

Sec. 8—Powers of Congress

Cls. 11, 12, 13, and 14—War; Military Establishment

by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second.”¹⁵¹⁴

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnam War has been whether the President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.¹⁵¹⁵ The Supreme Court studiously refused to consider the issue in any of the forms in which it was presented,¹⁵¹⁶ and the lower courts generally refused, on “political question” grounds, to adjudicate the matter.¹⁵¹⁷ In the absence of judicial elucidation, Congress and the President have been

¹⁵¹⁴ *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872).

¹⁵¹⁵ The controversy, not susceptible of definitive resolution in any event, was stilled for the moment, when in 1973 Congress set a cut-off date for United States military activities in Indochina, Pub. L. 93–52, 108, 87 Stat. 134, and subsequently, over the President’s veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force. Pub. L. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548.

¹⁵¹⁶ In *Atlee v. Richardson*, 411 U.S. 911 (1973), *aff’d* 347 F. Supp. 689 (E.D. Pa., 1982), the Court summarily affirmed a three-judge court’s dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court’s grounds. *See also* *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied certiorari in all cases on its discretionary docket.

¹⁵¹⁷ *E.g.*, *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968), *aff’d sub nom. Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966), *aff’d* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); *Mora v. McNamara*, 387 F.2d 862 (D.C., 1967), *cert. denied*, 389 U.S. 934 (1968); *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970), and *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970), *consolidated and aff’d*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

During the 1980s, the courts were no more receptive to suits, many by Members of Congress, seeking to obtain a declaration of the President’s powers. The political question doctrine as well as certain discretionary authorities were relied on. *See, e.g.*, *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984) (invasion of Grenada), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (reflagging and military escort operation in Persian Gulf), *aff’d*, No. 87–5426 (D.C. Cir. 1988); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (U.S. Saudia Arabia/Persian Gulf deployment).