

Report for Congress

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

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David M. Ackerman
Legislative Attorney
American Law Division

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Summary

Article I, § 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). The WPR, *inter alia*, requires the President to report to Congress any time U.S. military forces are introduced into “hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Once such a report is submitted, the WPR requires that the forces must be withdrawn within 60 days (90 days in specified circumstances) unless Congress declares war or otherwise authorizes their continued involvement.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 all Presidents from Nixon to Bush have viewed the WPR as trenching on their constitutional powers. 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 in six other instances involving U.S. military involvement in El Salvador, Nicaragua, Grenada, the Persian Gulf conflict between Iraq and Iran, Iraq’s invasion of Kuwait (prior to the Congressional authorization), and NATO’s action in Kosovo, Presidential avoidance and Congressional inaction have led a number of Members to initiate suits in federal court to compel various Presidents to comply with the reporting and/or troop withdrawal requirements of the Resolution or to otherwise recognize Congress’ war powers. A seventh suit, recently decided, sought to enjoin the President from using military force against Iraq on the grounds such an action would exceed the authority conferred by Congress in the statute it adopted in October, 2002.

In every instance to date (with the exception of part of the last decision) the courts have found reasons not to render a decision on the merits of the suits. 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 not ruling out the possibility that a conflict over the use of force between Congress and the President could require a judicial resolution, the courts so far have deemed the matter to be one for the political branches to resolve.

This report summarizes the seven cases initiated by Members of Congress. It will be updated as circumstances warrant.

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Introduction

Seven times since the enactment of the War Powers Resolution in 1973,¹ Members of Congress have filed suit to force various Presidents to comply with its requirements or otherwise to recognize Congress' war powers under the Constitution. Seven times the federal courts have refused to render a decision on the merits.² In four instances the suits have foundered on the political question or equitable discretion doctrines, which the federal courts use to insulate themselves from essentially political disputes. In another case the suit failed on grounds of standing, and in two cases the suits foundered on the ripeness doctrine.

Article I, § 8, of the Constitution confers on Congress the power to “declare War”; and Congress has enacted such 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.³ 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). The legislation's supporters hoped that its enactment would ensure that a national consensus precedes the use of U.S. armed forces in hostilities abroad. Accordingly, the Resolution 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.”⁴ Unless Congress authorizes continued involvement by adopting a declaration of war

¹ P.L. 93-148 (Nov. 7, 1973); 87 Stat. 555; 50 U.S.C. §§ 1541 *et seq.* (1994).

² *But see infra* Doe v. Bush, 2003 U.S. App. LEXIS 4477 (1st Cir. 2003) (rejecting on the merits a contention that Congress in the “Authorization for the Use of Force Against Iraq Resolution of 2002” unconstitutionally delegated its war-declaring power to the President).

³ For a thorough review of Congress' actions in enacting declarations of war and otherwise authorizing the use of force and of the legal consequences of these actions, see CRS Report RL31133, *Declarations of War and Authorizations for the Use of Force: Historical Background and Legal Implications*.

⁴ 50 U.S.C. § 1543.

or other authorization, the WPR requires that U.S. troops be withdrawn at the end of 60 days (90 days in certain circumstances).⁵

Presidents from Ford to Bush have submitted more than 100 reports to Congress giving notice of the involvement of U.S. armed forces in hostile situations.⁶ But because all of these Presidents have objected to the War Powers Resolution as unconstitutionally trenching on their constitutional powers, their reports to Congress on the involvement of U.S. troops in hostilities overseas have generally avoided using language that would trigger the time limitation and the consequent need for Congressional authorization for continued involvement.⁷ That 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.

Although both the White House and the Members who have initiated the suits have claimed that each will ultimately prevail if the courts ever pass on the merits of the controversy, neither thus far 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 Administration claims 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 seven 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 and/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 invasion of Kuwait, NATO’s actions against Yugoslavia, and Iraq’s noncompliance with its obligation to disarm.

⁵ *Id.* § 1544.

⁶ See CRS Issue Brief IB81050, War Powers Resolution: Presidential Compliance.

⁷ The one exception to that practice was President Ford’s report to Congress on the U.S. response to the seizure of the *Mayaguez* in 1975 by Cambodian naval vessels, which specifically cited the section of the Resolution (§ 4(a)(1)) triggering the time limit. For a detailed description and analysis of Presidential compliance with the War Powers Resolution, see CRS Report RL31185, *The War Powers Resolution: After Twenty-Eight Years*.

El Salvador

In *Crockett v. Reagan*⁸ in 1982 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' 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 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 in *Baker v. Carr*,⁹ 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.

....

⁸ *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. den.*, 467 U.S. 1251 (1984).

⁹ 369 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.¹⁰

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 a 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.”¹¹

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.”¹²

On appeal the United States 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.”

Nicaragua

In *Sanchez-Espinoza v. Reagan*¹³ in 1983, twelve Members of the House of Representatives, 12 Nicaraguan citizens, and 2 United States citizens sued for damages, injunctive relief and a declaration that President Reagan and other executive officials had 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

¹⁰ 558 F.Supp. at 898.

¹¹ *Id.* at 899.

¹² *Id.* at 899.

¹³ *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

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 its 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 standards.”¹⁴ 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.”¹⁵ 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.”¹⁶

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.”¹⁷

The United States Court of Appeals for the District of Columbia affirmed on appeal. With respect to the claim of the Congressional plaintiffs that the assistance given the *contras* 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.”¹⁸ Justice Ginsburg filed an opinion concurring in the latter ruling on the grounds the issue was “not ripe for judicial review.” She stressed that the political branches had not as yet reached “a constitutional impasse”

¹⁴ 568 F. Supp. at 600.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *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.

¹⁸ 770 F.2d at 210.

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.”

Grenada

In *Conyers v. Reagan*¹⁹ in 1984, eleven Members of the House challenged the President Reagan’s use of force in Grenada as an executive usurpation of Congress’ 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, “[w]hat is available to these plaintiffs are the institutional remedies afforded to Congress as a body; specifically, the War Powers Resolution ...”²⁰

On appeal the United States Court of Appeals for the District of Columbia affirmed largely on mootness grounds because the invasion had been concluded. 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 *Lowry v. Reagan*²¹ in 1987, 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.²²

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 and concluded that the plaintiffs’ “dispute is ‘primarily with [their] fellow

¹⁹ *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *aff’d*, 765 F.2d 1124 (D.C. Cir. 1985).

²⁰ 578 F. Supp. at 327.

²¹ *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff’d*, No. 87-5426 (D.C. Cir. 1988).

²² *Id.* at 338.

legislators.”²³ 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.

Analyzing the complex international political situation as it impacted on the Gulf in light of the benchmarks set in *Baker v. Carr, supra*, the court also concluded “that plaintiffs’ request for declaratory relief presents a nonjusticiable political question.”²⁴ A judicial resolution of the matter, it said, would risk “the potentiality of embarrassment ... from multifarious pronouncements by various departments on one question.”²⁵

In an unpublished opinion the United States 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.²⁶ By the time of its decision Iran and Iraq had agreed to a cease-fire.

Iraq’s Invasion of Kuwait

In *Dellums v. Bush*²⁷ in 1990, fifty-three House Members and one Senator sought to enjoin President 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, however, sought or obtained Congressional authorization for the use of force. In those circumstances a 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 question 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.”²⁸ On the political question issue, it noted the “clear” 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

²³ *Id.* at 339.

²⁴ *Id.* at 340.

²⁵ *Id.* at 340, quoting *Baker v. Carr, supra*, at 217.

²⁶ *Lowry v. Reagan*, No. 87-5426 (D.C. Cir. 1988).

²⁷ 752 F.Supp. 1141 (D.D.C. 1990).

²⁸ *Id.* at 1149.

remedial discretion issue, the court concluded, without further explanation, that the plaintiffs “cannot gain substantial relief by persuasion of their colleagues alone.”²⁹

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, *i.e.*, 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 percent 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.”

No appeal was taken from this decision.

NATO’s Air War in Kosovo and Yugoslavia

In *Campbell v. Clinton*³⁰ in 1999, twenty-six Members of the House initiated a suit asking for a declaratory judgment that U.S. participation in NATO’s military actions against Yugoslavia in the Kosovo situation violated Congress’ 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 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

²⁹ *Id.* at 1149.

³⁰ *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).

that Congress had enacted a supplemental emergency appropriations bill on May 20 providing funds for the conflict in Yugoslavia but had not stated, as required to satisfy the War Powers Resolution, 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.”³¹ It rejected the 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*³² had “dramatically” altered the legal landscape. In that case, it asserted, the Court had held that members of Congress who voted against the Line Item Veto Act³³ 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.

Thus, the court said, it was not sufficient in this case for the Congressional plaintiffs 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.” 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.”³⁴ But the Congressional votes here, the court stated, did “not provide the President with such an unambiguous directive” but instead sent “distinctly mixed messages.” 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

³¹ *Id.* at 40.

³² 521 U.S. 811 (1997).

³³ 2 U.S.C. § 691.

³⁴ 521 U.S. at 43.

actual confrontation or impasse between the executive and legislative branches and thus no legislative standing.³⁵

The court also noted that the 26 plaintiffs in this case 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*³⁶ 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. In *Campbell* the appellate court interpreted *Coleman* to mean that the legislators had standing only if they had no legislative remedy whatsoever. But in this case, it concluded, “appellants ... continued ... to enjoy ample legislative power to have stopped prosecution of the ‘war’”:

Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign Congress always retains appropriations authority and could have cut off funds for the American role in the conflict And there always remains the possibility of impeachment should a President act in disregard of Congress’ authority on these matters.

This reasoning, the court said, applied to the plaintiffs’ claims regarding both the War Powers Resolution and the constitutional allocation of the war power.

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.” 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.” 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.

Judge Tatel’s concurring opinion took issue with this 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”; and, he said, courts have frequently made

³⁵ *Id.* at 44.

³⁶ 307 U.S. 433 (1939).

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." 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":

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.

Finally, Judge Randolph contended that the court 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." Thus, he asserted, "plaintiffs' votes against declaring war were not for naught," and for that reason they lacked standing to sue. 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."

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

Regime Change and Disarmament in Iraq

In *Doe v. Bush*³⁷ twelve Members of the House of Representatives, three members of the military, and fifteen parents of service members instituted suit to enjoin President 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,"³⁸ the plaintiffs contended that the authorization unconstitutionally delegated to the President Congress' power to declare war or, alternatively, that an invasion of Iraq would exceed the authority granted by the authorization. On February 24, 2003, a 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' constitutional authority.

Citing *Baker v. Carr, 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." The Constitution, it said, commits the conduct of the nation's foreign relations to the political branches of the federal government. As a consequence, it stated, "absent a clear abdication of this constitutional responsibility by the political branches, the judiciary has no role to play." In this instance, the court ruled, there was no "intractable constitutional gridlock." 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." 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."

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." One, it stated, is to prevent rulings on "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."

³⁷ *Doe v. Bush*, 2003 U.S. Dist. LEXIS 2773 (D. Mass. Feb. 27, 2003), *aff'd*, 2003 U.S. App. LEXIS 447 (1st Cir. Mar. 13, 2003), *petition for rehearing denied*, 2003 U.S. App. LEXIS 4830 (1st Cir. Mar. 18, 2003).

³⁸ P.L. 107-243 (Oct. 16, 2002). In its operative section the statute authorizes the President to use the armed forces of the United States "as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

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." "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."

The 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' 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." But, it said, "the mere fact that the October Resolution grants some discretion to the President fails to raise a sufficiently clear constitutional issue." 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." Moreover, it stressed, in the area of foreign affairs the Court has made clear that "the nondelegation doctrine has even less applicability" In addition, it said, "there is [no] clear evidence of congressional abandonment of the authority to declare war to the President." For more than a decade, it noted, Congress "has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq" The October resolution itself, the court said, "spells out justifications for a war and frames itself as an 'authorization' of such a war." These circumstances, the court concluded, "do 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.

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 to resolve the Presidential-Congressional impasse over the law and/or the constitutional division of the war power since the WPR's enactment, the courts have 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' 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 the courts are to be believed, 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, it seems unlikely that the courts will venture into this politically and constitutionally charged thicket.