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Ronald V. Dellums v. George Bush (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors

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*Ronald V. Dellums v. George
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Memorandum *Amicus Curiae*
Of Law Professors

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QUESTIONS PRESENTED

1. WHETHER THE PRESIDENT MAY, ABSENT MEANINGFUL CONSULTATION WITH AND GENUINE APPROVAL BY CONGRESS, ORDER UNITED STATES ARMED FORCES TO MAKE WAR.
2. WHETHER NONJUSTICIABILITY DOCTRINES BAR A FEDERAL COURT OF THE UNITED STATES FROM DECIDING THE ABOVE QUESTION.

INTEREST OF *AMICI*

The current situation in the Persian Gulf raises grave legal questions of pressing concern to all Americans. *Amici curiae*, the law professors named below, have lectured and published widely on the subjects of constitutional law or the law of United States foreign relations. This *amicus* memorandum sets forth their considered views on two constitutional questions raised by the cur-

rent controversy. It speaks solely to these matters of constitutional principle, not to the morality or political wisdom of any executed or contemplated governmental action. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools. The affiliations and qualifications of *amici* are as follows:

Bruce A. Ackerman is Sterling Professor of Law and Political Science at Yale University and author, *inter alia*, of *We The People* (forthcoming Harvard University Press).

Abram Chayes is Felix Frankfurter Professor of Law at Harvard University, former Legal Adviser to the United States Department of State, and author, *inter alia*, of *The Cuban Missile Crisis: International Crisis and the Role of Law*, and *International Legal Process* (co-author with T. Ehrlich and A. Lowenfeld).

Lori Fisler Damrosch is Professor of Law at Columbia University and author, *inter alia*, of *Foreign States and the Constitution*, 73 Va. L. Rev. 483 (1987), and of a forthcoming casebook on Foreign Affairs and the Constitution (co-author with L. Henkin).

John Hart Ely is Robert E. Paradise Professor of Law and former Dean of the Law School at Stanford University and author, *inter alia*, of *Democracy and Distrust; The American War in Indochina (Parts I & II)*, 42 Stan. L. Rev. 877, 1092 (1990); and *Suppose Congress Wanted a War Powers Act That Worked*, 88 Colum. L. Rev. 1379 (1988).

Erwin N. Griswold is former Dean and Langdell Professor of Law at Harvard University and former Solicitor General of the United States.

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Louis Henkin is University Professor Emeritus and Special Service Professor at Columbia University, formerly Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*, and author, *inter alia*, of *Foreign Affairs and the Constitution; Constitutionalism, Democracy, and Foreign Affairs*; a forthcoming casebook on Foreign Affairs and the Constitution (co-author with L. Damrosch); and *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976).

Harold Hongju Koh is Professor of Law at Yale University and author, *inter alia*, of *The National Security Constitution: Sharing Power After the Iran-Contra Affair*.

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Laurence H. Tribe is Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard University and author, *inter alia*, of *American Constitutional Law* (2d ed.); *Constitutional Choices*; and *On Reading the Constitution* (forthcoming Harvard University Press).

William W. Van Alstyne is the William & Thomas Perkins Professor of Law at Duke University and author, *inter alia*, of *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. Pa. L. Rev. 1 (1972).

ARGUMENT

1. THE PRESIDENT MAY NOT, ABSENT MEANINGFUL CONSULTATION WITH AND GENUINE APPROVAL BY CONGRESS, ORDER UNITED STATES ARMED FORCES TO MAKE WAR.

Article I, § 8, cl. 11 of the United States Constitution states that "Congress shall have Power . . . [t]o declare War." Although Article II, § 2, cl. 1 names the President "Commander in Chief of the Army and Navy," the President may not invoke that authority to make war without consulting with and gaining the genuine approval of Congress.

The structure and history of our Constitution compel this sharing of responsibility. Like other presidential powers, executive power to conduct military action remains subject to the checks and balances vested by the Constitution in Congress and the courts. "This system," in James Wilson's words, "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large" 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 528 (J. Elliot ed. 1888). Nor, as Justice Black's opinion for the Court suggested in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952), did the Framers vest a general warmaking authority in the President by using the words "executive Power" in Article II, § 1, cl. 1.¹ During the Constitutional Convention, the

¹ See also Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1, 30-46, 79-82, 87-91 (1979).

Framers did rephrase Congress' power to "make" war as an authority to "declare war." 2 *The Records of the Federal Convention of 1787*, at 318-19 (M. Farrand rev. ed. 1937). That rewording served not to transfer unilateral warmaking authority to the President, however, but only to clarify his constitutional latitude to repel sudden attacks against the United States without a formal declaration of war.²

In his famous concurrence in *Youngstown*, Justice Jackson posited that:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in the 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. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. *Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.*

343 U.S. 579, 635-638 (Jackson, J., concurring) (emphasis added).

This analysis "summarize[s] the pragmatic, flexible view of differentiated governmental power to which we are heir."³ In the present situation, Justice Jackson's reasoning requires a court to determine whether the presidential conduct in question falls

² See A. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 32 (1976) ("nothing in the change signifies an intent to allow the President a general authority to 'make' war in the absence of a declaration"); L. Levy, *Original Intent and the Framers' Constitution* 37 (1988). This memorandum addresses only the President's power to make war, not his authority to use force to repel sudden attacks upon United States territory or armed forces.

³ *Mistretta v. United States*, 488 U.S. 361, 381 (1989). The full Court has repeatedly endorsed Justice Jackson's reasoning in separation-of-powers cases. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (Justice Jackson's concurrence "brings together as much combination of analysis and common sense as there is in this area"); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (in *United States v. Nixon*, 418 U.S. 683, 707 (1974), "the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown* . . .").

within the exclusive scope of the President's Commander-in-Chief power. In analyzing this claim, the court should recall that the power to decide for war falls within the scope of legislative, not executive, authority. Any claim of presidential authority to act unilaterally as Commander-in-Chief, "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638. If the President claims to act under delegated authority, the court must carefully examine public expressions of congressional will to determine whether those expressions manifest genuine approval for presidential action.⁴

The Constitution specifies that Congress shall publicly manifest its approval for a determination to make war via a formal declaration of war. U.S. Const. art. I, § 8, cl. 11. We do not read that clause as rigidly stipulating the *only* political mechanism whereby Congress may meaningfully manifest its understanding and approval.⁵ We do, however, understand the structure and history of the Constitution to require that the President meaningfully consult with Congress and receive its affirmative authorization—not merely present it with *faits accomplis*—before engaging in war. We further believe that Congress must manifest its genuine approval through formal action, not legislative silence, stray remarks of individual Members, or collateral legislative activity that the President or a court might construe to constitute "acquiescence" in executive acts.

In *Mora v. McNamara*, 389 U.S. 934 (1967), Justice Stewart, joined by Justice Douglas, dissented from denial of certiorari to

⁴ This court should not avoid *Youngstown's* reasoning by invoking sweeping dicta from *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). The Court has never suggested—before, after, or in *Curtiss-Wright* itself—that the President's "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations," *id.* at 320, included a general power to make war. As Justice Jackson later recognized, *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring). Moreover, numerous commentators have exposed deep flaws in *Curtiss-Wright's* reasoning. See, e.g., Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.J. 467, 493 (1946); Berger, *The Presidential Monopoly of Foreign Relations*, 71 Mich. L. Rev. 1, 26-33 (1972); Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 Yale J. Int'l L. 5, 12-17 (1988); LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. Am. Hist. 695, 710-714 (1987); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 Yale L.J. 1 (1973).

⁵ Cf. U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States . . .").

three draftees' petition requesting injunctive and declaratory relief against allegedly illegal U.S. military activity in Vietnam. Justice Stewart identified the following "questions of great magnitude" raised by the petition:

I. Is the present United States military activity . . . a "war" within the meaning of Article I, Section 8, Clause 11, of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is [any] Joint Congressional . . . Resolution [passed with regard to such activity]?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

Id. at 934-35.

Amici submit that the current situation in the Persian Gulf also implicates these questions and that this court should analyze those issues before it in accordance with the constitutional principles stated above.

2. THE LEGAL QUESTIONS RAISED ABOVE ARE JUSTICIABLE AND IN AN APPROPRIATE CASE, A FEDERAL COURT MAY DECIDE THEM.

The parties before the court bear responsibility for addressing the justiciability of the specific legal claims raised here. *Amici* urge the court, however, to view those specific claims against a broad principle: that questions regarding the scope of Congress' power to declare war and the President's power as Commander-in-Chief are not, by their nature, inherently unfit for judicial resolution.⁶ In *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962), the Supreme Court called it "error to suppose that every case or con-

⁶ *Amici* take no position on the plaintiffs' standing to bring their claims.

troverly which touches foreign relations lies beyond judicial cognizance," arguing that the nonjusticiability doctrine is "one of 'political questions,' not one of 'political cases.'" That statement rested on a recognition that, since the beginning of the Republic, federal judges have reviewed the legality of military seizures, retaliatory strikes, and covert actions ordered under claims of delegated and inherent presidential power to conduct warfare.⁷ Those cases that have reviewed and sustained presidential orders of military action plainly rebut any claims that such actions are somehow immune from judicial scrutiny.⁸

More recently, the Supreme Court has announced that "[r]esolution of litigation challenging the constitutional authority of the one of the three branches cannot be evaded by courts because the issues have political implications" *INS v. Chadha*, 462 U.S. 919, 943 (1983). Questions of interpretation of treaties, executive agreements, and customary international law have long been held justiciable.⁹ Nor can a court evade interpretation of an Act of Congress—whether the War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (1982), or any subsequent joint resolution—simply because the legality of presidential warmaking may be called into question. As the Court recently declared, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Finally, in times of actual and threatened hostilities, the courts bear a special responsibility to scrutinize government conduct that allegedly infringes individual rights.¹⁰

Prudential factors do not invariably weigh against judicial res-

⁷ See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806). See generally Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L.J. 672, 701 (1972).

⁸ See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 666-71 (1862); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (reviewing and sustaining presidential action on the merits, relying on authority delegated from Congress).

⁹ See, e.g., *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176 (1982) (construing treaty); *United States v. Belmont*, 301 U.S. 324 (1937) (construing executive agreement); *The Paquete Habana*, 175 U.S. 677 (1900) (construing customary international law).

¹⁰ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971). Even the Supreme Court's thoroughly discredited decision in *Korematsu v. United States*, 323 U.S. 214 (1944), reviewed on the merits the wartime governmental conduct challenged there.

olution of warmaking questions.¹¹ If anything, meaningful judicial review is even more constitutionally necessary in the current situation than in traditional domestic cases. Through the Supremacy Clause, U.S. Const. art. VI, § 2, the Framers largely removed the states as a political check against executive action in foreign affairs. Precisely because federal judges enjoy life tenure and salary independence, they have both the power and a special obligation to say what the law is in warmaking cases, which invariably implicate controversial legal issues and affect private interests. Such cases raise "large and deeply troubling [substantive] questions" and require "the resolution of serious preliminary issues of justiciability." *Mora v. McNamara*, 389 U.S. 934, 935 (1967) (Stewart, J., joined by Douglas, J., dissenting from denial of certiorari). This court bears a grave constitutional duty to decide these questions carefully and systematically, and only after full briefing and oral argument.

¹¹ See, e.g., Redish, *Judicial Review and the "Political Question,"* 79 Nw. U.L. Rev. 1031, 1045-55 (1985); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations,* 17 UCLA L. Rev. 1135 (1970).