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Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?

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Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?

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I. INTRODUCTION

My first opportunity to read John Hart Ely's ideas on war powers came in 1988, when he published the antecedent of one chapter of *War and Responsibility* as an article in the *Columbia Law Review* titled *Suppose Congress Wanted a War Powers Act that Worked*.¹ The punctuation—without a question mark—makes an important point: The verb “suppose” invites us not to speculate about a counterfactual hypothetical, but rather to assume that Congress must want its own creation to work. Professor Ely's project was to show Congress how to fix it.

But it was already evident in 1988, and had been for some time, that Congress did *not* want a War Powers Act that really worked. Indeed, the dominant legislative proposal at that time, known as the Nunn-Byrd-Warner bill,² would have improved the fit between congressional prescription and executive behavior by relaxing the strictures of the War Powers Resolution.³ Current proposals would improve that fit more forthrightly, simply by repealing the Resolution.⁴ It was also evident then that Congress didn't—and apparently still doesn't—want to discharge the responsibilities concerning war and peace conferred upon Congress by the Constitution. Hence in *War and Responsibility*, as in

* Professor of Law, Columbia University. This essay forms part of a larger research project and is intended as a preview of work in progress. The author acknowledges the Columbia Law School's program of grants in support of faculty research for material assistance in this project.

1. John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988).

2. See S.J. Res. 323, 100th Cong., 2d Sess. (1988).

3. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1988 & Supp. 1991)).

4. See, e.g., S. 5, 104th Cong., 1st Sess., § 2(a) (“The War Powers Resolution . . . is repealed.”).

his earlier article, Professor Ely devotes considerable thought to the notion of forcing (or at least inducing) Congress to live up to its constitutional responsibilities.⁵

Many of us regret that Professor Ely's ideas have not been taken more seriously by the most important audience for which they were intended, namely the U.S. Congress. Congress, however, is not the only audience that needs to hear his message. The message of *War and Responsibility* should be the topic of conferences not only in Miami or Washington, but also in Buenos Aires, Lima, Quito, Tokyo, Bonn/Berlin, Rome, Ankara, Pretoria, and maybe even Minsk or Moscow.

Taking the message of *War and Responsibility* to foreign audiences would link Professor Ely's ideas to an equally ambitious project (of which our colleague Professor Louis Henkin is a leading exponent)—the spreading of the best of American constitutionalism to foreign lands. Indeed, just about the time that Professor Ely was publishing his article in the *Columbia Law Review*, an intellectual event celebrating the Bicentennial of the Constitution was also taking place at Columbia Law School. There, under Professor Henkin's direction, scholars from around the world were exploring the Constitution's influence abroad.⁶ That investigation did not extend to the Constitution's war powers clauses, but it is my project to take the inquiry in that direction. There is reason to explore the possibility that the American experiment of constitutional control over war power, even while remaining controversial in concept and implementation with respect to contemporary U.S. military involvements, has generated trends outside the United States toward subordinating executive warmaking to constitutional control. In places where this American constitutional idea did fall on fertile soil, significant advances have been made toward constraining the initiation of military conflict.

The argument I propose to make—and I would like to enlist Professor Ely in the effort both to make it and to strengthen the empirical basis for it—is that around the world, in constitutional democracies everywhere, we see a borrowing of what was an American innovation in 1787. That idea is the Madisonian one (elaborated upon as well by other eighteenth-century thinkers and leaders) of committing the most solemn national decision, the decision to go to war, not to one person or even one body of persons, but rather to the shared judgment of two branches, with the Legislative branch having the ultimate say.

5. See JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH*, 47-67 (1993).

6. See generally *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1990).

All constitutional democracies have had to grapple with the fundamental problem of determining when national military power should be committed to situations of actual or potential conflict. To date, however, legal scholarship on war powers—Professor Ely's and everyone else's—has addressed only single national systems. The present symposium is no exception, for the only mention of other countries' legal systems has come in Professor Bernard Oxman's comments addressed to the problem of fashioning a United Nations security system that can function efficiently (and in that context, parliamentary involvement was portrayed as a potential impediment to collective decisionmaking).⁷

What is lacking is a crossnational, crossdisciplinary analysis of war-and-peace decisionmaking as a challenge to democratic theory and constitutionalism. A comparative understanding of constitutionalism and war powers can show that for all their many differences, constitutional democracies do share certain basic commitments that distinguish them from other forms of government and notably affect their decision-making processes in the military sphere. As more and more polities undergo democratic transformation, the identification and consolidation of a common core of democratic accountability in the war-and-peace sphere will take on ever-increasing significance.

My central argument is that the body of experience of the mature democracies in their war-and-peace decisions reflects a common core of commitment to democratic accountability. The techniques of accountability surely do vary—some techniques are embodied in written constitutions and other formal instruments, while others are unwritten or informal; some entail greater and others lesser degrees of legislative supervision; some are before-the-fact and others after-the-fact; some do and some do not include control through constitutional courts or other judicial bodies. For all their differences, however, constitutional democracies share certain basic values as well as a common interest in transplanting those values to other polities where they are not yet entrenched.

My project seeks to understand what is common among the democracies and what is not, as well as what is transferable and what is not. Thus, while I proceed from the assumption (already validated by consid-

7. Professor Oxman is concerned that a second level of deliberations in national legislatures could delay and possibly derail or prevent collective action. Bernard H. Oxman, *The Relevance of the International Order to the Allocation of Internal Powers to Use Force*, 50 U. MIAMI L. REV. 129, 139-41 (1995). This concern deserves serious consideration, going beyond what is feasible in the scope of this comment. In some constitutional systems (including in the United States, although Professor Ely might not agree, cf. ELY, *supra* note 5, at 54-60), the difficulty could be addressed by conferring advance authorization through standing legislation. In other constitutional systems, however, such as the German and Japanese systems discussed at notes 33-52 *infra*, a fresh legislative decision is required to validate each specific commitment to participate in international peacekeeping.

erable literature) that expansion of communities committed to democratic governance correlates with expansion of domestic and international peace,⁸ I do not argue that the details of the American form of constitutionalism are necessarily the best model for polities in transition to adopt. A major objective of the research is to understand what aspects of the American experience are unique and what aspects are generalizable.

What can we in the United States learn from the experience of other constitutional democracies? With typically American missionary fervor, we have often sought to impose our own vision of constitutionalism on others; some "transplants" took, but others did not. Too often, however, Americans deny or fail to perceive the possibility that the legal systems of other countries could have any relevance for our own. The American experience is in many respects unique. However, through a better understanding of what is common to and what is different among constitutional democracies, we may not only be able to make wiser choices within our own constitutional system, but also be able to reach some generalizations about the transferability of our successes to other polities that are going through constitutional transformation.

II. WHY A COMPARATIVE CONSTITUTIONAL STUDY OF WAR POWER?

The intrinsic interest of a comparative study of constitutionalism and war perhaps needs no further defense or apology. However, in view of widespread skepticism about the effectiveness of law in regulating the use of force, I would like to make several claims about the value of a comparative legal study of this subject, not only for its own sake but also in the service of widely shared objectives.⁹ The international community does indeed have a major stake in the constitutional evolution of member states as regards the authority to decide to go to war. That stake, or rather those multiple interests, are to:

- (1) Strengthen trends toward constitutionalism generally, by which I mean the concept of governance based on law;
- (2) Strengthen trends toward civilian control over military forces;
- (3) Support the adoption of constitutional safeguards governing war powers, so as to reduce the possibility of international conflict;
- (4) Ensure that states are in a position to fulfill their responsibil-

8. The literature exploring the "democratic peace" (or "interdemocratic peace") hypothesis is by now voluminous. For a glimpse at some of the aspects of this literature of interest to lawyers, see *infra* text at notes 20-28.

9. I draw here on my comment titled *Constitutional Control of Military Actions: A Comparative Dimension*, 85 AM. J. INT'L L. 92 (1991).

ities under international treaties, including those concerning collective defense and collective security;

(5) Ensure that decisions concerning the use of force within an international system of collective security are made on a rational and responsible basis.¹⁰

I will not pause here to defend the assertion of a shared interest in strengthening constitutionalism in general, but rather will move to the specific applications of constitutionalism to war powers—a sphere of inquiry almost entirely ignored in comparative legal scholarship. This vacuum is unfortunate. Although the “market” for comparative analysis of domestic legal systems should and does include a demand for comparative understanding of the bodies of public law reflecting political organization, governance structures, and relationships between government and polity, the supply of research in these areas is quite limited. While excellent comparative legal studies exist in certain areas of public law (for example, judicial review of legislative or executive action, and protection of human rights), this literature leaves essentially unexplored the problem of war-and-peace decisionmaking.

The absence of any significant comparative examination of constitutional control of war power may well reflect conventional wisdom that laws on war are to be disregarded—or so one might infer if one’s horizons are limited to American experiences of the past few decades, and indeed so one might conclude from much of the discussion at this symposium.¹¹ If American constitutionalism has proved less than fully successful in the war powers field, then must one despair of the efficacy of

10. *Id.* at 93. These are not the only interests that might be advanced by a greater understanding of the legal framework for military decisionmaking. I focus here on instrumental applications. The primary objects of study in my project are the flourishing democracies, which are likely to be allied with the United States in efforts to restrain or rebuff conflicts initiated by others. An understanding of the decision-making processes of potential nondemocratic adversaries could also have instrumental value in conflict prevention (for example, it was essential during the Cold War to have as accurate an appreciation as possible of military decisionmaking within the Kremlin); but those processes fall outside the scope of the present study.

Contributors to the democracy-and-peace literature have speculated that the relative transparency of military decisionmaking in democratic societies could be one of the factors decreasing the possibility of initiation or escalation of conflicts against those societies, because misperception of their actual intentions is reduced. *See infra* text accompanying notes 23-28. If this speculation has merit, then dissemination of a deeper understanding of the workings of military decisionmaking within constitutional democracies could contribute to this conflict-avoidance potential. Indeed, a fuller appreciation of parliamentary participation in defining the interests worth fighting for could strengthen deterrence by enhancing the credibility of the military commitments of democratic states.

11. Professors Glennon and Lobel stress the deviations of the practice of recent administrations from constitutional and statutory requirements. *See* Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Jules Lobel, “Little Wars” and the Constitution, 50 U. MIAMI L. REV. 61 (1995).

constitutional constraint of war across the board? Not at all. A principal purpose of the research agenda I have in mind is to ask whether and how constitutional control of war power can work in any democratic society, with our own democratic society being just one example, and perhaps a less-than-optimal one.

My hypothesis is that constitutional control of war power is not only conceivable as an ideal, but is in fact operational and effective in many diverse countries. In a variety of different democracies, constitutionalism works to ensure that representative organs, and ultimately the people, participate in the processes for deciding on the polity's military commitments. Where constitutionalism works, we should both recognize that fact and learn from it. What makes it work? Can it be made to work in other countries, or in a wider range of circumstances? How can its workings be improved within polities with established traditions of constitutional control and in other polities that may draw on them as models?

Not the least of the possible values of such an inquiry is as a source of ideas for the constitutional reforms now underway in Eastern Europe, the Americas, and elsewhere. Attention to constitutional control over war power should be an important component of the strengthening of democracy in Argentina and Turkey, which under previous regimes resorted to war in an attempt to settle longrunning disputes (over the Falklands/Malvinas and Cyprus, respectively). A balanced appreciation of the limitations as well as the possibility of constitutional transplants should inform any discussion of whether, for example, the U.S.-led multinational coalition (composed largely of forces from democratic countries) should have pursued more activist policies of attempting to impose Western-style governance on Iraqi society after the Persian Gulf War of 1990-91.¹²

Above all, we must be attentive to the conditions that make constitutionalism, and constitutional transplants, take root and flourish in new contexts, as well as to the factors tending toward the opposite effect. If, for example, the renunciation-of-war clauses in the U.S.-imposed German and Japanese constitutions have worked and continue to structure decisionmaking and political debate over those countries' military undertakings even half a century later, then it is important to understand both why the roots of the exotic plant took hold and whether the circumstances of success were so unusual as to preclude the possibility of a

12. Such an argument is made in ROBERT W. TUCKER & DAVID C. HENDRICKSON, *THE IMPERIAL TEMPTATION* 142-151 (1992) (arguing that the coalition should have pursued a military occupation of Iraq, with a view toward reconstructing its political institutions as was done with Germany and Japan in the aftermath of World War II).

further grafting onto other constitutional cultures.¹³ Similar questions can be asked about other apparent success stories, such as the constitutionalization of neutrality in post-war Austria.

Covert action is another sphere in which comparative constitutional law can supply relevant insights. A decade ago, Stansfield Turner pointed out that virtually all Western democracies (with the notable isolated exception of the United Kingdom) had moved toward legislative supervision of intelligence activities.¹⁴ Former CIA directors, including Turner, are among the most effective advocates for parliamentary oversight of intelligence activities. The efficacy of legislative oversight obviously varies quite dramatically, both between different democracies and within one democracy over time, as our own Iran-Contra affair shows.¹⁵ Rudimentary oversight did not prevent France's Rainbow Warrior affair, for example. But these difficulties in implementing the concept of democratic control over secret services do not undercut the value of scholarly comparative analysis,¹⁶ or indeed of interparliamentary dialogue aimed at sharing experiences and learning from them.¹⁷ The important point is to identify and understand the common trend across democratic societies to subject covert paramilitary activities to parliamentary control.

The efforts of the post-Cold War period to redesign systems of collective defense and collective security in light of contemporary needs show further applications for the comparative law of war powers. The Persian Gulf War marks the start of the current phase of such efforts; the Bosnian conflict (which continues as of this writing) illustrates the perplexities faced by democratic states that try to use multilateral military force while their electorates remain deeply skeptical about being drawn

13. At the risk of overdoing my horticultural metaphors, I would also like to suggest that even where there is no question of *retransplanting* back to the United States a plant with more than a little U.S. parentage—for example, the German and Japanese models, which may be transplantable to third countries but surely not back to the United States—some benefits from cross-fertilization may still be available.

14. STANSFIELD TURNER, *SECURITY AND DEMOCRACY* 179 (1985) (citing West Germany, France, Italy, Australia, and Canada as countries that have all "taken steps to bring their intelligence organizations under closer control of their political authorities," and predicting that British intelligence would soon be similarly brought under oversight).

15. See generally HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

16. I began my reflections on comparative control over intelligence activities when I presented a paper on the U.S. experience in intelligence oversight to a conference in Bologna, Italy, where I heard the views of Italian experts on whether the U.S. experience could shed light on the much different problems facing Italian society. See Lori F. Damrosch, *Il controllo democratico sui servizi segreti*, in *Democrazia e segreto* (Raimondo Catanzaro ed., 1985).

17. Such efforts are underway under the auspices of, for example, the Lawmaking for Democracy project of the Lawyers Alliance for World Security. See U.S. State Dep't Dispatch, 1993 WL 2977106, Aug. 9, 1993.

into a foreign quagmire. Constitutional democracies likewise have had to wrestle with whether to participate in U.N.-authorized operations in Somalia, Rwanda, Haiti, and elsewhere. The problem of constitutional control over collective military action has been central to each of these conflicts and has figured prominently in attention being given in the 1990s to devising new systems (which could be prepared in advance rather than on an ad hoc basis for each new emergency) for collective response to future crises.

The drafters of the U.N. Charter were aware that domestic constitutional requirements would affect the extent to which states could commit national military forces to a collective security endeavor. In deference to both constitutional and political sensitivities, Article 43 of the Charter contemplates that national military units would be placed at the Security Council's disposal on the basis of agreements to be negotiated between states and the United Nations; such agreements would be subject to ratification by member states "in accordance with their respective constitutional processes."¹⁸ When the U.S. Senate gave advice and consent to ratification of the Charter, and when the U.S. Congress enacted the U.N. Participation Act to implement the Charter, it was clearly understood that the legislative organ with constitutional responsibility for deciding to go to war—the Congress—would approve any agreement under Article 43; after such approval, the Executive branch could execute the agreement.¹⁹ Although Article 43 fell victim to the Cold War and was never activated, a revival of interest following the end of the Cold War has led to several proposals for establishing the terms under which the United Nations could draw on military forces committed to it in advance by member states. For democratic states, a key issue in the consideration of any such proposals is the mechanism for ensuring a constitutionally sufficient decision to participate in such a system and in particular uses of military force thereunder.

A comparative study of constitutional aspects of participation in collective security arrangements shows that democratic states attach a high value to preserving constitutional control over military action within any multilateral framework, whether under the auspices of the United Nations, the North Atlantic Treaty Organization, or other body. Far from being a hindrance, fidelity to national constitutional require-

18. U.N. Charter, art. 43, ¶ 3.

19. See United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (1945) (codified as amended at 22 U.S.C. § 287d) (stating that agreement under art. 43 "shall be subject to the approval of the Congress by appropriate Act or joint resolution"), discussed in Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L. J. 597, 615 (1993) and Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 78 (1991).

ments is essential to the success of such arrangements. In particular, the participation of the Legislative branch, to the extent required by national constitutional law, should strengthen rather than undermine collective military action.

III. CONSTITUTIONALISM AND CONFLICT: DOMESTIC FOUNDATIONS OF INTERNATIONAL PEACE

The correlation between international peace and internal political organization was developed as a philosophical and constitutional proposition more than two centuries ago. Immanuel Kant commonly receives credit for the intellectual paternity of the philosophical linkage between the two concepts in his essay *To Perpetual Peace*, published in 1795.²⁰ James Madison and other American constitutionalists had already expounded the notion that republics under popular control would be less likely than kings to take their countries into war,²¹ and that view found juridical expression in the Constitution drafted at Philadelphia in 1787.²² The eighteenth-century argument stood in contradistinction to then-prevalent tyrannical-monarchical forms of political organization, which were seen as more likely to drag the people into unwarranted, unwanted hostilities.

Kant's insight has been the object of intensive research by twentieth-century political scientists, who in recent years have analyzed almost two centuries' worth of wars between and among countries of differing political structures, with the objective of understanding whether democratization promotes peace. The accumulated data and analysis provide a starting point for moving beyond the effort to understand observable phenomena toward a more explicit articulation of implications for constitutional decisionmaking.

The proposition is now firmly established that democracies virtually never go to war with *each other*; thus we now have empirical proof of Kant's philosophical speculation about peaceful relations within a league of democratic states—what some contemporary political scien-

20. Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 107-39 (Ted Humphrey trans., 1983).

21. Madison wrote, for example, that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl." Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 *THE WRITINGS OF JAMES MADISON* 312 (Gaillard Hunt ed., 1906); see also Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFF.* 205, 225 n.23 (citing Thomas Paine for the assertion that democracy and war are incompatible).

22. See U.S. CONST. art. I, § 8, cls. 11-16.

tists call the theory of the "interdemocratic peace."²³ Yet the hypothesis that democracies are inherently more pacific than nondemocracies has not been empirically validated. To the contrary, the conventional wisdom is that the evidence tends to show that in their relations with nondemocracies, democracies are just as violence-prone and perhaps even just as likely to initiate conflict as other regimes.²⁴ The evidence on conflicts between democracies and nondemocracies, and especially on democracies as initiators of conflicts against nondemocracies, requires further consideration in order to arrive at a fair assessment of the Madisonian claims of the war-restraining characteristics of the American model of constitutional democracy.

The political science literature on the democracy-peace linkage is not always attentive to questions of greatest interest to legal consumers of this research. Political scientists have adopted different definitions of "democracy" in their methodologies but have rarely attempted to ascertain whether, within the overall category of "democracies," there are subtypes that have been more successful than others in avoiding violent conflict. Although researchers have introduced some refinements of arguable relevance to legal concerns, the information bearing on a comparative assessment of differing forms of democratic control of warmaking is not easy to tease out. Interdisciplinary dialogue between lawyers and political scientists may help shed light on this question.

Michael W. Doyle (whose article set the tone for much of the research of the past decade) erects a dichotomy between "liberal" and "illiberal" regimes, with the former defined in terms of four basic attributes. One attribute is representative government, including "the requirement that the legislative branch have an effective role in public policy" and that "representative government is internally sovereign (. . . especially over military and foreign affairs)."²⁵ Doyle takes some account of the legislative role in formulating foreign policy. For example, he excludes pre-World War I Germany from his catalogue of liberal states, largely on the ground that the Kaiser's control of military policy was unchecked by a legislature that otherwise had substantial policy-making authority. Doyle, however, does not make a separate investigation of the

23. Cf. BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993) (exploring the peaceful relationships among democracies).

24. See, e.g., Doyle, *supra* note 21, at 225 ("Liberal states are as aggressive and war prone as any other form of government or society in their relations with nonliberal states."). But see James L. Ray, *R.J. Rummel's Understanding Conflict and War* 8-10 (Feb. 1995) (on file with the author) (discussing literature tending to show that democracies may indeed be less conflict-prone than other types of regimes); see also JAMES L. RAY, *DEMOCRACY AND INTERNATIONAL CONFLICT* (1995).

25. Doyle, *supra* note 21, at 212.

criterion of legislative constraint on the executive, apart from its use to assign states to either the "liberal" or "illiberal" category.

While Doyle analyzes the democratic variable as a dichotomy, other commentators use three or more categories. Still others rank states in terms of scores assigned to various democratic attributes (such as the percentage of the adults enjoying suffrage, or the extent of freedoms of speech or press).²⁶ Other researchers, while examining whether polities that undergo transformation from nondemocratic to democratic regime-types (or vice versa) are more or less likely to get involved in conflict during periods of democratization, have drawn attention to the destabilizing potential of turbulent transitions.²⁷ Like Doyle's work, much of this literature treats substantial constraints over the executive in the foreign policy field (whether emanating from the legislature or otherwise) as among the factors relevant to ascertaining and/or ranking a state's "democratic" credentials; the extent of judicial independence is also sometimes factored in.²⁸ Yet none of these inquiries gets very far in analyzing the extent to which structural features of different democratic types correlate with lesser levels of violence, especially with the initiation of violence. In particular, there is little explicit discussion of the constraining role of different modalities of controls on the war-initiating powers of the executive branch.

Looking at the problem through the lens of comparative constitutional law challenges us to test the hypothesis that the phenomenon of

26. Among investigators using graduated, composite, or compound measures are RUSSETT, *supra* note 23 (creating a composite index and classifying states as "democratic," "anocratic," or "autocratic" based on index scores); Ted R. Gurr et al., *The Transformation of the Western State*, 25 *STUDIES IN COMP. INT'L DEV.* 73 (Spring 1990) (measuring "democracy" and "autocracy" with values from 0 to 10); and R.J. Rummel, *Libertarianism and International Violence*, 27 *J. CONFLICT RESOL.* 27, 27 (1983) (testing propositions including "the more freedom that individuals have in a state, the less the state engages in foreign violence," using ordinal rankings of degrees of freedom).

27. See generally Edward D. Mansfield & Jack Snyder, *Democratization and the Danger of War*, 20 *INT'L SECURITY* 5 (1995).

28. One of Gurr's components, for example, is the institutionalized constraints that exist on the decision-making powers of chief executives, whether individuals or collectivities: the greater the constraints, the more democratic the polity. Gurr, *supra* note 26, at 83; see also Steve Chan, *Mirror, Mirror on the Wall . . . Are the Freer Countries More Pacific?*, 28 *J. CONFLICT RESOL.* 617, 630 (1984) (setting up a dichotomy under which a country is categorized as "more free" only if it has at least a partially effective legislature to check the executive); Mansfield & Snyder, *supra* note 27 (conducting separate analyses based on a composite index and on three component indices, one of which is a measure of institutionalized constraints on executive decisionmaking); Melvin Small & J. David Singer, *The War-Proneness of Democratic Regimes, 1816-1965*, 1 *JERUSALEM J. INT'L RELS.* 50, 54 (1976) (categorizing regimes using criteria such as "a legislative body that is . . . dominant over or at least equal to the executive"); cf. Zeev Maoz & Nasrin Abdolali, *Regime Types and International Conflict, 1816-1976*, 33 *J. CONFLICT RESOL.* 3, 17 (1989) (analyzing independent variables including "independence of executive" and "distribution of authority").

democracies initiating violence against nondemocracies might be explained partly in terms of imperfect subordination of executive war powers to constitutional controls. To the extent that executive warmaking is constitutionally constrained and made subject to prior legislative approval, democracies might become more pacific, not only in their relations with other democracies but with any type of regime. Although this hypothesis remains untested and unproved, important normative implications would flow from its being proved. Among those would be that it is not enough to favor democratization in the sense of periodic electoral validation of the government, or liberalization in the sense of respect for human rights and individual autonomy; rather, attention must also be given to whether particular political structures and systems of constitutional control might be more effective than others in checking the war-making potential of the executive branch.

The role of the American President as initiator of several conflicts during the 1980s suggests some of the issues to be explored in attempting to understand conflicts between democracies and nondemocracies. U.S. involvement in Central America in the mid-1980s, and U.S. interventions in Grenada in 1983 and Panama in 1989, are examples of imperfect constitutional control on the part of a democratic state that initiated conflict with nondemocratic states. As for the Central American controversy, the Reagan Administration (or at least some of its key figures) found ways to circumvent explicit congressional prohibitions on U.S. attempts to overthrow the Nicaraguan government or to provoke a military exchange with Nicaragua,²⁹ and in this way (among others) undermined the proper functioning of our constitutional system of government.³⁰ The Reagan and Bush Administrations acted without congressional authorization in undertaking the invasions of Grenada and Panama, even though the nature of the operations and the likelihood of combat implicated the constitutional prerogatives of Congress. The courts declined to articulate the boundaries of lawful executive action and left the President essentially free to implement an expansive view of his own constitutional powers.³¹

Whether the U.S. constitutional system ultimately worked in each instance to implement a commitment to constitutional control of war powers is a matter for fair debate. My purpose in this brief comment is to identify the issues rather than resolve them and to suggest the impor-

29. For discussion of these and other congressionally imposed restrictions on the use of appropriated funds, see Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 857-69 (1994).

30. See KOH, *supra* note 15.

31. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

tance of exploring different modalities of constitutional governance as they succeeded (or failed) to halt initiation of violence between democratic and nondemocratic states. This inquiry is especially pertinent regarding mature democracies, which have devised varying methods for controlling executive actions in the domestic and foreign spheres. Once these variations in constitutional control are identified and explained, with attention to successes as well as failures, we will have a better understanding of the relationship between democracy and peace. We may also be able to confine the proposition that "democracies are not inherently more pacific than nondemocracies" to a subset of democratic countries with identifiable anomalies or pathologies in their constitutional control structures.

IV. THE GULF WAR COALITION AND THE CASES OF GERMANY AND JAPAN

Americans are well aware that in January 1991, Congress conducted a historic debate that resulted in legislation authorizing the President to use military force against Iraq, in accordance with resolutions of the U.N. Security Council.³² Less well known in this country are the corresponding deliberations that occurred in democratic parliaments in London, Paris, Ottawa, Rome, Madrid, Canberra, and elsewhere that also produced support for multinational military action. The constitutional significance of these decisions varies considerably from country to country, with some of the parliamentary actions largely reflecting political endorsement of decisions already put into operation by the executive, and others signaling a greater potential for legislative control over military decisionmaking.

The parliamentary deliberations in Bonn and Tokyo were not at all of the rubberstamp sort. Although Chancellor Kohl and Prime Minister Kaifu had staked considerable political capital on policies entailing a not insignificant degree of tangible support for the multinational coalition, they were reined in by parliaments with rather different interpretations of constitutional limits on military participation.³³ These events led to developments of import for the present project: In Japan in 1992, the legislature passed a peace-keeping operations law that both enabled and

32. Authorization for Use of Military Force Against Iraq, Pub. L. 102-1, 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541) (1991).

33. In Japan, the government withdrew a bill that would have enabled Self-Defense Forces to support the coalition forces in the Persian Gulf. The bill was withdrawn without a vote in the face of heated opposition, which was partly grounded in constitutional objections. See Akiho Shibata, *Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations*, 19 YALE J. INT'L L. 307, 314-15 (1994).

constrained Japanese involvement in U.N. peacekeeping in Cambodia;³⁴ and in Germany, the Federal Constitutional Court in a landmark decision delineated the conditions under which participation in U.N.-authorized interventions could proceed.³⁵

In Japan, the fundamental war powers principle is expressed in Article 9 of the 1946 constitution, which provides as follows under the heading "Renunciation of War":

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.³⁶

American occupation authorities wrote the Japanese constitution to further the plan sketched by Allied leaders at Potsdam for a thorough demilitarization and pacification of Japan.³⁷ A literal reading of the constitution, which was drafted in English and then translated into Japanese, seems to preclude maintenance of any military capability whatsoever. But at several points in Japanese postwar history, decisions have been taken and understandings reached that have allowed Japan to remain a substantial military power, albeit in a passive posture; recently, however, active involvement in collective military efforts has become possible. The pivotal points have included: (1) the creation of the Self-Defense Forces in the early 1950s, (2) the ratification and subsequent renewal of the Mutual Security Treaty with the United States, and (3) the reassessment of Japanese war powers precipitated by U.N.-related developments of the 1990s, including the Persian Gulf War (in which Japanese involvement was minimal),³⁸ and the U.N. transitional authority in Cambodia (in which Japanese peacekeepers had a tangible presence).³⁹

34. *See id.* at 308 (discussing the Law Concerning Cooperation in U.N. Peacekeeping Operations and Other Operations, 1992) [hereinafter *Peacekeeping Operations Law*].

35. Judgment of July 12, 1994, 90 BVerfGE 286 (Ger.).

36. KENPO [Constitution] art. IX (Japan), in 8 *Constitutions of the Countries of the World* 16 (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

37. For a cogent rendering of the drafting history, with valuable references, see Andrzej Rapaczynski, *Bibliographical Essay*, in *CONSTITUTIONALISM AND RIGHTS* 405, *supra* note 6, at 429-33.

38. Two months after the end of the war, Japan dispatched a minesweeper to the Gulf. This was the first extra-regional deployment of the Japanese military since World War II. *See* Steven R. Weisman, *Breaking Tradition, Japan Sends Flotilla to Gulf*, N.Y. TIMES, Apr. 25, 1991, at A11; Shibata, *supra* note 33, at 316-18.

39. Japanese contributions included a ground unit of 600 troops and several hundred troops in other capacities, including naval and air transport and civilian monitoring. Shibata, *supra* note 33, at 308 n.6.

With respect to judicial interpretation of ambiguous constitutional provisions concerning war powers, the Japanese experience has been more like the American experience than like the German experience, which will be discussed below. Except for two lower court decisions that were later reversed,⁴⁰ Japanese courts have avoided ruling on constitutional challenges to sensitive security policies. 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.⁴¹ By deferring to the political organs of government and expressing a reluctance to interfere with the decisions of those organs in the security sphere, Japanese courts have given the political branches broad discretion in carrying out military functions.⁴²

This is not to say that constitutional control mechanisms are absent in Japan, but rather that they have taken a largely nonjudicial form. With respect to Article 9, as with other constitutional questions, the Japanese judiciary is not in any essential sense the "last resort," but merely one forum among several in which to make constitutional arguments. The role of Japanese courts may be merely incidental with respect to important political questions. The real constitutional debate occurs in the legislature, in newspapers, and in gathering places.

Seen in this light, the Japanese Legislature, or Diet, is the forum in which Article 9 has acquired most of its contemporary meaning. The

40. See JOHN M. MAKI, *COURT AND CONSTITUTION IN JAPAN* 298-361 (1964) (discussing the *Sunakawa* case, of 1959, in which a Tokyo trial judge ruled that the presence of U.S. forces in Japan was unconstitutional); James E. Auer, *Article Nine of Japan's Constitution*, 53 *LAW & CONTEMP. PROBS.* 171, 182 (1990) (discussing the *Naganuma* case, of 1973, in which a trial judge ruled that the Self-Defense Forces were unconstitutional).

41. See MAKI, *supra* note 40, at 348. Summarizing the Japanese Supreme Court majority's decision in the *Sunakawa* case, one judge wrote:

the Security Treaty possesses a highly political nature of great importance to the very existence of our country; that a decision as to the unconstitutionality of such treaty, as a matter of principle, does not involve a decision of the judicial courts; and that, accordingly, the constitutional review of such a treaty, unless it is recognized as being "clearly and obviously unconstitutional or invalid," lies outside the scope of constitutional review.

Id. See also the alternative translation in Series of Prominent Judgments of the Supreme Court Upon Questions of Constitutionality, No. 4, at 3, 6 (available in Columbia Law School Library) for the following passage:

unless the said treaty is obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the court. It is proper to construe that the question of the determination of its constitutionality should be left primarily to the Cabinet which has the power to conclude treaties and the Diet which has the power to ratify them; and ultimately to the political consideration of the people with whom rest the sovereign power of the nation.

42. See Auer, *supra* note 40, at 182 (discussing the subsequent history of the *Naganuma* case).

Diet, in the 1950s, decided that the creation of the Self-Defense Forces could be reconciled with a view of the constitution which was within the realm of plausibility.⁴³ Since then the Diet has engaged in a continual reassessment of what contemporary constitutional consciousness requires. In the 1990s, the Diet has acted as a substantial check on executive power, as the history of the government's proposals for action during the Gulf War shows. The enactment in 1992 of a statutory framework to govern cooperation with U.N. peace-keeping operations reflects another legislative act of constitutional interpretation.⁴⁴ In my work-in-progress, I am examining the very real constraints rooted in Article 9, as interpreted by the Japanese Diet, as an important instance of legislative control over executive war powers.

The German example illustrates the role of a judicial organ exercising constitutional control and the democratic theory of legislative control of war powers. For purposes of comparative constitutional analysis, a recent decision of the German Federal Constitutional Court is highly instructive. That decision interprets the relevant provisions of the German constitution as applied to German participation in military actions under the auspices of the United Nations.⁴⁵ The German form of judicial constitutional supervision is quite different from the American model in many respects. It shows, *inter alia*, that judicial organs can play a constructive role in giving contemporary meaning to constitutional war powers provisions. As Thomas Franck cogently documented in his book criticizing the U.S. political question doctrine,⁴⁶ German courts, and the German Federal Constitutional Court in particular, do not shrink from addressing war-and-peace decisions, but rather confront them on the merits. The results are laudable: The polity as a whole benefits from understanding the legitimacy of the actions of the political branches (or, where relevant, the constitutional limits applicable to such actions), and the political branches themselves draw strength from that process of legitimation.

The reasoning of the German decision on U.N. peacekeeping is perhaps even more pertinent to this essay than the fact that a decision was rendered on the merits. The German constitution embodies a renunciation of the power to initiate war but preserves the power to engage in self-defense of German territory and the territory of its allies, and to

43. In the words of the Supreme Court in *Sunakawa*, this interpretation was at least not "clearly and obviously unconstitutional." See MAKI, *supra* note 40, at —.

44. It is notable that the Peacekeeping Operations Law itself requires that the Diet approve in advance and periodically review the participation of Japanese troops in U.N. or other peace-keeping operations. See Shibata, *supra* note 33, at 324-25.

45. See Judgment of July 12, 1994, 90 BVerfGE 286 (Ger.).

46. THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 107-25 (1992).

enter into collective security arrangements.⁴⁷ Previous judicial decisions in Germany had dealt with German participation in collective security efforts under NATO, such as through military bases and the emplacement of certain controversial weapons on German territory.⁴⁸ But as of the time of the Persian Gulf War, the question of the constitutionality of participation in U.N.-authorized military actions had not been authoritatively resolved.

The 1994 judicial decision arose from divisions within Germany over the constitutional permissibility of German participation in the multinational peace-keeping (or peace enforcement) actions in the former Yugoslavia and Somalia. The substance of the decision allows Germany to play a significant role in certain collective efforts, subject to advance authorization by the parliament, or Bundestag. The Federal Constitutional Court wrote, "The Constitution obliges the Federal Government to seek enabling agreement by the German Bundestag, as a rule in advance, before committing the armed forces to action."⁴⁹ The court thus gave particular application in the military sphere to the "democracy principle" of German constitutional law. The court in previous decisions stated that that principle required parliamentary endorsement of certain international commitments.⁵⁰ The democracy principle is an "unassailable" core element of German constitutionalism: It cannot be altered even by constitutional amendment.⁵¹ Significantly, the court stressed that only a legitimizing decision by the Bundestag could satisfy the democracy principle with respect to military engagements.

The court's insistence on legislative endorsement of the constitutional validity of German participation in U.N.-authorized military actions warrants close comparison to the corresponding question in constitutional discourse elsewhere.⁵² This is one of many pieces of evi-

47. GRUNDGESETZ [Constitution] arts. 26, 87a, 87b.

48. These have included decisions on the Pershing II and cruise missile controversies. For discussion, see FRANCK, *supra* note 46, at 117-18.

49. Judgment of July 12, 1994, 90 BVerfGE 286 (Ger.), *quoted in* Craig R. Whitney, *Court Permits German Troops a Foreign Role*, N.Y. TIMES, July 13, 1994, at A1, A13.

50. For the Federal Constitutional Court's explanation of the democracy principle as applied to German participation in the Maastricht Treaty, see Judgment of Oct. 12, 1993 (Brunner v. European Union Treaty), *translated in* 69 COMMON MKT. L. REP. 57, 84-88 (1994).

51. Under Article 79(3) of the German Constitution, certain basic principles of constitutionalism, including democracy, rule of law, and separation of powers, are "unassailable;" they cannot be changed even by constitutional amendment. The principle of democracy as an unassailable principle was discussed in Judgment of Oct. 12, 1993, *supra* note 50, at 84-88. For an explanation of the theory of an "unalterable core" of constitutional principles, see Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 18-20 (1995).

52. Franck, who strongly endorses the concept of judicial control of executive decisions in the military sphere, would exclude the U.S. Congress from the constitutional control function in a U.N.-authorized military conflict. *Compare* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War*, 85 AM. J. INT'L L. 63 (1991) *with* Glennon, *supra* note 19, at 88 (differing views

dence showing a worldwide trend toward subordinating executive war power to advance legislative authorization.

V. CONCLUSION

A comparative study will, I hope, generate new insight for the ongoing controversy in the United States about the roles of the President and the Congress in war-and-peace decisionmaking. Constitutional discourse about war powers has come to seem increasingly sterile, with little possibility of breaking the stalemate between advocates of meaningful congressional participation and defenders of presidential authority. On the side of a renewal of congressional power are a finite number of eloquent but well-worn quotes from the framers; on the executive's side are growing numbers of instances (now more than 200) in which presidents are said to have acted in their own way, rather than in the framers' or Congress's way. Compounding the stalemate is the irresolvability of fundamental problems of constitutional theory, such as the significance to be attributed to the intentions and understandings of the founding generation, as against a body of contemporary practice apparently at odds with originalist conceptions. Judicial resolution is unlikely, at least for as long as U.S. courts continue their course of eschewing decision on the merits when presidential war powers are challenged.

The framers' choices made for the Constitution of 1787 reflect their convictions that no one person, or body of persons, should have sole responsibility for deciding to go to war; that the person who would be crowned with the laurel of victory has the greatest temptation toward war and therefore should be denied the decision-making prerogative; that those who hold the purse strings should determine at the outset whether to incur the costs of conflict; and that the war power should rest with the most representative organ. Those choices may indeed embody the height of wisdom for the framers' time; but if the framers' insights are to command respect in a world dramatically changed, they must be validated anew for our own generation and for the generations to follow.

A comparative examination of war powers across a variety of democratic societies can contribute a new dimension to the U.S. constitutional debate. If worldwide trends are toward greater constitutional control over executive war powers, as manifested through legislative supervision and some measure of judicial review for validity, then the

on whether congressional involvement is called for). At the time of the Gulf War, however, many U.S. constitutional lawyers believed that the President was constitutionally barred from initiating major combat without congressional authorization. *See, e.g.*, Memorandum Amicus Curiae, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990), reprinted in 27 *STAN. J. INT'L L.* 257 (1991).

U.S. experience must be reinterpreted. Undoubtedly, the framers' insights of 1787 helped set those trends in motion and provided a model that many other democracies have emulated. It is ironic that post-World War II American presidents have advanced sweeping claims for their own military prerogatives, even while working to instill notions of constitutional control over executive power in other polities. A global comparative study can put the American experience in perspective and help us understand what aspects of that experience are (and arguably should remain) unique.

I invite Professor Ely to join me on the quest to understand and strengthen these crossnational trends. Perhaps our next symposium can be held in Moscow, where the image of a strong executive ordering a military assault on the stronghold of the legislature (there known as the White House) gives new meaning to Edward Corwin's famous image of an "invitation to struggle" for the privilege of control over foreign policy.⁵³ Several years ago I was in Moscow at a time of optimism that the then-ascendant elites of the Gorbachev period had come to understand that the worst misadventures of Soviet rule (including the invasions of Czechoslovakia and Afghanistan) had come about precisely because of the centralization of war-making power in too few hands.⁵⁴ The recent events in Chechnya indicate that, in present-day Russia, structural guarantees against excessive concentration of war powers in one person's hands are nonexistent or at least nonfunctioning. The same events also illustrate the broader relevance of one of the propositions Harold Koh has offered at this symposium,⁵⁵ which I reformulate as follows: Presidents who are weak in their domestic political posture, but who believe themselves to possess very potent and essentially unchecked war powers, are the most dangerous of all.

53. EDWARD S. CORWIN, *THE PRESIDENT* 171 (4th rev. ed 1957) (the Constitution is "an invitation to struggle for the privilege of directing American foreign policy").

54. For references to condemnation by legislative authority of some of the Soviet abuses, see Damrosch, *supra* note 9, at 94-97.

55. See Harold H. Koh, *War and Responsibility in the Dole/Gingrich Congress*, 50 U. MIAMI L. REV. 1, 11-12 (1995).