

EXCLUSIVE

Biden Administration Debates Legality of Arming Ukrainian Resistance

Russia could make the case that the United States is a co-combatant.

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The United States is debating plans to support armed Ukrainian resistance as Russia mounts a massive invasion that U.S. officials believe is aimed at toppling the Ukrainian government, underscoring fears in Washington that Ukraine's military could buckle under an offensive from tens of thousands of Russian soldiers.

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The administration's internal debate, described by three officials and congressional aides, has heated up, with some officials expressing caution that arming Ukrainian resistance could make the United States legally a co-combatant to a wider war with Russia and escalate tensions between the two nuclear powers.

Over the past year, some administration officials have repeatedly warned against military moves that could inadvertently escalate tensions with Moscow. This led U.S. President Joe Biden to temporarily hold up sending U.S. defensive military aid to Ukraine despite buy-ins from other U.S. agencies.

The debate partly centers on the legal basis of a U.S. president's war power authorities and underscores how concerned U.S. national security planners are that Ukraine's government could swiftly fall. A senior U.S. defense official said

Thursday that Russia is “making a move on Kyiv” in an effort to decapitate Ukrainian President Volodymyr Zelensky’s government and install “their own method of governance.”

If this were to happen, some aides on Capitol Hill believe Biden should seek approval from Congress before sending weapons and other military aid to Ukrainian forces. Some international law experts believe that delivering such arms during an active war could allow Russia to make the case that the United States is legally a party to the conflict, triggering an inadvertent escalation between the two nuclear powers.

“It’s going to be a real game of chicken, frankly, about how that goes down,” said Scott Anderson, a former U.S. State Department lawyer who now serves as a visiting fellow at the Brookings Institution, a Washington-based think tank. “How far is Russia willing to push the argument that the United States or Europe are making themselves part of the conflict in arming the Ukrainians?”

Officials and congressional aides described plans to arm a Ukrainian resistance as in the nascent stages, with the Biden administration still discussing how to provide a pipeline for weapons to the resistance if needed. Officials briefed on the matter described an intense back-and-forth debate within the Biden administration’s ranks.

Before Russia began firing missiles and dropping bombs on Ukrainian territory on Thursday, the U.S. Defense Department was examining how to transport weapons into the country, possibly using ground routes. “There are different ways you can help provide support, and we’re exploring those ways in case air transport’s not possible,” the senior U.S. defense official said earlier this week. U.S. Defense Secretary Lloyd Austin has publicly pledged to continue to provide arms support to Ukraine.

Some officials said the National Security Council (NSC) isn’t ruling out U.S. Defense Department plans to arm Ukrainians but rather asking standard questions about how and when the aid would be delivered, what legal authorities the United States could use to do so, and why the Ukrainians might need the weapons. The Biden administration has provided more than \$600 million in defensive military aid to Ukraine since Russia first started a major military buildup in 2021.

Yet skeptics see the rising questions within the U.S. government as part of a pattern. The NSC pushed back on defensive assistance to the Ukrainians over the course of the past year, arguing the move could be perceived as escalatory and only exacerbate tensions with Russia. The administration delayed packages of military aid twice last year—in April and December—before reversing course and ultimately greenlighting both deliveries.

A National Security Council spokesperson, emailing on condition of anonymity to talk about a sensitive policy matter, said the U.S. president's advisors are focused on running "an inclusive and rigorous policy review process," especially in changing security environments. Biden's advisors are focusing on continuing to support the Ukrainian government, the spokesperson said, including by delivering security assistance that has already been authorized.

The United States is "planning for a range of contingencies" for how to provide support to Ukraine's people in the face of a Russian invasion, the person said, including provisions for security, economic, and humanitarian assistance.

Meanwhile, top Ukrainian officials have vowed to fight Russian forces, even after invading units seized Chernobyl nuclear power plant and airfields outside of Kyiv. In an address on Thursday morning, Zelensky said weapons would be issued to any citizen capable of defending the country. (The nation's defense ministry later tweeted that Ukrainian citizens could obtain weapons from the government by displaying a passport.) Earlier this week, Ukrainian Foreign Minister Dmytro Kuleba said Ukraine's plan, if diplomacy failed, was to "to fight for every inch of our land and every city and every village. To fight until we win, of course." In a press conference on Thursday, Ukraine's ambassador to the United States said Russia's initial attacks had left 40 Ukrainian service members dead.

Many Republican lawmakers on Capitol Hill are anticipating a drawn-out conflict should the crisis escalate and want the Biden administration to do more to prepare the Ukrainians to bleed the Russian military if troops attempt to hold large swaths of territory. A legislative package floated by congressional Republicans, dubbed the Never Yielding Europe's Territory (NYET) Act, would create a policy framework for the United States to aid Ukrainian resistance forces against a possible Russian occupation of the country. A senior congressional source who spoke to *Foreign Policy* on the condition of

anonymity said the Ukrainian resistance would likely need stinger missiles, mines, rifles, communications gear, and access to U.S. intelligence feeds to help fend off Russian assaults.

U.S. special operations and the CIA have been working to train up Ukrainian forces since Russia illegally annexed Crimea from Ukraine and fomented separatist movements in eastern Ukraine in 2014, *Yahoo News* reported last month. U.S. military officials are increasingly confident in Ukraine's military capabilities, which have significantly improved since 2014.

"We've been side by side with them in the trenches," said one former U.S. defense official familiar with the effort. "We know who they are, what they are, what they can do, [and] what they're willing to do."

A European official who's seen the training of Ukrainian forces in irregular military tactics firsthand said Russian invading forces that are coming in from Belarus could see enemies popping out of the tree lines and staging ambushes with anti-tank weapons.

"On both sides of the road, there are forests for tens and tens of kilometers," the official, speaking on condition of anonymity to speak candidly about military matters, told *Foreign Policy*. "To put ambushes there is so easy. You are not coming through in that direction."

The Biden administration and its allies in NATO have consistently pledged support for Ukraine and swiftly condemned Russian President Vladimir Putin's decision to recognize two breakaway Ukrainian provinces and dispatch so-called peacekeeping troops there.

While the United States has triggered a first round of sanctions on Russia and warned of more to come, it has also made clear it would stop short of deploying troops to Ukraine—which is not a member of NATO—to defend the government in Kyiv, Ukraine's capital.

U.S. lawmakers have ramped up debates in recent years on whether to curb a president's ability to launch military actions abroad without Congress's prior approval. Supporters of such efforts argue that over the course of several decades, the White House has gradually gained more power to wage war without congressional consent than the U.S. Constitution allows.

On Tuesday, U.S. Reps. Peter DeFazio and Warren Davidson, along with more than 40 other lawmakers, sent a letter to Biden urging him to consult Congress before authorizing any troop deployments to Ukraine. Although no such deployments are planned, the letter served as a signal to the White House to remember it has limited war power authority without congressional consent.

Much of the past war powers debates have hinged on controversial U.S. support for a Saudi-led coalition fighting Iran-backed Houthi rebels in Yemen, including with U.S. munitions and logistical support. Unlike the war in Yemen, however, there is broad bipartisan consensus in Congress for supporting Ukraine in the face of a Russian invasion.

That support isn't unanimous, however. A senior Senate Democratic aide said several offices across bipartisan lines are already considering potential war-power implications of arming a Ukrainian resistance, though they have not moved to draft any formal legislation.

About a dozen Republican senators refused to sign on to the Republican-led NYET Act. That division could preview a debate in Congress on whether to curb the president's ability to deliver more military aid to Ukraine, especially in the event of an all-out Russian invasion or fighting after the Ukrainian government's collapse.

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