

June 20, 2014

Dear Member of Congress,

As the conflict in Iraq deepens and you consider options for U.S. intervention, we write to urge respect for the constitutional requirements for using force abroad. The Constitution vests in Congress the power and responsibility to authorize offensive military action abroad.

We recognize that the Constitution impliedly permits a limited set of circumstances in which the President may act on his own without prior congressional authorization in defense of the Nation and its citizens. The deployment of troops to Iraq to protect and defend U.S. personnel and the Embassy in Baghdad is one such circumstance.

Yesterday the President said that American troops would not be returning to combat in Iraq, but he did not rule out “targeted and precise military action.” However, any use of offensive military force to address the conflict in Iraq, including air strikes by drones or manned aircraft, would be unlawful without prior congressional approval. The War Powers Resolution (WPR) does not provide an exception to that rule. The WPR statute expressly disclaims any intent to confer authority that presidents would lack in its absence, and any interpretation of the WPR that would allow a president to use force for 60 days to intervene in Iraq absent congressional authorization is unconstitutional.

Neither the 2001 Authorization for Use of Military Force (AUMF) nor the 2002 Iraq AUMF could have contemplated, much less authorized, military intervention in the current conflict in Iraq. We are deeply concerned by statements to the contrary from several Members of Congress who met with the President on June 18. As far as we are aware, the Islamic State in Iraq and Syria (ISIS) has not engaged in hostilities against the United States and therefore cannot qualify – using the administration’s own test – as an “associated force” of al Qaeda within the meaning of the 2001 AUMF. As for the 2002 Iraq AUMF, the President declared that war over more than two years ago and administration officials have stated repeatedly that the President supports its repeal because facts on the ground have rendered the law essentially obsolete.

When considering the use of force in Syria last year, President Obama invoked his responsibility as “the President of the world’s oldest constitutional democracy,” and stressed that “our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people.” Consistent with that expression of constitutional values vis-à-vis Syria, any use of force to address the conflict in Iraq likewise needs prior congressional approval and without such approval would be unlawful and violate the rule of law and democratic values.

Sincerely and respectfully,

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David Skaggs, Adjunct Professor of Law, University of Colorado Law School; former Member of Congress (D-CO) and Member of the Appropriations Committee and Permanent Select Committee on Intelligence

All signatories are members of the Constitution Project's War Powers Committee.