



September 5, 2017

The Honorable Donald Trump
President of the United States
White House
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Washington, D.C. 20500

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RE: Congress Alone Has the Constitutional Authority to Decide
Whether the United States May Use Force Against North Korea

Dear President Trump:

The American Civil Liberties Union strongly urges you to uphold the Constitution, and the fundamental principle of separation of powers, by recognizing the sole authority of Congress to declare war—and to refrain from the use of force against North Korea in the absence of explicit congressional authorization for the use of force. Despite recent threats by North Korean leader Kim Jong-un and the reported firing of test missiles by North Korea, you as President have no constitutional authority to use force against North Korea. The one exception to the Constitution’s delegation to Congress of the power to declare war is the President may unilaterally order the use of force to, in the words of James Madison, “repel sudden attacks,” which is a factual scenario that does not apply to North Korea.

The ACLU is particularly concerned by recent threats you and Administration officials have made publicly, including:

- In a tweet on September 3, you stated, “South Korea is finding, as I have told them, that their talk of appeasement with North Korea will not work, they understand one thing!”
- Also on September 3, when asked if the United States would attack North Korea, you replied, “We’ll see.”
- Secretary of Defense James Mattis stated, on September 3, “Any threat to the United States or its territories, including Guam, or our allies will be met with a massive military response, a response both effective and overwhelming,” and “We are not looking to the total annihilation of a country, namely North Korea, but as I said, we have many options to do so.”
- In a tweet on August 30, you stated, “The U.S. has been talking to North Korea, and paying them extortion money for 25 years. Talking is not the answer!”

- In a tweet on August 11, you stated, “Military solutions are now fully in place, locked and loaded, should North Korea act unwisely. Hopefully Kim Jong Un will find another path!”
- On August 10, you said, in reference to a previous statement on North Korea, “Maybe it wasn’t tough enough,” and that North Korea should be “very nervous...Because things will happen to them like they never thought possible, OK?”
- On August 9, you stated that “North Korea best not make any more threats to the United States” and that further threats “will be met with fire, fury and frankly power the likes of which this world has never seen before.”

This drumbeat of threats over the past several weeks has raised concerns across the country about whether you will abide by the check on the President’s power that is fundamental to the Constitution’s separation of powers on war authority.

Article I of the Constitution explicitly and exclusively reserves for Congress the power to declare war. Article 1, Section 8 provides that only the Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” among other war powers. Any use of force against North Korea without a declaration of war or explicit authorization by Congress would strike at the very heart of the fundamental principle of separation of powers that is at the core of the Constitution and is the undergirding of our democratic form of government.

The ACLU does not take a position on whether military force should be used against North Korea. However, we have been steadfast in insisting, from Vietnam through the war in Afghanistan, both wars in Iraq, the military action against Libya, and the ongoing use of force in Iraq, Syria, Yemen, and Somalia that decisions on whether to use military force require Congress’s specific, advance authorization. Absent a sudden attack on the United States that requires the President to take immediate action to repel the attack, the President does not have the power under the Constitution to decide to take the United States into war. Such power belongs to the Congress alone.

As Thomas Jefferson once wrote, this allocation of war power to Congress provides an “effectual check to the Dog of war” by “transferring the power of letting him loose from the Executive to the Legislative body” Letter from Jefferson to Madison (Sept. 6, 1789). Congress alone has the authority to say yes or no on whether the United States can use military force in North Korea or anywhere else.

The structure of the Constitution reflects the framers’ mistrust of concentrations of power and their consequent separation of those powers into the three branches of our government. The framers well understood the danger of combining powers into the hands of a single person, even one who is elected, particularly a person given command of the armed forces. In order to prevent such an accumulation in times of war or emergency, the framers split the war powers between the Executive and Legislative branches, giving the Congress the power to declare war, i.e., make the decision whether

to initiate hostilities, while putting the armed forces under the command of the President.

In giving the power of deciding whether to go to war to Congress alone, the framers made clear that the President's powers as Commander in Chief, while "nominally the same [as] that of the king of Great Britain . . . in substance [is] much inferior to it." The Federalist No. 69 (Alexander Hamilton). As Alexander Hamilton explained, the power of Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all of which, by the Constitution under consideration, would appertain to the legislature." *Id.*

Chief Justice Marshall made clear, as early as 1801, that the Executive Branch did not have the power to decide whether the country will use military force. In a series of cases involving the seizure of vessels during an undeclared naval war with France, the Supreme Court made clear that Congress, not the President, was the ultimate repository of the power to authorize military force. See *Little v. Barreme*, 6 U.S. 170 (1804), *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *Bas v. Tingy*, 4 U.S. 37 (1800). As Marshall made clear, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." *Talbot*, 5 U.S. at 28 (1801).

In *The Prize Cases*, 67 U.S. 635 (1863), the Supreme Court found that a "state of war" may exist without a declaration of war. But the peculiar context of the Civil War explains those cases. Indeed, the Court reaffirmed that, in contrast to the President's power to suppress insurrections, "By the Constitution, Congress alone has the power to declare a national or foreign war." *Id.* at 668.

Although some supporters of unlimited Presidential war making power argue that the President, as Commander in Chief, has the ability to use military force whenever he deems it necessary in the "national interest" and need not obtain either a declaration of war or Congressional approval, this view is based on a misreading of history. Proponents of this view make much of the fact that the drafters of the Constitution had considered giving Congress the sole power to "make War," but in the end decided its power would be to "declare War." Some supporters of Executive power claim this means the President has the power to make war regardless whether Congress has acted. However, James Madison explained that this change was made simply to leave "to the Executive the power to repel sudden attacks." Debates in the Federal Convention, Aug. 17, 1787. According to Hamilton, "anything beyond" such use of military force "must fall under the idea of reprisals and requires the sanction of that Department [i.e., the Congress] which is to declare or make war." Letter from Hamilton to Sec. of War James McHenry. May 17, 1798.

As this history makes clear, the correct view of the Constitution, and the unbroken view of Congress, has been that the President's power to engage in large-scale military operations without Congressional approval is limited to the power “to repel sudden attacks.” Any other use of military force requires a declaration of war or other explicit Congressional authorization.

The War Powers Act does not provide a route around the Constitution. Some analysts wrongly claim that the War Powers Act, which was enacted in 1973 as a response to presidential overreaching in expanding and extending the Vietnam War, somehow gives a president a 90-day free pass to go to war without congressional authorization. The War Powers Act provides that, if Congress does not consent to the use of military force within 60 days of the President first reporting to Congress on a military action, then the President must withdraw American forces within 30 days. 50 U.S.C § 1544(b). But the timetable in the War Powers Act is a statutory safeguard and not a free pass to get around the Constitution. It is a backstop for remedying presidential wrongs, and does not override the Constitution’s allocation of war powers between the Executive Branch and the Congress.

Moreover, the use of force against North Korea at this time would also violate the most critical provision of the most critical treaty that binds the United States and all other nations. Just as the Constitution is the cornerstone of our government and sets our commitment to the rule of law, the Charter of the United Nations is the foundational document in international law. Ratified by the United States in 1945, the UN Charter embodies the most fundamental elements of international law. Within the UN Charter, art. II, para. 4, forms its very core, as it provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,” unless acting in self-defense or as authorized by a resolution of the UN Security Council. Use of force against North Korea, in the current absence of a Security Council resolution, would violate the most fundamental provision of the most fundamental treaty in international law.

You cannot—and should not—unleash Jefferson’s “Dog of war” in North Korea or elsewhere, without congressional authorization and compliance with the law. The Congress, as representatives of the American citizenry, has exclusive authority under the Constitution to decide whether the President may use military force. Particularly in the wake of your recent threats of military action against North Korea—with allusions to the possible use of nuclear weapons against another country for the first time since World War II—we urge you to make clear that you will refrain from use of force outside the scope of the Constitution and the law.

Please do not hesitate to contact us if you have any questions regarding this matter.

Sincerely,

Handwritten signature of Faiz Shakir in black ink.

Faiz Shakir
Director

Handwritten signature of Christopher Anders in black ink.

Christopher Anders
Deputy Director

cc: All members of U.S. Senate and U.S. House of Representatives