

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

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October 4, 2017

President Donald Trump  
The White House  
600 Pennsylvania Ave NW  
Washington, DC 20500

**Re: Presidential Authority to Initiate War Against North Korea**

Dear Mr. President:

I write on behalf of the New York City Bar Association and its 25,000 members from nearly every American state to call your urgent attention to the requirements of the U.S. Constitution, federal legislation and international law with respect to the commencement of war and, in particular, to the strict limits our Constitution and laws impose on the power of our President to unilaterally commit the nation to war. As explained below, in the absence of an actual or imminent attack on the United States (or in some circumstances on its allies), the President has no authority to commence a war in “anticipatory self-defense” (sometimes incorrectly called a “preemptive” war) on another nation without prior Congressional approval. Although the challenges posed to world peace by the current leadership of North Korea are real, bellicose threats and displays of military prowess by that nation do not constitute the type of imminent attack that might justify unilateral Presidential action to order a military attack against that country.

The City Bar recognizes the complexity of both the policy and strategic options for dealing with the threats to regional stability and world peace presented by North Korea’s recent actions and statements. We therefore take no position at this time whether U.S. military action against North Korea is wise or warranted. We do, however, insist that, absent a direct or imminent military attack on the U.S. by North Korea, any action to authorize U.S. military action amounting to acts of war against North Korea must be authorized by Congress in order to satisfy the requirements of the U.S. Constitution and domestic law.\*

**Congress Alone Has the Power to Declare War**

Article 1, Section 8, Clause 11 of the Constitution makes clear that only Congress has the authority to declare war: “The Congress shall have the Power . . . to declare War...” As the City Bar noted in its [2002 report](#) on “The Legality and Constitutionality of the President’s Authority

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\* The focus of this letter is compliance with U.S. domestic and Constitutional law. We also expect that the U.S. will comply with all applicable international law obligations.

to Initiate an Invasion of Iraq,” this has been understood since the founding of our Republic to mean that the President’s role is to conduct, not initiate, war and, where necessary, to “repel sudden attacks” against the U.S. As we explained in that report, the President’s authority can be explained as the difference between (a) “defensive” military action against an actual or imminent attack; and (b) other military actions amounting to acts of war. Defensive action against an actual or imminent threat is within the authority of the President as Commander in Chief. Power to authorize other military actions constituting acts of war lies exclusively with Congress, which can act either through a formal declaration of war or other legislation.

There has been a great deal of attention paid internationally to what constitutes the kind of “imminent threat” that could justify “anticipatory self-defense” under the Laws of War. The U.S. has historically contended that, to be “imminent,” such a threat from a foreign power must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” This standard, known as the “*Caroline* test,” is also useful in determining the scope of Presidential authority to take military action against “imminent” threats to the U.S.

Whether the facts in any case amount to an “instant, overwhelming” threat that leaves “no choice of means and no moment for deliberation” must, of course, be carefully evaluated, particularly when discussing the actions of states claiming the capacity to use nuclear-tipped intercontinental ballistic missiles. However, it seems clear that mere rhetorical bluster and displays of military prowess or weapons by a foreign leader do not meet this test. Nor, in our view, does the development and placement within one’s own country of nuclear weapons and long-range missiles by itself amount to action justifying anticipatory action against an “imminent” threat because those actions do not leave the U.S. with “no choice of means and no moment for deliberation.” Again, we emphasize that we do not contend that the U.S. is without remedies to address North Korea’s conduct or even that military action is necessarily an appropriate response to that conduct. What we do insist on is that any such action requires Congressional, and not simply Presidential, authorization.

### **War Powers Resolution and AUMF**

In 1973, in response to the actions of Presidents Lyndon Johnson and Richard Nixon in initiating and expanding the war in Southeast Asia, Congress adopted a “War Powers Resolution” requiring the President to consult with and then report regularly to Congress after unilaterally deploying U.S. armed forces within the territory, air space or waters of a foreign country without a declaration of war or other legislative authorization. The War Powers Resolution limits that deployment to 60 days (which may be extended for another 30 days) unless Congress either declares war or authorizes a further deployment. The War Powers Resolution, however, was not intended, and has never been understood, to recognize or to delegate to the President the power to initiate large-scale military action against a foreign nation absent an actual military attack (or an imminent threat of military action) against the U.S. The U.S. 2003 invasion of Iraq, for example, was specifically authorized by Congress and did not rely on any claim of Presidential authority to take that action unilaterally.

In the wake of the terrorist attacks against the U.S. on September 11, 2001, Congress also enacted the Authorization for the Use of Military Force (AUMF) authorizing the President to use armed force against “those nations, organizations or persons he determines planned, authorized, committed or aided” the 9/11 attacks. While there has been considerable debate as to the scope of this AUMF in the campaigns against Al Qaeda and, more recently, ISIS, the AUMF clearly provides no authority for military action against North Korea, which has never been accused by

the U.S. government of any connection with the 9/11 attacks or the continuing terrorist actions carried out in the Middle East and elsewhere by Al Qaeda or ISIS.

### **U.N. Security Council Authorization**

It is argued by some scholars that the President may initiate military action without Congressional approval when authorized by the U.N. Security Council in accordance with the Charter of the United Nations, which has the status of a ratified treaty under U.S. law. However, any such contention is irrelevant in the present case because the Security Council has taken no action to authorize military action against North Korea either under present circumstances or under the terms of the 1953 Armistice Agreement that ended the Korean War. Moreover, in view of the strong stand against such action by both Russia and China, the Security Council is highly unlikely to take any such action in the foreseeable future.

### **No Inherent Presidential Authority to Initiate War**

Finally, we note that the President's status as Commander-in-Chief of U.S. military forces does not carry with it an inherent right to declare or initiate war. If that were so, the power of Congress to declare war would be meaningless and the Constitutional check on unilateral action by a single individual to engulf our nation in war would be vitiated.

### **Conclusion**

As explained above, we believe that, absent an actual or imminent attack on the U.S., the President is required to seek prior Congressional authorization for military action against North Korea notwithstanding the bellicose nature of North Korea's rhetoric and its development and deployment within its own territory of nuclear weapons and long-range missiles.

Respectfully,



John S. Kiernan  
President of the Association

CC:

Vice President of the United States Michael R. Pence  
Secretary of State Rex W. Tillerson  
Secretary of Defense James Mattis  
National Security Advisor H. R. McMaster  
Chair of the Joint Chiefs of Staff Joseph F. Dunford, Jr.  
Senate Majority Leader Mitch McConnell  
Senate Minority Leader Chuck Schumer  
Speaker of the House Paul Ryan  
House Minority Leader Nancy Pelosi  
Chairman, Senate Foreign Relations Committee Bob Corker  
Chairman, House Foreign Affairs Committee Ed Royce