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## War Powers: An Essay on John Hart Ely's *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*

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**WAR POWERS: AN ESSAY ON JOHN HART  
ELY'S WAR AND RESPONSIBILITY:  
CONSTITUTIONAL LESSONS OF VIETNAM  
AND ITS AFTERMATH**

*Philip Bobbitt\**

WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH. By *John Hart Ely*. Princeton: Princeton University Press. 1993. Pp. x, 244. \$24.95.

INTRODUCTION

I approached John Ely's<sup>1</sup> new book with the anticipation of delight, qualified by a certain apprehensiveness. Delight because Ely is almost alone among writers in my solemn field in his ability to write with humor; indeed, he writes in a style that reminds me of the marvelous Joseph Heller. There is no reason, I suppose, for constitutional law professors to be incapable of writing amusing and fresh prose or exposing a false syllogism with the light touch of juxtaposition rather than the heavy bludgeon of irony, but how rare this is! More importantly, Ely's arguments have the satisfying feel of good craft: like his wit, his arguments are unlabored, natural, idiomatic.

Nevertheless, I also approached the book with some dread, because Vietnam is a subject that unhinges anyone born between, say, 1940 and 1960. A book subtitled *Constitutional Lessons of Vietnam* is apt to belong to the same genre as books like *The Great War: Its Lessons and Its Warnings*<sup>2</sup> written in the early part of this century: that is, the one thing you can expect to find is that no "lessons" have been learned because the historical experience is too close, too searing, and what you are likely to encounter instead is an account so skewed as to seem neurotic after a few decades. The strategic lesson of Vietnam is either (a) do not intervene in a civil war on behalf of a corrupt, client elite against an idealistic popular national liberation force because a Third World insurgency with the support of the people will

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\* Baker & Botts Professor of Law, University of Texas. A.B. 1971, Princeton; J.D. 1975, Yale; Ph.D. (Modern History) 1983, M.A. 1984, Oxford. — Ed. The author gratefully acknowledges his debts, scholarly and literary, to Ms. Elizabeth Pearsall, A.B. 1987, Princeton, J.D. 1994, University of Texas, and laments that this review, which is as much hers as mine, is the last of our happy collaboration. Although she could not protect me from all my errors, to the extent that this piece is sound, it is the consequence of her careful research and lucid comments. *Ave atque vale*.

1. Robert E. Paradise Professor of Law, Stanford University.

2. JESSE COLLINGS, *THE GREAT WAR: ITS LESSONS AND ITS WARNINGS* (1915).

ultimately defeat a high-tech but unpopular First World force with no moral basis in the hearts and minds of the people; or (b) do not commit U.S. forces and prestige to a remote theater without being willing to use maximum force to achieve victory quickly because popular support at home will not tolerate a long conflict in which American self-interest is vague and difficult to define. Like the differing accounts of a husband and wife after a divorce, these lessons have more to do with the guilt and trauma of the survivors than with any strategic understanding of the causes of failure. So I feared that I might read in a book about constitutional "lessons" one more repetition of the claim, so faithfully repeated by Senator Fulbright, that the constitutional basis for the Vietnam War was untenable because the joint resolution on which it was based was procured through fraud — the Gulf of Tonkin incident was arranged by the United States as a pretext for escalation — or deceit, because Fulbright and his colleagues never dreamed the Gulf of Tonkin Resolution would be used to support a commitment of arms so vastly greater than was already devoted to the conflict.<sup>3</sup> Something of this sort may be found in Michael Glennon's new book, *Constitutional Diplomacy*.<sup>4</sup> Because Ely's book is explicitly directed to revising the War Powers Resolution, I confess I expected to see these themes united. As Harold Koh has put it, "Congress passed the War Powers Resolution to prevent future Vietnams, undeclared creeping wars that start and build before Congress or the public are fully aware."<sup>5</sup> Thankfully, I found that Ely's book does not repeat this cant. It is generally scrupulous and, to a rare extent, detached. It really is about the constitutional basis for war powers, and its meticulous rendering of that basis as applied to the Vietnam War is, as far as I know, unique.

There is, however, an anomaly at the heart of the constitutional interpretation of the branches' respective war powers. Until it is resolved, we shall have a complete impasse between partisans of the executive and legislative branches. At first this anomaly appears so absurd, and its resolution so implausible, that I only introduce the problem with considerable temerity. If we attend carefully to the differences in the forms of constitutional argument, however, we can see the subtle and debilitating effects of this anomaly and may even, I believe, find a cure.

The anomaly is that the power to make war is not an enumerated power and thus is not vested by the constitutional text. In that respect, it resembles the power to incorporate a national bank; that is, it amounts to an implied means that must serve the powers that are enu-

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3. J. William Fulbright, *Foreword* to MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* at ix, xiii (1990) (discussing the fraudulent aspects of the Gulf of Tonkin incident).

4. GLENNON, *supra* note 3.

5. HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 39 (1990).

merated and must be accomplished through the ordinary statutory processes that are specified by the text. Once we resolve this anomaly, the many insights and lucid historical descriptions in John Ely's new book, *War and Responsibility*, can take us a long way toward solving this most vexing of contemporary constitutional issues; but without such a resolution, Ely's proposals will inevitably be fallow and will not, I think, materially affect a debate that is currently at a standstill. Accordingly, I will (i) describe Ely's book and (ii) set it in the context of that debate; (iii) point out the consequences for Ely's argument of the anomaly I have just mentioned; (iv) offer a somewhat different explanation of the constitutional arguments assessing war powers that will account for the anomaly; and (v) suggest how what is novel and particularly impressive in Ely's account might be married to this explanation.

## I

*War and Responsibility* is divided into six chapters. The first chapter is devoted to the constitutional background of the war powers controversy (pp. 3-11). This is perhaps the most problematic material, though Ely does not appear to believe it to be so. I will describe this problem in much greater detail in the next section.

Chapter Two evaluates the constitutionality of the war in Vietnam and breaks that discussion down into several parts: its overall constitutional legality, the legality of the ground war in Cambodia, the effect of repeal of the Tonkin Gulf Resolution, and the legality of the continued bombing in Cambodia after the withdrawal of American troops from the theater (pp. 12-46).

In his discussion of the overall legality of American involvement, Ely briefly describes the Southeast Asia Treaty Organization (SEATO) treaty,<sup>6</sup> rejects the argument that the SEATO treaty could count as congressional authorization for war (p. 15), and then moves on to a discussion of the Tonkin Gulf Resolution<sup>7</sup> and continuing defense appropriations and the argument that these provide a constitutional basis for the war.

Ely emphasizes the broad language of the Resolution and the fact that transcripts of the congressional debate make it clear that at least some members of Congress clearly understood the breadth of the powers they were granting President Johnson, although they later said they were tricked or misled (pp. 15-26). Ely goes on to say that because Congress repeatedly voted for defense appropriations earmarked for the war in Vietnam and extended the draft, it unquestionably and

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6. Pp. 13-14 (discussing the Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, 209 U.N.T.S. 28).

7. Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

manifestly continued to authorize the war (pp. 27-30). After a stinging denunciation of what he sees as congressional cowardice and deceit when faced with a constitutional duty to participate in war policy, he concludes: "It was Congress's duty to exercise independent judgment. That's why we have separate branches. That's why the war power is vested in Congress" (p. 30).

Ely also finds that the broad "resist aggression" language of the Tonkin Gulf Resolution authorized the ground war in Cambodia, "though barely" (pp. 31-32), and then naturally turns to the difficult question of what authority for the war generally remained after the repeal of that Resolution. He offers a complicated analysis of Congress's real intent in repealing the Resolution and concludes that because Congress continued to support the war with appropriations and draft extensions, Congress had not effectively de-authorized the war (pp. 32-34). In much the same way he addresses the continued bombing of Cambodia. Again, Ely relies on what he terms Congress's "tongue-and-groove, proceeding more by notice and acquiescence than by anything resembling a straight in-or-out vote" to say that the bombing was authorized because a majority of Congress could have stopped it before August 15, 1973, but did not (pp. 43-46).

Chapter Three addresses the problem of inducing Congress to face up to its constitutional responsibilities. Ely reframes the question in terms of forcing Congress to uphold "the judgment that no single individual should be able to take the nation into war and thereby risk the lives of all of us, especially our young people" (p. 47). He repeatedly links America's military success to a system of legislative authorization that ensures broad public support for military interventions.

Ely writes that the War Powers Resolution was enacted by Congress in an effort to lock itself into a certain role in war policy, so that in future conflicts Congress would not dodge the issue (p. 48). He analogizes Congress's action to Ulysses's lashing himself to the mast to avoid being seduced by the Sirens' song (p. 53). Ely blames the failure of the Resolution partially on the fact that the role Congress had written for itself was one that it had not been eager to assume in the recent past. In addition, he repeatedly quotes the judgments of observers, notably Thomas Eagleton, who have concluded that Congress really does not want to be a part of these decisions (p. 49).

Ely discusses the events leading up to Congress's authorization of the Persian Gulf War, again emphasizing that the President had to request Congress to take the authorization vote (pp. 49-52). In terms of structuring incentives for Congress to fill its constitutional role in the area of war powers, Ely suggests that the President actually has his own strong incentives to share the responsibility of waging war, but Ely also recognizes that it is politically unlikely that future presidents will move in the direction of ceding part of their war powers to Con-

gress (pp. 52-54). Ely also discusses increased judicial oversight of the division of war powers between the President and Congress and possible amendments to the War Powers Resolution, which he details in the appendix to his book (pp. 115-38).

Chapter Four examines the secret American war in Laos that the United States waged from 1962 to 1969. Here, Ely argues that U.S. military involvement in Laos was unconstitutional because the United States had signed the Geneva agreements making Laos neutral and then gone on secretly to fund and train an armed force to fight there, finally sending U.S. bombing missions into Laos (pp. 68-73).

Ely goes on to discuss four possible defenses for the war in Laos: that it was only a paramilitary effort by the CIA and therefore not a real war (pp. 73-75); that it was authorized in the same way that the Vietnam War was authorized, by the Gulf of Tonkin Resolution (p. 75); that there were compelling reasons for keeping the American role a secret, requiring a certain amount of deception (pp. 76-82); and that in any case the secret was not so well kept that Congress could not have investigated and de-authorized it had it wanted to (pp. 82-93). Ely ends by rejecting each of these arguments, but, granting that Congress is unlikely to be energetic enough to investigate as envisioned in the fourth defense, he returns to his argument in the previous chapter for a more hands-on judicial role in the area of war powers (pp. 93-97).

Chapter Five discusses the secret bombing in Cambodia and draws a sharp contrast with the secret war in Laos. Ely details the lengths to which the Nixon administration went, not only to keep the bombing of Cambodia secret, but actually to falsify the records so that it would be impossible for even the most conscientious and energetic Congress to reconstruct what had happened. He rejects the various justifications involving Cambodian Prince Sihanouk that the United States later advanced as rationales for the bombing and cover-up. Because the secret bombings continued after Sihanouk had been deposed, Ely finds unconvincing the claim that the deception was the product of Sihanouk's insistence coupled with a U.S. desire to protect the political position of the Prince (pp. 98-102).

Ely then poses the question: What is the remedy for waging a secret war in which Congress is not complicit? He points out that the House proposed to add the secret bombing of Cambodia to the charges in the Articles of Impeachment against Nixon, and Ely agrees that impeachment would be the proper punishment for the kind of deception Nixon carried out against Congress and the American people about Cambodia (pp. 102-04).

Finally, in Chapter Six, Ely takes up the subject of covert war. He briefly discusses the growth of "reform" legislation relating to covert wars and requiring congressional notice and oversight. He discusses

the uses of section 102(d)(5) of the National Security Act of 1947<sup>8</sup> and the efforts made to put Congress back in the decisionmaking loop, including the Hughes-Ryan Amendment,<sup>9</sup> which limited funds for CIA operations unless the President reported on those operations to congressional appropriation committees. He also examines the Church Committee investigation, which relied on Congress's role as inquisitor and factfinder.<sup>10</sup> Ely argues that Congress must be involved in individual decisions to act in or against certain countries, and he concludes that a wholesale authorization similar to the broad language of the Tonkin Gulf Resolution would not discharge Congress's responsibility (pp. 105-08).

Rather surprisingly, Ely does say that the Congress does not have to authorize covert action that is paramilitary in nature. He bases this on his reading of what he repeatedly refers to as the "War Clause" (meaning the Declaration of War Clause); this, he concludes, provides that a president faced with a sudden attack on America could make war and seek congressional authorization simultaneously. Of course he recognizes there is little distinction between the arguments that "there isn't time for Congressional authorization" and that "waiting for Congress could undermine our military objectives in a particular situation." But he salvages a significant role for Congress nonetheless by arguing that a statute requiring limited reporting of covert wars to Congress would be "manifestly insufficient constitutionally" when secrecy is *not* a military necessity or when the "covert" action is actually well known (p. 109). Thus, for Ely, American involvement in the Laos conflict would still have been unconstitutional even if reported, and so would any so-called covert operation that is not actually secret. This limits to secret conflicts the ability of presidents to fight unauthorized wars, and then only for the period before the secrecy of the operation is compromised (pp. 109-12). Ely also voices support for Eagleton's proposal to extend the War Powers Resolution to include all American agents involved in hostilities (pp. 113-14).

Throughout this book, but especially in Chapter One, Ely largely assumes a constitutional framework that might be called the Standard Model, at least as regards recent, post-Vietnam opinion. It is to that model, to the fundamental but problematic subject of the constitutional scope of war powers, and to scholarship on that issue that I will now return.

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8. Pp. 106-07 (discussing 50 U.S.C. § 403(d)(5) (1988) (current version at 50 U.S.C. § 4033(d)(5) (Supp. IV 1992))).

9. P. 107 (citing Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974) (repealed 1991)).

10. Pp. 107-08 (citing SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BOOK I: FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. (1976)).

## II

The contemporary war powers debate begins with the issue of the authorization for American engagement in the Vietnam War. This historical fact perhaps accounts for the acute polarization of that debate and, with some notable exceptions, for the peculiarly passionate and slightly hysterical tone of many of the contributions. If Ely's book does nothing more than serve as an honest appraisal of some embarrassing issues, we would be in his debt and count it an important addition to this literature.

The foundational text for this body of work — and one that is also remarkably free of posturing — is Taylor Reveley's magisterial *War Powers of the President and Congress*.<sup>11</sup> Perhaps because it is so carefully nuanced, this impressive work is more often pillaged for citations and research than discussed. A generation of writers — including Ely — has relied upon it to provide definitive textual, ethical, historical, and doctrinal materials. Reveley asks, "By what criteria do we decide how the Constitution allocates the war powers?"<sup>12</sup> and proposes that we consider "the text of the Constitution's war-power provisions, the purposes of those who wrote and ratified the text, evolving beliefs since 1789 about what the Constitution requires, and . . . the *actual* allocations of control that have existed between the President and Congress since 1789."<sup>13</sup>

To those who are interested in modal approaches to constitutional interpretation,<sup>14</sup> Reveley will prove a pleasure to read. He does not pretend, as some writers do, that text or history or precedent or ethos "solves" the war powers question. He correctly points out, for example, that "none doubt that Congress must vote to declare war if America is to declare it. . . . We must go beyond the text to decide which if any hostilities entered by America *must* be declared."<sup>15</sup> Reveley also observes that,

although [congressional deliberations in 1789 over executive control of the State Department, then called the Department of Foreign Affairs, were] a debate on constitutional interpretation, and although it was participated in by men who had been members of the Convention, there is no reference to the discussions of that body or to the decisions of its committees.<sup>16</sup>

"Practice since 1789 . . . has a role in constitutional interpretation. . . .

11. W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981).

12. *Id.* at 170.

13. *Id.*

14. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (discussing the six modes of constitutional interpretation: historical, textual, structural, prudential, doctrinal, and ethical).

15. REVELEY, *supra* note 11, at 171.

16. *Id.* at 172 (quoting HENRY M. WRISTON, *EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS* 89 (1929)).



But [this] practice . . . is not a compelling guide to what the Constitution means except as practice is embodied in *current* laws, executive orders, or court rulings."<sup>17</sup> And

[p]opular beliefs amount to little more than vague intimations that Congress should have a greater role in decisions about war and peace than it has had recently, with no hard concept of *when* or *how* the legislative voice should be heard; a]nd these beliefs are countered by others that executive primacy is essential, given the realities of our times.<sup>18</sup>

Finally, Reveley offers ten prudential guidelines that he is careful to distill from the commitments of the other modalities.<sup>19</sup>

While concluding that the President can act unilaterally in advance of congressional endorsement, Reveley seeks to check this concession by proposing that Congress could, by concurrent resolution, vote to terminate American engagement.<sup>20</sup> Scholars have more often used Reveley's work than responded to it, for several possible reasons: perhaps because of this endorsement of provisions that clearly could not survive *INS v. Chadha*;<sup>21</sup> perhaps because of his quixotic view that Congress could direct a president to commit troops;<sup>22</sup> or perhaps simply because the War Powers Resolution had not, at the time of Reveley's book, yet proved the absurd failure it has become and therefore tended to preempt Reveley's suggestions. Reveley's book remains, however, the most detailed and thoughtful treatment of this issue.

After this work, scholarship on this subject took on a somewhat more polemical style. Advocacy regarding war powers was hardly new to historians and political scientists — Corwin and Commager for example, or Arthur Schlesinger, Jr.<sup>23</sup> — or to legal academics active in the antiwar movement — Richard Falk, for example<sup>24</sup> — but it took the 1980s to produce a body of work by law professors that was virtually divided along the fault line of congressional and presidential perspectives.

17. *Id.* at 173.

18. *Id.* at 174.

19. *Id.* at 175-81 (proposing guidelines that would ensure national defense, hinder use of the military for domestic tyranny or for aggression abroad, create and maintain national consensus behind government decisions, ensure democratic control, encourage rationality, permit continuity while allowing revision, permit emergency action in advance of democratic consensus, allow speed and secrecy when necessary, and enhance efficiency).

20. *Id.* at 195-98.

21. 462 U.S. 919 (1983).

22. REVELEY, *supra* note 11, at 196.

23. See EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917); EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947); HENRY S. COMMAGER, *THE DEFEAT OF AMERICA* (1974); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

24. See Richard A. Falk, *The Circle of Responsibility*, in *CRIMES OF WAR* 222 (Richard A. Falk et al. eds., 1971).

Robert Turner stresses the importance of the declaration of war as entirely an event with significance in international law: only if the law of nations required such a declaration did Congress thereby acquire the authority to constrain the President by refusing to declare war.<sup>25</sup> In a case like the Iraqi invasion of Kuwait, for example, it was clear that Kuwait enjoyed the right of self-defense, which would embrace any actions taken on its behalf by the United States, proportionate to the Iraqi offensive. With respect to the President's textual authority, Turner invokes Article II's provision that "[t]he executive Power shall be vested in [the] President,"<sup>26</sup> contrasting this with Article I's grant to Congress of only those "legislative powers herein granted."<sup>27</sup> Having strictly cabined Congress's declaration of war power, Turner finds no other enumerated powers in Congress that could constitutionally prevent the President from protecting the national security through use of the armed forces. Turner observes that the President's responsibility to "faithfully execute" the laws<sup>28</sup> includes his duty to enforce treaty provisions — which Article VI makes the "supreme Law of the Land"<sup>29</sup> — and thus concludes that, textually, the Constitution provides ample power for the President to assist any nation to whom the United States has given a security commitment through a treaty, including those states whom the UN Security Council has asked the member states to assist.<sup>30</sup>

By contrast, Louis Henkin writes that the text "gave the decision as to whether to put the country into war to Congress."<sup>31</sup> He doubts whether Congress could delegate this power, even to maintain nuclear deterrence.<sup>32</sup> And with respect to the Constitution's allocation of power to the executive branch, he fails to find in the text any authority that would empower the President to resist the 1973 War Powers Resolution imposing various restrictions on his power, on the grounds that to resist, "[t]he President would have to find foreign affairs and Commander in Chief powers that give the President power exclusive of Congress, and there is little basis for that in text."<sup>33</sup>

I have chosen two of the most distinguished and careful commentators in this area. Even exemplary scholars, however, seem to become advocates when they choose up sides on this issue. Thus Michael Glennon sees no ambiguity in Hamilton's words, "*when the*

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25. ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 85 (1991).

26. U.S. CONST. art. II, § 1, cl. 1.

27. U.S. CONST. art. I, § 1, cl. 1, *discussed in* TURNER, *supra* note 25, at 52.

28. U.S. CONST. art. II, § 1, cl. 8 (providing the President's oath of office).

29. U.S. CONST. art. VI, cl. 2, *discussed in* TURNER, *supra* note 25, at 49-52.

30. TURNER, *supra* note 25, at 87-92.

31. LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 39 (1990).

32. *Id.*

33. *Id.* at 31.

nation is at peace, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received: in other words, it belongs to Congress only, *to go to War*,"<sup>34</sup> but he carefully omits Hamilton's next sentence: "But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of the Congress is nugatory . . ."<sup>35</sup> Glennon also leaves out the historical context of the statement. Thus also, from the opposite perspective, Judith Best points out that on the initial vote at the Convention to strike the power to make war from Congress's Article I powers, only two states opposed, and she notes that Oliver Ellsworth changed his vote "after Rufus King pointed out that 'make' war might be interpreted to mean 'conduct' war."<sup>36</sup> But she does not disclose that there is disagreement as to the numbers in the initial vote<sup>37</sup> and that, in any case, Ellsworth's initial speech can only be read as reflecting opposition to any effort that would make war easier to commence.<sup>38</sup> Neither of these is an example of error, but the omissions are rather a little too sharp for such able academics. This is "lawyer's history" as that phrase is sarcastically used, and it arises when unshakable commitment has overtaken scholarly completeness.

I could multiply examples, but suffice it to say that virtually all commentary on this subject falls into one of two positions. Under the first view, Congress has the exclusive power to determine whether to introduce forces into war, though in emergencies the President may act. This conclusion is firmly established in the text, by the Declaration of War Clause;<sup>39</sup> by history, in which the President was denied the power either to make war, as proposed at the Convention, or to declare war, as was the Royal prerogative; by precedent, at least until the post-World War II period when presidents departed from earlier practice; and by prudence, as the ill fate of the American experience in Vietnam confirms, given that the process of congressional authorization might have either ensured the war's success by promoting true public support as a concomitant to congressional endorsement, or at least averted a failure, as American forces would never have been sent at all. Under the second view, the President has the exclusive power to deploy armed forces to protect the national security, a constitu-

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34. GLENNON, *supra* note 3, at 84 (quoting Alexander Hamilton, *The Examination, Number 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 455-56 (Harold C. Syrett et al. eds., 1977)).

35. Hamilton, *supra* note 34, at 456.

36. Judith A. Best, Letter to the Editor, *Constitutional Winners and Losers*, POLY. REV., Summer 1989, at 86, 86.

37. REVELEY, *supra* note 11, at 83. The official secretary, William Jackson, reports that the motion was initially defeated 5 to 4. *Id.*

38. *Id.*

39. U.S. CONST. art. I, § 8, cl. 11.

tional position that is wholly confirmed by the text, in the Commander in Chief Clause<sup>40</sup> and the vesting of all executive power in the President;<sup>41</sup> by history, showing that the Framers intended the Declaration of War Clause to determine the status of U.S. actions under international law vis-à-vis neutrals and civilians, and nothing more; by precedent, which must include the many U.S. engagements that though minor were accomplished entirely without congressional consent and at least three major wars that were fought and funded without a declaration of war;<sup>42</sup> and by prudence, as the immediacy and peril of contemporary affairs demand both secrecy and swiftness to a degree incompatible with true congressional deliberation.

One seldom encounters a partisan of either of these positions who does not subscribe to every article of faith, and most commentators fit into one of the two camps. Most unfortunate, however, is that it is hard to see how anyone could craft a working and principled compromise from such a division because, unlike other constitutional disputes, the partisans appear to find each of their own points decisive and dispute the validity of all of their opponents' claims, as opposed to the more typical modal conflict in which one side has a stronger historical argument, for example, but must concede that the text can go the other way, or in which even allies on the same side hold different modal positions — some accepting a textual rationale, for example, but having doubts as to the doctrinal justification.

Ely is firmly in the congressional camp on this question of constitutional foundations. Thus he writes, regarding historical arguments, [T]he "original understanding" . . . can be obscure to the point of inscrutability. . . . In this case, however, it isn't. The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, "declared" in so many words or not — most weren't, even then — had to be legislatively authorized. . . .

There were several reasons for the founders' determination to vest the decision to go to war in the legislative process. [p. 3; citations omitted]

He touches on other modes by claiming, "Contrary to the words and unmistakable purpose of the Constitution, contrary as well to reasonably consistent practice from the dawn of the republic to the mid-twentieth century, such decisions have been made throughout the Cold War period by the executive, without significant congressional participation . . ." (p. ix). He is so confident of this view that he spends only a few pages addressing the issue and can scarcely bring himself quite to treat his adversaries seriously. Indeed, he is so free of

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40. U.S. CONST. art. II, § 2, cl. 1.

41. U.S. CONST. art. II, § 1, cl. 1.

42. The three wars were the Naval War with France, *see infra* text accompanying notes 67-69; the Korean War, *see* pp. 10-11; and, of course, the Vietnam War, *see* pp. 12-46.

self-doubt on this issue that he even embraces Alexander Haig, remarkably, for the proposition that consultation with Congress would have spared us the human loss of Vietnam (p. 5), despite the fact that the balance of his book is devoted to a compelling account of Congress's complicity with the Executive in maintaining that war. Ely writes in these pages with an adroit wit; the reader will never have the sense that there is actually much of an issue here. That is too bad, because unless Ely can bridge this chasm — and he presents no new arguments on this point — the entire agenda of the book, to devise a workable and responsible War Powers Act, must fail. Unless he persuades the partisans of the presidency on the constitutional question, one can hardly expect them to acquiesce on the operational matters in which Congress is, to say the least, at its weakest. It is, unfortunately, telling that the ever lucid William Van Alstyne writes this praise on the dust jacket, "The scholars will find it outstanding. Congress should find it indispensable."<sup>43</sup> This enthusiasm is seconded by Congressman Ronald Dellums, who writes, "[This book] makes a significant contribution to the hoped-for restoration of the historic constitutional balance between the legislative and executive branches."<sup>44</sup> If you can imagine such a quotation, verbatim, being bestowed upon a different book by, say, Caspar Weinberger or Dick Cheney, then you have some measure of the problem.

### III

Ely, and partisans of the congressional position generally, treat the Declaration of War Clause as if it were a "Power to Make War Clause" with the power of tactical command stripped from it.<sup>45</sup> This is an easy mistake to make in light of the fragmentary stage directions we have of the debate at the Convention. From one angle it appears that *make war* was changed to *declare war* out of concern that the former phrase might entangle Congress in making tactical decisions. Of course even if this had been the case — and it appears doubtful that the Convention as a whole held this view, whatever may have been in the mind of the delegate who made the suggestion — it was not conveyed to the ratifiers who had only the text and the Federalist gloss to go on. It is to their understanding that we must turn for constitutional authority, just as we turn to the intentions of the grantor — and not to those of her lawyer — for the authoritative construction of a trust instrument.

Textually, the one thing that the Declaration of War Clause can-

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43. William W. Van Alstyne, quoted on the dust jacket of *War and Responsibility*.

44. Ronald V. Dellums, quoted on the dust jacket of *War and Responsibility*.

45. Partisans of the presidency do the same thing in reverse: they treat the Commander in Chief Clause as if it were a Power to Make War Clause with the power to issue a declaration stripped from it.

not grant is the equivalent of the power to make war with the tactical role removed, because a declaration of war only comes after war has commenced. That is, it is a legal characterization of an ongoing conflict as one that is “declared” or “perfected,” much as a lien is perfected by a filing or a child is legitimized by a “declaration.” This is why the Declaration of War Clause itself appears among the grants of power related to international law — for example, the power to grant letters of marque and reprisal.<sup>46</sup> Because declarations of war have come only after states of war had begun, such declarations cannot be conditions precedent to the making of war.

Ely’s treatment of this problem illustrates the difficulties that arise when historical and textual arguments become entangled. He writes:

It is true that an early draft of the Constitution vested the power “to make war” in Congress, and this language was changed during the editing process to the power “to declare war.” This change was made for two reasons. The first was to make clear that once hostilities were congressionally authorized, the president, as “commander in chief,” would assume tactical control (without constant congressional interference) of the way they were conducted. (Proponents of broad executive authority to involve the nation in military hostilities often rely on the constitutional designation of the president as “Commander in Chief . . .,” but the record is entirely clear that all this was meant to convey was command of the armed forces once Congress had authorized a war, that it did not carry authority to start one.) The second reason for the change in language was to reserve to the president the power, without advance congressional authorization, to “repel sudden attacks.” [p. 5; footnotes omitted]

But if these were actually the reasons for the change — if indeed the removal of the power to make war, along with the introduction of the power to declare war, was merely a “change” in the sense of a modification (Ely refers to the change as an “editing process” (p. 5)) rather than a substitution — how does the new text actually accomplish this? If a declaration of war is a necessary condition for the President’s making war — as congressional partisans interpret the changed language to mandate — then how can it be that this was the language chosen to reserve to the President the authority to act, in some cases, without advance congressional authorization? The one thing that survives the change, according to the congressional interpretation, is the requirement for authorization.

Ely’s discussion of historical argument shows the pitfall of not carefully distinguishing between history and text. He is tempted to reason back from the apparently clear — to us today — meaning of the Declaration of War Clause to the intentions of the Framers: it is this anachronistic textual clarity that leads him to conclude that the introduction of the Declaration of War Clause occurred simply be-

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46. See U.S. CONST. art. I, § 8, cl. 11.

cause the *make war* was “changed” in the “editing process” to *declare war* so as to prevent congressional interference with the Commander in Chief Clause (p. 5). The Commander in Chief Clause was already present, however, in the draft that proposed the Power to Make War Clause; if the reason for the “editing” had been as Ely indicates, the change might have been made straightforwardly in the Commander in Chief Clause, that is, vesting “sole power” in the President or something along those lines. I do not doubt the ample evidence that the Convention became persuaded that Congress should not have the power to make war because it would be impracticable; what I doubt is that this fact supplies the historical interpretation for the very different power to *declare war*. Putting to one side our contemporary expectations, why would draftsmen who intended to edit Congress’s power to make war *only to the extent* of reaffirming an explicit and exclusive presidential power and reserving an implied presidential power — why would such persons strike the entire Power to Make War Clause and insert a completely distinct power, the power to declare war? Ely ignores this distinction and so persists in referring to the Declaration of War Clause as simply the War Clause. There is ample historical evidence, however, that the Declaration of War Clause was introduced, not as an “edit” for the Power to Make War Clause, but for purposes of its own.

The effect of this slight conflation of the forms of argument is enormous for Ely’s discussion as a whole. The fundamental thesis of *War and Responsibility* is that Congress has been quite complicitous in the post-War decisions to use force abroad.

It is common to style this shift a usurpation, but that oversimplifies to the point of misstatement. It’s true our Cold War presidents generally wanted it that way, but Congress . . . ceded the ground without a fight. In fact, and this is much of the message of this book, the legislative surrender was a self-interested one: Accountability is pretty frightening stuff. [p. ix]

Because he gives a congressional reading to the Declaration of War Clause, and perhaps because he is so horrified at the result of congressional complicity without declarations, he reasons that if Congress were somehow given an extra procedural step — something that would pin accountability on Congress in the way that a declaration of war so clearly does — the United States would get different outcomes in its decisions to go to war. This approach is so much more honest than most, because Ely has the moral courage to describe congressional complicity in thorough detail, that we may be inclined to overlook the constitutional foundation on which it rests. But if one abandons the interpretation Ely virtually assumes for the Declaration of War Clause, then the complicity that he so amply documents begins to look more like compliance with the actual constitutional mandate.

Ely’s defense of his interpretation has three parts. He begins by

offering a series of historical arguments that show that the Framers intended war to be legislatively authorized. These are thoroughly convincing, but they do not show — indeed they decisively negative — that this is the same thing as a declaration of war. Ely chooses, however, to treat these two procedures as the same and, having made this virtually universal but nonetheless fatal elision, then turns to the two most frequent counterarguments to treating Congress's power to declare war as creating a condition precedent for warmaking. One must note, however, that neither of these objections necessarily applies to the legislative process. So it is Ely's elision that requires his having to make a rebuttal. The two counterarguments are prudential — it is impractical in contemporary security affairs to require congressional approval in a way that hampers the presidential use of force abroad — and precedential — various presidents and Congresses on countless occasions over two centuries have behaved as though there were no such requirement. Let us look at the structure of this interpretation — the principal argument and the elision, and the two counterarguments and their respective rebuttals. I hope this will throw into high relief the fundamental move Ely makes that ensnares him in the terms of the current debate.

#### A. *The Historical Argument*

[T]he “original understanding” . . . can be obscure . . . . In this case, however, it isn't. The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, “declared” in so many words or not — most weren't, even then — had to be legislatively authorized. [p. 3; footnotes omitted]

Hang on. What does “in so many words” mean here? Does it simply mean that other joint resolutions like the Gulf of Tonkin Resolution<sup>47</sup> or the Gulf War Resolution<sup>48</sup> virtually amount to declarations of war? Is that what the “early practice” established? Or does it sweep within its scope all warmaking legislation emanating from Congress and treat it as “declarations of war” in so many words? If it is the latter, then are declarations of war just legislation, in so many words? If they are, then why have the enumerated power to declare war in the first place? John Ely is a very careful and very scrupulous person. Why would he engage in this apparent sleight of hand? Because it reflects an unquestioned assumption by which historical arguments from the debates and particularly from early practice are

47. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

48. Authorization for the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).



conflated with the text of the Declaration of War Clause, thereby leveraging that text into an enumerated power to make war.

Look at the move again.

[O]nly one delegate to either the Philadelphia convention or any of the state ratifying conventions . . . is recorded as suggesting that authority to start a war be vested in the president. [Another delegate] responded that he “never expected to hear in a republic a motion to empower the Executive alone to declare war,” and [the first delegate] subsequently disowned his earlier view.<sup>49</sup>

Did you see it this time? From the quoted passage, it appears that the two speakers treated the concepts of making and declaring war as interchangeable. This is what we know of that debate, pieced together from the notes of the official secretary, William Jackson, which were undisclosed until 1819, and the notes of James Madison, which were published in 1840.<sup>50</sup> Charles Pinckney began the debate over whether to vest the war power in Congress with an objection to the inclusion of the House of Representatives.<sup>51</sup> For several reasons, including the provisions allocating the treaty power, Pinckney preferred that the war power rest in the Senate alone.<sup>52</sup> Pierce Butler extended this argument by proposing to vest the power in the President, because many of the objections against the House also applied, in Butler’s view, to the Senate.<sup>53</sup> No one made a formal motion, however, until Madison made his celebrated “sudden attack” motion that, while not explicitly encompassing presidential authority to anticipate attacks — even though the August 6 draft *had* explicitly given this authority to the states — did seem to intend to enlarge the emergency authority of the President in a way that was incompatible with Congress’s enumerated power to make war.<sup>54</sup> At that point Madison and Elbridge Gerry, who had seconded Madison’s sudden attack motion, moved to insert *declare*, striking out *make* and leaving to the Executive as a consequence of this removal the power to repel sudden attacks.<sup>55</sup> As observed above, it is the *removal* of the power to make war, not the *inclusion* of a power to declare war, that clears the way for the President to respond to sudden attacks. This point is obscured by the economy of the Framers in substituting *declare* for *make*.

Before the Convention took its first vote on this motion — the Jackson and Madison accounts differ as to the outcome of the vote —

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49. P. 3 (footnote omitted) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS]).

50. Max Farrand, *Introduction* to 1 CONVENTION RECORDS, *supra* note 49, at xi, xi-xii, xv-xix.

51. 2 CONVENTION RECORDS, *supra* note 49, at 318.

52. 2 *Id.*

53. 2 *Id.*

54. 2 *Id.*

55. 2 *Id.*

four delegates spoke.<sup>56</sup> Sherman thought that *make* should be retained so that the President would not be able to commence war.<sup>57</sup> In these circumstances, either the text would have had both the *make* and *declare* clauses, or the *declare* clause would have been struck in favor of the *make* clause. Defending his own motion, Gerry replied — either to Butler or to Sherman or to both — that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>58</sup> By this remark, Gerry might be taken as responding to Sherman’s latter alternative and suggesting rhetorically that this would be the consequence of removing the power to “declare” from Congress. Instead, it is usually taken as a retort to Butler’s much earlier suggestion that the power to make war be lodged in the Executive, in which case the word *declare* is a bit wide of the mark as Butler did not make such a proposal. It cannot, however, be taken as a reply to Butler, equating declaring with making war — as Ely and so many have done — because it was Gerry’s motion after all that introduced the idea of a declaration. If the only difference between the power to declare and the power to make war is that the latter preempts a power to respond to sudden attacks, then Gerry’s retort could not have been directed to Butler: Butler was scarcely arguing that the President be given a power that lacked the ability to repel sudden attacks. Indeed, Butler never mentioned the power to declare war at all. In fact, he made no motion; the only motion that was under debate was the Madison-Gerry motion.

This famous exchange, which is so routinely misunderstood, I believe, is similar to the following hypothetical dialogue:

*A:* The text now gives Congress the power to create a federal reserve and to appoint its officials. I think the President should have the power to create a federal reserve because Congress is too sensitive to constituent pressures for lower interest rates. (Butler)

*B:* I think the text as it stands is too broad; the grant of power to Congress could be interpreted to displace the President from taking any emergency economic action, such as determining the timing of Treasury auctions. I move to strike the “federal reserve” text, and I move to insert the power to require annual reports from Treasury officials. (Gerry)

*C:* Don’t strike the text; such a motion will imply that the President can create his own federal reserve. (Sherman)

*B:* I’m shocked that anyone would assert that the President could deny Congress access to annual reports on interest rates. (Gerry)

Now, for a long time it has been said that *B* was responding to *A* in *B*’s last remark, but this is very doubtful on many grounds, including the timing, the sequence, and the reference to the motion on the table.

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56. 2 *Id.* at 318-19.

57. 2 *Id.* at 318.

58. 2 *Id.*

Most importantly, however, the logic of the substitution itself does not support this reading. We have only made this mistake so routinely because it appears in harmony with our contemporary textual preconception that *declare* means *commence*.

This exchange is made considerably clearer by a subsequent statement by Butler, in a context that gives it more constitutional significance than the debate at the Convention. On January 16, 1788, Butler recalled for the South Carolina ratification convention why *declare* had been substituted for *make*.<sup>59</sup> The record of this account is verbatim — unlike the Convention notes — and it underscores the fundamental point that the power to make war was decisively removed from either branch as an enumerated power, an important step for our current debate and one having nothing whatever to do with the declaration power per se. Butler said:

It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition — which was, that negotiations always required the greatest secrecy, which could not be expected in a large body.<sup>60</sup>

This is also consistent with Pinckney's effort to strike the entire Declaration of War Clause on August 17, that is, *after* the substitution.<sup>61</sup> This would be nonsense if the power to declare war were simply the power to make war stripped of both the authority to repel attacks and the power to oversee tactics. Such a motion would then divest the federal government of the power to defend the Republic. It only makes sense if the power to make war is not an enumerated power at all and, of course, if it is not coextensive with the power to declare war. So Ely is quite right, importantly right as we shall see, that the Framers were determined to "vest the decision to go to war in the legislative process" (p. 3), but he is wrong to identify that process with the power to declare war.

Having made the historical argument in this way, however, Ely must now respond to the two counterarguments.

### B. *The Prudential Counterargument*

This sort of argument goes as follows:

59. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 263 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1861).

60. 4 *Id.*

61. 2 CONVENTION RECORDS, *supra* note 49, at 319.

a. In a world in which many foreign states have the power to attack U.S. forces — and some even the U.S. mainland — almost instantly, it is impractical to require the President to seek advance authorization to use force. The harm to U.S. security would come before anything could be done to stop it.

b. In a security system such as the Atlantic Alliance, an attack upon an ally can most effectively be deterred by commitments to defend against such attacks as quickly as possible, something that is made much less likely — and therefore less effective as a deterrent — by the requirement of specific congressional authorization in advance. The requirement vitiates the security guarantee.

c. In a nuclear era, the requirement for advance authorization would collapse the system of deterrence, making preemptive strikes by our enemies more likely.

To these, Ely makes the following countermoves: First, he argues that even if a constitutional requirement became unduly impractical, the correct response would be to repeal the requirement, not unilaterally to declare it inoperative (pp. 5-6). This is a powerful argument if you think those are the only two alternatives. We have long been accustomed, however, to using prudential arguments as interpretive moves, and, particularly in this century, it is not hard to find such arguments in Supreme Court opinions that do not sub silentio repeal parts of the Constitution but rather apply them with a sensitivity to consequences.

Second, Ely returns to the Convention debate over the substitution of *declare* for *make* and reminds us that Madison at least believed that the President had the power to repel “sudden attacks,” which power the substitution confirmed (p. 5). One could use this phrase to cover both attacks on U.S. territory and perhaps other threats to our security. Attacks “might or might not mean ‘attack on the United States,’ but ‘sudden’ does . . . suggest . . . urgency” (p. 6).

Ely is too sensitive to the different modalities of constitutional argument, however, to be happy with this move. A textual argument such as this can hardly be made from a phrase in Madison’s notes; such arguments are confined to the *constitutional* text. Therefore, he uses this phrase to suggest a historical argument: What could have been the intent of the Framers in reserving such authority to the President? They might have thought that, in the event of an attack on the United States, there would necessarily be such consensus that congressional consent would be irrelevant. This argument, he notes, proves either too much or too little: either we assume that a likely consensus will support action other than simply a response to an attack on the United States — as it surely would in at least some cases — and thus open up a limitless endorsement of presidential initiative, or we limit the authority to cases of actual attacks on the United States and undercut what seems to be the rationale for the phrase in the first place. To these difficulties one might add some doubt as to whether the re-

quirement of congressional action should be replaced by a requirement of consensus among the congressional leadership, but the notes show that Ely is wary of the elitism suggested by such a move (p. 7 n.33).

Instead he chooses to assume that the point of the phrase *sudden attack* — and thus of the Convention that relied upon it — was to give the President authority in situations so time-sensitive that action must be taken and authority from Congress sought simultaneously (p. 7). This construction of the intent of the Convention is eminently practical and preserves the requirement that congressional consent occur as soon as possible.

To this argument, Ely adds two prudential arguments of his own. The first is that a congressional check on executive schemes is especially necessary in the era of the all-volunteer army and useful when different political parties occupy Congress and the White House. It is a shame that he should repeat the old canard that President Bush might have started a war in 1992 to demonstrate “‘leadership’ . . . when . . . the economy refuse[d] to ‘jump-start’ in time for an upcoming election” (p. 8). I know of no evidence for this, and Ely cites only press speculation (p. 8 n.41); it is saddening that a man of such stature should make such a charge, and I can think of nothing to say about it except that, in light of my long-standing and well-grounded admiration for John Ely, this seems out of character.

The other prudential argument Ely gives is that congressional authorization helps forge national unity and thus deflates potential resistance to war (p. 8). This argument conflicts with the previous one to the extent that one believes congressionally authorized wars can be just as foolish as those that are unauthorized, and Ely ends this discussion by addressing that point. Here he quotes Alexander Bickel, the preeminent prudentialist of his era, “Singly, either the President or Congress can fall into bad errors . . . . So they can together too, but that is somewhat less likely, and in any event, together they are all we’ve got.”<sup>62</sup> This rather resigned defense rests on a number of controversial propositions — why not the Supreme Court, too? — and in any case does not tell us the degree of mutual dependence that is helpful, but it is, as Ely observes, well put (p. 9).

### C. *The Final Counterargument*

The final counterargument is made from precedent. When constitutional arguments of this sort are made on the basis of caselaw, this form of argument is called “doctrinal,” but there are as many kinds of precedent as there are constitutional institutions creating them. In the

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62. P. 9 (quoting *Hearings on War Powers, Libya, and State-Sponsored Terrorism Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 88 (1986) (statement of J. Brian Atwood, Director, National Democratic Institute) (quoting Alexander Bickel)).

case of the presidency, doctrinal argument relies on past presidential decisions; the reporter system is *The Messages and Papers of the President*, which includes executive orders, veto messages, State of the Union Addresses, and so forth.

In 1966 the State Department Legal Adviser's Office produced a memorandum collecting over 125 incidents in which the President used the armed forces abroad without obtaining prior congressional authorization.<sup>63</sup> The vast majority of these incidents were minor assertions of U.S. power against pirates, local insurrectionaries who threatened American citizens abroad, and the like.<sup>64</sup> Not all of these examples, however, can be easily dismissed. Several involved protracted occupations of foreign states that, though authorized by treaty, were not specifically authorized by Congress;<sup>65</sup> several were invasions of disputed territories claimed by the United States and thus, while not constituting acts of war, were nonetheless substantial uses of force.<sup>66</sup> The most relevant precedents, however, are the French Naval War and the Korean War, both of which were conducted without benefit of a declaration of war and both of which were, by any standard, substantial national engagements.

The State Department memorandum refers to "the 'undeclared war' with France (1798-1800)," a citation to which Ely strongly objects.<sup>67</sup> "The memorandum," he writes, "is also dead wrong about the example cited: The undeclared war with France was authorized by Congress clearly, repeatedly, and in advance, as everyone, including President Adams, believed it to be" (p. 10 n.54). Here, I think, both sides get it wrong, and they do so in a way that reinforces the intellectual impasse on this issue.

The Legal Adviser is surely wrong to cite the French Naval War as an example of a president relying on his inherent constitutional authority to wage war. There may be some doubt as to precisely when the war began — which bears on whether or not congressional authorization was "in advance" of the entry of American forces into the hostilities — but there can be no doubt that the war was fought pursuant to congressional statutory authorizations. At the same time, Ely is rather casual about assimilating statutory authorizations into declarations of war. The French Naval War was an undeclared war, and there is much of constitutional significance we can learn from that fact.

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63. Leonard C. Meeker, U.S. Dept. of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEPT. ST. BULL. 474, 484-85 (1966) [hereinafter *State Dept. Memorandum*], reprinted in 75 YALE L.J. 1085, 1101 (1966).

64. Edward Corwin, *The President's Power*, in *THE PRESIDENT: RULES AND POWERS* 360, 361 (David E. Haight & Larry D. Johnson eds., 1965).

65. REVELEY, *supra* note 11, at 142.

66. *Id.* at 139.

67. P. 10 n.54 (quoting and discussing *State Dept. Memorandum*, *supra* note 63, at 474).

If we recall that the United States had no navy at the beginning of this period, that the Constitution requires that all military appropriations are limited to a maximum of two years,<sup>68</sup> and that, as I have argued, the power to make war is nowhere enumerated in the Constitution, then we can reconstruct rather clearly the expectations of the Framers and the ratifiers. When the President sought to involve the United States in other than emergency actions of self-defense, it was expected that he would go to Congress and request the appropriate funding to execute his proposed policy, and the usual statutory processes would go into effect. This is precisely what happened in the instance of the first war of the United States. A declaration of war was never forthcoming, though the issue was widely debated, because a declaration of war was not thought even relevant to the commencement of belligerency but was, rather, believed to change the legal status of the belligerent states to one of total war. For this reason President Adams resisted calls for a declaration of war in 1798 (p. 9 n.45).

Well, what difference does it make? After all, the main point is whether Congress has to approve military action, is it not? There are two important points here.

First, congressional partisans often make much of the fact that some wars — usually wars from which they wish to disassociate themselves — are undeclared, meaning no more than that they were conducted without benefit of a declaration of war. If “declaration” is the key event for Congressional partisans, an event for which statutory authorizations like those that fueled the Korean War or even joint resolutions like the Gulf of Tonkin Resolution are not satisfactory substitutes, then the French Naval War counts against the congressional position. On the other hand, if statutory authorizations are sufficient, as they are for Ely, then what is the point of the declaration of war clause? No one claims, I assume, that a declaration could be a “substitute” for appropriation and authorization statutes.<sup>69</sup> It is crucial to note that Ely repeatedly cites examples of statutory authorizations as vindications of Congress’s power to declare war, even going so far as to refer to the clause granting such power as the “War Clause.” Although this may have the rhetorical effect of aggrandizing the Declaration of War Clause, in fact it undercuts the claims of partisans to an exclusive role for the declaration as a kind of condition precedent.

Second, if the Framers believed statutory authorizations to be the route by which the United States would be committed to war, reserv-

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68. U.S. CONST. art. I, § 8, cl. 12.

69. Presidents have signed declarations of war in the past, but it seems clear from the language of the Constitution that the President cannot veto a declaration, Congress alone having the power to declare war. But obviously the President can veto a statutory authorization. *But see* CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 66 n.1 (1970) (noting that President Cleveland threatened to veto a declaration of war against Spain).

ing the additional jolt of a declaration for "total" wars, then the focus of the entire inquiry changes, and changes, I think, in a way that is much truer both to the strategic demands of the commencement of war and to the political process of defense authorizations. Wars rarely start as unexpected ambushes; they are usually the culmination of a long period of policy decisions. We can in retrospect see even U.S. wars that appear to begin out of the blue — like the attack on Pearl Harbor — as the consequence of a series of American political decisions. It is a self-deception to pretend that war arises inexplicably, by accident, without the steady determination that invariably is its cause. If we think of the declaration of war as a commencing act — which it almost never is and which the Framers did not expect it to be — we will not scrutinize those steps that bring us to war, steps that are in the main statutory in nature. Moreover, we will be inclined to pretend, for reasons Ely amply documents (pp. 47-67), that Congress really has played no role in formulating and funding very specific foreign and security policies. It seemed odd to me at the time that members of Congress, who had spent countless hours in hearings discussing U.S. strategic plans vis-à-vis the Arabian Peninsula and had approved detailed procurement programs for equipment whose only conceivable use was deployment in that theater, expressed surprise that the President would actually deploy troops in Saudi Arabia following the Iraqi invasion of Kuwait.

Why then would one be inclined to elevate the Declaration of War Clause to this absurd status? Because it provides a handy constitutional *text* with which one's opponents can be embarrassed. Thus, in reply to the argument from *precedent*, Ely writes, "In language and recorded purpose the War Clause made an unmistakable point that needed no further gloss: Acts of war must be authorized by Congress" (p. 10).

Ely has one more argument to deploy against the counterargument from precedent. In the context of doctrinal argument, one can sometimes dispose of an inconvenient or contrary case by carefully examining the earlier holding. Often it will turn out that the precedent is not nearly as broad as is claimed, and that the questions actually decided are much narrower than is claimed. Here Ely relies on this strategy, albeit in the context of presidential-congressional precedent rather than caselaw.

Assume, he suggests, that postratification practice could overrule the text. This would require, however, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."<sup>70</sup> This, he says, is manifestly lacking. True, Presidents Polk, Wilson, and Roosevelt may have failed to comply

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70. P. 10 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).



fully with the congressional partnership that the Constitution requires, but they at least dissembled and claimed to be doing so; as a result, their examples cannot count as precedent. It is, as La Rochefoucauld said, as if “[h]ypocrisy is a tribute which vice pays to virtue.”<sup>71</sup> Only defiance — open and notorious — would present the question to history that, once decided, could count as precedent.

Which brings us to Korea. Ely really cannot answer the argument from precedent in this case by this move. He acknowledges that Secretary of State Dean Acheson “not only claimed unprecedented unilateral authority to commit our troops to combat (and keep them there long after there was opportunity for congressional consideration) but even went so far as to suggest that Congress lacked authority to stop it” (p. 10). He attempts to blunt this acknowledgment by suggesting that when political considerations prevented Congress from objecting — “Those in Congress who understood . . . had to soft-pedal the point lest they appear . . . ‘soft on Communism’ ” (p. 11), citing as an example, of all people, Robert Taft — that the dispute over MacArthur’s authority eclipsed the question of the constitutionality of the war (p. 11), and that various rationalizations — the defensive character of the American role, the Security Council resolutions calling for assistance to South Korea — though in his view clearly erroneous, muddied the waters (p. 11). Presumably, however, politics is often a factor in wartime, and it is strange that constitutional points that are so clear to Ely today should have been so obscure to virtually everyone in Congress at the time. As Ely conscientiously notes,

Congress, including the Taft Republicans, gave virtually full support to five separate pieces of war-related legislation during the intervention — a bill extending the draft, an emergency aid bill for Asia, a bill lifting the ceiling on the size of the armed forces, a bill to increase taxes by \$4.7 billion to help pay for the war, and an act giving the President power over defense production.<sup>72</sup>

The French Naval War and the Korean War are important precedents, for different reasons. The actions of the early Congress, which sat when the French Naval War commenced, are unusually reflective of the original constitutional understanding. It is unlikely that the Declaration of War Clause can have the meaning attributed to it by Ely and others, as a matter of historical argument, and that this fact escaped the members of that Congress contemporaneous with the war.

The Korean War is significant for a similar contextual reason. Much of the early precedent on these matters is, after all, less relevant to our current strategic situation because of changes in the interna-

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71. DUC DE LA ROCHEFOUCALD, MAXIMES No. 218 (1678), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 410 (Angela Partington ed., 4th ed. 1992).

72. P. 11 n.66 (quoting Larry Elowitz & John W. Spanier, *Korea and Vietnam: Limited War and the American Political System*, 18 ORBIS 510, 517 n.11 (1974)).

tional and defense environment. One can maintain that the situation of a small, fragile maritime community with hardly an army and no navy, hugging a coastal perimeter largely controlled by hostile powers, is simply irrelevant to the U.S. position today. Korea, however, presented the sort of post-World War II security problem that the world has encountered many times since, and in this respect the situation of the United States — including the presence of nuclear weapons and the nexus of Japanese vulnerability and consequent American security guarantees — has not changed, despite the end of the Cold War. It will not do, I think, simply to dismiss the Korean War as precedent on the grounds that it was merely one of “the many constitutional aberrations of the Cold War period” (p. 10 n.57).

This review of the classic forms of argument — historical, textual, prudential, doctrinal — omits entirely the structural form, which is especially suited to intergovernmental problems, and the ethical form, which is also relevant. In the next section I will take up these forms and suggest an alternative view of the constitutional allocation of war power.

#### IV

I have already implied that it is a mistake to approach the question of war power from the perspective of the separation of powers. To do so is to begin by asking either one of two sets of questions. First, one might ask: What can the President do without a declaration of war? When does the magnitude of hostilities become a war and thus require congressional endorsement? When does a so-called police action authorized by the UN Security Council amount to a war? And so on. Or one might begin from the opposite angle: How does Congress appropriately share the war power? As Congress determines when war is to be fought, what mechanisms can be put into place to ensure that the war that is authorized is the one that is fought? Can such oversight be practical in light of the partisan division of the houses of Congress? Can intelligence be protected and expeditious decisions arrived at? And so on.

This choice of either one starting position or the other depends on the usual characterization of the U.S. government as arising from the separation of powers. Characterizing the system we have as a system of separated powers, however, is misleading. It is really a system of linked and sequenced powers. It makes far more sense to see the pattern of required cooperation in war as sequential, here as with other powers, in which one branch can act within certain boundaries, thereby having an impact on the choices open to the other branches but not determining the outcome of those choices. No branch can do anything of legal significance — pass a law, ratify a treaty, appoint a judge, render a decision, enforce a regulation — without at least one

other branch having participated, but each branch is guaranteed the integrity of its own enumerated powers. They provide the genetic menu of possibilities that political life actualizes, just as the petals of a flower will vary in color depending on sunlight or as the height of a child, while genetically limited, will vary according to nutrition.

For the most part, the President carries out powers in our system that are enumerated to Congress and are delegated to him. This is the case with the Department of the Treasury — executing the tax laws, for example — or the Department of Health and Human Services — executing the Social Security statutes that Congress passes pursuant to its spending powers — and so on. The Constitution enumerates very few powers to the Executive. Even these — like the powers enumerated to the Judiciary — usually require Congress to act first. Thus, for example, Congress may not determine how the courts will decide a case — because the judicial power is not delegated to the courts but enumerated to them in Article III — but Congress must first vest the federal courts with jurisdiction or there will be no cases to decide. Indeed, despite the language of Article III that the federal judicial power shall extend to cases arising under the statutes and laws of the United States,<sup>73</sup> there was little federal question jurisdiction until late in the nineteenth century when Congress provided for it by statute.<sup>74</sup> Congress need not choose to invest the courts with the power to hear cases, but having done so, Congress may not, for example, forbid the courts to rule in a particular case or even make it a condition of jurisdiction that the courts refrain from declaring what the law is on a particular subject.<sup>75</sup> Similarly, the President has the enumerated pardon power.<sup>76</sup> Congress may not tell him whom to pardon. But unless Congress has passed a federal criminal code, there will be no offenses for which someone can be pardoned.

The power of command of the armed forces is one of the few enumerated executive powers.<sup>77</sup> Congress may not act as a commander, directing where troops will go, because the President has the enumerated power on this subject and thus the Congress has not delegated the power. Unless Congress, by statute, provides an army, transport, weapons, and matériel, however, there is nothing for the President to command. Indeed, our first war was fought when Congress agreed to create a navy to make that war feasible. As Taft wrote in 1916, Congress might refuse to vote the appropriation for an army or might re-

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73. U.S. CONST. art. III, § 2, cl. 1.

74. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 846-47 (2d ed. 1973).

75. *Id.* at 321-22 (quoting *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting)).

76. U.S. CONST. art. II, § 2, cl. 1.

77. U.S. CONST. art. II, § 2, cl. 1.

peal the law organizing the army, but it cannot provide an army of which the President must be the Commander in Chief and then in the law of its creation limit him in the use of the army to enforce any of the laws of the United States in accordance with his constitutional duty.<sup>78</sup>

Taft's conclusion rests on essentially structural grounds. That is, it draws its force from inferences, rather than explicit directions, drawn from the constitutional text: the text mandates certain legal relationships (delegation of power, enumerated powers, and so on) and provides certain structures (the branches of the federal government, the system of federalism, and others); from these structures and relationships, the imperatives of a specific context — war — will draw forth various conclusions. Because the power of command is vested in the President, for example, and because the Constitution provides for an executive branch, the President's orders along a particular chain of command within the Executive cannot be altered without the President's concurrence. That is, the fundamental structure of linked powers is animated by the relationship between those powers that is specifically applied to war.

Recall now that Congress's role in raising armies was, in the original contemplation of the Framers, by no means routine. The Framers did not anticipate that the United States would employ a large standing army, or that Congress would have to declare war before raising one. Funding armed forces was deemed to be of such significance that any decision to field an army had to be revisited and reiterated at least every two years. These appropriations statutes amounted, constitutionally, to authorizations for the Commander in Chief to dispose of those forces so as best to protect the country. Indeed, in the eighteenth and nineteenth centuries, when war seemed imminent, the President was expected to go to Congress and ask for forces, whether or not he also sought a declaration. What confuses us today is the presence of standing armies whose authorizations and appropriations have become more or less routine, even permanent parts of the statutory background. Thus members of Congress are inclined to feel they have authorized nothing — certainly not hostile action — when they have approved large, heavily armed forces whose only justification can be that they are prepared to fight.

As a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or by forbidding their use in pursuit of a particular policy at any time.

In Indochina, of course, Congress withdrew funds for both the ground and the air wars in Cambodia and denied requests by the Ford

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78. See WILLIAM H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 94, 128-29 (1916). One must assume, it should be noted, that "the laws of the United States" include our treaties.

administration for funds in the wake of the April 10, 1975, collapse of South Vietnam (pp. 39-41). In 1975 and 1976, Congress refused to appropriate funds for aid to factions in the Angolan civil war, thus halting direct U.S. involvement.<sup>79</sup> Earlier, in 1813, President Madison withdrew U.S. forces from a part of Spanish East Florida when Congress refused to ratify his actions.<sup>80</sup> And Grover Cleveland refrained from using force in Hawaii after House and Senate resolutions warned against such an action.<sup>81</sup> When Andrew Jackson determined that military force ought to be used to compel France to pay its debt to the United States, Henry Clay blocked the plan in the Senate. What Congress cannot do is direct the forces it has created. But if Congress has not carefully weighed the commitments it undertakes in providing the forces first, it will very much want to have a part in directing their disposition and indeed will feel cheated, constitutionally, of a responsibility that the Constitution, however, requires it to exercise in a particular statutory way.

When President Truman sent troops to defend South Korea on the basis of a UN resolution, he did so despite an act of Congress requiring the President to acquire specific approval from that body before committing troops in support of a UN resolution.<sup>82</sup> On essentially structural grounds, Truman's Secretary of State, Dean Acheson, took the position that not only did the President have the power to send troops but Congress had no power to interfere in that particular way<sup>83</sup> — though of course Congress could have withdrawn funds from the forces in Japan.

As a structural matter, then, the Constitution requires a congressional appropriation for armed forces that does not exceed the mandate of a single Congress and must be repassed within at most two years;<sup>84</sup> once Congress has provided such forces, however, they are the President's to command so long as they are used to enforce the laws and treaties of the United States.

On this understanding, the constitutionally proper way for the United States to go to war is by statute — providing the forces and matériel for specific purposes — and by executive action, deciding

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79. TURNER, *supra* note 25, at 114.

80. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 303-26 (1976).

81. See RICHARD E. WELCH, JR., THE PRESIDENCIES OF GROVER CLEVELAND 169-75 (1988).

82. United Nations Participation Act of 1945, Pub. L. No. 79-264, § 6, 59 Stat. 619, 621 (codified as amended at 22 U.S.C. § 287d (1988)).

83. P. 10 (citing *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Comm. on Foreign Relations and the Comm. on Armed Services on S. Con. Res. 8*, 82d Cong., 1st sess. 88-93 (1951) (memorandum of Secretary of State Dean Acheson)).

84. U.S. CONST. art. I, § 8, cl. 12.

where and how to deploy the forces in pursuit of those purposes. Thus, the President might order into hostile action forces that Congress provided by law and equipped with the means of waging war. He might, within his constitutional power, proceed without further specific authorization even if other statutes purported to interfere with his command of these forces, so long as Congress had decided to provide forces by law. In an era of large, worldwide deployments, there is very little geographical limit as to the possible uses for these troops unless Congress decides to limit their number or matériel or the policies they may be used to enforce, though of course the Congress can decommission forces — or merely threaten to — if they object to a proposed deployment.

The war power is not vested solely in Congress as Ely repeatedly alleges. The power to declare war *is*, but it does not amount to the exclusive constitutional route to begin hostilities. But neither is the power to wage war vested exclusively in the President. The power to command the forces *is*, but this power also does not amount to the war power.

One consequence of this analysis is that statutes — defense appropriation acts, defense authorizations — can serve as the basis on which the President may validly commit U.S. forces without further returning to Congress for fresh mandates beyond those given by statute.

This was the history of the entirely valid constitutional authorization of the Vietnam War, and Ely forthrightly and, I think, courageously acknowledges this (pp. 12-34). President Johnson needed large and repeated special appropriations to escalate the war to the level of approximately half a million men; he asked for those special appropriations and received them by near-unanimous votes (pp. 27-28). Anyone who really wanted the troops withdrawn need only have voted no. Moreover, President Johnson also sought the Gulf of Tonkin Resolution so that there could be no doubt as to the legal basis for the war (pp. 15-17). (It must be observed, however, that Ely does not question the legal basis for the war even after the declaration was repealed.) In any case, the passage of the Tonkin Resolution silenced even some of its sponsors who continue to maintain that it was, after all, not a declaration of war.

Throughout the course of the war, hundreds of billions of dollars were appropriated to support it, and the draft was repeatedly extended. . . .

. . . .

In this case, it would be an understatement to say that the program for which Congress was appropriating funds (and extending the draft) was conspicuous. In May of 1965 Congress enacted a special appropria-

tion of \$700 million for "military activities in southeast Asia."<sup>85</sup>

The President's message requesting this appropriation had begun:

I ask the Congress to appropriate at the earliest possible moment an additional \$700 million to meet mounting military requirements in Vietnam.

This is not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed.<sup>86</sup>

Yet as late as 1990, Senator Fulbright could maintain that, once "tricked" into voting for the Gulf of Tonkin Resolution, Congress could not cease funding the Vietnam War: "The political realities of 'voiding' a war when the troops are in the field, the flags flying, and the bands playing make that option impractical."<sup>87</sup>

This brings us to ethical argument. Most often, ethical constitutional arguments are used in the context of human rights. The fundamental ethos of our Constitution is the division between public and private life, which reflects our fierce determination to retain for ourselves dimensions of our lives that, in other societies, are the subject of governmental regulation. The constitutional texts of the Declaration of Independence, the Ninth and Tenth Amendments, and the Privileges or Immunities Clause of the Fourteenth Amendment express this ethos. Another ethos that is just as basic, however, equally inspires our Constitution: that is the notion of self-government, based on the idea that the government's limited sovereignty derives from delegation by the People, who are wholly sovereign. One corollary to this idea is that the People must have an opportunity, through the electoral process, to affirm actions taken in their name. This can only happen if they are told what is actually being done.

There are several routes by which the United States can be legitimately taken to war. One is by declaration of war. This usually follows the incidence of war and gives formal recognition to a preexisting state. A declaration might, however, also initiate hostilities if it were conditional — that is, if it were in the form of an ultimatum. Thus, preventing the President from declaring war without Congress also prevents him from committing the "substantive act of initiating offensive hostilities against another state in such a manner as to commence a *de facto* war, without first securing the affirmative approval of both houses of Congress."<sup>88</sup> Another route is by statute. Another route to

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85. P. 27 (footnote omitted) (quoting H.R.J. Res. 447, 89th Cong., 1st sess., 79 Stat. 109 (1965)).

86. P. 27 (quoting 111 CONG. REC. 9282 (1965)).

87. Fulbright, *supra* note 3, at xiii.

88. TURNER, *supra* note 25, at 80.

war is by treaty, because treaties have, by virtue of Article VI, the same legal force as statutes.<sup>89</sup> Another avenue of constitutional authority occurs in the context of an emergency — an imminent threat to American forces or nationals abroad, to our civil order, or to the society as a whole.<sup>90</sup> All of these avenues, however, are limited by the obligations of the Executive to put its policies before the public truthfully. It goes without saying that a statute authorizing a force structure to defend Europe would have been questionable authority for the unprovoked invasion of the former Soviet Union. Nor would a treaty requiring the United States to aid a stricken ally support the use of force when the alleged attack was merely concocted — a justification used by the Japanese at Mukden and by the Nazis for their invasion of Poland.<sup>91</sup> Secret operations are, of necessity, required by war and by the preparations for war. A democracy cannot, however, tolerate secret policies, because they are robbed of the legitimacy our institutions confer.

Thus, constitutional argument from an ethical perspective requires that the public be fully and truthfully informed of the war aims of the President.<sup>92</sup> If the People were deceived in the process, no customary method of taking the United States to war would be legitimate. It is an open constitutional question whether even a specific statutory authorization would be valid if it were based on deception — such as is frequently, and falsely, alleged about the Gulf of Tonkin incidents.<sup>93</sup>

The President, however, is not the only figure who can mislead the public. What happens when a member of Congress attempts to disown his vote or the constitutional consequences of that vote? For example, some members of Congress at the time of the Vietnam War voted for an appropriation and then claimed they had not voted for the war itself. As Ely notes,

Senator Albert Gore (Sr.), to take but one example, indicated that by his vote he did not intend “to approve an escalation of the war or to approve the sending of combat troops into South Vietnam.” However, Operation Rolling Thunder was well under way, we had had combat troops in Vietnam for two months, and the appropriation was \$700 million for military activities in Vietnam: What exactly did Gore and his similarly exculpatory colleagues think they *were* voting for?<sup>94</sup>

As Stanley Karnow has pointed out, “During the seven-year span from July 1966 through July 1973, Congress recorded one hundred

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89. U.S. CONST. art. VI, cl. 2.

90. See PHILIP C. BOBBITT, *STATES OF WAR* (forthcoming 1995).

91. Cf. BOBBITT, *supra* note 14, at 80-81.

92. This applies to covert, paramilitary operations also: thus the Contra intervention by the Reagan administration stood on a somewhat different basis than its arms policies toward Iran.

93. See, e.g., Fulbright, *supra* note 3, at xiii; NEIL SHEEHAN, *A BRIGHT SHINING LIE* 379-80 (1988).

94. P. 27 (quoting 111 CONG. REC. 9497 (1965) (statement of Sen. Albert Gore)).



and thirteen votes on proposals related to the war.”<sup>95</sup> In his 1966 State of the Union Address, President Johnson predicted that special expenditures for Vietnam for the next fiscal year would rise by \$5.8 billion.<sup>96</sup> Thus, on March 1, 1966, Congress approved a \$4.8 billion supplemental military appropriation by votes of 393 to 4 and 93 to 2.<sup>97</sup> Senator Morse’s motion to end the war was tabled on a vote of 92 to 5.<sup>98</sup> Yet Senator Joseph Clark said at the time, “I wish to make it very clear indeed that my votes, both against the Morse amendment and for the [appropriation,] do not indicate an endorsement of the policy which I fear the Administration is following.”<sup>99</sup> And many members of Congress continued to insist that, although they opposed the war, the presence of American troops in a hostile theater required them to continue voting for funds (pp. 28-29), an argument that, if correct, would count against my assertion that such authorizing statutes also authorize war. In fact, I doubt these self-serving declarations have any constitutional significance. As Ely points out,

This was said so often I assume it convinced some constituents, and it must have been internalized by the men who said it as well. However, it doesn’t make sense. . . . Congress could have phrased its funds cut-off as a phase-out, providing for the protection of the troops as they were withdrawn. . . . True, the president could have vetoed such a measure . . . and there might not be the two-thirds majority needed to override.

However, a simple refusal to appropriate funds can’t be vetoed. [p. 29] Ely does not ask himself, however, whether or not the position he takes — that Congress has the war power by virtue of the Declaration of War Clause — might have contributed to this deception. Only this morning, as I wrote these lines in Austin, Texas, I had the misfortune to hear former Senator McGovern on television, explaining that the Gulf of Tonkin Resolution was not a declaration of war. He said that it had no force of law, and that its framers testified under oath that it was not a declaration of war and should not be interpreted as such.

But Senator McGovern could not mean that a joint resolution, passed by both Houses and signed by the President, “has no force of law.” Indeed, the War Powers Resolution is a joint resolution. What he clearly means is that it is not a declaration of war, and of course in this he is right. This assumes that a declaration of war must precede any constitutionally valid use of the armed forces to wage war, a position that Ely also assumes, despite his sharp criticism of the hypocrisy of Senator Fulbright and others who attempted to disown the effect of the Resolution and the subsequent appropriation and authorization

95. STANLEY KARNOW, *VIETNAM: A HISTORY* 491 (1983).

96. Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union*, PUB. PAPERS 3, 8 (Jan. 12, 1966).

97. 112 CONG. REC. 4411, 4474-75 (1966).

98. *Id.* at 4404.

99. *Id.* at 4382.

acts for which they voted and without which the President could not have waged the war in Southeast Asia (pp. 16-23, 27-28). The difference is that Ely permits other statutory instruments to serve the function of a declaration of war. This is an appealing solution, because it shows up the absurd bad faith of men who voted to support the war but kept their records — and perhaps even their consciences — clean by never actually voting on a declaration, and it can be assimilated into two centuries of practice. There is no textual warrant for this substitution, however, and, as we see in Senator McGovern, there is the potential for much mischief, for it perpetuates the idea that the declaration is somehow essential, which in turn perpetuates the anti-ethical constitutional arguments of members of Congress.

I have thus far suggested that Congress can act by statute to authorize a war, not because this substitutes for a declaration, but because it is a valid means in and of itself. In the final section of this review I will ask what difference it really makes to say this. After all, is not the point that Congress has a necessary constitutional role in this process? Does it really matter whether this is accomplished by statute or by declaration of war?

## V

The most important distinctions between vesting power in Congress through its enumerated powers to raise and support armies and to spend for the common defense and, on the other hand, through its power to declare war are as follows: (i) the power to declare war is exclusive and requires no participation by the President; (ii) relying on the statutory process better reflects the actualities of policy review during the appropriations and authorization process; (iii) the statutory account better fits the constitutional history of practice in the area of war powers; and (iv) a statute-based account of war powers opens the way to an accommodation between the branches precisely because it is a sequenced and cooperative process, while arguments based on the exclusive powers of either branch have led to deadlock.

If the power to declare war were the power to wage war — with the tactical component removed — then a declaration alone would be sufficient to commence fighting and the President's refusal to act would be a violation of his oath. We are inclined to think of presidents as aggressive and eager for conflict and of Congress as more cautious. I think this is inaccurate even as a reading of recent history, but there are other, less controversial historical examples to the contrary, Cleveland's resistance to a war with Spain in 1896 being perhaps the clearest.<sup>100</sup> Moreover, because a declaration of war has the effect of creating a juridical situation of total war, it means that the country enters into belligerency at a higher level of conflict than may be appro-

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100. See *supra* note 69.

priate. Why, we may ask ourselves, did John Adams so resolutely refuse — “courageously,” in Ely’s words (p. 146 n.45) — to accept a declaration of war at the time of the French Naval War if the constitutional source of his authority to wage war derived from the Declaration of War Clause? What was courageous about Adams’s stand was that by his refusal he lowered the level of international hostilities. If there were no important difference in these methods, there would be no “courage” to it. Finally, is it not wiser to require a two-thirds vote, rather than a simple majority, to compel the President to wage a war in which he does not concur?

The dramatic debate in the Senate at the time of the Gulf War was an inspiring example of deliberative exchange (p. 50). The occasion for that debate, however, might just as easily have been the supplemental appropriation as the joint resolution. What is lost by focusing on special resolutions is attention to the lengthy and thorough policy debates that occur at the time of the adoption of the defense budget and the various defense supplemental appropriations. This is the time when strategic policies are hammered out between the branches. It is ridiculous to pretend shock that, for example, helicopters designed for desert warfare in case of an attack on the Arabian Peninsula are actually going to be deployed against Iraqi forces that have invaded Kuwait. No one familiar with the hearings and extensive debate that accompany defense appropriations and authorizations could claim that strategic policies are not the main core of these deliberations.

In actuality, the declaration of war was a vestigial legal trait even at the time of the Constitutional Convention. In the preceding century there had been thirty-four major wars in Europe; only one of these was declared, a point made in the *Federalist Papers*.<sup>101</sup> In our constitutional history, war has been declared only five times, and in every case this was after hostilities were underway. In light of both the French Naval War — our first war — and the Korean War, it is difficult to maintain that the source of Congress’s authority is its power to declare war. There is a role for this clause, both in international law — as a declaration changes the status of nonbelligerents — and domestically — as it rallies the nation to a supreme effort. But neither of these is invariably appropriate.

The War Powers Resolution is a defunct law. No president has ever agreed to comply with its terms, and no Congress has ever taken steps to enforce it. The mechanism of the Resolution is too clever and yet naive at the same time. It depends upon a sixty-day “clock” that commences running when the President reports that troops have been introduced into hostilities, it thereafter requires their withdrawal if

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101. See, e.g., THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that “the ceremony of a formal denunciation of war has of late fallen into disuse”).

Congress does not authorize the use of force and it provides for an immediate termination pursuant to a concurrent resolution (too clever). Yet the Resolution does not seem to have contemplated what to do if the President simply refuses to start the clock, as has uniformly been the case (rather naive). Its core provision, section 5(c), the concurrent resolution to terminate hostilities regardless of the report,<sup>102</sup> is widely regarded as clearly and obviously unconstitutional after *Chadha*.<sup>103</sup> Ely expresses his "personal opinion" that section 5(c) does not fit the profile of a standard legislative veto and therefore is not unconstitutional, because "it should be read . . . as part of a *package* attempting to approximate in concrete terms the accommodation reached by the founders, that the [P]resident could act militarily in an emergency but was obligated to cease and desist in the event Congress did not approve" (p. 119). If this is convincing, then I suppose a great many measures that use legislative procedures that contradict or avoid those provided by Articles I and II might be constitutional on the same basis. I do not find the intention "to approximate" sufficient to override these procedures, but, in any event, Ely proposes a revision of the War Powers Resolution that avoids this problem (pp. 132-38).

Ely's revision appreciates that it is Congress that is eager, for its own reasons, to avoid enforcing the War Powers Resolution and that the current War Powers Resolution gives ample scope for this evasion. Ely's revision requires that the President seek specific authorization for the use of force in a belligerency and terminates funding for any deployment that violates this requirement (p. 138). It is thus simpler and, because of a provision specifically providing for judicial oversight (p. 135), more easily enforceable. Any reluctant army private could enforce this law, regardless of the attitude of Congress or the President.

This cleanly drafted and carefully considered rewrite does, however, have two shortcomings. First, it is highly unlikely to appeal to the President, whose support it must have if it is to become law in the foreseeable future. Second, as a constitutional matter, it cannot bind future Congresses.

It is quite true that thoughtful presidents are by no means averse to giving Congress a role in the decision to go to war, although it is not so easy to ensure that Congress will own up to that role. Ely quotes Lyndon Johnson as saying,

I said early in my Presidency that if I wanted Congress with me on the landing of Vietnam, I'd have to have them with me on the takeoff. And I did just that. But I failed to reckon with one thing: the parachute. I

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102. War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 555, 556-57 (1973) (codified at 50 U.S.C. § 1544(c) (1988)).

103. *INS v. Chadha*, 462 U.S. 919 (1983).

got them on the take off, but a lot of them bailed out before the end of the flight.<sup>104</sup>

But a statute that requires that the President return to Congress for a fresh authorization, most likely in the midst of hostilities, represents a compromise that no president is likely to risk. President Carter rejected such an idea,<sup>105</sup> President Ford rejected it,<sup>106</sup> and I imagine President Clinton would feel the same.

More important, such framework statutes — like Gramm-Rudman, for example — cannot bind future Congresses. If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference — as does Ely's rewrite and also the original War Powers Resolution — is without legal effect. On the other hand, if one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of the electoral mandate. Imagine, for example, a statute that provided that no appropriations or authorization provision shall exceed a term of six months or an act that forbade the President from interpreting any subsequent statute as permitting him to issue regulations to enforce that statute unless specifically authorized to do so therein. A rule of interpretation, if it contravenes a valid constitutional power — in this case, that is, that a subsequent Congress could constitutionally endorse a war by an appropriations and authorization statute — would amount to a restriction on the ability of a Congress to repeal by inference preexisting law. Such a fresh hurdle to later legislation is nowhere authorized by the Constitution and is inconsistent with the notion of legitimacy derived through the mandate of each new Congress. Of course this argument hinges on the validity of an appropriations and authorization statute as a constitutional means of making war, but Ely acknowledges such validity (p. 128).

Does this mean that presidents can simply ransack the current Defense Appropriations Act for available forces and that Congress then has no way to stop a president from unilaterally making war so long as one-third plus one of the members of one House sustains his veto — for the balance of the biennium? It may well mean that. But it need not, because there is a proposal that quietly does what I think John Ely and the Congress that adopted the War Powers Resolution want to do. Charles Black has suggested

the formation of a consensus, or convention, to the effect that certain kinds of presidential vetoes are to be overridden . . . for example, around presidential acts of war. As now, Congress might simply pass a bill or

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104. P. 53 (quoting Letter from Lyndon Johnson to Eugene Rostow (Mar. 25, 1972), quoted in Eugene V. Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 15 (1986)).

105. GLENNON, *supra* note 3, at 308.

106. *Id.* at 288 n.35, 289.

resolution, dealing negatively with the presidential act. The President would veto. Then, if the new convention prevailed, an override could be easily arranged, usually by the members who do not want to vote for override absenting themselves.<sup>107</sup>

This is precisely what the authors of section 5(c) of the War Powers Resolution tried to accomplish through an unconstitutional procedure. That Resolution got the two-thirds vote necessary to override a veto. Is it so unlikely that a constitutionally scrupulous means of doing this would fail? As Black points out, "any Senator or Congressman, however he voted on the original vote, might think it most unwise for the country to be committed to a warlike action that has been disapproved by majorities in both Houses, and so might vote for an override."<sup>108</sup> Unlike the War Powers Resolution, such a convention of automatic override would give Congress much greater flexibility precisely because it is not a statute whose terms — like the sixty-day clock — are subject to presidential interpretation. And if such a conventional override were ignored by the President, then the courts, without any special provision, would inevitably be drawn to the aid of Congress when civil suits required them to determine "what the law is."

This solution does not force Congress to act, as John Ely wishes. Nor does it force the President to seek fresh authorization for the use of forces that the Congress has provided, as Ely also wishes. It is, however, faithful to the constitutional conception of the branches' roles in making war, and it is, by its modesty and pragmatism, just possibly a realistic way of making cooperation and limitation feasible.

### CONCLUSION

John Ely may or may not be "the most original constitutional scholar of our age," as Alan Dershowitz writes<sup>109</sup> — I am inclined to reserve that title for Charles Black — and it is certainly true that "[n]obody . . . write[s] like John Ely," as Laurence Tribe observes.<sup>110</sup> But for me the most signal quality of this book is its shining integrity. Ely's patient, careful, but never tedious examination of Congress's role in the authorization of the Vietnam War is an inspiring antidote to the indulgent amnesia of so many who ought to know better. If his work can be connected to proposals that are attractive to both branches, it can lead us out of the current impasse and back to methods that are constitutionally impeccable as well as politically viable.

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107. See Charles L. Black, Jr., *The Year of Pride and Shame*, 67 B.U. L. REV. 783, 792 (1987).

108. *Id.* at 793.

109. Alan M. Dershowitz, quoted on the dust jacket of *War and Responsibility*.

110. Laurence H. Tribe, quoted on the dust jacket of *War and Responsibility*. Unless, of course, it is Joseph Heller.