



# Assessing Recent U.S. Airstrikes in the Middle East Under the War Powers Framework

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Airstrikes by U.S. forces in the Middle East have markedly increased since the outbreak of the current Israel-Hamas conflict on October 7, 2023. To date, the targets have been Iranian-supported militant groups in [Iraq and Syria](#) and in [Yemen and the Red Sea](#). The strikes have prompted questions by [Members of Congress](#) and [legal scholars](#) about the legality of the President’s use of force under both U.S. and international law. The Biden Administration has submitted reports “consistent with” the [War Powers Resolution \(WPR\)](#) to Congress following some of the strikes, setting forth the legal authorities that the executive branch relies on to justify its military actions.

This Legal Sidebar focuses on the application of the domestic war powers framework to the strikes. It begins by explaining relevant Supreme Court precedent and the respective understandings of war powers advanced by Congress and by the executive branch over time. The Sidebar then examines the Biden Administration’s asserted legal bases for recent strikes under this domestic war powers legal framework and discusses ways that Congress would seek to enhance or constrain executive authority to carry out such strikes.

## The U.S. War Powers Framework

The Framers of the Constitution [purposefully divided](#) war powers between Congress and the President. Article I grants Congress several powers related to the use of force, including the powers to [declare war](#), [raise and support](#) the Army, provide for the [Navy](#), [regulate the Armed Forces](#), and issue [letters of marque and reprisal](#). Article II makes the President “[Commander in Chief](#)” of the Army and Navy, as well as the Militia when in federal service. Presidents have claimed—and the Supreme Court and Congress have to varying extents recognized—that Article II includes inherent presidential war power that is not expressly provided in the Constitution and that may be exercised independently of Congress. Accordingly, it is well established that there are two potential sources of presidential authority to use force, although their contours are often debated:

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1. congressional authorization (either in the form of a formal declaration of war or, as has been the practice since World War II, [statutory authorizations](#) for the use of military force); and
2. independent authority implied in [Article II](#).

## Statutory Authorizations for the Use of Military Force (AUMFs)

The scope of the President’s power to use force pursuant to an authorization for the use of military force (AUMF) is a matter of statutory interpretation. Congress has passed joint resolutions granting AUMFs that [gave](#) the President [extensive](#) authority to use force, and administrations have generally [interpreted](#) these grants of authorization [broadly](#). There were early Supreme Court cases that recognized Congress’s authority to limit the use of military force by [construing](#) language in [declarations of war](#) and [AUMFs](#) as dispositive of the scope of presidential authority. The Court [has](#), at times, read [AUMFs](#) and, more frequently, statutory grants of authority to the President in other [areas](#) of [foreign policy](#) expansively. Recent caselaw on the subject, however, is sparse.

When the executive branch has relied on congressional authorizations to support its use of force since the September 11, 2001, terrorist attacks, it has cited two AUMFs—the [2001 AUMF](#), which authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” in order to prevent their future acts of terrorism against the United States, and the [2002 AUMF](#), which authorizes the President to use “necessary and appropriate” force to “defend the national security of the United States against the continuing threat posed by Iraq.” In so doing, the executive branch has interpreted the 2001 AUMF to extend, for example, to [numerous](#) “[associated forces](#)” that did not exist in 2001. Similarly, the executive branch has interpreted the 2002 AUMF to [extend](#) beyond threats “posed by Iraq” to encompass threats “to a stable and democratic Iraq” and “terrorist threats emanating from Iraq.” Both the [Obama](#) and [Trump](#) Administrations claimed that Congress “ratified” this interpretation of the 2002 AUMF by appropriating funds to support continued military operations in Iraq. In a [2018 report](#), the Trump Administration [stated](#) that the 2002 AUMF “contains no geographic limitation on where authorized force may be employed.”

## Independent Article II Authority for the Use of Force

When Presidents have cited statutory authorizations to justify their uses of force, such citation is in [addition](#) to rather than instead of the President’s inherent Article II authority, which several administrations have maintained would [independently](#) support their unilateral use of force. The Supreme Court has [held](#) that the President has inherent authority to defend the nation from an armed invasion without prior congressional authorization, but it has not defined the outer limits of this inherent authority. For instance, the Court has not determined whether there is independent authority in the absence of a sudden attack on U.S. territory, and courts have otherwise largely declined to weigh in on the distribution of war powers based on [justiciability](#) doctrines such as [standing](#) and the [political-question doctrine](#).

The legislative and executive branches have offered differing views and interpretations on when the President needs Congress’s authorization for military action. Due to the dearth of directly relevant judicial precedent, it is the political branches’ interpretations and practices that provide the predominant gauge of the constitutional distribution of war powers.

## Independent Article II Power According to Congress

Congress advanced its interpretation of the distribution of constitutional war powers by [enacting](#) the 1973 WPR over President Nixon’s [veto](#). In [Section 2\(c\)](#), Congress stated its understanding of the scope of the

President's independent Article II power as Commander in Chief "to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Absent congressional authorization, Section 2(c) provides that the President has independent Article II authority to use military force in such circumstances only in response to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

Although the WPR does not define "national emergency" or "attack," the law makes clear that, whatever the scope of the President's independent constitutional authority to use force in response to an attack, Congress understands it to be temporally limited. In the absence of a declaration of war, the WPR [requires](#) the President to submit to Congress a report within 48 hours of introducing of U.S. forces into hostile situations ("48-Hour Report"). The President [must then withdraw](#) U.S. forces within 60 days (or 90 days under certain circumstances) after a 48-Hour Report was either submitted or required to be submitted (whichever is earlier) unless Congress "(1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."

### Independent Article II Power According to the President

The executive branch's interpretations of independent presidential authority related to the use of force outside of U.S. territory have been broader than Congress's view embodied in the WPR. President Nixon vetoed the WPR in part [based](#) on this position, and subsequent administrations have [continued to contest](#) the WPR's constitutionality on the ground that the resolution impermissibly narrows the President's authority to use force absent a declaration of war or statutory authorization. The executive branch has denied that the WPR provides a "complete recitation" of the President's independent war powers authorities, and has instead provided a [non-exhaustive list](#) of the situations in which it believes the President has constitutional authority to use force without congressional authorization, including to rescue U.S. citizens, to protect U.S. embassies, and to implement commitments in security treaties.

In addition, the [Obama](#) and [Trump](#) Administrations articulated a two-part inquiry for determining when the President has authority to use force without congressional authorization, which the Trump Administration explained as being "[distilled](#)" from long-standing executive branch precedent and practices: first, whether the military action would serve "[important national interests](#)," and second, whether the "[nature, scope, and duration](#)" of the anticipated operation might rise to the level of a "war" such that it may intrude upon Congress's power to declare war in [Article I, Section 8, Clause 11](#) of the Constitution. According to the Department of Justice Office of Legal Counsel (OLC), this second inquiry requires a "fact-specific assessment," but generally military engagements amount to "war" in the constitutional sense only if they are "[prolonged and substantial](#)" and "involv[e] [exposure of U.S. military personnel to significant risk](#) over a substantial period." (Although the executive branch treats OLC opinions as binding on itself, OLC opinions [do not bind](#) the courts or Congress.)

The OLC has also interpreted the President's independent Article II authority to use defensive force in arguably [more expansive ways](#) than that recognized either in Supreme Court caselaw or by Congress in the WPR. The executive branch has argued, for example, that the President's power to use defensive force encompasses both "[collective self-defense](#)"—that is, defending partner forces—and "anticipatory" self-defense—that is, self-defense to [prevent](#) anticipated attacks.

## The Biden Administration's Asserted Legal Bases for the Recent Airstrikes

The Biden Administration has submitted [48-Hour WPR Reports](#) for some of the recent airstrikes in the Middle East against Iran-backed militant groups. The WPR [requires](#) that the report explain "the

circumstances necessitating the introduction of United States Armed Forces”; “the constitutional and legislative authority under which such introduction took place”; and “the estimated scope and duration of the hostilities or involvement.” All of the 48-Hour Reports that the Biden Administration has [submitted](#) for post-October 7 airstrikes, for example, include language asserting independent constitutional authority to use force [typical](#) of [similar](#) language [used across administrations](#):

I directed this military action consistent with my responsibility to protect United States citizens both at home and abroad and in furtherance of United States national security and foreign policy interests, pursuant to my constitutional authority as Commander in Chief and Chief Executive and to conduct United States foreign relations.

## Iran-Backed Militia Targets in Iraq and Syria

Although Iranian-backed militant groups operating in Iraq have been conducting attacks on U.S. forces based in Iraq and Syria [since 2017, these attacks have increased](#) since the Hamas terrorist attacks in Israel on October 7 and Israel’s subsequent military operation in Gaza. In late January 2024, an attack by an alleged Iranian-backed militia [hit a U.S. military facility](#) in Jordan near the Syrian border, killing three U.S. servicemembers and injuring more than forty. The Biden Administration responded to these post-October 7 attacks with several military actions and submitted eight 48-Hour Reports to Congress.

In the first five reports—submitted on [October 27](#), [November 10](#), [November 14](#), [November 22](#), and [December 27](#) of 2023—President Biden based his authority for military actions in Iraq and Syria only on inherent Article II power. The reports suggest that the Administration was relying on the independent authority that the executive branch has claimed using the two-part inquiry. In these reports, President Biden stated that he “directed this military action in furtherance of United States national security and foreign policy interests.” The reports also stated that the action was taken “to protect and defend our personnel”—an objective that OLC has [previously opined](#) as [sufficiently important](#) to satisfy the first inquiry.

Although the reports do not explicitly address the second inquiry, which asks whether the action would fall short of “war” in the constitutional sense, the descriptions of the military actions provided could be read to suggest that they do not. The reports describe the strikes as “[precis\[e\]](#),” “[targeted](#),” “[designed to limit the risk of escalation](#),” and “[discrete](#).” OLC has [opined](#) that some prior [air and missile strikes](#) did not pass the threshold of “war” under the second inquiry in the analysis. At the same time, the current situation presents features that arguably were not present in earlier analyses. For example, OLC [examined](#) the risk that an initial strike would escalate into a broader conflict and thus be of a “prolonged and substantial duration”—a possibility that becomes more likely the more successive “discrete” military actions are taken in response to repeated attacks by the same militant groups in the region. The Biden Administration’s statements in each 48-Hour Report that the Iranian-backed groups’ attacks “have placed under grave threat the lives of . . . United States personnel,” and that the Administration’s strikes are in response to a “series of attacks and continuing threats of future attacks,” also suggest that there is potential for escalation and “exposure of U.S. military personnel to significant risk over a substantial period.”

Perhaps because of the potential for escalation and continuation of hostilities past the WPR’s 60-day deadline, in the first report of 2024, President Biden pivoted to an AUMF-based rationale rather than relying solely on the President’s Article II authority. In this [January 5, 2024, report](#), President Biden relied on both the 2001 AUMF and 2002 AUMF in addition to independent Article II authority. He continued to rely on the same three authorities in the last two reports submitted for military actions in Iraq and Syria to date—on [January 25](#) and [February 4](#) of 2024.

The 48-Hour Reports submitted in 2024 do not provide the interpretations of the two AUMFs that the Biden Administration is relying on, but it appears that the Administration understands the AUMFs to

incorporate an expansive version of presidential self-defense authority into their statutory authorizations. This theory was first advanced by the [Trump Administration](#) and has seemingly been [subsequently adopted](#) by the Biden Administration:

Statutes that authorize the use of necessary and appropriate force, including the 2001 AUMF and 2002 AUMF, encompass the use of force both to carry out the missions under the statutes and to defend U.S. or partner forces as they pursue those missions.

The executive branch appears to interpret the 2001 and 2002 AUMFs and any future statutory authorizations for the use of force to include providing *primary* authorization for offensive military action for certain purposes and providing *secondary* authorization to act in self-defense or to defend others, even against threats that may be largely unrelated to the primary mission. (The Biden Administration has [referred](#) to defense against such threats as “ancillary defenses.”) Although they do not expressly state as much, the Biden Administration’s 48-Hour Reports suggest that a principal purpose of the strikes was defending U.S. personnel who, as [one of the reports](#) states, “are in Iraq and Syria . . . pursuant to the 2001 [AUMF].”

No court has yet addressed whether this theory is a valid interpretation of the AUMFs. As noted, courts have largely declined to hear challenges to the President’s use of force.

## Houthi Targets in Yemen and the Red Sea

The Biden Administration has also launched strikes against Iranian-backed militant groups in Yemen and the Red Sea. The targeted group—the [Houthis](#)—has engaged in [repeated attacks](#) since the October 7 terrorist attack in Israel and subsequent Israeli military operation in Gaza. The Houthis have targeted commercial ships and U.S. and British naval vessels in the Red Sea, [disrupting](#) supply routes through a key maritime choke point and causing shipping costs to [spike](#).

Since November 2023, U.S. Central Command has [reported](#) numerous strikes by U.S. forces operating in the region against Houthi targets both [within Yemeni territory](#) and in [international waters of the Red Sea](#). According to U.S. Central Command, numerous strikes were taken in “[self-defense](#)” because Houthi weapons, facilities, and other targets represented “an [imminent threat](#) to merchant vessels and U.S. navy ships in the region.” Although these strikes have taken place sometimes on a daily basis, President Biden has submitted only four [48-Hour Reports](#) to Congress (on [January 12](#), [January 24](#), [February 5](#), and [February 26](#) of 2024)—all of which provide notification that he directed U.S. forces to engage in military actions undertaken with the United Kingdom “to deter and degrade Houthi capacity to conduct future attacks against the United States and *against vessels operating in the Red Sea*” (emphasis added). Relying solely on Article II power, President Biden further wrote that he took this military action “in the exercise of the United States’ [inherent right of self-defense](#) as reflected in Article 51 of the United Nations Charter.” Although the executive branch has made such claims with respect to the protection of U.S. military vessels in the past, the apparent claim of Article II authority to protect commercial ships operating under any nation’s flag may represent an expansion of the President’s independent Article II authority beyond that which it has asserted in the past.

## Congressional Considerations

Courts have largely declined to answer questions about the constitutional distribution of war powers. In the absence of a judicial determination, potential answers may be offered by the executive branch’s assertions of authority to use military force and by Congress’s responses to those assertions. Given that the Supreme Court has [recognized](#) that executive branch claims of foreign policy authority over time can contribute to constitutional meaning, particularly when Congress has acquiesced either explicitly by authorization or implicitly by silence in the face of such claims, Congress might consider whether and

how to respond to the executive branch's claims regarding the scope of its authority to use military force. Congress may consider, for example,

- amending the War Powers Resolution to clarify Congress's understanding of the scope of the President's independent Article II authority in response to the executive branch's interpretations of that authority (as [some](#) recent [bills](#) propose);
- using its appropriations authority to provide funding or to prohibit funding for certain types of military operations, such as defending commercial vessels;
- repealing AUMFs (as [some](#) recent [bills](#) propose) or amending them to constrain or expand the authority granted to the President, such as by expressly authorizing or prohibiting certain uses of force in self-defense by military personnel operating pursuant to the authorization or to protect certain commercial shipping; or
- holding hearings, conducting investigations, or otherwise exercising its oversight authorities in response to specific claims of executive branch authority to use military force or to produce information about the President's military operations and the asserted legal justifications to inform Congress in the exercise of its legislative authorities.

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