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A Tug of War: The War Powers Resolution and The Meaning of "Hostilities"

"The provision of the constitution giving the warmaker power to the Congress was dictated, as I understand it, by the following reasons. Kings had always been involving their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one should hold the power of bringing this oppression upon us."¹

Abraham Lincoln

A significant legal and political issue before the nation today concerns the war powers of the nation. The struggle between the executive branch and Congress over the war powers has been dormant for the past several years, following the spotlight attention received during the Vietnam era.² The war powers issue involves a struggle between the President and Congress over the power to commit United States armed forces to war. The controversy over war powers has been revived by the latest policies of the Reagan Administration concerning military involvement in Lebanon and Central America.³

The crux of the controversy involves two conflicting interpretations of the term "hostilities" and the phrase "imminent involvement in hostilities" which are found in the War Powers Resolution⁴ (hereinafter

1. Letter from Abraham Lincoln to William H. Herdon (Feb. 15, 1848) reprinted in R. BASLER, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 451-52 (1953).

2. During the 1973 Hearings, Congress considered over thirty war power bills and resolutions. See Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971) (for review of war powers proposals considered by Congress in the years prior to 1972). See also Revely, *Constitutional Allocation of the War Powers Between the President and Congress*, 15 VA. J. INT'L L. 73 (1974); Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?* 16 WM. & MARY 823 (1975) (for review of legislative history from 1972 to the passage of the WPR).

3. See, e.g., *Congress Faces Fight with Reagan over Marines in Lebanon*, S.F. Examiner & Chronicle, Sept. 11, 1983 at A12, col. 1; *Incidents in Lebanon and El Salvador . . . Raises New Concerns on Capitol Hill*, 41 CONGRESSIONAL QUARTERLY WEEKLY REPORT 342-43 (1983); see also N.Y. Times, Nov. 29, 1982 at N18, col. 4; N.Y. Times Nov. 17, 1982 at N27, col. 2; *Percy Insists on Approval by Congress to Expand Role in Lebanon*, 40 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2941.

4. 50 U.S.C. §§1541-1548 (1976). On November 7, 1973, the House of Representatives

the WPR). The Reagan Administration defines these terms very narrowly,⁵ whereas Congress prefers a much broader interpretation.⁶ By applying standard statutory construction, this comment will show that the definition of the Reagan Administration is inconsistent with the intent, objective, purpose, and spirit of the WPR.

In 1973, the WPR was enacted as a response to congressional and public disenchantment over the Vietnam conflict.⁷ The WPR requires the President to make a formal report and consult Congress if he undertakes certain military actions without a declaration of war.⁸ The WPR also provides that the President must seek congressional approval to keep United States troops where hostilities or imminent involvement in hostilities are present.⁹

Prior to the Vietnam conflict, a steady growth of independent executive power in committing American forces into combat existed.¹⁰ From 1940 to 1970, the executive branch held an overwhelming foreign affairs predominance.¹¹ During that period, the President involved United States troops in major wars and ordered fighting without any

and the Senate voted to override President Nixon's veto of H.J. Res. 542. The House overrode by a vote of 284 to 135 and the Senate followed by an overwhelming 75 to 18 vote. 119 CONG. REC. 520, 115 (daily ed. Nov. 7, 1973).

5. See *infra* notes 160-75 and accompanying text.

6. See *infra* notes 152-58 and accompanying text.

7. JAVITS, J. WHO MAKES WAR: THE PRESIDENT VERSUS THE CONGRESS 268-71 (1973).

"This legislation is reactive to the Vietnam War—nothing more—nothing less." Statement of Representative Kemp. CONG. REC. 83866. See also War Powers, *Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs*, 93rd Cong., 1st Sess., 149 (Statement by Mr. Brown, acting Legal Advisor, Department of State) [hereinafter referred to as *1973 House Hearings*]. A Gallup poll conducted shortly after the WPR was enacted indicated that 80% of the American people approved of the new law. MULLEN, *PRESIDENTIAL POWER AND POLITICS* 102 (1976).

8. See *infra* notes 41-44 and accompanying text.

9. 50 U.S.C. §1544(b).

10. Five times in the past twenty-two years, Presidents have mounted major military interventions without prior consultation with the Congress. The interventions include the Bay of Pigs, the intervention in the Dominican Republic, the bombing of North Vietnam, and the incursion into Cambodia and Laos. See *1973 House Hearings*, *supra* note 7, at 98. See also *War Powers Legislation, Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59*. Before the Committee on Foreign Relations, 92nd Cong. 1st Sess. 359 (1971) [hereinafter referred to as *1971 Senate Hearings*]. For a chronological list of 153 military actions taken by the United States without a declaration of war see *id.* at 298. For a categorization of major United States armed actions overseas with the relevant congressional action see *id.*

11. Rovine, *Congressional-Executive Relations and the United States Foreign Policy*, 17 WILLAMETTE L.J. 41, 42 (1980); see also FRANCK, *FOREIGN POLICY BY CONGRESS*, 65-67 (1979). According to a Senate Foreign Relations Committee Report, the recent trend in Presidential usurpations of the war power originated with President Theodore Roosevelt's use of the Navy to prevent Columbia from reasserting jurisdiction over its rebellious province of Panama, and his intervention in Cuba and the Dominican Republic. Those precedents were reinforced by Presidents William Taft's and Wilson's unauthorized use of armed forces in the Caribbean and Central America culminating in the establishment of American military governments in Haiti, the Dominican Republic, and Nicaragua. CONG. REC. 17936 (1974). Historian Arthur Schlesinger, Jr. believes that President McKinley set the trend by sending 5000 American troops to the siege of Peking in 1906. See N.Y. Times, Oct. 12, 1974 at 1, col. 4.

congressional authorization.¹² The dominant purpose of the WPR was to counter this trend by ensuring that the collective judgment of Congress and the President will be applied when United States forces are introduced into hostilities.¹³ The WPR was intended to prevent situations similar to Vietnam, that is, “. . . situations in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop.”¹⁴ By enacting the WPR, Congress, in effect, was asserting what was believed to be its constitutional role in the process of collective decision-making regarding matters of war and peace.¹⁵

Subsequent to the passage of the WPR, a number of international incidents occurred in which the President, because of the nature of the commitment of American troops, invoked provisions of the WPR.¹⁶

12. CONG. REC. 17936 (1974).

13. 50 U.S.C. §1541(a).

14. *Crockett v. Reagan*, 558 F. Supp. 893, 899 (1982).

15. The allocation of power to commit the United States to war receives extensive treatment in the constitution. Specific functions are granted to one political branch to the exclusion of the other. The President is Commander in Chief of the Army, Navy, and Militia. U.S. CONST. art. 2, §2. He also receives Ambassadors and other public Ministers. *Id.* Congress is to provide for the common defense and the general welfare of the nation. *Id.* art. 1, §8, cl. 1. Congress is also “to declare war” and to “raise and support armies”. *Id.* art. 1, §8, cl. 11, 12. Congress makes rules which regulate and govern the military forces, and has the power for calling out the militia to enforce the laws, suppress insurrections, and repel invasions. *Id.* art. 2, §8, col. 1.

Constitutional history supports the proposition that Congress was the body that was to be entrusted with the power to make war. James Wilson told the Constitutional Convention that the power to “declare” war was lodged in Congress as a guard against being “hurried” into war, so that “no single man (can) . . . involve us in such distress.” 2 J. ELLIOT, *DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (2 ed. 1836). The severely limited role of the President was a studied response to what Madison called “an axiom that the executive is the department of power most distinguished by its propensity to war; hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.” J. MADISON, *LETTERS OF HELVIDIUS*, IN *WRITINGS* 138, 174 (G. Hunt ed. 1906). Those who were to conduct a war, according to Madison, could not in the nature of things, be proper or safe judges of whether a war ought to be commenced, continued, or concluded. *Id.* at 148. The framers designed the role merely for command of the Army as “first general.” *Id.* See also Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam*, 121 UNIV. OF PA. L. REV. 1 (1972); Burger, *War-Making by the President*, 121 UNIV. OF PA. L. REV. 29 (1972); Sofart, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 LAW AND CONTEMP. PROBS. 12 (1976). But see Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972).

16. During the Ford Administration, four incidents were formally reported under the WPR: (1) the transportation of refugees from Danang, April 1975; (2) the evacuation of U.S. nationals from Phnom Penh, April 1975; (3) the evacuation of U.S. nationals and others from Saigon, April 1975; and (4) the rescue of the Mayaguez and its crew, Koh Tang Island. *War Powers: A Test of Compliance, Hearings Before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations*, House of Representatives, 94th Congress, 1st Sess., (1975) [hereinafter referred to as *A Test of Compliance*]. Two incidents not reported by the Ford Administration were: (1) the evacuation of United States nationals and other civilians during the civil turmoil in Cyprus and Lebanon, June 1976; and

Public interest in the WPR has been rekindled by President Reagan's deployment of American Marines in the multinational peacekeeping force in Lebanon and by the Administration policy toward Central America.¹⁷ Recent commitments of United States armed forces abroad have precipitated complaints that the Reagan Administration is sending troops into hostile situations without the approval of Congress as required by the WPR.¹⁸

In Lebanon, for example, about 1200 United States Marines are serving in a 4000-man peacekeeping force along with French and Italian troops.¹⁹ That force has been enlarged by the deployment of an additional 2000 Marines stationed off the coast of Lebanon.²⁰ Shortly after their first deployment, one Marine died and three others were injured when a land mine exploded.²¹ In August and September of 1983, the Marines came under attack by Druse Moslems and returned fire, waging firefights near the airport.²² Five Marines were killed and twenty-four wounded.²³

Central America, according to the Reagan Administration, has become an East-West battleground, with the national security of all the Americas at stake.²⁴ Officials have announced plans for a large scale extended United States military presence near the Honduran border with Nicaragua.²⁵ A naval battle force has been posted off the Central American Coast and plans have been approved for a limited

(2) the augmentation of United States troops in Korea after two American personnel were killed in the tree cutting incident, August 1976. *Memorandums on War Powers and Korean Deployments by the acting Legal Advisor to the Secretary of State*, August 21, 1976. See also Zutz, *The Recapture of the Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 *INTERN. LAW AND POL.* 457 (1976). Of the two incidents during the Carter Administration, one incident, the Iranian rescue attempt, was formally reported. President Carter's letter to House Speaker Thomas O'Neill, Jr. and Senator Magnuson, on Iran Rescue Effort, April 17, 1980; *N.Y. Times*, April 28, 1980. The airlift of European troops to Shaba province, Zaire during an invasion of Angola-based former Kattanga Gendarmes was not reported, June 1978. Letter from the Legal Advisor, Department of State, to Chairman Sparkman of the Senate Foreign Relations Committee concerning the War Powers Resolution and the U.S. Airlift operation in Zaire, Dec. 1, 1978. The Reagan Administration has sent three reports to Congress under the WPR. Two reports involved the deployment of U.S. Marines in the peacekeeping force in Lebanon, dated August 24, 1982, 18 *WEEKLY COMPILATION OF PRES. DOCUMENTS*, 1048 and September 29, 1982, 18 *WEEKLY COMPILATIONS OF PRES. DOCUMENTS* 1232. The sending of jets and AWACS to Chad prompted a report pursuant to the WPR on August 9, 1983. *Sacramento Union*, Aug. 9, 1983 at 1, col. 5.

17. See *supra* note 3 and accompanying text.

18. *Id.*

19. 40 *CONGRESSIONAL QUARTERLY WEEKLY REPORT* 2413, 2469 (1982).

20. *N.Y. Times*, Sept. 2, 1983, at 8Y, col. 1.

21. See *supra* note 19 and accompanying text.

22. *N.Y. Times*, Aug. 3, 1983, at Y1, col. 4.

23. *N.Y. Times*, Sept. 9, 1983, at Y6, col. 2.

24. Taubman, *Worst-Case Plans for Central America*, *N.Y. Times*, June 16, 1983, at 2E. col. 3.

25. *N.Y. Times*, July 23, 1983, at Y1, col. 6.

blockade of Nicaragua.²⁶ Military leaders say they are willing to send American forces to Central America if they can “. . . use enough muscle to get the job done.”²⁷ One Navy Military advisor, Lieutenant Commander Albert A. Schaufelberger, was shot to death as he sat in his car in San Salvador.²⁸ Following the death of Lieutenant Schaufelberger, the Popular Liberation Forces, which claimed responsibility for the incident, said the killing of advisors would continue until the United States withdraws from El Salvador.²⁹

The recent events in Lebanon and Central America indicate a deepening United States involvement and an expanded military role in both regions. This involvement raises the question of whether the WPR should be activated, and if so, whether the President is required by law to consult Congress pursuant to the WPR. Whether the WPR has been activated depends on the definition of “hostilities” or “imminent involvement in hostilities.”³⁰ The Reagan Administration takes the position that hostilities are not present unless United States armed forces are actively engaged in an armed confrontation between opposing forces involving an exchange of fire.³¹ Prior to mid-September 1983, the President refused to seek congressional approval under the WPR for any of his military actions, preferring instead to report troop deployments under sections of the WPR that do not require congressional approval,³² or to report without specifying any section of the WPR.³³

This comment will propose that the letter and spirit of the WPR require that hostilities be interpreted broadly to include the commitment of troops short of actual combat. First, this author will explain the major provisions of the WPR. The failure of the President to report pursuant to the proper section of the WPR then will be explored as applicable to the situation in Lebanon. Next, because the word “hostilities” is undefined by the WPR, a literal meaning of the term will be examined. Upon finding the term ambiguous, and therefore susceptible to different meanings, extrinsic aids will be used to interpret hostilities. An examination of several extrinsic aids reveals conflicting interpretations between the executive branch and Congress.

26. *Id.*

27. See Taulman, *supra* note 24, at 2E, col. 3.

28. N.Y. Times, May 27, 1983, at Y1, col. 1.

29. San Francisco Chronicle, July 14, 1983, at 16, col. 4.

30. 50 U.S.C. §§1543(a)(1), 4(a)(1).

31. See *infra* notes 168-69 and accompanying text.

32. See *infra* note 74 and accompanying text.

33. See *infra* note 81 and accompanying text.

To resolve these conflicting interpretations, the author then will examine the circumstances existing at the time the WPR was enacted, the objective and purpose of the WPR, the evil that Congress sought to prevent by enacting the WPR, and the spirit of the WPR. These aids support a broad interpretation of hostilities and indicate that the inconsistent, narrow interpretation adopted by the President was not intended by Congress. Finally, this comment will propose that section 4(a)(1) of the WPR is implicated when the intended definition of hostilities is applied to the military situations in Lebanon and Central America. This comment necessarily limits the factual analysis to events that occurred prior to mid-September 1983 because of the rapidly changing circumstances in Lebanon and Central America. To understand the WPR, a brief look at the mechanism which Congress designed to recapture its share of war making power is important.

A. The War Powers Resolution

Prior to the passage of the WPR, Congress was faced with a situation in which its war powers had been eroded almost to nonexistence.³⁴ The decline of the congressional hold on the war powers apparently stemmed from a number of intertwined factors, including outright abdication of influence by the legislators,³⁵ aggressive pursuit of influence by the executive,³⁶ and the heightened pace, complexity, and hazard of international affairs.³⁷ The WPR sought to correct the constitutional imbalance that had arisen between the executive branch and Congress in the area of war powers.³⁸

Under the WPR, the President must send Congress a report within forty-eight hours after he introduces United States troops into the following situations:

- (1) into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances;³⁹
- (2) into the territory, airspace, or waters of a foreign nation while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces;⁴⁰ or
- (3) in numbers which substantially enlarge United States forces

34. WILCOX AND FRANK, *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY* 84 (1976).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Amendment to War Powers Resolution*, United States Senate, Committee on Foreign Relations, S.2179, May 4, 1982 at 186. [hereinafter cited as *Amendment to the WPR*].

39. 50 U.S.C. §§4(a)(1), 1543(a)(1).

40. *Id.* §§4(a)(2), 1543(a)(2).

equipped for combat already located in a foreign nation.⁴¹ The report is to present the circumstances necessitating the introduction of forces,⁴² the constitutional and legislative authority under which the introduction took place,⁴³ and the estimated scope and duration of the hostilities or involvement.⁴⁴

If the President reports to Congress under the first circumstance, section 4(a)(1) of the WPR is activated.⁴⁵ According to section 4(a)(1), the President then must withdraw the troops within sixty days unless Congress has declared war, extended the sixty day period, or is unable to meet because of an attack on the United States.⁴⁶ If the President reports under either of the other circumstances, section 4(a)(2) or 4(a)(3) of the WPR is activated.⁴⁷ Under section 4(a)(2) and 4(a)(3), Congress has no automatic right to review the presence of troops on foreign soil, and the sixty day period is not activated.⁴⁸

If troops are introduced into hostilities and the President reports to Congress under section 4(a)(1), the failure of Congress to act within sixty days constitutes a negative response and the troops must be withdrawn.⁴⁹ At the same time, Congress has the prerogative to pass a concurrent resolution to terminate the involvement.⁵⁰ The constitutionality of the concurrent resolution has recently been the subject of controversy. In a seven-two decision, the Supreme Court, in *I.N.S. v. Chadha*,⁵¹ struck down the legislative veto, saying legislative vetoes of executive branch acts violate fundamental structural provisions of the United States Constitution. The Court struck down a portion of a 1952 federal immigration law that allowed the House of Representatives to order, over objections from the Immigration and Naturalization Service, the deportation of J. Chadha, a Kenyan living in California who had overstayed his student visa.⁵²

The majority opinion, written by Chief Justice Burger, appears to indicate that the Court was seizing the opportunity to rule in the

41. *Id.* §§4(a)(3), 1543(a)(3).

42. *Id.* §1543(a)(3)(A).

43. *Id.* §1543(a)(3)(B).

44. *Id.* §1543(a)(3)(C).

45. *Id.* §1543(a)(1).

46. *Id.* §1544(b).

47. *Id.* §1543(a)(2)(3).

48. *Id.* §1544(b).

49. Withdrawal is automatically required after 60 days if Congress is inactive. *Id.* §1544(b). See also Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 WM. & MARY L. REV. 823, 844, 849 (1975).

50. 50 U.S.C. §1544(c).

51. 51 U.S.L.W. 4907 (1983).

52. *Id.*

strongest language and as broadly as possible on the question.⁵³ Chief Justice Burger's opinion struck at the very notion of legislative vetoes of every variety, pointing out that the drafters of the Constitution spelled out a uniform procedure in Article I for enacting laws, and the framers of the Constitution did not intend for the lawmakers to bypass that procedure.⁵⁴

The precise impact of *Chadha* on the termination provision of the WPR has not yet been determined. Some members of Congress questioned whether the case would even affect the WPR,⁵⁵ while others speculated that the ruling would strip Congress of the power to require the President to withdraw American troops from foreign hostilities.⁵⁶ Authority suggests that the concurrent resolution veto provision of the WPR is essentially different from that overturned in *Chadha*.⁵⁷ The distinction drawn is that the legislative veto in the WPR does not concern power delegated by Congress.⁵⁸ Instead, the problem has been to determine how the legislative and executive branches share a responsibility regarding war making that combines elements of both congressional and Presidential power. Unable to define by statute the precise boundaries between the branches, Congress relied on the legislative veto as a procedural safeguard between potentially conflicting constitutional interpretations.⁵⁹ Furthermore, section 244(c)(2) of the Immigration and Nationality Act, which was held unconstitutional in *Chadha*, was a particularly egregious violation of the separation of powers because section 244(c)(2) operated to reverse the outcomes of adjudications rather than merely prevent the promulgation of general, prospective rules.⁶⁰ A veto that reverses the outcome of an adjudication is a positive seizure by Congress of powers constitutionally allocated to the President and the judiciary.⁶¹ The WPR, on the other hand, has been considered an intermediate veto because it asserts congressional power in a "twilight zone," an area in which the holder of the power absent the WPR is debatable.⁶²

Even if the concurrent resolution, as a mechanism of the WPR, is specifically held to be unconstitutional, the other requirements of

53. L.A. Daily J., July 24, 1983, at 1, col. 6.

54. *Id.* at 4914, 4915.

55. L.A. Daily J., June 24, 1983, at 16, col. 2.

56. N.Y. Times, June 24, 1983, at Y1, col. 6.

57. See Knoeckel, *Immigration Law: Constitutionality of One-House Legislative Veto of Stays in Deportation*, 22 HARV. INT'L L.J. 423, 428 (1981).

58. *Id.*

59. *Id.*

60. *Id.* at 427.

61. *Id.* at 428.

62. *Id.* at 428 n.36.

the WPR would remain valid.⁶³ The WPR contains provisions concerning the possible invalidation of one or more of its provisions and provides in section 9, the separability clause, that if any provision of the WPR is held invalid, the remainder of the statute shall not be affected.⁶⁴ One remaining section of importance is section 5(b), which calls for an automatic termination of hostilities lasting more than sixty days unless Congress assents by specific authorization.⁶⁵ This author leaves to another day, or to others, a discussion of the constitutionality of the concurrent resolution provision contained in the WPR in light of *Chadha*.

Assuming the concurrent resolution mechanism is constitutional, both houses of Congress can terminate any undeclared war as soon as a war begins or any time thereafter.⁶⁶ The power of Congress to terminate United States involvement can be exercised after the commencement of any hostilities, and for any legal, strategic, or political reason.⁶⁷ These two termination provisions, congressional failure to act and the concurrent resolution, are coupled with priority procedures designed to ensure swift congressional action.⁶⁸

As of mid-September, President Reagan failed to report to Congress pursuant to the WPR concerning military involvement in Central America.⁶⁹ The President reported the circumstances in Lebanon to

63. See *infra* note 64 and accompanying text.

64. 50 U.S.C. §1548 provides: "If any provision of this chapter or the application thereof of any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstances shall not be affected thereby." *Id.*

65. *Id.* §1544(b) provides:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

66. *Id.* §1544(c) provides: "Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."

67. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 613 (1977).

68. 50 U.S.C. §1545. Once the President reports a use of force to Congress, any member of Congress can introduce a bill supporting or opposing the President's actions. The bill would move swiftly through committee, and would be submitted to a vote by the full Congress within a maximum of sixty days. *Id.*

69. See *infra* note 81 and accompanying text.

Congress under section 4(a)(2), but has repeatedly failed to invoke 4(a)(1), claiming hostilities are not present.⁷⁰ By refusing to admit that hostilities are present in Lebanon, President Reagan in effect, has skirted the requirements of section 4(a)(1).

B. Sidestepping the Reporting Requirements

When President Reagan initially raised the possibility of sending troops to Lebanon, Administration officials reportedly told congressional leaders that President Reagan would cite section 4(a)(2).⁷¹ The President claimed the United States troops were being sent "equipped for combat" into a zone where there was no likelihood of being involved in combat.⁷² Section 4(a)(2) would not require congressional approval of the stationing of the troops.⁷³ Congressional leaders interpreted this Presidential action as an attempt to capriciously avoid the proper role of Congress as defined by the WPR.⁷⁴ At a meeting with congressional leaders, President Reagan admitted a disagreement existed over what section the President should cite in his report, but he nevertheless promised to adhere not only to the spirit, but to the letter of the WPR.⁷⁵ When the time actually arrived to report to Congress, the President failed to specify in his letter to Congress the particular subsection of the WPR under which he was reporting.⁷⁶

The letter contained several provisions explaining why the President felt imminent hostilities were not present, thereby eliminating the requirement of congressional approval under section 4(a)(1).⁷⁷ According to the President, he had no intention or expectation that United States troops would become involved in hostilities.⁷⁸ Furthermore, an agreement with Lebanon expressly ruled out any combat responsibilities

70. See *infra* notes 74-78 and accompanying text.

71. 40 CONGRESSIONAL QUARTERLY WEEKLY REPORT 1695 (1982).

72. *Id.*

73. See *supra* note 46 and accompanying text.

74. 40 CONGRESSIONAL QUARTERLY WEEKLY REPORT 1695 (1982). Clement Zablocki, D-Wis., chairman of the House Foreign Affairs Committee, complained that an "equipped for combat" report would not accurately describe the circumstances in Beirut and would rob Congress of its rightful role in determining how long the troops stayed. *Id.* at 2158.

75. *Id.* at 1695.

76. *Id.* at 2158. An informed State Department official said debate on the issue within the administration had produced three reasons for not citing any specific section of the act: (1) the administration planned to withdraw the Marines within 30 days in any event, which would make the WPR moot; (2) assurances were given from all parties concerned that the U.S. forces would be in no danger of hostilities; and (3) the official said "Zablocki made it clear that his preference was that we not report under the 'equipped for combat' provision." Since the administration was unwilling to report under the first or "hostilities provision" the official said, to cite no provisions "seemed the eminently sensible thing." *Id.*

77. *Id.* at 2157.

78. *Id.*

for the forces.⁷⁹ This was buttressed with a statement that all armed elements in the area gave assurances that they would not interfere with the activities of the multinational force.⁸⁰ By asserting that hostilities or imminent involvement in hostilities were not present in Lebanon, President Reagan avoided reporting pursuant to section 4(a)(1). Therefore, the sixty day period at the end of which the troops would have to be removed was not activated.

The serious and deepening involvement of the United States in Central America would seem to activate at least one of the provisions of the WPR. In February 1983, Democrats on the House Foreign Affairs Committee launched a sustained attack of the President's failure to report to Congress that military advisors in El Salvador were in danger of becoming involved in hostilities.⁸¹ The President, however, has not reported to Congress on the matter.⁸² This comment proposes that the WPR is activated, and furthermore, that the report should be made pursuant to section 4(a)(1).

Upon a finding that hostilities are present or imminent involvement is clearly indicated by the circumstances in Lebanon and Central America, President Reagan is required to report the activities pursuant to section 4(a)(1).⁸³ Continued maintenance of the military operations, then, would be subject to congressional approval.⁸⁴ To decide if section 4(a)(1) of the WPR is activated, hostilities must be defined.

C. Defining Hostilities

The breadth and scope of the WPR turns on the meaning of the word hostilities. Hostilities and situations where imminent involvement in hostilities is clearly indicated by the circumstances are the key definitional phrases in the WPR, but are undefined by the WPR.⁸⁵ The term hostilities is used to broadly describe the military activity that the WPR is intended to govern and is included in section 4(a)(1), the most stringent provision of the WPR.⁸⁶ Section 4(a)(1) provides

79. *Id.*

80. *Id.*

81. 41 CONGRESSIONAL QUARTERLY WEEKLY REPORT 342: The "attack" occurred two days after a U.S. Army sergeant suffered a leg wound in a helicopter in which he was riding was fired upon by guerillas. Committee Chairman Zablocki said the Reagan Administration was caught in a "contradiction." On one hand, the Administration had not invoked the WPR, contending that the advisors were not engaged in hostilities. At the same time, the advisors received "hostile fire" pay bonuses. *Id.*

82. See *supra* note 75 and accompanying text.

83. See *supra* notes 39-47 and accompanying text.

84. See *supra* notes 39-44 and accompanying text.

85. *A Test of Compliance*, *supra* note 16, at 36; see also King & Leavens, *Curbing The Dog of War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 71, 78 (1977).

86. See *supra* note 39 and accompanying text.

that when United States troops are introduced into hostilities, the President must withdraw the troops within sixty days unless Congress has acted.⁸⁷ This section has become the most controversial and debated provision of the WPR.⁸⁸

The WPR is now codified in Title 50 United States Code Sections 1541-1548.⁸⁹ The interpretation of these statutes is guided by certain general rules of construction.⁹⁰ The first step in interpreting a federal statute is to give effect to the intent of Congress.⁹¹ To ascertain this intent, the first reference is to the literal meaning of the words employed.⁹² The plain and obvious meaning of the words in the statute is the safest interpretation and most clearly expresses legislative intent.⁹³ Each word and phrase must be given its plain meaning, and only when ambiguity exists in the phraseology of a statute may extraneous data be considered to aid in the interpretation.⁹⁴

Congress is presumed to have used words according to their ordinary meaning unless a different use is clearly indicated.⁹⁵ Since no specialized or technical meaning was ascribed to the word hostilities,⁹⁶ a logical assumption is that Congress had none in mind and intended that hostilities be given its plain and ordinary meaning. The following section interprets hostilities by applying the above analysis.

1. *The Literal Meaning of Hostilities*

If the common meaning of a term is involved in interpreting statutes, a court may consult dictionaries, lexicons, and other written authorities.⁹⁷ The dictionary definition of hostilities provides a starting point, but unfortunately, the various definitions afford little guidance. Webster's Dictionary defines hostilities as "overt acts of war."⁹⁸ Black's Law Dictionary defines hostilities as "having the character of an enemy" and "standing in the relation of an enemy."⁹⁹

87. See *supra* note 39 and accompanying text.

88. See *supra* note 3 and accompanying text.

89. 50 U.S.C. §§1541-1548.

90. Frankfurter, *Some Reflections On The Reading of Statutes*, 47 COLUM. L.R. 527 (1947); see also Landis, *Statutory Interpretations*, 43 HARV. L. REV. 863 (1930).

91. Johnson Service Company v. H.S. Kaiser Company, 324 F. Supp. 745, 749 (1971).

92. *Id.*

93. National Forest Preservation Group v. Volpe, 352 F. Supp. 123, 126 (1972).

94. American Express Co. v. United States, 290 F. Supp. 778, 780 (1968).

95. Matala v. Consolidation Coal Co., 647 F.2d 427, 429 (1981).

96. Evidence from the congressional hearings indicates hostilities was not ascribed a specialized meaning. Senator Javits stated "(I) am inclined to leaving 'hostilities' undefined as a word of art. That is preferable, but I am not adamant on this." 1971 Senate Hearings, *supra* note 10, at 560.

97. Certified Blood Donors Services, Inc. v. United States, 377 F. Supp. 964, 966 (1974).

98. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1094 (1971).

99. BLACK'S LAW DICTIONARY 664 (5th ed. 1979).

Various levels, forms, and degrees of violence in the relations of armed parties exist.¹⁰⁰ The dictionary definitions, being quite broad and general, fail to make clear where on the scale of violence hostilities exist in the context of the WPR.

Under principles of international law, the term hostilities is more precise, but, as will be shown, not precise enough to describe the varying degrees of hostilities sufficient to warrant the application of the WPR. Hostilities is often discussed in reference to "war" in international law.¹⁰¹ The term hostilities has generally been adopted as a more practical than legal term, and is considered a form of armed conflict not amounting to war.¹⁰² The manual of Public International Law defines hostilities as consisting of the mutual application of violence and coercion by armed forces of contending states.¹⁰³ In interpreting Article 2(4) of the United Nations Charter, the state of war was distinguished from hostilities, with hostilities ranging from minor border incidents to extensive military operations.¹⁰⁴ In *Britian S.S. Co. v. The King*,¹⁰⁵ Lord Atkinson stated that hostilities, a term of no narrower scope than war, connotes the "idea of belligerents. . . ."¹⁰⁶ Some experts in international law concerning armed conflict have construed the term to mean all hostilities and defined hostilities as "violent behavior."¹⁰⁷ Again, these definitions are too ambiguous and broad to draw the fine line needed to ascertain the threshold level of violence needed to implicate section 4(a)(1) of the WPR. Additionally, the definitions and references to hostilities are too varied to reach a solid consensus on the meaning of hostilities.

2. Hostilities as an Ambiguous Term

The determination that "hostilities" is an ambiguous term and therefore, susceptible to different meanings, is supported by selected provisions from congressional hearings. In general, opposition to defining hostilities precisely or too narrowly was evidenced throughout

100. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 416 (1971).

101. The practice of states continues to distinguish between the state of war and hostilities. The distinction, however, is not maintained consistently throughout the law. For example, the Hague Convention No. III concerning the opening of hostilities, speaks of the commencement of war in terms of hostilities. SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW, 804 (1968).

102. See Lazareff, *supra* note 100, at 416.

103. See Sorenson, *supra* note 101, at 416.

104. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 219 (1982).

105. 1921 1 A.C. 99 (1920).

106. Evans, *Judicial Decisions*, 69 AM. J. OF INT'L L. 406, 423 (1975).

107. FRIEDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 745 (1972).

congressional hearing records.¹⁰⁸ The idea of making a "laundry list" or spelling out the circumstances in which the President may involve the military in the absence of a declaration of war was rejected.¹⁰⁹ Rather than attempting to codify the circumstances that define hostilities, Professor Bickel, a noted constitutional law expert and Professor of Law at Yale University, stated that the preferable mode was a good faith understanding of the term and an assumption that Presidents would act in good faith to discharge their duties.¹¹⁰ Senator Javits, one of the chief sponsors of the WPR, acknowledged that the resolution did not endeavor to spell out a definition of hostilities, but adopted the term as a word of basic understanding.¹¹¹ Members of Congress recognized the peril in trying to be too exact with definitions because of the difficulties in achieving a terminology that could anticipate all the emergencies which might arise.¹¹² By choosing a general approach, rather than trying to be too exact in definitions, something was "left to judgment, the intelligence, [and] the wisdom" of members of Congress and the President.¹¹³ Based on the hearings, some evidence also exists that hostilities was deliberately left undefined and ambiguous so that the meaning of the word could be clarified or gradually spelled out by experience.¹¹⁴

3. *The Use of Extrinsic Aids to Interpret Hostilities*

As demonstrated, the meaning of hostilities is unclear and ambiguous; therefore, extrinsic aids may be used for interpretation.¹¹⁵ Examples of extrinsic aids are congressional hearings,¹¹⁶ committee reports,¹¹⁷ opinions of legal advisors to the President,¹¹⁸ circumstances existing at the time the WPR was enacted,¹¹⁹ the objec-

108. 1971 Senate Hearings, *supra* note 10, at 599; see also *id.* at 572, where Professor Bickel stated that he would be wary of trying too detailed a definition of the term hostilities, "wary indeed always of unnecessary detailed definitions as if this were the Internal Revenue Code." See also 1973 House Hearings, *supra* note 7, at 93.

109. War Powers Legislation, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, 92nd Cong. 1st Sess., 30 (1971) (statement by Mr. Bingham) [hereinafter referred to as 1971 House Hearings].

110. 1973 House Hearings, *supra* note 7, at 185.

111. 1973 Senate Hearings, *supra* note 10, at 28.

112. *Id.*

113. *Id.*

114. *Id.* Dr. Commanger analogized the term "hostilities," as used generally, to the phrase "due process of law," which was gradually spelled out by experience. *Id.*

115. American Express Company v. United States, 290 F. Supp. 778, 780 (1968).

116. Dawson Chemical Co. v. Rohm & Haas, 444 U.S. 986 (1980).

117. Zenith Radio Corp. v. Matsushita Electric, 494 F. Supp. 1190, 1223 (1980).

118. BLACK, BLACK ON INTERPRETATION OF LAWS 90 (2d ed.).

119. Benton v. United States, 488 F.2d 1017, 1021 (1973).

tive and purpose of the WPR,¹²⁰ the evil that Congress sought to prevent by the WPR,¹²¹ and the spirit of the WPR.¹²² The first extrinsic aid available for interpreting the meaning of hostilities is the various congressional hearings at which attempts were made to define hostilities.

a. Congressional Hearings

The hearings held in the four years prior to adoption of the WPR are relevant to a full understanding of the term hostilities.¹²³ During the hearings, hypothetical situations were posed to assist in determining what constituted hostilities. Representative Bingham, in discussing the meaning of hostilities, stated that an operation in which the United States supplied air transport did not constitute hostilities.¹²⁴ Supposing that Marine guards became involved in protecting an embassy under siege, according to Representative Bingham, an involvement in hostilities would have occurred.¹²⁵

Two major sponsors of war power bills differed in their opinions of whether hostilities were present if 2000 advisors were sent to Israel. Speaking hypothetically, Senator Javits stated that the deployment of advisors would not place them in a situation involving an imminent threat to the forces.¹²⁶ On the other hand, Senator Eagleton stated that the situation clearly indicated imminent involvement in hostilities, although an active war did not exist at the time.¹²⁷

Congressional discussion of military actions undertaken by past presidents resulted in classifying certain situations as involving hostilities. Senator Javits explained in a colloquy with Representative Bingham that the sending of United States planes over Cuba to take pictures did not involve hostilities or imminent hostilities.¹²⁸ When the United States insisted on inspecting ships at sea, then imminent danger of hostilities may have been present.¹²⁹ During the hearings held in 1970,¹³⁰ the sending of Marines into Lebanon by President Eisenhower was considered a deployment of troops into an area where

120. *Rogers v. Frito-Lay*, 611 F.2d 1074, 1080 (1980).

121. *Benton*, 488 F.2d at 1021.

122. *General Serv. Emp. U. Local No. 773 v. N.L.R.B.*, 578 F.2d 361, 367 (1978).

123. *South Corp. v. United States*, 531 F. Supp. 180, 184 (1982).

124. *1973 House Hearings*, *supra* note 7, at 92.

125. *Id.* at 93.

126. *Id.* at 21.

127. *Id.* at 73.

128. *Id.* at 17.

129. *Id.*

130. *Congress, The President, and the War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs*,

hostilities existed.¹³¹ Likewise, the dispatch of Marines to the Dominican Republic¹³² and the defensive quarantine of Cuba were clearly considered a commitment to hostilities.¹³³

Senators Javits and Eagleton were also in disagreement over the exact time when United States hostilities in Vietnam began. Senator Javits' judgment was that hostilities began when President Johnson deployed American forces in the combat situation, around March 1965.¹³⁴ The sending of 2000 advisors by President Kennedy to Vietnam, according to Senator Javits, was not a commitment to imminent hostilities.¹³⁵ The Senator stated that the United States became involved in imminent hostilities when President Kennedy ordered United States advisors to accompany South Vietnamese units on combat patrols, with orders to shoot back.¹³⁶ Senator Eagleton, on the other hand, stated hostilities began sooner, possibly when the first advisor was deployed in Vietnam.¹³⁷ In the end, Senator Eagleton concluded that Congress must depend on the good faith of the President to report pursuant to the WPR.¹³⁸

In military conflicts which gradually escalated, some authority suggested that the dividing line for requiring congressional action was either the initial commitment of regular United States combat units¹³⁹ or the first combat casualty sustained by American forces.¹⁴⁰ The suggestion was made that congressional authorization be required when regular combat units are committed to sustained hostilities or when regular combat units are committed to combat.¹⁴¹ A magnitude test was discussed that would define major hostilities as a military engagement involving substantial casualties, with major hostilities requiring congressional approval.¹⁴² Others believed that the approval of Congress was required when American soldiers were in danger of being killed, even though the soldiers were in a supply unit or any other kind of division.¹⁴³

Senate Joint Resolution 59,¹⁴⁴ introduced by Senator Eagleton,

91st Cong., 2nd Sess. (1971) [hereinafter referred to as *Congress, The President, and War Powers*].

131. *Id.* at 413.

132. *Id.*

133. *Id.*

134. *Id.* at 16.

135. *Id.* at 17.

136. *Id.* at 17.

137. *Id.* at 74.

138. *Id.*

139. 1971 Senate Hearings, *supra* note 10, at 474.

140. 1971 House Hearings, *supra* note 109, at 28.

141. 1971 Senate Hearings, *supra* note 10, at 474.

142. *Id.* at 465.

143. 1971 House Hearings, *supra* note 110, at 50.

144. The Eagleton Resolution was introduced on March 1, 1971, and was one of five war

defined hostilities as including the deployment of United States forces in a foreign land where imminent involvement in combat activities was a reasonable possibility.¹⁴⁵ Also included was the assignment of American soldiers to accompany, command, coordinate, or participate in the movement of regular or irregular armed forces of a foreign country when the foreign forces were engaged in any form of combat activity.¹⁴⁶ Resolution 59 suggests that combat activities were considered to be the equivalent of hostilities.

Limited deployments of United States military advisors to countries where combat activities were in progress, or could be expected to commence shortly, was recognized as becoming increasingly more dangerous.¹⁴⁷ This was especially true in an era when "brushfire" wars and guerilla warfare were becoming common.¹⁴⁸ Thus, some members of Congress believed that congressional approval was necessary when military advisors were dispatched into battle areas,¹⁴⁹ and when advisors were assigned to foreign troops in the field.¹⁵⁰

Although congressional hearings are important in interpreting an ambiguous term of a statute,¹⁵¹ in the instant case they fail to provide any clear or concise criteria for determining when hostilities are present. At best, some general accord is present in defining several circumstances which are clearly of sufficient military intensity that a reasonable person would have little problem considering them as constituting hostilities. On the other hand, Congress has been unable to agree on a specific method for determining whether hostilities are present in less intense circumstances. A second source of data used to shed light on the meaning of hostilities is the House Foreign Affairs Committee Report on the WPR.

b. A Broad Meaning of Hostilities

The House Foreign Affairs Committee¹⁵² (hereinafter H.F.A.C.) has

powers bills introduced in the Senate during that year. Eagleton, *Congress, and The War Powers*, 37 Miss. L. REV. 1, 19 (1972).

145. 1971 Senate Hearings, *supra* note 10, at 198.

146. *Id.*

147. 1973 House Hearings, *supra* note 7, at 68.

148. *Id.*

149. 1971 Senate Hearings, *supra* note 10, at 198.

150. *Id.*

151. See *supra* note 117 and accompanying text.

152. Report of the House Foreign Affairs Committee on H.J. Res. 542, 93rd Cong., 1st Sess., June 15, 1972. In the summer of 1973, the House of Representatives and the Senate passed their respective versions of the war powers act, and these were referred to Conference Committee to be reconciled. The result was H.J. Res. 542, which, on November 7, 1973, became PL 93-148. GLENNON AND FRANCK, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 4 (1981).

adopted its own definition of hostilities. The H.F.A.C. Report discusses the background, constitutional context, and intent of the WPR.¹⁵³ The section-by-section analysis of the H.F.A.C. Report is the clearest statement of the definition of hostilities to be found:

The word hostilities was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. *Imminent hostilities* denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.¹⁵⁴

Hearings were held during the Ford Administration in which Chairman Zablocki used the definition as a benchmark in questioning legal advisors to the President.¹⁵⁵ The use of this definition by Zablocki supports a broad interpretation of hostilities because as long as a clear and present danger of armed conflict exists, even though no shots have been fired, hostilities are present.¹⁵⁶ United States forces are not required to accompany foreign forces in combat or on operational patrols.¹⁵⁷ The President, however, has persisted in defining hostilities more narrowly than Congress apparently intended.¹⁵⁸ The Ford and Reagan Administrations have both adopted a narrow definition of hostilities that conflicts with the H.F.A.C. definition.

c. A Narrow Meaning of Hostilities

Hearings held in 1975 concerning the lack of full compliance with the WPR by the Ford Administration were attended by Monroe Leigh, Legal Advisor to the Department of State.¹⁵⁹ During Mr. Leigh's testimony, he was asked for his working definition of hostilities and imminent hostilities, and how the definitions related to the first three war power reports made by President Ford.¹⁶⁰ He was requested to keep in mind the definition of hostilities as stated in the section-by-section analysis of the H.F.A.C. Report.¹⁶¹ Mr. Leigh contended that as defined, a large measure of judgment was required in interpreting

153. *Id.*

154. *Id.*

155. *A Test of Compliance*, *supra* note 16, at 36.

156. *Supra* note 154 and accompanying text.

157. *Id.*

158. *See infra* notes 168-73 and accompanying text.

159. *A Test of Compliance*, *supra* note 16, at 1.

160. *Id.* at 35.

161. *Id.* at 36.

hostilities.¹⁶² He further noted the differing views expressed during prior hearings and stated that the term was definable only in the context of an actual set of facts.¹⁶³ While refusing to provide a generalized definition, Mr. Leigh's working definition of hostilities was interpreted to mean a situation in which United States troops were actively engaged in exchange of fire with opposing units of hostile forces.¹⁶⁴ Imminent hostilities was defined as a situation in which a serious risk to the safety of United States troops from hostile fire was present.¹⁶⁵ According to Mr. Leigh, neither hostilities nor imminent involvement in hostilities encompassed irregular or infrequent violence that may have occurred in a particular area.¹⁶⁶

With regard to the activities in Lebanon and Central America, President Reagan has followed precedent by maintaining a narrower interpretation of the word hostilities than the House Foreign Affairs Committee has adopted.¹⁶⁷ In response to questions posed by the House Foreign Affairs Committee, the State Department declared that American forces would not go on patrol or on a combat mission with Salvadoran forces, or otherwise be placed in situations where combat was likely.¹⁶⁸ Section 4(a)(1), therefore, would not be activated. Hostilities were interpreted by the State Department to apply to any armed confrontation between opposing forces involving an exchange of fire, whether in a conventional or a guerilla conflict.¹⁶⁹ This definition, closely tracking that of Mr. Leigh's, is similarly a narrow interpretation requiring an actual exchange of fire between opposing forces.

The President's definition of the meaning of hostilities, when compared to the definition stated in the H.F.A.C. Report, is extremely narrow. The President requires armed confrontation between opposing forces involving an exchange of fire.¹⁷⁰ In contrast, the H.F.A.C.

162. *Id.*

163. *Id.*

164. *Id.* at 37.

165. *Id.*

166. *Id.* During the hearings, Mr. Zablocki took issue with the restrictive definitions of hostilities or imminent hostilities. He stated: "In the Cambodian situation even if there was one artillery piece fired that is a hostile situation." *Id.* at 49. The definitions of hostilities and imminent involvement in hostilities stated by Mr. Leigh correspond closely to views expressed by a Department of Defense representative in a 1974 letter to Representative Findley. Although Findley, who had written much of the reporting requirements in the WPR, individually countered the viewpoint found in the letter; the executive branch, nevertheless, persisted in defining hostilities narrowly. *Committee on Foreign Affairs, The War Powers Resolution, A Special Study of the Committee on Foreign Affairs* 202 (1982) [hereinafter cited as *A Special Study of the Committee on Foreign Affairs*].

167. See *infra* note 168 and accompanying text.

168. *War Powers Resolution and El Salvador*, CONG. REC., March 5, 1981.

169. *Id.*

170. *Id.*

section-by-section analysis definition of hostilities encompasses situations in which no shots have been fired.¹⁷¹ Furthermore, the definition of imminent hostilities denotes a situation in which a clear potential for a state of confrontation or actual armed conflict exists.¹⁷² Generally, executive constructions should be accorded considerable weight,¹⁷³ however, executive interpretations should not stand when inconsistent with legislative intent¹⁷⁴ and policy.¹⁷⁵ The H.F.A.C. Report indicates that the intended definition of hostilities by Congress was broad and not narrow. This interpretation is supported by further extrinsic aids.

To determine the weight to be accorded the President's different and distinct view of the meaning of hostilities, other extrinsic aids will be explored to clarify the interpretation of the President. This comment contends that the President's interpretation is inconsistent with the intent, purpose, and policy underlying the WPR. Furthermore, this comment will demonstrate that the restrictive definition of hostilities cannot stand when viewed in light of the spirit of the WPR. Other important extrinsic aids for interpretation of the WPR are the circumstances existing at the time the WPR was enacted, the objective and purpose of the WPR, and the evil that Congress sought to prevent by the WPR. An examination of these extrinsic aids reveals that the narrow interpretation adopted by the executive branch is too restrictive and incorrect.

d. Circumstances Existing at the Time the WPR was Enacted

The circumstances existing at the time the WPR was enacted indicate that the President's narrow interpretation of hostilities should be disregarded. The initial impetus for a number of bills and resolutions on the war powers was the American incursion into Cambodia in May 1970.¹⁷⁶ This incident caused a crisis in relations between the executive and legislative branches.¹⁷⁷ The main difficulty involved the commitment of United States military forces exclusively by the President, purportedly under his authority as Commander in Chief, but without congressional approval or adequate consultation with Congress.¹⁷⁸

171. See *supra* note 153 and accompanying text.

172. *Id.*

173. *McGinnis v. Video Theatres*, 262 F. Supp. 607, 614 (1967).

174. *Brénnan v. Udall*, 251 F. Supp. 12, 23 (1966).

175. *TH v. Jones*, 425 F. Supp. 873, 880 (1975).

176. U.S. CODE CONG. & AD. NEWS, 93rd Cong., 1st Sess., 1973, 2348.

177. *Id.* at 2349.

178. *Id.*

The single issue of American involvement in the Vietnam War caused members of Congress to reconsider the fundamental principles upon which the nation was founded.¹⁷⁹ Testimony received at the congressional hearings confirmed the view of many that the constitutional "imbalance" of authority over war making had swung heavily to the President in modern times.¹⁸⁰ This authority had accrued to the President simply from its exercise, and not from any legal or constitutional basis.¹⁸¹ To restore the balance provided by the Constitution, Congress reasserted its own prerogative and responsibilities by enacting the WPR.¹⁸² The H.F.A.C. Report definition of hostilities is consistent with this effort to restore the "balance" of authority over war powers by requiring more reporting to Congress under section 4(a)(1). Thus, regarding war making decisions, Congress can be a more effective watchdog of the President. The objective and purpose of the WPR also supports a broad interpretation of the term hostilities, rather than the restrictive definition adopted by President Reagan.

e. The Objective and Purpose of the WPR

The objective and purpose of the WPR corroborates the H.F.A.C. section-by-section definition of hostilities. The objective of the WPR was to end Presidential dominance of war powers and to establish a procedure for the close cooperation of the President and Congress in the deployment and maintenance of troops abroad.¹⁸³ By passing the WPR, Congress codified the authority to place American troops abroad.¹⁸⁴

The purpose of the WPR, as clearly articulated on the face of the WPR, was to ensure that the collective judgment of Congress and the President would apply to the introduction of United States armed forces into hostilities.¹⁸⁵ The legislation was designed to prevent future undeclared wars.¹⁸⁶ During the hearings, several purposes were elucidated, including (a) to reaffirm the authority of the President to act in emergencies,¹⁸⁷ (b) to reaffirm the power of Congress to declare war,¹⁸⁸ and (c) to require prior consultation with the Congress before

179. *Id.* at 2348.

180. *Id.* at 2349.

181. 1973 House Hearings, *supra* note 7, at 78.

182. U.S. CONG. & AD. NEWS, *supra* note 176, at 2349.

183. Letter from Chairman Thomas E. Morgan, House Committee on Foreign Affairs, Nov. 1, 1973 (refuting President Nixon's veto message).

184. 1973 House Hearings, *supra* note 1, at 8.

185. 50 U.S.C. §1541 (1976).

186. Amendment to the WPR, *supra* note 38, at 189.

187. 1973 House Hearings, *supra* note 7 at 8.

188. *Id.*

involving the armed forces in hostilities.¹⁸⁹ The articulated purposes of the WPR refute a narrow reading of hostilities because a restrictive interpretation would not encourage close cooperation between the President and Congress. Instead, a narrow reading of hostilities places significantly more authority with the President in committing troops to foreign lands, rather than ensuring the collective judgment of *both* Congress and the President.

Central to the war powers framework was the establishment of full continuing communications between the Congress and the executive branch.¹⁹⁰ Congress was always to be fully apprised of United States troop presence and strategic interest anywhere in the world that could lead to involvement in armed conflict.¹⁹¹ The insistence upon a case-by-case consultation ensured that congressional input into war making decisions would be keyed to particular circumstances and not provided generally.¹⁹² The most important consideration was to ensure that Congress be interjected in the war making process at the *onset* of military involvement.¹⁹³ A broad or liberal interpretation of hostilities supports the principle of ensuring that Congress be included at the outset in all war making decisions. Narrowly interpreting hostilities, on the other hand, would permit the President to involve United States forces in military situations that gradually could build into a foreign war without congressional approval. This restrictive definition of hostilities, in addition to being inconsistent with the objective and purpose of the WPR, also is inconsistent with the evil that Congress sought to prevent by enacting the WPR.

f. The Evil that Congress Sought to Prevent

Congress, by enacting the WPR, sought to prevent the evil of future Vietnams, that is, unpopular and undeclared Presidential wars.¹⁹⁴ Congress sought to avoid the commitment of United States armed forces by the President to a prolonged conflict, without a clear definition of the purpose of the commitment and the will of the people to pursue a victory.¹⁹⁵ Specifically, the WPR was a resolution to end the practice of Presidential war.¹⁹⁶ An effort was made to learn from

189. *Id.*

190. *Id.* at 78.

191. *Id.*

192. *U.S. Policy in the Western Hemisphere*, 97th Congress, 2nd Sess., REPORT NO. 97-470 at 5 [hereinafter cited as *U.S. Policy in Western Hemisphere*].

193. *1973 House Hearings*, *supra* note 7, at 78.

194. *Id.* at 98.

195. *Id.* at 386. (Statement of Hon. Tom Railsback of Illinois.)

196. *Id.* at 8.

the lessons of the tragic decade of war in Vietnam.¹⁹⁷ Vietnam cost the nation very heavily in blood, treasure, and morale.¹⁹⁸ The WPR was adopted to assure that any future decision to commit the United States to war must be shared by Congress to be lawful.¹⁹⁹ By adopting a restrictive definition of hostilities and thereby excluding congressional input, the executive branch again is claiming that the decision to wage war is solely within its discretion. That claim is precisely the evil that Congress sought to prevent by enacting the WPR. Furthermore, a narrow interpretation of hostilities is inconsistent with the spirit of the WPR.

g. The Spirit of the WPR

A settled rule of interpretation is that acts of Congress must be interpreted in light of the spirit in which they were written.²⁰⁰ The WPR was born in the midst of tumultuous political pressures in America.²⁰¹ The resolution was created as a response to a dangerous imbalance in our constitutional checks and balances, that is, the prolonged engagement in undeclared wars.²⁰² By enacting the WPR, Congress sought to prevent situations in which the incremental involvement of United States troops could lead to full scale war.²⁰³ Congress intended to prevent quagmires like Vietnam, where United States forces were committed little-by-little, and then more and more, exclusively by the President.²⁰⁴ This allegedly occurred under the President's authority as Commander in Chief, but without debate, consultation, or approval by Congress.²⁰⁵

The result of these types of involvement was the creation of situations in which Congress was faced with Presidential *faits accomplis*.²⁰⁶ Instead of deciding whether to authorize hostilities before they began, Congress was left with little alternative but to formalize circumstances

197. *Id.*

198. *War Powers Resolution Amendments of 1982, S.2179*, 97th Congress, 2nd Sess., 189 (Statement by Senator Byrd quoting Senator Javits) [hereinafter referred to as *WPR 1982 Amendments*]. Vietnam cost the nation 56,000 lives and \$200 billion in direct expenditures. The war obligated the U.S. to another \$200 billion in veterans' benefits, and has caused the greatest national rift since the War between the States. *1973 House Hearings, supra* note 7, at 108.

199. *1973 House Hearings, supra* note 7, at 4.

200. *General Serv. Emp. U. Local No. 73*, 578 F.2d at 367.

201. The Department of State Bulletin, Aug. 29, 1977 (statement of Herbert Hansell, Legal Advisor).

202. *Amendment to WPR, supra* note 38, at 186.

203. *Id.*

204. *Id.* at 189.

205. U.S. CONG. & AD. NEWS, *supra* note 181, at 2349.

206. MULLEN, PRESIDENTIAL POWER AND POLITICS 100 (1976).

already in existence.²⁰⁷ Congress had no choice but to accede to the President.²⁰⁸

In addition to facing Presidential *faits accomplis*, Congress was keenly aware that the United States must never go to war without the full moral sanction of the American people.²⁰⁹ To wage war without the full consent of Congress and the people was clearly wrong.²¹⁰ For the American people to participate in war making decisions, the only practical way was through Congress, and the WPR was intended to guarantee that participation.²¹¹

A broad interpretation of hostilities would preclude initial military involvements, initiated by the President, from escalating into full scale wars by requiring congressional approval at the incipient stages of a conflict. By interpreting hostilities broadly, Congress would decide whether to authorize hostilities before they began, thus avoiding Presidential *faits accomplis*. More importantly, by seeking and obtaining congressional approval before a large scale undeclared war exists, the President would be guaranteed the moral support and sanction of the American people.

Thus far, this comment has illustrated that the term hostilities was considered an adequate term during the WPR hearings. Congress was opposed to defining hostilities precisely or too narrowly for fear that the definition would not encompass all emergencies that might arise,²¹² and because an ingenious mind could always conjure up a situation

207. *Id.*

208. *Congress, The President, and The Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1796 (1968).

209. *Amendment to WPR*, *supra* note 38, at 192.

210. *Id.* at 93.

211. An analogy to Maritime law also supports a liberal interpretation of hostilities. Maritime law defines the term hostilities in a similar context as the WPR, that is, in circumstances in which risks of warlike behavior exist. Generally a marine insurance policy covers common perils of the sea and contains a Free from Capture and Seizure clause which eliminates from coverage certain risks of a warlike nature. *Standard Oil Company of New Jersey v. United States*, 340 U.S. 54, 55 (1950). The term hostilities as used in the standard exclusion clause has been defined as actual operations of war either offensive, defensive, or protective by a belligerent. *Internat'l Dairy Eng. Co. of Asia, Inc. v. American Home A. Co.*, 352 F. Supp. 827, 829 (1970). Courts have held that hostile activities need not involve the overt use of a weapon which is in itself capable of inflicting harm. *Id.* Activities which constitute hostilities, for Maritime purposes, include the extinguishment of a navigational light, the outfitting of a ship if done for a hostile purpose, and the dropping of a flare by an unidentified airplane. *Id.* The Maritime definition of hostilities is broad when contrasted against the interpretation adopted by the Reagan Administration. The interpretation is, however, consistent with the House Foreign Affairs Committee definition, in that the definition does not require that actual shots be fired. *See* 18 HALSBURY'S LAWS OF ENGLAND (2nd ed. 1935) §439 at 316; *See also* *Ionides v. The Universal Marine Insurance Company*, 14 C.B. (N.S.) 259, 288 (1863); *Esso Standard Oil Co. v. United States*, 122 F. Supp. 109, 111 (1954).

212. *See supra* note 113 and accompanying text.

that avoided a strict definition.²¹³ By adopting a general definition of hostilities, something was left to the judgment, intelligence, and wisdom of Congress and the President.²¹⁴

As a result of this flexible approach to defining hostilities, two conflicting interpretations of the term developed. The first, adopted by the H.F.A.C., defines hostilities to include both situations in which fighting has begun, and those in which no shots have been fired but where a clear and present danger of armed conflict exists. The second definition, adopted by the Reagan Administration and consistent with prior Executive interpretations, is restrictive in requiring an actual exchange of fire between opposing forces before hostilities are deemed present.

The President's definition of hostilities cannot stand when viewed in light of the circumstances surrounding the enactment of the WPR, the purpose and objective of the WPR, and the evil that Congress sought to prevent. Congress intended a broader definition of hostilities, one which would ensure that Congress would share in the war making process at the onset of military involvement.²¹⁵ To be consistent with the spirit of the resolution, hostilities must be defined so that Congress may debate and discuss whether to authorize hostilities before they begin. Congress must not be faced with *faits accomplis*. The statutory rules of construction dictate that a liberal definition of hostilities is the proper interpretation. A broad definition, like the H.F.A.C. definition, consequently, is preferred according to statutory construction over that of the executive branch.

To date, President Reagan has not accepted the broad interpretation of hostilities, following instead the restrictive interpretation. As demonstrated, the restrictive definition is an incorrect interpretation of hostilities. Since the term hostilities has been misinterpreted by the Reagan Administration, the situations in Lebanon and Central America have been reported under the wrong section of the WPR. The next section of the comment will examine the application of section 4(a)(1) to both situations.

D. Hostilities and Imminent Hostilities in Lebanon and Central America

Section 4(a)(1) of the WPR is activated when United States troops

213. The point was made that "... an ingenious mind can find an excuse under almost any set of criteria for doing what he wants to do." 1971 *House Hearings*, *supra* note 110, at 13.

214. See *supra*, note 114, and accompanying text.

215. 1973 *House Hearings*, *supra* note 7, at 7.

are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.²¹⁶ Imminent involvement in hostilities has not been the subject of conflicting interpretations, like the term hostilities. To a large degree, the H.F.A.C. Report and the definition of Mr. Leigh, the advisor to President Ford, impart a similar meaning.²¹⁷ Both definitions require a high possibility of armed conflict and encompass those situations of lesser intensity than hostilities. Although the Reagan Administration has not officially announced its definition of imminent hostilities, recent statements indicate that the Administration does not consider the situation in Lebanon as constituting imminent hostilities.²¹⁸ This section will propose that the magnitude and intensity of the United States involvement in Lebanon and Central America meet the threshold of military activity necessary to constitute imminent involvement in hostilities. First, the situation in Lebanon will be examined, followed by a discussion of the United States military posture in Central America.

1. Lebanon

The first contingent of United States Marines landed in Beirut at dawn on August 25, 1982.²¹⁹ This contingency was sent to help 800 French Legionnaires keep peace as 7000 Palestine Liberation forces, held under siege since June, were evacuated.²²⁰ The Marines were lightly armed and were confined to the Beirut port area.²²¹ The next contingent of Marines entered Beirut September 29-30 and took up positions around the airport south of the capitol.²²² Nicholas Veliotis,

216. See *supra* note 41 and accompanying text.

217. Compare the H.F.A.C. Report definition of "imminent hostilities," a situation in which there is a clear potential either for such a state of confrontation (no shots have been fired but there is a clear and present danger of armed conflict) or for actual armed conflict" with Mr. Leigh's definition, "a situation in which a serious risk from hostile fire to the safety of United States troops was present." See *supra* notes 154-60 and 161-77 and accompanying text. The term "imminent hostilities" cannot be found in the WPR. "Situations where imminent involvement in hostilities is clearly indicated by the circumstances," however, is a key definitional phrase. See *supra* note 87 and accompanying text. The distinction may be drawn that there are three distinct situations in which section 4(a)(1) may be activated: when armed forces are introduced into "hostilities," "into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and where "imminent hostilities" are present. This writer contends, although these three key terms are present throughout the hearings, and in subsequent testimony, the use of "imminent hostilities" is merely a more convenient way of saying "situations where imminent involvement in hostilities is clearly indicated by the circumstances," and therefore, their intended meanings are the same.

218. N.Y. Times, Sept. 9, 1983, at 64, col. 2.

219. 40 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2157.

220. *Id.*

221. *Id.*

222. *Id.* at 2469.

Assistant Secretary of State for Near Eastern Affairs, said the Marines would play a more active role in the peace keeping force than they did earlier in Beirut.²²³ This force was larger and equipped with heavier weapons.²²⁴ The Marines were based at the airport on the southern edge of the city and patrolled north to the Presidential palace, securing and occupying positions at intersections.²²⁵ Now they are equipped with several tanks, armored personnel carriers, mortars, and antitank weapons.²²⁶ Their general orders were the same as before — to defend themselves if fired upon.²²⁷ The Marines were more publicly visible and susceptible than they were in August when limited to the port area.²²⁸ In addition, the Marines were being supported with United States Sixth Fleet forces, including the aircraft carrier *U.S.S. Independence*.²²⁹ The airwing of the carrier includes fighter and attack aircraft and is stationed close to the Lebanese Coast.²³⁰ Mr. Veliotis refuted the characterization of the Marine deployment as “open-ended” and stated that the troops would be in Lebanon for a limited period of time.²³¹ The outer limit for withdrawal of Marines from Lebanon was set for the end of 1982.²³²

Within twenty-four hours of entering Beirut, one Marine was killed and three others were wounded when an Israeli shell that the Marines were trying to defuse exploded.²³³ Strictly speaking, this may not have been the result of hostilities, but the casualty indicates the potential jeopardy facing American troops.²³⁴ Besides the bomb incident, the Beirut International Airport was shelled several times. On July 22, 1983, the shelling resulted in the injury of two Marines and one Navy air controller.²³⁵ The attack killed twenty-three people and

223. *Id.*

224. *Id.*

225. Knickerbacker, *Open-ended Role for U.S. Marines in Beirut Makes Pentagon Brass Edgy*, *Christian Science Monitor*, Sept. 30, 1982, at 12, col. 1.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. 40 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2469.

232. *Id.*

233. *Id.*

234. Representative Zablocki said the death of the Marine, which was characterized as accidental, “only reinforces the question of whether there may be imminent hostilities.” He likened the situation to a man walking barefoot in a glass factory: “you’re bound to get cut.” Mr. Zablocki’s opinion was that any further incidents would put Mr. Reagan in the position of putting himself under the structures of the act. *N.Y. Times*, Oct. 1, 1982 at 2, col. 5. Senator Joseph Biden said that the tragic killing of the Marine demonstrates that the American forces were in a hostile situation. *Washington Post*, Oct. 1, 1982, at A21, col. 3.

235. *San Francisco Examiner*, July 24, 1983, at 1, col. 1-6.

wounded sixty-five, including three servicemen who were wounded by shrapnel or flying glass.²³⁶

On August 11, the Druse gunners shelled and rocketed the United States Marine compound at Beirut airport in one of the worst waves of violence around the capitol in months.²³⁷ Five civilians were killed and thirty people were wounded, including Marine First Lieutenant Morris.²³⁸ A Soviet-made 122-millimeter rocket crashed inside the Marine compound at dawn, injuring Morris.²³⁹ The following day, the airport was hammered with a barrage of twenty rockets.²⁴⁰ Two shells from the first two barrages crashed 500 yards from the American peacekeeping forces, causing Marines to be placed on maximum alert.²⁴¹ In response, the Marines fired flares above Druse positions using 81-millimeter mortars, the first heavy weapons used against other forces since the Marines arrived in Lebanon.²⁴² On August 29, 1983, the Marines fought a ninety-minute battle with Lebanese militiamen.²⁴³ An army checkpoint where the Marines were stationed came under attack by rocket-propelled grenades and semiautomatic weapons.²⁴⁴ The thirty Marines returned the fire, using M-60 machine guns and M-16 rifles, with no casualties reported.²⁴⁵ This was the first time Marines in Lebanon traded fire with Lebanese militia units.²⁴⁶

The ninety-minute battle with Lebanese militia units, in and of itself, constitutes hostilities as defined broadly by the House Foreign Affairs Committee. The H.F.A.C. Report stated that hostilities encompassed a situation in which no shots have been fired but where a clear and present danger of armed conflict exists.²⁴⁷ During the battle with militia units, the Marines, in fact, "returned fire on confirmed targets"²⁴⁸ and shots were fired amounting to an actual armed conflict. The restrictive interpretation of hostilities, adopted by the Reagan Administration, was defined as any armed confrontation between opposing forces involving an exchange of fire.²⁴⁹ Technically, although the exchange of fire occurred, this definition may not have been met

236. *Id.*

237. San Francisco Chronicle, August 11, 1983 at 1, col. 5.

238. *Id.*

239. *Id.* at 20, col. 5.

240. The Sacramento Bee, August 12, 1983, at A3, col. 5.

241. *Id.*

242. *Id.*

243. N.Y. Times, Aug. 29, 1983 at Y1, col. 4.

244. *Id.*

245. *Id.*

246. *Id.*

247. See *supra* note 155 and accompanying text.

248. N.Y. Times, Aug. 29, 1983, at Y4, col. 1.

249. See *supra* note 165 and accompanying text.

because the Marines are part of a peacekeeping force.²⁵⁰ The militia units, therefore, may not be considered opposing forces.

The following day, two Marines were killed and fourteen were wounded in the second involvement of combat.²⁵¹ In response to heavy and protracted mortar fire that lasted five hours, the Marines used artillery mortars and helicopter gunships to silence batteries in the hills near the airport.²⁵² On August 31, the Marines came under attack from all three of the positions they maintained near Beirut Airport.²⁵³ The Marines fired back with M-16 rifles, M-60 machine guns, and flares, and two Cobra helicopters were sent aloft.²⁵⁴ Some State Department and Defense Department officials said that the attacks by Druse and Shiite Moslem fighters seemed to be coordinated against the multinational peacekeeping forces.²⁵⁵

Despite the serious military fighting involving American troops, President Reagan has declined to invoke section 4(a)(1) of the WPR.²⁵⁶ Larry Speakes, the White House spokesman, opposed invoking section 4(a)(1), and considered the fighting as "an isolated incident,"²⁵⁷ placing significant emphasis on the peacekeeping status of American forces.²⁵⁸ Secretary of State George Schultz said the situation could not yet be classified as hostilities involving the Marines.²⁵⁹ Rather, he said, the Marines were caught in the midst of widespread violence not necessarily directed at them.²⁶⁰ In effect, the Reagan Administration has avoided reporting under section 4(a)(1) by skewing the facts in favor of its position, classifying the fighting as isolated incidents, and emphasizing the neutral peacekeeping role of the Marines.

The neutral peacekeeping role of the Marines has been refuted by Walid Jumblat, the Druse leader. Mr Jumblat accused the Marines of siding with the Christian-dominated Lebanese Army.²⁶¹ Since the Marines are providing the Lebanese factional army with logistical support, expertise and training, this proved enough for the Druse to consider the Marines as "enemies."²⁶² Nabih Berri, head of the Shiite

250. N.Y. Times, Aug. 31, 1983, at Y6, col. 2.

251. N.Y. Times, Aug. 30, 1983, at Y1, col. 4.

252. *Id.* at Y6, col. 5.

253. N.Y. Times, Aug. 31, 1983, at Y1, col. 6.

254. *Id.*

255. *Id.* at 46, col. 1.

256. *Id.*

257. *Id.*

258. *Id.*

259. Qwertzman, *Schultz Refuses to Classify Clashes as Hostilities Involving Marines*, N.Y. Times, Sept. 1, 1983 at Y1, col. 6.

260. *Id.*

261. N.Y. Times, Sept. 2, 1983, at Y8, col. 2.

262. *Id.*

Moslems, stated that the Marines had "turned into a fighting force against Moslems in Lebanon."²⁶³

In response to the increased fighting, President Reagan ordered a 2000 member Marine force into the Mediterranean to secure the safety of the Marines already on shore.²⁶⁴ Additionally, American F-14 Tomcat fighters from the carrier *Eisenhower* have roared over Beirut with the mission of protecting American troops.²⁶⁵ United States Navy fire power also entered the war when the frigate *Bowen* fired four 5-inch shells at Druse artillery batteries located in the foothills overlooking Beirut.²⁶⁶ United States air power has been reinforced with arrival of the *Tarawa*, a 30,000-ton American amphibious assault ship that carries six Harrier Jump jets built for ground attack missions.²⁶⁷

Although attacks upon United States Marines occur daily and United States military involvement deepens, the Reagan Administration insists that hostilities are not present in Lebanon.²⁶⁸ Viewing these events *vis-a-vis* the broad definition of hostilities adopted by the House Foreign Affairs Committee, the logical conclusion is that a clear and present danger of armed conflict is present in a situation where forces *are* actively engaged in armed conflict, using 155-millimeter howitzers, 81-millimeter mortars, and cobra helicopters, and where those forces are being supported by an aircraft carrier. Even the restrictive definition of hostilities adopted by the Reagan Administration has been met by the fighting taking place in Lebanon. Armed confrontation between opposing forces involving an exchange of fire is occurring between United States Marines and the Lebanese Militia almost daily.²⁶⁹

Since hostilities are apparent in Lebanon, the President must follow the law and acknowledge this fact by reporting to Congress pursuant to section 4(a)(1) of the WPR. By doing so, he will allow Congress to undoubtedly approve deployment of the Marines, and ultimately, to more strongly support his decision to deploy Marines in Lebanon. The President also must follow the law with respect to military activities in Central America by reporting to Congress pursuant to section 4(a)(1).

263. *Id.*

264. *Id.* at Y1, col. 1.

265. N.Y. Times, Sept. 9, 1983, at Y1, col. 6.

266. *Id.*

267. Middleton, *Fighting in Lebanon: Balance of Forces*, N.Y. Times, Sept. 9, 1983, at Y6, col. 1.

268. Smith, *U.S. Will Protect Marines, Bush Warns*, N.Y. Times, Sept. 9, 1983, at Y6, col. 1.

269. See *supra*, notes 243, 251, 253 and accompanying text.

2. Central America—In the Shadow of War Ships

United States military activities in Central America have assumed a higher profile and new significance as a result of the importance attached to the conflict by President Reagan.²⁷⁰ The President believes that for the first time, the United States faces real danger on its borders, and that the government must protect the safety and security of the American people.²⁷¹ The Reagan Administration is involved in a major escalation of United States presence in Central America.²⁷² A major expansion of covert operations is part of the plan to increase American military activities in the region.²⁷³ These plans include stepped-up support for antigovernment insurgents in Nicaragua and a campaign of sabotage against Nicaragua.²⁷⁴ The expanded program makes the activities of the Central Intelligence Agency the most extensive operations since Vietnam.²⁷⁵

In addition to the covert and sabotage operations against Nicaragua, the United States is involved in large scale military exercises of ground, naval, and air forces.²⁷⁶ Honduras is the focus of United States maneuvers.²⁷⁷ To date, 5000 American troops are involved in military maneuvers with Hondurans.²⁷⁸ These maneuvers are expected to continue in 1984.²⁷⁹ So far, ten war ships are involved in military maneuvers off the coast of Central America with eleven other ships on the way.²⁸⁰ The exercises are considered unusual in their scale, duration, and proximity to combat areas.²⁸¹ Specifically, the exercises are designed to lay the groundwork for expanded American presence and to test and

270. *A Special Study of the Committee on Foreign Affairs*, *supra* note 166, at 248.

271. N.Y. Times, July 20, 1983, at Y1, col. 5.

272. N.Y. Times, July 23, 1983, at Y1, col. 6.

273. N.Y. Times, July 25, 1983, at Y1, col. 6.

274. *Id.*

275. *Id.*

276. The ground and aircraft exercises, in particular, would underline the swift expansion of Honduras as the center of U.S. military activity. Engineer battalions are expected to clear two or three airstrips in a week to accommodate C-5 Galaxy transports, the Air Force's largest, and any type of fighter plane. N.Y. Times, July 21, 1983, at 44, col. 1. The airforces of the U.S. and Honduras also will hold air exercises for planning air strikes, using U.S. Air Force spotter planes and Honduran ground attack aircraft. N.Y. Times, Aug. 21, 1983, at Y3, col. 4. Some Hondurans consider the U.S. Military maneuvers as transforming their country into a "platform for war." They believe that if the U.S. wants to defeat the Nicaraguans and cannot do it covertly, the U.S. will involve Honduras in a war. N.Y. Times, Aug. 28, 1983, at Y3, col. 4.

277. N.Y. Times, July 21, 1983, at 44, col. 1.

278. Newsweek, Sept. 5, 1983, at 35.

279. *Id.*

280. N.Y. Times, Aug. 7, 1983, at 1E, col. 3.

281. Rennert, *Kissinger: No Drastic U.S. Action*, The Sacramento Bee, July 26, 1983 at A13, col. 5.

refine plans for a military quarantine around Nicaragua.²⁸² A quarantine, which involves the use of naval force to isolate a nation, falls short of a formal blockade, which is considered tantamount to an act of war.²⁸³ Administration officials say that the imposition of a partial naval blockade of Nicaragua would represent a major increase in military hostilities in the region and could place American forces in confrontation with Soviet merchant vessels.²⁸⁴ In August 1983, an American destroyer shadowed a Soviet freighter off the coast of Nicaragua for twenty-four hours.²⁸⁵ The freighter allegedly contained a cargo of helicopters and spare parts for an air transport.²⁸⁶ Although the American destroyer did not interdict the freighter, the incident added to congressional nervousness about the President's intentions and strategies.²⁸⁷

The expanded military presence in Central America by the United States includes the positioning of new radar and electronic surveillance posts, the accumulation of large stocks of military equipment in Honduras, and the construction of a \$150 million air and naval base on the coast of Honduras.²⁸⁸ This deepening involvement in Central America, illustrated by an array of military thrusts into the region, has heightened concern that the United States may be heading toward the use of combat forces in the region.²⁸⁹ As of September 1983, fifty-five military advisors are in El Salvador.²⁹⁰ A proposal to increase the number to 125 in 1984, and to broaden the scope of the flexibility of the advisors to permit the accompanying of Salvadoran forces into the field is being considered.²⁹¹ Since any increase in the number of advisors might be considered as an effort to further Americanize the war in El Salvador, the Defense Department suggested tightening the definition of advisor to ensure that some American personnel are not counted under any ceiling on advisors.²⁹² Wide concern has been expressed that the training role of advisors could spill over into combat, producing the kind of slow, steady increase in American involvement that marked the initial phases of the Vietnam War.²⁹³ To date, military advisor Lieutenant Schaufelberger is the

282. See *supra* note 273 and accompanying text.

283. *Id.*

284. N.Y. Times, July 26, 1983, at Y5, col. 1.

285. N.Y. Times, Aug. 5, 1983, at Y1, col. 6.

286. *Id.*

287. N.Y. Times, Aug. 6, 1983, at Y4, col. 2.

288. N.Y. Times, July 23, 1983, at Y4, col. 2.

289. N.Y. Times, July 26, 1983, at Y5, col. 1.

290. N.Y. Times, July 24, 1983, at Y1, col. 6.

291. *Id.*

292. *Id.* at Y8, col. 4.

293. *Id.*

only American military fatality in El Salvador.²⁹⁴ Following his death, threats were made that all United States advisors would be sent back home in coffins.²⁹⁵ Additionally, an Army Sergeant was shot by leftists forces while riding in a helicopter during an operational mission.²⁹⁶

Should the President consider whether the WPR is implicated, these incidents would most likely be considered by the Administration as sporadic instances of violence, and therefore, not hostilities or imminent involvement in hostilities. When coupled with the overall major military escalation in Central America, which includes the twenty-one war ships to be involved in naval maneuvers,²⁹⁷ the proposed quarantine of Nicaragua,²⁹⁸ the covert war against Nicaragua,²⁹⁹ and the general mood of war in the region,³⁰⁰ then a situation exists in which imminent involvement in hostilities is present. According to the H.F.A.C. Report, imminent hostilities involve a situation in which a clear potential for a state of confrontation or actual armed con-

294. See *supra* note 28 and accompanying text.

295. See *supra* note 29 and accompanying text.

296. 41 CONGRESSIONAL QUARTERLY WEEKLY REPORT 342.

297. See *supra* note 280 and accompanying text.

298. See *supra* note 282 and accompanying text.

299. See *supra* note 276 and accompanying text.

300. The Foreign Minister of Nicaragua, the Rev. Miguel d'Escoto Brockman, was quoted by United Press International from Managua as refusing to deny that the Soviet Union had been shipping arms to Nicaragua. He said: "There is a war being waged against our country." The U.S. covert operation against Nicaragua has been of sufficient intensity to be characterized as a secret war, N.Y. Times, July 29, 1983, at Y25, col. 2, and as an undeclared war of President Reagan's. N.Y. Times, July 23, 1983, at Y17, col. 2.

301. See *supra* note 154 and accompanying text.

302. See *infra* note 304 and accompanying text.

303. The most striking analogy between the experiences in Vietnam and El Salvador involves the world view and political policy makers in Washington. Mohn, *Salvador and Vietnam*, N.Y. Times, Aug. 20, 1983, at Y1, col. 3. United States officials in the 1960's initially viewed the war in South Vietnam as a challenge originating in Peking and Moscow, and the more direct support of the Vietcong from North Vietnam. *Id.* In much the same spirit, President Reagan stated that the Soviet Union underlies all the unrest in Central America. *Id.* Secretary of State, A. Haig, said that the problem in El Salvador was external intervention in the foreign affairs of a sovereign nation. *Id.* Another similarity grows from the fact that in both situations the U.S. began by trying to fight a proxy war and assume an advisory role. *Id.* In this connection both the South Vietnamese government of 1961 and the Salvadoran government of 1980 did not seem to many critics to be the most suitable instruments or proxies with which to wage a war. *Id.* Other similarities between the war in Vietnam and El Salvador include an automatic promotion policy which gives key command jobs to officers on the basis of political reliability rather than merit; a military resistance against adopting a strong and persistent belief that the holding of elections in the proxy nation will create a legitimate government and cripple the rebel movement; withdrawal by the U.S. is not considered a serious option; and human rights was considered an issue in both wars. *Id.* *Contra.* President Reagan stated that the beginning stages between U.S. activity in El Salvador and the beginning stages in Vietnam was "profound." *A Special Study of the Committee of Foreign Affairs*, *supra* note 167, at 250. See also *A Symposium: Vietnam-Era Aides Explore Parallels and Differences*, N.Y. Times, Aug. 21, 1983, at 5, col. 1.; *Using El Salvador to Battle The Ghosts of Vietnam*, The Washington Post, March 1, 1981, at C1.

flict may be found.³⁰¹ Because the totality of the circumstances indicates a clear potential for a state of confrontation between United States troops and Soviet or Nicaraguan forces, President Reagan is required to report to Congress pursuant to section 4(a)(1) of the WPR.

The need for a report under section 4(a)(1), thereby requiring a decision to be made by Congress, is underscored by the general lack of congressional and public support for the United States buildup in Central America.³⁰² Very strong analogies between American involvement in the guerilla war in El Salvador and the United States role in Vietnam have been drawn.³⁰³ A recent Gallup poll indicated that a majority of Americans fear that the United States will become embroiled in a Vietnam-like commitment.³⁰⁴

Considering the facts present in Central America, where the potential for a state of military confrontation clearly exists, President Reagan is required pursuant to the WPR to report to Congress under section 4(a)(1). President Reagan must obtain the approval of the American people through their congressional representatives to be assured of sufficient public support to wage war, if necessary, in Central America.

E. Conclusion

The War Powers Resolution, enacted over a presidential veto nearly ten years ago,³⁰⁵ has never been more relevant than now with United States Marines in Lebanon and Central America. By adopting a restrictive definition of the term hostilities, the Reagan Administration has evaded the effects of section 4(a)(1) of the WPR. President Reagan has avoided the requirement of obtaining congressional approval to maintain United States troops in Lebanon and Central America.

This author has illustrated that Congress intended a broad definition of hostilities, not a restrictive interpretation. The circumstances existing at the time the WPR was enacted,³⁰⁶ the objective and purpose of the WPR,³⁰⁷ and the evil which Congress sought to prevent by enacting the WPR³⁰⁸ all support a liberal interpretation of

304. A majority of Americans questioned by Gallup pollsters say they continue to think that the U.S. will become involved in El Salvador as it was in Vietnam, and nearly half disapprove of President Reagan's policies in Central America. Seventy-one percent of the people familiar with the situation in El Salvador felt that there was at least a fairly likely chance that the U.S. would become more deeply involved. Gruson, *Poll Reveals Fear of a New Vietnam*, N.Y. Times, July 24, 1983 at Y8, col. 6.

305. See *supra* note 4 and accompanying text.

306. See *supra* notes 176-82 and accompanying text.

307. See *supra* notes 183-93 and accompanying text.

308. See *supra* notes 194-99 and accompanying text.

hostilities. Furthermore, the spirit in which the WPR was enacted indicates that hostilities must be defined broadly.³⁰⁹

By applying the definition of hostilities intended by Congress to the situation in Lebanon, hostilities obviously exist. This author, therefore, contends that President Reagan is not properly complying with the law.³¹⁰ By insisting upon a self-serving definition of hostilities, and claiming that the fighting in Beirut is only the result of sporadic incidents of violence not covered by the WPR,³¹¹ President Reagan

309. See *supra* notes 200-15 and accompanying text.

310. If Congress were to initiate suit in federal court seeking presidential compliance with the WPR, the court would be squarely confronted with the political question doctrine. The political question doctrine is that principle under which the courts defer the determination of an issue to the political branches of government. Firmage, *The War Powers and The Political Question Doctrine*, 49 UNIV. COLO. L. REV. 65,66 (1977). Numerous law review articles have been written which address the political question doctrine relative to the WPR. See Firmage, *The War Powers and the Political Question Doctrine*, 49 UNIV. OF COLO. L. REV. 65 (1977); Keynes, *Democracy, Judicial Review, and the War Powers*, 8 OHIO NORTHERN UNIV. L. R. 69 (1981); Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605, 640 (1970). In *Crockett v. Reagan*, 558 F. Supp. 893, 898 (1982), the U.S. District Court of the District of Columbia held that an action initiated by 29 members of Congress against President Reagan was non-justiciable. The action challenged the conduct of the President and the Secretaries of Defense and State in supplying military equipment and aid to El Salvador in violation of the WPR. The court concluded that the factfinding necessary to determine whether U.S. forces had been introduced into hostilities or imminent hostilities in El Salvador rendered the case nonjusticiable, but did not dismiss the case on political question grounds. *Id.* at 898. At that time, the court faced a dispute as to whether a small number of military personnel who apparently suffered no casualties had been introduced into hostilities or imminent hostilities.

In its political question discussion, the court stated that the suit was not of the type which involved potential judicial interference with executive discretion in foreign affairs. *Id.* Rather, plaintiffs sought to enforce existing law concerning procedures for decision-making. The court stated that the issue was not a political question simply because it involved the apportionment of power between the executive and legislative branches, and that the duty of the courts to decide these questions had been reaffirmed repeatedly. *Id.*

Although the court lacked the resources and expertise to resolve disputed questions of fact concerning the military situations in El Salvador, the court admitted that a case could arise with facts less elusive. Vietnam was an example of the type of situation in which the court felt that to decline to find that U.S. forces had been introduced into hostilities would be an absurdity. *Id.* at 898, 899. Since questions of standing, equitable discretion, and private right of action were not fully decided, the *Crockett* court did not conclude that a court should entertain an action to enforce the WPR when the existence of involvement is clearly ascertainable. *Id.* at 899.

The court stated that although other barriers to a similar action might exist, the political question doctrine would not be one of them. Were Congress to pass a resolution stating that a report was required under the WPR, or that the forces should be withdrawn, and the President disregarded the resolution, the court stated that a constitutional impasse appropriate for judicial resolution would be presented. *Id.*

Because of the discrepancy regarding the facts in El Salvador at the time of the suit, the court lacked judicially discoverable and manageable standards for resolution of the *Crockett* suit. In contrast, the facts in Lebanon and Central America today, as already pointed out by this writer, are less elusive than those in *Crockett*, and the military activity is of sufficient intensity that the existence of involvement in hostilities is easily ascertainable. *Crockett*, in effect, removes the political question barrier if Congress reaches an impasse with the President and decides to initiate suit in federal court.

311. See *supra* note 258 and accompanying text.

is weaving amidst the shadows of the law, disregarding the purpose and spirit of the WPR.

The military posture of American involvement in Central America is substantially different from that in Lebanon. In Central America, fewer American deaths have occurred as well as less actual fighting by American forces.³¹² The concern, however, is that the United States will become involved in another situation like Vietnam.³¹³ The major expansion and escalation of American presence in Central America substantially increases the likelihood of involvement in hostilities. When taken into full account, the military posture in Central America requires that President Reagan seek congressional approval pursuant to section 4(a)(1) of the WPR.

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312. Compare *supra* note 23 and accompanying text with *supra* note 28 and accompanying text.

313. See *supra* note 304 and accompanying text.