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Campbell v. Clinton and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War

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Articles

Campbell v. Clinton and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War

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> *The President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same as that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of the fleets and armies; all which by the Constitution under consideration would appertain to the legislature.*
>
> Alexander Hamilton[1]

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THE FOLLOWING ARTICLE REPRESENTS THE OPINIONS OF THE AUTHOR AND DOES NOT NECESSARILY REFLECT THE POSITION OF

One of the most fascinating aspects of American legal history in the last thirty years has been the conflict between Congress and the President over exercise of the war power. Frequently, the related surface spectacle, in which members of congress struggle to determine what position to take during a pending military conflict, has perhaps been even more interesting. Before taking a clear stand before their constituents, these congressmen want to wait in order to know in advance the answers to three fundamental questions: will we win, how many casualties will there be, and how long will it take? The President, of course, often has no such luxury before action is required.

The horrific consequences of war and the very real possibility that critical decisions will have to be made in the future on a number of foreign military operations lifts this conflict far beyond one of mere academic interest. If history provides any guidance, we can expect that these decisions will not be easy and will involve equally strong arguments on both sides. The merits of the debates for and against the Persian Gulf War were reflected by the fact that on January 12, 1991, after U.S. forces had already been deployed, a total of 302 congressmen voted for and 230 against authorizing the President to use force against Iraq pursuant to Security Council Resolution 678.[2] The vote in the House of Representatives defeating a proposed Senate concurrent resolution authorizing air and missile strikes against Yugoslavia was 213 to 213.[3] The recent Senate vote against removing U.S. troops from Kosovo was fifty-three to forty-seven.[4] One can easily imagine a similar situation as a President, over congressional opposition, moves to defend Taiwan against Chinese missile attacks. Absent peace in the Middle East, it is also not difficult to foresee the possibility of a future President feeling obligated to defend Israel in the face of a Congress acting, or refusing to act, out of fear of retaliation by terrorists using weapons of mass destruction. Thus, the recent decisions in *Campbell v. Clinton*[5] and their progeny pertaining to the efforts of members of Congress to assert control over the power to commence, or prevent, war are of paramount importance.

THE DEPARTMENT OF JUSTICE OR ANY OTHER GOVERNMENT AGENCY.

1. FEDERALIST NO. 69, at 465 (A. Hamilton) (Cook ed. 1961).
2. *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).
3. S. Con. Res. 21, 106th Cong. (1999).
4. *See* Eric Schmitt, "*Senators Refuse to Set a Deadline on Kosovo Troops*," N.Y. TIMES May 19, 2000 at 1.
5. 52 F. Supp. 24 (D.D.C. 1999); 203 F.3d 19 (D.C. Cir. 2000).

I

Who, under the Constitution, should have the power to commit the nation to war? It appears certain that the founding fathers intended that this monumental decision should be made by Congress, except when the President found it necessary to repel an attack or suppress insurrection. In the one segment of the debates on this issue preserved from the Constitutional Convention's Committee on Drafting, the following notations appear:

> Mr. Butler . . . (stated) he was for vesting the power in the President, who will have all the requisite qualities, and will not support war but when the nation will support it.
>
> Mr. Madison and Mr. Gerry moved to change (Congress shall) "make" war to "declare" leaving to the executive the power to repel sudden attacks.
>
> Mr. Sharman thought . . . the executive should be able to repel and not to commence war.
>
> Mr. Gerry never expected to hear in a republic a motion to empower the executive alone to declare war.
>
> Mr. Mason was against giving the power of war to the executive because he can not be trusted with it.[6]

This brief glimpse into history reveals the seeds of opposing views which, as Justice Douglas pointed out in *Mora v. McNamara*[7], continued to be voiced from the time of the Civil War to the Vietnam War.

James Madison and his colleagues, however, prevailed over Pierce Butler, the aristocratic former British officer and delegate from South Carolina, by a vote of eight to one.[8] Their recommendations were adopted by the full convention and, accordingly, Article I, section 8 of the Constitution gives to Congress, not the Chief Executive, the power to declare war, grant letters of marque and reprisal, raise and support Armies, provide and maintain a Navy, make rules for governing the land and naval forces, provide for calling forth the militia and provide for arming, organizing and disciplining the militia. The President, on the other hand, executes the laws passed by Congress and serves as Commander in Chief of the military. He has a "shared" power with Congress to be sure, but it is essentially the authority to decide

6. Massachusettes v. Laird, 451 F.2d 26, 31, (1st Cir. 1971) (quoting 2 Farrand 318-319).

7. 389 U.S. 934 (1967) (Douglas, J. dissenting).

8. *See Laird,* 451 F.2d at 32 n.10.

when, where and how the military should be employed in a conflict declared by Congress.

The contemporary statements of the framers underscore this understanding of the Constitution. Thomas Jefferson wrote: "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[9] James Wilson stated his expectation that the system would guard against the possibility of hostilities being initiated by one man.[10] Even Alexander Hamilton, who was well known as a proponent of executive power, did not hesitate to point out, as quoted above, that our President, unlike the King of England, could not on his own command the country to enter a state of war.

II

How then did we get to the point that in 1972, Congress felt compelled to pass the War Powers Resolution in an effort to reclaim what was its right under the Constitution? How, with this historical background, did we find ourselves in 1999 observing a President, without explicit authorization, conducting an air war against a foreign nation involving 800 aircraft, more than 20,000 sorties and resulting in thousands of military and civilian casualties?[11] It is beyond the scope of this article to list all of the executive actions, instances of congressional acquiescence and judicial opinions which led to this expansion of presidential power, but there are a few which must be highlighted.

The legislative acts of 1798-1799 authorizing our naval forces to attack (French) ships on the high seas demonstrated that Congress was an early and active participant in the undeclared naval war with France. However, *Bas v. Tingy's*[12] subsequent finding that a state of "imperfect war" may legally exist where the "popular feeling may not have been ripe for a solemn declaration of war"[13] created the possibility that future Presidents could conduct offensive military operations without an explicit congressional declaration. A few years later, President Jefferson, without the permission of Congress, dispatched the Navy to the Mediterranean

9. 15 PAPERS OF JEFFERSON 397 (Boyd ed. Princeton 1955).

10. 2 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1787 (J. Elliott, 2d. ed. 1836).

11. *See* Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000).

12. 4 U.S. 37 (1800).

13. *Id.* at 45.

so as to be in position to take action against the Barbary pirates if those coastal states then committed hostilities. President Polk in 1846 sent the U.S. Army into the hotly disputed Texas border territory between the Nueces and Rio Grande, later asking for a declaration of war against Mexico when the Mexican army responded with what he claimed to be an attack on American forces on American soil. President Lincoln did not seek a declaration of war before ordering the naval blockade and military invasion of the Confederacy, nor did he obtain congressional approval before taking such dramatic measures as issuing the Emancipation Proclamation and suspending habeas corpus. In *The Prize Cases*[14] which followed, five Supreme Court Justices agreed with Mr. Justice Grier that during the Civil War an actual "state of war existed which demanded and authorized a recourse .... and no name given to it by (the President or Congress) could change the fact."[15] Justice Nelson represented the minority with his contrary position that a state of war, which would bring into existence legal obligations and duties, did not exist unless it was "recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States."[16]

This trend towards executive power continued with *Cunningham v. Neagle*[17] and *In re Debs*,[18] domestic cases that placed the imprimatur of the Supreme Court upon a theory of presidential "protective" power not explicitly stated in the Constitution. Significantly, the court in *Neagle* cited a publicly applauded overseas naval mission as a laudatory example of the use of this protective power.[19] *United States v. Curtiss-Wright Export Co.*[20] subsequently enhanced presidential authority to an even greater degree with its oft-cited dicta that, in the field of foreign affairs, the President's power was "plenary and exclusive."[21] Volumes have been written about this decision, but it is enough to say that it has been relied upon as justification for virtually every foreign military

14. The Brig Amy Warwick, 67 U.S. 635, 690 (1863). [Popularly regarded as *The Prize Cases*.]
15. *Id.* at 670.
16. *Id.* at 690.
17. 135 U.S. 1 (1890).
18. 158 U.S. 564 (1895).
19. *See id.* at 64.
20. 299 U.S. 304 (1936).
21. *Id.* at 320.

operation authorized solely by the President since the date that it was published.[22]

Nevertheless, it can be argued that in many ways these cases and events merely set the stage for the two most influential factors in the rapid growth of executive power. These were: 1) the speed of events in the twentieth century and 2) the constant danger of imminent confrontation during the Cold War. These factors, epitomized by the Korean War and the Cuban missile crisis, magnified the perceived need to completely defer to the President as the nation's protector in dealing with serious threats posed by foreign nations. This atmosphere, with its underlying reliance upon "superior" presidential knowledge and authority, persisted until the Vietnam War.

III

It was not well known in 1964 that the American destroyers attacked in the Gulf of Tonkin by North Vietnamese patrol boats were actually present as apparent covering forces during commando raids against North Vietnam. The President expressed outrage over North Vietnam's "provocation" and the Congress subsequently passed the infamous Gulf of Tonkin Resolution stating that "these attacks [were] part of a deliberate and systemic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors . . . [accordingly] [t]he Congress approves and supports the determination of the President . . . to take all necessary measures . . . to prevent further aggression."[23] Relying on this provision, the SEATO defense treaty and the continuous appropriations by Congress, President Johnson waged an ever-expanding war in Vietnam until the Tet offensive led to his decision not to run for reelection. President Nixon's policy of "peace with honor" and "Vietnamization" did not bring the war to an early conclusion. As a result, the courts were increasingly confronted with lawsuits brought by soldiers who had obtained standing because they had been ordered to Vietnam. The principle thrust of their arguments was that the Executive was forcing them to participate in a war not properly authorized by Congress by means of a declaration as envisioned by the Constitution.

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22. *See* Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 5 (1999); HAROLD HONJU KOH, NATIONAL SECURITY CONSTITUTION, (1990); Harold Honju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran Contra-Affair*, 97 YALE L. J. 1255, 1306-10, 1313, 1335, 1337 (1988).

23. Gulf of Tonkin Resolution, House Pub. L. No.88-408, 78 Stat. 384 (1964).

The series of cases challenging the legality of the Vietnam War put the courts squarely in the middle of the "impenetrable thicket"[24] of the political question doctrine formulated by *Baker v. Carr.*[25] That is, in deciding in the first instance whether the matter submitted was justiciable, the courts had to determine if 1) there was a textually demonstrable commitment of the issue to another branch of government; 2) there was a lack of judicially discoverable and manageable standards for reviewing it; 3) the matter involved a policy question beyond judicial discretion; and 4) the matter involved the potential for embarrassment resulting from competing pronouncements from different branches and or the need to respect the decisions of separate branches.[26]

Although differing in their rationales, virtually all the courts confronted with these efforts to halt the war "'shied away' on 'political question' grounds."[27] *Orlando v. Laird*[28] and *Massachusetts v. Laird.*[29] are characteristic of these decisions. In the former opinion, the Second Circuit found that based on the Tonkin Gulf Resolution and military appropriations, Congress was clearly acting in mutual participation with the President in the prosecution of the war.[30] Whether there must be an official legislative declaration of war was a matter "determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry."[31] The First Circuit in *Massachusetts v. Laird* concluded that the question of whether there should be a declaration of war had been textually committed to other branches by the Constitution.[32] The fact that there had been no formal declaration did not mean that there was a congressional disagreement with administration policy.[33] On the contrary, the evidence demonstrated legislative support.[34] Accordingly, the court held that "the Constitution, in giving some essential powers to congress and others to the executive, committed the matter to both

24. Massachusetts v. Laird, 451 F.2d 26, 29 (1st Cir. 1971).
25. 369 U.S. 186 (1962).
26. *See id.* at 217.
27. Mottola v. Nixon, 318 F. Supp. 538, 550 (N.D. Cal. 1970).
28. 443 F.2d 1039 (2d Cir. 1971).
29. 451 F.2d 26 (1st Cir. 1971).
30. *See* Orlando v. Laird, 443 F.2d at 1042.
31. *Id.* at 1043.
32. *See* Massachusetts v. Laird, 451 F.2d at 32-33.
33. *See id.* at 33-34.
34. *See id.*

branches, whose joint concord precludes the judiciary from measuring a specific executive action . . . ."[35]

Significantly, after the Gulf of Tonkin Resolution was terminated by Congress effective January 2, 1971, the D.C. Circuit in *Mitchell v. Laird*[36] found that President Nixon's duty was now to try "in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation—its defense, its honor, its morality."[37] Whether President Nixon was so proceeding, however, was a question "which at this stage in history a court is incompetent to answer."[38] Even so, four Judges dissented from the majority's opinion, stating that regardless of the repeal of the Gulf of Tonkin resolution, "the appropriations ... indicate Congress' continuing assent to the prosecution of the war."[39]

During and after the war, the popular wisdom was that the conflict was solely "Johnson's war" or "Nixon's war," a misperception that was encouraged by many in the legislature as it became obvious that the war was not being won. It naturally followed from this logic that the solution to prevent future executive debacles would be a measure which would help reestablish the war power in the hands of the Congress where it originally had been placed by the Constitutional Convention of 1789. The result was the War Powers Act of 1973.[40] The very first provision of this legislation made it clear that Congress was attempting to take a historical stand on solid constitutional grounds after 183 years of expanding executive power. Section 1541 of the War Powers Act stated that :

> It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities...
>
> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities ... are exercised only pursuant to (1) a declaration of war, (2)

35. *Id.* at 33.
36. 488 F.2d 611 (D.C. Cir. 1973).
37. *Id.* at 616.
38. *Id.* at 616.
39. *Id.* at 617.
40. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1999)).

> specific statutory authorization or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[41]

The act went on to provide that, in the absence of a declaration of war, the President must submit a written report to the Speaker of the House and President Pro Tempore of the Senate within forty-eight hours of introducing U.S. forces into hostilities or into situations where imminent involvement in hostilities was clearly indicated.[42] The report would set forth the circumstances necessitating the introduction of forces, the estimated scope and duration of hostilities, and the constitutional and legislative authority under which the introduction took place.[43] If Congress was physically able to meet and had not granted an extension, the President must terminate any use of force within sixty days of the due date of the first report unless Congress had declared war or specifically authorized the use of force.[44] At any time that U.S. Armed Forces were involved in hostilities outside the territory of the United States without a declaration of war or specific authorizing statute, the President must remove the forces if Congress so directed by means of a concurrent resolution.[45]

With an understanding of the legal debates over implied powers during the Vietnam War, Congress further provided that authority to introduce U.S. Armed Forces could not be inferred from any appropriations act or any treaty unless they contained provisions specifically authorizing force within the meaning of the War Powers Resolution (WRP).[46] Furthermore, to prevent the fiction of "advisors only," and the "mission creep" that sometimes came with the true deployment of advisors, the statute provided that "for purposes of this chapter, the term 'introduction of U.S. Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged ... in hostilities."[47]

President Nixon and legal scholars who had observed the development of an inherent presidential war power, as well as

41. 50 U.S.C. § 1541.
42. 50 U.S.C. § 1543(a).
43. 50 U.S.C. § 1543(a)(3).
44. 50 U.S.C. § 1544(b).
45. 50 U.S.C. § 1544(c).
46. 50 U.S.C. § 1547(a)(1).
47. 50 U.S.C § 1547(c).

"protective" and "plenary and exclusive" authority in foreign affairs, immediately questioned the constitutionality of the War Powers Resolution.[48] President Nixon also had concerns related to the fact that the resolution would require that the use of force be terminated without a vote, or after a vote by concurrent resolution which would require no presentment to the executive for signature or veto. Accordingly, he sent a veto message to Congress stating in part,

> In effect the Congress is here attempting to increase its policy-making role through a provision which requires it take no action at all. In my view, the proper way for Congress to make known its will on such foreign policy questions is through a positive action with full debates on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits.[49]

In addition, the resolution would "eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation."[50] This latter point, of course, received substantial support with the Supreme Court's decision ten years later in *INS v. Chadha*[51] calling into question all "legislative veto" provisions.[52]

The political climate was not conducive to acceptance of the President's arguments. Stung by what was perceived as Nixon's expansion of the war in 1970 by invading Cambodia, increasingly distrustful as news of the Watergate burglary and likely executive cover up became public, and ready to reclaim its authority, Congress overrode the Presidential veto and the War Powers Resolution became law.

IV.

Those who thought the War Powers Resolution might be a panacea that would halt military adventurism and permit Congress to resume control over foreign affairs were soon disappointed.

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48. *See, eg.*, arguments for and against the War Powers Resolution in NATIONAL SECURITY LAW (John Norton Moore, et al. eds., 1990).

49. President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, R. Nixon, Pub. Papers, 893, 894-95 (Oct. 24, 1973).

50. *Id.* at 893.

51. 462 U.S. 919 (1983).

52. *See* Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L. J. 785 (1984) and Thomas Franck and Clifford Bob, *The Return of Humpty Dumpty, Foreign Relations Law After the Chadha Case,* 79 AM. J. INT'L L. 912 (1985).

During President Reagan's term in office he dispatched advisors to El Salvador, Honduras and Nicaragua, invaded Grenada, and sent the U.S. Navy into hostile waters in the Persian Gulf in the "Tanker War" without once obtaining explicit authorization from Congress. When small groups of Congressmen appealed to the courts on the grounds that the War Powers Resolution had been ignored, they found that the judiciary refused to come to their assistance.

The courts relied on a number of theories to avoid making a decision on the merits. Dominant among them was the position expressed by Justice Powell in *Goldwater v. Carter*[53] while concurring in the dismissal of a suit brought by twenty-four members of Congress who had attempted to prevent President Carter's abrogation of the mutual defense treaty with Taiwan. Powell reasoned that the Treaty case should not proceed because a majority of the Senate or House had not specifically rejected the President's claim: "If the Congress chooses not to confront the President, it is not our task to do so."[54] The same was true with challenges by a few members of Congress to President Reagan's actions in El Salvador,[55] Nicaragua[56] and the Persian Gulf.[57] The D.C. Circuit also employed the related doctrine of equitable or remedial discretion in response to congressional complaints that the administration had acted illegally in Nicaragua[58] and Grenada.[59] Under this doctrine, the courts stated that they would not exercise jurisdiction where Congress had institutional remedies available if they could obtain the votes, such as appropriations legislation and impeachment. Finally, some of the opinions continued to assert under *Baker v. Carr* that the courts lacked judicial resources or manageable standards to resolve disputed issues of fact such as whether war or hostilities existed.[60]

The failure of the courts to take action when a few legislators banded together to try to reverse administration policy did not mean, however, that the WPR had no effect on the congressional-executive relationship. This was demonstrated when Saddam Hussein invaded Kuwait and the first large-scale military action since passage of the WPR appeared imminent. Although President

53. 444 U.S. 996 (1979).
54. *Id.* at 997-998.
55. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983).
56. Sanchez-Espinoza v. Reagan 770 F.2d 202 (D.C. Cir. 1985).
57. Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).
58. *See Sanchez-Espinoza*, 770 F.2d at 202.
59. Conyers v. Reagan 578 F. Supp. 324 (D.D.C. 1984).
60. *See Lowry*, 676 F. Supp. at 333; *Crockett*, 720 F.2d at 1355.

Bush continuously maintained that he had independent authority to initiate military action in the Persian Gulf War, a review of statements and events after the fact demonstrates the impact of the WPR.[61] On August 9, 1990, President Bush informed congressional leaders "consistent" with the War Powers Resolution that he was deploying troops to the Gulf to "deter Iraqi aggression and preserve the integrity of Saudi Arabia."[62] After President Bush made the decision to increase the size of the force in order to prepare for offensive action to drive the Iraqi's out of Kuwait, he conveyed his position on November 14, 1999 to a special bi-partisan Congressional commission that had been set up to monitor events.[63] The President stated at a press conference on December 2, 1990 that he had not continuously talked to Congress: "I cannot consult with 535 strong willed individuals. I can't do it, nor does my responsibility under the Constitution compel me to do that." But when the beginning of hostilities loomed the following month, he sent a letter to Congress on January 8, 1991 asking for their support.[64] Congress responded on January 12, 1991 with a resolution authorizing the use of force to implement UN Resolution 678 stating that it was to be construed as "specific statutory authorization within the meaning of section 5 of the War Powers Act."[65]

The President, thus, did make efforts to consult with congressional leaders, Congress took active steps to remain engaged in the decision process, and in the end President Bush sought congressional support for military action. As Representative David Bonior stated, "[T]he WPR was an important vehicle for us to exercise our constitutional mandate . . . It gave us a way to jump in to a defense of our congressional responsibilities."[66] In an interview after the war, Representative Dante Fascell stated,

> The President kept saying in meetings that he could go it alone. But many of us kept telling him that he couldn't, that he needed the support of the American people and the Congress. If the WPR wasn't there, he might have taken the bit in his mouth a la

61. Eileen Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War*, 21 J. LEGIS. 23 (1995).

62. *Id.* at 261 (quoting 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 Arabis and the Middle East, 26 Wkly. Comp. Pres. Doc. 1125-26 (Aug. 9, 1990)).

63. *See id.* at 27.

64. *See id.* at 28.

65. *Id.* at 27.

66. Burgin, *supra* note 61 at 40.

> Johnson and gone on his own ... The fact that we had a dialogue between the President and Congress here, and (we) kept telling him this, was important.[67]

Another potentially encouraging development during the pendency of the Gulf War for those who would seek to curb presidential power was the court's decision in *Dellums v. Bush*.[68] On November 20, 1990, fifty-four congressmen had filed suit under the Constitution seeking an injunction to prevent military action without congressional authorization.[69] Perhaps because of internal debate as to whether the forces then present in the Gulf were in imminent danger of hostilities, the plaintiffs did not stake their claim on the WPR in addition to the Constitution. The court's decision on December 13, 1990 was nevertheless instructive and potentially useful for those who would seek judicial intervention at a later date. In his opinion, Judge Greene in rapid sequence disposed of many of the arguments that had kept courts from acting in previous cases. He declined to hold that members of Congress did not have standing to bring the lawsuit even though military action had not yet been taken.[70] The case involved votes on matters which should be entrusted to their respective chambers, and, if Congress waited until the President commenced war, the meaning of a Congressional vote would be lost.[71] He further stated that the question whether forces were involved in war or hostilities was not a "political question" which the courts were incapable of answering, especially when the forces involved were of great magnitude and significance.[72] Finally, he refused to invoke the doctrine of remedial discretion, stating:

> The 'remedies' of cutting off funding to the military or impeaching the President are not available to these plaintiffs, either politically or practically. Additionally, these 'remedies' 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.[73]

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67. *Id.* at 42.
68. 752 F. Supp. 1141 (D.D.C 1990).
69. *See id.* at 1143.
70. *See id.* at 1147-48.
71. *Id.* at 1147.
72. *Id.* at 1145.
73. *Dellums*, 752 F. Supp. at 1149.

In this particular case, however, in accordance with Justice Powell's reasoning in *Goldwater v. Carter*, as only a minority of members had brought the suit, the judge thought it unwise to take action: "[T]he President is entitled to be protected from an injunctive order regarding a declaration of war when there is no evidence that this is what the Legislative branch as such—as distinguished from a fraction thereof—regards as a necessary prerequisite to military moves in the Arabian desert."[74] If a majority of members brought the case at a time when the President was clearly committed to war, however, the plaintiff's motion for an injunction would be seriously considered.[75]

V.

On March 24, 1999, after Serbian atrocities in Kosovo and the refusal of the Federal Government of Yugoslavia (FRY) to agree to a peace settlement proposed by the United Nations, NATO forces led by the United States commenced an air war against Yugoslavia. On March 26, 1999, the President reported to Congress, consistent with the WPR, that he had taken this action, "pursuant to my constitutional authority to conduct foreign relations and as Commander-in-Chief and Chief Executive."[76] In a series of votes on April 28, 1999, the House of Representatives: 1) defeated by a vote of 427 to 2 a joint resolution calling for the declaration of a state of war between the U.S. and Yugoslavia;[77] 2) defeated by a vote of 290 to 139 a concurrent resolution that would have directed the President pursuant to the WPR to remove U.S. forces from their present positions in connection with operations against the FRY;[78] and 3) rejected by a vote of 213 to 213 a concurrent resolution that had been earlier passed by the Senate authorizing the President to conduct air and missile operations against the FRY.[79] On May 21, 1999, Congress passed an Emergency Supplemental Appropriations Act that provided emergency appropriations for the conflict in Yugoslavia.[80]

On April 30, 1999, Congressman Tom Campbell and twenty-five other Representatives filed a lawsuit to compel the President to obtain congressional authorization to continue the war. The suit

74. *Id.* at 1151.
75. *See id.* at 1152.
76. Campbell v. Clinton, 52 F. Supp.2d 34, 38 (D.D.C. 1999).
77. H.R.J. Res. 44, 106th Cong. (1999).
78. H.R. Con. Res. 82.
79. S. Con. Res. 21.
80. Pub. L. No. 106-31, 113 Stat. 57.

claimed that the President was acting in violation of the Constitution by not seeking a declaration of war and that, pursuant to the War Powers Resolution, he must terminate all hostilities within 60 days of March 26, 1999 absent specific congressional authorization to continue.[81] As the plaintiffs in *Dellums* did not rely on the WPR, this was arguably "the first truly significant invocation of that law to restrict a presidential war-making initiative."[82] The Justice Department claimed in response that the suit was asking for adjudication of a political question and that the matter was not ripe for review as decided by the court in *Dellums*.[83] The government also stated that, based on the Supreme Court's recent opinion in *Raines v. Byrd*,[84] plaintiffs did not have standing because they had not demonstrated personal injury traceable to the defendant's allegedly illegal conduct which was likely to be redressed by the requested relief.[85]

Raines v. Byrd involved a suit brought by a minority group of Congressmen challenging the Line Item Veto Act.[86] They alleged that this Act, by permitting the President to strike particular items from bills that had been passed by both houses, in effect diluted their voting power under Article I of the Constitution.[87] The Supreme Court found that their claim was not one of individual personal injury, but of institutional injury and lack of political power.[88] The Court held that individual members in this type of case did not have a sufficient personal stake in a case or controversy to establish standing.[89] The Court further noted that the standing requirement was especially rigorous in any case that would require the Court to decide the Constitutionality of an act of one branch of government.[90] It was noted in passing that some importance was attached to the fact that the plaintiffs in the case were a minority who had not been authorized to represent their respective chambers.[91]

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81. Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1994).
82. Maj. Geoffrey S. Corn, *Campbell v. Clinton: The "Implied Consent" Theory of Presidential War Power is Again Validated*, 161 MIL. L. REV 202, 205 (1999). This article pertains only to the District Court's opinion.
83. *See Campbell*, 52 F. Supp.2d at 40.
84. 521 U.S. 811 (1997).
85. *See Campbell*, 52 F. Supp. 2d at 40-41.
86. *See Raines*, 521 U.S. at 813.
87. *See id.* at 816.
88. *See id.* at 821.
89. *See id.* at 826.
90. *See id.* at 819.
91. *See Raines*, 521 U.S. at 829.

The Court in *Raines* did, however, allow that institutional standing could be established in certain cases of complete nullification of a legislative act.[92] Relying on *Coleman v. Miller*,[93] a case where a state Lt. Governor's vote had defeated legislation which had been passed, the Court acknowledged that, in a similar situation where the legislature's will had been ignored and there was no further recourse, the case might be allowed to proceed.[94]

On June 8, 1999, U.S. District Court Judge Paul Friedman granted the President's motion to dismiss in *Campbell v. Clinton*. He held that, after *Raines*, all previous discussions of ripeness and remedial discretion were subsumed in the standing analysis required by that case.[95] The courts should not umpire general disputes between the executive and legislative branches with regard to the scope of their powers.[96] Complaints that the President had ignored the WPR, therefore, were not enough. Rather, Congress must have exercised authority and the President must have acted to nullify a clear direction from Congress.[97] Only then would there be a true constitutional impasse or actual confrontation that would give the legislature standing.[98] In this case, the different votes of Congress had sent "distinctly mixed messages."[99] The lack of a consistent majority vote against the President, and the small number of Representatives bringing the lawsuit, meant that standing had not been established.[100]

The court went on to state, however, that it did not consider the appropriations bill that had been passed as authorization within the meaning of the WPR.[101] Furthermore, if standing was established, the President should not assume that the court would treat the war powers issue as a non-justiciable political question.[102] The court also volunteered that it did not believe the availability of legislative alternatives such as impeachment would be sufficient to defeat standing if the President had acted to nullify a clear direction from Congress.[103]

92. *See id.* at 823.
93. 307 U.S. 433 (1939).
94. *See Raines*, 521 U.S. at 821.
95. *Campbell* 52 F. Supp.2d at 40.
96. *See id* at 41.
97. *See id.* at 42.
98. *See id.* at 43.
99. *Id.* at 44.
100. *See Campbell*, 52 F. Supp. 2d at 44.
101. *See id.* at 44, n.9.
102. *See id.* at 40, n.5.
103. *See id.* at 45, n.11.

The conflict in Yugoslavia officially ended on June 21, 1999 when NATO announced the termination of the air campaign and Defense Secretary Cohen began redeployment of U.S. aircraft back to their home bases. The D.C. Circuit, nevertheless, accepted the original case for review and on February 18, 2000 a three judge panel issued its opinion.[104] The appellate court appeared to acknowledge that the matter was technically moot and need not be decided because the exact same circumstances would probably not reoccur and the issues did not inherently evade judicial scrutiny. [105] But, instead of relying on mootness, the court chose to issue a twenty one page opinion in which it affirmed the lower court based on lack of legislative standing pursuant to *Raines v. Byrd.*

The reasoning of the appellate court was, however, sharply divided. Judges Silberman and Tatel held that "complete nullification" only occurred when Congress had no further recourse.[106] As Congress could pass a law forbidding the use of the Air Force in Yugoslavia, cut off funds for military operations, or impeach the President, its ability to act had not been completely nullified. Judge Randolph completely rejected this interpretation of nullification, holding that it applies any time a legislative bill that has been passed is ignored by the executive or that has been defeated actually goes into effect.[107] Here, although military forces were being utilized, "War was not declared and the President never maintained that he was prosecuting the war with the approval of the House."[108] "[The President did not] exercise statutory authority reserved to him only when Congress has declared a war, and their votes against declaring war can not be considered a nullity."[109] Accordingly, there was no standing in this particular case with respect to a specific vote.[110] However, if such nullification had been achieved, then standing would be established and it would not be sufficient to defeat standing to maintain that appropriations could later be cut or the President impeached.[111]

104. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).
105. *See id.* at 32.
106. *See id.* at 22-23.
107. *See id.* at 29.
108. *Id.* at 29.
109. *Campbell*, 203 F.3d. at 33.
110. *See id.* The nullification required to establish standing by a member of Congress apparently would have to be a nullification of a current vote. It would not be sufficient to state simply that the President "ignored the War Powers Resolution and hence the votes of an earlier Congress." *Id.*
111. *See id.* at 32.

Judge Randolph agreed with District Judge Friedman as to the lack of importance that should be attached to congressional appropriations in general as evidence of true legislative intent or as a vehicle to express congressional will. During the Vietnam War, a Department of Defense budget intended by some members to protect against the worldwide Soviet menace was sometimes interpreted as specific authorization for the war in Southeast Asia. Furthermore, even when funds were specifically designated for the combat zone, this did not necessarily constitute approval of military intervention in that particular area. Rather, "'As every schoolboy knows,' Congress may pass such legislation not because it is in favor of continuing the hostilities but because it does want to endanger soldiers in the field. The War Powers Resolution itself makes the same point" by stating that authority to introduce forces into hostilities should not be implied from any appropriations act.[112]

The appellate judges also came to different conclusions as to whether or not the issue was justiciable. Judge Silberman stated that the threshold question under the WPR of whether U.S. forces are engaged in hostilities "is not precise enough and too obviously calls for a political judgment to be one suitable for judicial determinations."[113] Judge Tatel strongly disagreed. He stated that determining the existence of hostilities or war was no more difficult than determining what police conduct violated the constitutional guarantees against unreasonable search and seizure. Relying on *Bas v. Tingy*, the Prize cases, *Mitchell v. Laird* and *Dellums*, he noted that the court had often made findings as to whether a state of war existed:

> If in 1799 the Supreme Court could recognize that sporadic battles between American and French vessels amounted to a state of war, then surely we, looking to similar evidence, could determine whether months of daily air strikes 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 [of the Constitution].[114]

Furthermore, under the WPR, the court "would need to ask only whether, and at what time, U.S. forces were introduced into hostilities."[115]

112. *Id.* at 31, n.10.
113. *Id.* at 25.
114. *Campbell*, 203 F.3d. at 40.
115. *Id.*

The court was thus unanimous in deciding that standing had not been achieved in this case, but divided as to exactly what congressional actions were necessary before it could be established. The three appellate judges also took strong, but often contradictory, stands on related issues of justiciability and the meaning of appropriations, which had been debated in the past and are likely to be considered significant in the future.

VI.

An examination of *Clinton v. Campbell* and the previously cited decisions clearly demonstrates that *Baker v. Carr*, *Goldwater v. Carter* and now *Raines v. Byrd* have presented major obstacles to any attempt to secure the effective intercession of the judiciary in disputes over the executive exercise of the war power. As noted earlier, Congress' efforts to reestablish authority with the War Powers Resolution had been weakened in part by *Chadha's* threat to the legislative veto as contained in 50 U.S.C 1544(c)'s requirement that forces be removed if Congress so directed by a concurrent resolution. If 50 U.S.C 1544(b), pertaining to the termination of force within sixty days in the absence of express congressional authorization, had any viability in light of Justice Powell's opinion in *Goldwater* and the decision in *Dellums v. Bush*, it would appear that this provision has now been completely negated by the need for a specific affirmative majority vote demanded by *Raines* and *Campbell.* It was, thus, no accident that Justice Randolph took the unusual step of printing in its entirety President Nixon's veto message seriously questioning these two aspects of the WPR as an appendix to his decision in *Campbell.*

We could be left then with the continued operation of the doctrine of "implied congressional consent" to presidential war-making which was expressed in the *Laird* cases and has extended through the campaign against Yugoslavia. Referring to the introduction of U.S. forces in Bosnia and Iraq immediately before the Serbian conflict, Charles Tiefer noted that, "Today's war actions receive funding from appropriations in which an ambivalent Congress neither expressly authorizes nor expressly cuts off funding for particular interventions."[116] These constitute what in essence can be termed "partial declarations of war" which are sanctioned by

116. *See* Charles Tiefer, *War Decisions in the Later 1990's by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 5 (1999); WILLIAM C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994).

"legitimizing appropriations."[117] This may be the only way to proceed with a Congress whose members, for obvious political reasons, are reluctant to publicly commit in the early stages of military action. It would certainly conform with Justice Jackson's acknowledgment of executive power when acting without specific congressional authorization or disapproval in an area of concurrent authority.[118]

In the author's opinion however, a close review of the decisions in *Dellums*, *Raines* and *Campbell* actually provides some hope for any Congress ready to take a stand in defense of its constitutional authority to control the war power. As related in this article, Judge Greene in *Dellums* and Judges Friedman and Tatel in *Campbell* made it clear that they believed the courts, in many circumstances, could determine whether war or hostilities existed. They would not seek the shelter of the political question doctrine on this issue unless the situation was ambiguous. Furthermore, Judge Greene, Judge Friedman and Judge Randolph refused to regard appropriations as determinative and pointedly rejected the related remedial discretion doctrine that would always defer judicial action as long as Congress could impeach the President.

It is also interesting to note that, despite the positions of Presidents Nixon and Bush and President Clinton's announcement of the use of force in Yugoslavia "pursuant to my constituational authority to conduct foreign relation and as Commander in Chief," the Clinton administration did not claim "inherent" power to conduct the bombing campaign in its response to plaintiff's claims in *Campbell v. Clinton*.[119] This, hopefully, may be an indication that the WPR and decisions such as *Dellums v. Bush* have convinced the executive that it is no longer proper to act as if presidential power in foreign affairs was "plenary and exclusive."

In addition, "counsel for the President (in *Campbell*) appears to have acknowledged that an individual alleging personal injury from the President's alleged failure to comply with the War Powers clause or the War Powers Resolutions, as for example, a service person who has been sent to carry out the air strikes .... would have standing to raise these claims."[120] It is true that such a requirement not only places an undue burden on those in the military sworn to obey orders, but that it takes time when delay is

117. Tiefer, *supra* note 116 at 5..
118. Youngstown Sheet and Tube Co., v. Sawyer, 343 U.S. 579. 637 (1952).
119. Corn, *supra* note 82.
120. *Campbell*, 52 F. Supp.2d at 43, n.8.

not always the best course in cases involving the imminent outbreak of hostilities. Nevertheless, as Justice Souter said in *Raines*, there is sometimes a "virtue in waiting" for a private suit "after the politics have at least subsided from a full boil."[121] This concession by the executive, although supported by precedent,[122] should be welcome as at least removing a possible roadblock to bringing war powers questions to the courts, even if individual suit is not always the ideal or most timely instrument.

Finally, and more importantly, a Congress ready to take responsibility on its own without undue delay should recognize in *Dellums v. Bush*, *Raines v. Byrd* and the opinions in *Campbell v. Clinton,* an opening for the reassertion of power at any point in a crisis as long as they are ready to explicitly act by a majority vote. In the Vietnam War cases, the courts would often cite prior congressional appropriations and the Selective Service Act as an indication of congressional will. This persisted even when the Gulf of Tonkin Resolution had been withdrawn. Under *Raines*, however, any specific congressional act ignored by the President could potentially create an immediate nullification issue despite prior legislation that indicated support for administration policy. A number of judges in these cases indicated that they would not always hide behind the political question doctrine of *Baker v. Carr* or the doctrine of remedial discretion. Executive nullification could, under *Raines* and *Campbell*, provide a critical issue upon which judges must now rule.

Of course, what exactly constitutes "nullification" will continue to be a subject for debate. It could be argued that Clinton's continued use of force after sixty days was a direct violation of the WPR and therefore a nullification of existing legislation. Judge Randolph, a proponent of single act nullification, rejected this interpretation, however, in part because the statute had been passed by a former Congress.[123] On the other extreme, the executive would probably maintain that nullification would only occur if a two thirds majority of Congress had overriden a presidential veto and the President had continued to act contrary to a specific congressional prohibition. If Chadha does in fact preclude the use of the simple majority legislative veto as set forth in 1544(c), this position could prevail. But Judge Randolph

121. *Raines*, 521 U.S. at 835.

122. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Massachusettes v. Laird, 451 F.2d 26 (1st Cir. 1971).

123. *See Campbell*, 203 F.3d at 31.

indicated that nullification could be created when a majority of Congress passed or declined to pass a relevant proposal and the President completely ignored the vote. Specifically, if the President had assumed control of transportation systems or condemned land as authorized in time of war, or "invaded Yugoslavia by land" in opposition to the express purpose of a legislative vote, he would have nullified congressional action and created standing.[124] In light of these disparate views, it can be anticipated that "nullification" will be the key strategic point in the next legal battle to limit the war power that has been assumed by the President.

VII.

Characterizing the President's military power in *Youngstown Steel* almost fifty years before President Clinton's attack on Yugoslavia, Justice Jackson wrote these prophetic words:

> (The) loose appellation (of Commander in Chief) is sometimes advanced as support for any Presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.
>
> No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.[125]

It was in this spirit that Congress passed the War Powers Act in 1973. In an interview on May 17, 2000, Senate majority leader Trent Lott publicly stated that he and his colleagues continued to firmly advocate adherence to the principles of this legislation.[126] It is, of course, encouraging that a leading member of Congress maintains support for this historical effort to reassert control over the war power. But the entire Congress must recognize and have the courage to accept that it was the intent of the founding fathers that they, not the President, decide when to initiate offensive war.[127]

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124. *Id.* at 31-32 and nn.8 and 9.

125. *Youngstown,* 343 U.S. at 642, 646.

126. Trent Lott, Interview on *Hardball with Chris Matthews*, (CNBC television broadcast, May 17, 2000).

127. Those who would like to see the courts and the Congress take a more active role have proposed a number of solutions to revitalize the process. Congress could more explicitly define "war," "hostilities," and "imminent hostilities" for courts that have claimed they had no manageable standards to make a determination regarding the existence of these states of conflict. Brian H. Spaid, *Collective Security v. Constitutional Sovereignty: Can the President Commit*

Congress' abdication of authority for reasons of politics and expediency has created the danger that the framers sought to prevent; that one man could bring the country into an unjustified and catastrophic war. The air war over Yugoslavia presented the country with another example of congressional vacillation and "mixed" legislative messages. But *Dellums v. Bush*, *Raines v. Byrd* and *Campbell v. Clinton* indicate that if Congress can take an explicit stand on a specific exercise of the war power, they are likely to find that the courts will enforce their will.

Troops Under the Sanction of the United Nations Security Council Without Congressional Approval, 17 U. DAYTON L. REV. 1055 (1992). Congress could attempt to "legislate away the jurisdictional shields (noted above) by which the courts have insulated themselves from the war powers process." Peter J. Spiro, *Review: of War Powers and the Sirens of Formalism by John Hart Ely*, 68 N.Y.U. L. REV. 1338 (1993) (reviewing John Hart Ely, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)). The courts, for example, could be directed to make a finding on whether or not hostilities were imminent and then remand the case to Congress for approval or disapproval. *See id.* The problem, as Professor Koh has stated, is that "Congress can not legislate judicial courage any more than it can legislate executive self-restraint or congressional willpower." HAROLD HONJU KOH, THE NATIONAL SECURITY CONSTITUTION 181 (1990). The political question, ripeness and nullification doctrines developed by the courts will not be easy to overcome absent the impetus provided by a majority vote in Congress.

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