

July 29, 2019

The Honorable Mitch McConnell  
Senate Majority Leader  
317 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Nancy Pelosi  
Speaker of the House  
1236 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Chuck Schumer  
Senate Minority Leader  
322 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Kevin McCarthy  
House Minority Leader  
2468 Rayburn House Office Building  
Washington, D.C. 20515

Dear Senators McConnell and Schumer and Representatives Pelosi and McCarthy:

The undersigned organizations, committed to good governance and strengthening our democratic institutions, urge you to enact fundamental reform of the War Powers Resolution of 1973 (WPR). This action is critical to restoring the constitutional balance of powers between Congress and the president that the founders of this nation enshrined in the Constitution with deliberate care.

The framers of the Constitution were keenly aware of the potential for unilateral executive warmaking. As a result, they built numerous protections into our system to ensure the president could not go to war without authorization from Congress. Most notably, Article I, Section 8 gives Congress the power to declare war, raise armies, and call up state militias. Article II, Section 2 gives the president power as commander-in-chief, but that authority is limited by the explicit powers given to the Congress.<sup>1</sup> As Alexander Hamilton writes in Federalist No. 69, the role of the president should be more limited than that of a monarch, whose power “extends to the declaring of war, and to the raising and regulating of fleets and armies.”

This concept is as basic to our democracy as freedom of speech and of religion, and was adhered to—more or less—until the start of the Korean War. The excesses of the Vietnam War, and in particular the invasion of Cambodia in 1970, spurred Congress to reverse executive branch encroachment on these powers by enacting the WPR.

“We live in an age of undeclared war, which has meant Presidential war,” states the committee report for the 1973 WPR. “Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances.” The law contained three main safeguards to rein in executive powers and protect against future abuses: (1) a requirement for the president to terminate automatically any use of military force subject to the resolution, unless Congress provided authorization for the activity within 60 days of the activity being reported to Congress; (2) processes for Congress to terminate unauthorized military actions;

and (3) a mandate for the president to consult with Congress, and keep it informed about ongoing hostilities.

For a variety of reasons, the WPR failed to adequately restrain unilateral military action by the president. Initially, the WPR permitted Congress to halt hostilities with a simple majority-vote from each chamber. After the Supreme Court's 1983 decision in *INS v. Chadha*, the president could veto such a resolution, necessitating a veto-proof majority to terminate military operations.<sup>ii</sup> Through the 1990s and to the present day, the executive branch has arrogated to itself additional power by narrowing the definition of military activity requiring congressional authorization. For example, in 2011, the Obama administration claimed that airstrikes and Special Forces missions in Libya did not constitute war under the Constitution, and therefore did not require congressional authorization, in part because there was no "aim at the conquest or occupation of territory."<sup>iii</sup>

The expanding criteria under which the president claims to have unilateral power to make war underscores this point. The WPR states that the president may only introduce the armed forces without congressional approval when there is "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." The conference report on the WPR suggests a "nuclear missile attack or direct invasion," might constitute such circumstances. By contrast, the Trump administration now defines these conditions as including a single casualty among U.S. troops based in the Middle East.<sup>iv</sup>

Congress, meanwhile, has allowed the executive branch to exploit and contort those powers that it does expressly grant. Successive presidents have invoked the 2001 Authorization for the Use of Military Force (AUMF) as the basis for military operations in at least 19 countries, including seven that are ongoing.<sup>v</sup> The law, which authorized force against the perpetrators of the September 11 terrorist attacks, has been used to justify strikes against groups that did not exist at the time. Fewer than 16 percent of current Members of Congress voted for the AUMF in 2001, or any other current authorization for the use of military force. In the one case where a majority in both houses of Congress directed an end to U.S. involvement, in the Yemen Civil War, the executive branch nevertheless continued military operations.

Regardless of one's views on the 2001 AUMF or the conflict in Yemen, this is not how our system was designed to work. Although the president has powers under Article II of the Constitution to defend the country against a sudden attack, Congress decides when the country goes to war. Our system cannot function if Congress cedes its power or accedes to executive branch encroachment, as in the case of the 2001 AUMF. Nor can our system function if Congress expresses the will of the people and is disregarded, as in the case of the Yemen WPR.

We urge you to move quickly to reform and update the congressional procedures for authorizing the use of military force and constraining unilateral executive action. More specifically, Congress

should modernize the WPR. A modernized WPR, at a minimum, could include the following elements:

- A requirement that each future authorization for the use of military force automatically expires after two years, at which time Congress may vote to extend it. This will give the military sufficient clarity while ensuring no Member of Congress serves a full term without having to perform his or her constitutional duty.
- Any new congressional AUMF should be specific with respect to the individual groups or nations Congress is authorization force against, as well as the specific countries where such force may be used. This will eliminate ambiguity in what Congress has and has not authorized.
- Congress should strengthen the reporting requirements of the WPR to cover all uses of force or engagement in hostilities, regardless of the underlying legal authorities for the activity. This will account for the increased complexity of U.S. military operations since 1973 and prevent gaps in reporting.
- Congress should be required to make public reports under a new WPR. Secrecy around who and where the U.S. is fighting runs contrary to basic democratic principles.
- Congress should clarify the definition of “hostilities.” This will make it clear what military actions require reporting to Congress.
- Existing AUMF should not be “grandfathered,” and should sunset within one year.<sup>vi</sup>
- No funds may be obligated or spent for military operations that do not comply with the provisions of the modernized WPR.

Although Congress could exempt future authorizations for the use of military force from these requirements, our proposed reforms would be a powerful deterrent to doing so, and would set clear expectations for the limits of executive power.

The founders of our country fought to be free from, and wrote a constitution to protect against, presidents making unilateral war in the manner of King George III. Recognizing that extraordinary circumstances might require extraordinary powers, they also gave the president the authority to defend the country from attack.

Such tensions are part of our system of government, and it is the role of Congress to keep these tensions in balance. In the conference report for the War Powers Resolution, Congressman

Clement Zablocki observed that the “constitutional ‘balance’ of authority over warmaking has swung heavily to the president. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities.” In 1973, in a moment of great upheaval and partisanship in our country, Congress came together and answered this call. It must now do so again.

Sincerely,

Brennan Center for Justice at NYU Law School  
Demand Progress  
Human Rights First  
Niskanen Center  
Open Society Policy Center  
Project On Government Oversight  
Protect Democracy  
Public Citizen  
R Street Institute

cc: Members of the Senate Foreign Relations Committee  
Members of the House Foreign Affairs Committee

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<sup>i</sup> A more comprehensive list of warmaking authorities may be found at:

<https://www.lawfareblog.com/war-powers>.

<sup>ii</sup> In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, the Supreme Court ruled that the one-house legislative veto violated the constitutional separation of powers.

<sup>iii</sup> Missy Ryan, Greg Jaffe, and John Hudson, “Pompeo warns Iran about trigger for U.S. military action as some in administration question aggressive policy,” *The Washington Post*, June 18, 2019. [https://www.washingtonpost.com/world/national-security/pompeo-warns-iran-about-trigger-for-us-military-action-as-some-in-administration-question-aggressive-policy/2019/06/18/48bd3be0-9116-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/world/national-security/pompeo-warns-iran-about-trigger-for-us-military-action-as-some-in-administration-question-aggressive-policy/2019/06/18/48bd3be0-9116-11e9-b570-6416efdc0803_story.html).

<sup>iv</sup> Caroline Krass, “Memorandum Opinion for the Attorney General; Authority to Use Military Force in Libya,” April 1, 2011. <https://fas.org/irp/agency/doj/olc/libya.pdf>.

<sup>v</sup> Matthew Weed, “Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress,” Congressional Research Service, February 16, 2019.

[https://lee.house.gov/imo/media/doc/Presidential%20Reference%20to%202001%20AUMF%20in%20Notifications%20and%20Executive%20Actions%20Memorandum%20Update%20\(2-16-2018\)%20Final.pdf](https://lee.house.gov/imo/media/doc/Presidential%20Reference%20to%202001%20AUMF%20in%20Notifications%20and%20Executive%20Actions%20Memorandum%20Update%20(2-16-2018)%20Final.pdf).

<sup>vi</sup> This would include both the 2001 and 2002 AUMF, as well as previous authorizations, such as the 1955 AUMF for protecting Taiwan, and the 1957 AUMF for the Middle East.