

Dawn E. Johnsen  
Acting Assistant Attorney General  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

September 8, 2021

Dear Ms. Johnsen:

On behalf of the Presidential Reform Project, we are writing to urge the Department of Justice to withdraw three Office of Legal Counsel (“OLC”) opinions concerning presidential war powers that were issued at the dawn of the George W. Bush Administration: *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 143 (2002); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, *Re: Authorization for Use of Military Force Against Iraq Resolution of 2002* (Oct. 21, 2002); *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188 (2001). The first two opinions held that Article II authorizes the President, without congressional authorization, and without any other limitation, to use substantial military force, including ground troops, against Iraq. The third opinion held that Article II authorizes the President to use military force against the perpetrators of the 9/11 terrorist attacks but also other threatening terrorist groups not connected to the 9/11 attacks. It further held that Congress cannot “place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.” 25 Op. O.L.C. at 214.

While OLC has made clear that it “should not lightly depart from [its] past decisions,” it has also acknowledged that “as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.” Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, to Attorneys of the Office, *Re: Best Practices for OLC Legal Advice and Written Opinions* at 2 (Jul. 16, 2010) [hereinafter *2010 OLC Best Practices Memorandum*]; see also Walter Dellinger, et al., *Principles to Guide the Office of Legal Counsel* at 5 (Dec. 21, 2004) (noting that while OLC should afford “due respect for the precedential value of OLC opinions from administrations of both parties; . . . OLC’s current best view of the law sometimes will require repudiation of OLC precedent”).

For three reasons, we believe it is appropriate for the Justice Department to withdraw the opinions referenced above.

First, the opinions take an extreme, indefensible view of presidential war powers. The opinions in the aggregate stand for the proposition that the President can on his naked determination of the national interest use any amount of military force that he deems appropriate, and that Congress can do nothing by statute to curtail these powers. In short, the opinions contemplate a constitutionally unconstrained presidential power to use military force.

The President of course possesses very broad authority under Article II to use military force in the absence of congressional authorization, especially in order to defend the nation. But the three opinions’ rejection of any constitutional limitations on the President’s unilateral military powers is anomalous among executive branch precedents. See, e.g., *Targeted Airstrikes Against the Islamic State of Iraq and the Levant*, 38 Op. O.L.C. 82, 97–98 (2014) [hereinafter *Targeted Airstrikes Opinion*] (acknowledging that uses of force of sufficient “nature, scope, and duration” can “constitute a ‘war’ requiring prior congressional approval under the Declaration of War Clause”); *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op.

O.L.C. Supp. 321, 332 (1970) (acknowledging that “constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale”). The three opinions break with executive branch precedents in defying these important constitutional constraints.

Second, the three opinions were in real senses *dicta* since they were drafted after Congress had already authorized force against the post-9/11 terrorist threats in 2001, and against Iraq in 2002. In other words, *after* the President had already sought and received authorization to use military force from Congress for the relevant military operations, OLC opined that the President had authority under Article II to use force in the absence of these congressional authorizations. The opinions thus violate the OLC best practice that “[t]here should ... be a practical need for the written opinion,” and that “OLC should avoid giving unnecessary advice.” *See* 2010 OLC Best Practices Memorandum at 3.

Third, the objectionable constitutional analysis in the three opinions in question has never been relied upon by OLC in its subsequent war powers opinions. *See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. (May 31, 2018); *Targeted Airstrikes Opinion*, 38 Op. O.L.C. 82 (2014); *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20 (2011); *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30 (2004). Indeed, these four subsequent OLC war powers decisions adopt a constitutional framework that is incompatible with the three opinions in question. This now-settled framework draws on a line of earlier OLC opinions from the Clinton Administration. *See, e.g., Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995).

Withdrawing the three opinions in question would not constrain the President in any way material to the national security interest. Keeping the opinions on the books, by contrast, invites irresponsible uses of presidential power by the President and other executive branch actors, and strains OLC’s credibility as a principled legal decision maker.

Thank you for your consideration.

Sincerely,



Bob Bauer



Jack Goldsmith

CC: The Honorable Merrick Garland  
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