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WAR AND THE FORGOTTEN EXECUTIVE POWER CLAUSE OF THE CONSTITUTION: A REVIEW ESSAY OF JOHN HART ELY'S *WAR AND RESPONSIBILITY*

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ESSAYS

War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's *War and Responsibility*

ROBERT F. TURNER*

I. INTRODUCTION

The comments on the dust jacket signal that this is a book with which to be reckoned: "destined to become a classic," according to Harvard Law Professor Laurence Tribe; Duke Law Professor William Van Alstyne proclaims it "a brilliant assessment"; and former Senator Thomas Eagleton asserts "without a doubt, this is the definitive work on war powers." Harvard Professor Alan Dershowitz adds that Professor Ely, who held a chair at Harvard before he became the Dean of Stanford Law School at the young age of 44 years, is "the most original constitutional scholar of our age." He is currently a chaired professor at Stanford. In light of his indisputable ability, it is surprising that his latest book suffers from significant flaws.

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By any standard, this is a remarkable book. It is likely to produce mixed emotions in veterans of the Indochina debates of the sixties and early seventies. On one hand, *War and Responsibility* is unusually well-written and readable, and, for the most part, the arguments are cogently reasoned. In several areas of the book, the level of analysis approaches brilliance. Many of Professor Ely's conclusions are so contrary to the scholarly "conventional wisdom" that one must admire his intellectual courage.

Nonetheless, there are also glaring errors, overstatements, omissions, and even a few apparent internal contradictions. The inconsistencies are so remarkable that some may note that the book seems to combine the factual analysis of John Norton Moore, a leading supporter of the legality of U.S. involvement in Indochina, with the conclusions of Richard Falk, a preeminent critic![1]

One of the most disappointing aspects of *War and Responsibility* is the *ex cathedra* nature of many of Professor Ely's pronouncements. While other scholars devote entire volumes to conflicting interpretations of the separation of constitutional war powers, Ely simply proffers a series of unsupported assumptions for the reader to accept as true. To be sure, John Hart Ely is a highly respected constitutional scholar. However, as this Essay will seek to demonstrate, some of his "truths" desperately need defending if they are to be accepted. They are hardly self-evident.

II. INTERPRETING CONSTITUTIONAL TEXT

Throughout *War and Responsibility*, Professor Ely offers his readers some rather unusual constitutional interpretations. For example, Founding Fathers as diverse as Thomas Jefferson and Alexander Hamilton appear to have viewed the power to declare war as inherently executive in nature. Further, there was wide-

1. For readers who do not remember the great legal debates over the Indochina conflict in the *American Journal of International Law* and numerous other fora, John Norton Moore and Richard A. Falk were widely recognized as among the most effective advocates of the major competing viewpoints and produced some of the most powerful exchanges within the international law community. See, e.g., Richard A. Falk, International Law and the United States Role in the Viet Nam War, 75 Yale L.J. 1122 (1966); Richard A. Falk, International Law and the United States Role in Viet Nam: A Response to Professor Moore, 76 Yale L.J. 1095 (1967); Richard A. Falk, The Cambodian Operations and International Law, 65 Am. J. Int'l L. 1 (1971); John N. Moore, International Law and the United States Role in Viet Nam: A Reply, 76 Yale L.J. 1051 (1967); John N. Moore, The Lawfulness of Military Assistance to the Republic of Viet Nam, 61 Am. J. Int'l L. 1 (1967); John N. Moore, Legal Dimensions of the Decision to Intercede in Cambodia, 65 Am. J. Int'l L. 38 (1971).

spread consensus among the Founding Fathers that the powers executive in nature, yet vested by the Constitution in Congress or in the Senate, were to be strictly construed.[2] However, Professor Ely writes, without explanation, that the declare war clause should be given an "appropriately broad reading."[3]

Ely argues for a radically narrow reading of the President's Commander in Chief power,[4] claiming that "the record is entirely clear that all this was meant to convey was command of the armed forces *once Congress had authorized a war.*"[5] The President would have tactical control over U.S. forces, he writes, once "hostilities were congressionally authorized."[6] It remains unclear exactly who would command U.S. military forces until Congress so acts, or exercise strategic control during authorized hostilities.

At various points in the work Professor Ely characterizes the Article I, Section 8 power of Congress to declare war as "the Declaration of War Clause,"[7] "the War Clause,"[8] or "the Constitution's simple reference to 'war.' "[9] He interprets it as giving Congress exclusive power over combat[10] and as "requiring congressional authorization before Americans were sent to die."[11]

To his credit, Professor Ely researched enough into the history of declarations of war to observe that a declaration of war "typically was almost entirely nondirective . . . . All it did was declare that we

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2. For a discussion of the views of Jefferson and Hamilton on war and executive power, see infra notes 106-11 and accompanying text.

3. John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath 106 (1993). To be sure, the expression "appropriately broad" is something of a tautology, and one might contend that it encompasses a very narrow breadth if that is found "appropriate," but Professor Ely clearly seems to be saying that the appropriate interpretation of this clause is a broad one.

4. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States." U.S. Const. art. II, § 2.

5. Ely, supra note 3, at 5 (emphasis added). This statement seems clearly erroneous as a matter of constitutional law. The President does not surrender his constitutional Commander in Chief powers during periods in which Congress has not "authorized a war."

6. Id. Presumably "tactical" is used here to distinguish the President's role from that of some other entity, unidentified by Professor Ely, charged with the "strategic" control of U.S. forces. Obviously, the President possesses both strategic and tactical control over U.S. military forces at all times, subject, of course, to the constitutional constraint that he not use those forces in such a manner as to infringe upon the constitutional powers of Congress or the rights of individuals.

7. Id. at 66.

8. Id. at 10, 58, 67.

9. Id. at 66.

10. Id. at 7.

11. Id. at 140 n.5.

were at war with one or more enemies and leave the 'how' up to [the President]."[12] He thus concludes:

> The defense of South Vietnam . . . was a project that had been congressionally authorized by the Tonkin Gulf Resolution and other statutory provisions as well. (There is no doubt that Cambodian sanctuaries were in fact being used as bases for Communist moves into Vietnam.) Thus viewed, it is difficult to understand the theory on which the president needed additional statutory authorization for the drive [into Cambodia]—any more, for example, than Franklin Roosevelt needed special congressional permission for our landings in French North Africa (at the time a neutral territory) or on various Pacific islands with which we, similarly, were not at war.[13]

This is an excellent, well reasoned point. One can only hope that this conclusion will have an enduring impact in putting to rest the remnants of the once popular notion that the 1970 U.S. incursion into Cambodia was unconstitutional.

III. DECLARATIONS OF WAR

One of the shortcomings of *War and Responsibility*, in my view, is a product of the author's lack of expertise in international law. Although Professor Ely teaches courses on National Security Law, his lack of training or experience in a key component of that subject leads him to conclude that "[t]he oft-made observation that declarations of wars are 'outmoded' is entirely beside the point . . . of any sensible constitutional argument one can imagine."[14] This assertion presents a difficult challenge to resist.

To understand such an argument, some background is necessary. For example, it is useful to recall the view embraced by Hamilton and Jefferson that the authority of Congress to declare war should be construed narrowly,[15] and to recognize that the Founding Fathers chose to define the power given to Congress by using a term of art from the law of nations.[16] Identifying clause 11 of Arti-

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12. Id. at 25.
13. Id. at 32.
14. Id. at 162 n.84.
15. See infra notes 106-11 and accompanying text.
16. They might have said "authorize hostilities," "consent to the use of military force," or, to use the language found in section 2(a) of the 1973 War Powers Resolution, introduce "United States Armed Forces into hostilities or into situations where imminent

cle I, section 8, of the Constitution as "the War clause" may be a useful shorthand. However, it is essential to keep in mind that the operative term in this clause is not *war*, an admittedly ambiguous word, but *declare war*, which in 1789 had a well-established meaning in the law of nations. Historically, and as understood by the Founding Fathers, this was an act associated with the initiation of offensive hostilities.

The Founding Fathers were well-read men, and the second most common lawbook found in a study of approximately one hundred private libraries in colonial Virginia was the landmark treatise by Hugo Grotius (1583-1645), *De Jure Belli ac Pacis* (The Law of War and Peace).[17] Among the most extensive of these libraries was that of our third president, which subsequently formed the basis of the collection of the Library of Congress. The 1983 *Catalogue of the Library of Thomas Jefferson* devotes more than 20 pages to Jefferson's books on the "Law of Nature and Nations," including multiple copies of some of the more important works.[18]

Declarations of war were widely discussed in the leading treatises on the law of nations. Grotius, the man widely acclaimed as the "father" of modern international law, argued in 1625:

> To understand . . . the declaration of war, we must draw an accurate distinction between what is required by the law of nature [which he contended was the source of international law] and what is not required by the law of nature, but is nevertheless honorable . . . . By the law of nature, *no declaration is required when one is repelling an invasion, or seeking to punish the actual author of some crime*. . . . And no more necessary, by the law of nature, is any declaration when an owner wishes to lay hands on his

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involvement in hostilities is clearly indicated by the circumstances," had they wished to avoid the narrow meaning of the term in the law of nations.

17. George K. Smart, Private Libraries in Colonial Virginia, 10 Am. Literature 24 (1938), cited in A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 119 (The University Press of Virginia 1968). In fact, Edward McNall Burns, in his 1938 biography of James Madison, notes that our fourth President "was thoroughly familiar with the works of . . . Grotius," and that "[f]or his theories of international relations he drew copiously from Vattel, Pufendorf, and Bynkershoek." Edward M. Burns, James Madison: Philosopher of the Constitution 187 (1938).

18. 2 Catalogue of the Library of Thomas Jefferson 67-88 (1983) (Jefferson's library included both Latin and French editions of the multi-volume Grotius classic, De Jure Belli ac Pacis); see also id. at 363-75 (concerning "Maritime" Law); id. at 384-429 (concerning "Foreign Law," a category in which he placed the law of the other colonies).

> own property [that has been wrongfully taken by another].[19]

The eminent Dutch publicist argued further that it was superfluous for war to be "declared by both sides,"[20] and explained that "[a] declaration of war against the sovereign of a people is considered a declaration at the same time against not only all his subjects but all who will join him as allies and thereby become his accessories."[21] It was precisely because this formal legal action by one state against another carried such a strong content that the Founding Fathers—who believed that "[i]f there be one principle more deeply rooted than any other in the mind of every American, it is that we should have nothing to do with conquest"[22]—sought in the Constitution to encumber the process.

Similar observations were made by others before and after Grotius published his landmark treatise.[23] Perhaps the most important of the earlier writers was the Italian Alberico Gentili, whose two volume[24] study was published in 1612.[25] Gentili argued that it was "unjust, detestable, and savage" not to declare war properly when so required,[26] but qualified this by noting that "when war is undertaken for the purpose of necessary *defense*, the declaration is not at all required."[27] English scholar Richard Zouche (1590-1661) maintained the same position.[28] Samuel von Pufendorf (1632-94)

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19. Hugo Grotius, The Law of War and Peace, Book III, Chapter 3 at 289 (Louise R. Loomis trans., 1949) (emphasis added).

20. Id. at 291.

21. Id.

22. Thomas Jefferson, Letter to William Short, in 5 The Writings of Thomas Jefferson 364 (Paul Ford ed., 1895).

23. Nearly a century before Grotius, the Spaniard Franciscus de Victoria argued that "the prince . . . has authority to declare war, and no one else," but concluded that "[a]ny one . . . can accept and wage a defensive war." The power of self-defense was by nature a right and duty of the state. Franciscus de Victoria, De Indis et de Jure Belli Relectiones 167-69 (Ernest Nys ed., Carnegie Institution 1917). Thus,

> if within one and the same realm one city should take up arms against another, or one of the dukes against another duke, and the king should neglect or should lack courage to exact redress for the wrongs that have been done, the aggrieved city or duke may not only resort to self-defense, but may also commence war and take measures against the enemy and even kill the wrongdoers, there being no other adequate means of self-defense.

Id. at 169.

24. The treatise was largely composed of three previously published works.

25. 2 Alberico Gentili, De Jure Belli Libri Tres (John C. Rolfe trans., 1933) (1612).

26. Id. at 140.

27. Id. at 136 (emphasis added).

28. 2 Richard Zouche, Juris et Judicii Fecialis, sive, Juris Inter Gentes, et Quaestionum de Eodem Explicatio 171 (J.L. Brierly trans., 1911).

devoted but a sentence to the issue, referring his readers to Grotius.[29] Dutchman Cornelius Van Bynkershoek (1673-1743) argued that a declaration of war was "an act of mere humanity," and that no formalities were required to defend against aggression "since all laws permit the repelling of force by force."[30]

Another prominent authority on international law was Swiss jurist Emmerich de Vattel (1714-67). Vattel, who was frequently cited by early Americans like Jefferson,[31] Hamilton,[32] and John Marshall,[33] wrote that "[h]e who is attacked and only wages *defensive* war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy's declaration."[34] The German Christian Wolff (1679-1754) added in 1764, "[a] defensive war is naturally not to be announced."[35]

Another highly respected Swiss jurist was Jean Jacques Burlamaqui (1694-1748), whose writing was also popular among educated Americans during the years leading up to the Constitutional Convention. He, too, writes about the declaration of war, concluding that "this declaration takes place only in *offensive wars*."[36]

One of the earliest American authorities on international law was Chancellor James Kent. He reviewed the practice of states, observing that formally declaring war had "fallen into disuse," and noted that "[t]he jurists are . . . divided in opinion, in respect to the necessity or justice of some previous declaration to the enemy in the case of *offensive* war."[37] Elsewhere, he wrote:

> It has been usual to precede hostilities by a public declaration. The ancient Romans entered on war with great solemnity. . . . War with them was held unlawful without a

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29. Samuel von Pufendorf, Le Droit de la Nature et des Gens, Book VIII, ch. VI, § VII.

30. 2 Cornelius Van Bynkershoek, Quaestionum Juris Publici 18, 21 (Tenney Frank trans., 1930).

31. See, e.g., 3 Writings of Thomas Jefferson 237 (H.A. Washington ed., Memorial ed. 1853); 9 id. at 134-35; 16 id. at 185-86.

32. See, e.g., 4 The Works of Alexander Hamilton 315, 355, 380, 410, 435, 436, 451, 458 (Henry Cabot Lodge ed., 1904); 5 id. at 29, 36, 41, 44, 272, 383, 430-36, 438, 442, 477; 6 id. at 87, 110, 117, 131, 224.

33. See, e.g., 7 The Papers of John Marshall 312 (Charles F. Hobson ed., 1993).

34. Emmerich Vattel, The Law of Nations 316 (J. Chitty ed., 1849) (emphasis added); see also id. at 319 ("defensive war requires no declaration").

35. 2 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum (Joseph H. Drake trans., 1934).

36. Jean Jacques Burlamaqui, The Principles of Natural and Political Law 187 (T. Nugent trans., 7th ed. corrected, 1830).

37. Kent's Commentary on International Law 188 (J.T. Abdy ed., 1866) (emphasis added).

> previous declaration. But the modern civilians are divided in opinion as to its necessity and it is now mostly laid aside in practice. It is essential however that some public act should announce to the people their new condition with regard to a foreign nation, and authorize their *aggression*.[38]

A. *The Constitutional Convention*

When Madison and Gerry moved to change the draft constitutional text from giving Congress the power "to make war," a power taken from the Articles of Confederation which provided for no national executive, to the lesser power "to declare war," it was emphasized that this was to leave the President free to defend the nation against sudden attack and also to clarify that the conduct of hostilities was exclusively an executive responsibility.[39] Madison noted that, during the debate, "Mr. Sharman thought . . . . [t]he Executive sh[oul]d be able to *repel* and not to commence war."[40] Thus, it seems clear that the Founding Fathers understood that declarations of war were not necessary when force was used by the Commander in Chief to defend the nation against foreign aggression or to repel an attack.

B. *Mr. Jefferson Launches a Defensive War*

An interesting debate occurred in connection with Jefferson's First Annual Message to Congress of December 8, 1801. President Jefferson essentially misrepresented the facts of an armed naval conflict with the Barbary Pirates as follows:

> I sent a small squadron of frigates into the Mediterranean, with assurances to that power [Tripoli] of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The bey had already declared war in form. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded, and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the

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38. James Kent, Dissertations: Being the Preliminary Part of a Course of Law Lectures 66 (1991) (emphasis added).

39. 4 The Writings of James Madison 227 (Gaillard Hunt ed., 1903).

40. Id. (emphasis added).

> Tripolitan cruisers having fallen in with, and engaged the small schooner Enterprise, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries.[41]

Actually, thanks to the subsequent publication of the relevant historical documents by the Office of Naval Records and Library, by authority of the Congress, it is now established that Captain Richard Dale had been instructed by the Acting Secretary of the Navy, under direction of the President, to sail his squadron to the Mediterranean. If, upon arriving, he learned that the Barbary Pirates had declared war on the United States, he was ordered to "distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence—*by sinking, burning or destroying their ships & Vessels wherever you shall find them.*"[42]

In reality, the decision to liberate the vessel in question was made by Captain Dale, who had dispatched Lieutenant Andrew Sterret with the schooner *Enterprise* to proceed to the island of Malta to secure water for the fleet. Sterret was instructed not to be delayed by taking enemy ships as prize while en route to Malta, because "you have not much water on board." His orders provided that if he engaged an enemy vessel

> on your Passage to Malta you will heave all his Guns Over board Cut away his Masts, & leave him In a situation, that he can Just make out to get into some Port, but if coming back you will bring her with you if you think you can doe [sic] it with safety.[43]

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41. 3 The Writings of Thomas Jefferson 328-29 (Memorial ed., 1904). It is perhaps noteworthy that, even here, Jefferson recognizes the right of the Commander in Chief to authorize "defensive" military action, albeit a very narrowly defined concept of defense.

42. 1 Naval Documents Related to the United States War with the Barbary Powers 467 (Claude A. Swanson ed., 1939) (emphasis added).

43. Id. at 534-35.

The so-called defensive aspect of the operation was dictated entirely by operational expedience, not constitutional principle. It is quite possible that Jefferson intentionally overstated the case in order to motivate Congress to quickly unite behind his decision to use force.[44]

Documents contained in the Library of Congress collection of Jefferson's papers reveal that the issue had in fact been discussed during one of Jefferson's first cabinet meetings, on May 15, 1801. The subsequent instructions to Captain Dale to sink, burn, and destroy ships of the Barbary Pirates wherever they could be found reflected the strong consensus that emerged from that meeting regarding the scope of the Commander in Chief power. Typical of the views expressed at the cabinet meeting were those of Treasury Secretary Albert Gallatin, a former member of the Pennsylvania constitutional convention, three-term congressman, and well-known champion of legislative powers. As set down in Jefferson's own hand-written notes:

> Gallatin: to declare war & to make war is synonymous. The Exve can not put us in a state of war, but if we be put into that state either by the decla of Congress or of the other nation, the command & direction of the public force then belongs to the Exve.[45]

On the question of whether "the squadron now at Norfolk [should] be ordered to cruise in the Mediterranean" and "what shall be the object of the cruise," Jefferson noted that "all concur in the expediency of cruise."[46] He then recorded his next inquiry:

> [W]hether the captains may be authorized, if war exists, to search for & destroy the enemy vessels wherever they can find them? All except [Attorney General Lincoln] agree they should; M[adison], G[allatin], & S[mith] think they may pursue into the harbors, but M[adison] that they may not enter but in pursuit.[47]

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44. It is worth noting that Jefferson had long been a "hawk" on the issue of the Barbary Pirates. As early as 1786, he had favored trying to effect a peace with the Barbary Pirates "through the medium of war." However, Washington and Adams has preferred to emulate the European practice of paying ransom for hostages. Id. at 10.

45. Jefferson's Handwritten Note, May 15 Cabinet Meeting (copy on file with author).

46. Id.

47. Id.

As already discussed,[48] Acting Secretary of the Navy Samuel Smith subsequently issued orders to the squadron commander including broad authority to search out and destroy the enemy if war had been declared. For reasons that are unclear but may well pertain to a perception that, as a matter of legislative strategy, this approach would get Congress quickly "on board," Jefferson subsequently misrepresented the details of the *Enterprise* encounter in his first annual message to Congress. Jefferson's inaccurate statement to Congress has become a mainstay in the scholarship of advocates of narrow presidential authority to use military force in the absence of formal congressional sanction.

Whatever Jefferson's motives, his contention that the Commander in Chief lacked power to use offensive force in response to a foreign attack was sharply challenged. Alexander Hamilton, for example, wrote on December 17, 1801:

> [The Constitution provides that] "[t]he Congress shall have power to declare War;" the plain meaning of which is that, it is the peculiar and exclusive province of Congress, *when the 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*. 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 Congress is nugatory: it is at least unnecessary.[49]

A 1,961-page analysis of the Constitution, prepared by the Congressional Research Service of the Library of Congress, concluded that "Congress apparently accept[ed] Hamilton's view"[50] of this dispute. Hamilton's view also carried the day with the Supreme Court when President Abraham Lincoln's failure to get formal legislative sanction to attack secessionist states during the Civil War was challenged by the owner of ships seized as prizes of war. The Court majority concluded:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution

48. See supra note 42 and accompanying text.

49. 25 The Papers of Alexander Hamilton 455-56 (Harold C. Syrett & Jacob E. Cooke eds., 1977).

50. The Constitution of the United States of America: Analysis and Interpretation 327, S. Doc. No. 92-82, 92d Cong., 2d Sess., (1973).

> confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States .... He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . . [But i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And . . . it is none the less a war, although the declaration of it be "*unilateral.*" .... "A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other." . . . The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.[51]

All of this serves to strengthen the argument that the power to declare war vested in Congress by the Constitution is limited in scope and pertains only to the authorization of such offensive initiation of military force as would have required a formal declaration of war at the time the Constitution was drafted. It was, in essence, an additional safeguard to prevent the Commander in Chief from endangering the lives of America's youth and the solvency of the national treasury by launching painful and costly wars over political, diplomatic, or economic grievances or from a belief that geographic expansion by military conquest would serve the people's interests. Each House of Congress was given a "veto"[52] over such a decision as a part of our unique system of checks and balances. This was intended to be an important safeguard against abuse, but at the same time it is a narrow limitation on the President's general control of the nation's military forces. Under the constitutional scheme, the President needed no specific authorization to use force to defend against a military threat to the United States or to faithfully execute the laws or treaties of the nation in circumstances

51. The Prize Cases, 67 U.S. (2 Black) 635, 668-69 (1862).

52. It was common in the early period to describe the congressional power to declare war and the Senate's role in blocking diplomatic appointments and treaties as "negatives" or "vetoes." This is useful conceptually to emphasize that the initiative in all of these matters was to be with the executive.

under which the law of nations would not require a formal declaration.

C. *The Vitiation of the "Declare War" Clause*

Let us now return to Professor Ely's assertion that the fact that "[t]he oft-made observation that declarations of wars are 'outmoded' is entirely beside the point . . . . of any sensible constitutional argument one can imagine."[53] The counter-argument is really quite simple. States generally do not issue declarations of war today[54] because modern international law has outlawed the kinds of military actions that have historically been thought to require such an instrument under international law and which the Founding Fathers sought to limit by giving Congress an antecedent veto. By ratifying the Kellogg-Briand Treaty in 1929[55] and the United Nations Charter in 1945,[56] the United States effectively surrendered its once sovereign right to commit armed aggression. However, even had it not given its consent, a peremptory norm of modern international law, *jus cogens*,[57] clearly prohibits the aggressive use of military force by all states, at least in the absence of

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53. See supra note 14 and accompanying text.

54. In researching a 1983 book on the War Powers Resolution, the present writer contacted the Congressional Research Service of the Library of Congress, the Legal Adviser to the Department of State, and the Assistant General Counsel (International) in the Office of the Secretary of Defense in an effort to identify any formal "declaration of war" issued by any recognized nation since the late 1940's. No such declaration has been documented. Robert F. Turner, The War Powers Resolution: Its Implementation in Theory and Practice 41-42 n.87 (1983). There is some debate over whether statements made by Egyptian officials during the 1956 Suez Crisis and a Panamanian legislative act in December 1990 constituted such a declaration. Neither is likely such a declaration. However, even if a few exceptions could be found, the basic state practice has been to avoid such instruments. See, e.g., Navios Corp. v. The Ulysses II, 161 F.Supp. 932, 940 (D. Md. 1958) ("[I]t is difficult to tell when 'war' or 'a state of war' exists, in the present era of border incidents, police actions, armed clashes, and brush-fire wars."); Theodore Draper, Did Noriega Declare War?, N.Y. Rev. Books, Mar. 29, 1990 at 13.

55. General Treaty for the Renunciation of War As An Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

56. See, e.g., U.N. Charter, art. 2, ¶ 4, 59 Stat. 1031, T.S. 993, 3 Bev. 1153.

57. Widespread acceptance of the concept of *jus cogens* is relatively new in international law, and conflicts with the historic principle that state sovereignty could only be limited by consent. As defined by the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679, 98-99, art. 53 (entered into force Jan. 27, 1980). Although the United States has not yet ratified the treaty, the Department of State has taken the position that the treaty "is already generally recognized as the

authorization by the U.N. Security Council.[58] Thus, the President would violate a fundamental principle of modern international law if he initiated any use of military force which would require advance congressional authorization.

The only significant uses of force authorized for individual states today are in self-defense or pursuant to the authorization of the U.N. Security Council. While international practice admittedly has not always kept pace with legal theory, virtually all states now acknowledge that their once sovereign right to unilaterally initiate a war no longer exists. Arguably the greatest American international lawyer of this century, the late John Bassett Moore,[59] commented upon the conclusion of the 1928 Kellogg-Briand Pact: "[s]elf-defense by a nation is not war. When once you have outlawed war, do not use the word war any more."[60] Professor Ely's book simply ignores this offensive-defensive distinction.

D. *Authorizing War by Treaty*

It is sometimes asserted that the power of Congress to declare war cannot be altered or exercised through the treaty process because, under U.S. law, the Constitution clearly is supreme *vis á vis* treaties.[61] There are two distinct components to this line of reasoning: (1) that a treaty cannot deprive Congress of its constitu-

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authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st. Sess., at 1 (1971).

58. To what extent the Security Council could lawfully authorize states to engage in armed aggression against a third state is unclear and beyond the scope of this essay. However, as a brief observation, the actions taken, and threatened, pursuant to Security Council Resolution 940, of July 31, 1994, present an interesting test case. Although the legal justification for authorizing the use of armed force "to facilitate the departure from Haiti of the military leadership [and] the prompt return of the legitimately elected President" to Haiti was a Security Council determination that "the situation in Haiti continues to constitute a threat to peace and security in the region," there was not even a suggestion that General Cdras and his associates had planned, threatened, or engaged in the use of armed force against another state. The apparent reason for U.N. intervention was the promotion of democracy.

59. Lest I be accused of bias because John Bassett Moore once occupied the professorship at the Naval War College which I now hold, I would note that Professors Wormuth and Firmage have called him "the most eminent American scholar in international law." Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History & Law 33 (1986). One might argue that Professor Moore deserves the title for the first half of the century, with Yale Law School's Myres McDougal deserving the honor for the post-World War II era. Either way, John Bassett Moore's comments are worthy of careful attention.

60. William Hard, The World's Work, March, 1929, at 83, as cited in Quincy Wright, The Meaning of the Pact of Paris, 27 Am. J. Int'l L. 39, 51 (1933)(quoting John Bassett Moore).

61. See Reid v. Covert, 354 U.S. 1 (1957).

tional power to declare war on behalf of the United States; and (2) that a treaty cannot authorize the President to use military force without the prior approval of both Houses of Congress.

The first of these is fairly easy to disprove. Properly understood, the power of Congress with respect to the initiation of an offensive war, taking the nation from peace to war in the absence of hostile action by a foreign state, is a "negative" or veto over an executive decision. Congress was not expected to send envoys around the world searching out potential targets to attack. The President was invested with the primary responsibility for the care of the nation's military security and foreign relations, but he was prohibited from taking the extreme step of commencing a war without first having to persuade both Houses of Congress to grant their consent.

Nothing in the U.N. Charter alters this constitutional relationship. Congress still retains a veto if the President concludes that it is in the national interest to launch the kind of military operation for which international law would have required a formal declaration of war. The Charter has not taken away the constitutional safeguard of a legislative veto over U.S. aggression, but simply has outlawed the once sovereign right of states to initiate such actions. The important check on executive power remains in place, but as an exercise of its constitutional treaty-making process the United States has agreed to a more fundamental limitation that has essentially vitiated the utility of the legislative power to declare war. One of the fundamental attributes of sovereignty is the power to enter into international compacts, surrendering sovereign powers in return for similar concessions by other states. Nothing in the Constitution conflicts with this principle.[62]

The second argument is perhaps more interesting: Does the express grant to Congress of the power to declare war mean that this is the only constitutional means by which the United States can authorize the initiation of such hostilities, or could the same result be achieved through the use of the treaty power? Treaties, like statutes, are a part of the supreme law of the land.[63] Unlike other

62. From the standpoint of U.S. constitutional law, it is probably true that the President may still initiate hostilities of a nature and magnitude that would traditionally have required a declaration of war. Although such an act would almost certainly violate the Charter and other principles of international law, as long as Congress gave its consent, it is highly likely that U.S. courts would treat the issue as a "political question" and not intervene, at least in the absence of a strong claim of an infringement of individual constitutional rights.

63. U.S. Const. art. VI.

provisions of the Constitution,[64] Article I, Section 8 does not state that it provides the exclusive means for accomplishing a constitutional purpose. On this point Professor Ely's book is quite good. He writes:

> Tempting as the conclusion [that the House must be involved] may be, however, this argument cannot work. For surely the judgment here made explicit at the convention, that the power in question should not be vested solely in the Senate but had to be shared with the House of Representatives, underlay *every* congressional power listed in Article I, section 8.[65]

In reality, decisions concerning "Taxes, Duties, Imposts and Excises,"[66] the regulation of "Commerce with foreign Nations,"[67] duties of naturalized citizens,[68] protecting intellectual property,[69] defining and punishing "Felonies committed on the high Seas, and Offenses against the Law of Nations,"[70] "fix[ing] the Standard of

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64. See, e.g., id. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Even here, however, there is arguably some ambiguity, because the Constitution provides that a treaty is a part of the "Law of the Land." Id. art. VI.

65. Ely, supra note 3, at 15.

66. U.S. Const. art. I, § 8, cl. 1; see, e.g., Convention Establishing a Customs Cooperation Council, Dec. 15, 1950, 22 U.S.T. 320; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains, Dec. 31, 1975, U.S.-U.K., 31 U.S.T. 5668.

67. U.S. Const. art. I, § 8, cl. 3; see, e.g., Convention to Regulate Commerce, July 3, 1815, U.S.-U.K., 8 Stat. 228; United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668; Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411; Agreement to Refrain from Invoking the Obligations of Most-Favored-Nation Clause in Respect of Certain Multilateral Economic Conventions, July 15, 1934, 49 Stat. 3260, 165 L.N.T.S. 9.

68. U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization"); see, e.g., Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Apr. 12, 1930, 50 Stat. 1317, 178 L.N.T.S. 227.

69. U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); see, e.g., Convention on Literary and Artistic Copyrights, Aug. 11, 1910, 38 Stat. 1785; Patent Cooperation Treaty, with Regulations, June 19, 1970, 28 U.S.T. 7645; Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749.

70. U.S. Const. art. I, § 8, cl. 10; see, e.g., Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Convention to Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949.

Weights and Measurements,"[71] regulating postal matters,[72] making "Rules concerning Captures on Land and Water,"[73] and virtually every other Article I, section 8 power are routinely handled by treaty or executive agreement.[74] Despite occasional allegations and protests to the contrary, the right of the United States to initiate war, and thus the lawful right of Congress to declare war, has been clearly limited by treaty at least since the early days of this century.[75]

This does not necessarily mean that the congressional power to declare war is now totally devoid of content and utility. If a President decided it was in the national interest to commence an aggressive war in violation of the most fundamental principles of

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71. U.S. Const. art. I, § 8, cl. 5; see, e.g., Convention Concerning the Creation of an International Office of Weights and Measures, Regulations and Transient Provisions, May 20, 1875, 20 Stat. 709.

72. U.S. Const. art. I, § 8, cl. 7; see, e.g., Agreement for the Direct Exchange of Parcels by Parcel Post, Oct. 27, 1924, U.S.-U.K., 43 Stat. 1854; Constitution of the Universal Postal Union, July 10, 1964, 16 U.S.T. 1291.

73. U.S. Const. art. I, § 8, cl. 11; see, e.g., Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Convention Regarding the Rights of Neutrals at Sea, July 22, 1854, 10 Stat. 1105; Convention with Respect to the Laws and Customs of War on Land, with Annex of Regulations, July 29, 1899, 32 Stat. 1803.

74. As a matter of modern constitutional practice, the Executive Branch generally has taken the position that mutual security treaties will not be used as a constitutional basis for bypassing Congress. Whether this is a political or a constitutional decision is unclear. However, given the inadequate understanding of the Constitution by most modern policy makers, such statements may not be worth a great deal as legal precedent. To be sure, the political justification for involving Congress in decisions likely to lead to sustained involvement in major hostilities are considerable. As a matter of constitutional law, however, it is not difficult to construct an argument that the President could defend a NATO ally without further legislative sanction. Article 5 of the NATO treaty provides in part: "The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all; and consequently they agree . . . [to] assist the Party or Parties so attacked by taking . . . such action as it deems necessary, including the use of armed force . . . ." North Atlantic Treaty, Apr. 4, 1949, art. 6, 63 Stat. 2241, 2242, U.N.T.S. 243, 244. Thus, as a matter of law, this treaty makes an attack on a NATO ally an attack on the United States. Under the Constitution, there is widespread agreement by even the strongest proponents of congressional war powers that the President has independent authority to use force in response to an armed attack against the United States. Further, he not only has the power but a constitutional duty to see the "laws" of the nation, including its treaty commitments, "faithfully executed." U.S. Const. art. II, § 3. This was largely an academic issue throughout the Cold War, as U.S. military forces were intentionally deployed at the forward edge of the anticipated battle area to serve as "trip wires," because an attack on West Germany would of necessity have also constituted a direct attack on U.S. armed forces. Therefore, the constructive attack theory would be unnecessary because U.S. troops would actually be attacked.

75. See, e.g., Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241; Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259.

international law, this clause would still serve as a theoretical check against such adventurism. There may also be uses of force of a non-defensive nature that are legal under international law but which might nevertheless require congressional authorization. Precisely what, if anything, remains of the power of Congress to declare war is very much subject to legitimate constitutional debate.[76]

E. *Ignoring Historic Practice*

While Professor Ely acknowledges the existence of an argument for broad executive power based upon two centuries of practice, he simply dismisses this as irrelevant with a citation to the famous observation in *Powell v. McCormack* "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[77] One might argue, particularly given the extent of the constitutional practice and the long history of congressional acquiescence, that this approach begs the question and perhaps the practice is evidence that the actions were not viewed as contrary to the constitutional

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76. One might argue that military actions like "Operation Just Cause," the December 1990 intervention in Panama that led to the arrest of Manuel Noriega, still might require prior congressional authorization. A discussion of the merits of the Panama operation is beyond the scope of this Essay, but my review of Operation Just Cause at the end of 1989 left me with serious doubts that it could be justified as an act of self-defense under article 51 of the U.N. Charter. However, one could also argue that the operation fell below the threshold of the declaration of war clause. Other non-defensive settings, such as the U.N.-authorized humanitarian intervention in Haiti, might also arguably warrant some congressional role. Given the lack of clear guidance, one can only speculate as to how the Founding Fathers would have reacted to such a proposal. On the one hand, Congress clearly has an important "resource allocation" responsibility that might arguably justify giving it a voice in such matters. At the same time, "exceptions" to the President's general grant of executive power were to be construed narrowly, and the President clearly maintains responsibility for the general management of foreign and military affairs. Ultimately, the resource allocation function can be satisfied by the practical reality that the President will need to approach Congress for additional funds if the contemplated operation is going to exceed a certain threshold. The better view is probably that the existence of U.N. Security Council authorization and the President's duty and power to see the laws faithfully executed provide ample independent legal authority for the President to act with whatever military resources the Congress has seen fit to place at his disposal. The arguments for involving Congress in such decisions are primarily political, if adequate funding exists, but they are nevertheless very compelling. As the experiences of the 1950's and early 1960's suggest, where potential aggressors tended to moderate their goals following the enactment of joint resolutions authorizing the President to use force, aggression may be deterred if Congress and the President act in harmony in signaling that it will not be tolerated. Examples include Formosa (1955), the Middle East (1957), and Cuba (1962).

77. Ely, supra note 3, at 9.

scheme. Dismissing the importance of constitutional practice in the interpretative process rings of the most extreme form of "original intent" jurisprudence, and comports neither with the thinking of James Madison[78] nor the modern holdings of the Supreme Court.[79]

Another troubling aspect of the Ely approach is his suggestion that all use of force situations in the eyes of the Framers required either a declaration of war or the issuance of a congressional "letter of marque and reprisal," a process by which states prior to the mid-nineteenth century could authorize private individuals to seize a foreign vessel or other property either to redress a private grievance or to assist the state during public hostilities. From these two clauses, he concludes "[t]hus the framers and ratifiers of the Constitution provided that all acts of armed combat performed on behalf of the United States—*even if they didn't amount to 'war'*—had to be authorized by Congress."[80] This analysis ignores both defensive war and a range of public acts involving armed force short of war well-known in the writings on the law of nations read by the Founding Fathers.

IV. GOVERNMENT SECRECY AND REPUBLICAN GOVERNMENT

Some of Professor Ely's constitutional assertions seem almost bizarre. In another of his *ex cathedra* pronouncements, he asserts in one footnote "[s]ignificant clandestine campaigns within an ongoing and fully authorized war are unconstitutional unless there is a compelling military justification for keeping them secret."[81]

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78. Professor Edward McNall Burns writes:

> [Madison] insisted that the national legislature had at least a limited power to decide questions of constitutionality that had been left in doubt by the written organic law. To be sure no one Congress would have the right to settle the issue; but over a considerable time the deliberate and reiterated assertions of a particular constitutional construction, by a succession of Congresses, should be taken to possess a *de facto* validity and should therefore be entitled to the respect of all branches of the government. In other words, he believed in a kind of rule of *stare decisis* for legislative as well as judicial interpretations of the Constitution.

Edward McNall Burns, supra note 17, at 132.

Madison's belief that constitutional *lacunae* would be filled by early practice is reflected in his attitude toward the second National Bank Act. Although he had argued strenuously that the federal government lacked constitutional power to establish a bank, once the issue had been resolved against him he treated the issue as settled and did not object to subsequent legislation in the field.

79. See, e.g., Powell v. McCormack, 395 U.S. 486, 547 (1969).

80. Ely, supra note 3, at 67.

81. Id. at 199 n.60.

This claim is so at odds with the theory and practice of our Constitution as to have certainly warranted an explanation.

There seems to be a widespread assumption in the post-Vietnam era that the Founding Fathers viewed secrecy in government as incompatible with democratic theory. While it is true that they believed as a general principle that an informed public was essential to democratic government,[82] they were practical men who recognized that intelligence, military, and diplomatic matters often had to be kept secret not only from the nation's enemies, but even from the American people and their elected representatives in Congress.

A. *The Committee of Secret Correspondence*

The obvious inability of legislative bodies to manage the details of foreign communication led the Continental Congress to establish a "Committee of Secret Correspondence" on November 29, 1775.[83] Two weeks later, the Committee dispatched Thomas Story as a secret messenger to France, Holland, and England, with instructions to make contact with a network of unofficial "secret agents" serving the United States in foreign capitals, such as Silas Deane in France and Arthur Lee in England.

After meeting with Lee, Story returned to America and gave this report to the Committee, as recorded in a memorandum dated October 1, 1776 that was found among the Committee's official papers:

> On my leaving London, Arthur Lee, Esq., requested me to inform the Committee of [Secret] Correspondence that he had several conferences with the French Ambassador, who had communicated the same to the French court; that in consequence thereof the Duke de Vergennes had sent a gentleman to Mr. Lee, who informed him that the French Court could not think of entering into a war with England, but that they would assist America by sending

82. Presumably, most school children are familiar with Jefferson's famous maxim that, "[i]f a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." 14 Writings of Thomas Jefferson, supra note 41, at 384. Only slightly less popular is Madison's warning that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 The Writings of James Madison, supra note 39, at 103.

83. 3 Journals of the Continental Congress 392 (1905).

> from Holland this fall two hundred thousand pounds sterling worth of arms and ammunition to St. Eustatius, Martinico, or Cape François. That application was to be made to the Governours or Commandants of those places by inquiring for Monsieur Hortalez, and that on persons properly authorized applying, the above articles would be delivered to them.[84]

This arguably may have been the first "covert operation" to which the United States was a party, and the secret offer of £200,000 worth of arms was welcome news in America. It was also recognized as highly sensitive news. For that reason, Benjamin Franklin and the members of the small committee he chaired agreed without dissent that it could not be shared with their colleagues in the Congress. Their memorandum explains:

> The above intelligence was communicated to the subscribers [Franklin and Robert Morris], being the only two members of the Committee of Secret Correspondence now in the city, and our considering the nature and importance of it, we agree in opinion that *it is our indispensable duty to keep it secret even from Congress*, for the following reasons:
>
> First, Should it get to the ears of our enemies at New-York, they would undoubtedly take measures to intercept the supplies, and thereby deprive us not only of those succours, but of others expected by the same route.
>
> Second, as the Court of France have taken measures to negotiate this loan of succour in the most cautious and secret manner, should we divulge it immediately, we may not only lose the present benefit, but also render that Court cautious of any further connection with such unguarded people, and prevent their granting other loans and assistance that we stand in need of, and have directed Mr. Deane to ask of them. For it appears from our intelligence they are not disposed to enter into an immediate war with Britain, although disposed to support us in our contest with them. We therefore think it our duty to cultivate their favourable disposition towards us, draw from

84. Verbal Statement of Thomas Story to the Committee, 2 Peter Force, American Archives: A Documentary History of the North American Colonies, Fifth Series, 818-19 (1837-53) (emphasis omitted).

> them all the support we can, and in the end their private aid must assist to establish peace, or inevitably draw them in as parties to the war.
>
> Third, *We find by fatal experience that Congress consists of too many members to keep secrets.*[85]

The memorandum contained the written endorsements of Richard Henry Lee and William Hooper, to whom it had been shown some days later, with the notation that Lee ""concur[red] heartily" and Hooper "sincerely approve[d]" of its contents.[86]

B. *John Jay and* Federalist No. 64

One of the criticisms of American government under the Articles of Confederation was that all functions of government were entrusted to the Congress, which tended to micromanage military and diplomatic affairs and could not keep secrets. Robert R. Livingston agreed to serve as "Secretary of the United States of America for the Department of Foreign Affairs" in February 1782, but by the end of the year he had submitted his resignation in frustration. Nearly two years passed before John Jay was chosen as the successor to act as the "agent" of Congress in diplomatic intercourse. He, too, was quickly stymied by such things as the demand of Congress to receive every proposal submitted by the Spanish *Chargé* during treaty negotiations.[87]

Jay was particularly frustrated by the demands by Congress—which, in the absence of any executive organ of government, had exclusive control over war, treaties, and other aspects of the nation's foreign communications—for access to confidential information and diplomatic letters. Professor Henry Wriston, in his classic 1929 study, explains:

> It is interesting, in connection with the submission of Lafayette's letters to Congress, to observe that Jay regarded this as a serious limitation upon the value of the correspondence. *Congress never could keep any matter strictly confidential; someone always babbled.* "These circumstances must undoubtedly be a great restraint on those public and private characters from whom you would otherwise obtain useful hints and information. I for my

85. Id. at 819 (emphasis added).

86. Id.

87. An excellent discussion of this period is contained in Henry Merritt Wriston, Executive Agents in American Foreign Relations 18-22 (1929).

> part have long experienced the inconvenience of it, and in some instances very sensibly."[88]

These frustrations were widely shared. Jay went on to play a key role both in explaining the Constitution as a co-author of the *Federalist Papers* and in interpreting it as the nation's first Chief Justice. He took on the issues of secrecy and intelligence squarely in *Federalist* essay number 64, explaining the benefits of entrusting matters requiring secrecy to the executive while requiring the approval of two-thirds of the Senate before the President could ratify a completed treaty:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet *he will be able to manage the business of intelligence in such manner as prudence may suggest.*[89]

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88. Id. at 23 (emphasis added). The internal quotation is cited to a letter from Jay to Thomas Jefferson, then Minister to Paris, dated Apr. 24, 1787.

89. The Federalist No. 64 at 434-35 (John Jay) (Jacob E. Cooke ed., 1961) (emphasis added). Jay's contribution to understanding the Constitution in this Essay is of tremendous importance. Discussing Jay's subsequent role in explaining the meaning of the Constitution, and, specifically, the importance of this essay, University of Washington Professor Arthur Bestor (hardly a champion of strong executive power) has observed:

> In this contribution to *The Federalist* Jay was of course examining the completed Constitution, not offering suggestions to those about to frame it. As an interpretation of the original intent of the document, Jay's essay is of the highest importance. *His diplomatic experience*—commencing with his appointment as minister to Spain in 1779; followed by his participation, as one of the commissioners, in the negotiation of peace with Great Britain; and continuing, from 1784 on, with his service as Secretary of the United States for the Department of Foreign Affairs—*fitted him better than anyone else to judge the intended effect of the new Constitution both on the actual process of negotiation and on the character of the relationship that would have to be maintained between executive and legislative authorities.*

Arthur Bestor, Separation of Powers in the Domain of Foreign Affairs, 5 Seton Hall L. Rev. 527, 621-22 (1974) (emphasis added). Professor Gordon Baldwin concludes: "John Jay, an experienced attorney and diplomat, suggested that intelligence gathering arrangements are within the sole power of the President. In his view, they are a purely executive

Jay added, with an allusion to the shortcomings of the Articles of Confederation: "So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects."[90]

C. *Washington, the Senate, and Congressional Leaks*

Further contemporary insight into the Founding Fathers' perception that Congress could not be trusted to keep secrets is found in an informal note made by our first Secretary of State, Thomas Jefferson. Beginning during his service in this capacity, Jefferson made various notes, on what he called "passing transactions," to assist his memory. He later combined them into three volumes which we today know as *The Anas*. The following entry is instructive:

> *April 9th,* 1792. The President had wished to redeem our captives at Algiers, and to make peace with them on paying an annual tribute. The Senate were willing to approve this, but unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it. . . . *They said . . . that if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate*, and did not choose to take money from the treasury or to borrow. But he agreed he would enter into provisional treaties with the Algerines, not to be binding on us till ratified here.[91]

This is an important and largely forgotten part of our history. While certainly there was a recognition of the need for an informed public, and in most matters a presumption against government secrecy, experience had shown that secrecy was sometimes essential even beyond the scope of national security affairs, as illustrated by the Constitutional Convention of 1787.

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function linked to the treaty negotiation process, and the information so gained need not be reported to Congress." Gordon B. Baldwin, Congressional Power to Demand Disclosure of Foreign Intelligence Agreements, 3 Brooklyn J. Int'l L. 1, 19 (1976).

90. Federalist No. 64, supra note 89, at 435.

91. The Complete Anas of Thomas Jefferson 72-73 (Franklin B. Sawvel ed., 1903). This document also appears in 1 The Writings of Thomas Jefferson 190-91 (Ford ed.), supra note 22 (emphasis added).

D. *The Federal Convention of 1787*

On May 29, 1787, the fourth day of deliberation,[92] the Constitutional Convention adopted a series of rules as part of the Standing Orders of the House. Rules three through five provided:

> That no copy be taken of any entry on the journal during the sitting of the House without the leave of the House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published, or communicated without leave.[93]

The great constitutional historian Clinton Rossiter has described this so-called secrecy rule as "the most critical decision of a procedural nature the Convention was ever to make," and notes that "in later years, Madison insisted that 'no Constitution would ever have been adopted by the convention if the debates had been public.' "[94] Indeed, at his insistence, Madison's own important notes on the convention were not published until 1840, four years after his death and more than half a century after the convention had ended.[95]

E. *Early Congressional Practice*

Of particular value in trying to understand the original constitutional scheme are the acts of the First Congress, elected in early 1789. Two-thirds of its twenty-two senators and fifty-nine representatives had either been members of the Philadelphia Convention of 1787 or of state ratifying conventions, and only seven of them had opposed ratification. Accordingly, their actions are entitled to special weight. As Chief Justice John Marshall observed in 1821, in trying to determine the intent of the Founding Fathers, "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition."[96]

It is therefore noteworthy that the First Congress appropriated a "contingent fund" of $40,000, which was a considerable sum at the time, for the President to use for special diplomatic agents and other sensitive foreign affairs needs. The statute expressly provided "[t]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made*

92. The Convention was to begin on May 14, the second Monday in May, but a quorum did not arrive until May 25.

93. 1 The Records of the Federal Convention of 1787 15 (Max Farrand ed., 1966).

94. Clinton Rossiter, 1787: The Grand Convention 167 (1966).

95. 1 The Records of the Federal Convention, supra note 93, at xv.

96. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

public, and also *for the amount of such expenditures as he may think it advisable not to specify*."[97] It is significant that the President was not required to account to Congress "under injunction of secrecy" for sensitive expenditures. He was required simply to inform Congress of the sums expended so that the fund could be replenished as necessary. Congress was not to be told the details, as the Founding Fathers had learned first-hand the harm that could be done by leaks.

It is perhaps also worth noting that the contingent account was not only replenished but increased within three years to the level of one million dollars, with much of it reportedly being used for such expenditures as bribing foreign officials and ransoming hostages.[98] In this era of Boland Amendments and massive appropriations bills packed with "conditions," it is important to understand that the Founding Fathers envisioned something quite different. It is instructive, from time to time, to reflect upon the original plan. In an 1804 letter to Secretary of the Treasury Albert Gallatin, President Jefferson summarized the practice during the nation's first fifteen years:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[99]

When Jefferson used his contingent account to fund a paramilitary army of Greek and Arab mercenaries to invade Tripoli and pressure its Bey to surrender American hostages, no one seems to have complained that Congress was not informed in advance of the operation.[100] Jefferson's successor, James Madison, a man of some familiarity with the meaning of the Constitution, found that he needed additional funds to underwrite a covert action to gain control over disputed territory between Georgia and Spanish Florida

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97. Act of 1 July 1790, 1 Stat. 129 (1790) (emphasis added).

98. Ed Sayle, The Historical Underpinnings of the U.S. Intelligence Community, 1 Int'l J. of Intelligence and Counterintelligence 9 (1986).

99. 11 The Writings of Thomas Jefferson, supra note 41, at 5, 9, 10 .

100. I discuss this incident in greater detail in a forthcoming book.

in 1811, so he asked Congress to enact a "secret appropriation" of $100,000 for that purpose. The need for secrecy having passed, the secret appropriation was discretely made public years later, in 1818.[101] In light of this history, Professor Ely's contention that, even during periods of authorized war, the Constitution mandates that every sensitive operation must be made public is difficult to understand.

V. IGNORING THE PRESIDENT'S "EXECUTIVE" POWER

Perhaps the greatest shortcoming of Professor Ely's discussion of the constitutional text, however, is his total failure to even acknowledge the existence of Article II, section 1, which provides that "The executive Power shall be vested in a President of the United States of America."[102] Although the clause has been largely ignored in the post-Vietnam debate over the separation of national security powers under the Constitution, the Founding Fathers considered it to be a power of tremendous importance.

As early as 1789, when the first session of the first House of Representatives debated the establishment of a Department of Foreign Affairs (later renamed Department of State), the issue arose as to what authority would be required to remove a cabinet secretary from office. The Constitution established a process for appointment by the President with the advice and consent of the Senate,[103] but it was silent on the removal power. During an important debate that was widely understood as establishing a major constitutional precedent, some legislators argued that the Secretary of Foreign Affairs could not be removed without the consent of the Senate and others went so far as to suggest that, given the absence of constitutional guidance to the contrary, there would be life tenure unless an incumbent secretary resigned or was impeached.

Representative James Madison argued that the President should be free to dismiss members of his cabinet despite the fact that the Constitution required Senate advice and consent to their appointment. Madison reasoned:

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101. 3 Stat. 471 (1818).

102. U.S. Const. art. II, § 1, cl. 1.

103. [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

U.S. Const. art. II, § 2, cl. 2.

> The doctrine . . . which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be a great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution no less explicit . . . ; it is that part which declares that *the Executive power shall be vested in a President of the United States*. The association of the Senate with the president in exercising that particular function, is an exception to this general rule; and *exceptions to general rules, I conceive, are ever to be taken strictly*.[104]

Madison was hardly alone in interpreting the "executive power" clause as vesting in the President all federal government powers viewed as executive in their nature unless clearly lodged elsewhere in the instrument. On April 24, 1790, Madison's close friend and mentor, Jefferson, responded to a request from President Washington for legal advice on whether it was necessary to consult with the Senate on issues concerning ambassadors and ministers that were not specifically addressed in the Constitution. Although the Constitution provided that ambassadors nominated by the President could not be appointed without Senate advice and consent,[105] it did not specify who would decide to which countries it would be necessary to send ambassadors, what grade would be appropriate for each post, and the like. Jefferson's argument not only closely paralleled the earlier reasoning of his friend Madison, but went further in clarifying that these executive powers included the control of the nation's foreign intercourse. He wrote:

> The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of representatives; *it has declared that "the Executive powers shall be vested in the President," submitting only special articles*

104. 1 Annals of Cong. 515-17 (J. Gales ed., 1789) (emphasis added).
105. See supra note 103 and accompanying text.

> *of it to a negative by the Senate*; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.
>
> *The transaction of business with foreign nations is Executive altogether.* It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.[106]

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106. 16 The Papers of Thomas Jefferson 378-79 (Julian P. Boyd ed., 1961). Readers may wonder on what basis Jefferson argued that control over foreign affairs was inherently "executive" in nature. The answer is not difficult. Like the other educated men of his era who were nurtured on the writings of Locke, Montesquieu, and Blackstone, Jefferson had been raised to consider, in Locke's language, "the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth" to be the exclusive province of the Executive. See, John Locke, The Second Treatise on Civil Government § 146. Locke actually coined the term "federative" power to describe this authority. He noted that it required the same attributes of secrecy, speed, and unity of plan that were necessary for the execution of the municipal laws and argued that the executive and federative powers were "hardly to be separated, and placed, at the same time, in the hands of distinct Persons." Montesquieu, proclaimed by Madison to be "[t]he oracle who is always consulted and cited" on the subject of separation of powers (The Federalist No. 47 at 324), drew a distinction between "the executive [power] in regard to matters that depend on the civil law," and "the executive [power] in respect to things dependent on the law of nations," by which he argued "the prince or magistrate . . . makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions." Montesquieu, The Spirit of the Laws 151 (Charles T. Nugent trans., 1949). William Blackstone wrote in his widely-read Commentaries that "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men." 1 William Blackstone, Commentaries on the Laws of England 245 (1st ed., 1765).

For further relevant excerpts from these writers, see Robert F. Turner, The Constitutional Framework for the Division of National Security Powers between Congress, the President, and the Courts, in John N. Moore et al., National Security Law 749-56 (1990). When Jefferson referred to "exceptions" to the control of foreign affairs being "construed strictly," it is clear that he viewed the power of Congress to declare war as such an exception. See infra notes 160-65 and accompanying text. Jefferson warned Madison in 1787 to guard against the "evil" of the legislature becoming involved in "the details of execution." In a letter to Edward Carrington from Paris dated August 4, 1787, Jefferson wrote:

> I think it very material, to separate, in the hands of Congress, the executive and legislative powers, as the judiciary already are, in some degree. This, I hope, will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have passed them, and the things never done.

Jefferson went on to write:

> The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.[107]

Jefferson wrote in the margin of his file copy of this memorandum "endorsed by Washington,"[108] a fact that is clear from an entry in Washington's diary made three days after the memorandum was submitted:

> Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.[109]

Alexander Hamilton made an almost identical observation three years later in his first *Pacificus* letter. Hamilton wrote:

> The second Article of the Constitution of the United States, section 1st, establishes this general Proposition,

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6 The Writings of Thomas Jefferson supra note 22, at 228. Two years later, in a March 14, 1789, letter to Madison, Jefferson warned: "The executive, in our governments, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years." 7 id. at 312. The idea that Congress would attempt to aggrandize its power by interpreting the limited power to declare war to encompass the power to seize control over decisions regarding troop movements or other "core" Commander in Chief authority might not have greatly surprised Jefferson, but it certainly would have displeased him.

107. 16 The Papers of Thomas Jefferson, supra note 106, at 379.

108. Id. at 379 n.9.

109. 4 George Washington Diaries 122 (John C. Fitzpatrick ed., 1925).

That "The EXECUTIVE POWER shall be vested in a President of the United States of America."

The same article in a succeeding Section proceeds to designate particular cases of Executive Power. It declares among other things that the President shall be Commander in Cheif [sic] of the army and navy of the UStates and of the Militia of the several states when called into the actual service of the UStates, that he shall have power by and with the advice of the senate to make treaties; that it shall be his duty to receive ambassadors and other public Ministers and to take care that the laws be faithfully executed.

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; as in regard to the cooperation of the Senate in the appointment of Officers and the making of treaties; which are qualifica[tions] of the general executive powers of appointing officers and making treaties: Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd [sic] as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governt. the expressions are—*"All Legislative powers herein granted shall be vested in a Congress of the UStates;"* in that which grants the Executive Power the expressions are, as already quoted "The EXECUTIVE PO[WER] shall be vested in a President of the UStates of America." . . .

The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and *qualifications which are expressed in the instrument. . . .*

. . . .

It deserves to be remarked, that as the participation of the Senate in the making of Treaties, and the power of the

> *Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.*[110]

It is worth noting that Hamilton's reasoning was expressly embraced by Chief Justice William Howard Taft more than 130 years later in an opinion joined by a majority of the Court. Discussing Washington's proclamation of neutrality, the Chief Justice reasoned:

> That proclamation was at first criticized as an abuse of executive authority. It has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration, and has been often followed by succeeding Presidents. Hamilton's argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article II of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the First Congress as to the Presidential removal depends, and he cites it as authority.[111]

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110. 15 The Papers of Alexander Hamilton 38-39, 42 (Harold C. Syrett ed., 1969) (footnote omitted).

111. Myers v. United States, 272 U.S. 52, 137 (1926). The Chief Justice argued further:

> The requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, would not be enlarged beyond the words used. Madison, 1 Annals 462, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was a convincing indication that none was intended. . . .
>
> Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, [and] that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication.

Id. at 164.

Another prominent Founding Father to address this issue was John Marshall, who after having participated in the Virginia convention for the ratification of the U.S. Constitution and prior to serving briefly as Secretary of State and being appointed by President John Adams as Chief Justice of the United States (a position he held with distinction for three decades), was elected to the Sixth Congress (1799-1800) as a Federalist member of the House of Representatives. One of the great debates during that period, occupying eighty pages in the *Annals of Congress*, was the "Case of Jonathan Robbins."

The record shows that Republican critics of President Adams, led by Edward Livingston of New York, introduced a resolution criticizing the President for having unilaterally surrendered—pursuant to an extradition provision of the Jay Treaty—a British seaman named Thomas Nash who, unbeknownst to the President at the time of extradition,[112] claimed to be an impressed U.S. citizen named Jonathan Robbins. As the lengthy debate drew to a close, John Marshall was scheduled to make the final statement against the resolution. Marshall's brilliant analysis was the most memorable consequence of the entire episode, and has repeatedly been cited by the Supreme Court.[113] The *Annals* provide this summary of Marshall's argument:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
>
> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

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112. The most thorough discussion of the Robbins affair I have encountered is a Master's Degree Thesis in the library of the University of Virginia. Lawrence D. Cress, The Jonathan Robbins-Thomas Nash Incident, 1799-1800 (1973) (unpublished M. Hist. thesis, University of Virginia). Mr. Cress concludes that Nash (Robbins) was not a U.S. citizen.

113. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893) (referring to the "masterly and conclusive argument of John Marshall in the House of Representatives"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (alluding to "Marshall's great argument" relating to the President's exclusive power to represent the United States to foreign nations).

> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it. . . .
>
> The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.
>
> If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connexion between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union? . . .
>
> It is then demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department.
>
> . . . In this respect, the President expresses constitutionally the will of the nation . . . . This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a Constitutional power.[114]

Pennsylvania Republican Albert Gallatin had been scheduled to respond to Marshall, but he was reportedly left virtually speechless by the power of Marshall's analysis. His biographer writes that Gallatin turned to his Republican friends and stated "[g]entlemen,

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114. 1 Annals of Cong. 613-15 (Joseph Gales ed., 1851). Note Marshall's assertion that "[i]n this respect, the President expresses constitutionally the will of the nation." Cf. Blackstone's assertion that "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation." 1 Blackstone, supra note 106, at 245.

answer it yourself; for my part I think it unanswerable."[115] Without further debate, Livingston's resolution was defeated by nearly a two-to-one margin (61-35),[116] and shortly thereafter a resolution introduced by Delaware Federalist James A. Bayard, expressing approval of the manner in which President Adams had handled the Robbins affair, was approved 62-35.[117] Even Republican Thomas Jefferson, who had lost the election of 1796 to Adams by three votes and was a strong rival of Federalist John Marshall, acknowledged privately that Marshall had distinguished himself greatly in the debate.[118]

Thus, the historical record is reasonably clear.[119] Contrary to the modern conventional wisdom, the reason U.S presidents have controlled U.S. foreign relations from the days of George Washington was not a result of some fluke caused by excessive admiration for Washington. Instead, the Constitution was designed that way.

Furthermore, the President's special responsibilities for the nation's foreign relations have been acknowledged time and again even by Congress. When the Senate first established a standing Committee on Foreign Relations in 1816, one of its first reports stated:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and . . . . [f]or his conduct he is responsible to the Constitution. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[120]

Nearly four decades later, however, in the final days of the Thirty-Third Congress, a detailed statute attempting to regulate such diplomatic matters as the destinations and grades for ambassadorial appointments was introduced into the House by a first-term Representative who portrayed it as "a compilation of existing laws, placed in a proper connection to render plain the few modifi-

115. Henry Adams, The Life of Albert Gallatin 232 (J.B. Lippincott & Co. 1879).

116. 10 Annals of Cong. 618-19 (1800).

117. Id. at 621.

118. 9 Works of Thomas Jefferson 121 (Paul Ford ed., Fed. ed., 1905).

119. This is not to say there were not dissenters or differences of viewpoint. However, my research reveals a remarkable consensus on this point.

120. Edward S. Corwin, The President: Office and Powers 1787-1987 441 n.114 (4th rev. ed. 1957).

cations proposed."[121] Noting that no changes had been made in the country's "machinery for foreign intercourse . . . during a period of sixty-five years," he argued that it had been a mistake to leave so many decisions regarding diplomacy to the discretion of the executive. Among other things, this resulted in uncertainty because many rules were changed as Administrations changed and new Secretaries of State took office. He concluded that the original practice set in 1789 resulted from "the general confidence reposed in the moderation and good sense of General Washington, who was then President," which "checked all disposition to question the amount of power left to be exercised at his discretion."[122]

As one Representative later put it, the quickly-approved statute was "a bill that nobody knew anything about."[123] A member of the upper house remarked "[w]hen the bill was passed [in the Senate] . . . it went through under that steam pressure which very often carries bills through the Senate."[124] Senator James A. Bayard, Jr., a Democrat from Delaware, argued: "That bill came to us under such circumstances, that, like many other laws which we pass, it was passed without being discussed, debated, or considered at all."[125]

In defense of his powers, President Franklin Pierce had simply announced that he would ignore the provisions of the statute that he felt were unconstitutional.[126] Upon reconsideration of what it had done, the Congress moved quickly to repeal the objectionable portions of the earlier law. As reported on July 28, 1856, Senate Foreign Relations Committee Chairman James M. Mason, a Virginia Democrat, argued:

> Mr. President, in a very few words I will state to the Senate the object of this bill. At the last session of Congress

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121. Cong. Globe, 33d Cong., 2d Sess. 246 (1855).

122. Id. at 245.

123. Cong. Globe, 34th Cong., 1st Sess. 2458 (1856) (Rep. George Washington Jones (D.-Tenn.)).

124. Id. at 787 (Sen. Benjamin Fitzpatrick (D.-Ala.)). Senate Foreign Relations Committee Chairman James M. Mason (D.-Va.) explained that:

> The act was passed at a very late period of the last session in the House of Representatives, and it was found impossible in the Senate to amend it without [jeopardizing] the whole bill, which embraced the consular as well as the diplomatic system; and therefore many of those objectionable features in the bill we were obliged to allow to pass unnoticed.

Id. at 786.

125. Id. at 787.

126. Id. at 786.

a law was passed of a very voluminous character, embracing both the consular and diplomatic services. One of the features of that law was in the nature of a mandate on the President, prescribing the grade of our foreign ministers, and affixing to those grades thus prescribed an appropriate salary. The Executive, very properly, I think, declined complying with the terms of the law, because it trenched on the executive trust. The President necessarily must be the sole judge of the grades of our foreign ministers. . . .

The principal object, therefore, of this bill is, leaving it discretionary with the President, as to the grade of ministers abroad, to affix to each of those grades, when appointed, an appropriate salary . . . .

[The Bill has been] carefully worded with a view to leave, as it was the intention of the bill to leave, all that pertains to the diplomatic service of the country . . . exclusively to the Executive, where we consider the Constitution has placed it.

Our foreign ministers . . . are . . . of necessity the organs of the Executive. The Constitution of the United States has lodged with the President the executive power, without undertaking to define what the executive power is. Careful and jealous as it has been in every other grant of power—careful to measure out power to the Legislature—in giving to the President the authority that is intended to be given to him, it is simply spoken of as the executive power. Now, as we consider it, a part of executive power is supreme control, free from the intervention of legislation, over the diplomatic service. . . . As we understand—certainly as I understand—that is a matter which is not within legislative control, because it pertains to the diplomatic service. These are the immediate organs of the Executive, and must remain so, subject to his control, and subject to his instruction and to the discretion of his instructions without intervention from any quarter. . . .

I mean to say exactly what I have said, that the whole executive power by the Constitution is lodged in the President; that the diplomatic service, in our foreign intercourse, I understand to be necessarily a part of the executive power; and that, if Congress undertakes to prescribe minutely what the minister shall do, or what he

> shall not do, abroad . . . it trenches on the executive power. The President may find it, and doubtless has found it, important and desirable, in the conduct of our foreign intercourse from time to time, to use some portion of the fund, which is always placed at the control of the Executive for contingent expenses of foreign intercourse, to enable a minister to perform acts which, if we could legislate on the subject, he would be forbidden from doing by law.[127]

Another enlightening congressional debate occurred in the spring of 1896, a year after revolution had broken out in Cuba. Congress had adopted a concurrent resolution expressing the opinion that the state of belligerency between Spain and Cuba should be officially recognized. This was ignored by President Cleveland. Early in 1897, the Senate considered a joint resolution (which, unlike the earlier concurrent resolution, would have the legal effect of a statute) purporting to acknowledge "the independence of the Republic of Cuba."[128] During the lengthy floor debate that followed, Senator Eugene Hale, an attorney who served five terms each in the House and Senate (longer in the Senate than any of his contemporaries),[129] introduced into the *Congressional Record* a massive "Memorandum Upon Power to Recognize Independence of a New Foreign State."[130] Citing and quoting extensively from court decisions, the works of prominent jurists, and congressional precedents themselves, the memorandum presented eight propositions that could be "clearly established." The first of these was that "[n]either the Legislative nor the Executive Branch of the Government is Subordinate to the Other. They were intended to be and are coordinate."[131] In section three, the memorandum argued that it was "of the highest importance" that the "two independent and coordinate branches of the Government should be always in accord, and that neither should endeavor to force action of the other by indirect means,"[132] although either branch "May Properly Express Its Opinion or Wishes to the Other."[133]

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127. Cong. Globe, 34th Cong., 1st Sess. 1797-98 (1856).

128. Quoted in Corwin, supra note 120, at 188-89.

129. Biographical Dictionary of the American Congress 1774-1989, S. Doc. No. 34, 100th Cong., 2d Sess. 1110 (1989).

130. 29 Cong. Rec. 663-82 (1897).

131. Id. at 663.

132. Id. at 664.

133. Id.

The bulk of the Hale memorandum was devoted to establishing that "acts Concerning Foreign Relations" were "Executive in their nature."[134] Under this heading the memorandum argued:

> [T]he initiation of a foreign policy, not taking the form of a treaty, belongs to the executive exclusively . . . .
>
> It is in the light of this conception of the executive character of foreign negotiations and acts concerning foreign relations that our Constitution gave the President power to send and receive ministers and agents to or from any country he sees fit and when he sees fit, and not to send or receive any, as he may think best; also, the power to make treaties—that is, to negotiate with or without agents, as he may prefer, when he may prefer, or not at all, if he prefer; to draw up such articles as may suit him, and to ratify the acts of his plenipotentiaries, instructed by him, the only qualification of his power being the advice and consent of the States in the Senate to the treaty he makes.
>
> These grants confirm the executive character of the proceedings and indicate an intent to give all the power to the President which the Federal Government itself was to possess—the general control of foreign relations. . . .
>
> . . . While, therefore, Congress can refuse to appropriate to carry a treaty into effect, since no one can compel it to do so, and the President can refuse to carry on a war authorized by Congress, or to execute any law passed by Congress, yet such proceedings are not constitutional and could never become constitutional by habit, for our Constitution is written, and each part of the Government represents the will of the whole nation in exercising the functions assigned to it, and rebels against the will of the nation in preventing another part from exercising its functions to the fullest extent.[135]

Turning to the views of the early American statesmen, the memorandum quoted Senator William Maclay, a Democrat from Pennsylvania, from his *Sketches of Debate in the First Senate*, as having said the following during the debate on the bill to organize the Department of Foreign Affairs:

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134. Id. at 665.
135. Id.

> The first clause was: "There shall be an executive department," etc. There are a number of such bills, and may be many more, tending to direct the most minute particle of the President's conduct. If he is to be directed how he shall do everything, it follows he must do nothing without direction. To what purpose then is the executive power lodged in the President, if he can do nothing without a law directing the mode, manner, and, of course, the thing to be done? May not the two Houses of Congress, on this principle, pass a law depriving him of all powers? You may say it will not get his approbation. But two-thirds of both Houses will make it a law without him, and the Constitution is undone at once.[136]

The memorandum then concluded "it thus appears that even the establishment of an executive department of foreign affairs was regarded as trenching upon the free action of the Executive in its proper sphere."[137]

Great emphasis was placed in the memorandum on the need for secrecy in foreign affairs. Referring to the earliest days of the republic, it said:

> In those days the President alone was supposed to know all that was needed to be known to manage foreign affairs and *to get his knowledge from undisclosed correspondence with agents appointed by him*. The Constitution is to be read in the light of this fact, and, so read, we can not doubt that foreign affairs were intended to be conducted as they had been in all European countries by the possessor of such knowledge, and that even the initiative in making war was expected to be taken upon a communication from the President of such information, and not upon idle rumors and the tales of travelers. . . .
>
> . . . It still remains true, therefore, that the general management of foreign affairs should be left to the one having charge of the diplomatic agents and in continual correspondence with them.[138]

In the end, the joint resolution attempting to "recognize" Cuba was referred to the Committee on Foreign Relations, along with

136. Id.
137. Id.
138. Id. at 669 (emphasis added).

another such resolution proffering "the friendly offices" of the United States "with the government of Spain to bring to a close the war between Spain and the Republic of Cuba."[139] After an extensive survey of the precedent, the committee rendered an adverse report on the resolutions on constitutional ground, saying in part:

> The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity . . . .
>
> Congress can help the Cuban insurgents by legislation in many ways, but it can not help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct will be shown by the opinions of jurists and statesmen of the past.[140]

Further evidence of the traditional congressional deference to the executive in foreign affairs is found in a landmark 1906 debate. Senator John Coit Spooner, a three-term Wisconsin Republican and reputedly "one of the best constitutional lawyers of his time,"[141] presented a major address on presidential powers in foreign affairs while opposing a resolution by Senator Augustus Bacon, a Georgia Democrat, calling on President Roosevelt to provide the Senate with negotiating instructions and other background material regarding Morocco. Particularly because of his legal expertise, Senator Spooner's remarks have received frequent attention from constitutional scholars.[142]

Spooner argued that the Senate had "nothing whatever to do" with "the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the

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139. Quoted in Corwin, supra note 120, at 189.

140. Id.; see also, Quincy Wright, The Control of American Foreign Relations 21 (1922).

141. Bestor, supra note 89, at 661. Senator Spooner declined an invitation to serve as Attorney General in the McKinley administration, as well as a similar request from President Taft to serve as Secretary of State. Biographical Directory of the U.S. Congress 1855 (1989).

142. See, e.g., Corwin, supra note 120, at 182; Bestor, supra note 89, at 661.

making of a treaty."[143] Except for this role in treaty making, "the Senate, under the Constitution, has obviously neither responsibilities nor power."[144] He continued:

> From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.[145]

Spooner did not challenge the propriety of the Senate passing a resolution "expressive of its opinion" on foreign policy matters. However, he argued "if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President."[146] As far as U.S. foreign relations were concerned, excluding "only the Senate's participation in the making of treaties," Spooner argued that "the President has the absolute and uncontrolled and uncontrollable authority."[147] Noting that "secrecy" was "deemed by the framers" to be "of the most vital importance,"[148] Senator Spooner continued:

> [T]he three great coordinate branches of this Government are made by the Constitution independent of each other except where the Constitution provides otherwise. We have no right to assume the exercise of any executive power save under the Constitution . . . . We as the Senate, a part of the treaty-making power, have no more right under the Constitution to invade the prerogative of the President to deal with our foreign relations, to conduct them, to negotiate treaties, and that is not all—the conduct of our foreign relations is not limited to the negotiation of treaties—we have no more right under the

143. 40 Cong. Rec. 1418 (1906).
144. Id.
145. Id.
146. Id.
147. Id.
148. Id. at 1420.

> Constitution to invade that prerogative than he has to invade the prerogative of legislation.[149]

Before citing various treatises, court cases, and other authority to support his position, Senator Spooner reminded his colleagues of the "act creating the Department of State, in 1789," which "was an exception to the acts creating the other Departments of the Government." The State Department was "a Department which from the beginning the Senate has never assumed the right to direct or control."[150]

During his lengthy presentation, Senator Spooner engaged in a rather heated colloquy with Senator Benjamin Tillman of South Carolina, who opposed the President's decision to deploy warships to Santo Domingo. This illuminating exchange occurred:

> Mr. Spooner. . . . Would the Senator have had our ships withdrawn from Santo Domingo? He complained the other day because they were not. . . .
>
> Mr. Tillman. Does the Senator contend that there were any American citizens there whose lives where in jeopardy, or any facts to show it?
>
> Mr. Spooner. There were undoubtedly American citizens there. I know nothing definite upon that subject.
>
> Mr. Tillman. You had better get some facts and not guess.
>
> Mr. Spooner. I know this: I know it is for the President to say where our ships shall be.
>
> Mr. Tillman. I do not dispute that proposition at all . . . .[151]

When Senator Spooner had completed his extensive remarks, Senator Henry Cabot Lodge of Massachusetts, a Harvard Law School graduate whose six terms in the Senate included subsequent service as Majority Leader, commented:

> Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making, or as to the condition of the Santo Domingo question, which

149. Id.
150. Id.
151. Id. at 1424.

> we have heard from the Senator from Wisconsin [Mr. Spooner] this afternoon.[152]

Professor Corwin notes that during this debate even Senator Bacon conceded that "the question of the President's sending or refusing to send any communication to the Senate is not to be judged by legal right, but [is] . . . one of courtesy between the President and that body."[153] Corwin adds: "The record of practice amply bears out this statement."[154]

In the post-Vietnam era, modern commentators have largely ignored this lengthy history of acknowledging that the President's primary responsibility for foreign affairs is not an "implied power," nor the chance result of George Washington having out-jumped the congressional center and grabbed the ball on a matter either overlooked by the Framers or left unresolved as an "invitation to struggle."[155] Instead, it was expressly vested in the President as an understood component of the "executive power" contained in Article II, section 1 of the Constitution. The traditional view was summarized by Professor Quincy Wright, former President of both the American Political Science Association and the American Society of International Law: "[W]hen the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant . . . ."[156] Similarly, Professor Louis Henkin, of Columbia Law School, observed fifty years later that "[t]he executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[157]

To be sure, the Founding Fathers departed from the theories of Locke and the others by providing for important checks by the Senate and Congress over certain aspects of the President's conduct of the nation's foreign intercourse. Among these was the vesting in Congress of the power to declare war. This may tempt some to conclude that this important authority was viewed by the Founding Fathers as inherently a legislative power, but that argu-

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152. Id. at 1431.

153. Corwin, supra note 120, at 182-83.

154. Id. at 183.

155. One of the most frequently cited remarks on this subject in Professor Corwin's assertion that "the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy." Corwin, supra note 120, at 171.

156. Quincy Wright, supra note 140.

157. Louis Henkin, Foreign Affairs and the Constitution 43 (1972).

ment is difficult to sustain. As already noted, Hamilton expressly mentioned that "the power of the Legislature to declare war" was an exception "out of the general 'executive power' vested in the President," and thus was "to be construed strictly."[158]

Although Jefferson is by far the most often quoted of the Founding Fathers on this issue by advocates of strong congressional war powers,[159] he, too, argued that "exceptions" vested in the Senate to the President's general control of "business with foreign nations" were to be "construed strictly."[160] It is also reasonably clear that Jefferson viewed the business of war, including the power to declare war, as executive by nature. Strong evidence for such a conclusion can be found through a careful reading of a 1789 letter he wrote to Madison, that is one of the two most often cited of Jefferson quotes by advocates of broad legislative war powers.[161]

The letter in question was written on September 6, 1789, while Jefferson was Minister to France and Madison was serving in Congress. Written prior to the invention of his polygraph (which made simultaneous identical copies of his correspondence with a second pen), he hand-copied the letter both for his own records and as an enclosure for a letter sent three days later to Dr. Richard Gem. There are minor differences in the text between the various copies. The version which Library of Congress experts conclude was actually sent, presumably the one found in Madison's papers, reads in part: "[w]e have already given in example one effectual check to the Dog of war, by transferring the power of declaring war from the Executive to the Legislative body, from those who are to spend to those who are to pay."[162] Another frequently quoted version written in Jefferson's handwriting, presumably an earlier draft (on the theory that he might make improvements in subsequent copies and would wish to send the best version to his correspondent), reads: "[w]e have already given in example one effectual check to the Dog of war, by transferring the power of letting him loose from the executive to the Legislative body, from those who are to spend

158. See 15 The Papers of Alexander Hamilton, supra note 110, at 42.

159. "[A]dvocates of the War Powers Resolution turned to [Jefferson] perhaps more often than to any other founder as authority for their opinion that the president's war power was limited to meeting attacks." Robert Scigliano, The War Powers Resolution and the War Powers, in Joseph M. Bessette & Jeffrey Tulis, The Presidency in the Constitutional Order 138 (1981).

160. 16 The Papers of Thomas Jefferson, supra note 106, at 379.

161. The other popular Jefferson quotation, of course, is from his first annual message to Congress, discussed supra at notes 41-52 and accompanying text.

162. 15 The Papers of Thomas Jefferson, supra note 106, at 390.

to those who are to pay."[163] The difference between "declaring war" and "letting him loose" is not substantively significant; the remarkable term, apparently overlooked by other writers, is the word "transferring." Jefferson was clearly commenting upon the new Federal Constitution, and thus one must ask why he alleged that the power to "declare war" had been "transferred" from the executive to the legislative authority. After all, prior to the ratification of the Constitution there was no federal "executive" power. Until earlier that year, the American rule was set forth in the Articles of Confederation: "The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . ."[164] Prior to the entry into force of the Federal Constitution, the power to declare war, along with all other federal government powers, was in the hands of the legislature. Why then did Jefferson speak of *transferring* the power to declare war "from the executive to the Legislative body"?

One interpretation clearly makes sense. Like Locke, Montesquieu, Blackstone, and Hamilton, Jefferson believed that the power to declare war was *in its nature* an executive function, wisely "transferred" by the new American government to the legislature as a check against executive adventurism. Perhaps there are other explanations, although none come easily to mind. If this one is accurate, then it follows that Jefferson would have wanted it to be "construed strictly."[165] Professor Ely's book and contemporary conventional wisdom to the contrary, there is little evidence that the Founding Fathers intended the vesting in Congress of a veto over a decision to initiate aggressive war to carry with it broad authority to regulate the many other facets of the control of military power that were vested in the President by both the Commander in Chief clause and the general grant of executive power.

Is this the only conceivable explanation of the constitutional separation of foreign affairs powers? Certainly not. But it is an important analytical approach that was widely embraced by many of the more influential Founding Fathers, and it obviously warrants serious consideration by modern scholars even if it is ultimately to be rejected. Today the executive power clause has been largely forgotten and is routinely ignored by scholars in the field. In fair-

163. Id. at 397.

164. Articles of Confederation, art. 9. An exception was provided in article 6, permitting states to engage in war if invaded by a foreign power or attacked by an Indian tribe.

165. See supra note 106 and accompanying text.

ness, Professor Ely's volume is hardly alone in that respect. Nevertheless, no book that fails to even mention this important line of constitutional reasoning can be considered a serious candidate as the definitive work on this subject. Anyone who wishes to argue that Washington, Jefferson, Hamilton, Jay, Marshall, and at least the early Madison, not to mention key congressional leaders throughout most of the nation's history, were mistaken when they asserted that the executive power clause vested in the President all powers of an "executive" nature not expressly placed elsewhere, must overcome the burden of countering their arguments with equally persuasive authority. Simply ignoring their statements and offering *ex cathedra* pronouncements about their positions is not a satisfactory substitute.

Given his general approach, it is surprising to note that on several occasions Professor Ely seems to advocate a sort of Lockean prerogative[166] for the President to "act in excess of legislative authorization"[167] and to respond militarily to "serious threats to our national security beyond actual attacks on United States territory."[168] In discussing the need for prior congressional consultation before committing U.S. armed forces to hostilities, Ely suggests that "where premature disclosure would cause palpable military damage, the requirement of advance congressional authorization should be inapplicable. . . ."[169] Under the subheading "Must Covert Wars Be Congressionally Authorized," he concludes "I don't particularly like it, but I'm afraid we must answer the question the subhead poses in the negative: At least sometimes, at least for some limited period, the president can constitutionally engage in covert acts of war without advance congressional authorization."[170] It is difficult to reconcile these disparate views.

VI. FROM KOREA TO THE GULF OF TONKIN

The conventional wisdom is that Presidents Kennedy, Johnson, and Nixon, following a practice started by the Truman Administra-

166. In a footnote to this discussion of what he calls a "general theory of emergency power entertained by some of the founders," Professor Ely cites John Locke's *Two Treatises of Government* §§ 159-60. These are the specific paragraphs in which Locke argues for an executive prerogative to act in excess of, and occasionally even contrary to, the existing law. Ely, supra note 3, at 7, 145 n.34.

167. Id. at 7.

168. Id.

169. Id. at 87.

170. Id. at 109.

tion in Korea, dragged an unwilling nation into an unpopular war in Indochina against the will of Congress. The Korean precedent is characterized by one scholar in these words: "[C]onsulting neither Congress nor the people but using the enormous accrued powers of the presidency as though he were any absolute monarch, [President Truman] had put America into what was, in point of casualties, her third largest war."[171]

Consistent with this theory, Professor Ely argues that the constitutional problem of executive war-making began in 1950. He claims President Truman unilaterally started the war in Korea and Secretary of State Dean Acheson made "a deliberate assertion of presidential prerogative."[172] However, powerful evidence exists in the form of declassified top secret State Department documents, supported by the *Congressional Record* and the autobiographies of key congressional leaders, that President Truman placed very high priority on keeping Congress fully informed about Korea. Furthermore, he was prepared to go before a joint session of Congress to seek a joint resolution of approval until dissuaded from involving Congress more directly in the process by the advice of congressional leaders.

A top secret "Memorandum of Conversation" prepared by Ambassador-at-Large Philip C. Jessup, later to serve with distinction as a Judge on the International Court of Justice between 1960 and 1969, records that, on the day following the invasion, President Truman held a dinner at Blair House[173] with senior cabinet members and military leaders. Jessup notes that the President wished "the State Department to prepare a statement for a message for

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171. Robert Leckie, The Wars of America 858 (1968). Similarly, Professor Harold H. Koh, in his prize-winning book, writes: "President Truman responded to the Korean invasion by committing American troops to combat without consulting Congress, relying not on a declaration of war, but on his constitutional powers as president and commander-in-chief." Harold H. Koh, The National Security Constitution 106 (1990).

172. Ely, supra note 3, at 53, 151. As to the suggestion that Truman "started" the Korean war, Kim Il Sung deserves that credit. Recent revelations from the Soviet Communist Party archives appear to refute revisionist claims to the contrary. See, e.g., Stalin Approved Korean Attack, Urged Chinese Intervention, 15 A.B.A. Nat'l Sec. L. Rep. (No. 11) 1, 7 (Nov. 1993) (quoting Florida State University Professor Kathryn Weathersby's conclusions, on the basis of studying documents in the archives, that "the assertion . . . that the military action by North Korea on June 25 was a defensive response to provocation by the South, is simply false").

173. The White House was undergoing renovation at the time. The President was residing in Blair House.

him to deliver in person to Congress on Tuesday [27 June] indicating exactly what steps had been taken."[174]

Ambassador Jessup notes in another top secret memorandum that, during a meeting of the same group the following evening, Secretary Acheson recommended that the President personally speak with the Senate Foreign Relations Committee Chairman Tom Connally and other Senators, and the President responded that he already had a meeting scheduled for 10:00 a.m. the following morning with "the big four"[175] and would include others Acheson thought should be present. A list of fourteen Senators and Representatives was agreed upon to invite to the meeting, which was re-scheduled for 11:30 on the morning of Tuesday, June 27.[176]

Truman's subsequent telephone call to Senator Connally was important. Not only was Senator Connally the powerful chairman of the Senate Foreign Relations Committee, but he had chaired the U.S. Delegation to the 1945 San Francisco Conference that drafted the U.N. Charter. Perhaps more importantly, he had led the fight in the Senate both to consent to the ratification of the Charter and to approve the U.N. Participation Act. He could therefore speak with considerable authority about the legislative intent underlying those two actions. Recalling Truman's telephone call in his autobiography, Senator Connally wrote:

> He hadn't as yet made up his mind what to do.
>
> . . . .

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174. 7 Foreign Relations of the United States 1950 at 160 (1976). In reality, the State Department had already moved to keep Congress informed about events in Korea even before the President's plane touched down in Washington. According to Senator Howard Smith, a Republican from New Jersey and the second Ranking Republican on the Senate Foreign Relations Committee, "[w]hen the first reports came of the attack of North Korea, representatives of the State Department were good enough to confer with some members of the Foreign Relations Committee." 96 Cong. Rec. 9332 (1950). When asked by Senator George Aiken, a Republican from Vermont, whether the country was being kept "fully and accurately informed" about the crisis, Senator Smith responded:

> I feel that if all of us are not informed, at least those of us on the Committee on Foreign Relations certainly should be called to account, because we have been given a telephone number which we can call at the State Department where all the bulletins will be available, and I suppose they would be made available also to every Member of the Senate.

Id. at 9333.

175. A note to the Jessup memorandum states that the "Big Four" were Vice President Alben W. Barkley, Senate Majority Leader Scott Lucas, House Speaker Sam Rayburn, and House Majority Leader John McCormack. Id. at 182 n.8.

176. Id. at 182.

> "Do you think I'll have to ask Congress for a declaration of war if I decide to send American forces into Korea?" the President asked.
>
> "If a burglar breaks into your house," I said, "you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. You have the right to do it as commander-in-chief and under the U.N. Charter."[177]

When the President met with congressional leaders on June 27, he received strong bipartisan support from everyone in the room. According to the declassified top secret memorandum on the meeting prepared by Ambassador Jessup, much of the discussion consisted of congressional leaders praising the President and asking whether he had adequate forces.[178] Senator Connally provides this account in his autobiography:

> The President then asked each man present what he thought we should do. There was no disagreement that the United States had to help the South Koreans. Nor did anyone object to Truman's remark about the U.N. . . . . No one present raised even minor criticism to any of the four points, although a few wondered if Congress should approve them.[179]

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177. Senator Tom Connally, My Name Is Tom Connally 346 (1954).

178. For example, Senator Alexander Wiley, the ranking Republican on the Foreign Relations Committee during the illness of Senator Arthur Vandenberg, said "it was sufficient for him to know that we were in there with force and that the President considered this force adequate." 7 Foreign Relations of the United States, supra note 174, at 200. House Majority Leader John McCormack "asked Admiral Sherman whether he thought the Navy should not now be strengthened," and Congressman Mike Mansfield "said that we should stiffen Western Europe as well." Id. at 201.

179. Tom Connally, supra note 177, at 348. This account is consistent with Truman's subsequent memoirs, in which he asserts "I asked for the views of the congressional leaders" and "[t]he congressional leaders approved of my action." 2 Memoirs by Harry S. Truman: Years of Trial and Hope 338 (1956). David McCullough's highly-regarded recent biography of President Truman states of this meeting: "[t]he congressional leaders had given the President their undivided support. No one had said a word against what he had decided. Further, he had been advised to proceed on the basis of presidential authority alone and not bother to call on Congress for a war resolution." David McCullough, Truman 780 (1992). McCullough adds:

> Cheers broke out in the House and Senate when the [President's] statement was read aloud. By a vote of 315 to 4, the House promptly voted a one-year extension of the draft law. . . .
>
> . . . .

A review of the *Congressional Record* for the period demonstrates that, with very few exceptions, Truman's actions were overwhelmingly supported on a bipartisan basis in the Congress.[180] Admittedly, Senator Taft alleged (wrongly) that there had been "no pretense of consulting the Congress" and concluded that "there is no legal authority" for the President's actions,[181] but most members who addressed the constitutional issue supported the President's authority to act without specific legislative sanction[182] and even Senator Taft admitted that he would vote to approve Truman's actions if a resolution came before the Senate.[183] Taft's constitutional argument was promptly attacked as insupportable by such prominent historians as Arthur Schlesinger, Jr.,[184] and Henry Steele Commager.[185]

Despite the assurances he had received earlier from Senator Connally, it is clear that President Truman too retained some lingering doubts about whether he should obtain a formal resolution

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> The response of the American people—by mail, telegrams, phone calls to the White House and Congress—the response of the press, of nearly everyone whose opinion carried weight in Washington and in the country, was immediate, resounding approval—a point that would be very soon forgotten.

Id. at 781.

180. A detailed discussion of Truman's relationship with Congress in the early stages of the Korean conflict is beyond the scope of this Essay, but will be addressed by the author in detail in an article now in preparation.

181. 96 Cong. Rec. 9320 (1950).

182. See, e.g., the statement by Senate Majority Leader Scott Lucas challenging the "audacity" of those who "seriously contend that President Truman is devoid of such powers." Id. at 9328.

183. Id. at 9320.

184. Calling Taft's statements "demonstrably irresponsible," Schlesinger wrote in a letter to the editor of the *New York Times*:

> From the day that President Jefferson ordered Commodore Dale and two-thirds of the American Navy into the Mediterranean to repel the Barbary pirates American Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approval. . . . Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities.

Arthur M. Schlesinger, Jr., Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents Cited, N.Y. Times, Jan. 9, 1951, at 28. A little more than two decades later, Schlesinger took a quite different approach to executive power in The Imperial Presidency (1973).

185. Denouncing the "Republican high command" for its "attack upon the President's conduct of foreign relations," Professor Commager concluded: "Whatever may be said of the expediency of the Taft-Coudert program, this at least can be said of the principles involved—that they have no support in law or in history." Henry S. Commager, Presidential Power: The Issue Analyzed, N.Y. Times, Jan. 14, 1951, § 6 (Magazine), at 11, 23-24.

from Congress. He met again with congressional leaders on Friday, June 30, at which time he announced that he had decided to send U.S. ground combat forces to defend South Korea. Senator Connally provides this account:

> At that meeting, Truman bluntly announced his decision to use U.S. ground forces in the defense of South Korea. After that there was a long silence, and on almost every face I could read agreement with his decision. Only Wherry argued that the President should have consulted with the House and Senate before deciding to use ground forces. Representative Dewey Short reprimanded Wherry.[186]

Later that afternoon, Congress adjourned for a ten-day Fourth of July recess; but Truman arranged to meet with Senate Majority Leader Scott Lucas—the only congressional leader remaining in Washington—on the afternoon of July 3. In preparation for the meeting, he had the State Department prepare a draft of a congressional resolution endorsing his actions in Korea. The following excerpts are from Ambassador Jessup's top secret notes of the meeting:

> THE PRESIDENT asked Mr. Acheson to lead off.
>
> MR. ACHESON said the purpose of the meeting was to lay before the President and his advisors a recommendation by the Department of State that the President go before Congress some time in the near future to make a full report to a Joint Session of the Congress on the Korean situation. It was proposed that this report to the Congress would be followed by the introduction of a Joint Resolution expressing approval of the action taken in Korea. . . .
>
> . . . .
>
> THE PRESIDENT asked Senator Lucas what was his reaction to this suggestion. He indicated that Congress would not reassemble until a week from today but that he wanted to consider whether he should deliver such a message when Congress reassembled.
>
> . . . .

186. Tom Connally, supra note 177, at 349.

SENATOR LUCAS said that he frankly questioned the desirability of this. He said that things were now going along well . . . . He said that the President had very properly done what he had to without consulting the Congress. He said the resolution itself was satisfactory and that it could pass. He suggested as an alternative that the President might deliver this message as a fireside chat with the people of the country. . . .

[He] said that most of the members of Congress were sick of the attitude taken by Senators Taft and Wherry. . . .

. . . .

[T]o go up and give such a message to Congress might sound as if the President were asking for a declaration of war. . . .

. . . .

THE PRESIDENT said that it was necessary to be very careful that he would not appear to be trying to get around Congress and use extra-Constitutional powers. . . .

. . . .

[He] said that it was up to Congress whether such a resolution should be introduced, that he would not suggest it. He said it was not necessary to make a decision today and that he too was just thinking out loud. . . .

. . . .

SENATOR LUCAS said that he felt he knew the reactions of Congress. He thought that only Senator Wherry had voiced the view that Congress should be consulted. Many members of Congress had suggested to him that the President should keep away from Congress and avoid debate. . . .

. . . .

THE PRESIDENT said . . . . he would have further consultations with the Big Four next Monday. He said he was still just thinking out loud and if there were any better suggestion he would be glad to listen to it.

SENATOR LUCAS commented that Senator Taft was merely following his same old line. Senator Jenner's statement in Indiana was unbelievable. Senator Lucas said if there should be a row in Congress that would not

> help abroad. He did not think that Congress was going to stir things up.
>
> THE PRESIDENT said this depends on events in Korea. He said that if this view met with the approval of those present he would wait until he had his talks with the leaders next Monday.
>
> This was agreed.[187]

Consistent with the advice of the Senate Majority Leader, on July 19, 1950 the President submitted a lengthy written message to Congress.[188] At 10:30 p.m. that same evening, he delivered a radio and television address to the nation.[189]

Thus, the historical record appears to refute the conventional wisdom that President Truman unilaterally, or simply following the advice of Secretary Acheson, elected to ignore the Congress on Korea. On the contrary, keeping Congress informed was a priority objective from the start. The decision not to go before a joint session of Congress immediately and seek a joint resolution of support—which would have easily passed—was made after lengthy personal consultations with congressional leaders and pursuant to the specific advice of both the highly-respected Chairman of the Senate Foreign Relations Committee and the Senate Majority Leader. Of course, it is possible to argue that the Constitution actually required President Truman to obtain formal congressional authorization to use military force in Korea.[190] However, given the record that now exists, it is not a valid criticism to assert that President Truman "ignored" or elected to "bypass" Congress, even though that remains the conventional wisdom to this day.

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187. 7 Foreign Relations of the United States, supra note 174, at 286-91. Presumably unaware of this document, which had not yet been declassified, Professor Arthur Schlesinger wrote in 1973 that, "[o]n July 3 Acheson recommended that Truman *not* ask for a resolution but instead rely on his constitutional powers as President and Commander in Chief." Arthur M. Schlesinger, Jr., The Imperial Presidency 136 (1973); see also Robert F. Turner, Truman Didn't "Ignore Congress" on Korean War, 16 A.B.A. Nat'l Sec. L. Rep. (No. 9) 1-7 (Sept. 1994).

188. 7 Foreign Relations of the United States, supra note 174, at 430; H.R. Doc. No. 646, reprinted in 96 Cong. Rec. 10,626-30 (July 19, 1950).

189. 7 Foreign Relations of the United States, supra note 174, at 430.

190. I am led to believe that my good friend Dr. Louis Fisher, of the Library of Congress Congressional Research Service, will argue precisely this point in a forthcoming issue of the *American Journal of International Law*.

A. *Defense of South Korea*

At the heart of the congressional reaction to Truman's actions in Korea were a recognition that the President was acting "defensively" to foreign aggression and that he was executing the nation's U.N. Charter commitments rather than unilaterally initiating a "war" that required prior legislative sanction. Professor Ely acknowledges this line of reasoning, but dismisses it summarily as essentially a joke:

> The waters were muddied by certain semiattractive rationalizations: that our actions were taken in *defense* of South Korea (which was at last initially true, but constitutionally irrelevant) and that the authorization by the United Nations Security Council could take the place of authorization by the United States Congress . . . . The fallacy of both these defenses led soon to the recurrent assertions of the Truman Administration—now a part of our national treasury of graveyard humor—that Korea wasn't really a war but rather a "police action," and its adoption of a constitutional reading that had from the dawn of the republic been recognized as erroneous, that the Commander in Chief Clause encompassed the authority not simply to manage wars approved by Congress but the right to start them unilaterally as well . . . .[191]

A number of things can be said of this view. First of all, despite the conventional wisdom (which this writer shared until he began researching the issue) that President Truman coined the term "police action" to describe the Korean conflict, a review of the *Congressional Record* reveals that the term was in common use in the Legislative Branch before Truman's affirmative response on June 29 to a reporter's inquiry about whether the operation could correctly be characterized as a "police action."[192] For example, the day before Truman's press conference, Senator Ralph Flanders rhetorically asked whether "we have here a declaration of war without consent of Congress" and concluded: "So, Mr. President, it seems to me that this is in no sense [a] declaration of war, but the carrying out of an existing obligation."[193] When Senator Taft rose

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191. Ely, supra note 3, at 11 (emphasis in original).

192. Senator Connally describes this exchange and notes: "Later, the reporter's term gave the isolationists a chance to confuse the issue and to heap ridicule upon the President's brave action." Connally, supra note 177, at 348.

193. 96 Cong. Rec. 9315 (1950).

and criticized the President's failure to obtain legislative sanction, Flanders responded that "the President was within his rights in intervening in Korea" and characterized the conflict as a "police action" rather than a "war."[194]

Much later, Senator William Knowland—a conservative critic of many Truman policies—rose and argued:

> Mr. President, I am not one of those who dispute the powers of the President of the United States to take necessary police action. I believe that he has been authorized to do it under the terms of our obligations to the United Nations Charter. I believe he has the authority to do it under his constitutional power as Commander in Chief of the Armed Forces of the United States.
>
> Certainly the action which has been taken to date is not one which would have required . . . a declaration of war, as such, by the Congress of the United States. What is being done is more in the nature of a police action.[195]

When Senator Flanders later slipped-up and described events in Korea as "a war," Senator Eugene Millikin interjected that "it is a police operation" and Flanders quickly agreed.[196]

Finally, it should be observed that the view taken by most legislators of the President's actions in Korea in June 1950 were quite consistent with congressional understanding of the President's responsibilities under the U.N. Charter and U.N. Participation Act half a decade earlier. A few excerpts from the December 12, 1945 *Report of the House Committee on Foreign Affairs* on the latter statute are illustrative:

> The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations which will actually be carried out by and under the authority of the President as the Chief Executive, diplomatic, and military officer of the Government. Among such obligations is that of supplying armed forces to the Security Council concerning which provision is made in section 6.
>
> [T]he ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to

194. Id. at 9328.
195. Id. at 9540.
196. Id. at 9541.

> fulfill the commitments assumed by the United States thereunder . . . .[197]

On the issue of whether the Congress should reserve a "veto" over decisions to use U.S. armed forces to carry out decisions of the Security Council, the House report quoted this language from the Senate Foreign Relations Committee's report on the U.N. Charter issued six months earlier:

> [T]he committee is convinced that any reservation to the Charter, or any subsequent congressional limitation designed to provide, for example, that employment of the armed forces of the United States to be made available to the Security Council under special agreements referred to in article 43 could be authorized only after the Congress had passed on each individual case, would clearly violate the spirit of one of the most important provisions of the Charter. . . .
>
> *Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war* but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.
>
> The committee feels that a reservation or other congressional action such as that referred to above *would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.*[198]

This is not a book about Korea, however, and one should not be too hard on Professor Ely for missing evidence ignored even by prominent historians. Similarly, one should probably forgive him

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197. H.R. Rep. No. 1383, 79th Cong. 1st Sess., at 4-5 (1945).

198. Id. at 7-8 (emphasis added). It should be noted that the U.S. troops under discussion here were those expected to be made available to the Security Council pursuant to a congressionally-approved article 43 agreement, and the outbreak of the Cold War effectively prevented the implementation of that provision. However, the underlying issue of whether U.S. troops helping to enforce the Charter in the event of international aggression infringes upon the power of Congress to "declare war" would seem to be the same irrespective of whether the troops had been assigned to the Security Council in advance or were deployed on an *ad hoc* basis in response to Security Council decisions or recommendations.

for ignoring the wealth of evidence based upon classified records[199] confirming the North Vietnamese attacks on U.S. naval vessels on August 2 and 4, 1964 in the Tonkin Gulf, or, for that matter, official Vietnamese accounts claiming credit for the attacks.[200] While important, these issues are peripheral to his book.

Professor Ely shines, however, in his analysis of the constitutional significance of the 1964 Gulf of Tonkin Resolution and in his detailed analysis of the accompanying legislative debates. He concludes, for example, that "[o]n its face," the Tonkin Resolution "certainly was broad enough to authorize the subsequent actions President Johnson took in Vietnam,"[201] and that "the legislative history of the Resolution confirms that those members of Congress who had read it understood it at the time of the vote."[202] In this regard, he notes that "Senator Jacob Javits stated that 'We who support the joint resolution do so with full knowledge of its seriousness and with the understanding that we are voting a resolution which means life or the loss of it for who knows how many hundreds or thousands?' "[203]

In assessing this debate, Ely concludes: "Particularly disillusioning over the years was the performance of Senator J. William Ful-

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199. Especially valuable in this regard is the analysis contained in the so-called Pentagon Papers. It is omitted from the initial public version because the "leaked" version only contained every other page of this two-sided document. However, it was later published in volume 5 of the "Senator Gravel Edition" of the Pentagon Papers, pp. 320-29. Perhaps even more useful is a more recent scholarly study prepared by the Naval Historical Center on the basis of interviews with participants and a careful review of a wealth of classified and unclassified documentation. Among its conclusions are:

> American leaders did not seek to provoke a North Vietnamese reaction in order to secure a *casus belli*, as often has been alleged. . . . Neither were the actions initiated by over-zealous North Vietnamese boat commanders. Intelligence unmistakably revealed that the naval headquarters in Ben Thuy and Van Hoa issued the orders. . . . That an attack occurred on 2 August is beyond contention. Physical evidence, including a spent Communist round taken from the destroyer's superstructure and photographs of the enemy naval craft, complement the wealth of other extant information. In addition, the North Vietnamese subsequently acknowledged attacking Maddox. As the succeeding chapter will show, the validity of the 4 August attack also was established, thus convincing American leaders that a strong reaction was warranted.

2 Edward J. Marolda & Oscar P. Fitzgerald, The United States Navy and the Vietnam Conflict 435-36 (1986).

200. See, e.g., Socialist Republic of Vietnam, Vietnam: The Anti-U.S. Resistance War 60, cited in id. at 414 n.48.

201. Ely, supra note 3, at 16.

202. Id. at 17.

203. Id.

bright,"[204] who during the 1964 debates told his colleagues they were authorizing President Johnson to "use such force as could lead into war."[205] Fulbright claimed fifteen years later that the resolution's passage "must stand as the only instance in the nation's history in which Congress authorized war without knowing that it was doing so."[206]

Rather than embracing the traditional argument that Vietnam was a "presidential" war in the tradition of Korea, Professor Ely concludes that "the Tonkin Gulf Resolution of 1964 was a reversion to the pre-1950 pattern: We have seen that it was presented to the Congress and voted on as what it said it was, an authorization to wage war against North Vietnam."[207] He also makes the insightful observation that the two confrontations in the Tonkin Gulf in early August 1964 were not a primary reason for the United States becoming involved in a major armed conflict in Indochina. He quotes Representative Dante Fascell, who went on to chair the House Foreign Affairs Committee for many years, as having observed: "My own impression of what happened at that time [August 1964] was that most everybody said, well, the President wants this power and he needs to have it. It had relatively little to do with the so-called [Tonkin Gulf] incident."[208] The reality is that there were any of a number of attacks on U.S. citizens in South Vietnam in the weeks and months following the Tonkin incidents that could equally as well have provided a basis for going to Congress and seeking a resolution, assuming, *arguendo*, that any specific "incident" was needed given the clear support already in Congress for escalating U.S. involvement in Indochina.

At times, Ely seems to acknowledge the underlying basis of U.S. involvement in defending South Vietnam, noting that the government's account of Hanoi's aggression "was closer to the truth than radical critics would have had us believe at the time." He also states: "There really was a North Vietnamese infiltration of the South, and there really was a 'Ho Chi Minh trail' stretching down through Laos and Cambodia."[209] His analysis of the Vietnam

204. Id. at 16.

205. Id. at 18. The language in the quotation marks is from a question asked by Senator John Sherman Cooper, co-sponsor of the Fulbright [Tonkin] Resolution, to which Fulbright responded: "That is the way I would interpret it." Id.

206. Id. at 16.

207. Id. at 53.

208. Id. at 20.

209. Id. at 68.

aspect of the conflict is, on balance, quite useful and it will likely surprise many readers who will pick up the volume expecting a more conventional academic viewpoint. Professor Ely is clearly a scholar of intellectual integrity and political courage.

Nonetheless, there are some annoying factual errors, such as his suggestion that one of the lessons we need to learn from Vietnam is "that wars unsupported by the people at large are unlikely to succeed."[210] In reality, the public opinion polls consistently reflected strong support for the conflict between 1964 and 1966. One of the great myths of the Vietnam conflict is that the American public opposed assisting South Vietnam from the start. On the contrary, President Johnson's approval rating soared thirty points during August 1964, from forty-two to seventy-two percent, and the Gallup organization attributed this rise to his strong stand in Vietnam following the Tonkin Gulf incidents.[211] Professor John E. Mueller notes that "support for the war in Vietnam rose very considerably as American troops joined the fighting during the last half of 1965," with polls showing that supporters of the conflict outnumbered opponents by a margin of more than three-to-one.[212] In November 1965, when there were more than 200,000 U.S. soldiers in Vietnam, the Gallup poll asked whether those questioned would be more or less likely to vote for a congressional candidate who advocated "sending a great many more men to Vietnam," or a massive escalation of the war. Of those expressing an opinion, sixty percent responded that they would be "more likely" to support such a candidate.[213] By March 1966, more than seventy percent of those expressing an opinion responded to pollsters that the United States had "not made a mistake" by entering the fighting in Vietnam, and supporters outnumbered critics as late as the eve of the 1968 Tet Offensive.[214] Even after the polls began to show a majority of Americans thought it had been a "mistake" to send U.S. troops to Vietnam, the anti-war demonstrations and many press accounts helped to confuse the public perception of national opinion. Brookings Institution scholars Leslie Gelb and Richard Betts note:

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210. Id. at 4.

211. Albert H. Cantril, The American People, Viet-Nam, and the Presidency 2-3 (1970), quoted in Leslie H. Gelb & Richard K. Betts, The Irony of Vietnam: The System Worked 212 (1979).

212. John E. Mueller, War, Presidents and Public Opinion 53-54 (1973).

213. 3 The Gallup Poll 1971 (1971).

214. Mueller, supra note 212, at 55.

> By 1968 a five-to-three majority of the U.S. public saw the original decision to go to war as a mistake, but simultaneously the number of those who wanted to end the war by escalating, even to the point of invading the DRV [North Vietnam], exceeded the number favoring complete withdrawal by a considerable margin. Support for the war, according to polls, exceeded confidence in the President's handling of it, and that confidence was declining. This accounted for the astonishing and rarely recognized phenomenon that Eugene McCarthy's total in [the] New Hampshire [primary election, where he won a plurality of the Democratic votes,] contained three *hawkish* anti-administration votes for every two pro-withdrawal votes; "of those who favored McCarthy before the Democratic Convention but who switched to some other candidate by November, a plurality had switched to [superhawk Alabama Governor George] *Wallace*."[215]

To be sure, in 1967 only forty-eight percent of those queried told the Gallup pollsters that they had "a clear idea of what the Vietnam war is all about." It should be kept in mind that only five percent more said they "had a clear idea" of what World War II was all about six months after the Pearl Harbor attack.[216] Professor Mueller concludes that public support for Vietnam and Korea followed a very similar pattern:

> The situation with regard to the data from Korea and Vietnam is rather extraordinary. . . . [T]he amount of *vocal* opposition to the war in Vietnam was vastly greater than for the war in Korea. Yet it has now been found that support for the wars among the general public followed a pattern of decline that was remarkably similar. Although support for the war in Vietnam did finally drop below those levels found during Korea, it did so only after the war had gone on considerably longer and only after American casualties had far surpassed those of the earlier war.[217]

Professor Ely is hardly alone in believing that the United States went into Vietnam without the support of the American people.

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215. Gelb & Betts, supra note 211, at 172 (footnote omitted).
216. Mueller, supra note 212, at 63.
217. Id. at 65.

Indeed, he cites former POW Admiral James Stockdale and former Secretary of State Alexander Haig as making the same observation. However, like Professor Ely, they were mistaken. In late 1964, eighty percent of those polled said they were "paying attention" to what was going on in Vietnam, and by 1966 the figure had reached ninety-three percent.[218] One can only add that the better than 200-to-1 margin[219] by which Congress voted to authorize hostilities in August 1964 refutes the conventional wisdom that the United States went into Vietnam without the support of Congress as well.

Given the dismal human rights record of the Stalinist regime that prevailed after 1975[220] and the accounts of "reeducation" camps and "boat people," possibly the most difficult part to comprehend of Ely's Vietnam analysis is his conclusion on the ethical issues in a footnote to Chapter Four:

> [P]erhaps I should add—so you'll know (as we said during the period under discussion) "where I'm coming from"—that I believe just as fervently that if we had to pick a side, we were on the right one in Laos (and, God knows, in Cambodia). Vietnam is substantially less clear in this regard, though that's the war that was constitutional; I seem to be fated to spend my life pointing out that these are not the same thing.[221]

B. *Cambodia & Laos*

Professor Ely does an excellent job of discussing the legal arguments surrounding the Cambodia incursion of 1970 and the subsequent bombing of that country. He concludes that the intervention that led to the Kent State tragedy was "constitutionally authorized,"[222] and also that "a neutral commentator must

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218. Id. at 54.

219. See supra notes 202-08 and accompanying text. The resolution passed the House by a vote of 416-0, and the Senate 88-2.

220. Vietnam is ranked even today as among the twenty worst human rights offenders in the world by respected human rights organizations. See, e.g., Freedom House, Freedom in the World 5 (1994).

221. Ely, supra note 3, at 192 n.4.

222. Id. at 31.

conclude on balance that Congress did indeed authorize the bombing" during that period.[223]

He is far less impressive in his analysis of the bombing of the Cambodian sanctuaries from March 1969 until the 1970 incursion in Chapter Five, which he entitles "The (Enforceable) Unconstitutionality of the Secret Bombing of Cambodia, 1969-1970." He admits that several members of Congress were advised of the bombing,[224] concludes that "the bombing constituted a rational means of supporting our troops in South Vietnam" and "could otherwise be fit within the authorization of the Tonkin Gulf Resolution,"[225] and even concedes that Cambodia's Chief of State, Norodom Sihanouk, "at least acquiesced in the bombing."[226] He concludes: " 'So what?' Sihanouk's consent might conceivably have some relevance as a matter of international law, but what could it have to do with the demands of the United States Constitution?"[227]

One hardly knows where to begin in response. Even had Sihanouk not given his consent, the presence of large numbers of North Vietnamese and Viet Cong soldiers launching hostilities against U.S. troops from the "sanctuaries" in Cambodia permitted the United States to use necessary and proportional military force to eliminate the threat.[228] The legal problem becomes even easier with the consent of the Cambodian Head of State, even if given quietly. In that situation, the President has not even arguably exceeded his authority under the Tonkin Resolution and the SEATO treaty. To use force against North Vietnamese and Viet Cong forces, already admittedly authorized by the Tonkin Resolution, in Cambodian territory, with the consent of Cambodia, is not a violation of Cambodia's rights under international law and is not even arguably and act of "war" against Cambodia. Whatever its limits, the power of Congress to declare war is simply not at issue here. It makes no sense for Professor Ely to wring his hands at "the brutal violation of a neutral country." Unless, of course, he is

223. Id. at 44 (emphasis omitted); see also id. at 45-46 ("[A]s best we can make out (given contemporaneously accepted notions of 'authorization') Congress probably did authorize the bombing of Cambodia from mid-1970 on.").

224. Id. at 98. Although irrelevant to international law issues, this may still be worth noting.

225. Id. at 99.

226. Id. at 100.

227. Id. at 99.

228. For an excellent discussion of the legal issues associated with the Cambodian situation, see John N. Moore, Law and the Indo-China War 479-530 (1972).

talking about the actions of the North Vietnamese and Viet Cong during the years leading up to the U.S. counter-attacks, which he clearly is not. By 1969, the Cambodian sanctuaries were not, as he admits, "neutral" and Sihanouk's consent kept the counter-attacks from even arguably violating Cambodian rights.

Indeed, one is tempted to dismiss this entire chapter by simply referring Professor Ely back to page thirty-two of his own book, where he justifies the subsequent 1970 intervention in Cambodia by analogy to President Roosevelt's landing of U.S. troops in neutral French North Africa during World War II. The primary difference, one gathers, appears to be that the 1970 intervention was announced to the public and the 1969 bombing was kept a secret both from the public and most members of Congress for several years. Keeping the initial bombing a secret may arguably have been bad policy, although, for reasons given by Professor Ely, such a conclusion is difficult to reach. However, there is nothing in the constitutional text, its history, or more than two centuries of practice to support the conclusion that secret military operations during otherwise properly authorized hostilities are unconstitutional.

Ely's discussion of Laos is complex and might have benefitted from a background in international law. He recognizes that Laos was covered by the Gulf of Tonkin resolution and that it did "request assistance" pursuant to that authority. He notes that the "training and support" of Souvanna Phouma's army began "years" before enactment of the Tonkin statute, and the bombing of illegal[229] North Vietnamese strongholds in Laos predated the statute "by months."

He also acknowledges that the United States agreed to help defend Laos, as an "associated" protocol state, from Communist aggression in 1955 when the Senate consented to ratification of the SEATO treaty. Yet he fails to address the President's clear constitutional duty to see treaties and other laws "faithfully executed."[230] Within the limits of the resources placed at his command by Congress, this situation gave the President a great deal of constitutional latitude in assisting the government of Laos to defend itself against an illegal North Vietnamese occupation of part of its sovereign territory. Training Laotian soldiers and the limited bombing of por-

229. Professor Ely concludes that the U.S. complied with the 1962 Geneva agreements on Laos by withdrawing our military advisers by the deadline, but that Hanoi left "somewhere between 6,000 and 10,000 North Vietnamese fighting men in Laos." Ely, supra note 3, at 69.

230. U.S. Const., art. II, § 3.

tions of Laotian territory at the request of the Souvanna Phouma hardly constituted a usurpation of the power of Congress to declare war against North Vietnam. Professor Ely simply does not make the case why such conduct required either the knowledge or approval of Congress under the Constitution other than making a conclusory statement that "[s]ecret wars are prima facie unconstitutional."[231]

Like many contemporary writers, Ely seems obsessed with keeping such matters public. At one point he argues that "even notice to the entire Congress is insufficient to satisfy the constitutional requirement: *We the people* are part of the process too."[232] This brings back memories of the infamous "Ludlow Amendment" considered by Congress in the years leading up to World War II, which would have imposed a constitutional requirement that the U.S. populace would have to approve a decision to go to war by national plebiscite.[233]

The Ludlow Amendment failed, and no knowledgeable scholar can argue seriously that the Founding Fathers objected to secrecy—particularly in the national security field. After all, as has already been discussed,[234] Madison himself said that the Constitution would not have been possible had the entire Convention of 1787 not been ruled by strict secrecy,[235] and he moved during the Convention to eliminate a requirement to publish all federal expenditures annually so that secret military or diplomatic expenditures could be concealed until the need for secrecy had passed.[236] Writing in *Federalist No. 64*, one of John Jay's strongest criticisms of the problems with the Articles of Confederation was the lack of attention to "secrecy and dispatch."

VII. CONGRESS, "RESPONSIBILITY," AND A NEW WAR POWERS LAW

A major contention of this book is that Congress has refused to accept "responsibility" for its constitutional role, preferring instead to avoid political accountability at almost all costs. Presidents in the Cold War era have exercised greater control over military

231. Ely, supra note 3, at 72.
232. Id. at 87.
233. Turner, supra note 54, at 1.
234. See supra note 94 and accompanying text.
235. Rossiter, supra note 94, at 167.
236. 2 The Records of the Federal Convention of 1787, supra note 93, at 618-19; 3 id. at 326.

affairs, he suggests, not so much because of executive usurpation, but because "Congress (and the courts) ceded the ground without a fight." Ely argues "the legislative surrender was a self-interested one: Accountability is pretty frightening stuff."[237]

Looking ahead to the possibility of future use of force crises, he speculates:

> The likely congressional reaction thus seems not the simple-minded one of rushing to approve whatever war the president comes up with next, but rather a return to the tradition of evasion, a resolve of still greater doggedness in resisting suggestions—even, in the unlikely event it again comes to it, a suggestion by the President—that casting a vote on whether Americans are to die might be part of their job. The next war might be another Desert Storm or it might not: better to keep your options open and claim vindication either way.
>
> . . . .
>
> . . . Decisions on war and peace are tough, and more to the point they are politically risky. Since 1950 Congress has seen little advantage in making them.[238]

While hardly original,[239] this is a critically important observation. Having a scholar of Professor Ely's distinguished reputation make the point may prove helpful. Less helpful, however, are his subsequent conclusion that the solution to the problem is to drag the courts into the dispute to force Congress "to do its job"[240] and his proposal in an appendix of a "new" war powers statute to replace the 1973 War Powers Resolution. His legislative approach ranges from the benign to the disastrous.

In the former category, for example, he would change the name of the statute from "War Powers Resolution" to "Combat Authorization Act,"[241] on the grounds that "a joint resolution . . . sounds

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237. Ely, supra note 3, at ix.

238. Id. at 52.

239. See, e.g., Robert F. Turner, Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy 160 (1991) ("Above all else, the congressional response to war powers issues has reflected an unwillingness to be held accountable for risky decisions.")

240. Ely, supra note 3, at 60; see also, id. at 125 ("If, therefore, the constitutional plan—timely congressional consideration of military ventures—is to work, it appears that Congress will have to be forced to such considerations. . . . It thus seems clear that the courts must be brought into the act.").

241. Id. at 116.

suspiciously like a concurrent resolution."[242] This may have a certain appeal to those concerned primarily with public perceptions of legitimacy, although the key players, namely Congress, the President, and the courts, know very well that a joint resolution is a law. Then again, one might respond that "Combat Authorization Act" sounds suspiciously like an unconstitutional attempt to usurp the powers of the Commander in Chief. However, the real difficulties with Professor Ely's proposed statute have little to do with its title.

A. *The Unconstitutional Delegation Charge*

Time and again Professor Ely complains that the War Powers Resolution is unconstitutional because it constitutes a "gift to the president of sixty (actually ninety) free days to fight any war he likes."[243] This is not a new argument. In fact, it is often embraced in Executive Branch circles[244] and it was essentially the reason that Senator Thomas Eagleton, a strong advocate of congressional war powers, refused to vote for the Resolution in 1973.[245] However, it is not a reasonable interpretation of the statute.

To assert that Congress intended when it enacted the War Powers Resolution to grant the President additional legal authority to initiate or fight wars is to ignore the entire history and legislative debate leading up to passage of the statute. It is also directly at odds with the clear language of section 8(d), which provides:

> Nothing in this joint resolution—
>
> (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or
>
> (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.[246]

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242. Id. at 115.

243. Id. at 116.

244. This observation is based upon the writer's extensive first-hand experience working on war powers issues in the Pentagon, State Department, and elsewhere within the Executive Branch.

245. 119 Cong. Rec. 28, 36,176-78, 36,188-90 (1973).

246. War Powers Resolution of Nov. 7, 1973, § 8(d), 50 U.S.C. § 1547(d) (1988).

The clear intention of the authors of the War Powers Resolution was that the President's power to introduce U.S. armed forces into harm's way was to be exercised only when affirmatively authorized by both Houses of Congress or when the nation or its armed forces were attacked.[247] However, realizing that Presidents historically had claimed independent constitutional authority to commit forces under a range of other circumstances, Congress designed the War Powers Resolution to establish a framework relationship for any use of force by the Commander in Chief.

Somewhat ironically, Professor Ely proposes amending the Resolution by striking out the clear language of section 8(d), on the theory that a President might claim authority thereunder to use force not expressly authorized by Congress or to ignore provisions of the Resolution which might be subject to constitutional attack. He writes:

> Section 8(d) . . . was obviously inserted as a hedge, to indicate that should the Resolution's provisions begin to stray across constitutional bounds, they are to be reined in. Having given (understandably) closer attention to the Resolution's constitutionality, however, we are in a position to understand that its only aspects that are even arguably unconstitutional are the concurrent resolution provision, section 5(c)—which is arguable—and Congress's gift to the president of sixty (actually ninety) free days to fight any war he likes. My statute eliminates both of these, and thus any possible need for the 8(d) hedge. But what harm, you may be wondering, could there be in saying that nothing in the Resolution is intended to alter the constitutional authority of either Congress or the president? Under my statute it will become superfluous, but so what? Only this, and it is something: It gives the president a peg on which to hang his defiance. ("The Resolution itself says it isn't supposed to cut into my prerogatives, but if I followed 4(a) and reported this to Congress that would cut into my prerogatives, so by disobeying the Resolution I am actually following the Resolution.") Congress should therefore get rid of it.[248]

247. Id. at § 2(c).
248. Ely, supra note 3, at 116 (endnotes omitted).

Several observations can be made about this paragraph. First, as has already been demonstrated, section 8(d) serves far more than to affirm the obvious point that the Resolution should not be interpreted to violate the Constitution. It also makes it clear that Congress did not intend to expand the powers of the President to use armed force beyond those given by the Constitution.

Furthermore, Professor Ely claims to have "given (understandably) closer attention to the Resolution's constitutionality." Here, it is unclear whether he is claiming superior expertise just to the Congress, which over more than two decades held thousands of pages of hearings on the issue, or is also dismissing the contrary conclusions of the numerous scholars who have reached different conclusions. He then concludes that only two aspects of the statute are even "arguably unconstitutional." As already indicated, Professor Ely is mistaken in concluding that the Resolution grants additional power to the President, unconstitutional or not. As will be discussed below, his reservations about the unconstitutionality of the legislative veto provision of section 5(c) are, to be charitable, weak.[249] His suggestion that other constitutional objections are not even "arguable" dismisses not only the views of a plethora of distinguished scholars,[250] but also those of the six American presidents who have held office since it was enacted (each of whom had considerable legal resources at his disposal in reaching the conclusion that the Resolution infringed upon constitutional powers of the Executive), and hundreds of legislators over the years, including the Senate Majority and Minority Leaders extant at the time the book was published.[251] Nonetheless, Professor Ely describes scholars who find constitutional fault with the Resolution as "intemperate."[252]

Next, he writes that section 8(d) will become "superfluous" under his version of the Resolution. If he is correct as to its meaning, it already is superfluous. It might strengthen the President's hand to have a legislative enactment asserting that a specific type of military deployment, such as the rescue of endangered U.S. citizens from within a foreign country, was within the President's

249. See infra notes 268-73 and accompanying text.

250. Myres McDougal of Yale Law School, former Yale Law School Dean Eugene Rostow, and John Norton Moore of the University of Virginia School of Law are just a few.

251. See infra note 263 and accompanying text.

252. Ely, supra note 3, at 187.

independent constitutional authority.[253] However, a statutory provision that provides simply that constitutional powers are superior to statutory powers is a constitutional tautology.

B. *Rescuing Endangered Civilians*

After having announced that only two provisions of the existing Resolution are "even arguably unconstitutional," on the following page Professor Ely appears to acknowledge that section 2(c) suffers from a similar fate. He states "there seems to be a consensus that if 2(c) is to be made 'operational,' it will have to be broadened. Virtually everyone agrees that it should have included the protection of American citizens as one of the justifications for presidential military action in advance of congressional authorization."[254]

Professor Ely gets around this by asserting that "section 2(c) appears in a part of the Resolution entitled 'Purposes and Policy,' where all agree it is operational only to the extent the president chooses voluntarily to comply. It thus begs to be ignored, and functions only to help breed contempt for the entire Resolution."[255] In reality, however, "all" do not agree that section 2(c) was not intended by Congress to be legally binding. Senator Jacob Javits, who was the principal Senate leader in pushing for legislation in this field, took a contrary view.[256]

Nor is section 2(c) worded as an expression of the "sense of Congress" or as a non-binding dictum. It states that "[t]he constitutional powers of the President as Commander in Chief . . . are exercised only pursuant to" three enumerated circumstances, not that they "should" or "ought" be so exercised. To avoid the provision's obviously unconstitutional infringement upon the President's independent authority, many commentators have assigned it mere hortatory effect. However, to the extent that it is given legal effect, section 2(c) is another clearly unconstitutional provision of the Resolution.

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253. The distinction here is that Congress would be affirming the President's constitutional interpretation that a particular power was encompassed by the "commander in chief" or other expressed constitutional grant. A general legislative affirmation of the well-established principle that constitutional powers are superior to statutory powers does not address the underlying issue of the precise scope of a constitutional power.

254. Ely, supra note 3, at 117.

255. Id.

256. See Turner, supra note 54, at 12.

C. *The "Silent Veto" of Section 5(b)*

One of the most objectionable features of the 1973 statute in the eyes of many commentators has been the silent veto of section 5(b), which requires the President to withdraw U.S. armed forces from "hostilities" or "situations where imminent involvement in hostilities is clearly indicated by the circumstances" within sixty-two days[257] unless Congress has declared war or otherwise clearly authorized the operation or extended the deadline. This period can be extended another thirty days by the President if necessary for the safety of the forces during the process of withdrawal.

Essentially, this procedure established a legal presumption that when the President sends troops into harm's way and Congress ignores the deployment or cannot make up its mind whether the President was justified or not, such as if one House of Congress passes a joint resolution of approval and the other either fails to act or approves a different resolution not easily reconciled with the first House's action, then the President is wrong and must withdraw the forces immediately. It can also be faulted for surrendering the strategic initiative to international terrorists or other foreign entities that wish the nation harm, as it allows them to start the war powers clock running by attacking U.S. military forces abroad. That is to say, this provision virtually places a "bounty" on the lives of U.S. military personnel by rewarding those who attack them. Not surprisingly, its repeal is a frequent target of proposed new legislation in the war powers field.

D. *Employing the "Power of the Purse"*

Bucking what may be said to be a trend, however, Professor Ely would not only retain this constitutionally-dubious[258] provision, he would strengthen it. He writes:

> Several commentators have suggested that this command be augmented by a provision that once the clock has thus

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257. Like most commentators, Professor Ely discusses this as a "sixty-day" time limit. Ely, supra note 3, at 116. In reality, the sixty-day period does not begin to run until the President submits a report to Congress under section 4(a)(1) of the statute or until the forty-eight-hour deadline for such a report has expired. This gives the President sixty-two days before the "silent veto" provision is triggered if he ignores the reporting requirement.

258. The provision is almost certainly overbroad, and if used to prohibit a presidential use of force independently authorized by the Constitution, such as defending endangered U.S. citizens, it would be unconstitutional. See generally Robert F. Turner, The Power of the Purse, in The Constitution and National Security 73 (Howard E. Shuman & Walter R. Thomas eds., 1990).

> run, funds to support the troops be cut off. While this should be redundant, it probably is a good idea anyhow, as virtually everyone, including apologists for broad presidential power in this area, agrees that Congress has constitutional authority to end a war by terminating its funding.[259]

At the risk of being denounced as an "apologist for broad presidential power in this area," one might suggest that not everyone, and perhaps that is why Professor Ely said *virtually* everyone, agrees with this broad statement. Congress certainly has the constitutional power to end U.S. military operations by refusing to appropriate the necessary funding. This was designed to be an important check given to the Congress by the Constitution.

It is something else for Congress to attempt to "defund" ongoing operations by the use of an appropriations "rider," as was done in Vietnam, stating that no money appropriated "in this or any other bill" may be used for a particular military purpose otherwise subject to the President's constitutional discretion. Thus, it would almost certainly be unconstitutional for Congress to usurp the discretion of the Commander in Chief by conditional appropriations which, *inter alia*:

> a) denied funding unless the President deployed specified military units to locations chosen by Congress or its agent;
> b) prohibited the President from deploying existing military forces, using otherwise available fiscal resources, to specified regions or locations around the globe (assuming that the deployment was otherwise within the President's exclusive constitutional discretion); or
> c) made the availability of funds contingent upon the President accepting strategic or tactical directions on the conduct of military operations from Congress, its agent, or anyone else.

The "power of the purse" is a great power. However, it is not exempt from the clear requirement that all exercises of constitutional power conform to the other provisions of the Constitution. The Supreme Court has held that Congress may not use its undisputed control over the jurisdiction of the courts for the indirect purpose of denying legal effect to a presidential pardon,[260] and that

259. Ely, supra note 3, at 121.
260. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

it may not use appropriations conditions as a means of enacting a bill of attainder.[261] It would certainly strike down a statute that made judicial appropriations contingent upon the Supreme Court's refraining from invalidating specified, or unspecified, legislative enactments on constitutional grounds, an approach one might call the "Judicial Review Neutralization Act of 1995." Such an unchecked interpretation of the appropriations power would obviously vitiate the entire concept of separation of powers and checks and balances—not to mention individual rights—and would leave everything to the mercy of the legislature. Fortunately, that was not the government established by the Founding Fathers; like all other constitutional acts of power, the power of the purse may not be used to bypass the constraints placed elsewhere in the Constitution upon Congress. As a general principle, Congress may not use purse string constraints to indirectly accomplish any purpose that it is prohibited by the Constitution from doing directly, and that includes usurping the President's discretion as Commander in Chief.

E. *Broadening the Scope of Section 4(a)*

The most "serious problem" Professor Ely apprehends with the war powers "clock" is "in getting the clock started"[262] in the first place, and his proposed remedy is to broaden still further the scope of section 4(a) of the War Powers Resolution. Former Senate Majority Leader George Mitchell conceded that the current statutory standard is unconstitutionally broad, "unduly restricts the authority granted by the Constitution to the President as Commander in Chief," and "threatens . . . the delicate balance of power established by the Constitution."[263] Nevertheless, Professor Ely finds this provision "too demanding."[264] In lieu of the current reporting requirements of section 4(a) of the Resolution he would add the following language: "Before introducing United States Armed Forces into hostilities or a situation where there is an imminent danger thereof, or retaining them in a location where hostilities or the imminent danger thereof have developed, the President shall have obtained a declaration of war or specific statutory

261. United States v. Lovett, 328 U.S. 303 (1946).

262. Ely, supra note 3, at 121.

263. See, e.g., 134 Cong. Rec. 71, 6177-78 (daily ed., May 19, 1988) (statement of Sen. Mitchell).

264. Ely, supra note 3, at 122.

authorization."[265] To clarify the broad scope of this new requirement, he adds this language: "An imminent danger of hostilities exists, inter alia, whenever there exists a substantial possibility that United States Armed Forces will be attacked, irrespective of any hope that the presence of such forces will deter such attack."[266]

It is difficult to take this proposal seriously. Professor Ely's approach would arguably[267] require specific legislative sanction virtually every time the President made a troop movement outside of the continental United States. Much of the business of being Commander in Chief involves deploying and re-deploying the nation's military forces to protect the nation and its interests from potential danger. There is arguably a "substantial danger" of attack virtually any time U.S. forces come within range of various unpredictable hostile threats.

This danger occurs both when forces are committed to foreign trouble spots and when they are withdrawn. One might argue that were President Clinton to decide to withdraw most of the U.S. armed forces from South Korea, that "introduction" of those forces elsewhere, whether they are to be "introduced" into Norway or Arkansas, would arguably create "a situation where there is an imminent danger," or a "substantial possibility" of attack on the remaining U.S. forces in South Korea. In this regard, it is worth noting that the withdrawal of U.S. combat forces from South Korea in 1949 is widely recognized as having contributed to Kim Il Sung's decision to invade South Korea in June 1950.

The power to declare war was given to Congress as a veto over a presidential decision to take the nation from peace to war for reasons other than defending against foreign aggression. It was not even arguably intended to authorize Congress to micromanage the business of the Commander in Chief. Deciding on how best to deploy available military forces to defend the interests of the country is at the core of the President's military function and is an issue for which Congress lacks both the constitutional mandate and the institutional competency.

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265. Id. at 133.

266. Id. at 134.

267. Members of Congress have been notorious for stretching the existing war powers language to cover situations which do not even arguably constitute an usurpation of the power to declare War, and there is considerable precedent for such an interpretation of Professor Ely's proposed language. See, e.g., Turner, supra note 54, at 69.

F. *The Legislative Veto of Section 5(c)*

While acknowledging that "[t]here is . . . a strong likelihood" that the legislative veto provision of section 5(c), which compels the President to remove forces from foreign hostilities "if the Congress so directs by concurrent resolution," would be "invalidated" if the issue ever came before the courts,[268] Professor Ely nevertheless expresses the "personal opinion . . . that section 5(c) is not unconstitutional."[269] He argues that the provision is distinguishable from the "standard 'legislative veto' wherein Congress has delegated certain powers to the executive branch and then attempts to pull them back by reserving a right to veto executive exercises of the delegation."[270]

He is correct that the War Powers Resolution "veto" is different from the norm, but the distinction hardly strengthens his case. Whereas in the classic *Chadha*[271]situation Congress seeks to regulate the execution of discretionary authority vested by the Constitution in Congress and then delegated to the Executive, in the War Powers Resolution Congress seeks to use the mechanism to control powers vested by the Constitution directly in the President as Commander in Chief.[272] This not only violates the presentment clause of Article I, section 7, it seeks to accomplish an end denied to Congress even by proper legislative procedures. The clear relevance of the 1983 *Chadha* case to section 5(c) of the War Powers Resolution was noted by Justice White in his dissent: "Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto' . . . . operating on such varied matters as *war powers* and agency rulemaking."[273]

Despite his belief that the legislative veto provision is constitutional, Professor Ely ultimately concludes that it is "useless" because "Congress would be most unlikely ever to try to invoke

268. Ely, supra note 3, at 120.

269. Id. at 119.

270. Id.

271. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

272. It is not my contention that Congress lacks any power to constrain the President in the use of armed force abroad. Instead, I argue that there are circumstances clearly encompassed by the broad language of the Resolution which exceed the proper congressional role and infringe upon independent powers vested by the Constitution in the Executive.

273. 462 U.S. at 967 (emphasis added).

it," and thus it "should be repealed."[274] This is consistent with an important underlying theme of his book, the "Responsibility" component of his title, that Congress has failed to play a responsible constitutional role with respect to decisions involving the use of armed force.

Essentially, Professor Ely has correctly diagnosed that Congress lacks the political courage to want to go on record in such a way that its members could be held accountable when American lives are at risk. This part of his thesis is as politically sound as it is unremarkable, as many others have voiced it time and again.[275] However, Professor Ely's remedy is unique. Having observed the obvious political reality of congressional pusillanimity when American lives are at stake, he proposes the solution of having Congress enact a new law forcing itself to act in such circumstances. Perhaps his next book will try to solve the crime problem by persuading potential miscreants to agree in advance to report themselves to the police after each new crime. It is perhaps a testament to Professor Ely's ultimate wisdom that he concludes that enactment of such a proposal "doesn't seem very likely in the immediate future."[276]

VIII. CONCLUSION

In a sense, there are two important sub-themes to the volume: the legal critics of U.S. involvement in Vietnam, Cambodia, and, to some extent, Laos, were largely mistaken when they alleged that these were "presidential wars" that Congress did not authorize in a fully constitutional manner, and we must therefore find a way to fix the problem of "presidential war" about which these mistaken critics complained. It is a challenging argument to try to follow.

On one page, for example, he concludes that, "as the constitutional requirement of congressional authorization has historically been understood, Congress does indeed appear (years of denial and doubletalk notwithstanding) to have authorized each of these phases of the war."[277] Both before and after that passage, however, he describes Vietnam as an "executive-initiated war"[278] and a "presidential war."[279]

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274. Ely, supra note 3, at 120.
275. See supra note 239 and accompanying text.
276. Ely, supra note 3, at 130.
277. Id. at 12.
278. Id. at 11.
279. Id. at 57.

This is nevertheless, on balance, a useful book. It is a serious, honest book. As such, it is relatively easy reading, so long as the reader does not spend too much time trying to reconcile all of the disparate views expressed. Professor Ely has added a fresh voice to a debate that still needs to be understood by Americans if the "real" lessons of the Vietnam tragedy are to be absorbed, and he has shed some important new light in the process. While Vietnam is increasingly being relegated to the history books, recent events in places like Somalia, Bosnia, and Haiti emphasize the timeliness of addressing the war powers issue.[280]

Ultimately, no constitutional law text that fails to even mention the critically important Executive Power clause of the Constitution is likely to survive as "the definitive work on war powers." Professor Ely does not strengthen his hand when he dismisses scholars like former Yale Law School Dean Eugene Rostow as one of the "apologists for broad presidential powers," or characterizes as "intemperate" Professor John Norton Moore's considered view that Congress is "breaking the law" by leaving clearly unconstitutional statutes like the War Powers Resolution on the statute books and by enacting hundreds of legislative vetoes after the Supreme Court has declared the mechanism to be unconstitutional.[281] As noted, even former Senate Majority Leader George Mitchell has acknowledged that the War Powers Resolution is unconstitutional.[282]

In a sense, this is really two separate books. Much of the research and analysis is quite excellent, not unlike the writings on these same issues produced by Professor John Norton Moore in the sixties and seventies. However, after having persuasively made the case that the Vietnam conflict was not, in fact, a presidential war, Professor Ely then gives us his prescription for how to prevent such presidential wars in the future. It makes interesting, if confusing, reading. With that and various other caveats already discussed, it is to be recommended.

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280. This is illustrated further by the ironic coincidence that as I was typing this sentence my telephone rang and a *Washington Post* reporter wanted to discuss war powers issues related to Haiti. See Ruth Marcus, Administration Is Challenged On Issue of Haiti Invasion Vote, Wash. Post, Sept. 14, 1994, at A18.

281. Ely, supra note 3, at 187 n.96.

282. See supra note 263 and accompanying text.