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Defense Primer: Legal Authorities for the Use of Military Forces

By the Framers' apparent design, to keep the nation's "purse" and the "sword" in separate hands and in other ways hinder the nation's embroilment in unnecessary wars, the Constitution divides war powers between Congress and the President. Congress, under Article I, Section 8, is empowered to declare war, provide for and regulate the Armed Forces, and issue letters of marque and reprisal, as well as to call forth the militia to suppress an insurrection, repel an invasion, or "execute the Laws of the Union." Under Article II, the President, as the Commander in Chief, has the responsibility to direct the Armed Forces as they conduct hostilities, put down insurrections, or execute the law when constitutionally authorized to do so.

The extent to which the President has independent authority under the Constitution, without explicit statutory support, to use the military for purposes other than to repel a sudden attack is the subject of long-standing debate. At the same time, efforts in Congress to exercise its constitutional war powers in some way that is perceived to constrain military operations have met with objections that such actions violate the constitutional separation of powers.

Overview

Congress has enacted 11 separate formal declarations of war against foreign nations in five different wars, each time preceded by a presidential request either in writing or in person before a joint session of Congress.

Congress has also enacted authorizations for the use of force rather than formal declarations of war. Such measures have generally authorized military force against either a named country or unnamed hostile nations in a given region. In most cases, the President has requested the authority; Congress has sometimes given the President less than what he requested. Congress has also authorized the President to use the military forces or the militia domestically to put down insurrections or execute civilian law when certain criteria are met. As noted in CRS Report R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (2018) and CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2014), Congress has provided approximately 50 statutory authorizations to use the military forces for foreign or domestic purposes—not including formal declarations of war.

As for the use of such authority, CRS Report R42738, *Instances of Use of United States Armed Forces Abroad, 1798-2023* (2023) lists hundreds of instances of U.S. uses of force abroad, observing they reflect varying degrees of intensity and longevity. It notes that most major uses of military force abroad—of the type that might be classified as wars or armed conflicts under international law—historically had been authorized by Congress. The end of World War II appears to have heralded a change in this regard. For example, President Truman sent troops to defend South Korea in 1950 under his own authority and a UN Security Council resolution, but without specific authority from Congress.

War Powers Resolution

Concern that too much of the war powers had accreted to the President while Congress's own authority had eroded led to the 1973 enactment of the War Powers Resolution (WPR; P.L. 93-148) over President Nixon's veto. The WPR asserts that the President has the authority to commit U.S. troops to hostilities in only three sets of circumstances.

> WPR Section 2(c) provides that the President's powers to introduce U.S. Armed Forces into situations of hostilities or imminent hostilities are exercised only pursuant to—
>
> (1) a declaration of war,
>
> (2) specific statutory authorization, or
>
> (3) a national emergency created by attack upon the United States, its territories or possessions, or its Armed Forces.

The WPR also attempts to circumscribe implied sources of authority.

> WPR Section 8 provides that the authority to introduce Armed Forces is not to be inferred from any provision of law or treaty unless such law, or legislation implementing such treaty—
>
> (a) specifically authorizes the introduction of Armed Forces into hostilities or potential hostilities, and
>
> (b) states that it is intended to constitute specific statutory authorization within the meaning of the WPR.

Presidents have taken a broader view of the Commander in Chief power to use military force abroad. They have variously asserted as sources of authority United Nations or NATO decisions involving military intervention, appropriations measures, and other statutes that do not specifically cite the WPR. Additionally, they have relied on the Commander in Chief power itself and the President's foreign affairs authority under Article II of the Constitution.

The executive branch has also occasionally attached significance to the failure of Congress to pass measures introduced to prevent or end military operations overseas. It has also interpreted some military uses of force to fall below the threshold of "hostilities" within the meaning of the WPR.

Beginning in 2018, Congress has required the President to report on the legal and policy frameworks for the United States' use of military force and related national security operations.

Use of Military Forces to Execute Civilian Law

Under the Constitution, states retain the primary responsibility and authority to provide for civil order and the protection of their citizens' lives and property. The federal government is responsible for protecting the states against invasion and insurrection, and, if the state legislature (or the governor, if the legislature cannot be convened) requests it, protection against "domestic Violence." While Congress is also empowered to authorize the militia to be called forth to execute federal law, historical precedent suggests that such use was meant to be rare.

The Insurrection Act

Soon after Congress was first assembled under the Constitution, it authorized the President to call out the militia, initially to protect the frontier against "hostile incursions of the Indians," and subsequently in cases of invasion, insurrection, or obstruction of the laws. Insurrections against state governments could be put down under the act only if the state legislature applied for such assistance. These provisions were quickly extended to allow for the employment of the Armed Forces in domestic circumstances, where the law already provided the militia could be employed. After the Civil War, Congress added a new provision for the use of federal military forces to protect civil rights.

The Insurrection Act has been invoked on dozens of occasions through U.S. history, although its use since the end of the 1960s civil rights disturbances has become exceedingly rare. Its last invocation appears to have occurred in 1992, when the acquittal of police officers on charges of beating motorist Rodney King sparked rioting in Los Angeles. Congress amended the statute in 2006 after Hurricane Katrina raised concerns that the statutory requirements impeded the military's ability to render effective assistance amid the perceived breakdown of civil law and order, but repealed that amendment the following year after state governors objected to it.

The Posse Comitatus Act

The Posse Comitatus Act (PCA) outlaws the willful use of any part of the Armed Forces to execute the law unless expressly authorized by the Constitution or an act of Congress.

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, Navy, Marine Corps, Air Force, and Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.
>
> 18 U.S.C. § 1385 (as amended)

The express statutory exceptions include legislation that allows the President to use military force to suppress insurrection or to enforce federal authority, and laws that permit the Department of Defense to provide federal, state, and local police with information, equipment, and personnel.

Case law indicates that "execution of the law" in violation of the PCA occurs (1) when civilian law enforcement officials make "direct active use" of military investigators; (2) when the use of the military "pervades the activities" of the civilian officials; or (3) when the military is used to subject "citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature." Courts have held that the PCA is not violated when the Armed Forces conduct activities for a military purpose and it does not apply to the National Guard, unless it is employed in federal service.

Relevant Statutes

50 U.S.C. §§ 1541-1549

10 U.S.C. §§ 251-255, §§ 271-284, § 12406

18 U.S.C. § 1385

CRS Products

CRS Report R42699, *The War Powers Resolution: Concepts and Practice*, by Matthew C. Weed (2019).

CRS In Focus IF13134, *Understanding the War Powers Resolution*, by Matthew C. Weed (2025).

CRS Report R42738, *Instances of Use of United States Armed Forces Abroad, 1798-2023*, by Barbara Salazar Torreon and Sofia Plagakis (2023).

CRS Report R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, by Jennifer K. Elsea (2018).

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