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War Powers: What Are They Good for?: Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit Against the President

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War Powers: What Are They Good for?[†]: Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit Against the President

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[†] The inspiration for the title came from EDWIN STARR, *War, on* WAR & PEACE (Motown Record Co. 1970).

[*] J.D. Candidate, 2003, Indiana University School of Law—Bloomington; B.A., 2000, Indiana University. The inspiration for this Note came from a question posed in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 724 (4th ed. 2000). I would like to thank my family and friends for their support throughout my seven unforgettable years in Bloomington, as well as the other eighteen years of my life (especially Jessie Pope, who has put up with me during law school). I would also like to thank Professor Dawn Johnsen for her extremely helpful insight during the various stages of Note writing. I dedicate this Note to all those, alive or dead, who inspire me, especially my grandparents, Basil, Carmela, Marilyn, and Richard, Professor Glenn Gass, John, Paul, George, Ringo, Sweetness, 1720 N. Jordan, and of course Bea Arthur.

INTRODUCTION

Like father, like son. In 1990, then-President George H.W. Bush led the United States into war against Iraq—the Persian Gulf War. His son, current President George W. Bush, recently led the U.S. into another war with Iraq. While Congress did not officially declare war, it gave the President authorization to use military force in Iraq.[1] Important questions would have arisen if President Bush had sent troops to Iraq without congressional authorization—questions regarding the extent of constitutional and statutory war powers vested in both the President and Congress, questions regarding the widely held belief that the President is the sole proprietor of war powers,[2] and questions regarding the consequences for the President if Congress has not provided authorization for military force.

This Note addresses the situation in which the President commences a military operation without congressional authorization, and ninety days passes (per the War Powers Resolution).[3] More specifically within that context, this Note addresses a hypothetical situation that has yet to happen in American history: congressional passage of a law (over the President's veto) requiring removal of troops from a military operation.[4] Serious constitutional questions surface about which governmental branch, executive or legislative, has the power to determine the outcome of this particular situation. Would this hypothetical law pass constitutional muster? Could President Bush, as Commander-in-Chief of the United States Armed Forces,[5] be forced to remove those troops? If he did not remove the troops, what recourse would Congress have?

Part I examines the storied and tumultuous history of Congress and the President's fight over war powers. Part II considers the constitutionality of Congress passing a law requiring the removal of troops from a military operation, in light of Justices Frankfurter's and Jackson's *constitutional impasse* tests from *Youngstown Sheet & Tube Co. v. Sawyer*,[6] concluding that the President's constitutional power in the situation would not be as great as that of Congress's. Part III contemplates what would happen if the President ignores Congress and refuses to remove troops, and what Congress can do to enforce such a law, such as impeach, sue, or cut funding. While prior suits of this kind against the President have been dismissed on various grounds, this Note concludes that a lawsuit by members of Congress to enjoin the President from continued military action would prove to be successful in this situation.

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1. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (2002).

2. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 980 (1999).

3. *See* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000) (requiring the President to terminate United States Armed Forces military operations after sixty days if there has been no congressional authorization for the particular military operation, with a possible extension of an additional thirty days if the President feels it is necessary).

4. While there have been countless articles and books devoted to war powers, none has addressed this particular hypothetical situation.

5. U.S. CONST. art. II, § 2, cl. 1.

6. 343 U.S. 579 (1952).

I. THE HISTORY OF WAR POWERS

The roles of Congress and the President with regard to war powers have been debated since America's Founding Fathers wrote our Constitution. Only in the past sixty years has the President asserted a seeming monopoly over war powers,[7] prompting Congress in 1973 to pass the War Powers Resolution[8] over President Nixon's veto.[9] Even though the War Powers Resolution was supposed to restore the balance of war powers between Congress and the President,[10] Presidents have skirted the Resolution since its passage, and even greater, some have completely ignored it.[11]

A. The Text of the Constitution and the Framers' Intent

The Constitution itself provides Congress with many more duties and responsibilities pertaining to war than it does to the President. Congress is empowered to "provide for the common Defence,"[12] declare war,[13] grant letters of marque and reprisal,[14] make rules "concerning Captures on Land and Water,"[15] raise and support armies[16] and a navy,[17] make rules regulating the armed forces,[18] "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[19] provide for "organizing, arming, and disciplining, the Militia,"[20] and governing the parts of the militia that "may be employed in the Service of the United States."[21] The President's war powers are stated much more concisely: "The President 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."[22]

Constitutional scholars maintain that during the Constitutional Convention in 1787, it was clear that the Framers did not want to vest war-making powers solely in the hands of the Executive.[23] Believing that authorization of war should be part of the democratic process, the Framers "felt that the Congress, as the most representative

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7. *See infra* Parts I.B-D.

8. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)). The War Powers Resolution will be discussed in more depth *infra* Part I.C.

9. *See* Fisher, *supra* note 2, at 965.

10. War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2000).

11. *See infra* Part I.D.

12. U.S. CONST. art. I, § 8, cl. 1.

13. U.S. CONST. art. I, § 8, cl. 11.

14. *Id.*

15. *Id.*

16. U.S. CONST. art. I, § 8, cl.12.

17. U.S. CONST. art. I, § 8, cl. 13.

18. U.S. CONST. art. I, § 8, cl. 14.

19. U.S. CONST. art. I, § 8, cl. 15.

20. U.S. CONST. art. I, § 8, cl. 16.

21. *Id.*

22. U.S. CONST. art. II, § 2, cl. 1.

23. *See* Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2358 (2001).

body, was the best qualified to make this decision."[24] James Madison opposed putting the power to declare war in the hands of the same person who would conduct a war, arguing that one person could not be trusted to determine "whether a war ought to be commenced, continued or concluded."[25] Further, in The Federalist No. 69, Alexander Hamilton strongly implied that the reason for giving Congress such powers over war was to avoid complete control over the military by one person, as was the case with the king of Great Britain.[26] "The President will have *only the occasional command* of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."[27] The Legislature, by contrast, is in charge of declaring war, as well as raising and regulating fleets and armies.[28]

The Framers further debated whether the Constitution should give Congress the power to "make" war, or the power to "declare" war.[29] In deciding to use the word "declare" rather than "make," the Framers wanted to allow the President to quickly initiate war if the United States or its troops abroad were suddenly attacked, with no time to gain the consent of Congress.[30] In any other situation, however, Congress would have the sole power to initiate war,[31] and the President's power to repel sudden attacks "did not extend to taking the country into full-scale war or to mount an offensive attack against other nations."[32]

B. The Downfall of Congressional War Powers: World War II and Korea

Until World War II, the balance of war powers between Congress and the President was largely maintained.[33] President Franklin Roosevelt altered this balance by expanding the President's power over the military "to an unprecedented degree."[34] At the end of the 1940s, there was a widely held belief that Congress had compromised much of its war powers, allowing the President to use the Armed Forces at his will.[35] As a writer for the *New York Times* stated, many Americans believed that the President's power to repel sudden attacks "had developed into an undefined power . . . to employ without congressional authorization the armed forces in the protection of American rights and interests abroad whenever necessary."[36]

Congress attempted to curb presidential control by directing standing committees to

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24. *Id.*

25. 6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906).

26. THE FEDERALIST NO. 69 (Alexander Hamilton).

27. *Id.* (emphasis added).

28. *Id.*

29. Fisher, *supra* note 2, at 939.

30. *Id.*; *see* Hahn, *supra* note 23, at 2357.

31. *See* Hahn, *supra* note 23, at 2355-56.

32. Fisher, *supra* note 2, at 939.

33. NATIONAL COMMITMENTS, S. REP. NO. 91-129 (Comm. on Foreign Relations), 91ST CONG. (1st Sess. 1969).

34. *Id.* at 14.

35. *Id.* at 15.

36. Edward S. Corwin, *Who Has the Power to Make War?*, N.Y. TIMES, July 31, 1949, (Magazine), at 14.

keep watch over executive activities,[37] while President Roosevelt assured Congress that its power would return to normal once World War II ended.[38] Despite these assurances, Roosevelt's practice of skirting constitutional war powers requirements started a trend for future Presidents. Roosevelt's successor, Harry Truman, single-handedly involved the United States in the Korean War without seeking Congress's approval,[39] beginning a "new era in the exercise of presidential prerogative."[40] This marked the first time that a President, on his own, involved the United States in a major war, while Congress sat idly by.[41] In 1952, a steel workers' strike threatened to stop the supply of arms and ammunition to U.S. troops.[42] Arguing that such a stoppage constituted a national emergency, President Truman attempted to further wield his presidential power by issuing an executive order to seize steel mills.[43] The Supreme Court struck down President Truman's executive order in *Youngstown Sheet & Tube Co. v. Sawyer*.[44]

Justice Black, writing for the *Youngstown* majority, found that President Truman overstepped his constitutional bounds by issuing the order,[45] and that "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[46] In addition to Justice Black's opinion, *Youngstown* contained four concurring opinions and one dissenting opinion, the most significant of which are the concurring opinions of Justices Frankfurter and Jackson.[47] Focusing on the issue of separation of powers, both of these concurrences contained appropriate constitutional frameworks to use in determining when a President has stepped into the constitutional realm of Congress. These two concurring opinions will be analyzed in Parts II.B and II.C.

C. Vietnam and the War Powers Resolution

After the Korean War, the next major U.S. military conflict was the Vietnam War. As well as was both an unsuccessful and costly war for the United States, the Vietnam War was a "marked example of unilateral executive initiative in leading U.S. military

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37. Fisher, *supra* note 2, at 946.

38. In a message presented to Congress in 1942, President Roosevelt stated that "[w]hen the war is won, the powers under which I act automatically revert to the people—to whom they belong." 88 CONG. REC. 7044 (daily ed. Sept. 7, 1942).

39. Fisher, *supra* note 2, at 946.

40. Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely?*, 24 OKLA. CITY U. L. REV. 233, 279 (1999).

41. Fisher, *supra* note 2, at 946.

42. Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1156 (2001).

43. *Id.*

44. 343 U.S. 579 (1952).

45. *Id.* at 587-88.

46. *Id.* at 589.

47. The two respective tests laid out by Justices Frankfurter and Jackson in *Youngstown* are applicable when there is a "constitutional impasse" or "actual confrontation" between Congress and the President. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 105-13 (1990); Corn, *supra* note 42, at 1157.

affairs."[48] Based on later-discredited facts, President Lyndon Johnson underhandedly convinced Congress in August 1964 to pass the Gulf of Tonkin Resolution,[49] which authorized President Johnson to resist armed attacks against U.S. forces and "prevent further aggression."[50] Under the Gulf of Tonkin Resolution, President Johnson felt that he did not need a congressional declaration of war to lawfully engage in military operations in Vietnam.[51]

In 1969, Congress began to question the President's (then Richard Nixon) power to act unilaterally with regard to the war, after the situation in Vietnam became increasingly unfavorable for United States forces.[52] Mentioning the intent of the Framers as well as historical examples from past military conflicts, members of Congress lambasted the Gulf of Tonkin Resolution, as well as Presidents Johnson's and Nixon's actions, as unconstitutional.[53] After another few years of unsuccessful operations in Vietnam and President Nixon's continued disregard of congressional pleas to obey the constitutional war powers structure, Congress passed the War Powers Resolution[54] over President Nixon's veto.[55]

The War Powers Resolution was Congress's attempt to restore the constitutional balance of war powers so as to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities."[56] A main component of the War Powers Resolution is the requirement that the President must consult with Congress before entering into military operations.[57] This consultation requirement is not meant to be discretionary, but rather, the President is "obliged by law to consult [with Congress] before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged."[58]

Further, when there is no congressional declaration of war, the War Powers Resolution requires the President to submit a report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate within forty-eight hours of any introduction of American troops into hostilities.[59] Once this report is submitted to Congress, the President must end any use of the Armed Forces within sixty days

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48. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 771 (1996).

49. H.R.J. Res. 1145, 88th Cong., Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Pub. L. No. 91-672, 812, 84 Stat. 2055 (1971). *See also* Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 24 (2000).

50. H.R.J. Res. 1145.

51. Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T STATE BULL. 474, 488 (1966).

52. S. REP. NO. 91-129 (1969).

53. *Id.*

54. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541-1548 (2000).

55. RICHARD NIXON, VETOING HOUSE JOINT RESOLUTION 542, A JOINT RESOLUTION CONCERNING THE WAR POWERS OF CONGRESS AND THE PRESIDENT, MESSAGE FROM THE PRESIDENT, H.R. DOC. NO. 93-171 (1973).

56. War Powers Resolution § 2(a), 50 U.S.C. § 1541(a) (2000).

57. War Powers Resolution § 3, 50 U.S.C. § 1542 (2000).

58. 119 CONG. REC. 33,550 (1973)(explanation by Senator Jacob Javits of the Conference Report).

59. War Powers Resolution § 4(a), 50 U.S.C. § 1543(a) (2000).

unless Congress declares war or authorizes use of military force.[60] The President can also extend the sixty-day deadline by an additional thirty days if it is necessary.[61]

D. Presidential Disregard of the War Powers Resolution

Since the passage of the War Powers Resolution, Presidents have generally claimed to have complied with its provisions, although their compliance has not always been complete.[62] Many of the U.S. military conflicts after enactment of the War Powers Resolution have been relatively minor.[63] The Persian Gulf War and the United States' military involvement in Kosovo, however, have marked yet another impasse in congressional attempts to legitimize the provisions of the War Powers Resolution.

1. The Persian Gulf War

Following Iraq's invasion of Kuwait on August 2, 1990, President George Bush immediately deployed U.S. Armed Forces to aid Kuwait's troops, and levied economic sanctions against Iraq.[64] One week later, President Bush reported to Congress, "consistent with the War Powers Resolution."[65] In his report, President Bush proclaimed that the mission was defensive, with the purpose of deterring Iraqi aggression.[66] On October 23, 1990, Congress enacted a bill to provide extra pay for U.S. troops in the Persian Gulf, but some members of Congress expressed concerns that President Bush was acting without congressional authorization or consultation.[67]

By November 1990, there were approximately 230,000 U.S. troops in the Middle

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60. War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000).

61. *Id.*

62. *See* SHANE & BRUFF, *supra* note 48, at 807-17, 836-44.

63. Examples include the following: President Carter's attempted military rescue of American hostages in Iran in 1980, *see id.* at 808-10; President Reagan's attempts to deploy Marines to Lebanon in 1982, *see id.* at 812-13; President Reagan's use of the Armed Forces to help stabilize the government of Grenada in 1983, *see id.* at 814; the United States' bombing of Libya in 1986, *see id.* at 814-15; protection of Kuwaiti oil tankers in the Persian Gulf in the wake of the Iran-Iraq war in 1986, *see id.* at 815; President George Bush's invasion of Panama in 1989 to end the rule of General Manuel Noriega, *see id.* at 815-16; the deployment of Marines to Liberia in 1990 to evacuate U.S. nationals during a rebellion against the Liberian government, *see id.* at 816-17; the deployment of U.S. troops to Somalia to help stabilize the Somalian government in the wake of a new government in 1992, *see id.* at 839-41; President Clinton's authorization of air strikes in Bosnia in the mid-'90s, *see id.* at 841-42; the deployment of U.S. troops in the mid-'90s to help restore a democratically elected government in Haiti, *see id* at 842-44.

64. *Id.* at 817.

65. Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East, 26 WKLY COMP. PRES. DOC. 1225 (Aug. 9, 1990); *see also* Letter to the Speaker of the House and the President Pro Tempore of the Senate on Additional Economic Measures Taken with Respect to Iraq and Kuwait, 26 WKLY COMP. PRES. DOC. 1229 (Aug. 9, 1990).

66. 26 WKLY COMP. PRES. DOC. at 1225.

67. *See* SHANE & BRUFF, *supra* note 48, at 821.

East, and President Bush declared that their mission was now offensive.[68] President Bush's unilateral actions, turning a supposed defensive mission into an offensive one, prompted two unsuccessful lawsuits against the President.[69] Congressional apathy for President Bush's actions apparently subsided. On "the eve" of the initial bombing campaign in Iraq,[70] Congress statutorily authorized the use of military force against Iraq.[71] This authorization was the first of its kind since World War II.[72]

2. Kosovo

After the Persian Gulf War, the United States was involved in several small military conflicts around the world,[73] including the former Yugoslavia. Various new countries had formed following the breakup of the former Yugoslavia. As a result, there was a great degree of conflict between the many ethnicities within these new states. In March 1999, despite no authorization from Congress, President Clinton ordered air and missile strikes against the Federal Republic of Yugoslavia to protect the province of Kosovo.[74] Even though there had not been any congressional authorization for the strikes, and they were not defensive, President Clinton claimed that the attacks were well within his constitutional powers as Commander-in-Chief of the United States Armed Forces.[75]

Members of Congress were incensed over President Clinton's unilateral use of force.[76] Particularly angered was Representative Tom Campbell, who felt that President Clinton had violated the War Powers Resolution by maintaining a military operation for longer than sixty days without congressional assent.[77] Congressman Campbell, along with thirty other members of Congress, filed a lawsuit against President Clinton, seeking a declaration that President Clinton had violated the War Powers Resolution and that the military operation in Kosovo was unconstitutional.[78]

The court dismissed the case, however, finding that the plaintiffs lacked standing because "[a]n asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court."[79] Further, the

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68. *Id.* at 820.

69. *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (suit by fifty-four members of Congress dismissed because it was not ripe); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (Sergeant's suit dismissed for lack of ripeness).

70. *See* Kahn, *supra* note 49, at 25.

71. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-01, 105 Stat. 3 (1991).

72. *See* SHANE & BRUFF, *supra* note 48, at 836.

73. *See id.* at 839-44.

74. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WKLY. COMP. PRES. DOC. 527-28 (Mar. 26, 1999).

75. *Id.*

76. *See* Corn, *supra* note 42, at 1176-78.

77. Press Release, Statement by Congressman Campbell on Kosovo, *at* http://www.house.gov/campbell/990324.htm (Mar. 24, 1999) (last visited Jan. 2002) (site no longer available); *see also* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000).

78. *See* Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999).

79. *Id.* at 41 (quoting Allen v. Wright, 468 U.S. 737, 754 (1984)).

court determined that the plaintiffs lacked standing because they were unable to show that their inability to vote on the military operation in Kosovo represented a "constitutional impasse" or "actual confrontation" [80] between the President and Congress, or that their votes "would have been sufficient to defeat (or enact) a specific legislative act." [81] The Court of Appeals for the District of Columbia ("D.C. Circuit") affirmed the District Court's dismissal of the case.[82]

E. Conclusion

In 1998, the House of Representatives passed a bill that attempted to limit the President's ability to conduct war, providing that no funds "may be used to initiate or conduct offensive military operations by [U.S. Armed Forces] except in accordance with the war powers clause of the Constitution, which vests in Congress the power to declare and authorize war."[83] The bill, however, did not pass in the Senate. Had both houses of Congress passed this bill, it certainly would have been a step toward Congress regaining its constitutional war powers.[84] Even though zealous Presidents have eroded congressional war powers in the last sixty years, there is still hope for Congress, especially when it does not authorize military action.

II. CONGRESSIONAL SILENCE OR DISAPPROVAL OF A MILITARY OPERATION

Per section 5(b) of the War Powers Resolution, the President has sixty days of free rein to engage in military hostilities without congressional authorization.[85] Once that sixty-day period has tolled (and Congress has not authorized the action), Congress has full constitutional power to pass a law requiring the removal of U.S. troops from that military hostility. Not only is this contemplated by the War Powers Resolution,[86] but the Framers of the Constitution would also support such a removal, as would Justices Frankfurter and Jackson using their tests from *Youngstown*. Assuming the sixty-day period has passed, the President would be powerless to challenge Congress's law in this situation.

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80. *Id.* at 43.

81. *Id.* at 42 (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997)).

82. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).

83. H.R. 4103, 105th Cong. § 8106 (1998).

84. *See* Fisher, *supra* note 2, at 1008; Hahn, *supra* note 23, at 2391.

85. *See* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000) (If the President does not get congressional approval of a military action within sixty days, he must terminate the action, or he can extend the deadline an additional thirty days if he feels that it is an "unavoidable military necessity."); *see also* Dennis J. Kucinich, *The Power to Make War*, 34 LOY. L.A. L. REV. 61, 65-66 (2000).

86. War Powers Resolution § 5(c), 50 U.S.C. § 1544(c) (2000):

> Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

For a discussion of why section 5(c) of the War Powers Resolution is unconstitutional, see *infra* Part III.B.1.

A. Framers' Intent

It is clear that the Framers would have been categorically opposed to the President taking unilateral military action without congressional authorization, except when the United States or its troops abroad were suddenly attacked and the President needed to repel such attacks.[87] This power did not carry over into initiating offensive attacks.[88] Rather, a self-defensive action "would preserve the status quo and thus enable congressional deliberation to go forward with respect to the larger issues of whether or not to go to war."[89]

Aware of the horrors of the British monarchy and the complete unilateral control of the King over the British military,[90] the Framers desired a more balanced system of war powers, where one person (the President) could not determine "whether a war ought to be commenced, continued or concluded."[91] Therefore, the President was only able to command the military "as by legislative provision may be called into the actual service of the Union."[92]

Moreover, the text of the Constitution explicitly bestows on Congress the right to declare war[93] and to raise and maintain Armies[94] and a Navy.[95] It is only after Congress declares war, or statutorily authorizes a military operation, that the President may assume command of the Armed Forces.[96] This is a clear indication that the Framers would not have allowed a President to take unilateral military action without congressional assent. Given the amount of constitutional control over initiation and support of military operations that the Framers vested in Congress, compared to the relatively limited control the Constitution gives to the President, one can confidently conclude that the Framers would support a law by Congress requiring removal of U.S. troops from a military operation in the absence of prior congressional authorization for that operation.

B. Application of Justice Frankfurter's Test from Youngstown

Justice Frankfurter's opinion used past presidential and congressional practice as a guide for interpreting separation of powers issues.[97] He used a three-part test to

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87. *See supra* note 30 and accompanying text; *see also* Sheffer, *supra* note 40, at 258-59 (discussing *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), and President Lincoln's authority to take defensive actions against the Confederacy after the attack on Fort Sumter).

88. *See supra* note 31 and accompanying text.

89. *See* Kahn, *supra* note 49, at 20.

90. THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The king of Great Britain . . . [has] at all times the entire command of all the militia within [his] several jurisdictions . . . [and the king's power] extends to the *declaring* of war and the *raising* and *regulating* of fleets and armies.") (emphasis in original).

91. 6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906).

92. *Supra* note 90.

93. U.S. CONST. art. I., § 8, cl. 11.

94. U.S. CONST. art. I., § 8, cl. 12.

95. U.S. CONST. art. I., § 8, cl. 13.

96. *See* U.S. CONST. art. II., § 2, cl. 1 ("The President shall be Commander in Chief . . . when [the Armed Forces are] called into the actual Service of the United States.").

97. *Youngstown*, 343 U.S. at 593-614 (Frankfurter, J., concurring).

determine that President Truman's actions were unconstitutional. The first requirement in the test is whether the President's practice had been "systematic, unbroken . . . [and] long pursued."[98] This, in essence, would work to establish some legitimacy to the President's actions, as opposed to when the President had just recently started a particular practice. The second element is whether Congress has had notice of this established practice.[99] "This is essential because a conclusion that an executive exercise of power is based on the Constitution has the potential consequence of disabling the Congress from participating in such exercise,"[100] so there needs to be a showing of Congress's acquiescence in the President's practice.[101] The third requirement is that the President's practice must have been "never before questioned" by Congress.[102] If Congress had previously challenged the President's practice, it would tend to prove that Congress felt the President's actions were unconstitutional.[103]

The first element in Justice Frankfurter's test, "systematic, unbroken . . . [and] long pursued" past practice by the President,[104] would lean slightly in favor of Congress. While Presidents have not always strictly complied with the requirements of constitutional war powers or the War Powers Resolution,[105] there has been some sort of congressional authorization for most U.S. military actions.[106] One would be hard-pressed to say that Presidents have always complied with their constitutional and statutory obligations in times of war. However, the President's control over U.S. military actions without a declaration of war or congressional authorization cannot be considered a longstanding practice because it has arguably never occurred.[107]

Justice Frankfurter's second and third requirements, therefore, would also fall in favor of Congress. Without a longstanding presidential practice of military control absent any sort of congressional assent, obviously Congress cannot have had notice of or have challenged such a practice. If the President were to argue that past Presidents have unilaterally controlled military operations,[108] and thus Congress has been on notice, the President would still fail. Simply because there has been a history of constitutionally questionable practice does not make that practice de facto constitutional.[109]

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98. *Id.* at 610.

99. *Id.*

100. Corn, *supra* note 42, at 1159.

101. *Id.*

102. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

103. Corn, *supra* note 42, at 1159.

104. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

105. *See supra* Parts I.B-D.

106. *See supra* Parts I.B-D.

107. A possible exception would be President Clinton's military operation in Kosovo. *See supra* Part II.D.2. Another possible exception would be President Reagan's unilateral control over the 1983 military operation in Grenada. However, the conflict lasted only one week, so there was insufficient time for much of a controversy to unfold. *See* SHANE & BRUFF, *supra* note 48, at 814.

108. *See supra* Parts I.B-D.

109. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . . ."); *see also* INS v. Chadha, 462 U.S. 919, 959 (1983) (striking down the longstanding congressional use of the legislative veto); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)

In conclusion, as opposed to when war is declared or statutorily authorized, a President acting unilaterally without congressional authorization would plainly fail Justice Frankfurter's test. Therefore, a law requiring removal of U.S. forces would be considered constitutional by Justice Frankfurter. Any presidential challenges to such a law would not hold any ground. Thus, in the hypothetical situation presented in this Note, Congress would clearly pass Justice Frankfurter's test from *Youngstown*.

C. Application of Justice Jackson's Test from Youngstown

In his concurring opinion, Justice Jackson set forth three different scenarios where a possible conflict could arise between Congress and the President.[110] The first instance is when the President acts according to explicit or implied congressional authorization.[111] Here, the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[112] The second instance is a "zone of twilight," where Congress has not spoken (one way or the other) about the particular practice, and therefore there is an element of uncertainty regarding the roles of both the President and Congress.[113] In these situations, "congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility," and the test of power should rely on contemporary circumstances, "rather than on abstract theories of law."[114] The third instance occurs when the President acts in direct conflict with Congress's express or implied will.[115] Here, the President's power "is at its lowest ebb" because he must rely solely on his constitutional powers, subtracted from any of Congress's constitutional powers.[116] Justice Jackson noted that a finding for the President in the third instance would virtually disable Congress's power over that particular subject, and could possibly disrupt the constitutional equilibrium between the two branches.[117]

Under Justice Jackson's *Youngstown* test, Congress clearly has the authority to pass a law requiring the President to remove U.S. Armed Forces from a military hostility after the sixty-day (or ninety-day after extension) War Powers Resolution period has passed.[118] By refusing to acknowledge such a congressional mandate, the President would be acting against the express will of Congress, which means that the President's power would be "at its lowest ebb."[119]

Here, "the President must have exclusive constitutional authority in order for his

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("[N]o one acquires a vested or protected right in violation of the Constitution by long use . . . ."); Powell v. McCormack, 395 U.S. 486, 546-47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less constitutional at a later date.").

110. *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

111. *Id.* at 635.

112. *Id.*

113. *Id.* at 637.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 637-38.

118. *See* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000).

119. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

action to be legitimate."[120] The Constitution makes it clear that the President may only take command of the Armed Forces when they are "called into the actual Service of the United States."[121] Congress is the only governmental body authorized by the Constitution to call the Armed Forces into service.[122] To hold in favor of the President in a situation like this would be to "[disable] the Congress from acting upon the subject,"[123] virtually nullifying congressional constitutional war powers and giving the President free reign over all aspects of war making. Therefore, a Presidential challenge to a law requiring him to remove troops from a military operation in the absence of congressional authorization for that action would fail Justice Jackson's test.

D. Conclusion

The President's constitutional power over the Armed Forces begins when Congress declares war or statutorily authorizes military force.[124] While the War Powers Resolution (and not the Constitution) seemingly allows the President to act unilaterally for sixty days in a military operation,[125] if Congress were to pass a law requiring the President to remove troops from that military operation (or a law cutting off funds for that operation), the law would unquestionably be considered constitutional. The constitutional balance would be in favor of Congress, and not the President.

III. CONGRESSIONAL AVENUES OF ENFORCEMENT FOR A LAW REQUIRING THE PRESIDENT TO REMOVE TROOPS FROM A MILITARY OPERATION

Congress would have several avenues available to enforce its constitutional authority over the President should the President disregard a law requiring removal of U.S. Armed Forces from a military operation (or cutting off funds for the military operation). The most drastic of these avenues would be for Congress to impeach the President.[126] A less drastic measure would be for members of Congress to sue to enjoin the President from continuing the military operation. A suit of this kind would have the most likelihood of success if more than half of the members of Congress (preferably two-thirds) joined in the suit. Third, and perhaps the least drastic, Congress could use

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120. Corn, *supra* note 42, at 1160 (citing *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)).

121. U.S. CONST. art. II, § 2, cl. 1.

122. *See* U.S. CONST. art. I, § 8, cl. 11 (Congress has the power to declare war.).

123. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

124. The exception is cases of sudden attack against the United States or its troops abroad, where the President can use force to repel such attacks. *See supra* note 30 and accompanying text.

125. *See* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000).

126. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."); U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

the power of the purse to cut off spending for such an operation.[127] It is assumed that the President would veto such a bill, whether the bill proposed to remove troops or cut funding for the operation, but that Congress would pass the law over his veto.[128]

A. Impeachment

In a government of checks and balances and separation of powers, impeachment is Congress's check on the President. If the President were unable to convince Congress to provide authorization for a military operation, a continuation of that operation would be an abuse of the President's constitutional power.[129] Such an abuse is impeachable.[130] However, impeachment proceedings are so rare[131] that it would be highly unlikely that Congress would take this route.

Even if two-thirds of Congress had voted to override the President's veto regarding removal of troops, there is no guarantee that the House of Representatives would initiate impeachment proceedings, or that two-thirds of the Senate would vote to impeach the President. This is especially true considering the infrequency of presidential impeachment and the fact that no President has ever been removed from office via impeachment.[132] Partisan politics might further hamper the possibility of impeachment, since Senators (and Representatives) generally vote along party lines.

Further, if the past is a prologue to the future, an alleged abuse of war powers was explicitly rejected by the House Judiciary Committee as an article of impeachment of

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127. *See* Sanchez-Espinosa v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) ("Congress has formidable weapons at its disposal[, such as] the power of the purse . . . ."); *see also* U.S. CONST. art. I, § 7, cl. 1 (Congress has the power to pass "All Bills for raising Revenue."); U.S. CONST. art. I, § 8, cl. 12 (Congress shall "raise *and support* Armies.") (emphasis added); U.S. CONST. art. I, § 8, cl. 13 (Congress shall "provide *and maintain* a Navy.") (emphasis added); U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). This Note does not deal with this issue directly, but rather assumes that cutting (or not appropriating) funding for military operations is always an option. This Note also assumes that in dealing with the specific hypothetical here (an event that has never occurred), Congress would rather choose to sue to enjoin the President from continuing a military operation, in an effort to restore the balance in war powers that has been lost over the last six decades.

128. Presumably, if Congress were to pass a bill over the President's veto requiring the President to remove troops from a military operation, Congress would also pass a bill over the President's veto that would cut off funding for that military operation.

129. *See supra* Part II.

130. *See* Fisher, *supra* note 2, at 1005.

131. Only three Presidents have ever gone through impeachment proceedings. Andrew Johnson in 1868 came one vote shy of being convicted by the Senate after firing the Secretary of War without the Senate's consent. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 251-52 (4th ed. 2000). In 1974, impeachment proceedings were underway for Richard Nixon's involvement in the Watergate scandal; however, Nixon resigned before he could be removed from office. *See id.* at 640-42. The House of Representatives impeached Bill Clinton in December 1998 for allegedly committing perjury, but the Senate acquitted him in February 1999. *See id.* at 735.

132. *See supra* note 131.

Richard Nixon in 1974.[133] None of this is to suggest that it would be impossible for Congress to impeach a President for failing to remove troops after Congress passed a law directing him to do so. It tends to show that a successful impeachment would be unlikely, however.

B. A Lawsuit by Members of Congress to Enjoin the President's Continued Military Activities

As an alternative to impeachment, after passing the law requiring the removal of troops from a military operation over the President's veto, members of Congress could sue the President, seeking an injunction requiring the President to enforce Congress's law and remove troops. In the past, congressional suits challenging the President's constitutional war powers and the President's powers under the War Powers Resolution in the wake of military conflicts have been unsuccessful. There were two suits against President Ronald Reagan, one against President George H.W. Bush, and one against President Bill Clinton.[134]

In *Sanchez-Espinosa v. Reagan*,[135] the District Court for the District of Columbia dismissed a suit by twelve members of the House of Representatives, who challenged President Reagan's actions in Nicaragua under the War Powers Resolution. The court said that the issue was nonjusticiable, since Congress was at the time considering the validity of President Reagan's actions.[136] As such, if the court were to step in, it would interrupt the institutional roles of the respective branches of the government.[137]

A year later, in 1984, eleven members of the House challenged President Reagan's authority to unilaterally control the week-long military operation in Grenada in late

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133. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H. REP. NO. 93-1305, 11 (1974).

134. Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000) (suit by twenty-six (with five more joining the suit later) members of the House of Representatives seeking declaration that President Clinton violated the War Powers Clause of the Constitution and the War Powers Resolution by conducting air strikes in Yugoslavia without congressional authorization dismissed because the Representatives lacked standing); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (suit by fifty-four members of Congress seeking to enjoin President Bush from going to war against Iraq without first obtaining congressional authorization dismissed as not ripe for adjudication); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985). As a side note, there has been one case against President George W. Bush, which was dismissed with prejudice for lack of standing. Callan v. Bush, No. 4:03CV3060 (D. Neb. Apr. 30, 2003), *available at* http://news.findlaw.com/hdocs/docs/iraq/cllnbsh43003mem.pdf. However, this suit was filed by an former member of Congress, Clair A. Callan, who served as a Representative from Nebraska from 1965 to 1967. *GoMemphis: America At War*, http://staging.gomemphis.com/mca/america_at_war/article/0,1426,MCA_945_1928261,00.html. However, since former Rep. Callan is no longer a member of Congress, the suit has little bearing on the hypothetical situation or the analysis presented in this Note.

135. 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

136. *Id.* at 600.

137. *Id.*

1983.[138] The D.C. Circuit upheld a district court holding, which dismissed the case as moot, since U.S. troops had long since been removed from Grenada, and thus, there was no presidential activity that could be enjoined.[139] The suits against Presidents Bush (*Dellums v. Bush*[140]) and Clinton (*Campbell v. Clinton*[141]) will be discussed below in Part III.B.2.

What these suits have lacked, among other things, is the backing of a majority of Congress. There has never been a suit against the President involving a majority of the members of Congress. If Congress were to pass a law over the President's veto, an ensuing suit by members of Congress would also rely on the War Powers Resolution and the War Powers Clause of the Constitution. A court would likely find in favor of the members of Congress, and not dismiss the suit for lack of standing, if two-thirds of Congress joined in the suit (or authorized certain members to sue on their behalf). As shown below, the best avenue of relief would be for the members of Congress to sue under a separation of powers conflict theory, rather than strictly under the War Powers Resolution.

1. The Invalidity of Section 5(c) of the War Powers Resolution

Presumably, members of Congress would sue the President for not complying with the War Powers Resolution.[142] It is in this respect that it is both important and necessary that Congress passes a law over the President's veto, rather than just passing a concurrent resolution without presentment to the President calling for the end of a military operation, pursuant to section 5(c) of the War Powers Resolution.[143] Applying *INS v. Chadha*[144] to the War Powers Resolution, section 5(c) is unconstitutional because it does not follow the proper constitutional process of lawmaking.

In *Chadha*, the Supreme Court held unconstitutional section 244(c)(2) of the Immigration and Nationality Act, which authorized one House of Congress to pass a resolution to invalidate an executive branch decision to keep a deportable alien in the United States. The Court relied on the Presentment Clause of the Constitution,[145]

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138. *Conyers*, 765 F.2d 1124.

139. *Id.* at 1127.

140. 752 F. Supp. 1141 (D.D.C. 1990).

141. 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

142. This is assuming that the President has not complied with the War Powers Resolution by consulting with Congress before and during the military conflict. *See generally* War Powers Resolution §§ 2-9, 50 U.S.C. §§ 1541-1548 (2000). If the President had complied with the consultation requirements of the War Powers Resolution, and Congress had still not authorized the military operation after sixty days, *see* War Powers Resolution §§ 3-5, 50 U.S.C. §§ 1542-44 (2000), Congress would undoubtedly have a successful claim that the President did not comply with section 5(b) of the War Powers Resolution, which requires the President to remove troops after sixty days if Congress has not approved of the military operation.

143. "[A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." War Powers Resolution § 5(c), 50 U.S.C. § 1544(c) (2000).

144. 462 U.S. 919 (1983).

145. U.S. CONST. art. I, § 7, cl. 3:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and

finding that, in allowing the President to have the veto power, the Framers were careful "to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."[146] As such, the Court struck down section 244(c)(2) because it was not "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."[147]

Similar to the unconstitutional section 244(c)(2) in *Chadha*, section 5(c) of the War Powers Resolution authorizes Congress, by concurrent resolution, to require the President to remove troops from a military conflict.[148] Section 5(c) is a congressional attempt to invalidate an executive branch decision to keep troops involved. To be constitutional, and within the holding in *Chadha*, the concurrent resolution under section 5(c) would have to follow all of the requirements of the Presentment Clause, allowing the President a chance to veto the resolution if so desired. Section 5(c) is unconstitutional because it merely allows one House of Congress to unilaterally act (with the approval of the other House) to require the President to remove troops, with or without his consent. Thus, for a successful congressional claim of unconstitutional behavior on the part of the President in this context, it is necessary for both Houses to pass a law, allow the law to go to the President, and then repass the law over the President's veto. Congress cannot expect to rely on section 5(c) of the War Powers Resolution.

2. The Shortcomings of the Challenges in *Dellums* and *Campbell*

The two most recent congressional attempts at challenging the President's constitutional war powers authority were both dismissed. *Dellums v. Bush*[149] was dismissed for lack of ripeness and *Campbell v. Clinton*[150] was dismissed because the congressional challengers lacked standing.

a. *Dellums v. Bush*

In *Dellums*, fifty-four members of Congress sought to enjoin President Bush from pursuing any offensive attacks against Iraq without first receiving a declaration of war or statutory authorization from Congress. President Bush argued that the case had to be dismissed because determining whether a military operation is an offensive one is a political question, and therefore nonjusticiable. He claimed that the Constitution is designed "to have the various war- and military-related provisions [relating to Congress and the President] construed and acting together, . . . [which means that it is

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House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .

146. *Chadha*, 462 U.S. at 947-48.

147. *Id.* at 957-58.

148. War Powers Resolution § 5(c), 50 U.S.C. § 1544(c) (2000).

149. 752 F. Supp. 1141 (D.D.C. 1990).

150. 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

not] a legal question."[151] The court, however, thought differently. Relying on *Mitchell v. Laird*,[152] the court posited that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause."[153] Further, the court pointed out that "courts have historically made determinations about whether this country was at war for many other purposes—the construction of treaties, statutes, and even insurance contracts[,] . . . even in the absence of a congressional declaration."[154]

Next, the court dealt with the issue of standing, and held that the members of Congress did indeed have standing to sue. Using the standing test from *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*[155] and *Allen v. Wright*,[156] the plaintiff has to allege: "(1) that he personally suffered actual or threatened injury, and (2) that the 'injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable action."'"[157] The court found that the members of Congress had alleged a constitutional injury because "members of Congress plainly have an interest in protecting their right to vote on matters entrusted to their respective chambers by the Constitution."[158]

The court also found that there was a "real and immediate" threatened injury, because once the President goes to war, Congress would lose its constitutional right to declare war.[159] Finally, the court held that the members of Congress had no more legislative remedies available, because even a joint resolution advising the President not to go to war with Iraq "would not be likely to stop [him] . . . if he is persuaded that the Constitution affirmatively gives him the power to act otherwise."[160] The court further noted that the legislative remedies of impeachment and cutting military funding "would not afford the relief sought by the plaintiffs—which is the guarantee that they will have the opportunity to debate and vote on the wisdom of initiating a military attack against Iraq before the United States Military becomes embroiled in belligerency with that nation."[161]

After determining that the members of Congress had standing, the court then moved to the issue of ripeness, holding that the claim was not ripe. First, the court noted that Congress had not clearly stated either way whether or not it supported the military effort against Iraq.[162] "[A] dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."[163] The court then went on to say that only a majority of Congress would be

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151. *Id.* at 1144-45.

152. 488 F.2d 611 (D.C. Cir. 1973).

153. *Dellums*, 752 F. Supp. at 1146.

154. *Id.* (citing N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946); Prize Cases, 67 U.S. 635 (1863)).

155. 454 U.S. 464, 472 (1982).

156. 468 U.S. 737, 751 (1984).

157. *Dellums*, 752 F. Supp. at 1147.

158. *Id.*

159. *Id.*

160. *Id.* at 1149.

161. *Id.*

162. *See id.* at 1149-50.

163. *Id.* at 1150 (quoting Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J.,

able to obtain relief from a court, because only a majority of Congress has the competency to declare war.[164] Further, the court held that the President had not clearly shown a military commitment "to a definitive course of action" that could necessarily be categorized as "war," which meant that President Bush's actions could also not support a claim of ripeness, therefore, the case was dismissed.[165]

b. *Campbell v. Clinton*

In *Campbell*,[166] twenty-six members of the House of Representatives (five more Representatives joined the suit later) sued President Clinton, seeking a declaration that the President had violated the War Powers Clause of the Constitution and the War Powers Resolution by not obtaining a declaration of war or statutory authorization from Congress for initiating and continuing air strikes in Kosovo.[167] The suit came after several unsuccessful attempts by Congress to both support and terminate the Kosovo military operation.[168] Nonetheless, the plaintiffs sought an order demanding the removal of troops within thirty days.[169] In his defense, President Clinton filed a motion to dismiss, arguing that the plaintiffs lacked standing, that the issue presented was a nonjusticiable political question, and that the issues were not ripe for resolution by a court.[170]

The court quickly dismissed the President's political question claim,[171] and moved on to a determination of whether or not the members of Congress had standing to sue. To have standing, the plaintiffs would have had to show that they "suffered an invasion of a legally protected interest which is concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process."[172] In this case, they lacked standing because their claim against the President was "too generalized an injury to provide a legislator with standing."[173]

Regardless, the members of Congress argued under *Coleman v. Miller*[174] that the

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concurring)).

164. *Id.* at 1151.

165. *Id.* at 1152.

166. 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

167. Campbell, 52 F. Supp. 2d at 39.

168. *Id.* at 37-39 (The Senate passed a concurrent resolution authorizing air strikes, but the House rejected it by a 213-213 vote; the House rejected a joint resolution declaring war against the Federal Republic of Yugoslavia; the House rejected a concurrent resolution that would have required President Clinton to remove troops, pursuant to section 5(c) of the War Powers Resolution; the House passed a bill prohibiting Department of Defense funds to be used for deploying grounds troops with specific congressional authorization; and Congress passed the Emergency Supplemental Appropriations Act, which gave supplemental appropriations for the conflict, but contained no section that was meant to satisfy the congressional authorization requirement of the War Powers Resolution.).

169. *Id.* at 39.

170. *Id.*

171. *Id.* at 40 n.5 (explaining that not all War Powers Clause claims involve a nonjusticiable political question).

172. *Id.* at 41 (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)).

173. *Id.* at 42.

174. 307 U.S. 433 (1939) (The Supreme Court upheld standing for half of the Kansas state

President injured the members of Congress by nullifying or ignoring Congress.[175] However, the court held that *Coleman* had since been limited, and that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the grounds that their votes have been completely nullified."[176] Therefore, since Congress had not given any "clear, consistent message" to the President on whether or not air strikes in Kosovo were authorized, the members of Congress lacked standing.[177] Further, the relatively few number of plaintiffs (31 out of 535 members of Congress) did not represent the majority of Congress, nor had the plaintiffs been authorized to represent the 213 members who voted against the air strikes,[178] which further invalidated the members' claim that they had standing.[179]

The court went further with regard to the issue that Congress had sent mixed signals to the President, and noted that the President had merely continued the air strikes despite Congress's division.[180] Without an explicit congressional decision one way or another, the President cannot reasonably act against the wishes of Congress. Therefore, the lack of a confrontation between Congress and the President prevented the members of Congress from having standing. "Absent a clear impasse between the executive and legislative branches, resort to the judicial branch is inappropriate."[181]

Because the district court did not deal with the President's alleged failure to conform with the War Powers Resolution, the members of Congress appealed.[182] The D.C. Circuit upheld the district court's finding that the members lacked standing.[183] Because Congress never unilaterally disapproved of President Clinton's actions, the plaintiffs could not claim that their votes had been nullified by the President.[184]

3. Likelihood of Success of a Congressional Challenge with No Congressional Approval of the President's Military Actions

With the ninety-day period[185] tolled and a law passed over the President's veto requiring him to remove troops from a military operation in the absence of congressional authorization, members of Congress would be able to turn to the courts if the President refused to abide by Congress's order. As shown above, the merits of the congressional claim would have passed constitutional muster.[186] However, under

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senators whose votes against an amendment to the U.S. Constitution were nullified by Kansas's Lieutenant Governor.).

175. *Campbell*, 52 F. Supp. 2d at 42.

176. *Id.* (quoting Raines v. Byrd, 521 U.S. at 823).

177. *Id.* at 44.

178. *Id.*

179. *Id.*

180. *Id.* at 45.

181. *Id.*

182. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000). *See* Corn, *supra* note 42, at 1179.

183. *See Campbell*, 203 F.3d at 20-24.

184. *Id.* at 22-23.

185. *See* War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (2000).

186. *See supra* text accompanying Parts II.B-C (applying Justice Frankfurter's and Justice Jackson's tests from *Youngstown*).

Dellums and *Campbell*, the real questions are whether or not the claim would be ripe and whether or not the members of Congress would have standing. While *Dellums* and *Campbell* seem to stand for the proposition that it is difficult for members of Congress to successfully sue the President for violations of constitutional war powers, a situation like the one hypothesized here has never occurred. The dicta in both cases clearly supports the conclusion that a court would in fact choose to rule on the merits of this case, rather than dismiss the case, as was done in *Dellums* and *Campbell*.

a. Applying *Dellums*

If the President were to argue that it is his determination as to whether or not a military action is a war in the constitutional sense, and thus the issue is a nonjusticiable political question, the members of Congress would rely on *Dellums* to defeat the President's claim. The court in *Dellums* explicitly stated that courts in the past have made determinations about whether the United States was at war.[187] Further, "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause."[188] Therefore, the congressional claim would be justiciable, and not fall into the realm of a political question.

Next, the *Dellums* court looked at the issue of standing, and found that the members of Congress satisfied the requirements of *Allen v. Wright*.[189] They had shown a threatened injury—that if the President were to go to war without congressional authorization, Congress would lose its constitutional right to declare war.[190] Further, the court found that there were no more legislative remedies available because a joint resolution would be merely advisory, and the remedies of impeachment and cutting military funding would not allow Congress the relief it sought, which was the ability to debate and vote on whether or not to go to war in the first place.[191] As such, in the hypothetical situation here, the President could not successfully argue that Congress could use other avenues to achieve its end instead of seeking an injunction. Rather, *Dellums* stands for the proposition that Congress has a constitutional right to declare (or not declare) war, and standing to assert that right.

Where *Dellums* and the hypothetical situation presented in this Note would differ is with respect to ripeness. The *Dellums* court held that the members of Congress had not presented a ripe claim because both the President and Congress had not decisively asserted their respective constitutional authority.[192] Also, the court held that only a majority of Congress could obtain relief from a court, because only a majority of Congress can affirmatively declare war.[193] Further, since President Bush's military action at the time of the suit could not be definitively categorized as "war," the case was dismissed for lack of ripeness.[194]

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187. *Dellums*, 752 F. Supp. at 1146.
188. *Id.*
189. 468 U.S. 737 (1984).
190. *See Dellums*, 752 F. Supp. at 1147.
191. *Id.* at 1147-49.
192. *Id.* at 1149-50.
193. *Id.* at 1151.
194. *Id.* at 1152.

In the hypothetical situation presented here, Congress has asserted its constitutional authority by passing a law over the President's veto. The President could argue that he has not yet conducted war in the constitutional sense, and that the military commitment could not be categorized as "war."[195] However, in vetoing the bill, the President would seem to say that he would like the military operation to proceed further, rather than agree with Congress's wishes to cease the operation. As such, a court could not conclude that the issue is not ripe, because Congress and the President would have both "assert[ed] [their] constitutional authority"[196] through the legislative and presentment processes. Further, if a majority of Congress (and even more favorably two-thirds) were to join in the suit (or authorize certain members of Congress to sue on their behalf), according to *Dellums*, the claim would be ripe.[197]

b. Applying *Campbell*

Campbell seemed to further narrow the possibility of a congressional suit challenging the President's constitutional war powers. However, upon further examination, *Campbell* would help the congressional claim in the hypothetical situation presented here. While the court in *Campbell* dismissed the congressional claims due to lack of standing because the claim was too general,[198] the holding relied on the fact that Congress had sent mixed signals to the President about whether or not it supported President Clinton's air strikes in Kosovo.[199] This, combined with the fact that only thirty-one members of Congress were represented in the suit, led to the conclusion that the members of Congress in *Campbell* did not show that their votes had been completely nullified by President Clinton's continued air strikes.[200] The important rule to extract from *Campbell* is that the President could not have been said to have acted against Congress's explicit actions since Congress had not *clearly* acted one way or another. Thus, there was no constitutional impasse that would require the judiciary to step in.[201]

On the other hand, in the hypothetical situation presented here, Congress, in passing a law over the President's veto, would have clearly and explicitly sent a message to the President that it disapproved of the President's unilateral control over a military action. By ignoring Congress's law and continuing the military operation, the President would essentially nullify each Congress member's vote for the bill, trampling their constitutionally sanctioned rights in the process. Further, there would be a constitutional impasse because the President and Congress would have both asserted their constitutional authority over the military action, with neither party willing to yield

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195. Obviously, the magnitude of a military operation would shed some light on whether or not it could be considered a "war." Factors to look for would include, but should not be limited to: the number of troops deployed; the predicted length of the operation; the type of weaponry used; whether or not ground forces had been deployed; and the frequency and magnitude of any air strikes.

196. *Dellums*, 752 F. Supp. at 1150.

197. *See id.* at 1151.

198. *Campbell*, 52 F. Supp. 2d at 42.

199. *Id.* at 45.

200. *Campbell*, 203 F.3d at 22-23.

201. *Campbell*, 52 F. Supp. 2d at 45.

to the other. Thus, if two-thirds of the members of Congress were to join together in a suit against the President (either directly or by allowing certain members to sue on their behalf), under *Campbell* the suit would be justiciable, and the members of Congress would have standing to sue.

C. Conclusion

With impeachment an unlikely option in this hypothetical situation, Congress must turn to the judiciary in order to regain the war-making powers that Presidents have taken from it over the past six decades. The erosion of congressional war powers has gone on long enough, and not even the War Powers Resolution has been able to stop it. There is a framework in place for Congress to launch a successful suit against the President, if necessary. *Dellums* and *Campbell* both have their shortcomings; however, those shortcomings will not prevent future Congresses from asserting their constitutional war powers in court, and enjoining the President from disregarding Congress's law. *Dellums* shows that this claim would be ripe for judicial review, and *Campbell* provides a basis for congressional standing and the justiciability of the claim. All of this analysis points to Congress regaining its constitutional war-making powers with the help of a federal court and enjoining the President from further military action.

CONCLUSION

This Note has presented a hypothetical situation in which Congress, over the President's veto, passes a law requiring the removal of troops from a military operation, when there has been no previous congressional authorization for the operation. Since the 1940s, there has been a steady decline in the consultation between the President and Congress with regard to going to war. The passage of the War Powers Resolution in 1973 looked like a step in the right direction for Congress. In particular, Presidents since its passage have found ways to "comply" with the Resolution while continuing to maintain the imbalance of war-making powers between Congress and the President. One would hope that the Executive and Legislative Branches of the government would not be in such disaccord that Congress would resort to a lawsuit against the President to enforce a law requiring the removal of troops from a military operation. However, as *Dellums* and *Campbell* have shown, all members of Congress have not looked upon the President's unilateral control over recent military actions favorably.

Congress has authorized the use of military force in the current conflict with Iraq. However, perhaps the next time a President unilaterally commences an unpopular military action, Congress will become more vigilant in its protest of the President's actions. If President George W. Bush had invoked the military operation in Iraq without Congress's consent, Congress could have passed a law over President Bush's veto requiring the removal of American troops from that operation. Relying on the analysis discussed above, Congress would be able to successfully stake its war powers claim in a federal court, and enjoin President George W. Bush from any further military action in Iraq without first seeking congressional authorization. Justices Frankfurter's and Jackson's respective constitutional impasse tests from *Youngstown* would supply Congress with the constitutional merit for such a claim. *Dellums* and *Campbell*, respectively, provide the basis to show that this claim would be ripe for

judicial review and that Congress does indeed have standing to assert its claim. Unlike his father in *Dellums*, President George W. Bush would not have been so successful in court defending his unilateral military actions.