AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan-Bush Era – Separation of Powers

*Walter Dellinger*, **Deployment of United States Armed Forces into Haiti** (1994)[[1]](#footnote-1)

*In 1990, the reformer Jean-Bertrand Aristide was elected president of the island nation of Haiti, some 800 miles off the coast of Florida. A few months later, in the midst of political turmoil over his proposals and style of governing, he was deposed in a military coup. Aristide retreated into exile in the United States. In the 1992 American presidential elections, candidate Bill Clinton criticized the Bush administration for not doing enough to return Aristide to office. As president, Clinton sought to increase the pressure on the military leaders in Haiti to step down. In light of the military debacle in Somalia in the fall of 1993, the possibility of American military intervention in Haiti was controversial. The Congressional Black Caucus urged the Clinton administration to take action, but the defense appropriations bill included a prohibition on the use of funds for any military operation in Haiti except in such limited circumstances as might be needed to “protect or evacuate United States citizens.” Meanwhile, the United States assembled a military force to install Aristide back in Haiti. In the summer of 1994, the United Nations Security Council passed a resolution authorizing the use of military force in Haiti. The Clinton administration announced that an invasion of Haiti was imminent, providing leverage for a delegation led by former-President Jimmy Carter to negotiate a peaceful transition of power as American ships sailed toward Haiti. As the troops for the invasion were being assembled, a group of U.S. senators wrote to the Office of Legal Counsel demanding an accounting of what legal advice had been offered to President Clinton regarding his authority to deploy the American military to Haiti. Assistant Attorney General Walter Dellinger responded, explaining that the deployment was consistent with both congressional statutes and the president’s own constitutional authority. Ultimately, he argued, the deployment of the armed forces to Haiti did not constitute a “war” that required congressional authorization.*

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[I]t was the sense of Congress that the President need not seek prior authorization for the deployment in Haiti provided that he made certain specific findings and reported them to Congress in advance of the deployment. The President made the appropriate findings and detailed them to Congress. . . . Accordingly, this is not, for constitutional purposes, a situation in which the President has “take[n] measures incompatible with the expressed or implied will of Congress.” *Youngstown Sheet and Tube v. Sawyer* (1952). Rather, it is either a case in which the President has acted “pursuant to an . . . implied authorization of Congress,” so that “his authority is at its maximum,” or at least a case in which he may “rely upon his own independent powers” in a matter where Congress has “enable[d], measures on independent presidential responsibility.”

. . . . While Congress obviously sought to structure and regulate such unilateral deployments [in passing the War Powers Resolution of 1973], its overriding interest was to prevent the United States from being engaged, without express congressional authorization, in major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important objectives where the risk of sustained military conflict was negligible.

Further, in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed. . . . By declining, in the WPR or other statutory law, to prohibit the President from using his conjoint statutory and constitutional powers to deploy troops into situations like that in Haiti, Congress has left the President both the authority and the means to take such initiatives.

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Finally, in our judgment, the Declaration of War Clause, U.S. Const. art. I, sec. 8, c. 11 . . . did not of its own force require specific prior congressional authorization for the deployment of troops at issue here. The deployment was characterized by circumstances that sufficed to show that the operation was not a “war” within the meaning of the Declaration of War Clause. The deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved. Taking that and other circumstances into account, the President, together with his military and intelligence advisors, determined that the nature, scope, and duration of the deployment were not consistent with the conclusion that the event was a “war.”

In reaching that conclusion, we were guided by the initial premise, articulated by Justice Robert Jackson, that the President, as Chief Executive and Commander in Chief, “is exclusively responsible” for “the conduct of diplomatic and foreign affairs,” and accordingly that he may, absent specific legislative restrictions, deploy United States armed forces “abroad or to any particular region.” *Johnson v. Eisentrager* (1950). Presidents have often utilized this authority, in the absence of specific legislative authorization, to deploy United States military personnel into foreign countries at the invitation of the legitimate governments of those countries. . . .

. . . . Most recently, in 1989, at the request of President Corazon Aquino, President Bush authorized military assistance to the Philippine government to suppress a coup attempt.

Such a pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, “evidences the existence of broad constitutional power.”

. . . . [W]e believe that “war” does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of “war.”

In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary, the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment. Indeed, it was the President’s hope, since vindicated by the event, that the Haitian military leadership would agree to step down before exchanges of fire occurred. Moreover, while it would not be appropriate here to discuss operational details, other aspects of the planned deployment, including the fact that it would not involve extreme use of force, as for example preparatory bombardment, were also relevant to the judgment that it was not a “war.”

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1. Excerpt taken from 18 *Opinions of the Office of Legal Counsel* 173 (1994). [↑](#footnote-ref-1)