AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

*Jay S. Bybee*, **Authority of the President to Use Military Force against Iraq** (2002)[[1]](#footnote-1)

*In 1991, the United States under President H.W. Bush led an international coalition of forces that compelled Iraq to withdraw its invasion force from the neighboring country of Kuwait. That military effort followed the adoption of a United Nations Security Council resolution authorizing member states to use “all necessary means” to resolve the conflict in Kuwait and a congressional resolution authorizing the use of force against Iraq. That military operation liberated Kuwait within weeks of its start but did not attempt to dislodge Saddam Hussein from power in Iraq. Nonetheless, Iraq remained under a regime of United Nations sanctions with a goal of ending Iraq’s covert effort to develop weapons of mass destruction, resulting continued American military supervision of Iraq and repeated bombings of the country. One missile strike was in reprisal for an attempt by Iraqi agents to assassinate former-president Bush during a visit to Kuwait in 1993.*

*On September 11, 2001, terrorists hijacked four civilian passenger planes and flew two of them into the World Trade Center in New York City and the Pentagon in Washington, D.C. (the fourth crashed in Pennsylvania as a result of passenger efforts to retake control of the aircraft). The terrorists were quickly linked to the al-Qaeda terrorist group based in Afghanistan. A week later, Congress authorized the use of military force against all those “nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” In October, the United States under President George W. Bush (the son of the president during the 1991 Iraq war) led a military operation in Afghanistan that toppled the Taliban regime and disrupted al-Qaeda operations in the country.*

*In 2002, the George W. Bush administration began to publicly increase pressure for the escalation in the use of force in Iraq given conflicts over UN weapons inspections in the country and suspicion that Iraq’s weapon development program would shortly be able to produce workable weapons of mass destruction. In October 2002, Congress passed a new authorization for the use of force against Iraq, citing the Iraqi weapons program and its willingness to harbor international terrorists among other concerns. In November, the United Nations Security Council adopted a resolution giving Iraq a “final opportunity” to fully comply with previous disarmament mandates. In March 2003, the United States announced that diplomatic efforts had failed and that military force would be necessary to disarm Iraq. Shortly thereafter, air and ground forces launched a full assault on Iraq, toppling the Hussein regime. Subsequent investigation discovered that the Iraq weapons development program had been severely debilitated over the course of the prior decade and that the Iraqi government did not view al-Qaeda as a potential ally.*

*In October 2002, Assistant Attorney General Jay Bybee in the Office of Legal Counsel produced an opinion examining the president’s authority to use force in Iraq under domestic and international law. The opinion concluded that the president had ample authority launch an offensive, even without a new congressional authorization for the use of force. The opinion claimed a broad unilateral authority for the president to use force “to protect the national security interests of the United States.”*

. . . . We conclude that the President possesses constitutional authority to order the use of force against Iraq to protect our national interests. This independent authority is supplemented by congressional authorization in the form of the Authorization for the Use of Public Force Against Iraq Resolution (1991), which supports the use of force to secure Iraq’s compliance with its international obligations following the liberation of Kuwait, and the Authorization for the Use of Military Force (2001), which supports military action against Iraq if the President determines Iraq provided assistance to the perpetrators of the terrorist attacks of September 11, 2001. In addition, using force against Iraq would be consistent with international law, because it would be authorized by the United Nations Security Council, or would be justified as anticipatory self-defense.

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We have consistently advised that the Constitution grants the President unilateral power to take military action to protect the national security interests of the United States. Under Article II, Section 2, the President is the “Commander in Chief of the Army and Navy of the United States.” The Constitution also gives the President exclusive powers as the Chief Executive and the “sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Export Corp*. (1936). . . . Although Article I vests in Congress the power to “raise and support Armies,” “provide and maintain a Navy,” and to appropriate funds to support the military resources to the President as Commander in Chief – as well as the power to issue formal declarations of war. Article III vests in the President, as Chief Executive and Commander in Chief, the constitutional authority to use such military forces as are provided to him by Congress to engage in military hostilities to protect the national interest of the United States. The Constitution nowhere requires for the exercise of such authority the consent of Congress. Cf., U.S. Const., Art. I, Sec. 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”); Articles of Confederation of 1778, Art. IX, Sec. 6 (“The United States, in Congress assembled, shall never engage in a war . . . unless nine States assent to the same. . . .”). Thus, as then-Attorney General Robert Jackson explained more than sixty years ago, the President’s authority as Commander in Chief “has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting . . . American interests.”

Presidents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief and their constitutional authority to conduct U.S. foreign relations. In fact, the establishment of a large peacetime military force in the twentieth century has given rise to numerous unilateral exercises of military force grounded solely in the President’s constitutional authority. For example, the deployment of U.S. troops in the Korean War by President Truman was undertaken without congressional authorization. More recently, when President Clinton directed the extensive and sustained 1999 air campaign in the Former Republic of Yugoslavia, he relied solely on his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” As we recently explained, “[t]he role of practice” in determining the proper allocation of authority between the political branches “is heightened in dealing with issues affecting foreign affairs and national security, where ‘the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions.’”

Accordingly, we believe that the President’s constitutional authority to undertake military action to protect the national security interests of the United States is firmly established in the text and structure of the Constitution and in Executive Branch practice. Thus, to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary. For example, were the President to conclude that Iraq’s development of WMD might endanger our national security because of the risk that such weapons either would be targeted against the United States, or would be used to destabilize the region, he could direct the use of military force against Iraq to destroy its WMD capability. Or, were it the President’s judgment that a change of regime in Iraq would remove a threat to our national interests, he would direct the use of force to achieve that goal. Were the President to take such action, he would be acting consistently with the historical practice of the Executive Branch.

At times throughout our history, the President’s constitutional authority to use force has been buttressed by statute. Such statutory support is not necessary in light of the President’s independent constitutional authority to direct military action. . . . Nonetheless, congressional support of presidential action removes all doubt of the President’s power to act. According to the analysis set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), and later followed and interpreted by the Supreme Court in *Dames & Moore v. Regan* (1981), the President’s power in such a case would be “at its maximum.” Were the President to direct military action against Iraq, he would be acting at the apex of his power because . . . his constitutional authority to use such force is supplemented by congressional authorization [namely, the 1991 Authorization for the Use of Force Against Iraq and the 2001 Authorization for the Use of Force against those providing assistance to the terrorists responsible for the attacks of September 11th].

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“[E]very President has taken the position that [the War Powers Resolution of 1973] is an unconstitutional infringement by the Congress on the President’s authority as Commander-in-Chief.” . . .

This Office has never formally opined on the constitutionality of the WPR; we have, however, questioned the WPR’s constitutionality on numerous occasions. . . . Most recently, this Office has stated that “action taken by the President pursuant to the constitutional authority recognized in [the WPR] cannot be subject to the substantive requirements of the WPR.” *President’s Authority to Conduct Military Operations*, 25 Op. O.L.C. 211 (2001).

Finally, we note that the WPR has been controversial ever since its enactment in 1973 and has been the subject of litigation when Presidents have used military force, allegedly in violation of the WPR. . . . To date, no court that we are aware of has ever reached a judgment on the merits; cases have been dismissed on the basis of a variety of procedural defects, including lack of standing, lack of ripeness, and the political question doctrine. . . . If the President were to take military action without complying with the WPR, it is likely that litigation would be brought. We think it is unlikely, however, that a court would rule on the merits of the WPR.

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1. Excerpt taken from 26 *Opinions of the Office of Legal Counsel* 143 (2002). [↑](#footnote-ref-1)