



# Bending the Guardrails: U.S. War Powers after 7 October

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Headquarters

**International Crisis Group**

Avenue Louise 235 • 1050 Brussels, Belgium

Tel: +32 2 502 90 38 • [brussels@crisisgroup.org](mailto:brussels@crisisgroup.org)

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# Principal Findings

**What's new?** Hamas's 7 October 2023 attacks, and Israel's subsequent military campaign in Gaza, have sparked new and renewed hostilities around the Middle East involving Iran-aligned groups and the United States. The Biden administration has worked around legal guardrails to engage in this fighting without approval from the U.S. Congress.

**Why does it matter?** In the U.S., decision-making about use of force is divided between Congress and the president. This feature is meant to ensure due deliberation about matters of war and peace. But the safeguard has eroded, with power concentrated in the presidency. The Biden administration's post-7 October legal tactics accelerate this trend.

**What should be done?** While Washington's immediate priorities should be to broker an end to hostilities in Gaza, and prevent escalation elsewhere in the region, the erosion of the war powers framework needs remediation over the long term. The U.S. government should reinforce legal checks on imprudent war-making.

## *Executive Summary*

As the U.S. has resorted to military force to manage blowback from the war in Gaza – in Syria, Iraq and the Red Sea – the Biden administration has struggled to reconcile its actions with legal constraints meant to prevent the president from going to war without Congressional authorisation. Questions about how the U.S. government’s war powers are divided between Congress and the president are highly contested, and successive administrations have developed aggressive theories about when the president is entitled to go to war without lawmakers’ approval. In making room to engage in post-7 October 2023 hostilities, the Biden administration has expanded this canon of arguments, further corroding guardrails that, however imperfect, help prevent the world’s most powerful country from slipping into imprudent war. Although the U.S. priority right now must be to broker peace in Gaza and avoid further regional escalation, Washington should, over the long term, set about repairing the war powers framework. Reform legislation previously introduced in both houses of Congress offers a promising way forward.

Since 7 October 2023, when Hamas militants attacked southern Israel, killing almost 1,200 people and taking hundreds of hostages, the U.S. government led by President Joe Biden has played a complicated role. It has armed Israel and provided it political support at the same time as it has sent humanitarian relief to Gaza’s suffering civilian population and encouraged an end to hostilities. But Washington’s engagement has gone further; it has also included warfighting.

To some extent, U.S. military action linked to the Gaza war is an outgrowth of Washington’s legacy posture in the Middle East. U.S. troops have been stationed in Iraq and Syria since the Obama administration’s counter-ISIS campaign in 2014 – although their functions often seem more aimed at countering Iran. These troops were soon drawn into hostilities as Hamas’s sister groups in the Iran-linked “axis of resistance” struck U.S. forces in a show of support for their Palestinian allies.

There is more to U.S. engagement than garrisons fending off attacks, however. U.S. armed forces have placed themselves directly between Israel and its adversaries. In the immediate aftermath of 7 October, the Biden administration sought to deter Iran and its client groups, like Hizbollah, from pressing their advantage against a distracted Israel and sparking a regional conflagration. To underscore its seriousness, the U.S. deployed additional warships and forces in the eastern Mediterranean. It also sent them to the Red Sea, where the U.S. Navy soon began exchanging fire with Yemen-based Houthi insurgents who launched missiles ineffectively at Israel before shifting their targets to commercial shipping. A U.S.-led coalition helped shoot down an Iranian fusillade fired on 13 April 2024 to retaliate for Israel’s strike on a consular facility in Damascus, and U.S. troops also deployed to a pier the U.S. built off Gaza for the maritime delivery of humanitarian aid.

As a practical matter, the U.S. has worked to manage escalatory risks, but it has stretched its legal authorities in doing so, in ways that could prove momentous. In the U.S. system, Congress is empowered to “declare war” and the president is statutorily required to withdraw U.S. forces from hostilities after 60 days absent legislative authorisation. Yet the Biden administration has not sought Congressional authori-

sation for the post-7 October military engagements. Rather, it has looked for ways around the legal guardrails established to keep the U.S. from going to war without deliberation. In some cases, the administration has relied on legal strategies pioneered by its predecessors. But it has gone further, through the expansive interpretation of statutes meant to regulate the introduction of U.S. forces into hostilities. The precedents it has created are now available to all future U.S. presidents, deepening the White House's already yawning well of martial authority.

Congress has done little to stop the administration's actions. To some extent, political reality is at work here: given the broad support for Israel in the legislature, Congress is unlikely to use this occasion to start questioning the executive branch's authority in the use-of-force domain. Even members who appear uncomfortable with unilateral executive action are wary of introducing legislation to curtail U.S. hostilities, given that any such measure would likely fail. There is also a chance that if lawmakers were instead to authorise these conflicts, the war authorisation would become a vehicle for Congressional hawks to force upon the White House more authority than it wants – for example creating a statutory basis for waging war on Iran. That risk is not worth taking at present.

But the administration's actions, and Congressional inaction, have real costs. The tactics that the Biden administration has used now form part of the war powers playbook that future administrations may draw from. They will help future presidents sidestep rules intended to promote transparency and inter-branch deliberation while restraining the impulse to make imprudent war. Some former officials express concern that by making the use of force such an accessible instrument, the erosion of war powers guardrails elevates war-making as a tool of statecraft – too easily reached for when diplomatic solutions prove unavailing. It is a reasonable concern and one that can be addressed only through legislative reform.

Repairing the guardrails would be a tall order, but Congress has recalibrated the balance of war powers before. In 1973, it passed a reform statute that reasserted Congressional prerogatives in matters of war and peace. That law is part of the system that has been worn down, but it can be reinvigorated. Indeed, bipartisan sponsors have introduced draft legislation in both houses of Congress that would do so. The bill would close loopholes that successive administrations have used to justify unilateral executive branch lawmaking and guide Congress toward narrow, time-limited authorisations.

Reform legislation has no realistic prospect in the short term, while the administration is correctly focused on pushing Israel and Hamas toward a ceasefire, and the U.S. struggles through a dramatic campaign season before the November presidential election. But in the long term, it is a worthy objective, and proponents should keep looking for openings to make progress. Congress last seriously revisited war powers was toward the end of the Vietnam conflict – in reaction to the unauthorised expansion of that devastating war in South East Asia. Washington's political leaders should not wait for history to repeat itself before they act again.

**Washington/Baghdad/Dubai/Brussels, 24 July 2024**

# Bending the Guardrails: U.S. War Powers after 7 October

## I. Introduction

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The Middle East has been at risk of major conflagration since Hamas attacked Israel on 7 October 2023, killing almost 1,200 people, most of them civilians, and taking hundreds of hostages. Israel's response has devastated the Gaza Strip and killed tens of thousands. Throughout the region, anger has grown as the suffering of Palestinians worsens. Hamas's sister organisations – Iran-backed groups that call themselves the “axis of resistance” – have joined the fray to differing degrees.

Against this backdrop, the United States has pursued a multi-pronged agenda. Most visibly it has stood by Israel's side, arming it and offering it diplomatic cover, even as it now seeks to coax the parties into a ceasefire deal – an effort stymied thus far by Israel's unwillingness to pledge a halt to the conflict and (for some time) Hamas's insistence that such a deal end the war.<sup>1</sup> But it also has worked to protect its own troops, which have been deployed in Syria and Iraq since the Obama administration launched the counter-ISIS campaign in 2014. At the same time, it has tried to shelter Israel from further attack, keep the Red Sea open for international shipping and deter actions that might lead to a full-blown Middle East conflict.

The Biden administration has called upon the U.S. military to help with all three items on this agenda. It has bolstered existing deployments and authorised new ones. In several places, U.S. forces have been shot at by “axis of resistance” elements, and they have shot back. In effect, the U.S. has become embroiled in a series of mini-conflicts in the Middle East – all without the White House seeking approval from Congress, as it is supposed to do in most circumstances.

This report offers a picture of how the Biden administration's actions surrounding Israel's Gaza campaign have in effect expanded presidential war powers, further weakening constraints that serve the purpose of conflict prevention, and how this trend might over time be reversed. It begins by outlining the domestic U.S. legal framework for the use of force, much of which is meant to restrain the executive from introducing U.S. forces into conflict without robust debate. It then summarises U.S. operations in the Middle East after 7 October 2023. Finally, it analyses the legal stratagems the Biden administration has used to circumvent intended safeguards and suggests avenues for long-term reform. The report is based on interviews conducted largely between October 2023 and July 2024, with over 30 current and former U.S. executive branch officials (including members of Crisis Group's staff who contributed to the report), as well as Congressional staff and officials in Middle Eastern

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<sup>1</sup> Hamas appears to have diluted its demands in this respect. Crisis Group interviews, diplomats, July 2024. See also “Hamas softens demand for permanent ceasefire in truce talks, officials say”, *The New York Times*, 16 March 2024.

countries. It also draws upon scholarly literature, government documents and Crisis Group's previous work on U.S. war powers.<sup>2</sup>

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<sup>2</sup> See Crisis Group United States Reports N°5, *Overkill: Reforming the Legal Basis for the U.S. War on Terror*, 17 September 2021; and N°6, *Stop Fighting Blind: Better Use-of-Force Oversight in the U.S. Congress*, 26 October 2022. See also Stephen Pomper, "Targeted Killing and the Rule of Law: The Legal and Human Costs of 20 Years of U.S. Drone Strikes", testimony to the U.S. Senate Committee on the Judiciary, 2 February 2022; Brian Finucane and Michael Hanna, "Don't rely on U.S. law to prevent escalation in the Middle East", *War on the Rocks*, 24 October 2023; and Brian Finucane, "Regional Conflict in the Middle East and the Limitations of the War Powers Resolution", *Just Security*, 8 January 2024.

## II. U.S. War Powers: An Overview

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The Biden administration's approach to war powers issues since 7 October 2023 has taken shape against the backdrop of a web of U.S. law, lore and practice. The core elements include the U.S. constitution and the 1973 War Powers Resolution, as well as the statutes enacted by Congress to authorise U.S. military counter-terrorism operations in the wake of the 11 September 2001 attacks and to enable the invasion of Iraq in 2003.

### A. *A Deliberative Design*

A U.S. president's authority to use military force derives first and foremost from the U.S. constitution – which divides war powers between the U.S. government's two political branches. The constitution's Article I assigns to Congress the power to “declare war” and a number of associated authorities.<sup>3</sup> Congress exercises this prerogative through formal declarations of war (such as those it made against the Axis powers in World War II) as well as statutory authorisations of the use of military force (such as those for post-9/11 military counter-terrorism operations and the 2003 Iraq war) – all of which require the president's signature to become law.<sup>4</sup> By contrast, the president's unilateral war powers are linked to his or her “commander-in-chief” status under the constitution's Article II.

The constitution's framers intended the division of war powers between Congress and the president to serve as a conflict prevention mechanism. They believed that the president should have unilateral authority to repel “sudden attack” – but beyond that they hoped that giving the legislature the power to declare war would be a brake on imprudent war-making.<sup>5</sup> They envisioned that Congress, as a deliberative body, would be less prone to rush into war than a single person – the president – might be if he or she had sole discretion. Because the legislative branch is more democratically representative than the presidency, affording it the primary power to make war also served the goals of democratic legitimacy and accountability.

The question of exactly how war powers are divided between Congress and the president has long been subject to debate, however, with the president's unchecked powers expanding over time.<sup>6</sup> In practice, the executive branch itself has come to

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<sup>3</sup> U.S. Constitution, Article 1, Section 8, Clause 11.

<sup>4</sup> For many purposes, declarations of war and use of forces authorisations are functionally equivalent.

<sup>5</sup> U.S. Constitution, Article 2, Section 2. See, eg, Max Farrand (ed.), *The Records of the Federal Convention of 1787* (New Haven, 1966), pp. 318-319; Michael Ramsey, “The President's Power to Respond to Attacks”, *Cornell Law Review* (2007) (noting the framers' intent that the president would have “the power to repel sudden attacks”); and *Prize Cases*, 67 U.S. 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority”).

<sup>6</sup> See, for instance, Arthur Schlesinger, *The Imperial Presidency* (Boston, 2004); John Hart Ely, *War and Responsibility* (Princeton, 1995); David Baron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (New York, 2016); Michael Beschloss, *Presidents of War: The Epic Story, from 1807 to Modern Times* (New York, 2018); Rebecca Ingber, “The Insidious War Powers Status



determine the extent of the president's unilateral power to wage war, with senior lawyers espousing an increasingly capacious view of the authorities under Article II.<sup>7</sup> According to the Department of Justice's Office of Legal Counsel (OLC), the president has unilateral authority to use force to advance "national interests" so long as the action is not anticipated to result in "war in the constitutional sense" – meaning that OLC does not consider it sufficiently major in "nature, scope and duration" to require Congressional approval.<sup>8</sup>

Neither of these tests has been particularly constraining. OLC has deemed "national interests" to include everything from an expansive conception of self-defence to humanitarian intervention, leading some experts to characterise the standard as nearly meaningless.<sup>9</sup> As for the "nature, scope and duration" test – whereby the executive branch's lawyers determine whether a military action rises to the level of war for constitutional purposes – it is both pliant and unevenly applied. Prior to the Afghanistan and Iraq conflicts, for example, OLC issued a memorandum averring that President George W. Bush had authority to launch those wars even in the absence of Congressional approval. Neither opinion mentioned the "nature, scope and duration" test. While more recent memoranda from the Obama, Trump and Biden administrations have stepped back from the claims made in the Bush-era precedents, those opinions remain on the books, despite the urging of scholars and former senior government lawyers from both parties that OLC withdraw them.<sup>10</sup>

But although the overall trend since World War II has been the expansion of presidential war powers, there have been moments of reform. Most notably, in the waning days of the Vietnam War and amid allegations from the legislature that the presidency had expanded that war beyond the boundaries of its authority in Cambodia, a bipartisan super-majority of members sought to restore the legislature's role in matters of war and peace.<sup>11</sup> By enacting the 1973 War Powers Resolution over President Richard Nixon's veto, legislators erected a barrier aimed at keeping

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Quo", *Yale Law Journal*, vol. 133, 8 March 2024; and Matthew C. Waxman, "War Powers Reform: A Skeptical View", *Yale Law Journal*, vol. 133, 8 March 2024.

<sup>7</sup> See, for instance, Schlesinger, *The Imperial Presidency*, op. cit.; Ely, *War and Responsibility*, op. cit.; Baron, *Waging War*, op. cit.; Beschloss, *Presidents of War*, op. cit.; Ingber, "The Insidious War Powers Status Quo", op. cit., and Finucane, "Regional Conflict in the Middle East and the Limitations of the War Powers Resolution", op. cit.

<sup>8</sup> Memorandum for the Attorney General from Caroline D. Krass, Authority to Use Military Force in Libya, 2011. OLC's legal guidance, usually recorded in written opinions, is treated as binding within the U.S. executive branch. Some, though not all, of these opinions are released to the public.

<sup>9</sup> See, eg, Assistant Attorney General Steven Engel, "April 2018 Airstrikes against Syrian Chemical Weapons Facilities", U.S. Department of Justice, 31 May 2018; and Curtis Bradley and Jack Goldsmith, "OLC's meaningless 'national interests' test for the legality of presidential uses of force", *Lawfare*, 5 June 2018.

<sup>10</sup> The OLC opinions in question are Deputy Assistant Attorney General for the Office of Legal Counsel John Yoo, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them", 25 September 2001; and Assistant Attorney General for the Office of Legal Counsel Jay Bybee, "Authority of the President Under Domestic and International Law to Use Military Force Against Iraq", 23 October 2002. For one call to withdraw the opinions, see Brian Finucane and Stephen Pomper, "Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the 'War on Terror'", *Just Security*, 10 September 2021.

<sup>11</sup> See Ely, *War and Responsibility*, op. cit.

the president from taking the country to war without Congressional notification and authorisation.<sup>12</sup>

The key provisions of the 1973 resolution require the president to notify Congress within 48 hours when U.S. armed forces “are introduced” into “hostilities” or “are introduced” into “situations where imminent involvement in hostilities is clearly indicated by the circumstances”. If the president does not obtain the requisite congressional authorisation, according to the resolution, then within 60 days – extendable to 90 under certain circumstances – the armed forces must be withdrawn from the hostilities or situation of imminent hostilities.

### B. *A Half-Century of Erosion*

But what the 1973 resolution sought to achieve in shoring up Congressional war powers has eroded over time. The executive branch has been the primary driver of this trend, which it has advanced through a mix of legal tactics passed from one administration to the next.<sup>13</sup> Chief among these tactics has been to interpret key terms in the resolution that narrow its scope of application. A second has been to devise arguments for resetting the statute’s 60-day deadline for gaining authorisation or withdrawing troops so that the 60th day is never reached. More recently, the executive branch has also argued that statutes enacted in 2001 and 2002 to authorise the “war on terror” and the war in Iraq constitute Congressional authorisation for operations against new adversaries.

#### 1. Interpretation of undefined terms

One vehicle for weakening the 1973 resolution’s guardrails has been the executive branch’s interpretation of key terms left undefined in that text. Some of these are crucial to determining when the resolution’s reporting and withdrawal requirements are triggered. Of particular consequence was the State Department’s legal adviser’s announcement in 1975 that he interpreted “hostilities” to mean “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces”. He also said “imminent hostilities” means “a situation in which there is a serious risk from hostile fire to the safety of United States forces”.<sup>14</sup> Based on the legislative history, lawmakers had in mind a much broader definition – one that would encompass confrontations before shots are fired – but the State Department’s 1975 approach to hostilities has nonetheless generally prevailed for almost 50 years.<sup>15</sup> The president has thus had significant latitude to deploy troops into potentially

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<sup>12</sup> War Powers Resolution, Conference Report, No. 93-547, 4 October 1973; Ely, *War and Responsibility*, op. cit.

<sup>13</sup> U.S. courts have generally avoided substantive rulings on application of the War Powers Resolution.

<sup>14</sup> Letter from Monroe Leigh, legal adviser to the Department of State, to Clement Zablocki, chairman of the House Subcommittee on International Security and Scientific Affairs, 3 June 1975.

<sup>15</sup> The House Foreign Affairs Committee’s report on the Resolution states: “The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. ‘Imminent hostilities’ denotes a situa-

hostile situations without setting off the 60-day clock that ends with either the requirement to obtain Congressional approval or the requirement to withdraw forces.

Executive branch lawyers have also interpreted what it means to “introduce” armed forces into hostilities – another concept that bears on when the 60-day clock starts ticking. In a 1980 opinion, OLC took the position that:

if our armed forces otherwise lawfully stationed in a foreign country were fired upon and defended themselves, we doubt that such engagement in hostilities would be covered by the consultation and reporting provisions of the War Powers Resolution. The structure and thrust of those provisions is the “introduction” of our armed forces into such a situation and not the fact that those forces may be engaged in hostilities. It seems fair to read “introduction” to require an *active decision* to place forces in a hostile situation rather than their simply acting in self-defense.<sup>16</sup> (emphasis added)

In practice (as discussed in Appendix A), the executive branch has not regularly invoked – or, it seems, consciously relied upon – this supposed “active decision” loophole in the law. But as discussed below, the Biden administration appears to have found an application for it in the conflict with the Houthis in the Red Sea.

## 2. Stopping the clock

The executive branch has also avoided the time limits imposed by the War Powers Resolution by stopping and restarting the 60-day clock imposed by the law. For example, the Reagan administration treated the 1987-1988 “tanker war” in the Persian Gulf as a series of discrete exchanges of fire with Iran, filing multiple reports under the War Powers Resolution as though it was entering into hostilities and shortly thereafter exiting them, thus never running up against the 60-day clock.<sup>17</sup> The Obama administration repeated this tactic during the early phase of the anti-ISIS campaign in 2014 by filing repeated notifications under the War Powers Resolution for incidents that were sometimes only a few days apart.<sup>18</sup> Indeed, the Obama administration submitted a series of near weekly reports in August and September 2014 for airstrikes on ISIS in an attempt to treat them as separate actions.<sup>19</sup>

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tion in which there is a clear potential either for such a state of confrontation or for actual armed conflict”.

<sup>16</sup> John Harmon, Assistant Attorney General Office of Legal Counsel, “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization”, 12 February 1980.

<sup>17</sup> The U.S. got involved in the “tanker war” by reflagging oil tankers and providing them with naval escorts to protect them from Iranian attack during the Iran-Iraq War. The U.S. characterised these incidents as part of a single war in a case before the International Court of Justice, but not for purposes of domestic law. Todd Buchwald, “Anticipating the President’s Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker War”, *Just Security*, 28 June 2019.

<sup>18</sup> Brian Finucane, “Renewed Tension in the Persian Gulf: Further War Powers Lessons from the Tanker War”, *Just Security*, 16 August 2023; Jack Goldsmith, “A New Tactic to Avoid War Powers Resolution Time Limits”, *Lawfare*, 2 September 2014.

<sup>19</sup> Crisis Group interviews, former U.S. officials, 2021-2024.

### 3. Statutory safe harbour

In addition to interpreting the 1973 resolution narrowly, and stopping the clock, successive administrations have also worked around the resolution's requirements by arguing that military operations are *already* authorised by Congress under a prior use of force statute – generally either the 2001 Authorization for Use of Military Force (which has been treated as the bulwark of legal authority for uses of force against al-Qaeda, ISIS, and deemed affiliates and branches thereof) and the 2002 Authorization for the Use of Military Force Against Iraq – respectively, the “2001 AUMF” and the “2002 AUMF”. The Obama administration shifted from relying on a clock-stopping strategy to invoking statutory authority for counter-ISIS operations in Iraq and Syria as the frequency and duration of U.S. strikes made the former approach untenable.<sup>20</sup>

As Crisis Group has argued elsewhere, executive branch reliance upon these war authorisations is often strained, particularly when they are applied to groups that did not exist at the time that Congress enacted them or are interpreted to provide auxiliary authority for “ancillary self-defence” against entities like Iran or Iran-backed groups.<sup>21</sup> Nevertheless, these statutes afford useful legal advantages. By invoking them, the executive branch can assert that its actions are pre-authorized by Congress and thus the White House does not require further authorisation by Congress to continue fighting, the 1973 resolution notwithstanding. Modern U.S. practice with respect to the 1973 War Powers Resolution and the 2001 and 2002 AUMFs is further explored in Appendices A and B, respectively.

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<sup>20</sup> Crisis Group Report, *Overkill: Reforming the Legal Basis for the U.S. War on Terror*, op. cit.

<sup>21</sup> Ibid. See also Brian Finucane, “An Unauthorized War”, *Foreign Affairs*, 11 January 2022; and Tess Bridgeman and Brian Finucane, “Tit-for-Tat Hostilities in Syria: War Powers and International Implications”, *Just Security*, 8 September 2022.

### III. U.S. Involvement in Hostilities after 7 October

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Much as it has been shaped by past practice, the Biden administration's approach to war powers amid the Gaza war is of course also shaped by events on the ground. Ever since Hamas's 7 October attacks, U.S. policymakers have been keenly aware of the dangers of regional escalation, to Israel, to other U.S. allies and to U.S. assets in the Middle East. Washington has long sought to forestall large-scale, multi-front Middle East wars such as still might develop today, fearing disruptions to the global economy caused by reductions in the outward flow of oil (as during the 1973 war) or traffic through the Suez Canal. To pursue these interests, and to protect Israel and U.S. forces from attack by the "axis of resistance", the U.S. has deployed additional assets to the region, using force on numerous occasions since 7 October. This section gives an overview of these instances, while Section IV below lays out the domestic legal justification on which the administration has appeared to rely.

#### A. *Iraq and Syria*

As the war in Gaza escalated, Iran-backed groups in Iraq and Syria ended a unilateral, months-long ceasefire and resumed launching drones and rockets at U.S. forces on 17 October 2023.<sup>22</sup> Groups belonging to an umbrella entity calling itself the Islamic Resistance (which includes Kata'ib Hizbollah as well as Harakat al-Nujaba and Kataib Sayed al-Shuhada) not only renewed their strikes, but also stepped them up in solidarity with the Palestinians in Gaza and to put pressure on Israel to end the war.<sup>23</sup> That these groups would target U.S. forces in response to Israeli actions after 7 October was not a complete surprise, as some of them had previously fired at U.S. troops at the al-Tanf garrison in Syria in retaliation for Israeli attacks in the region.<sup>24</sup>

Although attacks on U.S. forces subsided during the short-lived pause in fighting in Gaza in late November, they picked up once again as Israel's offensive recommenced.<sup>25</sup> The Pentagon insisted in December that the war in Gaza "has not spread out into a wider regional conflict" and that the attacks on U.S. forces in Iraq and Syria were unrelated to it – claims that members of the "axis of resistance" flatly contradicted.<sup>26</sup> These groups had attacked U.S. forces over 170 times since 7 October 2023.<sup>27</sup>

The casualty rate on the U.S. side has been low in Syria and Iraq, but there have been both injuries and deaths. Islamic Resistance attacks have injured several U.S. servicemembers and killed three. The fatalities occurred on 28 January 2024 in a drone strike on Tower 22, a U.S. facility in Jordan that supports the U.S. garrison across

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<sup>22</sup> For details, see Nanar Hawach, "How Iran Seeks to Exploit the Gaza War in Syria's Volatile East", Crisis Group Commentary, 9 May 2024; and Crisis Group Commentary, "Understanding the Risks of U.S.-Iran Escalation Amid the Gaza Conflict", 10 November 2023.

<sup>23</sup> Ibid.

<sup>24</sup> "Strike on U.S. base was Iranian response to Israeli attack, officials say", *The New York Times*, 18 November 2021.

<sup>25</sup> The Pentagon press secretary noted the dropoff in attacks in Iraq and Syria coinciding with the "humanitarian pause" in Gaza. Press briefing, U.S. Department of Defense, 28 November 2023.

<sup>26</sup> Press briefing, U.S. Department of Defense, 4 December 2023.

<sup>27</sup> "U.S. strikes in Syria and Iraq kill dozens of militants", *Washington Post*, 4 February 2024.

the Syrian border at al-Tanf.<sup>28</sup> Following the attack, Esmail Qaani, head of the Qods force, the elite unit of Iran's Islamic Revolutionary Guards Corps, promptly flew to Baghdad, meeting with representatives of the Islamic Resistance in Baghdad. Qaani's message to these groups was clear: dial back attacks on U.S. forces in Iraq and Syria.<sup>29</sup> On 30 January, following the meeting, Kata'ib Hizbollah issued a statement announcing it would suspend attacks against U.S. personnel on U.S. bases.<sup>30</sup>

This statement did not keep the U.S. from retaliating, but thus far it appears to have helped keep a lid on further escalation. On 2 February, the U.S. hit a number of targets in Iraq.<sup>31</sup> Among the Iraqis killed and injured were members of militias uninvolved in attacks on U.S. forces.<sup>32</sup> The U.S. conducted another drone strike in the heart of Baghdad on 7 February, killing a senior leader of Kata'ib Hizbollah, Abu Baqir al-Saadi.<sup>33</sup> With this last operation, the U.S. had carried out at least seven rounds of airstrikes ordered by President Joe Biden as well as others apparently ordered by lower-level commanders since October 2023.<sup>34</sup>

As of mid-July, with the possible exception of two incidents involving intercepted drones, attacks on U.S. forces in Iraq and Syria have largely petered out, perhaps because the Islamic Resistance has heeded calls for restraint from Tehran.<sup>35</sup> Another factor is likely the Islamic Resistance's aim of forcing a U.S. military departure from Iraq. For the time being, at least some elements of the Islamic Resistance view continued attacks on U.S. forces as not only unnecessary for achieving this goal but also counterproductive.<sup>36</sup> Still, the potential for renewed attacks remains – for example, if Israel and Hizbollah become involved in a full-fledged war, the latter's Iraqi allies may feel compelled to join the fighting by targeting U.S. forces. It remains to be seen whether an intercepted drone strike on Ain al-Assad air base in Iraq on 16 July signals a more general resumption of attacks on U.S. forces.<sup>37</sup>

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<sup>28</sup> Crisis Group telephone interviews, February 2024. See also “3 American soldiers killed in drone strike in Jordan, U.S. says”, *The New York Times*, 28 January 2024.

<sup>29</sup> “Iraq armed groups dial down U.S. attacks on request of Iran commander”, Reuters, 18 February 2024.

<sup>30</sup> “Powerful Iran-backed militia in Iraq to suspend military ops against U.S. forces in region”, CNN, 30 January 2024.

<sup>31</sup> Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution, 25 January 2024.

<sup>32</sup> “Militia hit by U.S. airstrikes in Iraq claims no connection to attacks on American troops”, PBS Newshour, 7 February 2024. The groups comprising the Islamic Resistance are part of a larger agglomeration known as the Hashd al-Shaabi (Popular Mobilisation), a collection of militias that formed in answer to Shiite clerics' call for mass resistance to ISIS. Some Hashd factions are tied to Iran; others are not.

<sup>33</sup> Press briefing, U.S. Department of Defense, 8 February 2024.

<sup>34</sup> See the website of the War Powers Resolution Reporting Project at the New York University School of Law's Reiss Center on Law and Security.

<sup>35</sup> “After 30 Days of Suspending Activities, Iranian Militias Attack U.S. Base in Deir Ezzor with a Drone”, Syrian Observatory for Human Rights, 26 March 2024; “Drones target Iraq's Ain al-Asad airbase, no casualties, says military source”, Reuters, 16 July 2024.

<sup>36</sup> Crisis Group interview, Iraqi security official, Baghdad, May 2024.

<sup>37</sup> “Drones target Iraq's Ain al-Asad airbase, no casualties, says military source”, op. cit.

## B. Red Sea/Gulf of Aden/Yemen

If the Gaza war reinvigorated – within limits – a dormant conflict between the U.S. and Iran-backed groups in Syria and Iraq, it has spawned an entirely new one between the U.S. and the Houthis in Yemen. The latter responded to the war by firing missiles and drones at Israel, commercial vessels in the Red Sea with alleged connections to Israel and U.S. warships. The *USS Carney* guided-missile destroyer and the *USS Eisenhower* carrier strike group (some but not all of the principal U.S. naval assets involved in fighting the Houthis) entered the Red Sea on 18 October and 4 November 2023, respectively.<sup>38</sup> According to the Pentagon, these ships were deployed after 7 October to “deter a wider conflict to bolster regional stability and of course to make it clear that we will protect and defend our national security interests”.<sup>39</sup> Although the *USS Eisenhower* group has departed the Red Sea, it is due to be replaced by the *USS Theodore Roosevelt* carrier strike group, which has orders to “continue promoting regional stability, deter aggression and protect the free flow of commerce in the region”, according to the U.S. military.<sup>40</sup>

U.S. forces in the Red Sea have struggled to achieve these objectives. Direct U.S. military engagement with the Houthis began on 19 October, when the *USS Carney* (soon after transiting the Suez Canal) shot down a barrage of Houthi missiles and drones apparently aimed at Israel.<sup>41</sup> The *Carney's* commander characterised the nine-hour battle, involving over 50 salvos from the destroyer, as the most intense U.S. naval combat since World War II.<sup>42</sup> Possibly in response to the *Carney's* disruption of their attempted attack on Israel, on 8 November the Houthis downed a U.S. Reaper drone.<sup>43</sup> A week later, another destroyer, the *USS Hudner*, intercepted a Houthi drone purportedly headed for the vessel.<sup>44</sup> U.S. warships were now in what the navy deemed an “active weapons engagement zone”.<sup>45</sup> Unable to hit Israel directly, the Houthis began going after commercial vessels. They hijacked the *M/V Galaxy Leader* on 19 November, claiming the ship had Israeli connections.<sup>46</sup> Days later, after the *USS Mason* intervened to stop apparent pirates from seizing another mer-

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<sup>38</sup> “*USS Carney* transits the Suez Canal”, Defense Visual Information Distribution Service, 18 October 2023; “Ike carrier strike group arrives in Middle East region”, U.S. Naval Forces Central Command Public Affairs, 4 November 2023. The *USS Eisenhower* carrier strike group includes the destroyers *USS Gravelly* and *USS Mason* and the cruiser *USS Philippine Sea*. “Ike Carrier Strike Group Arrives in Middle East Region”, press release, U.S. Navy, 4 November 2023.

<sup>39</sup> Press briefing, U.S. Department of Defense, 19 October 2023.

<sup>40</sup> Statement From Pentagon Press Secretary Maj. Gen. Pat Ryder on the *Eisenhower* Carrier Strike Group Departing the CENTCOM Area of Responsibility, 22 June 2024.

<sup>41</sup> “Incident involving US warship intercepting missiles near Yemen lasted 9 hours”, CNN, 20 October 2023; “*USS Carney* returns from a Middle East deployment unlike any other”, CBS News, 30 June 2024.

<sup>42</sup> “*USS Carney* returns from a Middle East deployment unlike any other”, op. cit.

<sup>43</sup> “U.S. Reaper drone shot down near Yemen by Iran-backed Houthi rebels, official says”, CNN, 8 November 2023.

<sup>44</sup> “U.S. navy destroyer shoots down drone over the Red Sea”, *The Maritime Executive*, 15 November 2023.

<sup>45</sup> “*USS Eisenhower* strike group locked in unrelenting fight at pace unseen in decades”, *Stars and Stripes*, 22 March 2024.

<sup>46</sup> “Yemen’s Houthi rebels hijack an Israeli-linked ship in the Red Sea and take 25 crew members hostage”, Associated Press, 20 November 2023.

chant vessel, the Houthis launched ballistic missiles toward the *Mason's* general location, according to U.S. Central Command. The crew later released a video boasting that the navy was “22-0”, an apparent reference to the number of Houthi projectiles it had shot down.

But the attacks went on. On 16 December, the *USS Carney* shot down fourteen “one-way attack drones”. Two days later, it responded to an assault with multiple projectiles on the *M/V Swan Atlantic*.<sup>47</sup> By mid-December, the Houthi fire on commercial vessels had caused several major shipping companies to halt voyages through the Red Sea.<sup>48</sup>

In December, to deter the Houthis and ensure freedom of navigation in the Red Sea, the U.S., together with the UK, Bahrain, Canada, France, Italy, the Netherlands, Norway, the Seychelles and Spain, established the multinational Operation Prosperity Guardian, but this measure did not bring hostilities to an end, either.<sup>49</sup> The Houthis continued to launch ballistic missiles into Red Sea shipping lanes, and on 23 December, the destroyer *USS Laboon* shot down four drones it described as “inbound”.<sup>50</sup>

The fighting also involved air-to-air combat, with U.S. F/A-18 fighter jets intercepting Houthi projectiles. After the *Maersk Hangzhou*, a Singapore-flagged container ship, was reportedly struck by a missile, the destroyer *USS Gravelly* responded, downing two additional ballistic missiles fired at the two commercial and naval vessels, according to U.S. Central Command. A fatal clash closed out the year: on 31 December the *Hangzhou* again came under attack, this time by Houthi small boats, and U.S. navy helicopters responded to its distress call.<sup>51</sup> The Houthis reportedly shot at the helicopters, which returned fire, sinking three of the four boats, and killing a total of ten fighters.<sup>52</sup>

The persistent attacks led the U.S. to issue an ultimatum to the Houthis in a statement co-signed by Australia, Bahrain, Belgium, Canada, Denmark, Germany, Italy, Japan, the Netherlands, New Zealand, Singapore, South Korea and the UK.<sup>53</sup> The statement warned the Houthis that they would “bear the responsibility of the consequences should they continue to threaten lives, the global economy and free flow of commerce in the region’s critical waterways”.<sup>54</sup> The Houthis remained undeterred, launching what U.S. Central Command referred to as a “complex attack” the following week. This attack sent more drones, cruise missiles and ballistic missiles toward Red Sea shipping lanes, again prompting a U.S. and UK naval response.<sup>55</sup>

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<sup>47</sup> “U.S. warship responds to an attack on commercial ship in Red Sea”, CNN, 18 December 2023.

<sup>48</sup> “Shipping giants pause Red Sea voyages as attacks mount”, Reuters, 19 December 2023.

<sup>49</sup> “Statement from Secretary of Defense Lloyd J. Austin III on Ensuring Freedom of Navigation in the Red Sea”, U.S. Department of Defense, 18 December 2023. The coalition includes Egypt as well, though it has not announced its participation.

<sup>50</sup> “*USS Laboon* shoots down four drones in Red Sea”, *Navy Times*, 23 December 2023.

<sup>51</sup> “U.S. sinks 3 ships, kills 10 after Houthi Red Sea attack”, Reuters, 31 December 2023.

<sup>52</sup> *Ibid.*

<sup>53</sup> “A Joint Statement from the Governments of the United States, Australia, Bahrain, Belgium, Canada, Denmark, Germany, Italy, Japan, Netherlands, New Zealand, Republic of Korea, Singapore, and the United Kingdom”, 3 January 2024.

<sup>54</sup> *Ibid.*

<sup>55</sup> See “Conflict in the Red Sea”, U.S. Naval Institute, 12 March 2024.



The Houthis' disregard for the joint ultimatum led a U.S. official who spoke to Crisis Group to predict that the U.S. response would be "spicy".<sup>56</sup> Sure enough, on 11 January the U.S. and UK launched airstrikes on Houthi targets in Yemen associated with maritime attacks.<sup>57</sup> By 14 March, the U.S. had conducted 44 such strikes.<sup>58</sup> These involved both strikes directed by U.S. Central Command in purported "self-defence" of U.S. forces in the waters off Yemen and four rounds of pre-planned strikes ordered by the White House, some in conjunction with the UK.<sup>59</sup> U.S. Central Command dubbed the "multilateral and dynamic strikes" on Houthi targets in Yemen Operation Poseidon Archer.<sup>60</sup>

None of these actions halted the Houthi drone and missile launches at commercial vessels and U.S. warships. As President Biden himself acknowledged in late January, U.S. strikes were not "working" to stop Houthi attacks, but nonetheless, he said, they were "going to continue".<sup>61</sup> According to the Pentagon, between November 2023 and mid-June 2024, there have been more than 190 attacks on U.S. military as well as merchant vessels in the Middle East.<sup>62</sup> The Houthis have gone after vessels transiting the southern Red Sea and the Gulf of Aden, with a combination of drones, fast boats, land attack cruise missiles and, for the first time anywhere, anti-ship ballistic missiles.<sup>63</sup> Direct hits included the sinking of the *M/V Rubymar* (a British-owned cargo ship) and the *M/V Tutor* (a Greek-owned coal carrier) as well as an anti-ship ballistic missile strike on the *M/V True Confidence* that killed three crew members.<sup>64</sup>

Most of these attacks occurred after the U.S. began hitting targets in Yemen. Indeed, the Houthis appear to have escalated their attacks in response to subsequent events in Gaza – including, they claim, by using more accurate weapons and expanding the range of their targets in retaliation for Israeli operations in Rafah, Gaza's southernmost city, which began in May.<sup>65</sup> But despite the regular actions, the Pentagon has not altered its claim in December that the U.S. was "not in an armed conflict with the Houthis".<sup>66</sup>

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<sup>56</sup> Crisis Group interview, U.S. official, January 2024.

<sup>57</sup> "Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution", 12 January 2024.

<sup>58</sup> "Iran and U.S. held secret talks on proxy attacks and ceasefire", *The New York Times*, 15 March 2024.

<sup>59</sup> See the War Powers Resolution Reporting Project website.

<sup>60</sup> Press briefing, U.S. Department of Defense, 25 January 2024.

<sup>61</sup> "Houthis embrace 'direct confrontation' with U.S. as Biden admits airstrikes aren't working", CNBC, 19 January 2024.

<sup>62</sup> "Yemen's Houthis undeterred by U.S. campaign to halt Red Sea attacks", *Washington Post*, 22 June 2024.

<sup>63</sup> "Houthi Attacks in the Red Sea: Issues for Congress", Congressional Research Service, 12 March 2024.

<sup>64</sup> "Sinking of *Motor Vessel Rubymar* risks environmental damage", U.S. Central Command, 2 March 2024; "Three dead in first fatal Houthi attack in the Red Sea", CNBC, 7 March 2024; "Yemen's Houthis undeterred by U.S. campaign to halt Red Sea attacks", op. cit.

<sup>65</sup> "Leader of revolution confirms effort to strengthen fourth stage of escalation in terms of momentum and force of strikes", Yemen News Agency (SABA), 16 May 2024.

<sup>66</sup> "Former Mideast commander calls on Biden to respond to Houthi attacks", *Politico*, 8 December 2023.

### C. *Other Items*

Other post-7 October U.S. military activities that implicate the 1973 War Powers Resolution include assistance to Israel in defending itself from an aerial barrage by Iran and the use of U.S. forces to construct a pier for humanitarian aid deliveries in Gaza.

As concerns the air defence of Israel: on 13 April, following Israel's 1 April air attack on an Iranian facility in Damascus that killed several senior Revolutionary Guards (an attack that presumably involved a U.S.-origin warplane and possibly U.S. munitions), Iran launched dozens of drones, cruise missiles and ballistic missiles from its soil at Israel.<sup>67</sup> In coordination with defensive efforts by Israel, and partners and allies that included the UK and France, U.S. F-15E fighters as well as destroyers in the eastern Mediterranean downed over 70 of the Iranian drones as well as at least four of the ballistic missiles.<sup>68</sup> The U.S. defence of Israel involved not only air and naval assets, but also the first use in combat of the Standard Missile 3 ballistic missile interceptor.<sup>69</sup>

As for the pier, in response to Gaza's dire humanitarian situation the Biden administration dispatched U.S. military personnel to build and protect a floating pier and causeway off the coast to enable aid delivery by sea.<sup>70</sup> According to the Pentagon, the pier's construction and operation has involved at least 1,000 U.S. service members.<sup>71</sup> Aid deliveries facilitated by U.S. forces began in mid-May, but the U.S. immediately encountered logistical difficulties in distributing the assistance and soon thereafter, rough seas knocked the pier out of commission for two weeks.<sup>72</sup> According to aid organisations, the pier largely failed in its objective, and in mid-July the Pentagon declared an end to the mission.<sup>73</sup>

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<sup>67</sup> "Top Iranian commanders are reported killed in Israeli strike in Syria", *The New York Times*, 1 April 2024.

<sup>68</sup> "USAF fighters shoot down Iranian drones in defense of Israel", *Air & Space Forces Magazine*, 14 April 2024.

<sup>69</sup> "SM-3 ballistic missile interceptor used for the first time in combat, officials confirm", USNI News, 15 April 2024.

<sup>70</sup> "Biden announces U.S. will build pier on Gaza shore for large-scale aid delivery", *The Guardian*, 7 March 2024.

<sup>71</sup> "Building Biden's Gaza pier could take 60 days, Pentagon says", *Politico*, 9 March 2024.

<sup>72</sup> "Pentagon's maritime aid operation faces immediate obstacles in Gaza", *Washington Post*, 21 May 2024; "Gaza aid pier suffered at least \$22 Million in damage, Pentagon assesses", *Washington Post*, 6 June 2024.

<sup>73</sup> "U.S. pier for Gaza aid is failing, and could be dismantled early", *The New York Times*, 18 June 2024; "Pentagon ends Gaza pier mission", *Washington Post*, 17 July 2024.

## **IV. Lawyering Conflict: The Biden Team's Approach**

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As laid out in Section III, the U.S. has engaged in both new and revived conflicts in the Middle East since 7 October 2023. Yet the Biden administration has chosen not to seek fresh authorisation from Congress for U.S. troops to conduct these hostilities, instead relying on both old and new legal tactics to maintain that it has the authority to conduct these without a legislative mandate.

### *A. Why Not Seek Authorisation?*

While it has not shared its thinking publicly, there are many reasons why the White House might prefer not to seek authorisation from Congress. At a policy level, obtaining a use of force authorisation might be seen by Iran-backed groups and perhaps Iran itself as a declaration of war. It could wind up provoking them to scale up their military action, rather than induce them to dial it down. In places where the U.S. is re-entering a war zone that it recently exited, or where deterrence has not been entirely effective, seeking authorisation could be seen as a formal concession of failure. Further, absent temporal limitations, which hawkish members of Congress would likely resist, a new authorisation would join the 2001 and 2002 AUMFs as an enduring source of authority for future administrations to wage further wars. If the new authorisation is broadly framed, as some legislators would push it to be, it could also catalyse pressure on the administration to take measures it does not wish to take (ie, act more forcefully), based on the argument that the administration should use the full limit of its authority to defend Israel.

But the administration is probably at least equally concerned about the domestic politics of seeking an authorisation, which would be a highly sensitive proposition in an election year.<sup>74</sup> The administration's opponents on the right might either stymie the bill, in order to deal the Democrats a political defeat, or salt it with provisions that the administration considers unacceptable – perhaps including by broadening the authority beyond what the White House considers necessary, such as by greenlighting military action against Iran.<sup>75</sup> Meanwhile, those to the administration's left might see in such legislation evidence that Biden's campaign promises to end “forever wars” were hollow – something that could further upset progressives already deeply alienated by the administration's support for Israel's Gaza campaign.<sup>76</sup>

Thus, like its predecessors, the Biden administration has performed legal sleight of hand since 7 October in order to engage in hostilities beyond the time limits arguably imposed by the War Powers Resolution while maintaining the position that no new congressional authorisation is required. Despite repeated inquiries from lawmakers of both parties, the Biden administration has yet to fully explain its exact thinking about these engagements, particularly in the conflict with the Houthis.<sup>77</sup>

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<sup>74</sup> Crisis Group interviews, Congressional staff, January-April 2024.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid. On Biden's campaign promises, see “Biden promises to end ‘forever wars’ as president”, AP, 11 July 2019.

<sup>77</sup> Ibid. See also Letter from Senators Tim Kaine, Todd Young, Christopher Murphy and Michael Lee to President Biden, 23 January 2024.

At times, it has appeared to be making up its rationales on the fly.<sup>78</sup> For example, after a month of airstrikes on the Houthis, the administration was reportedly “still working through in real time” the application of the War Powers Resolution to the conflict.<sup>79</sup> In a February subcommittee hearing on “Yemen and Red Sea Security Issues”, Senator Todd Young, a Republican from Indiana, expressed frustration with State Department witnesses who were unable to articulate the legal basis for defending commercial shipping: “Guys, did you not anticipate questions about the legal rationale before you came before the subcommittee?”<sup>80</sup>

To be sure, the Biden administration has reported some of its hostilities under the War Powers Resolution. As of mid-June, the Biden administration had filed eleven War Powers reports for U.S. military action in the Middle East since 7 October – seven for strikes in Iraq and Syria and four for strikes in Yemen.<sup>81</sup> Though these reports did not specify which provision of the resolution they were submitted under (which is standard practice), the factual descriptions in the documents indicate they were filed in connection with the introduction of U.S. armed forces into hostilities.

But what is more notable is what the administration has *not* reported under the resolution – and thus placed outside that law’s mechanism for triggering a 60-day deadline to obtain authorisation or withdraw troops. For reasons that it has not explained, the administration has submitted reports only in connection with pre-planned strikes authorised by the president. By contrast, it has sent none for other actions in Iraq, Syria and Yemen that appear to have been taken in “unit self-defence” – ie, actions taken by U.S. forces to ostensibly defend themselves – and thus authorised by officers at U.S. Central Command or in the Middle East.<sup>82</sup>

Moreover, the administration does not appear to have reported the over 170 attacks on U.S. forces in Iraq and Syria since 17 October 2023. It has also failed to submit war powers reports in connection with U.S. naval operations in the Red Sea, despite the repeated U.S. engagements there, including the firing of ballistic missiles from Yemen, the downing of the U.S. Reaper drone and the fatal firefight on 31 December. Further, the White House did not report the extensive involvement of U.S. forces in the 13 April defence of Israel; nor has it reported the deployment of U.S. troops in connection with the Gaza pier.

### *B. Legal Camouflage: Three Key Strategies and Some Open Questions*

The Biden administration’s reporting practices suggest that it is employing a combination of strategies to avoid running past the War Powers Resolution’s 60-day deadline for removing U.S. forces from hostilities undertaken without Congressional authorisation. The executive branch has not explained its legal thinking in full, and there may be differing views within the “lawyers group”, a shifting collective of attor-

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<sup>78</sup> Crisis Group interviews, Congressional staff, October 2023-March 2024.

<sup>79</sup> Crisis Group interviews, Congressional staff, February 2024.

<sup>80</sup> “Yemen and Red Sea Security Issues”, U.S. Senate Committee on Foreign Relations, 27 February 2024.

<sup>81</sup> See the War Powers Resolution Reporting Project website for the reports and analysis of their contents.

<sup>82</sup> Crisis Group interviews, Congressional staff, January-March 2024; and descriptions provided by the U.S. Department of Defense.

neys from various agencies who confer about the legal dimensions of national security matters.<sup>83</sup> Nonetheless, it appears that the administration is relying on a few overlapping theories – some, as laid out in Section II, with long histories – to justify waging these conflicts without Congressional authorisation.

#### 1. Stopping and restarting the 60-day clock

First, the administration appears at times to have steered around the War Powers Resolution's 60-day deadline by taking the position that there is no single conflict in the greater Levant or in the seas off Yemen. Rather, it has treated U.S. military engagements as a series of "one-off" events – each its own little war lasting perhaps no longer than the incident itself – undertaken pursuant to the president's constitutional authority to wage war unilaterally in the "national interest" so long as it does not exceed OLC's nature, scope and duration threshold.<sup>84</sup>

With respect to the post-October 7 U.S. campaign against the Houthis, despite the U.S. engaging in nearly regular airstrikes beginning on 11 January (following months of naval action in the Red Sea), and persisting through mid-July, the White House has submitted four separate notifications under the War Powers Resolution to Congress.<sup>85</sup> As noted, these reports pertain exclusively to strikes authorised by the president; all were also conducted in conjunction with the UK.<sup>86</sup> The administration has characterised these four rounds of bombing as "discrete strikes", implying that it considers each to constitute a distinct "introduction of U.S. armed forces into hostilities" after which the law's 60-day clock resets.<sup>87</sup> Indeed, an unnamed "senior administration official" suggested to *The New York Times* that U.S. strikes were too intermittent for the 60-day clock to run continuously, citing U.S. practice during the tanker war.<sup>88</sup>

Similarly, in Iraq and Syria, the seven reports submitted by the administration corresponding to presidentially directed strikes beginning on 27 October 2023, suggested that each action constituted a distinct "introduction of U.S. armed forces into hostilities", but that they did not join together under the umbrella of a single conflict.<sup>89</sup> As with U.S. bombing in Yemen, the administration seemed to be trying to preserve the argument that the law's 60-day clock stopped after each round of airstrikes. This approach echoed that of the Obama administration when, in 2014, it relied solely on the constitution's Article II as authority for hitting ISIS in Iraq.

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<sup>83</sup> Crisis Group interview, former U.S. official, February 2024. In war powers deliberations, this group would typically include attorneys from OLC, the Pentagon and the State Department, convened by a legal adviser at the National Security Council.

<sup>84</sup> Finucane, "Regional Conflict in the Middle East and the Limitations of the War Powers Resolution", op. cit.

<sup>85</sup> See the War Powers Resolution Reporting Project website. Reports for U.S. military action against the Houthis were filed on 12 and 24 January as well as 5 and 26 February 2024.

<sup>86</sup> Ibid.

<sup>87</sup> Senate Foreign Relations Committee, Questions for the Record, April 2024.

<sup>88</sup> "Biden lawyers wrestle with lack of Congressional blessing for Houthi conflict", *The New York Times*, 22 February 2024.

<sup>89</sup> See the War Powers Resolution Reporting Project website.

## 2. Unit self-defence vs. “introduction into hostilities”

Another strategy for working around the War Powers Resolution’s 60-day clock is to claim that it is not even in motion. The administration appears to have taken this approach in relation to its naval actions in the waters off Yemen and airstrikes on Houthi targets. It appears to argue that there has been no “introduction” of U.S. armed forces in or around Yemen that would start the clock running.<sup>90</sup>

Here, the administration’s reasoning seems to be based on the 1980 OLC opinion discussed in Section II. It argues that actions taken by U.S. vessels in unit self-defence do not constitute an introduction or require reporting under that OLC opinion because they do not involve an “active decision” to place U.S. forces in harm’s way, meaning there was no “introduction” implicating the War Powers Resolution. In effect, they suggest that instead of U.S. armed forces being introduced into hostilities, hostilities were introduced to U.S. armed forces.<sup>91</sup> (By contrast, pre-planned and presidentially authorised strikes – of the sort the administration has reported in Iraq and Syria – do not seem to qualify for this loophole.<sup>92</sup>)

In addition to resurfacing the 1980 gloss on what constitutes an “introduction” of U.S. forces, the Biden administration has apparently expanded this loophole further. The administration argues that U.S. forces have the delegated authority to defend themselves not only from attack but also from the threat of “imminent” attack, all under the rubric of unit self-defence, and all without triggering the resolution’s reporting restrictions.<sup>93</sup> Under this theory, actions to pre-empt what are asserted to be imminent attacks do not constitute a reportable “introduction” of U.S. forces into hostilities, even if U.S. forces fire the first shot.<sup>94</sup> Moreover, the Biden administration has not – at least publicly – defined any limits that might constrain this self-defence exception to the resolution. Instead, it vaguely asserts that “[w]hat constitutes a threat of imminent attack depends on the particular facts and circumstances at the time”.<sup>95</sup>

To the extent the Biden administration is relying on the 1980 OLC opinion, its approach seems misleading in several ways. First, by the language of the 1980 opinion, an “introduction” involves “an active decision to place forces in a hostile situation rather than their simply acting in self-defense”.<sup>96</sup> It is not clear how some of the administration’s deployments escape characterisation as an “active decision”. In particular, some of the principal warships engaged in fighting the Houthis – ie, the *USS Carney* and *USS Eisenhower* carrier strike group – entered the Red Sea on 18 October and

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<sup>90</sup> Crisis Group interviews, Congressional staff, April 2024. See also Senate Foreign Relations Committee, Questions for the Record, April 2024.

<sup>91</sup> Crisis Group interviews, Congressional staff, April 2024.

<sup>92</sup> Responses to Senate Foreign Relations Committee, Questions for the Record, April 2024 (noting that “War Powers Resolution does not require reporting on the actions U.S. forces have taken to defend themselves while continuing to conduct longstanding naval operations to protect and defend U.S. commerce and interests at sea”). See also John Harmon, Assistant Attorney General Office of Legal Counsel, “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization”, 12 February 1980.

<sup>93</sup> Ibid.

<sup>94</sup> Senate Foreign Relations Committee, Questions for the Record, April 2024.

<sup>95</sup> Senate Foreign Relations Committee, Questions for the Record, April 2024.

<sup>96</sup> Harmon, “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization”, op. cit.

4 November, respectively, when Israel's offensive in Gaza was already well under way. It was not as if pre-positioned ships suddenly found fighting breaking out around them.<sup>97</sup> Indeed, given the heightened regional tensions, it is hard to believe that the navy did not anticipate hostile activity. Under a fair reading of the 1973 resolution, it is likely that entering the Red Sea by itself constituted an "introduction" of forces into "imminent hostilities".

Secondly, many of the subsequent exchanges of fire between U.S. forces and the Houthis involved "active decisions" by the U.S. that went beyond those forces merely defending themselves from Houthi attack. Such incidents include the *USS Carney's* downing of drones and missiles on 19 October 2023. According to one of the *Carney's* officers cited by CBS News, the projectiles were aimed at Israel and not the warship itself.<sup>98</sup> Whatever the administration's legal theory was for acting in Israel's defence, it is hard to see how this incident was not reportable under the 1973 resolution.<sup>99</sup> Similarly, once the Houthis began targeting commercial vessels in the Red Sea, U.S. forces repeatedly inserted themselves between the Houthis and their intended victims by downing drones or missiles. Such actions in defence of commercial ships occurred on 3 December, 13 December and 30 December, as well as on 24 February and 9 April 2024.<sup>100</sup> As of mid-July, the U.S. Central Command continues to regularly strike Houthi targets in Yemen. These would all seem to be reportable "active decisions" under OLC's 1980 test.<sup>101</sup>

Thirdly, the ostensible carveout identified by OLC in 1980 is particularly difficult to justify when the strikes were directed by the U.S. Central Command in response to deemed "imminent threat[s] to U.S., coalition and merchant vessels in the region".<sup>102</sup> The nature of anticipating and taking action against an event that has yet to occur necessarily requires an "active decision" to fire, which would seem to close the loophole the administration has invoked.

Finally, there is express executive branch precedent for reporting the use of force in unit self-defence, and Congress has previously pushed back against the assertion of an exemption in analogous circumstances.<sup>103</sup>

### 3. Statutory safe haven and ancillary self-defence

Prior to October 2023, the Biden administration had relied on the president's commander-in-chief authority under the constitution's Article II for its operations against Iran-backed groups in Iraq and Syria. After its strikes, therefore, it filed reports under

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<sup>97</sup> "*USS Carney* transits the Suez Canal", op. cit.; "Ike carrier strike group arrives in Middle East region", op. cit.

<sup>98</sup> "*USS Carney* returns from a Middle East deployment unlike any other", op. cit.

<sup>99</sup> "Incident involving US warship intercepting missiles near Yemen lasted 9 hours", op. cit.

<sup>100</sup> See "USNI new timeline: Conflict in the Red Sea", op. cit.

<sup>101</sup> Harmon, "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization", op. cit.

<sup>102</sup> U.S. Central Command, "June 6 Red Sea Update", 6 June 2024 (noting U.S. airstrikes on Houthi drones that supposedly "presented an imminent threat to U.S., coalition forces, and merchant vessels in the region").

<sup>103</sup> As discussed in Appendix A, Congress explicitly noted in statute that the defensive action by U.S. marines in Beirut in August 1983 triggered the requirements of the War Power Resolution. Multi-national Force in Lebanon Resolution, Public Law 98-119, 97 Stat. 805 (1983).

the War Powers Resolution and relied on the clock-stopping strategy to shield itself from the implication that it was creating 60-day deadlines to avoid obtaining Congressional authorisation.<sup>104</sup> In so doing, it distanced itself from the Trump administration's approach to similar strikes, which was to claim that operations in Syria and Iraq had been Congressionally authorised. The Trump administration argued that the 2001 and 2002 war authorisations provided a legal basis not only for using force against ISIS in Iraq and Syria, but also for "ancillary self-defence" should non-ISIS foes attack U.S. forces.<sup>105</sup>

The Biden administration's rejection of the Trump White House's legal theories of these hostilities appears to have been deliberate.<sup>106</sup> In part, the new administration's lawyers were reportedly concerned about the absence of clear limiting principles for these ancillary self-defence theories.<sup>107</sup> They were likely worried in particular that Trump had overstretched the statutes, possibly creating a foundation for relying on them for a war with Iran, with which his administration had a particularly contentious relationship.<sup>108</sup> Consistent with this theory, in a November 2023 hearing before the House Foreign Affairs Committee, a Pentagon official said "we still do not support including Iran-aligned militia groups on the 2001 AUMF", insisting that Article II of the constitution provides sufficient authority for strikes on Iran-backed groups.<sup>109</sup>

Whatever the case, after the 7 October attacks, the persistence of attacks and counterattacks involving the U.S. military in Iraq and Syria, made it unsustainably difficult to rely on the clock-stopping strategy. Following its first post-7 October strike on an Iran-backed proxy in Syria, the Biden administration stuck with its established playbook, relying on Article II as authority and a war powers notification to Congress.<sup>110</sup> But as attacks by Iran-backed groups continued along with U.S. retaliatory attacks, the argument that each incident could be viewed separately for purposes of the War Powers Resolution and its 60-day clock became increasingly strained.

After a month of renewed attacks on U.S. forces and retaliatory U.S. strikes, the Biden administration began shifting gears. It hinted to Congress at having statutory authority for the operations, echoing the transition that the Obama administration made in legal theories during the early days of the counter-ISIS campaign in 2014.<sup>111</sup> Tacking in a similar direction, the Biden White House in its 22 November and 27 December 2023 letters to Congress – corresponding to strikes on 21 November and 25 December – stated that the president had ordered the military actions "pursuant to [his] constitutional authority" but also that he had "directed the strikes in order to

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<sup>104</sup> Bridgeman and Finucane, "Tit-for-Tat Hostilities in Syria: War Powers and International Implications", *op. cit.*

<sup>105</sup> "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations", U.S. National Security Council, March 2018. See also Crisis Group Report, *Overkill*, *op. cit.*

<sup>106</sup> Crisis Group interview, former U.S. official, August 2022.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> "Friend and Ally: U.S. Support for Israel after Hamas' Barbaric Attack", *op. cit.*

<sup>110</sup> "Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution", 27 October 2023.

<sup>111</sup> "Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria", 23 September 2014.



protect and defend our personnel who are in Iraq [and Syria] conducting military operations pursuant to the 2001 Authorization for Use of Military Force”.<sup>112</sup> By invoking a statutory basis for the U.S. presence in Iraq and Syria, the White House no doubt hoped to head off any claim that the time for Article II-based use of force had expired because of the 60-day clock.

The Biden administration took a further step regarding statutory authority in its 5 January 2024 notification to Congress. In an unprecedented move in the history of such reports, the publicly available text of the notification identified neither what military action was being reported nor where the action had occurred.<sup>113</sup> Instead, this information was seemingly reported to Congress in a classified annex away from the public eye.

Still, the unclassified notification’s context and content gave important clues about the underlying action. The previous day, the Pentagon had acknowledged a U.S. drone strike on Mushtaq Jawad Kazim al-Jawari, a leader of Harakat al-Nujaba, in Baghdad. Further, for the first time in Biden’s term, the White House cited in the report both the 2001 AUMF and the 2002 Iraq AUMF in connection with a strike on an Iran-backed group. The report said Biden had directed the unidentified military action based on his constitutional authority “and in accordance with the 2001 Authorization for Use of Military Force ... and the Authorization for Use of Military Force Against Iraq”. The White House took this tack in subsequent letters reporting retaliations for the fatal attack on U.S. troops at Tower 22.<sup>114</sup>

By invoking both the 2001 and 2002 AUMFs as authority for the unspecified military action reported on 5 January – ie, taking the position that Congress had long ago authorised the strikes in prior legislation – the Biden administration gave itself permission to disregard the War Powers Resolution and its 60-day clock for strikes on Iran-backed groups in Iraq and Syria. The White House then fully embraced the theories of the Trump administration, which had cited the decades-old war authorisations – enacted to enable the U.S. to fight al-Qaeda and topple Saddam Hussein – as legal bases to strike Iran-backed groups.<sup>115</sup> Echoing Trump administration arguments about “ancillary self-defence”, the Biden team contended that “[s]tatutes that authorize the use of necessary and appropriate force, including the 2001 AUMF and the 2002

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<sup>112</sup> “Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution”, 22 November 2023; “Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution”, 27 December 2023.

<sup>113</sup> “Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution”, 5 January 2024.

<sup>114</sup> “Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution”, 25 January 2024; “Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution”, 4 February 2024.

<sup>115</sup> “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, March 2018; “Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, February 2020. The Trump administration even invoked the AUMFs as the legal basis for killing General Qassem Soleimani, then head of the Qods force, in Iraq on 3 January 2020.

AUMF, encompass the use of force both to carry out the missions under the authorizing statutes and to defend U.S. or partner forces as they pursue those missions”.<sup>116</sup>

The administration has not articulated the limits of such supposed ancillary self-defence authority tied to the U.S. counter-ISIS mission in Iraq and Syria.<sup>117</sup> But assertions of this purported authority are particularly hard to justify when made in response to attacks on U.S. forces that are not actually engaged in the counter-ISIS operations that the U.S. has deemed to be covered by the 2001 AUMF. The information available about U.S. forces at al-Tanf in Syria and those supporting them at Tower 22 in Jordan indicates that they are there to counter Iran – an activity that neither the 2001 nor the 2002 authorisation can reasonably be read to cover.<sup>118</sup> Following the attack on Tower 22, the White House was vague about what U.S. troops were actually doing there and at al-Tanf, simply noting that “the *rationale* is purely anti-ISIS” but that “there may be other (unspecified) strategic benefits”.<sup>119</sup> (emphasis added)

#### 4. Open questions

The Biden administration has not explained to the public (nor, it seems, to many members of Congress) its legal theories for using the U.S. armed forces to install and operate the pier off the coast of Gaza (very much still an active war zone) or in the significant U.S.-led military operation in April to defend Israel from Iran’s retaliatory drone and missile barrage. It is possible the White House is relying on narrow interpretations of “introduction”, “hostilities” or “imminent hostilities” to avoid triggering the law and its authorise-or-withdraw requirements. With respect to the U.S. air defence of Israel, there is at least some prior executive branch practice of not reporting missile defence activity and without explaining the underlying legal reasoning.<sup>120</sup> Congressional staffers recognise that these operations may well implicate the War Powers Resolution, but many Congressional offices have been reluctant to raise questions about them with the administration.

#### C. Congressional Reaction

While the Biden administration engages in conflict without fresh Congressional authorisation in the Middle East, Congress as an institution has in effect acquiesced through inaction. Such “underreach” by the legislature has been a common response to the executive branch’s war powers expansionism.<sup>121</sup> In the case of the post-7 October conflicts, Congress is divided both in terms of legal views and policy preferences. More broadly, it faces great political and practical difficulties in exercising its authority

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<sup>116</sup> Crisis Group interviews, Congressional staff, January-February 2024. See also “Report on the Legal and Policy Framework for the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, March 2024.

<sup>117</sup> Crisis Group interview, Congressional staff, February 2024.

<sup>118</sup> Finucane, “An Unauthorized War”, *op. cit.*

<sup>119</sup> Crisis Group interview, Congressional staff, February 2024.

<sup>120</sup> On this precedent, see Finucane, “Regional Conflict in the Middle East and the Limitations of the War Powers Resolution”, *op. cit.*

<sup>121</sup> Crisis Group interviews, congressional staff, January-February 2024. See also Crisis Group Report, *Overkill*, *op. cit.*; and “How Congress is reacting to Biden’s military attack on the Houthis in Yemen”, *Time*, 12 January 2024.

once fighting starts. As a result, the legislative branch has failed to assert its institutional prerogatives.

An illustrative case is the post-7 October U.S. strikes on the Houthis in Yemen. When these strikes began, a bipartisan collection of legislators including left-wing progressives and right-wing Trump backers denounced this unauthorised use of force.<sup>122</sup> Others, such as Senator Tim Kaine, a Democrat from Virginia and a leading voice in Congress on war powers issues, at first expressed understanding of the response to the Houthis' attacks but also signalled unease about escalation.<sup>123</sup> Some members of Congress were particularly sceptical of the self-defence rationale offered by the White House for strikes on the Houthis, noting that U.S. military operations in and around Yemen appeared dedicated to ensuring freedom of navigation – a laudable objective in the abstract but one that was inconsistent with the administration's legal justifications.<sup>124</sup> Even Congressional offices sympathetic to the White House's actions worried both about the risk of a catastrophic strike on a U.S. warship by the Houthis – particularly after the fatal attack on *Tower 22* – and the war powers precedent established by the unauthorised intervention.<sup>125</sup>

As the anti-Houthi campaign continued, Kaine and other members began questioning the White House's stated rationales (including whether the U.S. strikes are actually in self-defence), its legal justifications and the effectiveness of U.S. military action.<sup>126</sup> At a February 2024 Senate hearing, Kaine suggested that a halt to fighting in Gaza would be more likely to calm the situation with the Houthis than further U.S. military action.<sup>127</sup>

The theories the Biden administration has articulated behind closed doors have failed to satisfy certain sceptical members of Congress and their staff.<sup>128</sup> Some staff who have sought to understand the administration's legal thinking have described the responses from the White House as “frustrating” and “BS”.<sup>129</sup> Others have also characterised the administration's responses to legal inquiries as “vague” and the underlying theories, so far as they can discern them, as “ridiculous” and “pretty crazy”.<sup>130</sup>

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<sup>122</sup> “Biden's Yemen strike reignites Congress' battle over war powers”, *Politico*, 12 January 2024.

<sup>123</sup> “Kaine Statement on U.S. Military Strikes against Houthis”, Senator Tim Kaine, 12 January 2024.

<sup>124</sup> Crisis Group interviews, Congressional staff, January-March 2024.

<sup>125</sup> Crisis Group interviews, Congressional staff, January-April 2024.

<sup>126</sup> Crisis Group interviews, Congressional staff, January-March 2024. See also “Yemen and Red Sea Security Issues”, *op. cit.*

<sup>127</sup> *Ibid.* Kaine noted: “I guess my most serious scepticism right now is the effectiveness of this. President Biden himself has said that the actions that we are undertaking are not likely to deter Houthi escalation. ... The Houthis have said this is because of the war in Gaza. ... I would venture to suggest that about the only time we've seen something that was a de-escalation moment was in the week-plus long pause in Gaza when the first hostage deal was done. Trying to re-establish deterrence, I don't think you're going to do it if the 200 strikes become 400 strikes, 800 strikes, 1,200 strikes. I think you will reestablish deterrence when we get a hostage deal, that leads us to a truce that leads us to humanitarian aid into Gaza, that leads us to the ability to discuss whether whatever that truce period is can be extended”.

<sup>128</sup> Crisis Group interviews, Congressional staff, January-June 2024.

<sup>129</sup> Crisis Group interview, Congressional staff, April 2024.

<sup>130</sup> Crisis Group interview, Congressional staff, February-March 2024.

One senator was reportedly “dialled up to eleven” in aggravation at what he considered farfetched legal explanations from the administration.<sup>131</sup>

But this dissatisfaction is far from universal among lawmakers. Several members of Congress, predominantly Republicans, have not only welcomed the U.S. strikes on the Houthis as well as on Iran-backed groups in Iraq and Syria, but have also called for a more aggressive military response, including potential action against Iran itself.<sup>132</sup> Meanwhile, many members of Congress, perhaps a majority, are content not to voice an opinion on the White House’s unilateral military actions.<sup>133</sup> Lacking sufficient consensus, Congress has not responded legislatively.

Although the Biden administration remains uninterested in a new war authorisation, members of Congress have raised the issue. In February, Senator Ben Cardin, a Democrat from Maryland who chairs the Foreign Relations Committee, said he thought the administration should come to Congress for authorisation for its operations in the Middle East.<sup>134</sup> Cardin cited the constraints imposed by the 60-day clock and the question of whether the clock could stop and restart.<sup>135</sup> Representative Michael McCaul, a Republican from Texas, and Senator Chris Murphy, a Democrat from Connecticut, have separately indicated they were working on authorisations for the use of force against Iran-backed groups in order to put U.S. military operations on a proper legal footing, though they have not introduced legislation to date.<sup>136</sup>

Broadly speaking, the lack of enthusiasm in Congress for potential authorisations reveals substantive differences on the wisdom of continued use of military force, with some members arguing, for example, that strikes on the Houthis are ineffective and that a ceasefire in Gaza will likely be necessary to restore calm to the Red Sea.<sup>137</sup> Some members also worry that an authorisation that explicitly encompasses Iran-backed groups could pave the way for wider conflict in the region, including direct confrontation with Iran. There are also diverging opinions on the scope of any new authorisation (eg, should it include Iran).<sup>138</sup> Perhaps most significantly, many members are traditionally wary of taking hard votes on matters of war and peace, and this occasion appears to be no exception.<sup>139</sup>

Congressional disunity has also discouraged members sceptical of the administration’s use of force from acting forcefully to bring them to a halt. Some members

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<sup>131</sup> Crisis Group interview, Congressional staff, April 2024.

<sup>132</sup> “How Congress is reacting to Biden’s military attack on the Houthis in Yemen”, op. cit.

<sup>133</sup> Crisis Group interviews, Congressional staff, January-March 2024.

<sup>134</sup> “Senate Foreign Relations Chair Cardin urges Biden to seek Congressional approval for Middle East strikes,” *Spectrum News*, 1 February 2024.

<sup>135</sup> *Ibid.*

<sup>136</sup> “McCaul preparing authorization of military force against Hamas, Iran proxies,” *The Hill*, 17 October 2023. See also “Yemen and Red Sea Security Issues”, op. cit. At this hearing, Senator Murphy said “for the military campaign against the Houthis to continue, I believe that a tailored, time-bound congressional authorisation is not just nice to have. It is required to both authorise and limit the current military operation and I will be in discussions with my colleagues in the coming days to introduce such an authorisation”.

<sup>137</sup> Crisis Group interviews, Congressional staff, December-March 2024. See also “Yemen and Red Sea Security Issues”, op. cit.

<sup>138</sup> Crisis Group interviews, Congressional staff, December-March 2024.

<sup>139</sup> Crisis Group interviews, Congressional staff, December-March 2024.

worry about introducing legislation that would require removing U.S. forces, fearing that if such a measure failed to gain traction it could backfire by signalling *de facto* approval for the operations.<sup>140</sup> A rare exception is a measure introduced by Senator Ted Cruz, a Republican from Texas. This joint resolution would direct the president to “terminate the use of United States Armed Forces for the construction, maintenance and operation” of the Gaza pier within 30 days.<sup>141</sup> A similar bill may be introduced in the House.<sup>142</sup> The Cruz legislation appears motivated less by concern about the separation of war powers than by standing against humanitarian aid for Gaza as well as forcing a difficult vote on Democrats.<sup>143</sup> Senators blocked the Cruz legislation over a point of order, with a majority voting that it was not entitled to expedited procedures because U.S. forces were not “engaged in hostilities” (a different standard from the 1973 resolution) as required by the rules.<sup>144</sup>

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<sup>140</sup> Crisis Group interviews, Congressional staff, February-March 2024.

<sup>141</sup> Senate Joint Resolution 89. Compare to Senate Joint Resolution 68 (2020), introduced by Senator Kaine, that would have required the removal of US forces from hostilities with Iran and which explicitly cited the War Powers Resolution as well as the provision granting the measure expedited procedures.

<sup>142</sup> Crisis Group interviews, Congressional staff, May 2024.

<sup>143</sup> Crisis Group interviews, Congressional staff, June 2024.

<sup>144</sup> Crisis Group interviews, Congressional staff, July 2024. See also 50 U.S. Code §1546a (“Any joint resolution or bill introduced in either House which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization shall be considered in accordance with the procedures of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976, except that any such resolution or bill shall be amendable. If such a joint resolution or bill should be vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to twenty hours in the Senate and in the House shall be determined in accordance with the Rules of the House”.)

## V. Peace, then Reform

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The immediate priority for the Biden administration for avoiding escalation in the Middle East should be bringing the Gaza war to an end. After deriding the notion of a ceasefire in the war's early months, the Biden administration has made a diplomatic push to halt it.<sup>145</sup> Yet Israel and Hamas remain at loggerheads over a deal to end the war, with Prime Minister Benjamin Netanyahu insisting that Israel reserves the right to resume hostilities.<sup>146</sup> Hamas, for its part, demands that a ceasefire be permanent, though it is reportedly willing to accept a document without explicit wording to that effect.<sup>147</sup> The latest rounds of talks has progressed to specific aspects of implementation, but a full agreement has yet to be reached.<sup>148</sup> The U.S. should do all it can to broker a deal, whether that means pressing regional partners with influence over Hamas or using the leverage afforded by its military support to Israel. If through diplomacy the U.S. can help bring fighting to a halt in Gaza, it will not only create an opening to end the humanitarian catastrophe that has afflicted the strip's 2.2 million residents, but it should also lower the temperature in at least some of the other regional hotspots where U.S. troops are stationed.

By contrast, the question of how the U.S. government should address the steady consolidation of war powers in the presidency will take longer to work through. Congress's options for constructive engagement at this stage – in the midst of the post-7 October conflicts and in the run-up to a hotly contested U.S. presidential election – are limited. Trying to reverse-engineer authority for the current U.S. engagements would be unwise. It is entirely possible that some legislators would go beyond approving what the U.S. is doing, and push it to do more, for example in confronting Iran. Moreover, even if Congress and the administration were in lockstep, for the White House to seek authorisation from Congress now could well be escalatory in and of itself, thus heightening tensions that are likely to remain at least until the guns in Gaza go silent. For this reason, lawmakers who encouraged authorisation legislation for good governance purposes, but appear to have shelved these proposals, had the right idea.

But although eschewing new war authorisations may be the best approach at present, it is no justification for complacency about the degradation of checks and balances on presidential war powers. Absent corrective action, it is entirely likely that the Biden administration's post-7 October practice and legal theories will harden into more precedent to be relied on and expanded by successor executives, further undercutting both the conflict prevention and democratic accountability purposes of distributing war powers between the political branches. As one former senior Biden administration lawyer pointed out, the accretion of unilateral war-making power in the presidency favours the use of force over diplomacy by making it ever easier for

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<sup>145</sup> Crisis Group Statement, "A Gaza Ceasefire", 7 June 2024.

<sup>146</sup> Ibid.

<sup>147</sup> Crisis Group interviews, diplomats, July 2024. See also "Hamas softens demand for permanent ceasefire in truce talks, officials say", op. cit.

<sup>148</sup> Crisis Group interviews, U.S. officials, July 2024.

the president to wade deeper and deeper into a conflict without facing scrutiny for what he or she is doing.<sup>149</sup>

Accordingly, more than half a century after the 1973 War Powers Resolution was enacted, reform is needed – both to the resolution itself and to the open-ended 2001 and 2002 war authorisations that successive administrations have used to help circumvent it. Although it is difficult to undertake reforms in the middle of a war, the aftermath can be a moment for reflection and change, and proponents should look for such a window.

In terms of how members of Congress might approach this significant project, the first step might be to place the goalposts for the next administration or at least for the next propitious moment. Among the recommendations that Crisis Group has put forward for reform and continues to support are to overhaul the 1973 War Powers Resolution as envisaged in the National Security Reforms and Accountability Act, which has been introduced on a bipartisan basis in the House of Representatives.<sup>150</sup> A companion bill called the National Security Powers Act was introduced in the Senate in the last Congress.

Among other things, reform legislation would shorten the 60-day clock to help control efforts to manipulate it; cut off funding for wars that did not have authorisation when the clock ran out; and set out expectations for future use of force authorisations, including that they require periodic renewal in order to avoid unchecked “forever” authorisations like the 2001 and 2002 AUMFs. The reform legislation would not, and could not, impinge on the president’s constitutional self-defence powers.<sup>151</sup>

Thorough reform would also require Congress to revise and replace the 2001 AUMF with legislation that (among other things) identifies the groups with which the U.S. is at war; removes the ability for the executive branch to name new groups that fall under the statute without Congressional approval; and imposes a two-year reauthorisation requirement so that war cannot go on endlessly without a check.<sup>152</sup> A more straightforward exercise should be to repeal the 2002 AUMF, recognising that the Iraq invasion for which purpose it was enacted is long over with.<sup>153</sup>

A nearer-term legislative objective would be to work on more incremental, likely more achievable reforms to tighten current laws. An appropriate place to start, given the way in which this term has been interpreted for purposes of post-7 October conflicts, would be to define what it means for U.S. armed forces to be “introduced into hostilities”. Drawing from the National Security Powers Act, for the purposes of the War Powers Resolution the phrase “United States Armed Forces are introduced into hostilities” could be defined as:

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<sup>149</sup> Harold Koh, “The National Security Constitution in the Twenty-First Century”, speech at Politics and Prose bookstore, Washington, 28 June 2024.

<sup>150</sup> Crisis Group Report, *Overkill*, op. cit.

<sup>151</sup> “In Support of National Security Reforms and Accountability Act”, U.S. House of Representatives, undated. See also Tess Bridgeman and Stephen Pomper, “A Giant Step Forward for War Powers Reform”, *Just Security*, 20 July 2021.

<sup>152</sup> Crisis Group Report, *Overkill*, op. cit.; Brian Finucane, “The House Tackles Zombie War Authorizations: Possibilities and Perils”, *Just Security*, 14 August 2023; Brian Finucane and Stephen Pomper, “War Powers Guard Rails Can Keep the U.S. from Sliding into a New Middle East War,” *Just Security*, 2 July 2021; Brian Finucane, “Putting AUMF Repeal into Context”, *Just Security*, 24 June 2021.

<sup>153</sup> *Ibid.*

any situation involving any use of lethal or potentially lethal force by or against United States forces, whether or not constituting self-defense measures by the United States forces, and irrespective of the domain, whether such force is deployed remotely, or the intermittency thereof.

Such a definition would close some of the loopholes described above and help forestall future interpretive gamesmanship by the U.S. executive branch. In particular, it would clarify that there is no “unit self-defence” carveout nor an exception for force deployed remotely, such as by drone or surface-to-air missiles. Although it would not prevent the executive branch from taking immediate defensive actions, it would subject any longer military campaign (such as that against the Houthis) to the time limits of the War Powers Resolution. Although by no means a war powers panacea, such a provision would meaningfully advance goals of transparency and Congressional control, the objectives of the original 1973 law.



## VI. Conclusion

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In a sense, the Biden administration's military engagements in the Middle East since 7 October 2023 have held up a mirror to the dysfunction of the U.S. legal regime meant to constrain the president's war powers. This system, which is supposed to help ensure that decisions about when and where the world's most powerful nation wages elective war do not rest with a single person, has been hollowed out over time. Not only does the framework allow significant freedom of action, it also permits substantial freedom of innovation, letting each administration rely on its own doctrine to establish new precedents that may give future administrations even greater leeway for unilateral action.

Why do war powers need to be rebalanced? After all, creating higher expectations for Congress to participate in decisions about war and peace will not guarantee prudent decision-making by any stretch. The U.S. Congress authorised the 2003 invasion of Iraq and elements of the Vietnam War, to take just two examples. But for all the imprudent wars that Congress has approved, there are other cases where U.S. involvement might have been avoided or been more quickly curtailed had the nation's political leaders taken seriously requirements for Congressional authorisation and made provision (as reform proposals tend to suggest) for periodic reauthorisation. The Obama administration's 2011 military intervention in Libya – which itself prompted controversy over application of the War Powers Resolution – is but one example.<sup>154</sup>

While the time is not ripe for big war and peace legislation – just months before a presidential election and with the risk that Congressional action could send an escalatory signal in the region – reform ideas should not be put into cold storage. Sceptics may say the current system is in fact appropriate for guarding U.S. national security, because slowing presidential decision-making will disadvantage the U.S. on the world stage.<sup>155</sup> But given the president's constitutional authority to defend the country by repelling “sudden attack”, it is hard to see that being a dangerous impediment to protection of the United States. Other doubters may be more fatalistic – arguing that when it comes to divided war powers, the ship has sailed, thanks to growing precedent, an executive branch that (regardless of party) has grown used to unilateral war powers and a Congress that does not want to make tough calls on matters of war and peace.<sup>156</sup>

But it would be a mistake to allow this mindset to cloud the impulse to improve the system. As the 1973 War Powers Resolution demonstrated, it is possible for Congress to rouse itself for reform. Generally, such legislative action is prompted by a major strategic miscalculation by Washington, with all the suffering that these bring for the civilians who must suffer the consequences of imprudent war. U.S. political leaders need not wait for such a moment to act. Those who kick the can down the road until one comes will be doing a disservice to themselves, the U.S. public and global peace and security.

**Washington/Baghdad/Dubai/Brussels, 24 July 2024**

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<sup>154</sup> “White House defends continuing U.S. role in Libya operation”, *The New York Times*, 15 June 2011.

<sup>155</sup> Waxman, “War Powers Reform: A Skeptical View”, op. cit.

<sup>156</sup> Jack Goldsmith, “The Soleimani Strike: One Person Decides”, *Lawfare*, 3 January 2020.

## Appendix A: The War Powers Resolution: Key Issues

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Years of tensions between Congress and the executive branch over the Vietnam war, and its expansion into Cambodia, led Congress to enact the 1973 War Powers Resolution in an effort to claw back some of the power that the presidency had amassed.<sup>157</sup> The War Powers Resolution sought to forestall any president from moving troops into positions where they might engage in conflict or be placed in harm's way without notifying Congress. It also aimed to put in place various safeguards that would impede the president's ability to wage unilateral war.

To this end, Section 4(a) of the resolution establishes reporting requirements to prevent the president from taking the country to war in secret. In the absence of a declaration of war or other statutory authorisation, the president is subject to multi-tiered obligations to report to Congress within 48 hours on certain triggering actions by U.S. armed forces. First, under subsection 4(a)(1) he or she must report when U.S. armed forces "are introduced" into "hostilities" or "are introduced" into "situations where imminent involvement in hostilities is clearly indicated by the circumstances". Secondly, even if U.S. forces have not been introduced into hostilities or imminent hostilities, subsection 4(a)(2) requires him or her to report deployment of "combat-equipped" forces to another country (the executive branch defines "combat-equipped" as forces armed with crew-served weapons, such as machine guns requiring more than one person to operate and mortars). Thirdly, pursuant to subsection 4(a)(3), the president must report any substantial enlargement of combat-equipped forces in a country where they are already stationed.

The resolution's real teeth come, however, in Section 5. Under Section 5(b) of the 1973 resolution, the submission of a report under the first of these scenarios – introduction of U.S. forces into hostilities or situations of imminent hostilities – creates a 60-day window during which the president must either work with Congress to get authorisation for using force or withdraw the troops. The resolution also contains a provision in Section 5(c) that allows Congress to order the removal of U.S. forces from hostilities through a concurrent resolution – that is, a resolution passed by both houses of Congress but not presented to the president for his or her signature or veto.<sup>158</sup>

The latter check on executive powers is essentially gone, however. A 1983 Supreme Court decision, *INS v Chadha*, cast likely fatal constitutional doubt upon the capacity of Congress to bypass the executive through a concurrent resolution.<sup>159</sup> Following this decision, Congress amended the 1973 law to replace the concurrent resolution mechanism with procedures for a joint resolution that would require the president's signature. Consequently, the president can start a war without congressional authorisation so long as the OLC's "national interest" and "nature, scope and duration" tests

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<sup>157</sup> War Powers Resolution, Conference Report, No. 93-547, 4 October 1973.

<sup>158</sup> For a discussion of the OLC tests, see Section II of this report.

<sup>159</sup> 8 *INS v. Chadha*, 462 U.S. 919 (1983). In this case, which concerned a provision of U.S. immigration law, the Supreme Court held the one-house legislative veto of executive branch action to be unconstitutional and suggested that concurrent resolution mechanisms in laws such as the War Powers Resolution likewise violated the constitutional principle of separation of powers. Post-*Chadha*, there is a broad assumption that laws require bicameral support in Congress and either presidential signature or (in the event of a veto) an override by supermajorities in both houses.

are deemed met, but Congress cannot direct a withdrawal from hostilities unless 1) the president is prepared to sign off on it; or 2) legislators can muster the bicameral supermajority that is required to override a presidential veto.

Given the practical and political obstacles, it would be very difficult for Congress to end U.S. participation in an armed conflict if the president wished to continue. A Congressional staffer described the notion as “laughable”.<sup>160</sup> Indeed, twice in recent years, bipartisan majorities in both houses of Congress invoked Section 5(c) in voting to withdraw U.S. armed forces from hostilities – in 2018, directing the administration to end U.S. support for the Saudi bombing campaign in Yemen, and in 2020, to require President Trump to withdraw U.S. forces from hostilities with Iran after the U.S. drone strike that killed Iranian general Qassem Soleimani and the subsequent Iranian missile attack on U.S. forces in Iraq.<sup>161</sup> In both cases, Trump vetoed the legislation, and in neither case were the majorities large enough to override him.<sup>162</sup>

The War Powers Resolution has been weakened in other ways as well. Although the text did not define “hostilities” or “imminent involvement in hostilities”, the relevant legislative history indicates that Congress intended these terms to be construed broadly in order to establish a low threshold for both the reporting and withdrawal provisions. The House Foreign Affairs Committee’s report on the Resolution explains:

The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. “Imminent hostilities” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

Not surprisingly, the executive branch has favoured interpretations of the resolution that are less likely to constrain the president’s ability to use military force without Congressional authorisation. In the most oft-repeated formulation, the State Department’s legal adviser informed Congress in a 1975 letter that its working definition of “hostilities” meant “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces”.<sup>163</sup> He also said “imminent hostilities” means “a situation in which there is a serious risk from hostile fire to the safety of United States forces”.

In subsequent years, the White House has offered readings of the law that permit the executive to do even more without getting Congress involved. As noted in Section II, a 1980 opinion, OLC took the position that:

if our armed forces otherwise lawfully stationed in a foreign country were fired upon and defended themselves, we doubt that such engagement in hostilities would be covered by the consultation and reporting provisions of the War Powers

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<sup>160</sup> Crisis Group interview, Congressional staff member, July 2021.

<sup>161</sup> “Senate fails to override Trump’s veto on Yemen”, *Politico*, 2 May 2019; “Trump vetoes Iran war powers resolution”, CNN, 6 May 2020.

<sup>162</sup> *Ibid.*

<sup>163</sup> Letter from Leigh to Zablocki, *op. cit.*

Resolution. The structure and thrust of those provisions is the “introduction” of our armed forces into such a situation and not the fact that those forces may be engaged in hostilities. It seems fair to read “introduction” to require an active decision to place forces in a hostile situation rather than their simply acting in self-defense.<sup>164</sup>

Yet the U.S. executive branch has not regularly invoked or, it seems, consciously relied upon this reading of the word “introduction” as a loophole in the law. To the contrary, both the facts and framing of some past war powers notifications indicate that they pertain to just these sort of on-the-spot defensive actions authorised by field commanders, rather than the president. For example, in August 1983, U.S. marines in Lebanon engaged in combat after coming under attack. The Reagan administration reported the fighting “consistent with” the War Powers Resolution, even though in returning fire the marines were acting “[a]s contemplated by their rules of engagement” rather than at the direction of the commander-in-chief.<sup>165</sup>

Notably, Congress has rejected narrow executive branch interpretations of “hostilities” and “introduction” in the context of the War Powers Resolution. In the above case of Lebanon, for example, the Reagan administration had deployed U.S. forces without Congressional authorisation. When considering an after-the-fact authorisation for this deployment, the Senate Foreign Relations Committee pushed back against arguments that there was a carveout in the War Powers Resolution for on-the-spot defensive actions. In a report, the committee stated:

Arguments have been made, that a hostile situation was not indicated by the present circumstances because the Marines: (a) Only returned rather than initiated fire; (b) Acted only in self-defense; (c) Remained essentially in one location rather than taking offensive actions; (d) Performed a mission of “peacekeeping,” “presence” or “interposition”. However, there is nothing in the legislative history of the War Powers Act to indicate that any of these considerations would alter the fact that “hostilities” are indicated.<sup>166</sup>

Moreover, with respect to U.S. military action in Lebanon, Congress put into law its view that the August 1983 exchange of fire involving U.S. marines triggered section 4(a)(1) of the War Powers Resolution (presumably as an “introduction” of U.S. forces into hostilities”) even though the Reagan White House had characterised it as an on-the-spot defensive response.<sup>167</sup> Joe Biden, then a senator, opposed the draft Lebanon use of force resolution in committee, emphasising in a separate dissent in the committee report that “I would not support any authorization for troops in Lebanon of any

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<sup>164</sup> Harmon, “Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization”, *op. cit.*

<sup>165</sup> “Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Participation in the Multinational Force in Lebanon”, 30 August 1983.

<sup>166</sup> Congressional Record 129 (1983): 25750. The formulations “War Powers Resolution” and “War Powers Act” are used interchangeably.

<sup>167</sup> Multinational Force in Lebanon Resolution, Public Law 98-119, 97 Stat. 805 (1983); Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Participation in the Multinational Force in Lebanon, 30 August 1983.

duration absent much more clearly defined goals and a reasonable prospect of attaining those goals”.<sup>168</sup>

But while executive branch interpretations of the War Powers Resolution are often unilateral – endorsed neither by Congress nor by the courts, and sometimes seemingly rejected by the former – sporadic Congressional dissent has not prevented the further accretion of war powers by the executive.

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<sup>168</sup> Congressional Record 129 (1983): 25753.

## Appendix B: The 2001 and 2002 War Authorisations

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Although the U.S. constitution demarcates the war powers of Congress and the president, and the 1973 War Powers Resolution was an effort to bring the two branches back into alignment with that original demarcation, the use of force authorisations enacted by Congress in 2001 (prior to the post-9/11 U.S. invasion of Afghanistan) and 2002 (prior to the U.S. invasion of Iraq) have undermined efforts to restore Congressional prerogatives in matters of war and peace. Lacking temporal limits, these decades-old statutes have been interpreted as elastic grants of authority for the executive branch to wage war across the Middle East and beyond, without having to return to Congress for fresh authorisation and the debate and deliberation that would entail.<sup>169</sup>

### **2001 Authorization for Use of Military Force**

In the immediate aftermath of the terrorist attacks of 11 September 2001, the Bush administration drafted a broadly worded authorisation for the use of military force (widely referred to as the “2001 AUMF”), which Congress passed by an overwhelming majority and the president signed into law on 18 September 2001. This statute, the principal domestic legal authority for U.S. military action in counter-terrorism missions since 2001, provides that:

the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>170</sup>

Among the key features of this authorisation is that it does not specify against whom, or in which countries, force may be used. Nor does it set a date on which the authority will lapse unless renewed. As Crisis Group has written previously, successive U.S. administrations have stretched the authorisation’s scope far beyond the originally intended targets – al-Qaeda (the group that conducted the 9/11 attacks) and the Taliban (who harboured them) to cover a range of jihadist entities that did not even exist in 2001.<sup>171</sup>

Then-Deputy Secretary of State John Sullivan asserted in August 2017 that the 2001 AUMF provided statutory authority at that time for U.S. military operations against “the following individuals and groups: al-Qa’ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan; al-Qa’ida in the Arabian Peninsula; al-Shabaab; individuals in Libya who are part of al-Qa’ida; al-Qa’ida in Syria; and ISIS”. As Sullivan explained, that war authorisation was the statutory authority for U.S. detention of the remaining inmates at Guantanamo Bay, Cuba.<sup>172</sup>

The Trump administration also espoused a fresh theory by which it could use force on the authority of the 2001 AUMF. In 2017 and 2018, U.S. forces deployed in Syria

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<sup>169</sup> Crisis Group Report, *Overkill*, op. cit.

<sup>170</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>171</sup> Crisis Group Report, *Overkill*, op. cit.

<sup>172</sup> Letter from John Sullivan, Deputy Secretary of State, to Ed Royce, Chairman of the House Foreign Affairs Committee, 2 August 2017.

– formally as part of a counter-ISIS mission – were repeatedly attacked by non-ISIS groups, particularly (but not only) at the al-Tanf garrison in the country’s south east.<sup>173</sup> The U.S. responded with airstrikes, including in a battle near Deir al-Zour on 7 February 2018 that killed hundreds of non-ISIS fighters, among them Russian mercenaries.<sup>174</sup> The administration’s legal justification for these strikes rested on the novel argument that U.S. forces and partners were undertaking a mission authorised by the 2001 AUMF, which provided them with ancillary authority to defend themselves from anyone else who might attack them in the course of that mission.<sup>175</sup> By relying on the 2001 AUMF instead of the constitution’s Article II, the administration avoided having to report these actions to Congress under Section 4(a)(1) of the War Powers Resolution and starting the 60-day clock for withdrawing U.S. forces from hostilities absent Congressional authorisation.

### **2002 Authorization for Use of Military Force against Iraq**

In addition to the 2001 AUMF, four administrations have also invoked authority of the 2002 Authorization for Use of Military Force Against Iraq.<sup>176</sup> This resolution provides that:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The 2002 AUMF provided the domestic legal authority for the 2003 invasion of Iraq as well as the subsequent U.S. occupation of Iraq and the follow-on military presence until the U.S. military withdrawal in 2011.<sup>177</sup> In 2014, the Obama administration cited it as a source of subsidiary authority for the military campaign against ISIS when confronted with the 60-day deadline imposed by the War Powers Resolution – in part by interpreting “threat posed by Iraq” expansively and citing other previous repurposing of that 2002 law by the executive branch.<sup>178</sup> The Trump administration also invoked this resolution as a statutory basis for the killing of General Soleimani in 2020.<sup>179</sup> In the case of the Soleimani strike, the Trump administration seemed to rely on a theory of ancillary authority arising from the 2002 statute – that is, the U.S. could target the Iranian general because he posed a threat to U.S. forces in Iraq operating under that law.

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<sup>173</sup> Crisis Group interview, former U.S. official, July 2021.

<sup>174</sup> “How a 4-hour battle between Russian mercenaries and U.S. commandos unfolded in Syria”, *The New York Times*, 24 May 2018.

<sup>175</sup> “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, March 2018.

<sup>176</sup> For an overview of the 2002 AUMF, see Scott R. Anderson, “How the 2002 Iraq AUMF Got to be So Dangerous, Part 1: History and Practice” and “Part 2: Interpretation and Implications”, *Lawfare*, 15 and 29 November 2022.

<sup>177</sup> *Ibid.*

<sup>178</sup> “Letter from the President – War Power Resolution Regarding Iraq”, White House, 23 September 2014.

<sup>179</sup> “Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, February 2020.

### Appendix C: U.S. Hostilities in the Middle East before 7 October

U.S. military operations in the wake of the 7 October attack occur against the backdrop of more than twenty years of U.S. military activities in the Middle East – including in Iraq, Syria and Yemen.

U.S. forces invaded Iraq in 2003 under President George W. Bush, were withdrawn in 2011 by President Barack Obama, and were reintroduced by Obama in 2014 to combat ISIS. That group had surged across northern Iraq, captured Mosul, committed widespread atrocities, and menaced U.S. consular and diplomatic posts. It was threatening to attack Baghdad and Erbil. Confronted with what Secretary of State John Kerry later deemed genocidal attacks on the Yazidis and the threats to U.S. personnel and the Iraqi government, the Obama administration began ordering airstrikes on ISIS, first in Iraq and then in Syria.<sup>180</sup>

When U.S. armed forces redeployed to Iraq in 2014, they settled into an uneasy *modus vivendi* with Iran-backed, Iraqi paramilitary groups. Many of the militias belong to the Hashd al-Shaabi (Popular Mobilisation), made up of masses of fighters who answered the 2014 call of Grand Ayatollah Ali al-Sistani, the foremost Shiite cleric in Iraq, to rid the country of ISIS. Some of these groups and their members had previously fought the U.S. military in Iraq in the period from 2003 to 2011. But that dynamic changed when U.S. and Hashd forces battled ISIS in parallel through 2017, both with the sponsorship of the Iraqi government. At that time, the Iran-backed groups within the Hashd generally refrained from attacking U.S. troops, apparently at Tehran's behest: Iran and the U.S. shared the objective of eradicating ISIS.<sup>181</sup>

As the counter-ISIS mission decreased in intensity following the liberation of Mosul in 2017, the already tense relationship between U.S. forces and Iran-backed groups began to unravel. The watershed moment was in 2018, when President Trump unilaterally withdrew from the 2015 Iran nuclear deal. This decision set in motion a period of rising frictions between Iran and the U.S., with Washington's subsequent reimposition of sanctions on Tehran as part of Trump's "maximum pressure" campaign. In April 2019, the U.S. further ratcheted up the pressure by designating Iran's Islamic Revolutionary Guards Corps as a Foreign Terrorist Organization.<sup>182</sup>

Increased tit-for-tat attacks between U.S. and Iran-backed forces in Iraq formed the backdrop for the 2 January 2020 U.S. airstrike that killed General Soleimani, head of the Iranian Revolutionary Guards' elite Qods force, and Abu Mahdi al-Muhandis, the Iraqi founder and commander of Kata'ib Hizbollah and leader of the Hashd. Tehran predictably reacted with significant force. Within days, it sent a fusillade of missiles aimed at U.S. forces at Ain al-Assad air base in western Iraq, killing no one but leaving over 100 service members with traumatic brain injuries.<sup>183</sup> Attacks by

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<sup>180</sup> John Kerry, "Remarks on Daesh and Genocide", 17 March 2016. Kerry said: "Daesh [ISIS] is responsible for genocide against groups in areas under its control, including Yazidis, Christians and Shia Muslims".

<sup>181</sup> Press briefing, U.S. Department of State, 31 March 2022. "From 2012 to 2018, there were no significant attacks ... against U.S. service members, diplomatic facilities in Iraq. That changed in 2018".

<sup>182</sup> *Ibid.*

<sup>183</sup> Despite the injuries, Trump tweeted "All is well". The Pentagon later awarded dozens of the injured service members Purple Hearts – a decoration given to soldiers killed or wounded in battle – for what Trump had downplayed as "headaches". "Troops to receive Purple Hearts for injuries dur-



Iran-backed groups on U.S. forces in Iraq then continued during the remainder of Trump's time in office and into the first year of Biden's term.<sup>184</sup> Frequent attacks on U.S. forces in Iraq only began to abate after Biden's first year in office.<sup>185</sup> By September 2022, groups in Iraq had begun to observe a unilateral truce with respect to U.S. forces in Iraq, an arrangement that became official when the government of Mohammed Shiaa al-Sudani was formed that November.<sup>186</sup>

U.S. troops have also been engaged for years in hostilities with the same Iran-backed groups operating in Syria. As with U.S. hostilities in Iraq, these also escalated during the Trump administration, with fighting concentrated around the U.S. base at al-Tanf.<sup>187</sup> The Tanf deployment is ostensibly linked to the counter-ISIS mission but for years its sustainment has seemed more to be part of an Iran containment strategy.<sup>188</sup>

Flare-ups between U.S. troops and Iran-backed militias in Syria continued after Trump left office. Prior to 7 October, the Biden administration had conducted four airstrikes on unspecified "Iran-backed militia groups" in Syria, in retaliation for drone and rocket attacks on U.S. facilities. The U.S. preferred to hit back in Syria even when the perpetrators were Iraqi groups or launched attacks from Iraq, likely due to the need to manage relations with Baghdad while U.S. troops are stationed in Iraq and Syria.<sup>189</sup> In some cases, the U.S. simply chose not to respond. During the period

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ing Iranian missile barrage on al-Asad airbase in Iraq", *Military Times*, 28 April 2020; "Who would live and who would die: The inside story of the Iranian attack on Al Asad airbase", CBS News "60 Minutes", 8 August 2021. "An Army intelligence officer gave Major Alan Johnson his assessment of the Iranian threat: 'Their intention is to level this base and we may not survive'".

<sup>184</sup> For example, in March 2020, a rocket attack on U.S. troops killed two U.S. soldiers, prompting further retaliatory airstrikes on Kata'ib Hizbollah in Iraq, which the U.S. government blamed for the fatalities. "US launched airstrikes in Iraq in retaliation for rocket attack, Pentagon confirms", *The Guardian*, 13 March 2020.

<sup>185</sup> Bridgeman and Finucane, "Tit-for-Tat Hostilities in Syria: War Powers and International Implications", op. cit.

<sup>186</sup> Crisis Group Commentary, "Understanding the Risks of U.S.-Iran Escalation Amid the Gaza Conflict", op. cit.

<sup>187</sup> In one particularly intense period of exchanges, in May and June 2017, the U.S. military repeatedly battled fighters forces supporting the Syrian government, carrying out airstrikes on ground forces and shooting down two drones. Finucane, "An Unauthorized War", op. cit.

<sup>188</sup> Although Washington originally dispatched these troops as part of the counter-ISIS campaign, by the end of 2018 they had little to do in that regard. The Pentagon wanted to remove them. In his memoir, Bolton writes "[Secretary of Defense James] Mattis was sceptical of al-Tanf's worth, probably because he was focused on ISIS rather than Iran. Iran was my main concern, and I stayed firm on al-Tanf throughout my time as national security advisor". John Bolton, *The Room Where It Happened* (New York, 2020). In 2021, a former U.S. official familiar with the U.S. military presence recounted that within the Trump administration there were quiet deliberations about trading away the garrison in return for concessions from its backers in Damascus and Moscow, but that Bolton had derailed these deliberations by making maximalist demands such as for the complete removal of all Iranians from Syria. Crisis Group interview, former U.S. official, July 2021. Two current U.S. officials confirmed this account. Crisis Group interviews, July 2022-April 2023.

<sup>189</sup> In justifying the strikes, which occurred in February and June 2021, August 2022, and March 2023, the U.S. stated that "[t]hey were conducted in a manner intended to establish deterrence". "Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution", 25 March 2023. Victoria Nuland, then undersecretary of state for political affairs, similarly referred to the deterrent intent behind prior strikes in a 28 September 2023 con-

from January 2021 to March 2023, there were 83 attacks on U.S. forces in Syria and Iraq and only four rounds of retaliatory U.S. airstrikes, according to testimony by General Mark Milley, who was then chair of the Joint Chiefs of Staff.<sup>190</sup>

Finally, Yemen was another theatre for U.S. operations in the period prior to the 7 October attacks. U.S. counterterrorism operations in Yemen date back to the George W. Bush administration. Then, starting in 2015, the U.S. backed a Saudi-led coalition seeking to wrest control from Houthi rebels who had secured control of Yemen's capital city of Sanaa, and restore the internationally recognised government. The U.S. provided key support for the Saudi-led intervention – including arms and maintenance of attack aircraft, although the U.S. largely eschewed direct military action in this conflict.<sup>191</sup> Members of Congress from both parties increasingly opposed this support, however, especially as reports emerged that the coalition was striking civilian objects in what appeared to be indiscriminate attacks.<sup>192</sup> President Biden moved quickly when he took office to curtail U.S. support for the unpopular war.<sup>193</sup>

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gressional hearing, “Reclaiming Congress’s Article I Powers: Counterterrorism AUMF Reform”, House Foreign Affairs Committee, 28 September 2023.

<sup>190</sup> “Top US military officer warns of arms race in Western Pacific”, Voice of America, 28 March 2023.

<sup>191</sup> Crisis Group United States Report N°3, *Ending the Yemen Quagmire: Lessons for Washington from Four Years of War*, 15 April 2019. The sole publicised exception was an October 2016 strike on a Houthi radar facility in response to alleged missile launches at a U.S. warship. “Letter to Congressional Leaders on War Powers Resolution Report for Yemen”, White House, 14 October 2016.

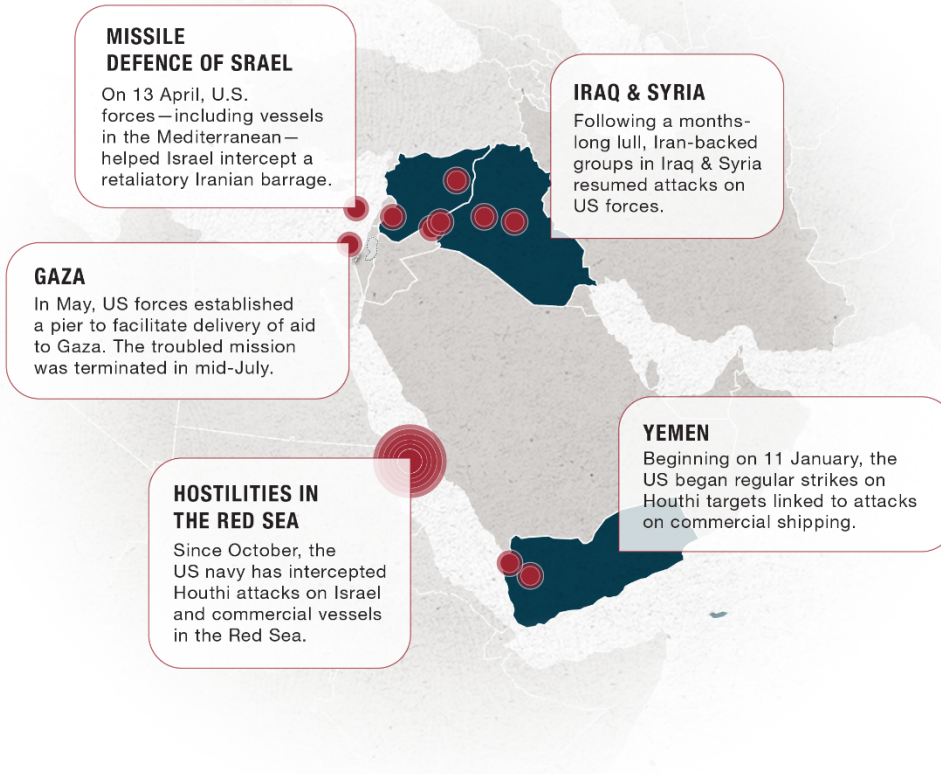
<sup>192</sup> When the mood in Washington soured on Riyadh following the killing of U.S. resident Jamal al-Khashoggi at a Saudi consular facility, a bipartisan majority in both houses acted within the War Powers Resolution framework to pass a bill that would have required the U.S. to step back altogether; President Trump vetoed the proposed legislation before it could acquire the force of law, however. See Crisis Group Report, *Ending the Yemen Quagmire*, op cit.

<sup>193</sup> In early February 2021, he announced “this war has to end. And to underscore our commitment, we’re ending all American support for offensive operations in the war in Yemen, including relevant arms sales”. “Biden announces end to US support for Saudi-led offensive in Yemen”, *The Guardian*, 4 February 2021. In practice, “relevant arms sales” included weapons such as air-delivered, precision-guided munitions, which Saudi Arabia had repeatedly used in attacks on civilians. Crisis Group interview, June 2021. See also “Yemen: US-Made Bombs Used in Unlawful Airstrikes”, Human Rights Watch, 8 December 2016. President Obama had previously paused the transfer of precision-guided munitions at the end of his administration after Saudi Arabia used them to attack a funeral in Sanaa, killing over 100 civilians. “U.S. to halt some arms sales to Saudi, citing deaths in Yemen campaign”, Reuters, 13 December 2016.

**Appendix D: The Biden Administration's Post-7 October Middle East Conflicts**

■ Theatres of Conflict

● Incidents post-7 October 2023



## Appendix E: About the International Crisis Group

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The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 120 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries or regions at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international, regional and national decision-takers. Crisis Group also publishes *CrisisWatch*, a monthly early-warning bulletin, providing a succinct regular update on the state of play in up to 80 situations of conflict or potential conflict around the world.

Crisis Group's reports are distributed widely by email and made available simultaneously on its website, [www.crisisgroup.org](http://www.crisisgroup.org). Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board of Trustees – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policymakers around the world. Crisis Group is co-chaired by President & CEO of the Fiore Group and Founder of the Radcliffe Foundation, Frank Giustra, as well as by former Foreign Minister of Argentina and Chef de Cabinet to the United Nations Secretary-General, Susana Malcorra.

Comfort Ero was appointed Crisis Group's President & CEO in December 2021. She first joined Crisis Group as West Africa Project Director in 2001 and later rose to become Africa Program Director in 2011 and then Interim Vice President. In between her two tenures at Crisis Group, she worked for the International Centre for Transitional Justice and the Special Representative of the UN Secretary-General in Liberia.

Crisis Group's international headquarters is in Brussels, and the organisation has offices in seven other locations: Bogotá, Dakar, Istanbul, Nairobi, London, New York, and Washington, DC. It has presences in the following locations: Abuja, Addis Ababa, Bahrain, Baku, Bangkok, Beirut, Caracas, Gaza City, Guatemala City, Jerusalem, Johannesburg, Juba, Kabul, Kyiv, Manila, Mexico City, Moscow, Seoul, Tbilisi, Toronto, Tripoli, Tunis, and Yangon.

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**July 2024**

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**Appendix F: Reports and Briefings on the United States since 2021**

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**Special Reports and Briefings**

*Ten Challenges for the UN in 2021-2022*, Special Briefing N°6, 13 September 2021.

*7 Priorities for the G7: Managing the Global Fallout of Russia's War on Ukraine*, Special Briefing N°7, 22 June 2022.

*Ten Challenges for the UN in 2022-2023*, Special Briefing N°8, 14 September 2022.

*Seven Priorities for Preserving the OSCE in a Time of War*, Special Briefing N°9, 29 November 2022.

*Seven Priorities for the G7 in 2023*, Special Briefing N°10, 15 May 2023.

*Ten Challenges for the UN in 2023-2024*, Crisis Group Special Briefing N°11, 14 September 2023.

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**United States**

*Nineteen Conflict Prevention Tips for the Biden Administration*, United States Briefing N°2, 28 January 2021 (also available in Arabic).

*Overkill: Reforming the Legal Basis for the U.S. War on Terror*, United States Report N°5, 17 September 2021.

*Stop Fighting Blind: Better Use-of-Force Oversight in the U.S. Congress*, United States Report N°6, 26 October 2022.

*Out of the Box: How to Rebalance U.S. Somalia Policy*, United States Report N°7, 27 June 2023.

*Sanctions, Peacemaking and Reform: Recommendations for U.S. Policymakers*, United States Report N°8, 28 August 2023.

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## Appendix G: International Crisis Group Board of Trustees

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