# EDITORIAL COMMENT

## THE EXECUTIVE'S MISPLACED RELIANCE ON WAR POWERS "CUSTOM"

*By Michael J. Glennon**

Historical practice, or custom, has long been seen as a source of authority in the resolution of separation-of-powers disputes.[1] In two recent cases assessing the limits to the president's power regarding the recognition of foreign nations[2] and the making of recess appointments,[3] the Supreme Court heavily emphasized past practice. Historical practice, the Court said, reflects "the compromises and working arrangements that the elected branches of Government themselves have reached."[4] In the realm of war powers, the executive branch has long relied on custom to justify military initiatives that were carried out without congressional approval.[5] In essence, the executive has argued that because force has been used in the past without congressional approval, the same is permissible in various other situations (for example, in the Dominican Republic, Grenada, Haiti, Kosovo, and Panama).[6]

The Obama administration has insisted that significant use of force without congressional approval is constitutionally permissible because of "the 'historical gloss' placed on the Constitution by two centuries of practice."[7] The administration made this claim explicitly to justify

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[1] *See generally* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984). Because custom counts more in some situations than in others, "any examination of historical practice must reckon with the hierarchy of legal sources in . . . different methodologies," some of which accord less weight to custom than do others. Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 81–82 (2013). I suggest a hierarchy of sources, integrating custom with the constitutional text, case law, Framers' intent, and functional considerations in MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).

[2] Zivotofsky v. Kerry, No. 13-628 (U.S. June 8, 2015).

[3] NLRB v. Noel Canning, No. 12-1281 (U.S. June 26, 2014).

[4] *Id.*, slip op. at 2.

[5] *See*, *e.g.*, Leonard Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966) ("Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798–1800).") As Meeker pointed out, however, Congress did approve use of force in Vietnam by enacting the Gulf of Tonkin Resolution.

[6] *See*, *e.g.*, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 187 (1980).

[7] Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to Eric Holder, Attorney General, Authority to Use Military Force in Libya 7 (Apr. 1, 2011), *at* http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf.



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the use of force against Libya.[8] "Our history," it asserted, "is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval."[9] The administration later claimed authority to use force against Syria[10] without congressional approval, and also against ISIS.[11] The administration has not provided—and Congress has not demanded—a formal legal opinion explaining its assertion of authority with respect to either of these latter two situations, but it is reasonable to infer that its rationale in both would again rest in part[12] on the probative value of historical practice.

This actual historical record suggests that reliance on past practice in the war powers realm is misplaced. Much of the difficulty can be capsulized in one word—incommensurability. Custom is properly established inductively by lining up historical precedents that are alike, disregarding precedents that are not alike, and then inferring a pattern of practice. The probity of the product—in constitutional law, as in other legal regimes in which custom serves as a source of authority—thus lies in ensuring that constitutive historical precedents are actually on point. Genuine precedents must be apposite, comparable in all important respects to the facts at hand. The problem in the realm of war powers is that three highly pertinent contextual factors undermine the commensurability of putative historical precedents: risk, emergency, and the congressional posture. The exclusion of data concerning these three elements renders customary methodology in the war powers realm excessively malleable, systematically favoring executive power over congressional power.[13] Assessments of historical war powers practice must therefore be viewed with skepticism.

Custom, moreover, does not stand alone as a source of authority in resolving separation-of-powers disputes. The Court has recently given increased weight to functional considerations—that is, to a political branch's institutional characteristics that counsel for or against a role in certain types of decisions. Privileging war-powers historical practice, however, undervalues Congress's functional attributes in war-powers decision making and overvalues those of the executive. An elaboration follows.

## I. RISK

The most important consideration in using force—and the one most often concealed if not disregarded in the list-making of incidents—concerns risk, or the level of danger created by the use of force in a given military operation. The Congressional Research Service acknowledges

[8] *Id.*

[9] *Id.*

[10] Remarks on the Situation in Syria, 2013 DAILY COMP. PRES. DOC. 596 (Aug. 31, 2013), *at* http://www.gpo.gov/fdsys/pkg/DCPD-201300596/pdf/DCPD-201300596.pdf.

[11] Letter to Congressional Leaders Reporting on the Commencement of Military Operations in Iraq, 2014 DAILY COMP. PRES. DOC. 650 (Sept. 8, 2014), *at* http://www.gpo.gov/fdsys/pkg/DCPD-201400650/pdf/DCPD-201400650.pdf.

[12] With respect to military actions undertaken against ISIS, the White House threw in the unconvincing claim that authority is also conferred by preexisting statutory authorization to use military force against al Qaeda (in 2001) and Iraq (in 2002). Spencer Ackerman, *White House Says Expired War Powers Timetable Irrelevant to Isis Campaign*, GUARDIAN (Oct. 16, 2014), *at* http://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq. If such authority were in effect, it would conveniently have forestalled the application of the War Powers Resolution's sixty-day time period. War Powers Resolution, sec. 5(b)(1), Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541–1548 (2012)).

[13] *See* Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers,* 126 HARV. L. REV. 411, 439–447 (2012) (describing why the president and Congress are not equally situated in their ability to act).

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that it makes no effort to assess the magnitude of force employed in the U.S. military actions that it lists.[14] Nor does it purport to assess the risk that each such use of force entailed—including the gravity of the threat of retaliation against potential U.S. military targets beyond the battlefield, of the danger posed to noncombatants in the United States and elsewhere, of the peril of creating safe havens for groups hostile to the United States and its allies, of the likelihood of stoking regional antagonisms and instability, of the damage inflicted on the nation's worldwide reputation, and of the possibility of unintended consequences generally. Typically, reliance on custom tends to obscure known, foreseeable risks that were incurred at the time of a given action; it focuses instead on acontextual similarities among the catalogued incidents that are easily quantified afterwards but had little to do with initial risk. Inductively arrived-at formulae reflect the narrowness of that methodology. An example is the recurring reference by the Office of Legal Council (OLC) to a military operation's "nature, scope and duration,"[15] pertaining to the number of troops involved, the length of their deployment, the number of cruise missiles launched, and so forth. Risk is typically unexamined and unreported. Quantifiable factors that are neatly categorized ex post on a list or comparative grid give little indication of aggregate risk or geopolitical significance. Thus, the launch of a single cruise missile against, say, military assets of the Russian Federation deployed in Ukraine could be described as limited in nature, scope, and duration—which is how OLC described the Libyan operation.[16]

Clearly, even "limited" operations can entail significant risk. In 2012, the U.S. permanent representative to NATO and NATO's military commander declared that "NATO's operation in Libya has rightly been hailed as a model intervention."[17] The lawlessness, violence, and chaos that currently reign in Libya has been extensively reported. Terrorist organizations that target the United States now openly enjoy a vast, new safe haven, which the Department of State itself acknowledges.[18] But other foreseeable risks of the operation are largely unappreciated. For example, based on U.S. intelligence, a senior Obama administration official estimated that between one hundred to one thousand MANPADS (man-portable air-defense systems) were still unaccounted for in Libya in 2012, despite U.S. efforts to destroy them. Intelligence officials believe that some of the MANPADS have been smuggled across Libya's borders. "In the wrong hands, shoulder-fired antiaircraft missiles pose a major threat to passenger air travel, the commercial aviation industry and possibly military aircraft around the world," said the assistant secretary of state who oversaw the effort. "Not only could a successful attack against an aircraft cause a devastating loss of life, but it could also cause significant economic damage."[19]

Unintended consequences, as military planners know, are an ever-present reality in war but seldom show up in after-the-fact compilations of historical precedents. Descriptions of the "Kosovo" precedent, for example, often quantify and highlight the low number of U.S. casualties incurred during the operation—zero. Missing from such accounts is an incident that occurred at Kosovo's

[14] BARBARA SALAZAR TORREON, CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2015 (2015), *at* http://fas.org/sgp/crs/natsec/R42738.pdf.

[15] *See*, *e.g.*, Memorandum from Caroline D. Krass, *supra* note 7.

[16] *Id.*

[17] Ivo Daalder & James Stavridis, *NATO's Victory in Libya: The Right Way to Run an Intervention*, FOREIGN AFF., Mar.–Apr. 2012, at 2, 2.

[18] U.S. Department of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2013*, *at* http://www.state.gov/j/ct/rls/crt/2013/224828.htm.

[19] Abigail Hausloherner, *Libyan Militia Leader Says Looters Stole Shoulder-Fired Missiles*, WASH. POST, Sept. 25, 2012, at A12.

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Pristina airport when British lieutenant general Sir Mike Jackson disobeyed an order from NATO commander General Wesley Clark and declined to send an assault team of British and French paratroopers into the airport to prevent it from falling into Russian hands on the day that NATO troops crossed into the province from Macedonia. "I'm not going to do that. It's not worth starting World War III," Jackson reportedly told Clark.[20] But the Twitter-ized, list-making method of retelling history leaves no doubt as to the simplistic, "precedential" bottom line: the president acted, here as elsewhere, without congressional approval.

## II. EMERGENCY

A second factor typically eludes the cataloguing of historical incidents in the realm of war powers. That factor is the presence or absence of a national security emergency, the evidence of which tends to be highly contextual and often disputed. Presidential war power is broader when the nation confronts a direct and imminent national security threat that must be met before Congress has time to act. This principle flows not only from original materials reflecting the Framers' intent but also from the functional attributes of the political branches. The Supreme Court, noting the institutional advantages of the presidency, quoted Hamilton: "Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'"[21] The Court might have noted that, absent an emergency, Congress, too, has functional advantages over the executive—in deliberativeness, in transparent process, in the capacity to reconcile diverse viewpoints, in the ability to ask hard questions, and in forging (or destroying) a national consensus.[22] But the presence or absence of emergency, like the level of risk, is seldom reflected in a summary recounting of precedents.

One reason is that reasonable people often disagree whether a bona fide emergency exists. Another is that a seeming emergency can sometimes result from foot dragging or avoidable delay. The Security Council, for example, debated the Libyan question for five weeks prior to the vote on Resolution 1973 on March 17, 2011. The possibility of a humanitarian crisis of some sort was eminently foreseeable and more than adequate time was available to seek approval from Congress to intervene militarily had the executive been willing to do so.[23] In recent decades opportunities for deliberation have existed in most other instances in which force has been used or contemplated. The United States was said to confront a quintessential emergency during the evacuation of Saigon, to recall a famous example, largely because—in

[20] Elizabeth Becker, *U.S. General Was Overruled in Kosovo*, N.Y. TIMES, Sept.10, 1999, at A6; *see generally* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001).

[21] Zivotofsky v. Kerry, *supra* note 2, at 11.

[22] Perhaps aware of such considerations, in response to questions from the *Boston Globe* in 2007, then-Senator Barack Obama gave a well-known answer: "The 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." Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE, Dec. 20, 2007, *at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/.

[23] *See* Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARVARD NATIONAL SECURITY JOURNAL FORUM (Apr. 14, 2011), *at* http://fletcher.tufts.edu//media/Fletcher/News%20Images/Glennon_Journal.pdf; Hugh Roberts, *Who Said Gaddafi Had to Go?*, LONDON REV. BOOKS, Nov. 17, 2011, at 8; Alan Kuperman, *A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign*, 38 INT'L L. SECURITY 1 (2013).

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resolute denial of the government's impending collapse—the U.S. ambassador, Graham Martin, failed to activate the withdrawal plan ("Operation Frequent Wind") until the last minute, as North Vietnam's tank corps moved to encircle the city. In such circumstances Congress is confronted with a fait accompli that leaves little room for disapproval without presenting the appearance of national disunity or undercutting troops already committed to combat. The net result is, again, an incomplete and misleading "pattern" of practice offered in support of military initiatives that fails to reflect the context in which the use of force actually occurred.

## III. THE CONGRESSIONAL POSTURE

Compilations of war powers practice thus tend to imply that Congress consented, when it in fact did not. For several reasons, enumerations that formally categorize the congressional stance as approval, disapproval, or no action often do not fully capture Congress's posture. First, as the Supreme Court has noted, these "three categories represent[] 'a somewhat oversimplified grouping,' and it is doubtless the case that executive action in any particular instance falls not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[24] Second, comparison for precedential analysis rests on the public record. Yet opposition and support are frequently signaled privately by members of Congress in ways that escape the attention of the press and public. A focus on formal legislative action overlooks the entire legislative substrata in which congressional viewpoints are informally expressed. Senator Fulbright's early objections to the Bay of Pigs operation and invasion of the Dominican Republic, for example, were conveyed privately to Presidents Kennedy and Johnson. Fulbright's later opposition to the Vietnam War was signaled not personally or directly (he and Johnson no longer spoke to each other) but through efforts to galvanize national opinion through public committee hearings, which were broadly covered by the press. Third, while oversight committees are occasionally informed, in many instances members of Congress are not aware of covert operations with military dimensions such as drone strikes and cyberattacks.[25] Finally, even formal action, taken by an individual member, a committee, or one house alone, can be difficult to categorize.[26] Congressional inaction intended as silence often looks, procedurally, the same as congressional inaction intended as disapproval; in neither case is any measure officially adopted.[27] Yet analysis of historical war powers practice often assumes commensurability, wrongly equating formal congressional silence with acquiescence and acquiescence with approval.[28]

[24] Dames & Moore v. Regan, 453 U.S. 654, 669 (1981). *Zivotofsky* and *Noel Canning*, like *Dames & Moore*, suggest that the posture of Congress, and thus the validity of certain presidential action, does not depend solely on formally enacted legislative measures. The Court seems to have backed off from the formalism of *INS v. Chadha*, 462 U.S. 919 (1983), where it held that measures not subject to the president's veto cannot have the force of law.

[25] *See* MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT (2014).

[26] For the classic work on the difficulty of assessing legislative intent, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

[27] *See generally* Alan Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211 (2013).

[28] Scholars have identified structural reasons why Congress fails to respond to executive encroachments on its war powers. For example, getting 535 members to deal coherently with collective-action problems is a challenge. Loyalties to party often trump loyalties to the institution of the House or Senate. Members of Congress often are driven by the electoral connection (that is, the desire to be reelected), which sometimes conflicts with institutional protection. *See* Bradley & Morrison, *supra* note 13.

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## IV. CONCLUSION

The incommensurability of historical incidents and the consequent malleability of custom suggest that the important question is not "what is the custom?" but rather "who decides what the custom is?" Given the political branches' capacity and availability to answer that question, their functional attributes become critical. Because war powers disputes arising in recent years have been regularly dismissed as nonjusticiable, the courts have been unwilling to provide an impartial custom-finding forum. Because Congress is typically confronted with a fait accompli when force is used, it has not been able to parse historical precedents in ex ante deliberation. Because it can act swiftly, the executive is able to occupy the field and to decide for itself whether its actions are consistent with historical practice. It is no accident that the Congressional Research Service compilation is drawn largely from lists put together by the Defense Department, State Department, White House, and Central Intelligence Agency.[29] A system in which the executive is both the authoritative interpreter of controlling custom and the judge of its own case systematically favors the executive in war powers disputes at the expense of Congress. "All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda," Justice Scalia noted in his concurring opinion in the recess appointments case. Reliance on custom to assess the breadth of presidential war powers "thus all but guarantees the continuing aggrandizement of the Executive Branch."[30]

Historical practice has the attraction of a jurisprudential holy grail. The reason is understandable; custom presents the illusion of objectivity, of a source of indisputable authority that exists "out there," waiting to be discovered in the same fixed form by all observers, whatever their politics. But the supposed objectivity of customary methodology is just that—illusory. A historical precedent does not subsist as an invisible corporeality somewhere in the ether, awaiting capture, identification, and mechanical categorization. Precedents are artifacts of the human mind, creations of human imagination. Characterizations of a given set of facts can be generalized or particularized arbitrarily, thereby broadening or narrowing the precedent. No law of nature or logic dictates what aspect of a given incident is relevant or irrelevant. Context can be included or excluded capriciously as a function of the structure of incentives and disincentives that is deeply imbedded within the U.S. political system and that shapes the views of all governmental participants. Accordingly, the scope or even existence of a given custom is often a question on which reasonable people can differ, demonstrated recently by a split Supreme Court trying to sort out just what was customary in both recognition practice and recess appointment practice. Exceptions may be found in more neatly quantifiable realms where less room exists for disagreement. Custom can be an instructive source of authority where its limits have been established over decades by a succession of judges who have spelled out precisely what was relevant in a series of robust examinations of historical incidents. In areas such as war powers, however, where pertinent precedential fact patterns are disputed, unavailable, or incomplete, where judicial fact finding has been all but absent, and where the Framers' fears of untethered executive power were so profound, a sound allocation of authority must rest on more than the claim that the exercise of unchecked power is now customary.

[29] TORREON, *supra* note 14.

[30] NLRB v. Noel Canning, *supra* note 3, Concurring Op. Scalia, J., slip op. at 26.

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