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COMMITTEE ON FOREIGN RELATIONS

REGARDING
LIBYA AND WAR POWERS
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Good morning Mr. Chairman, Senator Lugar, and Members of the Committee. Thank you for the opportunity to testify before you today on the issue of Libya and war powers.

For the record, I am the Charles Weiner Professor of Law at Temple University Law School, where I teach subjects relating to international and constitutional law. From 2004-2006, I was Rusk Professor of International Law at the University of Georgia Law School. I am a former law clerk to Judge Stephen F. Williams on the U.S. Court of Appeals for the D.C. Circuit and to Justice David H. Souter of the Supreme Court of the United States. I have also served as an Attorney-Adviser in the Office of the Legal Adviser, U.S. Department of State, as well as Director for Democracy on the staff of the National Security Council. I am currently a member of the Advisory Committee on Historical Diplomatic Documentation, U.S. Department of State. Among other subjects, I have published widely on matters relating to foreign affairs and the Constitution.

In my view, U.S. participation in NATO operations in Libya has been lawful. The President had constitutional authority to initiate U.S. participation in these operations without advance congressional authorization. That participation continues to be lawful. The Administration's interpretation of "hostilities" under the War Powers Resolution is a plausible one, although not free from doubt. I understand concerns on the part of members of Congress with respect to this interpretation. In my view, however, it is not clear that the definition of "hostilities" – which becomes operable only through the contested 60-day termination provision of section 5(b) – meaningfully bears on the legality of the U.S. participation in the NATO campaign.

The legality of the Libya operation in the absence of congressional authorization is not to diminish the importance of congressional participation in war powers decision-making. Nor does it mean that war powers comprises a constitutional black hole. The rule of law is a central feature of our system for addressing questions relating to the use of force. There are important respects in which congressional participation is constitutionally demanded. However, I do not believe that the War Powers Resolution affects the constitutional balance of powers with respect to the use of force. WPR-related disputes such as the one you are considering today distract from key decisions on which the collective judgment of the executive and legislative branches remains essential. Congress and the President should leave aside their

differences on the War Powers Resolution and work towards mutually acceptable terms for continued US participation in NATO operations in Libya.

Constitutional Parameters

The constitutional division of war powers cannot be measured with calipers. The courts have largely absented themselves from matters implicating war powers. Judicial non-participation makes sense as a matter of institutional capacity. It does, however, lead to a paucity of authoritative pronouncements on the division of war powers. Against this landscape, historical practice supplies the precedents that guide our contemporary understandings of war powers. As Justice Frankfurter famously observed in the Steel Seizure case, these precedents add to the written Constitution "a gloss which life has written upon them."

While not unchanging, historical practice relating to war powers has proved remarkably consistent. This practice can be reduced to three basic principles.

1. For major engagements, the President must as a constitutional matter secure congressional authorization in advance. This explains why both George W. Bush and George H.W. Bush sought congressional authorization before initiating military action in Kuwait and Iraq. This was not simply a matter of politics; it was a matter of constitutional necessity. Where the use of U.S. armed forces is likely to implicate a major commitment of resources over an extended period of time with a risk of substantial casualties, our constitutional system demands the prior assent of the legislative branch.

2. For less significant engagements, on the other hand, the President is constitutionally empowered to deploy U.S. forces without congressional authorization. On numerous occasions throughout U.S. history, presidents have undertaken deployments involving the use or potential use of force without congressional approval. From recent decades, we have examples including Kosovo, Bosnia, Haiti, Panama, the so-called Tanker War of the mid-1980s, the 1986 bombing of Tripoli, Lebanon, and Grenada, among others. This practice is consistent and has been engaged in with the knowledge and acquiescence of the legislative branch. It establishes a clear constitutional standard with respect to the division of war power. This standard reflects the imperatives of the use of force against the landscape of foreign relations and the national interest: the need for dispatch and flexibility that conforms to the institutional capacities of the presidency.

The practice supports the constitutionality of President Obama's decision to participate in the Libya operation without advance congressional authorization. Because the operation is limited in nature, scope, and duration, it fits comfortably within the practice relating to the use of force short of "real war." In my view, the opinion of the Office Legal Counsel of April 1, 2011, on this question is persuasive. This conclusion is confirmed by the lack of any persistent institutional opposition to the initial decision.

The distinction between major and lesser engagements also explains why comparisons between the approaches of Presidents Bush and Obama to Iraq and Libya respectively are misplaced. The two episodes are constitutional apples and oranges. Iraq involved a massive commitment of resources, with grave risks to U.S. armed forces. Though hardly trivial, Libya lies towards the other end of the constitutional spectrum. The distinction is material for constitutional purposes.

3. Finally, Congress has the power to terminate or condition particular military engagements through engagement-specific, affirmative legislation. This power is exercised subject to the President's exclusive authorities as Commander-in-Chief over military decision-making, reasonably conceived. Joint resolutions respecting U.S. deployments in Lebanon and Somalia supply recent historical examples in which Congress imposed temporal limitations on the use of U.S. armed forces. Congress could impose such limitations with respect to the Libya operation. Congress also has the power to issue institutional pronouncements through non-binding pronouncements. These institutional statements are of constitutional consequence. For instance, the formal condemnation by the House of Representatives of President Polk's initiation of the conflict with Mexico in 1848 evidenced its rejection of the constitutionality of that engagement.

As in any area of constitutional law, but especially in the absence of judicial decisions, these categories supply only an outline of the law. The boundaries of these categories are unstable and subject to revision and evolution, especially in the face of changing background conditions. However, there is a remarkable consistency to the practice. This consistency suggests workability. The consistency also suggests an acceptance of the practice as legitimate by all relevant constitutional actors, the Congress and President centered among them.

The War Powers Resolution

For all its notoriety, the War Powers Resolution has had little effect on war powers practice. From appearances, the Act has marked the front lines of contests between Congress and the President over war powers. In reality, disputes relating to the War Powers Resolution are better characterized as skirmishes. The Act has not materially affected the terms of continuing struggles between the executive and legislative branches relating to war powers.

Nor should it. The Act reflected the moment of its creation in 1973, an anomalous one marking a nadir in congressional-executive relations. The Act has changed presidential behavior in only one notable respect, through the reporting requirement of section 4. It is now a routine and accepted practice for Presidents to report uses of force as well as substantial combat deployments to the congressional leadership. This requirement is unexceptional and advances important transparency values. In section 3, the Act also codifies a historical tradition of consultation by the President with Congress in all possible instances.

But in other respects, the Act has proved unable to shift constitutional understandings as developed through the practice.

This works in both directions. By its terms, the Act ostensibly gives the President a 60-day window in which to undertake any use of force, regardless of magnitude, without congressional authorization. Both George H.W. Bush and George W. Bush could have, consistent with the War Powers Resolution, undertaken major military engagements against Iraq without prior congressional authorization. And yet the failure to secure advance congressional authorization in those cases would have violated prevailing constitutional standards. The War Powers Resolution, in other words, cannot validate what would otherwise constitute presidential overreaching.

On the other side, the Act has not subtracted from presidential powers. In its policy statement, for instance, the Act fails to recognize the protection of US citizens as a justification for the use of military force. That has not stopped Presidents from justifying military engagements on that basis, consistent with longstanding practice. Nor have subsequent Congresses rejected that justification.

The 60-day termination provision of section 5(b) comprises the Act's most controversial provision. It has been accepted as constitutional only by President Carter (and then only in passing, in a single paragraph of an OLC opinion). Section 5(b) was tested by President Clinton in the context of the 1992-93 Somalia deployment. On only one occasion has Congress acted to authorize a deployment on its understanding of a section 5(b) deadline, with respect to the 1982-83 Lebanon peacekeeping deployment.

The most notable episode implicating the 60-day clock was President Clinton's participation in the NATO bombing campaign in Kosovo. Participation in that operation, as with the Libya operation, continued more than 60 days after its initiation in the absence of specific statutory authorization. In that case the Office of Legal Counsel asserted that congressional funding for the operation satisfied the requirements of the War Powers Resolution, notwithstanding the section 8(a) requirement that authorization not be inferred from appropriations. This was a questionable argument on its own terms. It was a central objective of the War Powers Resolution to end authorization through appropriations measures, on the theory that Congress would never cut off the funding of U.S. troops in the field. Bills to extend specific authorization for the Kosovo operation consistent with section 8(a) failed to pass. In the end Congress and other actors accepted the continuation of the bombing past the 60-day window.

That was as it should have been. I will not rehearse here at length the structural arguments against the termination provision of section 5(b). Suffice it to say that inaction may not equate with disapproval, as demonstrated by contradictory actions on Congress's part during the Kosovo operation (and in the House last week with respect to Libya). Military decision-making should not be driven on a prospective basis by legislative default devices. The stakes are too high to be governed by the dead hand of legislation enacted to address the difficulties of another era.

"Hostilities" Under the War Powers Resolution

In the absence of funding specific to the Libya operation, President Obama lacks the sort of argument that President Clinton made with respect to the Kosovo campaign. Instead, the Administration argues that the participation in the Libya operation does not rise to the level of "hostilities" for purposes of the Act and the section 5(b) trigger. I have three observations with respect to this question.

First, plain language approaches to textual meanings seem particularly inappropriate in the context of war powers. In parallel to the evolution of constitutional understandings, statutory measures relating to national security and military force are likely to be interpreted in light of practice and historical precedent as much as through language. The War Powers Resolution should not be addressed in the way one would address the tax code.

Second, practice relating to the War Powers Act renders the Administration's interpretation a plausible one. As the Legal Adviser has detailed for you this morning, there are historical precedents suggesting a narrower interpretation of the term "hostilities" than might be expected from an everyday

understanding of the term. (It is unfortunate that this full explanation has waited until today, however, to the extent that others have been able to fill an explanatory vacuum.)

Third, that is not to say that the Administration's position is necessarily the better one. Members of this committee and the Senate as a whole do not have to accept that position. The contrary position is also reasonable. There is insufficient practice and other evidence definitively to resolve the question either way as applied to the particulars of U.S. participation in NATO operations in Libya. To the extent that Congress makes clear, through a formal institutional pronouncement (as opposed to isolated statements of particular members), that it rejects the Administration's interpretation of "hostilities," then the case will stand at best as a contested precedent, one to be resolved, perhaps, in future episodes.

But, finally, it is not clear how pressing the "hostilities" question buys Congress anything as an institution. In my view, it is not obviously in Congress's institutional self-interest to press the point. On the one hand, I believe that any President faced with the winding down of the 60-day clock would identify some justification for avoiding the terms of section 5(b). No responsible Chief Executive would terminate a military operation in the national interest in the face of congressional inaction. If not authorization gleaned from a funding measure, if not an argument relating to "hostilities," then some other avenue would present itself to evade the termination provision. Section 5(b) is unlikely ever to be given effect. Nor will the judiciary ever enforce it.

Call it death by a thousand cuts. Does this mean that section 5(b) is unconstitutional? That question may better be left to the court of history. Although presidents may not declare the Act unconstitutional, from the Reagan Administration onward they have been careful not to concede the point. They have good cause to avoid the distraction of constitutional confrontation where a more minimalist argument will serve the same end.

On the other hand, Congress has no real need of the provision, lack of respect for which reflects poorly on the institution. Congress has ample tools with which to control presidential deployments of U.S. armed forces. As the nature of military engagement migrates away from the use of ground forces, at least in limited conflicts, Congress will be able to use the appropriation mechanism with less fear of leaving U.S. forces in harm's way. The nature of these engagements, often in the name of the international community, will also give Congress more latitude to constrain presidential action. In coming years we may well witness a trend towards greater congressional participation in decisions relating to the use of U.S. armed forces.

In any event, devising a position of the Congress with respect to the operation in Libya should be the primary task at hand. Disputes relating to the War Powers Resolution are likely to distract from that undertaking. I believe we would be having the same sort of discussion today even if the War Powers Resolution had not been enacted. The persistent cloud over the Act underlines the perception of some that Congress is ill-equipped in this realm. Congress would be better served by focusing on other institutional tools for participating in the full spectrum of use-of-force decisions.

Thank you, Mr. Chairman, for the opportunity to present my views to you on this important subject. This is a critical juncture in the history of constitutional war powers. It is important that the Senate give these questions its closest consideration.