LITIGATING WAR: THE JUSTICIABILITY OF EXECUTIVE WAR POWER

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The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations.[1]

The constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war.[2]

INTRODUCTION

Courts frequently dismiss claims against the executive's use of the war power as being non-justiciable political questions. This lack of a judicial check has created a situation in which meaningful checks and balances on the war power are found only in the Executive Branch itself.[3] But the Constitution places the bulk of war powers in the hands of Congress.[4] Executive usurpation of Congress's constitutional prerogative to initiate hostilities has significantly weakened the separation of powers.

Congress sought to rectify this power imbalance by passing the War Powers Resolution. The War Powers Resolution creates a private

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1. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) (citations omitted).

2. Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

3. *See* Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1329 (2012) (noting the existence of a "growing body of scholarship suggesting that, especially during national security crises, meaningful checks and balances can be found internally within the Executive Branch").

4. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 7 (6th ed. 2016).

right of action for claims against the executive war power.[5] The Resolution also restrains courts' use of the political question doctrine as a tool to dismiss claims against the executive war power.[6] To ensure that courts properly assess the justiciability of claims against the executive war power, Congress should modernize the War Powers Resolution.

Part I of this Note provides a background description of the allocation of war powers in both the Constitution and historical practice. Part II discusses the political question doctrine and how the Supreme Court has applied it to foreign affairs cases. Part III discusses the Vietnam War and the passage of the War Powers Resolution. Part IV provides an overview of how courts have applied the political question doctrine to the executive war power since the passage of the War Powers Resolution. Part V suggests how Congress and the courts can restore the constitutional balance of war powers.

I. WAR POWERS IN THE CONSTITUTION AND IN HISTORICAL PRACTICE

Early historical practice suggests executive-legislative balance in the realm of war powers, but the executive has been dominant since at least 1950.[7] The executive's relatively recent domination of war powers is antithetical to the language of the Constitution and the intention of the Framers. Article I, Section 8 of the Constitution empowers Congress to "declare War, grant Letters of Marque and Reprisal," "raise and support Armies," "provide and maintain a Navy," and "organiz[e], arm[], discipline[e]" and "call[] forth the Militia."[8] In contrast, the President's sole enumerated war power is his position as "Commander in Chief" of the armed forces.[9]

A. War Powers in the Constitution

It is clear from the records of the Constitutional Convention that the Framers intended for Congress alone to have the power to initiate

5. Ange v. Bush, 752 F. Supp. 509, 511 n.1 (D.D.C. 1990).

6. Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68 (1977) ("Congress has removed much of the force of the political question doctrine as an impediment to independent judicial review of executive war power acts by adopting the War Powers Resolution.").

7. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 10 (1993).

8. U.S. CONST. art. I, § 8.

9. *Id.* art. II § 2.

hostilities.[10] At the Pennsylvania ratifying convention, James Wilson emphasized that "the important power of declaring war is vested in the legislature at large . . . ."[11] William Paterson, a member of the Constitutional Convention and a Supreme Court Justice from 1793 to 1806, wrote that "it is the exclusive province of congress to change a state of peace into a state of war."[12] Justice Paterson held that the President cannot authorize hostilities on his own, because "[t]hat power is exclusively vested in Congress . . . ."[13] James Madison—the Father of the Constitution—agreed that the power to declare war was "essentially [and] exclusively . . . vested in the Legislature . . . ."[14] As President, Madison praised the wisdom of the Constitution in vesting the power to declare war in "the legislative department of the Government."[15]

Declarations of war have largely disappeared since 1945, possibly suggesting that Congress's power to declare war may be little more than a historical artifact.[16] The Framers, however, were acutely aware of the impending extinction of formal declarations of war. Just months after the Constitutional Convention, Alexander Hamilton wrote that "the ceremony of a formal denunciation of war has of late fallen into disuse . . . ."[17] Because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect,"[18] the phrase "declare war" cannot be interpreted as a mere artifact of a bygone era. The disuse of formal declarations of war during the Framers' own time suggests that they intended "declare war" to include less formal congressional authorizations of hostilities. By including the power to grant letters of marque and reprisal in the War Powers Clause, the Framers gave Congress authority over hostilities that do not meet the threshold of war.[19] And until the mid-twentieth century, presidents

10. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 698 (1997).

11. *Id.* at 717.

12. United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806).

13. *Id.*

14. Treanor, *supra* note 10, at 746.

15. *Id.* at 726.

16. Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 90 (2008).

17. THE FEDERALIST NO. 25 (Alexander Hamilton).

18. Marbury v. Madison, 5 U.S. 137, 174 (1803).

19. *See* Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 69–70 (1995) ("The early history of the nation also supports a reading of the Marque and Reprisal Clause that provides Congress the power to authorize a broad spectrum of armed hostilities not rising to the level of declared war.").

observed that the executive alone could not constitutionally involve the nation in war.[20]

B. War Powers and the Early Presidents

The President's sole enumerated constitutional war power is his position as Commander-in-Chief, and early practice suggests that Commander-in-Chief was simply "a generic term referring to the highest officer in a particular chain of command."[21] Major General Anthony Wayne was called Commander-in-Chief when he led the U.S. Army in the 1790s.[22] General Wayne's successor, James Wilkinson, was also known as the Commander-in-Chief.[23] At the North Carolina ratifying convention, future Supreme Court Justice James Iredell said that although the President "is to command the military forces of the United States," he "has not the power of declaring war by his own authority . . . . The power of declaring war is expressly given to Congress . . . ."[24]

President Washington often obtained congressional authorization before using force.[25] The first military conflict of Washington's presidency was the Northwest Indian War.[26] On September 29, 1789, Congress passed a bill empowering President Washington to call upon state militias to defend the frontier from American Indians.[27] President Washington also received congressional authorization to engage in naval hostilities with the Barbary pirates.[28]

Presidents Adams relied on congressional authorization for the major foreign policy crisis of his presidency: an undeclared naval war with France.[29] From May 1798 to March 1799, Congress passed no fewer than four acts empowering the President to act against armed French vessels.[30]

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20. FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 28, 142, 151 (2d ed. 1989).
21. *Id.* at 109.
22. *Id.*
23. *Id.* at 110.
24. *Id.* at 112.
25. Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 41 (1995).
26. Adam Mendel, Comment, *The First AUMF: The Northwest Indian War, 1790–1795, and the War on Terror*, 18 U. PA. J. CONST. L. 1309, 1311 (2016).
27. *Id.* at 1309.
28. WORMUTH & FIRMAGE, *supra* note 20, at 59–60.
29. *Id.* at 60.
30. *Id.*

During the Jefferson and Madison administrations, Congress enacted at least ten statutes authorizing the use of force against the Barbary pirates.[31] In 1805, President Jefferson said that "Congress alone is constitutionally invested with the power of changing our condition from peace to war . . . ."[32] When President Madison determined that hostilities with Britain had reached a breaking point, he dutifully requested and received a declaration of war from Congress.[33]

C. War Powers and the Early Congresses

When the executive *did* intrude on congressional war powers, early Congresses asserted themselves. Congressman Henry Clay harangued General Andrew Jackson after Jackson invaded Spanish Florida without congressional authorization.[34] Clay was emphatic that "[o]f all the powers conferred by the Constitution of the United States, not one is more expressly and exclusively granted than that is to Congress of declaring war."[35] Even if Jackson's supporters had "succeeded in showing that an authority was conveyed by the Executive to General Jackson to take the Spanish posts," Clay insisted that by doing so they "would only have established that unconstitutional orders had been given, and thereby transferred the disapprobation from the military officer to the Executive."[36]

D. War Powers and the Marshall Court

Congress's preeminence in war was supported by the Supreme Court under Chief Justice John Marshall. On February 9, 1799, Congress authorized the seizure of ships sailing *to* French ports.[37] One month later, President Adams ordered Captain Little to seize ships sailing *to* or *from* French ports.[38] Because Adams's instructions differed from those of Congress, the Court held that his instructions

31. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1224 (2006).

32. 9 ANNALS OF CONG. 19 (1805).

33. *See* BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2017 2 (2017) ("On June 18, 1812 [when Madison was President], the United States declared war between the United States and the United Kingdom of Great Britain and Ireland.").

34. 15 ANNALS OF CONG. 631–55 (1819).

35. *Id.* at 647.

36. *Id.* at 653.

37. Little v. Barreme, 6 U.S. (2 Cranch) 170, 170–71. (1804).

38. *Id.* at 171.

did not authorize the seizure.[39] The Court unambiguously declared: "The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry."[40]

E. Executive Usurpation of Congress's War Powers and Arguments from Historical Gloss

Since 1950, the executive has engaged in numerous hostilities without congressional authorization.[41] For example, the so-called "police action" in Korea was unauthorized by Congress,[42] but resulted in over 100,000 U.S. casualties.[43] The numerous "humanitarian" interventions of the 1990s involved tens of thousands of troops yet lacked congressional authorization.[44] These large-scale, post-1950 uses of unauthorized force are unlike earlier instances, which were typically small-scale landings to protect Americans abroad.[45] Those uses of force did not pose constitutional problems, as there is a near-universal consensus among scholars that the Commander-in-Chief powers include using force to rescue American citizens abroad and to protect U.S. embassies and consulates.[46] Because the Constitution empowers the president to appoint ministers and consuls,[47] defending embassies falls under the Take Care Clause.[48]

Despite their recency, some scholars argue that the post-1950 uses of unauthorized force constitute a "historical gloss" on the Constitution.[49] Justice Frankfurter famously described historical gloss as

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39. *Id.* at 178–79.

40. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801), *rev'd on other grounds*.

41. ELY, *supra* note 7, at 10.

42. *Id.* at 10–11.

43. NESE F. DEBRUYNE, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2 (2018).

44. *See generally* Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125 (2000).

45. *See* WORMUTH & FIRMAGE, *supra* note 20, at 146.

46. *See* John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1393–94 (1988) (arguing that "[v]irtually everyone agrees" that the President can use military force to protect American people, embassies, and legations).

47. U.S. CONST. art. II, § 2, cl. 2.

48. *Id.* at art. II, § 3; *see also* Cunningham v. Neagle (*In re* Neagle), 135 U.S. 1, 60–68 (1890) (holding that the Take Care Clause covers "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution . . . .").

49. Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1154–56 (2001).

> a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President . . . .[50]

Later Courts have looked favorably upon Frankfurter's use of "historical gloss."[51] Such prominent scholars as Professor Curtis Bradley have also accepted that "arguments from history are—and are likely to remain—pervasive in the separation of powers context."[52]

The Court has held, however, that just because "an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[53] Similarly, scholars as eminent as Professor John Hart Ely have ridiculed historical gloss as a constitutional "'adverse possession' theory."[54] Furthermore, even if one accepts historical gloss arguments, it is not clear that they apply to the executive war power. Professors Francis Wormuth and Edwin Firmage argue that "[i]n the case of executive wars, none of the conditions for the establishment of constitutional power by usage is present."[55] The text of the Constitution clearly places war powers in the hands of Congress, not the President. For this reason, "[t]he early Presidents, and indeed everyone in the country until the year 1950, denied that the President possessed such a power."[56] Thus, "[i]t can only be audacity or desperation that leads the champions of recent presidential usurpations to state that 'history had legitimated the practice of presidential war-making.'"[57]

II. THE POLITICAL QUESTION DOCTRINE

Although the Constitution vests Congress with the power to initiate war, courts frequently dismiss claims against executive war power as posing nonjusticiable political questions. In the case of

50. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

51. *See* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (holding that a history of Congressional acquiescence to executive power may legitimize presidential action).

52. Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012).

53. Powell v. McCormack, 395 U.S. 486, 546–47 (1969).

54. ELY, *supra* note 7, at 10.

55. WORMUTH & FIRMAGE, *supra* note 12, at 151.

56. *Id.*

57. *Id.*

Baker v. Carr, the Court held that a political question involves at least one of the following six elements:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
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> [2] or a lack of judicially discoverable and manageable standards for resolving it;
>
> [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> [5] or an unusual need for unquestioning adherence to a political decision already made;
>
> [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[58]

The *Baker* decision provided unclear guidance on how to apply the political question doctrine to issues of war.[59] The Court recognized that issues arising from foreign relations "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature . . . ."[60] But the Court emphasized that it is an "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[61] For example, courts are able to recognize the existence of armed conflict.[62] Furthermore, if a case presents "clearly definable criteria," then "the political question barrier falls away."[63]

One of the Court's few applications of the political question doctrine to foreign affairs was in *Goldwater v. Carter*.[64] When President Carter terminated the U.S.'s mutual defense treaty with Taiwan, Senator Barry Goldwater led a group of twenty-five current and former members of Congress in a suit against President Carter.[65] Although the D.C. District Court ruled that President Carter could not terminate a treaty without congressional approval, the Court of

58. Baker v. Carr, 369 U.S. 186, 217 (1962).
59. *Id.* at 211–14.
60. *Id.* at 211.
61. *Id.*
62. *See id.* at 212–13 (citation omitted).
63. *Id*. at 214.
64. 444 U.S. 996 (1979).
65. Goldwater v. Carter, 481 F. Supp. 949, 950 (D.D.C. 1979).

Appeals reversed.[66] Without hearing oral arguments, a divided Supreme Court dismissed the complaint.[67] Justices Rehnquist, Burger, Stewart, and Stevens all held that the case raised a non-justiciable political question.[68]

Justice Powell, writing in dissent, thought that dismissing the case as a political question was "incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another."[69] Justice Brennan—the author of *Baker v. Carr*—also dissented.[70] He thought that Justice Rehnquist "profoundly misapprehend[ed] the political-question principle as it applies to matters of foreign relations."[71] Justice Brennan agreed that "the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'"[72] But, Justice Brennan continued, timing matters. The political question doctrine is not applicable when courts are "faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts."[73]

Given the Justices' own disagreements on the political question doctrine, it is unsurprising that lower courts have described the doctrine as having "shifting contours and uncertain underpinnings."[74] It is no surprise then that the political question doctrine has played a limited role in Supreme Court jurisprudence; the Court has relied on the doctrine only a handful of times.[75] Nevertheless, lower courts have

66. *Id.* at 965; Goldwater v. Carter, 617 F.2d 697, 709 (D.C. Cir. 1979).
67. *Goldwater*, 444 U.S. at 996.
68. *Id.* at 1002 (Rehnquist, J., concurring).
69. *Id.* at 1001 (Powell, J., concurring).
70. *Id.* at 1006–07 (Brennan, J., dissenting).
71. *Id.* at 1006.
72. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 211-13 (1962)).
73. *Id.* (citations omitted).
74. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 69 (D.D.C. 2014) (quoting Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (*en banc*)).
75. El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("The political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed. The Court has relied on the doctrine only twice in the last 50 years.").

frequently relied on the political question doctrine when analyzing challenges to the executive war power.[76]

III. THE VIETNAM WAR AND THE PASSAGE OF THE WAR POWERS RESOLUTION

The Vietnam War incited an enormous amount of popular protest and congressional opposition against the executive war power. It also encouraged litigation, which was largely unsuccessful. But the tide began to turn in the latter stages of the war when the U.S. intervened in Cambodia.[77] Less than a year after the U.S. signed the Paris Peace Accords and ostensibly ended its participation in the war,[78] Congress passed the War Powers Resolution over President Nixon's veto.[79] The War Powers Resolution clearly indicated Congress's desire to reassert its constitutional authority over war-making decisions.[80] In so doing, Congress "removed much of the force of the political question doctrine as an impediment to independent judicial review of executive war power acts . . . ."[81]

A. The Courts, the Political Question Doctrine, and the Vietnam War

The Vietnam War was not the first American war to have its constitutionality challenged in court. During the Korean War, James Bolton was convicted of refusing to comply with the draft.[82] On appeal, Bolton argued the Korean War was unconstitutional because Congress had not declared war.[83] The Second Circuit dismissed the complaint for lack of standing, because Bolton had not been ordered to Korea.[84] However, the court's ruling did not rest on the political question doctrine, and the court suggested that a person ordered "to

76. Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967); Smith v. Obama, 217 F. Supp. 3d 283, 297 (D.D.C. 2016); Lowry v. Reagan, 676 F. Supp. 333, 337 (D.D.C. 1987); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985).

77. Holtzman v. Schlesinger, 361 F. Supp. 553, 566 (E.D.N.Y. 1973), *rev'd* 484 F.2d 1307 (2d Cir. 1973).

78. GEORGE R. DUNHAM AND DAVID A. QUINLAN, U.S. MARINES IN VIETNAM: THE BITTER END, 1973–1975 11 (1990) (reporting that the United States provided South Vietnam with $1.8 billion total in military aid during Fiscal Years 1974 and 1975).

79. DYCUS ET AL., *supra* note 4, at 349.

80. *See* War Powers Resolution § 2, 50 U.S.C.A. § 1541 (West 2018).

81. Firmage, *supra* note 6, at 68.

82. United States v. Bolton, 192 F.2d 805, 806 (2d Cir. 1951).

83. *Id.*

84. *Id.*

fight in an 'undeclared war'" would have standing to challenge the constitutionality of the order.[85]

Multiple servicemembers challenged the constitutionality of the Vietnam War.[86] Private First Class Berk and Specialist Orlando had long-running suits requesting injunctions against their deployment orders because the Vietnam War had not been properly authorized by Congress.[87] The Second Circuit held that war powers cases did not necessarily constitute political questions, because "the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war."[88] However, the court ultimately concluded that the Gulf of Tonkin Resolution, war appropriations, and conscription legislation constituted "mutual participation in the prosecution of war."[89]

Private Luftig unsuccessfully sought an injunction to prevent him from being sent to Vietnam, arguing the war was unconstitutional.[90] In rejecting his argument, the D.C. Circuit aggressively applied the political question doctrine to the executive's war powers: "the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power . . . ."[91]

Reflecting the growth of anti-war sentiment, the D.C. Circuit discarded its broad *Luftig* interpretation of the political question doctrine in 1973.[92] The court held that the judiciary is, in fact, able to determine the allocation of war powers between the political branches.[93] Because Congress had repealed the Gulf of Tonkin Resolution in 1971, Senators and Representatives could no longer justify "the *indefinite* continuance of the war . . . ."[94] Furthermore, congressional appropriations failed to constitute approval of the

85. *Id.*

86. Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967).

87. *Orlando*, 443 F.2d at 1040.

88. *Id.* at 1042; *see also DaCosta*, 448 F.2d at 1369 ("[T]here was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.").

89. *Orlando*, 443 F.2d at 1042.

90. *Luftig*, 373 F.2d at 665.

91. *Id.* at 666.

92. Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973).

93. *Id.*

94. *Id.*

war.[95] As "every schoolboy knows," a Congressman who was completely opposed to the war might still vote for military appropriations "because he was unwilling to abandon without support men already fighting."[96] These votes—"cast in pity and piety"—should not be construed "as though they were votes freely given to express consent."[97]

Nevertheless, the court dismissed the claim as a political question.[98] President Nixon's stated policy was "to bring the war to an end as promptly as was consistent with the safety of those fighting," and the court concluded that it lacked the ability to analyze whether the President's actions were consistent with that policy.[99]

Supreme Court Justice William Douglas—an outspoken opponent of the Vietnam War[100]—rejected the application of the political question doctrine to litigation involving the executive war power.[101] When Massachusetts brought a suit arguing that U.S. involvement in Vietnam was unconstitutional, the Supreme Court declined to hear the case by a 6-3 vote, with Justices Douglas, Harlan, and Stewart dissenting.[102] Justice Douglas issued a powerful fourteen-page dissent, declaring that "[t]he question of an unconstitutional war is neither academic nor 'political.'"[103] The Court was not tasked with determining "the wisdom of fighting in Southeast Asia," but with deciding "whether under our Constitution presidential wars are permissible . . . ."[104] Because the Supreme Court's duty is to interpret the Constitution, Justice Douglas argued that the case was justiciable.[105]

Congresswoman Elizabeth Holtzman brought another war-related suit[106] that caught Justice Douglas's eye. Representative Holtzman sought to end the U.S. bombing of Cambodia that the President was conducting without congressional authorization, arguing that her right

95. *Id.* at 615.
96. *Id.*
97. *Id.*
98. *Id.* at 616.
99. *Id.*
100. James L. Moses, *William O. Douglas and the Vietnam War: Civil Liberties, Presidential Authority, and the "Political Question"*, 26 PRESIDENTIAL STUD. Q. 1019, 1019 (1996).
101. Massachusetts v. Laird, 400 U.S. 886, 887 (1970) (Douglas, J. dissenting).
102. *Id.* at 900.
103. *Id.*
104. *Id.* at 896.
105. *Id.* at 894.
106. Holtzman v. Richardson, 361 F. Supp. 544 (E.D.N.Y. 1973).

to a vote on the declaration of hostilities was being impaired.[107] The district court sympathized with Holtzman, noting that majorities in both Houses had opposed the continued bombing of Cambodia.[108] Furthermore, the court rejected the notion "that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized."[109] If this were the rule, then the President would only need a vote of "one-third plus one of either House in order to conduct a war . . . ."[110]

Thus, the court granted an injunction for Representative Holtzman, although it postponed the date of the injunction to allow the government to appeal for a stay.[111] The Court of Appeals stayed the injunction, but Justice Douglas vacated the stay.[112] He decried the "ton of bombs" dropped on "Cambodian farmers whose only 'sin' is a desire for socialized medicine to alleviate the suffering of their families and neighbors."[113] However, the other Justices quickly reversed Justice Douglas and reinstated the stay.[114] After the Court of Appeals heard the case, it concluded that Representative Holtzman lacked standing because she had not been denied the right to vote or debate on Cambodia.[115]

B. The War Powers Resolution

Cambodia loomed large in the minds of the members of Congress who passed the War Powers Resolution of 1973.[116] The report by the House Committee on Foreign Affairs opened by acknowledging that "[t]he Cambodian incursion of May 1970 provided the initial impetus for a number of bills and resolutions on the war powers."[117] Congress had been "disturbed by the lack of prior consultation," and the result was a "near crisis in the relations between the executive and

107. *Id.* at 547.
108. Holtzman v. Schlesinger, 361 F. Supp. 553, 565 (E.D.N.Y. 1973).
109. *Id.*
110. *Id.*
111. *Id.* at 565–66.
112. Schlesinger v. Holtzman, 414 U.S. 1321, 1321 (1973).
113. Holtzman v. Schlesinger, 414 U.S. 1316, 1317 (1973).
114. Schlesinger v. Holtzman, 414 U.S. at 1321–22.
115. Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) ("She has fully participated in the Congressional debates which have transpired since her election to the Congress. The fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein.").
116. *See* H.R. REP. NO. 93-287, at 2348 (1973).
117. *Id.*

legislative branches . . . ."[118] With the War Powers Resolution, Congress intended to "reassert its own prerogatives and responsibilities" by "restor[ing] the balance provided for and mandated in the Constitution."[119]

Congress acknowledged that it did not possess a monopoly on war powers.[120] The president had the "right to defend the Nation against attack, without prior congressional authorization, in extreme circumstances such as a nuclear missile attack or direct invasion."[121] Rather, Congress was concerned with "the commitment of U.S. military forces exclusively by the President (purportedly under his authority as Commander in Chief) without congressional approval or adequate consultation with the Congress."[122] Hence, the purpose of the War Powers Resolution is to "fulfill the intent of the framers of the Constitution" by ensuring congressional input when U.S. troops enter "hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[123] The President may introduce forces into hostilities or imminent hostilities only with congressional authorization or in response to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[124]

The House report provides guidance on what Congress meant by "hostilities and imminent hostilities": "any time combat military forces [are] sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt."[125] The report used the 1962 U.S. intervention in Thailand as an example of an intervention that "would have required Presidential reports" if the Resolution had existed then.[126] In the Thailand intervention, the U.S. sought to intimidate Laotian communists by sending the Seventh

118. *Id.*
119. *Id.* at 2349.
120. *Id.* at 2348–49.
121. *Id.* at 2349.
122. *Id.*
123. 50 U.S.C.A. § 1541(a) (West 2018).
124. 50 U.S.C.A. § 1541(c) (West 2018).
125. H.R. REP. NO. 93-287, at 2352 ("Reporting is required when the President 'commits United States Armed Forces equipped for combat to the territory, airspace or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair or training of United States Armed Forces'.").
126. *Id.*

Fleet to Thai waters and five thousand troops to the Thai-Laos border.[127]

Section 3 of the War Powers Resolution calls on the president to consult with Congress "in every possible instance" before introducing forces into hostilities or imminent hostilities.[128] The House report emphasized that consultation should occur "*prior* to the commitment of armed forces . . . ."[129] "Consult" is not a mere synonym of inform; "consult" requires the President to ask Congress for its advice, opinions, and, depending on the situation, its approval.[130] Furthermore, the President should try to consult with Congress even "in extraordinary and emergency circumstances . . . when it is not possible to get formal congressional approval . . . ."[131]

Section 4 requires the President to provide Congress with information related to the use of armed forces.[132] The major requirement is submitting a report to the Speaker of the House and President pro tempore of the Senate within forty-eight hours of introducing forces into hostilities, imminent hostilities, or "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[133] The phrase "numbers which substantially enlarge" should be given a "common sense understanding . . . ."[134] For example, increasing the number of Marines at an embassy from five to ten would not require a report, nor would adding one thousand troops to U.S. forces in Europe.[135] President Kennedy, however, would have been required "to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000."[136]

Section 5 requires the president to terminate the use of armed forces within sixty days if he does not receive congressional authorization.[137] The president may obtain a thirty-day extension if

127. Edmund F. Wehrle, *"A Good, Bad Deal": John F. Kennedy, W. Averell Harriman, and the Neutralization of Laos, 1961–1962*, 67 PAC. HIST. REV. 349, 370 (1998).
128. 18 U.S.C.A. § 1542 (West 2018).
129. H.R. REP. NO. 93-287, at 2350 (emphasis added).
130. *Id.* at 2351.
131. *Id.* at 2350.
132. 18 U.S.C.A. § 1543 (West 2018).
133. 18 U.S.C.A. § 1543(a) (West 2018).
134. H.R. REP. NO. 93-287, at 2352.
135. *Id.*
136. *Id.*
137. 18 U.S.C.A. § 1544(b) (West 2018).

necessary to safely withdraw troops.[138] Section 5(c) allows Congress to use a concurrent resolution to force the withdrawal of troops.[139] This power, however, is probably akin to a legislative veto, and therefore Section 5(c) is likely unconstitutional under *INS v. Chadha*.[140]

Sections 6 and 7 discuss the procedure of introducing a joint resolution, and Section 8 expressly states that appropriations do not constitute authorization.[141] Lastly, Section 9 is a separability clause.[142]

President Nixon vetoed the War Powers Resolution, but Congress overrode his veto.[143] No president has accepted the Resolution as constitutional.[144] Many opponents of the Resolution argue that it is an unconstitutional infringement on the President's Commander-in-Chief powers.[145] There is some truth to this, as Section 2 excessively restricts the situations in which the President can unilaterally use force.[146] Section 2 should expand the situations in which the President is allowed to introduce armed forces without congressional authorization to include rescuing American citizens abroad and protecting American embassies and consulates.[147] As noted above, Section 5(c) is likely an unconstitutional legislative veto. The separability clause in Section 9, however, ensures that these minor errors are not fatal to the Resolution.

As Professor Stephen Carter of Yale has recognized, the War Powers Resolution is constitutional because it merely defines and enforces the war power from Article I of the Constitution.[148] Defining the power and coupling it with reasonable enforcement mechanisms is a legitimate exercise of congressional authority that "does not intrude on any presidential prerogative."[149]

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138. *Id.*

139. 18 U.S.C.A. § 1544(c) (West 2018).

140. 462 U.S. 919, 957–59 (1983). *But see* Ely, *supra* note 46, at 1395–98 (arguing that Section 5(c) is distinguishable from *Chadha* and is constitutional).

141. 18 U.S.C.A. § 1545–1547 (West 2018).

142. 18 U.S.C.A. § 1548 (West 2018).

143. DYCUS ET AL., *supra* note 4, at 349.

144. *Id.*

145. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 119 (1984).

146. *See* Ely, *supra* note 46, at 1393. ("[Section] 2(c) not only is too restrictive of necessary presidential authority, but is almost inevitably so. Virtually everyone agrees that it should have included the protection of American citizens as one of the justifications for presidential military action.").

147. *See id.* at 1394.

148. Carter, *supra* note 145, at 101–02.

149. *Id.* at 102.

IV. THE POLITICAL QUESTION DOCTRINE SINCE THE WAR POWERS RESOLUTION

No successful claim has been made against the executive war power since the passage of the War Powers Resolution. Courts have repeatedly held that the constitutional allocation of war powers raises a non-justiciable political question.[150] But courts have not entirely ruled out the possibility of a plaintiff's having standing, and at least one court has held that the War Powers Resolution creates a private right of action.[151]

A. Central America and the Caribbean

In *Crockett v. Reagan*, twenty-nine members of Congress brought suit against President Reagan, Secretary of State Alexander Haig, and Secretary of Defense Caspar Weinberger.[152] The members of Congress argued that the defendants had violated both the Constitution and the War Powers Resolution by sending nearly sixty U.S. servicemembers to El Salvador without obtaining a congressional declaration of war or submitting a report to Congress.[153] The D.C. District Court held that determining whether U.S. forces had been introduced into hostilities was a matter of "congressional, not judicial, investigation and determination."[154] Therefore, the court dismissed the claim and the appellate court affirmed this decision.[155]

In 1983, twelve members of Congress brought suit against President Reagan, alleging that "U.S.-sponsored terrorist raids against various towns and villages in Nicaragua" constituted unauthorized acts of war.[156] The D.C. District Court dismissed the case under the political question doctrine.[157] Relying on *Crockett*, the court judged itself incompetent to inquire "into sensitive military matters."[158] Furthermore, ruling that President Reagan was violating the

150. *See* Smith v. Obama, 217 F. Supp. 3d 283, 297 (D.D.C. 2016), *aff'd sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018); Lowry v. Reagan, 676 F. Supp. 333, 337 (D.D.C. 1987); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

151. Ange v. Bush, 752 F. Supp. 509, 511 n.1 (D.D.C. 1990).

152. Crockett v. Reagan, 558 F. Supp. 893, 895 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

153. *Id.* at 895–96.

154. *Id.* at 898.

155. *Id.* at 903.

156. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 598 (D.D.C. 1983).

157. *Id.* at 600.

158. *Id.*

Constitution would have expressed "a lack of the respect due coordinate branches of government."[159]

Shortly after the U.S. invasion of Grenada in October 1983, the D.C. District Court heard a case brought by eleven members of Congress against President Reagan.[160] The Reagan administration claimed that it had consulted with Congress before sending troops into Grenada, in accordance with Section 3 of the War Powers Resolution.[161] The President, however, had only informed Congress that the U.S. was invading Grenada *after* he had given the order to invade.[162] Nevertheless, the court ruled that because the plaintiffs still had "the institutional remedies afforded to Congress as a body," it would be "unwise" for the court to involve itself in this executive-legislative dispute, and dismissed the case.[163]

B. Persian Gulf

When the U.S. began escorting ships in the Persian Gulf and battling Iranian naval vessels, 110 members of the House of Representatives brought suit arguing that these actions triggered the Section 4(a)(1) reporting requirement of the War Powers Resolution.[164] The D.C. District Court dismissed the case under the political question doctrine, ruling that a determination of whether the executive had violated Section 4(a)(1) would also require a determination of whether the U.S. was "engaged in 'hostilities' or in 'situations where imminent involvement in hostilities is clearly indicated by the circumstances.'"[165] The court felt that determining whether the U.S. was involved in hostilities "would be both inappropriate and imprudent . . . ."[166]

In the buildup to the Persian Gulf War, Sergeant Michael Ange sought an injunction to prevent President Bush from deploying him to the Persian Gulf.[167] Ange argued that his deployment orders violated

159. *Id.*
160. Conyers v. Reagan, 578 F. Supp. 324, 325–26 (D.D.C. 1983).
161. Michael Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 POL. SCI. Q. 627, 630 (1985).
162. *Id.* at 630–31.
163. Conyers, 578 F. Supp. at 327.
164. Lowry v. Reagan, 676 F. Supp. 333, 334 (D.D.C. 1987).
165. *Id.* at 337.
166. *Id. But see* Koohi v. United States, 976 F.2d 1328, 1335 (9th Cir. 1992) (holding that the United States was engaged "in hostile military activities vis-a-vis Iran in order to protect Gulf Shipping").
167. Ange v. Bush, 752 F. Supp. 509, 510 (D.D.C. 1990).

the War Powers Clause of the Constitution and Sections 4(a) and 5(b) of the War Powers Resolution.[168] The court took a broad view of the political question doctrine, refusing to even consider "precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches."[169]

But the political question doctrine was far from settled. On the same day that the D.C. District Court dismissed Ange's claim as a non-justiciable political question, it held in *Dellums v. Bush* that suits challenging executive war power *do not* automatically raise political questions.[170] The court had "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen . . . could be described as a 'war' within the meaning of Article I, Section 8, Clause 11, of the Constitution."[171] Referring to the D.C. Circuit's Vietnam-era decision in *Mitchell v. Laird*, the *Dellums* court concluded that it had the power to determine that the U.S. was at war.[172] It held that historical practice demonstrated courts' competence to determine the existence of war, because courts frequently determine the existence of war when construing treaties, statutes, and insurance contracts.[173] Nevertheless, the court denied the plaintiffs' request for a preliminary injunction, as the plaintiffs represented only about ten percent of Congress.[174]

C. Kosovo

Arguably, the Kosovo War resulted in the most legally significant suit against the executive war power.[175] On March 24, 1999, the U.S. began bombing Yugoslavia, ostensibly to halt Yugoslav repression of the Kosovar Albanians.[176] Five weeks later, the House of Representatives defeated a resolution declaring war on Yugoslavia by a vote of 427 to 2.[177] The House also rejected a resolution authorizing

168. *Id.* at 511.
169. *Id.* at 512.
170. Dellums v. Bush, 752 F. Supp. 1141, 1144–46 (D.D.C. 1990).
171. *Id.* at 1146.
172. *Id.*
173. *Id.*
174. *Id.* at 1150–51.
175. Campbell v. Clinton, 52 F. Supp. 2d 34, 37–39 (D.D.C. 1999), *aff'd*, 203 F.3d 19, 19 (D.C. Cir. 2000).
176. *Id.* at 37. *But see* JOHN NORRIS, COLLISION COURSE: NATO, RUSSIA, AND KOSOVO xxiii (2005) ("It was Yugoslavia's resistance to the broader trend of political and economic reform—not the plight of Kosovar Albanians—that best explains NATO's war.").
177. *Id.* at 38.

President Clinton to bomb Yugoslavia by a tie vote of 213 to 213.[178] Twenty-six members of the House who had voted against authorization of the bombing campaign sued President Clinton, arguing that he had violated the War Powers Clause of the Constitution by bombing Yugoslavia without congressional authorization.[179] They also claimed that President Clinton had violated the War Powers Resolution by not withdrawing American military forces from Yugoslavia within sixty days of the initiation of hostilities.[180]

The D.C. District Court held that the plaintiffs lacked standing because Congress as a whole had "sent distinctly mixed messages" about the air strikes.[181] Therefore, the court did not need to determine whether the case fell under the political question doctrine, although it did say that "case[s] brought by a legislator alleging a violation of the War Powers Clause" do not automatically raise non-justiciable political questions.[182]

The D.C. Circuit Court of Appeals unanimously upheld the ruling, although each judge filed a concurring opinion.[183] Judge Silberman would have held that the political question doctrine applied.[184] In an oblique reference to the district court's reasoning in *Dellums v. Bush*, Judge Silberman wrote that it was "irrelevant that courts have determined the existence of a war in cases involving insurance policies and other contracts," because those cases did not turn on "whether there was a war as the Constitution uses that word . . . ."[185] In fact, according to Judge Silberman, there is no "constitutional test for what is war."[186] Furthermore, Judge Silberman opined that *The Prize Cases* show that the President can repel aggressive acts by third parties without congressional authorization.[187] Therefore, challenges to the constitutionality of executive war power must prove that the President is *repelling* an aggressive act—that is, the President did not

178. *Id.*
179. *Id.* at 39.
180. *Id.*
181. *Id.* at 44.
182. *Id.* at 40 n.5.
183. Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000).
184. *Id.* at 24–25 (Silberman, J., concurring).
185. *Id.* at 26.
186. *See id.* at 25 (citations omitted) ("Appellants cannot point to any constitutional test for what is war.").
187. *Id.* at 27.

initiate the conflict.[188] Of course, "[t]he question of who is responsible for a conflict is, as history reveals, rather difficult to answer," and Judge Silberman concluded that courts are unable to answer it.[189]

Judge Tatel did not agree that the case raised a non-justiciable political question.[190] Plaintiffs who otherwise had standing could bring a suit against the President for alleged violations of the War Powers Clause and the War Powers Resolution.[191] Judge Tatel wrote that courts routinely determine which police searches are *unreasonable*, which government actions *establish* a religion, and which districts are so gerrymandered they violate *equal protection* of the laws.[192] None of those constitutional terms are self-defining, and the standards for analyzing those terms have developed through judicial decisionmaking.[193] Thus Judge Tatel averred, "[c]ourts have proven no less capable of developing standards to resolve war powers challenges."[194] To counter Judge Silberman's reference to *The Prize Cases*, Judge Tatel noted that there the Court had managed to determine the existence of an undeclared war by simply looking at the facts of the conflict.[195] Referring the early Supreme Court case of *Bas v. Tingy*,[196] Judge Tatel reminded his colleagues that in the year 1799 the Court had recognized "that sporadic battles between American and French vessels amounted to a state of war . . . ."[197] Why then, the judge wondered, was the D.C. Circuit in the year 2000 incapable of determining "whether months of daily airstrikes involving 800 U.S. aircraft flying more than 20,000 sorties and causing thousands of enemy casualties amounted to 'war' . . . ?"[198]

D. Terrorism

El-Shifa Pharmaceutical Industries Co. v. United States was another important case that emerged from Clinton administration air strikes.[199] In response to terrorist attacks on U.S. embassies in Kenya

188. *Id.*
189. *Id.*
190. *Id.* at 37 (Tatel, J., concurring).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 38.
196. 4 U.S. (4 Dall.) 37 (1800).
197. Clinton, 203 F.3d at 40.
198. *Id.*
199. 607 F.3d 836 (D.C. Cir. 2010).

and Tanzania, President Clinton ordered missile strikes against a factory in Sudan that was allegedly producing chemical weapons for Osama bin Laden.[200] Tragically, the factory produced pharmaceuticals, not chemical weapons, and the destruction of the factory resulted in tens of thousands of deaths.[201] When the factory's owner brought suit, the D.C. Circuit dismissed the claim as raising a non-justiciable political question.[202] The court distinguished between claims questioning the wisdom of foreign policy decisions and claims presenting purely legal issues.[203] Because *El-Shifa* revolved around the wisdom of selecting targets for missile strikes, it raised a non-justiciable political question.[204] However, a claim involving foreign policy would be justiciable if it merely alleged that "the Executive has exceeded the scope of prescribed statutory authority or failed to obey the prohibition of a statute or treaty."[205]

More recently, Captain Nathan Smith brought suit challenging President Obama's exercise of war power in hostilities against terrorists.[206] Captain Smith argued that the U.S. military campaign against ISIL was not authorized by Congress and thereby violated the War Powers Resolution.[207] President Obama's legal bases for the military campaign against ISIL were the 2001 and 2002 Authorizations for Use of Military Force (AUMF).[208] Congress had passed both AUMFs, and both explicitly stated that Congress was authorizing military force in accordance with Sections 5(b) and 8(a)(1) of the War Powers Resolution.[209] The 2001 AUMF empowered the President to use force against "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ."[210] The 2002 AUMF empowered the

200. *Id.* at 838.

201. Werner Daum, *Universalism and the West: An Agenda for Understanding*, HARV. INT'L REV., Summer 2001, at 19, 19.

202. El-Shifa, 607 F.3d at 844.

203. *Id.* at 842 (citing Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring)).

204. *See id.* at 843–44 ("The case at hand involves the decision to launch a military strike abroad . . . . we conclude that both [of the plaintiff's claims] raise nonjusticiable political questions.").

205. *See id.* at 842 (citations omitted).

206. Smith v. Obama, 217 F. Supp. 3d 283, 288 (D.D.C. 2016).

207. *Id.* at 285.

208. *Id.* at 286–87.

209. *Id.*

210. 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

President to "defend the national security of the United States against the continuing threat posed by Iraq."[211]

Captain Smith argued that neither AUMF provided a legal basis for the campaign against ISIL.[212] The 2001 AUMF did not apply because ISIL was established three years after September 11 and broke with al-Qaeda no later than 2013.[213] In regard to the 2002 AUMF, Captain Smith noted that the Defense Department's general counsel had conceded that "the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF."[214] Furthermore, National Security Advisor Susan Rice told Congress that the Obama administration did *not* rely on the 2002 AUMF for actions against ISIL.[215]

The D.C. District Court, however, disagreed with Captain Smith and dismissed his claim as a non-justiciable political question.[216] The court believed that it lacked the standards to determine whether ISIL was affiliated with the perpetrators of September 11 or whether a military campaign against ISIL was necessary to "defend the national security of the United States against the continuing threat posed by Iraq."[217]

Nevertheless, the court also rejected a broad interpretation of the political question doctrine as applied to the executive war power.[218] Using the language of *Baker v. Carr*, the court acknowledged that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[219] The *Smith* court concluded that "[t]he presence of a political question 'turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action,'" and thus agreed with the *El-Shifa* court.[220]

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211. 2002 Authorization for Use of Military Force, Pub. L. No. 107-243, 116 Stat. 1498.

212. Plaintiff's Memorandum in Opposition of Motion to Dismiss at 34–44, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016) (1:16-CV-00843-CKK).

213. *Id.* at 40.

214. Plaintiff's Memorandum at 35.

215. *Id.*

216. Smith v. Obama, 217 F. Supp. 3d 283, 297 (D.D.C. 2016).

217. *Id.* at 298.

218. *Id.*

219. *Id.* (quoting El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010)).

220. *Id. (*quoting El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010)).

V. RECOMMENDATIONS

Courts should open their doors to litigants who challenge the executive war power, because the political question doctrine does not apply to such challenges.[221] These challenges are based on determining "whether a particular branch has been constitutionally designated as the repository of political decisionmaking power," and therefore these challenges are "matter[s] of constitutional law . . . within the competence of the courts."[222] Even if one believes that Frankfurter's historical gloss theory applies to the executive war power, Congress is able to reclaim that power.[223] Professor Bradley writes that although "historical practice supports unilateral presidential authority" in the war powers setting, "little practice establishes that Congress is disabled from restricting or regulating that authority . . . . To the extent that custom-based presidential authority is considered nonexclusive, it is more analogous to some sort of license or easement than to adverse possession."[224]

A. Strengthening the War Powers Resolution

The War Powers Resolution's text clearly demonstrates Congress's intent to reclaim its war powers.[225] There are several ways Congress could strengthen the War Powers Resolution, starting by creating a private right of action. Although at least one court has held that the War Powers Resolution creates a private right of action,[226] Congress should make this explicit in the Resolution's text. Professor Ely recommended giving this right of action to "[a]ny member of the United States Armed Forces ordered to the relevant theatre of operations, [and] any Member of Congress . . . ."[227] He also suggested language instructing courts that "[s]uch action shall not be dismissed . . . on the ground that the plaintiff lacks standing, the case

221. *See* David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) ("[T]he Supreme Court's jurisprudence, stretching from early in our history through Youngstown to numerous contemporary war powers cases, is rife with instances of the Court's resolving questions of the Executive's war powers, just as it has adjudicated other separation of powers disputes between the political departments").

222. *See* Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

223. *See* DYCUS, *supra* note 4, at 47 ("Of course, Congress can always reclaim and exercise its constitutional authority.").

224. Curtis A. Bradley and Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, SUP. CT. REV. 1, 55 (2014).

225. 50 U.S.C.A. § 1541 (West 2018).

226. Ange v. Bush, 752 F. Supp. 509, 511 n.1 (D.D.C. 1990).

227. ELY, *supra* note 7, at 135.

presents a political question, the case is unripe, or as an exercise of the court's equitable discretion."[228]

Section 2(a) should define "hostilities or imminent hostilities." The definition used in the House report would suffice: "any time combat military forces [are] sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt."[229] Professor Ely's definition would also work: "a substantial possibility that United States Armed Forces will be attacked, irrespective of any hope that the presence of such forces will deter such attack."[230]

Section 2(c) should expand the situations in which the President is allowed to introduce armed forces without congressional authorization to include rescuing American citizens abroad and protecting American embassies and consulates.[231] Because the President has almost unquestioned authority to use force in those situations, not including them serves only to weaken the War Powers Resolution.[232]

Section 3 should specify *which* members of Congress the president must consult before introducing armed forces into hostilities or imminent hostilities.[233] The consulted members of Congress should include, at the very least, these eighteen individuals: the President pro tempore of the Senate; the Speaker of the House; the Chair and Ranking Member of the Senate Committees on Armed Services, Foreign Relations, Homeland Security and Governmental Affairs, and Intelligence; and the Chair and Ranking Member of the House Committees on Armed Services, Foreign Affairs, Homeland Security, and Intelligence.

The requirement that the President withdraw forces within sixty days absent congressional authorization should be reduced to twenty days. It is virtually inconceivable that the President would ever be in a situation where armed forces were engaged in hostilities for more than three weeks before Congress could convene. Congress managed to declare war on Japan the day after Pearl Harbor,[234] and the

228. *Id.*
229. H.R. REP. NO. 93-287, at 2352.
230. ELY, *supra* note 7, at 134.
231. *See* Ely, *supra* note 46, at 1393–94.
232. *See supra* p. 7 and notes 45–48.
233. *See* Ely, *supra* note 46, at 1400–01.
234. Joint Resolution Declaring a State of War Against the Imperial Government of Japan, Pub. L. No. 77-328, 55 Stat. 795 (1941).

Authorization for the Use of Military Force against the perpetrators of September 11 was passed and approved within a week of the attacks.[235]

As noted above, Section 5(c) is likely an unconstitutional legislative veto under *Chadha*.[236] Thus, Section 5(c) should be dropped.

By defining key terms, creating a right of action, clarifying requirements, and dropping unconstitutional elements, Congress could make the War Powers Resolution a useful instrument in restoring the constitutional balance of war powers. Courts can help restore this constitutional balance by narrowly applying the political question doctrine.

B. Courts are Capable of Adjudicating War-Related Claims

Federal and state courts have long demonstrated that they have the judicially discoverable and manageable standards necessary to determine the existence of war, even in the absence of a formal declaration.[237] As early as 1800, the Supreme Court held that "every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."[238] The Supreme Court has not been deterred by the lack of a formal declaration of war, having determined that "it is a matter of history that all along our Western frontier there has been a succession of Indian wars, with great destruction of life and property, and yet seldom has there been a formal declaration of war on the part of either the government or the Indians."[239] Similarly, the Supreme

235. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

236. *See supra* p. 194 and note 140.

237. *See* Marks v. United States, 161 U.S. 297, 302–03 (1896) ("[I]t is a matter of history that all along our Western frontier there has been a succession of Indian wars, with great destruction of life and property, and yet seldom has there been a formal declaration of war on the part of either the government or the Indians."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) ("[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."); Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992) ("[F]rom a practical standpoint 'time of war' has come to mean periods of significant armed conflict rather than times governed by formal declarations of war."); Darnall v. Day, 37 N.W.2d 277, 280 (Iowa 1949) ("[A]s commonly understood . . . war ends when hostilities cease."); Stankus v. New York Life Ins. Co., 44 N.E.2d 687, 689 (Mass. 1942) ("A conflict between the armed forces of two nations under authority of their respective governments would be commonly regarded as war.").

238. Bas, 4 U.S. at 40 (opinion of Washington, J.).

239. Marks, 161 U.S. at 302–03.

Court of Iowa has ruled that war "refers to the period of hostilities and not to a technical state of war . . . ."[240]

Courts have put forth commonsense definitions of war and hostilities. The Supreme Judicial Court of Massachusetts defined war as "[a] conflict between the armed forces of two nations under authority of their respective governments . . . ."[241] The Ninth Circuit has used an even simpler definition: "periods of significant armed conflict . . . ."[242] Using this definition, the Ninth Circuit determined that the U.S. was involved in a war when it protected Persian Gulf shipping during the Iran-Iraq War.[243]

Sitting on the D.C. Circuit, then-Judge Kavanaugh recognized that cases involving national security or international relations do not automatically raise political questions.[244] "Indeed," Judge Kavanaugh wrote, "from the time of John Marshall to the present, the Court has decided many sensitive and controversial cases that had enormous national security or foreign policy ramifications."[245]

In a positive sign for the future, the Roberts Court did not apply the political question doctrine in *Zivotofsky*.[246] Menachem Zivotofsky's parents unsuccessfully applied for a passport and consular report that would have recorded his birthplace as "Jerusalem, Israel."[247] An Act of Congress allowed U.S. citizens born in Jerusalem to record their birthplace as "Jerusalem, Israel."[248] However, the State Department's policy was that passport officials should write only "Jerusalem."[249] When Zivotofsky's parents brought suit, the Secretary of State argued it should be dismissed as a political question.[250] Both the District Court[251] and the Appeals Court[252] agreed with the Secretary. But when the Supreme Court heard the case, eight

240. Darnall, 37 N.W.2d at 280.
241. Stankus, 44 N.E.2d at 689.
242. Koohi, 976 F.2d at 1334.
243. *Id.* at 1335.
244. El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 856 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (citations omitted).
245. *Id.*
246. Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012).
247. *Id.* at 192–93.
248. *Id.* at 191.
249. *Id.* at 191–92.
250. *Id.* at 191.
251. Zivotofsky v. Secretary of State, 511 F. Supp. 2d 97, 99 (D.D.C. 2007), *aff'd*, 571 F.3d 1227 (D.C. Cir. 2009), *rev'd sub nom.* Zivotofsky v. Clinton, 566 U.S. 189 (2012).
252. Zivotofsky v. Secretary of State, 571 F.3d 1227, 1228 (D.C. Cir. 2009), *rev'd sub nom.* Zivotofsky v. Clinton, 566 U.S. 189 (2012).

Justices held that the political question doctrine did *not* apply.[253] Chief Justice Roberts, writing for the majority, held that courts have the standards necessary to examine "the textual, structural, and historical evidence" of foreign policy cases.[254] Examining evidence and using "familiar principles of constitutional interpretation" are not outside the purview of the courts; it "is what courts do."[255]

CONCLUSION

Courts should not hold that challenges to the executive war power invariably raise political questions. These challenges concern the constitutional allocation of decisionmaking power, and they are therefore justiciable. Courts should open their doors to members of Congress who seek to assert their constitutional prerogatives and to servicemembers who seek assurance that they are fighting in a constitutional war.

253. Clinton, 566 U.S. at 191.
254. *See id.* at 201.
255. *Id.*