



August 30, 2013

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232 Capitol Building
Washington, DC 20515

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 Capitol Building
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

AMERICAN CIVIL
LIBERTIES UNION
NATIONAL OFFICE
125 BROAD STREET 18TH FL
NEW YORK NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: Congressional Approval Needed Before Use of Military Force in Syria

Dear Speaker Boehner, Minority Leader Pelosi, Majority Leader Reid, and Minority Leader McConnell:

The American Civil Liberties Union (ACLU) strongly urges you to schedule floor debates and votes in both houses of Congress on the question of whether the President may use military force in Syria. Given the widespread reports that such action is being contemplated by the administration, and in light of reports that the some parties believe mere consultation between the President and certain congressional leaders provides sufficient authority to the President to engage in military force, floor debate should commence as soon as possible and certainly no later than the date on which Congress reconvenes. Failure by Congress to consider and decide whether the President may use military force in Syria would mark an abdication by Congress of the war powers reserved for it under Article I of the Constitution. Use of military force by the administration in Syria in the absence of congressional action 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 in Syria. However, we have been steadfast in insisting, from Vietnam through the military action in Libya in 2011, 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 and derives from the Constitution. 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.

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."¹ 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."²

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.³ 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.”⁴

In The Prize Cases⁵, 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.”⁶

¹ The Federalist No. 69 (Alexander Hamilton).

² Id.

³ 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).

⁴ *Talbot*, 5 U.S. at 28 (1801).

⁵ 67 U.S. 635 (1863).

⁶ Id. at 668.

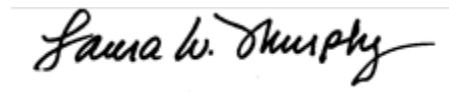
Although some supporters of unilateral Presidential war-making power argue that the President, as Commander in Chief, has the ability to use military force without either a declaration of war or Congressional approval when he deems it necessary in the “national interest” and does not anticipate a “war” in the apparent sense of a prolonged intensive military action, this view is based on a misreading of history. Some 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.”⁷ 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.”⁸

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 Congressional authorization.

Moreover, Executive Branch “consultations” with or briefings of members of Congress, as have been reported publicly, may be useful for congressional oversight, but are not a substitute for the Congress carrying out its obligations under Article I of the Constitution. No amount of letters, congressional testimony, or Situation Room briefings can make up for the House and Senate declining to act in accordance with the authority that the Constitution reserves for the Congress, to decide whether the United States should use military force in Syria.

It is up to the Congress, as representatives of the American citizenry, to insist upon its exclusive authority under the Constitution to decide whether the President may use military force in Syria. This decision should be the first order of business for each house when the Congress reconvenes and, if the President wishes to engage in the use of military force before that date, Congress should reconvene early to take up this critical matter.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Laura W. Murphy
Director, Washington Legislative Office

⁷ Debates in the Federal Convention, Aug. 17, 1787.

⁸ Letter from Hamilton to Sec. of War James McHenry, May 17, 1798.



Hina Shamsi
Director, National Security Project



Christopher E. Anders
Senior Legislative Counsel

Cc: Members of the United States House and Senate