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WAR MAKING POWERS AND THE JUSTICIABILITY OF THE WAR POWERS RESOLUTION

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ABSTRACT

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This paper discusses United States constitutional and statutory war making authority and examines why courts in the United States have never permitted a constitutional test of the 1973 War Powers Resolution. It concludes by predicting whether a court will ever hear on the merits, a case to enforce the Resolution as it is currently written.

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WAR MAKING POWERS AND THE JUSTICIABILITY OF THE WAR POWERS RESOLUTION

The decision to commit a nation to war is a most profound one because of war's grave consequences for both combatants and non-combatants. Consequently, the question of who has the authority to commit a nation to war is vital. In the United States, there is disagreement over the answer to the question, "who has the authority to send the armed forces in harm's way?" While there is virtually no disagreement that Congress has the power to *declare* war, hotly disputed is the question of whether it is Congress or the President that has the power to *make* war. Below, we will examine constitutional and statutory war making authority and discuss why courts in the United States have never permitted a constitutional test of the 1973 War Powers Resolution.[1] We will conclude by predicting whether a court will ever hear a case involving the War Powers Resolution, on the merits.

CONSTITUTIONAL & STATUTORY WAR MAKING POWERS

THE CONSTITUTION

Since all laws of the United States must pass constitutional muster[2], it is appropriate that we examine war making powers beginning with the supreme law of the land. The Constitution confers to the legislative branch many powers relating to war making, the armed forces and the maintenance of law and order outside of the territorial boundaries of the United States.[3] First and foremost among these is the power "to declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water."[4] The Constitution vests Congress with the authority "to raise and support Armies"[5], "to provide and maintain a Navy,"[6] and "to make Rules for the Government and Regulation of the land and naval Forces."[7] Congress is "to provide for organizing, arming, and disciplining, the Militia for governing such Part of them as may be employed in the Service of the United States,"[8] and once formed, Congress may call upon this "Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[9] In addition to raising training and maintaining the armed forces of the United States, the Constitution grants to the Congress, a number of responsibilities in the area of foreign affairs. Among these are the power "to regulate Commerce with foreign Nations,"[10] to establish the rules by which persons from foreign lands will be allowed to become United States citizens,[11] and "to define and punish Piracies and Felonies committed on the high Seas"[12] and define and punish other violations of international law.[13] Additionally, it is within Congress's prerogative, through its ratification authority, to decide whether to allow international treaties to

become law and through their confirmation authority to decide who shall represent the United States in foreign lands as an ambassador.[14]

While Congress's constitutional powers in war making and in foreign affairs appear at first glance to be quite extensive, they are by no means plenary. Congress shares some of these powers with the Executive Branch. While it is Congress that raises, trains and maintains the armed forces, it is "the President [who] shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[15] The duty to "Commission all the Officers of the United States[16] is the Constitution's only other language specifically linking the chief executive to the armed forces. The Constitution confers broad authority to the President by vesting him with "executive power,"[17] and instructs him to "take Care that the Laws be faithfully executed.[18]

There is no provision in the Constitution that confers upon the third branch, the judiciary, any war making powers. The Constitution does, however, give the judiciary some authority over foreign affairs. It vests the judicial power of the United States "in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[19] This places the Supreme Court in a preeminent position over United States courts that hear cases arising from military law (e.g. United States Court of Appeals for the Armed Forces) or international subject matter (e.g. United States Court of International Trade, United States Immigration Court). It extends judicial power to cases "arising under this Constitution, the Law of the United States, and Treaties made,"[20] as well as cases "affecting Ambassadors, other public Minister and Consuls; -to all Cases of admiralty and maritime Jurisdiction" and between a United States state or citizens of the United States and foreign countries.[21]

The United States Constitution, and hence the United States Government, is characterized by the checks and balances of power that are created between the Executive, the legislature and the judiciary. The balance of powers is not necessarily typified by clear bright lines of authority drawn between the branches. During the Constitutional Convention, there were many contentious issues that divided the delegates. In order to reach agreement, the delegates had to compromise, which resulted in areas of constitutional ambiguity.[22] As we shall see, the power to make war was one of these areas. "[I]n their deliberations at Philadelphia, the Constitution's framers wanted to ensure that the new Republic they were creating would be free of what they regarded as the ultimate vice of the European monarchies of the day: the easy resort to war by an unaccountable and unresponsive executive."[23] Among the greatest concerns of the founding fathers was the unchecked power of a mighty executive. However, a government under the Articles of Confederation showed them the perils of a weak executive.

The challenge to the delegates to the Constitutional Convention was to strike the proper balance between freedom for the citizen and efficacy for the government.

THE WAR POWERS RESOLUTION

Purpose

Congress last declared war upon another nation during World War II, over a half century ago. Since that time, presidents have sent United States armed forces overseas into harm's way many times. By 1973, the Democratic Party, which had controlled both houses of Congress for the past 20 years, had controlled the White House for only eight. During that time, the executive branch increasingly acted as though the conduct of foreign policy were within its exclusive purview while Congress became increasingly more frustrated with its impotency. Finally, emboldened by President Johnson's inept prosecution of the Viet Nam War and President Nixon's criminality, Congress decided to reassert its constitutional war making authority over a weakened and discredited executive branch.[24] They did this by passing the War Powers Resolution and Intelligence Oversight Act.[25] A practice that most irritated Congress was the presidential habit of claiming congressional concurrence with presidential war making initiatives absent a vote authorizing those initiatives. This was done by the Executive pointing to declarations of congressional support for the troops after the troops had been committed or by pointing to congressional appropriations passed to avoid leaving America's fighting men and women in a lurch or to avoid the embarrassment of having a government that was not unified in its cause.[26] "The Senate Foreign Relations Committee explained in its report on the resolution, that the provision was intended 'to counteract the opinion...that passage of defense appropriation bills, and the extension of the Selective Service Act, could be construed as implied congressional authorization of the Vietnam War.'"[27] Congress intended that the Resolution leave its war making powers and those of the President unchanged. It wanted to clarify the Constitution's ambiguities concerning war making and reassert what it regarded as its right to be meaningfully consulted *before* the Nation went to war rather than after military action was *faits accomplis.*[28]

Obligations

The War Powers Resolution consists of eight sections and imposes three basic obligations. First, it tells the President under what circumstances he is obligated to consult with Congress about the overseas deployment of United States Forces. Second, it prescribes the information that the President is obligated to communicate to Congress in the course of these

consultations. Finally, it tells the President under what conditions he must terminate hostilities and bring the troops home.[29]

Section 1541 of the War Powers Resolution declares the purpose of the legislation. Its purpose is not to change the intent of the Constitution's framers, but to fulfill their intent by ensuring "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..." after they have been committed.[30] The section admonishes the President that he is only to introduce armed forces into hostilities or likely hostile situations, or in reaction to an attack upon the territory or possession of the United States or upon its armed forces or after he receives from Congress, either a declaration of war or a statute specifically authorizing the action.[31] Section 1541 also cites the necessary and proper clause of the Constitution,[32] granting to the Congress, the authority to make all laws that are necessary and proper to facilitate the execution of Congress's constitutionally vested powers to include its war making powers. "All laws" would presumably include the War Powers Resolution itself.

Section 1542 directs the President to consult in every possible instance with the Congress *before* introducing United States armed forces into situation to which the Resolution applies[33] and to consult regularly with the Congress until he has withdrawn the armed forces from such situations.[34] Barring a surprise massive nuclear attack, a circumstance in which consultation would be impossible is difficult to conceive. Note that Section 1542 does not specifically identify with whom in Congress the President should consult. Since two of the three conditions precedent to the President introducing armed forces into hostile situations require full congressional action (a declaration of war or passage of a statute),[35] consultation with only congressional leaders may be insufficient.

Section 1543 codifies the President's reporting requirements. In the absence of a declaration of war, the President is to submit a report to the Speaker of the House of Representatives and the President Pro tempore of the Senate within 48 hours of:

1. Introducing troops into hostile situations;

2. introducing troops into a foreign nation equipped for combat except for strictly training or maintenance; or

3. substantially enlarging the strength of combat troops already deployed.[36]

The War Powers Resolution requires the President to file his report in writing and to include: The circumstances which necessitated the introduction of troops; the constitutional and legislative authority under which he acted; and the estimated scope and duration of United

States involvement.[37] As long as the President continues to keep United States troops in a hostile venue, he must report to Congress not less than once every six months.[38] Lastly, Section 1543, while directing the President to provide other information to Congress as it requests, affirms that it is the Congress that possesses responsibilities with respect to committing the Nation to war and the use of her armed forces on foreign soil.[39]

Section 1544 is the termination clause. It requires the President to terminate use of United States armed forces within sixty calendar days of submitting his report pursuant to Section 1543 "unless the Congress (1) has declared war or has enacted a specific authorization for such use...(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."[40] The President can received a thirty-day extension if he determines and certifies that "unavoidable military necessity respecting the safety of United States Armed Forces" requires the continued use of forces to bring about their prompt removal.[41] Note that the President does not get a thirty-day extension to complete the mission upon which he dispatched the troops. However, anytime that the Congress directs via a concurrent resolution that the President remove United States troops from foreign soil absent a declaration of war or a specific authorizing statute, he must do so.[42] This is referred to as the congressional veto. It extends over any presidential use of the armed forces overseas absent a congressional declaration or statute.[43]

Sections 1545 and 1546 contain the procedural details of how Congress may authorize the use of troops beyond the sixty and ninety-day limits or terminate their use under Section 1544(c). These sections establish time limits for action to help speed such legislation along without undue delay while at the same time ensuring that the measure is debated and that both sides, pro and con, are heard.[44]

Section 1547 provides that Congressional approval for troop deployment is not to be inferred from any treaty to which the United States is a party nor any law that does not authorize insertion of the United States Armed Forces into a specific hostile situation.[45] This restriction includes the introduction of advisors to foreign forces engaged in hostilities or faced with the imminent threat of them.[46] Exempted, however, are troops that are members of high-level staffs that were established before the enactment of the War Powers Resolution or pursuant to the United Nation's Charter or any treaty that Congress ratified before the Resolution's passage.[47] Section 1547 also declares that the Resolution is not intended to alter the constitutional authority of the President and Congress, nor grant to the President, any authority to commit United States troops abroad that he did not have before the Resolution's passage.[48] As we

shall see in the next section, opinions differ considerably as to whether the War Powers Resolution does in fact alter the President's authority pursuant to the Constitution or stated another way, whether the Resolution can pass constitutional muster.

The final section, Section 1548, is the severability clause. It declares that if any provision of the War Powers Resolution is declared invalid by a court of law, the remaining provisions will continue in full force and be unaffected by the invalidation.[49]

Points of Contention

The constitutional ambiguity regarding war-making powers stems from the undefined role of the President as commander in chief. Is he in charge of his nation's armed forces, able to commit them abroad with unfettered discretion, or does he only assume his commander in chief role after the Congress has authorized that they be employed? The answer to this question depends upon whom one asks. Since the War Powers Resolution took effect, presidents have held an expansive definition of their role as commander in chief.[50] The resolution is the manifestation of a Congress desiring to reassert its role as the war-making branch of decision. "The result has been a constitutional stand-off between the two political branches over how the government should proceed with respect to future decisions to use military force-each side feeling both entrenched and resentful of the other's motive and intents."[51]

Since the War Powers Resolution's passage, all presidents from both parties have complied to a small degree with it, but their overall attitude has been one of opposition.[52] They have all either ignored the law or objected to it as an unconstitutional limitation upon their war making powers.[53] President Nixon first tried to kill the War Powers Resolution by vetoing it.[54] No President has acknowledged the law's constitutionality nor has any president ever fully complied with it.[55] While President Carter submitted a report to Congress regarding Desert One, the 1980 mission to rescue the United States Embassy hostages in Iran, he informed Congress only after the mission failed, rather than consult with them in advance as the Resolution requires.[56] President Ford was the only commander in chief to report his decision to employ armed forces "pursuant to" Section 1543 rather than "consistent with" it as other president's have done.[57] He did this after ordering the armed seizure of the United States ship S.S. Mayaguez that had been pirated by the Cambodian Navy. The pattern of using other than "pursuant to" language lays bare Presidential resistance to starting the sixty-day time limit to withdraw troops absent Congressional action that the report triggers.[58] President Ford's report ultimately had no effect on the mandatory withdrawal provision since, as in Desert One, by the time he rendered the report, the military action was concluded.[59]

In the spring of 1986, while United States fighter-bomber aircraft were inbound to bomb Libya in retaliation for Muramar Qaddafi's support of international terrorism, President Reagan attempted to satisfy his obligation to consult with Congress about the impending military action by reading a prepared statement to selected Congressional leaders. As Bob Michel, a Congressional leader from the President's own party opined, "if I had some serious objection, how could I make it now?"[60] In 1999, President Clinton did not seek congressional approval for the air war that the United States prosecuted against Yugoslavia, a war that cost thousands of lives and tens of billions of dollars in damage and was the most intensive bombing campaign waged in the history of warfare. And even as he signed House Joint Resolution 77, Congress's authorization for the President to use military force against Iraq, President Bush stated "[A]s I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the longstanding positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital United States interests or the constitutionality of the War Powers Resolution."[61]

Besides a general objection to the War Powers Resolution, that it infringes upon the President's constitutional war making authority as the chief executive and the armed force's commander in chief, critics have opposed two specific provisions. The first is the automatic withdrawal provision of Section 1544(b). Detractors claim that it is unconstitutional to require the President to act absent some affirmative action by Congress. "Since the resolution recognizes that the President has independent authority to use the armed forces in certain circumstances, they state 'on what basis can Congress seek to terminate such independent authority by the mere passage of time.'"[62] Additionally, opponents raise practical problems which the provision could give rise to such as signaling to the enemy a lack of unanimity of purpose and a lack of resolve. Additionally, this provision may encourage enemies of the United States to attempt to wait out the President in the hope that lack of support at home for the military action will cause the President to abandon it. An extension of hostilities, claim the critics, will result in unnecessary loss of life and limb among United States troops.[63]

The second most objectionable provision, is the legislative veto provision of Section 1544(c). Critics cite the 1983 Supreme Court decision in *Immigration and Naturalization Service v. Chadha*, as support for their claim that a legislative veto is unconstitutional.[64] In *Chadha*, the court struck down an attempt by one house of congress to invalidate an Executive Branch decision to allow a deportable alien to remain in the United States.[65] The court's reasoning was that the house's action was legislative and thus required passage by *both* houses and presentment to the President.[66] However, the court also acknowledged that not every

legislative action requires the bicameralism and presentment requirements of the Constitution's Article I.[67] The position taken by the supporters of the War Powers Resolution, is that the Resolution fits squarely within this exception. What side would prevail in court with regard to both of these constitutional questions is unclear because the constitutionality of the Resolution has never been decided upon its merits.

JUSTICIABILITY

GENERALLY

A justiciable case is one that a court will agree to hear. Since the United States federal government is one of limited powers, branches of it must be granted specific powers under the Constitution in order to exercise them. Courts organized under Article III of the Constitution are empowered to hear cases involving "cases or controversies arising under the Constitution, laws, or treaties of the United States; of admiralty and maritime jurisdiction; in which the United States is a party; between two or more states; between a state and citizens of another state; between citizens of different states between citizens of the same state claiming lands under grants of different states and between a state or citizens thereof and foreign state, citizens or subjects."[68] In addition to these constitutional restrictions, there are other, self-imposed restrictions concerning what type of cases an Article III court may hear. A court will not hear a case where there is nothing at stake; where there is no genuine controversy. It will not hear a case that is not ripe, that is, where the plaintiff (complaining party) has not suffered actual harm or is not under the threat of imminent harm. An Article III court will not hear a moot case in which the conflict is already resolved. It will not hear a case unless the plaintiff has standing or a personal interest in the case's outcome. The Supreme Court will not hear a case from a state court, if the state court's judgment is based upon adequate and independent state grounds or if the outcome of a case is based upon an unsettled question of state law. Finally, an Article III Court will not decide political questions.[69]

Since the War Powers Resolution went into force in 1973, some members of Congress have attempted to judicially enforce the President's obligation to comply with it. Each time, without exception, the courts have prevented congressmen from having their cases heard on the merits declaring them all nonjusticiable due to lack of ripeness, mootness, political question and standing. Congressional plaintiffs have spent significant amounts of money in legal fees to enforce the War Powers Resolution. We will now examine each legal justiciability hurdle to determine if a case brought by congressmen to enforce the Resolution as it is currently written will ever be heard on the merits.

RIPENESS

As the clouds of war grew dark in the Persian Gulf, President Bush announced his intention to significantly increase United States troop strength in the region above the 230,000 that were already in the theater so that he would have "an adequate offensive military option" should he need it.[70] Congress had not been asked to take any action with regard to their war making power, nor to this point did they. Congressman Dellums along with 53 other members of Congress, sued the President to enjoin him from initiating offensive operations in the Gulf without congressional approval.[71] The Federal District Court of the District of Columbia refused to order the injunction, declaring that their case was not yet ripe for two reasons. The first, was that just 54 Congressmen and not a majority of Congress had sought relief. The second, was that the Executive Branch had not yet sufficiently shown that it intended to commit the troops to battle.[72] The court relied upon upon *Goldwater v. Carter* (1979) in which Justice Powell asserted that a case between two branches of government is not ready for judicial review unless each branch has fully asserted its constitutional authority.[73] Congress could have negotiated the ripeness hurdle had it acted as a body to express its disapproval for the Executive's actions and had the Executive in a more positive manner, indicated his commitment to pursue the combat option. On-going armed hostilities would have also met the commitment requirement. There exists case law indicating a willingness of the courts to overturn unconstitutional executive acts absent congressional action, but the *Dellums* court did not take notice of these.[74]

MOOTNESS

In *Dellums*, the court dismissed the plaintiff's claim declaring it moot after Congress voted to support offensive military action to oust Iraqi forces from Kuwait.[75] Fifteen years before, the Court of Appeals for the District of Columbia also dismissed a suit as moot.[76] In that case, Congressman John Conyers, with ten other members of the House of Representatives (appellants), challenged President Reagan's authority to invade the island of Grenada absent a congressional declaration of war. Because, by the time the suit was brought, the conflict was long over, the court declared that the constitutional issue was no longer alive. Appellants claimed that while hostilities had ceased, the case was not moot under the "capable of repetition, yet evading review" doctrine.[77] To survive the mootness test under this doctrine, as articulated in *Southern Pacific Terminal Co. v. ICC*[78], a court must decide that 1) the challenged action is, by its very nature, too short of duration to be litigated before it ends and 2) there is a reasonable expectation that the same plaintiff will suffer the same harm again. This doctrine is currently known as the *Weinstein* test.[79] The court in Conyers noted that since the appellants

had not satisfied the first prong of the test, they did not qualify for the mootness exception under the doctrine.[80] To survive the mootness test, the conditions that make a case ripe, must still exist when the suit is brought. If a President were to command a cease fire and a case were then dismissed as moot due to a cessation of hostilities, if he were to again order the forces to combat, this might then satisfy the first prong of the *Weinstein* test. In *Conyers*, appellants cited the Korean and Vietnam wars as conflicts during which the Executive made war absent congressional approval. The court noted that these two conflicts were of sufficient duration whereby a suit to enjoin the President's actions could have been fully litigated. [81]

POLITICAL QUESTION

Throughout the last century, courts have observed that political questions are generally beyond the competence of the court to decide.[82] In *Oetjen v. Central Leather* (1918)[83] the Supreme Court declared that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – "political" – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[84] This view has changed over the years, and the modern view of the justiciability of cases involving political questions is currently embodied in *Baker v. Carr* (1962).[85] In the *Baker* opinion, Justice Brennan, writing for the majority, declared, "[t]he doctrine of which we treat is one of "political questions," not one of "political cases. The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority."[86] While Baker did not involve war making powers, or even foreign affairs, Justice Brennan also commented "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[87] The court went on to define cases that contained a non-justiciable political question. They include cases where there "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable 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."[88] This extensive list of places wherein a political question may be found appears to have provided to subsequent courts a generous selection of options by which they may choose to avoid hearing a war powers case as a number have.[89] In *Massachusetts v. Laird*,[90] the State of

Massachusetts, seeking to enjoin the Secretary of Defense from sending its citizens to Viet Nam for military duty, focused upon the test for a textually demonstrable constitutional commitment of the issue to a coordinate political department. They found this commitment as they concluded that Congress had the right to support an undeclared war.[91] In *Mitchell v. Laird*,[92] the Court of Appeals for the District of Columbia Circuit concluded that it was incompetent to determine if the military actions ordered by President Nixon were a good-faith effort to end the Viet Nam War and would not substitute their judgment for the President who had substantial discretion in the area of foreign affairs.[93] In *Crockett v. Reagan*,[94] the United States District Court for the District of Columbia concluded that the court had neither the resources nor the expertise to determine if hostilities were imminent in El Salvador.[95] While the judicial tradition of deference to the President is alive and well, there may be some cracks in the armor. In *Goldwater*, Justice Powell, concurring with the majority, rejected the assertion that cases involving foreign relations are political questions.[96] He wrote, "This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President...Interpretation of the Constitution does not imply lack of respect for a coordinate branch. If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is.'"[97] Although *Dellums* was dismissed for ripeness, the government's political question claim was dismissed as the court concluded that a case did not present a political question solely because it touched upon foreign affairs.[98] Finally, in *INS v. Chadha*, the Supreme Court held that "resolutions of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications..."[99] While recent case law might lead one to conclude that a congressional effort to judicially enforce the War Powers Resolution is a justiciable question, a court's propensity to find a political question and avoid hearing a case should not be underestimated.

STANDING

The latest effort of congressmen to judicially enforce the War Powers Resolution against the President was led by Congressman Tom Campbell in 1999 after President Clinton ordered United States forces to bomb the country of Yugoslavia.[100] The court dismissed the case after deciding that the Congressman did not have standing to sue. The *Campbell* opinion cited

Raines v. Byrd, as controlling authority with regard to standing.[101] In Raines, plaintiff congressmen claimed that the President's authority under the Line Item Veto Act diminished the institutional power of Congress. Upon dismissing the case for lack of standing, the court stated that it had *never* granted standing to congressmen challenging the Executive's authority. The court observed that the congressional plaintiffs possessed adequate political remedies to resolve the situation. They could for instance have repealed the Line Item Veto Act or they could have passed spending bills with a provision that exempted a bill from the Act.[102] In *Chenoweth v. Clinton*, the United States Court of Appeals for the District of Columbia Circuit dismissed a suit led by Congressman Helen Chenoweth challenging the President's issuance of an executive order for the protection of rivers. In that suit, the court said that because the dispute could be resolved utilizing the political process, to grant the petitioners standing to hear the case would be "meddling in the internal affairs of the legislative branch."[103] The court in *Chenoweth* used a ripeness argument to deny the Congressmen standing. The *Campbell* opinion did acknowledge that there is one soft spot in the *Raines* "no-standing for Congressmen if they have Options rule." In *Coleman v. Miller*,[104] Kansas State legislators were granted standing after claiming that their 20 to 20 vote on the ratification of a constitutional amendment, the Child Labor Amendment, should have been enough to kill the measure and that a tie-splitting vote by the Lieutenant Governor effectively nullified their vote. Because the senators could not undo by themselves the ratification of a constitutional amendment, they had no legislative remedy. This situation is a very narrow soft spot indeed. It is difficult to conceive of a situation dealing with the War Powers Resolution that could similarly situate the United States Congress. It could be argued that Congress almost always has a legislative remedy should it decide to exercise one. If Congress votes to oppose Presidential military action and in defiance, the President orders military action, Congress could cut off funding for the operation. If the President spends money to prosecute a war after Congress denies him the funding, the Senate could impeach him. If the Senate tries, convicts and ousts the President in a trial, and he refuses to leave office, Congress would then conceivable have exhausted its legislative options. Perhaps the bar to achieve standing is not that high. We don't know since Congress has never legislatively barred an Executive's war making initiative. Perhaps if it tries, the court will grant its members standing to sue. At this juncture, we can only speculate.

CONCLUSION

As we have discussed, the four justiciability tests about which a congressional plaintiff must be most concerned, are ripeness, mootness, political question and standing. The following

describes a scenario in which all four of these justiciability tests are satisfied: In this scenario, the plaintiffs' case will be ripe because the United States Armed Forces will be engaged in hostilities overseas and the Congress as a body will have legislatively expressed their opposition to the deployment ordered by the President. The case will not be moot because hostilities will continue for the duration of the trial. Not only will Congress have legislatively expressed their opposition, but they will have appropriated no monies for the military operation nor will they have demonstrated as a body though a joint declaration or in any other formal way, their support for the operation. This will demonstrate a genuine conflict between the legislative and executive branch, and although the case will touch upon a political issue, the judiciary will see the appropriateness of deciding a dispute between the other two branches of government. Finally, because Congress opposed the Executive as a body, rather than as a minority of members, the court may find standing, though it is more likely that they will not because of the addition legislative options still open to Congress (e.g. terminating funding or impeachment). That all four justiciability tests will be met at the same time is remote. It has never occurred to date and is unlikely to in the future, especially in light of the short duration of recent United States conflicts. The standing requirement will be particularly troublesome as discussed *supra*.

Before seeking judicial enforcement of the War Powers Resolution again, congressmen may enjoy greater success if they first amend the War Powers Resolution to define ripeness, political question and standing to broaden the circumstances under which they would qualify as plaintiffs. In this way, congressional plaintiffs may be able to legislatively negotiate the justiciability obstacles that they have to date been unable to overcome in the courts.

WORD COUNT = 5,787

ENDNOTES

[1] *War Powers Resolution and Intelligence Oversight Act*, 50 U.S.C. §§1541-1548 (1973).

[2] *Marbury v. Madison*, 5 U.S. 137 (1803).

[3] U.S. Const.

[4] U.S. Const. art. 1, § 8, cl. 11.

[5] U.S. Const. art. 1, § 8, cl. 12.

[6] U.S. Const. art. 1, § 8, cl. 13.

[7] U.S. Const. art. 1, § 8, cl. 14.

[8] U.S. Const. art. 1, § 8, cl. 16.

[9] U.S. Const. art. 1, § 8, cl. 15.

[10] U.S. Const. art. 1, § 8, cl. 3.

[11] U.S. Const. art. 1, § 8, cl. 4.

[12] U.S. Const. art. 1, § 8, cl. 10.

[13] *Id.*

[14] U.S. Const. art. 2, § 2, cl. 2.

[15] U.S. Const. art. 2, § 2, cl. 1.

[16] U.S. Const. art. 2, § 3.

[17] U.S. Const. art. 2, § 1. cl. 1.

[18] U.S. Const. art. 2, § 3.

[19] U.S. Const. art. 3, § 1.

[20] U.S. Const. art. 3, § 2, cl. 1.

[21] *Id.*

[22] Donald M. Snow and Eugene Brown, *Puzzle Palaces and Foggy Bottom, U.S. Foreign and Defense Policy-Making in the 1990s* (New York: St. Martin's Press, 1994), 158.

[23] *Id.*

[24] *Id* 162.

[25] 50 U.S.C. §§1541-1548.

[26] Michael J. Glennon, *The Gulf War and the Constitution*, Spring 1991 Foreign Affairs 84, 85.

[27] *Id.* 85.

[28] Gary M. Stern and Morton H. Halperin. *The U.S. Constitution and the Power to Go to War.* Westport (Greenwood Press, 1994), 58.

[29] Snow, *supra*, 163

[30] 50 U.S.C. §1541(a).

[31] *Id.* §1541(c).

[32] U.S. Const. art. 1, sec. 8, cl. 18.

[33] 50 U.S.C. §1541(a).

[34] *Id.* §1542.

[35] *Id.* §1541(c).

[36] *Id.* §1543(a).

[37] *Id.* §15439(a).

[38] *Id.* §1543(c).

[39] *Id.* §1543(b).

[40] *Id.* §1544(b).

[41] *Id.* §1544(b).

[42] *Id.* §1544(c).

[43] Cyrus R., Vance, *Striking the Balance: Congress and the President under the War Powers Resolution,* 133 U. Pa. L. Rev. 79 (1984).

[44] 50 U.S.C. §§1545-1546.

[45] *Id.* §1547(a).

[46] *Id.* §1547(c).

[47] *Id.* §1547(b).

[48] *Id.* §1547(d).

[49] *Id.* §1548.

[50] Snow, *supra*,159.

[51] Stern, *supra*, 2.

[52] *Id.* 61.

[53] Snow, *supra,* 165.

[54] *Id.* 165.

[55] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996).

[56] Stern, *supra,* 64.

[57] *Id.* at 64.

[58] 50 U.S.C. §1544.

[59] Stern, *supra*, 64.

[60] Snow, *supra*, 166.

[61] Stern, *supra*, 75.

[62] *Id.* 60.

[63] *Id.* 60.

[64] Vance, *supra. citing Immigration and Naturalization Service v. Chadha*, 462 U.S. 917 (1983).

[65] *Chadha*, 462 U.S. 917.

[66] *Id.*

[67] *Id.*

[68] Elizabeth L. *Syndor* et al., *Barbri Bar Review Multistate* (Harcourt, Brace Legal and Professional Publications, Inc., 1996), 1 *paraphrasing* U.S. Const. art. 3, § 2, cl. 1.

[69] *Id.* 3-7.

[70] Dellums *v. Bush*, 752 F. Supp. 1141, 1143 (D.D.C. 1990).

[71] *Geoffrey* S. *Corn*, *Presidential War Power: Do the Courts Offer Any Answers?* 157 Mil. L. Rev. 180 (1998).

[72] *Dellums*, 752 F. Supp. at 1149-1152.

[73] *Id.* at 1150 *citing Goldwater v. Carter*, 444 U.S. 996 (1979).

[74] Glennon, *supra*, 95 citing *Brown v. United States*, 12 U.S. 110 (1814) and *Yoshida International, Inc. v. United States* 378 F. Supp. 1155 (Cust. Ct. 1974).

[75] Glennon, *supra,* 4.

[76] Conyers v. Reagan, 765 F.2d 1124 (D.D.C. 1985).

[77] *Id.*

[78] *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

[79] *Weinstein v. Bradford*, 423 U.S. 147 (1975).

[80] *Conyers,* 765 F.2d 1124.

[81] *Id.*

[82] *Yoo*, *supra.*

[83] *Oetjen* v. *Central Leather, 246 U.S. 297 (1918).*

[84] *Id.* at 303.

[85] *Baker v Carr*, 369 U.S. 186 (1962).

[86] *Id.* at 217.

[87] *Id.* at 211.

[88] *Id.* at 217.

[89] *Crockett v. Reagan,* 720 F.2d 1355 (D.D.C. 1983); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

[90] *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

[91] *Id.*

[92] *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

[93] *Id.* at 616.

[94] *Crockett v. Reagan,* 720 F.2d 1355.

[95] *Id.*

[96] *Goldwater,* 444 U.S. 996.

[97] *Id.* at 999-1001.

[98] *Dellums*, 752 F. Supp. 1141.

[99] *Chadha*, 462 U.S. at 943.

[100] *Campbell v. Clinton,* 52 F. Supp. 2d 34 (D.D.C. 1999).

[101] *Id. citing Raines v. Byrd*, 521 U.S. 791, (1997).

[102] *Raines*, 521 U.S. 791.

[103] *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999).

[104] *Coleman v. Miller*, 307 U.S. 433 (1939).

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