



U.S. Department of Justice


Office of Legal Counsel

Office of the Deputy Assistant Attorney General

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**MEMORANDUM FOR DANIEL J. BRYANT
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OFFICE OF LEGISLATIVE AFFAIRS**

From: John C. Yoo 
Deputy Assistant Attorney General

Re: Specter/Harkin Joint Resolution Calling for Congress to Vote on a Resolution for the Use of Force by the United States Armed Forces Against Iraq

This memorandum sets forth the views of the Office of Legal Counsel on a draft joint resolution recently proposed by Senators Arlen Specter and Tom Harkin, regarding the possible use of force by the U.S. Armed Forces against Iraq. The resolution states that Congress should consider and vote on a resolution authorizing the use of force by the United States before force is used against Iraq.

Although the Administration might welcome an expression of Congressional support for any military action the Executive Branch may decide to take against Iraq, such a resolution is unnecessary as a matter of constitutional law. As Chief Executive and Commander in Chief, the President possesses ample authority under the Constitution to direct the use of military force against Iraq. To the extent that the joint resolution suggests that military action against Iraq would be unlawful absent further action by Congress, it relies upon an erroneous interpretation of the Constitution. Moreover, even putting aside any constitutional source of power, statutory authorization for such a military action already exists.

I.

The draft resolution asserts that military actions other than those taken during an emergency must receive specific prior authorization from Congress. The resolution states, correctly, that "Congress has the exclusive authority to declare war under Article I, Section 8 of the United States Constitution." The resolution goes on to state, however, that the President has the power "to take military action in an emergency when Congress does not have time to deliberate and decide on a declaration of war or the equivalent authorization for the use of force." If enacted, this resolution would promote an interpretation of the Constitution that the President's constitutional authority to use force is *limited* to such emergency situations. The resolution asserts that "there is adequate time for the Congress to deliberate and decide on the authorization to initiate military action against Iraq," and that, "if Congress takes no action in the current situation where there is adequate time to deliberate and decide, there will be a significant

further, if not virtually complete, erosion of congressional authority under Article I, Section 8 of the United States Constitution.”

The resolution also notes that, “within the past half century, Presidents have unilaterally initiated military actions in Korea, Vietnam, Grenada, Lebanon, Panama, Somalia and Kosovo.” Finally, the resolution points out that President George H.W. Bush “initially stat[ed] publicly that he did not need congressional action,” but that he “ultimately requested authorization from Congress . . . to use force against Iraq under circumstances similar to the present situation.” The resolution itself does not authorize the use of force against Iraq, but only makes clear that Congress should vote on such a measure before any hostilities begin.

II.

To the extent that the resolution states that the President cannot use military force against Iraq absent specific Congressional authorization, it is mistaken. Under the plain text of the Constitution, the President has the authority to initiate the use of military force to protect the United States. Article II expressly vests in the President, and not in Congress, the full “executive Power” of the United States. U.S. Const. art. II, § 1, cl. 1. Article II also provides that the President “shall be Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2, cl. 1. The Framers understood the Commander in Chief Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. Taken together, these two provisions constitute a substantive grant of broad war power to the President.

In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive – which includes the conduct of warfare and the defense of the nation – unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the “executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1, cl. 1. That sweeping grant vests in the President an unenumerated “executive Power” and contrasts with the specific enumeration of the powers granted to Congress by the Constitution. *See* U.S. Const. art. I, § 1 (vesting in Congress “[a]ll legislative Powers *herein granted*”) (emphasis added). The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress. The textual provisions in Article II, combined with considerations of constitutional structure and the fundamental principles of the separation of powers, forbid Congress from interfering with the President’s exercise of his core constitutionally assigned duties, absent those “exceptions and qualifications . . . expressed” in the Constitution. *Myers v. United States*, 272 U.S. 52, 139 (1926).

There is no expression in the Constitution of any requirement that the President seek authorization from Congress prior to using military force. There is certainly nothing in the text of the Constitution that explicitly requires Congressional or Senate consent before the President may exercise his authority as Chief Executive and Commander in Chief to command U.S. military forces. By contrast, Article II expressly states that the President must obtain the advice and consent of the Senate before entering into treaties or appointing ambassadors. U.S. Const.

art. II, § 2, cl. 2. Similarly, Article I, Section 10 expressly denies *states* the power to “engage” in war without Congressional authorization, except in case of actual invasion or imminent danger. U.S. Const. art. I, § 10, cl. 3. Moreover, founding documents prior to the U.S. Constitution, such as the South Carolina Constitution of 1778, explicitly prohibited the Executive from commencing war or concluding peace without legislative approval. S.C. Const. art. XXVI (1776), *reprinted in* Francis N. Thorpe, ed., 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* at 3247 (1909). The founders of the Constitution thus well knew how to constrain the President’s power to exercise his authority as Commander in Chief to engage U.S. Armed Forces in hostilities, and decided not to do so.

All three branches have recognized the President’s broad constitutional power as the Chief Executive and Commander in Chief to initiate hostilities and to use military force to protect the nation. The Executive Branch, for example, has long interpreted the Commander in Chief power “as extending to the dispatch of armed forces . . . for the purpose of protecting American interests.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941); *see also Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992) (President’s role as Commander in Chief and Chief Executive vests him with constitutional authority to order U.S. forces abroad to further national interests). The Supreme Court has likewise held that a major object of the Commander in Chief Clause is “to vest in the President the supreme command over all the military forces, – such supreme and undivided command as would be necessary to the prosecution of a successful war.” *United States v. Sweeny*, 157 U.S. 281, 284 (1895). As Commander in Chief, the President “is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.” *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

Congress itself recently recognized the President’s constitutional authority to use military force when it enacted Pub. L. No. 107-40 by overwhelming margins shortly after the terrorist attacks of September 11, 2001. That law expressly states that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Moreover, Congress has acquiesced in the unilateral use of force by Presidents during the course of numerous armed conflicts. During the previous Administration, for example, we concluded that Congress had approved of President Clinton’s unilateral decision to use military force in Kosovo, when it enacted Pub. L. No. 106-31, 113 Stat. 57 (May 21, 1999), to provide emergency supplemental appropriations for continued military operations there. *See Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.).

Indeed, Presidents have made clear that they were relying upon their inherent constitutional powers when they have used force in recent conflicts. For example, President George H.W. Bush launched Operation Desert Storm pursuant to his authority as Commander in Chief. *See Letter to Congressional Leaders on the Persian Gulf Conflict*, 1 Pub. Papers of George Bush 52 (1991). In 1992, President Bush ordered the participation of the United States in the enforcement of the southern no-fly zone in Iraq pursuant to his constitutional authority. *See Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions*, 2 Pub. Papers of George Bush 1574, 1575 (1992-93). When President Clinton ordered the 1993, 1996, and 1998 missile strikes against Iraq, he likewise

pointed to his constitutional authority as Commander in Chief and Chief Executive. See *Letter to Congressional Leaders on the Military Strikes Against Iraq*, 2 Pub. Papers of William Jefferson Clinton 2195, 2196 (1998); Letter from President William J. Clinton, to the Honorable Newt Gingrich, Speaker of the House of Representatives at 2 (Sept. 5, 1996); *Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters*, 1 Pub. Papers of William Jefferson Clinton 940 (1993). And, to take a more recent example, when President Clinton directed the extensive and sustained 1999 air campaign in the Former Republic of Yugoslavia, he relied entirely on his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” *Letter to Congressional Leaders Reporting on Airstrikes against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 1 Pub. Papers of William Jefferson Clinton 459 (1999). In none of these interventions did Congress interfere with or regulate the President’s exercise of his Commander-in-Chief powers.

Because the President possesses broad constitutional authority as Chief Executive and Commander in Chief to direct the use of military force against Iraq, Congressional authorization is legally unnecessary. To the extent that the resolution can be construed to state otherwise, it misrepresents the constitutional allocation of war powers between Congress and the President. Congress has the power to “provide for the common Defence,” to “raise and support Armies,” to “provide and maintain a Navy,” and to appropriate funds to support the military, U.S. Const. art. I, §§ 8-9, to be sure, but it is the President who enjoys the constitutional status of Commander in Chief. As such, the President has full constitutional authority to use all of the military resources provided to him by Congress.

Indeed, the proposed resolution itself concedes that, “within the past half century, Presidents have unilaterally initiated military actions in Korea, Vietnam, Grenada, Lebanon, Panama, Somalia and Kosovo.”¹ The resolution also notes that President George H.W. Bush asked for Congressional authorization prior to his use of force against Iraq in 1991, implying that such use of force might not have been lawful but for that authorization. As President Bush noted at the time, however, Congressional authorization, although welcomed by the Administration, was legally unnecessary, because the President possesses full authority to use military force under the Constitution. See *Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq*, 1 Pub. Papers of George Bush 40 (1991) (“my request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch

¹ The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. As the Supreme Court has repeatedly recognized, governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (quoted in *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Moreover, the role of practice is heightened in dealing with issues affecting foreign affairs and national security. As the Supreme Court has noted, “the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases.” *Dames & Moore*, 453 U.S. at 661. In particular, the difficulty the courts experience in addressing “the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive” with respect to foreign affairs and national security makes the judiciary “acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case.” *Id.* at 660-61. Historical practice and the ongoing tradition of Executive Branch constitutional interpretation therefore play an especially important role in this area.

on . . . the President's constitutional authority to use the Armed Forces to defend vital U.S. interests").

The resolution correctly states that the Constitution vests in Congress, and not the President, the power to "declare War." U.S. Const. art. I, § 8, cl. 11. The Constitution nowhere states, however, that Congress has the additional power to "make" or "engage" or "levy" war. By contrast, Article I, Section 10 addresses the power of states to "engage" in war, U.S. Const. art. I, § 10, cl. 3, while Article III describes the offense of treason as the act of "levying war" against the United States, U.S. Const. art. III, § 3, cl. 1. Thus, the constitutional text itself demonstrates that the power to "declare" war was a narrower power than that of engaging, making, or levying war. By placing the power to declare war in Congress, the Constitution did nothing to divest the President of the traditional power of the Commander in Chief and Chief Executive to decide to use force.

The Founders did not contemplate that a declaration of war would be legally necessary for the President to use military force. To the contrary, the Founders were intimately familiar with the extensive British practice of engaging in undeclared wars throughout the preceding century. That is not to say that the power to declare war had no meaning whatsoever at the time of the Founding. Rather, Congress's Article I power to declare a legal state of war, and to notify other nations of that status, once had an important effect under the law of nations. And even today, the power to declare war continues to trigger significant domestic statutory powers, such as those established under the Alien Enemy Act of 1798, 50 U.S.C. § 21, and federal surveillance laws, 50 U.S.C. §§ 1811, 1829, 1844. Declarations of war have significant constitutional ramifications as well. *See* U.S. Const. art. I, § 10, cl. 3 (prohibiting states from "lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War" without Congressional consent only "in time of Peace"); U.S. Const. amend. III (permitting the quartering of soldiers in private homes "in time of war . . . in a manner to be prescribed by law"); U.S. Const. amend. V (permitting criminal trials without grand jury indictment in cases "arising . . . in the Militia, when in actual service in time of War or public danger"). The power to declare war has seldom been used, however. Although Presidents have deployed the U.S. Armed Forces, by conservative estimates, more than a hundred times in our nation's history, Congress has declared war just five times. This long practice of U.S. engagement in military hostilities without a declaration of war demonstrates that the political branches have interpreted the Constitution just as the founders did.

III.

Putting aside the President's authority under the Constitution, no action by Congress is legally necessary to authorize the use of military force against Iraq, because statutory authorization already exists.

On January 14, 1991, shortly before the United States and allied nations began Operation Desert Storm, Congress enacted Pub. L. No. 102-1, the "Authorization for Use of Military Force Against Iraq Resolution." Subsection 2(a) authorizes the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677." U.N. Security Council Resolution 678, in turn, authorizes member states "to use

all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” The other resolutions listed in Pub. L. No. 102-1 relate to Iraq’s military invasion of Kuwait on August 2, 1990 and are identical to the resolutions “recall[ed] and reaffirm[ed]” in Resolution 678.

By authorizing the use of U.S. Armed Forces “pursuant to” Resolution 678, Pub. L. No. 102-1 sanctions not only the employment of the methods approved in that resolution – that is, “all necessary means” – but also the objectives outlined therein – namely, “to uphold and implement . . . *all subsequent relevant* resolutions and to restore international peace and security to the area.” S.C. Res. 678 (emphasis added). Two of the most important “subsequent relevant resolutions” are U.N. Security Council Resolution 687, which requires, *inter alia*, the inspection and destruction of Iraq’s program to develop weapons of mass destruction, and U.N. Security Council Resolution 688, which demands that Iraq halt the repression of its civilian population. Should the President determine that the use of force is necessary to promote the objectives of either resolution, such force would find clear statutory authorization in Pub. L. No. 102-1.

Congress has demonstrated several times that Pub. L. No. 102-1 remains in effect. The same Congress that enacted Pub. L. No. 102-1 expressed its sense that Pub. L. No. 102-1 continues to authorize the use of force even after Iraq’s withdrawal from Kuwait. Specifically, Section 1095 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 contains a congressional finding that Iraq is violating Resolution 687’s requirements relating to its weapons of mass destruction program, and expresses Congress’s sense that “the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1).” Pub. L. No. 102-190, § 1095 (Dec. 5, 1991). Section 1096 of that same Act expresses Congress’s sense that “Iraq’s noncompliance with United Nations Security Resolution 688 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region . . . and [that] the Congress supports the use of all necessary means to achieve the goals of United Nations Security Resolution 688,” which condemns the repression of the Iraqi civilian population, “consistent with all relevant United Nations Security Council Resolutions and . . . Public Law 102-1.” Several years later, in August 1998, Congress enacted a Joint Resolution finding that Iraq “is in material and unacceptable breach of its international obligations,” and “urg[ing]” President Clinton “to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance” with those obligations. Pub. L. No. 105-235 (1998). The preamble to Pub. L. No. 105-235 details numerous instances in which Iraq failed to comply with U.N. inspections of its weapons of mass destruction program and concludes that “Iraq’s continuing weapons of mass destruction programs threaten vital United States interests and international peace and security.” In addition, the Preamble mentions a 1996 incident in which Iraqi troops overran Irbil in Northern Iraq, thereby repressing its civilian population. The finding and recommendation in Pub. L. No. 105-235, together with the reference to “relevant laws,” which would include Pub. L. No. 102-1, reflect strong congressional support for the President’s continuing legal authority to take military action against Iraq to bring it into compliance with its international obligations. Finally, Congress recently amended Pub. L. No. 102-1 to extend the reporting requirements from every 60 days to every 90 days. *See* Pub. L. No. 106-113, Div. B, § 1000(a)(7) (1999). Such an amendment could serve no purpose unless Pub. L. No. 102-1 remained in effect.

The practice of the Executive Branch, in which Congress has acquiesced, further demonstrates that Pub. L. No. 102-1 continues to be in effect and to provide supplemental statutory authority for the President to implement applicable Security Council Resolutions, including Resolutions 678, 687, and 688. Consistent with the reporting requirement in section 3 of Pub. L. No. 102-1, President Bush and his two predecessors have written to Congress at regular intervals to report on the status of efforts to secure Iraqi compliance with the applicable Security Council resolutions. This practice has gone unchallenged by Congress. Moreover, President George H.W. Bush and President Clinton authorized the use of force on several occasions under Pub. L. No. 102-1. For example, in January 1991, shortly after ordering U.S. Armed Forces to commence combat operations against Iraqi forces and military targets in Iraq and Kuwait, President George H.W. Bush reported to Congress that such operations were “contemplated by” Pub. L. No. 102-1. *See Letter to Congressional Leaders on the Persian Gulf Conflict*, 1 Pub. Papers of George Bush 52 (1991). Shortly thereafter, President Bush reported to Congress that he had ordered the 1992 participation of the United States in the enforcement of the southern no-fly zone in Iraq “consistent with” Pub. L. No. 102-1. *See Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nations Security Council Resolutions*, 2 Pub. Papers of George Bush 1574, 1575 (1992-93). In September 1996, President Clinton reported to Congress that he had ordered U.S. cruise missile strikes “consonant with” Pub. L. No. 102-1 and section 1096 of the 1992-93 Defense Authorization Act. *See Letter from President William J. Clinton, to the Honorable Newt Gingrich, Speaker of the House of Representatives 1* (Sept. 5, 1996). And in 1998, President Clinton directed missile and aircraft strikes against Iraq “under” Pub. L. No. 102-1. *See Letter to Congressional Leaders on the Military Strikes Against Iraq*, 2 Pub. Papers of William Jefferson Clinton 2195, 2196 (1998). Congress has acquiesced in each of these uses of force.

Military action against Iraq might also be authorized, under certain circumstances, pursuant to Pub. L. No. 107-40, the “Authorization for Use of Military Force” enacted shortly after the terrorist attacks of September 11, 2001. Pub. L. No. 107-40 authorizes the President to use “all necessary and appropriate force” against those nations, organizations or persons whom “he determines planned, authorized, committed, or aided the [September 11th] terrorist attacks . . . 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” (emphasis added). Were the President to order military action against Iraq because, in his judgment, Iraq provided assistance to the perpetrators of the September 11th attacks, he also would be acting with prior Congressional authorization.

IV.

In sum, the President possesses broad constitutional authority as Chief Executive and Commander in Chief to direct the use of military force against Iraq. Accordingly, although the Administration might welcome an expression of Congressional support for such military action, the resolution incorrectly suggests that statutory authorization is constitutionally required. In any event, statutory authorization already exists in current law to support future military action against Iraq.