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The Judiciary's Job in Foreign Affairs and War Powers Cases

Introduction

Since the inception of the Constitution, there has been much confusion on who directs the United States in the realm of foreign affairs. However, one thing has remained present; that all three branches have a say in some way or another. In “Constitutional Confusion on Military Direction and Foreign Affairs Powers,” I attempted to examine the push-and-pull relationship between Congress and the President on foreign affairs direction. However, in this essay, I will attempt to attack that question from another angle. Instead of asking, “Who leads the United States in foreign affairs,” as we did last time, this time we instead are posed with the question, “How does the court fulfill its *proper* role in foreign affairs and war powers cases?” Again, the reality of the situation is that there is no clear-cut answer about the role of the judiciary. Instead, we are left to decide based on the ambiguities of foundational documents, and what the court has demonstrated in the past. Similar to last time, we will often see courts contradicting themselves, and other courts.

To give some foresight as to what to expect, the essay follows this outline:

- I. Answering the question, what is the proper role of the courts?
- II. What are war powers, and how can they be allocated?
- III. How does the court fulfill its *proper* role?

IV. Conclusion

I. What is the Proper Role of the Courts?

To begin, it is important to note, what is the ‘proper’ role of the court in this realm? For all intents and purposes, we will use this definition: “The role of the courts is to hear and decide foreign affairs and war powers cases, and balance national security with individual rights while ensuring that the correct entity exercises the correct power.” To break this definition down, the court’s first responsibility is to hear and decide cases. Applying this to the topic at hand, we recognize that they have the responsibility to hear and decide cases related to foreign affairs and war powers. (Later on, we will dive into how sometimes courts choose to pass on this responsibility.)

Furthermore, I assert that the courts are also tasked with balancing national security with individual rights. Recognizing that a person has certain guaranteed rights in the United States, but also recognizing that sometimes ensuring national security requires that a person’s rights be revoked, it is important to find the extremely fine line of a balance between the two. Balancing the two ensures that the government will not trample on a person’s rights, unless necessary, to protect national security as a whole. It also acknowledges that sometimes it is necessary.

The final portion of the definition espoused above states, “while ensuring that the correct entity exercises the correct power.” This portion references back to the “Constitutional Confusion on Military Direction and Foreign Affairs Powers,” essay where we recognize that certain war powers are to be executed by certain branches of government (i.e. the power to declare war is reserved to Congress under Article 1 of the Constitution). This is an attempt to ensure that the courts are continuing to resolve the push-and-pull issues between Congress and the President outlined in the last essay.

When put all together, these sections answer the question, “What is the proper role of the courts in war powers and foreign affairs?” The court is to hear cases related to foreign affairs and decide the cases in a way that balances the need for national security with individual rights. While at the same time, ensuring that the branches operate under the proper authority.

II. What are War Powers and how can they be Allocated?

To understand how the Judiciary interferes in war powers cases, we must first understand what war powers are. War powers are broad and ambiguous topics. For the purposes of this essay, we will view them in their broadest, and most far-reaching terms. Generally speaking, they are any direction of the United States Military in conflict with a foreign entity. In addition, foreign affairs can be regarded as the country of the United States of America’s official government interaction with a foreign entity. With the broadest definitions of foreign affairs and war powers in mind, we next need to understand just how they can be allocated.

To do this, it is easiest to revisit things in terms of the midterm essay. In it, we describe three different situations- solutions to the question “Who leads the United States in foreign affairs?” Those three are the three main ways foreign affairs and war powers can be allocated. We call the three solutions, Congressional Supremacy, Executive Supremacy, and Tandem Action (to fix a technical issue, ‘Tandem Action’ will further be called ‘Joint Action’).

In the Congressional Supremacy solution, the United States Congress possesses the majority of war powers and directs the United States in its foreign affairs. Congress typically would direct the President about what to do. The Executive Supremacy solution suggests that the majority of these powers is allocated to the President, who needs virtually no legislative approval or directive to resolve

foreign affairs issues and direct the military, save what is explicitly written in the Constitution (e.g. enacting treaties). Both of these solutions are based on each respective branch asserting that they have inherent powers. The third and final solution is the Joint Action idea. In this, Congress and the Executive Branch should act together to resolve foreign affairs issues and issue directives to the United States Military. For more on these, reference the respective sections in my ‘Constitutional Confusion on Military Direction and Foreign Affairs Powers.’

We should also briefly define both ‘national security’ and ‘individual rights,’ as having a firm understanding of these terms is just as essential to defining how the court can fulfill its proper role as understanding foreign affairs and war powers. National security can be best described briefly and broadly by the United Nations when Segun Osisanya writes, “the ability of a state to cater for the protection and defence of its citizenry (Osisanya).” Individual rights can be best defined as “Civil rights are personal rights guaranteed and protected by the U.S. Constitution and federal laws enacted by Congress (US HHS).”

We now have a firm grasp on what the *proper* role of the Judiciary is, and what foreign affairs and war powers are. So now, we are left with the overarching question, ‘How does the court fulfill its proper role?’

III. How does the Court fulfill its Proper Role?

To fulfill its proper role, the court has many combinations of decisions it can make. When posed with a situation where the government treads on an individual’s rights in the context of national security, the court is forced to decide whether the government was proper in its actions. Essentially, the court is deciding whether or not the government possessed enough of a reason to believe that the best

way to protect national security was to suspend someone's rights. The court can either answer this question with a yes or no. Yes, the government was constitutional in its actions, or no, the government was unconstitutional in its actions.

A. When the Government was Constitutional

In many cases, the court has decided that, in order to protect national security, it was necessary for the government to violate a person's civil rights. One early example of this was the Prize Case in 1862. In 1862, amid the Civil War, without military approval, President Lincoln issued a blockade of southern ports. In these cases, the court answered the question "Did Lincoln act within his presidential powers as defined by Article II when he ordered the seizures absent a declaration of war?" Justice Grier, on behalf of the Supreme Court, extended the power to the president to act in defense of national security. Grier wrote that the President was "bound to meet [the war] in the shape it presented itself, without waiting for Congress to baptize it with a name."

Sometime later, in the *United States v. The Progressive*, the Supreme Court denied the opposing parties the right to free speech and press, in the name of national security. *The Progressive* was a newspaper that published an article relating to the technical instructions of creating an H-bomb. Although the article had been written using only publicly available information, the Court held that the compiling of the information created a likelihood for direct, imminent, and irreparable injury to the nation. It was against this backdrop that the Court decided that it was legal to prevent the newspaper from publishing this information. *The Progressive* is a prime example of the court fulfilling its proper role. Whether you agree with its ruling, the court balanced the government's responsibility to

foster national security, with the newspaper's right to free speech and press and came down on the side of national security.

Another, more extreme, example of this arose against the backdrop of the attacks on Pearl Harbor. President Roosevelt issued Executive Orders to exclude Japanese Americans from certain areas of the west coast and to effectively intern Japanese Americans. These Executive Orders were reported to prevent incidents of subversion and espionage from individuals of Japanese descent. It was in *Hirabayashi v. United States* where the court found that the President's executive orders and the implementation of a curfew for citizens of Japanese descent were constitutional.

Thus far, we have only regarded the first two aspects of the Judiciary's *proper* role, "hearing and deciding foreign affairs and war powers cases; and balancing national security with individual rights." In the Prize Cases, *The Progressive*, and *Hirabayashi*, there was no struggle between Congress and the President, therefore the court was never tasked with determining which one possessed the power. However, the third and final part of the Judiciary's *proper* role is ensuring that the correct entity, Congress or the President, exercises the power.

We can see this in *Youngstown v. Sawyer*, where Justice Black took the view that the President has no power to act except in cases *expressly* authorized by the Constitution or by an Act of Congress. The Judiciary, in this case, rejected the Executive Branch's argument that the President possesses inherent power, and ensured that the correct entity exercises the correct power, by placing restrictions on the President.

While there are many cases where the court has decided that the need for national security trumps a person's individual rights, there are also cases of the opposite stature.

B. When the Government was Unconstitutional

In many cases, the government has treaded on a person's individual rights in the name of national security. However, it was later determined by the courts that the government was not proper in doing so. This is the situation when the Judiciary fulfills its *proper* role by deciding an individual's rights triumph over the need for national security. Or, in other words, it is not essential to national security to strip someone of their rights.

One of the most prominent examples of this is in NY Times v. United States. In the wake of the NYT publishing the Pentagon Papers, the Nixon Admin tried to prevent the New York Times and the Washington Post from publishing these documents from classified Defense Dept. studies regarding US activities in Vietnam. The government argued that the publishing of the documents would jeopardize national security, however, the court disagreed. The Supreme Court held that the government needed to prove an inevitable, direct, and immediate danger to the United States to revoke the newspapers' freedom of press. The court, unsatisfied with the government arguments, ruled that there was no danger, therefore the government could not abridge the freedom of press and prevent the articles from being published.

When the court decides that there is no power for the government to exercise, it then does not have a power to allocate to either branch. Therefore, the court has accomplished its proper role by hearing and deciding the case and balancing the two sides.

However, various courts in the past have taken a different approach to defining their *proper* role than we have. Therefore, they have taken unconventional approaches to fulfill their perceptions of the Judiciary's proper role.

C. When the Judiciary Refuses to Hear a Case

One of the founding principles of the United States was the separation of powers. We already know that the struggle between foreign affairs and war powers authority is between the political branches of government, the Legislative and the Executive. With this concept in mind, various courts in the past have taken the stance that certain questions (those which solely include ideas that are allocated to the political branches) are nonjusticiable, meaning the court cannot decide them. Because the foreign affairs and war powers are allocated solely to the Legislative and the Executive branches, some courts have refused to answer questions related to these.

The most notable, and clear, example of this is in *Ange v. Bush*. In response to an Iraqi invasion, President Bush deployed United States Military troops to Saudi Arabia. The Plaintiff, Sgt. Ange, sued, arguing that the President did not have the authority to deploy reserve troops to the area. Therefore, the court was posed with the question, “Did the President have the authority to deploy troops to Saudi Arabia?” District Court Judge Royce Lamberth refused to answer the question, saying that the ‘Plaintiff’s War Powers Challenged Are Political Questions Over Which This Court Declines to Exercise Jurisdiction.’ The Supreme Court previously created a standard called the ‘political question doctrine,’ where they lay out the conditions that trigger unreviewability by the courts. The primary portions of this doctrine cited by Lamberth are that there is a ‘textually demonstrable constitutional commitment of the issue,’ and a ‘respect due’ to the coordinate branches of government. First, the ‘textually demonstrable constitutional commitment of the issue.’ Essentially, this phrase suggests that an issue is nonjusticiable in the event that the issue is already allocated to one or more of the other branches of government. In the case of foreign affairs and war powers, Lamberth

wrote that the judicial branch cannot intrude into the realm of foreign affairs. “The judicial branch ... is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches...”

Further to this topic, the Supreme Court stated in *Harisiades v. Shaughnessy*, “[foreign policy decisions are] of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”

This view of the role of the Judiciary is to resolve disputes between branches, about issues that are not political in nature. Therefore, using Lamberth’s ideology, the Judiciary views that it has virtually no *proper* role in relation to foreign affairs and war powers.

A similar view to Lamberth can be found in *Hirabayashi*, where the court refused to answer the more political of two questions. In *Hirabayashi*, two issues were presented. (1) Whether the curfew was legal, and (2) whether the court could relocate individuals. The court ducked the question relating to the relocation, by claiming that since the sentences were served concurrently, if the curfew was found constitutional, it is unnecessary to discuss the relocation. Although this claim is not as bold as Lamberth’s in *Ange*, it is still an example of the Judiciary refusing to decide specific issues relating to war powers and foreign affairs.

We’ve acknowledged how the court sometimes views its role with restraint in this realm, however, we know the court frequently contradicts itself. Therefore, we must also look at the other side of the court’s view of its role in this domain.

D. When the Court Expands its Authority

Having understood that some courts wish to abstain from answering political questions, other courts wish to answer the very same questions. The most notable example of this is found in *Dellums v. Bush*. With virtually the same facts as *Ange v. Bush*, this case was brought by members of Congress, instead of a deployed soldier. Seeing as *Dellums* takes place after *Ange*, the court was posed with discussing two questions. (1) Is the War Powers Clause justiciable in court; and (2) did President Bush exceed his authority by deploying troops without a formal declaration of war by Congress. In *Ange*, the court decided that the War Powers Clause, and war powers as a whole, was nonjusticiable in court. However, in *Dellums*, Judge Harold Greene decided that the war powers question is a justiciable topic. He reasoned that while the Constitution does grant foreign affairs responsibility to the political branches, it does not prohibit the Judiciary from resolving cases simply because they are related to foreign affairs. Greene postulates that the court must look at *the particular question posed* when deciding if an issue is justiciable. He further notes that courts have decided cases in the past that have had substantiation impacts on foreign policy, such as *Youngstown*.

In *Ange*, Lamberth made the suggestion that the court had no place in determining whether or not the United States was at war, as they did not have the tools or knowledge to do so. However, Greene rejected Lamberth's suggestion, saying, "courts have historically made determinations about whether this country was at war for many other purposes," and then lists some examples.

Greene, however, refused to address the second issue as it was seen as premature since the congressional members were suing before an official act of Congress was passed. They were seen as giving Congress a stance on a topic before it was officially made.

Another example of the Judiciary expanding its authority can be seen in the Prize Cases. Set against the backdrop described above, the court gave Lincoln the ability to act without an official congressional declaration of war, as they determined that a ‘de facto war’ was occurring. We already know that the official power to declare war is possessed solely by Congress, however, in the Prize Cases, the Judiciary effectively gave itself the power to determine when the United States was at war, with or without an official declaration.

IV. Conclusion

With all of our essential background knowledge in mind (foreign affairs, war powers, national security, and individual rights) we revisit the overarching questions. First, “What is the *proper* role of the courts in relation to foreign affairs and war powers?” It is clear that the courts are tasked with three main goals. One, hearing and deciding cases related to foreign affairs and war powers. Two, balancing national security and individual rights. Three, ensuring that the authority falls into the proper hands. These three goals can be combined into one, concise answer to the first question: “The role of the courts is to hear and decide foreign affairs and war powers cases, and balance national security with individual rights while ensuring that the correct entity exercises the correct power.”

The second overarching question is, “How does the court fulfill its *proper* role?” We’ve determined that the court does this in a few ways. They first have to decide whether or not they pose the jurisdiction to address the issue, some courts say no, but assuming yes, the court then has to balance the government’s responsibility of protecting national security with a person’s individual rights. If the court decides that the government’s responsibility outweighs a person’s individual rights, the court

then has to decide to who holds the power, the Executive Branch or the Legislative Branch, which spawns an entirely different argument.

Sources Cited

Stadnyk, Landin. *National Security and The Constitution*, Chicago, IL, 2022, pp. 1–13,

Constitutional Confusion on Military Direction and Foreign Affairs Powers.

Osisanya, Segun. “National Security versus Global Security | United Nations.” *United Nations*, United

Nations, 2022, www.un.org/en/chronicle/article/national-security-versus-global-security.

Accessed 16 Mar. 2022.

US Department of Health and Human Services. “What Are Civil Rights?” *HHS.gov*, 26 July 2013,

www.hhs.gov/civil-rights/for-individuals/faqs/what-are-civil-rights/101/index.html. Accessed

16 Mar. 2022.

Barnum, David. *National Security and The Constitution. The Prize Cases*. Vol. 1, 2022, p. 86.

Barnum, David. *National Security and The Constitution. United States v. The Progressive*. Vol. 2,

2022, p. 14.

Barnum, David. *National Security and The Constitution. Hirabayashi v. United States*. Vol. 2, 2022,

p. 49.

Barnum, David. *National Security and The Constitution. NY Times v. United States*. Vol. 2, 2022, p.

1.

Barnum, David. *National Security and The Constitution. Ange v. Bush*. Vol. 1, 2022, p. 96.

Barnum, David. *National Security and The Constitution. Dellums v. Bush*. Vol. 1, 2022, p. 100.