# Chapter 6 - The role of the Judiciary

## Marbury v. Madison, 5 U.S. 137 (1803)

### What is a mandamus action?

### What does it require the movant to show to be granted mandamus?

### Why would this make it really hard to get a mandamus in a national security case?

### Did Marbury satisfy the requirements for mandamus?

### Why didn’t the Supreme Court issue the mandamus?

## El-Shifa Pharmaceutical Industries Co. v. United States 607 F.3d 836 (DCC 2010)

### What happened on August 7, 1998?

### What happened on August 20th, 1998?

### What notice did the president give congress under the War Powers Resolution?

### What was the tie between Bin Laden and the plant?

### Who are the plaintiffs and what is their claim?

### What is the procedural posture of the case before the Circuit Court?

### How does this affect how the plaintiffs’ allegations are treated?

### Did the government even know who owned the plant when it was hit?

### What did the government claim later about the owner?

### What happened to plaintiffs’ claim under the Takings Clause?

### What are the Baker v. Carr, 369 US 691 (1962) factors for determining if a case presents a nonjusticiable political question?

### How many do you need to make a case a political question?

### The constitution leaves setting immigration policy to Congress. What wasn’t I.N.S. v. Chadha, 462 U.S. 919 (1983) dismissed as a political question?

### What does the Steel Seizure Case tell us about dodging judicial review by claiming extraordinary authority during war time?

### How does the standard for judging what is a political question resemble a mandamus proceeding?

### Can Congress give the Court the jurisdiction over political questions?

### What can the court do when reviewing the Secretary of State’s designation of a group as a ‘‘foreign terrorist organization’’ under the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. §1189 (2006)?

### What does Gilligan tell us about reason that the court should stay out of reviewing military decisions?

### What was plaintiffs’s law of nations claim?

### What would the court have to find to address the claim?

### What would be the standard the court would have to try to apply?

### Is the court saying that the attack was OK?

### Dissent – reason for dismissing claims (not in casebook) Federal courts lack subject matter jurisdiction over claims that are “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.” Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (internal quotation marks omitted). Plaintiffs' two claims in this case fall into that category.

### Why does the dissent claim that the political question doctrine cannot be used when the claim is a statutory rather than a constitutional violation?

### What does the dissent say would be the effect of applying the political question doctrine to statutory cases?

### While this may be true, what is another way the court could handle a statute that it thought impermissibly constrained the executive?

### What is the effect of the court not deciding this case?

## Notes

### How does this case differ from The Steel Seizure Case, Curtiss-Wright, Dames & Moore, Little v. Barreme, Bas v. Tingy, and other cases where the court did decide cases involving national security?

### What is the significance of the court’s quotation from Walter Nixon v. United States, 506 U.S. 224, 228 (1993), in which the Supreme Court declared that ‘‘the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it’’?

### Campbell v. Clinton, 203 F.3d 19, 24-25 (D.C. Cir. 2000) note 4

#### Judge Silberman maintained that ‘‘no one’’ could challenge the President’s actions because of a lack of ‘‘judicially discoverable and manageable standards’’ and because ‘‘the War Powers Clause claim implicates the political question doctrine.’’

#### Judge Tatel opined that ‘‘[w]hether the military activity in Yugoslavia amounted to ‘war’ within the meaning of the Declare War Clause . . . is no more standardless than any other question regarding the constitutionality of government action. . . . Courts have proven no less capable of developing standards to resolve war power challenges [than Fourth or First Amendment actions].’’

#### Why is deciding whether there is a war in this case different from deciding it in a case where an insurance company does not want to pay a claim because the policy excludes coverage in times of war?

## Standing

## What must a party show to have constitutional standing?

## Could Congress give individuals the right to challenge a president’s deployment of troops without a declaration of war?

## Citizen standing

### Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y. 1991)

#### What was plaintiff's claimed injury in fact?

#### What did the court say about this?

#### Why not accept this claim?

### What about taxpayers who do not want their taxes spent on war?

### American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007) – Round I

#### Why couldn’t the reporters and others show standing to sue over the government’s illegal eavesdropping?

### Amnesty International USA v. Clapper, 638 F.3d 118 (2d Cir. 2011) – Round II

#### How did the change in the law and timing overcome the problem in round I?

#### This is being reviewed by the United States Supreme Court in the Oct 2012 term.

## Congressional Standing

### What does Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) tell us about congressional standing to contest an illegal war?

#### Why?

#### How did the court decide the case?

#### Will this always be the result?

### Raines v. Bird, 521 U.S. 811, 829 (1997)

#### What did the plaintiffs want the court to rule?

#### What was their standing problem?

#### If congress really thought this was unconstitutional, what could it do?

#### What did the court eventually rule about the line item veto?

#### Does Raines end the ability of a congressperson to effectively litigate the constitutionality of a law?

### Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), aff’d, 203 F.3d 19 (D.C. Cir. 2000)

#### What were the congressmen arguing?

#### What did the plaintiffs claim was the significance of “congressional votes defeating a declaration of war (427-2), defeating an authorization of the air strikes (213-213), defeating a resolution ordering an immediate end to U.S. participation in the NATO operation (290-139)?

#### What is the legal status of a bill that does not pass?

#### What did Congress vote for?

#### Why does one appropriations bill trump a thousand failed bills?

#### Would it even trump a successful join resolution telling the president to get out of Yugoslavia?

#### What can congress do if it does not like a war the president is in?

#### What can congress do if the president orders in troops in violation of provisions of the appropriations bill supporting the troops?

### Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002) – Do Congresspersons have standing to contest the president abrogating a treaty?

#### Do they have any greater interest than a citizen?

#### How is this different from Mitchell v. Laird?

## Ripeness

### Why is there a ripeness doctrine in the federal courts?

### Is this different in some state courts?

### When did Justice Powell say that a fight between the congress and the president is ripe?

### What was the legal claim in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990)?

### Why did the court reject this request for a preliminary injunction?

### What will be the problem once this happens?

### Doe v. Bush, 323 F.3d 133 (1st Cir. 2003)

#### Who were the plaintiffs?

#### Why did they say that it was illegal for Bush II to invade Iraq?

#### What is wrong with the claim that congress colluded with the president?

#### Why did the court find that the case was not ripe?

#### Do you think the court would have reached a different result if they had waited a few days and the war had started?

## In general, why is the role of the courts so limited as regards illegal wars and fights in congress over war powers?