



## War Powers



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### Overview Resources

[Article I, Section 8, Clause 11](#) of the [U.S. Constitution](#) grants Congress the power to declare war. The President, meanwhile, derives the power to direct the military after a Congressional declaration of war from [Article II, Section 2](#), which names the President Commander-in-Chief of the armed forces. These provisions require cooperation between the President and Congress regarding military affairs, with Congress funding or declaring the operation and the President directing it. Nevertheless, throughout the 20<sup>th</sup> and 21<sup>st</sup> centuries, Presidents have often engaged in military operations without express Congressional consent. These operations include the Korean War, the Vietnam War, Operation Desert Storm, the Afghanistan War of 2001 and the Iraq War of 2002.

### Commander in Chief

The questions of whether the President possesses authority to use the military absent a Congressional declaration of war and the scope of such power, if it exists, have proven to be sources of conflict and debate throughout American history. While some scholars believe the Commander-in-Chief Clause confers special powers on the President, others argue that, if the President does have these powers, the Constitution does not provide how far the President may go. These scholars wish to construe the Clause narrowly, claiming that the Founders gave the President the title to preserve civilian supremacy over the military, not to provide additional powers outside of a Congressional authorization or declaration of war.

After the Kennedy, Johnson, and Nixon Administrations had spent nearly a decade committing U.S. troops to Southeast Asia without Congressional approval, Congress responded by passing [the War Powers Resolution](#) in 1973. The War Powers Resolution requires that the President communicate to Congress the committal of troops within 48 hours. Further, the statute requires the President to remove all troops after 60 days if Congress has not granted an extension.

When passed, Congress intended the War Powers Resolution to halt the erosion of Congress's ability to participate in war-making decisions. The terrorist attacks against the World Trade Center on September 11, 2001, however, created new complications for the separation of powers within the war powers sphere. After September 11, the United States Congress passed the [Authorization for Use of Military Force against Terrorists](#) (AUMF). President George W. Bush and his cabinet invaded Afghanistan to root out the Taliban government, which ruled Afghanistan and permitted the Al Qaeda terrorist network to conduct terrorist training within the country's borders. During the conflict, the U.S. military rounded up alleged members of the Taliban and those fighting against U.S. forces. The military then placed these "detainees" at a U.S. base located at Guantanamo Bay, Cuba at the direction of the Bush Administration who designed the plan under the premise that federal court jurisdiction did not reach the base. Consequently, the Bush Administration and military believed that the detainees could not avail themselves of habeas corpus and certain protections guaranteed by the U.S. Constitution.

As the military held many of these prisoners at the base for years without bringing formal charges against them, the prisoners found counsel within the United States to file habeas corpus petitions within U.S. federal courts. A series of cases then came before the U.S. Supreme Court dealing with the constitutionality of the prisoners' detentions at Guantanamo.

In 2004 [Rasul v. Bush](#) became the first case in which the Supreme Court directly discussed the Bush Administration's policies. 542 U.S. 466. The Court in this case held that 28 U.S.C. § 2241 permits federal district courts to hear habeas corpus petitions by aliens held within territory over which the United States exercises "plenary and exclusive jurisdiction." This holding included Guantanamo detainees. The Court then instructed the district courts to hear the petitions.

After the Bush Administration responded to [Rasul](#) by permitting detainees to bring their

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petitions before military tribunals, the Supreme Court again addressed the matter in 2006 when they handed down [Hamdan v. Rumsfeld](#). 548 U.S. 557. The *Hamdan* opinion held that the President lacks constitutional authority under the Commander in Chief Clause to try detainees in military tribunals. The tribunals also violated the [Uniform Code of Military Justice](#) and the [Geneva Conventions](#). Furthermore, the Court rebuked the government's arguments that the [AUMF](#) expanded Presidential authority.

Congress responded by passing [the Detainee Treatment Act](#), which provides that "no court, court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay, Cuba." Lakhdar Boumediene, an Algerian citizen, challenged the constitutionality of this statute in [Boumediene v. Bush](#) (06-1195) in 2008. The Court struck down the Bush Administration's policies for a third time, holding that a Congressional suspension of habeas corpus requires an explicit suspension of the writ and that merely stripping the federal courts of jurisdiction does not actually suspend the writ. The Court also argued that the detainees lacked proper procedural safeguards to ensure a fair trial and the ability to ascertain the nature of their charges.

## Emergency Powers

The Constitution does not expressly grant the President additional powers in times of national emergency. However, many scholars think that the Framers implied these powers because the structural design of the Executive Branch enables it to act faster than the Legislative Branch. Because the Constitution remains silent on the issue, the courts cannot grant the Executive Branch these powers when it tries to wield them. The courts will only recognize a right of the Executive Branch to use emergency powers if Congress has granted such powers to the President.

A claim of emergency powers was at the center of President Abraham Lincoln's suspension of habeas corpus without Congressional approval in 1861. Lincoln claimed that the rebellion created an emergency that permitted him the extraordinary power of unilaterally suspending the writ. With Chief Justice Roger Taney sitting as judge, the Federal District Court of Maryland struck down the suspension in [Ex Parte Merryman](#), although Lincoln ignored the order. 17 F. Cas. 144 (1861).

President Franklin Delano Roosevelt similarly invoked emergency powers when he issued an order directing that all Japanese Americans residing on the West Coast be placed into internment camps during World War II. The U.S. Supreme Court upheld this order in [Korematsu v. United States](#). 323 U.S. 214 (1944).

Harry Truman declared the use of emergency powers when he seized private steel mills that failed to produce steel because of a labor strike in 1952. With the Korean War ongoing, Truman asserted that he could not wage war successfully if the economy failed to provide him with the material resources necessary to keep the troops well-equipped. The U.S. Supreme Court, however, refused to accept that argument in [Youngstown Sheet & Tube Co. v. Sawyer](#), voting 6-3 that neither Commander in Chief powers nor any claimed emergency powers gave the President the authority to unilaterally seize private property without Congressional legislation. 343 U.S. 579.