

March 7, 2024

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

RE: Ensuring Compliance with the War Powers Resolution of 1973 in Connection with U.S. Military Action against the Houthis in the Red Sea and Yemen

Dear President Biden:



National Office  
125 Broad Street, 18th Floor  
New York, NY 10004

Executive Director  
Anthony D. Romero

The American Civil Liberties Union expresses our profound concern that, within the next week, your administration will be in violation of the War Power Resolution of 1973 through the continued use of military force without congressional authorization against the Houthis in the Red Sea and Yemen.

The ACLU does not take positions on the political decision to use force or go to war abroad, but for more than 50 years we have been steadfast on the importance of our system of checks and balances in restraining presidential war powers—regardless of which party holds power.<sup>1</sup> From Vietnam to both Iraq wars to the use of force in Libya and elsewhere, we have urged strict presidential compliance with (i) the Constitution,<sup>2</sup> which requires Congress alone to make the ultimate decision to go to war and use force except

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<sup>1</sup> See, e.g., ACLU Says Military Action in Kosovo Violates Constitution and War Powers Act (Apr. 28, 1999), <https://www.aclu.org/press-releases/aclu-says-military-action-kosovo-violates-constitution-and-war-powers-act>; Letter to Congressional Leadership on Respecting the Limits of [2001] Military Force Authorization, <https://www.aclu.org/letter/letter-congressional-leadership-respecting-limits-military-force-authorization> (Feb. 7, 2002); ACLU Says Military Action in Iraq Without Congressional Approval Would Be Unconstitutional (Sept. 13, 2002), <https://www.aclu.org/press-releases/aclu-says-military-action-iraq-without-congressional-approval-would-be>; ACLU Asks Congress to Debate and Vote on President's Use of Force in Libya (Mar. 25, 2011), <https://www.aclu.org/press-releases/aclu-asks-congress-debate-and-vote-presidents-use-force-libya>; Letter to President Obama Regarding Congressional Approval Before Using Military Force in Syria (Aug. 30, 2013), <https://www.aclu.org/legal-document/letter-president-obama-regarding-congressional-approval-using-military-force-syria>; Trump's Airstrikes On Syria Are Illegal Without Congressional Authorization (Apr. 13, 2018), <https://www.aclu.org/press-releases/aclu-trumps-airstrikes-syria-are-illegal-without-congressional-authorization>.

<sup>2</sup> U.S. Const. Arts. I & II.

to repel a sudden attack or in a genuine emergency (and then only for a limited period); and (ii) the War Powers Resolution, which Congress intended to reflect the constitutional allocation of powers.<sup>3</sup>

As president, you have commendably acknowledged, and sought to correct, some of the grave mistakes made by presidential administrations of both parties over the past 23 years when it comes to expansive and unilateral U.S. military action around the globe.<sup>4</sup> But news accounts indicate that your administration is poised to repeat some of them, with respect to ongoing military operations in the Red Sea and Yemen. In particular, citing a “senior administration official,” the *New York Times* reported that your administration is deliberating reliance on incorrect legal reasoning and controversial precedents to avoid its obligations under the War Powers Resolution.<sup>5</sup> But such a decision would unlawfully sideline Congress’ Article I authority. To continue military hostilities against the Houthis without congressional authorization after March 12 would violate the War Powers Resolution, defy the proper balance of powers between the branches of government, and risk flouting the constitutional and democratic structure that must properly govern the use of U.S. force abroad.

If checks and balances are to have meaning, they need to robustly apply to the decision to go to war—one of the most momentous decisions our nation can make. As the reportedly contested nature of the administration’s deliberations makes clear, a decision to continue using military force against the Houthis is critical precisely because it strikes at the very heart of the Constitution’s fundamental principle of separation of powers. That principle undergirds our democratic system of government. The framers well understood the danger of combining powers into the hands of a single person who is given command of the armed forces. In order to prevent such an accumulation in times of war or emergency, the framers split the war powers between the Executive and Legislative branches, giving only the Congress the power to declare war, i.e., make the decision whether to initiate hostilities, while putting the armed forces under the command of the president. Thus, the separation of powers requires a congressional vote, by majority in both houses and informed by public debate, to ensure that life and death decisions are sound, broadly democratic, and accountable to the American people.

For those reasons, Congress passed the War Powers Resolution (WPR), in the wake of this country’s unconstitutional and disastrous role in the war in Vietnam and Southeast Asia. The principal innovation of the WPR is that Congress recognized the president’s limited Article II power to respond to an emergency, while ensuring that, after a short, specified period of notification and consultation, Congress must authorize uses of military

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<sup>3</sup> Pub. L. No. 93-148, 87 Stat. 555 (1973).

<sup>4</sup> See, e.g., Joseph R. Biden, Jr., *Why America Must Lead Again*, Foreign Affairs (Mar.–Apr. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>.

<sup>5</sup> Charlie Savage, *Biden Lawyers Wrestle With Lack of Congressional Blessing for Houthi Conflict*, N.Y. Times (Feb. 22, 2024), <https://www.nytimes.com/2024/02/22/us/politics/biden-congress-houthi-conflict.html>.

force that are likely to become more lasting in nature—and the president must end the use of force if Congress does not specifically authorize it.

Significantly, this means that under the WPR, a congressional failure to act in the wake of a WPR notification does not clear the field for the Executive but, instead, reverts authority for a more extensive use of force to Congress. The executive does not have a license to ignore Congress, or its legal obligations under the WPR.

At your direction, since at least January 12, the United States has been using significant military force in against the Houthis. Your administration reported those initial military actions to Congress as taken “in the exercise of the United States’ inherent right of self-defense.”<sup>6</sup> Since then, the military has engaged in an ongoing operation that includes dozens of strikes against Houthi targets. Under the WPR’s 60-day clock, absent congressional authorization, your administration must end these military operations by March 12.

The *Times* reported that, per a senior administration official, “the administration is developing a theory for why, if current trends continue, it has leeway to say that the [WPR] clock does not apply.” The official gave three examples, none of which is a permissible interpretation of WPR obligations.

First, it is simply not lawful or credible for the Executive Branch to unilaterally determine that the WPR does not apply when the president authorizes strikes in “self-defense” where “the Navy was already in the Red Sea before hostilities arose,” and was not therefore “introduced” into hostilities for WPR purposes. Congress has explicitly stated that the reach of the WPR is intended to be broad and has never accepted such a narrow view of “introduction” into “hostilities.”<sup>7</sup> Indeed, U.S. military personnel are deployed in multiple parts of the globe during peacetime for multiple reasons and their mere presence cannot be invoked as an end-run around the WPR and the constitutional separation of powers. As your administration reported to Congress, under the WPR, in June 2023, the U.S. has military deployments in Afghanistan, Iraq, Syria, Yemen, Saudi Arabia, Jordan, Lebanon,

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<sup>6</sup> Letter from President Joseph R. Biden Jr., to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution (Public Law 93-148) (Jan. 12, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/01/12/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution-public-law-93-148-10>.

<sup>7</sup> H.R. Rep. No. 93-547, at 7 (1973), *available at* <https://www.fordlibrarymuseum.gov/library/document/0019/4520942.pdf> (stating that “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.”); *see also*, Brian Finucane, Just Security (Jan. 8, 2024), <https://www.justsecurity.org/91069/regional-conflict-in-the-middle-east-and-the-limitations-of-the-war-powers-resolution> (citing to Senate Foreign Relations Committee report rejecting Reagan administration argument that a “hostile situation” was not indicated when Marines “only returned” fire, “acted only in self-defense,” remained in one location, and were performing “a mission of . . . presence”).

Turkey, Somalia, Kenya, Djibouti, Niger, Cuba, and the Philippines.<sup>8</sup> An argument based on such a cramped reading of the WPR could exempt those regions from the strictures of the WPR and would turn both the Resolution and the separation of powers principles that animate it on their heads.

Second, your administration appears to be considering an argument that U.S. military action in international waters, with occasional entry into Yemeni airspace or waters for “intermittent” strikes, does not constitute “hostilities” under the WPR. Yet at the same time, your administration has made clear that all of its strikes against Houthi targets have been part of the same military response and campaign. Moreover, narrowly and unilaterally interpreting “hostilities” in this way is again not credible or consistent with the WPR—the unpredictable and potentially uncabined spread of a U.S. involvement in a foreign conflict is precisely what the WPR was intended to prevent.

Third, if your administration is in fact contemplating pointing to past administrations’ precedents that either violated or pushed the limits of the WPR through creative but unlawful legal interpretations, it would only repeat past mistakes. For example, your administration should not rely on the 2011 precedent of U.S. use of force in Libya without congressional authorization. That unilateral presidential determination was based on another incorrect legal analysis that determined that the United States was not engaged in “hostilities” because the use of U.S. air power was in support of multilateral allies, under the terms of a U.N. Security Council resolution, and without U.S. ground troop involvement. But the decision to sideline Congress on that basis was wrong, and it conflicted with legal advice from the Departments of Defense and Justice that this conduct did in fact constitute “hostilities” for WPR purposes.<sup>9</sup>

Finally, we urge you to reject out of hand the potential invocation of two congressional authorizations for use of force, from 2001 and 2002, to the current conflict with the Houthis. Simply put, neither one of those authorities plausibly represents congressional approval of use of force against the Houthis. Successive administrations have stretched the 2001 AUMF far beyond its original purpose of authorizing force against al-Qaeda and the Taliban, including to justify strikes against ISIS, a group that did not exist at the time of enactment of the 2001 AUMF. They have also relied on the 2002 Iraq War AUMF to justify lethal force and detention far beyond Congress’s original purpose of authorizing force against the Saddam Hussein regime in Iraq. Your administration has rightly supported repeal of the 2002 AUMF<sup>10</sup> and should similarly support repeal of the 2001 AUMF, and not further an undemocratic and unjustifiable expansion of them.

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<sup>8</sup> Letter from President Joseph R. Biden Jr., to the Speaker of the House and President pro tempore of the Senate Consistent on War Powers Report (June 8, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/08/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-on-war-powers-report>.

<sup>9</sup> Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. Times (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

<sup>10</sup> Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy (Mar. 16, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/03/S316-SAP.pdf>.

When you committed to “end the forever war,”<sup>11</sup> the American people understood it as not only a promise to wind down past presidents’ unilateral and unauthorized uses of force, but a commitment of your own to avoid the same mistakes. Your administration’s actions to abide by the separation of powers and the War Powers Resolution in good faith in light of the conflict against the Houthis will be one of the most consequential decisions of your presidency, and its implications will reverberate as precedent for future presidents, as well. The ACLU urges you to comply with the War Powers Resolution and the Constitution and refrain from further use of force unless Congress determines to authorize it.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Romero", with a stylized underline.

Anthony D. Romero  
Executive Director

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<sup>11</sup> President Joseph R. Biden Jr., Remarks on the End of the War in Afghanistan (Aug. 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan>.