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Senator Robert C. Byrd, Chairman  
United States Senate  
Committee on Appropriations  
Washington, D.C. 20510-6025

Dear Senator Byrd:

I am writing in response to your letter of July 22 inquiring whether in my opinion, “the Bush Administration currently has authority, consistent with the U.S. Constitution and the War Powers Resolution, to introduce U.S. Armed Forces into imminent or actual hostilities in Iraq for the purpose of removing Saddam Hussein from power.” You raised the question because, as you say, in your letter, you are “deeply concerned about comments by the Bush Administration and recent press reports that our nation is coming closer to war with Iraq.”

I was away from my office at Duke University during the week when your inquiry arrived. Because you understandably asked for a very prompt response, I am foregoing a fuller, more detailed, statement to you just now, the day just following my reading of your letter, on August 6. I shall, however, be pleased to furnish that more elaborate statement on request. Briefly, these are my views:

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A. The President may not engage our armed forces in “war with Iraq,” except in such measure as Congress, by joint or concurrent resolutions duly passed in both Houses of Congress, declares shall be undertaken by the President as Commander in Chief of the Armed Forces. As Commander in Chief, i.e., in fulfilling that role, the President is solely responsible for the *conduct* of whatever measures of war *Congress shall authorize*. It is not for the President, however, to presume to “authorize himself” to embark on war.

Whether the President deems it essential to the national interest to use the armed forces of the United States to make war against one of our neighbors, or to make war against nations yet more distant from our shores, it is all the same. The Constitution requires that he not presume to do so merely on his own assessment and unilateral order. Rather, any armed invasion of or actual attack on another nation by the armed forces of the United States as an act of war requires decision by Congress *before* it proceeds, not after the President would presume to engage in war (and, having unilaterally commenced hostilities, *then* would merely confront Congress with a “take-it-or-leave it” *fait accompli*). The framers of the Constitution understood the difference vividly--and made provision against vesting *any* war-initiating power in the Executive.<sup>1</sup>

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<sup>1</sup>It is today, even as it was when Thomas Jefferson wrote to James Madison from Paris, in September, 1789, referring then to the constitutional clauses putting the responsibility and power to embark on war in Congress rather than in the Executive. And thus Jefferson observed: “We have given, in example, one effectual check to the dog of war, by transferring  
(continued...) ”

**B.** Nor does the form of government of--or any policy currently pursued by--an identified foreign nation affect this matter, although either its form of government or the policies it pursues may of course bear substantially on the decision *as shall be made by Congress*. Whether, for example, the current form of government of Iraq is so dangerous that no recourse to measures short of direct United States military assault to “remove” that government (a clear act of war) now seem sufficient to meet the security needs either of the United States or of other states with which we associate our vital interests, may well be a fair question. That it is a fair question, however, is merely what therefore also makes it right for *Congress to debate that question*.

Indeed, it appears even now that Congress is engaged in that debate. And far from feeling it must labor under any sense of apology in conducting that debate--whether or not some in the executive department or elsewhere express irritation over what they regard as presumptuous by Congress, it is not presumptuous but entirely proper. It is what the Constitution assigned to Congress the responsibility to do.

**C.** And first, with respect to that debate, suppose it were the case that the President believed that measures of war were *not* now necessary and ought *not* be passed by Congress, at least not at this time. I put the point this way the better to clear the air to make a neutral observation of the respective roles. --Were he of that view, without doubt *he should so advise* Congress. And equally without doubt, Congress should desire and welcome him to do so, not merely from respect for his office, rather, at least equally because both his information and his views would be among the most important considerations Congress should itself take into account.

**D.** But the same is true in the reverse circumstance as well. It is altogether the right prerogative of the President to lay before Congress every consideration which, in the President’s judgment, requires that measures of direct military intervention in Iraq now be approved by Congress, lest the security of the nation be even more compromised than it already is.<sup>2</sup> If the President believes we cannot any longer, by measures short of war, now avoid the unacceptable risk of weapons of mass destruction from developing under a repressive Iraq regime already defiant of various earlier resolutions by the United Nations Security Council, it is by all means his prerogative and his responsibility as President candidly, even bluntly, to say so--to Congress.

And he may as part of that address, accordingly request from Congress that he now be appropriately authorized, as President and as Commander in Chief, “to deploy and engage the armed forces of the United States in such manner and degree as the President determines to be necessary in affecting such change of government in Iraq”...as will remove that peril, or accomplish such other objectives (if any) as Congress may specify in its authorizing resolution. Supposing Congress agrees, the resolution will be approved, and the authority of the President to proceed, consistent with that resolution, will be at once both established and clear.

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<sup>1</sup>(...continued)

the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” C. WARREN, *THE MAKING OF THE CONSTITUTION* 481 n. 1 (1928). (See also Chief Justice John Marshall’s Opinion for the Supreme Court in *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1, 28 (1803) (“The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides.”))

<sup>2</sup> Exactly as President Jefferson did in reporting to Congress in equivalent circumstances, in 1801. Thus, his urgent message to Congress reviewed attacks recently made against American commercial vessels in the Mediterranean, reported defensive steps already taken in repelling those attacks, and then declared the following: “The Legislature will doubtless consider whether *by authorizing measures of offense* also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of *this important function confided by the Constitution to the Legislature exclusively*, their judgment may form itself on a knowledge and consideration of every circumstance of weight.” 22 *ANNALS OF CONG.* 11 (1801), reprinted in 1 *MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 326-27 (J. Richardson ed. 1898) (emphasis added.)

E. Equally, however, in the event that Congress does *not* agree. That is, insofar as, *despite* whatever presentation the President shall make (or shall have made), Congress is *unpersuaded* that such military intervention under the direction of the President as he may propose is now appropriate to authorize and approve, it may assuredly decline to do so. In that circumstance, and until Congress shall decide otherwise, matters are also settled and equally clear. The President may not then proceed to embark upon a deliberate course of war against the government or people of Iraq.

F. And correspondingly, however, the President is not to be faulted in that circumstance, insofar as authorization by Congress for military intervention or other measures of war *is* withheld. For the responsibility (and any fault--if fault it be) then will rest with Congress, even as the Constitution contemplates that it should.

In short, the President acquits himself well by making full report to Congress of information, and of his reasons, and of his judgment, as to what the circumstances now require of the nation, in his own view. That Congress may disagree is no reflection upon the President nor, necessarily, upon itself. Rather, it but reminds us of which department of our national government is charged by the Constitution to decide whether and when we shall move from a position of peace, however strained, to one of war. By constitutional designation, *that department is assuredly the legislative department, not the executive.*

G. I do not here presume to address the limited circumstance in which the country comes under attack, in which event the President may assuredly take whatever emergency measures to resist and repel it are reasonably required to that end. Likewise, in respect to exigent circumstances of U.S. forces or American citizens lawfully stationed, or temporarily resident, in areas outside the United States in which local hostilities may unexpectedly occur, with respect to which intervention to effectuate safe rescue will not be regarded as an act of war. Neither these nor other variant possibilities were raised by your letter, however, so I leave them for another day.

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You also asked for comments respecting three previous Joint Resolutions by Congress, i.e., whether any of these, or some combination, constitute a sufficient basis for the President to proceed to engage whatever magnitude of invasive forces would be necessary to overthrow Iraq's current government and/or seek out and destroy or remove such weapons of mass destruction, as well as the means of their production, as that invading force would be authorized to accomplish. Specifically, you adverted to The War Powers Resolution of 1973 (Pub. L. No. 93-148, Nov. 7, 1973); The Authorization for Use of Military Force Against Iraq Resolution of 1991 (Pub. L. No. 102-1, Jan. 14, 1991); and The Authorization for Use of Military Force Resolution of 2001 (Pub. L. No. 107-40, Sept. 18, 2002).

As to the first of these, the "War Powers Resolution of 1973" (or War Powers Act as it is sometimes informally called), I am very clear that it is certainly not a Resolution authorizing or directing the President now to engage the armed forces of the United States in acts of war within or against Iraq. As to the second and third, I do not believe they can serve that function either, though there is some more reasonable margin for disagreement--one which Congress itself, however, is frankly far better situated to attempt to resolve than I or anyone else so removed from a fuller record one would need to be of more than marginal help.

The reasons for my uncertainty regarding the Joint Resolution of 1991 (specifically captioned by Congress as "The Authorization for Use of Military Force Against Iraq Resolution") will take but a few sentences to share. That this Resolution *did* authorize what became "Operation Desert Storm" as a major use of the war power, against Iraq specifically, under the direction of the President (with collaborative forces of other nations), and the use of massive force, including bombardment and invasion of Iraq, is unequivocal. A declared objective sought to be achieved (and thus part of the described scope of the authorized use of force) was...to "achieve implementation of"...eleven United

Nations Security Council Resolutions, each identified by specific number. The Resolution also required (i.e., “the President shall submit”) the President “at least once every 60 days” to submit to Congress a summary on the status “of efforts to obtain compliance by Iraq” with those resolutions.

Foremost among the stated objectives of that authorized use of war power was to force the unconditional withdrawal of Iraq forces from Kuwait and restoration of that country’s “independence and legitimate government.” As much as that has surely been accomplished--was well accomplished fully a decade ago.

However, the Resolution also recited that “Iraq’s conventional, chemical, biological, and nuclear weapons and ballistic missile programs and its demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace.” Thus, it was also in contemplation of that “grave threat” the United States was willing to make the commitment as it did. And we have the President’s report (as I must assume Congress has received it) that that threat has not yet abated, indeed, may have been renewed.

Moreover, it is additionally true that in a significant sense, our “invasion” of Iraq, *proper as it was immediately following this authorization by Congress* (and still may be), *continues to this very day*. It does so, as the Congress is well aware in a variety of ways, but most notably by the continuing armed overflights through large swaths of Iraq air space, and the continuing forcible interdiction of Iraqi installations in large areas of Iraq (north and south) by direct military force. So, in one reasonable perspective, there has simply been a *continuing*, albeit immensely reduced and attenuated “war” with Iraq, under the direction of the President, and within the boundaries of that original Resolution of 1991.

Still, it is far from certain that these elements are enough insofar as the President may now propose to “re-escalate” the conflict in enormous magnitude: (a) to overthrow the government of Iraq and (b) insert whatever invading force as he would deem required to locate and destroy any existing stores of weapons of “mass destruction,” and the means of their production. The principal basis for that uncertainty (at least my own uncertainty) is twofold. First, that the express authorization made by Congress in 1991 was, as noted above, to use all necessary military force “to achieve implementation of” *certain specifically numbered UN Security Council Resolutions, none* of which I have had the opportunity to read or study, and therefore cannot resolve for suitable fit today. It is my impression that with the exception of ourselves (and perhaps the British), however, that members of the Security Council may not now regard those decade-old resolutions as adequate for the United States to use as an adequate sanction to “reignite” a virtual full-scale war, as distinct from the continuing overflights. but I am in no position to speak to that question as well as others. Similarly, I should think it best for *Congress itself*, to resolve whether the decade-old Resolution enacted by Congress in 1991 can cover the present case as well though, in my own view, it probably does not.

Third, and most recent among the resolutions you enclosed, is the express “Authorization for Use of United States Armed Forces” by Congress, adopted on September 18, 2001, following the cataclysmic events of September 11. The authorization is quite current. And it calls expressly for the use of U.S. Armed Forces “against those responsible for the recent attacks launched against the United States.” It is also framed in the following quite inclusive terms, in § 2(a), that:

[T]he 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.

I nonetheless think it doubtful that this will “stretch” to cover a proposal to use military force to overthrow the government of Iraq as is currently being considered, without authorization by Congress, absent quite responsible evidence that Iraq *was* involved in “the terrorist attacks that occurred on Sept.

11, 2001" --evidence that may exist but not that I have seen reported in the press or elsewhere. I note, respectfully, that the authorization is not an "open-ended" one to authorize the use of military power against any nations, organizations, or persons whom the President identifies as proper targets insofar as it would merely help in some general sense to "prevent" future terroristic attacks by such nations, organizations, or persons. Rather, it is to permit such uses of military power only with reference to those identified as having contributed in some substantial manner to the September 11th attacks, or known now to be harboring such persons.

But in this effort not to neglect your several requests, I have (more than?) reached my limit to try to be of immediate assistance to you and your committee. The portions of this letter I would emphasize are in its first half, the portions dealing with the constitutional questions reviewed in letter sections **A.** through **F.** I wish you well with your deliberations.

Sincerely,

William Van Alstyne