The War-Making Powers of the President

William M. Beaney
BOOK REVIEW

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Reviewed by William M. Beaney*


This carefully written, scholarly study brings the debate over the respective war-making powers of the President and Congress to the posture it had assumed by November 1982. Such has been the rapid flow of events that recently, in November 1983, important new chapters have been added to the tale ably recounted by Thomas and Thomas, co-authors of nine books dealing with important international issues and developments. As Charles O. Galvin concludes in the Foreward to this book:

[T]hey [the Thomases] 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.¹

The heart of the difficulty arises from our separated and shared power system which inevitably gives rise to many questions concerning the respective powers of Congress and the President. One of the most serious questions which arises is where the boundaries of their respective roles in war-making lie. Article II of the Constitution spells out a potentially powerful role in foreign affairs and national security in its terse list of grants of presidential powers: "The executive power" encompasses duties including commander-in-chief, making treaties, receiving ambassadors and taking "care that the laws be faithfully executed." In the historical chapters (1-5) the authors reveal the accordion-like expansion and continuation of war-making powers, dependent upon the philosophy of the presidential office-holder and the particular issue involved. Franklin D. Roosevelt, a strong President by any standard, abandoned use of force

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in Latin America, but did not hesitate to commit acts against Germany long before the outbreak of World War II, belying United States neutrality. His Secretary of State, Dean Acheson, told the Senate Committees on Foreign Relations and the Armed Services that the Congress, in the exercise of its power under the Constitution, lacked power to interfere with the President's powers in the implementation of foreign policy and treaties.

The Constitution gives to Congress the power "to declare war." The same law allows Congress to "grant Letters of Marque and Reprisal," and clause 14 authorizes "Rules for the Government and Regulation of the land and naval forces." In addition, Congress can point to the power of the purse and the "necessary and proper" clause as justification for a role in war-making short of a declaration of war.

The basic dilemma facing the United States since the end of World War II, when it assumed the role of leader of the free world, is that the perceived enemy—the Soviet Union—has long-term goals which it seeks to achieve by overturning unstable regimes through revolutionary means and by confrontations with the United States in situations where it believes the United States will not respond. The Berlin airlift and the Cuban Missile crisis and ensuing naval blockade represent Soviet miscalculations. Vietnam, on the other hand, was a Soviet triumph, because at little cost (personnel and materiel) its surrogates inflicted a shattering blow to the prestige and morale of the United States.

It is increasingly obvious that the "cold war" policies do not involve declarations of war. Congress sat by during the Vietnam conflict, quite content to follow presidential leadership (repeated appropriations; Tonkin Gulf Resolution) as the stakes and costs grew ever greater. As success evaded South Vietnam and the United States, a "let's bring the boys home" attitude developed in the American public. Nightly TV exposure of the human and material costs of an undeclared war that refused to yield victory turned public opinion, and eventually Congress, against President Johnson's protestation that the United States effort would eventually prevail. His successor, President Nixon, compounded his problem in Vietnam by covert actions which amounted to waging an undeclared executive war.

Extending military assistance to a nation that seeks it violates no principle of international law nor any provision of the United States Constitution. This is true whether a treaty or simple executive agreement is the chosen instrument for justifying the placement or employment of armed forces. More controversial are those agreements made in times of

2. Id. at 21.
4. Id. cl. 14.
5. Id. cl. 18.
6. THOMAS & THOMAS, supra note 1, at 85.
rebellion or turmoil when the United States intervenes to maintain peace and stable government, such as in El Salvador. Of doubtful validity is intervention, not at the request of the “assisted government” but of their neighbors who claim to act under a treaty with the invaded nation, as in Grenada this last fall. Of course, there are other acceptable principles of international law available to justify such actions, as the supporters of the Grenada “rescue” mission have made clear. The United States Constitution gives its citizens travelling abroad the right to protection and international law recognizes the legitimate exercise of sovereign power for that purpose. Given the way the superpowers, and lesser powers, tend to tailor the facts of any given situation to conform with international law norms, there is nothing but the momentary displeasure of the world community to deter or punish a major nation bent on protecting a self-proclaimed national interest. Therefore, the heart of the controversy in the United States arises from the endless struggle for supremacy between Congress and the President with respect to war-making without a declaration.

Recognizing that the precedents and realities supported presidential preeminence, Congress in 1973 adopted, over a presidential veto, the War Powers Resolution, the most serious effort to this date by Congress to limit presidential war-making powers. Claiming that the Act fulfilled “the intention of the framers of the Constitution,” the Act required consultation with Congress, reports to Congress and an opportunity for Congress to ensure termination of hostilities and removal of United States forces whenever the President proposes to introduce, or has introduced, United States Armed Forces into hostile situations. Except for emergencies, the import of the Act is that the President should consult with, and receive congressional approval for, potential or actual war-making exercises. The Act is filled with ambiguities and unanswered questions.

As the authors point out:

Section 2(c) of the resolution seems to restrict presidential power by asserting that the constitutional powers of the President as Commander-in-Chief to deploy forces abroad is limited to three types of situations: (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by ‘attack upon the United States, its territories, or possessions, or its armed forces.’

None of these conditions was present in the Cuban missile crisis in which President Kennedy acted to forestall the introduction of missiles with a nuclear capacity in Cuba. Nor does this section take into account the other foreign policy bases for presidential action: treaty power, executive power, and, as Justice Sutherland proclaimed in U.S. v. Curtiss-Wright, 209 U.S. 304 (1936), the President’s role as the nation’s exclusive agent in foreign affairs plus certain attributes derived from national sovereignty.

Understandably, President Nixon, who attempted to veto the 1973

8. THOMAS & THOMAS, supra note 1, at 133.
Joint Resolution, and subsequent Presidents have been unenthusiastic with this effort of Congress to gain a more explicit share of the undeclared war-making power. As early as 1975, President Ford showed little concern for the Resolution’s provisions in evacuating Americans and Vietnamese from South Vietnam and in rescuing the merchant ship Mayaguez and her crew, though he did in the latter case notify Congress after the action was completed.

The Carter Administration’s softer international line presented fewer occasions for controversy but the Reagan Administration’s hawkish policies produced episodes in late 1983 that brought into sharp focus the attempt by Congress to share in the war-making process. The suicide bombing of the Marine quarters in Beirut, Lebanon in October led to an agreement by the President to accept an eighteen-month limit on the presence of the peacekeeping force, though the President skirted the direct application of the War Powers Resolution. United States intervention in Grenada later in October, assertedly to rescue American students and to forestall the creation of a firmer Cuban presence, again raised questions about the applicability of the War Powers Resolution. President Reagan, without formally complying with the Resolution, informed Congress by a letter only after the military operation was well-advanced, and subsequently announced through a spokesman that virtually all forces would be withdrawn within 60 days. The popular success of the American Grenada operation has blunted criticism based on international law and the Constitution. After failures in Lebanon, Iran, and South Vietnam, the frustrating program to prop up El Salvador, the lack of success in supporting the overthrow of the Sandinista regime in Nicaragua, and even world-wide rejection by our friends and others of the invasion as a violation of international law has proved no deterrent. The Congressional critics have been silenced—the foreign critics ignored.

What the authors have demonstrated is that while legal norms in the body of international law have a role to play, it is hardly a substantial impediment when the superpowers pursue their national interests. In domestic law, the situation remains unclear. The attempt by Congress to fill in the constitutional lacunae has not yet had a fair trial, but it has not yet cowed Presidents into abandoning their great role in national security and foreign policy, of which the use of military forces is an obvious part.

A final issue, with which the authors deal inconclusively: Is judicial resolution possible? The lesson drawn from attempts to challenge the Vietnam undeclared war is that courts, or at least most judges, are reluctant to find intelligible constitutional standards to guide the judiciary. The nature of the issue(s) involved suggests the wisdom of abstaining, which leaves to the elected Congress and President the obligation to hammer out reasonable compromises through the give and take of political life.