Reference Sheet on Presidential War Powers

Executive Claims of Authority

The executive branch currently claims that the President has the constitutional authority to use military force without Congressional authorization, "at least insofar as Congress has not restricted it," where two conditions are met:

- The President could "reasonably determine" that the action "serves important national interests"; and,
- The action is of a limited enough "nature, scope and duration" that it is unlikely to "constitute a war for constitutional purposes" requiring constitutional authorization under the Constitution's Declare War Clause.

Neither the "important national interest" nor the "nature, scope and duration" requirements have been defined with much specificity.

At times, the executive branch has also claimed that the president has the authority to act in a manner not subject to these limitations, including in some cases of national self-defense.

Relevant Legislation

The War Powers Resolution ("WPR") enacted by Congress in 1973 sets certain limits on the President's authority to use military force without Congressional authorization, including the following:

- The President is supposed to consult with Congress "in every possible instance" before using military force, and "regularly" after hostilities initiate;
- The President must report to Congress within 48 hours whenever he inserts U.S. armed forces into hostilities, deploys military personnel while armed overseas (except for certain specified purposes), or substantially enlarges an existing military presence, as well as at regular six-month intervals thereafter;
- The President must remove U.S. armed forces from hostilities if so directed by Congress through a concurrent resolution (*though this is now widely believed to be unconstitutional)*;
- The President must terminate U.S. armed forces' participation in "hostilities" within 60 to 90 days if Congress does not provide statutory authorization for their activities (*though some presidents have argued this is unconstitutional in at least some circumstances, while others have interpreted "hostilities" narrowly so that it does not cover ongoing military activities*).

The WPR also contains several procedural provisions that allow certain legislation to proceed without being subject to standard legislative obstacles:

- The original WPR contains "priority procedures" for joint resolutions or bills providing "specific authorization" for using military force or extending the 60 to 90 day period;
- The original WPR also contains "priority procedures" for concurrent resolutions directing the removal of U.S. armed forces from "hostilities" (*though some experts believe these procedures may not prove effective in all circumstances*);
- After *INS v. Chadha* (1983), Congress enacted separate "expedited procedures" for joint resolutions requiring the removal of U.S. armed forces engaged in hostilities overseas without statutory authorization, but only in the Senate (*used for recent Iran and Yemen resolutions*).

Congress has also enacted special notification and reporting requirements for certain types of military activities, including sensitive military operations, sensitive military cyber operations, and covert action (which is not covered by the WPR).

Recently, Congress has also enacted legislation requiring the executive branch to notify it of any changes to the "legal and policy frameworks for the use of military force and related national security operations" and release an annual report on those changes to the public.

Finally, Congress has adopted legislation authorizing the use of military force in several instances, most notably through the 2001 Authorization for Use of Military Force (AUMF) relating to the 9/11 attacks and the 2002 AUMF relating to Iraq. (These are not being covered in today's session.)

Judicial Review

The federal courts have voiced reservations about inserting themselves into military decisions and have rarely reached the merits of legal challenges. Instead, they have usually disposed of such cases on one of the following grounds:

- Some courts have held that plaintiffs lack the requisite constitutional standing to challenge the president's military decisions:
    - Individuals directly impacted by military operations, including servicemembers, often have standing;
    - Members of Congress lack standing to challenge executive action unless they can argue that their votes have been nullified by executive action (*though individual chambers or Congress as a whole may have standing to pursue constitutional claims*).
- Some courts have held that military decisions are non-justiciable political questions constitutionally committed to the political branches (*though recent case law suggests that this may not apply where there is an express conflict between the political branches*);
- Some courts have held that challenges to military decisions are not ripe for adjudication unless Congress has taken concrete steps to disagree with or oppose the executive branch's actions (*and often has ceased tacit acquiescence through continuing appropriations and other vehicles*);
- Some courts have delayed their decision until changes in circumstances render the legal outcome irrelevant, then dismissed the case as moot.