

# United States Senate

WASHINGTON, DC 20510

The Honorable Mitch McConnell  
Majority Leader  
United States Senate

The Honorable Charles "Chuck" Schumer  
Minority Leader  
United States Senate

March 7, 2018

Dear Senators:

We write to respond to the Department of Defense's February 27, 2018 letter announcing its opposition to S.J. Res. 54, which invokes the War Powers Resolution with respect to the U.S. government's involvement in the Yemini civil war. The Department advances several reasons for its opposition, none of which are meritorious, and which we will address in turn.

The Department first incorrectly contends that the government's activities do not constitute "hostilities" pursuant to the War Powers Resolution.<sup>1</sup> Based on publicly available information and our briefings with Department of Defense officials, the United States' refueling operations, intelligence sharing activities, and participation in the Joint Combined Planning Cell – in which members of the U.S. armed forces provide targeting assistance – plainly constitute "hostilities" pursuant to the War Powers Resolution. To avoid this conclusion, the Department relies on an implausibly narrow interpretation of "hostilities" to include only "situation[s] in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."<sup>2</sup> Put another way, the Department's position is that the War Powers Resolution does not apply unless the president initiates armed conflict with a sufficiently formidable opponent capable of firing at U.S. forces. This interpretation of "hostilities" is incompatible with the ordinary meaning of "hostilities" and the express purposes of the War Powers Resolution, which include "insur[ing] that the collective judgment of both the Congress and the President will apply" before the United States enters armed conflict and confirming that "[t]he constitutional powers of the President as Commander-in-Chief" to initiate armed conflict "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or

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<sup>1</sup> See Letter to the Honorable Mitch McConnell from William S. Castle, Acting General Counsel, Department of Defense, at 1-2 (Feb. 27, 2018) (hereinafter "Letter from Department of Defense").

<sup>2</sup> *Id.*, at 2 (quoting Letter to Rep. Clement J. Zablocki from Monroe Leigh, Legal Adviser, Dept. of State, and Martin R. Hoffian, General Counsel, Dept. of Defense (June 3, 1975); see *Libya and War Powers: Hearing Before the S. Comm. On Foreign Relations*, 112<sup>th</sup> Cong. (2011) (statement of Harold H. Koh, Legal Adviser, U.S. Department of State, at 8) (arguing that, among other reasons, the United States' activities in Libya did not constitute "hostilities" because "our operations have not involved U.S. casualties or a threat of significant U.S. casualties" nor did they "involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sustained confrontations of any kind with hostile forces"), available at <https://2009-2017.state.gov/documents/organization/167452.pdf>.

(3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.” 50 U.S.C. § 1541(a)-(b).

In any event, several of the United States’ activities trigger the War Powers Resolution for independent reasons not addressed by the Department of Defense. Participating in the Joint Combined Planning Cell constitutes the “assignment of member[s] of [U.S. Armed Forces] to command, coordinate, participate in the movement of, or accompany the ... military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.” *Id.* § 1547(c). As the Committee Report accompanying the War Powers Resolution explained, the purpose of this provision “is to prevent secret, unauthorized military support activities” and to prevent the gradual escalation of U.S. involvement in a conflict.<sup>3</sup> Similarly, air-to-air refueling missions constitute the introduction of forces “into the territory, airspace, or waters of a foreign state, while equipped for combat.” 50 U.S.C. § 1543(a)(2).<sup>4</sup>

The Department next invokes the doctrine of constitutional avoidance as a reason to conclude that the United States’ activities do not trigger the War Powers Resolution. The Department claims that the joint resolution raises “potential constitutional concerns,” because the president has Article II authority to establish the Joint Combined Planning Cell and to conduct air-to-air refueling operations, consistent with his authorities as Commander-in-Chief and to conduct the foreign affairs of the nation.<sup>5</sup> Although the president has unqualified authority to act as Commander-in-Chief once armed conflict has begun, he lacks independent authority to initiate armed conflict except in narrow circumstances not applicable here. Moreover, the president’s authority to conduct foreign relations consists of the authority to conduct diplomacy, and does not include the power to initiate armed conflict in most cases. The Department’s position would expand presidential authority far beyond these constitutional limits and would effectively nullify Congress’ express constitutional authority to declare war. Because the president lacks Article II authority to initiate armed conflict in Yemen, there is no constitutional problem with calling on the president to cease any conduct that triggers the War Powers Resolution.

The Department is also wrong to assert that the joint resolution somehow “call[s] into question the statutory authority for ongoing U.S. counterterrorism operations in Yemen,” specifically with respect to operations against ISIS.<sup>6</sup> In advancing this argument, the Department fundamentally misunderstands the joint resolution, which does not repeal or alter existing statutory authority to engage in counterterrorism operations, but instead provides that the government is required to cease activity that triggers the War Powers Resolution for which it lacks statutory authorization. Unless the Department takes the position that the United States lacks authority to fight ISIS pursuant to the 2001 Authorization to Use Military Force, the joint resolution does not affect U.S. operations against the organization.

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<sup>3</sup> S. Rep. 93-220, at 24 (1973).

<sup>4</sup> To be sure, there is an exception to this provision. It does not apply to “deployments which relate solely to supply, replacement, repair, or training of such forces.” But the term “such forces” as used in Section 1543(a)(2) refers to *U.S. forces*, not foreign forces. 50 U.S.C. § 1543(a)(2). Because the government’s refueling operations support Saudi forces, this exception does not apply.

<sup>5</sup> Letter from Department of Defense, at 2 & n.3.

<sup>6</sup> *Id.*, at 2.

The Department also expresses policy disagreement with the joint resolution.<sup>7</sup> We strongly disagree with the Department's claim that the joint resolution would undermine the United States' alliances. Contrary to the Department's claims, the United States is a better and more formidable ally when the public and Congress, as well as the president, support the use of military force. But more fundamentally, no policy determination is more important than ensuring that we respect the Constitution's separation of powers. As James Madison explained, "[i]n no part of the Constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department."<sup>8</sup> Ignoring the constitution's commands in service of short-term policy preferences will ensure only that Congress is unable to exercise its prerogatives when it disagrees with a future president's use of force.

Finally, the Department makes a last-ditch attempt to argue that, in fact, the government *already* has statutory authority for certain activities.<sup>9</sup> Neither the Arms Export Control Act, which authorizes the United States to license or sell defense articles, nor anything in 10 U.S.C. § 2341 *et seq.*, which governs acquisition and cross-servicing agreements, provides statutory authorization – let alone the “clear statutory authorization” required by the War Powers Resolution, *id.* § 1541(c) – for the United States to engage in any conduct in Yemen implicated by the War Powers Resolution.

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For too long, and under both parties, Congress has abdicated its responsibility to provide authorization for the use of military force. S.J. Res. 54 begins the process of reasserting congressional responsibility for the decision to commit U.S. armed forces to military conflict. Regardless of what one thinks of our involvement in Yemen, it is important that Congress either provides express authorization for our involvement in the conflict or calls on the president to cease operations.

As you know, a joint resolution pursuant to the War Powers Resolution is considered pursuant to 50 U.S.C. § 1546a, which in turn calls for the use of the process outlined in Section 601b of the International Security Assistance and Arms Export Control Act of 1976. Section 601b states that, once a resolution is filed, it will be sent to the U.S. Senate Committee on Foreign Relations, where it may be considered for up to ten calendar days. After ten days, the resolution may be discharged from the Committee for consideration on the Senate floor, with ten hours of debate equally divided. We expect that leadership will comply with the law and schedule a timely vote on our resolution. We look forward to presenting the merits of our position to our colleagues, a robust debate, and a vote on the resolution.

Sincerely,

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<sup>7</sup> *Id.* at 1.

<sup>8</sup> University of Chicago, The Founders Constitution: James Madison, Letters of Helvidius, No. IV, [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_2-3s15.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s15.html).

<sup>9</sup> Letter from Department of Defense, at 3-4.



Mike Lee  
U.S. Senator

Bernie Sanders  
U.S. Senator

Chris Murphy  
U.S. Senator

CC: The Honorable Bob Corker, Chairman, Committee on Foreign Relations  
The Honorable Bob Menendez, Ranking Member, Committee on Foreign Relations