H.R. 3590	2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51
Bingham, Jonathan; Javits, Jacob	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers	1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239
Boehner, John A.	Obama, Barack	Presidential Powers – Hostilities and War Powers	2011-3-23; 1 J.L. (1 Pub. L. Misc.) 256
Boehner, John A.	House of Represent- atives	Presidential Powers – Hostilities and War Powers	2011-6-2; 1 J.L. (1 Pub. L. Misc.) 282
Fois, Andrew	Hatch, Orrin G.	Duty to Defend – National Defense Authorization Act, 110 Stat. 186	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
Senate Foreign Relations Commit- tee	Fulbright, James	Presidential Powers – Hostilities and War Powers	1973-6-14; 1 J.L. (1 Pub. L. Misc.) 242
Harris, Kamala D.	Hudson, Henry E.	Constitutionality of the Individual Mandate	2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59
Hertling, Richard A.	Leahy, Patrick J.	Duty to Defend – Department of Justice Oversight	1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30
Kerry, John F.	Senate	Presidential Powers – Hostilities and War Powers	2011-6-21; 1 J.L. (1 Pub. L. Misc.) 287
Koh, Harold Hongju	Senate Foreign Relations Commit- tee	Presidential Powers – Hostilities and War Powers	2011-6-28; 1 J.L. (1 Pub. L. Misc.) 292
Krass, Caroline D.	Holder, Eric H.	Presidential Powers – Hostilities and War Powers	2011-4-1; 1 J.L. (1 Pub. L. Misc.) 260
Leigh, Monroe; Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers	1975-5-9 & 6-3; 1 J.L. (1 Pub. L. Misc.) 249
Lugar, Richard C.	Senate	Presidential Powers – Hostilities and War Powers	no date; 1 J.L. (1 Pub. L. Misc.) 306
McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	Potential Constitutional Problems with the “Nebras- ka Compromise”	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47
Zablocki, Clement	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers	1963-6-15 [sic]; 1 J.L. (1 Pub. L. Misc.) 247

INDEXES

CUMULATIVE INDEX 3: RECIPIENTS

Recipient	Author	Topic	Date; Cite
Cornyn, John; Hutchison, Kay Bailey	Abbott, Greg	Potential Constitutional Problems with H.R. 3590	2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51
Hatch, Orrin G.	Fois, Andrew	Duty to Defend – National Defense Authorization Act, 110 Stat. 186	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
Holder, Eric H.	Krass, Caroline D.	Presidential Powers – Hostilities and War Powers	2011-4-1; 1 J.L. (1 Pub. L. Misc.) 260
House Foreign Affairs Committee	Bingham, Jonathan; Javits, Jacob	Presidential Powers – Hostilities and War Powers	1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239
House Foreign Affairs Committee	Zablocki, Clement	Presidential Powers – Hostilities and War Powers	1963-6-15 [sic]; 1 J.L. (1 Pub. L. Misc.) 247
House Foreign Affairs Committee	Leigh, Monroc; Zablocki, Clement	Presidential Powers – Hostilities and War Powers	1975-5-9 & 6-3; 1 J.L. (1 Pub. L. Misc.) 249
House of Representatives	Boehner, John A.	Presidential Powers – Hostilities and War Powers	2011-6-2; 1 J.L. (1 Pub. L. Misc.) 282
Hudson, Henry E.	Harris, Kamala D.	Constitutionality of the Individual Mandate	2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59
Leahy, Patrick J.	Hertling, Richard A.	Duty to Defend – Department of Justice Oversight	1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30
Obama, Barack	Boehner, John A.	Presidential Powers – Hostilities and War Powers	2011-3-23; 1 J.L. (1 Pub. L. Misc.) 256
Pelosi, Nancy; Reid, Harry	McMaster, Henry, et al.	Potential Constitutional Problems with the “Nebraska Compromise”	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47
Senate	Kerry, John F.	Presidential Powers – Hostilities and War Powers	2011-6-21; 1 J.L. (1 Pub. L. Misc.) 287
Senate	Lugar, Richard C.	Presidential Powers – Hostilities and War Powers	no date; 1 J.L. (1 Pub. L. Misc.) 306
Senate Foreign Relations Committee	Fulbright, James	Presidential Powers – Hostilities and War Powers	1973-6-14; 1 J.L. (1 Pub. L. Misc.) 242
Senate Foreign Relations Committee	Koh, Harold Hongju	Presidential Powers – Hostilities and War Powers	2011-6-28; 1 J.L. (1 Pub. L. Misc.) 292



INDEXES

CUMULATIVE INDEX 4: TOPICS

Topic	Author	Recipient	Date; Cite
Constitutionality of the Individual Mandate	Harris, Kamala D.	Hudson, Henry E.	2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59
Duty to Defend – Department of Justice Oversight	Hertling, Richard A.	Leahy, Patrick J.	1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30
Duty to Defend – National Defense Authorization Act, 110 Stat. 186	Fois, Andrew	Hatch, Orrin G.	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
H.R. 3590 – Potential Constitutional Problems	Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51
“Nebraska Compromise” – Potential Constitutional Problems with	McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47
Presidential Powers – Hostilities and War Powers	Bingham, Jonathan; Javits, Jacob	House Foreign Affairs Committee	1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239
Presidential Powers – Hostilities and War Powers	Fulbright, James	Senate Foreign Relations Committee	1973-6-14; 1 J.L. (1 Pub. L. Misc.) 242
Presidential Powers – Hostilities and War Powers	Zablocki, Clement	House Foreign Affairs Committee	1963-6-15 [sic]; 1 J.L. (1 Pub. L. Misc.) 247
Presidential Powers – Hostilities and War Powers	Leigh, Monroe; Zablocki, Clement	House Foreign Affairs Committee	1975-5-9 & 6-3; 1 J.L. (1 Pub. L. Misc.) 249
Presidential Powers – Hostilities and War Powers	Boehner, John A.	Obama, Barack	2011-3-23; 1 J.L. (1 Pub. L. Misc.) 256
Presidential Powers – Hostilities and War Powers	Krass, Caroline D.	Holder, Eric H.	2011-4-1; 1 J.L. (1 Pub. L. Misc.) 260
Presidential Powers – Hostilities and War Powers	Boehner, John A.	House of Representatives	2011-6-2; 1 J.L. (1 Pub. L. Misc.) 282
Presidential Powers – Hostilities and War Powers	Kerry, John F.	Senate	2011-6-21; 1 J.L. (1 Pub. L. Misc.) 287
Presidential Powers – Hostilities and War Powers	Koh, Harold Hongju	Senate Foreign Relations Committee	2011-6-28; 1 J.L. (1 Pub. L. Misc.) 292
Presidential Powers – Hostilities and War Powers	Lugar, Richard C.	Senate	no date; 1 J.L. (1 Pub. L. Misc.) 306