War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution

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Summary

Article I, Section 8, of the Constitution confers on Congress the power to "declare War." Modern Presidents, however, have contended that, notwithstanding this clause, they do not need congressional authorization to use force. Partly in response to that contention, and because of widespread concern that Congress had allowed its war power to atrophy in the Korean and Vietnam conflicts, Congress in 1973 enacted the War Powers Resolution (WPR, P.L. 93-148). Among other things, the WPR generally requires the President to report to Congress within 48 hours when, absent a declaration of war, U.S. Armed Forces are introduced into "hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances." After a report is submitted or required to be submitted, the WPR requires that the forces be withdrawn within 60 days (90 days in specified circumstances) unless Congress declares war or otherwise authorizes their continued involvement.

Nonetheless, subsequent Presidents have continued to maintain that they have sufficient authority independent of Congress to initiate the use of military force; and several Presidents have viewed aspects of the WPR as unconstitutionally infringing upon their Commander-in-Chief authority. Congress has on four occasions enacted authorizations specifically waiving the 60-90 day limitation on the use of force otherwise imposed by the WPR. But on eight occasions Members of Congress have filed suit to force various Presidents to comply with WPR requirements or otherwise to recognize Congress's war powers under the Constitution. In six of the seven cases where final rulings were issued, the courts have found reasons not to render a decision on the merits of the plaintiffs' claims. In the seventh case, involving the President's authority to pursue military action against Iraq following congressional authorization, the court ruled on the merits of the plaintiffs' claim concerning the constitutionality of this authorization, but dismissed all other claims on jurisdictional grounds. The courts have variously found the political question doctrine, the equitable/remedial discretion doctrine, the issue of ripeness, and the question of congressional standing to preclude judicial resolution of the matter. Although the courts have not ruled out the possibility that a conflict over the use of force between Congress and the President could require a judicial resolution, they have thus far deemed the matter to be one for the political branches to resolve.

On June 15, 2011, 10 Members of Congress brought suit in federal court seeking a declaratory judgment that ongoing U.S. military operations against Libya violated Congress's constitutional power to declare war, and also requested a judicial order enjoining further operations against Libya absent a declaration of war.

This report summarizes the seven cases initiated by Members of Congress in which final rulings were reached, which concerned U.S. military activities in El Salvador, Nicaragua, and Grenada; military action taken during the Persian Gulf conflict between Iraq and Iran; U.S. activities in response to Iraq's invasion of Kuwait (prior to the congressional authorization); and U.S. participation in NATO's action in Kosovo and Yugoslavia. This report also briefly discusses the current legal challenge to enjoin further military action against Libya, and discusses more generally the debate surrounding the WPR's application to these military operations. This report will be updated as circumstances warrant.

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Introduction[1]

Eight times since the enactment of the War Powers Resolution in 1973,[2] Members of Congress have filed suit to force various Presidents to comply with its requirements or otherwise to recognize Congress's war powers under the Constitution. In each of the seven instances where a ruling was delivered, the reviewing court refused to render a decision on the merits.[3] In four of these cases, the suits foundered on the political question or equitable discretion doctrines, which the federal courts use to insulate themselves from what they view as essentially political disputes. In another case the suit failed on grounds of standing, and in two other cases the suits foundered on the ripeness doctrine. On June 15, 2011, 10 Members of Congress filed suit to enjoin further U.S. military operations against Libya unless Congress passes a declaration of war. As of the date of this report, no judgment has been rendered by the reviewing court.

Article I, Section 8, of the Constitution confers on Congress the power to "declare War," and Congress has enacted declarations eleven times in American history. It has also enacted a number of authorizations for the use of military force not rising to the level of a declaration of war.[4] Nonetheless, concern that Congress had allowed its war power to atrophy in the contexts of the Cold War and the wars in Korea and Vietnam led to the enactment in 1973, over President Nixon's veto, of the War Powers Resolution (WPR, P.L. 93-148). The legislation's supporters hoped that its enactment would ensure that a national consensus precedes the use of U.S. Armed Forces in hostilities. Accordingly, the WPR requires the President to consult with Congress "in every possible instance" prior to introducing U.S. Armed Forces into hostilities and to report to Congress within 48 hours when, absent a declaration of war, U.S. Armed Forces are introduced into "hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances."[5] After this report is submitted (or after such date that it was required to be submitted), the WPR requires that U.S. troops be withdrawn at the end of 60 days (90 days in certain circumstances), unless Congress authorizes continued involvement by passing a declaration of war or some other specific authorization for continued U.S. involvement in hostilities.[6]

Several Presidents have viewed aspects of the War Powers Resolution as unconstitutionally trenching upon their constitutional authorities in matters of war and foreign relations.[7]

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[1] An earlier version of this report was prepared by David M. Ackerman, Legislative Attorney, CRS.

[2] P.L. 93-148 (Nov. 7, 1973); 87 Stat. 555; 50 U.S.C. §§ 1541 *et seq*. (1994).

[3] *But see infra* Doe v. Bush, 323 F.3d 133 (1st Cir. 2003) (affirming lower court's dismissal of some of plaintiffs' claims on ripeness grounds, but also rejecting on the merits a contention that Congress in the "Authorization for the Use of Force Against Iraq Resolution of 2002" had unconstitutionally delegated its war-declaring power to the President).

[4] For a thorough review of Congress's actions in enacting declarations of war and otherwise authorizing the use of force, along with the legal consequences of these actions, *see* CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Richard F. Grimmett.

[5] 50 U.S.C. § 1543.

[6] *Id.* at § 1544. The sixty-day period may be extended by no more than thirty additional days if the President certifies in writing to Congress that "unavoidable military necessity respecting the safety" of U.S. forces compels the continued use of such forces in the course of bringing about their withdrawal. *Id.*

[7] *See generally* Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 39-45 (2002) [hereinafter "2002 OLC Opinion"] (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution). The (continued...)

Nonetheless, Presidents from Ford to Obama have submitted more than 125 reports to Congress giving notice of the involvement of U.S. Armed Forces in hostile situations, as is required under the War Powers Resolution.[8] With one exception, however, all of these reports have characterized themselves as being "consistent with," rather than pursuant to, the requirements of the War Powers Resolution. This language appears intended to leave open the question as to whether the executive recognizes the reported activities to fall under the purview of the War Powers Resolution, or perhaps whether the executive deems the Resolution's requirements to be legally binding upon it.[9] The practice has frustrated numerous lawmakers and has led some to pursue other avenues, including litigation, to compel the President to recognize the legal necessity of obtaining congressional authorization for the use of force

Both the Members who have initiated suits and the White House have claimed that their respective position will ultimately prevail if the courts ever pass judgment on the merits of the controversy. But in the cases where final rulings have been issued, the reviewing courts have found that neither side has taken steps that would give the courts a viable statutory or constitutional issue to resolve, rather than a policy dispute. On the one hand, despite periodic claims by the executive branch that it would welcome a court test, the Justice Department has consistently raised threshold obstacles to court challenges such as Member standing to sue and the political question doctrine—obstacles which have so far successfully forestalled judicial rulings on the merits. On the other hand, litigation by Members of Congress to force a decision has not been preceded by legislative actions that have been sufficient to create the "irreconcilable conflict" between the executive and legislative branches that might make a judicial decision possible, if not probable.

This report summarizes the eight suits that have been brought by Members of Congress since the enactment of the War Powers Resolution which have alleged presidential noncompliance with the Resolution or the requirements of the Constitution with respect to the involvement of U.S. Armed Forces in El Salvador, Nicaragua, Grenada, U.S. escort operations in the Persian Gulf, Iraq's

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Department of Justice's Office of Legal Counsel (OLC) has noted that while it had "has long questioned the constitutionality of the WPR, ...[it had] not done so consistently." *Id.* at 43 n.18. Indeed, in a 1980 opinion, the OLC stated its view that "Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by" the WPR. *Id.* (quoting Dept. of Justice, Office of Legal Counsel, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980)), though it is not clear that other Administrations have agreed with the OLC's conclusion. *See, e.g.*, 2002 OLC Opinion, *supra*, at 39-46. Although OLC opinions are not legally binding, they are generally adhered to within the executive branch unless overruled by the President or the Attorney General. In an interview describing the Obama Administration's position that the WPR does not prohibit ongoing U.S. operations against Libya, Administration officials acknowledged that the 1980 OLC Opinion remains in effect, and also claimed that the Administration's position that the U.S. military operation is lawful is not premised on the view that the WPR is unconstitutional. Charlie Savage and Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, NEW YORK TIMES, June 16, 2011 (discussing interview with White House counsel Robert Bauer and State Department Legal Adviser Harold Koh).

[8] *See* CRS Report RL33532, *War Powers Resolution: Presidential Compliance*, by Richard F. Grimmett.

[9] *See* Campbell v. Clinton, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) (rejecting the petitioners' argument that the President, by submitting a report to Congress concerning U.S. activities in Kosovo, had implicitly conceded that those activities fell under the purview of the WPR, because "the President only said the report was 'consistent' with the WPR"). *See also* Dept. of Justice, Office of Legal Counsel, *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271 (1984) (appearing to distinguish a report submitted "consistent with" the WPR from one filed pursuant to its statutory requirements); *Effective Date of the Reporting Requirement Imposed by the Multinational Force In Lebanon Resolution*, 7 Op. O.L.C. 197 (1983) (similar).

invasion of Kuwait, NATO's actions against Yugoslavia, Iraq's noncompliance with its obligation to disarm, and U.S. military operations against Libya.

El Salvador

In the 1982 case of *Crockett v. Reagan*,[10] 16 Senators and 13 House Members asked a federal district court to declare that military aid supplied to the government of El Salvador by President Reagan usurped Congress's war powers under the Constitution and violated the War Powers Resolution and the Foreign Assistance Act. In particular, the lawmakers charged that the unreported dispatch of at least 56 members of the U.S. Armed Forces as military advisers to war-racked El Salvador constituted a violation of the Resolution. The Reagan Administration moved to dismiss the action on the grounds the suit involved a political question, and the district court granted the motion. The U.S. Court of Appeals for the District of Columbia affirmed.

Examining the categories of political questions set forth by the Supreme Court in *Baker v. Carr*,[11] the trial court rejected the Administration's arguments that judicial resolution was inappropriate because it would interfere with executive discretion in the foreign affairs field or because the suit involved the apportionment of power between the executive and legislative branches. However, it concluded, judicial resolution was inappropriate because there were no "judicially discoverable and manageable standards for resolution" of the case:

> The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR is mandated because our forces have been subject to hostile fire or are taking part in the war effort are appropriate for congressional, not judicial, investigation. Further, in order to determine the application of the 60-day provision, the Court would be required to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist. This inquiry would be even more inappropriate for the judiciary.
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[10] Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355, 1357 (D.C.Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

[11] 369 U.S. 186 (1962). The Supreme Court in *Baker* identified the possible dimensions of the political question doctrine as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. 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 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.

Id. at 217.

> The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador.[12]

The trial court contrasted the situation in El Salvador with the conflict in Vietnam, noting that the latter conflict had persisted for seven years, resulted in more than 1 million deaths (including over 50,000 Americans), and involved the expenditure of $100 billion. In El Salvador, the court noted, the American military personnel were relatively few in number and had suffered no casualties. Accordingly, the court concluded, the question of whether U.S. forces had been introduced into hostilities in El Salvador was less obvious than Vietnam, and "[t]he subtleties of fact-finding in this situation should be left to the political branches."[13]

The court declined to speculate about the kind of congressional actions that might give rise to a judicially manageable issue, noting simply that "Congress has taken absolutely no action that could be interpreted to have that effect." However, it did state that "were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented."[14]

On appeal the U.S. Court of Appeals for the District of Columbia affirmed the dismissal in a brief *per curiam* opinion "for the reasons stated by the District Court." The Supreme Court subsequently denied a petition of certiorari to review the decision.

Nicaragua

In *Sanchez-Espinoza v. Reagan*[15] in 1983, 12 Members of the House of Representatives, 12 Nicaraguan citizens, and two United States citizens sued for damages, injunctive relief, and a declaration that President Reagan and other executive officials violated various federal statutes, including the War Powers Resolution, by supporting paramilitary operations designed to overthrow the government of Nicaragua. A federal district court dismissed the litigation as raising nonjusticiable political questions, and the U.S. Court of Appeals for the District of Columbia again affirmed.

The district court stated as a predicate that the separation of powers doctrine affords the judiciary a very limited role in matters related to foreign policy and national security, stating that such matters are largely, if not exclusively, entrusted to the political branches. The court then examined various benchmarks established by the Supreme Court for application of the political question doctrine, and found three of the criteria established in *Baker v. Carr, supra*, for determining whether a question falls into that category to be particularly relevant.

In accord with the *Crockett* decision, the district court held that resolution of the issue raised by the congressional plaintiffs called for fact-finding that exceeded the court's competence. In political question terms, the court said that resolution of the issue raised by the lawmakers was difficult if not impossible because of the lack of "judicially discoverable and manageable

[12] 558 F.Supp. at 898.

[13] *Id.* at 899.

[14] *Id.* at 899.

[15] Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

standards."[16] According to the court, the circumstances before it were even more egregious than those in *Crockett* since "the covert activities of CIA operatives in Nicaragua and Honduras are perforce even less judicially discoverable than the level of participation by U.S. military personnel in hostilities in El Salvador."[17] In addition, the court stated, in light of the wide differences between the President and Congress concerning Nicaraguan policy, "[a] second reason for finding this matter non-justiciable is the impossibility of our undertaking independent resolution without expressing a lack of the respect due coordinate branches of government."[18]

Finally, the court averred, because Administration policy was under constant review at both ends of Pennsylvania Avenue, attempts at a resolution by the judiciary presented a real danger of embarrassment from multifarious pronouncements by various departments on the question of U.S. involvement. "Such an occurrence," it said, "would, undoubtedly, rattle the delicate diplomatic balance that is required in the foreign affairs arena."[19]

The U.S. Court of Appeals for the District of Columbia affirmed on appeal. With respect to the claim of the congressional plaintiffs that the assistance given to the Nicaraguan Contra rebels by the executive branch violated the Boland amendment forbidding the CIA and the Department of Defense from providing any such assistance, the court noted that the Boland amendment was an appropriations rider and had expired at the end of fiscal 1983. As a consequence, it held that the claim had to be dismissed as moot. With respect to the congressional plaintiffs' claim that the assistance to the Contras amounted to waging war and that, as a consequence, they had "been deprived of their [constitutional] right to participate in the decision to declare war," the appellate court, citing *Crockett*, held that the "war powers issue presented a nonjusticiable political question."[20] Future Justice Ginsburg, at the time an appellate court judge, filed an opinion concurring in the latter ruling on the grounds the issue was "not ripe for judicial review."[21] She stressed that the political branches had not as yet reached "a constitutional impasse" on the issue. Congress, she said, has "formidable weapons at its disposal ... [b]ut no gauntlet has been thrown down here by a majority of the Members of Congress."[22]

Grenada

In *Conyers v. Reagan*,[23] 11 Members of the House challenged the President Reagan's use of force in Grenada as an executive usurpation of Congress's war powers under the Constitution. The federal district court dismissed the action on the basis of the doctrine of equitable/remedial discretion, which counsels the courts to refrain from hearing cases brought by congressional plaintiffs who can obtain substantial relief by legislative action. In particular, the court said,

[16] 568 F. Supp. at 600.

[17] *Id.*

[18] *Id.*

[19] *Id.* The court noted in a footnote that another reason for dismissing the suit lay in the doctrine of equitable or remedial discretion. As explained by the court, that doctrine counsels judicial restraint where the congressional plaintiffs could obtain substantial relief through congressional action and the suit represents, as a consequence, a "circumvent(ion of) the process of democratic decisionmaking." *See* 568 F. Supp. 600-601, n. 5.

[20] *Sanchez-Espinoza*, 770 F.2d at 210.

[21] *Id.* at 210 (Ginsburg, J., concurring).

[22] *Id.* at 211 (Ginsburg, J., concurring).

[23] Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *aff'd*, 765 F.2d 1124 (D.C. Cir. 1985).

"[w]hat is available to these plaintiffs are the institutional remedies afforded to Congress as a body; specifically, The War Powers Resolution, appropriations legislation, independent legislation or even impeachment...."[24]

On appeal the U.S. Court of Appeals for the District of Columbia affirmed largely on mootness grounds because the invasion had been concluded. The congressional plaintiffs' attempt on appeal to raise the war powers issue because of the post-invasion presence of U.S. military personnel in Grenada, the appellate court said, came too late and did not alter the moot character of the case.

Persian Gulf Conflict Between Iran and Iraq

In the 1987 case of *Lowry v. Reagan*,[25] a federal district court dismissed an action brought by 110 Members of the House to compel President Reagan to file a report under the War Powers Resolution in connection with the initiation of U.S. escort operations of reflagged Kuwaiti oil tankers in the Persian Gulf during the war between Iran and Iraq. The grounds for dismissal this time were both the equitable discretion and political question doctrines. Once again, the U.S. Court of Appeals for the District of Columbia affirmed.

Taking note of the divisions in Congress with respect to the applicability of the War Powers Resolution and the wisdom of the escort operation, the district court observed: "Although styled as a dispute between the legislative and executive branches of government, this lawsuit evidences and indeed is a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution to the Persian Gulf situation."[26]

The court also took note of several unsuccessful legislative efforts to force presidential compliance with the law and to revise and strengthen the War Powers Resolution, leading the court to conclude that the plaintiffs' "dispute is 'primarily with [their] fellow legislators.'"[27] Accordingly, the court said it was proper as a matter of equitable discretion to withhold the exercise of jurisdiction and the requested relief. It noted, however, that if Congress enacted legislation to enforce the Resolution and the President ignored it, "a question ripe for judicial review" would be presented.[28]

Analyzing the complex international political situation as it impacted on the Gulf in light of the benchmarks set by the Supreme Court in *Baker v. Carr*, discussed *supra*, the district court also concluded "that plaintiffs' request for declaratory relief presents a nonjusticiable political question."[29] A judicial resolution of the matter, it said, would risk "the potentiality of embarrassment ... from multifarious pronouncements by various departments on one question."[30]

[24] 578 F. Supp. at 327 (internal citation omitted).

[25] Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. 1988).

[26] *Id.* at 338.

[27] *Id.* at 339.

[28] *Id.*

[29] *Id.* at 340.

[30] *Id.* at 340, *quoting Baker*, 369 U.S. at 217.

In an unpublished opinion, the U.S. Court of Appeals for the District of Columbia dismissed the appeal on grounds the suit presented a nonjusticiable political question and on grounds of mootness.[31] By the time of its decision Iran and Iraq had agreed to a cease-fire.

Iraq's Invasion of Kuwait

In the 1990 case of *Dellums v. Bush*,[32] 53 House Members and 1 Senator sought to enjoin President George H. W. Bush from initiating an offensive attack against Iraq without first obtaining congressional authorization. Iraq had invaded and occupied Kuwait in August, 1990; and President Bush, with the sanction of the United Nations Security Council, had assembled a massive military force in the vicinity with the apparent purpose of reversing that occupation. He had not yet, however, sought or obtained congressional authorization for the use of force.[33] In those circumstances, the reviewing federal district court ruled that the issue was not yet ripe for judicial decision and dismissed the case.

In contrast to the preceding decisions, the court concluded that neither the political question nor the equitable/remedial discretion doctrines precluded it from resolving the issue presented by the suit. It said that "in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization."[34] On the political question issue, it noted the plain language of the Constitution authorizing Congress to declare war and the absence of any serious factual dispute that the initiation of combat operations against Iraq by several hundred thousand troops would constitute a war. It further asserted that the courts were not excluded from resolving suits merely because they involved questions of foreign policy. On the remedial discretion issue, the court concluded, without further explanation, that the plaintiffs "cannot gain substantial relief by persuasion of their colleagues alone."[35]

Nonetheless, the court refused to resolve the case on the merits on the grounds that not all the elements necessary for a decision were yet present; that is, the case was not yet "ripe" for decision. On the one hand, it noted, a majority of the Congress had taken no action on the matter of whether congressional authorization was needed in this instance; the plaintiffs, it observed, represented only about 10% of the Congress. On the other hand, it said, it was also not yet irrevocably certain that the President intended to initiate a war against Iraq. Both elements, it asserted, were necessary before a court could address the constitutional issue. It said that a majority of Congress had to request relief "from an infringement on its constitutional war-declaration power," and the executive branch had to be shown to be committed to "a definitive course of action."[36]

No appeal was taken from this decision.

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[31] Lowry v. Reagan, No. 87-5426 (D.C. Cir. 1988).

[32] 752 F.Supp. 1141 (D.D.C. 1990).

[33] Such authorization was subsequently obtained. P.L. 102-1 (1991).

[34] *Id.* at 1149.

[35] *Id.* (internal quotations omitted).

[36] See *id.* at 1151-1152.

NATO's Air War in Kosovo and Yugoslavia

In 1999, 26 Members of the House initiated a suit in the case of *Campbell v. Clinton*,[37] asking for a declaratory judgment that U.S. participation in NATO's military actions against Yugoslavia in the Kosovo situation violated Congress's constitutional power to declare war or otherwise authorize military action and that the War Powers Resolution required the termination of U.S. participation "no later than sixty calendar days after March 24, 1999" (the date NATO began bombing Yugoslavia) unless Congress authorized continued U.S. involvement. A federal district court dismissed the action on the grounds that the Members lacked standing to bring the suit, and the U.S. Court of Appeals for the District of Columbia affirmed on the same grounds. The Supreme Court denied a request to review the decision.

The district court noted that the House and Senate had taken a number of actions with respect to NATO's offensive in Yugoslavia. On March 23, 1999, the Senate had approved a concurrent resolution authorizing the President to "conduct military air operations and missile strikes in cooperation with our NATO allies against ... Yugoslavia" by a vote of 58-41. On March 24, the day the attacks began, the court said, the House approved a resolution stating that it "supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia and recognizes their professionalism, dedication, patriotism, and courage" by a vote of 424-1. On April 28 the House defeated a joint resolution declaring war on Yugoslavia by a vote of 2-427; rejected the concurrent resolution that had been approved by the Senate on a tie vote of 213-213; rejected a concurrent resolution directing the President to withdraw U.S. Armed Forces from their involvement in the NATO campaign by a vote of 139-290; and passed a bill barring the use of Department of Defense funds for the deployment of ground forces in Yugoslavia without specific authorization by voice vote. Finally, the court noted that Congress had enacted a supplemental emergency appropriations bill on May 20 providing funds for the conflict in Yugoslavia but had not stated, as seemingly required to satisfy the War Powers Resolution,[38] that the measure constituted specific statutory authorization for the continued involvement of U.S. Armed Forces.

The trial court stated that the lawsuit raised "especially grave separation of powers issues" and observed that courts traditionally have been reluctant "to intercede in disputes between the political branches of government that involve matters of war and peace."[39] It rejected the

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[37] Campbell v. Clinton, 52 F.Supp.2d 34 (D.D.C. 1999), *aff'd*, 203 F.2d 19 (D.C. Cir.), *cert. den.*, 531 U.S. 815 (2000).

[38] The WPR generally provides that the President shall terminate hostilities within 60 to 90 days unless Congress has either declared war or provided "specific authorization for such use of United States Armed Forces...." 50 U.S.C. § 1444(c). *See also* 50 U.S.C. § 1447(a)(1) (stating that authorization to introduce U.S. forces into hostilities shall not be inferred "unless such provision specifically authorizes the introduction of United States Armed Forces"). On several occasions when it has authorized the executive to use military force, Congress has included express language that the measure constitutes "specific authorization" under the War Powers Resolution. *See e.g.*, P.L. 107-40 (2001) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization under the terms of the WPR); P.L. 107-243 (2002) (authorization to use force against Iraq constituted specific authorization under the WPR); P.L. 102-1 (1991) (authorization for first Persian Gulf conflict). The executive branch, however, has taken the position that the WPR does not bind future Congresses from impliedly authorizing hostilities, and took the position that Congress had authorized continuing hostilities against Yugoslavia via appropriations legislation, despite the fact that this legislation did not describe itself as constituting specific authorization under the WPR. Dept. of Justice, Office of Legal Counsel, *Authorization for Continuing Hostilities in Kosovo*, 2000 OLC LEXIS 16 (2000).

[39] *Campbell*, 52 F.Supp.2d at 40.

argument, however, that courts can never adjudicate disputes that involve foreign relations. But it said that in this instance it did not need to determine whether the case was properly subject to judicial decision because the congressional plaintiffs lacked standing to bring the suit. While the D.C. Circuit had in the past followed a fairly relaxed standard with respect to congressional standing, it said, the Supreme Court in *Raines v. Byrd*[40] had "dramatically" altered the legal landscape. In that case, the Court had held that Members of Congress who voted against the Line Item Veto Act (P.L. 104-130) lacked standing to challenge the constitutionality of the act because they retained a political remedy, namely, the repeal of the act or the exemption of individual appropriations from its purview. Any injury they suffered with respect to their votes on future appropriations bills and to the balance of power between Congress and the President, the Court had ruled, was "wholly abstract and widely dispersed" and lacked the particularity and concreteness necessary to confer standing.[41]

Thus, the district court in *Campbell* concluded that it was not sufficient for the congressional plaintiffs in the case before it to allege simply that the President had ignored the Declaration of War Clause of the Constitution or the War Powers Resolution. Nor, it held, was it sufficient to allege that Congress had taken actions in this instance which the President had nullified or ignored by initiating and continuing U.S. involvement in the NATO campaign. For Members of Congress to have standing, the court said, there had to be a genuine "constitutional impasse."[42] Had Congress directed the President to withdraw U.S. forces and he had refused to do so, or had Congress refused to appropriate funds for the air strikes and the President had used other funds for that purpose, the court suggested, "that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs."[43] But the congressional votes here, the court stated, did "not provide the President with such an unambiguous directive" but instead sent "distinctly mixed messages."[44] The court concluded: "Where, as here, Congress has taken actions that send conflicting signals with respect to the effect and significance of the allegedly nullified votes, there is no actual confrontation or impasse between the executive and legislative branches and thus no legislative standing."[45]

The court also noted that the 26 Members had not been authorized by the House to institute the suit.

On February 18, 2000, the U.S. Court of Appeals for the District of Columbia affirmed on standing grounds. The court noted that in *Coleman v. Miller*[46] the Supreme Court had ruled that state legislators who claimed their votes had been sufficient to defeat the ratification of a constitutional amendment had standing to challenge the actions of the Kansas Secretary of State in authenticating the amendment as approved, because the effect of the authentication was to nullify the effectiveness of their votes. The majority of the appellate panel interpreted *Coleman* to mean that the legislators had standing only if they had no legislative remedy whatsoever. Applying this analysis to the case before it, the *Campbell* court concluded that the plaintiffs

[40] 521 U.S. 811 (1997).

[41] *Id.* at 829.

[42] *Campbell*, 52 F.Supp.2d at 43, *quoting* Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring).

[43] *Id.*, *quoting Goldwater*. 444 U.S. at 997-998 (Powell, J., concurring).

[44] *Id.* at 43-44.

[45] *Id.* at 44.

[46] 307 U.S. 433 (1939).

enjoyed "ample legislative power to have stopped prosecution of the 'war.'"[47] The panel majority listed several options by which Congress could act legislatively to limit hostilities:

> In this case, Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure--albeit only a concurrent resolution--introduced to require the President to withdraw U.S. troops. Unfortunately, however, for those congressmen who, like appellants, desired an end to U.S. involvement in Yugoslavia, this measure was *defeated* by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.[48]

Because legislative remedies were available to the plaintiffs, the appellate court found their situation dissimilar to that of the legislators in *Coleman* and held that they lacked standing to bring their challenge.

Each of the three judges on the appellate panel filed concurring opinions as well. Judge Silberman stated that in his opinion the plaintiffs' claims (and, apparently, any other war power claim) should also be dismissed on grounds of nonjusticiability, because "[w]e lack 'judicially discoverable and manageable standards' for addressing them, and the War Powers Clause claim implicates the political question doctrine."[49] The 60-day withdrawal mandate of the War Powers Resolution, he stated, is triggered only if U.S. forces are engaged in hostilities or are in imminent danger of hostilities. But that standard, he contended, "is not precise enough and too obviously calls for a political judgment to be one suitable for judicial determinations."[50] Similarly, he asserted, there is no constitutional test for determining what constitutes a war or when a declaration of war is necessary, and the judiciary is ill-equipped to engage in the fact-finding involved in making such determinations. Finally, Judge Silberman said, such issues are necessarily ones of "the greatest sensitivity for our foreign relations" on which conflicting pronouncements by the different branches of government ought to be avoided.[51]

Judge Tatel's concurring opinion took issue with the assertion that the case presented a nonjusticiable political question. Determining whether war exists or not, he contended, "is no more standardless than any other question regarding the constitutionality of government action";[52] and, he said, courts have frequently made that determination. Moreover, he asserted, the plaintiffs' claim regarding the War Powers Resolution did not even require the court to make that determination but only whether U.S. Armed Forces were introduced into "hostilities." "One of the most important functions of Article III courts," he said, "[is] determining the proper constitutional allocation of power among the branches of government."[53] Claims that a case involves issues of foreign relations and risks the danger of government speaking with "multifarious voices," Judge Tatel concluded, should not prevent a court from determining "whether the President exceeded his constitutional or statutory authority by conducting the air campaign in Yugoslavia":

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[47] *Campbell*, 203 F.2d 19, 23 (D.C. Cir. 1999).

[48] *Id.* (italics in original).

[49] *Id.* at 24-25 (Silberman, J., concurring).

[50] *Id.* at 25 (Silberman, J., concurring).

[51] *Id.* at 27 -28 (Silberman, J., concurring).

[52] *Id.* at 37 (Tatel, J., concurring).

[53] *Id.*, 203 F.2d at 40-41 (Tatel, J., concurring).

> If in 1799 the Supreme Court could recognize that sporadic battles between American and French vessels amounted to a state of war, and if in 1862 it could examine the record of hostilities and conclude that a state of war existed with the confederacy, then surely we, looking at similar evidence, could determine whether months of daily airstrikes involving 800 U.S. aircraft flying more than 20,000 sorties and causing thousands of enemy casualties amounted to "war" within the meaning of Article I, section 8, clause 11.[54]

Finally, Judge Randolph wrote an opinion concurring with the judgment of the panel but disagreeing with its reasoning. He contended that the panel had misapplied the Supreme Court's decisions in *Coleman* and *Raines* but that the case still should have been dismissed on the grounds of standing and also of mootness. The plaintiffs lacked standing, he said, not because they retained legislative remedies for what they claimed to be the President's illegal actions but because their votes had not, as required by *Raines*, been completely nullified. In fact, he said, their vote against a declaration of war deprived the President of the greatly expanded powers he obtains under a number of statutes in a declared war and deprived him as well of the "authority to introduce ground troops into the conflict."[55] Thus, he asserted, "plaintiffs' votes against declaring war were not for naught," and for that reason they lacked standing to sue.[56] The reasoning of the majority opinion was wrong, he contended, because it "confused the right to vote in the future with the nullification of a vote in the past." In addition, he said, the case was moot, because hostilities had ended at least by June 21, 1999. If the issue were one "capable of repetition, yet evading review," Judge Randolph noted, it would not be moot. But neither element was satisfied here. The D.C. Circuit's prior decision in *Conyers v. Reagan, supra*, he stated, had held that wars initiated without congressional approval are not matters that inherently evade review. Moreover, he said, it was doubtful that the statutory claim that the President continued the war for more than 60 days without congressional authorization met the "capable of repetition" element. President Clinton, he noted, was the first President "who arguably violated the 60-day provision," and the plaintiffs themselves stated that in modern times most U.S. attacks on foreign nations "will be over quickly, by which they mean less than 60 days."[57]

The congressional appellants sought further review in the Supreme Court, but on October 2, 2000, the Court denied review.

[54] *Id.* at 40 (Tatel, J., concurring).

[55] *Id.* at 31 (Randolph, J., concurring).

[56] *Id.* (Randolph, J., concurring).

[57] *Id.* (Randolph, J., concurring).

Regime Change and Disarmament in Iraq

In *Doe v. Bush*[58] 12 Members of the House of Representatives, 3 members of the military,[59] and 15 parents of service members instituted suit to enjoin President George W. Bush from launching a military invasion of Iraq to remove Saddam Hussein from power and to enforce Iraq's disarmament. Notwithstanding enactment in October 2002 of the Authorization for the Use of Force Against Iraq Resolution (P.L. 107-243), the plaintiffs contended that the authorization unconstitutionally delegated Congress's power to declare war to the President or, alternatively, that an invasion of Iraq would exceed the authority granted by the authorization. On February 24, 2003, the reviewing federal district court held the suit to raise a nonjusticiable political question and dismissed the case. On March 13, 2003, the U.S. Court of Appeals for the First Circuit affirmed on the basis that the issues in the case were not ripe for judicial review and that the October authorization did not constitute an unlawful delegation of Congress's constitutional authority.

Citing *Baker v. Carr*, discussed *supra*, the trial court held that judicial resolution of a war powers issue would be appropriate "only when the actions taken by Congress and those taken by the Executive manifest clear, resolute conflict."[60] The Constitution, it said, commits the conduct of the nation's foreign relations to the political branches of the federal government. As a consequence, "absent a clear abdication of this constitutional responsibility by the political branches, the judiciary has no role to play."[61] In this instance, the court ruled, there was no "intractable constitutional gridlock."[62] In the October 2002 authorization, it noted, "Congress has expressly endorsed the President's use of the military against Iraq"; and as of the day of its decision, it said, "the President, for his part, has not irrevocably committed our armed forces to military conflict in Iraq."[63] Given the "day to day fluidity" in the situation, the court concluded, the case raised "political questions ... which are beyond the authority of a federal court to resolve."[64]

On March 13, 2003, the U.S. Court of Appeals affirmed. Eschewing reliance on the political question doctrine, the appellate court held that there was no "constitutional impasse" between Congress and the President regarding the use of force against Iraq and, as a consequence, the issue was not ripe for judicial review. Ripeness, the court said, "mixes various mutually reinforcing constitutional and prudential considerations."[65] One, it stated, is to prevent rulings on

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[58] Doe v. Bush, 2003 257 F. Supp. 2d 436 (D. Mass. 2003), *aff'd*, 323 F.3d 133 (1st Cir. 2003), *petition for rehearing denied*, 322 F.3d 109 (1st Cir. 2003).

[59] In dismissing the plaintiffs' claims on jurisdictional grounds, the reviewing courts in the *Doe* litigation did not directly address when or whether private parties have standing to sue the President on the grounds that military operations violate the War Powers Resolution or the constitutional allocation of war powers between the political branches. In an earlier case, the U.S. District Court for the District of Columbia held that a military serviceman had standing to challenge a presidential order deploying him to the Persian Gulf on the grounds that the order exceeded presidential authority under the War Powers Resolution. The court nonetheless dismissed the case on political question and ripeness grounds. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990).

[60] *Id.* at 438.

[61] *Id.*

[62] *Id.* at 439.

[63] *Id.* at 440.

[64] *Id.*

[65] Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003).

"abstract disagreements." A second is "to avoid unnecessary constitutional decisions." A third element simply recognizes that courts can benefit "from a focus sharpened by particular facts." In this instance, it asserted, "[m]any important questions remain unanswered about whether there will be a war, and, if so, under what conditions."[66] Even if the plaintiffs' assertion that the October authorization does not authorize the use of force against Iraq is granted, it said, "it is impossible to say yet whether or not those commands will be obeyed."[67] "If courts may ever decide whether military action contravenes congressional authority," the court concluded, "they surely cannot do so unless and until the available facts make it possible to define the issues with clarity."[68]

The appellate court did, however, reach the merits of the issue on the plaintiffs' other claim, namely, that the discretionary authority to use force conferred on the President by the October authorization unconstitutionally delegated Congress's power to declare war. That issue might be "clearly framed," the appellate court stated, "if Congress gave absolute discretion to the President to start a war at his or her will."[69] But, it said, "the mere fact that the October Resolution grants some discretion to the President fails to raise a sufficiently clear constitutional issue."[70] Even with respect to the exercise of powers that are entirely legislative in nature, it noted, the Supreme Court has upheld "enactments which leave discretion to the executive branch ... as long as they offer some 'intelligible principle' to guide that discretion."[71] Moreover, it stressed, in the area of foreign affairs the Supreme Court has made clear that "the nondelegation doctrine has even less applicability...."[72] In addition, it said, "there is [no] clear evidence of congressional abandonment of the authority to declare war to the President."[73] For more than a decade, it noted, Congress "has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq ...."[74] The October resolution itself, the court said, "spells out justifications for a war and frames itself as an 'authorization' of such a war."[75] These circumstances, the court concluded, did not warrant judicial intervention.

On March 18, 2003, the appellate court rejected an emergency petition for rehearing of its decision. The court stated: "Although some of the contingencies described in our opinion appear to have been resolved, others have not. Most importantly, Congress has taken no action which presents a fully developed dispute between the two elected branches. Thus, the case continues not to be fit for judicial review."[76]

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[66] *Id.* at 139.

[67] *Id.*

[68] *Id.* at 140-141.

[69] *Id.* at 143.

[70] *Id.*

[71] *Doe*, 323 F.3d at 143.

[72] *Id.*

[73] *Id.* at 144.

[74] *Id.*

[75] *Id.*

[76] *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003) (internal quotations omitted).

Recent Developments Involving Libya

On June 15, 2011, 10 Members of the House of Representatives filed suit in the U.S. District Court for the District of Columbia challenging the lawfulness of U.S. participation in military operations against Libya.[77] President Obama's decision to take military action against Libya without prior legislative authorization has sparked renewed debate regarding the allocation of war powers between the political branches and the meaning and effect of the War Powers Resolution. On March 19, 2011, President Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973, which authorizes U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country.[78] On March 21, 2011, President Obama submitted a report to Congress "consistent with" the requirements of the War Powers Resolution.[79] In the following weeks, the United States employed manned and unmanned aircraft to destroy Libyan military targets and air defense capabilities, before transferring command of coalition operations to NATO. Thereafter, the United States continued to play a supporting role in coalition actions against Libya, including providing intelligence, refueling coalition forces' equipment, and more limited deployment of unmanned and manned aircraft to strike Libyan targets.[80]

Continued U.S. action against Libya has reignited debate on long-standing questions concerning the President's constitutional authority to use military force without congressional authorization, as well as the meaning and effect of the War Powers Resolution. As mentioned previously, the War Powers Resolution generally provides that, in the absence of a formal declaration of war, the President must report to Congress within 48 hours of the introduction of U.S. forces into actual or imminent hostilities (except in cases where Congress has issued a declaration of war), and he must thereafter terminate hostilities within 60 days of such time that the report is submitted or required to be submitted, unless Congress has declared war or specifically authorized the continued use of U.S. military force. Because U.S. operations against Libya have extended beyond the 60-day deadline for unauthorized hostilities established by the War Powers Resolution, some have argued that these operations must be terminated.

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[77] A copy of the complaint can be viewed at http://kucinich.house.gov/UploadedFiles/Libya_Complaint_Master.pdf.

[78] For further discussion of U.S. operations in Libya and related issues, see generally CRS Report RL33142, *Libya: Unrest and U.S. Policy*, by Christopher M. Blanchard.

[79] As previously discussed, the use of this wording is in accordance with long-standing executive practice, and appears intended to avoid triggering provisions of the WPR which apply in the event that the President submits a report "pursuant to" WPR requirements.

[80] *See* Report to the House of Representatives on United States Activities in Libya [hereinafter "Presidential Report"], submitted June 15, 2011, available at http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics, at 5-12 (discussing U.S. military involvement in coalition activities against Libya); Charlie Savage and Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 20, 2011. The *New York Times* cites unnamed U.S. officials as stating that, since handing over control of military operations against Libya to NATO, U.S. warplanes struck some sixty Libyan targets, while unmanned U.S. drones fired at Libyan forces roughly thirty times. CRS consultations with U.S. officials indicate that U.S. strikes support two different components of the NATO operation. Manned U.S. fighter aircraft conduct suppression of enemy air defense (SEAD) strikes to protect NATO aircraft flying no-fly zone enforcement missions. Unmanned U.S. aerial vehicles conduct strikes against Libyan ground targets as part of the NATO civilian protection mission. Manned U.S. fighter aircraft are also available at NATO request to conduct civilian protection strike missions, but such a request would require the express approval of the Secretary of Defense.

On June 3, 2011, the House of Representatives passed a resolution (H.Res. 292) which claimed that the President "has not sought, and Congress has not provided, authorization for the introduction or continued involvement of the United States Armed Forces in Libya."[81] The resolution also instructed the President to submit a report to the chamber within 14 days, "describing in detail United States security interests and objectives, and the activities of United States Armed Forces, in Libya since March 19, 2011." The report was required to include, among other things, the "President's justification for not seeking authorization by Congress for the use of military force in Libya." The House resolution also directed the Secretaries of State and Defense, along with the Attorney General, to submit copies of any official documents relating to communications with Congress regarding military operations in Libya, or addressing the War Powers Resolution's application to these operations.

On June 15, 2011, President Obama submitted a report in response to H.Res. 292. In the report, the President characterized U.S. operations in Libya being "of limited nature, duration, and scope," while also serving "important U.S. interests."[82] The report asserted that the President has "constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad."[83] The President further claimed that military operations in Libya are consistent with the requirements of the War Power Resolution, and that the Resolution's requirement that unauthorized hostilities be terminated within 60 days does not apply to current U.S. operations. According to the report, U.S. operations since early April have been sufficiently limited so as not to constitute "hostilities" under the WPR. Specifically, the report stated:

> The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.[84]

The President's interpretation of the War Powers Resolution's application to military activity has been criticized by some observers as overly constrained. Neither the express language of the WPR nor the legislative history of the measure provide a precise indication as to the range of military activities intended to be covered by the term "hostilities," but the legislative history suggests the Congress intended the act to apply to significant military engagements, including at

[81] The resolution also included a statement of policy declaring that the President shall not deploy U.S. forces on the ground in Libya except for purposes of rescuing a U.S. serviceman from imminent danger. While this statement has no legal force or effect, given that it derives from a non-binding resolution, it appears consistent with current executive policy. *See* White House Office of the Press Secretary, *Remarks by the President in Address to the Nation on Libya*, Mar. 28, 2011, at http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya (reiterating pledge not to put U.S. ground troops into Libya).

[82] Presidential Report, *supra* note footnote 80, at 25.

[83] *Id.*

[84] *Id.*

least some confrontations with belligerent forces that do not involve an exchange of fire.[85] Moreover, at least as a matter of international legal practice, repeated military strikes by one sovereign entity against another may be deemed "hostilities," even if such actions do not expose the attacking force to serious threat of injury.[86] Some have asserted that the scale and duration of U.S. operations against Libya, along with the continued engagement in manned and unmanned aerial attacks upon Libyan targets, provide sufficient grounds to conclude that the United States is involved in "hostilities" for purposes of the War Powers Resolution. Further, some have suggested that the Administration's analysis too narrowly focuses on the question of whether the U.S. operation can be construed as "hostilities" standing alone. Some argue that in assessing whether U.S. forces are currently engaged in hostilities, it is appropriate to consider the overarching NATO military operations in Libya, rather than simply the supporting role that U.S. forces play within these operations.[87] Indeed, Section 8 of the WPR indicates that references to the introduction of U.S. forces into hostilities were intended to cover situations where U.S. personnel, though perhaps not directly participating in combat operations themselves, "command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."[88] If it is proper to consider the collective NATO operation in Libya when determining whether U.S. forces are currently "in hostilities," it may be significantly more difficult to argue that the WPR does not apply.[89]

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[85] According to the House Report on the War Powers Resolution:

> [t]he word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "*Imminent hostilities*" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. Rep. 93-287 (1973), at 7. The legislative history suggests that the Resolution was generally aimed at deterring "the commitment of U.S. forces exclusively by the President...without congressional approval or adequate consultation by Congress." *Id.*

[86] *See* PIETRO VERRI, DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT, (INTERNATIONAL COMM. OF THE RED CROSS 1992) (TRANSLATED BY EDWARD MARKEE AND SUSAN MUTTI) (defining "hostilities" as "Acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience....").

[87] When authorizing Member States to prevent the Libyan government from attacking civilians, the U.N. Security Council appeared to view such attacks as occurring within the context of an armed conflict between the Libyan government and portions of the populace. *See* United Nations Security Council Res. 1973, at Preamble, cl. 3 ("Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians"). Arguably, military action taken by coalition forces to protect Libyan civilians could be characterized as being a part of this conflict.

[88] 50 U.S.C. § 1547(c) (defining "introduction of United States Armed Forces"). This provision originated in the version of the WPR that was originally passed by the Senate. According to the accompanying Senate report,

> The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever-deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisers" to accompany South Vietnamese units on combat patrols; and, in Laos, secretly and without Congressional authorization, U.S. "advisers" were deeply engaged in the war in Northern Laos.

Sen. Rep. 93-220 (1973), at 27.

[89] The WPR provides that no additional statutory authorization is necessary for U.S. military personnel to participate jointly with other nations in "the headquarters operations of high-level military commands" in place prior to the WPR's enactment (e.g., NATO, the North American Air Defense Command). 50 U.S.C. § 1547(b). This provision originated in the version of the WPR originally passed by the Senate. The accompanying Senate report indicates that this (continued...)

Concern has also been expressed by some that the President's interpretation of the War Powers Resolution could significantly circumscribe its application in situations where military force is deployed in a manner that poses minimal risk of U.S. casualties, without regard for the magnitude of the force used. If, for example, the President unilaterally ordered U.S. forces to engage in heavy aerial bombardment of a country lacking the capability to shoot down U.S. aircraft, would the lack of a serious threat of U.S. casualties mean that such action would not be considered "hostilities" under the War Powers Resolution? Questions may also arise as to the WPR's application to situations where U.S. military action consists primarily of unmanned aerial strikes controlled by U.S. personnel far from harm's way.

It is possible, though perhaps unlikely, that the controversy surrounding the application of the WPR to U.S. operations in Libya will be resolved by the courts. The Members who have initiated litigation regarding the Libya operation allege, among other things, that the military action violates the statutory requirements of the War Powers Resolution and contravenes Congress's constitutional authority over matters of war. The plaintiffs seek a judgment declaring, *inter alia*, that U.S. operations against Libya constitute a "war" for purposes of the Constitution, and as such are unconstitutional absent authorization from Congress. The plaintiffs have further requested the issuance of a judicial order enjoining further military operations against Libya absent a declaration of war from Congress. It remains to be seen whether the reviewing court will reach the merits of the plaintiffs' claims, or whether the case will be dismissed on similar jurisdictional grounds as previous cases brought by Members. Even assuming that the case is dismissed, there remain several avenues by which Members may act to constrain U.S. action in Libya, including limiting or conditioning the availability of funds for the operation.[90] Alternatively, it is possible that Congress may opt to expressly authorize continued U.S. participation in operations against Libya, or provide statutory authorization for certain types of military activities while prohibiting certain others.[91]

(...continued)

exemption was intended to ensure that U.S. forces would not be barred from participating in the command headquarters of organizations like NATO in the event that those entities became involved in hostilities. However, the report states that the provision was not intended to exempt other U.S. military activities in support of NATO from the requirements of the WPR. Specifically, the report states that this provision was included to ensure that the WPR:

> would not require, for instance the withdrawal of U.S. military personnel from NATO command headquarters in the event that forces of other NATO nations became engaged in hostilities unrelated to NATO, or in hostilities in which the introduction of U.S. forces were not authorized under [the pertinent sections of the WPR as ultimately enacted]... or by other specific statutory action of the Congress. However, in the absence of specific statutory authorization members of the U.S. armed forces...could not by reason of the NATO Treaty "command, coordinate, participate in the movement of, or accompany" the regular or irregular forces of a NATO country engaged in hostilities.

Sen. Rep. 93-220 (1973), at 31.

[90] For further discussion of legislative avenues used by Congress to limit an ongoing military action, see generally CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett. *See also* CRS Report RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

[91] *See e.g.*, S.J.Res. 20 (introduced by Sen. Kerry), 112th Cong. (2011) (proposed joint resolution authorizing the limited use of U.S. forces in Libya).

Conclusion

Historically, the courts have been reluctant to act in cases involving issues of national security and foreign policy. The enactment of the War Powers Resolution in 1973 does not appear to have altered that situation. Seven efforts by lawmakers since enactment of the Resolution effectively calling upon federal judges to put traditional scruples aside have proven to be unavailing. In each and every case brought since the WPR's enactment to resolve the political branches' impasse over the law and/or the constitutional division of the war power in which a final judicial ruling has been issued, the reviewing court has concluded that the factors calling for abstention outweigh those in favor of involvement. The courts have variously relied on the political question doctrine, the equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing. In the one ruling arguably on the merits, the U.S. Court of Appeals for the First Circuit ruled that a discretionary grant of authority to the President to use force under specified circumstances does not constitute an unlawful delegation of Congress's power to declare war.

The courts have made clear, however, that while formidable, none of the aforementioned procedural barriers constitutes an insurmountable obstacle to resolving the statutory or constitutional issues concerning war powers. All of the opinions to date indicate that the barrier to the exercise of jurisdiction stems from the posture of the cases, not some institutional shortcoming. If this view prevails, both statutory and constitutional war powers issues can be judicially determined if a legal, as distinguished from a political, impasse is created. It has been suggested that this can come about by congressional action that directs the President to take a particular action, or bars him from doing so, and by presidential noncompliance. Absent such an irreconcilable conflict, however, many believe it's unlikely that the courts will venture into this politically and constitutionally charged thicket.

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