March 6, 2018

The Honorable Mitchell "Mitch" McConnell
Majority Leader
United States Senate

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

Dear Majority Leader McConnell and Minority Leader Schumer:

William S. Castle, Acting General Counsel of the Department of Defense, addressed a letter dated February 27th, 2018 to Majority Leader McConnell in anticipation of the introduction of S. J. Res. 54 by Senators Sanders, Lee, and Murphy. Mr. Castle's letter was solicited by the Majority Leader. It was not volunteered.

S. J. Res. 54 is a lineal descendant of H. Con. Res. 81, which was introduced in the House by U.S. Representatives Ro Khanna and Mark Pocan, Vice Chair and Co-Chair of the Congressional Progressive Caucus, respectively. The Congressmen have asked us to provide a legal analysis of Mr. Castle's letter, which we wish to share with you and your Senate colleagues.

As you know, S. J. Res. 54 requires the Senate to debate and vote to end the unauthorized U.S. military participation in the Saudi-led war against Yemen's Houthis unless and until Congress has declared war or has enacted a specific statutory authorization. The resolution's constitutionality is rooted in the Declare War Clause, which was reinforced by the War Powers Resolution of 1973. The Constitution's architects were *unanimous*: only Congress could take the nation from peace to war or otherwise authorize the offensive use of the United States Armed Forces in hostilities. The insinuation in Mr. Castle's letter that the President may unilaterally engage the United States in military action to defend presidentially decreed American interests is frivolous.

Mr. Castle argues that S. J. Res. 54 is tilting at windmills because the resolution wrongly assumes U.S. Armed Forces have been introduced into Saudi-led hostilities against Yemen's Houthis. If enacted into law, S. J. Res. 54 "would not achieve its apparent purpose" because "U.S. forces do not," Castle contends, "coordinate, accompany, or participate in the movement of coalition forces in counter-Houthi operations." Such level of military involvement would satisfy the threshold that triggers Section 8 of the War Powers Resolution, i.e., the introduction of U.S. Armed Forces into hostilities.

Mr. Castle's argument is refuted by facts provided by the Department of Defense to the House of Representatives in connection with the consideration of H. Res. 599 in 2017. That measure, which passed 366 to 30, and which was drafted after extensive consultation with the Department of Defense, determined that the United States has both "participated in intelligence cooperation" and "has provided midair refueling services to Saudi-led Arab Coalition warplanes conducting

aerial bombings in Yemen against the Houthi-Saleh alliance." It further concluded that "Congress has not enacted specific legislation authorizing the use of military force against parties participating in the Yemeni civil war."[1]

Mr. Castle proffers an interpretation of the War Powers Resolution that contradicts the express language of the statute. He argues that "Section 8(c) defines 'introduction of United States Armed Forces' but does not address the term 'hostilities.'" But Section 8(a), which introduces the term "hostilities," expressly directs the reader to Section 8(c) for its definition. Reading the two sections together, there can be no doubt that "hostilities" are initiated whenever there is an "introduction of United States Armed Forces":

> SEC. 8. (a) **Authority to introduce United States Armed Forces into hostilities** or into situations wherein involvement in hostilities is clearly indicated by the circumstances **shall not be inferred**—
> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, **unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution;**
> [...]
> (c) For purposes of this joint resolution, **the term "introduction of United States Armed Forces" includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular 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.**

Under the twin subsections, U.S. refueling of Saudi coalition warplanes conducting aerial bombings against Houthi targets constitutes accompanying and participating in the movement of Saudi-led forces engaged in hostilities. According to subsection (c), that means the introduction of U.S. Armed Forces into hostilities.

Moreover, U.S. Armed Forces have been assigned to the Joint Combined Planning Cell based in Riyadh to assist in anti-Houthi operations conducted in Yemen. S. J. Res. 54 quotes Secretary of Defense James Mattis, who admitted that U.S. military personnel "have gone in" to assist Saudi forces in "how you do target analysis and how you make certain you hit the right thing." The provision of intelligence by U.S. service members assigned to assist the Saudi coalition in determining what and where to bomb clearly constitutes coordination of hostilities, once again representing the "introduction of U.S. Armed Forces" into "hostilities."

Mr. Castle wrongly assumes that the Executive Branch controls congressional interpretations of its own laws. It is the Senate's responsibility to interpret the War Powers Resolution's application to S. J. Res. 54. For purposes of the coming debate and vote on S. J. Res. 54, it is

[1] H.Res.599 - Expressing the sense of the House of Representatives with respect to United States policy towards Yemen, and for other purposes, 115th Congress.

irrelevant that Mr. Castle cites a 1975 letter written by State Department and Defense Department lawyers to argue that "it has been the longstanding view of the Executive Branch that 'hostilities' refers to 'a situation in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.'" The plain language of the statute cannot be narrowed by executive fiat.

As the American Civil Liberties Union explained in a 2011 letter refuting Executive Branch rationales for unauthorized U.S. hostilities in Libya, "the plain language of the War Powers Resolution" contains "no carve-out for multinational operations, intermittent military operations, or operations in which no ground forces are deployed":

> Indeed, the legislative history of the War Powers Resolution makes clear that a House of Representatives subcommittee specifically chose to insert the term "hostilities" in the statute, instead of the narrower term "armed conflict," to broaden the War Powers Resolution's scope to include even situations where "no shots had been fired, but where there is a clear and present danger of armed conflict."[2]

In its deliberations on S. J. Res. 54, the Senate must heed the contemporaneous report by its Foreign Relations Committee, which accompanied the War Powers Resolution of 1973. This report explicitly articulated congressional intent to forestall mission creep:

> **The purpose of this provision [Section 8(c)] is to prevent secret, unauthorized military support activities** and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisers" to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. "advisers" were deeply engaged in the war in northern Laos.[3]

The intent of the Framers of the Constitution leaves no room for argument: The Executive Branch could not be trusted with the war power because it aggrandizes the President. As President George Washington declared in 1793, "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."[4] The Constitution's principal architect, James Madison, concurred: "In 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."[5]

Section 2(c) of the War Powers Resolution sought to explicitly reaffirm those constitutional constraints:

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[2] American Civil Liberties Union Washington Legislative Office, "Re: Opposition to H.J. Res. 68 and H.R. 2278—Unless Amended to Identify the Enemy, Define the Scope of the Conflict, and Specify the Objectives of the United States," June 24th, 2011.
[3] Matthew C. Weed, "The War Powers Resolution: Concepts and Practice," Congressional Research Service, March 28th, 2017.
[4] Louis Fisher, "The Law of the Executive Branch: Presidential Power," (Oxford University Press, 2014) 316.
[5] James Madison, "Letters of Helvidius nos. 1 - 4," August 24th - September 14th, 1793.

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised **only** pursuant to (1) a declaration of war, (2) **specific statutory authorization,** or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

The War Powers Resolution employs Section 8 to ensure executive compliance with the requirement in Section 2(c) of a specific statutory authorization of force by requiring a qualifying statute to specifically refer to the War Powers Resolution. Therefore, Section 2(b) of the 2001 Authorization for Use of Military Force (AUMF) and Section 3(c) of the 2002 AUMF both contain the identical requirement:

> SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.[6]

There is no text—not the National Defense Authorization Act nor any Acquisition and Cross-Servicing Agreement—that contains such a provision for activities that constitute hostilities in the Saudi-led war against Yemen's Houthis.

Mr. Castle also claims that S. J. Res. 54 would harm U.S. foreign policy interests. We look forward to a robust, open, and public debate in the Senate on such matters, as the Constitution and War Powers Resolution both demand. For the record, a July 2017 finding in the State Department's "Country Reports on Terrorism 2016" observed that the Saudi-led war against Yemen's Houthis has "continued the security vacuum that has enabled al-Qaeda in the Arabian Peninsula (AQAP) and ISIS's Yemen branch to deepen their inroads across much of the country."[7] In December 2017, Lora Shiao, acting director of intelligence for the National Counterterrorism Center, similarly noted in Senate testimony that AQAP "continues to exploit the conflict in Yemen to gain new recruits and secure areas of safe haven, contributing to its enduring threat."[8] If Mr. Castle's contention stands in spite of such evidence, the Executive Branch should be able persuade majorities in the House and Senate to enact a specific statutory authorization for anti-Houthi hostilities conducted by U.S. Armed Forces in Yemen.

Finally, we close by cautioning against some of the extreme contentions advanced by Mr. Castle. "The President," he claims, "has authority pursuant to Article II to take military action that furthers sufficiently important national interests." James Madison anticipated and rejected such dubious rationales, writing: "The constitution supposes, what the History of all Govts demonstrates, that **the Ex. is the branch of power most interested in war, & most prone to it.** It has accordingly with studied care, vested the question of war in the Legisl."[9]

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[6] S.J.Res 23 - Authorization for Use of Military Force, 107th Congress; H.J. Res. 114 - Authorization for Use of Military Force Against Iraq Resolution of 2002, 107th Congress.
[7] United States Department of State, "Country Reports on Terrorism 2016," July 2017.
[8] Lori Shiao, Hearing Before the Senate Committee On Homeland Security And Governmental Affairs, "Adapting to Defend The Homeland Against the Evolving International Terrorist Threat," December 6th 2017.
[9] James Madison, "James Madison to Thomas Jefferson," April 2nd 1798.

The constitutionality of S. J. Res. 54 is plain: The Necessary and Proper Clause of Article 1, Section 8 grants Congress the authority, under the Declare War Clause of the Constitution, to terminate any offensive use of U.S. Armed Forces at any time and in any place. Congress has implemented that power through the enactment of the War Powers Resolution's requirements of express congressional consent to the initiation of "hostilities." If the law means anything, it means that the Senate should debate and vote on S. J. Res. 54.

Sincerely,

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Bruce Fein
Associate Deputy Attorney General to President Ronald Reagan, 1981-1982