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Judicial Rulings on the War Power

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ABSTRACT

This report reviews the history of judicial rulings on the war power, starting with what the framers intended for "defensive actions" by the President and moving forward to summarize the principal Supreme Court and lower court decisions. For additional analysis, see Richard F. Grimmett, "War Powers Resolution: Presidential Compliance," Congressional Research Service Issue Brief IB81050 (July 2, 1999) and Richard F. Grimmett, "Instances of Use of United States Armed Forces Abroad, 1798-1998," Congressional Research Service Report 98-881F (October 27, 1998). This report provides background data and will not be updated unless events warrant.

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Summary

The Constitution empowers Congress to "declare war," but there is broad disagreement on the scope of presidential power to conduct undeclared wars. In addition to wars that have been declared or specifically authorized by Congress, Presidents have initiated a number of other military operations without either seeking or obtaining congressional approval. This report analyzes the disputes over the war power that have been submitted to the courts.

Dozens of war-power issues have been litigated over the past two centuries. Although federal courts have generally avoided most of them by relying on various threshold tests (such as standing, mootness, ripeness, and political questions), it is a misconception to say that the judiciary generally upholds presidential action. On a number of occasions the courts have struck down unilateral presidential actions, challenged and rejected ambitious theories of executive power, and upheld the prerogatives of Congress.

Of the cases that the courts have decided to sidestep, it is usually the case that Congress—as an institution—has failed to confront the President with restrictive legislation. Instead, a handful of lawmakers go to the courts to seek relief. Under these conditions, the courts have made it plain that the judiciary will not referee a case unless the two branches are in irresolute conflict and the entire Congress has exhausted all the institutional remedies available to it.

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Judicial Rulings on the War Power

This report provides a brief history of judicial rulings on the war power. These cases illustrate central themes of executive-legislative relations, the power of the purse, and the difficulty of litigating many of these issues in court.

Although the Constitution empowers Congress to "declare war," a declaration of war has been used in only five military conflicts: the War of 1812, the Mexican War of 1846, the Spanish-American War of 1898, World War I, and World War II. On a number of occasions, Congress has chosen to authorize war instead of declaring war. Particularly in the period since 1950, Presidents have resorted to military operations against other countries without seeking either a declaration or an authorization from Congress.

Some studies conclude that federal courts, over the years, have generally supported independent presidential use of the war power. For example, a recent book states that although the pattern of the courts is to "lie back" rather than rule on questions of the war power, "when they are forced to rule, they usually uphold presidential action."[1] However, the record is much more complex, with courts on a number of occasions striking down unilateral presidential actions, challenging ambitious theories of executive power, and upholding the prerogatives of Congress.

1. Defensive Actions

The Framers recognized that the President possessed an implied authority to use military force for certain defensive actions. When the draft of the Constitution empowered Congress to "make war," it was objected that legislative proceedings "were too slow" for the safety of the country in the event of an emergency. James Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the President "the power to repel sudden attacks."[2]

Reactions to the Madison-Gerry amendment emphasize the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it." Roger Sherman objected: "The Executive shd. be able to repel and not to commence war." Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war." George

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[1]Martin S. Sheffer, The Judicial Development of Presidential War Powers x-xi (1999).

[2]2 Records of the Federal Convention of 1787, at 318-19 (Max Farrand ed. 1937).

Mason spoke "agst giving the power of war to the Executive, because not <safely> to be trusted with it; . . . He was for clogging rather than facilitating war."[3]

This line between defensive and offensive wars was understood by the early Administrations. During the presidency of George Washington, Congress passed a number of statutes to protect inhabitants of the frontiers from hostile actions by Indians. Members of the Washington Administration realized that military operations against Indians were limited to defensive actions. Secretary of War Henry Knox wrote to William Blount, governor of the Southwest Territory, on October 9, 1792: "The Congress which possess the power of declaring War will assemble on the 5th of next Month—Until their judgments shall be made known it seems essential to confine all your operations to defensive measures."[4] Writing in 1793, President Washington instructed executive officials that "no offensive expedition of importance can be undertaken until after [Congress] have deliberated upon the subject, and authorized such a measure."[5]

In 1801, President Thomas Jefferson sent a small squadron of frigates to the Mediterranean to protect against possible attacks by the Barbary powers. He told Congress that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." It was up to Congress to authorize "measures of offense also."[6]

After Congress had declared war against England in the War of 1812, President James Madison called on the state militia pursuant to statutory authority. A legal dispute reached the Supreme Court in 1827. The Court said there could be no question that the legislation gave the President the right to call up state militia to repel invasion from abroad or to suppress internal insurrections. The Court concluded that "the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons." Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).

This exclusive, unreviewable presidential judgment depended upon authority expressly delegated by Congress. It was a power "confided by congress to the president." The power granted by Congress was limited to cases of "actual invasion, or of imminent danger of invasion." The power was to be exercised "upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." Id.

2. To Declare and Authorize War

Although the constitutional text only empowers Congress to declare war, it was well understood by the Framers that governments can make war without a formal declaration. The first major war that involved the United States—the "quasi war"

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[3]Id. at 319.

[4]4 The Territorial Papers of the United States 195 (Clarence Edwin Carter ed. 1936).

[5]33 The Writings of George Washington 73 (John C. Fitzpatrick ed. 1939).

[6]1 Messages and Papers of the Presidents 315 (Richardson ed.).

against France from 1798 to 1800—was not declared. It was authorized, however, by a number of statutes. The war against France came to the Supreme Court in two cases decided in 1800 and 1801, both of which acknowledged that Congress can resort to authorization rather than declaration. In the first case, Justice Washington said that war could be of two forms: (1) "declared in form, . . . *solemn*, and . . . of the perfect kind" and (2) "imperfect" (undeclared but authorized). Bas v. Tingy, 4 Dall. (4 U.S.) 37, 40 (1800). To Justice Chase, Congress "is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time." In his judgment, the war against France was "a limited, partial war. Congress has not declared war in general terms; but congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land." Id. at 43. Justice Paterson spoke of an "imperfect war." Id. at 45.

A year later, Chief Justice John Marshall wrote the opinion of the Court in the second case on the undeclared war with France. He said that 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 in this inquiry." Congress may authorize "general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." Talbot v. Seeman, 5 U.S. (1 Cr.) 1, 28 (1801).

These cases reject the proposition that the power of Congress over war is limited to declared wars and that Presidents may use independent authority to engage in military actions for undeclared wars. Congress had jurisdiction over both declared and authorized wars. As Chief Justice Marshall noted, the "whole powers of war" were vested in Congress, and legislative acts were the sole guides to judicial inquiry.

3. A Statute Trumps a Presidential Proclamation

A third case from the war against France raised another issue: when Congress has legislated military policy, can Presidents exceed those boundaries by issuing proclamations and other executive decrees? Part of the legislation enacted from 1798 to 1800 authorized the President to seize vessels sailing *to* French ports. President John Adams issued an order directing American ships to capture vessels sailing *to or from* French ports. Captain George Little followed Adams' order by seizing a Danish ship sailing from a French port. He was subsequently sued for damages.

When Chief Justice Marshall received this case, his "first bias" was to support Captain Little. Although the instructions from President Adams "could not give a right, they might yet excuse [a military officer] from damages. Military men were expected to follow the orders of their superiors. Upon further reflection, Marshall decided that Captain Little was liable for damages: "I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions [by Adams] cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." Little v. Barreme, 2 Cr. (6 U.S.) 170, 179 (1804).

In short, when Congress establishes national policy for military operations, the President, in his capacity as commander in chief, must execute statutory policy, not independent and inconsistent executive initiatives.

4. The *Smith* Decision in 1806

In 1794, Congress passed the Neutrality Act to prohibit American citizens from providing assistance to any military expedition against "the territory or dominions of any foreign prince or state with whom the United States are at peace." 1 Stat. 384, sec. 5. A circuit court in 1806 reviewed the indictment of Colonel William S. Smith for engaging in military actions against Spain. He claimed that his military enterprise "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government." United States v. Smith, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342).

The court repudiated Smith's claim that a President or his assistants could somehow authorize military adventures by private citizens after Congress had specifically forbidden such actions. The court said that the Neutrality Act was "declaratory of the law of nations; and besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government." Id. at 1229. Executive officials—even the President—could not waive statutory provisions. "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids." Id. at 1230. The court also noted: "Does [the President] possess the power of making war? That power is exclusively vested in congress." Id. A distinction was drawn between the President's authority to resist invasion (a defensive power) and military actions taken against foreign countries (an offensive power). There was a "manifest distinction" between going to war with a nation at peace and responding to an actual invasion: "In the former case, it is the exclusive province of congress to change a state of peace into a state of war." Id.

5. The Civil War

In a separate, unique category are the actions taken by President Lincoln during the Civil War. Some accounts describe his conduct as dictatorial, but in fact he recognized that his actions—even emergency actions—required the support of Congress through the regular legislative process.

In April 1861, with Congress in recess, Lincoln issued proclamations calling forth the state militia, suspending the writ of habeas corpus, and placing a blockade on the rebellious states. The blockade was upheld by the Supreme Court in 1863. Justice Grier said for the Court that the President as commander in chief "has no power to initiate or declare a war either against a foreign nation or a domestic State," but in the event of foreign invasion the President was not only authorized "but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." The President had no choice but to meet the crisis in the shape it presented itself "without waiting for

Congress to baptize it with a name; and no name given to it by him or them could change the fact." The Prize Cases, 67 U.S. 635, 668-69 (1863).

Unlike some contemporary Presidents (Truman, Bush, and Clinton), Lincoln never claimed that he possessed full authority to act as he did. In fact, he admitted to exceeding the constitutional boundaries established for the President and therefore needed the sanction of Congress. He told Congress that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."[7] Lincoln used the "war power," which included not only his powers under Article II but those of Congress under Article I. He believed that his actions, especially suspending the writ of habeas corpus, were not "beyond the constitutional competency of Congress."[8] Congress debated his request at length, with Members supporting the President on the explicit assumption that his acts were illegal.[9] The statute enacted by Congress legalized Lincoln's actions "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[10]

Lincoln's deference to Congress did not extend to the judiciary. His suspension of the writ of habeas corpus was opposed by Chief Justice Taney, sitting as circuit judge. Taney ruled that since Lincoln had no authority under the Constitution for suspending the writ, the prisoner, John Merryman, should be set free. When Taney attempted to serve a paper at the prison, to release Merryman, prison officials refused to let Taney's marshal discharge his duty. At that point Taney noted: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." Ex parte Merryman, 17 Fed. Case No. 9,487 (1861), at 153. Only after the war was over and Lincoln dead did the Court breath some life into the privilege of the writ of habeas corpus. In 1866, the Court held that military courts could not function in states where federal courts had been open and operating. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

6. Reconstruction Period

In 1867, the Supreme Court decided a case in which the state of Mississippi sought to enjoin and restrain President Andrew Johnson from using the military to implement two Reconstruction Acts. The statutes divided 10 Southern states into five military districts and made it the duty of the President to assign to each one an officer of the army to enforce the statutes. Attorney General Stanbery warned the Court that any attempt to subject the President to subpoena or judicial force would be met by a presidential decision to decline to obey the Court order, "not out of any disrespect to this court, but out of respect to the high office which he fills." If the President refused to obey the Court order, what then? Stanbery told the Court that

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[7] 7 Messages and Papers of the President 3225.

[8] Id.

[9] Cong. Globe, 37th Cong., 1st Sess. 393 (1861) (statement by Senator Howe).

[10] 12 Stat. 326 (1861).

the next steps would be to hold the President in contempt and perhaps put him in jail, all of which would make it impossible for him to perform his duties. State of Mississippi v. Johnson, 4 Wall. (71 U.S.) 475, 485-87 (1867).

In a unanimous opinion for the Court, Chief Justice Chase rejected plaintiff's assertion that the duties placed upon President Johnson were ministerial, with nothing left to judgment or discretion. Instead, the duties were "purely executive and political" and thus beyond "judicial interference with the exercise of Executive discretion." Id. at 499. The duties "must necessarily be performed under the supervision of the President as commander-in-chief." Id. Moreover, the Court speculated on what would happen if it did issue an order to the President. If he refused obedience "it is needless to observe that the court is without power to enforce its process." On the other hand, if the President complied with the court order and refused to execute the congressional statutes, the House of Representatives might impeach him. Would the Court then interfere, in behalf of the President, and attempt to restrain by injunction the Senate from sitting as a court of impeachment? Id. at 500-01. The Court concluded: "we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." Id. at 501.

7. The Chinese Exclusion Case

Dicta in a case decided by the Supreme Court in 1889 is of interest because it recognized that the executive branch at that time still acknowledged that the decision to take offensive action against another nation was reserved by the Constitution to Congress, not to the President. In upholding a statute that excluded Chinese laborers from the United States, the Court discussed England's request to the United States for naval forces to act in concert with France against China. "As this proposition involved a participation in existing hostilities, the request could not be acceded to, and the Secretary of State in his communication to the English government explained that the war-making power of the United States was not vested in the President but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken." The Chinese Exclusion Case, 130 U.S. 581, 591 (1889). The language here is significant. The Court (and the Administration) referred not merely to the war-*declaring* power of Congress but to the war-*making* power.

8. Protecting Life and Property

On numerous occasions, Presidents have used military force to protect American lives and property without seeking—or obtaining—congressional authority. A prominent example from the nineteenth century was the U.S. bombardment of Greytown, Nicaragua. In 1854, an American ship was ordered to Greytown to compel local authorities to make amends for an affront to an American diplomat. American firms in that area had also complained about property losses. When the commander of the American ship decided that the authorities had failed to make appropriate amends, he bombarded the town from nine in the morning to mid-

afternoon and subsequently sent forces ashore to destroy by fire whatever remained of the town.[11]

A resident of the town sued for damages to his property, but in 1860 a federal court upheld the commander's actions on the basis of the President's duty to protect lives and property in other countries. It is to the President, said the court, that citizens abroad "must look for protection of person and property." Durand v. Hollins, 8 Fed. Cas. (Cir. Ct. S.D. N.Y. 1860) (Case No. 4,186), p. 1123.

In 1868, Congress legislated on the President's power to protect lives and property abroad. The statute directed the President to demand from a foreign government the reason for depriving any American citizen of liberty. If it appeared wrongful and in violation of the rights of American citizenship, the President was to demand the citizen's release. If the foreign government delayed or refused, the President could use such means "not amounting to acts of war" as he thought necessary and proper to obtain the release.[12] Legislation in 1989 inserted "and not otherwise prohibited by law" after "acts of war."[13]

Another life-and-property action litigated in the courts involved President McKinley's sending of 5,000 U.S. troops to China in 1900 to protect American citizens threatened by the "Boxer Rebellion." When Congress returned from recess, he stated that his actions "involved no war against the Chinese nation."[14] A court case raised the question of whether the Boxer Rebellion was a "war." Fred Hamilton, a U.S. serviceman charged with murder and found guilty by a military court, was tried and convicted under the 58th article of war, which requires that a general court-martial be assembled in "time of war." A circuit court in Kansas noted that Congress had increased the pay of military personnel fighting in China to the amount paid in "time of actual war." Relying on this statutory action, the court ruled that there prevailed in China "a condition of war, within the spirit and intent" of the 58th article of war. Hamilton v. M'Claughry, 136 Fed. 445, 451 (C.C. Kan. 1905). From 1900 to the 1930s, there were many other examples of Presidents using the life-and-property reason to justify intervention in the Dominican Republic, Nicaragua, Haiti, Mexico, and other countries.[15]

9. The Power of Dicta

In the 1936 case of *United States* v. *Curtiss-Wright Corp.*, the Supreme Court had to decide whether Congress had delegated too broadly in empowering the President to declare an arms embargo in South America. The statute allowed the

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[11]Milton Offutt, "The Protection of Citizens Abroad by the Armed Forces of the United States," Johns Hopkins University Studies in Historical and Political Science, ser. 44, no. 4 (1928), pp. 32-34.

[12]15 Stat. 223 (1868); 22 U.S.C. § 1732 (1994).

[13]103 Stat. 1900, sec. 9 (1989).

[14]13 Messages and Papers of the Presidents 6423 (December 3, 1900).

[15]Louis Fisher, Presidential War Power 47-54 (1995).

President to impose an arms embargo whenever he found that it "may contribute to the reestablishment of peace" between belligerents. In upholding this statutory grant, the Court added dicta (extraneous observations) to describe presidential power in broad terms, drawing not merely from the Constitution but from extraconstitutional sources.

In two cases decided the previous year, the Court struck down the delegation of domestic power to the President.[16] All that was necessary in *Curtiss-Wright* was to announce that Congress could delegate more broadly in international affairs than in domestic affairs. The basic question: Could *Congress* transfer some of *its* power to the President, especially for conditions that were difficult to predict with any accuracy? Instead, Justice Sutherland, who wrote for the majority, went beyond the statutory question to argue that the exercise of presidential power does not depend solely on an act of Congress because of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." 299 U.S. 304, 320 (1936).

A number of studies have found Sutherland's opinion deficient on historical and constitutional grounds.[17] Moreover, several subsequent court decisions noted that the views expressed by Sutherland were only dicta. Justice Robert Jackson noted that "much of the [Sutherland] opinion is dictum." Youngstown Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952). In 1981, a federal appellate court cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President the `sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization." American Intern. Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

Nevertheless, Sutherland's opinion, including the dicta, is often cited for a broad definition of presidential power in external affairs. It is frequently cited by the Supreme Court to support the existence of independent, implied, and inherent powers for the President.[18]

10. World War II Cases

Both in preparation for World War II and its prosecution, the courts regularly upheld the delegation of vast war powers to the President. The Priorities Act of 1941,

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[16]Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Corp. v. United States, 295 U.S. 495 (1935).

[17]Charles Lofgren, "*United States* v. *Curtiss-Wright Export Corporation*: An Historical Reassessment," 83 Yale L. J. 1 (1973); David M. Levitan, "The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory," 55 Yale L. J. 467 (1946); Claude H. Van Tyne, "Sovereignty in the American Revolution: An Historical Study," 12 Am. Hist. Rev. 529 (1907).

[18]E.g., Dames & Moore v. Regan, 453 U.S. 654, 661 (1981); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States v. Pink, 315 U.S. 203, 229 (1942).

passed six months before Pearl Harbor, authorized the President to allocate any material he deemed necessary for the public interest or to promote the national defense. The power to mobilize the resources of the business community was upheld by the Supreme Court. If the power of the federal government was great enough to draft men for battle, "its power to draft business organizations to support the fighting men who risk their lives can be no less." United States v. Bethlehem Steel, 315 U.S. 289, 305 (1942).

After Congress declared war, mobilization authority was extended to the control of facilities and the operation of plants closed by strikes. Under the Emergency Price Control Act of 1942, President Roosevelt appointed a price administrator who was authorized to designate areas in the country in which defense activities had caused an increase in housing rents. The price administrator designated 28 such areas, set maximum rents, and gave the rent director discretion to order decreases on his own initiative. Judicial machinery was supplied to handle appeals. This administrative apparatus was attacked as unconstitutional delegation of power, but this statutory authority was upheld by the Supreme Court. Bowles v. Willingham, 321 U.S. 503 (1944).

To combat inflation, Congress authorized the President to adjust prices, wages, and salaries "to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities." Plaintiffs argued in court that these vague mandates transferred the legislative power to the President, but the Court upheld that statute. Yakus v. United States, 321 U.S. 414 (1944). Another statute, delegating to the Administration the authority to decide on what constituted "excessive profits" and to institute claims to recover the money, was also upheld. Lichter v. United States, 334 U.S. 742 (1947).

Even after World War II was over, President Truman continued to exercise broad war powers. On May 8, 1945, he announced the end of the war in Europe and on August 14 he announced the surrender of Japan. Yet the following May he seized certain bituminous coal mines under the authority of the War Labor Disputes Act, which empowered the President to take possession of any plant, mine, or facility as may be required for the "war effort." Such authority remained in force until the President proclaimed the "termination of hostilities," a step Truman did not take until December 31, 1946, more than 16 months after Japan's surrender. Truman retained other powers that remained in force during "a state of war" and "a state of emergency." Truman stressed that "a state of war still exists."[19]

The Housing and Rent Act of 1947 provided for an extension of wartime rent controls. The Supreme Court conceded in a decision in 1948 that war in modern times left an impact on the economy for years after, and created a dangerous situation in which the war power "may not only swallow up all other powers of Congress, but largely obliterate the Ninth and Tenth Amendments." However, the Court held that continuation of rent controls in this case did not contain such implications. A housing deficit still existed because of the return of veterans and the slowdown in wartime residential construction. Woods v. Miller, 333 U.S. 138, 146 (1948).

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[19]Public Papers of the Presidents, 1946, at 513.

Not until April 28, 1952, the effective date of the Peace Treaty between Japan and the Allies, did President Truman sign a statement terminating the state of war with Japan, as well as the national emergencies proclaimed by President Roosevelt in 1939 and 1941. Thus, although actual hostilities between the United States and enemy forces lasted for less than four years, Presidents Roosevelt and Truman together exercised emergency and war powers for more than 12 years.

11. The Steel Seizure Case

In 1952, President Truman faced a nationwide strike of steelworkers, threatening his ability to prosecute the war in Korea. He reacted by issuing Executive Order 10340, directing the Secretary of Commerce to take possession of and operate the plants and facilities of 87 major steel companies. In district court, the Justice Department argued that President Truman had acted solely on inherent executive power without any statutory support, and that courts were powerless to control the exercise of presidential power when directed toward emergency conditions.[20]

District Judge David A. Pine rejected the Justice Department's analysis of inherent presidential power and also its claim that President Truman's action was not susceptible to judicial review. In holding Truman's seizure of the steel mills to be unconstitutional, Judge Pine acknowledged that a nationwide strike could do extensive damage to the country but believed that a strike "would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction." Youngstown Sheet & Tube Co. v. Sawyer, 103 F.Supp. 569, 577 (D.D.C. 1952).

The Supreme Court, split 6 to 3, affirmed Judge Pine's decision. Youngstown Co. v. Sawyer, 343 U.S. 579 (1952). However, each of the five concurring Justices wrote separate opinions, advancing different views of the President's emergency power. Only Justices Black and Douglas insisted on specific constitutional or statutory authority to support presidential seizure of private property. The other four concurring Justices (Frankfurter, Jackson, Burton, and Clark) and the three dissenters left presidential power more open-ended when responding to future emergencies.

Justice Jackson's concurrence has greatly influenced interpretations of presidential power. He identified three categories, ranging from presidential actions based on express or implied congressional authorization (putting executive authority at its maximum) to executive measures that were incompatible with congressional policy (reducing presidential power to its lowest ebb). In between those two scenarios lay a "zone of twilight" in which the President and Congress shared authority. Jackson said that congressional inertia, indifference, or quiescence might enable, if not invite, independent presidential action. 343 U.S. at 637. He said he had no illusion that any decision by a court "can keep power in the hands of Congress if it is not wise and timely in meeting its problems." Although the power to legislate for emergencies belongs in the hands of Congress, "only Congress itself can prevent power from slipping through its fingers." Id. at 654.

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[20] "U.S. Argues President Is Above Courts," The New York Times, April 25, 1952, at 1.

Several cases reached the federal courts regarding the question of whether the conflict in Korea was legally a "war" in terms of life insurance policies. One district court held that the hostilities in Korea constituted war even if not formally declared: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war." Weissman v. Metropolitan Life Ins. Co., 112 F.Supp. 420, 425 (D. Cal. 1953). In another life insurance case, a district judge concluded: "No unsophisticated mind would question whether there was a war in Korea in 1952." Gagliormella v. Metropolitan Life Ins. Co., 122 F.Supp. 246, 249 (D. Mass. 1954). The same result was reached in Carius v. New York Life Insurance Co., 124 F.Supp. 388, 391-92 (D. Ill. 1954).

12. The Vietnam Cases

The war in Vietnam triggered dozens of cases in the federal courts, each of them challenging the scope of presidential power. Most of the legal disputes were disposed of at the district or appellate court level. Those that reached the Supreme Court were regularly turned aside on various grounds.

In one of the early cases, David Henry Mitchell, III, was convicted in 1966 for failing to report for induction into the armed forces. To justify his conduct, he argued that alleged violations of various treaties to which the United States was a signatory was a defense to his prosecution. The Second Circuit disagreed in 1966, pointing out that the power of Congress "to raise and support armies" and "to provide and maintain a navy" was quite distinct from the use the President makes of members of the armed forces. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966). The Supreme Court denied certiorari, with Justice Douglas dissenting. 386 U.S. 972 (1967).

In 1966 and 1967, a district court and the D.C. Circuit dismissed a suit brought by an army private who wanted the judiciary to enjoin military officials from sending him to Vietnam. The courts held that the suit should be dismissed because it sought judicial review of political questions that were beyond the jurisdiction of the courts. Luftig v. McNamara, 252 F.Supp. 819 (D.D.C. 1966), aff'd, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1967). A similar case was brought by three members of the military and disposed of in the same manner. Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967). When the Supreme Court denied cert, two Justices (Stewart and Douglas) dissented. 389 U.S. 934 (1967). Two other cases during this period were handled in similar fashion. United States v. Hart, 382 F.2d 1020 (3d Cir. 1967), cert. denied, 391 U.S. 956 (1968) (Douglas, J., dissenting); United States v. Holmes, 387 F.2d 781 (7th Cir. 1967), cert. denied, 391 U.S. 936 (1968) (Douglas, J., dissenting). In the latter case, Justice Douglas said: "I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question." 391 U.S. at 949.

Subsequent court challenges were also unsuccessful. A private citizen brought a class action against President Johnson, the Secretary of State, and the Secretary of Defense for a declaratory judgment that they had acted unconstitutionally by carrying on the war in Vietnam without a congressional declaration of limited or general war.

A district court dismissed the action because the citizen lacked standing to sue and because the case presented a nonjusticiable political question. Velvel v. Johnson, 287 F.Supp. 846 (D. Kans. 1968). That decision was upheld on appeal. Velvel v. Johnson, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970). Other cases brought by plaintiffs in the late 1960s also went against them. Morse v. Boswell, 289 F.Supp. 812 (D. Md. 1968), aff'd, 401 F.2d 544 (4th Cir. 1968), cert. denied, 393 U.S. 1052 (1969) (Douglas, J., dissenting); McArthur v. Clifford, 402 F.2d 58 (4th Cir. 1968), cert. denied, 393 U.S. 1002 (1968) (Douglas, J., dissenting).

John Heffron Sisson, Jr., was indicted for refusing to comply with a draft board order. In three separate decisions, a district court held that the issue of whether there was a lack of constitutional authority to conscript him to serve in a war that Congress had not declared presented a political question outside the court's jurisdiction. United States v. Sisson, 294 F.Supp. 511, 515, 520 (D. Mass. 1968). The district court later decided that his prosecution violated the free exercise and establishment of religion clauses of the First Amendment and the due process clause of the Fifth Amendment because he was conscientiously opposed to American military activities in Vietnam, even though he was not in a formal sense a religious conscientious objector. United States v. Sisson, 297 F.Supp. 902 (D. Mass. 1969). The Supreme Court dismissed the government's appeal on the ground that the Court lacked jurisdiction; the merits of the case, including issues of the war power, were not addressed. United States v. Sisson, 399 U.S. 267 (1970).

Another suit, requesting injunctive and declaratory relief, was brought by Salvatore Orlando, who had been ordered to report for transport to Indochina (Vietnam, Laos, and Cambodia) but objected that the war had not been declared or specifically authorized by Congress. A district court found that Congress had repeatedly given its support for the war, both by voting appropriations and extending the Selective Service Act. Orlando v. Laird, 317 F.Supp. 1013, 1018 (E.D. N.Y. 1970). The judge rejected the argument that Congress had been "coerced" into offering legislative support:

> . . . it is idle to suggest that the Congress is so little ingenious or so inappreciative of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt courses of action from which it wishes the national power to be withdrawn. Political expediency may have counseled the Congress's choice of the particular forms and modes by which it has united with the presidency in prosecuting the Vietnam combat activities, but the reality of the collaborative action of the executive and the legislative required by the Constitution has been present from the earliest stages. Id. at 1019.

On appeal to the Second Circuit, this decision was affirmed. The precise means by which Congress decides to ratify or approve military operations "is a political question." Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971). When the Supreme Court denied cert, 404 U.S. 869 (1971), Justices Douglas and Brennan dissented. Other efforts during this period to challenge the legality of the war in Vietnam were also rejected.[21]

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[21]Massachusetts v. Laird, 400 U.S. 886 (1970); Commonwealth of Massachusetts v. Laird, (continued...)

In 1973, the Second Circuit was asked whether the Secretary of Defense, the Secretaries of Army, Navy, and Air Force, and the Commander of American military forces in Vietnam may implement the President's directive ordering mining of the ports and harbors of North Vietnam and continuation of air and naval strikes against military targets located in North Vietnam. The court decided that the case was a nonjusticiable political question. The court said that judges were "deficient in military knowledge, lack[ed] vital information upon which to assess the nature of battlefield decisions, and [sat] thousands of miles from the field of action," and thus could not "reasonably or appropriately determine whether a specific military operation constitutes an 'escalation' of the war or is merely a new tactical approach within a continuing strategic plan." DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973).

13. Does an Appropriation "Authorize" Policy?

Many of these cases involved the question of whether Congress, by appropriating funds for the Vietnam War, had provided "authorization" within the meaning of the Constitution. Initially, judges were persuaded that the appropriation of funds to prosecute the war was one form of legislative authorization. Orlando v. Laird, 317 F.Supp. at 1017; Orlando v. Laird, 443 F.2d at 1041; Davi v. Laird, 318 F.Supp. at 481. As the Second Circuit noted in 1971: "there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution." DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972).

Another case, seeking a preliminary injunction, was brought by a private who argued that his superiors were without authority to order him to South Vietnam. An appellate court held that he did not show sufficient probability of success on the merits and was not entitled to preliminary injunction. Berk v. Laird, 429 F.2d 302 (2d Cir. 1970). When the case was remanded to district court, the private offered expert testimony from Professor Richard E. Fenno, Jr., that appropriations bills "do not encompass major declarations of policy." Another expert witness, Don Wallace, Jr. of the Georgetown Law Center, also emphasized that both houses of Congress have rules against including substantive legislation in appropriations bills, and that many Members of Congress who voted funds to support armed forces in Vietnam did not endorse the Administration's policy. Berk v. Laird, 317 F.Supp. 715, 718, 721 (E.D. N.Y. 1970). District Judge Judd rejected that analysis:

> Whatever the comments of individual Congressmen, the act [of appropriating funds] nevertheless gave Congressional approval to military expenditures in Southeast Asia. That some members of Congress talked like doves before voting with the hawks is an inadequate basis for a charge that the President was violating

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[21](...continued)
327 F.Supp. 378 (D. Mass. 1971), aff'd, 451 F.2d 26 (1st Cir. 1971); Mottola v. Nixon, 318 F.Supp. 538 (N.D. Cal. 1970), rev'd by 464 F.2d 178 (9th Cir. 1972); Davi v. Laird, 318 F.Supp. 478 (W.D. Va. 1970).

> the Constitution in doing what Congress by its words had told him he might do. Id. at 724.

In other parts of his decision, Judge Judd underscored this point. He said an appropriations act "is like any other act of Congress," and that the Constitution "is not concerned with boundaries between the jurisdiction of appropriations sub-committees and substantive committees. Rules limiting amendment, even if enforced, are not of constitutional significance." Id. at 728. "The entire course of legislation," he said, "shows that Congress knew what it was doing, and that it intended to have American troops fight in Vietnam." Id. Judge Judd also pointed to the Gulf of Tonkin Resolution, enacted in 1964, as legislative authority to President Johnson to prevent aggression in Southeast Asia. Id. at 723.

Other judges expressed reluctance to assume that in appropriating funds for Vietnam, Members of Congress were necessarily endorsing the war. To explore such matters, said a three-judge court in 1972, would require judges to interrogate Members "regarding what they intended by their votes, and then synthesization of the various answers. To do otherwise would call for gross speculation in a delicate matter pertaining to foreign relations." Atlee v. Laird, 347 F.Supp. 689, 706 (D. Pa. 1972), aff'd, 411 U.S. 911 (1973). These types of issues, the court held, were political questions beyond the competence of the court.

A year later, the D.C. Circuit revisited the issue of appropriations. Two members of the panel, Judge Wyzanski and Chief Judge Bazelon, recognized that the overwhelming view of courts had been that appropriations, draft extensions, and other forms of legislation on Indochina "did constitute a constitutionally permissible form of assent." Judge Wyzanski noted that he had earlier expressed the same view. However, he and Judge Bazelon "now regard that body of authority as unsound." Mitchell v. Laird, 476 F.2d 533, 538 (D.C. Cir. 1973). As Judge Wyzanski explained:

> This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Id.

The War Powers Resolution of 1973 contains a section on the issue of whether the appropriation of funds constitutes an authorization by Congress. The resolution provides that the authority to introduce U.S. armed forces into hostilities or into situations where involvement in hostilities would be "clearly indicated" by the circumstances shall not be inferred "from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such

situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution."[22]

14. Cases Brought by Members

From the Vietnam War to the present day, Members of Congress have gone to court to contest presidential wars and defend legislative prerogatives. In most of these cases the courts have held that the Members lacked standing to bring the case. Even when Members gained standing, the courts refused to grant relief for a number of reasons. Judges pointed out that the Members bringing the case represented only a fraction of the congressional membership, and that often another group of Members had filed a brief defending the President's action. Moreover, courts noted that Congress as a whole failed to invoke its institutional powers to confront the President.

In 1972, Senator Mike Gravel, joined by another Senator and 20 Members of the House of Representatives, went to court seeking declaratory and injunctive relief against military activities in Indochina. They argued that the military actions were unlawful because Congress had not declared war. A district court dismissed the suit as not within its jurisdiction for lack of standing by the Members, as an unconsented suit against the United States, and as presenting a nonjusticiable political question. Gravel v. Laird, 347 F.Supp. 7 (D.D.C. 1972).

A year later, Congressman Parren Mitchell and 12 other Members of the House filed a complaint against President Nixon and the Secretaries of State, Defense, Army, Navy, and Air Force seeking an injunction against the war in Indochina unless Congress explicitly authorized the war. Although the D.C. Circuit granted the plaintiffs standing to sue, it held that the question was political and beyond the jurisdiction of the court. Mitchell v. Laird, 476 F.2d 533 (D.C. Cir. 1973). However, the court had no difficulty in deciding that "there has been a war in Indo-China." Id. at 537.

In 1973, Congressman Robert Drinan and three other Members of Congress, joined by an airman in the U.S. Air Force, sought a declaratory judgment and injunctive relief that the aerial combat operations in Cambodia violated domestic and international law. A district court held that the case involved political questions. The court also noted that Congress and President Nixon had reached an agreement, known as the "August 15 Compromise," which allowed for the bombing to continue for an additional 45 days. Therefore, the branches were not "in resolute conflict." Drinan v. Nixon, 364 F.Supp. 854, 860 (D. Mass. 1973). Had it been apparent that the branches were "clearly and resolutely in opposition as to the military policy to be followed by the United States, such a conflict could no longer be regarded as a political question, but would rise to the posture of a serious constitutional issue requiring resolution by the judicial branch." Id. at 858. That decision was upheld on appeal; 502 F.2d 1158 (1st Cir. 1973).

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[22] 87 Stat. 558, sec. 8(a)(1) (1973).

The same result was reached in a case brought by Congresswoman Elizabeth Holtzman, who sought a determination that President Nixon could not engage in combat operations in Cambodia and elsewhere in Indochina in the absence of congressional authorization. Initially a district court granted her standing to bring the suit and refused to dismiss the case on political question grounds. Holtzman v. Schlesinger, 361 F.Supp. 544 (E.D. N.Y. 1973).

In a subsequent ruling, the court held that the President would be enjoined from engaging in combat operations in Cambodia, but that the effective date of the injunction would be postponed in order to permit the Administration to apply for a stay from the appellate court. Holtzman v. Schlesinger, 361 F.Supp. 553 (E.D. N.Y. 1973). The court reviewed the history of the "August 15 Compromise." After President Nixon vetoed an appropriations bill that included language denying the use of funds for bombing in Cambodia, Congress was unable to override the veto. The two branches then agreed on language that allowed the bombing to continue until August 15, 1973, after which the use of funds for combat activities in North Vietnam, South Vietnam, Laos, and Cambodia would be prohibited. The court said that it "cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized." Id. at 565. The Second Circuit reversed the district court, holding that the Holtzman challenge presented a political and not a justiciable question. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973). The Second Circuit took note of the "August 15 Compromise" as evidence that Congress had approved the Cambodian bombing. Id. at 1313.

Congressman Michael Harrington, joined by other Members of Congress and private taxpayers, brought an action to enjoin shipments of war ordnance on the ground that the shipments violated statutes prohibiting the expenditure of funds to support U.S. combat activities in Southeast Asia. A district court held that the questions were political and beyond the scope of judicial inquiry, remarking that "it is the function of the Congress to determine whether the Executive has executed the laws at variance with the intent of Congress." Harrington v. Schlesinger, 373 F.Supp. 1138, 1141 (D. N.C. 1974). This decision was affirmed by the Fourth Circuit, which denied standing for the Members of Congress and the private taxpayers. Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

15. Member Suits (1982-99)

During the Administrations from Ronald Reagan to Bill Clinton, Members of Congress continued to bring war power cases to court. They were regularly denied relief under doctrines that included nonjusticiability, mootness, ripeness, and standing. A number of these cases, however, highlight the factors that would be necessary to effectively challenge presidential war power in court.

Congressman George Crockett and 28 other Members of Congress brought a lawsuit against President Reagan for supplying military equipment and aid to El Salvador, claiming that these actions violated the Constitution, the War Powers Resolution (WPR), and the Foreign Assistance Act. A district court held that the claim involving the WPR was nonjusticiable because it would require the court to do

factfinding to determine whether U.S. forces had been introduced into "hostilities or imminent hostilities" in El Salvador. Crockett v. Reagan, 558 F.Supp. 893, 898 (D.D.C. 1982). Such factfinding had to be left to the political branches:

> If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. . . . Congress has taken absolutely no action that could be interpreted to have that effect. Certainly, were Congress to pass a resolution under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse would be presented. Id. at 899.

The court exercised its equitable discretion to dismiss the claim that El Salvador, under the Foreign Assistance Act, should be denied security assistance because it had violated human rights. The doctrine of equitable discretion[23] allows the court to dismiss a claim when Members of Congress have a dispute that is primarily with fellow legislators. President Reagan had issued certifications to Congress that El Salvador had made a concerted and significant effort to comply with internationally recognized human rights and Congress had accepted those certifications. Id. at 902. The district court's decision was affirmed on appeal. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

Another case, involving Nicaragua, was brought by 12 Members of Congress, citizens of Nicaragua, and residents of the state of Florida. The Nicaraguan plaintiffs sought damages for injuries allegedly caused by U.S.-sponsored terrorist raids against various towns and villages in Nicaragua. The congressional plaintiffs claimed violations of the Constitution, the neutrality laws, the Boland amendment, and the War Powers Resolution. The Florida residents sought to enjoin the alleged operation of U.S.-sponsored paramilitary training camps located in Florida. A district court held that these claims presented a nonjusticiable political question. Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983). When this decision was affirmed on appeal, Judge Ruth Bader Ginsburg in a concurring opinion noted that Congress "has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available to the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress." Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985).

A third challenge to President Reagan's use of military and paramilitary forces came from Congressman John Conyers and 10 other Members of Congress who challenged the constitutionality of the invasion of Grenada. A district court held that pursuant to the doctrine of equitable/remedial discretion, it would not exercise its jurisdiction in action. In denying the motion for injunctive relief and granting the motion to dismiss, the court explained that the doctrine of equitable discretion is designed to prevent Members of Congress from asserting their constitutional or legislative claims in court when they have collegial or in-house remedies available to them. Conyers v. Reagan, 578 F.Supp. 324, 326 (D.D.C. 1984). By the time this case reached the appellate court, the invasion had been terminated. The case was thus

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[23]This doctrine, unique to the D.C. Circuit, is now in doubt as a result of the Supreme Court decision in Raines v. Byrd, 521 U.S. 811 (1997).

dismissed on grounds of mootness. Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

Yet a fourth war powers case was brought against President Reagan, this time involving 110 Members of the House who requested a district court to declare that the President was required to file reports that would trigger the 60-to-90 day clock of the War Powers Resolution with regard to U.S. escort operations in the Persian Gulf. The court held that the constraints of equitable discretion and the political question doctrine made the exercise of jurisdiction inappropriate. Lowry v. Reagan, 676 F.Supp. 333 (D.D.C. 1987). Once again a court noted that Congress had failed to mount a challenge to the President by using legislative remedies available to it. Had Congress enacted a joint resolution stating that hostilities existed in the Persian Gulf for purposes of section 4(a)(1) of the War Powers Resolution, and if the President still refused to file a report triggering the 60-to-90 day clock, "this Court would have been presented with an issue ripe for judicial review." Id. at 341. This decision was affirmed by the D.C. Circuit in 1988 (No. 87-5426).

A more significant case involved a 1990 suit brought by 53 Members of the House and one Senator who requested an injunction to prevent President Bush from initiating an offensive attack against Iraq without first securing a declaration of war or other explicit congressional authorization for such action. Although a district judge ruled that the issue was not ripe for judicial determination, he decisively rejected many of the sweeping claims for presidential war-making prerogatives promoted by the Justice Department. Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990). The department argued that the issue was political rather than legal, and that only the political branches could determine the question of using military force against Iraq. The judge said that claim was "far too sweeping to be accepted by the courts." Id. at 1145. If the President

> had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand. Id.

In a footnote, the judge explained how a dispute would be ripe for judicial determination. If Congress decided that U.S. forces should not be used in foreign hostilities and the President refused to abandon participation in such hostilities, "action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision." Id. at 1144 n.5.

Second, the court cited earlier cases for the proposition that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause." Id. at 1146. The court said it had "no hesitation" in concluding that an offensive military operation against Iraq by several hundred thousand U.S. servicemen "could be described as a `war' within the meaning of Article I, Section 8, Clause 11, of the Constitution." Id.

Third, the Justice Department argued that the plaintiffs lacked standing to sue. The threat of injury, it said, was not immediate because there was only a "possibility" that the President would initiate war against Iraq, and that there was no way of knowing before that occurred whether he would seek a declaration of war from Congress. Id. at 1147. The court concluded: "that argument, too, must fail," pointing out that it was "disingenuous for the Department to characterize plaintiffs' allegations as to the imminence of the threat of offensive military action for standing purposes as 'remote and conjectural.'" Id. at 1148.

Having challenged the Administration's arguments on these grounds, the court identified a familiar weakness to Congress's position: It had yet to act through the regular legislative process to safeguard its institutional interests. It would be "both premature and presumptuous" for the court to decide whether a declaration of war was required "when the Congress has provided no indication whether it deems such a declaration either necessary, on the one hand, or imprudent, on the other." Id. at 1149-50. What would happen, said the court, if it issued the injunction requested by the plaintiffs and a majority of the Members of Congress decided that the President was free, as a legal or constitutional matter, to act militarily toward Iraq without a congressional declaration of war? Id. at 1150. The court could find itself out on a limb, taking a position without support from the political branches. To protect the court from this embarrassment, it would be necessary for a majority of the Members of Congress "to seek an order from the courts to prevent anyone else, *i.e.*, the Executive, from in effect declaring war. In short, unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe." Id. at 1151.

Two other lawsuits—brought by a sergeant of the National Guard in one case and a private citizen in another—challenged President Bush in his contemplated action against Iraq. Both cases were dismissed by district courts. The first case was dismissed on the ground that the President's deployment orders and activities in the Persian Gulf were not subject to judicial review. Ange v. Bush, 752 F.Supp. 509 (D.D.C. 1990). In the second, a court held that the citizen did not establish a "case or controversy" necessary for federal jurisdiction. Pietsch v. Bush, 755 F.Supp. 62 (E.D. N.Y. 1991).

Finally, Congressman Tom Campbell and 25 other Members of the House brought an action in 1999, seeking a declaration that President Clinton had violated the War Powers Clause of the Constitution and the War Powers Resolution by initiating offensive air operations against the Federal Republic of Yugoslavia without obtaining authorization from Congress. A district court concluded that the plaintiffs did not have standing to raise their claims. Campbell v. Clinton, Civil Action No. 99-1072 (PLF) (D.D.C. 1999). In seeking guidance on legislative standing, the court relied particularly on the Line Item Veto decision of *Raines* v. *Byrd*, 521 U.S. 811 (1997). As in other cases, the court emphasized the importance of Congress acting as an institution, through a majority of Members, rather than having a few legislators bring an issue to the judiciary. Only after Congress acted against a President to create a true "constitutional impasse" or "actual confrontation" between the two political branches would there be a basis for legislative standing, for "otherwise courts would 'encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve

the conflict.'" Memorandum Opinion at 17, quoting Goldwater v. Carter, 444 U.S. at 997-98 (Powell, J., concurring). The court said that if Congress had directed President Clinton "to remove forces from their positions and he had refused to do so or if Congress had refused to appropriate or authorize the use of funds for the air strikes in Yugoslavia and the President had decided to spend that money (or money earmarked for other purposes) anyway, that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs." Id.

16. Conclusions

From 1789 to 1950, the power to initiate war against other nations resided for the most part in the branch that the Framers had selected: Congress. There were a number of military actions conducted unilaterally by the President, but they were generally short-term and modest in scope. Throughout that period, the federal courts were supportive of legislative prerogatives.

President Truman's decision in 1950 to go to war against North Korea was the first major presidential war against a foreign power. Although Congress did not take action to protect legislative interests, the Supreme Court placed a restraint on President Truman by striking down his seizure of steel mills. Since that time, Presidents have shown an increasing willingness to use military force against foreign countries without seeking authorization from Congress. Legislators have taken a number of these disputes to court, but federal judges have consistently advised them that if they want to litigate the scope of presidential war power, they must first exhaust all institutional and legislative remedies. Congress must act as a whole to challenge the President.