

BUT CF.

KUWAIT, THE CONSTITUTION, AND THE COURTS: TWO CHEERS FOR JUDGE GREENE

DECEMBER 19, 1990¹

Judge Harold Greene's decision in *Dellums et al. v. Bush*² was plainly right in its central proposition, that (except in the event of a "sudden attack" upon the United States) the Constitution places unambiguously in Congress the authority to decide whether the nation goes to war. (Once war is congressionally authorized—note that there has never been a requirement that such authorization actually be labeled a "declaration of war," only that it be clear—authority to manage it then passes to the President in his role as "Commander in Chief.")³

Judge Greene was right about a second important proposition as well: whether the required congressional authorization has been obtained is not a "political question" the courts should refuse to decide. No one, including the plaintiffs, wants courts to get involved in the business of authorizing wars, only the business of deciding whether Congress has done so. In fact the federal courts routinely decided such questions throughout the nineteenth century.⁴ Precious few judges in this century have had the wisdom and

1. A version of approximately half this essay appeared in the December 23, 1990 issue of *The Los Angeles Times*, and is used here with permission.

2. 752 F. Supp. 1141 (D.D.C. 1990).

3. All this has been demonstrated repeatedly. See sources cited in Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386-92 (1988). The problem is not so much a lack of consensus among objective experts respecting the nature of the constitutional command as an unwillingness on the part of the legislative and judicial branches to call the executive on its bold (and generally successful) efforts to overrun it.

4. See, e.g., *Bas v. Tingey*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862); Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 U. KAN. L. REV. 449, 480-81 n. 138 (1968) (citing twenty-one cases in which federal courts had decided whether Congress had sufficiently authorized military action the President was conducting); E. KEYNES, UNDECLARED WAR 94-101 (1982). On the application of the political question doctrine to such questions, see generally Ely, *supra* note 3, at 1407-12.

courage so forthrightly to endorse either of these propositions, however. Thus the two cheers for Judge Greene, and loud ones.⁵

The lawsuit ran aground, however, on a third finding by Judge Greene, that unless and until the plaintiffs (fifty-four members of Congress) could get a majority of their colleagues to join their challenge, the case was not “ripe” for decision. Stuart M. Gerson, the Assistant Attorney General who argued the case for the administration, exulted that the decision had “left the President’s prerogatives for him to act unchanged and unaffected.”⁶ This is a frightening view of the demands of the Constitution for a high Justice Department official to take. Judge Greene finds that (although ripeness problems preclude judicial injunction) President Bush’s (then) unilateral march toward war was an unconstitutional one, and the administration claims . . . vindication! Gerson’s view does have a certain practical validity, however, or at least it would for an administration set on doing whatever it could get away with.

Judge Greene appeared to believe that his ripeness holding followed directly from the fact that it takes a majority vote in Congress to authorize a war: “the majority of [Congress] under the Constitution is the only one competent to declare war, and *therefore* also the one with the ability to seek an order from the courts to prevent anyone else, *i.e.*, the Executive, from in effect declaring war.”⁷ The only problem is that it isn’t a “therefore”: in fact allegations that the wrong government official or body has taken the action complained of are most commonly brought by someone other than the official or body whose authority has been usurped.⁸

But maybe Greene just worded it the wrong way around. If it takes a majority of Congress to declare a war, it also takes a majority⁹ to block one. Greene seems to think that, because it would take a majority to vote down a presidentially-requested declaration of war on the floor of Congress, it should take a similar majority to bring suit to block a presidentially-announced decision to go to war in court.

On first reading this version may flow a little more easily, but

5. Judge Greene was also correct in rejecting the governments’ contention that the congressional plaintiffs lacked standing. See note 18 *infra*.

6. N.Y. Times, Dec. 14, 1990, at A9, col. 1.

7. 752 F. Supp. at 1151 (emphasis supplied).

8. States are rarely plaintiffs in cases challenging congressional action as exceeding federal power, the federal government just as rarely a plaintiff in suits to enforce the dormant commerce clause. Most separation of powers cases are, similarly, brought by someone other than the institution or official whose decision authority was usurped. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

9. Okay, on some occasions only fifty percent, but we can ignore that refinement without losing the point.

on analysis it too proves to be a *non sequitur*. In the first place, Greene's language at several points makes pretty clear that the sort of majority he meant to require is a majority of both houses of Congress.¹⁰ Since it would take only a majority of *one* house to block a declaration of war, however, it would seem to follow, on our reconstruction of Greene's logic, that such a one-house majority should also be able to sue.

While that confusion may raise questions about the coherence of Judge Greene's rationale, it is unlikely often to make a real world difference. There are, however, more fundamental respects in which Greene's "ripeness" qualms misunderstand the point of the Constitution's War Clause,¹¹ especially as it bears on the political structure of late twentieth century America. Most obviously, requiring the president to follow the constitutionally prescribed procedures—one might suppose that even a single person who will be disadvantaged by the war should be able to insist on *that*—is not the same thing as telling him he can't go to war.

But even assuming it were the same—that everyone who wanted to see Congress play its constitutionally mandated role felt that way only because she opposed the war on its merits—the fact that a majority can block a war by refusing to vote yes still should not imply a power on the part of the president to go forward unless a majority can organize itself to vote (or sue) no.¹² The framers were explicit in their understanding that if Congress did not approve of the executive's pursuance of a given war, it could end it by refusing it further funding.¹³ But they also understood that once the president had committed "our boys" to the battlefield, it would become a virtual impossibility, emotionally and politically, to vote to cut off their "support." The Constitution requires a congressional declaration of war—it does not say the president can commit troops to combat unless Congress takes steps to stop him—and there is every indication that this choice was deliberate.

This original decision has taken on additional validity today.

10. E.g., 752 F. Supp. at 1151 n.28 (emphasis added):

Likewise, the non-binding resolution approved by the House Democratic Caucus stating that Congress give "affirmative approval" before military action is initiated against Iraq . . . is not the statement of *Congress as a whole*.

See also, e.g., *id.* at 1152.

11. Greene's ripeness holding has roots in Justice Powell's (solitary) concurrence in *Goldwater v. Carter*, 444 U.S. 996, 997-1002 (1979). But see Ely, *supra* note 3, at 1411 n.91; note 20 *infra* and accompanying text.

12. On the connection between Greene's standing holding and his implicit construction of the War Clause as requiring congressional approval on only those occasions when Congress wishes to take a stand one way or the other, see note 19 *infra*.

13. See, e.g., A. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER* 57 (1976).

The late twentieth century is in general an era of comparatively unassertive congresses (perhaps one would better say congresses comparatively unprepared to put their votes where their misgivings are). As a sizeable political science literature has documented, congressmen today have found the most comfortable road to survival—and do they ever survive—to lie in combining a maximum of individual services for constituents, and other interest groups seen as critical to reelection, with a minimum of actual legislative policy-making.¹⁴

I do not wish to overstate: when the Constitution inescapably requires its assent, Congress remains capable of standing up to the president, as in the Bork and constitutional flag-burning amendment situations. Decisive legislative action risks constituent support, though, and thus whenever there is any plausible way to avoid decision, Congress tends to take it. The most egregious example of this may be the very subject under discussion, war-making. The Constitution tried to make that, too, a decision respecting which Congress's assent would be inescapably required. The system held pretty well for a century and a half but broke down in 1950, over Korea—our clearest example of a war not authorized in advance by Congress—and it has stayed pretty much broken down ever since.

Our lengthy, bloody war in Vietnam *was*, or at least so I have argued, sufficiently authorized by Congress, most notably in the Tonkin Gulf Resolution, but invariably with a maximum of obfuscation, disclaimers that the authorization being enacted certainly shouldn't be taken as indicating that those voting for it actually wanted the war to proceed.¹⁵ And respecting our various smaller wars since—Grenada, Tripoli, Panama, the naval war with Iran, and so forth—the president's confident assertions that such decisions are his alone, and the majority of Congress's unwillingness to take any action stronger than knitting their brows and waiting to see how the war in question played politically, both increased apace. For wars can go badly or wars can go well, and actually going on the record at the beginning (or for that matter any time before the end) can be risky. It is far safer to wait for the final curtain to decide whether you should applaud, or instead protest that you never really approved of the venture.

The New York Times' editorial of December 16, 1990 summa-

14. See, e.g., M. FIORINA, CONGRESS: KEYSTONE OF THE EXECUTIVE ESTABLISHMENT (2d ed. 1989); sources cited in Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. (forthcoming 1991).

15. See generally Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990).

rized the administration's overall argument thus: "Congress knows how to say no, officials argue, and if it fails to do so, why that's tantamount to a declaration of war."¹⁶ We have seen, however, that this never was, and today it assuredly is not, a symmetrical situation. The fact that a majority of Congress can take action to stop a war if it can organize itself to do so is not remotely a functional substitute for the constitutional requirement that wars are not to be begun without Congress's affirmative approval.

Actually the framers didn't want it to be symmetrical—but the asymmetry they sought was the exact opposite of that created by the combination of the administration's assertions that it doesn't need authorization, and Judge Greene's decision. George Mason said he was "for clogging rather than facilitating war; but for facilitating peace," and Oliver Ellsworth defended the requirement of congressional authorization by saying that "[i]t should be more easy to get out of war, than into it."¹⁷ Unfortunately Greene's "ripeness" ruling—that it should take one or another sort of "declaration of peace," some affirmative action by a majority of Congress to keep the country out of war (indeed, to insist that the president follow the prescribed procedures)—puts the shoe on the other foot.

Thus Congressman Dellums and his fifty-three fellow plaintiffs did not purport to be speaking for a majority of Congress. While President Bush was the nominal, and certainly a proper, defendant, he was only part of the story. The suit was aimed in reality not simply at the executive branch but at the "silent majority" (well, maybe not exactly silent) of the plaintiffs' colleagues as well, the majority who were proving most reluctant actually to cast a vote on the question whether, and subject to what limitations, the invasion should proceed. Though professional courtesy precluded its being put just this way, it was a suit that said "[t]he President's unilateral actions, and the unwillingness of a majority of our congressional colleagues to be forced on the record one way or the other, is depriving the fifty-four of us of a right the Constitution guarantees us, that of voting on wars before the President starts them."¹⁸ It makes no sense in a suit thus conceived for the judge to say he'll listen as soon as the plaintiffs can get a majority of their colleagues to join them.¹⁹ A central point, without which the suit would have been

16. N.Y. Times, Dec. 16, 1990, at 14, col. 2.

17. 2 THE RECORDS OF THE FEDERAL CONVENTIONS 319 (M. Farrand ed. 1911) [hereinafter Farrand].

18. It is the deprivation of this constitutionally required vote that gives members of Congress standing to bring such a suit. See 752 F. Supp. at 1147; Ely, *supra* note 3, at 1412-13.

19. Greene's language at several points underscored the connection between his stand-

unnecessary,²⁰ was that the very majority the judge wished to see thus signed up was striving mightily to avoid having to take a stand on the issue one way or the other.

Why should we care—more to the point why should courts care—if Congress wants thus to surrender its constitutional prerogatives to the president? Doesn't it have ample means to get them back if it ever gets around to wanting to (or at least to make life miserable for any president who resists)? Probably it does, but the problem with the argument is that the war power wasn't given to Congress as a sort of "perk," but rather to insure that no single person would be vested with the tragic decision to take the country into combat. George Mason said he was "against giving the power of war to the Executive, because not safely to be trusted with it."²¹ The prerogatives of congressmen aren't what's at stake here, but rather the lives of American (and other) young people—mainly, in this enlightened age of "volunteer" armies, the lives of young people whose disadvantage quota has already been filled.

EPILOGUE: JANUARY 13, 1991

As you are aware, since that was written Congress did pass a resolution approving President Bush's use of force against Iraq.²² Can we conclude that the problem is therefore solved—that from here on we can count on Congress to step up and take responsibility

ing holding and his failure to understand that the point of the War Clause cannot be served by leaving it up to Congress whether or not it wishes to take a stand.

[H]ere the [military] forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required *if Congress desires to become involved*.

752 F. Supp. at 1145 (emphasis supplied).

What if the Court issued the injunction requested by the plaintiffs, but it subsequently turned out. . . that the majority of the members of [the Legislative] Branch, *for whatever reason*, are content to leave this diplomatically and politically delicate decision to the President?

It would hardly do to have the Court, in effect, force a choice upon the Congress

Id. at 1150-51 (footnote omitted and emphasis supplied). However, since 1950 Congress has made it unfortunately clear that it is unprepared to perform its constitutionally assigned function of deciding on war and peace unless *someone* forces it to.

20. Judge Greene's test comes close to making cases like this practically nonjusticiable, in that if a majority could be found to sue, presumably—at least on Greene's apparent assumptions (see discussion preceding note 12)—that same majority would enact a resolution to forestall or limit the war.

21. Farrand, *supra* note 17, at 319.

22. What's more, the debates preceding the votes in both Houses were among the most responsible within my memory—as, indeed, was President Bush's statement reacting to them. (It may also be worth noting that whereas the Senate vote in favor of the Tonkin Gulf Resolution was 88-2, the vote here was 52-47.) Congress has by no means lost the ability to decide responsibility (if not always as I would); it just needs to be pushed to decide at all.

for these decisions? It would be nice to think so—nice, but unduly optimistic. Kuwait was obviously unique in several respects. By the time of the resolution we had massed over 400,000 troops in the area, together with concomitant numbers of ships, planes, and tanks: there was no denying that this was going to be a real war, and a big one at that. In addition, so many months had passed that every Tom, Dick, and Harriet—regular columnists, guest columnists, “friends of the court”—had rehashed every angle of the proposed war so often that the correct constitutional conclusion had actually had a chance to become embedded in the public and congressional consciousness: there being no colorable claim that there had not been time for debate, this was inescapably Congress’s call. Neither is Judge Greene likely to recur; his clear and courageous stand on the merits of *Dellums v. Greene* must itself have helped Congress understand it really couldn’t hide any longer.

Even all that probably wouldn’t have been enough to move Congress to act, though. Recall how they had reacted to President Bush’s earlier bald-faced assertion that the War Powers Resolution was inapplicable because there was no “imminent danger of hostilities”—by going home—and up until the very end the “too early/too late” whipsaw bid fair to carry the day. (“It’s premature to talk of war, we must give the diplomatic process a chance”/ “The President has been on this course for months, we can’t pull the rug out from under him now.”) What turned it around, of course, was President Bush’s *request* that Congress vote an authorization. By that request—obviously calculated further to tighten the screws on Saddam Hussein—the President deprived Congress of the option it has in other cases been able to retain, that of waiting to see whether the war goes sour and, if it does, protesting that it was, after all, *the President’s* war all along, that they were never even consulted about it, let alone asked whether they wished to authorize it.

I pray I am wrong about this, and the heady smell of accountability will prove so sweet for the members of Congress that they will be moved to reclaim their constitutional prerogatives even when they are not essentially forced to. But for the moment I’m afraid that all the Kuwait resolution corroborates for me is the feeling that Congress can be induced to share the responsibility for politically risky decisions only when one of the system’s father figures shames them into it. It is because there is little hope that the circumstances will more than occasionally conspire to induce the president to play this role,²³ that it seems to me essential that the courts stand ready

23. There are patent political advantages to the president in spreading the responsibility for wars. While one might hope that that by itself would induce presidents to comply with

to do so.

PARTING SHOT: MARCH 22, 1991

The fact that the war against Iraq went so “well” (at least in terms of relative body counts) probably means that Congress (especially its Democratic members) will stampede to approve the next war that comes along—at least rhetorically, and officially as well if the President requests a vote (which for the reasons noted he probably won’t). Assuming our next war doesn’t also turn out to be a video game—as only the most carefully chosen wars will—Congress will probably revert to its familiar pattern of refusing to get anywhere near such issues unless someone forces it to. Although, once pushed, Congress performed its duty quite responsibly this time, the moral it is likely to draw from the story is that it should either (a) rubber-stamp or (b) hide, not that it should in the future, at least not voluntarily, actually assume responsibility for such frightening decisions.

John Hart Ely*

the Constitution, the fact is it hasn't. The advantages of such accountability-spreading have been evident for some time, but just as evidently they have seemed to a series of presidents insufficiently attractive in the ordinary case (one lacking Kuwait's months-long attempt at intimidation by increasing threat) to outweigh the reduction in effective unilateral presidential power thought to be entailed by an admission that the decision is not by rights his alone.

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