



August 30, 2013

President Barack Obama  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

AMERICAN CIVIL  
LIBERTIES UNION  
NATIONAL OFFICE  
125 BROAD STREET 18<sup>TH</sup> FL  
NEW YORK NY 10004-2400  
T/212.549.2500  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT REMAR  
TREASURER

RE: Obtain Congressional Approval Before Using Military Force in Syria

Dear Mr. President:

The American Civil Liberties Union (ACLU) strongly urges you to refrain from initiating military action in Syria until such time as Congress has taken votes in both chambers authorizing such use of military force. Widespread reports suggest that such action is being contemplated by your administration in the coming days or weeks. But mere consultation with certain congressional leaders does not provide you the authority to engage in military force. Accordingly, to the extent you have determined the need to go forward with military action, we urge you to ask congressional leaders to begin floor debate as soon as possible and certainly before the commencement of military action. 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. Concurrently with this letter, we are urging Congress to undertake debate on the proposed military action in Syria.

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."<sup>1</sup> 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."<sup>2</sup>

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.<sup>3</sup> 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.”<sup>4</sup>

In *The Prize Cases*<sup>5</sup>, 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.”<sup>6</sup>

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

---

<sup>1</sup> The Federalist No. 69 (Alexander Hamilton).

<sup>2</sup> Id.

<sup>3</sup> 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).

<sup>4</sup> *Talbot*, 5 U.S. at 28 (1801).

<sup>5</sup> 67 U.S. 635 (1863).

<sup>6</sup> Id. at 668.

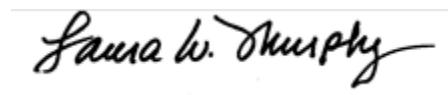
anticipate a “war” in the apparent sense of a prolonged intensive military action, this view is based on a misreading of history. Some proponents of this view make much of the fact that the drafters of the Constitution had considered giving Congress the sole power to “make War,” but in the end decided 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.”<sup>7</sup> 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.”<sup>8</sup>

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 in the present circumstances, may be useful for congressional oversight, but 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 an exercise of authority that the Constitution reserves for the Congress, to decide whether the United States should use military force in Syria.

Every president has the obligation to respect the exclusive authority of the Congress under the Constitution to decide whether the use of military force may be undertaken. We urge you to put this proposal before Congress for deliberation prior to the initiation of any military action in Syria. The Legislative branch deserves and is entitled to have its say in this most critical matter.

Sincerely,



Laura W. Murphy  
Director, Washington Legislative Office



Hina Shamsi  
Director, National Security Project



Christopher E. Anders  
Senior Legislative Counsel

---

<sup>7</sup> Debates in the Federal Convention, Aug. 17, 1787.

<sup>8</sup> Letter from Hamilton to Sec. of War James McHenry. May 17, 1798.