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Kenneth L. Heisz

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I. INTRODUCTION

Two hundred years of history under the Constitution has arguably demonstrated the workability of two fundamental principles: (1) separation of powers; and (2) checks and balances.[1] The Framers of the Constitution knew that the success and survival of the government they were forming depended on a certain amount of agreement between the executive, legislative and judicial branches. However, the "separation of powers" and "checks and balances" scheme upon which this government is predicated inevitably fosters struggle over various policy matters. Nowhere is this conflict more apparent than in the context of which branch will ultimately control United States foreign policy.[2] This is particularly true in the realm of the "war powers."[3]

The objective of this article is threefold. First, the article will discuss the evolution of the "war powers" from its inception under the Constitution to the present day, including its most recent embodiment under the controversial War Powers Resolution.[4] Second, the analysis will focus on whether War Powers Resolution claims are justiciable; in other words, whether judicial review over the war-making power is permitted. Finally, the question of justiciability leads to a discussion of the still controversial notion of whether a member of Congress has standing to litigate War Powers Resolution claims.[5] Throughout this article, it should be recognized that the issues discussed have direct impact on international law via the United States' handling of its foreign policy.

II. HISTORICAL OVERVIEW OF WAR POWERS

The "original intent" of the Framers of our Constitution was to

1. Although the Constitution has undergone various changes in form as well as substance, these two principles which represented liberty to the framers have endured. *See, e.g.*, THE FEDERALIST, NOS. 10 (J. Madison); 28 (A. Hamilton); 41 (J. Madison); 47 (J. Madison); and 51 (J. Madison).
2. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 200 (1940).
3. U.S. CONST. art. I, § 8.
4. War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (1973).
5. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 150-54 (1988).

vest primary control over war powers with the most representative branch of government: Congress.[6] The accepted reason for entrusting Congress with such control was a general belief that the executive branch would have a proclivity towards war-making. For example, in a letter to Thomas Jefferson, James Madison expressed such an opinion stating that "[t]he constitution supposes, what the History of all Govts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It [Congress] has accordingly with studied care, vested the question of war in the Legisl[ature]."[7]

Specifically, the allocation of war making power which Madison spoke of can be found in article I, section 8, clause 11 of the Constitution, which provides Congress with the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[8] This power, albeit vested in the most representative branch, ironically caused some concern that Congress was quickly becoming an oligarchy. Whether or not a common perception, this concern was prevalent enough to warrant a response from Alexander Hamilton. In discussing the significant restraints placed on the legislative branch, Hamilton emphasized:

> [T]hat the whole power of raising armies was lodged in the *Legislature*, not in the *Executive*; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected; and that . . . there was to be found . . . an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against keep-

6. The Framers believed that the essence of liberty derived from a republican form of government where the most representative branch would have the responsibility for the initiation of war. This would ensure that the government was acting in accordance with the people's will before the nation entered into any war. In distinguishing the predominant authority of Congress vis-a-vis the executive authority in the separation of powers scheme, Alexander Hamilton said:

> The President is to be the commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies-all which, by the Constitution under consideration, would appertain to the legislature [Congress].

THE FEDERALIST NO. 69, at 446 (A. Hamilton) (B. Wright ed. 1966).

7. Letter from Madison to Jefferson (April 2, 1778), *reprinted in* 6 MADISON, WRITINGS 312-13 (G. Hunt ed. 1906).

8. U.S. CONST. art I, § 8.

ing up of troops without evident necessity.[9]

As a further restraint, the Constitution required joint or bicameral affirmative action before war could be waged, ostensibly a limitation designed to ensure wars with only broad grassroots support.[10] On the other hand, the executive branch was vested with the power of "Commander-in-Chief."[11] Although this clause is susceptible to different interpretations, the scope of authority seems to be that it extends to supervision of the wars authorized and/or declared by Congress. For although the President was to be the "first General and Admiral,"[12] the President was not vested with the power to initiate wars or unilaterally deploy armed forces.[13] Despite the Framers' efforts to the contrary, the control over the war power began to incrementally shift from the legislative branch to the executive branch.[14]

Subtly developed modern theories such as "interposition" and "intervention" to explain military action gradually facilitated the executive branches' encroachment on congressional war-making authority.[15] This significant expansion of Presidential war-making authority

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9. THE FEDERALIST NO. 24, at 204 (A. Hamilton) (J. Pole. ed. 1987). For discussion of how the appropriation limitation is being circumvented, see *Hearings Before the Subcomm. on Nat'l Security Policy & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 64 (1970).

10. J. ROGERS, WAR POLICING AND THE CONSTITUTION 34 n.21 (1945). During the ratification process, Framer James Wilson made this comment to the Pennsylvania convention:

> This system will not bring 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 . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed. 1888) (emphasis added).

11. U.S. CONST. art. II, § 2.

12. THE FEDERALIST NO. 69, at 465 (A. Hamilton) (J. Pole ed. 1987). The Framers substituted the word "declare" for "make" in the Constitution's granting of war powers to Congress in order to allow an exception (according to Madison) which left the Executive with "the power to repel sudden attacks" on the United States. 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 318-19 (M. Farrand ed. 1966).

13. *Id.*

14. Countless scholars have attributed this significant shift to many things including congressional acquiescence and complacency as well as presidential prerogative and usurpation. *See, e.g.*, E. KEYNES, UNDECLARED WAR (1982); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A.L. REV. 599 (1984); Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A.L. REV. 715 (1984).

15. *See* DEPT. OF STATE, THE RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d ed. 1933). J. Reuben Clark, the solicitor of the State Department, proposed in 1912 a distinction between "interposition" and "intervention." *Id.*

predictably led to various military deployments without any congressional authorization.[16]

As a consequence, the United States' military involvement in Korea set a precedent as the first time in history that the executive branch claimed the broad power to begin a war without congressional approval.[17] To justify his action, President Truman stated that the military involvement was necessary in order to protect the "interest of American foreign policy."[18] Although not without controversy,[19] the military deployment in Korea was conducted, for the most part, with Congress out of the picture.[20] Therefore, the Truman Administration

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> Interposition meant simply the limited insertion of troops to protect lives and property; it implied neutrality toward the government or toward the contesting forces within the country; and, since it was a normal exercise of international law, it did not, Clark argued, require Congressional approval. The power to interpose he derived from the President's executive power; nothing special was claimed for the President in his role as Commander in Chief. Intervention, on the other hand, meant interference in sovereign affairs; it implied an act of war and required congressional authorization.

A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 89-90 (1973).

16. *Id.* at 88-91. *See also* 2 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 678-99 (1939); P. CARTER, CONGRESSIONAL AND PUBLIC REACTION TO WILSON'S CARIBBEAN POLICY 1913-1917 (1977). It is also interesting to note the comment of then-Congressman Abraham Lincoln who stated in a letter to William Herndon with regards to the Mexican War, "[a]llow the President to invade a neighboring nation, whenever 'he' shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix 'any limit' to his power in this respect . . . ." 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451 (R. Basler ed. 1953).

17. *Authority of the President to Repel the Attack in Korea*, 23 Dep't St. Bull. 173 *passim* (1950) (quoted in Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213, 232 n.57 (1983)). "[T]his claim of presidential power was without precedent in American history." *Id.* at 233.

18. President Truman committed United States troops in Korea on the theory that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof." 23 DEP'T. ST. BULL. 173 (1950). Truman's Secretary of State, Dean Acheson, articulated the Administration's vision that:

> Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Assignment of Ground Forces in European Area: Hearings Before the Senate Comm. on Foreign Relations & Armed Services, 82d Cong., 1st Sess. 92 (1951) (Statement of Dean Acheson, Secretary of State).

19. Senator Robert Taft made the observation that "[t]he President simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war." 97 CONG. REC. 57 (1951).

20. This is reflected in a remark by Frederic R. Coudert, Jr., a conservative congressman from New York, who said, "how devastating a precedent [we] have set in remaining silent while the President took over the powers specifically reserved for Congress in the Constitution." A. SCHLESINGER, JR., *supra* note 15, at 135.

obtained the distinction of engineering the first *undeclared* war in United States history.[21] It is also important to note that during this time, no litigation was ever initiated by anyone to challenge this relatively novel notion of presidential prerogative.[22]

This newly-fashioned presidential prerogative was next exercised by President Nixon in Vietnam and a second *undeclared* war became a reality. However, the difference between the United States' military involvement in Vietnam as opposed to Korea was the degree of congressional complicity and deference to the executive branch in conducting the wars.[23] As noted earlier, Congress was conspicuously uninvolved with the conflict in Korea.[24] In Vietnam, on the other hand, Congress abdicated its responsibility over the war powers through passage of the infamous Gulf of Tonkin Resolution.[25]

Despite the fact that this Gulf of Tonkin Resolution gave the President unbridled authority, in particular, the free reins to make war,[26] few heeded the wisdom of the Constitution's framers in expressing doubt that the President would use it.[27] That such carte blanche

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21. *Supra* note 18. Obviously, one of the difficulties is in differing interpretations of what constitutes a "war."

22. This is qualified as a "relatively new notion" because the exercise of "presidential prerogative" in a military situation is not completely unprecedented. *Cf.* The Prize Cases, 7 U.S. (3 Wall.) 514 (1865). It should also be noted that litigation was brought to challenge the executive branch's authority to seize property to further international military policy. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

23. Technically, President Nixon inherited the Vietnam conflict since military advisers had been present in Cambodia as early as President Eisenhower's Administration. However, the military buildup dramatically increased during Nixon's presidency.

24. *See* A. SCHLESINGER, JR., *supra* note 15, at 133.

25. The Gulf of Tonkin Resolution provided:

> Sec.1. That Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> Sec.2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Gulf of Tonkin Resolution of 1964, Pub. L. No. 88-408, §§ 1-2, 78 Stat. 384 (1964).

26. Supporters of the Resolution included Senators Fulbright, Cooper and Javits. 110 CONG. REC. 18,403-04, 18,409 (1964) (statement of Sen. Fulbright); *Id.* at 18,409-10 (statement of Sen. Cooper) *Id.* at 18,418 (statement of Sen. Javits).

27. Only two senators, Senator Wayne Morse of Oregon and Senator Greening of Alaska voted against the resolution. Both were subsequently defeated in their re-election campaigns. Senator Wayne Morse expressed his dissent in saying:

> I believe that history will record that we have made a great mistake by subverting

delegation of authority would occur is not as surprising as the cavalier manner in which Congress hastily passed the measure without reflection upon the constitutional implications.[28] Despite later congressional efforts to reclaim what had been given to the executive branch willy-nilly,[29] the political momentum remained within the bounds of presidential prerogative for the remainder of the conflict.

Undoubtedly, the combined experiences of Korea and Vietnam served as the prelude to passage of the War Powers Resolution.[30] There had been a constitutional breakdown in the war powers sphere. Now, through various hearings on war-making authority, Congress attempted to regain its rightful (constitutional) legacy.[31] The result was a bipartisan effort to legislatively recoup what was already clearly expressed and sufficiently articulated in the Constitution. That such legislation was deemed necessary can be construed as tacit acknowledgment of past congressional impotence when confronted with a recalcitrant executive branch. In any case, Congress seemed to believe

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> and circumventing the Constitution of the United States . . . by means of this resolution. As I argued earlier today at some length, we are in effect giving the President . . . warmaking powers in the absence of a declaration of war. I believe this to be a historic mistake.

110 CONG. REC. 18,470 (1964).

28. The House of Representatives adopted the Resolution by a vote of 416 to 0 after time in the committee and the floor amounted to eighty minutes. The Senate passed the Resolution by a vote of eight-eight to two after approximately eight and a half hours of debate. *Staff of House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982); THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS 4-5 (Comm. Print 1982) (hereinafter SPECIAL STUDY).

29. The Senate Foreign Relations Committee issued what can be characterized as a remorseful report when it stated:

> The Gulf of Tonkin resolution represents the extreme point in the process of constitutional erosion that began in the first years of this century. Couched in broad terms, the resolution constitutes an acknowledgment of virtually unlimited Presidential control of the armed forces. It is of more than historical importance that the Congress now ask itself why it was prepared to acquiesce in the transfer to the executive of a power which, beyond any doubt, was intended by the Constitution to be exercised by Congress.

S. REP. NO. 797, 90th Cong., 1st Sess. 20 (1967).

Repeal of the Resolution was symbolic at best with little practical effect since the Nixon administration had disavowed any reliance on the resolution for its military excursions. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971). The Nixon administration relied on the Commander-in-Chief power to supervise troop deployment for the protection of troops already in the field. SPECIAL STUDY, *supra* note 28, at 37, 41.

30. The reality of such experiences were indicative of the executive branch's expansion in the area of war powers.

31. Various legislative proposals were being discussed at this time with regards to the overall division of war powers and authority. *See Congress, The President, and the War Powers: Hearings Before the Subcomm. on National Security Policy & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970).

that the War Powers Resolution would bolster its position in getting the executive branch to recede or relinquish the war-making authority granted to it by default.[32] Therefore, in 1973, and over the veto of President Nixon, Congress adopted the War Powers Resolution.[33] For many members of Congress and the public in general, it symbolized the restoration of the respective rights and responsibilities between the executive and legislative branches in every decision to commit United States troops.[34]

III. THE WAR POWERS RESOLUTION

Three sections are considered to be the major substantive provisions of the War Powers Resolution.[35] For example, section 3 requires, in pertinent part, that "[t]he President in every possible instance shall consult with Congress *before introducing* United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[36]

Section 4 is a reporting requirement which is considered by some to be "the essential element of the War Powers Resolution."[37] In specified deployment of United States Armed Forces,[38]

> [T]he President *shall submit within 48 hours* [a written report to both Houses] . . . setting forth: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.[39]

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32. *Id.*

33. The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (1973).

34. *See* Zablocki, *War Powers Resolution: Its Past Record And Future Promise*, 17 LOY. L.A.L. REV. 579, 597-98 (1984). Representative Zablocki was chairman of the House Committee on Foreign Affairs, and co-author of the War Powers Resolution.

35. The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48 (1973).

36. *Id.* (emphasis added).

37. Zablocki, *supra* note 34, at 581.

38. Section 4(a) specifies that:

> In the absence of a declaration of war, in any case in which United States Armed Forces are introduced
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

The War Powers Resolution of 1973, § 4, 50 U.S.C. § 1543 (1973).

39. *Id.* (emphasis added).

A reasonable construction of the emphasized portion seems to be that it requires affirmative action and disallows executive discretion. However, the numerous instances of executive noncompliance (without uniform congressional disapprobation) has made it otherwise.[40]

This problem of executive noncompliance can be traced to the executive branch's use of the "Commander-in-Chief" power which has perpetuated the myth of its constitutional importance.[41] As one of the resolution's drafters stated, "[t]he notion that the President can decide whether or not to seek congressional approval for committing troops is not evident in the Constitution or in the statements of the founding fathers. The fact that executive branch lawyers say there is such evidence does not give it constitutional foundation."[42] Nevertheless, the executive branch's noncompliant attitude has persisted, thereby frustrating the development of any collective judgment between Congress and the President on whether or not to commit troops to hostilities.[43]

The third major provision is section 5 which requires that the President withdraw any armed forces located in hostile zones within sixty calendar days "unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."[44] The glaring defect of such a provision is that it politically legitimizes or, at a minimum, condones executive encroachment on the war powers through unilateral troop deployment, and relegates

40. *See generally*, Zablocki, *supra* note 34.

41. *Id.* at 581.

42. *Id.* However, Rep. Zablocki seems to make an unwitting, or at least, unnecessary concession when explaining this provision. He would have been better disposed to substitute "when" in place of "if" when he said, "If the President files a report under the first circumstance . . . ." *Id.* at 581. If this is indicative of the collective state of mind of Congress, then the unlimited Presidential prerogative heretofore witnessed has been left undisturbed and Congress is left in its reactive posture.

43. *Id.* at 582. Another deficiency worth noting is the fact that several terms in the consultation requirement are not defined. "Neither the key terms, 'consult,' and 'hostilities,' nor the phrase, 'in every possible instance,' are defined, leaving the application of this provision to the vagaries of political circumstance and presidential creativity. The decisions of whether and to what extent consultation is required are to be made by the President." Ides, *supra* note 14, at 627.

44. The War Powers Resolution of 1973, § 5(b), 50 U.S.C. § 1544 (1973). Section 5(b) also has a thirty day extension provision following executive certification "that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." *Id.*

Congress to a reactive posture or knee-jerk position.[45] In practical terms, this means that the President can deploy troops on his own without any congressional involvement until after the fact. Unfortunately, this fundamentally deviates from the stated purpose of the Resolution:

> The purpose of the War Powers Resolution is, in its own terms, to fulfill the intent of the framers of the Constitution of the United States and insure that the *collective judgment of both the Congress and the President* will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.[46]

In practical effect, the Resolution has delegated "short-term"[47] war-making power to the President since it is unlikely that Congress will terminate the military action of already-engaged forces prior to expiration of the sixty (or ninety) day period.[48] Under such conditions, Congress would be left with little choice but to ratify the executive's initiative.[49] With this scenario in mind, there were some who voiced concern that this Resolution would not reinvigorate congressional involvement in the war powers decision-making context that others envisioned and hoped for.[50] On the other hand, the Resolution

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45. "The composite message from the War Powers Resolution is that the President has an open ended authorization from Congress to insert United States military forces into hostilities whenever he deems it sound to do so. He should consult; he must report; but in all events the decision to engage in military action is in his hands." Ides, *supra* note 14, at 630.

46. The War Powers Resolution of 1973, § 2, 50 U.S.C. § 1541 (1973) (emphasis added).

47. The military invasion of Grenada is a case in point.

48. Although section 5(c) of the War Powers Resolution states that "such forces shall be removed by the President if the Congress so directs by concurrent resolution," this is probably invalid following the decision of INS v. Chadha, 462 U.S. 919 (1983). Section 5(c) only requires a majority vote of Congress and does not require presentment to the executive. The War Powers Resolution of 1973, § 5(b), 50 U.S.C. § 1549 (1973). This circumvents the political process which is forbidden under *Chadha*.

49. L. TRIBE, *supra* note 5, at 236.

50. Senator Abourezk stated the Resolution was "a blank check which will implicate Congress in whatever aggressive war-making a President judges to be necessary." 119 CONG. REC. 25052-53 (1973). Likewise, Senator Fulbright condemned the Resolution's "de facto grant of expanded Presidential authority" and rejected such codification believing the better alternative was to leave the executive without any notice of congressional posture. "A prudent and conscientious President, under those circumstances, would hesitate to take action that he did not feel confident he could defend to Congress. He would remain accountable to Congress for his action to a greater extent than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative taken without its advance approval." *Id.* at 25095.

makes it less likely that the United States will become militarily involved in any foreign country for an extended period of time without the express sanction of Congress.

IV. CONGRESSIONAL STANDING

The War Powers Resolution was Congress' attempt at a constitutional comeback in foreign affairs, and specifically, in the partnership of war-making authority. Therefore, when a situation arises in which there is executive noncompliance with the War Powers Resolution as well as a non-vigilant Congress vis-a-vis the Resolution's provisions, it should not surprise anyone that such a political impasse is eventually brought to the judicial forum. In fact, the American public witnessed several judicial challenges to the legality of the war effort in Vietnam by a broad spectrum of citizens, taxpayers, draftees, *and members of Congress*.[51] In most of these cases, the federal courts refused to adjudicate challenges to presidential war-making.[52] However, these cases arose prior to Congress passing the War Powers Resolution. Therefore, any litigant challenging military deployment by the executive now has statutory as well as constitutional authority.

In order to get through the courtroom door, a litigant must have "standing" to bring the suit. The concept of "standing" derives from the self-imposed limitation on judicial power which is expressed by the "case or controversy" clause of article III of the Constitution.[53] In *Sierra Club v. Morton*,[54] the United States Supreme Court stated

51. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), *cert. denied sub nom.*; Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.*.

52. A notable and short-lived exception was the case of Holtzman v. Richardson, 361 F. Supp. 553 (E.D.N.Y. 1973), in which Judge Judd enjoined the bombing of Cambodia because it was unauthorized by Congress. Judge Judd found that the Executive had ignored limits imposed by Congress in its expansion of the war effort in Cambodia. This decision was reversed by the Second Circuit based on the finding that the process in which the Executive winds down the war is a non-justiciable political question. Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

53. The primary focus of standing is "on the party seeking to get his complaint before a federal court" and only secondarily "on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis added). *See also* L. TRIBE, *supra* note 5, at 107.

54. 405 U.S. 727 (1972).

that the requirement of standing entailed:

> Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has been traditionally referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker v. Carr*, 369 U.S. 186, 204, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen*, 392 U.S. 83, 101.[55]

While still controversial, there appears to be two classes of plaintiffs who have standing to litigate War Powers Resolution claims.[56] Until the United States Supreme Court rules otherwise, congressional members can cite the District of Columbia Circuit Court decision in *Kennedy v. Sampson*[57] *("Sampson")* as their authority for standing and being able to litigate claims in general.[58] In *Sampson*, Senator Edward Kennedy was not authorized to bring the suit on behalf of the Senate or Congress.[59] Instead, he claimed alternative theories of standing including, "his capacity as a citizen, as a taxpayer, and as a member of the United States Senate."[60]

Significantly, the appellate court agreed with the district court that it was in Kennedy's "capacity as an individual United States Senator who voted in favor of S.3418 [The Family Practice of Medicine

55. *Id.* at 731.

56. The United States Supreme Court has never directly addressed the subject of legislator standing, the alleged first class of plaintiffs. L. TRIBE, *supra* note 5, at 150. This has left the courts divided on the issue. The second class for standing purposes is military personnel who refuse to participate in military excursions which they believe are in violation of the War Powers Resolution. *See, e.g.*, Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), *cert. denied sub nom.* Orlando v. Laird, 404 U.S. 869 (1971). Congressional members can argue they have standing under the authority of Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

57. 511 F.2d 430 (D.C. Cir. 1974).

58. Note that legislators can possibly have standing on their own behalf or in a representative capacity. *See* L. TRIBE, *supra* note 5, at 145.

59. Senator Kennedy brought suit for a declaratory judgment that the Family Practice of Medicine Act became law following its overwhelming passage in both House and Senate, even though the President had not signed the Act. At the expiration of the ten-day period, it had been in the possession of the executive branch. The legal question involved "the validity of executive action which purports to have disapproved an Act of Congress by means of a constitutional procedure [an executive pocket veto] which does not permit Congress to override the disapproval." *Sampson*, 511 F.2d at 432.

60. *Id.* at 433.

Act]"[61] that was determinative, and did not consider the alternative theories. Therefore, irrespective of any concurrence or nonconcurrence of other members who voted for the legislation, an individual legislator has standing to protect the effectiveness of his or her own vote. Another way of viewing this is that whenever the role of Congress is diminished by executive action or a particular vote of Congress has been effectively nullified, individual members of Congress have standing to litigate the matter.[62]

In reaching this conclusion, the *Sampson* court recognized that more than one approach in evaluating standing existed.[63] Nevertheless, this court used the test from *Flast v. Cohen*,[64] which required a determination of whether a "logical nexus" existed between Kennedy's status as a Senator and the claim he sought to be adjudicated.[65] To answer this, the *Sampson* court was forced to analyze the validity of an executive pocket veto.[66] The veto had the effect of preventing Congress from having the opportunity to override such a veto in contravention of the political process as set forth in the Constitution.[67] The court's analysis demonstrated that a "logical nexus" was present between Senator Kennedy and his claim in that the purported pocket veto had unconstitutionally nullified his vote in favor of particular legislation.[68]

Notably, the *Sampson* court also discussed a different analysis of standing which was employed in *Association of Data Processing Service Organization v. Camp*[69] *("Camp")*. In *Camp*, the United States Supreme Court dealt with the question of standing by formulating a two-prong test.[70] The first prong requires a plaintiff to allege that the

61. *Id.*
62. *Id.*
63. *Id.*
64. 392 U.S. 83, 102 (1968).
65. *Sampson*, 511 F.2d at 433.
66. *Id.* If the court accepted this executive action as valid, then Senator Kennedy's vote would be nullified and he would have "no right to demand or participate in a vote to override the President's veto." *Id.* On the other hand, if Kennedy's "interpretation of the veto clause [was] correct, then the bill became law without the President's signature." *Id.*
67. In order for the political process to be legitimate as well as constitutional, all legislation must comply with the provisions of bicameralism and presentment. INS v. Chadha, 462 U.S. 919 (1983).
68. *Sampson*, 511 F.2d at 433.
69. 397 U.S. 150 (1970).
70. *Id.* at 152-53.

challenged action has caused him or her "injury in fact."[71] The second prong requires a determination of whether the violated interest is within the "zone of interests" that should be protected or regulated by the statute or constitutional guarantee in question.[72]

Senator Kennedy satisfied the first prong of this test in his pleading by alleging that the pocket veto had injured him by denying him the effectiveness of his vote as a United States Senator.[73] To satisfy the second prong, Senator Kennedy argued that his interest was protected by the constitutional guarantee found in article I, section 7.[74] This particular constitutional provision is traditionally invoked whenever there is a perceived intrusion or encroachment upon the allocated power or prerogative of one branch by another.[75]

The defendants countered this argument by relying upon *Coleman v. Miller*.[76] They argued that Senator Kennedy's injury was derivative in nature and, therefore, only the Senate or Congress as a whole could file suit in this case since Senator Kennedy's single vote was not the legal or political equivalent of passage of a bill.[77]

However, the court found this reasoning unhelpful since what is pertinent and a prerequisite to qualifying for standing is only that a party be among the injured.[78] As established in *Sierra Club v. Morton*,[79] it is not necessary that a plaintiff be the *most* grievously or even the *most* directly injured.[80]

Although the *Coleman v. Miller* opinion did not deal with the question of whether one of the legislator plaintiffs could have maintained the suit alone, the Court believed that "[i]n light of the purpose of the standing requirement . . . the better reasoned view of both *Coleman* and the present case is that an individual legislator has standing to protect the effectiveness of his vote with or without the concur-

71. This injury can be "economic or otherwise." *Sampson*, 511 F.2d at 433 (citing *Camp*, 397 U.S. at 152-53).

72. *Id.*

73. *Id.* at 433-34.

74. *Id.* U.S. CONST art. I, § 7 is one of several provisions surrounding the "separation of powers" doctrine which allocate the powers and prerogatives to each governmental branch. The court stated that Kennedy's "asserted interest plainly falls among those contemplated by the constitutional provision [art. I, § 7] upon which he relies." *Sampson*, 551 F.2d at 433.

75. *Id.*

76. 307 U.S. 433 (1939).

77. *Sampson*, 511 F.2d at 435.

78. *Id.*

79. 405 U.S. 727 (1972).

80. *Sampson*, 511 F.2d at 435 (statement of the *Sampson* court in interpreting "among the injured" in *Sierra Club*).

rence of other members of the majority."[81] Additionally, while the court agreed with the proposition that Senator Kennedy's vote in the legislative process was not the functional equivalent to passage of the bill, nevertheless, every legislator participates in the overall power of Congress when that individual votes in favor or against proposed legislation.[82] According to the court, a legislator could not assert a more essential interest.[83]

A different analysis was conducted by the court in *Riegle v. Fed. Open Market Comm.*[84] This court considered the question of whether a United States Senator had standing to challenge the constitutionality of certain procedures which were established by the Federal Reserve Act.[85] Senator Riegle alleged that he suffered injury as a result of his inability to exercise his right under the appointments clause of the Constitution.[86]

In performing its analysis, the *Riegle* court acknowledged that its prior opinions contained two contradictory principles with regard to congressional plaintiffs and standing.[87] In some of its cases, the court had suggested that no distinctions should be made between congressional plaintiffs and private plaintiffs when conducting a standing analysis.[88] On the other hand, the court had utilized a special standard in congressional plaintiff cases because of its concern over interfering in the legislative process.[89] Standing would be withheld from congressional plaintiffs whenever the court determined that an alternative remedy was available.[90] Stated simply, this remedy consisted in the recognition that, in most instances, congressional plaintiffs could introduce legislation to cure the alleged injury.[91] The confusion

81. *Id.*
82. *Id.* at 435-36.
83. *Id.* at 436.
84. 656 F.2d 873 (D.C. Cir. 1981).
85. *Id.* at 874.
86. *Id.* at 877.
87. *Id.*
88. *See, e.g.*, Harrington v. Bush, 553 F.2d 190 (1977). "[T]here are no special standards for determining Congressional standing questions." *Id.* at 204.
89. *See, e.g.*, Ruess v. Balles, 73 F.R.D. 90 (D.D.C. 1976) (Parker, J.), *aff'd*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978). "When congressional plaintiffs have sought to accomplish in this court what they were unable to persuade their colleagues to do, we have usually refused to confer standing because of our concern for non-interference in the legislative process." Riegle v. Fed. Open Market Comm., 656 F.2d 873, 877 (D.C. Cir. 1981).
90. "[T]he principle that a legislator must lack collegial or 'in-house' remedies before this court will confer standing has been a theme of our congressional plaintiff opinions." *Id.* at 879.
91. *Id.* at 879-90. *But see*, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) and

engendered by having such a double standard was compounded by this court's inconsistent application of the "collegial" remedy.[92]

The *Riegle* court's solution was to retain both standards but to separate the collegial remedy from the standing analysis.[93] Consequently, Senator Riegle acquired standing under the traditional standing analysis.[94] However, the court dismissed his case based on the belief that judicial action would improperly interfere and circumvent the legislative process.[95] The problem with this strict judicial restraint is that it conceivably forecloses all suits by congressional plaintiffs.[96]

V. JUSTICIABILITY: FROM JUDICIAL ABDICATION TO JUDICIAL REMEDY

The Vietnam War experience generated an ongoing discussion regarding the concepts of justiciability in general and the political question doctrine in particular.[97] Traditionally, legal scholars have viewed the political question doctrine as one of the ways a court can avoid issues by methods of nondecision and predictable deference to another branch's judgment.[98] An expression of the classical view of this doctrine is as follows:

> I submit that . . . the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations

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Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated*, 444 U.S. 996 (1979) (mem.). The circuit court held the disenfranchisement of a senator, when a President attempted to unilaterally terminate a treaty without the consent of the Senate, was sufficient injury for standing purposes. The Court ignored the standing issue altogether and vacated on the basis that plaintiffs did not pose a justiciable question.

92. Congressional plaintiffs were granted standing despite availability of the collegial remedy in Kennedy v. Sampson, 511 F.2d 430, 436 (D.C. Cir. 1974), and in Goldwater v. Carter, 617 F.2d 697, 701-03 (D.C.Cir.), *vacated*, 444 U.S. 996 (1979).

93. *Riegle*, 656 F.2d at 881.

94. *Id.* at 879.

95. *Id.* at 882.

96. The court seems to trade one approach it deems inconsistent with another inconsistent approach called "circumscribed equitable discretion." *Id.* at 881. While the court narrows the parameters of the courtroom door to make it difficult for congressional plaintiffs to get in, it also readily admits that the same suit could be brought by a private plaintiff in most cases anyway. *Id.* This court did not even deal with the possibility of a congressional plaintiff having standing in a representative capacity. *See* L. TRIBE, *supra* note 5, at 150-54.

97. *See* F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR 229 (1986).

98. *Id.*

> where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretation process generally. That, I submit is *toto caelo* different from a broad discretion to abstain or intervene.[99]

This classical view can be contrasted with another view that might be characterized as the "pragmatic" view.[100] The pragmatic view is broad in that it encompasses prudential considerations such as lack of judicially manageable standards, insufficient information due to lack of fact-finding resources, and the reality that a judgment might go unenforced.[101]

In *Baker v. Carr*,[102] the political question doctrine received its best known formulation with regards to the question of justiciability.[103] While focusing on the spirit of the separation of powers, Justice Brennan identified six factors as relevant for consideration:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[104]

Undoubtedly, the most common application of the political question doctrine occurs when litigation involves foreign affairs.[105] While Justice Brennan stated the Court will often decide such cases, he also suggested factors which lead to a deferential posture to the political branches.[106] In fact, subsequent Court decisions have indicated that the first factor, a clear delineation in the Constitution which commit-

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99. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 9 (1959).

100. F. WORMUTH & E. FIRMAGE, *supra* note 97, at 230.

101. *Id.* Professor Alexander Bickel has offered what is described as a "normative" view. This theory has not achieved much acceptance. *Id.*

102. 369 U.S. 186 (1962).

103. *Id.*

104. *Id.*

105. F. WORMUTH & E. FIRMAGE, *supra* note 97, at 232.

106. 369 U.S. 186 (1962).

ted the issue to one of the political branches, is the critical one.[107]

With Vietnam as a backdrop, a few legal scholars began to question whether complete abstention from adjudicating such cases was justified.[108] Further, while most courts continued to balk at deciding cases related to foreign affairs and the war powers, a few began to address the merits as being within the realm of judicial competence.[109]

When the United States Supreme Court heard such cases, it exhibited a preponderant deference to the political branches. This has particularly been the case when it appeared that Congress and the executive branch were in agreement on the issue in question.[110] *Korematsu v. United States*[111] is a tragic example of a case where the Court was unwilling to second-guess the political branches who were in accord on the relocation of Japanese-Americans to concentration camps.[112]

On the other hand, *Duncan v. Kahanamoku*[113] demonstrates that the Court is less likely to defer judgment when the political branches have failed to act in unison.[114] With regard to a war powers issue, the Court should appropriately uphold congressional authority over inconsistent executive action based on the textually demonstrable constitutional grant of war powers to Congress.[115] The hostilities in Korea gave rise to a case which is illustrative of this point. In 1952, President Truman issued an executive order to seize the nation's steel mills in order to avoid work stoppage.[116] However, the Court rejected

107. *See* INS v. Chadha, 462 U.S. 919 (1983); Powell v. McCormack, 395 U.S. 486 (1969).

108. *See* Tigar, *Judicial Power, the Political Question Doctrine and Foreign Relations*, 17 UCLA L. REV. 1135 (1970); Henkin, *Is There a 'Political Question' Doctrine?*, 50 YALE L.J. 597 (1976); Henkin, *Vietnam in the Courts of the United States: Political Questions*, 63 AM. J. INT'L L. 284 (1969).

109. The main problem with such cases during the Vietnam era was that such cases came too few and too late.

110. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 80-89 (1977).

111. 323 U.S. 214 (1944).

112. Despite the fact that this congressional action utilized a normally forbidden racial standard for classification, the Court condoned the action by commenting, "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Id.* at 220. *Cf.* Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) and Duncan v. Kahanamoku, 327 U.S. 304 (1946), where the Court intervened to enjoin the exercise of post-war powers which were inconsistent with civil liberties.

113. 327 U.S. 304 (1946).

114. F. WORMUTH & E. FIRMAGE, *supra* note 97, at 237.

115. It is generally accepted that judicial resolution of such an interbranch controversy is appropriate. *See* L. TRIBE, *supra* note 5, at 152 n.51.

116. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). President Truman

this extra constitutional notion of executive power.[117] Neither the constitutional allocation of "Commander-in-Chief" powers or the authority as the nation's Executive justified this exercise of power.[118]

Nevertheless, the Supreme Court's role during the Vietnam War was primarily confined to its routine of refusing to review lower court decisions concerning war powers issues. Interestingly, this ignored historical precedent in which the Court had ruled on the nature of the war powers.[119]

In contrast to the Supreme Court, lower courts during this period began to show increased willingness to scrutinize the actions of the executive and legislative branches.[120] Further, a predominant theme of many of the cases toward the end of the Vietnam War was that it was appropriate for courts to decide such cases when a direct conflict existed between the two political branches.[121]

The first significant glimpse of judicial willingness to intervene in such a conflict occurred when a district court upheld a congressional plaintiff's challenge to the President's war-making authority in *Holtman v. Schlesinger*.[122] Although short-lived because of a later re-

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was concerned that a threatened labor strike would jeopardize the ongoing war effort in Korea. Therefore, he ordered the seizure of the nation's steel mills without congressional authorization. *Id.*

117. *Id.* at 637.

118. It is fairly clear from the *Youngstown* opinion that the Justices agreed that Congress could properly have authorized the seizure of the steel mills. In fact, emphasis was given to the fact that Congress had previously withheld this kind of power for resolving industrial disputes from the executive prior to this. *Id.* at 602.

119. F. WORMUTH & E. FIRMAGE, *supra* note 97, at 240. The authors give such examples as Bas v. Tingy, 4 U.S. (4 Dall.) 40 (1800), and Little v. Barreme, 6 U.S. (2 Cranch) 177 (1804) where the Supreme Court ruled that Congress had the power to authorize hostilities without declaring general war. *Id.*

120. In Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), the court stated the following:

> The constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. *Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine . . . .*

Id. at 1042 (emphasis added).

121. Judge Coffin in Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971), commented that:

> The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view.

Id. at 34. *See also*, F. WORMUTH & E. FIRMAGE, *supra* note 97, at 242-43.

122. 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d. Cir. 1973).

versal,[123] the court's opinion was a far cry from the dismissals predicated on the much-maligned political question doctrine which were common throughout the major portion of the Vietnam War era."[124]

The *Holtman* suit was instigated by Congresswoman Elizabeth Holtman and various Air Force officers who sought "a determination that the President of the United States and the military personnel under his direction and control may not engage in intensive combat operations in Cambodia . . . in the absence of Congressional authorization required under Article I, Section 8, Clause 11, of the Constitution."[125] District Court Judge Judd rejected both defense objections that Congresswoman Holtman lacked standing and that the case involved a nonjusticiable political question.[126] On appeal, the circuit court reversed Judge Judd. To understand the appellate court's reversal, it is important to note that the suit was brought during the final stages of the war. Thus, as a practical matter, the circuit court was most likely cognizant of the difference "between the relative ease of initiating war and the difficulty of ending it,"[127] and therefore might have hesitated to disrupt ongoing accommodations and negotiations between the two political branches for expediting and end to the war.[128]

Another notable effort by individual congressional members to challenge the executive's war-making authority came in the case of *Crockett v. Reagan*.[129] *Crockett* is particularly pertinent because it entailed an attempt to obtain judicial enforcement of the War Powers Resolution. In *Crockett*, Congressman George Crockett and twenty-eight congressional colleagues challenged President Reagan's failure to comply with the "reporting" and "termination"[130] requirements of the War Powers Resolution following United States military involve-

123. The appellate court reversed the lower court based on its determination that the question of the legality of bombing in Cambodia subsequent to removal of American forces was a non-justiciable political question. *See* Holtzman v. Schlesinger, 484 F.2d 1307, 1308-13 (2d Cir. 1973).

124. *See, e.g.*, Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972), *rev'g* 318 F. Supp. 538 (N.D. Cal. 1970); Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *aff'g*, 287 F. Supp. 846 (D.Kan. 1968), *cert. denied*, 396 U.S. 1042 (1970); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972).

125. *Holtzman*, 361 F. Supp. at 554.

126. *Id.*

127. F. WORMUTH & E. FIRMAGE, *supra* note 97, at 244.

128. *Id.*

129. 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

130. 558 F. Supp. at 893.

ment in El Salvador. The plaintiffs contended that the President had dispatched at least fifty-six members of the United States armed forces to El Salvador and also provided monetary aid and military equipment to support the Junta.[131]

Because these "military advisers" were in combat zones, had been subjected to at least two direct attacks, had suffered casualties while fighting beside government troops, and had been designated for a short while to receive "hostile fire pay,"[132] their continuing presence and involvement constituted "the introduction of Armed Forces into hostilities or imminent hostilities"[133] thereby triggering the Resolution's sixty-day cut-off provision.[134] As their remedy, plaintiffs wanted a declaratory judgment that the sixty-day provision had been triggered and/or an injunction directing the defendants to immediately withdraw all military aid including the armed forces from El Salvador.[135]

In countering this complaint, the defendants moved for dismissal based upon the following four separate grounds. First, that the complaint presented a nonjusticiable political question; second, the plaintiffs did not have standing; third, the court should utilize its equitable discretion and dismiss the case; and, fourth, that the statutory provisions invoked by plaintiffs provided no private right of action.[136]

The district court agreed with the defendants and concluded that the necessary fact-finding to determine whether United States military forces had been introduced into hostilities or imminent hostilities rendered the case "nonjusticiable."[137] Therefore, even though the court accepted the plaintiffs' allegations as true for the purposes of ruling on the defendants' motion to dismiss, it granted the motion and avoided the merits of the case.

Although the court characterized the instant case as being one

131. *Id.* at 895.

132. *Id.* at 897. *See also*, Wash. Post, July 30, 1982, at A24. The Comptroller General's report stated that the Pentagon initially designated El Salvador as a "hostile fire zone." *Applicability of Certain United States Laws That Pertain to U.S. Military Involvement in El Salvador*, General Accounting Office, Report by the Comptroller General, GAO ID-82-53 (1982). This designation was later revoked "for policy reasons" which were presumably executed to avoid reporting to Congress under the War Powers Resolution.

133. War Powers Resolution of 1973, § 4(a)(1), 50 U.S.C. §§ 1541-48 (1973).

134. *Id.*

135. Crockett v. Reagan, 558 F. Supp. 893, 896 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

136. *Id.*

137. *Id.* at 898.

where there is a "lack of judicially discoverable and manageable standards for resolution,"[138] it also affirmed the appropriateness of judicial review over questions of apportionment of power between the two political branches.[139] In fact, the court disagreed with the defendants' contention that the judicial branch should never hear such a case since it would interfere with executive discretion in foreign affairs.[140]

The reasoning behind such a position was the court's distinction that the plaintiffs were not seeking "relief that would dictate foreign policy but rather to enforce existing law concerning *the procedure for decision-making*."[141] Yet, the court deferred the matter to the political forum in dismissing the suit under the political question doctrine.[142] The impression given is that the court believed a remedy could still be fashioned in as much as Congress could still enact certain legislation that would curtail the executive's excesses.[143]

In its analysis, the court contrasted the instant case with the Vietnam War which was the historical backdrop and catalyst for the passage of the War Powers Resolution.[144] The court acknowledged that military involvement by the United States in Vietnam which spanned seven years at the cost of more than 50,000 American lives was a situation where it would be "absurd to decline to find that United States forces had been introduced into hostilities"[145] and deny application of the War Powers Resolution. According to the court, however, the facts of Vietnam were "less elusive" than the case it had before it.[146] The problem with such an analogy is that it unduly restricts the War Powers Resolution to only a Vietnam-like situation. This would still allow short-term military deployments without con-

138. *Id.*

139. *Id.* In the court's words, it is not only appropriate but "[t]he *duty* of courts to decide such questions . . . [and this] has been repeatedly reaffirmed by the Supreme Court." *Id.* (emphasis added). *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

140. *Crockett*, 558 F. Supp. at 898.

141. *Id.* (emphasis added)

142. This court followed the holding of Riegle v. Fed. Open Market Comm., 656 F.2d 873 (D.C. Cir. 1981) and the doctrine of equitable discretion for congressional plaintiffs. *Crockett*, 558 F. Supp. at 902.

143. *Id.*

144. The *Crockett* court stated that the case before it involved "subtleties of factfinding" in contrast to Vietnam and was unable to make a determination of whether United States military forces had been introduced into hostilities or imminent hostilities in El Salvador. *Id.* at 899.

145. *Id.* at 898-99.

146. *Id.* at 898.

gressional authorization.[147]

A recent example of this was the military deployment and reflagging of Kuwaiti ships in the Persian Gulf.[148] This furor of events led to a suit filed in federal district court seeking to force President Reagan to abide by the War Powers Resolution by filing a report as required by section 4(a)(1).[149] The court refused to retain jurisdiction and dismissed the suit based on the political question doctrine.[150]

VI. PROPOSAL

Unfortunately, the War Powers Resolution has not resolved the

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147. In Senator Javits' words:

> The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the sixty-day automatic cutoff] will provide an important national safeguard against creeping involvement in future Vietnam style wars.

Foreign Relations Committee on War Powers Act, Feb. 9, 1972, 119 CONG. REC. 1400 (1973).

148. L.A. Times, Oct. 26, 1987, at 10; *Senate Keeps Alive Debate on War Powers*, Daily J., Oct. 12, 1987, at 3, col. 1.

149. This effort was led by Rep. Mike Lowry (D-Wash.) in which three Senators and 110 members of the House of Representatives filed suit in United States district court on August 7, 1987. The congressional plaintiffs were seeking declaratory relief that would require the President to file reports under the War Powers Resolution. Plaintiffs contended that the reporting requirement of section 4(a)(1) "was triggered by the July 22, 1987 initiation of United States escort operations in the Persian Gulf and by the September 21, 1987 attack on an Iranian Navy ship laying mines in the Persian Gulf." Lowry v. Reagan, No. 87-2196 (D.D.C. Dec. 18, 1987) (memorandum opinion of Judge George Revercomb). In his twenty-page opinion, Judge Revercomb declined jurisdiction to enforce the resolution "because of the constraints of the equitable discretion and political question doctrines." *Id.* at 20. This court distinguished the instant case from *Crockett* in that the Persian Gulf was deemed more "volatile and more critical to U.S. economic interests than the situation in El Salvador." *Id.* at 18. Further, Congress had debated and voted on the Persian Gulf situation while taking no action with regards to El Salvador.

The final points of Judge Revercomb's analysis regarded the existence of hostilities. The court noted that the resolution lacked a definitional section as well as any fixed legal standard for determining whether hostilities existed. Combined with the lack of fact-finding resources and the President's need for flexibility, the court concluded that the case did not contain judicially manageable standards. *Id.* at 19. This case is currently being appealed.

150. It is readily admitted that the resolution has not facilitated more cooperation between the executive and legislative branches. If anything, it has always been a point of friction whenever United States military forces have come under hostile fire. Every President since Nixon has attempted to skirt the applicability of the resolution when filing reports that are "consistent with" the law without actually recognizing it. L.A. Times, Oct. 26, 1987, at 10. Because of this, Rep. Howard Berman filed an amicus curiae brief in the Lowry v. Reagan suit that asked Judge Revercomb to declare the reports that President Reagan submitted as section 4(a)(1) reports. *See* Lowry v. Reagan, No. 87-2196 (D.D.C. filed Aug. 7, 1987) (Amicus Curiae Brief filed Nov. 9, 1987, at 4). In any case, the alternatives are to repeal the resolution or amend it in the hope of making it more operable. At this time, I have selected the latter alternative as feasible.

constitutional crisis that currently exists in the war powers arena. On the other hand, the resolution remains a *potentially* useful and viable concept.[151] Therefore, in order to increase its effectiveness and applicability, it requires two related alterations. First, the resolution must be amended by Congress in order to make it more difficult for the executive branch to ignore or circumvent its application. Second, the judicial branch must be more willing to hear War Powers Resolution claims. Since judicial restraint remains prevalent in the war powers sphere,[152] Congress can facilitate judicial review by providing the courts with the necessary legal standards to enforce the War Powers Resolution.[153]

In order to vitiate various concerns which have been articulated by several courts, Congress should amend the resolution. First, a definitional section needs to be added to correct the constructional weaknesses that courts have identified.[154] Congress must define "hostilities" and "imminent hostilities." A proposed definition of "hostilities" would be: when United States military forces have initiated or participated in an exchange of munitions (whether by air strike, naval shelling or ground forces) or otherwise used military weapons. Any armed force which is designated to receive "hostile-fire" pay will conclusively be presumed to be in an area of hostility.

"Imminent hostilities" could be defined as: any time in which a United States military force prepares to engage in combat activity. Combat activity would include flying over enemy territory, the use of military advisers in foreign countries engaged in civil war, and providing military escort using live ammunition (including but not limited to reflagging operations and evacuations).

The second major alteration deals with the resolution's reporting provision. The reporting provision would need to be linked up with the definitional section so that once a situation matches up with the terms, the section 4(a)(1) mechanism is triggered. The President

151. *See supra* note 149.

152. *See supra* note 149, at 19.

153. While one might expect a commonsense understanding of such terms, they have been a major stumbling block to invocation of the resolution. *See supra* note 149 (Does anybody really question whether U.S. military forces are in an area of "hostility" after May 17, 1987 when 37 U.S. seamen were killed as the result of an Iraqi missile attack on the frigate Stark? *See Senate Keeps Debate Alive on War Powers, supra* note 148, at 3, col. 1.).

154. As this resolution has already survived the political hurdles of bicameralism and presentment, the mechanism is in place until triggered. INS v. Chadha, 461 U.S. 919 (1983), is only a factor in situations where affirmative action is necessary. Then the political process is safeguarded by the provisions of bicamerality and presentment.

would be required to submit a report which expressly indicates that it is being issued "in compliance with section 4(a)(1) of the War Powers Resolution" to avoid any ambiguity. Also, legislative history must be incorporated in the Policy and Purpose Section to confirm that the legislative intent was to establish the principle that inaction on Congress' part is to have operational effect. In other words, a concurrent resolution is not necessary for invocation of section 4(a)(1).[155] If a President fails to comply or believes the situation does not fall within the purview of the War Powers Resolution, members of Congress would be vested with a private right of action to challenge the executive's understanding of the situation. This would eliminate the problem of standing. The judicial hearing would be expedited to occur within one week and a special court could be established for hearing this matter.[156]

The primary remedy would be a declaratory relief action requiring the President to file a 4(a)(1) report. The Court could not order the withdrawal of military troops unless it finds the President has failed to comply with the War Powers Resolution and sixty days have elapsed without congressional authorization extending the military deployment.

VII. CONCLUSION

The view that the War Powers Resolution has restored the balance in the shared responsibilities of troop deployment between the executive and legislative branches seems refuted by the Grenada and current Persian Gulf situations. It is clear that various Presidents have taken unconstitutional liberties and engaged in illegal acts of war-making authority. On the other hand, Congress shares the blame for being unconstitutionally generous in allowing such acts to continue unchallenged. In this modern era we call "the nuclear age," it is more critical than ever that Congress assume its constitutional role of controlling the war powers.

While litigation by congressional plaintiffs may not be the ulti-

155. Alternatively, the District of Columbia Appeals Court could be the proper tribunal with the Supreme Court fulfilling its normal function of review.

156. The allocation of the war power to Congress is a strong indication that the framers envisioned deliberation and debate before engaging in war. While some might argue such a notion is antiquated in this nuclear age, there are others who argue the exact opposite in that it is precisely because of the possible consequences of extinction and survival that counsels for a collective conscience over an individual one. *See* F. WORMUTH & E. FIRMAGE, *supra* note 97, at 267-77.

mate solution, the courts must recognize the distinction between intervention in foreign policy making and enforcing decision making within the foreign policy area. Such judicial enforcement would not foreclose suits by congressional plaintiffs based on standing and the political question doctrines. In any case, even if the proposed amendments were implemented, unless there is steadfast congressional insistence that the resolution be factored into every foreign policy formulation that involves military action, the resolution will remain a dormant relic and the executive branch will continue to run roughshod over Congress in the war powers domain.

Kenneth L. Heisz