

ROADMAP FOR RENEWAL

Strengthen Congress's Capacity to Fulfill its Constitutional Role

II. Ensure constitutional checks on war powers to prevent lawless wars

Our Constitution divides warmaking powers between Congress and the President. The Founders created this shared authority and responsibility so that no one person could commit the nation to war, and so that the United States would not enter into war without support of the people. The Constitution thus names the President Commander in Chief with authority to carry out military action, but grants Congress—and only Congress—the power to declare war. Congress also can curtail the use of force by refusing to fund it.

Yet over the last several decades, Congress's exercise of its constitutional authority has waned to the point of near nonexistence. Over that period, occupants of the White House have increasingly viewed their power to use military force as unilateral. In order to prevent lawless wars and reckless exercise of the vast military power entrusted to the President, Congress must restore constitutional balance to the process by which the United States decides to use force abroad.

To do this, Congress must:

- Clarify which wars are authorized;
- Reduce the risk of unilateral nuclear war; and
- Shift the balance of warmaking power back to Congress.

The Problem

Going to war is one of the most consequential actions taken by a nation: it is a life-or-death decision; it requires significant expenditure of resources; and it impacts a country's short- and long-term international standing. No action of our government carries greater weight than directing our military against a new adversary. Yet from the Korean and Vietnam Wars a generation ago, to airstrikes in the former Yugoslavia in the 90s, to military action against the Gaddafi regime in Libya under President Obama, presidential decision-making about the use of force has become increasingly unconstrained by Congress.

In 2017, the Trump Administration launched missile strikes against Syria without authorization from Congress, without UN support, and without explaining why unilateral force was legal. Despite pressure from Protect Democracy through a FOIA lawsuit and requests from Congress, the Administration withheld documents outlining the legal basis for that military action. (Learn more about Protect Democracy's litigation and advocacy work on legal authority for use of force [here](#)).¹ Following pressure from the litigation and

¹ Protect Democracy, *Release the Memo: Our Lawsuit to Obtain The Secret Memo Laying out the President Trump's View of His War-making Authority*. Available at <https://protectdemocracy.org/syria-lawsuit/>.

some individual Senators, when the Administration again struck Syria in 2018, it made its legal analysis public—in a [memorandum](#) that expressed a breathtakingly broad view of when the President can decide, on his own, to commit U.S. troops and resources in new theatres and against new adversaries.²

The Executive Branch's asserted authority to engage the military in acts of war without consent from or explanation to Congress, our allies, or the American people, reduces to three core problems:

The American people don't know the scope of military actions that Congress has authorized, leaving the Executive branch with enormous flexibility to engage our armed forces without political accountability. We see this ambiguity in our military engagement in the Middle East, including activity in Syria, mentioned above; operations in Niger that left four American service members dead in October 2017; ongoing and ill-defined support of Saudi-led forces in the Yemeni civil war, including deployment of green berets; and the fight against ISIL, a militant proto-state based in Iraq and Syria, which both Presidents Obama and Trump justified by reference to 2001 and 2002 AUMFs targeting Al Qaeda, despite Al Qaeda's having disavowed any association with ISIL. Neither Congress nor the public has a clear understanding of what limits the Executive Branch sees on its scope of authority to use force.

An autocratic or unstable president could launch a nuclear attack—or an attack that could prompt a nuclear response—leading to mass devastation with little to no political deliberation. President Trump has, on more than one occasion, threatened both North Korea and Iran with nuclear weapons, the use of which could lead to catastrophic consequences on a global scale. In the context of the Executive Branch's broad views of the President's authority to use force, and outdated protocols covering the use of nuclear weapons, which date from the 1970s, the threat of one person leading us into a horrific nuclear war is far too great.

We've upended a delicately balanced constitutional protection against wanton spilling of American blood. Congress is supposed to declare war, the President is supposed to carry it out, and Congress should use its purse strings and oversight powers if the President exceeds the warmaking authority Congress has granted. Yet Congress has become all too passive, while Presidents have increasingly assumed the power to direct the use of force without the full support, or sometimes even the knowledge, of the American people. In a democracy, it's critical for the public to be engaged in these decisions, as the weight of war ultimately falls on the members of the public who serve and their families and communities. Our Constitution sets up a system where no one person can take us to

² O.L.C. Mem. Op., *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities* (May 31, 2018), Available at <https://www.justice.gov/olc/opinion/file/1067551/download>.

war—it's time to restore the balance so that the public, through their representatives in Congress, gets a say in these decisions.

Proposed Solutions

Congress must reassert its constitutional role in warmaking and provide a check on lawless or unauthorized wars by:

Clarifying which wars are authorized

- Congress should repeal AUMFs in place since 2001 and 2002 and conduct oversight regarding the Executive's view of what military activity was pursued pursuant to those authorizations.
- Congress should replace the AUMFs with a new resolution outlining clearly what military activity Congress has and has not authorized, including safeguards against endless wars.
- Congress should pass legislation requiring Executive branch disclosure of all legal opinions on the use of force in particular theatres and against specific adversaries and, at least to select Members or Committees, all military action undertaken pursuant to those powers.

Reducing the risk of unilateral nuclear war

- Congress should modernize the nation's nuclear protocols, including requirements that any nuclear strike order be verified as coming from the President and certified as legal and appropriate by other Executive branch officials, such as the Attorney General and Secretary of Defense. Congress should assess whether these certifications should include consideration of non-nuclear military action, or its infeasibility.
- Congress should ensure that nuclear protocols address not just first-strike use of nuclear weapons, but also uses of force against nuclear-armed adversaries that are likely to provoke a defensive nuclear strike, and should consider whether and how Congress must be consulted before the Executive branch declares an offensive or defensive nuclear strike "imminent."

Shifting proper balance of warmaking authority back to Congress

- Congress should establish a commission that will assess how this constitutional imbalance developed and propose ways to restore it, including revisions to the War Powers Act effecting a clearer bar on warmaking launched unilaterally by the President without the consent of Congress.
- Congress should issue a resolution reasserting its constitutional role and declaring that the Executive branch cannot make unilateral decisions about initiating military

force but must consult Congress as a coequal branch and as the branch most responsive to the will of the American people.