

Committee for the Republic  
816 Connecticut Avenue, N.W. Suite 200  
Washington, D.C. 20006

March 3, 2021

Honorable Merrick Garland  
Attorney General-Designate  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Re: Presidential compliance with the Declare War Clause—President Joe Biden’s February 25, 2021 air strike against Syria and continuation of unconstitutional presidential wars

Dear Attorney General-Designate Garland:

During your confirmation hearing before the Senate Judiciary Committee, you explained: “The Attorney General takes an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic. I am mindful of the tremendous responsibility that comes with this role.”

The attached Memorandum for the Attorney General underscores that the Constitution’s Declare War Clause, as understood by its authors, ratifiers, and President Joe Biden, **entrusts exclusively to Congress responsibility for deciding whether to use the armed forces in an offensive capacity, leaving to the executive the authority to respond to sudden attacks against the United States that have already broken the peace.**

Without congressional authority, on February 25, 2021, President Biden ordered an attack against Syria featuring two F-15E Strike Eagles dropping seven precision guided munitions on Abu Karmal. The Rome Statute of the International Criminal Court defines the crime of aggression to include: “*Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.*”

As the attached Memorandum persuasively demonstrates, your pledge to the Senate Judiciary Committee will oblige you as Attorney General to advise President Biden that the air strike in Syria violated the Declare War Clause and constituted an impeachable offense under Mr. Biden’s own standards. The Memorandum further demonstrates that your oath will oblige you to advise President Biden that ongoing presidential wars in Libya, Somalia, Syria, Iraq, Afghanistan, Pakistan, and against Al Qaeda and ISIS transgress the Declare War Clause and must cease absent prompt congressional declarations of war.

Telling a president “No” requires political courage. But capitulation to the President at the expense of the Constitution is not an option. During World War II, Attorney General Francis Biddle initially opposed odious concentration camps for 120,000 Americans of Japanese


ancestry. But he acquiesced without protest to accommodate President Franklin Roosevelt. Mr. Biddle explained in his 1962 Memoir: "The decision had been made by the President. It was a matter of military judgment. I did not think I should oppose it further."

Mr. Biddle's faint-heartedness should not be repeated.

Sincerely,

A handwritten signature in black ink, appearing to read "John Henry".

John Henry  
Chairman

A handwritten signature in black ink, appearing to read "Bruce Fein".

Bruce Fein  
Vice Chairman

Cc: Nancy Pelosi  
House Speaker

Kevin McCarthy  
House Minority Leader

Chuck Schumer  
Senate Majority Leader

Mitch McConnell  
Senate Minority Leader

Dick Durban  
Chairman, Senate Judiciary Committee

Chuck Grassley  
Ranking Member, Senate Judiciary Committee

Bob Menendez  
Chairman, Senate Foreign Relations Committee

James Risch  
Ranking Member, Senate Foreign Relations Committee

Tim Kaine

Senator, Virginia

Chris Murphy  
Senator, Connecticut

Jack Reed  
Chairman, Senate Armed Services Committee

James Inhofe  
Ranking Member, Senate Armed Services Committee

Jerald Nadler  
Chairman, House Judiciary Committee

Jim Jordan  
Ranking Member, House Judiciary Committee

Gregory Meeks  
Chairman, House Foreign Relations Committee

Michael McCaul  
Ranking Member, House Foreign Relations Committee

Adam Smith  
Chairman, House Armed Services Committee

Mike Rogers  
Ranking Member, House Armed Services Committee

Ro Khanna  
Representative, California

## MEMORANDUM FOR THE ATTORNEY GENERAL

March 3, 2021

Re: Presidential compliance with the Declare War Clause—President Joe Biden’s February 25, 2021, air strike against Syria and continuation of unconstitutional presidential wars

The Declare War Clause, Article I, section 8, clause 11, is the Constitution’s cornerstone that you have pledged to defend. As amplified hereafter, the Clause **entrusts exclusively to Congress responsibility for deciding whether to use the armed forces in an offensive capacity, leaving to the executive the authority to respond to sudden attacks against the United States that have already broken the peace.**

The Clause was intended to clog the arteries of war because of its alarming tendency to destroy the rule of law, liberty, and precipitate blowback which history amply substantiates. In times of war, the law falls silent, e.g., *Korematsu v. United States*, 323 U.S. 274 (1944), overruled in *Trump v. Hawaii*, 585 U.S. \_\_\_ (2018); *Debs v. United States*, 249 U.S. 211 (1919). James Madison, father of the Constitution, warned, “No nation could preserve its freedom in the midst of continual warfare.”

Every participant in the drafting, debating, and ratifying of the Constitution understood that Congress alone was endowed with the power to take the nation from a state of peace to war or to otherwise direct the offensive use of the armed forces. Marquee names on that score included George Washington, Madison, Thomas Jefferson, Alexander Hamilton, James Wilson, and John Marshall, later Chief Justice of the United States. Mr. Madison spoke for all in explaining: “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.” Indeed, there can be little doubt that the Constitution would have been defeated if it had contained the following text in Article 2: “The President shall have power to initiate war or otherwise employ the armed forces of the United States offensively to further presidentially decreed national security interests that shall neither be questioned nor reviewed by either Congress or the Supreme Court.”

President Joe Biden has exhibited an understanding of the Declare War Clause and a commitment to impeaching, convicting, and removing a president who attacks a foreign country without congressional approval.

As a presidential candidate in 2007, echoing the Constitution’s authors, Mr. Biden elaborated in an exchange with Chris Matthews on NBC:

**MATTHEWS:** You said that if the president of the United States had launched an attack on Iran without congressional approval, it would have been an impeachable offense.

**BIDEN:** Absolutely.

**MATTHEWS:** Do you want to review that comment you made? Well, how do you stand on that now?

**BIDEN:** Yes, I do. I want to stand by that comment I made. The reason I made the comment was as a warning. I don't say those things lightly, Chris. You've known me for a long time. I was chairman of the Judiciary Committee for 17 years, or its ranking member. I teach separation of powers and constitutional law. This is something I know.

So I got together and brought a group of constitutional scholars together to write a piece that I'm going to deliver to the whole United States Senate, pointing out the president has no constitutional authority to take this nation to war against a country of 70 million people, unless we're attacked or unless there is proof that we are about to be attacked.

And if he does, I would move to impeach him. The House obviously has to do that, but I would lead an effort to impeach him.

During a 2007 New Hampshire town meeting, Mr. Biden reiterated: "I want it on the record, and I want to make it clear. If [President George W. Bush attacks Iran without congressional authorization] I will move to impeach him."

Barack Obama, before his 2008 election to the presidency, similarly understood: "The president does not have the power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

On February 25, 2021, however, President Biden ordered an attack against Syria featuring two F-15E Strike Eagles dropping seven precision guided munitions on Abu Karmal without congressional authorization. The Rome Statute of the International Criminal Court defines the crime of aggression to include: "*Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.*"

*The following exchange took place between Congressman Randy Forbes and Defense Secretary Robert Gates during a congressional hearing on President Obama's presidential war against Libya:*

**"Mr. Forbes.** Mr. Secretary, you are Secretary of Defense. You ought to be an expert on what is an act of law--act of war or not. If it is an act of war to launch a Tomahawk missile at New York City, would it not also be an act of war to launch that by us on another nation?

**Secretary Gates.** Presumably.

*On February 26, 2021, while the Department of Justice remained silent, Pentagon spokesman John Kirby defended the constitutionality of President Biden's air strikes against Syria on the grounds of Article 51 of the United Nations Charter and presidential power under Article 2 of the Constitution to respond in self-defense to sudden attacks.*

*But the United Nation's Charter is a treaty which is subordinate to the Constitution, including the Declare War Clause. The Supreme Court amplified in Reid v. Covert, 354 U.S. 1, 16-17 (1957): "There is nothing in this language [of the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution...It would be manifestly contrary to the objectives of those who created the Constitution...to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions...The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined."*

*Mr. Kirby's Article 2 argument was equally flawed. Mr. Biden was not responding in self-defense to a sudden attack by Syria against the United States. Indeed, while Syria has never attacked the United States, we have been attacking Syria routinely for six (6) years. Mr. Kirby justified the F-15E air strikes as legitimate retaliation in self-defense against militia groups Kateab Hezbollah and Kataeb Sayyid al Shuhada allegedly implicated in much earlier rocket attacks against Iraqi installations that house American forces or contractors and were allegedly supported by Iran. The self-defense argument is frivolous.*

*It requires credible evidence that military force was employed to prevent actual or imminent danger of death or serious bodily injury to United States military personnel. There is no evidence that the United States bombings at Abu Karmal in Syria were to prevent immediate death or injury to United States forces or contractors. Indeed, they were not even contemporaneous with the alleged Iranian-backed militia rocket attacks on Iraqi installations.*

*Further, the presence of United States troops in Iraq at the sole direction of the president to defend against alleged Iranian domination of Iraq without congressional authorization is itself unconstitutional. Congress has never declared war against Iran. The 2002 AUMF at best authorizes military force against Iraq, not Iran, over Iraqi threats to the national security. Iran was not implicated in the 9/11 terrorist abominations, and thus the 2001 AUMF has no arguable application.*

*Your constitutional oath of office requires you, as Attorney General, to advise President Biden that the February 25, 2021, air strike in Syria violated the Declare War Clause and constituted an impeachable offense under Mr. Biden's own standards. You are also obliged to advise President Biden that ongoing presidential wars in Libya, Somalia, Syria, Iraq, Afghanistan, Pakistan, and against Al Qaeda and ISIS transgress the Declare War Clause and must cease absent prompt congressional declarations of war.*

The Declare War Clause permits no delegation of congressional authority over war to the President. Indeed, the premise of the Clause is that the President would be an untrustworthy steward of the war power because of the constant temptation to concoct excuses for belligerency to aggrandize executive power. Mr. Madison elaborated:

*"Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which*

separates the sword from the purse, or the power of executing from the power of enacting laws.”

The April 1, 2011, Office of Legal Counsel (OLC) Memorandum Opinion for the Attorney General should be revoked. It endorses offensive use of the armed forces by the President without congressional authorization “to protect important national interests,” a concept of infinite elasticity. It is intellectually inexcusable that the 14-page Memorandum Opinion makes no references to the views or understandings of the authors or ratifiers of the Declare War Clause, akin to expounding on the theory of judicial review without referencing *Marbury v. Madison*, 5 U.S. 137 (1803).

OLC should be directed to prepare a superseding Memorandum Opinion for the Attorney General honestly interpreting the Declare War Clause to require a congressional declaration of war or statutory directive for any offensive use of the United States Armed Forces. The President would possess authority to respond to sudden attacks against the United States that had already shattered the peace.

Members of Congress take the same oath, salute the same flag, say the same pledge of allegiance, and sing the same national anthem as does the President. If the President cannot convince majorities in the House and Senate that a recommended war or offensive use of the military is in the national interest, then the President must desist unless or until he articulates superior persuasive arguments that carry the day.

Telling a president “No” requires political courage. But capitulation to the President at the expense of the Constitution is not an option. During World War II, Attorney General Francis Biddle initially opposed odious concentration camps for 120,000 innocent permanent residents and citizens of Japanese ancestry. He argued that both military authorities and the FBI agreed there was no evidence of an imminent attack or planned sabotage on the West Coast. But he acquiesced without protest to accommodate President Franklin Roosevelt. Mr. Biddle explained in his 1962 Memoir: “The decision had been made by the President. It was a matter of military judgment. I did not think I should oppose it further.”

Mr. Biddle’s faint-heartedness should not be repeated.



Bruce Fein  
Vice Chairman  
Committee for the Republic