AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Judicial Power and Constitutional Authority

Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971)

In 1970, the Massachusetts legislature passed a law directing the state attorney general to file suit in federal suit—on behalf of its citizens and the "integrity" of the Constitution—seeking a declaration that the Vietnam War was unconstitutional because it was not initiated by a formal declaration of war and an injunction preventing Secretary of War Melvin Laird from ordering any Massachusetts citizens to the theater of operations in Southeast Asia. The attorney general filed suit in federal district court, joined by several state citizens who were current members of the armed forces or subject to the draft. The case was assigned to Chief Judge Charles Wyzanski, a Roosevelt appointee. He dismissed the complaint, observing that though "it is at least possible that the courts do have the power to determine the relative scope of Congressional and Presidential power to authorize the use abroad of our armed forces," the plaintiffs failed on the merits since Congress had actively participated in the military build-up in Vietnam. Wyzanski was not the first to hear such a case, and he pointed to the decision of several district and circuit courts that had reached the same conclusion in similar cases the year before.

Undaunted, the plaintiffs appealed to the First Circuit Court of Appeals, and their case was heard by a three-judge panel that included an Eisenhower appointee and two Johnson appointees, including Frank Coffin, a one-time Maine congressman, who wrote the opinion for the unanimous court. Like other courts that heard cases involving the constitutionality of the war, this court was reluctant to simply dismiss the case as beyond the reach of the judicial power, but it was also determined not to issue a declaration that the war was unconstitutional. In this opinion, did the judges take the issue of the constitutionality of the war to be a "political question" not subject to judicial review or not? How had the earlier decisions of the judiciary opened the door to such a case?

The state attorney general had first applied to the U.S. Supreme Court to hear the case, but the Court refused in Massachusetts v. Laird *(1970). Without an opinion explaining the reason for the Supreme Court's refusal to hear the case, lower courts were left with little guidance as to how to proceed when the state attorney general turned to them. Justice Douglas filed a dissent, along with two of his brethren, from the Court denial of the motion to file the case. Douglas argued that cases such as* Baker *and* Powell *had opened the door to such a case. "It is far more important to be respectful to the Constitution than to a coordinate branch of government," Douglas asserted. "The question of an unconstitutional war is neither academic nor 'political.' This case has raised the question in an adversary setting. It should be settled here and now."*

JUDGE COFFIN delivered the opinion of the Court.

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. . . . What remains is the contention that, since the substantiality of plaintiffs' constitutional claims is challenged, there is lack of subject matter jurisdiction, citing *Powell v. McCormack* (1969). No such doctrine can be drawn from *Powell*; the contrary was made clear in *Baker v. Carr* (1962), i.e., that only if a claim is absolutely devoid of merit or frivolous could dismissal for lack of jurisdiction be justified. Nor do we find any merit in the claim that the individual plaintiffs, particularly those serving in Southeast Asia, lack standing. *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970). . . .

. . . . Suffice it to say that some of the plaintiffs are properly before us. While the challenge to the constitutionality of our participation in the Vietnam war is a large question, so also is the question whether such an issue is given to the courts to decide, under the circumstances of this case. The Supreme Court has thus far not ruled on the latter issue in this context. Other federal courts have differed in their

rationales. Scholars have probed "the political question" and have found it just as much an impenetrable thicket as have the courts.

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. . . . [O]nce given the principle that a plaintiff may challenge the constitutionality of undeclared military operations, a court must be prepared to adjudicate whether actions are justified as emergency ones needing no declaration, or have gone beyond this bound. In the latter event the court must adjudicate whether Congress has expressly or impliedly ratified them. Workable standards, fact finding, the prospect of conflicting inferior court decisions, and other factors might well give pause to the most intrepid court.

We do not, however, rely on these factors. Partly we feel that to base abstinence on such pragmatic, if realistic, considerations is not desirable unless so clearly dictated by circumstances that it cannot be mistaken as abdication. Moreover, on a question so dominant in the minds of so many, we deem it important to rule as a matter of constitutional interpretation if at all possible. Finally, and of course most pertinently, we derive recent guidance from the Supreme Court's approach in *Powell v. McCormack*, giving dominant consideration to the first decisional factor listed in *Baker v. Carr*. This is the inquiry "whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment."

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. . . . [T]he war power of the country is an amalgam of powers, some distinct and others less sharply limned. In certain respects, the executive and the Congress may act independently. The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without Congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities. To Congress is granted the power to appropriate funds for sustaining armies. . . . An analogous power given to the President is his power as Commander-in-Chief to station forces abroad. . . . *Johnson v. Eisentrager* (1950). Congress has the power to concur in or to counter the President's actions by its exclusive authority to appropriate monies in support of an army, navy and air force, . . . and by granting letters of marque and reprisal. . . . While the fact of shared war-making powers is clearly established by the Constitution, however, and some of its elements are indicated, a number of relevant specifics are missing. The Constitution does not contain an explicit provision to indicate whether these interdependent powers can properly be employed to sustain hostilities in the absence of a Congressional declaration of war. Hence this case.

The brief debate of the Founding Fathers sheds no light on this. All we can observe, after almost two centuries, is that the extreme supporters of each branch lost . . .

Under these circumstances, what can we say was "textually committed" to the Congress or to the executive? Strictly speaking, we lack the text. . . . We must have some license to construe the sense of the Constitutional framework, wholly apart from any doctrine of implied powers inherent in sovereignty, *cf. United States v. Curtiss-Wright Export Corp*. (1936). We observe, first, that the Founders' silence on the subject of hostilities beyond repelling attack and without a declaration of war was not because the phenomenon was unknown. . . .

Secondly, we note that the Congressional power to declare war implies a negative: no one else has that power. But is the more general negative implied -- that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war? The drafters of the Constitution, who were not inept, did not say, "power to commence war". . . .

Finally, we give some significance to the fact that in the same "power to declare war clause", Article I, Section 8, Clause 11th, there is the power to grant letters of marque and reprisal. Were this a power attendant to and dependent upon a declared war, there would be no reason to specify it separately. . . . It is clear that there can be an "enemy", even though our country is not in a declared war. . . . *See also*, *Prize Cases* (1863).

As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from

measuring a specific executive action against any specific clause in isolation. . . . In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion, we have also addressed the merits of the constitutional issue. We think, however, that this is inherent when the constitutional issue is posed in terms of scope of authority.

In circumstances where powers are interrelated, Justice Jackson has said that:

> "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer* (1952) (concurring opinion).

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The question remains to be asked: when the executive and Congress disagree not as to the advisability of fighting a war but as to the appropriate level of fighting, how shall the Constitution be served? When the executive takes a strong hand, Congress has no lack of corrective power. Congress has the power to tax, to appropriate, to impound, to override a veto. The executive has only the inherent power to propose and to implement, and the formal power to veto. The objective of the drafters of the Constitution was to give each branch "constitutional arms for its own defense." *The Federalist* No. 23 (Hamilton). But the advantage was given the Congress, Hamilton noting the "superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body."

All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. This question we do not face. Nor does the prospect that such a question might be posed indicate a different answer in the present case.