

November 14, 2018

**RE: Oppose H. Con. Res. 138**

Dear Representative:

The ACLU strongly urges you to oppose H. Con. Res. 138, because it could needlessly and mistakenly form the legal basis for another decade or more of U.S. attacks in Yemen, without having any legal effect on stopping the U.S. role in supporting the Saudi-led fight against the Houthis in Yemen. While we endorse the objective of stopping the unauthorized and unlawful US role in joining and supporting the Saudi-led coalition in Yemen, H. Con. Res. 138 is the wrong approach. It causes problems, while solving none.



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Instead of H. Con. Res. 138, the Congress should pursue effective measures to end the unauthorized support and fighting, which has resulted in horrific consequences in Yemen. We would have supported the amendment that Congressman Ro Khanna proposed to add this past spring to the National Defense Authorization Act, which would have prohibited the funding of U.S. refueling of Saudi aircraft. We similarly will support Senate legislation to bar arms shipments and other defense assistance to the Kingdom of Saudi Arabia, as a way to stop the U.S. role in the Saudi-led fight in Yemen. There are multiple ways for Congress to assert its constitutional authority and force its will to stop use of force that was never authorized by Congress, but H. Con. Res. 138 does not meet that objective.

H. Con. Res. 138 is a mistaken approach because:

**The Resolution May Extend and Increase Fighting in Yemen for Another Decade or Longer:** The resolution contains two drafting errors that could inadvertently extend and increase fighting in Yemen, rather than end or reduce it.

First, the resolution contains an exception clause for the use of force in Yemen, when such force is purportedly authorized by the 2001 Authorization for Use of Military Force (AUMF). This reference to exempting “United States Armed Forces engaged in operations authorized under the 2001 Authorization for Use of Military Force” in Yemen raises serious concerns that the Executive Branch will claim that the Congress is implicitly recognizing and authorizing the United States’ use of force in Yemen under the AUMF.

The U.S. use of force in Yemen, through three presidential administrations, has caused death and destruction, including to countless civilians and bystanders---all without any authorization from Congress. We expect that this resolution, if enacted, would be used by the Executive Branch as a claim of authority and direction from Congress to greatly expand and extend the U.S. role in Yemen.

To be clear, in the more than 17 years since enactment of the AUMF, Congress has never authorized reliance on the AUMF for conflict in Yemen, and any application of the AUMF to a fight in Yemen remains an open legal question as the Supreme Court has not decided the question. Without so much as a hearing or markup, enactment of H. Con. Res. 138 would likely result in the Executive Branch claiming that Congress has brought U.S. use of lethal force in Yemen within the scope of the AUMF.

Second, the same exception clause could result in continued U.S. funding and support for Saudi- and United Arab Emirates-led forces in Yemen, as long as the Executive Branch could claim that those forces are targeting al Qaeda or other forces covered by the AUMF. Actions by both countries have resulted in multiple devastating rights violations against Yemenis. Moreover, particularly when military officials have already claimed they do not know the mission of each Saudi aircraft refueled by the U.S., there is no reason to believe that H. Con. Res. 138 will effectively end U.S. support for Saudi forces in Yemen.

**The Resolution Could Create a Harmful Precedent Under the War Powers Resolution:** U.S. support for the Kingdom of Saudi Arabia against the Houthis is already a violation of the War Powers Resolution. The War Powers Resolution is self-executing. Under its provisions, the President must remove all U.S. forces from hostilities no later than 90 days after U.S. forces were entered into hostilities. By resolution, Congress can end authority and force withdrawal of forces earlier than 90 days—but once 90 days has passed, it is unlawful for the President to keep U.S. forces in hostilities. President Obama violated the War Powers Resolution, with respect to support for the Saudi-led coalition, more than two years ago, and President Trump has continued the unlawful support for the Saudis in Yemen.

Voting on H. Con. Res. 138 could create a harmful precedent that causes the Executive Branch to claim Congress must pass a resolution of disapproval in order for the War Powers Resolution to be effective in stopping hostilities. Future presidents could claim, notwithstanding the passage of more than 90 days with U.S. forces engaged in hostilities unauthorized by Congress, that unless a resolution of disapproval such as H. Con. Res. 138 is enacted, the U.S. action does not violate the War Powers Resolution.

H. Con. Res. 138 is not needed to establish a violation of the War Powers Resolution. The violation occurred more than two years ago. The role of Congress

now should be to enforce the War Powers Resolution by defunding U.S. support for the Saudi-led forces, rather than passing a resolution that will have no legal effect on the U.S. role there.

**The Resolution Inexplicably Does Not Define the “Hostilities” From Which U.S. Forces Must Withdraw:** By not defining “hostilities” in the operative section of the resolution, H. Con. Res. 138 will likely result in the Executive Branch determining that it does not have to change its current operations. The failure to define the specific “hostilities”—namely U.S. support, including refueling of aircraft, military advice and information, logistics, and other support to the Saudi-led coalition fighting the Houthis in Yemen—would mean that Congress is not responding to the clear, albeit wrong, position of the Obama and Trump administrations that “hostilities” is a narrow term under the War Powers Resolution, and does not apply to fights conducted by air.

The Acting General Counsel of the Department of Defense already communicated the administration’s position to Congress. While the administration position is legally incorrect, there likely will be little ability to have the question adjudicated. The way to resolve it would be by using specific statutory language on what hostilities are banned, which is not done by this resolution. The near certain result of this resolution would be that, even if enacted, the administration will likely take the position that the resolution has no legal effect.

As an organization that has been engaged in more national security litigation over the past 17 years than any other private legal organization, and during that same period has been engaged in more legislative and administrative debates and conflicts related to national security and the rule of law than any other nongovernmental organization, we have long urged Congress to claim its exclusive constitutional authority to decide whether, where, and against whom the United States should go to war---and we have long urged the president to avoid or end the use of force when Congress has not authorized it. We strongly support ending all unauthorized use of force, including the removal of U.S. forces from hostilities with the Saudis against the Houthis in Yemen.

But H. Con. Res. 138 is the wrong approach. Despite the best intentions of the sponsors, it will likely add to war authority, rather than subtract from it. We strongly urge a “No” vote if the resolution comes to the House floor for a vote. We even more strongly urge the sponsors to consider the War Powers Resolution as already violated, and now take steps for Congress to force its will on the Executive Branch, beginning with spending bans.

Please do not hesitate to contact us ([canders@aclu.org](mailto:canders@aclu.org)) with any questions.

Sincerely,

Handwritten signature of Faiz Shakir in black ink.

Faiz Shakir  
National Political Director  
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Handwritten signature of Christopher Anders in black ink.

Christopher Anders  
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