

The Law: Litigating the War Power with Campbell v. Clinton

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Presidential war power has expanded because of executive initiatives, congressional acquiescence, and judicial passivity. This article takes a look at the traditional role of courts in serving as an independent check on presidential war power. During the past half century, however, judges have increasingly invoked a number of doctrines to avoid deciding war power cases: standing, mootness, ripeness, political questions, and prudential considerations. This pattern culminates in Congressman Tom Campbell's challenge to President Bill Clinton's war in Yugoslavia, a case that failed on a combination of standing and political questions. The net effect of this legislative and judicial performance is that we now have unchecked presidential wars, a condition that would have astonished the framers of the Constitution.

Several recent scholars have suggested that federal courts have rarely decided cases involving the war power and that when they do, they invariably support the president. In a study on judicial review and the war power, Christopher May (1989) offered this analysis: "Before World War I the Supreme Court—with one short-lived exception—refused to pass on the validity of laws adopted under the war powers of the Constitution" (p. vii). He spoke of "the long-standing position that war powers legislation is not subject to judicial review" (p. 1). "The notion that the war powers were exempt from judicial scrutiny had a long and distinguished lineage" (p. 16).

A similar perspective appears in a more recent study by Martin Sheffer (1999) on the judiciary's record of passing judgment on presidential war powers. Executive-legislative conflicts regarding war and peace "rarely find their way to the judiciary and, when they do, are rarely decided according to proper constitutional interpretation" (p. ix). Courts, "speaking generally, either postpone ruling or uphold, when they do rule, [presidential] exercises of the [war] power" (p. x). The courts "lie back, seeking to avoid having to rule on questions of the conduct of commander-in-chief (and war) powers, and when they are forced to rule, they usually uphold presidential action" (pp. x-xi).

However, it has not been the practice of federal courts to regularly flinch from deciding war power and foreign-affairs questions. For most of American history, the judiciary has

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accepted and decided these cases, and they have recognized and upheld congressional prerogatives as much as, if not more than, presidential prerogatives (King and Meernik 1999).

The Judiciary Decides War Power Cases

Two early Supreme Court cases, in 1800 and 1801, involved the “Quasi War” against France. In *Bas v. Tingy* (1800), the Court left to Congress the judgment whether it wanted to fully declare war or to authorize an “imperfect” war (4 Dall. 37). Congress chose to do the latter in the war against France. In *Talbot v. Seeman* (1801), Chief John Marshall looked solely to Congress for defining the scope of the war power: “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” (5 U.S. 1, 28).

What happened when a presidential decision in time of war collided with policies that Congress had established in a statute? Did the courts run for cover, designating the dispute a political question to be decided solely by the elected branches? No, the case was treated like any other dispute, to be resolved in accordance with legal and constitutional principles. *Little v. Barreme* (1804) involved a proclamation by President John Adams to seize ships, although his order exceeded the authority granted him by Congress. In a major ruling, Chief Justice Marshall said that national policy is defined by statute, not by conflicting executive pronouncements. Presidential “instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass” (6 U.S. 170, 179). Under this decision, military commanders who implement illegal presidential proclamations are liable for damages.

Another major decision was *United States v. Smith* (1806), decided by a federal circuit court. Colonel William S. Smith, indicted under the Neutrality Act for engaging in military actions against Spain, claimed that his military enterprise “was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government” (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 activities by private citizens after Congress had specifically forbidden such actions. The court ruled that the Neutrality Act was “declaratory of the law of nations; and besides, every species of private and unauthorized hostilities is inconsistent with the social compact, and the very nature, scope, and end of civil government” (p. 1229). The clear message from the court: Executive officials—even the president—may not set aside statutory policy. “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” (p. 1230). The court also noted the following: “Does [the President] possess the power of making war? That power is exclusively vested in congress” (p. 1230). The court drew a distinction 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” (p. 1230).

Some scholars describe the actions taken by President Abraham Lincoln during the Civil War as dictatorial; however, in fact, he recognized that his decisions—including those of an emergency nature—required the support of Congress through the regular legislative process. Advising members of Congress that his actions during their recess most likely exceeded his constitutional powers, he said that the emergency proclamations, “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” (Richardson 1897-1925, 7:3225). Congress debated his request at length, with lawmakers supporting the president on the explicit assumption that his acts were illegal (*Congressional Globe* 1861). 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” (12 Stat. 326 [1861]).

When Lincoln’s proclamations establishing a blockade of southern ports were challenged in court, judges did not step aside and refuse to decide the case. In upholding the blockade in *The Prize Cases* (1863), Justice Grier noted that the president “has no power to initiate or declare a war either against a foreign nation or a domestic State” (67 U.S. 635, 668). Richard Henry Dana Jr., who helped argue the case for the administration, made precisely the same point. The blockade did not bear upon “*the right to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress” (p. 660).

Even Lincoln’s suspension of the writ of habeas corpus produced a court ruling. Sitting as circuit judge, Chief Justice Taney concluded 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 in *Ex parte Merryman* (1861): “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” (17 Fed. Case No. 9,487, at 153). Only after the war was over and Lincoln dead did the Court breathe some life into the privilege of the writ of habeas corpus. In *Ex parte Milligan* (1866), the Court held that military courts could not function in states where federal courts had been open and operating (71 U.S. 2).

Dicta in an 1889 case decided by the Supreme Court 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 the president. In *The Chinese Exclusion Case* (1889), 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. (130 U.S. 581, 591).

Notice that the Court—and the administration—referred not merely to the war-*declaring* power of Congress but to its war-*making* power.

Throughout World War II, the courts decided a number of cases that involved the delegation of vast war powers to the president. In upholding these grants of power, the courts decided these cases rather than ducking them, for example, *United States v. Bethlehem Steel*, 315 U.S. 289 (1942); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Lichter v. United States*, 334 U.S. 742 (1947). On the issue of whether the president's emergency war powers may continue after hostilities have ended, the Court took the case and decided it in favor of presidential discretion to deal with economic problems precipitated by the war, for example, *Woods v. Miller*, 333 U.S. 138 (1948).

The Steel Seizure Case of 1952 represents a well-known example of the Court rebuffing the president's exercise of the war power. Faced with a nationwide strike of steelworkers that threatened his ability to prosecute the war in Korea, President Harry Truman issued an executive order to direct 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 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. In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), District Judge David A. Pine rejected the department's analysis of presidential power and the claim that judicial review was not available (103 F.Supp. 569, 577 [D.D.C. 1952]). The Supreme Court, split 6 to 3, affirmed Judge Pine's decision. Each of the five concurring Justices in *Youngstown Co. v. Sawyer* wrote separate opinions, advancing different views of the president's emergency power (343 U.S. 579).

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. Judges did not find that this issue exceeded the competence or the authority of the courts. 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" (*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).

The Courts Learn How to Duck

Combat operations in Southeast Asia triggered dozens of cases in the federal courts. Most of the lawsuits, challenging the scope of presidential power, were disposed of at the district or appellate court level. Those that reached the Supreme Court were regularly turned aside on various grounds, with the Court typically denying certiorari. It was here (at a very late date in American history) that courts evolved the doctrine that war power issues were inappropriate for the judiciary (Wormuth and Firmage 1989, 235-52). The courts held that such suits should be dismissed because they sought judicial review of political questions that were beyond the jurisdiction of the courts, for example, *Luftig v. McNamara*, 252 F.Supp. 819

(D.D.C. 1966), affirmed, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1967). Other Vietnam cases were disposed of in similar fashion, for example, *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), cert. denied, 389 U.S. 934 (1967); *United States v. Hart*, 382 F.2d 1020 (3d Cir. 1967), cert. denied, 391 U.S. 956 (1968); *United States v. Holmes*, 387 F.2d 781 (7th Cir. 1967), cert. denied, 391 U.S. 936 (1968); *Velvel v. Johnson*, 287 F.Supp. 846 (D. Kans. 1968), aff'd, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); *United States v. Sisson*, 294 F.Supp. 511 (D. Mass. 1968); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973); *Ailee v. Laird*, 347 F.Supp. 689, 706 (D. Pa. 1972), aff'd, 411 U.S. 911 (1973).

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 held that the lawmakers lacked standing to bring the case. Even when legislators were granted standing, the courts refused relief on numerous grounds. Judges pointed out that the legislators represented only a fraction of the congressional membership and that often another group of legislators had filed a brief defending the president's action. Courts regularly note that Congress as a whole has failed to invoke its institutional powers to confront the president.

In 1972, a case brought by Senator Mike Gravel, joined by another senator and twenty members of the House, argued that the military actions in Indochina were unlawful because Congress had not declared war. The suit was dismissed because of standing and the political question doctrine. See *Gravel v. Laird*, 347 F.Supp. 7 (D.D.C. 1972). A similar case was turned aside a year later. After granting the legislators standing, the appellate court held that the question was political and beyond the jurisdiction of the courts. See *Mitchell v. Laird*, 476 F.2d 533 (D.C. Cir. 1973).

A case brought by Congressman Robert Drinan and three other members of Congress, claiming that aerial combat operations in Cambodia violated domestic and international law, underscored the need for Congress—as an institution—to confront the president. The district court held that the case involved political questions, in part because Congress and President Richard Nixon had reached an agreement, known as the “August 15 Compromise,” that allowed the bombing to continue for an additional forty-five days. Therefore, the branches were not “in resolute conflict.” See *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 an 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. (P. 858)

That decision was upheld on appeal; 502 F.2d 1158 (1st Cir. 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. See *Holtzman v. Schlesinger*, 361 F.Supp. 544 (E.D. N.Y. 1973). In a subsequent ruling, the court held that it would enjoin President Nixon from engaging in combat operations in Cambodia but postponed the effective date of the injunc-

tion to permit the administration to apply for a stay from the appellate court. See *Holtzman v. Schlesinger*, 361 F.Supp. 553 (D.D. N.Y. 1973). The Second Circuit reversed the district court, holding that the lawsuit presented a political and not a justiciable question. See *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 (p. 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 lawmakers and private taxpayers. See *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975).

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. Congressman George Crockett and twenty-eight 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 fact-finding to determine whether U.S. forces had been introduced into “hostilities or imminent hostilities” in El Salvador. See *Crockett v. Reagan*, 558 F.Supp. 893, 898 (D.D.C. 1982). Such fact-finding, said the court, had to be done by Congress:

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. (P. 899)

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 twelve 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 WPR. 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. See *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 Con-

gress “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 ten other members of Congress who challenged the constitutionality of the invasion of Grenada. A district court held that it would not exercise its jurisdiction, in part because members of Congress should not be able to assert their constitutional or legislative claims in court when they have collegial or in-house remedies available to them. See *Conyers v. Reagan*, 578 F.Supp. 324, 326 (D.C. Cir. 1984). By the time this case reached the appellate court, the invasion has been terminated and the case was thus dismissed on grounds of mootness. See *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 sixty- to ninety-day clock of WPR with regard to U.S. escort operations in the Persian Gulf. The court held that a number of constraints, including the political-question doctrine, made the exercise of jurisdiction inappropriate. See *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 WPR, and if the president still refused to file a report triggering the sixty- to ninety-day clock, “this Court would have been presented with an issue ripe for judicial review” (p. 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 fifty-three members of the House and one senator. They requested an injunction to prevent President George 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. 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” (*Dellums v. Bush*, 752 F.Supp. 1141, 1145 [D.D.C. 1990]). The judge remarked that 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” (p. 1145).

In a footnote, the judge explained the type of dispute that 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” (*Dellums v. Bush*, 1144, n. 5). The court cited earlier cases for the proposi-

tion 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” (p. 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.”

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 (*Dellums v. Bush*, 1147). The court’s response: “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’” (p. 1148).

Having challenged the administration’s legal and constitutional arguments on these grounds, the court identified a familiar weakness to the lawmakers’ position: Congress 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” (*Dellums v. Bush*, 1149-50). What would happen, said the court, if it issued the injunction requested by the plaintiffs and a majority of lawmakers decided that the president was free, as a legal or constitutional matter, to act militarily toward Iraq without a congressional declaration of war? 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. (P. 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. See *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. See *Pietsch v. Bush*, 755 F.Supp. 62 (E.D. N.Y. 1991).

Tom Campbell’s Case

Congressman Tom Campbell and twenty-five 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 WPR by initiating an offensive air operation against the

Federal Republic of Yugoslavia without obtaining authorization from Congress. A district court ruled that the plaintiffs did not have standing to raise their claims. See *Campbell v. Clinton*, 52 F.Supp.2d 34 (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 to defend its prerogatives—through a majority of its members—rather than having a few legislators bring a dispute 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’” (52 F.Supp.2d at 43, citing Justice Powell’s concurrence in the 1979 treaty termination case, *Goldwater v. Carter*). 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. (P. 43)

The district court’s ruling was affirmed by the D.C. Circuit on February 18, 2000. Although three judges participated in the panel decision, they managed to generate at least four positions. Writing for the majority, Judge Laurence H. Silberman held that the members of Congress lacked standing to bring the suit. On that point he was joined by Judge A. Raymond Randolph, who nevertheless wrote a concurrence offering different views on the standing issue. Judge David S. Tatel wrote a dissenting opinion, agreeing with Silberman’s analysis of the standing issue but disagreeing with Silberman’s position that the case posed a nonjusticiable political question. Silberman wrote a concurrence to express his views on the political question doctrine. See *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). Reading these four opinions by three judges serves to highlight how little agreement, or understanding, there is on the judiciary’s role on war power disputes.

Judge Silberman’s opinion for the majority focuses on the standing issue. In analyzing *Raines v. Byrd*, he concludes that it is “not readily apparent” what the Supreme Court meant when it referred to a legislator’s vote being completely “nullified” and therefore entitled to judicial relief (p. 22). He also said that Congress “certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign” and that Congress “has a broad range of legislative authority it can use to stop a President’s war making” (p. 23).

Judge Randolph agreed that the plaintiffs lacked standing but disagreed with the analysis of Silberman and Tatel on *Raines*. Randolph reviewed the four votes taken by the House of Representatives on April 28, 1999, including a vote of 427 to 2 against a declaration of war and a tie vote refusing to authorize the conduct of military air operations and missile strikes in cooperation with NATO. Campbell and the other plaintiffs argued that they had standing because Clinton’s prosecution of the war “completely nullified” their votes against declaring war and against authorizing a continuation of the hostilities.

The phrase “completely nullified” appears in *Raines*, from which Randolph cites this language:

Legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified. (P. 29)

To Randolph, the key issue is whether the legislative actions went “into effect,” which in this case did not happen. War was not declared. As for the vote on authorizing the hostilities, Clinton never maintained that he needed congressional approval. Did his continuation of the war after April 28 have the effect of nullifying the votes of those who voted against authorization?

The majority answered that question by pointing out that Congress had ample opportunities to stop the prosecution of the war but never acted to cut off funds, to invoke impeachment, or to take other steps. To this Randolph responds, “The majority has, I believe, confused the right to vote in the future with the nullification of a vote in the past, a distinction *Raines* clearly made” (p. 32). Since members of Congress are always able to vote for legislation, “the majority’s decision is tantamount to a decision abolishing legislative standing” (p. 32). Randolph said that if the court wanted to get rid of legislative standing altogether, “we ought to do so openly and not under the cover of an interpretation, or rather misinterpretation, of a phrase in *Raines*.” Randolph also claimed that the majority’s decision conflicted with a recent D.C. Circuit case on legislative standing, *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (1999). *Chenoweth* regarded the previous pocket veto case of *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), as still good law. Plaintiffs in *Kennedy* had standing because a pocket veto by President Nixon had nullified their votes. To establish standing, there was no need for them to take additional legislative action, such as passing the same law again or impeaching the president.

Just as the three panel members disagreed on standing, so did they divide on the competence of courts to decide war power issues. In his concurrence, Silberman argued that we lack “judicially discoverable and manageable standards to address war power issues” and that War Powers Clause disputes implicate the political question doctrine (pp. 24-25). Looking to the war power cases litigated during the Reagan years and the demand placed on courts to determine whether hostilities or imminent hostilities existed to trigger WPR, Silberman agreed with the general holding “that the statutory threshold standard is not precise enough and too obviously calls for a political judgment to be one suitable for judicial determination.” No matter “how clear it is in any particular case that ‘hostilities’ were initiated . . . the statutory standard is one generally unsuited to judicial resolution.” He said that Campbell and the other appellants “cannot point to any constitutional test for what is war” (p. 25).

In contrast to Silberman, Judge Tatel disagreed that the case posed a nonjusticiable political question and that courts lack judicially discoverable and manageable standards for determining the existence of a “war.” Determining whether the military activity in Yugoslavia amounted to “war” within the meaning of the Declare War Clause “is no more standardless than any other question regarding the constitutionality of government action.” Tatel identified other complex constitutional questions, including the meaning of “unrea-

sonable searches and seizures,” the establishment of religion, and equal protection standards for drawing congressional districts. On all those questions, and others, courts have been able to develop standards for constitutional terms that are “not self-defining” (p. 37). He cited cases, beginning with *Bas v. Tingy* (1800), to show the capacity and willingness of courts to accept and decide disputes over the war power. Tatel said that “courts are competent to adjudge the existence of war and the allocation of war powers between the President and Congress” (p. 39).

Conclusions

For most of U.S. history, federal courts have decided the merits of a number of war power disputes. Only in recent decades, beginning with the Vietnam War, has the judiciary leaned on the political question doctrine to sidestep these kinds of cases. With Congress unwilling to confront the president with legislative restrictions (Fisher 2000) and the courts loath to reach the merits of these cases, it appears that presidents may initiate and conduct wars whenever they like. In this fundamental respect, the framers’ belief in a system of checks and balances, with each branch able and willing to fight off encroachments from other branches, has failed. Few people seem to be paying much attention about this collapse of constitutional principles and the decline in representative democracy.

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