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Constitutions, Military Force, and Implications for German American Relations

*Kenneth B. Moss**

The constitutional procedures and practices that governments have in place to declare war or to authorize the use of military force in an intervention significantly influence their ability to use armed force and to justify such action. For example, American Presidents often deploy military forces into hostile situations and subsequently seek votes in the U.S. Senate and House of Representatives to authorize this action. Such concentration of power in a President's hands allows for a degree of flexibility in using armed force that is not shared by the governments of some U.S. allies. In the latter, both a clearer political consensus and a prior parliamentary vote to authorize military intervention may be necessary before military forces are used. Such constitutional differences can amplify the issues that actually cause political disagreement tension between the U.S. and a friendly government. Indeed, the leeway American Presidents believe they have to use armed force may contribute to future disagreements over the appropriate and justifiable use of the military arm.

A good illustration is the dispute between the United States and Germany over armed intervention in Iraq. It is critical to remember that the disagreements that developed between Germany and the United States revolved around differing views of international law and institutions, the evidence cited by the U.S. to justify intervention, the appropriate international roles of the U.S. and Europe, and the emphasis placed on both preventive and pre-emptive measures in U.S. strategy. Nevertheless, the President's ability to deploy troops and commence other military preparations without approval of the Congress resulted from a concentration of war powers in his office that clearly made armed intervention in Iraq a real possibility from the beginning. The German Chancellor had no such power. Hypothetically, even if he had agreed with U.S. policy, he would have had to advocate his recommendations before the German parliament to obtain an authorization to deploy troops and other units. Given such widespread doubts about intervention in Iraq, that would have been virtually impossible, and it would have produced a political and constitutional crisis. Evidence of that likelihood could be found in the debate in March

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2003 concerning German participation in AWACS flights over Turkey and whether or not that would imply German involvement in the Iraq operation. The plain fact was that the German constitution and laws made it far more difficult to use force independent of parliamentary authorization in ways that Presidents largely take for granted. While these constitutional differences were not a cause of disagreement between the U.S. and Germany, they clearly set boundaries on how and when either government would resort to armed force.

In late 2005 a gap continues to grow between the United States and many allies in the constitutional and political processes by which a government decides to use military force.

The United States has seen the power to use armed force increasingly concentrated in the office of the president at Congress's expense. In Germany, the *Bundeswehr* is accountable to the *Bundestag*. As NATO and the EU work with future or new members, both seek reforms that establish and assure clear accountability, particularly in relation to national parliaments. While examples of authority exercised by the head of state or government remain—most notably France and, even in the United Kingdom, where the decision to use force is one made by appropriate members of the Cabinet with subsequent defense of the policy in Parliament, the overall trend indicates continuation of a more quickly reactive and concentrated system in the U.S. and more deliberative, consensus dependent processes in much of Europe.

Contrasting the Two Systems

Whether the President or Congress control the use of military force is a question the U.S. Constitution does not answer clearly. The Congress receives an array of powers in Article I that, some argue, place this control in its hands—the power to "declare war," "raise and support" an army and navy, call forth the state militias (the National Guard of today) to repel an invasion, and to define and punish "offences against the Law of Nations." All in all these are a very extensive array of powers that would seemingly make the military a Congressional possession. Yet, Article II makes the President... "the Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States, when called into the actual Service of the United States." Thus, who has final control over the decision to intervene or to use military force?

Although some argue otherwise, it is hard to believe the authors of the Constitution intended the President to seek a declaration of war with every use of military force not involving a direct attack on the United States or protection of its nationals. Even the late 18th Century had its form of "limited wars," where a formal declaration, which is a form of announcement under international law, seemed unnecessary and potentially complicating for both the United States and other nations. However, there is good reason to argue that in these circumstances the Constitution does expect the President to seek an authorization to use force from the Congress. Some early Presidents used military power with the claim there were circumstances that required initial action with a subsequent authorization. Nevertheless, such Presidential actions did not depend on a claim of "executive prerogative" that drew authority from the "commander-in-chief" provision of the U.S. Constitution.

It is the claim of "executive prerogative," combined with the permanent presence of a large military since the Second World War, which has so strengthened the President's hand to the point of being irreversible. After nearly three generations, this has become the customary environment for a majority of citizens and their Congress. It is true that when President Harry Truman acted under the authority of the commander-in-chief clause in late June 1950 to order U.S. forces to Korea he was sub-

sequently challenged, but Truman later received even greater criticism from his claim that he was also ordering their deployment under the authority of the UN Charter. President George H. W. Bush claimed he did not even need an authorization by Congress to use force, much less a declaration of war, in the first Gulf War, and in 1999 President William J. Clinton deployed U.S. forces into Operation Allied Force with a remarkably sweeping claim of "executive prerogative." In response to the attacks of September 11, 2001, it is debatable whether President George W. Bush needed an authorization from the Congress to intervene in Afghanistan, but against Iraq he assuredly did, even though he echoed his father's view that there was no constitutional requirement. However, deployment of troops into the region before the actual votes in the Senate and the House demonstrated that the President wanted the authorization much more for political support than for constitutional concerns related to intervention.

The Congress is further hindered by its own self-inflicted shortcomings, the attitudes of the Federal courts, and, arguably, its inability and unwillingness to rely on international law and multilateral institutions as sources of counterweight against the President. In 1973 the Congress passed legislation to prevent another Vietnam and Presidential disregard for its constitutional powers. However, this War Powers Resolution left the President the full prerogative of deciding when and where to deploy forces, provided no definitions of key terms, and permitted the President to determine which provision of the law to report to Congress about the deployment. Presidents viewed the law as unconstitutional. Thus, Congress had extremely difficult choices to stop a specific operation—either passage in both the House and Senate of legislation to halt the action, which the President could veto, or stop the actual funding. One can argue that the War Powers Resolution has often made President's pause and purposely seek the Congress's support for political reasons. After all, if a President has this support, both domestic and international opinion sees a more united U.S. position. Also, some operations have been within the sixty-day time frame allowed by the law, but that may reflect as much operational characteristics of the mission as any Presidential desire to recognize the War Powers Resolution. The interventions surveyed in the previous paragraph indicate how willing Presidents have been to act under their claimed authority before turning to Congress. Larger scale missions seem to invite greater independent Presidential action. These larger operations show that as a constitutional solution the War Powers Resolution has failed.

Nor have other efforts to find a legal solution succeeded. When faced with appeals raised by citizens or some members of Congress, the federal courts have essentially stated they will not do what the Congress seems unwilling to do—amend or create a new law that would adjust the imbalance. Also international law, unlike its role in the German *Grundgesetz*, does not provide an anchor or framework that reinforces the U.S. Constitution. In internal settings, the Congress's position is that legislation can override international law. Within the international arena, the Congress may legislate requirements to have U.S. policy conform to international law, but the Congress will not recognize any Presidential use of military force that depends on international law rather than Congressional authorization. The protection of Congressional power and U.S. sovereignty remain paramount in the U.S. Congress.

The situation in Germany has some interesting parallels but poses many more significant contrasts with what has happened in the history of the U.S. Constitution and the issue of military force. The *Grundgesetz* is the product of an entirely different climate and historical circumstances than a constitution written in 1787—a constitution written in the wake

of a world war's aftermath, the division of Germany, but, also most notably, during a time when the importance of international law and the need to craft a global political order had never appeared so urgent. Thus, Article 25 defined international law as both a source and part of federal law. If the Americans wrote a constitution that tried to insulate and protect themselves from a largely hostile world, the German *Grundgesetz*, as indicated in Article 24, defined the Federal Republic as part of a larger system of collective security to which national sovereignty would be subordinated. Both constitutions reflected strong suspicions of a standing military, but the Americans were not haunted by the issue of aggression emerging from their soil, in fact, the U.S. Constitution contained a framework for expansion which might occur through peaceful expansion or force. For Germany, an action that could be seen as aggression was out of question for reasons of law and conscience, however, the various sections of Article 115 assured accountability to both the *Bundestag* and *Bundesrat* and the Federal President in cases of national defense.

Constitutions and their subsequent evolution naturally reflect changing perceptions of the international environment and a nation's sense of its appropriate role. Thus, the end of the Cold War, the emergence of instability in southeastern Europe, and the discussions of expanded missions for NATO, the EU, and the UN, invited re-examination of the question of military force, intervention and appropriate accountability in Germany. In 1994 the *Verfassungsgericht* ruled that control of the *Bundeswehr* could not be solely in the hands of the head of government but must be a "*Parlamentsheer*," an armed force accountable to the national parliament.

The German Constitutional Court's ruling sought to guarantee that circumstances and justifications for interventions by the *Bundeswehr* would remain consistent with the *Grundgesetz* and not contribute to a pattern that concentrated power in the Chancellery. However, it was the *Bundestag's* responsibility to write the law, which occurred nearly eleven years later in March 2005 and after nearly fifty deployments and additional controversies, including German involvement in Operation Allied Force in 1999 without UN authorization, participation in the deployment of NATO AWACs aircraft after the terrorist attacks of 2001, and the development of a mandate for EU peacekeeping in Macedonia with German participation.

The German model of clear parliamentary control and votes to authorize the use of force are noticeably different from actual practices in American decisions to use force, even though many experts in the U.S. would argue they resemble what the writers in Philadelphia had intended. To those in the U.S. who favor strong Presidential control over the use of the military, the *Parlamentsbeteiligungsgesetz* will seem overly cautious and reason for arguing that Germany is unreliable. Yet, the law tries to find a balance between not compromising Germany's reliability as an ally or responsible member of the international community while guaranteeing adherence to the *Grundgesetz* and assuring, especially when there is a coalition government, that a decision for intervention by armed force has as much public support as possible. Aside from "coalitions of the willing" without UN support, there is little reason to think Germany will not be present in various missions. Its law may not enable it to be first in line, but the same law does not force it to be last either.

Implications

Any major law inevitably faces developments and unexpected surprises that may invite lawmakers to review it later. The *Parlamentsbeteiligungsgesetz* has a number of question marks. Perhaps foremost is the provision concerning a simplified procedure for *Bundestag* concurrence with certain limited or low-scale operations not requiring a prior vote. The law permits a party *Fraktion* or five per cent of the

Bundestag within seven days to demand action by the whole parliament. Normally, a coalition would be assured of victory, but a delay could be costly in domestic politics and to the effectiveness of the intervention. A second significant area concerns the various definitions in the law. To arguably avoid voting on literally every form of deployment, the law presents examples where votes should not be necessary, such as instances where it is expected soldiers would not have to carry weapons. Other examples of low intensity operations are provided as well as a provision permitting situations where the government had to deploy and then seek subsequent authorization. With all of these provisions German lawmakers created stricter guidelines than their American counterparts in the 1973 War Powers Resolution, but like their colleagues in Washington they did not want to tie the Chancellor's hands too much. Yet, at some point a very limited operation may go awry and present the government with a degree of violence and casualties that become both a crisis on ground as well as to a Chancellor and the *Bundestag*. It is this form of scenario that can fuel a major security debate at home while raising public misgiving about the effectiveness of both the head of government and the parliamentary processes that are supposed to be in place to reduce the likelihood of such events. Whenever this happens, it will be another defining moment for the future direction of German security policy.

It is fair to say that neither the number of overseas deployments by the *Bundeswehr* nor the constitutional factors that govern its use are widely appreciated in the United States. Revisiting the arguments that separated the United States and Germany during recent years will not help to heal relations; yet, key audiences in the United States need to understand that one repercussion of the Iraq crisis was that it too moved Germany towards passage of the current law. The German desire to ground foreign deployments of military force in international law and parliamentary control will not set well with practitioners and scholars who advocate strong presidential action or a more independent stance by the U.S. in international affairs. Yet, regardless of different paths in constitutional developments, Germans should not overlook the value of raising issues with the U.S. in a constitutional context and doing so in as many settings as possible. For example, the U.S. Constitution may not be well understood by many Americans and it is often misinterpreted for specific purposes, but when someone hears that an action or law is "unconstitutional" it frequently invites a sobering pause or a retort that the Constitution should be amended. Americans perhaps need to hear at times that others regard their own national constitutions with as much reverence or value. Better understanding of the constitutional frameworks of others will not produce agreement on policy, but it can serve as a restraint, a thoughtful call for respect, and a reminder that governments sometimes are limited by laws and values expressed in those laws that their citizens cherish. Such discussion is one way of trying to limit damage that can be caused by political factors and emotion.

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