Presidential War and Congressional Consent: The Law Professors' Memorandum in *Dellums v. Bush*

HAROLD HONGJU KOH*

Thanksgiving 1990 found our nation on the brink of a constitutional crisis. The President threatened to commit nearly half a million American soldiers to war against Iraq without congressional approval. Just weeks later the crisis evaporated: in January 1991 the President requested, and Congress passed, a joint resolution formally approving the war.[1] Within months, America and its allies had won a smashing victory.

Such events beget many documents, among them the Memorandum *Amicus Curiae* of Law Professors that follows in these pages. How did this memorandum originate? What difference did it make? And how should constitutional history remember this latest war powers crisis?

I. THE MEMORANDUM

On August 2, 1990, Iraq invaded Kuwait. Six days later, President Bush ordered the largest overseas deployment of American combat forces since the Vietnam War. The mission's code name, "Operation Desert Shield," reflected its stated objective: to

* Professor of Law, Yale University. I am grateful to William S. Dodge, Yale Law School Class of 1991, for helping me with this essay, which grows out of a column originally published in the Spring-Summer 1991 issue of *Constitution* Magazine. The views expressed here are mine and are not necessarily shared by the other signatories to the Law Professors' Memorandum in *Dellums v. Bush*.

[1] Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), *reprinted in* 137 CONG. REC. S403-04 (daily ed. Jan. 12, 1991) [hereinafter Iraq Resolution].

shield neighboring Saudi Arabia from an attack by Saddam Hussein's Iraq. The President began committing troops during a congressional recess, but Congress returned to session broadly supportive of the President's actions. Yet underlying both congressional and public support was the deep fear of another Vietnam War, entered through incremental presidential troop commitment rather than open national debate.

Through the fall, tensions built as the President ordered soldiers and reservists to the Persian Gulf from communities all over the country. In October, the House and Senate each passed resolutions that supported the defensive operation but stopped short of authorizing war.[2] Nevertheless, on November 8, two days after the mid-term elections, the President ordered the U.S. armed forces to double the number of American troops in the Gulf in order to provide the United States with "an adequate *offensive* military option."[3] Soon thereafter, Secretary of Defense Dick Cheney told the Senate Armed Services Committee, "I do not believe the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf."[4]

Led by attorney Michael Ratner and Professor Jules Lobel of the University of Pittsburgh Law School, New York's Center for Constitutional Rights filed two lawsuits against the President in the United States District Court for the District of Columbia. The first, on behalf of reservist Michael Ange, claimed that the President had exceeded his authority under both the Constitution and the War Powers Resolution by ordering Ange to participate in Operation Desert Shield.[5] The other, brought on behalf

[2] S. Con. Res. 147, 101st Cong., 2d Sess., 136 CONG. REC. S14,338 (daily ed. Oct. 2, 1990); H.R.J. Res. 658, 101st Cong., 2d Sess., 136 CONG REC. H8441-42 (daily ed. Oct. 1, 1990). Later that month, eighty-one Members of Congress issued a statement demanding "that the Administration not undertake any offensive military action without the full deliberation and declaration required by the Constitution." *See* Statement of Concern of Eighty-One Members of Congress (Oct. 26, 1990), Exhibit No. 26, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (Civ. No. 90-2866).

[3] The President's News Conference on the Persian Gulf Crisis, 26 WEEKLY COMP. PRES. DOC. 1789, 1790 (Nov. 8, 1990) (emphasis added).

[4] Supp. Exhibit No. 2 (Dec. 3, 1990), Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (Civ. No. 90-2866); R. Marcus, *Congress and President Clash Over Who Decides on Going to War*, Wash. Post, Dec. 14, 1990, at A46, col. 1; *see also* The President's News Conference, 26 WEEKLY COMP. PRES. DOC. 1948, 1955 (Nov. 30, 1990) (remarks of President Bush) ("I know what it's like to have fallen comrades and see young kids die in battle. It's only the President that should be asked to make the decision . . . .").

[5] Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (invoking War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982)).

of Representative Ronald Dellums and forty-four (eventually fifty-three) other Members of Congress, sought to enjoin the President under the War Powers Clause of the Constitution from initiating an attack against Iraq without first obtaining explicit congressional authorization.[6]

These events transpired far from the academy, but close to the concerns of those professors who specialize in constitutional and foreign affairs law. Upon learning from the Center for Constitutional Rights of the pending lawsuits, I spoke to several colleagues, at Yale and elsewhere, and asked whether we could afford to keep silent regarding the Administration's emerging constitutional position. We agreed that we could not. Despite our differing views on the morality and political wisdom of going to war—subjects on which we held many opinions and could claim no expertise—we were united on two matters of constitutional principle. We agreed, first, that the Constitution did not permit the President to order U.S. armed forces to make war without meaningfully consulting with Congress and receiving its affirmative authorization; and second, that the political question doctrine did not bar a federal court from deciding that constitutional question in an appropriate case or controversy. Although suits challenging the constitutionality of the Vietnam War had previously raised both issues, judicial treatment of both had been cursory and disappointing.[7] We feared that courts might perfunctorily invoke the Vietnam precedent to avoid determining who in our government should decide on war against Iraq.

Shortly before Thanksgiving, we decided to submit an *amicus curiae* memorandum making these points in *Dellums v. Bush*, which had been filed on November 20, 1990. Our goal was not so much victory for Dellums—indeed, we styled our filing a "memorandum," not a brief supporting either plaintiffs or defendant—as to prompt thoughtful judicial and national examination of the constitutional role of congressional consent in a decision to go to war. Because time was of the essence, we decided to file a short,

[6] Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (seeking to enjoin the President under U.S. CONST. art. I, § 8, cl. 11, which states "Congress shall have Power . . . [t]o declare War").

[7] *See, e.g.*, Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967) (Justices Stewart and Douglas dissenting from denial of certiorari); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973). *See generally* L. Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 623 n.74 (1976) (collecting cases); R. Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974) (collecting cases).

straightforward statement, signed by about ten professors well-known for their expertise in constitutional and foreign affairs law (and representing a diverse range of political beliefs).[8] We contacted a number of potential signatories, who agreed in principle to participate.

From that point forward, the production of the memorandum resembled the drafting of an *en banc* judicial opinion. The whole process took less than two weeks from conception to filing. An initial draft was prepared and faxed or express mailed to all potential signatories, who, one by one, suggested modifications and joined in.

Logistical problems abounded. The memorandum was drafted during Thanksgiving vacation, when we were scattered all over the world.[9] Conference calls among all signatories proved impossible. Nearly everyone wanted to know what everyone else thought, and some signatories vigorously debated questions of substance and strategy in one-on-one telephone conversations. But most striking in retrospect was not how much we disagreed, but how quickly we settled on a final draft, a measure of the consensus we shared on the central issues.

Judge Harold Greene was assigned *Dellums* and ordered expedited briefing, scheduling oral argument only twelve days after Thanksgiving.[10] Fortuitously, I had already agreed to testify

8 The final list included Bruce Ackerman and myself of Yale; Abram Chayes, Erwin Griswold, and Laurence Tribe of Harvard; Lori Fisler Damrosch and Louis Henkin of Columbia; John Hart Ely and Gerald Gunther of Stanford; Philip Kurland of Chicago; and William Van Alstyne of Duke. Each signed in an individual capacity, not as a representative of his or her school.

9 One key signatory was first contacted at the Prague Ambassador Hotel and was read the draft memorandum over the phone. He signed on immediately, then called in additional changes a few hours later from Vienna. Another, who had just argued an exhausting Supreme Court case, signed on just before flying to Bermuda for a family holiday. A third traveled cross-country for Thanksgiving while receiving and reading drafts. Having just returned from an extended East Asian trip, I conducted most of my initial conversations about the memorandum from a hotel in Philadelphia, where I had traveled to deliver a paper.

10 A little-noticed, critical ruling was Judge Greene's decision to retain *Dellums* on his docket, despite the government's claim that it was a "related case" that should have been assigned, along with *Ange,* to a different D.C. federal judge. The Center for Constitutional Rights argued successfully that *Dellums,* a suit by Members of Congress directly invoking the Constitution to enjoin a war, differed materially from *Ange,* a suit by a reservist invoking the War Powers Resolution to challenge his deployment to a defensive military operation. We expected Judge Greene to be skeptical of the government's sweeping political question claims. In the restructuring of AT&T, he had previously shown an ability to render even the most complex case judicially manageable. Moreover, in trying former National Security Adviser John Poindexter for criminal offenses committed during the Iran-*Contra* Affair, Judge Greene had demonstrated enormous skill at handling massive volumes of classified documents.

before the Senate Foreign Relations Committee on the Monday morning after Thanksgiving, which made it convenient for me to file our memorandum in Washington personally on that day.

A few comic moments leavened the last hours before filing. One signatory joined our memorandum the Friday after Thanksgiving, only after receiving the penultimate version faxed from a delicatessen near my in-laws' home in Syosset, Long Island. On Sunday night the last signatories called in their final comments and joinders to a fax and computer room at Yale Law School. Memorandum in hand, I flew to Washington early the next morning and importuned an early-arriving friend at a D.C. law firm to let me xerox additional copies at his office. I then literally walked down Pennsylvania Avenue toward Capitol Hill, serving the Department of Justice at 9th Street, filing the memorandum at the U.S. courthouse six blocks later, and arriving at the Dirksen Building in time to enter the brief into the Senate Foreign Relations Committee's hearing record.[11]

II. The Results

Amici usually overestimate the impact of their briefs. But if nothing else, our filing helped focus national attention on both the *Dellums* case and the constitutional issues it raised.[12] Judge Greene's opinion in *Dellums*, issued just nine days after oral argument, declared the congressional plaintiffs' injunctive request unripe, a ruling read by some as a victory for the Government.[13] But en route to this holding, Judge Greene not only accepted both arguments made by our memorandum, but also resoundingly rejected the Government's requests that the suit be dismissed for lack of standing or remedial discretion.

Most striking was Judge Greene's declaration that "in princi-

[11] *See Relations in a Multipolar World: Hearings Before the Senate Comm. on Foreign Relations*, 101st Cong., 2nd Sess. 93-98 (1990) (statement of Harold Hongju Koh).

[12] *See, e.g.*, J. Elson, *Just Who Can Send Us to War?*, Time, Dec. 17, 1990, at 33; F. Strasser & M. Coyle, *Law Professors Join the Debate on War Powers*, Nat'l L.J., Dec. 10, 1990, at 5, col. 1; A. Lewis, *War and the President*, N.Y. Times, Nov. 30, 1990, at A33, col. 1 (op ed); N. Lewis, *Law Professors Demand War-Making Limits*, N.Y. Times, Nov. 27, 1990, at A17, col. 1. For more critical commentary, see J.G. Sidak, *To Declare War*, 1991 Duke L.J. —(forthcoming 1991); L.G. Crovitz, *Lawsuit Offensive Against the Commander in Chief*, Wall St. J., Dec. 5, 1990, at A17, col. 3.

[13] *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). For a typical next-day headline, see S. Saul, *Judge Backs Bush on War Consent*, Newsday, Dec. 14, 1990, at 7, col. 1. For reasons stated in the text, a more appropriate headline would have been "Court Issues President Stern Warning." For more discerning readings of the opinion, issued in subsequent weeks, see, e.g., A. Lewis, *Republic Under Law*, N.Y. Times, Jan. 4, 1991, at A27, col. 1 (op ed); *Notes and Comment*, The New Yorker, Dec. 31, 1990, at 25.

ple, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization . . . ."[14] In effect, that statement amounted to an unappealable declaratory judgment *against* the Government. For had the President subsequently waged war without congressional authorization, he would have faced tens, if not hundreds, of suits citing *Dellums*, brought not only by Members of Congress but also by soldiers claiming (unquestionably ripe) rights *not* to fight and die in an unconstitutional, unauthorized war.[15] Nor could the Government, as the technical victor in *Dellums*, appeal this ruling, except by cross-appeal from an appeal that plaintiffs chose not to pursue.

We cannot know whether the prospect of litigating scores of unpopular post-*Dellums* suits helped dissuade the President from waging an unauthorized war against Iraq. The decision date was pushed back to January 15, 1991 by a United Nations Security Council Resolution authorizing member nations to "use all necessary means" after that date to drive Iraq from Kuwait.[16] Public opinion polls reported that more than seventy percent of the American people believed that the President should obtain congressional approval before going to war.[17] One week before the deadline, the Senate Judiciary Committee held hearings on the constitutional questions raised by *Dellums*, at which three signatories of our memorandum testified.[18] At that hearing a letter based on the *amicus* memorandum, now signed by more than 240 law professors, was introduced into the record.[19] That same day, the President formally requested that Congress pass a resolution

14 Dellums v. Bush, 752 F. Supp. at 1149.

15 My certainty that such suits would have been filed rests on the literally scores of inquiries I received in the days following our filing from counsel for soldiers who were either resisting, or anticipating resisting, call-ups to fight in an unauthorized war.

16 S.C. Res. 678, U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990).

17 *See, e.g.*, G. Seib & M. McQueen, *Poll Finds Americans Feel Hawkish Toward Iraq But Would Grant Some Concessions to Avoid War*, Wall St. J., Dec. 13, 1990, at A16, col. 1 (71% of those polled said President should be required to receive approval from Congress before taking offensive military action against Iraq); R. Morin, *Majority Wants Hill In On Gulf*, Wash. Post, Nov. 17, 1990, at A18, col. 5 (seventy-six percent of those interviewed said President should ask permission from Congress before launching an attack against Iraq).

18 *See The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (Jan. 8, 1991) (forthcoming) [hereinafter *Senate Judiciary Hearings*]. The witnesses called included Professors Louis Henkin, William Van Alstyne, and myself.

19 A colleague later told me that the Justice Department had asked a number of law professors to draft a "counter-brief" to our memorandum, but apparently no such effort ever materialized.

supporting the use of all necessary means to implement the Security Council's resolution.[20] Three days before the deadline, by votes of 52-47 in the Senate and 250-183 in the House, Congress enacted a joint resolution that approved the use of military force against Iraq, so long as the President had found, and reported to Congress, that all diplomatic avenues had been exhausted.[21]

All of this activity suggests that in the months before the war, we witnessed a rare, but not unprecedented, moment of national constitutional debate. Other recent examples include the public debates during Watergate over the constitutional scope of executive privilege and during Judge Bork's Supreme Court nomination hearings over the existence of a constitutional right to privacy. On each occasion, the American people firmly endorsed one constitutional viewpoint. Here, it was that the President and Congress acting together, and not just the President alone, must decide whether to send us to war.

III. The Lessons

How should our constitutional law remember the Great War Powers Crisis of 1990? The answer is familiar: there is good news and bad news. The good news, perhaps, is that we may not soon hear our President claim inherent constitutional authority to commit U.S. forces to such a large-scale, premeditated, potentially sustained war. The constitutional accommodation reached by the President, Congress, and the courts establishes the most recent episode as a piece of "quasi-constitutional custom" around which future institutional expectations will likely coalesce.[22]

During the Iraq crisis, all three branches affirmed Congress' constitutional right to approve war. In *Dellums*, Judge Greene

[20] Letter to Congressional Leaders on the Persian Gulf Crisis, 27 Weekly Comp. Pres. Doc. 17, 18 (Jan. 8, 1991).

[21] *See* Iraq Resolution, *supra* note 1.

[22] I have elsewhere defined "quasi-constitutional custom" as

> a set of institutional norms generated by the historical interaction of two or more federal branches with one another: [for example,] executive practice of which Congress has approved or in which it has acquiesced, [and] formal and informal congressional actions with which the president has consistently complied . . . . Each of these historical sources has contributed to the creation of a customary constitutional law in the realm of foreign affairs . . . .
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> These customary rules represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters.

H. Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 70 (1990).

declared: "here the 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."[23] Congress reaffirmed its constitutional prerogatives not only in the authorizing joint resolution, which expressly invoked the War Powers Resolution,[24] but also in the House of Representatives' Bennett-Durbin Resolution, which stated that the Constitution "vests all power to declare war in the Congress" and that "[a]ny offensive action against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated."[25]

Equally important, notwithstanding his subsequent disclaimer, the President finally came to Congress and asked it to approve the war.[26] And while the President's lawyers repeatedly cited more than two hundred historical instances in which the executive branch had supposedly committed troops abroad without congressional approval, most of these cases are simply beside the point. When one excludes those cases where the President repelled a sudden attack on U.S. territory, possessions, or armed forces (which most would concede he may do alone), where he in fact acted with congressional approval, where lower executive officials acted without authority, or where American troops attacked pirates, bandits, or rebels, not sovereign states, this century offers only four true precedents of large-scale, premeditated, potentially sustained war: the two World Wars, Korea, and Vietnam. If one includes Iraq, the President has now come to Congress in four of the five most relevant cases: for formal declarations in the two World Wars and for authorizing resolutions in Vietnam and Iraq.[27]

[23] Dellums v. Bush, 752 F. Supp. at 1145.

[24] Section 2(c) of the Iraq Resolution, *supra* note 1, declared that "[n]othing in this resolution supersedes any requirement of the War Powers Resolution," and specified that "[c]onsistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."

[25] H.R. Con. Res. 32, 102d Cong., 1st Sess., 137 CONG. REC. H390 (daily ed. Jan. 12, 1991).

[26] *See* Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48 (Jan. 14, 1991) (statement of President Bush) ("[M]y request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.").

[27] In Korea, the remaining case of a large-scale, premeditated, sustained war, I be-

The bad news, unfortunately, is that none of our governmental institutions acquitted themselves admirably during this latest debate. The President could have sought Congress' approval on at least three prior occasions: in August 1990, when he first committed troops; in November 1990, after he had ordered the offensive troop buildup; or in December 1990, by calling a special session of Congress. Choosing none of these, he instead waited until the last possible moment to seek congressional consent. Congress performed no better. Sleeping on its constitutional authority, affirmed by the War Powers Resolution, Congress failed to challenge either the President's initial commitment of troops in August or his November buildup of those forces to offensive levels. When Congress finally addressed the question whether to approve the war, its prior acquiescence in this massive troop commitment effectively forced its hand. The courts, too, ultimately avoided responsibility for barring an unauthorized war. Even *Dellums*, the most courageous judicial ruling, fell short, invoking curious reasoning to hold unripe the plaintiffs' claim for injunctive relief.[28]

The somber lesson of Iraq, then, is that we face a continuing, serious dysfunction in our national security system. As Vietnam and the Iran-*Contra* Affair vividly illustrated, our national security system permits the President to act secretly and with the advice of only a few close advisers, gives Congress incentives to acquiesce in and avoid accountability for important foreign policy decisions, and allows the courts to abstain and defer to the political

lieve that the President committed troops unconstitutionally, but Congress cured the violation almost immediately with various ratifying actions. *See generally Senate Judiciary Hearings, supra* note 18 (statement of Harold Hongju Koh). For a persuasive case that at least the publicly known aspects of the Vietnam War were congressionally authorized, see J. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990).

[28] Judge Greene reasoned that for the case to be ripe

> the plaintiffs in an action of this kind [must] be or represent the majority of the Members of the Congress: the majority of the body that 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.*

Dellums v. Bush, 752 F. Supp. at 1151 (emphasis added). In fact, since the Constitution requires *Congress* affirmatively to declare war, a majority of *one* house (for example, fifty-one Senators)—far from a majority of Congress as a whole—may prevent the Executive from "declaring" war. Under Judge Greene's own reasoning, it is unclear why less than a congressional majority should not also be able to obtain a court order enjoining an unauthorized war. Moreover, Judge Greene held the *Dellums* plaintiffs' claims unripe, but he did not dismiss their suit, which suggests that his real conclusion was that the equitable prerequisites for injunctive relief had not yet been met.

branches. The result is a national security decision-making process that places too great a burden upon the presidency, while allowing Congress and the courts too easily to avoid constructive participation in important national security decisions. Its constitutional flaw is that our system of checks and balances is dramatically weakened when foreign affairs are at stake.

I have recently argued that Congress should address this systemic imbalance through legislative reform, preferably by enactment of a new national security charter that incorporates a reinvigorated War Powers Resolution.[29] Otherwise, I warned, we would soon face another constitutional crisis like the Iran-*Contra* Affair. We have now survived just such a crisis in the war powers arena. But left unprotected, how many more of these trials can our National Security Constitution endure?

[29] *See generally* H. KOH, *supra* note 22, at 153-228; H. Koh, *Reply,* 15 YALE J. INT'L L. 382 (1990).