

The President's **WAR POWERS**

Article II War Powers and the
Authorizations for Use of Military Force



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The President's War Powers

ARTICLE II WAR POWERS AND THE AUTHORIZATIONS FOR
USE OF MILITARY FORCE

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The President's War Powers

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Introduction

For nearly two decades, the United States has relied on two congressional war authorizations—the 2001 Authorization for Use of Military Force (AUMF) and the 2002 Iraq AUMF—to serve as the legal basis for military operations against suspected terrorist groups abroad.

Despite significant congressional opposition to the executive branch's continued expansion of the scope of the 2001 and 2002 AUMFs, some members of Congress have expressed concern that should these instruments be repealed, the president will be stripped of the ability to respond with military force to an actual or imminent attack against the United States. This is simply not the case.

In actuality, the Constitution provides the president with inherent powers to use military force without congressional authorization for defensive purposes. While this power is necessarily limited, it is significant and ensures that, even absent an AUMF, the president retains the ability to use military force in order to defend the national security of the United States.

This issue brief will set out the framework for the division of war powers between the executive and legislative branches. It will then provide background information on the War Powers Resolution and the 2001 and 2002 AUMFs, discuss several specific instances in which the president has the authority to use military force without prior congressional approval, and note some of the disagreements between Congress and the executive branch concerning the limits of the president's war powers.

It will demonstrate that maintaining a war authorization to protect against future, unknown threats not only contravenes the constitutional division of war powers, it is also unnecessary.

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Maintaining a war authorization to protect against future, unknown threats not only contravenes the constitutional division of war powers, it is also unnecessary.

1. The Division of War Powers Between the Legislative and Executive Branches

In seeking to ensure that the fraught decision to go to war was not in the hands of any one person, the framers of the Constitution divided the war powers between Congress and the president. Article I grants Congress the authority to “declare war,” while Article II designates the president as “Commander in Chief of the Army and Navy,” assigning to the president the authority to conduct a duly authorized war.

This division of war powers was designed so that any decision to go to war could only be made with the widest possible political consensus. Only Congress, as the body most accountable to the American people, could, through a deliberative process, decide whether the nation chose war. As James Madison put it, “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”¹

2. The President's Article II Defensive Power

In addition to the president's power over the conduct of war, the framers were also conscious of the need for the president to respond with force should the nation be attacked. According to James Madison and Elbridge Gerry's constitutional debate notes, with Congress having the power to “declare war,” this would “leav[e] to the Executive the power to repel sudden attacks.”²

The Supreme Court confirmed this executive war power³ in the *Prize Cases* of 1863.⁴ The Court held that President Lincoln's establishment of a blockade following the attack on Fort Sumter, without prior congressional authorization, was a lawful exercise of his Commander in Chief power.

According to Justice Grier, speaking for the majority: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war”

“The Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”
— James Madison

While the president has the authority to use force to defend the nation and repel a sudden attack, only Congress can authorize a prolonged war.

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1. Madison, J. & Hunt, G. (1900). *The writings of James Madison. comprising his public papers and his private correspondence, including numerous letters and documents now for the first time printed.* (Writings 6:312-314, 2 Apr. 1798). Retrieved from The Founders' Constitution. (Volume 3, Article 1, Section 8, Clause 11, Document 8). Chicago, Illinois: University of Chicago Press.
 2. “*Declaration of War.*” Justia (n.d.)
 3. Elsea, J. (2021). *Defense Primer: President's Constitutional Authority with Regard to the Armed Forces.* Congressional Research Service.
 4. *The Prize Cases.* 67 US 635 (1863).
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It is important to note that this defensive power is a limited one. While the president, as Commander in Chief, has the authority to use force to defend the nation and repel a sudden attack, only Congress can authorize a prolonged war.

3. Congress's Authority to Authorize Total War and the More Limited Use of Force

The "declare war" clause in Article I grants Congress the power to authorize the president to conduct both total war as well as more limited uses of force. Total war is authorized by a declaration of war, which provides the president with the entire and unqualified use of the U.S. military.

A declaration of war also activates a range of "standby statutory authorities," which cover a range of powers, including warrantless surveillance and conscription.⁵ More limited uses of force are authorized by statutory force authorizations. The 2001 AUMF and 2002 Iraq AUMF are examples of such statutory force authorizations and are discussed in more detail below.

In 1800, the Supreme Court confirmed Congress's authority to authorize the limited use of force in *Bas v. Tingy*.⁶ The Court unanimously held that Congress had lawfully authorized a limited, "imperfect" war or "Quasi-War" against France, through its passage of two statutory force authorizations, which authorized the president to use only the Navy, and for specified purposes. Congress has continued to authorize limited uses of force since this time. Indeed, a 2014 study of all declarations of war and statutory force authorizations found that 60% included a geographic limitation, 43% named the enemy, 37% limited the types of permissible operations, and 23% contained an expiration date.⁷

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4. The 2001 and 2002 AUMFs

The 2001 AUMF and 2002 Iraq AUMF are two examples of statutory force authorizations that Congress passed to authorize limited wars.

The 2001 AUMF, passed by Congress three days after the September 11 attacks, authorized the president to use "necessary and appropriate force" against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11" and those who harbored these entities.⁸

5. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. The Constitution Project. (2005).

6. *Bas v. Tingy*. 4 U.S. 37 (1800).

7. French, B. & Bradshaw, J. *Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF*. National Security Network.

8. *Authorization for Use of Military Force*, Pub. L. No. 107-40, S.J. Res. 23, 107th Cong. (2001).

The 2002 Iraq AUMF⁹ was passed to authorize the war against Saddam Hussein's regime in Iraq. It permitted the president to use the armed forces as "necessary and appropriate" to "defend U.S. national security against the continuing threat posed by Iraq" and to "enforce all relevant Security Council resolutions regarding Iraq" in connection with Iraq's alleged possession of weapons of mass destruction—an allegation that was proven false.

Over two decades, successive administrations have expanded the scope of the 2001 AUMF to justify 41 operations in 19 countries, against at least eight groups.¹⁰ The executive branch has stretched this authorization to cover groups that had no connection to the 9/11 attacks, including those such as ISIS, which did not even exist at the time.

The 2002 Iraq AUMF has also been interpreted beyond congressional intent. While the authorization has largely been cited as an "additional" source of authority for some operations against ISIS in Iraq and Syria,¹¹ the Trump administration claimed that it provided a source of authority for the drone strike that killed Iranian general Qassem Soleimani in January 2020.¹² This claim was rejected by respected legal scholars.¹³

5. The War Powers Resolution

The War Powers Resolution (WPR),¹⁴ passed by Congress over President Nixon's veto in 1973, was intended to correct concerns about a growing imbalance in the constitutional division of war powers between the legislative and executive branches. It provides that the president can only introduce U.S. armed forces into hostilities or where hostilities are imminent if Congress has passed a declaration of war or specific statutory authorization (such as an AUMF) or where there is a "national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

The WPR also requires any hostilities, conducted without a declaration of war or specific statutory authorization, to be terminated within 60 days, and provides a mechanism for Congress to order the termination of any such hostilities.

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9. S.J.Res. 107-114. (2002). *Authorization for Use of Military Force Against Iraq*.

10. Weed, M. (2018). "Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress." Congressional Research Service.

11. *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*. (2018). White House.

12. *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*. (2018). White House.

13. Goodman, R. & Vladeck, S. (2020). "Why the 2002 AUMF Does Not Apply to Iran." Just Security.

14. P.L. 93-148 (1973). *War Powers Resolution*.

While the WPR has often been misconstrued as an instrument that provides affirmative authority to the president to use force, this is not the case. Rather, the WPR provides a framework for the *existing* constitutional division of war powers between Congress and the executive branch, discussed above.

As the “Purpose and Policy” section of the WPR states, the intention of the resolution is “to fulfill the intent of the framers of the Constitution ... and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...”

The most prevalent misconception about the WPR concerns the requirement for the president to end foreign military actions after 60 days unless Congress specifically authorizes them. It is critical to note that this is *not* a “60-day free pass” for the president to use military force in any circumstances without congressional authorization.

Any use of force by the president during these 60 days must fall within the parameters of the president’s defensive war power as Commander in Chief, discussed above. Any use of force that is not within these parameters and has not been authorized by Congress would be unconstitutional.

As a bipartisan group of legal scholars has discussed, “Beyond this range of defensive war powers, the burden lies on the President to obtain the authorization [from Congress before using force abroad].” As they further note, “The use of force for other than a limited range of defensive purposes is unconstitutional unless the President obtains advance congressional authorization.”¹⁵

These scholars and other commentators have lamented this common misunderstanding surrounding the WPR’s 60-day clock.¹⁶ They note that rather than conferring any new power on the president to use force for 60 days, “the WPR expressly disclaims any intent to confer authority that presidents would lack in its absence.”

Indeed, the legislation is clear. The WPR does not give the president any power to use force without congressional approval. Rather, it provides a procedure to guide the existing division of war powers under the Constitution between Congress—as the body vested with the power to declare war—and the president, who, as Commander in Chief, is tasked with defending the nation absent congressional approval in certain limited circumstances.

Specific examples of the circumstances in which the president has authority to exercise such defensive war powers are discussed in the next section.

“The use of force for other than a limited range of defensive purposes is unconstitutional unless the President obtains advance congressional authorization.”

– The Constitution Project

The War Powers Resolution does not give the president any power to use force without congressional approval.

15. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. The Constitution Project. (2005).

16. Egan, B. & Bridgeman, T. (2020). “*Top Experts’ Background: Military Action Against Iran and U.S. Domestic Law*.” Just Security.

6. Examples of When the President Is Permitted to Use the Armed Forces Without Prior Congressional Authorization

The *Prize Cases*, discussed above in Section 2, was the last time the Supreme Court weighed in on the president's defensive war power as Commander in Chief. While there remains significant disagreement between the executive and legislative branches over the scope of this power, there is substantial agreement that the president can use military force without prior congressional authorization in several circumstances:

To defend against a sudden actual or imminent attack.

As noted above, in the *Prize Cases* the Supreme Court confirmed the president's power to use force without congressional authorization to repel sudden attacks. There is general agreement that this power permits the president to repel both actual and imminent attacks "when there is no time, as a practical matter, for Congress to decide."¹⁷ This right is also consistent with the right of states under Article 51 of the UN Charter to use force in self-defense against an actual or imminent armed attack.¹⁸

To protect and rescue Americans abroad.

As noted in a bipartisan expert report, "Congress has historically acquiesced in the President's use of limited force abroad, without specific prior congressional authorization, to protect and rescue Americans when local authorities cannot or will not protect them."¹⁹

A 1980 Department of Justice Office of Legal Counsel (OLC) opinion concerning the legality of the proposed rescue operation of 50 U.S. citizens being held hostage in Iran noted that the president has used military force without congressional authorization to protect and rescue Americans abroad in numerous instances, including evacuations from Phnom Penh, Saigon (both 1975), and Lebanon (1976).

The memo also pointed to the 1868 Supreme Court case of *Durand v. Hollins*,²⁰ which held that the president's Commander in Chief power permits the use of the military in response to an attack on American people or property abroad.

There is general agreement that this power permits the president to repel both actual and imminent attacks "when there is no time, as a practical matter, for Congress to decide."

"Congress has ... acquiesced in the President's use of limited force abroad ... to protect and rescue Americans when local authorities cannot or will not protect them."

- The Constitution Project

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17. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. The Constitution Project. (2005).
 18. Wood, M.C.; Lubell, N; et al. (2018). *Final Report on Aggression and Use of Force*. Sydney, Australia: International Law Association.
 19. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. The Constitution Project. (2005).
 20. *Durand v. Hollins*. 8 F. Cas. 111 (No. 4168) (1860).
 21. *Presidential Power to Use Armed Forces Abroad Without Statutory Authorization*. (1980). U.S. Department of Justice.
 22. *Authority to Use United States Military Forces in Somalia*. (1992). U.S. Department of Justice.
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It concluded that the Commander in Chief power provided the president with the authority to “rescue [U.S.] hostages [held in Iran] or to retaliate against Iran in the event that the hostages were harmed.”²¹

Subsequent OLC opinions have also cited the protection of U.S. citizens and property as a basis for the president’s use of military force under Article II, including in Somalia (1992)²² and Haiti (2004).²³

In addition to the president’s inherent Article II power to protect and rescue Americans abroad, Congress has also legislated to require the president to “use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release” of U.S. hostages held abroad by a foreign government.²⁴

To safely remove troops.

A bipartisan expert report states that, even if Congress, through its appropriations power, terminates the use of force abroad, this cannot impact the president’s authority to safely remove U.S. troops. The scholars reason that such an attempt by Congress would “intrude on the Commander in Chief’s tactical command of the day-to-day operation of the armed forces.”²⁵

To conduct peacetime deployments.

As Commander in Chief, the president is permitted to deploy U.S. armed forces for purely peaceful purposes. It should be noted that Congress has expressly authorized many such peaceful deployments, including for humanitarian relief,²⁶ foreign disaster assistance,^{27 28} and the detailing of troops in a “non-combatant capacity” to the United Nations.²⁹

However, scholars have noted that even where Congress has not specifically authorized such activities, “Congress has acquiesced in such uses of the armed forces by the President by adopting collateral facilitating legislation, appropriating funds for such uses after the fact, and not objecting to them when it had the opportunity to do so.”³⁰

Congress has also legislated to require the president to “use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release” of U.S. hostages.

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23. *Deployment of United States Armed Forces in Haiti*. (2004). U.S. Department of Justice.
 24. Vladeck, S. (2014). “*James Foley and the Hostage Act*.” Just Security.
 25. *Presidential Power to Use Armed Forces Abroad Without Statutory Authorization*. (1980). U.S. Department of Justice.
 26. 10 U.S. Code § 401. *Humanitarian and Civic Assistance Provided in Conjunction with Military Operations*.
 27. 10 U.S. Code § 404. *Foreign Disaster Assistance*.
 28. 22 U.S. Code § 2292. *General Provision*.
 29. 22 U.S. Code § 287d-1. *Noncombatant Assistance to United Nations*.
 30. *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. The Constitution Project. (2005).

7. Disagreement Between Congress and the Executive Branch over the Scope of Article II War Powers

While there is general agreement that the president's Article II war powers permit the use of force without congressional authorization in the aforementioned circumstances, there remains significant disagreement over the scope of this power for other actions.

The executive branch has expressed an increasingly expansive view of its Article II war powers by reference to a two-part test: 1) "whether the President could reasonably determine that the action serves important national interests" and 2) whether the contemplated military action would "bring the Nation into a war."³¹

This test originated in a 1992 OLC memo³² and has most recently been used to justify the January 2020 strike that killed Iranian general Qassem Soleimani,³³ the 2018 strikes against Syria,³⁴ and the 2011 campaign of airstrikes against Libya.³⁵ As scholars have discussed, the executive branch has not provided any criteria or limits for what constitutes a "national interest," permitting the president to use military force without congressional authorization. As such, the national interests test "provides no meaningful constraint on presidential power."³⁶

Congress, for its part, has never explicitly authorized the national interests test. Indeed, the last time that Congress legislated on the scope of the president's Commander in Chief power to use force without congressional approval was the aforementioned War Powers Resolution, which provides that this power is limited to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Congress has also twice utilized the procedure in the WPR to order the termination of U.S. involvement in hostilities in respect of Yemen³⁷ and Iran.³⁸ These resolutions were vetoed by President Trump.^{39 30}

The executive branch has expressed an increasingly expansive view of its Article II war powers.

The national interests test "provides no meaningful constraint on presidential power."

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31. "OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force." Lawfare (2018)
 32. *Authority to Use United States Military Forces in Somalia*. (1992). U.S. Department of Justice.
 33. *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*. (2018). U.S. Department of State.
 34. *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*. (2018). U.S. Department of State.
 35. *Authority to Use Military Force in Libya*. (2011). U.S. Department of Justice.
 36. Bradley, C. & Goldsmith J. (2018). *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*. Lawfare.
 37. Edmondson, C. (2019). "U.S. Role in Yemen War Will End Unless Trump Issues Second Veto." The New York Times.
 38. Grisales, C. (2020). "Senate Approves Legislation to Limit President's War Powers Against Iran." National Public Radio.
 39. Landler, M. & Baker, P. (2019). "Trump Vetoes Effort to Force End to U.S. Involvement in Yemen War." The New York Times.
 40. "Trump Vetoes Iran War Powers Resolution." (2020). Reuters.
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8. The Bottom Line on the President's Article II War Powers and Current AUMFs

While there remains disagreement between Congress and the executive branch over the outer boundaries of the president's Article II war powers, as this issue brief demonstrates, it has been accepted since 1863 that the Constitution provides the president with inherent power to use force without congressional authorization to defend the nation against an actual or imminent sudden attack. Congress has also historically acquiesced to the president's use of the military to protect and rescue Americans abroad without prior congressional approval.

As such, if a new, unforeseen group or country attacks or poses an imminent threat of attack to the United States, Article II of the Constitution gives the president the power to respond with military force in self-defense without prior congressional authorization.

The 2001 AUMF and 2002 Iraq AUMF were intended to be limited in scope. Continuing to reinterpret and repurpose them to apply to new groups or even countries not only goes against congressional intent, it infringes upon Congress's constitutional duty to determine where, when, and against whom the United States goes to war.

The framers of the Constitution carefully divided war powers between the executive and legislative branches to create a system of checks and balances that guards against the abuse of power and ensures that the American people have a say in the difficult decision of whether to go to war.

While only Congress can authorize war, the framers invested in the president, as Commander in Chief, the defensive power to repel a sudden imminent or actual attack. This important power ensures that should such a new threat to the United States emerge, the president has sufficient authority to respond with force pursuant to Article II of the Constitution, without needing to rely on existing, outdated AUMFs.

Should ... a new threat to the United States emerge, the president has sufficient authority to respond with force pursuant to Article II of the Constitution, without needing to rely on existing, outdated AUMFs.

FURTHER READING

- » *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*
The Constitution Project (2005)
- » *Defense Primer: President's Constitutional Authority with Regard to the Armed Forces*
Congressional Research Service (2021)
- » *"60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History"*
Buzzfeed (2014)
- » *"Why the 2002 AUMF Does Not Apply to Iran"* Just Security (2020)
- » *"OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force"*
Lawfare (2018)



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