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U.S. WAR POWERS AND THE POTENTIAL BENEFITS OF COMPARATIVISM

CURTIS A. BRADLEY

There is no issue of foreign relations law more important than the allocation of authority over the use of military force. This issue is especially important for the United States given the frequency with which it is involved in military activities abroad. Yet there is significant uncertainty and debate in the United States over this issue—in particular, over whether and to what extent military actions must be authorized by Congress. Because U.S. courts in the modern era have generally declined to review the legality of military actions, disputes over this issue have had to be resolved, as a practical matter, through the political process. For those who believe that it is important to have legislative involvement in decisions to use force, the political process has not proven to be satisfactory: presidents have often used military force without obtaining congressional approval, and Congress generally has done little to resist such presidential unilateralism.

The United States is not the only country to struggle with regulating the domestic authority to use military force. This issue of foreign relations law is common to constitutional democracies, and nations vary substantially in how they have addressed the issue. Comparative study of such approaches should be of inherent interest to scholars and students, including those trying to better understand the U.S. approach. Whether and to what extent such study should also inform the interpretation or revision of U.S. law presents a more complicated set of questions that are affected in part by one's legal methodology and how the comparative materials are being invoked.

This Chapter begins by describing the exercise of war powers authority in the United States, both before and after World War II, as well as some of the limitations on congressional and judicial checks on presidential uses of military force. It then considers the potential value of studying the war powers law and practice of other countries, as well as some of the reasons to be cautious about relying on such comparative materials.

Constitutional Text and Pre-World War II History

The law governing the distribution of war authority in the United States is complicated and, in many respects, uncertain. The U.S. Constitution assigns a variety of war-related powers to Congress, including the powers to appropriate and spend money, raise

and support the military, and declare war.¹ It also makes the President the Commander in Chief of the armed forces.² Although Congress's authority to issue declarations of war might suggest that its approval is needed before the United States enters into a war, there is some question about this, given that undeclared wars were common at the time the Constitution was adopted and are now the norm. Indeed, the United States has been involved in hundreds of military conflicts in its history but has declared war in only five of them, and the last time the United States declared war was during World War II. Even if Congress has the sole power to declare war for the United States, the text of the Constitution does not clearly say that Congress has the sole power to authorize uses of military force when war is not declared.³ Moreover, it may be that not all uses of force even qualify as acts of war.

Most scholars studying the issue have nevertheless concluded that the Constitution, as originally understood, requires the President to obtain congressional authorization before using military force against another state, except when acting in self-defense. This view appears to have been the understanding of early presidents. For example, the first U.S. president, George Washington, expressed the view that “[t]he Constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until they have deliberated on the subject, and authorized such a measure.”⁴ The President, under this view, could use force against another state only in defense.

Despite this early understanding, there were uncertainties in the nineteenth century about when congressional authorization was required. These uncertainties included: What constitutes self-defense, as opposed to offensive action? Does self-defense include, for example, the protection of Americans (and perhaps also their property) abroad? Does it include counter-attacks or reprisals, or just repelling attacks? To what extent must Congress authorize military action against non-state actors, such as pirates or unrecognized government entities? More generally, are there instances in which the use of force does not amount to “war,” and, if so, must Congress authorize those lower-level uses of force?

Against a backdrop of such uncertainties, there were a number of instances during the nineteenth century in which the United States used military force without congressional authorization—for example, to protect Americans and their trade activities abroad. Most of these military actions were small in scale and did not involve protracted engagements. On occasion, they triggered domestic controversy. For example, in the mid-nineteenth century there was debate in Congress over whether the military had exceeded its constitutional authority in bombarding Greytown, Nicaragua in retaliation for damage to American property and an injury to a U.S. official. In justifying the military's action, President Pierce

¹ U.S. CONST. art. I, § 8.

² U.S. CONST. art. II, § 2.

³ For an argument that “declare” would have originally been understood to include acts of war even without a verbal declaration, see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

⁴ Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 10 THE WRITINGS OF GEORGE WASHINGTON 366, 367 (Jared Sparks ed., New York, Harper & Bros. 1847).

likened Greytown to “a piratical resort of outlaws or a camp of savages” rather than to a nation and argued that the U.S. action was consistent with international practice.⁵ A court later upheld the constitutionality of the bombardment, reasoning that the core “object and duty” of governments is to protect their citizens “whether abroad or at home” and that the President is the appropriate actor within the United States to whom “citizens abroad must look for protection of person and of property.”⁶

The understanding of war powers described above, even with its many uncertainties, came under further strain during the early twentieth century. In 1900, President McKinley sent over 5,000 U.S. troops to China during the Boxer Rebellion, as part of a multinational coalition, without congressional authorization. In doing so, he emphasized that the U.S. action “involved no war against the Chinese nation” and was justified in part by the need to “secur[e] wherever possible the safety of American life and property in China.”⁷ In addition, on numerous occasions during the early twentieth century presidents used military force to intervene in Latin American countries, without congressional authorization, ostensibly to restore order and protect American citizens and their property.⁸ These interventions were justified as “police actions,” on the theory that the countries involved were not capable of maintaining law and order on their own. As President William Howard Taft explained after he left the presidency, while using force to protect American citizens abroad was potentially an “act of war [as a matter of constitutional law] if committed in a country like England or Germany or France,” this was not the case in countries where “law and order are not maintained, as in some Central and South American countries.”⁹

Despite this practice, Congress expressly declared war for the two most significant conflicts that the United States was involved in during the first half of the twentieth century—World War I and World War II. But World War II was the last time that Congress formally declared war.

Post-World World War II History

The establishment of the United Nations in 1945 added another complication to the legal analysis concerning U.S. war powers. Article 42 of the United Nations Charter gives the Security Council the power to authorize nations to use military force to address threats to the peace, breaches of the peace, and acts of aggression. This delegation of authority to the Council presents questions for the U.S. domestic law of war powers: In particular, given

⁵ President Franklin Pierce, Second Annual Message (Dec. 4, 1854), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 273, 282, 284 (James D. Richardson ed., 1896).

⁶ 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

⁷ President William McKinley, Message to Congress (Dec. 3, 1900), in 34 CONG. REC. 2, 4 (1901).

⁸ See David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 503, 527 (2012); see also MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 129–56 (2002) (describing American military interventions in Latin America between 1898 and 1914).

⁹ William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610–11 (1916).

that the Senate approved the Charter, including its delegation of authority to the Council, does a Council authorization of force remove the need for congressional authorization of such force?¹⁰ Additional questions are implicated by Article 43 of the Charter, which envisions that nations will enter into agreements to make military forces available for use by the Council. Neither the United States nor any other country has entered into an Article 43 agreement, but Congress did contemplate that such an agreement might be made when it enacted the UN Participation Act in 1945, which specifically authorized the President to negotiate an Article 43 agreement. Although the Act specified that any such agreement would have to be approved by Congress, it also made clear that once this happened the forces could be used without further congressional approval.¹¹

This new legal landscape would quickly be tested in 1950 when President Truman sent forces to defend South Korea in the Korean War. Although this was a substantial military campaign that lasted several years and involved tens of thousands of U.S. casualties, Truman never sought or obtained formal congressional authorization, let alone a declaration of war. In defending the President's actions, the State Department emphasized that the Security Council had authorized the use of force, and it argued that the "continued existence of the United Nations as an effective international organization is a paramount United States interest."¹² The Department also cited to past presidential uses of force that did not have express congressional authorization, such as in the Boxer Rebellion.

Although the Korean War is potentially an important precedent in favor of presidential unilateralism in using military force, its precedential weight has generally been thought to be limited, for several reasons: There has long been debate about whether Truman's action was constitutional; it occurred at a time when there was significant uncertainty about how the UN Charter framework interacted with the U.S. law of war powers; and most subsequent military actions that have involved a substantial use of ground troops have been authorized by Congress (namely, the Vietnam War, both Iraq wars, and the war in Afghanistan). Historical practice such as this is viewed by many as a significant consideration in ascertaining the distribution of war powers authority in the United States, given the absence of clear constitutional text or judicial precedent.¹³

¹⁰ For debate over this issue, compare Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 72 (1991) ("When the President commits U.S. forces to a UN police action in accordance with Article 42 of the Charter, it is because the U.S. Government is obliged by international law to comply. Such compliance by the President with international law is not prohibited—indeed, it is required—by the Constitution."), with Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 88 (1991) ("What the President constitutionally needs from the United States Congress, he cannot get from the United Nations Security Council."). Somewhat similar issues are raised by the self-defense treaties such as the North Atlantic Treaty, in which the Senate has consented to commitments whereby the United States has promised to use force to defend allies if they are attacked.

¹¹ See 22 U.S.C. § 287d.

¹² *Authority of the President to Repel the Attack in Korea*, DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), July 31, 1950, at 177.

¹³ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 461-68 (2012).

The War Powers Resolution

The Vietnam War of the 1960s and 1970s, which was authorized at least to some extent by Congress, became highly controversial and led to Congress's most vigorous effort to regulate presidential war-making. In 1973, Congress enacted the War Powers Resolution over President Nixon's veto, and the Resolution (which, despite its title, is a binding statute, to the extent it is constitutional) continues in force today. The Resolution states that its purpose is to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."¹⁴

In addition to provisions requiring that the president consult with and report to Congress about the introduction of U.S. forces into hostilities, the Resolution provides that if a President has introduced U.S. forces into hostilities, the President must terminate the use of these forces within 60 days unless Congress authorizes the operation.¹⁵ Such authorization, the Resolution further states, is not to be inferred from any treaty unless Congress has implemented the treaty with legislation that specifically authorizes the use of U.S. armed forces.¹⁶ Finally, the Resolution more generally expresses the view (in a provision that the executive branch contends is not legally binding) that:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (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.¹⁷

This provision does not mention a presidential power to use force to protect and rescue Americans threatened abroad, but it is generally assumed that there is some such power, and presidents have exercised such a power on a number of occasions since the enactment of the Resolution, often without controversy.¹⁸

Presidential administrations have varied in whether they have accepted the constitutionality of the 60-day cutoff provision. But even with this uncertainty about

¹⁴ 50 U.S.C. § 1541(a).

¹⁵ *See* 50 U.S.C. § 1544(b). The 60-day period can be extended for up to 30 days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

¹⁶ *See* 50 U.S.C. § 1547(a)(2).

¹⁷ 50 U.S.C. § 1541(c).

¹⁸ Some of the key congressional supporters of the War Powers Resolution later conceded that such an authority should have been included. *See* JOHN HART ELY, *WAR AND RESPONSIBILITY* 117 (1995).

whether the provision is constitutional, it appears to have had some effect on presidential action. Instead of openly disregarding the 60-day provision, when presidents have acted without congressional authorization they have typically either (1) concluded the military campaigns quickly (such as in Grenada and Panama in the 1980s), (2) claimed (sometimes questionably) that they had statutory authority that satisfied the requirements of the Resolution (such as with the 1999 bombing campaign in Kosovo and the conflict against the Islamic State that began in 2014), or (3) interpreted the Resolution as inapplicable (such the Obama administration’s claim in 2011 that continued U.S. participation in a bombing campaign against Libya did not amount to “hostilities” for purposes of the Resolution).

Even though the Resolution has not been entirely disregarded by presidents, most observers do not view it as a success.¹⁹ Because courts have generally avoided enforcing it, its effectiveness depends on the extent to which the executive branch either voluntarily complies with it or is induced to do so by Congress. But Congress has shown little political will to enforce it, and the executive branch has interpreted it in a manner designed to preserve executive branch flexibility. For example, although probably not its intent, the Resolution’s 60-day cutoff provision has been interpreted by the executive branch as a congressional acceptance of presidential authority to use force for less than 60 days.²⁰ Moreover, although the Resolution expressly states that appropriations statutes are not to be construed as authorizations to use force, the executive branch has maintained that the Resolution—since it is merely a statute—cannot control how later statutes (including appropriations statutes) are construed.²¹ Furthermore, the Resolution leaves undefined the key term “hostilities,” and the executive branch has interpreted that term in a manner that allows it to bypass the Resolution for some uses of force.²²

Congressional and Judicial Checks on Presidential War-Making

Apart from its enactment of the War Powers Resolution, Congress generally has not done much to resist presidential unilateralism in the war powers area. Sometimes there has been widespread support in Congress for the presidential action and therefore its members have seen no reason to insist on the formality of specific statutory authorization. This appears to have been true, for example, with the initiation of the Korean War and may also

¹⁹ See, e.g., John Hart Ely, *Suppose Congress Wanted a War Powers Resolution that Worked*, 88 COLUM. L. REV. 1379 (1988); Michael Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995).

²⁰ See Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Attorney General, “Authority to Use Military Force in Libya,” at 8 (Apr. 1, 2011), at <https://fas.org/irp/agency/doj/olc/libya.pdf>.

²¹ See Memorandum Opinion for the Attorney General, *Authorization for Continuing Hostilities in Kosovo*, 24 OP. OFF. LEGAL COUNSEL 327 (Dec. 19, 2000).

²² See, e.g., Testimony of Harold Hongju Koh, U.S. Department of State, on Libya and War Powers, Before Senate Foreign Relations Committee (July 28, 2011), at <http://www.cfr.org/libya/kohs-testimony-libya-war-powers-june-2011/p25401> (arguing that continued U.S. participation in the use of military force against Libya in 2011 did not constitute “hostilities” within the meaning of the War Powers Resolution, given the limited nature of the mission, the low risk to U.S. troops, the low risk of escalation, and the limited means of force being used).

be true to some extent with the campaign against the Islamic State. On other occasions, Congress has been content to wait and see how a campaign unfolds without taking a vote on it, thereby avoiding accountability if the campaign does not turn out well.

Even when Congress has concerns about a military campaign, it is often reluctant to take actions that might appear unsupportive of U.S. troops or that might hurt the chances of U.S. success. More generally, Congress as a collective body often has difficulty mobilizing opposition to the President, especially if one or both houses of Congress are controlled by the President's political party. At other times, partisan conflict may simply create gridlock, making it impossible to reach agreement on legislation. In early 2015, for example, President Obama proposed to Congress that it enact an authorization statute for the conflict against the Islamic State, but as of 2017 (with a new presidential administration) Congress still had not acted, even though it does not appear that Congress is opposed to the use of force in that conflict.²³

The United States has a powerful court system, so in theory the judiciary could police executive violations of either the constitutional law of war powers or the War Powers Resolution. In practice, however, courts in the modern era have invoked various "justiciability" limitations to avoid addressing these issues. They have insisted that the plaintiffs meet the requirements for standing and have generally disallowed members of Congress from claiming standing.²⁴ They have also refused to consider cases that are not sufficiently "ripe," either because it is not clear whether or to what extent force will be used or because Congress has not yet attempted to use its own resources to resist a president's unilateral action.²⁵ And, most significantly, they have tended to treat issues concerning the distribution of war authority as presenting a nonjusticiable "political question."²⁶ To be sure, the Supreme Court has signaled in recent years that the political question doctrine

²³ There have been rare instances in which Congress has used its authority over funding to curtail or terminate U.S. military operations, such as near the end of the Vietnam War, and in connection with U.S. military operations in Somalia in the 1990s after a number of U.S. service personnel were killed there. See Richard F. Grimmett, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments* 1-3 (Cong. Res. Serv., Jan. 16, 2007), at <https://fas.org/spp/crs/natsec/RS20775.pdf>. Members of Congress also have sometimes taken less formal action to resist presidential unilateralism in the use of force. For example, when President Obama was contemplating the use of force against Syria in 2013, 116 members of the House of Representatives signed a letter to the President stating that "[w]e strongly urge you to consult and receive authorization from Congress before ordering the use of U.S. military force in Syria. Your responsibility to do so is prescribed in the Constitution and the War Powers Resolution of 1973." See *116 House Members Sign Syria Letter to Obama (Updated)* (Aug. 28, 2013), at <http://www.rollcall.com/news/policy/87-house-members-sign-syria-letter-to-obama>.

²⁴ See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (dismissing challenge by thirty-one members of Congress to President Clinton's use of force in Yugoslavia in 1999); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (dismissing challenge by members of Congress to President Obama's use of force against Libya in 2011).

²⁵ See, e.g., *Doe v. Bush*, 323 F.3d 133, 137-39 (1st Cir. 2003); *Dellums v. Bush*, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990).

²⁶ See, e.g., *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

should have a narrow scope.²⁷ But very few cases ever get reviewed by the Supreme Court, and the lower federal courts continue to apply the political question doctrine with some vigor in the foreign affairs area.²⁸

In light of modern practice and the lack of significant judicial review, some academic observers have suggested that presidents now have the authority to initiate at least small-scale military campaigns that they deem to be in the national interest, especially if there is no significant use of ground troops.²⁹ Under this view, one would in effect need to distinguish between certain “big wars” that require congressional authorization and “small wars” that would not. This is essentially the position suggested by the executive branch (albeit noncommittally) in connection with the Libya campaign in 2011. But other scholars either read the historical practice differently or argue that it should not legitimize this degree of presidential unilateralism.³⁰

Other scholars accept that the above account might describe the “de facto” war powers regime today, but they contest its legality and desirability.³¹ These scholars maintain that Congress should be doing more to maintain an authorizing role, and that, outside of narrow self-defense and rescue situations, it is dangerous to allow the executive branch unilateral authority to use force abroad. Various proposals have been made over the years to improve the situation, such as through increased judicial review or amendments to the War Powers Resolution, but so far little has been done.

Example: Syria in 2013

The uncertain state of the constitutional law of U.S. war powers is illustrated by the deliberations in the Obama administration in 2013 about whether to use military force against Syria. The prior year, President Obama had announced that the use of chemical weapons by the Assad regime in Syria in its civil war would involve crossing a “red line”

²⁷ See *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (describing the political question doctrine as a “narrow exception” to the judiciary’s “responsibility to decide cases properly before it”).

²⁸ See Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I’s Political Question Analysis?*, LAWFARE (May 19, 2016), at <https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis>. See also, e.g., *Jaber v. United States*, 861 F.3d 241 (D.C. Cir. 2017) (applying political question doctrine to bar challenge, under domestic and international law, to drone strike by the U.S. military in Yemen).

²⁹ See, e.g., Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUSTON L. REV. 971, 978 (2016); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1348 (1993) (reviewing ELY, *supra* note 18).

³⁰ See, e.g., Michael J. Glennon, *The Executive’s Misplaced Reliance on War Powers “Custom,”* 109 AM. J. INT’L L. 551, 552 (2015); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 882-86 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

³¹ See, e.g., ELY, *supra* note 18; LOUIS FISHER, *PRESIDENTIAL WAR POWER* 294-97 (3d ed. 2013); Jules Lobel, *“Little Wars” and the Constitution*, 50 U. MIAMI L. REV. 61 (1995).

that would carry “enormous consequences.”³² When it appeared that the regime had crossed that line by using sarin gas against a rebel-held suburb of Damascus, Obama began preparing a military response. At that point, it appeared that he would act without seeking authorization from Congress. Abruptly, however, he changed course and said that he would first seek congressional approval.³³ This was a politically risky move, because it was far from clear that Congress would provide such authorization. The issue soon became moot, however, when Russia facilitated a diplomatic solution.³⁴

Obama’s change of heart occurred shortly after Britain’s prime minister indicated that he would accept a vote by the House of Commons rejecting that country’s participation in using force against Syria. In Obama’s public statement explaining his decision to seek authorization from Congress, he specifically referred to “what we saw happen in the United Kingdom this week when the Parliament of our closest ally failed to pass a resolution with a similar goal, even as the Prime Minister supported taking action.”³⁵ Obama also noted that, while he thought that he had the authority to carry out this military action without congressional authorization, he was also “mindful that I’m the President of the world’s oldest constitutional democracy.”³⁶

The decision to seek congressional authorization for the use of force against Syria was consistent with the views of presidential war powers that Obama had expressed while he was a candidate for the presidency in 2007. In an interview with Charlie Savage—then a reporter for the *Boston Globe* and later a reporter for the *New York Times*—Obama stated that “[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”³⁷ In privately discussing with his aides his decision to seek congressional authorization for using force against Syria, Obama apparently referred back to that 2007 interview.³⁸

The Obama administration’s practice, however, was not always consistent with Obama’s earlier views. Most notably, the administration used military force against the Qaddafi regime in Libya in 2011 without first obtaining congressional authorization, even though the United States did not face any actual or imminent threat. In defending the constitutionality of this action, the Justice Department’s Office of Legal Counsel (OLC)

³² Remarks by the President to the White House Press Corps (Aug. 20, 2012), at <https://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

³³ See Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013.

³⁴ See Mark Lander & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES, Sept. 10, 2013.

³⁵ Statement by the President on Syria (Aug. 31, 2013), at <https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

³⁶ *Id.*

³⁷ Charlie Savage, *Barack Obama’s Q&A*, BOSTON GLOBE (Dec. 20, 2007).

³⁸ See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 653 (2015).

expressed a view of presidential war powers that is substantially broader than the one that Obama had expressed while a candidate for the presidency. Quoting from prior executive branch legal opinions, OLC observed that “the President has the power to commit United States troops abroad, as well as to take military action, for the purpose of protecting important national interests, even without specific prior authorization from Congress.”³⁹ OLC did acknowledge that the President might be required to obtain congressional authorization for a use of force amounting to a “war,” but it insisted that such a requirement would be triggered “only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period,” a standard that it argued was not met with respect to the use of force against Libya.⁴⁰ Even for the subsequent aborted action in Syria, executive branch lawyers had apparently advised the President that he had the authority take unilateral action,⁴¹ and Obama himself claimed that although he was seeking congressional authorization, “I believe I have the authority to carry out this military action without specific congressional authorization.”⁴²

Potential Benefits of Comparativism

In considering whether to seek congressional authorization for the use of force against Syria in 2013, President Obama seemed to take into account the action by Britain’s prime minister in seeking and respecting parliamentary input. This example is a reminder that other constitutional democracies face similar issues in deciding how to regulate the use of military force.

There is substantial variation in how countries have approached the relationship between the legislative and executive branches with respect to war powers, so there is rich material for comparative evaluation.⁴³ For example, a 2010 study found that there was “a remarkable variance regarding the war powers of national parliaments in Europe, ranging

³⁹ Memorandum Opinion for the Attorney General, *Authority to Use Military Force in Libya*, at 6 (Apr. 1, 2011) (internal quotation marks omitted), at <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

⁴⁰ *Id.* at 8.

⁴¹ See SAVAGE, *supra* note 38, at 630.

⁴² Statement, *supra* note 35. In 2017, newly-elected President Trump not only expressed but acted on this executive branch understanding of presidential war authority, directing cruise missile strikes against Syria in response to that country’s use of chemical weapons. See Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017).

⁴³ See, e.g., Sandra Dietrich, Hartwig Hummel, and Stefan Marschall, *Parliamentary War Powers: A Survey of 25 European Parliaments*, Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper No. 21 (2010) (describing range of parliamentary control among European countries over deployment of the military), at https://www.phil-fak.uni-duesseldorf.de/fileadmin/Redaktion/Institute/Sozialwissenschaften/Hummel_PAKS_2010_01.pdf; Wolfgang Wagner, Dirk Peters, and Cosima Glahn, *Parliamentary War Powers Around the World, 1999-2004. A New Dataset* 11 (2010) (“The powers of parliaments in this issue area vary widely among democracies around the world.”); Katja S. Ziegler, *Executive Powers in Foreign Policy: The Decision to Dispatch the Military*, in CONSTITUTIONALISM AND THE ROLE OF PARLIAMENTS 143 (Katja S. Ziegler et al. eds., 2007) (“[I]n an international comparison parliamentary involvement in decisions to deploy military forces is anything but uniform.”).

from ‘very strong’ in Austria, Germany and Finland to ‘very weak’ in the cases of France, the UK and Greece.”⁴⁴ Similarly, Professor Tom Ginsburg has found, based on data from the Comparative Constitutions Project (which is coding all of the world’s constitutions since 1789), that “there are a wide variety of approaches to the problem of declaring war.”⁴⁵ Moreover, the distribution of war authority in other countries has not been static, and the trends and changes over time may themselves be instructive. For example, even though the initiation of war is considered a “royal prerogative” of the Crown in Great Britain, in recent years the executive branch in that country has sought legislative approval before using military force.⁴⁶ That said, it is not clear that the overall trend among constitutional democracies is in favor of legislative control over the use of force.⁴⁷

Importantly, comparing the role of legislatures in decisions to use force is much more complicated than simply looking to see whether their *ex ante* legislative approval is required. As one comparative study that focused on *ex ante* approval acknowledged:

Ex ante veto power is certainly not the only way in which parliaments could exert control over deployments. Even *ex ante* consultation, for example, could give parliament the opportunity to affect executive decisions somewhat. Parliaments, moreover, may become involved in other phases of a mission, not only before troops are deployed. Parliaments may, for example, be empowered to call the troops back home in the early phase of an operation. They may become involved at later stages of a deployment by retaining the right to monitor activities, thus acting as a watchdog whose presence may continue to affect executive decisions. Finally, parliament may become influential after a deployment has ended by performing an evaluation and exposing weaknesses in how government and the military leadership handled an operation.⁴⁸

There is thus a wide range of variables relating to domestic control over war powers that could be compared.

Despite such rich material, any comparative analysis of how nations regulate war powers should be approached with caution. Each country’s laws and practices are embedded within that country’s particular legal culture, political system, and historical tradition. Moreover, there may be limitations on how much one can translate the approach of a parliamentary system to the U.S. presidential system. There may also be particular

⁴⁴ Dietrich et al., *supra* note 43, at 9.

⁴⁵ Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT’L L. 138, 147 (2014).

⁴⁶ See Claire Mills, *Briefing Paper: Parliamentary Approval for Military Action* (May 12, 2015), at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7166>; Zoe Bedell, *British Parliament (Unlike the U.S. Congress) Actually Votes on Use of Force in Syria*, Lawfare (Dec. 3, 2015), at <https://www.lawfareblog.com/british-parliament-unlike-us-congress-actually-votes-use-force-syria>.

⁴⁷ See Wagner et al., *supra* note 43, at 25 (“[S]ince the 1990s this trend seems to be reversed, with the executive (re)gaining autonomous decision-making power over military deployments.”).

⁴⁸ *Id.* at 19.

pathologies that apply to the U.S. Congress (such as the extent of its partisanship, unpopularity, or vulnerability to lobbying interests) that do not apply to other legislatures. In addition, nations vary widely in the extent to which they can and do project military power abroad—both unilaterally and as part of collective operations—and it is difficult to find many nations that are comparable to the United States in this regard.⁴⁹ More generally, there is a danger (as with, for example, reliance on legislative history or historical materials) that comparative materials will be invoked selectively with a focus only on those most helpful to a particular position.

With appropriate caution, however, there are various ways in which a study of comparative war powers might be useful, including to those who seek to regulate war powers in the United States.⁵⁰ For example, knowledge of other nations' approaches can be useful for statutory drafting—for example, in considering how the War Powers Resolution might be improved. Consider, for example, Germany's 2005 Parliamentary Participation Act. In requiring the consent of the Bundestag (the lower house of Germany's legislature) for military deployments, the Act does a number of things that are distinct from the U.S. War Powers Resolution. Instead of having the consent requirement hinge on the undefined term "hostilities," it uses "deployment" as the trigger and defines it to mean "when soldiers of the German Federal Armed Forces are involved in armed engagements, or their involvement in an armed engagement is to be anticipated." It also specifies in detail the information that the executive must provide to the Bundestag in its request for authorization. In addition, to make the scheme more workable, it sets forth a more simplified procedure for the approval of "deployments of minor scope and intensity," which it proceeds to define and illustrate. The Act further provides that advance legislative approval is not needed for "[d]eployments in the event of imminent danger which allow no scope for delay" and for "operations whose purpose is to rescue persons from particularly dangerous situations, provided that the holding of a public debate in the Bundestag would endanger the lives of the persons in need of rescue," but it requires that the Bundestag "be informed appropriately prior to and during deployment" in these situations and that the executive seek the Bundestag's ex post approval promptly.

Comparativism can also highlight alternatives to statutory regulation. For example, another form of regulation can occur through the development of "constitutional conventions" of expected political behavior. Constitutional conventions are "maxims, beliefs, and principles that guide officials in how they exercise political discretion."⁵¹ The

⁴⁹ Although beyond the scope of this chapter, there are theoretical debates within the field of comparative constitutional law that reflect differing views about the significance of historical and contextual differences like these. See Michel Rosenfeld & András Sajó, *Introduction*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 16-18 (Michel Rosenfeld & András Sajó, eds. 2012).

⁵⁰ Conversely, other countries may benefit from looking at the U.S. war powers experience, including at what has not worked well. Cf. Yasuo Hasebe, *War Powers*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 49, at 479 ("While there are some moves towards the strengthening of parliamentary control in the United Kingdom and France, these efforts may encounter difficulties similar to those under the US War Powers Resolution.").

⁵¹ Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

recent practice of Great Britain might be instructive. Even though it has a tradition of executive control over war as part of the prerogative powers of the Crown, in recent years the government appears to have accepted that a constitutional convention has emerged whereby, except in emergency situations, the House of Commons is to be given an advance opportunity to debate the issue.⁵² Proposals to convert this convention into a more binding statute, along the lines of the U.S. and German approaches, have to date been rejected.⁵³

Studying comparative practice might also allow for a reassessment of the proper role and capacity of U.S. courts in examining war powers questions. Again, Germany is an interesting model, given that its courts have been especially willing to address war powers issues, including in challenges brought by the legislative branch.⁵⁴ By contrast, courts in some countries like Japan and Great Britain seem to be closer to the U.S. practice of avoiding war powers adjudication, and their rationales also would be worth study.⁵⁵ In addition to general questions of judicial capacity, comparativism might be instructive in thinking about whether and to what extent courts might draw upon international law in assessing executive war powers authority.⁵⁶

The most controversial use of comparativism, at least in the United States, would be in constitutional interpretation. Given how difficult it is to amend the U.S. Constitution (which would typically require supermajority votes in both houses of Congress and approval by three-fourths of the states), it is unlikely that comparative study would lead to a formal change in the constitutional text. As illustrated above, however, there is substantial room for interpretive disagreements over the meaning of the existing Constitution as it relates to war-making. Yet there has been robust debate in the United States over the propriety of looking to foreign and international materials to interpret the U.S. Constitution—for example, in determining the meaning of the Constitution’s ban on “cruel and unusual punishments.” One’s position in this debate depends to some extent on one’s general approach to

⁵² See *Parliamentary Approval for Military Action* (May 13, 2015), at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7166>.

⁵³ See *Ministers Drop Plan for War Powers Law*, THE GUARDIAN (Apr. 18, 2016).

⁵⁴ See Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies*, 50 MIAMI L. REV. 181, 196 (1995) (arguing that the German experience “shows, inter alia, that judicial organs can play a constructive role in giving contemporary meaning to constitutional war powers provisions”); see also THOMAS M. FRANCK, *POLITICAL QUESTIONS, JUDICIAL ANSWERS* ch. 7 (1992) (discussing and generally praising the “German model” of judicial review of foreign relations law cases).

⁵⁵ See, e.g., Damrosch, *supra* note 54, at 195 (“Using a version of the ‘political question doctrine’ and related techniques similar to those applied by U.S. courts, the Japanese Supreme Court (like its American counterpart) has refrained from articulating limits on the government’s military powers.”). In restricting the standing of federal legislators to challenge statutes or executive branch actions, the Supreme Court acknowledged that “[t]here would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime.” *Raines v. Byrd*, 521 U.S. 811, 828 (1997). But the Court contended that “[o]ur regime contemplates a more restricted role for Article III courts.” *Id.*

⁵⁶ See, e.g., Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOKLYN L. REV. 611 (2011).

constitutional interpretation.⁵⁷ Those who adhere to a strictly “originalist” approach to constitutional interpretation may dismiss modern comparative practice as irrelevant because it does not shed light on what the Constitution was understood to mean when it was adopted.⁵⁸ By contrast, interpreters who are willing to consider additional sources of constitutional meaning—such as the purposes of constitutional provisions, inferences from the constitutional structure, and the practical effects of adopting a particular interpretation—are more likely to view comparative materials as potentially relevant.⁵⁹

Despite such debate, a majority of the Supreme Court has been willing at various times to consider comparative materials.⁶⁰ Moreover, some of the objections to considering those materials may have less force in the war powers context, which is inherently international, than in the context of issues that seem more domestic in nature (such as the death penalty). For example, if Congress’s authority to control the use of military force turns on whether the use of force amounts to a “war,” as some scholars (and, at least sometimes, the executive branch) contend, then it may be instructive to see how other countries have drawn such a distinction (or similar distinctions). This is especially so given that the Constitution does not define the term “war” and its meaning may have evolved over time as the result of international law and practice.

In any event, even if one rejects a “borrowing” of comparative practice as part of constitutional interpretation, there is a subtler way in which comparative materials might be relevant to constitutional analysis: they can provide a backdrop against which it is possible to gain a better understanding of one’s own constitution. Knowing about alternative constitutional approaches can, for example, highlight the ways in which U.S. law reflects particular choices that could have been made differently. This is true even when (or perhaps especially when) the interpreter concludes that the constitutional analysis adopted by other countries is not well suited to the U.S. context.⁶¹ For example, whereas the U.S.

⁵⁷ See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

⁵⁸ Writing for a 5-4 majority of the Supreme Court in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), Justice Scalia rejected looking to experiences abroad when considering the U.S. Constitution’s requirements relating to federalism, contending that “such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”

⁵⁹ See, e.g., Justice Breyer’s dissent in *Printz*, 521 U.S. at 977 (“Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”); see also Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1232 (1999) (“[I]f one believes that constitutional interpretation is the application of reason to problems of governance within a framework set out in the Constitution’s words, experience elsewhere is relevant because it provides information that an interpreter committed to reason might find helpful.”).

⁶⁰ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010). See also Vicki C. Jackson, *Constitutions as “Living Trees”: Comparative Constitutional Law and Interpretive Metaphors*, 75 FORDHAM L. REV. 921, 922 (2006) (“The U.S. Supreme Court has a longstanding practice of (at least episodically) considering foreign legal experience in resolving American constitutional questions.”).

⁶¹ See, e.g., Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825 (1999) (“Through a process of interpretive

Constitution assigns the power to declare war to Congress, many modern Constitutions assign that power to the executive, while also often subjecting the executive's military action to legislative approval.⁶² Certainly this should at least be of interest to scholars of the U.S. Constitution. And, as a practical matter, judges and other officials are likely to take it into account once they are aware of it, even if they do not expressly rely on it in their decisionmaking.⁶³

Conclusion

The U.S. Constitution is more than 225 years old and is relatively short compared to many modern constitutions. Since the Constitution was adopted, there have been significant changes in the size of the U.S. military, the U.S. role in the world, the general scope of presidential authority, and the international law governing the use of force. Moreover, at least in the post-World War II era, U.S. courts have generally stayed out of disputes over the Constitution's distribution of war authority. This judicial reticence has meant that substantial war powers practice has developed without any clear indication from the courts whether it is lawful. Furthermore, Congress's one effort to enact a general regulatory statute concerning the distribution of war authority—the War Powers Resolution—implicates its own set of interpretive and constitutional uncertainties. As the United States continues to think about how best to regulate the use of military force, and about the proper role of the judiciary in policing such regulation, it can potentially learn from the experiences of other countries that have grappled with similar questions. At a minimum, such comparative reflection can allow for a deeper understanding of the United States' particular approach to war powers.

self-reflection, courts may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant the use of comparative law. Conversely, courts may conclude that comparative jurisprudence has emerged from a fundamentally different constitutional order; this realization may sharpen an awareness of constitutional difference or distinctiveness.”); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 114 (2005) (“[C]onstitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices” such that “[t]ransnational sources are seen as interlocutors, offering a way of testing understanding of one’s own traditions and possibilities by examining them in the reflection of others”); Tushnet, *supra* note 59, at 1236 (“The expressivist approach to comparative constitutional law takes as its premise that comparative inquiry may help us see our own practices in a new light and might lead courts using *non*-comparative methods to results they would not have reached had they not consulted the comparative material.”).

⁶² See Ginsburg, *supra* note 45, at 149-51. See also Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2494 (2006) (arguing that “comparative examples do not support the essentialist thesis that waging war is inherently an executive function”).

⁶³ Cf. Jackson, *supra* note 61, at 119 (“Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one’s own.”).