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U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, DC 20530

October 21, 2002

**MEMORANDUM FOR DANIEL J. BRYANT**
**ASSISTANT ATTORNEY GENERAL**
**OFFICE OF LEGISLATIVE AFFAIRS**

From: John C. Yoo [Signature of John C. Yoo]
Deputy Assistant Attorney General

Re: Authorization for Use of Military Force Against Iraq Resolution of 2002

This memorandum confirms the views of the Office of Legal Counsel, expressed to you last week, on H. J. Res. 114, the Authorization for Use of Military Force Against Iraq Resolution of 2002. This resolution authorizes the President to use the United States Armed Forces, "as he determines to be necessary and appropriate," either to "defend the national security of the United States against the continuing threat posed by Iraq," or to "enforce all relevant United Nations Security Council resolutions regarding Iraq." H. J. Res. 114, § 3(a).

We have no constitutional objection to Congress expressing its support for the use of military force against Iraq.[1] Indeed, the Office of Legal Counsel was an active participant in the drafting of and negotiations over H. J. Res. 114. We have long maintained, however, that resolutions such as H. J. Res. 114 are legally unnecessary. *See, e.g., Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 175-76 (1994) ("the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress"); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 335 (1995) ("the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances"). As Chief Executive and Commander in Chief of the Armed Forces of the United States, the President possesses ample authority under the Constitution to direct the use of military force in defense of the national security of the United States, as we explain in Section I of this memorandum, and as H. J. Res. 114 itself acknowledges when it states that "the President has authority under the Constitution to take

[1] Congress has expressed its support for the use of military force on a number of occasions throughout U.S. history, including, most recently, in response to the attacks of September 11, 2001. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* Act of May 28, 1798, 1 Stat. 561 (Quasi War with France); Act of Feb. 6, 1802, 2 Stat. 129 (First Barbary War); Act of Jan. 15, 1811, 3 Stat. 471 (East Florida); Act of Feb. 12, 1813, 3 Stat. 472 (West Florida); Act of Mar. 3, 1815, 3 Stat. 230 (Second Barbary War); Act of Mar. 3, 1819, 3 Stat. 510 (African Slave Trade); Joint Resolution of June 2, 1858, 11 Stat. 370 (Paraguay); Joint Resolution of Apr. 20, 1898, 30 Stat. 738 (Spanish-American War); Joint Resolution of Apr. 22, 1914, 38 Stat. 770 (Mexico); Joint Resolution of Jan. 29, 1955, 69 Stat. 7 (Formosa); Joint Resolution of Mar. 9, 1957, 71 Stat. 5 (codified at 22 U.S.C. § 1962) (Middle East); Joint Resolution of Aug. 10, 1964, 78 Stat. 384 (Gulf of Tonkin); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

action in order to deter and prevent acts of international terrorism against the United States." Moreover, as we detail in Section II, Congress has previously authorized the use of force against Iraq.

It has been our understanding that the President sought this resolution not out of need for legal authority, but in order to demonstrate, to the United Nations and to the current regime in Iraq, that the American people, as represented by both their President and their representatives in both Houses of Congress, fully support taking all action necessary and appropriate to enforce all relevant United Nations Security Council resolutions involving Iraq and to defend the United States against Iraq, including the use of force if necessary. We recognize that, notwithstanding the President's pre-existing constitutional and statutory authorities to use force, there are significant non-legal reasons for the President and Congress jointly to state their renewed commitment, particularly in light of the terrorist attacks of September 11, 2001, to use force if necessary to deal with the threat posed by Iraq to the national security of the United States and to international peace and security in the Persian Gulf region.

Accordingly, last week we recommended to you and to the White House that the President take steps to ensure that his decision to approve H. J. Res. 114 would not be construed in the future as an indication that this resolution was legally necessary. Specifically, we recommended that the President's signing statement include an explicit reservation stating that his signing of the resolution did not reflect any change in his position, and the long-standing position of the Executive Branch, that the President already possesses ample legal authority under the Constitution to order the use of force against Iraq. We further recommended that the President's signing statement expressly state that his signing of H. J. Res. 114 also did not change the established position of the Executive Branch that the War Powers Resolution cannot, consistent with the Constitution, restrict the President's authority as Chief Executive and Commander in Chief to order the use of military force. *See, e.g., 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, and my signing [Pub. L. No. 102-1] does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution").

I.

As we have explained on numerous occasions, the President has authority under the Constitution to initiate the use of military force to defend the national security of 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 – is vested in the President unless expressly assigned in the Constitution to Congress. 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. Indeed, 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) (quotations omitted).

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 Congress to 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). *See also* Articles of Confederation, art. IX, § 6, 1 Stat. 4, 8 (1778) ("The United States, in Congress assembled, shall never engage in a war . . . unless nine States assent to the same."). The framers 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