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

War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath. By John Hart Ely. Princeton: Princeton University Press. 1993. Pp. x, 244. \$ 24.95.

Philip Bobbitt*

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

SUMMARY:

... Once we resolve this anomaly, the many insights and lucid historical descriptions in John Ely's new book, War and Responsibility, can take us a long way toward solving this most vexing of contemporary constitutional issues; but without such a resolution, Ely's proposals will inevitably be fallow and will not, I think, materially affect a debate that is currently at a standstill. ... This conclusion is firmly established in the text, by the Declaration of War Clause; by history, in which the President was denied the power either to make war, as proposed at the Convention, or to declare war, as was the Royal prerogative; by precedent, at least until the post-World War II period when presidents departed from earlier practice; and by prudence, as the ill fate of the American experience in Vietnam confirms, given that the process of congressional authorization might have either ensured the war's success by promoting true public support as a concomitant to congressional endorsement, or at least averted a failure, as American forces would never have been sent at all. ... Charles Pinckney began the debate over whether to vest the war power in Congress with an objection to the inclusion of the House of Representatives. ... What happens when a member of Congress attempts to disown his vote or the constitutional consequences of that vote? For example, some members of Congress at the time of the Vietnam War voted for an

appropriation
and then claimed they had not voted for the war itself. ...

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Introduction

I approached John Ely's n1 new book with the anticipation of delight, qualified by a certain apprehensiveness. Delight because Ely is almost alone among writers in my solemn field in his ability to write with humor; indeed, he writes in a style that reminds me of the marvelous Joseph Heller. There is no reason, I suppose, for constitutional law professors to be incapable of writing amusing and fresh prose or exposing a false syllogism with the light touch of juxtaposition rather than the heavy bludgeon of irony, but how rare this is! More importantly, Ely's arguments have the satisfying feel of good craft: like his wit, his arguments are unlabored, natural, idiomatic.

-----Footnotes-----

n1. Robert E. Paradise Professor of Law, Stanford University.

-----End Footnotes-----

Nevertheless, I also approached the book with some dread, because Vietnam is a subject that unhinges anyone born between, say, 1940 and 1960. A book subtitled Constitutional Lessons of Vietnam is apt to belong to the same genre as books like The Great War: Its Lessons and Its Warnings n2 written in the early part of this century: that is, the one thing you can expect to find is that no "lessons" have been learned because the historical experience is too close, too searing, and what you are likely to encounter instead is an account so skewed as to seem neurotic after a few decades. The strategic lesson of Vietnam is either (a) do not intervene in a civil war on behalf of a

corrupt,
client elite against an idealistic popular national liberation force
because a
Third World insurgency with the support of the people will [*1365]
ultimately
defeat a high-tech but unpopular First World force with no moral basis in
the
hearts and minds of the people; or (b) do not commit U.S. forces and
prestige to
a remote theater without being willing to use maximum force to achieve
victory
quickly because popular support at home will not tolerate a long conflict
in
which American self-interest is vague and difficult to define. Like the
differing accounts of a husband and wife after a divorce, these lessons
have
more to do with the guilt and trauma of the survivors than with any
strategic
understanding of the causes of failure. So I feared that I might read in a
book
about constitutional "lessons" one more repetition of the claim, so
faithfully
repeated by Senator Fulbright, that the constitutional basis for the
Vietnam War
was untenable because the joint resolution on which it was based was
procured
through fraud - the Gulf of Tonkin incident was arranged by the United
States as
a pretext for escalation - or deceit, because Fulbright and his colleagues
never
dreamed the Gulf of Tonkin Resolution would be used to support a
commitment of
arms so vastly greater than was already devoted to the conflict. n3
Something of
this sort may be found in Michael Glennon's new book, Constitutional
Diplomacy.
n4 Because Ely's book is explicitly directed to revising the War Powers
Resolution, I confess I expected to see these themes united. As Harold Koh
has
put it, "Congress passed the War Powers Resolution to prevent future
Vietnams,
undeclared creeping wars that start and build before Congress or the
public are
fully aware." n5 Thankfully, I found that Ely's book does not repeat this
cant.
It is generally scrupulous and, to a rare extent, detached. It really is
about

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the constitutional basis for war powers, and its meticulous rendering of
that
basis as applied to the Vietnam War is, as far as I know, unique.

-----Footnotes-----

n2. Jesse Collings, *The Great War: Its Lessons and Its Warnings* (1915).

n3. J. William Fulbright, Foreword to Michael J. Glennon, *Constitutional Diplomacy* at ix, xiii (1990) (discussing the fraudulent aspects of the Gulf of Tonkin incident).

n4. Glennon, *supra* note 3.

n5. Harold H. Koh, *The National Security Constitution* 39 (1990).

-----End Footnotes-----

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

The anomaly is that the power to make war is not an enumerated power and thus is not vested by the constitutional text. In that respect, it resembles the power to incorporate a national bank; that is, it amounts to an implied means that must serve the powers that are enumerated and must be accomplished through the ordinary statutory processes that are specified by the text. Once we resolve this anomaly, the many insights and lucid historical descriptions in John Ely's new book, *War and Responsibility*, can take us a long way toward solving this most vexing of contemporary constitutional issues; but without such a resolution, Ely's proposals will inevitably be fallow and will not, I think, materially affect a debate that is currently at a standstill. Accordingly, I will (i) describe Ely's book and (ii) set it in the context of that debate; (iii) point out the consequences for Ely's argument of the anomaly I have just mentioned; (iv) offer a somewhat different explanation of the

constitutional arguments assessing war powers that will account for the anomaly;
and (v) suggest how what is novel and particularly impressive in Ely's account might be married to this explanation.

I

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

Chapter Two evaluates the constitutionality of the war in Vietnam and breaks that discussion down into several parts: its overall constitutional legality,

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the legality of the ground war in Cambodia, the effect of repeal of the Tonkin Gulf Resolution, and the legality of the continued bombing in Cambodia after the withdrawal of American troops from the theater (pp. 12-46).

In his discussion of the overall legality of American involvement, Ely briefly describes the Southeast Asia Treaty Organization (SEATO) treaty, n6 rejects the argument that the SEATO treaty could count as congressional authorization for war (p. 15), and then moves on to a discussion of the Tonkin Gulf Resolution n7 and continuing defense appropriations and the argument that these provide a constitutional basis for the war.

-----Footnotes-----

n6. Pp. 13-14 (discussing the Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, 209 U.N.T.S. 28).

n7. Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, 12, 84 Stat. 2053, 2055 (1971).

-----End Footnotes-----

Ely emphasizes the broad language of the Resolution and the fact that transcripts of the congressional debate make it clear that at least some members of Congress clearly understood the breadth of the powers they were granting President Johnson, although they later said they were tricked or misled (pp. 15-26). Ely goes on to say that because Congress repeatedly voted for defense appropriations earmarked for the war in Vietnam and extended the draft, it unquestionably and [*1367] manifestly continued to authorize the war (pp. 27-30). After a stinging denunciation of what he sees as congressional cowardice and deceit when faced with a constitutional duty to participate in war policy, he concludes: "It was Congress's duty to exercise independent judgment. That's why we have separate branches. That's why the war power is vested in Congress" (p. 30).

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

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

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

Ely discusses the events leading up to Congress's authorization of the Persian Gulf War, again emphasizing that the President had to request Congress to take the authorization vote (pp. 49-52). In terms of structuring incentives for Congress to fill its constitutional role in the area of war powers, Ely suggests that the President actually has his own strong incentives to share the responsibility of waging war, but Ely also recognizes that it is politically unlikely that future presidents will move in the direction of ceding part of their war powers to Congress (pp. 52-54). Ely also discusses increased judicial oversight of the division of war powers between the President and Congress and possible amendments to the War Powers Resolution, which he details in the appendix to his book (pp. 115-38).

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

Ely goes on to discuss four possible defenses for the war in Laos: that it was only a paramilitary effort by the CIA and therefore not a real war (pp. 73-75); that it was authorized in the same way that the Vietnam War was authorized, by the Gulf of Tonkin Resolution (p. 75); that there were compelling reasons for keeping the American role a secret, requiring a certain amount

of
deception (pp. 76-82); and that in any case the secret was not so well
kept that
Congress could not have investigated and de-authorized it had it wanted to
(pp.
82-93). Ely ends by rejecting each of these arguments, but, granting that
Congress is unlikely to be energetic enough to investigate as envisioned
in the
fourth defense, he returns to his argument in the previous chapter for a
more
hands-on judicial role in the area of war powers (pp. 93-97).

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

Ely then poses the question: What is the remedy for waging a secret
war in
which Congress is not complicit? He points out that the House proposed to
add
the secret bombing of Cambodia to the charges in the Articles of
Impeachment

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against Nixon, and Ely agrees that impeachment would be the proper
punishment
for the kind of deception Nixon carried out against Congress and the
American
people about Cambodia (pp. 102-04).

Finally, in Chapter Six, Ely takes up the subject of covert war. He
briefly
discusses the growth of "reform" legislation relating to covert wars and
requiring congressional notice and oversight. He discusses [*1369] the
uses of
section 102(d)(5) of the National Security Act of 1947 n8 and the efforts
made
to put Congress back in the decisionmaking loop, including the Hughes-Ryan
Amendment, n9 which limited funds for CIA operations unless the President

reported on those operations to congressional appropriation committees. He also examines the Church Committee investigation, which relied on Congress's role as inquisitor and factfinder. n10 Ely argues that Congress must be involved in individual decisions to act in or against certain countries, and he concludes that a wholesale authorization similar to the broad language of the Tonkin Gulf Resolution would not discharge Congress's responsibility (pp. 105-08).

-----Footnotes-----

n8. Pp. 106-07 (discussing 50 U.S.C. 403(d)(5) (1988) (current version at 50 U.S.C. 403-3(d)(5) (Supp. IV 1992))).

n9. P. 107 (citing Pub. L. No. 93-559, 32, 88 Stat. 1795, 1804 (1974) (repealed 1991)).

n10. Pp. 107-08 (citing Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, Book I: Foreign and Military Intelligence, S. Rep. No. 755, 94th Cong., 2d Sess. (1976)).

-----End Footnotes-----

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

period before the secrecy of the operation is compromised (pp. 109-12).
Ely also
voices support for Eagleton's proposal to extend the War Powers Resolution
to
include all American agents involved in hostilities (pp. 113-14).

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

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scholarship on that issue that I will now return. [*1370]

II

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

The foundational text for this body of work - and one that is also
remarkably free of posturing - is Taylor Reveley's magisterial War Powers
of the
President and Congress. n11 Perhaps because it is so carefully nuanced,
this
impressive work is more often pillaged for citations and research than
discussed. A generation of writers - including Ely - has relied upon it to
provide definitive textual, ethical, historical, and doctrinal materials.
Reveley asks, "By what criteria do we decide how the Constitution
allocates the
war powers?" n12 and proposes that we consider "the text of the
Constitution's
war-power provisions, the purposes of those who wrote and ratified the
text,
evolving beliefs since 1789 about what the Constitution requires, and ...
the
actual allocations of control that have existed between the President and
Congress since 1789." n13

-----Footnotes-----

n11. W. Taylor Reveley III, War Powers of the President and Congress (1981).

n12. Id. at 170.

n13. Id.

-----End Footnotes-----

To those who are interested in modal approaches to constitutional interpretation, n14 Reveley will prove a pleasure to read. He does not pretend, as some writers do, that text or history or precedent or ethos "solves" the war powers question. He correctly points out, for example, that "none doubt that Congress must vote to declare war if America is to declare it.... We must go beyond the text to decide which if any hostilities entered by America must be declared." n15 Reveley also observes that,

-----Footnotes-----

n14. Philip Bobbitt, Constitutional Interpretation (1991) (discussing the six modes of constitutional interpretation: historical, textual, structural, prudential, doctrinal, and ethical).

n15. Reveley, *supra* note 11, at 171.

-----End Footnotes-----

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although congressional deliberations in 1789 over executive control of the State Department, then called the Department of Foreign Affairs, were a debate on constitutional interpretation, and although it was participated in by men who had been members of the Convention, there is no reference to the discussions of that body or to the decisions of its committees. n16

"Practice since 1789 ... has a role in constitutional interpretation....
[*1371] But this practice ... is not a compelling guide to what the
Constitution means except as practice is embodied in current laws,
executive
orders, or court rulings." n17 And

-----Footnotes-----

n16. Id. at 172 (quoting Henry M. Wriston, Executive Agents in American
Foreign Relations 89 (1929)).

n17. Id. at 173.

-----End Footnotes-----

popular beliefs amount to little more than vague intimations that
Congress
should have a greater role in decisions about war and peace than it has had
recently, with no hard concept of when or how the legislative voice should
be
heard; and these beliefs are countered by others that executive primacy is
essential, given the realities of our times. n18

Finally, Reveley offers ten prudential guidelines that he is careful to
distill
from the commitments of the other modalities. n19

-----Footnotes-----

n18. Id. at 174.

n19. Id. at 175-81 (proposing guidelines that would ensure national
defense,
hinder use of the military for domestic tyranny or for aggression abroad,
create
and maintain national consensus behind government decisions, ensure
democratic
control, encourage rationality, permit continuity while allowing revision,
permit emergency action in advance of democratic consensus, allow speed and
secrecy when necessary, and enhance efficiency).

-----End Footnotes-----

While concluding that the President can act unilaterally in advance of
congressional endorsement, Reveley seeks to check this concession by
proposing
that Congress could, by concurrent resolution, vote to terminate American
engagement. n20 Scholars have more often used Reveley's work than
responded to

it, for several possible reasons: perhaps because of this endorsement of provisions that clearly could not survive INS v. Chadha; n21 perhaps because of his quixotic view that Congress could direct a president to commit troops; n22 or perhaps simply because the War Powers Resolution had not, at the time of Reveley's book, yet proved the absurd failure it has become and therefore tended to preempt Reveley's suggestions. Reveley's book remains, however, the most detailed and thoughtful treatment of this issue.

-----Footnotes-----

n20. Id. at 195-98.
n21. 462 U.S. 919 (1983).
n22. Reveley, supra note 11, at 196.

-----End Footnotes-----

After this work, scholarship on this subject took on a somewhat more polemical style. Advocacy regarding war powers was hardly new to historians and political scientists - Corwin and Commager for example, or Arthur Schlesinger, Jr. n23 - or to legal academics active in the antiwar movement - Richard Falk, for example n24 - but it took the 1980s to produce a body of work by law professors that was virtually divided along the fault line of congressional and presidential perspectives. [*1372]

-----Footnotes-----

n23. See Edward S. Corwin, The President's Control of Foreign Relations (1917); Edward S. Corwin, Total War and the Constitution (1947); Henry S. Commager, The Defeat of America (1974); Arthur M. Schlesinger, Jr., The Imperial Presidency (1973).
n24. See Richard A. Falk, The Circle of Responsibility, in Crimes of War 222 (Richard A. Falk et al. eds., 1971).

-----End Footnotes-----

Robert Turner stresses the importance of the declaration of war as entirely an event with significance in international law: only if the law of nations required such a declaration did Congress thereby acquire the authority to constrain the President by refusing to declare war. n25 In a case like the Iraqi invasion of Kuwait, for example, it was clear that Kuwait enjoyed the right of self-defense, which would embrace any actions taken on its behalf by the United States, proportionate to the Iraqi offensive. With respect to the President's textual authority, Turner invokes Article II's provision that "the executive Power shall be vested in the President," n26 contrasting this with Article I's grant to Congress of only those "legislative powers herein granted." n27 Having strictly cabined Congress's declaration of war power, Turner finds no other enumerated powers in Congress that could constitutionally prevent the President from protecting the national security through use of the armed forces. Turner observes that the President's responsibility to "faithfully execute" the laws n28 includes his duty to enforce treaty provisions - which Article VI makes the "supreme Law of the Land" n29 - and thus concludes that, textually, the Constitution provides ample power for the President to assist any nation to whom the United States has given a security commitment through a treaty, including those states whom the UN Security Council has asked the member states to assist. n30

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n25. Robert F. Turner, Repealing the War Powers Resolution: Restoring the

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Rule of Law in U.S. Foreign Policy 85 (1991).

n26. U.S. Const. art. II, 1, cl. 1.

n27. U.S. Const. art. I, 1, cl. 1, discussed in Turner, supra note 25, at 52.

n28. U.S. Const. art. II, 1, cl. 8 (providing the President's oath of office).

n29. U.S. Const. art. VI, cl. 2, discussed in Turner, supra note 25, at 49-52

n30. Turner, supra note 25, at 87-92.

-----End Footnotes-----

By contrast, Louis Henkin writes that the text "gave the decision as to whether to put the country into war to Congress." n31 He doubts whether Congress could delegate this power, even to maintain nuclear deterrence. n32 And with respect to the Constitution's allocation of power to the executive branch, he fails to find in the text any authority that would empower the President to resist the 1973 War Powers Resolution imposing various restrictions on his power, on the grounds that to resist, "the President would have to find foreign affairs and Commander in Chief powers that give the President power exclusive of Congress, and there is little basis for that in text." n33

-----Footnotes-----

n31. Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs 39 (1990).

n32. Id.

n33. Id. at 31.

-----End Footnotes-----

I have chosen two of the most distinguished and careful commentators in this area. Even exemplary scholars, however, seem to become advocates when they choose up sides on this issue. Thus Michael Glennon sees no ambiguity in Hamilton's words, "when the [*1373] 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," n34 but he carefully omits Hamilton's next sentence: "But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of the Congress is nugatory" n35 Glennon also leaves out the historical

context of
the statement. Thus also, from the opposite perspective, Judith Best
points out
that on the initial vote at the Convention to strike the power to make war
from
Congress's Article I powers, only two states opposed, and she notes that
Oliver
Ellsworth changed his vote "after Rufus King pointed out that 'make' war
might
be interpreted to mean 'conduct' war." n36 But she does not disclose that
there
is disagreement as to the numbers in the initial vote n37 and that, in any
case,
Ellsworth's initial speech can only be read as reflecting opposition to any
effort that would make war easier to commence. n38 Neither of these is an

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example of error, but the omissions are rather a little too sharp for such
able
academics. This is "lawyer's history" as that phrase is sarcastically
used, and
it arises when unshakable commitment has overtaken scholarly completeness.

-----Footnotes-----

n34. Glennon, supra note 3, at 84 (quoting Alexander Hamilton, The Examination, Number 1, N.Y. Evening Post, Dec. 17, 1801, reprinted in 25 The Papers of Alexander Hamilton 444, 455-56 (Harold C. Syrett et al. eds., 1977)).

n35. Hamilton, supra note 34, at 456.

n36. Judith A. Best, Letter to the Editor, Constitutional Winners and Losers, Poly. Rev., Summer 1989, at 86, 86.

n37. Reveley, supra note 11, at 83. The official secretary, William Jackson, reports that the motion was initially defeated 5 to 4. Id.

n38. Id.

-----End Footnotes-----

I could multiply examples, but suffice it to say that virtually all commentary on this subject falls into one of two positions. Under the first view, Congress has the exclusive power to determine whether to introduce forces into war, though in emergencies the President may act. This conclusion is

firmly
established in the text, by the Declaration of War Clause; n39 by history,
in
which the President was denied the power either to make war, as proposed
at the
Convention, or to declare war, as was the Royal prerogative; by precedent,
at
least until the post-World War II period when presidents departed from
earlier
practice; and by prudence, as the ill fate of the American experience in
Vietnam
confirms, given that the process of congressional authorization might have
either ensured the war's success by promoting true public support as a
concomitant to congressional endorsement, or at least averted a failure, as
American forces would never have been sent at all. Under the second view,
the
President has the exclusive power to deploy armed forces to protect the
national
security, a constitu [*1374] tional position that is wholly confirmed by
the
text, in the Commander in Chief Clause n40 and the vesting of all executive
power in the President; n41 by history, showing that the Framers intended
the
Declaration of War Clause to determine the status of U.S. actions under
international law vis-a-vis neutrals and civilians, and nothing more; by
precedent, which must include the many U.S. engagements that though minor
were
accomplished entirely without congressional consent and at least three
major
wars that were fought and funded without a declaration of war; n42 and by
prudence, as the immediacy and peril of contemporary affairs demand both
secrecy
and swiftness to a degree incompatible with true congressional
deliberation.

-----Footnotes-----

n39. U.S. Const. art. I, 8, cl. 11.
n40. U.S. Const. art. II, 2, cl. 1.
n41. U.S. Const. art. II, 1, cl. 1.

n42. The three wars were the Naval War with France, see *infra* text
accompanying notes 67-69; the Korean War, see pp. 10-11; and, of course,
the
Vietnam War, see pp. 12-46.

-----End Footnotes-----

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

Ely is firmly in the congressional camp on this question of constitutional foundations. Thus he writes, regarding historical arguments,

The "original understanding" ... can be obscure to the point of inscrutability.... In this case, however, it isn't. The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, "declared" in so many words or not - most weren't, even then - had to be legislatively authorized....

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

He touches on other modes by claiming, "Contrary to the words and unmistakable purpose of the Constitution, contrary as well to reasonably consistent practice from the dawn of the republic to the mid-twentieth century, such decisions have been made throughout the Cold War period by the executive, without significant congressional participation ..." (p. ix). He is so confident of this view that he spends only a few pages addressing the issue and can scarcely bring himself quite to treat his adversaries seriously. Indeed, he is so free of [*1375] self-doubt on this issue that he even embraces Alexander Haig, remarkably, for the proposition that consultation with Congress would have spared us the

human
loss of Vietnam (p. 5), despite the fact that the balance of his book is devoted
to a compelling account of Congress's complicity with the Executive in maintaining that war. Ely writes in these pages with an adroit wit; the reader
will never have the sense that there is actually much of an issue here. That is
too bad, because unless Ely can bridge this chasm - and he presents no new arguments on this point - the entire agenda of the book, to devise a workable
and responsible War Powers Act, must fail. Unless he persuades the partisans of
the presidency on the constitutional question, one can hardly expect them to
acquiesce on the operational matters in which Congress is, to say the least, at
its weakest. It is, unfortunately, telling that the ever lucid William Van Alstyne writes this praise on the dust jacket, "The scholars will find it outstanding. Congress should find it indispensable." n43 This enthusiasm is seconded by Congressman Ronald Dellums, who writes, "This book makes a significant contribution to the hoped-for restoration of the historic constitutional balance between the legislative and executive branches."
n44 If

you can imagine such a quotation, verbatim, being bestowed upon a different book
by, say, Caspar Weinberger or Dick Cheney, then you have some measure of the
problem.

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n43. William W. Van Alstyne, quoted on the dust jacket of War and Responsibility.

n44. Ronald V. Dellums, quoted on the dust jacket of War and Responsibility.

-----End Footnotes-----

III

Ely, and partisans of the congressional position generally, treat the Declaration of War Clause as if it were a "Power to Make War Clause" with the
power of tactical command stripped from it. n45 This is an easy mistake to

make
in light of the fragmentary stage directions we have of the debate at the
Convention. From one angle it appears that make war was changed to declare
war
out of concern that the former phrase might entangle Congress in making
tactical
decisions. Of course even if this had been the case - and it appears
doubtful
that the Convention as a whole held this view, whatever may have been in
the
mind of the delegate who made the suggestion - it was not conveyed to the
ratifiers who had only the text and the Federalist gloss to go on. It is to
their understanding that we must turn for constitutional authority, just
as we
turn to the intentions of the grantor - and not to those of her lawyer -
for the
authoritative construction of a trust instrument.

-----Footnotes-----

n45. Partisans of the presidency do the same thing in reverse: they
treat the
Commander in Chief Clause as if it were a Power to Make War Clause with the
power to issue a declaration stripped from it.

-----End Footnotes-----

Textually, the one thing that the Declaration of War Clause can
[*1376] not
grant is the equivalent of the power to make war with the tactical role
removed,
because a declaration of war only comes after war has commenced. That is,
it is
a legal characterization of an ongoing conflict as one that is "declared"
or
"perfected," much as a lien is perfected by a filing or a child is
legitimized
by a "declaration." This is why the Declaration of War Clause itself
appears
among the grants of power related to international law - for example, the
power
to grant letters of marque and reprisal. n46 Because declarations of war
have
come only after states of war had begun, such declarations cannot be
conditions
precedent to the making of war.

-----Footnotes-----

n46. See U.S. Const. art. I, 8, cl. 11.

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

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

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

according to the congressional interpretation, is the requirement for authorization.

Ely's discussion of historical argument shows the pitfall of not carefully distinguishing between history and text. He is tempted to reason back from the apparently clear - to us today - meaning of the Declaration of War Clause to the intentions of the Framers: it is this anachronistic textual clarity that leads him to conclude that the introduction of the Declaration of War Clause occurred simply because the make war was "changed" in the "editing process" to declare war so as to prevent congressional interference with the Commander in Chief Clause (p. 5). The Commander in Chief Clause was already present, however, in the draft that proposed the Power to Make War Clause; if the reason for the "editing" had been as Ely indicates, the change might have been made straightforwardly in the Commander in Chief Clause, that is, vesting "sole power" in the President or something along those lines. I do not doubt the ample evidence that the Convention became persuaded that Congress should not have the power to make war because it would be impracticable; what I doubt is that this fact supplies the historical interpretation for the very different power to declare war. Putting to one side our contemporary expectations, why would draftsmen who intended to edit Congress's power to make war only to the extent of reaffirming an explicit and exclusive presidential power and reserving an implied presidential power - why would such persons strike the entire Power to Make War Clause and insert a completely distinct power, the power to declare war? Ely ignores this distinction and so persists in referring to the Declaration of War Clause as simply the War Clause. There is ample historical

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evidence, however, that the Declaration of War Clause was introduced, not as an "edit" for the Power to Make War Clause, but for purposes of its own.

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

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

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

Ely's defense of his interpretation has three parts. He begins by [*1378] offering a series of historical arguments that show that the Framers intended war to be legislatively authorized. These are thoroughly convincing, but they do not show - indeed they decisively negative - that this is the same thing as a declaration of war. Ely chooses, however, to treat these two procedures as the same and, having made this virtually universal but nonetheless fatal elision, then turns to the two most frequent counterarguments to treating Congress's power to declare war as creating a condition precedent for warmaking. One must note, however, that neither of these objections necessarily applies to the legislative process. So it is Ely's elision that requires his having to make a rebuttal. The two counterarguments are prudential - it is impractical in contemporary security affairs to require congressional approval in a way that hampers the presidential use of force abroad - and precedential - various

presidents and Congresses on countless occasions over two centuries have behaved as though there were no such requirement. Let us look at the structure of this interpretation - the principal argument and the elision, and the two counterarguments and their respective rebuttals. I hope this will throw into high relief the fundamental move Ely makes that ensnares him in the terms of the current debate.

A. The Historical Argument

The "original understanding" ... can be obscure In this case, however, it isn't. The power to declare war was constitutionally vested in Congress. The

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debates, and early practice, establish that this meant that all wars, big or small, "declared" in so many words or not - most weren't, even then - had to be legislatively authorized. p. 3; footnotes omitted

Hang on. What does "in so many words" mean here? Does it simply mean that other joint resolutions like the Gulf of Tonkin Resolution n47 or the Gulf War Resolution n48 virtually amount to declarations of war? Is that what the "early practice" established? Or does it sweep within its scope all warmaking legislation emanating from Congress and treat it as "declarations of war" in so many words? If it is the latter, then are declarations of war just legislation, in so many words? If they are, then why have the enumerated power to declare war in the first place? John Ely is a very careful and very scrupulous person. Why would he engage in this apparent sleight of hand? Because it reflects an unquestioned assumption by which historical arguments from the debates and particularly from early practice are [*1379] conflated with the text of the Declaration of War Clause, thereby leveraging that text into an enumerated power to make war.

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n47. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, 12, 84 Stat. 2053, 2055 (1971).

n48. Authorization for the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

-----End Footnotes-----

Look at the move again.

Only one delegate to either the Philadelphia convention or any of the state ratifying conventions ... is recorded as suggesting that authority to start a war be vested in the president. Another delegate responded that he "never expected to hear in a republic a motion to empower the Executive alone to declare war," and the first delegate subsequently disowned his earlier view. n49

Did you see it this time? From the quoted passage, it appears that the two speakers treated the concepts of making and declaring war as interchangeable. This is what we know of that debate, pieced together from the notes of the official secretary, William Jackson, which were undisclosed until 1819, and the notes of James Madison, which were published in 1840. n50 Charles Pinckney began the debate over whether to vest the war power in Congress with an objection to the inclusion of the House of Representatives. n51 For several reasons, including the provisions allocating the treaty power, Pinckney preferred that the war power rest in the Senate alone. n52 Pierce Butler extended this argument by proposing to vest the power in the President, because many of the objections against the House also applied, in Butler's view, to the Senate. n53 No one made a formal motion, however, until Madison made his celebrated "sudden attack" motion that, while not explicitly encompassing presidential authority to anticipate attacks - even though the August 6 draft had explicitly given this authority to the states - did seem to intend to enlarge the emergency authority of the President in a way that was incompatible

with Congress's enumerated power to make war. n54 At that point Madison and Elbridge Gerry, who had seconded Madison's sudden attack motion, moved to insert declare, striking out make and leaving to the Executive as a consequence of this removal the power to repel sudden attacks. n55 As observed above, it is the removal of the power to make war, not the inclusion of a power to declare war, that clears the way for the President to respond to sudden attacks. This point is obscured by the economy of the Framers in substituting declare for make.

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n49. P. 3 (footnote omitted) (quoting 2 Records of the Federal Convention of 1787 (Max Farrand ed., 1911) hereinafter Convention Records).

n50. Max Farrand, Introduction to 1 Convention Records, *supra* note 49, at xi, xi-xii, xv-xix.

n51. 2 Convention Records, *supra* note 49, at 318.

n52. 2 *Id.*

n53. 2 *Id.*

n54. 2 *Id.*

n55. 2 *Id.*

-----End Footnotes-----

Before the Convention took its first vote on this motion - the Jackson and Madison accounts differ as to the outcome of the vote - [*1380] four delegates spoke. n56 Sherman thought that make should be retained so that the President would not be able to commence war. n57 In these circumstances, either the text would have had both the make and declare clauses, or the declare clause would have been struck in favor of the make clause. Defending his own motion, Gerry replied - either to Butler or to Sherman or to both - that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." n58 By this remark, Gerry might be taken as responding to Sherman's latter

alternative and suggesting rhetorically that this would be the consequence of removing the power to "declare" from Congress. Instead, it is usually taken as a retort to Butler's much earlier suggestion that the power to make war be lodged in the Executive, in which case the word declare is a bit wide of the mark as Butler did not make such a proposal. It cannot, however, be taken as a reply to Butler, equating declaring with making war - as Ely and so many have done - because it was Gerry's motion after all that introduced the idea of a declaration. If the only difference between the power to declare and the power to make war is that the latter preempts a power to respond to sudden attacks, then Gerry's retort could not have been directed to Butler: Butler was scarcely arguing that the President be given a power that lacked the ability to repel sudden attacks. Indeed, Butler never mentioned the power to declare war at all. In fact, he made no motion; the only motion that was under debate was the Madison-Gerry motion.

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n56. 2 Id. at 318-19.
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n57. 2 Id. at 318.

n58. 2 Id.

-----End Footnotes-----

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

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

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

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

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

Now, for a long time it has been said that B was responding to A in B's last remark, but this is very doubtful on many grounds, including the timing, the sequence, and the reference to the motion on the table. [*1381] Most importantly, however, the logic of the substitution itself does not support this reading. We have only made this mistake so routinely because it appears in harmony with our contemporary textual preconception that declare means commence.

This exchange is made considerably clearer by a subsequent statement by Butler, in a context that gives it more constitutional significance than the debate at the Convention. On January 16, 1788, Butler recalled for the South Carolina ratification convention why declare had been substituted for make.ⁿ⁵⁹ The record of this account is verbatim - unlike the Convention notes - and it underscores the fundamental point that the power to make war was decisively removed from either branch as an enumerated power, an important step for our current debate and one having nothing whatever to do with the declaration power per se. Butler said:

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n59. 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 263 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1861).

-----End Footnotes-----

It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition - which was, that negotiations always required the greatest secrecy, which could not be expected in a large body. n60

This is also consistent with Pinckney's effort to strike the entire Declaration of War Clause on August 17, that is, after the substitution. n61 This would be nonsense if the power to declare war were simply the power to make war stripped of both the authority to repel attacks and the power to oversee tactics. Such a motion would then divest the federal government of the power to defend the Republic. It only makes sense if the power to make war is not an enumerated power at all and, of course, if it is not coextensive with the power to declare war. So Ely is quite right, importantly right as we shall see, that the Framers were determined to "vest the decision to go to war in the legislative process" (p. 3), but he is wrong to identify that process with the power to declare war.

-----Footnotes-----

n60. 4 Id.

n61. 2 Convention Records, *supra* note 49, at 319.

-----End Footnotes-----

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

B. The Prudential Counterargument

This sort of argument goes as follows: [*1382]

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

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

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

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

Second, Ely returns to the Convention debate over the substitution of declare for make and reminds us that Madison at least believed that the President had the power to repel "sudden attacks," which power the

substitution

confirmed (p. 5). One could use this phrase to cover both attacks on U.S. territory and perhaps other threats to our security. Attacks "might or might not mean "attack on the United States,' but "sudden' does ... suggest ... urgency" (p. 6).

Ely is too sensitive to the different modalities of constitutional argument, however, to be happy with this move. A textual argument such as this can hardly be made from a phrase in Madison's notes; such arguments are confined to the constitutional text. Therefore, he uses this phrase to suggest a historical argument: What could have been the intent of the Framers in reserving such authority to the President? They might have thought that, in the event of an attack on the United States, there would necessarily be such consensus that congressional consent would be irrelevant. This argument, he notes, proves either too much or too little: either we assume that a likely consensus will support action other than simply a response to an attack on the United States - as it surely would in at least some cases - and thus open up a limitless endorsement of presidential initiative, or we limit the authority to cases of actual attacks on the United States and undercut what seems to be the rationale for the phrase in the first place. To these difficulties one might add some doubt as to whether the re [*1383] quirement of congressional action should be replaced by a requirement of consensus among the congressional leadership, but the notes show that Ely is wary of the elitism suggested by such a move (p. 7 n.33).

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

To this argument, Ely adds two prudential arguments of his own. The first is that a congressional check on executive schemes is especially necessary in the era of the all-volunteer army and useful when different political parties occupy

Congress and the White House. It is a shame that he should repeat the old canard that President Bush might have started a war in 1992 to demonstrate "leadership' ... when ... the economy refused to 'jump-start' in time for an upcoming election" (p. 8). I know of no evidence for this, and Ely cites only press speculation (p. 8 n.41); it is saddening that a man of such stature should make such a charge, and I can think of nothing to say about it except that, in light of my long-standing and well-grounded admiration for John Ely, this seems

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out of character.

The other prudential argument Ely gives is that congressional authorization helps forge national unity and thus deflates potential resistance to war (p. 8). This argument conflicts with the previous one to the extent that one believes congressionally authorized wars can be just as foolish as those that are unauthorized, and Ely ends this discussion by addressing that point. Here he quotes Alexander Bickel, the preeminent prudentialist of his era, "Singly, either the President or Congress can fall into bad errors So they can together too, but that is somewhat less likely, and in any event, together they are all we've got." n62 This rather resigned defense rests on a number of controversial propositions - why not the Supreme Court, too? - and in any case does not tell us the degree of mutual dependence that is helpful, but it is, as Ely observes, well put (p. 9).

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n62. P. 9 (quoting Hearings on War Powers, Libya, and State-Sponsored Terrorism Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 99th Cong., 2d Sess. 88 (1986) (statement of J. Brian Atwood, Director, National Democratic Institute) (quoting Alexander Bickel)).

-----End Footnotes-----

C. The Final Counterargument

The final counterargument is made from precedent. When constitutional arguments of this sort are made on the basis of caselaw, this form of argument is called "doctrinal," but there are as many kinds of precedent as there are constitutional institutions creating them. In the [*1384] case of the presidency, doctrinal argument relies on past presidential decisions; the reporter system is The Messages and Papers of the President, which includes executive orders, veto messages, State of the Union Addresses, and so forth.

In 1966 the State Department Legal Adviser's Office produced a memorandum collecting over 125 incidents in which the President used the armed forces abroad without obtaining prior congressional authorization. n63 The vast majority of these incidents were minor assertions of U.S. power against pirates, local insurrectionaries who threatened American citizens abroad, and the like. n64 Not all of these examples, however, can be easily dismissed. Several involved protracted occupations of foreign states that, though authorized by treaty, were not specifically authorized by Congress; n65 several were invasions of disputed territories claimed by the United States and thus, while not constituting acts of war, were nonetheless substantial uses of force. n66 The most relevant precedents, however, are the French Naval War and the Korean War, both of which were conducted without benefit of a declaration of war and both of which were, by any standard, substantial national engagements.

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n63. Leonard C. Meeker, U.S. Dept. of State, The Legality of United States Participation in the Defense of Viet-Nam, 54 Dept. St. Bull. 474, 484-85 (1966)

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hereinafter State Dept. Memorandum, reprinted in 75 Yale L.J. 1085, 1101 (1966).

n64. Edward Corwin, The President's Power, in The President: Rules and Powers 360, 361 (David E. Haight & Larry D. Johnson eds., 1965).

n65. Reveley, supra note 11, at 142.

n66. Id. at 139.

-----End Footnotes-----

The State Department memorandum refers to "the 'undeclared war' with France (1798-1800)," a citation to which Ely strongly objects. n67 "The memorandum," he writes, "is also dead wrong about the example cited: The undeclared war with France was authorized by Congress clearly, repeatedly, and in advance, as everyone, including President Adams, believed it to be" (p. 10 n.54). Here, I think, both sides get it wrong, and they do so in a way that reinforces the intellectual impasse on this issue.

-----Footnotes-----

n67. P. 10 n.54 (quoting and discussing State Dept. Memorandum, supra note 63, at 474).

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The Legal Adviser is surely wrong to cite the French Naval War as an example of a president relying on his inherent constitutional authority to wage war. There may be some doubt as to precisely when the war began - which bears on whether or not congressional authorization was "in advance" of the entry of American forces into the hostilities - but there can be no doubt that the war was fought pursuant to congressional statutory authorizations. At the same time, Ely is rather casual about assimilating statutory authorizations into declarations of war. The French Naval War was an undeclared war, and there is much of constitutional significance we can learn from that fact. [*1385]

If we recall that the United States had no navy at the beginning of this period, that the Constitution requires that all military appropriations are limited to a maximum of two years, n68 and that, as I have argued, the power to make war is nowhere enumerated in the Constitution, then we can reconstruct rather clearly the expectations of the Framers and the ratifiers. When the President sought to involve the United States in other than emergency actions of self-defense, it was expected that he would go to Congress and request the

appropriate funding to execute his proposed policy, and the usual statutory processes would go into effect. This is precisely what happened in the instance of the first war of the United States. A declaration of war was never forthcoming, though the issue was widely debated, because a declaration of war was not thought even relevant to the commencement of belligerency but was, rather, believed to change the legal status of the belligerent states to one of total war. For this reason President Adams resisted calls for a declaration of war in 1798 (p. 9 n.45).

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n68. U.S. Const. art. I, 8, cl. 12.

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-----End Footnotes-----

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

First, congressional partisans often make much of the fact that some wars - usually wars from which they wish to disassociate themselves - are undeclared, meaning no more than that they were conducted without benefit of a declaration of war. If "declaration" is the key event for Congressional partisans, an event for which statutory authorizations like those that fueled the Korean War or even joint resolutions like the Gulf of Tonkin Resolution are not satisfactory substitutes, then the French Naval War counts against the congressional position. On the other hand, if statutory authorizations are sufficient, as they are for Ely, then what is the point of the declaration of war clause? No one claims, I assume, that a declaration could be a "substitute" for appropriation and authorization statutes. n69 It is crucial to note that Ely repeatedly cites examples of statutory authorizations as vindications of Congress's power to declare war, even going so far as to refer to the clause granting such power as the "War Clause." Although this may have the rhetorical effect of

aggrandizing
the Declaration of War Clause, in fact it undercuts the claims of
partisans to
an exclusive role for the declaration as a kind of condition precedent.

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n69. Presidents have signed declarations of war in the past, but it
seems
clear from the language of the Constitution that the President cannot veto
a
declaration, Congress alone having the power to declare war. But obviously
the
President can veto a statutory authorization. But see Clinton Rossiter, *The
Supreme Court and the Commander in Chief* 66 n.1 (1970) (noting that
President
Cleveland threatened to veto a declaration of war against Spain).

-----End Footnotes-----

Second, if the Framers believed statutory authorizations to be the
route by
which the United States would be committed to war, reserv [*1386] ing the
additional jolt of a declaration for "total" wars, then the focus of the
entire
inquiry changes, and changes, I think, in a way that is much truer both to
the
strategic demands of the commencement of war and to the political process
of
defense authorizations. Wars rarely start as unexpected ambushes; they are
usually the culmination of a long period of policy decisions. We can in
retrospect see even U.S. wars that appear to begin out of the blue - like
the
attack on Pearl Harbor - as the consequence of a series of American
political
decisions. It is a self-deception to pretend that war arises inexplicably,
by
accident, without the steady determination that invariably is its cause.
If we
think of the declaration of war as a commencing act - which it almost
never is
and which the Framers did not expect it to be - we will not scrutinize
those
steps that bring us to war, steps that are in the main statutory in nature.
Moreover, we will be inclined to pretend, for reasons Ely amply documents
(pp.
47-67), that Congress really has played no role in formulating and funding
very
specific foreign and security policies. It seemed odd to me at the time
that
members of Congress, who had spent countless hours in hearings discussing
U.S.

strategic plans vis-a-vis the Arabian Peninsula and had approved detailed procurement programs for equipment whose only conceivable use was deployment in

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that theater, expressed surprise that the President would actually deploy troops in Saudi Arabia following the Iraqi invasion of Kuwait.

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

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

Assume, he suggests, that postratification practice could overrule the text. This would require, however, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." n70 This, he says, is manifestly lacking. True, Presidents Polk, Wilson, and Roosevelt may have failed to comply [*1387] fully with the congressional partnership that the Constitution requires, but they at least dissembled and claimed to be doing so; as a result, their examples cannot count as precedent. It is, as La Rochefoucauld said, as if "hypocrisy is a tribute which vice pays to virtue." n71 Only defiance - open and notorious - would present the question to history that, once decided, could count as precedent.

-----Footnotes-----

n70. P. 10 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

n71. Duc de La Rochefoucauld, *Maximes* No. 218 (1678), quoted in *The Oxford Dictionary of Quotations* 410 (Angela Partington ed., 4th ed. 1992).

-----End Footnotes-----

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

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Congress at the time. As Ely conscientiously notes,

Congress, including the Taft Republicans, gave virtually full support to five separate pieces of war-related legislation during the intervention - a bill extending the draft, an emergency aid bill for Asia, a bill lifting the ceiling

on the size of the armed forces, a bill to increase taxes by \$ 4.7 billion to help pay for the war, and an act giving the President power over defense production. n72

-----Footnotes-----

n72. P. 11 n.66 (quoting Larry Elowitz & John W. Spanier, Korea and Vietnam: Limited War and the American Political System, 18 Orbis 510, 517 n.11 (1974)).

-----End Footnotes-----

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

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

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

IV

I have already implied that it is a mistake to approach the question of war power from the perspective of the separation of powers. To do so is to begin by asking either one of two sets of questions. First, one might ask: What can the

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President do without a declaration of war? When does the magnitude of hostilities become a war and thus require congressional endorsement? When does a so-called police action authorized by the UN Security Council amount to a war? And so on. Or one might begin from the opposite angle: How does Congress appropriately share the war power? As Congress determines when war is to be fought, what mechanisms can be put into place to ensure that the war that is authorized is the one that is fought? Can such oversight be practical in light of the partisan division of the houses of Congress? Can intelligence be protected and expeditious decisions arrived at? And so on.

This choice of either one starting position or the other depends on the usual characterization of the U.S. government as arising from the separation of powers. Characterizing the system we have as a system of separated powers, however, is misleading. It is really a system of linked and sequenced powers. It makes far more sense to see the pattern of required cooperation in war as sequential, here as with other powers, in which one branch can act within certain boundaries, thereby having an impact on the choices open to the other branches but not determining the outcome of those choices. No branch can do anything of legal significance - pass a law, ratify a treaty, appoint a judge, render a decision, enforce a regulation - without at least one [*1389] other branch having participated, but each branch is guaranteed the integrity of its own enumerated powers. They provide the genetic menu of possibilities that

political life actualizes, just as the petals of a flower will vary in color depending on sunlight or as the height of a child, while genetically limited, will vary according to nutrition.

For the most part, the President carries out powers in our system that are enumerated to Congress and are delegated to him. This is the case with the Department of the Treasury - executing the tax laws, for example - or the Department of Health and Human Services - executing the Social Security statutes that Congress passes pursuant to its spending powers - and so on. The Constitution enumerates very few powers to the Executive. Even these - like the powers enumerated to the Judiciary - usually require Congress to act first. Thus, for example, Congress may not determine how the courts will decide a case - because the judicial power is not delegated to the courts but enumerated to them in Article III - but Congress must first vest the federal courts with jurisdiction or there will be no cases to decide. Indeed, despite the language of Article III that the federal judicial power shall extend to cases arising under the statutes and laws of the United States, ⁿ⁷³ there was little federal question jurisdiction until late in the nineteenth century when Congress provided for it by statute. ⁿ⁷⁴ Congress need not choose to invest the courts with the power to hear cases, but having done so, Congress may not, for example, forbid the courts to rule in a particular case or even make it a condition of jurisdiction that the courts refrain from declaring what the law is on a particular subject. ⁿ⁷⁵ Similarly, the President has the enumerated pardon power. ⁿ⁷⁶ Congress may not tell him whom to pardon. But unless Congress has passed a federal criminal code, there will be no offenses for which someone can be pardoned.

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ⁿ⁷³. U.S. Const. art. III, 2, cl. 1.

ⁿ⁷⁴. Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 846-47 (2d ed. 1973).

n75. Id. at 321-22 (quoting *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting)).

n76. U.S. Const. art. II, 2, cl. 1.

-----End Footnotes-----

The power of command of the armed forces is one of the few enumerated executive powers. n77 Congress may not act as a commander, directing where troops will go, because the President has the enumerated power on this subject and thus the Congress has not delegated the power. Unless Congress, by statute, provides an army, transport, weapons, and materiel, however, there is nothing for the President to command. Indeed, our first war was fought when Congress agreed to create a navy to make that war feasible. As Taft wrote in 1916, Congress might refuse to vote the appropriation for an army or might repeal the law organizing the army, but it cannot provide an army of which the President must be the Commander in Chief and then in the law of its creation limit him in the use of the army to enforce any of the laws of the United States in accordance with his constitutional duty. n78

-----Footnotes-----

n77. U.S. Const. art. II, 2, cl. 1.

n78. See William H. Taft, *Our Chief Magistrate and His Powers* 94, 128-29 (1916). One must assume, it should be noted, that "the laws of the United States" include our treaties.

-----End Footnotes-----

Taft's conclusion rests on essentially structural grounds. That is, it draws its force from inferences, rather than explicit directions, drawn from the constitutional text: the text mandates certain legal relationships (delegation of power, enumerated powers, and so on) and provides certain structures (the branches of the federal government, the system of federalism, and others); from these structures and relationships, the imperatives of a specific context

- war
- will draw forth various conclusions. Because the power of command is vested in the President, for example, and because the Constitution provides for an executive branch, the President's orders along a particular chain of command within the Executive cannot be altered without the President's concurrence. That is, the fundamental structure of linked powers is animated by the relationship between those powers that is specifically applied to war.

Recall now that Congress's role in raising armies was, in the original contemplation of the Framers, by no means routine. The Framers did not anticipate that the United States would employ a large standing army, or that Congress would have to declare war before raising one. Funding armed forces was deemed to be of such significance that any decision to field an army had to be revisited and reiterated at least every two years. These appropriations statutes amounted, constitutionally, to authorizations for the Commander in Chief to dispose of those forces so as best to protect the country. Indeed, in the eighteenth and nineteenth centuries, when war seemed imminent, the President was

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expected to go to Congress and ask for forces, whether or not he also sought a declaration. What confuses us today is the presence of standing armies whose authorizations and appropriations have become more or less routine, even permanent parts of the statutory background. Thus members of Congress are inclined to feel they have authorized nothing - certainly not hostile action - when they have approved large, heavily armed forces whose only justification can be that they are prepared to fight.

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

In Indochina, of course, Congress withdrew funds for both the ground and the air wars in Cambodia and denied requests by the Ford [*1391] administration for funds in the wake of the April 10, 1975, collapse of South Vietnam (pp.

39-41). In 1975 and 1976, Congress refused to appropriate funds for aid to factions in the Angolan civil war, thus halting direct U.S. involvement.
n79
Earlier, in 1813, President Madison withdrew U.S. forces from a part of Spanish East Florida when Congress refused to ratify his actions. n80 And Grover Cleveland refrained from using force in Hawaii after House and Senate resolutions warned against such an action. n81 When Andrew Jackson determined that military force ought to be used to compel France to pay its debt to the United States, Henry Clay blocked the plan in the Senate. What Congress cannot do is direct the forces it has created. But if Congress has not carefully weighed the commitments it undertakes in providing the forces first, it will very much want to have a part in directing their disposition and indeed will feel cheated, constitutionally, of a responsibility that the Constitution, however, requires it to exercise in a particular statutory way.

-----Footnotes-----

n79. Turner, supra note 25, at 114.

n80. See Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power 303-26 (1976).

n81. See Richard E. Welch, Jr., The Presidencies of Grover Cleveland 169-75 (1988).

-----End Footnotes-----

When President Truman sent troops to defend South Korea on the basis of a UN resolution, he did so despite an act of Congress requiring the President to acquire specific approval from that body before committing troops in support of a UN resolution. n82 On essentially structural grounds, Truman's Secretary of State, Dean Acheson, took the position that not only did the President have the power to send troops but Congress had no power to interfere in that particular way n83 - though of course Congress could have withdrawn funds from the forces in Japan.

-----Footnotes-----

n82. United Nations Participation Act of 1945, Pub. L. No. 79-264, 6, 59 Stat. 619, 621 (codified as amended at 22 U.S.C. 287d (1988)).

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n83. P. 10 (citing Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Comm. on Foreign Relations and the Comm. on Armed Services on S. Con. Res. 8, 82d Cong., 1st sess. 88-93 (1951) (memorandum of Secretary of State Dean Acheson)).

-----End Footnotes-----

As a structural matter, then, the Constitution requires a congressional appropriation for armed forces that does not exceed the mandate of a single Congress and must be repassed within at most two years; n84 once Congress has provided such forces, however, they are the President's to command so long as they are used to enforce the laws and treaties of the United States.

-----Footnotes-----

n84. U.S. Const. art. I, 8, cl. 12.

-----End Footnotes-----

On this understanding, the constitutionally proper way for the United States to go to war is by statute - providing the forces and materiel for specific purposes - and by executive action, deciding [*1392] where and how to deploy the forces in pursuit of those purposes. Thus, the President might order into hostile action forces that Congress provided by law and equipped with the means of waging war. He might, within his constitutional power, proceed without further specific authorization even if other statutes purported to interfere with his command of these forces, so long as Congress had decided to provide forces by law. In an era of large, worldwide deployments, there is very little geographical limit as to the possible uses for these troops unless Congress decides to limit their number or materiel or the policies they may be used to

enforce, though of course the Congress can decommission forces - or merely threaten to - if they object to a proposed deployment.

The war power is not vested solely in Congress as Ely repeatedly alleges.

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

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

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

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the passage of the Tonkin Resolution silenced even some of its sponsors who continue to maintain that it was, after all, not a declaration of war.

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

....

In this case, it would be an understatement to say that the program for which Congress was appropriating funds (and extending the draft) was conspicuous. In May of 1965 Congress enacted a special appropria [*1393]

tion
of \$ 700 million for "military activities in southeast Asia." n85

-----Footnotes-----

n85. P. 27 (footnote omitted) (quoting H.R.J. Res. 447, 89th Cong., 1st
sess., 79 Stat. 109 (1965)).

-----End Footnotes-----

The President's message requesting this appropriation had begun:

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

This is not a routine appropriation. For each Member of Congress who
supports this request is also voting to persist in our effort to halt
Communist
aggression in South Vietnam. Each is saying that the Congress and the
President
stand united before the world in joint determination that the independence
of
South Vietnam shall be preserved and Communist attack will not succeed. n86

Yet as late as 1990, Senator Fulbright could maintain that, once "tricked"
into
voting for the Gulf of Tonkin Resolution, Congress could not cease funding
the
Vietnam War: "The political realities of 'voiding' a war when the troops
are in
the field, the flags flying, and the bands playing make that option
impractical." n87

-----Footnotes-----

n86. P. 27 (quoting 111 Cong. Rec. 9282 (1965)).

n87. Fulbright, *supra* note 3, at xiii.

-----End Footnotes-----

This brings us to ethical argument. Most often, ethical constitutional
arguments are used in the context of human rights. The fundamental ethos
of our
Constitution is the division between public and private life, which
reflects our
fierce determination to retain for ourselves dimensions of our lives that,

in
other societies, are the subject of governmental regulation. The
constitutional

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texts of the Declaration of Independence, the Ninth and Tenth Amendments,
and
the Privileges or Immunities Clause of the Fourteenth Amendment express
this
ethos. Another ethos that is just as basic, however, equally inspires our
Constitution: that is the notion of self-government, based on the idea
that the
government's limited sovereignty derives from delegation by the People,
who are
wholly sovereign. One corollary to this idea is that the People must have
an
opportunity, through the electoral process, to affirm actions taken in
their
name. This can only happen if they are told what is actually being done.

There are several routes by which the United States can be legitimately
taken to war. One is by declaration of war. This usually follows the
incidence
of war and gives formal recognition to a preexisting state. A declaration
might,
however, also initiate hostilities if it were conditional - that is, if it
were
in the form of an ultimatum. Thus, preventing the President from declaring
war
without Congress also prevents him from committing the "substantive act of
initiating offensive hostilities against another state in such a manner as
to
commence a de facto war, without first securing the affirmative approval
of both
houses of Congress." n88 Another route is by statute. Another route to
[*1394]
war is by treaty, because treaties have, by virtue of Article VI, the same
legal
force as statutes. n89 Another avenue of constitutional authority occurs
in the
context of an emergency - an imminent threat to American forces or
nationals
abroad, to our civil order, or to the society as a whole. n90 All of these
avenues, however, are limited by the obligations of the Executive to put
its
policies before the public truthfully. It goes without saying that a
statute
authorizing a force structure to defend Europe would have been questionable
authority for the unprovoked invasion of the former Soviet Union. Nor
would a
treaty requiring the United States to aid a stricken ally support the use
of

force when the alleged attack was merely concocted - a justification used by the Japanese at Mukden and by the Nazis for their invasion of Poland. n91
Secret
operations are, of necessity, required by war and by the preparations for war. A
democracy cannot, however, tolerate secret policies, because they are robbed of
the legitimacy our institutions confer.

-----Footnotes-----

n88. Turner, *supra* note 25, at 80.

n89. U.S. Const. art. VI, cl. 2.

n90. See Philip C. Bobbitt, *States of War* (forthcoming 1995).

n91. Cf. Bobbitt, *supra* note 14, at 80-81.

-----End Footnotes-----

Thus, constitutional argument from an ethical perspective requires that the public be fully and truthfully informed of the war aims of the President.
n92 If
the People were deceived in the process, no customary method of taking the United States to war would be legitimate. It is an open constitutional question
whether even a specific statutory authorization would be valid if it were based
on deception - such as is frequently, and falsely, alleged about the Gulf of
Tonkin incidents. n93

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n92. This applies to covert, paramilitary operations also: thus the Contra
intervention by the Reagan administration stood on a somewhat different
basis
than its arms policies toward Iran.

n93. See, e.g., Fulbright, *supra* note 3, at xiii; Neil Sheehan, *A Bright Shining Lie* 379-80 (1988).

-----End Footnotes-----

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

Senator Albert Gore (Sr.), to take but one example, indicated that by his vote he did not intend "to approve an escalation of the war or to approve the sending of combat troops into South Vietnam." However, Operation Rolling Thunder was well under way, we had had combat troops in Vietnam for two months, and the appropriation was \$ 700 million for military activities in Vietnam: What exactly did Gore and his similarly exculpatory colleagues think they were voting for?
n94

-----Footnotes-----

n94. P. 27 (quoting 111 Cong. Rec. 9497 (1965) (statement of Sen. Albert Gore)).

-----End Footnotes-----

As Stanley Karnow has pointed out, "During the seven-year span from July 1966 through July 1973, Congress recorded one hundred [*1395] and thirteen votes on proposals related to the war." n95 In his 1966 State of the Union Address, President Johnson predicted that special expenditures for Vietnam for the next fiscal year would rise by \$ 5.8 billion. n96 Thus, on March 1, 1966, Congress approved a \$ 4.8 billion supplemental military appropriation by votes of 393 to 4 and 93 to 2. n97 Senator Morse's motion to end the war was tabled on a vote of 92 to 5. n98 Yet Senator Joseph Clark said at the time, "I wish to make it very clear indeed that my votes, both against the Morse amendment and for the appropriation, do not indicate an endorsement of the policy which

I fear
the Administration is following." n99 And many members of Congress
continued to
insist that, although they opposed the war, the presence of American
troops in a
hostile theater required them to continue voting for funds (pp. 28-29), an
argument that, if correct, would count against my assertion that such
authorizing statutes also authorize war. In fact, I doubt these
self-serving
declarations have any constitutional significance. As Ely points out,

-----Footnotes-----

n95. Stanley Karnow, *Vietnam: A History* 491 (1983).

n96. Lyndon B. Johnson, Annual Message to the Congress on the State of
the
Union, Pub. Papers 3, 8 (Jan. 12, 1966).

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n97. 112 Cong. Rec. 4411, 4474-75 (1966).

n98. *Id.* at 4404.

n99. *Id.* at 4382.

-----End Footnotes-----

This was said so often I assume it convinced some constituents, and it
must
have been internalized by the men who said it as well. However, it doesn't
make
sense.... Congress could have phrased its funds cut-off as a phase-out,
providing for the protection of the troops as they were withdrawn....
True, the
president could have vetoed such a measure ... and there might not be the
two-thirds majority needed to override. However, a simple refusal to
appropriate
funds can't be vetoed. p. 29

Ely does not ask himself, however, whether or not the position he takes -
that
Congress has the war power by virtue of the Declaration of War Clause -
might
have contributed to this deception. Only this morning, as I wrote these
lines in
Austin, Texas, I had the misfortune to hear former Senator McGovern on

television, explaining that the Gulf of Tonkin Resolution was not a declaration of war. He said that it had no force of law, and that its framers testified under oath that it was not a declaration of war and should not be interpreted as such.

But Senator McGovern could not mean that a joint resolution, passed by both Houses and signed by the President, "has no force of law." Indeed, the War Powers Resolution is a joint resolution. What he clearly means is that it is not a declaration of war, and of course in this he is right. This assumes that a declaration of war must precede any constitutionally valid use of the armed forces to wage war, a position that Ely also assumes, despite his sharp criticism of the hypocrisy of Senator Fulbright and others who attempted to disown the effect of the Resolution and the subsequent appropriation and authorization [*1396] acts for which they voted and without which the President could not have waged the war in Southeast Asia (pp. 16-23, 27-28). The difference is that Ely permits other statutory instruments to serve the function of a declaration of war. This is an appealing solution, because it shows up the absurd bad faith of men who voted to support the war but kept their records - and perhaps even their consciences - clean by never actually voting on a declaration, and it can be assimilated into two centuries of practice. There is no textual warrant for this substitution, however, and, as we see in Senator McGovern, there is the potential for much mischief, for it perpetuates the idea that the declaration is somehow essential, which in turn perpetuates the antiethical constitutional arguments of members of Congress.

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

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

If the power to declare war were the power to wage war - with the tactical component removed - then a declaration alone would be sufficient to commence fighting and the President's refusal to act would be a violation of his oath. We are inclined to think of presidents as aggressive and eager for conflict and of Congress as more cautious. I think this is inaccurate even as a reading of recent history, but there are other, less controversial historical examples to the contrary, Cleveland's resistance to a war with Spain in 1896 being perhaps the clearest. Moreover, because a declaration of war has the effect of creating a juridical situation of total war, it means that the country enters into belligerency at a higher level of conflict than may be appropriate. Why, we may ask ourselves, did John Adams so resolutely refuse - "courageously," in Ely's words (p. 146 n.45) - to accept a declaration of war at the time of the French Naval War if the constitutional source of his authority to wage war derived from the Declaration of War Clause? What was courageous about Adams's stand was that by his refusal he lowered the level of international hostilities. If there were no important difference in these methods, there would be no "courage" to it. Finally, is it not wiser to require a two-thirds vote, rather than a simple majority, to compel the President to wage a war in which he does not concur?

-----Footnotes-----

n100. See supra note 69.

-----End Footnotes-----

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

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In actuality, the declaration of war was a vestigial legal trait even at the time of the Constitutional Convention. In the preceding century there had been thirty-four major wars in Europe; only one of these was declared, a point made in the Federalist Papers. n101 In our constitutional history, war has been declared only five times, and in every case this was after hostilities were underway. In light of both the French Naval War - our first war - and the Korean War, it is difficult to maintain that the source of Congress's authority is its power to declare war. There is a role for this clause, both in international law - as a declaration changes the status of nonbelligerents - and domestically - as it rallies the nation to a supreme effort. But neither of these is invariably appropriate.

-----Footnotes-----

n101. See, e.g., The Federalist No. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "the ceremony of a formal denunciation of

war
has of late fallen into disuse").

-----End Footnotes-----

The War Powers Resolution is a defunct law. No president has ever agreed to comply with its terms, and no Congress has ever taken steps to enforce it. The mechanism of the Resolution is too clever and yet naive at the same time. It depends upon a sixty-day "clock" that commences running when the President reports that troops have been introduced into hostilities, it thereafter requires their withdrawal if [*1398] Congress does not authorize the use of force and it provides for an immediate termination pursuant to a concurrent resolution (too clever). Yet the Resolution does not seem to have contemplated what to do if the President simply refuses to start the clock, as has uniformly been the case (rather naive). Its core provision, section 5(c), the concurrent resolution to terminate hostilities regardless of the report, n102 is widely regarded as clearly and obviously unconstitutional after Chadha. n103 Ely expresses his "personal opinion" that section 5(c) does not fit the profile of a standard legislative veto and therefore is not unconstitutional, because "it should be read ... as part of a package attempting to approximate in concrete terms the accommodation reached by the founders, that the President could act militarily in an emergency but was obligated to cease and desist in the event Congress did not approve" (p. 119). If this is convincing, then I suppose a great many measures that use legislative procedures that contradict or avoid those provided by Articles I and II might be constitutional on the same basis. I do not find the intention "to approximate" sufficient to override these procedures, but, in any event, Ely proposes a revision of the War Powers Resolution that avoids this problem (pp. 132-38).

-----Footnotes-----

n102. War Powers Resolution, Pub. L. No. 93-148, 5(c), 87 Stat. 555, 556-57 (1973) (codified at 50 U.S.C. 1544(c) (1988)).

n103. INS v. Chadha, 462 U.S. 919 (1983).

-----End Footnotes-----

Ely's revision appreciates that it is Congress that is eager, for its own

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reasons, to avoid enforcing the War Powers Resolution and that the current War

Powers Resolution gives ample scope for this evasion. Ely's revision requires

that the President seek specific authorization for the use of force in a belligerency and terminates funding for any deployment that violates this requirement (p. 138). It is thus simpler and, because of a provision specifically providing for judicial oversight (p. 135), more easily enforceable.

Any reluctant army private could enforce this law, regardless of the attitude of Congress or the President.

This cleanly drafted and carefully considered rewrite does, however, have

two shortcomings. First, it is highly unlikely to appeal to the President, whose

support it must have if it is to become law in the foreseeable future. Second,

as a constitutional matter, it cannot bind future Congresses.

It is quite true that thoughtful presidents are by no means averse to giving

Congress a role in the decision to go to war, although it is not so easy to ensure that Congress will own up to that role. Ely quotes Lyndon Johnson as saying,

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

that. But I failed to reckon with one thing: the parachute. I [*1399] got them on the take off, but a lot of them bailed out before the end of the flight. n104

But a statute that requires that the President return to Congress for a fresh

authorization, most likely in the midst of hostilities, represents a compromise

that no president is likely to risk. President Carter rejected such an idea,

n105 President Ford rejected it, n106 and I imagine President Clinton would feel the same.

-----Footnotes-----

n104. P. 53 (quoting Letter from Lyndon Johnson to Eugene Rostow (Mar. 25, 1972), quoted in Eugene V. Rostow, "Once More Unto the Breach:" The War Powers Resolution Revisited, 21 Val. U. L. Rev. 1, 15 (1986)).

n105. Glennon, *supra* note 3, at 308.

n106. *Id.* at 288 n.35, 289.

-----End Footnotes-----

More important, such framework statutes - like Gramm-Rudman, for example - cannot bind future Congresses. If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference - as does Ely's rewrite and also the original War Powers Resolution - is without legal effect. On the other hand, if one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of the electoral mandate. Imagine, for example, a statute that provided that no appropriations or authorization provision shall exceed a term of six months or an act that forbade the President from interpreting any subsequent statute as permitting him to issue regulations to enforce that statute unless specifically authorized to do so therein. A rule of interpretation, if it contravenes a valid constitutional power - in this

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case, that is, that a subsequent Congress could constitutionally endorse a war by an appropriations and authorization statute - would amount to a restriction on the ability of a Congress to repeal by inference preexisting law. Such a fresh hurdle to later legislation is nowhere authorized by the Constitution and is inconsistent with the notion of legitimacy derived through the mandate of each new Congress. Of course this argument hinges on the validity of an appropriations and authorization statute as a constitutional means of making war, but Ely acknowledges such validity (p. 128).

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

the formation of a consensus, or convention, to the effect that certain kinds of presidential vetoes are to be overridden ... for example, around presidential acts of war. As now, Congress might simply pass a bill or [*1400] resolution, dealing negatively with the presidential act. The President would veto. Then, if the new convention prevailed, an override could be easily arranged, usually by the members who do not want to vote for override absenting themselves. n107

This is precisely what the authors of section 5(c) of the War Powers Resolution tried to accomplish through an unconstitutional procedure. That Resolution got the two-thirds vote necessary to override a veto. Is it so unlikely that a constitutionally scrupulous means of doing this would fail? As Black points out, "any Senator or Congressman, however he voted on the original vote, might think it most unwise for the country to be committed to a warlike action that has been disapproved by majorities in both Houses, and so might vote for an override." n108 Unlike the War Powers Resolution, such a convention of automatic override would give Congress much greater flexibility precisely because it is not a statute whose terms - like the sixty-day clock - are subject to presidential interpretation. And if such a conventional override were ignored by the President, then the courts, without any special provision, would inevitably be drawn to the aid of Congress when civil suits required them to determine "what the law is."

-----Footnotes-----

n107. See Charles L. Black, Jr., *The Year of Pride and Shame*, 67 B.U.

L. Rev.
783, 792 (1987).

n108. Id. at 793.

-----End Footnotes-----

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

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Conclusion

John Ely may or may not be "the most original constitutional scholar of our age," as Alan Dershowitz writes n109 - I am inclined to reserve that title for Charles Black - and it is certainly true that "nobody ... writes like John Ely," as Laurence Tribe observes. n110 But for me the most signal quality of this book is its shining integrity. Ely's patient, careful, but never tedious examination of Congress's role in the authorization of the Vietnam War is an inspiring antidote to the indulgent amnesia of so many who ought to know better. If his work can be connected to proposals that are attractive to both branches, it can lead us out of the current impasse and back to methods that are constitutionally impeccable as well as politically viable.

-----Footnotes-----

n109. Alan M. Dershowitz, quoted on the dust jacket of War and Responsibility.

n110. Laurence H. Tribe, quoted on the dust jacket of War and Responsibility.

Unless, of course, it is Joseph Heller.

-----End Footnotes-----

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SYMPOSIUM: FOREIGN AFFAIRS AND THE CONSTITUTION: THE ROLES OF CONGRESS,
THE
PRESIDENT, AND THE COURTS: What the Constitution Means by Executive Power

CHARLES J. COOPER * and ORRIN HATCH ** and EUGENE V. ROSTOW *** and
MICHAEL
TIGAR ****

* Charles J. Cooper is currently with the law firm of McGuire, Woods,
Battle
& Boothe. At the time of the delivery of these remarks, he was Assistant
United
States Attorney General, Office of Legal Counsel, a position in which he
served
from 1985 to 1988. Mr. Cooper was also Deputy Assistant Attorney General,
Civil
Rights Division, 1982-1985, and a Special Assistant, Civil Rights Division,
1981-1982. He was law clerk to Justice (now Chief Justice) William H.
Rehnquist, 1978-1979, and law clerk to Judge Paul H. Roney, United States
Court
of Appeals for the Fifth Circuit (now Chief Judge of the Eleventh Circuit),
1977-1978.

Mr. Cooper gratefully acknowledges the assistance of Mark Edelman,
attorney-advisor, Office of Legal Counsel, in the preparation of this
article.

** Orrin Hatch is United States Senator from Utah. Senator Hatch is
ranking
minority member of the Senate Judiciary Committee, member of the Senate
Select
Committee on Intelligence, and was a member of the Senate Select Committee
on
Secret Military Assistance to Iran And the Nicaraguan Opposition (the
Iran-Contra Affair).

*** Eugene V. Rostow is Sterling Professor of Law and Public Affairs
Emeritus, Yale Law School and Distinguished Visiting Research Professor of
Law
and Diplomacy, National Defense University. Over his long and
distinguished
career, Professor Rostow has served as Director of the United States Arms
Control and Disarmament Agency, 1981-1983; Undersecretary of State for
Political
Affairs, 1966-1969; Dean of the Yale Law School, 1955-1965; and adviser to
the
State department and Lend Lease Administrator, 1942-1944. Professor
Rostow has
published numerous articles on constitutional and international law topics.

**** Michael Tigar holds the Joseph D. Jamail Chair in Law at the
University
of Texas School of Law, and has published numerous books and articles over
the
course of his career as a practicing attorney and law professor. Professor

Tigar is Chairman-elect of the Section of Litigation of the American Bar Association, 1988-1989, and Chair of the Litigation Section of the American association of Law Schools.

SUMMARY:

... The topic of this panel -- the nature of executive power as it relates to

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foreign affairs -- is an extraordinarily timely one. ... Madison concluded that the power to declare neutrality was a legislative power vested in Congress, and not an executive power granted to the President. ... In addition, the Senate's power of concurrence in treaties gave it a role in shaping foreign policy, although sadly, some are arguing that the Senate can consent to a treaty without understanding what the executive branch thinks the treaty means. ... I have defended the view that all presidential military activity, other than repelling a sudden attack, requires congressional authorization, at least if the activity involves what are, under international law, acts of war. ... This is a power granted specifically to the executive branch, which is equipped to acquire the information necessary for foreign policy creation. ... What are some of the historical rebuttals to executive power? First, some might assert that history tends to give wide breadth to Congress' spending power in relation to the President's foreign policy role. ... Moreover, the Boland amendment is an example of congressional ineptitude, which demonstrates why the framers committed foreign policy preeminence to the Executive. ...

TEXT:

[*165] I. CHARLES J. COOPER

The topic of this panel -- the nature of executive power as it [*166] relates to foreign affairs -- is an extraordinarily timely one. The President and Congress are currently engaged in a number of disputes over their respective powers in the field of foreign affairs. The use of American naval vessels to escort reflagged merchant ships in the Persian Gulf has once again raised questions concerning the War Powers Act, n1 and the boundaries between the President's powers as Commander-in-Chief and the congress' power to declare war.

In the pending Department of State authorization bill, n2 Congress has asserted a right to use its appropriations power to micromanage the foreign policy of the United States. Similarly, in the Department of Defense authorization bill, n3 Congress again invoked the appropriations power in an attempt to control the President's implementation of a treaty to which the Senate consented fifteen years ago. n4 Furthermore, the imminent publication of the Iran-Contra Committee's report n5 will remind us that our brief respite from that matter has been all too temporary.

Clearly, the issue of presidential, as opposed to congressional, power in the field of foreign affairs is very much with us. Today, however, I propose not to discuss current events but to examine this [*167] issue from an originalist's perspective; that is, to examine the framers' original understanding of the executive power as it relates to foreign affairs.

Let us begin not with the framers themselves, but with their teachers. John Locke's Two Treatises of government n6 was one of the framers' primers on political science. Locke divided the power of government into three parts: the Legislative, which prescribes the internal or municipal laws of the society; n7 the Executive, which enforces the municipal laws; n8 and the Federative, which deals with foreign states. n9 What is particularly interesting about Locke's view is that even though he ultimately believed in the supremacy of the Legislature, his concept of executive power was quite broad. Locke's executive was not a mere functionary, which carried out the Legislature's wishes. Rather, the holder of executive power possessed the ability to use the power for the benefit of society. Locke explained his broad view of executive power as follows:

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Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require . . . [in some cases] it is fit that the laws themselves should .

. .

give way to the executive power n10

In short, by executive power Locke meant the "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it." n11

Locke believed that the executive power, notwithstanding its breadth, was not the only power that should be given to the Executive. Although he viewed the executive and federative powers as distinct, he believed that "they are [not] to be separated and placed at the same time in the hands of distinct persons." n12 Locke defined the federative power as "the power of war and peace, leagues and alliances, and all the transactions with all persons and all communities without the commonwealth." n13 Thus, Locke envisioned a system of government [*168] in which the Executive had broad discretionary powers, particularly in foreign affairs.

The theories of Locke, and of Blackstone n14 and Montesquieu, n15 who also perceived the direction of foreign relations as within the power of the Executive, n16 did much to define what the framers understood by executive power, but the way the framers felt about executive power was shaped by their experiences. By the time that the Declaration of Independence was signed, Americans who had long suffered the oppression of King George III and his royal governors had grown suspicious of executive power and placed their confidence in legislative assemblies. n17

The first state constitutions drafted after independence reflected this distrust of executive power and, therefore, generally featured strong Legislatures and very weak Executives. n18 The Virginia Constitution of 1776, for example, stated that the Chief Executive "shall [*169] with the advice of a Council of State, exercise the executive powers of government according to the laws of this commonwealth; and shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom, of England." n19 Jefferson, who served as Governor of Virginia during the Revolution, complained that all powers of the government "result to the legislative body," and that its direction of the Executive had become "habitual and familiar." n20

Similarly,
the Pennsylvania Constitution of 1776 provided for a virtually omnipotent,
unicameral legislature, and a correspondingly impotent executive
council. n21
Indeed, the council complained in a message to the legislature:

[I]t has been one of the greatest objections made to this Constitution,
that
it has left too little power in the executive branch; and yet we see daily
attempts to make that little less. We cannot suppose that it is intended
practically to show the people what mischief and abuse a single
legislature may
do, and yet we are at a loss otherwise to account for those proceedings
which
are particularly the objects of this message. n22

To be sure, a few states resisted this trend. The New York
Constitution of
1777, n23 and the Massachusetts Constitution of 1780, n24 both
provided for
strong Executives, but these were distinct exceptions. James Madison
lamented
during the Philadelphia Convention that:

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Experience proved a tendency in our governments to throw all power into
the
Legislative vortex. The Executives of the States are in general little
more
than Cyphers; the legislatures omnipotent. If no effectual check be
devised for
restraining the instability and encroachments of the latter, a revolution
of
some kind or other would be inevitable. n25

If one turns from the states to the national government under the
[*170]
Articles of Confederation, the situation was even worse. The Articles of
Confederation established no executive authority at all. n26 Throughout
the
Revolution, executive power was exercised by the Congress through a series
of ad
hoc committees and boards. n27 Such an arrangement was hardly conducive
to
conducting a war and led General Washington to complain -- with magnificent
understatement -- that "there is a vital and inherent principle of delay
incompatible with Military service in transacting Business, through such
various
and different channels." n28 As Alexander Hamilton noted, "the want of an
executive" was one of the primary deficiencies of the Articles of
Confederation. n29 Hamilton wrote:

Congress have [sic] kept the power too much in their own hands and has meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the Executive. It is impossible that such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision or with system. n30

By the time that the Constitutional Convention met in Philadelphia in 1787, the pendulum of opinion had begun to swing in favor of a strong Executive. n31 Gouveneur Morris explained that political theorists believed:

Republican Government is not adapted to a large extent of the Country, because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either renounce the blessing of the Union, or provide an Executive with sufficient vigor to pervade every part of it. n32

Needless to say, Morris favored the latter alternative. Far from fearing the concentration of power in the Executive, Morris argued that he would be "the great protector of the Mass of the people against legislative tyranny." n33

[*171] The new Constitution created a unitary Executive, unburdened by an executive council. The President was to be elected by an electoral college selected by the people n34 and was neither responsible to, nor removable by, the legislative branch, except insofar as he should be guilty of an impeachable offense. n35 The President was given broad powers of appointment, n36 the power to receive foreign ambassadors, n37 the preeminent role in making treaties, n38 command of the military, n39 and a qualified veto over legislative action. n40 In short, the Executive that emerged from the Philadelphia convention was an independent repository of government power, subject to "checks and balances," n41 but possessed of full dignity and authority in his own right.

The extent of the President's power over foreign affairs was soon put to the test. England and France declared war on each other in 1793. This presented an immediate problem for the United States because of our treaty obligations to France under the 1778 Treaty of Amity and Commerce n42 and the Treaty of

Alliance. n43 The free colonies had entered into these treaties with the King of France prior to the French Revolution, and there was some question as to whether they continued in force under the new revolutionary government. n44 A further question arose as to whether it was for the President or the Congress to make that determination. After consulting with his cabinet, President Washington decided, on his own authority and without Congressional approval, to issue a proclamation of neutrality. n45 Washington [*172] was supported by Secretary of the Treasury Alexander Hamilton, who defended the constitutionality of the proclamation in a series of essays published under the pseudonym "Pacificus." n46

Hamilton's principal argument was based on the twin conclusions that the proclamation was properly understood as an executive act, and that all the executive authority of the federal government belonged to the President. n47 Although Hamilton's first proposition is debatable, the second is seemingly indisputable, given the clear language of the first sentence of article II, section 1, of the Constitution. n48

Having first concluded that issuing the neutrality proclamation was an executive act, n49 Hamilton then noted that article II conferred the "Executive Power" on the President. n50 This grant of the entire executive power, Hamilton argued, was in sharp contrast to the wording of article I, section 1, which states "all legislative powers herein granted shall be vested in a Congress of the United States." n51 In other words, the President was granted all executive powers, while the Congress was granted only those legislative powers specifically enumerated. Hamilton argued that the recitation of specific presidential powers in article II was merely illustrative of the "Executive power," rather than an exhaustive catalog of its limits. n52

Hamilton acknowledged that the executive power was not unlimited. n53 For example, the Senate's right of advice and consent limited the treaty power and n54 the appointment of ambassadors. n55 In addition, the Commander-in-Chief power was limited by the Congress' [*173] power to declare war. n56 But he argued:

As the participation of the [S]enate 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. n57

Because neither of those two powers, strictly construed, was implicated by the proclamation of neutrality, its issuance was within the executive power of the President. n58

Although Secretary of State Thomas Jefferson favored a policy of neutrality, he believed that unilateral action of this kind by the President was unconstitutional. n59 Jefferson maintained that "a declaration of neutrality was a declaration [that] there should be no war, to which the executive was not competent." n60 Jefferson was particularly exercised by Hamilton's *Pacificus* essays, and he urged his friend and colleague, James Madison, to prepare a response. n61 Jefferson wrote: "For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public. There is nobody else who can and will enter the lists with him." n62

Although reluctant, Madison complied with Jefferson's request and prepared a

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series of essays published under the pseudonym "Helvidius." n63 In his essays, Madison denounced Hamilton's notion of executive power as having been inspired by the royal prerogatives of the British government and, therefore, to be "condemned as no less vicious in theory than it would be dangerous in practice." n64 Madison concluded that the power to declare neutrality was a legislative power vested in Congress, and not an executive power granted to the [*174] President. n65

We do not know why Madison was so reluctant to respond to Hamilton's *Pacificus* essays, but it may well have been because Hamilton's views of executive power mirrored views previously expressed by both Jefferson and Madison. In arguing that the executive power of article II, section 1, was an

independent grant of presidential authority above and beyond the specific powers listed in section 2, Hamilton reiterated an argument that Madison had used in a debate over the President's removal power during the first Congress. n66 And Jefferson, in an opinion to President Washington in April, 1790, wrote:

[The Constitution] has declared that the executive power shall be vested in the President, submitting only special articles of it to a negative by 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 specifically submitted to the Senate. Exceptions are to be construed strictly. n67

Jefferson's view, at least at that time, was very similar to Hamilton's.

A critical component of the President's executive power that is of obvious importance in the field of foreign affairs is his authority as Commander-in-Chief. n68 Modern theorists are reluctant to give that power the scope that its wording seems necessarily to imply, which prompts one to wish that the framers had further elaborated on the [*175] commander-in-chief power in the Constitution. The authors of the Massachusetts Constitution of 1780 apparently foresaw these modern theorists because they elaborated considerably. Article VII of the Massachusetts Constitution provided:

The governor of this Commonwealth, for the time being, shall be the commander-in-chief of the army and navy and of all the military forces of the State, by sea and land; and shall have full power, by himself, or by any commander, or other officer or officers, from time to time, to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of the Commonwealth, to assemble in martial array, and put in warlike posture the inhabitants thereof, and to lead and conduct them, and with them, to encounter, repel, resist, expel[,] pursue, by force of arms, as well by sea as by land, within or without the limits of this Commonwealth, and also to kill, slay and destroy, if necessary, and conquer, by all fitting ways, enterprises and means whatsoever, all and every such person and persons as shall, at any

time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment or annoyance of the Commonwealth; . . . and to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition and other goods, as shall, in a hostile manner, invade or attempt the invading, conquering or annoying this Commonwealth; and that the governor be intrusted with all these and other powers incident to the offices of captain-general and commander-in-chief, and admiral to be exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise. n69

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In simpler terms, the Governor, as Commander-in-Chief, was authorized to use military force to protect and defend the Commonwealth.

Presidents have generally interpreted their power as Commander-in-Chief in the same manner. President Jefferson's actions against the Barbary pirates provides an entertaining illustration of this point. I might add that any resemblance between this episode and current events in the Persian Gulf is entirely intentional.

During the late 18th and early 19th century, piracy was the major economic activity of four Barbary states: Algeria, Morocco, Tripoli, and Tunis. n70

Merchant ships sailing the Mediterranean were often attacked by pirates, who would not only steal their cargoes, but [*176] would also kidnap the crew for ransom. In addition to these income-producing activities, the Barbary states also extorted bribes to refrain from conducting these illegitimate pursuits.

In May, 1801, Tripoli declared war on the United States. Tripoli was upset that the United States had recently paid lavish bribes to the Dey of Algiers, but not to them. Fortunately, however, President Jefferson received advance warning of Tripoli's intentions. Even before word of the declaration of war had arrived in Washington, the Secretary of the Navy dispatched a squadron of four vessels under the command of Commodore Richard Dale to the Mediterranean on an "observation cruise." n71

Dale's orders were to sail into the Mediterranean and inform the Barbary states that the attitude of the American government was friendly, but that the United States intended to protect American commerce from attack. n72 Dale was also instructed that if he should find that any, or all, of the Barbary states had declared war on America, he was to "chastise their insolence -- by sinking, burning, or destroying their ships wherever you shall find them." n73

Commodore Dale ordered the four ships to fly only the English flag while at sea, until such time as there was "a necessity for the contrary." n74 That necessity occurred when one of the ships in the squadron, the schooner Enterprise, encountered a Tripolitan cruiser in the Mediterranean. The pirate commander was completely fooled by the English flag and somewhat indiscreetly confided to the American captain that he was in search of American merchant ships. Upon hearing that, Enterprise lowered the English flag and raised the American flag -- an early 19th century version of "reflagging." The Americans then opened fire and severely damaged the pirate ship, which eventually surrendered after more than half of her crew were either [*177] killed or injured. The Americans suffered no serious casualties. n75

The significant point about this episode is that President Jefferson, pursuant to his article II powers and without consulting, much less obtaining the approval of, Congress, sent American military forces half way around the world with explicit orders to engage in hostilities if necessary. Not only did Jefferson take this initiative on his own authority, he did not even inform Congress of the episode until six month later. n76

This necessarily brief survey establishes several points that I think are important for determining the original understanding of presidential power in the foreign affairs field. First, the founding generation understood executive power as conferring a broad authority that extended beyond the mere execution of

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the laws. Second, the unhappy experience with weak Executives in the states and

in the national government during the Revolution and the Confederation led the Philadelphia Convention to establish a strong, unitary Executive under the new Constitution. Finally, the understanding of article II displayed by Washington, Madison, Hamilton, and Jefferson indicates that the conduct of foreign relations is an aspect of the executive power entrusted to the President, subject only to narrowly defined exceptions. I submit, therefore, that the way that Presidents have historically handled foreign affairs is in accord with the way that the framers intended for them to act.

II. MICHAEL TIGAR

A. Introduction

Nearly twenty years ago, I wrote an article entitled Judicial Power, the "Political Question Doctrine," and Foreign Relations. ⁿ⁷⁷ I wrote in the shadow of significant military activity in Vietnam, and the incursion into Cambodia. I asked what, if any, role the Constitution required, or permitted, the federal judiciary to play in finding, declaring, and enforcing the rules of domestic and international law [*178] that limit military action by the executive branch. ⁿ⁷⁸ Today we live in the shadow of other conflicts. Therefore, we must once again measure the roles of the executive, legislative, and judicial branches in the areas of foreign and military affairs.

In the years following the publication of my article, Presidents representing both of our nation's political parties have claimed the unreviewable power -- a power that the Constitution seems to forbid -- to take action, and then have justified that action by invoking a vaguely defined concern for national security and a theory that the Court ought to keep its hands off. For example, President Nixon sought to justify warrantless domestic electronic surveillance. ⁿ⁷⁹ President Carter made a more extensive claim in the context of alleged espionage. ⁿ⁸⁰ The Reagan administration has taken the argument several steps further, claiming a broad immunity from both congressional and judicial scrutiny of its actions. ⁿ⁸¹

There are three questions that I want to address: First, what role does the Constitution assign to the judiciary in the conduct of foreign and military affairs? Second, what are the sources of law that the judiciary might

apply in
its sphere of competence? Third, what are the implications of these
conclusions
in today's international situation? The basic theme of my 1970 article
was that
the political question doctrine is all too often a judicial code word for
avoiding a judicial duty to protect litigants from unlawful exercises of
executive power. n82 Unfortunately, all too often that definition holds
true
today.

[*179] B. The Constitution, Foreign Affairs, and the Judiciary

In *Marbury v. Madison*, n83 Chief Justice Marshall acknowledged that
some
executive acts are beyond judicial review. n84 Since that dictum was
pronounced, Presidents and judges have tussled about its meaning. In
United
States v. Burr, n85 however, Chief Justice Marshall made it clear that
the
President was not immune from the judicial process. n86 Marshall's
opinion in
Burr formed the cornerstone of Dean Wigmore's treatment of executive
privilege,
n87 and is an implicit term in arguments about the role of the rule of law
in
matters of state.

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Harry Truman thought that he could seize the steel industry and run it
during
the Korean conflict because he was the President, there was shooting in
Asia,
and the steel industry was threatened with a shutdown. n88 The Supreme
Court,
however, had no trouble spelling out some truths about constitutional
governance. First, Presidents must obey the law. n89 Second, in our
society,
the laws are not silent, [*180] even in times of war. n90 Third, the
judiciary has the power to declare the law, regardless of who the parties
are,
when a real case or controversy requires such a declaration in order to
decide
who wins and who loses. n91 Recently, a majority of the District of
Columbia
Circuit, sitting en banc, echoed these principles when an American citizen
sued
the Secretary of Defense because the United States Government had taken
over his
land in Honduras to help mount covert military operations in Central
America.

These cases reflect a proper judicial attitude towards executive claims of unreviewable power to conduct foreign and military policy. After all, some who opposed the adoption of the Constitution did so because the executive branch appeared to possess too much unfettered power. In the Virginia debate, Patrick Henry wondered whether a lawless President would really obey the Supreme Court, or whether he would use his power as Commander-in-Chief to defy it. n93 Similarly, many people may recall that Abraham Lincoln, as a Congressman [*181] from Illinois, inveighed against the idea that the President could make himself like a king, "involving and improvising" the people in war. n94 Patrick Henry's concern, whether one agrees with it or not, expresses a contemporaneous understanding that the original purpose of the judicial branch was to ensure that the laws were faithfully executed.

Of course, Congress was also empowered to restrain foreign military activity through the control of appropriations, n95 declaration of war, n96 and grant of letters of marque and reprisal. n97 In addition, the Senate's power of concurrence in treaties n98 gave it a role in shaping foreign policy, although sadly, some are arguing that the Senate can consent to a treaty without understanding what the executive branch thinks the treaty means. n99 Although the President may embark upon a course of foreign policy, or step down the road of foreign military adventure, however, the judiciary will presumptively have power to fashion some remedy when that conduct infringes upon a private right.

The opposition to this view, as expressed by the dissenters in Arellano, n100 is based on both factual and legal solecisms. Arellano did not involve a presidential decision to respond to a sudden attack, so the hypotheticals conjured out of such imaginings by the dissenters exult drama over common sense. The dissenters went on to question why non-elected judges should be telling an elected President that he was trampling private rights in his march towards a military objective. n101 The answer is plain in the Constitution's text, and in the "law life" of the nation. The text recognizes that war is so calamitous

an event, for both public and private interests, that the President, alone, is not supposed to propel us into one. Justice Story said as much in his Commentaries on the Constitution. n102 Our national experience [*182] demonstrates that the rush towards improvident armed conflict is often associated with jingoistic rhetoric, systematic assaults on the right of dissent, and a public atmosphere of intolerance. n103 Non-elected judges are supposed to restrain such things in the service of the countermajoritarian values built into the Constitution by the framers. n104

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C. The Sources of Law

What do I mean by "law" in this context? Article VI of the Constitution makes supreme the "Constitution," "laws" and "treaties" of the United States. n105 I am sorry to have to say something that sounds tautological, but the point appears to have been lost in recent days: Military activity in violation of "laws" of the United States is unlawful.

I am not talking solely about the so-called Boland amendment, n106 but also about the network of laws that limit the use of United States funds, territory, and personnel to conduct hostile actions against countries with whom we are at peace. n107 Nothing in the text, history, or authoritative interpretation of the Constitution gives the President a shred of justification for violating, or purporting to authorize violation of, such laws. To argue the contrary is to sunder the most basic understanding upon which the Constitution was ratified: namely, that the states party to this compact were not installing as head of state a king by some other name. n108 Certainly, then, these parties did not intend to create a "king" free to disregard the law. As Lord Coke explained in Dr. Bonham's Case, n109 the law stands indifferent between sovereign and citizen and binds them both. n110 Military activity undertaken [*183] without affirmative congressional approval may also be unlawful, depending on one's interpretation of the Constitution. n111 I have defended the view that all presidential military activity, other than repelling a sudden attack, requires congressional authorization, at least if the activity involves

what
are, under international law, acts of war. n112

Treaties, such as the United Nations Charter, n113 and agreements on arms limitation, n114 also define the limits of lawful executive power. But there is another, long recognized source of "law" in the United States -- namely, customary international law. For example, when the Spanish-American War broke out, the United States Navy put a blockade around Cuba. Two Cuban fishing vessels, returning with their cargoes of fish, were seized by the Navy, claimed as prizes of war, and taken to Key West, Florida. There, they were forfeited to the United States by judicial order. In *The Paquete Habana*, n115 however, the Supreme Court reversed the seizure order, holding that the rules of customary international law were part of the "laws" embraced within the supremacy clause. n116 Under customary international law, fishing vessels peaceably engaged in their trade were exempt from seizure as prizes of war. n117 Therefore, the Navy was [*184] ordered to restore the proceeds of sale to the vessel owners, with damages and costs. n118

Since 1900, international law has undergone enormous change. Its content has grown to embrace new rights of persons, entities, and nations. n119 Most courts have agreed that individuals as such are beneficiaries of rights granted by international law, and may enforce such rights in judicial proceedings. n120 Some judges, such as Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, n121 have doubted that individuals, who are not subject to obligations under international law in their individual, as opposed to official, capacities, may enforce such rights. Such views, however, are inconsistent with a growing international consensus. n122

[*185] In sum, Presidents and their agents -- including military commanders and troops -- are subject to the commands of customary international law that limit violations by one nation of another nation's sovereignty and territorial integrity, and that limit interference in another nation's internal affairs. My

summary of the sources of law is quite independent of my earlier discussion of the proper role of the judiciary. Even if one believes that judges should not interfere with particular kinds of executive decisions, the rules of law are still there, and a President's obedience to them is at least a function of the oath of office.

Let me make no mistake about my meaning. I tremble for my country when I see the President proclaim that he and his staff are not bound by congressional restrictions on how appropriated funds are spent, even though article I of the Constitution clearly gives the Congress the power over the public monies. ⁿ¹²³ Similarly, the supremacy clause makes binding on the United States those treaties to which it is a party, including those provisions that accord jurisdiction over disputes to international tribunals. The President, as with the spending of the public monies, cannot choose to ignore or deride these provisions. Everyone who takes the supremacy clause seriously must insist that the President not be permitted to pick and choose which parts of the Constitution, laws, and treaties he will obey.

For example, in *Nicaragua v. United States*, ⁿ¹²⁴ the United States [*186] attempted to revoke its long standing acceptance of jurisdiction by the International Court of Justice. Laudably, despite the opening provided by the United States' continued insistence that the International Court of Justice lacked jurisdiction, the court fulfilled its duty by accepting the case, investigating the facts, finding the law, and ruling on the merits. ⁿ¹²⁵ By a lopsided majority, the court proclaimed that the United States' actions violated settled rules of international law, regarding the conduct of nations. ⁿ¹²⁶

The President and his advisers first derided, then ignored, the Court's decision ⁿ¹²⁷ -- a defiance that sets them against the supremacy clause, and weakens an already fragile, though decisively important, participant in the quest for peace and freedom in the international community. I would add that in grasping at the prerequisites of the imperial presidency, the incumbent has sought to curb dissent by imposing far reaching curbs on free access to governmental information, all in the name of national security, and supposedly insulated from meaningful judicial review. ⁿ¹²⁸

[*187] D. Implications for Today

More years ago than I care to remember, I studied with the French conservative political theorist Bertrand de Jouvenel. I was eager to judge political decisions of the past and present as right or wrong by my perhaps dim, but always unwavering, lights. Professor de Jouvenel reminded me that the most enduring lesson of great controversies, such as Truman's steel seizure and the commitment of troops to the Korean conflict, was that in our passion to see a decision made in a particular way, we too quickly forgot our most cherished convictions as to who was competent to make that decision.

Now, as then, that is the first lesson. Agreement or disagreement with the policies of a particular President cannot blind us to the duties of the legislative and the judicial branches to play their important parts. It is no answer to say, "The President is elected to make these decisions." The members of Congress are elected for this purpose as well. And, as the very structure of the Constitution makes clear, the non-elected judges are put in place precisely to enforce constitutionally based principles of supremacy of law, even when those principles are rooted in countermajoritarian values.

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A corollary principle is that the political question doctrine, invoked at times by the courts as a barrier to deciding the legality of foreign and military affairs decisions that touch on private rights, is unprincipled and illegitimate. I argued this in 1970 and am more than ever convinced of this fact by the laudatory terms in which the doctrine is described by its adherents. They like it precisely because of its "flexibility," although they concede that its "contours are murky and uncertain." n129 For me, this flexibility and uncertainty translates in practice into an unfettered judicial discretion to duck the duties and surrender the powers that article III clearly confers.

The second lesson is this: In the criminal law of Texas, if you have suffered an indignity or endured a threat, you can go home, stew about it for a while, return to the scene hours, or days, or weeks later, blow away your

antagonist,
and still have a good defense to a murder charge. n130 In the
19th-century, it
was sort of like that for big powers. If [*188] William Randolph Hearst
and
Teddy Roosevelt thought we should go down into some small Latin American or
Caribbean country, avenge some insult, grab some territory, and further our
theory of government, well, that was the way it was. But in today's
world, we
are all -- to my regret, at times -- living a little closer together and
the
armament is a little more powerful. n131

In the wake of World War II, the dozens of newly independent
nation-states
asserted their rights to develop along their own lines, perhaps in ways
that we
have disapproved. They are reshaping not only domestic politics, but also
the
landscape of international law. The principles of international law are
coming
to dictate what common sense should have told us: The new age requires
more, and
not less, restraint in foreign and military policy. It requires more, and
not
less, attention to the principles of domestic and international law, which
the
Constitution makes the supreme law of the land. That is why we must pay
renewed
attention to the law and its enforcement. That is why the Reagan
administration
has failed America.

III. EUGENE V. ROSTOW

Let me start this talk by recalling what I regard as the most important
and
most profound sentence John Marshall ever wrote: "Let us never forget that
it is
a Constitution we are expounding." n132 By that I think Marshall meant at
least three things. First, the Constitution [*189] is not a prolix code.
Rather, it is a short, clear, general outline of the structure and
principle of
government, an outline every citizen can understand. He thought this
dimension
of the Constitution was an infinitely valuable resource for a society of
free
men and women, and a most appropriate starting place for the evolution of
a body
of law. Second, the Constitution leaves ample room for growth and
adaptation as
its general principles are applied to the necessities of governance in a
constantly changing world. The third implication of Marshall's sentence
is that

the Constitution requires continuity -- in values and broad policy, not in detail -- as well as flexibility and adaptation to change. Marshall's jurisprudence is far too sophisticated to exaggerate the role of original intent among the forces which govern the growth of the law.

Article II is an excellent vehicle for examining the implications of Marshall's thesis. As Secretary Weinbergerⁿ¹³³ and Mr. Cooperⁿ¹³⁴ pointed out, the Presidency is one of the principal creations of the Founding Fathers -- a carefully considered response to the inadequacies of the government of the

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United States under the Continental Congress and the Articles of Confederation.

A strong, unified, and independent Executive was a felt necessity at the time of the Convention. Hamilton said:

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? . . . The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished." ⁿ¹³⁵

[*190] The President was not to be elected by Congress; rather, he was to be elected by the people, through the electoral college. ⁿ¹³⁶ Furthermore, in many of the most important aspects of his duty, he was not and is not responsible to Congress but, as Marshall said, is "accountable only to his country in his political character, and to his own conscience." ⁿ¹³⁷

Marshall's observation is under severe attack today as Congress continues its relentless post-Vietnam drive for supremacy. I submit, however, that the President's prerogative powers will survive, and indeed prevail, if Presidents fight for them, because they correspond to the nature of things and the necessities of government in the United States. That phrase, "the nature

of things," has a long history, and was a great favorite in the rational atmosphere of the eighteenth century. In the famous first paragraph of *The Spirit of the Laws*, Montesquieu said, "Laws, in their most general signification, are the necessary relations arising from the nature of things. The principle applies to the societies of man as it does to the physical universe." n138

What is the executive power vested in the President by article II? Mr. Cooper read you some passages from Locke. n139 There are other sources, however, that can be brought forward. Hamilton said that the executive power is all governmental power that is not judicial or legislative in character. n140 This definition is an odd but decidedly useful way to examine the problem, even though it is not fully adequate. In many instances, for example, the President may act, and in some instances he must act, even though Congress may also act but has not yet done so.

The case to which Mr. Cooper referred, n141 that of Washington's neutrality proclamation of 1793, illustrates the interdependence of the executive and the legislative power. Washington issued the proclamation, although later Congress had to pass a neutrality act to implement and give the proclamation effect. n142 By the way, some parts of [*191] that act are still on the books. n143

Sometimes, however, even when Congress has acted, a change in circumstance may justify a President's acting independently. Yesterday, a particular episode was discussed. I do not know whether the facts as presented are correct, but let us assume that they are. It was said that President Franklin Roosevelt informed the British of the location of the *Bismarck* during the Second World War, at a time when the United States was still neutral. The question presented to the speaker was whether the action by President Roosevelt was legal. The answer was that Roosevelt's conduct was illegal.

complex than yesterday's brief discussion indicated. John Locke said that under exceptional circumstances the Executive could indeed ignore a statute in the exercise of his inherent powers. n144 The Supreme Court also addressed the issue in the important case of *Mississippi v. Johnson*. n145 I think it is a great mistake, and also a common one, to assume that Lincoln violated the Constitution in order to save the union. In my view, the emergency prerogative powers Lincoln exercised should be considered constitutional because they were necessary, in his judgment, under the circumstances. That is the profound teaching of Madison's Federalist Number 41. n146

[*192] I should like to begin, however, with the self-evident proposition that under international law, the United States has all the powers of sovereignty that other states possess, including the sovereign power to disobey and violate international law and suffer the international consequences. n147 The Constitution divides those powers between the President and Congress on the principle of functional necessity. All the executive power of the United States, subject to some exceptions, is vested in the President, and all the national legislative power of the United States belongs to Congress, subject also to some exceptions.

As Madison said, the principle of separation of powers does not really call for separation, but for intermingling and interdependence. n148 The executive power, according to Montesquieu, has two great categories -- the executive power in respect to things dependent on the law of nations, and the executive power in regard to matters that depend on the civil law. n149 The essential fact about this division is that it cannot survive, as Professor Corwin wrote, unless each department can defend its characteristic functions against intrusion by either of the others. n150 This is our principal constitutional problem today, because as Madison warned, the framers were so preoccupied with the risks of executive tyranny that they seemed "never to have recollected the danger from legislative usurpations." n151

In characterizing the Presidency, I stand largely with Professor Corwin's

conclusion. After reviewing the early history and the writings of the teachers of the framers, Corwin stated:

[T]he fact is that what the framers had in mind was not the cabinet system as yet nonexistent even in Great Britain, but the 'balanced [*193] constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative.' Sir Henry Maine's dictum that 'the American Constitution is the British Constitution with the monarchy left out' is, from the point of view of 1789 almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also, of course, the hereditary feature. n152

Comparisons between the parliamentary system and the presidential system invariably fail for a variety of reasons. The President is not, and never can be, a Prime Minister. He is elected by a different constituency, serves for a fixed term, and, in many aspects of his duty, is not answerable to Congress. The fact that the Presidency was intended to be a strong independent office, and that he had a vaguely defined prerogative power carried over from the British Constitution, is undeniable. The exceptions to which I referred earlier in the

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allocation of legislative and executive authority, however, are genuinely important -- that is, the participation of the Senate in the appointment of officers, n153 and the ratification, but not the negotiation of, treaties, n154 and the power of Congress to declare war. n155

The language of the two paragraphs of article I, section 8, dealing with the war powers is concerned with matters of international law: defining and punishing piracies and felonies committed on the high seas, and against the law of nations, n156 declaring war, granting letters of marque and reprisal, and making rules concerning captures on land and water. n157 These are all matters of international law, and the meaning of those words is their

international law meaning. It should be remarked that the Founding Fathers were far more familiar with international law than most lawyers are today, because of the way the Founding Fathers were trained. I said recently that, with the possible exception of the provision of the Constitution requiring two Senators from each state, these two paragraphs are among the least ambiguous paragraphs in the Constitution. n158

The declaration of war provision does not mean what Professor Tigar said it means. It does not vest Congress with the supreme power over war, subject to a narrow exception for defense against sudden [*194] attack. It vests in the President the power to decide when to use the national forces in all cases except those rare ones when general war is indicated -- that is, general, rather than limited, war. In international law, the distinction between limited war and general war is the distinction that legitimizes the use of limited force during peace time in order to cure violent breaches of international law that violate the rights of states.

Mr. Cooper quoted remarks of Hamilton and Jefferson which treat the power of Congress to declare war as an exception to the general rule that instituting the use of the national forces is a matter for the President to determine. n159

Like all exceptions, it is to be strictly construed. Mr. Cooper, Hamilton, and Jefferson are surely right, although the rule is somewhat blurred because Presidents have prudently sought to obtain congressional support for their use of the national forces, particularly when the circumstances required an extended or a particularly bitter and divisive campaign.

Of course, there have been two schools of thought on this subject from the beginning, especially at the political level. This is certainly evident in the exchange between Hamilton and Madison to which Mr. Cooper referred, n160 and it has been true in the pattern of our history ever since. n161 The pattern of constitutional practice, however, has been fairly clear cut in recognizing a distinct executive power to act in the field of foreign affairs. Those who cling to the notion of a congressional supremacy have attempted to ignore

it for
as long as they can. The history of the War Powers Resolution illustrates
the
paradox very well.

The draftsmen of the War Powers Resolution started out bravely with the
premise of congressional supremacy. n162 They felt that without the prior
consent of Congress, the President could only use the national forces to
repel
sudden attacks. n163 After examining our constitutional history and the
facts
of life, however, they wound up with the present War Powers Resolution
which
recognizes that the President must have a great deal of discretion in
using or
threatening to use the national forces in many peacetime circumstances.
n164
Of course, in [*195] the War Powers Resolution, Congress tried to limit
the

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President's discretion to ninety days, in the name of the necessary and
proper
clause. n165 That, however, is constitutional nonsense.

The War Powers Resolution is profoundly unconstitutional, not simply
because
it violates *Immigration and Naturalization Service v. Chadha*, n166 but
for
much deeper separation of powers reasons as well. For example, many
people say
that the reporting requirement is an innocent sort of provision. After
all, we
want freedom of information, and we all have a right to know, don't we?
Surely
that is constitutional, isn't it? There are times, however, when the
President
should not report to Congress or, indeed, to anyone else. We heard Judge
Webster talk about some of the provisions for congressional oversight of
intelligence activities. n167 The President does not report to all the
members
of Congress in this context. Rather, he reports to a small number of
members of
Congress, the Gang of Eight as he said, or in some instances, an even
smaller
group, to satisfy the oversight requirement. n168

There are a lot of things that the President should not report.
Perhaps the
most important event in President Nixon's term of office was the nuclear
warning
that he gave to the Soviet Union. That warning was given in order to

prevent a nuclear attack by the Soviet Union against China. In the "nature of things," such supremely important actions can be effective only if they are secret. Similarly, President Johnson gave nuclear hints to the Soviet Union to keep them out of the 1967 Middle East conflict, and, of course, Truman did the same thing in Korea. Everybody who participated in the drafting of the War Powers Resolution, and all those persons testifying, agreed that the use of nuclear weapons had to be left to the sole control of the President. n169 This seems to me to give away the entire issue, and to [*196] confirm what I said about the nature of the problem of presidential versus congressional discretion. Only the President can possibly control the use of nuclear weapons. Everyone agrees, therefore, that the President has to be allowed to use them.

The essence of the presidential prerogative that we have been talking about as part of the executive power was defined best by the practices of President Lincoln. What I emphasize today is that there is a reservoir of national powers defined by international law, that Congress and the President possess because we are a nation. The President possesses some of those powers that are executive in character because he is the Chief Executive. The presidential powers mentioned in article II -- the power to pardon, n170 to call out the militia, n171 the veto power, n172 and so on -- are instances of the executive power, not the whole of it. I recall to you the powerful opinion on this subject by Justice Miller in *Ex parte Yarbrough*, n173 one of my favorite cases, but one of the most neglected major opinions in the reports. It is rarely found in a case book. We should not regard the examples of Franklin Roosevelt, Lincoln, and Truman, in using the national force without prior congressional approval, as violations of law. They were helping to define the law because law is much more than a chronicle of what the courts say, or even what the courts decide.

I would submit that *Korematsu* n174 has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The [*197] case has been overruled in fact because of the criticism it has received, and I

am
very grateful to Judge Winter for recalling an article I regard as the best
article I ever wrote. n175 Although the Supreme Court has not overruled
the
case, I do not think any practicing lawyer today would cite the decision
in a
brief. I think Chief Justice Marshall in *McCulloch* n176 meant that the
law is
not so much what has been said, but rather a pattern of behavior that
society

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deems right. His remark in *McCulloch v. Maryland* n177 means that there
are
great abiding purposes and values in the Constitution that do survive and
guide
us. They are simple maxims about being a government of laws and not of
men,
about the separation of powers, and so on.

Of course there are limits to the power of the executive branch. I
fully
agree with Professor Tigar that the courts can, do, and should take cases
that
deal with defining these limits. *Reid v. Covert* n178 is an example of
one
kind of limit on executive power. *Korematsu*, n179 of course, is another.

We spend too much time trying to determine exactly how the Founding
Fathers would have dealt with the Vietnam War or the nuclear weapon. It is an
impossible exercise, and it diverts us from more germane analyses. As Mr.
Cooper pointed out, Madison and Hamilton, who knew a great deal more about
original intent than we are ever going to know, differed about the extent
of the
war power within a few years of the Convention. n180

The great overriding policy goals of the Constitution abide, but
constitutional law, like any other law, is a living entity. Perhaps in
this
context it is appropriate to reflect on the wisdom of Holmes' famous
comment:
"[T]he life of the law has not been logic: it has been experience." n181

IV. ORRIN HATCH

John Jay explained in *The Federalist Papers* why the President [*198]
was
selected to propose, initiate, and generally take the lead in foreign
policy:

It seldom happens in the negotiation of treaties, of whatever nature,
but

that perfect secrecy and immediate dispatch are sometimes requisite.

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 are doubtless many of both descriptions

who would rely on the secrecy of the President, but who would not confide in the Senate, and still less in that of a large popular assembly. n182

I might underscore the above words of John Jay by saying I am one of those

who would rely on the ability of the President to maintain secrecy, while placing little faith in the ability of the Congress to do so.

The language of the Constitution, rather than the President's ability to maintain secrecy, assigns the President the preeminent role in foreign affairs.

The Constitution permits the President, via the appointment power, to place delegates -- his ambassadors -- in every land. n183 Thus, he is assured access

to worldwide intelligence. Further, the President and his agents do not take

occasional recesses; rather, they are perpetually on duty, ready for action.

Moreover, the Constitution assigns the President the role of negotiating treaties, n184 receiving foreign delegations, n185 and generally proposing

the shape of our foreign policy. Thus, the President can better articulate a

clear and consistent policy. In short, the President is quite clearly assigned

the position of leadership in United States foreign affairs.

This is not to say that Congress does not have a role in the foreign policy

process. Congress cooperates in this process by reviewing, accepting, or rejecting those policies proposed by the President. The Congress accomplishes

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this by what I call its "checking function," which is evident in the Senate's

role in advising and consenting on executive branch nominations n186 and treaties, n187 and in the Congress' power of the purse. n188 The power to

check, however, is not the power to control. The checking function must never

be allowed to [*199] swallow the general foreign policy power of the President. We must not forget that the President is, to quote then Congressman

John Marshall, "the sole organ of the nation in its external relations,

and its
sole representative with foreign nations." n189

The Constitution contains no clear-cut principle that defines how these general grants of authority should interface. Similarly, because of political questions, standing, and other justiciability doctrines, sweeping cases concerning separation of powers such as *United States v. Nixon*, n190 *Youngstown Sheet and Tube Co. v. Sawyer*, n191 and *United States v. Curtiss-Wright Export Corp.*, n192 have only rarely reached the courts. Thus, the Supreme Court has not articulated any explicit principle that reconciles the Congress' power with the President's own foreign policy prerogatives.

The closest attempt to articulate such a principle is Justice Jackson's observation in *Youngstown Sheet and Tube Co.* He said:

1. When the President acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter n193

This does little more than state the obvious fact that many constitutional questions involving the respective powers of the legislative and executive branches are resolved by a pattern of construction and practice between these two political branches. Thus, it is likely to be left up to the Congress and the President, rather than relying upon the Court, to resolve and reconcile their respective foreign policy responsibilities.

[*200] Although the Court is not likely to set explicit limits, there clearly are limits on Congress' ability to force compliance with its policies. The appropriation power provides a good example of this interplay. How do we reconcile the appropriations clause with the President's foreign policy power?

The President is given the power to lead in foreign policy; the Congress has the power of the purse. Does this suggest that the Congress can control foreign policy by refusing to appropriate funds? I think it is clear that constitutional foreign policy functions may not be eliminated by a congressional refusal to appropriate funds. The Congress may not, for example, deny the President funding to receive ambassadors, negotiate treaties, or deliver foreign policy addresses. This point is implicit in the reasoning of *United States v. Curtiss-Wright Export Corp.*, 1936 where the Court held that the President had broad discretion to carry out a congressional law that gave him authority to

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embargo arms. 195 How can the President exercise this discretion without the funding to either obtain information or act upon his determinations?

By the same token, it is clear that the President's foreign policy authority does not compel the Congress to appropriate funds exactly as the President desires. Congress is given discretion to appropriate funds as it sees fit, and the President participates in that process by wielding his veto power. In sum, the Constitution does not explicitly [*201] articulate a principle governing the degree to which Congress can condition foreign policy appropriations.

Other examples of this interplay are found in the processes of treaty and government recognition. Although the President makes treaties with the advice and consent of the Senate, he alone negotiates them. Thus, the Senate can debate and express its approval or disapproval of an agreement the President has negotiated, but it cannot enter the field of negotiations itself. And although the President has the power to grant or deny recognition to other governments, the Congress can indicate its support or disapproval of this recognition by various means.

In my opinion, Congress oversteps its role when it undertakes to dictate the specific terms of international relations. This is a power granted specifically to the executive branch, which is equipped to acquire the information

necessary
for foreign policy creation. Thus, when the Congress enters into the
process of
creating new policies by, for example, permitting certain forms of
humanitarian
aid, but not others, it is venturing beyond its own constitutional mission
and,
in fact, attempting to formulate foreign policy.

What are some of the historical rebuttals to executive power? First,
some
might assert that history tends to give wide breadth to Congress' spending
power
in relation to the President's foreign policy role. Prior to 1787, the
English
Parliament used the spending power to wrench control from the King. n196
Moreover, colonial legislatures established similar superiority concerning
funding questions over the colonial governors. n197 Some have argued that
these precedents mean Congress may use the spending clause as a check on
the
fear that the President might tend to acquire kingly preeminence. n198

I think the response to this line of reasoning is direct. The 1787
Convention did not adopt a parliamentary system with unquestioned
legislative
dominance. RATHER, it adopted a government consisting of three coequal
branches, under which the Executive received, for the reasons mentioned
before,
the preeminent authority over foreign policy. Unlike parliamentary
systems, the
legislature in our system does not have automatic dominance over the other
departments of the government. To the degree that it attempts to assert
such
dominance, [*202] Congress misreads the balance of powers envisioned by
the
Constitution.

Second, many senators argue that the conduct of foreign policy is
essentially
a concurrent power. Congress has certain foreign policy duties, such as
the
earmarking of taxpayer dollars. n199 The President has certain other
duties,
such as the negotiation of treaties. n200 Thus, the argument goes:
Foreign
affairs is a shared power, and the President cannot flaunt or ignore the
role of
Congress by disregarding directions contained, or implicit, in
appropriations
bills.

A reasonable response to that argument might be: Yes, the Constitution
does

envision some overlap of authority with respect to foreign affairs. This is healthy because it operates as a check and balance. Furthermore, the requirement of some concurrence between Congress and the executive branch ensures that a national consensus is formed if the nation is committed to new foreign policy directions. When Congress presumes to wrench from the President his role as chief articulator and sole organ of foreign policy leadership by dictating conditions and appropriations bills, however, it steps away from its role as a check on how tax dollars are, or should be, spent and steps into the role of usurper. In other words, Congress ignores its role as a check on the President and assumes a leadership role akin to negotiating a treaty -- an activity clearly forbidden to Congress -- when it dictates specific conditions for relations between foreign entities. Thus, although the Boland amendment n201 may not violate the legal limits of the Constitution, because the Constitution appears to set no defined limits, it is clear that the amendment does violate the spirit and general principles of the document.

Moreover, the Boland amendment is an example of congressional ineptitude, which demonstrates why the framers committed foreign policy preeminence to the Executive. This fact becomes even more clear when we trace the course of the amendment. First, is it really the Boland amendment, or is it the Boland amendments, or would you really let them rise to the dignity of amendments? For example, in year one aid is allowed as long as it is not used by the CIA to [*203] overthrow the Sandinistas. n202 The next year, aid is permitted as long as the Department of Defense and the CIA do not engage in a list of specific activities. n203 In year three, aid is allowed with few restrictions at all. n204 The following year, aid, either direct or indirect, is forbidden. n205 The next year aid is permitted again, but only if it is humanitarian. n206 Finally, aid is resumed without conditions. n207 Now this kind of consistency and clarity in foreign policy could only come from Congress. If all of our foreign affairs were conducted in this manner, we would probably provoke World War III in a short period of time, with the entire world fighting

us.

In conclusion, the absence of a clear legal demarcation between congressional and executive authority in foreign affairs indicates that this constitutional issue will be decided by a lengthy pattern of practice between the branches. Our attempt to find a general principle that ought to govern, however, suggests that the President ought to be left to propose and initiate, and the Congress ought to be employed as a check on faulty policies. This is what Congress does best. When Congress presumes to lead and set conditions, however, it ventures to undertake a mission that it is ill-equipped to handle. Just as we criticize judges for presuming to legislate -- a function that I think we all would agree they are generally ill-equipped to undertake -- so should [*204] we criticize the Congress when it attempts to formulate and execute foreign policy, a function it is not really equipped to formulate. The Boland amendments are classic examples of why the framers did not place foreign affairs into the hands of Congress.

Turning to the War Powers Resolution, similar constitutional and practical problems present themselves. The Constitution does not envision that we will stop and file a cloture petition in the Senate before returning fire, nor does it envision that we will stop and seek a time agreement for the Senate debate before protecting American lives and interests. Furthermore, the Constitution clearly does not envision that we consider a veto override before dodging a torpedo, or digging a fox hole. And these are only the practical problems. I

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agree with Gene Rostow that it is unconstitutional and something that Congress has politically foisted off on Presidents. Quite simply, the War Powers Resolution does not conform either to reality or to a plain reading of the Constitution. For constitutional and practical reasons, I simply do not think it can be upheld.

V. QUESTIONS AND ANSWERS

SPEAKER: Why did Judge Sofaer and the State Department, in trying to reinterpret correctly the ABM treaty, n208 not really refer to what President Carter did with regard to the Taiwan Relations Act n209 in 1979, where he decided that he did not want to abide by the treaty.

PROFESSOR ROSTOW: Since the time President Carter abrogated the security treaty with Taiwan, n210 I have objected to his action on constitutional grounds. I find it hard to imagine that a treaty ratified with the advice and consent of the Senate, part of the supreme law of the land, can be abrogated by a President on his own authority. For example, if a President should suddenly take us out of NATO, and when we woke up in the morning, we found three or four of our most fundamental security treaties abrogated without any congressional participation, I would feel that the President acted beyond his discretion. Some Presidents, nevertheless, have abrogated treaties [*205] because they found that the other party already had abrogated and breached the treaty, and therefore, the treaty was in a condition of breach. This seems to be a permissible part of the President's power in conducting foreign relations. Also, treaties have been abrogated in order to recognize another country, which is what President Carter did in the Taiwan case, when he established diplomatic relations with the Peoples Republic of China. As an incident to that action, he also exercised the withdrawal clause of the security treaty with Taiwan. Constitutionally, that is a defensible position because the President has an absolute monopoly on the question of recognition. n211

In 1933, when President Roosevelt established diplomatic relations with the Soviet Union, many agreements were made on the side. The Supreme Court said that those side agreements were, indeed, part of the supreme law of the land.n212 It is important to note that some of those opinions have been criticized.

SENATOR HATCH: A perfect illustration is when a President operates on his own in foreign policy because he concludes that it is more advantageous to world politics and to our country to have relations with mainland China than it is to continue the treaty with Taiwan. I think, however, we could have maintained our relationship with Taiwan and still created good relations with mainland

China.

With regard to the ABM treaty, I think Judge Sofaer makes an eloquent case that Sam Nunn is wrong. I also think President Reagan makes an eloquent case that Sam Nunn is wrong, because after watching the Russians violate the ABM treaty for years, I now argue for careful interpretations. It is incongruous that Senator Nunn puts us into a debatable posture when, literally, we are in the midst of negotiations with the Soviets, who themselves violate all canons of careful interpretation.

After we recognized mainland China, we experienced a decrease in good feelings between our country and China. It was only after Senator Henry Jackson went to China that the Chinese signaled they [*206] were ready to resume better relations with us. They met with Senator Jackson, Senator Zorinsky, and

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myself, as the Republican counterpart to Jackson, and treated us royally while we were in China. You are, however, looking at a Senator who amended Carter's Taiwan Relations Act against the President's will. n213 He fought the amendment to provide elements of protection for the Republic of China. This is another instance where Congress had to adapt itself politically to the President's will in foreign policy. We did not adapt completely, however, because we provided some continuing protection for our longstanding relationship with the Republic of China, which irritated the People's Republic. I think it also showed that we did not need the Taiwan Relations Act. What was needed was for the President to stand up and express a desire for good relations with mainland China, in harmony with our long-term relationship with Taiwan. I think the Chinese would have accepted that accommodation.

PROFESSOR TIGAR: It is hard to get over the fact that the Constitution divides the treatymaking process between the Senate and the President. What is being argued here is that the Senate agreed to the text of the treaty, and yet, apparently was not aware of the meaning that is now being ascribed to it.

Such an argument, which is legitimate, has to rest either on an interpretation of the text of the Constitution that I really do not see

here, or
Senator Hatch's view that somehow the President is more competent to do this. I would remind the Senator that while the Boland amendments were being debated and enacted, across town at 1600 Pennsylvania, the North-Pointexter show was being played out, which was hardly a model of consistency in the executive branch.

SENATOR HATCH: It was a lot more consistent than Congress, I will tell you that.

PROFESSOR ROSTOW: I did not answer your question about the application of the Taiwan example to the controversy over the ABM Treaty. It cannot be advanced seriously that the interpretation of a treaty, which is an international instrument of contract between [*207] countries, is decisively determined by what was said, or not said, in the murky debates on obscure side issues in 1972 on the ratification of the ABM Treaty.

I think Judge Sofaer is entirely correct on this aspect of the controversy. The interpretation of treaties is the subject of vast volumes, and it is like the interpretation of other contracts -- a matter of what the parties have decided. If the ratification process is perfunctory, it is still, nonetheless, a treaty, and the treaty has to be interpreted in accordance with the normal rules. These rules are that the later interpretation of the treaties should govern over the former. The President, in the first instance, is surely the person to interpret the treaty, just as he must interpret any other law when he enforces it. Congress can always overrule that construction by passing a statute inconsistent with the President's interpretation. According to our law, the later statement of the legislative intent prevails.

In the controversy about the ABM Treaty, there really is no doubt about the facts. In the negotiations, the Russians would not agree that the treaty should cover future technologies. They said: "You do not know what the new technologies are going to do, and we do not know what they are going to do. So let us agree to leave them out." That is what they thought they were doing in

Agreed Statement D. n214 The other interpretation, the so-called "narrow" interpretation, is a perfectly plausible legal theory, except that it does not correspond to the facts of the negotiations, and it does not explain why Agreed

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Statement D is there at all.

SPEAKER: In light of the President's responsibility to faithfully execute the laws, what is the proper and responsible way for the President to initiate a challenge to the War Powers Resolution, or any act that he feels is unconstitutional?

MR. COOPER: Well, the restrictions on justiciability make that a very difficult question to answer. The President cannot file a lawsuit against Congress to determine his rights under the War Powers Resolution. Obviously, on the other hand, he cannot fail to perform his constitutional obligations to the American people as the Chief Executive, the Commander-in-Chief, and the chief organ of our relations with foreign countries. It is really a very difficult position for any President. Any time there is a statute on the books that usurps the President's authorities, he simply cannot be bound by it.

PROFESSOR ROSTOW: Let me save the Assistant Attorney General from barratry and maintenance. He cannot admit to engaging [*208] in any such practices, but of course, he can and should organize a test suit, a practice used since the beginning of time. The President, however, should not make the mistake that Andrew Johnson made in testing the constitutionality of the Tenure of Office Act, which was the basis of his impeachment. n215 That was a terrible mistake. Luckily for him and for the Constitution, he prevailed.

The President has to disobey the Act in order to present a justiciable case, or he can follow the strange reasoning of *Sierra Club v. Morton*, n216 or *Board of Education v. Allen*. n217 Because the Supreme Court was so sympathetic to the law students who brought the *Sierra* litigation, I suggest that some of you go out and start a little litigation on that subject.

SPEAKER: But that is a passive response, where he has to defend. I am talking about --

PROFESSOR ROSTOW: Well, he doesn't have to defend the constitutionality in that case.

SPEAKER: But that subjects him to the possibility of the Tenure of Office Act and impeachment if the political tensions get --

PROFESSOR ROSTOW: I suggest powerful maintenance, that is all.

SENATOR HATCH: It is a political problem for the President. No one would fail to recognize that. He knows that if the climate is not right in this country for his refusal to comply with the War Powers Resolution, then he is going to pay a heavy political price for it. He also knows that generally -- especially in the years since the Vietnam War -- it is very difficult to get involved in any form of conflict without having whole segments of our society up in arms over it.

The only practical way that he can test it is to refuse to comply. The President is basically refusing to comply with it in the Persian Gulf matter, but Congress really has not tested him that much on it. I suspect that he would be sued at that point in a very important test [*209] case. I am not sure, however, that the Supreme Court is going to resolve it in the end.

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MR. COOPER: It is not accurate to say the President has failed to comply with the War Powers Resolution with respect to Persian Gulf matters. In every incident that might even arguably have required a report, a report satisfying those requirements has been filed. By the same token, however, he obviously is continuing to pursue a policy that he believes, in his capacity as the Chief Executive, Commander-in-Chief, and principal organ for foreign relations in this country, is in the best interest of the American people.

SPEAKER: The reason I asked the question is because I am inviting the

Congress, and all the scholars and lawyers, to be open to the possibility of creating some sort of injunctive relief, or having legislation that will be able to test this, that the President initiate some sort of affirmative move so he is not caught in this tension where he --

MR. COOPER: There is another problem with what we are suggesting here and that is --

SPEAKER: -- because I think ignoring the law is not --

PROFESSOR TIGAR: Assistant Attorney General Cooper is in a difficult position. He is like the old boy who said, "Well, I don't know about that issue. I haven't been retained yet." No one on this panel believes that the President acts in a rule freeway, right? That is to say, we are all talking about how you enforce the rules. While I yield to no one in my belief that the courts have the power to resolve disputes that involve private and even public rights, I would like to suggest something else that comes out of twenty years of being a trial lawyer. If the President and the Congress get to fussing with each other about it, they could settle it short of litigation. There is nothing wrong with that, and the constitutional system ought to provide for that. Indeed, it is a preferred way in the law life of the nation, as it is in the private relations of individuals.

A preemptive suit of the kind you are talking, however, obviously raises all of the justiciability difficulties trumped or doubled because the event has not yet happened. The particular way that the President regards his conduct as unreasonably restrained has not been spelled out by what he did.

Maybe you are back to Marbury v. Madison? n218 Judge Marbury, in essence, said, "You know, Adams told me I could be a judge, and the son of a gun won't give me my commission!" Chief Justice Marshall, while he said that the statute is unconstitutional, also went out [*210] of his way to tell Thomas Jefferson that he ought to have shaped up. n219 That is the original intent answer to your question.

PROFESSOR ROSTOW: What Professor Tigar says is perfectly correct, of course, except that at the present moment, we have an opportunity where there could be a live plaintiff with a real case. For example, the mother or widow of a soldier or sailor who was killed could bring an action as an executor.

MR. COOPER: That assumes that the political question doctrine does not apply to the questions that must be litigated.

SPEAKER: I would like to ask Senator Hatch if he feels that the views he expressed are going to get a fair play in the pending committee report which is due out soon? n220

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SENATOR HATCH: I have read most of the report on both sides, the majority and the minority. The majority does try to justify the Boland amendments. n221 The minority, I think, rips them to shreds, n222 but you will have to make up your own mind. I happen to have been a subscriber to the minority report, and I felt that the majority report was biased in its approach. It misstated and distorted some of the facts. It was too political, and frankly, some of the conclusions they reached were not very good. Even from a slanted perspective, however, the majority report admits there was no venality in this affair. n223 There is a real question whether there was real criminal intent to violate any statutes.

FOOTNOTES:

n1. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. @@ 1541-1548 (1982 & Supp. IV 1986)).

n2. H.R. 1777, 100th Cong., 1st Sess. (1987). The bill was subsequently enacted, in somewhat modified form, as the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331 (1987). For examples of this Congressional micromanagement, see the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, @ 123, 101 Stat. 1331, at 1341 (1987)

(closing of consular and diplomatic posts in Antigua and Barbuda); id., @ 151, at 1351-52 (withdrawal from U.S.-U.S.S.R. embassy agreement); id., @ 1003, at 1407 (prohibitions regarding the Palestine Liberation Organization); id., @ 1234(b), at 1418-19 (U.S. policy toward Iran-Iraq War). The act also contains numerous "sense of the Congress" provisions that are purely hortatory and, therefore, constitutionally unobjectionable.

n3. H.R. 1748, 100th Cong., 1st Sess. (1987). The House bill adopted most of the Senate proposals contained in S. 1174. After the delivery of these remarks, Congress enacted the House bill as the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987).

n4. The treaty in question is, of course, the "ABM" Treaty. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972). The Levin-Nunn amendment to S. 1174 sought to restrict the Reagan Administration's so-called "broad" interpretation of the ABM Treaty by limiting the expenditure of funds for the Strategic Defense Initiative to activities consistent with the "narrow" interpretation. See 133 CONG. REC. S6355-6379 (daily ed. May 13, 1987); 133 CONG. REC. S6453-6473 (daily ed. May 14, 1987); 133 CONG. REC. S12,134-12,195 (daily ed. Sept. 16, 1987); 133 CONG. REC. S12,235-12,243 (daily ed. Sept. 17, 1987); see also National Defense Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-108, @ 225, 101 Stat. 1019, 1056 (1987) (relevant provision of bill as enacted).

n5. The Select Committees issued a joint report on the Iran-Contra affair in November, 1987. H.R. REP. No. 433, S. REP. No. 216, 100th Cong., 1st Sess. (1987). Chapter 25 of the majority report, id. at 387-93, and chapters 2-4 of the minority report, id. at 457-79, set forth opposing views of the extent of presidential power in the field of foreign affairs.

n6. J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1960). For a discussion of Locke's influence on the framers, see B. BAILYN, THE IDEOLOGICAL

ORIGINS OF THE AMERICAN REVOLUTION 27-30 (1967).

n7. J. LOCKE, *supra* note 6, at 382-84.

n8. *Id.* at 382-84.

n9. *Id.* at 382-84.

n10. *Id.* at 384-85.

n11. *Id.* at 384-85.

n12. *Id.* at 384.

n13. *Id.* at 385.

n14. See W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765) (Univ. Chicago facsimile ed. 1979).

n15. See C. MONTESQUIEU, *THE SPIRIT OF LAWS* (1762) (J. Prichard rev. ed 1912).

n16. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 462 n.1 (5th rev. ed 1984).

n17. See J. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776* (1963). PROFESSOR Greene argues that much of the struggle between the colonies and Great Britain took place in the context of political contests between appointed royal governors and locally elected assemblies. Thus Americans quite naturally viewed legislatures positively and executives negatively. When independence afforded them the opportunity to construct their own political arrangements, they reacted accordingly.

The evolution of American opinion in regard to executive power is illustrated by the colonists' shifting attitude toward the British crown. As late as 1760, Americans had cheered the accession of George III to the throne. Benjamin Franklin predicted that under George III's rule "faction will dissolve and be dissipated like a morning fog before the rising sun." Letter from Benjamin Franklin to William Strahan (December 19, 1763), reprinted in 10 *THE PAPERS OF BENJAMIN FRANKLIN* 406, 407 (L. Labaree ed. 1966). John Adams noted in his diary, after reading George III's first speech to Parliament, that "these are

sentiments worthy of a king -- a patriot king." Diary of John Adams, 1761, reprinted in 2 THE WORKS OF JOHN ADAMS (C. Adams ed. 1850) (exact date unknown; entry between dates of February 9 and March 3, 1761).

The subsequent colonial crisis that resulted in independence profoundly affected American notions of the desirability of a strong Executive. By 1776, Americans had come to view the King in a somewhat different light. No longer the "rising sun" dissipating the fog, George III was now "the royal brute of Great Britain," descended from a "French bastard" who had conquered England with "an armed banditti." Abigail Adams wrote to her husband John that "we have in George a match for a Borgia or a Cataline, a wretch callous to every humane feeling." R. KETCHAM, PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829, at 69-73 (1984).

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n18. See W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS (1980); F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 89-91 (1966 ed.); J. MAIN, THE SOVEREIGN STATES, 1775-1783, at 143-44 (1973); A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789, at 164-170 (1924); C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789, at 25-54 (1923).

n19. VA. CONST. OF 1776, ch. II, art. IX.

n20. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 113-14 (T. Avernethy ed. 1964).

n21. PA. CONST. OF 1776, ch. II, @@ 1-3. See R. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790 (1942). See generally J. SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 (1936). Pennsylvanians, like other Americans, came to appreciate the necessity of executive power and, just a year after the adoption of the Constitution of the United States, replaced their 1776 constitution with a more balanced system.

n22. Quoted in C. THACH, *supra* note 18, at 32-33.

n23. NEW YORK CONST. OF 1777, arts. XVII-XIX.

n24. MASS. CONST. OF 1780, part II, c. II, @ 1, art. VII. See generally O. & M. Handlin, Introduction, THE POPULAR SOURCES OF POLITICAL AUTHORITY (O. & M. Handlin eds. 1966).

n25. 2 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 35 (M. Farrand rev. ed. 1937) [hereinafter M. FARRAND].

n26. C. THACH, supra note 18, at 55-75. See generally M. JENSEN, THE ARTICLES OF CONFEDERATION (1940); M. JENSEN, THE NEW NATION (1950).

n27. C. THACH, supra note 18, at 55-69.

n28. Letter from George Washington to the President of Congress (July 10, 1775), reprinted in 3 THE WRITINGS OF GEORGE WASHINGTON 320, 324 (Fitzpatrick ed. 1931). The situation Washington complained of improved dramatically when Congress appointed Joseph Trumbull as Commissary-General, but Trumbull later resigned because of a departmental reorganization that eliminated his power to remove key subordinates and placed it in Congress. When the supply system then returned to its pre-Trumbull state of inefficiency, Congress relented and restored the Commissary-General's power of removal. C. THACH, supra note 18, at 65-67.

n29. Letter from Alexander Hamilton to James Duane (September 3, 1780), reprinted in 2 THE PAPERS OF ALEXANDER HAMILTON 400, 404 (H. Syrett ed. 1961).

n30. Id. at 404.

n31. C. THACH, supra note 18, at 76.

n32. 2 M. FARRAND, supra note 25, at 52.

n33. Id.

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n34. U.S. CONST. art. II, @ 1, cls. 2-3.

n35. U.S. CONST. art. II, @ 4.

n36. U.S. CONST. art. II, @ 2, cls. 2-3.

n37. U.S. CONST. art. II, @ 3.

n38. U.S. CONST. art. II, @ 2, cl. 2.

n39. U.S. CONST. art. II, @ 2, cl. 1.

n40. U.S. CONST. art. I, @ 7, cls. 2-3.

n41. See, e.g., U.S. CONST. art I, @ 7, cl. 2 (congressional override of presidential veto); U.S. CONST. art. II, @ 2, cl. 2 (Senate's advice and consent to appointments and treaties); U.S. CONST. art. II, @ 4 (removal of President by impeachment and conviction by Senate).

n42. Treaty of Amity and Commerce, February 6, 1778, United States-France, 8 Stat. 12, 18(2) Stat. 203, Act Separate and Secret, 17 Stat. 795, 18(2) Stat. 213, T.S. No. 83, annulled by ch. 67, 1 Stat. 578 (1798).

n43. Treaty of Alliance, February 6, 1778, United States-France, 4 Stat. 6, 18(2) Stat. 201, T.S. No. 82, annulled by ch. 67, 1 Stat. 578 (1798). For the best texts of these treaties, including both the English and the original French versions, as well as a useful introductory essay, see THE TREATIES OF 1778 AND ALLIED DOCUMENTS (G. Chinard ed. 1928).

n44. See Pacificus No. II, Gazette of the United States (Philadelphia) July 3, 1793, in 15 H. SYRETT, *infra* note 46, at 55-63 (arguing that the treaties were defensive alliances and that the United States was not obligated to honor them because in the Anglo-French conflict France was the aggressor). See generally A. DECONDE, *ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER WASHINGTON* (1958) (general discussion of the politics and tensions of the period).

n45. Proclamation of Neutrality, No. 65, ASP, Foreign Relations I, 140, 93d Cong., 1st Sess. (1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430-31 (J. Fitzpatrick ed. 1939) [hereinafter J. FITZPATRICK]. The standard source on this episode is C. THOMAS, *AMERICAN NEUTRALITY IN 1793* (1931). See A. DECONDE, *supra* note 43; F. GILBERT, *TO THE FAREWELL ADDRESS: EARLY AMERICAN FOREIGN POLICY* (1961); P. VARG, *FOREIGN POLICIES OF THE FOUNDING FATHERS* (1963).

n46. Hamilton's Pacificus essays were originally published in the Gazette of

the United States (Philadelphia) June 29-July 20, 1793. They are reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33-43, 55-63, 65-69, 82-86, 90-95, 100-06, 130-35 (H. Syrett ed. 1969) [hereinafter H. SYRETT].

n47. *Pacificus* No. I, *Gazette of the United States* (Philadelphia) June 29, 1793, in 15 H. SYRETT, *supra* note 46, at 33-43.

n48. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, @ 1.

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n49. 15 H. SYRETT, *supra* note 46, at 37-38.

n50. *Id.* at 38.

n51. *Id.* at 39-40.

n52. *Id.* at 39.

n53. *Id.* at 42.

n54. *Id.*

n55. *Id.*

n56. *Id.*

n57. *Id.*

n58. *Id.*

n59. D. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 55-163 (1962); M. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 479-517 (1970). In addition to his constitutional scruples, Jefferson opposed a gratuitous American declaration of neutrality, preferring instead to exact some consideration, in the form of trade concessions, from the belligerents. D. MALONE, *supra*, at 70; M. PETERSON *supra*, at 484-85.

n60. Letter from Thomas Jefferson to James Madison (June 23, 1793), reprinted in 15 THE PAPERS OF JAMES MADISON 37 (T. Mason, R. Rutland, J. Session eds. 1985) [hereinafter T. MASON].

n61. Letter from Thomas Jefferson to James Madison (July 7, 1793),
reprinted
in 15 T. MASON, supra note 60, at 43.

n62. Id.

n63. Madison's five Helvidius essays were originally published in
Gazette of
the United States (Philadelphia) August 24-September 18, 1793. They are
reprinted in 15 T. MASON, supra note 60, at 64-120.

n64. Helvidius No. I, Gazette of the United States (Philadelphia)
August 24,
1793, in 15 T. MASON, supra note 60, at 72.

n65. Madison argued:

A declaration that there shall be war, is not an execution of laws; it
does
not suppose pre-existing laws to be executed; it is not in any respect, an
act
merely executive. It is, on the contrary, one of the most deliberative
acts
that can be performed; and when performed, has the effect of repealing all
the
laws operating in a state of peace, so far as they are inconsistent with a
state
of war; and of enacting as a rule for the executive, a new code adapted to
the
relation between the society and its foreign enemy. In like manner a
conclusion
annuls all the laws peculiar to a state of war, and revives the general
laws
incident to a state of peace.

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Helvidius No. I, Gazette of the United States (Philadelphia) August 24,
1793,
in 15 T. MASON, supra note 60, at 69 (emphasis in original).

Madison, however, seemed to waffle on the question of which branch, in
fact,
had the power to make such determinations and concluded:

[It] is plainly neither the one nor the other [Legislative or
Executive]. It
relates neither to the execution of the subsisting laws, nor to the
enaction of
new ones, and still less to an exertion of the common strength The
power in question seems therefore to form a distinct department, and to
belong

neither to the legislative nor to the executive.

Id. at 73.

n66. E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 28-30 (1917).

n67. Opinion on the Powers of the Senate Respecting Diplomatic Appointments (April 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378-379 (J. Boyd ed. 1961).

n68. U.S. CONST. art. II, @ 2, cl. 1. For a historical analysis of the commander-in-chief power, see C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (R. Longaker rev. ed. 1976).

n69. MASS. CONST. OF 1780, part II, c. II, @ 1, art. VII, annulled and replaced by art. 45 of the Amendments (1918).

n70. Jefferson's efforts against the Barbary pirates are surveyed in M. SMELSER, THE DEMOCRATIC REPUBLIC, 1801-1815, at 57-61 (1968). A discussion of the Dale mission appears in 1 THE GROWTH OF PRESIDENTIAL POWER 369-74, 376-78 (W. Goldsmith ed. 1974) [hereinafter W. GOLDSMITH].

n71. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, ASP, Foreign Relations II, 359, 7th Cong., 1st Sess. (1801), quoted in 1 W. GOLDSMITH, supra note 70, at 373.

n72. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, ASP, Foreign Relations II, 359, 7th Cong., 1st Sess. (1801), reprinted in part in 1 W. GOLDSMITH, supra note 70, at 374.

n73. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, ASP, Foreign Relations II, 359, 7th Cong., 1st Sess. (1801), reprinted in part in 1 W. GOLDSMITH, supra note 70, at 375-76.

n74. 1 W. GOLDSMITH, supra note 70, at 376. In his orders to Commodore Dale, General Smith had suggested that "[B]y disguising your ships, it will be some weeks before they [the Tripolitans and other North African states] will know that the squadron is cruising in the Mediterranean, and give you a fair change of punishing them." Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, ASP, Foreign Relations II, 359, 7th Cong., 1st Sess.

(1801).

n75. 1 W. GOLDSMITH, *supra* note 70, at 376-77. Commodore Dale described the circumstances in a letter to the Secretary of the Navy written shortly after

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their occurrence, and enclosed a copy of the action report of Enterprise's commanding officer, Lieutenant Andrew Sterrett. See Letter of Commodore Dale to the Secretary of the Navy (Malta Harbor, August 18, 1801), including Copy of Letter from Lieutenant Andrew Sterrett to Commodore Richard Dale, dated on board the United States' schooner Enterprise (At Sea, August 6, 1801), No. 165, ASP, Foreign Relations II, 360, 7th Cong., 1st Sess. (1801).

n76. Jefferson informed Congress of the Dale mission in his First Annual Message to Congress, December 8, 1801. See 11 ANNALS OF CONG. 11 (J. Gales ed. 1801), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314 (J. Richardson rev. ed. 1908).

n77. Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. REV. 1135 (1970).

n78. *Id.* at 1147-52, 1167-78. See Henkin, Is There a "Political Questions" Doctrine?, 85 YALE L.J. 597 (1976) (concluding political question doctrine is "deceptive packaging").

n79. *United States v. United States District Court for the Eastern District of Michigan (Keith)*, 407 U.S. 297, 303, 320-21 (1972) (18 U.S.C. @ 2511(3) does not confer power on President to conduct warrantless electronic surveillance based on national security grounds, and the Fourth Amendment requires prior judicial approval for Executive to conduct domestic security surveillance.).

n80. See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), appeal after remand, 667 F.2d 1105 (4th Cir. 1981), cert. denied, 454 U.S. 1144 (1982). The Fourth Circuit held that the "foreign intelligence" exception to the

Fourth Amendment permits warrantless electronic surveillance so long as (1) the object of the surveillance is a foreign power, its agent, or collaborators, and (2) the surveillance is primarily for foreign intelligence reasons. When the investigation becomes criminal, however, a warrant is then required. *Id.* at 915-16.

n81. See *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part, rev'd in part* sub nom., *Boos v. Barry*, 108 S. Ct. 1157 (1987); *Von Avlock v. Smith*, 720 F.2d 176 (D.C. Cir. 1983). As to the objections to Congressional scrutiny, see *United States v. Lavelle*, 751 F.2d 1266 (D.C. Cir. 1985). See also Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854-77 (1986); Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L. REV. 683, 711-12 (1984).

n82. *Tigar*, *supra* note 77, at 1165-67.

n83. 5 U.S. (1 Cranch) 137 (1803).

n84. *Id.* at 165-66.

n85. 25 F. Cas. 30 (C.C.W.D. Va. 1807) (No. 14,692d) (cited with approval in *United States v. Nixon*, 418 U.S. 683 (1974)).

n86. *Id.* at 34.

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n87. 8 J. WIGMORE, *EVIDENCE* @@ 2369-79 (McNaughton rev. ed. 1961 & Supp. 1987).

n88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

n89. Speaking for the Court, Mr. Justice Black delineated the President's role in the "law life" of our Nation with succinctness. He stated:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself In the framework of our

Constitution, the President's power to see that the laws are faithfully executed
refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise
and the vetoing of laws he thinks bad. And the Constitution is neither silent
nor equivocal about who shall make the laws which the President is to execute .
. . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress -- it directs that a presidential
policy be executed in a manner prescribed by the President The Constitution does not subject this lawmaking power of Congress to presidential
or military supervision or control.

Id. at 585-88. Mr. Justice Frankfurter, at least on this point, phrased it
somewhat more bluntly:

'The duty of the President to see that the laws be executed is a duty that
does not go beyond the laws or require him to achieve more than Congress see fit
to leave within his power.' The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean
undefined powers. The separation of powers built into our Constitution give
essential content to undefined provisions in the frame of our government.

Id. at 610 (Frankfurter, J., concurring) (quoting Mr. Justice Holmes in Myers
v. United States, 272 U.S. 52, 177 (1926)).

Mr. Justice Clark, in his concurrence, concluded that:

[W]here Congress has laid down specific procedures to deal with the type of
crisis confronting the President, he must follow those procedures in meeting the
crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting
the nation.

Id. at 662.

Mr. Justice Burton also concurred based upon the President's failure to follow the congressionally prescribed procedures. Id. at 660. Mr. Justice Jackson's three bases of presidential authority are discussed *infra* in text accompanying note 193.

n90. Mr. Justice Black phrased the second truth as follows: The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from

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stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Youngstown, 343 U.S. at 587.

n91. *Id.* at 583-84. Mr. Justice Frankfurter was more explicit on this point:

To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action.

Id. at 596.

n92. *Ramirez de Arrellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd* and remanded, 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*) (The destruction of a United States citizen's Honduran cattle ranch by construction of United States military base presented justiciable case, and the act of state doctrine did not bar judicial relief.), vacated and remanded for reconsideration, 471 U.S. 1113 (1985) (*mem.*) (vacated and remanded in light of enactment of Pub. L. No. 98-473, 98 Stat. 1884, 1893-1894, which provided compensation for Americans in Honduras whose property was taken by United States government action).

n93. 3 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 59 (3d ed. 1941) [hereinafter ELLIOT'S DEBATES] (remarks by Mr. Henry at the Virginia ratification convention, June 5, 1788), quoted in

Tigar, *supra* note 77, at 1172.

n94. U.S. CONST. art. I, @ 8, cls. 1, 12.

n95. U.S. CONST. art. I, @ 8, cl. 11.

n96. *Id.*

n97. Goldman, *The President, the People and the Power to Make War*, 21 AMERICAN HERITAGE, April, 1970, at 28, reprinted in 3 R. FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW* 489 (1972).

n98. U.S. CONST. art. II, @ 2.

n99. For a discussion of this dangerous "constitution busting" tactic, see Glennon, *Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987).

n100. 745 F.2d at 1545-74.

n101. *Id.* at 1546-49 (Tamm, J., dissenting); *id.* at 1561-62 (Scalia, J., dissenting).

n102. See J. STORY, *COMMENTARIES ON THE CONSTITUTION* @@ 1166, 1171, at 95-97 (3d ed. 1858); see also *THE FEDERALIST* NOS. 24-26 (A. Hamilton) (G. Carey & W. Kendall ed. 1966); Comment, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); Comment, *The President, the Congress, and the Power to Declare War*, 16 U. KAN. L. REV. 82 (1967).

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n103. See generally 1 T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 254-338 (2d ed. 1958).

n104. For a more extended discussion of this question, and a detailed response to such authors as Alexander Bickel, who rather derided the idea of a countermajoritarian institution asserting itself in this way, see Tigar, *supra* note 77, at 1136.

n105. U.S. CONST. art. VI.

n106. The Boland amendment provisions have appeared in various statutes. See, e.g., Further Continuing Appropriations Act, 1983, Pub. L. 97-377, @

793,
96 Stat. 1830, 1865 (1982). The Congressional Research Service compiled a legislative history and summary of the "Boland amendments" through the summer of 1987, and the report was subsequently published in the Congressional Record. See 133 CONG. REC. H4585-4987 (daily ed. June 15, 1987); see also H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 395-410 (1987) (Chapter 26 of the Iran-Contra Report, "The Boland Amendments and the NSC Staff").

n107. Relevant statutes are legion. Some examples include the Neutrality Act provisions codified at 18 U.S.C. §§ 956, 959, 960, and the War Powers Resolution provisions codified at 50 U.S.C. §§ 1541-1548. See J. STORY, *supra* note 102, §§ 1163-82, at 94-102.

n108. See authorities cited *supra* notes 97 & 102.

n109. 77 Eng. Rep. 646 (1610).

n110. *Id.* at 652 ("[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."); see *Plucknett, Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

n111. The most complete collection of material from the Vietnam War era is the series of volumes edited by Richard Falk, *supra* note 97. More recent military incursions have added urgency to the debate, but not much to the scholarship in the area.

n112. See Tigar, *supra* note 77, at 1170 nn.152-54. See generally authorities cited in R. FALK, *supra* note 97.

n113. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force October 24, 1945).

n114. See, e.g., Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, February 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337

(entered into force May 18, 1972); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (entered into force October 10, 1963).

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n115. The Paquete Habana, 175 U.S. 677 (1900).

n116. Id. at 700. See Glennon, Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 NW. U.L. REV. 321 (1985); see also Agora, May the President Violate Customary International Law?, 81 AM. J. INT'L L. 371 (1987) (comments by Kirgis, D'Amato, Paust); Agora, May the President Violate Customary International Law?, 80 AM. J. INT'L L. 913 (1986) (comments by Charney, Glennon, and Henkin); Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555 (1984).

n117. The Paquete Habana, 175 U.S. at 686.

n118. Id. at 714.

n119. See, e.g., African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (not yet in force); Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Organization of American States (OAS) Convention) (entered into force Oct. 20, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 1, Jan. 7, 1970 (entered into force June, 1978); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); Geneva Convention Relative to the Treatment of

Prisoners
of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135
(entered into force Oct. 21, 1950); Geneva Convention Relative to the
Protection
of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S.
No.
3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention on the
Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78
U.N.T.S.
277 (entered into force Jan. 12, 1951); Universal Declaration of Human
Rights,
Dec. 10, 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/777 (1948);
Articles 1
and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031,
T.S.
No. 993 (entered into force Oct. 24, 1945). See also Continuing
Appropriations,
Fiscal Year 1988, Pub. L. No. 100-202, @ 511, 101 Stat. 1329, 1329-155
(prohibiting expenditure of funds to aid any government's effort to
"repress the
legitimate rights of the population of such country contrary to the
Universal
Declaration of Human Rights.").

n120. See Tigar, The Foreign Sovereign Immunities Act and the Pursued
Refugee: Lessons from *Letelier v. Chile*, 1982 MICH. Y.B. INT'L LEGAL STUD.
421,
426-27; see also Bassiouni, International Criminal Law and Human Rights,
in 1
INTERNATIONAL CRIMINAL LAW 15 (M.C. Bassiouni ed. 1986).

The principle that international law may of its own force confer
individually
enforceable rights has long been a part of American law. See *United
States v.
Rauscher*, 119 U.S. 407 (1886) (violation of the rule of specialty under an
extradition treaty violates the rights of both the requesting state and the
prisoner).

n121. 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring).

n122. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)
(Deliberate

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torture under color of official authority violates international norms of
human
rights behavior so that Alien Tort Statute (28 U.S.C. @ 1350) provides
jurisdiction over alleged torturer found and served with process within
United
States borders, regardless of nationality of parties.); see also
Government of

Costa Rica (In the Matter of Vivian Gallerdo et al.), No. G101/81, 2 Inter-Am. Ct. H.R. 12 (1982) (Decision of Nov. 13, 1981) (Determination of whether death of citizen in prison constituted human rights violation was responsibility of Inter-American Commission on Human Rights.); Case of X v. United Kingdom, 62 Eur. Ct. H.R. (ser. A) (1981) (scrutinizing procedures for confinement to mental institutions); Golder Case, 18 Eur. Ct. H.R. (ser. A) (1975) (European Convention creates right of access to courts and right to counsel); Lawless Case, 1 Eur. Ct. H.R. (ser. A) (1961) (Detention without trial under unusual circumstances did not violate Articles 5 and 6 of European Convention.). But see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-10 (D.C.Cir. 1984) (Bork, J., concurring) (rejecting Filartiga, arguing congressional grant of jurisdiction did not create a cause of action, and concluding treaties do not confer privately enforceable rights unless treaty self-executing).

For a discussion of the issues raised by the erection of an international human rights standard, see HUMAN RIGHTS, AN INTERNATIONAL AND COMPARATIVE LAW BIBLIOGRAPHY (J. Friedman & M. Sherman eds. 1985); HUMAN RIGHTS IN INTERNATIONAL LAW (T. Meron ed. 1984); E. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1973); L. SOHN & T. BUERGENTHAL, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1981); THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (K. Vasak ed., P. Alston trans. ed. 1982); Buergenthal, The Inter-American Court of Human Rights, 76 AM. J. INT'L L. 231 (1982); Henkin, International Human Rights as "Rights," 1 CARDOZO L. REV. 446 (1979); Lillich & Paxman, State Responsibility for Injuries to Aliens Caused by Terrorist Activity, 26 AM. U.L. REV. 217 (1976-1977); Schwelb, The International Court of Justice and the Human Rights Clause of the Charter, 66 AM. J. INT'L L. 337 (1972); Watson, Legal Theory, Efficacy and Validity of Human Rights Norms, 1979 U. ILL. L.F. 609.

n123. U.S. CONST. art. I, @ 8, cls. 1, 12; art. I, @ 9, cl. 7.

n124. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on Merits of June 27, 1986), discussed in Highet, Evidence, the Court and the Nicaragua Case, 81

AM.

J. INT'L L. 1 (1987); see also Maier, Appraisal of the ICJ's Decision:

Nicaragua v. United States (Merits), 81 AM. J. INT'L L. 77 (1987)

(comments by

Briggs, Boyle, Christenson, D'Amato, Falk, Farer, Franck, Glennon, Gordon, Hargrove, Janis, Kirgis, Moore, Morrison, Reisman, Teson).

n125. Case Concerning Military and Paramilitary Activities In and Against

Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 17, 22-26 (Judgment on Merits of

June 27, 1986). On November 26, 1984, the court found that it had jurisdiction

and accepted the Nicaraguan application. Military and Paramilitary Activities

In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Jurisdiction and Admissibility of Application of November 26, 1984). In response, the Agent of the United States, on January 18, 1985, informed the court that the United States would no longer appear. Military and Paramilitary

Activities In and Against Nicaragua (Nicar. v. U.S.), 1985 I.C.J. 3 (Memorial

Order of Jan. 22, 1985). Although expressing its regret, the court did not refuse to further hear the case. The court recalled to the United States:

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Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits.

In the

normal course of events, for a party to appear before a court entails acceptance

of the possibility of the court's finding against that party. Furthermore the

Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the

validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights" in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision.

Nicaragua, 1986 I.C.J. at 23-24.

n126. Nicaragua, 1986 I.C.J. at 146-50.

n127. See Highet, *supra* note 124. See also Maier, *supra* note 124.

n128. See, e.g., Federal Polygraph Limitation and Anti-Censorship Act,

1984:

Hearings on H.R. 4681 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, H.R. REP. No. 123, 98th Cong., 2d Sess. 16 (1984) (statement of Michael E. Tigar, Raybourne Thompson Centennial Prof. of Law, Univ. of Texas, Austin).

n129. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring).

n130. While Texas adheres to the requirement that only "the immediate influence of sudden passion" will reduce a homicide offense from murder to manslaughter, TEX. PENAL CODE ANN. @ 19.04(a) (Vernon 1974), that is not the end of the story. The accused will generally be entitled to an instruction that he had the right to carry arms "to the scene of the difficulty and seek an explanation." See *Ruiz v. State*, 747 S.W.2d 535, 538 (Tex. Ct. App. 1988); *Mathews v. State*, 708 S.W.2d 835, 837-38 (Tex. Crim. App. 1986); *Banks v. State*, 656 S.W.2d 446, 447 (Tex. Crim. App. 1983). Under the former Texas law, the grade of a homicide offense was reduced if the victim had insulted the accused's female relative. See *Pitts v. State*, 29 Tex. App. 374, 16 S.W. 189 (Tex. Ct. App. 1891); *Norman v. State*, 26 Tex. App. 221, 9 S.W. 606 (Tex. Ct. App. 1888); *Willis v. State*, 74 Tex. Crim. 16, 166 S.W. 1172 (Tex. Crim. App. 1914); *Thompson v. State*, 72 Tex. Crim. 659, 163 S.W. 973 (Tex. Crim. App. 1914); *Wright v. State*, 36 Tex. Crim. 427, 37 S.W. 732 (Tex. Crim. App. 1896); *Jones v. State*, 33 Tex. Crim. 492, 26 S.W. 1082 (Tex. Crim. App. 1894). If the insult was not made to the victim's face, but was reported to the defendant by another person, it would be enough to trigger this provision if the victim killed the victim when next they met. See *Matthews v. State*, 708 S.W.2d 835 (Tex. Crim. App. 1986); *Dyson v. State*, 672 S.W.2d 484 (Tex. Crim. App. 1984); *Banks v. State*, 656 S.W.2d 446 (Tex. Crim. App. 1983); *Tave v. State*, 620 S.W.2d 604 (Tex. Crim. App. 1981).

n131. At the Symposium, where these thoughts were first expressed, Professor Rostow remarked to me during a break that "You do not understand anything about self-defense." I have read the recent literature expounding a right of self-defense that includes anticipatory invasion of the territorial integrity and sovereignty of other states. Nothing in the jurisprudence of any

international tribunal, and nothing in the history of either the Security Council or the General Assembly, justifies such views. The only conceivable justification is an expansive conception of United States' security interests that is at war with the collective security obligations of the United Nations charter, and cynical in light of our rejection of ICJ jurisdiction in *Nicaragua v. United States*. The United States cannot unilaterally define its rights by expanding its claims to dominance: A buffalo does not become a giraffe simply by sticking its neck out.

n132. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

n133. Due to prior publication commitments, Secretary Weinberger's remarks could not be included in this symposium.

n134. See *supra* text accompanying notes 31-41.

n135. *THE FEDERALIST NO. 70*, at 423-24 (A. Hamilton) (G. Carey & W. Kendall ed. 1966). Hamilton was even more emphatic on the Executive's capability of acting with energy, secrecy, and dispatch when he argued why the Executive, instead of the Congress, should be entrusted with the primary role in negotiating treaties and conducting foreign relations. Hamilton wrote:

Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous.

THE FEDERALIST NO. 75, at 452 (A. Hamilton) (G. Carey & W. Kendall ed. 1966) (emphasis original). See also *THE FEDERALIST NO. 64*, at 392 (J. Jay) (G. Carey & W. Kendall ed. 1966) ("It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite.") (emphasis original).

n136. U.S. CONST. art. II, @ 1, cls. 2-5.

n137. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, at 166.

n138. C. MONTESQUIEU, *supra* note 15, at 1.

n139. See *supra* notes 6-13 and accompanying text.

n140. *Pacificus No. I*, *Gazette of the United States* (Philadelphia) June 29, 1793, reprinted in 15 H. SYRETT, *supra* note 46, at 37-43.

n141. See *supra* notes 42-67 and accompanying text.

n142. Proclamation of Neutrality, No. 65, ASP, Foreign Relations I, 140, 3d Cong., 1st Sess. (1793), reprinted in 32 J. FITZPATRICK, *supra* note 45, at 430-31. Congress subsequently passed legislation making it unlawful to: (1) Serve or agree to serve a foreign state; (2) leave the United States for the purpose of enlisting in the service of a foreign state; (3) fit out a ship of war, or augment its force; (4) commit or aid in the commission of hostilities upon citizens of foreign states; and (5) set on foot an expedition against a foreign state. The President was authorized to use military forces to enforce the law. Act of June 5, 1794, ch. 50, 1 Stat. 381 (1794), repealed by Act of

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April 20, 1818, ch. 88, 3 Stat. 450 (1818). Additionally, the Congress had previously authorized the President to lay embargoes on all ships and vessels in United States' ports, as he thought necessary. Act of June 4, 1794, ch. 41, 1 Stat. 372 (1794).

n143. The current neutrality provisions are codified at 18 U.S.C. @@ 951-970 (1982 & Supp. IV 1986) (criminal penalties), and 22 U.S.C. @@ 401-465 (1982 & Supp. IV 1986) (war materials prohibitions (@@ 401-422), neutrality (@@ 441-457), and prevention of neutrality violations (@@ 461-465)). The carryover provisions are found at 18 U.S.C. @@ 958-968 (1982 & Supp. IV 1986).

n144. 2 J. LOCKE, *supra* note 6, at 392-93.

n145. *Mississippi v. Johnson*, 71 U.S. 475, 499 (1886) (President may not be restrained by injunction from executing act of Congress alleged to be unconstitutional; general principles "forbid judicial interference with the

exercise of Executive discretion.").

n146. THE FEDERALIST NO. 41, at 255-64 (J. Madison) (G. Carey & W. Kendall ed. 1966). Madison addressed the powers conferred on the federal government, arguing that the powers granted "were necessary means of attaining a necessary end." Id. at 255. Madison paid particular attention to the security powers conferred, noting that "security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union." Id. at 256. Disunion was an evil that would overshadow any potential for abuse of the powers conferred. Madison argued:

This picture of disunion cannot be too highly colored, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty ought to have it ever before his eyes that he may cherish in his heart a due attachment to the Union of America and be able to set a due value on the means of preserving it.

Id. at 259.

Because unity was the essential goal of the Constitution, Lincoln's exercise of emergency prerogative powers was not merely necessary, but rather, it was a necessity.

n147. See, e.g., *Perez v. Brownell*, 356 U.S. 44, 59 (1958) (Congress had authority to withdraw citizenship of United States citizens voting in foreign elections because the citizen's action might be construed to be a "reflection if not an expression" of United States policy, creating responsibility on the part of the United States.); *In re Neagle*, 135 U.S. 1, 64 (1890) (analogizing right of United States to appoint federal marshalls to protect Supreme Court justices to right of United States to threaten military action, without express congressional or treaty provision, to protect life and liberty of United States resident alien wrongfully detained abroad); *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884) (The United States is "clothed with the principal attributes of political sovereignty.") (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW 201

(O.W. Holmes 12th ed. 1873)); *Diggs v. Shultz*, 470 F.2d 461, 465 (D.C. Cir.) ("Congress may nullify, in whole or in part, a treaty commitment."), cert. denied, 411 U.S. 931 (1972); see also Rostow, "Once More Unto the Breach": The War Powers Resolution Revisited, 21 VALPARAISO U.L. REV. 1, 12-15 (1986).

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n148. THE FEDERALIST NO. 48, at 308-13 (J. Madison) (G. Carey & W. Kendall ed. 1966).

n149. C. MONTESQUIEU, *supra* note 15, at 151.

n150. E. CORWIN, *supra* note 16, at 9.

n151. THE FEDERALIST NO. 48, at 310 (J. Madison) (G. Carey & W. Kendall ed. 1966).

n152. E. CORWIN, *supra* note 16, at 14-15.

n153. U.S. CONST. art. II, @ 2.

n154. *Id.*

n155. U.S. CONST. art. I, @ 8, cl. 11.

n156. U.S. CONST. art. I, @ 8, cl. 10.

n157. U.S. CONST. art. I, @ 8, cl. 11.

n158. Rostow, *supra* note 147, at 6.

n159. See *supra* notes 46-47, 49-58, 67 and accompanying text.

n160. See *supra* notes 46-47, 49-58, 60-65 and accompanying text.

n161. Compare Tigar, *supra* note 77 with Rostow, *supra* note 147, at 6.
See
Comment, Congress, the President, and the Power to Commit Forces to Combat, *supra* note 102.

n162. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973), 119 CONG. REC. 14,234 (1973).

n163. See H.R. REP. No. 287, 93d Cong., 1st Sess. 3-5, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2349; see also H.R. CONF. REP. No. 547,

93d Cong., 1st Sess. 8, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2364 (Consultation provision indicating prior consultation will not always be possible.).

n164. See 50 U.S.C. @ 1542 (1982 & Supp. IV 1986) ("The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities . . .").

n165. War Powers Resolution, Pub. L. No. 93-148, @ 2b, 87 Stat. 555, 555 (1973) (codified as amended at 50 U.S.C. @ 1541(b)(1982 & Supp. IV 1986)) (purpose and policy). This section combines two Senate amendments to H.R.J. Res. 542 which sought to define the President's powers to commit armed forces to combat. See H.R. CONF. REP. NO. 547, 93d Cong., 1st Sess. 7, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2363-64.

n166. 462 U.S. 919 (1983) (holding one House of Congress legislative veto provision, @ 244(c)(2) of Immigration and Naturalization Act, 8 U.S.C. @ 1254 (c)(2), unconstitutional as violative of the bicameralism requirement, U.S. ,
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CONST., art. I, @@ 1, 7, and the presentment clauses, U.S. CONST., art. I, @ 7, cls. 2, 3).

n167. See Webster, The Role of Intelligence in a Free Society, 43 U. MIAMI L. REV. 155, 158-59 (1988).

n168. Id. at 159.

n169. See H.R. REP. NO. 287, 93d Cong., 1st Sess. 5-7, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2349-51 (statement of intent and effect and section 2 analysis).

n170. U.S. CONST. art. II, @ 2.

n171. Id.

n172. U.S. CONST. art. I, @ 7, cl. 2.

n173. 110 U.S. 651 (1884) (denying the habeas corpus petition of eight individuals convicted of conspiracy to prevent black citizen from

exercising
right to vote for member of Congress). Mr. Justice Miller responded to
the
argument that, because there was no express constitutional grant of power
to
Congress to enforce the right to vote, the law under which the petitioner
was
convicted was null and void, as follows:

The brief of counsel before us, though directed to the authority of
that body
to pass criminal laws, uses the same language [as the oft repeated textual
basis
argument]. Because there is no express power to provide for preventing
violence
exercised on the voter as a means of controlling his vote, no such law can
be
enacted. It destroys at one blow, in construing the Constitution of the
United
States, the doctrine universally applied to all instruments of writing,
that
what is implied is as much a part of the instrument as what is expressed.
This
principle, in its application to the Constitution of the United States,
more
than to almost any other writing, is a necessity, by reason of the inherent
inability to put into words all derivative powers -- a difficulty which the
instrument itself recognizes by conferring on Congress the authority to
pass all
laws necessary and proper to carry into execution the powers expressly
granted
and all other powers vested in the government or any branch of it by the
Constitution.

d. at 658.

n174. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding order
excluding Japanese-American citizens from coastal areas).

n175. Rostow, *The Japanese-American Cases -- A Disaster*, 54 YALE L.J.
489
(1945).

n176. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

n177. See *supra* note 132 and accompanying text.

n178. 354 U.S. 1 (1957) (Congress could not confer authority on military
courts to try United States military dependent civilians abroad, and
protections
of Bill of Rights apply to actions by the government against citizens
abroad.).

n179. *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Bowles v. Willingham*, 321 U.S. 503, 521 (1944) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.") (citing *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

n180. See *supra* notes 46-67 and accompanying text.

n181. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

n182. *THE FEDERALIST* NO. 64, at 392 (J. Jay) (G. Carey & W. Kendall ed. 1966) (emphasis in original).

n183. U.S. CONST. art. II, @ 2.

n184. *Id.*

n185. U.S. CONST. art II, @ 3.

n186. U.S. CONST. art. II, @ 2.

n187. *Id.*

n188. U.S. CONST. art. I, @ 9, cl. 7.

n189. 10 *ANNALS OF CONGRESS* 613 (J. Gales ed. 1800).

n190. 418 U.S. 683 (1974) (holding that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances).

n191. 343 U.S. 579 (1952).

n192. 299 U.S. 304 (1936).

n193. *Youngstown*, 343 U.S. at 635-38.

n194. 299 U.S. 304 (1936).

n195. *Id.* (It is not an unconstitutional delegation of legislative powers for Congress to authorize President to determine whether (1) embargo should go into effect, (2) when it may be terminated, and (3) the enforcement limits and exceptions.). Mr. Justice Sutherland reasoned that the delegation here was permissible because:

[w]e are here dealing not alone with an authority vested in the

President by
an exertion of legislative power, but with such an authority plus the very
delicate, plenary and exclusive power of the President as the sole organ
of the
federal government in the field of international relations -- a power
which does
not require as a basis for its exercise an act of Congress, but which, of
course, like every other governmental power, must be exercised in
subordination
to the applicable provisions of the Constitution. It is quite apparent
that if,
in the maintenance of our international relations, embarrassment -- perhaps
serious embarrassment -- is to be avoided and success for our aims
achieved,

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congressional legislation which is to be made effective through
negotiation and
inquiry within the international field must often accord to the President a
degree of discretion and freedom from statutory restriction which would
not be
admissible were domestic affairs alone involved. Moreover, he, not
Congress,
has the better opportunity of knowing the conditions which prevail in
foreign
countries, and especially is this true in time of war. He has his
confidential
sources of information. He has his agents in the form of diplomatic,
consular
and other officials. Secrecy in respect of information gathered by them
may be
highly necessary, and the premature disclosure of it productive of harmful
results.

Id. at 320.

n196. See, e.g., C. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED
STATES
86-116 (1894); see also THE FEDERALIST NO. 58, at 359 (J. Madison) (G.
Carey &
W. Kendall ed. 1966).

n197. See, e.g., O. DICKERSON, AMERICAN COLONIAL GOVERNMENT 1696-1765,
at
158-79 (1912); A. KELLY & W. HARBISON, H. BELZ, THE AMERICAN CONSTITUTION
ITS
ORIGINS AND DEVELOPMENT 33-34 (1948).

n198. See H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess.
411-12
(1987).

n199. U.S. CONST. art. I, @ 9, cl. 7.

n200. U.S. CONST. art. II, @@ 2, 3.

n201. See, e.g., Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, @ 793, 96 Stat. 1830, 1865 (1982). A compilation of the Boland type amendments, and the accompanying legislative history, was done in the beginning of June, 1987 by the Congressional Research Service, at the request of Rep. Alexander. See 133 CONG. REC. H4584-4987 (daily ed. June 15, 1987); see also H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 395-410, 489-99 (1987) (Chapter 26 of the majority report ("The Boland Amendments and the NSC Staff.") and Chapter 6 of the minority report ("The Boland Amendments.")).

n202. Further Continuing appropriations Act, 1983, Pub. L. No. 97-377, @ 793, 96 Stat. 1830, 1865 (1982).

n203. Continuing Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-107, @ 101(c), 97 Stat. 735, 736; Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, @ 775, 97 Stat. 1421, 1452; Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, @ 108, 97 Stat. 1473, 1475.

n204. Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, @ 8066, 98 Stat. 1837, 1935-37.

n205. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, @ 722(d), 99 Stat. 190, 254; International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, @ 722(e), 99 Stat. 190, 254; Supplemental Appropriations for the Fiscal Year Ending September 30, 1985, Pub. L. No. 99-88, @ 102(b), 99 Stat. 293, 324-25.

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n206. Intelligence Authorization Act for fiscal Year 1986, Pub. L. No. 99-169, @ 105, 99 Stat. 1002, 1003; Further Continuing Appropriations, 1985, Pub. L. No. 99-190, @ 8050, 99 Stat. 1185, 1211; see also Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, @ 1451, 99 Stat. 583, 760

(Sense of Congress that United States armed forces should not be introduced into or over Nicaragua.).

n207. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, @@ 201-16, 99 Stat. 1783, 2078-81.

Since the delivery of these remarks, this back and forth pattern has continued. See Intelligence Authorization Act for Fiscal Year 1988, Pub. L. No. 100-178, @ 104, 101 Stat. 1009, 1011 (terms and conditions for aid to Nicaraguan resistance); Department of Defense Authorization Act, Fiscal Year 1988 and 1989, Pub. L. No. 100-180, @ 1405, 99 Stat. 1019, 1179 (Sense of Congress that United States Armed Forces should not be introduced into or over Nicaragua); Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, @ 8144, 101 Stat. 1329, 1329-89 (prohibiting expenditure of funds by DOD or CIA to Nicaraguan resistance except in accordance with Pub. L. No. 100-178, @ 104, 101 Stat. 1009, 1011).

n208. See remarks of Abraham D. Sofaer in Koh, Nowak, Rees & Sofaer, The Treaty Power, 43 U. MIAMI L. REV. 101, 101-06.

n209. Pub. L. No. 96-8, 93 Stat. 14 (codified as amended at 22 U.S.C. @@ 3301-3316 (1982 & Supp. IV 1986)).

n210. Mutual Defense Treaty Between the United States of America and the Republic of China, United States-Taiwan, December 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213 (entered into force March 3, 1955), terminated January 1, 1980. Article X of the Treaty provided: "This Treaty shall remain in force indefinitely. Either party may terminate it one year after notice has been given to the other Party." Mutual Defense Treaty Between the United States of America and the Republic of China, December 2, 1954, United States-Taiwan, art. X, 6 U.S.T. 433, 437, T.I.A.S. No. 3178, at 5, 248 U.N.T.S. 213, at 216.

n211. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.) (The mutual defense treaty with Taiwan could not be terminated without advice and consent of Senate or approval of both Houses of Congress.), rev'd, 617 F.2d 697 (D.C. Cir.) (Because the President has full constitutional authority to recognize governments, the President did not exceed authority in terminating the mutual defense treaty in accordance with termination clause.), vacated and

remanded,
444 U.S. 996 (1979) (mem.) (district court directed to dismiss).

n212. *United States v. Belmont*, 301 U.S. 324 (1937). The Supreme Court held that the Executive had the authority to speak as the "sole organ of government" in negotiating an agreement settling claims and counterclaims between the United States and Soviet citizens and entities. *Id.* at 330. The Court further held that the agreement had the same effect as a treaty, although it did not require art. II, @ 2 advice and consent, so that state policy could not prevail over the agreement. *Id.* at 330-32.

n213. See Amend. No. 98 and U.P. Amend. No. 44 to S. 245. 96th Cong., 1st Sess., 125 CONG. REC. 4611-16, 4836-37 (1979). Amend. No. 98 was withdrawn, 125

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CONG. REC. 4616, but U.P. Amend. No. 44 was approved. 125 CONG. REC. 4836. Senator Hatch's amendments (1) permitted Taiwan to retain all of its consular offices in the United States, instead of requiring a substantial reduction, and (2) stated that embargo threats against Taiwan would be considered of grave threat to the security of the United States. Both were approved on voice votes. Ultimately, H.R. 2479 was passed in lieu of S. 245. See 1979 U.S. CODE CONG. & ADMIN. NEWS 36. The House bill, however, incorporated most of the Senate provisions. H.R. CONF. REP. No. 96-71, 96th Cong., 1st Sess., reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 36, 95-104. U.P. Amend. No. 44's provisions are codified at 22 U.S.C. @ 3309(b)(c) (1982 & Supp. IV 1986).

n214. *Limitation of Anti-Ballistic Missile Systems*, May 26, 1972, *United States-USSR, Agreed Interpretation D*, 23 U.S.T. 3435, 3456, T.I.A.S. No. 7503, at 21.

n215. See generally D. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1903) (discussion of the circumstances leading to the Tenure of Office Act, President Andrew Johnson's veto and later refusal to comply with the provisions of the act, and his subsequent impeachment).

n216. 405 U.S. 727 (1972). The Supreme Court held that a non-economic injury confers standing to challenge an agency action under 5 U.S.C. @ 702, but that the mere allegation of a "special interest" in the action is insufficient. Sierra Club, 405 U.S. at 739-40. A plaintiff must allege facts showing injury to himself before arguing the public interest in support of his claim. Id. at 735.

n217. 392 U.S. 236 (1968) (A penalty of expulsion from the board or reduction in state funding of a school district provided a personal stake sufficient for local school board members to challenge, on first amendment grounds, a statute permitting the free provision of textbooks to parochial students.).

n218. 5 U.S. (1 Cranch) 137 (1804).

n219. Id. at 154-61 (describing the appointment power of the President, and at what point executive discretion ends and ministerial duty begins).

n220. H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987) (reported November 13, 1987, ordered to be printed November 17, 1987).

n221. See id. at 395-407.

n222. See id. at 489-500.

n223. See id. at 7, 331-59, 417-20.

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