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## The War Powers

Ben Archibald

The powers of the president to make war have been questioned repeatedly throughout the history of the office. The executive makes one claim, while Congress makes another. As imagined, the court is often deferred to as the authority on the matter.

Article II, Section 2 states, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." Juxtapose this with Article I, Section 8, which states that Congress has the power "to declare war," and it becomes unclear who exactly possesses the power to move our troops into battle overseas. Despite the over 200 presidential wars that have been waged since George Washington first took office (*Hearings*, 126-148), it is unclear whether the president can legally, and more specifically, *constitutionally*, utilize the military in a war or warlike scenario. Our legal history is almost barren of judicial pronouncements regarding the legitimacy of executive or "presidential" wars. The acquiescence of Congress in executive wars, and the self-restraint of the judiciary in matters it deems "political" in nature, have combined to leave extremely faint elucidation of any specific contours of the war powers. The most recent case questioning the authority of the president to engage in military activities without a declaration of war came during the Gulf crisis earlier this decade.

Prior to the military conflict "Desert Storm" in 1990, 54 members of Congress requested an injunction barring President Bush from committing American armed forces to a military offensive (*Dellums*, at 1141). Filing in the Federal District Court of the District of Columbia, the plaintiffs argued that any move to war by the executive would be unlawful without an appropriate declaration by Congress (*Dellums*, at 1443). Sans a declaration of war, the congressmen argued, they would be deprived of their right to debate and decide whether the country ought to go to war. Acting on behalf of the president, the Department of Justice claimed that the issue was a non-justiciable political question, that the plaintiffs lacked standing and that the appropriate allocation of the war powers was not ripe for decision (*Dellums*, cited in "Questioning," 670).

In his decision, Judge Green initially outlined the constitutional framework of the controversy between the congressmen and the president. He recognized the framers' intent in preventing entrustment of the war-making powers to a single person and granted that Congress had the power to declare war, a power excluded from other branches. Judge Green noted:

If the Congress decides that the United States forces should not be employed in foreign hostilities, and if the executive does not of its own volition 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 (*Dellums*, at 1144).

Noting that powers granted to the executive as commander in chief of the armed forces were in direct conflict with the congressional power to declare war, the Justice Department argued on behalf of the president that the simultaneous existence of the congressional and executive powers made the isolation of a single war-making power impossible. The department argued that the harmonization of the various war powers was a political question.

The political question doctrine is based on the separation of powers and the limits of judicial power ("Questioning," 672). The court in *Dellums* outlined six possible scenarios where a court may invoke the doctrine as established in *Baker v. Carr*: (1) where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) where there is a lack of judicially discoverable and agreeable standards for resolving the issue; (3) where it is impossible to decide the issue without an initial policy determination of the kind clearly for nonjudicial discretion; (4) where it is impossible for the court to undertake independent resolution without expressing lack of respect due the coordinate branches of government; (5) where there is an unusual need for unquestioning adherence to a political decision already made; or (6) where there is potential for embarrassment from multifarious pronouncements from different departments on one issue ("Questioning," 674).

The executive argued that determining what constituted war was a question that rested on "delicate judgments" by the political branches (*Dellums*, at 1145). Arguing that the difference between an "act of war" and an "offensive military action" could not be known by any objective standards, the executive contended that without "judicially discoverable and manageable standards to apply," the definition of what constituted war could be found only through political means and is therefore non-justiciable.

The court responded to this by declaring that the conception of semantic defense left total discretion in the executive; they could choose to call any military activity, however "warlike," an "offensive military action." While the distinction between war and non-war may be difficult to realize, it is not beyond the scope of the court's powers. In *Mitchell v. Laird*, the District of Columbia Court of Appeals recognized that there was "no insuperable difficulty in determining whether a war . . . [was] within the . . . meaning of that term in Article I,

Section 8, Clause 11." *Mitchell* illustrates that the power to determine the specific delineation of the term "war" is within the grasp of the court.

The executive branch also challenged the plaintiff's standing. Utilizing the two-pronged test established in *Valley Forge v. Americans United*,<sup>1</sup> the court found that the plaintiffs did have standing in believing their claim that there was an immediate threat of military action and that deprivation of one's constitutional duties warrant a significant enough injury to warrant standing.<sup>2</sup>

In the end, Judge Green decided that since Congress had not taken a position on whether such a declaration was even necessary, it would have been "both premature and presumptuous for the court to render a decision on the issue of whether a declaration of war was required" (*Dellums*, at 1145). Utilizing the reasoning in *Goldwater v. Carter*<sup>3</sup> for determining ripeness in disputes between legislative and executive branches, Judge Green stated:

[The] judicial branch should not decide issues affecting the allocation of power between the president and Congress until the political branches reach a constitutional impasse. Otherwise we 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. . . . It cannot be said that either the Senate or the House has rejected the president's claim. If the Congress chooses not to confront the president, it is not our task to do so (*Dellums*, at 1150).

The court refused to presume that Congress would not endorse a military act in this situation without a declaration of war, acquiesce with the president's plans, or leave the decision in the hands of the president altogether. Without action by

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<sup>1</sup> The two-pronged test stated that: (1) the plaintiff must allege a personally suffered actual or threatened injury, and (2) the "injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."

<sup>2</sup> In *Moore v. United States House of Representatives* the court stated that a congressional plaintiff who suffers "unconstitutional deprivations of [his] constitutional duties" has standing to support his injuries when the "injuries are specific and discernable."

<sup>3</sup> *Goldwater* was a suit by eight senators, sixteen members of Congress and one former senator requesting that President Carter be barred from terminating a treaty with Taiwan without the approval of the Senate. They insisted that because the approval of treaties required Senate ratification, the termination of treaties should likewise require congressional consent. The case was dismissed for lack of ripeness.

a majority of Congress, the judicial had no real impasse or grievance to settle. On top of this issue of ripeness, the court found that there was not sufficient evidence to believe that the president was on the brink of creating war.

In conclusion, the court noted that if the specified conditions were met, an injunction would be issued. Presumably, then, ripeness would be found if Congress were to pass a resolution prohibiting the use of force by the president; and if the use of force was seen as imminent, the judiciary would grant an injunction. Judge Green pointed out that the framers' intent of dividing the war powers was realized in the Gulf War conflict when the Congress resolved to support the president's decision to mobilize forces into battle if the United Nations resolved to do so.

*Dellums* illuminates many of the complexities involved in resolving the war powers confusion. It reminds us that the term "war" is undefined in the Constitution along with the term "declare." The power of the president to command the armed forces is not at all clear in relation to the powers granted to Congress. While *Dellums* leaves the issue untested in the true sense, it does outline some rules that the court may follow<sup>4</sup> in future cases regarding the war powers allocation.

### Bibliography

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<sup>4</sup> There still may be considerable discrepancy between the decision in *Dellums* and a decision that the Supreme Court could issue. Some speculate that the Supreme Court would deem this a political question, where the Federal District Court did not.