

Presidential Power to Wage War Against Iraq

Michael J. Glennon

THE PRESIDENT DOES NOT currently have authority under U.S. domestic law – not treaty, statute, or the Constitution – to introduce the U.S. armed forces into hostilities against Iraq for the purpose of removing Saddam Hussein from power. This conclusion is based upon the assumption that Iraq was not involved in the events of September 11, and that use of force for this purpose would risk substantial casualties or large-scale hostilities over a prolonged duration. I reach that conclusion for the following reasons.

A. AUTHORIZATION BY TREATY

No treaty currently in force gives the President authority to use force. Indeed, the United States has never been a party to any treaty that purported to give the President authority to

use force. The constitutionality of any such treaty would be doubtful in that it would necessarily divest the House of Representatives of its share of the congressional war power. (For this reason, all of the United States' mutual security treaties have made clear that they do not affect the domestic allocation of power.) Moreover, war-making authority conferred by any such treaty would be cut off unless it met the requirements of section 8(a)(2) of the War Powers Resolution. Section 8(a)(2) requires, in effect, that any treaty authorizing the use of force meet two conditions. The first condition is that any such treaty must "be implemented by legislation specifically authorizing" the introduction of the armed forces into hostilities or likely hostilities. This condition is not met because no treaty is so implemented. The second condition is that

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any such implementing legislation must state that it is “intended to constitute specific statutory authorization” within the meaning of the War Powers Resolution. Again, since no implementing legislation is in effect, the second condition is also not met. Thus it must be concluded that, if further authority to use force is required, the President cannot seek that authority from any treaty.

The principle that no treaty can provide authority to use force in the war against terrorism is important because, prior to the use of force by the United States in the Gulf War, it was contended that the United Nations Charter, as implemented by the UN Security Council, provided such authority. The argument was advanced that the Security Council resolution that authorized force against Iraq (Resolution 678 of November 29, 1990) somehow substituted, in United States domestic law, for approval by the United States Congress (which was given later, in P.L. 102-1, on January 14, 1991). The argument was without merit and has been overwhelmingly rejected by legal scholars. Among other things, it is doubtful that the Charter gives the Security Council the power to order member states to use force, and doubtful, too, that this power, assigned by the Constitution to the Congress and the President, can be delegated to an international organization. In any event, the first Bush Administration never claimed such authority from the Security Council’s action. Indeed, Secretary of State James Baker made clear at the time that the Security Council had merely authorized the use of force against Iraq, not required it. Thus if the Security Council were to adopt new authority permitting the use of force against Iraq, that authority would not in and of itself constitute authorization within U.S. domestic law.

B. AUTHORIZATION BY STATUTE

The second source to which the President

might turn for authority to use force is statutory law. I referred above to the provision of the War Powers Resolution that limits authority to use force that can be inferred from a treaty. A companion provision limits such authority that can be inferred from a statute. That provision is section 8(a)(1). Section 8(a)(1) sets out two similar conditions that must be met before authority to use armed force can be inferred from a given statute. The first condition is that such a statute must “specifically authorize” the introduction of the armed forces into hostilities or likely hostilities. The second condition is that such a statute must state “that it is intended to constitute specific statutory authorization within the meaning of” the War Powers Resolution. Unless each condition is met, a given statute may not be relied upon as a source of authority to use armed force.

The War Powers Resolution cannot itself be relied upon as authorization to introduce the armed forces into hostilities because it does not meet these two conditions and because it explicitly provides that it confers no power on the President to introduce the armed forces into hostilities that he would not have had in its absence. Two statutes now in effect, however, may meet these conditions. The first statute is H.J. Res. 77 of January 14, 1991 (P.L. 102-1), the law authorizing use of force against Iraq during the Gulf War. The second statute is S.J. Res. 23, the law enacted by Congress and signed by the President on September 18, 2001 (P.L. 107-40).

1. The Gulf War authorization

Congress’s Gulf War resolution authorized the President to use force against Iraq only to the extent that such use of force had been authorized by the United Nations Security Council. Section 2(a) of P.L. 102-1 provides that “[t]he President is authorized, pursuant to subsection (b), to use the 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." (Subsection (b) required the President to determine, before using force, that all appropriate diplomatic and other peaceful means had been used.) Thus the Gulf War resolution would continue to authorize use of force against Iraq if such use continues to be authorized under Resolution 678 of the Security Council. If Resolution 678 does not continue to authorize the United States to use force against Iraq, on the other hand, the Gulf War resolution would not authorize the President to introduce the armed forces into hostilities against Iraq, and further congressional approval would be required. This would be true, as indicated above, even if the Security Council adopts new approval to use force against Iraq, since the existing congressional authorization, the Gulf War resolution, refers only to specific Security Council measures adopted at the time of the Gulf War.

In considering this key issue, it is helpful to recall the chain of events that led to the adoption of the relevant congressional and Security Council resolutions:

On August 2, 1990, Iraq invaded and occupied the territory of Kuwait.

On August 2, 1990, the Security Council adopted the first of the eleven resolutions later set out in Congress's Gulf War resolution, quoted above. This was Resolution 660, which condemned the Iraqi invasion of Kuwait and called for an immediate and unconditional withdrawal. All eleven Security Council resolutions related to the Iraqi invasion of Kuwait and represented an effort gradually to tighten the screws before authorizing use of force.

On November 29, 1990, the UN Security Council adopted Resolution 678 which, among other things, authorized "all member States to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace

and security in the region." The Resolution provided that this authority could not be exercised, however, if Iraq "on or before January 15, 1991, fully implements ... the above-mentioned resolutions" (The "above-mentioned resolutions" were the same eleven measures.)

On January 14, 1991, Congress adopted the Gulf War resolution.

On January 17, 1991, the United States commenced air attacks against Iraq.

On February 24, 1991, the United States commenced the ground attack.

On February 27, 1991, Iraq, in a letter to the President of the Security Council, promised to comply with the twelve Security Council resolutions.

On February 28, a cease-fire was declared.

On March 2, 1991, the Security Council adopted Resolution 686, noting the cease-fire, noting Iraq's promise to comply with the Council's twelve resolutions, demanding that Iraq do so, and demanding that Iraq meet additional conditions spelled out in paragraphs (2) and (3). Significantly, Resolution 686 further provided that, "during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid"

On April 3, 1991, the Security Council adopted Resolution 687, which demanded that Iraq destroy all weapons of mass destruction and set up a comprehensive on-site inspection regime under the aegis of the UN Special Commission on Iraq (UNSCOM). The Resolution also declared that, "upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990)."

On April 6, 1991, in a letter from its Iraqi Minister of Foreign Affairs, Iraq notified the President of the Security Council and the Secretary-General that it accepted the provisions of Resolution 687.

In light of this background, can Resolution 678 reasonably be construed to continue to authorize use of force by the United States against Iraq? While reasonable arguments can be made on both sides, the more persuasive argument appears to be that it does not, for these reasons:

(a) *The authority conferred by Resolution 678 was narrowly circumscribed and was directed at reversing the Iraqi invasion of Kuwait.* Resolution 678 conferred authority to use armed force for three different purposes. (i) The first purpose was to uphold and implement resolution 660. Resolution 660, however, simply called upon Iraq to withdraw from Kuwait; that goal has been achieved. (ii) The second purpose was to uphold and implement “all subsequent relevant resolutions.” The phrase could conceivably be construed as referring to any resolution adopted after the date on which Resolution 660 was adopted, August 2, 1990. Read in context, however, it seems more likely that the phrase refers to the nine “foregoing resolutions” that were recalled and reaffirmed in the first prefatory clause of Resolution 678. “All subsequent resolutions,” it might further be argued, could hardly be taken as referring to *any* resolution *ever* adopted on any future date by the Security Council. Such a construction would have had the effect, internationally, of divesting the Security Council of any future role in deciding whether to authorize use of force against Iraq – even though paragraph 5 of Resolution 678 explicitly affirms the intent of the Security Council “to remain seized of the matter.” Domestically, given the incorporation by reference of the phrase in Congress’s Gulf War resolution, such an interpretation would have effected a massive delegation of the congressional war power to the Security Council – a delegation that would create profound constitutional problems. These difficulties are avoided by giving the phrase “all subsequent relevant resolutions” the meaning that it seems plainly intended to have had, namely, as

referring to resolutions subsequent to Resolution 660 but adopted before Resolution 678. (iii) The third purpose for which Resolution 678 authorized use of force was to restore international peace and security in the region. A broad interpretation of that grant of authority would view it as permitting use of force against Iraq by any state at any point in the future when that state concluded that Iraq had disrupted that region’s peace and security. The authority to restore peace and security, was, however, like other provisions of Resolution 678 authorizing use of force against Iraq, tied to and precipitated by the Iraqi invasion of Kuwait. It seems unlikely that the Security Council, in adopting Resolution 678, intended to declare Iraq a free-fire zone into the indefinite future.

(b) *The authority to use force conferred in Resolution 678 was most likely extinguished April 6, 1991, the date the Iraqis notified the United Nations of their acceptance of the pertinent provisions of Resolution 687.* Under that Resolution, “a formal cease-fire” took effect upon such notification. The legal obligations that flow from a formal cease-fire are incompatible with the legal rights that flow from authorization to use force. The Security Council did “reaffirm” Resolution 678 in Resolution 949, adopted October 15, 1994, and also in Resolution 1137, adopted November 12, 1997. However, this was done only in prefatory clauses; neither Resolution 949 nor Resolution 1137 re-authorizes the use of force against Iraq. No resolution has done so. The Security Council has never declared that either the cease-fire or Resolution 687 is no longer in effect.

(c) *The authority to use force conferred in Resolution 678, once extinguished, did not revive when Iraq failed to comply with its obligations under Resolution 687.* Resolution 687 makes clear that the termination of that authority was conditioned upon Iraq’s notification of *acceptance* of the pertinent provisions of Resolution 687, not upon Iraq’s *compliance* with those provisions. In this regard it is instructive to compare the

terms of Resolution 687 with the terms of its predecessor resolution, Resolution 686. Resolution 686 implemented a provisional cease-fire following the suspension of hostilities between Iraq and the coalition forces. As noted above, Resolution 686 provides that *compliance*, not acceptance, by Iraq was required with respect to two paragraphs of Resolution 686 to bring about the termination of authority to use force. (It is agreed that Iraq has complied with those two paragraphs.) In contrast, Resolution 687 provides that *acceptance*, not compliance, was all that was required to terminate authority to use force. Had the Security Council intended to cause that authority to revive upon Iraqi non-compliance, the Council presumably would have used the same words, or similar words, that it used in the preceding resolution to bring about that result. But it did not. There is no indication in the terms of Resolution 687 or any other Security Council resolution that the Council intended that Iraqi non-compliance would trigger a revival of authority to use force.

(d) *A decision to revive Resolution 678 must be made by the Security Council and cannot be made by an individual member state.* As suggested by the interactive context in which the Gulf War was ended, the transaction that brought hostilities to a close was in the nature of an agreement. Its terms were set forth in Resolutions 686 and 687. Those terms were agreed to and approved by Iraq and the UN Security Council, not by Iraq and individual member states of the Security Council, and not by Iraq and individual member states of the Gulf War coalition. With rare exceptions that are not applicable here, under long-settled principles of international law rights flowing from the material breach of an agreement run to the aggrieved party of the agreement; a state has no right to complain of the breach of an agreement to which it is not a party. One of the rights that flows from the

power to complain of the material breach of an agreement is the option to terminate or suspend the agreement in whole or in part. In Resolution 687 the Security Council apparently intended to retain that right: paragraph 34 of Resolution 687 provides that the Council, not individual states, “shall take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.” Thus it would be up to the Council as a body to decide what action to take in response to a breach. Individual states such as the United States have no right to terminate or suspend those provisions of Resolution 687 that caused the authorities granted in Resolution 678 to be extinguished upon the notification of Iraqi acceptance. The option to terminate or suspend those provisions resides exclusively in the author of Resolution 678 and party to the agreement with Iraq: the Security Council, not individual member states.

(e) *It would be inappropriate to infer implicit Security Council intent to revive Resolution 678 from acquiescence by the Council to subsequent military strikes against Iraq that were not expressly authorized.* It can be argued that a consistent pattern of acquiescent practice would constitute evidence of the authoritative interpretation of the Resolution. However, the right of veto that inheres in the Council’s five permanent members renders this argument unconvincing in these circumstances. All five members have not remained silent during each of the subsequent strikes against Iraq; several have on occasion objected. Following the 1998 air strikes on Iraq, for example, the President of the Russian Federation declared that “[t]he UN Security Council resolutions on Iraq do not provide any grounds for such actions. By the use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law.”¹ The

1 Statement of the President of the Russian Federation, press release of the Mission of the Russian Federation to the UN, Dec. 20, 1998.

Chinese also objected.² When Resolution 1154 was adopted, warning that continued violations of Iraq's obligations to permit unconditional access to UNSCOM "would have the severest consequences," the French representative to the Security Council stated that the resolution was designed "to underscore the prerogatives of the Security Council in a way that excludes any question of automaticity It is the Security Council that must evaluate the behavior of a country, if necessary to determine any possible violations, and to take the appropriate decisions."³ Even if all five permanent members of the Security Council had remained silent, silence under such circumstances does not necessarily signify consent or approval. Silence may simply indicate a belief that objection is futile.

(f) *The War Powers Resolution requires that doubts flowing from ambiguous or unclear measures be resolved against finding authority to use force; at a minimum, these considerations raise such doubts.* As discussed above, section 8(a)(1) of the War Powers Resolution requires that Congress "specifically authorize" the introduction of the armed forces into hostilities if its enactment is to suffice as statutory approval. Because serious doubt exists whether Security Council Resolution 678 confers continuing authority on the United States to use force against Iraq,⁴ the Gulf War Resolution, which incorporates Security Council Resolution 678 by reference, cannot be said to constitute specific statutory authorization within the meaning of the War Powers Resolution to introduce the armed forces into hostilities against Iraq.

2. S.J. Res. 23

The second statute that meets these conditions

is the law enacted by Congress and signed by the President on September 18, 2001, P.L. 107-40, also known as Senate Joint Resolution 23 or S.J. Res. 23.

The statute contains five whereas clauses. Under traditional principles of statutory construction, these provisions have no binding legal effect. Only material that comes after the so-called "resolving clause" – "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled" – can have any operative effect. Material set out in a whereas clause is purely precatory. Such material may be relevant for the purpose of clarifying ambiguities in a statute's legally operative terms, but in and of itself such a provision can confer no legal right or obligation.

To determine the breadth of authority conferred upon the President by this statute, therefore, it is necessary to examine the legally operative provisions, which are set forth in section 2(a) thereof. That section provides as follows:

IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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.

The central conclusion that emerges from these words (which represent the only substantive provision of this statute) is that all authority that the statute confers is tightly linked to the events of September 11. The statute confers no authority unrelated to those events. The

2 Press release of the Foreign Ministry of China, Dec. 17, 1998 ("The unilateral use of force . . . without the authorization of the Security Council runs counter to the UN Charter and the principles of international law.").

3 UN Doc. S/PV.3858, at 15, 18 (1998).

4 I do not here discuss whether international law would permit use of force against Iraq absent Security Council approval.

statute authorizes the President to act only against entities that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. No authority is provided to act against entities that were not involved in those attacks. The closing reference limits rather than expands the authority granted, by specifying the purpose for which that authority must be exercised – “to prevent any future acts of international terrorism against the United States” No authority is conferred to act for any other purpose, or to act against “nations, organizations or persons” generally.

The statute thus cannot serve as a source of authority to use force in prosecuting the war on terrorism against entities other than those involved in the September 11 attacks. To justify use of force under this statute, some nexus must be established between the entity against which action is taken and the September 11 attacks.

The requirement of a nexus between the September 11 attacks and the target of any force is reinforced by the statute’s legislative history. Unfortunately, because of the truncated procedure by which the statute was enacted, no official legislative history can be compiled that might detail what changes were made in the statute, and why. It has been reported unofficially, however, that the Administration initially sought the enactment of legislation which would have set out broad authority to act against targets not linked to the September 11 attacks. The statute proposed by the Administration reportedly would have provided independent authority for the President to “deter and pre-empt any future acts of terrorism or aggression against the United States.”⁵ Members of Congress

from both parties, however, reportedly objected to this provision.⁶ The provision was therefore dropped from the operative part of the statute and added as a final whereas clause, where it remained upon enactment.⁷

C. CONSTITUTIONAL AUTHORIZATION

A starting point in considering the scope of the President’s independent constitutional powers is to note a proposition on which commentators from all points on the spectrum have agreed: that the President was possessed of independent constitutional power to use force in response to the September 11 attacks upon the United States. As was widely observed at the time, the War Powers Resolution itself supports this conclusion. Its statement of congressional opinion concerning the breadth of independent presidential power under the Constitution (section 2(c)(3)) recognizes the President’s power to use force without statutory authorization in the event of “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” Thus, U.S. military operations in Afghanistan could have been carried out under the President’s constitutional authority, even if S.J. Res. 23 had never been enacted. Thus, if it turns out that Iraq is linked to the September 11 attacks, S.J. Res. 23 will continue to suffice, along with the President’s constitutional authority, to provide all necessary authorization.

A more difficult question arises if Iraq was not connected with the September 11 attacks. In the last 30 years, Congress has on two occasions expressed its opinion concerning the scope of the President’s power to use armed

5 Helen Dewar @ Juliet Eilperin, *Emergency Funding Deal Reached; Hill Leaders Agree to Work Out Language on Use of Force*, WASH. POST, SEPT. 14, 2001 at A30.

6 Helen Dewar @ John Lancaster, *Congress Clears Use of Force, Aid Package; \$40 Billion – Double Bush’s Request – Earmarked for Rebuilding, Terror Response*, WASH. POST, SEPT. 16, 2001 at A11.

7 See CONG. REC., daily ed., Oct. 1, 2001 at S9949 (remarks of Sen. Byrd).

force without prior congressional approval. One statement of opinion is set forth in section 2(c)(3) of the War Powers Resolution. That provision lays out the view that the President may introduce the armed forces into hostilities, or likely hostilities, only pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces. I've also alluded to the other statement: the final *whereas* clause in S.J. Res. 23. That *whereas* clause expresses the opinion of Congress that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Obviously, these two statements are inconsistent. The scope of presidential power to wage war that was recognized by Congress in the War Powers Resolution is much narrower than that recognized in S.J. Res. 23. If the President only has power to act alone in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," then he obviously is without power to "to take action to deter and prevent acts of international terrorism against the United States" where no attack upon the United States has occurred. Which statement is correct?

In my view, neither. The statement in the War Powers Resolution is overly narrow, and the statement in S.J. Res. 23 is overly broad. The original, Senate-passed version of the War Powers Resolution contained wording, which was dropped in conference, that came close to capturing accurately the scope of the President's independent constitutional power. It provided – in legally binding, not precatory, terms – that the President may use force "to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack." This

formula, unlike the hastily-crafted words of the S.J. Res. 23 *whereas* clause, was drafted over a period of years, with numerous hearings and advice from the top constitutional scholars in the country. It was supported by Senators Fulbright, Symington, Mansfield, Church, Cooper, Eagleton, Muskie, Stennis, Aiken, Javits, Case, Percy, Hatfield, Mathias, Scott and Byrd – not an inconsequential group. They agreed upon a simple premise: that the war power is shared between Congress and the President.

This is the premise that animates all efforts by members of Congress who seek to have the Executive meet authorization and consultation requirements. This is the premise that is, for all practical intents and purposes, rejected by proponents of sole executive power.

The premise flows from each source of constitutional power:

The constitutional text. Textual grants of war power to the President are paltry in relation to grants of that power to the Congress. The President is denominated "commander-in-chief." In contrast, Congress is given power to "declare war," to lay and collect taxes "to provide for a common defense," to "raise and support armies," to "provide and maintain a navy," to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," to "provide for organizing, arming, and disciplining, the militia," and to "make all laws necessary and proper for carrying into execution ... all ... powers vested by this Constitution in the Government of the United States."

The case law. Support for the Executive derives primarily from unrelated dicta pulled acontextually from inapposite cases, such as *United States v. Curtiss-Wright* (1936). The actual record is striking: Congress has never lost a war powers dispute with the President before the Supreme Court. While the cases are few, in every instance where the issue of decision-making primacy has arisen – from

Little v. Barreme (1804) to the *Steel Seizure Case* (1952) – the Court has sided with Congress.

Custom. It is true that Presidents have used armed force abroad over 200 times throughout U.S. history. It is also true that practice can affect the Constitution's meaning and allocation of power. The President's power to recognize foreign governments, for example, like the Senate's power to condition its consent to treaties, derives largely from unquestioned practice tracing to the earliest days of the republic. But not all practice is of constitutional moment. A practice of constitutional dimension must be regarded by both political branches as a juridical norm; the incidents comprising the practice must be accepted, or at least acquiesced in, by the other branch. In many of the precedents cited, Congress objected. Furthermore, the precedents must be on point. Here, many are not: nearly all involved fights with pirates, clashes with cattle rustlers, trivial naval engagements and other minor uses of force not directed at significant adversaries, or not risking substantial casualties or large-scale hostilities over a prolonged duration. In a number of the "precedents," Congress actually approved of the executive's action by enacting authorizing legislation (as with the Barbary Wars).

Structure and function. If any useful principle derives from structural and functional considerations, it is that the Constitution gives the Executive primacy in emergency war powers crises, where Congress has no time to act, and that in non-emergency situations – circumstances where deliberative legislative functions have time to play out – congressional approval is required.

Intent of the Framers. Individual quotations can be, and regularly are, drawn out of context and assumed to represent a factitious collective intent. It is difficult to read the primary sources, however, without drawing the same conclusion drawn by Abraham Lincoln. He said:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

Chief Justice William Rehnquist, quoting Justice Robert Jackson in *Dames & Moore v. Regan* (1981), shared Lincoln's belief that the Framers rejected the English model. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

Notwithstanding the plain import of these sources of constitutional power, some argue that the only role for Congress occurs after the fact – in cutting off funds if the President commences a war that Congress does not support. Two problems inhere in this theory. First, it reads the declaration-of-war clause out of the Constitution as a separate and independent check on presidential power. The Framers intended to give Congress control over waging war before the decision to go to war is made. Giving Congress a role only after the fact, however, would make its power to declare war nothing but a mere congressional trumpet to herald a decision made elsewhere.

Second, the theory flies in the face of the Framers' manifest intention to make it more difficult to get into war than out of it. This approach would do the opposite. If the only congressional option is to wait for the President to begin a war that Congress does not wish the nation to fight, and then cut off

funds, war can be instituted routinely with no congressional approval – and seldom if ever ended quickly. The practical method of cutting off funds is to attach a rider to the Department of Defense authorization or appropriation legislation. This means, necessarily, passing the legislation by a two-thirds vote so as to overcome the inevitable presidential veto. The alternative is for Congress to withhold funding altogether – and be blamed by the President for closing down not merely the Pentagon but perhaps the entire federal government. The short of it is, therefore, that to view the congressional appropriations power as the only constitutional check on presidential war power is, for all practical purposes, to eliminate the declaration-of-war clause as a constitutional restraint on the President.

For reasons such as these, the Office of Legal Counsel of the Justice Department concluded in 1980 that the core provision of the War Powers Resolution – the 60-day time limit – is constitutional. It said:

We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of “unavoidable military necessity.” This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

Finally, Congress can regulate the President’s exercise of his inherent powers by imposing limits by statute.⁸

And so I conclude that to the extent that use of force against Iraq to remove Saddam Hussein from power would risk substantial casualties or large-scale hostilities over a prolonged duration, prior congressional approval would be required. *GB*

⁸ *Presidential Power to Use the Armed Forces Abroad without Statutory Authorization*, 4A OP. OFFICE OF THE LEGAL COUNSEL, DEP’T OF JUSTICE 185, 196 (1980).