

March 16, 2021

Dear Members of Congress,

We, the undersigned organizations, respectfully urge you to move swiftly to defend the Constitution and Congress's exclusive authority, under Article I, to declare war and authorize the offensive use of military force. In particular, we ask you to introduce War Powers Resolutions to make clear that the Executive Branch's strikes in Syria on February 25, 2021 were not authorized, and nor would be similar actions. The Biden Administration ("the Administration") does not even claim that the strikes were authorized by Congress, as required by the Constitution and the War Powers Act of 1973, and as such threatens to set a deeply troubling precedent early in this Administration that could be cited to justify further unauthorized military action in the region and beyond.

The specific combination of factors that define these strikes make the precedent particularly dangerous: 1) the strikes occurred in a country where Congress has not authorized military action; 2) the strikes targeted a group that Congress has not authorized to be targeted by military action and of which little is publicly known; 3) the Administration has not even attempted to claim that its action is permitted under any existing specific statutory authorization from Congress; and 4) the Administration's own statements and facts defeat its assertion that the strikes were legally conducted pursuant to the President's Article II authority, as the Administration apparently concedes that there was no imminent threat nor any other legally permissible justification for bypassing Congress's role in authorizing military action.

Congress's authority over war-making is not a mere legalistic formality: A more assertive Congress, realizing the role envisaged by our nation's founders, is likely to change Administration behavior and yield improved policy outcomes. For instance, after leaving office, President Obama reflected that the aftermath of his unconstitutional military intervention in Libya, which Congress did not act to prevent, was the worst mistake of his administration. A succession of War Powers Resolutions over recent years aimed at cutting off United States support for the Saudi-led war in Yemen yielded an end to mid-air refueling under Trump, and built the foundation for February's announcement of an end to American support for the Saudi coalition's offensive operations. Last month's Syria strikes contradict Biden's wildly popular promise of ending "forever wars" — a promise Congress can and should help him keep.

Background and Dubious Legal Basis for Syria Strikes

On February 25, 2021, the US struck facilities reportedly used by the militia groups Kata'ib Hezbollah and Kata'ib Sayyid al-Shuhada. In its War Powers report to Congress, the Administration asserts that these militias "were involved in recent attacks against United States and Coalition personnel in Iraq, including the February 15, 2021, attack in Erbil, Iraq, which wounded one United States service member and four United States contractors, as well as resulting in the death of a Filipino contractor." The report further claimed that "these groups are also engaged in ongoing planning for future such attacks."¹

¹ Biden, Joseph R. "A Letter to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution", February 27, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/>

However, the *New York Times* reported, regarding the organization claiming responsibility for the Erbil base attack, that little is known about the group, including whether it is backed by Iran or related to the organizations that used the facilities the American airstrikes targeted.” Reports indicate that these groups may be responsible for subsequent retaliatory strikes against the Al-Asad air base, where U.S. and affiliated coalition troops are located, on March 3, 2021.²

The Biden Administration has not asserted that the strikes took place under any specific statutory authorization granted by Congress. The Administration instead claims that Article II of the Constitution alone permits the president to sidestep Congressional authorization and unilaterally introduce the U.S. military into hostilities. The Administration asserts that the strikes constituted “self-defense” that is permissible under his “authority to conduct United States foreign relations and as Commander in Chief and Chief Executive.”

This legal justification asserted by the Administration is entirely without merit. While the U.S. Constitution and the War Powers Resolution of 1973 do include narrow exceptions that allow the President to engage in military actions for self-defense and to repel sudden attacks, the Administration’s own claims prove that this military action did not meet this high bar.

Article II of the U.S. Constitution is widely interpreted to permit the president to act unilaterally in response to imminent threats to the nation, and the War Powers Resolution of 1973 permits action without Congress in the event of a “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” But both of these exceptions apply only to a narrow set of situations where the imminent and extreme nature of the threat makes it impractical or impossible to convene Congress in a timely fashion that would enable the necessary defensive actions. That the strikes were planned over a period of several days and executed 10 days after the Erbil attack (with Defense Secretary Lloyd Austin reportedly assuring Biden that he “owned the clock” and could take his time to respond), demonstrate that there was ample time to permit Congress to exercise its duty to authorize military action.³

This imminent threat requirement was ratified as recently as the 116th Congress, which passed multiple War Powers Resolutions in the Democratic House and Republican Senate (including language explicitly reaffirming this requirement) to prohibit then-president Donald Trump from undertaking military action against Iran after he ordered a strike that killed Qassem Soleimani. In that instance, the Administration indeed alleged that its action was in response to an imminent threat that necessitated unilateral action under Article II. Congress however determined that such a claim was not supported by evidence, leading to the passage of the WPRs. Yet in the case of last month’s Syria strike, the Biden Administration does not even attempt to assert an imminent threat, merely citing “ongoing planning” for future attacks. As legal scholar and former Defense Department counsel Oona Hathaway explained last week in her analysis

² Cooper, Helene, Schmitt, Eric, “U.S. Airstrikes in Syria Target Iran-Backed Militias That Rocketed American Troops in Iraq,” *New York Times*, Feb. 25, 2021.
<https://www.nytimes.com/2021/02/25/us/politics/biden-syria-airstrike-iran.html>

³ Lubold, Gordon, & Youssef, “Biden Called Off Strike on a Second Military Target in Syria Last Week”, *The Wall Street Journal*, March 4, 2021,
<https://www.wsj.com/articles/a-military-strike-in-syria-shows-biden-team-at-work-11614866795>

of the legality of the Administration's strikes: "Past attacks combined with vague future planning is not sufficient to meet the necessity standard. Instead, there would need to be evidence that the groups were preparing for imminent attacks, not some possible attacks at some point in the future that they may or may not carry out."⁴ The Administration's own assertions are insufficient to meet the imminent attack standard, and therefore no further investigation is needed to determine that the action violated Constitutional and statutory requirements.

Moreover, the ostensible defensive nature of the strikes is further belied by the fact that they appear to have resulted in a retaliatory strike against the U.S. and its partners at the Al-Asad air base in Iraq. A self-defense justification necessarily requires an aim to *prevent* an attack — here, the evidence suggests that it more likely *provoked* an attack. As Hathaway explains: "Self-defense is not really self-defense if instead of preventing a threat, it precipitates it."⁵ The military response from the target of the strikes also casts serious doubt on the wisdom of the Administration's stated goal for the strike to "de-escalate the overall situation in both eastern Syria and Iraq."

If this patently unauthorized, illegal, and unconstitutional military action is allowed to stand without a forceful rebuke from Congress, it threatens to establish a precedent that could yield further such action — and undercut recent deliberate efforts by Congress to reassert its primacy over matters of warmaking, through the passage of a series of War Powers Resolutions.

We ask that you immediately introduce War Powers Resolutions to prohibit any future unauthorized attacks of this kind. If recent history is any indication, even Congressional attempts to exercise constitutional oversight duties and extract basic information—including the strength of the evidence of a supposed "imminent" attack, the nature of the non-state actor that was targeted, and the administration's pre-planning and deliberation before launching an airstrike without adequate consultation or any statutory authorization--will be frustrated unless the administration is compelled to cooperate under the threat of a War Powers Resolution vote.

If Congress doesn't act to rebuke and prohibit this illegal action, this precedent could be cited to defend unauthorized military action essentially anywhere in the world, against nearly any group, and at virtually any time, as long as an administration declares that U.S. interests are threatened by the targeted group at some moment in the past or in the future. The Administration's repeated declarations that it may respond at "a place and time of our choosing" is a telling indication of the broad discretion the Administration is claiming to engage in unauthorized military action, as well as justifying pre-planned, retaliatory and unauthorized U.S. strikes to "de-escalate the overall situation."⁶

⁴ Hathaway, Oona, "Knowns and Unknowns of US Syria Strike: Looming Int'l and Domestic Law Issues" *Just Security*, March 5, 2021, <https://www.justsecurity.org/75198/knowns-and-unknowns-of-us-syria-strike-looming-intl-and-domestic-law-issues/>

⁵ *Id.*

⁶ Gaouette, Tawfeeq & Starr, "US civilian contractor died during rocket attack on air base in Iraq, Pentagon says", CNN, March 3, 2021, <https://www.cnn.com/2021/03/03/politics/us-airbase-iraq-rocket-attack/index.html>
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We note with great interest the Administration’s announcement that it will seek to replace the 2001 and 2002 Authorizations for Use of Military Force with authorizations that are “narrow and specific” that will “end the forever wars”.⁷ This unprecedented claim of virtually unchecked Article II authority, however, threatens to render any such effort nearly meaningless, as it inherently implies that the Administration believes that the Constitution grants vast unilateral power over military action to the Executive — power it believes cannot be proscribed or restricted by Congressional action.

We respectfully urge you to exercise the authority delegated to Congress under our Constitution and reaffirmed by the War Powers Resolution of 1973 to swiftly introduce a War Powers Resolution in both chambers of Congress to refute and prohibit this expansive claim of executive power and restore the balance of power intended by the framers of our Constitution.

Sincerely,

Action Corps
Antiwar.com
Center for International Policy
CODEPINK
Concerned Veterans for America
Defense Priorities Initiative
Defending Rights & Dissent
Demand Progress
Environmentalists Against War
Global Network Against Weapons & Nuclear Power in Space
Historians for Peace and Democracy
Just Foreign Policy
MADRE
National Iranian American Council Action
Peace Action
Peace Direct
PEACEWORKERS
Quincy Institute
RootsAction.org
STEM Strikes for Peace
The Libertarian Institute
Veterans for Peace
Women for Weapons Trade Transparency
Yemeni Alliance Committee

(Organizations listed by alphabetical order)

⁷ Bender & Desiderio, “Biden backs new war powers vote in Congress, White House says”, Politico, March 5, 2021, <https://www.politico.com/news/2021/03/05/biden-war-powers-congress-473843>