



September 12, 2014

RE: Congress Must Not Recess Next Week Until It Fulfills Its Constitutional Duties of Debating and Voting on Whether to Authorize or Reject the Use of Force in Iraq and Syria Against ISIS—Four Steps to Take Before Recess

Dear Senator:

The American Civil Liberties Union strongly urges you to oppose recessing the Senate until Congress debates and votes on whether to authorize the President to use force against the group often referred to as the Islamic State in Iraq and Syria (ISIS). Given the immediacy, gravity, and scope of the armed conflict that the President has already entered United States armed forces into in Iraq, and his stated intent to use military force against ISIS in Syria, there is no more pressing question before Congress or the country—and no more fundamental constitutional question for you and your colleagues—than whether to authorize or reject the use of force in Iraq and Syria.

The President has neither statutory nor Article II authority to carry out the plans he described in his televised speech this week. Only Congress has the constitutional authority to authorize such extensive war powers. However, the President has already claimed for himself the authority, over the past several weeks, to order more than 1,500 uniformed American service members into Iraq and order more than 150 airstrikes. Congress must decide now whether and how to authorize or prohibit the use of force in Iraq and Syria.

Even while the President is ramping up an air campaign and sending more American ground personnel into Iraq, Congress is still poised to recess next week for nearly two months without deciding the question of whether to extend war authority for military force in Iraq and Syria. There may be as few as four legislative days left before the lengthy recess.

But waiting until after the election to take up this monumental question of whether the President may continue to use—and expand and accelerate the use of—military force in Iraq and Syria would mark an abdication by Congress of the war powers reserved for it under Article I of the Constitution. The failure of Congress to act promptly would strike at the very heart of the fundamental principle of separation of powers that is at the

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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 Iraq or Syria. However, we have been steadfast in insisting, from Vietnam through both wars in Iraq and up to conflicts during this presidential term in Libya and Syria, 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 unilaterally to take the United States into war. Such power belongs solely to the Congress. We urge you to not cede your constitutional authority by agreeing to recess the Senate without deciding the question of war authorization.

After thirteen years of war, the new war plans outlined by the President in his speech are even more consequential. Beyond the obvious and troubling costs of war in American lives and treasure, the country has a long and painful history of civil liberties and human rights being jeopardized during war. Over these past thirteen years, claims of war authority have been cited as legal justification for wrongs ranging from broad surveillance of phone calls and emails of Americans to secret prisons where suspects were subjected to torture to indefinite detention without charge or trial, even of an American citizen apprehended in the United States. We strongly urge Congress to reflect back on lessons from the past thirteen years—and consider all of the implications of going to war, including effects on civil liberties and human rights—in deciding the current question of whether and how to authorize war in Iraq and Syria.

As you consider the issue of whether and how to enter the country into a new war, we urge you to take these four steps before the House recesses:

STEP ONE: Answer the Question, “What War Authority Is President Obama Claiming for Himself?” Demand Public Release of Any Justice Department Office of Legal Counsel (OLC) Opinion on the Authority of the President to Use Force in Iraq or Syria

Congress must start its review of the war authority question by determining what authority the President already is claiming for himself. The Obama administration has made only general statements about its legal authority. But one of the most certain and definitive ways to answer the question of what authority the President claims he already has is to demand the public release of any Office of Legal Counsel (OLC) memorandum or other administration written legal opinions on claimed authority.

In a stunning development this week, Obama administration officials are now broadly claiming that the Authorization for Use of Force of 2001 (2001 AUMF) is authority for the use of force against ISIS. The 2001 AUMF authorized military action against “nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person,” which were the Taliban and core al Qaeda. As a threshold matter, not only did ISIS not even exist on September 11, 2001, but it has a hostile relationship with al Qaeda. If left unchecked by Congress, this spurious claim of authority under the 2001 AUMF could mean perpetual war authority against groups with, at best, exceedingly tenuous connections to core al Qaeda.

We are concerned that administration claims of inherent constitutional authority may be even broader than its claims under the 2001 AUMF. Shortly after the President ordered the start of military action in Libya in 2011, OLC wrote a memorandum advising that the President had the constitutional authority to use military force in Libya, even in the absence of any congressional authorization.

The claims of inherent presidential war authority in the OLC Libya memo are breathtakingly broad. We strongly urge you to read the April 1, 2011 OLC memo, which is publicly available on the Justice Department's OLC [webpage](#), because it may itself be the basis of claimed authority for the President to order similar, or even greater, military action in Iraq and Syria. The principal argument in the OLC memo is that Congress's Article I authority to declare war must be reviewed with the "historical gloss" of what OLC claims is a series of presidentially-ordered military actions that were neither authorized nor stopped by Congress. Remarkably, the April 2011 OLC memo claims that up to 20,000 ground soldiers can be put potentially in harm's way, or an extensive air-based bombing campaign can be run, without congressional authorization, and in the absence of any imminent threat.

Congress must demand the public release of any OLC or other written legal opinions on any claim of presidential authority. The release of the legal memos will enable you and your colleagues to address the administration's reasoning as you craft any legislation either authorizing or terminating war authority, and will enable the American people to participate meaningfully in the debate over the decision of whether to go to war.

STEP TWO: Congress Must Claim for Itself Its Constitutional Power to Authorize or Reject the Use of Force in Iraq or Syria

The Obama administration's assertion that the President does not need any specific declaration of war or AUMF to continue its war against ISIS in Iraq and expand it into Syria should not go unchallenged by Congress. Absent a need for a president to use the military to "repel sudden attacks" on the United States, the decision whether to go to war does not lie with the President, but with Congress. Congress's power over decisions involving the use of military force derives from the Constitution. Article I, 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.

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 President can carry out his plan to use military force in Iraq, Syria, 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 of power 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. Congress must now claim and exercise its constitutional authority by either authorizing or rejecting the use of force in Iraq and Syria.

STEP THREE: Follow Regular Order in Considering Any New AUMF

If Congress believes that there is a significant new threat to the national security of the United States that requires military force as a response, then it can declare war or enact a new AUMF—but if it does so, Congress should follow regular order. Before Congress enacted the 2002 AUMF to authorize the war against the regime of Saddam Hussein, it held fifteen hearings, had extensive debates in both houses, and considered the AUMF as separate legislation. The resulting 2002 AUMF identified a specific enemy, and set specific limits and a clear objective, which, once met, effectively terminates the AUMF. Congress can best serve its role in the constitutional plan of checks and balances if it follows that regular order again.

Of course, while Obama administration “consultations” with members of Congress or briefings of congressional staff may be useful for congressional oversight, they are not a substitute for 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 standing idly by while the President usurps the authority that the Constitution reserves for the Congress: to decide whether the President can carry out his plan to use force in Iraq or Syria.

STEP FOUR: Ensure that Any New AUMF Specifically Identifies the Enemy, the Scope of the Conflict, and Clear Objectives

Although the ACLU has no position on whether Congress should authorize or reject the use of force in Iraq or Syria against ISIS, we strongly urge that any declaration of war specify the countries or organizations against whom the use of force is authorized, the scope of the conflict, and clear objectives for the use of force. Only with such specificity can Congress fulfill its constitutional role as a check on the Executive Branch. Specificity helps ensure that all Americans can understand the consequences of any war decision and participate in the debate over that decision. It also guards against Congress providing an open-ended delegation of its constitutional war authority to the President.

Particularly after thirteen years of two successive presidents claiming the 2001 AUMF serves as authority for the use of military force against organizations and persons who are far removed from the specific subject of the 2001 AUMF, there is a critical need for Congress to identify the enemy with specificity. If Congress decides to authorize force against ISIS, then it should specifically identify and describe ISIS, and not permit this president or future presidents to find ways to try to fit future enemies—or their purported associates—into some ambiguous definition of enemy.

Similarly, identifying the scope of the conflict and clear objectives for the use of force serves two purposes. Specificity allows Congress to assert its role as a check on the executive,

by providing a standard against which to measure the progress of a war, and hold the President accountable for his actions. Specifying clear objectives for the use of force is important because, once the clear objectives are met, the authorization will no longer have effect.

Insertion of geographical limitations, restrictions on use of certain aspects of force (such as a bar on ground forces), or a sunset may impose some helpful limits on the scope or duration of an AUMF, but they are not a substitute for specificity in identifying the enemy, the scope, and the objectives of an authorization of force. Only with specificity on these latter criteria can Congress most effectively assert its constitutional authority, including setting the criteria for the effective termination of authority when objectives have been met.

President Obama has already unleashed Jefferson's "Dog of war" against ISIS in Iraq, without congressional authorization. That constitutional wrong has already happened. It is now up to the Congress, as representatives of the American citizenry, to exercise its authority under the Constitution to decide whether the President may continue to use military force in Iraq, or expand military operations into Syria. The ACLU strongly urges you to demand that Congress decide this crucial question before starting its nearly 60-day election recess. Please do not hesitate to contact Chris Anders at canders@aclu.org or 202-675-2308, if you have any questions regarding this matter.

Sincerely,



Laura W. Murphy
Director



Christopher E. Anders
Senior Legislative Counsel