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U.S. PRESIDENTIAL WAR POWERS

Steven Alan Samson

I. HISTORICAL BACKGROUND OF PRESIDENTIAL WAR POWERS

- A. WAR POWERS OF THE BRITISH MONARCH
  - 1. William Blackstone: The king has absolute power over foreign affairs and war (emphasis on royal prerogative)
  - 2. John Locke (Early Whig View): The "federative" or foreign policy power belongs the executive but is limited by Parliament
- B. DISTRIBUTION OF WAR POWERS IN THE AMERICAN CONSTITUTION
  - 1. War for Independence and Articles of Confederation
    - a. All executive powers of the British monarch passed to the Continental Congress
  - 2. Constitutional Convention at Philadelphia, 1787
    - a. The power of peace and war was entrusted to Congress
    - b. Supporters of a strong executive, like Charles Pinckney, John Rutledge, and James Wilson opposed transferring this power to the President
    - c. First Draft: Congress was granted power to "make" war
    - d. **Charles Pinckney** objected because legislative proceedings are too slow to respond to an emergency
    - e. **James Madison** and **Elbridge Gerry** moved to substitute the word "declare" for "make" so that the President would have "the power to repel sudden attacks"
    - f. **Separation of powers** as a safeguard against arbitrary rule: "The purse and the sword must not be in the same hands" (George Mason)
  - 3. Original Understanding: A Summary
    - a. Congress granted ultimate authority to control the use of military force (*Reading*: U.S. Const. Art. I, secs. 8-10)
    - b. President granted power to repel sudden attacks and command of the armed forces (*Reading*: Art. II, sec. 2)
    - c. "Other than emergency actions to defend the country while Congress is in recess, the power of Commander in Chief exists to carry out legislative, not executive, power" (Louis Fisher)

II. EVOLUTION OF PRESIDENTIAL WAR POWERS

- A. Early Applications
  - 1. George Washington's Neutrality Proclamation (1793): Hamilton justified it as proper exercise of inherent executive power
  - 2. Neutrality Act (1794) added congressional sanctions
  - 3. John Adams: Congress authorized but did not declare limited war against France; the President sent naval forces to attack French ships in retaliation for attacks on American ships

4. Thomas Jefferson: Sent naval forces to fight an undeclared war against the Barbary pirates and responded to British attack on the *Chesapeake* after seeking congressional guidance
5. Summary: The decision to go to war or deploy military forces (as in an undeclared war) was reserved to Congress; the President may repel attacks and respond to de facto wars

B. Extending the Scope of Presidential Prerogative
1. **James Knox Polk and the Mexican War**
   a. Occupation of disputed territory on the Texas-Mexico border provoked an incident and led the President to seek and get a declaration of war from Congress, 1846
   b. Retroactive censure of the President by the House, 1848
2. **Abraham Lincoln and the Civil War**
   a. The President called up the state militia, supplied troops, imposed martial law, imposed a blockade on Southern states, and suspended the writ of habeas corpus before calling Congress into special session
   b. Retroactive approval by Congress (July 1861), which delegated broad discretionary authority to the President
3. Customary Defensive War Power defined in *Prize Cases* (1863)
4. **Gunboat Diplomacy**: Frequent presidential military intervention in the Caribbean Basin following the Spanish-American War and construction of the Panama Canal
5. Woodrow Wilson: Occupied Haiti and the Dominican Republic; intervened in Mexico, Russia; armed American merchantmen
6. John W. Burgess: Restraints on foreign adventurism thwarted by income tax and use of conscription
7. United Nations Charter and Mutual Defense Treaties

IV. COLD WAR EXPANSION OF PRESIDENTIAL WAR POWER

A. **Korean War** Harry Truman intervened on his own authority, did not seek congressional authorization to commit American forces and, apart from the retroactive sanction of the U.N. Security Council, acted independently of the United Nations

B. Unilateral Presidential Actions: U-2 Spy Planes, Lebanon, Bay of Pigs, Cuba Missile Crisis, Congo, Dominican Republic, Southeast Asia

C. **Vietnam War** Gulf of Tonkin Resolution, 1964, subsequently treated by Lyndon Johnson as a blank check for escalation; subsequent congressional attempts to cut off funds were thwarted

V. CONGRESSIONAL EFFORTS TO RESTRICT PRESIDENTIAL WAR POWER

A. **War Powers Resolution**, 1973
1. Background: Senate's National Commitments Resolution, 1969
2. Recognizes that President has limited concurrent or initiating power to use armed force, subject to subsequent (not prior) congressional restraint

3. The reporting requirement of section 4(a)(1), which triggers a sixty-day time limit, has not been consistently observed, e.g., El Salvador (1981), Lebanon (1982, resulting in a compromise resolution in 1983), Grenada (1983), and Panama (1989)

B. **Boland Amendment**, 1982: Attached to a series of defense appropriations laws, using the power of the purse to limit availability of appropriated funds to the Contras

C. **Overt/Covert Operations**, e.g., Afghanistan, Angola, Nicaragua

D. **Iran-Contra Hearings**, 1987: Majority report condemned the operation's combination of the powers of the purse and the sword

E. **Persian Gulf War**: George Bush secured the acquiescence of Congress by acting under color of authority from U.N. Security Council, although it did not require the use of force

F. **Conclusion**: Congress and the President should seek to develop a working consensus on war power issues for the post-Cold War era

VI. A CASE STUDY

A. The Scenario

1. During congressionally-authorized hostilities against a foreign state, a United States naval officer receives a presidential order to seize American vessels or those suspected to be American that were trading with the enemy. The order is neither authorized nor prohibited by Congress. In fact, the law is silent about the President's authority to issue the order. The officer carries out this order but is then sued by the owner of a vessel that has been seized.

2. Premise of the Suit: The President's order is illegal since it has not been authorized by Congress.

B. Key Legal Issue: Is the officer personally liable for damages?

C. Key Political Issue: Does the President of the United States have war powers that may be exercised independently of, and perhaps contrary to, the war powers of Congress?

D. Maxims

1. The laws are silent amidst the clash of arms. -- Cicero

2. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. -- Robert Jackson, *Steel Seizure Case*, 1952 (concurring opinion)

E. Discussion of Handout on *Little* v. *Barreme* (1804)

VII. READING: AN OUTLINE OF THE CONSTITUTIONAL PROVISIONS

A. CONGRESSIONAL WAR POWER

1. Congress has the power to "provide for the common Defence"

2. Congress has the power to "declare War"

3. Congressional power also extends to the following:

a. Piracy, e.g., by the Barbary states of North Africa

b. Felonies committed on the high seas, e.g., the

murder of Leon Klinghoffer by terrorists

c. Offenses against the law of nations

d. Letters of marque and reprisal (including power to initiate hostilities without declaring war)

e. Captures, e.g., the *Amistad Case* (1839)

f. Raising and supporting armies

g. Biennial appropriations

h. Providing and maintaining a Navy

i. Making rules for the government and regulation of land and naval forces, such as General Order No. 100 during the Civil War

j. Calling forth and governing the militia when in the national service

4. General Provisions

a. Necessary and Proper Clause

b. Appropriations Clause

B. PRESIDENTIAL WAR POWER

1. Specific Provisions

a. President is Commander in Chief of the Army and Navy

b. President is Commander in Chief of state militias when called (by Congress) into the service of the United States

2. General Provisions

a. Treaty Making Power

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Glennon, Michael J. Constitutional Diplomacy. Princeton, NJ: Princeton UNiversity Press, 1990.

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Thomas, Ann Van Wynen, and A. J. Thomas, Jr. The War-Making Powers of the President: Constitutional and International Law Aspects. Dallas: SMU Press, 1982.