The War-Making Powers of the President

Constitutional and International Law Aspects

Ann Van Wynen Thomas
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Foreword by Charles O. Galvin

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FOREWORD

THE PRIVILEGE of writing this foreword is a great one indeed. The Doctors and Professors Thomas have been close friends and respected academic colleagues for a great many years. This latest work is another in a long series of books in which they have made a significant and substantial contribution to constitutional and international law.

In a complex representative democracy, who has the authority to commit the resources of the nation—its people and its material—to the declaration and the conduct of war? This inquiry is of utmost importance in these times, because the engagement of the nation in even limited hostilities in a nuclear age could portend its total destruction.

Who, then, has the authority? Congress has the power to declare war and to make appropriations for the support of the military forces, but the President is the Commander-in-Chief of the military forces. Suppose that a Congress declared war and provided for its support, and further suppose that a President—through ineptitude, neglect, or an unwillingness to engage in hostilities—appointed ineffectual military commanders and thus so intruded himself into the conduct of military affairs as to impede seriously the progress of the war and thus endanger the

nation. On the other hand, suppose that the Congress refused to declare war or provide the resources for its prosecution, and further suppose that the President in his role as the Commander-in-Chief determined that the national security was so jeopardized as to require immediate and aggressive action.

In these cases the Constitution creates a dilemma which the experience of two hundred years has not fully resolved. Moreover, as recently as the era of our participation in the war in Vietnam, no institutional arrangements for the handling of the problem have been made clear. If war has not been declared, so long as the Executive and the Congress are in general concord about the need to engage in hostilities the courts will probably not interfere as a matter of political pragmatism. Yet if the Executive continued the engagement without congressional support, then a more serious difficulty would be presented. It could cease to be a matter of political concern and would become a constitutional challenge in the courts. Was the President acting in self-defense, or pursuant to treaty? Was he seeking to rescue American lives in danger, and in so doing did he engage the nation in prolonged and protracted hostilities?

It is to these most important concerns that the Thomases have addressed themselves. They have provided a historical, a critical, and an analytical treatise which is a major contribution in the field. Although they conclude that the power of the President to commit forces abroad remains a dark continent of American jurisprudence, their splendid work has illumined the subject to the benefit of all who search the area.

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November, 1982

INTRODUCTION

THE HISTORY OF THE UNITED STATES is fraught with controversy as to the competing powers of President and Congress to commit military forces abroad for the purpose of conducting hostilities. The controversy reached a climax during the Vietnam debacle, but even that dreary episode and the resulting congressional attempt to curb presidential power can hardly be said to have solved the constitutional dilemma. To those of simplistic mental bent the answer is crystal clear. The use of armed force abroad is a power granted to the Congress through that body's constitutional power to declare war. Nevertheless it should be pointed out that the Korean and Vietnam ventures, both major conflicts, were carried on with no congressional declaration of war. Moreover, considerably more than one hundred military ventures of lesser intensity have been conducted without congressional authorization.[1]

History then, if not the Constitution, would appear to justify what might be termed presidential war-making. Jurists, statesmen, and politicians have found constitutional justification for use of force abroad upon presidential initiative alone. The words of Senator Tom Connally support this viewpoint: "The authority of the President as Commander-

in-Chief to send the armed forces to any place required by the security of the United States has often been questioned but never denied."[2]

At an earlier period in history William Howard Taft declared bluntly that Congress could not take away from the President "his power to determine the movements of the army and navy" so long as resort to their use was made "to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed."[3] Secretary of State Dean Acheson equated the President's power "with the carrying out of the broad foreign policy of the United States . . ." He also believed that "the authority may not be interfered with by Congress in the exercise of powers which it has under the Constitution."[4] Senator Goldwater has stated "that the President can take military action at any time he feels danger for the country, or stretching a point, for its position in the world."[5]

Thomas Jefferson would apparently disagree with such presidential prerogative. He said: "We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body from those who are to spend to those who are to pay."[6] Abraham Lincoln as a young man in 1848 would agree with Jefferson. He believed that the Constitution gave the war-making power to Congress.[7] It should, however, be remembered that he ordered the use of armed force against the Confederacy prior to congressional declaration of war.[8]

Others have taken great issue with a broad presidential power to commit the nation to a use of force without congressional authority to do so. Senator Robert A. Taft refused to follow the beliefs of his father and expressed the view that the President had no constitutional power to commit American troops abroad without congressional authorization.[9] The Fulbright Committee opined in 1967 that

> [e]xcepting only the necessary authority of the President to repel a sudden attack, the war power was vested in the Congress. Only in recent years has it passed to the executive, contributing to the dangerous tendency toward executive supremacy in foreign policy, a tendency which the committee hopes to see arrested and reversed.[10]

It is interesting to note that Senator Fulbright apparently did not share this view in 1961 when he wrote that "the President has full responsibility, which cannot be shared, for military decisions in a world in

which the difference between safety and cataclysm can be a matter of hours or even minutes." [11]

Finally, it may be noted that there are those who believe that the power of the Congress versus the power of the President to commit American troops to a use of force against a foreign sovereign must, constitutionally speaking, remain in a gray or twilight area, inasmuch as the Constitution does not give us a clear-cut rule. As Arthur Schlesinger, Jr., has declared: "While the Constitution sets outer limits on both Presidential and Congressional action, it leaves a wide area of 'joint possession.' Common sense, therefore, argues for congressional participation as well as for Presidential responsibility in the great decisions of peace and war."[12]

Advocates of presidential war-making power advance many reasons for the existence and necessity of the prerogative. The executive power rests in one man, the legislative power in many. There is as a result a unity in the office of the presidency which makes it possible for the President to make up his mind and to act with dispatch and secrecy, factors which are regarded as essential in the delicate realm of foreign relations. Here speedy and purposeful action is often requisite to counter moves from abroad and to deal with rapidly changing international events. Congress, it is claimed, is too cumbersome and ponderous a body to meet and deal with foreign policy and foreign military complexities. Too, the President can negotiate and act secretly, and such secrecy is often demanded by the necessities of a challenge as to whether or not resort should be had to the use of the military. The President also has superior sources of information which permit him to act with full knowledge of the situation. He has foreign experts at his command, and the vast intelligence-gathering machinery is at his hand. As the case of *United States* v. *Curtiss-Wright Export Corporation* puts it:

> Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.[13]

Moreover, the executive branch is always in session to deal with any emergencies which might occasion the use of armed force, whereas the houses of Congress are at times adjourned. The exigencies of a

situation can well demand action when Congress may not be in session. Finally, it is argued that in reality most of our declared wars have begun and fighting has commenced prior to a congressional declaration of war; and even when such has not been the case the President through his conduct of foreign policy has made a declaration of war by Congress inevitable. Viewed in this light, the actual congressional declaration appears to be superfluous.

Detractors of presidential power dispute these claims. The need for urgent speedy action by the President is, they say, exaggerated. Most of the so-called emergency situations which have resulted in a presidential use of force have not in reality demanded immediate military action and military response. Indeed, delay for a wiser thinking through of the state of affairs might well have been advantageous to the nation and to the conduct of international affairs. Moreover, Congress has demonstrated on various occasions that it can act with dispatch when urgency is demanded. The declaration of war in World Wars I and II and the Gulf of Tonkin Resolution authorizing a use of force in Vietnam are instances cited to prove the point. On the other hand, the institutional unity of the office of President and the fact that the executive power is vested by the Constitution in one man do not necessarily make for speed, secrecy, and superior information. The executive branch of government is today large and unwieldly. It is often disunited as to the action necessary in the face of certain events. Leaks of official information in modern times demonstrate an ineptness in this branch to maintain secrecy. Too, there is nothing to prevent the President from sharing secret information in closed hearings with the Congress, the body in a democratic republican nation which should share in the vital information which might necessitate a use of armed force abroad and the decision to use the armed force. After all, it is contended, the people or their representatives in the Congress have a right to know of and share in decisions affecting the national security and the all-important issues of war and peace.

The idea that the President alone possesses the information and its sources through his control of the foreign policy apparatus and its experts is also subject to attack. Opposing thought would believe that the Congress can also gain information through congressional experts in the field of international and military affairs. After all, the Congress does have committees to assist it. And, as has been pointed out, there is no exclusivity in the executive as to the correctness of the information

gathered or as to error in the use of such information once it is gathered. The fact that the President is always in session and the Congress is not is less important today. Times have changed. In these days of rapid communication and transportation, the Congress can be convened in short order so as to confer with the President. Delays in the convening of the Congress can hardly be considered a valid argument for presidential superiority.

Finally, as to the *fait accompli* postulate, it may be that hostilities ordered by the President have occurred before a declaration of war; still, this should not mean that the President should be permitted to conduct those hostilities for an indefinite period without congressional declaration. Moreover, the congressional power of war declaration was given by the Constitution, it is argued, so that Congress can be a valid component in the machinery of government to prevent the executive from acting in such a way as to plunge the country into war on his sole initiative and prerogative.[14]

To resolve this dispute between views of the powers of the Congress and the President, if indeed it will ever be satisfactorily resolved, an examination of the constitutional power of the President and the Congress which bear upon war-making and uses of force in foreign affairs to determine the proper constitutional assignment of power between the two becomes requisite. Our starting point, of course, should be the Constitution, and the meaning ascribed to its words to the extent that meaning can be derived from the words of the founding fathers.

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THE FOUNDING FATHERS AND THE CONSTITUTION

THE MEN WHO JOINED TOGETHER in Philadelphia in 1787 to draft the Constitution of the United States were imbued with the idea that a central or national government with strength and energy had become necessary. For some ten years the nation had conducted its government under the Articles of Confederation, a document which created a loose confederation of states with a weak central government the powers of which were exercised by the Congress.[1] This body exercised both legislative and executive power. There was no president, not even a prime minister. Moreover, and in spite of the fact that the former thirteen colonies were desperately trying to establish a permanent independence through force of arms, when they adopted the Articles of Confederation they were unwilling to commit themselves to standing armies or to give to the central government strong war powers. Article VII prohibited the states from establishing a permanent military force in times of peace "except as in the Judgment of the United States in Congress assembled" it should be necessary for "the defense of the state."[2] On the other hand, the states were required to keep a well-regulated and disciplined militia "sufficiently armed and accoutered."[3]

States were also forbidden to engage in any war without the consent of the Congress unless actually invaded by an enemy or in case of an imminent invasion which would not admit of delay.[4] The power of "determining on peace and war" was lodged exclusively with the central government, but this power was limited by the fact that nine states must consent to engagement in war.[5]

If they did consent, Congress could then declare war and enlist volunteers in an army, but it had to requisition from the states the money to equip and supply this army. It could request the use of the state's civilian militia to fight enemies internal and external, but there was no guarantee that one state would come to the aid of another or to the aid of all. Shays's rebellion in Massachusetts in 1786-87 highlighted the desperate need for a stronger national military authority. Most of the Massachusetts militiamen were sympathetic with the rebels, and neither the central government nor the governments of the neighboring states were able or willing speedily to aid the government of Massachusetts in putting down the revolt.[6] Reform became inevitable, for the rebellion indicated that the confederation could be defeated by enemies within as well as without.

When the delegates to the Constitutional Convention gathered, they were tired of ineffectual government under the Articles of Confederation and were willing to concede more powers to the national government.[7] Although the Constitution which emerged is a short document, uses words sparingly, and is an outline of government, still the external powers of the nation inclusive of the military powers are largely to be exercised by the federal government, and those powers are shared in varying degree between the Congress and the President. Nevertheless there was much debate and disagreement concerning these powers in the efforts of the framers to balance authority and liberty.

Among the primary questions concerning strengthened national powers were those having to do with military arrangement. George Washington believed that the military experience of the Revolution proved America's need for a professional national army. To him the state civilian militia was simply unequal to the exigencies of offensive or defensive large-scale warfare. But many of those at the Constitutional Convention disagreed. Mason, for example, sought to assure the liberties of the people against "the danger of standing armies in time of peace."[8] Even James Madison agreed that since peacetime armies "are allowed on all hands to be evil, it is well to discountenance them by the consti-

tution, as far as will consist with the essential power of the government. . . ."[9] Elbridge Gerry of Massachusetts sought by various means to limit both the size of the army and the degree of control to be exercised by the Congress over the state militias. On one occasion he tried to limit the numbers of troops to be kept in time of peace to two thousand, or three thousand at the most.[10] This suggestion brought forth the only unneutral remark from Chairman Washington, when in an audible aside he whispered to the deaf and aging Ben Franklin that in such a case it would be well to include also in the Constitution a stipulation that no enemy would be allowed to attack the United States with a larger force.[11]

Pinckney argued that the Constitution should contain words making the military always subordinate to the civil power and that the dangers which might arise from an entrenched permanent military force could be alleviated by a prohibition upon the legislative branch from granting money for the support of military land forces for more than one year.[12] The idea found a place in the Constitution, but the one-year limitation was increased to a two-year period.[13] It might be noted that this two-year limitation on appropriations did not apply to the naval forces, which were seen as a permanent necessity to a country whose main potential enemies were overseas.[14]

Concurrent with the argument over the standing army was the debate over who should have the control of the army, including the power to declare or make war. Hamilton at first suggested that the Senate alone should have the sole war-declaring power,[15] to which Pinckney agreed because the Senate would be better acquainted with foreign affairs than the House of Representatives and inasmuch as it was to be a smaller body it would be better equipped to make a decision.[16] Randolph of Virginia disagreed and declared that the power to declare war should be placed in the House of Representatives, for this organ represented the people of the nation instead of the states.[17] The Constitution originally provided that the senators were elected by the legislatures of the various states.[18] Butler, following the English practice, argued that the power should be vested in the executive.[19] In that nation power over foreign relations, war powers, and treaties was exercised by the king.[20] Butler declared that the power "to make war should be vested in the President who will have all the requisite qualities and will not make war but when the nation will support it."[21] Hamilton then modified his original stand and said that perhaps the President should have

the power to make war with the advice of the Senate.[22] A compromise between the Pinckney and Randolph views was finally obtained, in which the whole of Congress was to be involved in making war. In the draft of this provision which was given to the Convention on August 6, 1787, Congress was given the power to "make" war. This verb, however, was later changed after some discussion so that Congress was empowered to "declare" war. This weakened the original language and has caused debate throughout the ensuing years. The reason for the change, as stated by James Madison, lay in recognition of the fact that the executive power might be needed to repel sudden attacks.[23]

Thus we find that Congress has the sole power to declare war, leaving this decision not with the military or its civilian head, the President as Commander-in-Chief, but with the elected representatives of the people. The President as chief executive was to be responsible for the enforcement of all laws.[24] He was given a major share of the responsibility for the conduct of foreign relations as Commander-in-Chief of the army and navy and of the state militia when it was called into the service of the United States.[25]

It was also recognized that the treaty-making power had concealed in it a capacity to commit American armed forces to the support of foreign alliances. Strong debate emerged as to where this power should be lodged. If the President were made Commander-in-Chief, Madison asserted, he would necessarily derive so much power and importance from a state of war that he might be tempted, if he had the exclusive treaty-making power, to impede a treaty of peace. To Madison the treaty-making power should require a concurrence of two-thirds of the Senate.[26] The Committee on Detail would place the power in the Senate alone,[27] while others thought that if the Congress were to be given the power to declare war this body alone should have the power to make treaties.[28] Gerry believed that a majority of the Senate was much more liable to be corrupted by an enemy than the whole legislative body.[29] Madison argued that a distinction should be made between different types of treaties. The President and Senate should be allowed to make treaties of alliance for limited terms, while the concurrence of the whole legislature should be required for all other treaties.[30]

At one point Madison believed that the concurrence of two-thirds of the senators should not be necessary for peace treaties, which should be allowed to be made with less difficulty than other treaties.[31] To this Wilson agreed, stating that if two-thirds are necessary to make peace