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OPINION

Presidential Wars: A New Legal Challenge

An army captain's lawsuit asks a court to decide questions about war against the Islamic State.

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From World War II to the present time, presidents have exceeded constitutional and statutory authority in exercising the war power. In doing so, they violate the rule of law, the principle of self-government, and the vital system of checks and balances.

A lawsuit filed on May 4, 2016, by Captain Nathan Michael Smith asks a federal district court to decide whether President Barack Obama may engage in war against the Islamic State without receiving express approval from Congress.

An intelligence officer stationed in Kuwait, Smith supports military action against the Islamic State but wants a legal judgment that the orders he is asked to carry out are legally binding.

The lawsuit raises legitimate and important questions about the disturbing pattern of presidents who believe they can take the country to war without seeking prior support from Congress.

On July 11, the Justice Department asked the district court to dismiss Smith's case for several reasons, including a lack of standing to assert his claims and that the case raises nonjusticiable political questions.

Smith's attorneys responded on Aug. 18, arguing that the court has jurisdiction to hear the case, Smith

has standing, and it is his duty as a military officer to disobey orders that are beyond the president's authority as commander in chief.

Early decisions by the U.S. Supreme Court fully understood that only Congress could take the country from a state of peace to a state of war.

The president could take defensive actions to repel sudden attacks, but all three branches agreed that anything amounting to offensive war required either a declaration of war or statutory authorization.

'PLENARY AND EXCLUSIVE'

When conflicts arose between what Congress set forth as statutory policy and what a president ordered in combat, statutory policy prevailed, as the Supreme Court decided in *Little v. Barreme* (1804).

That pattern of judicial decisions limiting presidential power in external affairs persisted until *United States v. Curtiss-Wright Export* (1936). Based on multiple errors of history and constitutional analysis, the Supreme Court promoted for the first time a conception of presidential power in external affairs that was plenary and exclusive.

The case itself had nothing to do with independent presidential power. It arose when Congress in 1934 authorized the president to place an arms embargo in a region in South America.

President Franklin D. Roosevelt relied exclusively on statutory authority. No one in the lower courts or the Justice Department argued for any inherent, independent, plenary, exclusive or extraconstitutional presidential power.

Writing for the Supreme Court, Justice George Sutherland upheld the delegation of legislative power to the president. In dicta, however, he proceeded to commit numerous errors that would greatly expand presidential power in the field of external affairs.

He quoted out of context a speech that John Marshall gave in 1800 when he served as a member of the House of Representatives. He said during debate: "The president is the sole organ of the nation in external relations, and its sole representative with foreign nations."

The term "sole organ" is ambiguous, but Marshall clearly meant that the president carries out national policy only after it has been decided by both branches, either by statute or treaty. Yet Sutherland misinterpreted the speech to attribute to the president "plenary and exclusive power" in the field of international relations.

Marshall never said or implied that. He merely explained that when President John Adams transferred to Great Britain an individual charged with murder he did so not on the basis of some kind of independent presidential power but solely by relying on an extradition provision in the Jay Treaty.

EARLY PRECEDENT

Adams was not single-handedly making foreign policy. He was carrying it out.

The sole-organ doctrine continued to expand presidential power beyond constitutional limits from one decade to the next until partially corrected by the Supreme Court in *Zivotofsky v. Kerry* last year.

Presidential power also exceeded constitutional boundaries when President Harry Truman fundamentally misinterpreted the United Nations Charter. In July 1945, during Senate debate on the charter, he publicly pledged that if any agreements were negotiated to require U.S. troops in a U.N. military action, "it will be my purpose to ask Congress for appropriate legislation to approve them." That precise requirement was included in the U.N. Participation Act of 1945, which Truman signed without expressing any constitutional or policy objections.

Yet five years later he committed U.S. troops to Korea solely on the basis of Security Council resolutions without ever seeking, or obtaining, congressional approval. That unconstitutional precedent was followed by President Bill Clinton in Haiti and Bosnia and by Obama in Libya. When Clinton could not obtain U.N. authority for military action in Kosovo, he reached out to NATO allies for support. Treaties may not shift the Article I authority of Congress to outside bodies, whether the U.N. or NATO.

From 1950 to the present, presidents have engaged in unconstitutional wars. Captain Smith now asks the federal judiciary to restore the Constitution to its fundamental principles.

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