

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#1)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

In a 1980 opinion regarding the War Powers Resolution, the Justice Department's Office of Legal Counsel wrote the following:

We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity."

This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. 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.

Does this opinion continue to reflect the views of the Executive Branch with regard to the constitutionality of section 1544 (b) of the War Powers Resolution? If not, please indicate in what respects the views of the Executive Branch on this question have changed.

**Answer:**

Yes, the opinion continues to reflect the views of the Executive Branch.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#2)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

The 1973 House Committee Report on the bill that became the War Powers Resolution states that, in the resolution's text, "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."

Does the Administration believe that U.S. forces are engaged in armed conflict in Libya?

**Answer:**

For purposes of international law, U.S. and NATO forces are engaged in an armed conflict in Libya. We are committed to complying with the laws of armed conflict, and we hold other belligerents in the conflict, including the Qadhafi regime, to the same standards. With regard to the language quoted from the House report, as I noted in my testimony, the report and the statute do not specifically define the term "hostilities." My testimony cited other legislative history that reflects that, in the words of Senate sponsor Jacob Javits, Congress chose a term that "accepts a whole body of experience and precedent without endeavoring specifically to define it." As a matter of established practice, "hostilities" determinations under the War Powers Resolution have been understood as requiring a factual inquiry into the circumstances and conditions of the military

action in question, and particularly the expected dangers that confront U.S. forces. For the reasons set forth in my testimony, the Administration believes that the United States' supporting role in NATO Operation Unified Protector—which is limited in the nature of the mission, limited in the risk of exposure to United States Armed Forces, limited in the risk of escalation, and limited in the choice of military means—has not constituted the kind of “hostilities” envisioned by the Resolution’s 60-day pullout rule. This is a distinct inquiry from the legal tests for determining what constitutes an “armed conflict” under international law.

Moreover, as I explained in my testimony, the definition of “hostilities” that we have used in this instance is consistent with the definition that one of my predecessors, Monroe Leigh, offered to Congress on behalf of the Executive Branch in 1975. The discussion between our two branches of government regarding the meaning of “hostilities” has been ongoing, but throughout, the Executive has not departed significantly from the understanding we supplied at that time.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#3)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

Among the assistance U.S. forces are providing to enable NATO airstrikes in Libya are electronic warfare support, aerial refueling, and intelligence, surveillance and reconnaissance support.

If U.S. forces encountered persons providing assistance of this sort to Taliban or al Qaeda forces in Afghanistan, would the Administration consider that such persons were directly participating in hostilities against the United States under the laws of armed conflict?

**Answer:**

The laws of war provide that civilians, who as such are generally immune from attack in an armed conflict, can be targeted if and for such time as they take a direct part in hostilities. The precise contours of the concept of “direct participation in hostilities”—reflected in Common Article 3 of the 1949 Geneva Conventions, Article 51 of Additional Protocol I of 1977, and Article 13 of Additional Protocol II of 1977—remain subject to considerable debate, and specific determinations as to when an individual is taking a direct part in hostilities are highly fact-dependent. This international law of war concept has not, however, generally been applied to determine whether U.S. forces are engaged in

“hostilities,” as a matter of domestic law, for purposes of the War Powers Resolution.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#4)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

At the outset of the Libya operations, the Department of Justice opined that the operations were anticipated to be limited in their “nature, scope, and duration.” On this basis, it concluded that the President did not require prior Congressional authorization to initiate them.

As I indicated in my opening statement, three months into our military involvement in Libya, the Administration’s assurances about the limited nature of the involvement ring hollow. American and coalition military activities have expanded to an all but declared campaign to drive Qadhafi from power. The Administration is unable to specify any applicable limits to the duration of the operations. And the scope has grown from efforts to protect civilians under imminent threat to obliterating Libya’s military arsenal, command and control structure, and leadership apparatus.

Is it still the Administration’s view that the Libya operations are limited in their nature, scope, and duration? If so, please identify

- a. the specific limits that apply to the nature of U.S. military operations in Libya;
- b. the specific limits that apply to the scope of U.S. military operations in Libya, and
- c. the specific limits that apply to the duration of U.S. military operations in Libya.

**Answer:**

It remains the Administration’s view that the Libya operations are limited in their nature, scope, and duration, such that prior Congressional authorization was

not constitutionally required for the President to direct this military action. These same limitations inform our analysis of the War Powers Resolution: As my testimony explained in detail, the combination of four limitations—the limited nature of (1) our military mission (playing a supporting role in a NATO-led coalition to enforce a United Nations Security Council Resolution that authorizes Member States to engage in civilian protection), (2) the exposure to our armed forces (who have not to date suffered casualties or been engaged in active exchanges of fire), (3) the risk of escalation (which is reduced by the absence of U.S. ground troops or regional opposition and by the existence of U.N. authorization, among other factors), and (4) the military means we have been using (confined to a discrete set of military tools, most of them non-kinetic)—all contributed to the President’s determination that the 60-day pullout rule does not apply. The Administration will continue to monitor the nature of U.S. involvement in the NATO operation to determine whether any further steps within the War Powers Resolution framework would be appropriate.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#5a)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

Some have suggested that if the Administration were to acknowledge that the War Powers Resolution's definition of "hostilities" includes strikes by [unmanned] drones, the President would be constrained in his ability to carry out such strikes against members of al Qaeda, including in Somalia.

Does the Administration believe that the post-September 11 Authorization for the Use of Military Force (P.L. 107-40) provides Congressional authorization for the use of force, including strikes by unarmed drones, against members of al Qaeda in whatever foreign country they may be located?

**Answer**

Following the horrific attacks of 9/11, the United States has been in an armed conflict with al Qaeda and associated forces. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force against Al Qaeda, the Taliban, and associated forces in the 2001 Authorization for Use of Military Force. As I stated in a speech that I gave before the American Society of International Law on March 25, 2010, "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the

threat the target poses.” *See*

<http://www.state.gov/s/l/releases/remarks/139119.htm>. The choice of weaponry in a particular use of force is subject to a number of considerations; and in all cases, this Administration reviews the rules governing targeting operations to ensure that U.S. operations are conducted consistent with law of war principles, including the principles of distinction and proportionality.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#5b)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

Section 2(b) of P.L. 107-40 states “Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” In light of this provision, does the Administration believe there is any doubt that applicable requirements under the War Powers Resolution for Congressional authorization have been satisfied with respect to the use of military force, including strikes by [unmanned] drones, against members of al Qaeda?

**Answer:**

The Administration does not believe there is any doubt that the 2001 Congressional Authorization for the Use of Military Force against al Qaeda and associated forces authorizes all necessary and appropriate military force including the use of drones against members of al Qaeda, consistent with the laws of armed conflict, and that such authorization is sufficient for purposes of the War Powers Resolution.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#6)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

In a March 26 statement addressing the President's authority to initiate military operations in Libya, you stated that the Senate had passed a resolution, S. Res. 85, calling for a no-fly zone in Libya. The relevant language in the resolution "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."

Some have read your statement to suggest that the Administration believes that S.Res. 85 authorized the President to use military force in Libya. This would be a puzzling interpretation given that the language in question was addressed to the UN Security Council, not the President, that it made no mention of any use of military force by the United States, and that it was contained in a non-binding resolution of the Senate rather than a law enacted with the approval of the full Congress.

To avoid further confusion on this point, is it the Administration's position that S.Res. 85 provided the President legal authorization to use force in Libya?

**Answer:**

I believed on March 26, as I do now, that S. Res. 85 was a significant measure, inasmuch as it reflected the Senate's unanimous recognition of the seriousness of the situation in Libya and of the potential value of establishing a no-fly zone, which the United States then helped to do. But it is not the Administration's position—and I have never suggested—that S. Res. 85 provided the President legal authorization to use force in Libya.

**Questions for the Record Submitted to  
Legal Adviser Harold Hongju Koh by  
Senator Richard G. Lugar (#7)  
Senate Committee on Foreign Relations  
June 28, 2011**

**Question:**

Do you believe the President has been well served by not seeking Congressional authorization for the Libya operations? What advantages do you perceive the President to have gained by proceeding without Congressional authorization?

**Answer:**

While the President has concluded that Congressional authorization was not legally required for U.S. participation in the Libya operations as they have progressed to date, he has also made clear that he would welcome such authorization, as it would present the world with a unified position of the U.S. Government, strengthen our ability to shape the course of events in Libya, and dispel any lingering legal concerns. More specifically, the President has expressed his strong support for S.J. Res. 20, as introduced by Chairman Kerry and ten original cosponsors on June 21. He has also sought to ensure that the Administration consult with Congress extensively throughout the operation.