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"Little Wars" and the Constitution

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“Little Wars” and the Constitution

JULES LOBEL*

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I. INTRODUCTION

It is an honor to be invited to this symposium to discuss John Hart Ely’s great book, which focuses our attention on the central constitutional war powers issues. To speak after three distinguished speakers gives me both an opportunity and a problem. I’ve prepared a talk, yet the people who have spoken before waved what to me were red flags. I have many attributes of a bull and I can’t resist the temptation to charge.

My topic for today’s panel is whether the Constitution permits the President to engage in “little wars”—small military interventions and quick strikes, such as the Libyan bombing, the Grenada and Panama invasions, and the recent bloodless invasion of Haiti—without first obtaining congressional approval. Professor Ely has given us a convincing framework for analyzing that question and has proposed a reasonable and sensible solution that would restrain the Executive’s penchant for unilaterally initiating military actions: A Proposed Combat Authorization Act.¹ But as Professor Ely recognizes, such an Act is unlikely to become law anytime soon. The fundamental reason that Professor Ely’s excellent suggestions will not be celebrated in Washington in the twentieth century has to do with the red flags that both Harold Koh and Abraham Sofaer waved at me, flagging the connection between legal process and the substance of our national security policy.

* Professor Jules Lobel, University of Pittsburgh Law School, I want to thank my research assistants Michael Wagner and Alex Gruskos for their help with this article. I thank Professor Jane Stromseth for her helpful comments on a draft of this article, and Professor Michael Glennon. Thanks also to LuAnn Driscoll and the staff at the Word Processing Center at the University of Pittsburgh for their valuable assistance in preparing this manuscript.

1. JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 115-38 (1993) [hereinafter ELY, WAR AND RESPONSIBILITY]; see also John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988) [hereinafter Ely, *Suppose Congress Wanted*].

John Ely, Harold Koh, and Michael Glennon have all provided excellent critiques of post-World War II unilateral warmaking by the Executive branch, and of the failure of the War Powers Act (also known as the War Powers Resolution)² to correct that problem.³ They have developed good process-oriented solutions to establish joint congressional-executive dialogue and control over decisions to engage in military hostilities against other nations. The critique of the War Powers Resolution is not new. In fact, one of the most prescient critiques of the Resolution was articulated by Senator Eagleton, who although originally co-sponsoring the bill, criticized the bill when it reached the floor, and eventually voted against it.⁴ Throughout the 1970s, '80s, and '90s, scholars and politicians continually proposed procedural reforms to cure the ills of the War Powers Resolution. None was enacted. Now the question before Congress is not reform, but rather repeal.⁵

II. THE CONNECTION BETWEEN SUBSTANCE AND PROCESS

Neither a lack of thought, a paucity of good suggestions, nor a dearth of scholarly writing explains the failure to reform the legal process by which we go to war. One is tempted to attribute the inability to fix the War Powers Resolution to a failure of political will. Congressional political weakness—as well documented by Harold Koh, John Ely and others—certainly is one reason for the failure of the numerous reform efforts. But more fundamentally, these process reforms have not been enacted because most of the political elite, including the judicial branch, view our national interest as substantively requiring a strong Executive who can act decisively and unilaterally in foreign policy. Harold Koh's prescription, of first reforming the process to promote institutional dialogue between the branches, which would create a new foreign policy consensus,⁶ is doomed to failure. As Professors Ely and

2. "Despite the fact that (just like a statute) the War Powers Resolution was passed, by a two-thirds vote of each house, over the President's veto, and thus is understandably often referred to as the War Powers Act, it is officially a 'Resolution.'" ELY, *WAR AND RESPONSIBILITY*, *supra* note 1, at 115.

3. Ely, *Suppose Congress Wanted*, *supra* note 1; HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics than Law*, 78 AM. J. INT'L L. 571 (1984); see also Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715 (1984).

4. THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 207-12* (1974) (discussing the War Powers Resolution's delegation of power to the President to wage war for 60-90 days without prior congressional approval).

5. See S. 5, 104th Cong., 1st Sess. (1995) (Peace Powers Act of 1995).

6. Harold H. Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1 (1995) [hereinafter Koh, *Dole-Gingrich Congress*]; see also KOH, *supra* note 3, at 153-228; Harold H. Koh, *Reply*, 15 YALE J. INT'L L. 382, 383-84 (1990) [hereinafter Koh, *Reply*].

Koh recognize, there is a direct connection between the legal process established by the Constitution and a substantive perspective that reduces our use of military power abroad.⁷ Thus, the fundamental problem with the procedural reforms enacted in the 1970s and proposed over the next two decades is not, as Professor Koh contends, that Congress “overlooked” various loopholes or executive incentives to flout the law.⁸ Rather, Congress, the executive and the courts have generally agreed—despite some dissenting voices—that the President must maintain the power to act quickly and secretly, particularly with respect to these so-called little wars. That substantive view precludes process-oriented reform.

Judge Abraham Sofaer directly expressed the connection between constitutional process and the substance of national security decision-making. He stated that “the President is not so powerless, nor the nation so helpless” as to accept the type of proposals that John Hart Ely has presented.⁹ Judge Sofaer’s connection of presidential power to national power reflects a widespread view that our national power is tied substantively to executive freedom from procedural restraint. Professors Ely, Koh, Glennon and I all disagree with Judge Sofaer, but until substantial progress has been made in changing the political elite’s view of our national interest, procedural reform will get nowhere.

Judge Sofaer returned to the connection between substance and process at the end of his talk. He said that if you mandate that Congress get involved in these things, “Congress may screw things up every time it acts or virtually every time it acts.”¹⁰ He obviously used “screw things up” to mean that it will prevent—by delay, obfuscation, bureaucratic snafus, or lengthy debate—the President from using force in situations where our national interests require the use of force. The constitutional judgment that Congress must approve U.S. military actions abroad reflects the framers’ view that congressional slowness, deliberateness and vacillation play a positive role in reducing Executive uses of force. Judge Sofaer and much of the nation’s elite believe that the Executive’s use of force in Grenada, Libya, Panama, and other areas of the globe is in our national interest, and that therefore congressional slowness and inefficiency “will cause more harm than good.”¹¹

When I discuss substantive goals and policy, I do not mean whether or not you agree with particular policy decisions such as the invasion of

7. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 3-4.

8. See Koh, *Reply*, *supra* note 6, at 383, 387.

9. Abraham Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 34 (1995).

10. Abraham D. Sofaer, Remarks at *University of Miami Law Review Symposium* (Feb. 24, 1995).

11. Sofaer, *supra* note 9, at 55.

Haiti or the air strike on Libya. Rather, I mean that the procedural norms of the Constitution are connected to a substantive view of America's role in the world. The framers of the Constitution had a view of the United States as a non-interventionist, self-protective republic, and the war powers procedures reflected that view. America's changing role in the world led to changes in the process. There is no reason for the political elite to return to a legal process that was designed to hinder the Executive's ability to engage in limited military actions when a substantial segment of America's foreign policy makers believe it accords with America's national interest and role in the world to provide the President that power. Unless we fundamentally examine and redefine America's role in the world, we will be stuck with the process that we have had as a de facto matter for the last fifty years.

Professor Koh believes that we cannot have "a fundamental transformation of the substance of foreign policymaking, when the *process* of making that policy is so fundamentally defective."¹² We thus have a sort of which comes first, the chicken or the egg problem. I say that process cannot be reformed without changing the substance of our foreign policy goals and Professor Koh retorts that substance will never change with such a defective process. Both of us may be right if one only looks at the institutional actors: Congress, the Executive and the courts. But fortunately the institutional actors are not the only, albeit usually dominant, players on our political stage. Substantive and procedural change will occur together, and both changes probably will be driven by pressures from outside the institutional players, pressures that will provoke substantial and heated debate within Congress and even within the Executive branch. The last era of procedural reform occurred through precisely that kind of process.

The only time in our recent history since the onset of the Cold War that Congress has shown any political will to deal with these kinds of issues was in the immediate aftermath of Vietnam and Watergate. The mass protest and disgust with the Indochina War and with an imperial American foreign policy led substantial segments of the elite to change their positions about the process by which our armed forces are introduced into combat. Important institutional players such as J. William Fulbright and scholars such as Arthur Schlesinger supported a revival of the original constitutional warmaking process, usually explicitly drawing the connection between substance and process.¹³ As Professor Ely's

12. Koh, *Dole-Gingrich Congress*, *supra* note 6, at 8.

13. Compare J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 *CORNELL L.Q.* 1, 7 (1961) ("[T]he price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past.") with Sen. Fulbright's conversion in the late 1960s to support for reinvigorated congressional role,

book illustrates, Congress was unwilling to act clearly (if it ever did) until a late stage of the public protest. Spurred by the public outcry, Congress enacted several reform statutes between 1973 and 1977: the War Powers Resolution,¹⁴ the National Emergencies Act,¹⁵ the International Emergency Economic Powers Act,¹⁶ and the Hughes-Ryan Amendment.¹⁷ This period of procedural reform coincided with a tremendous searching as to the substantive values and goals of American foreign policy after Vietnam.¹⁸ Unfortunately, this reform period never decisively discarded the old "imperial" thinking and therefore produced weak statutes and was short lived.¹⁹

By the late 1970s and early 1980s, the political mood in America supported a reassertion of American power abroad. It is thus no accident that the procedural reforms of the mid-1970s sputtered. Indeed, the 1973-78 period was anomalous for Post World War II America. The

115 CONG. REC. 16618 (June 19, 1969) (remarks of Sen. Fulbright) ("If, in short, America is to become an empire, there is very little chance that it can avoid becoming a virtual dictatorship as well."); see also ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

14. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)).

15. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered sections of 50 U.S.C. between §§ 1601 and 1651 (1988)).

16. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1988 & Supp. V 1993)).

17. Pub. L. No. 93-559, § 32, 88 Stat. 1804 (1974) (codified at 22 U.S.C. § 2422 (1988) (repealed 1991)).

18. This same connection between substance and process drove the change in Soviet constitutionalism in the 1980s. Driven by popular protest, President Gorbachev's substantive policies in the late 1980s supported Soviet military retrenchment and interest in multilateral cooperation. Consistent with those new substantive policy goals, President Gorbachev expressly committed himself to refrain from using armed force (except to repel a surprise attack) outside the country without approval from the Soviet legislature. *Excerpts From Gorbachev Speech on Presidency*, N.Y. TIMES, Mar. 16, 1990, at A6.

19. Congressional control over covert warfare is a prime example of the weakness of the substantive and procedural aspects of the 1970s reform movement. In the immediate aftermath of Vietnam, the popular revulsion toward covert activities was so pronounced that even influential insiders such as (former Attorney General and Undersecretary of State) Nicholas Katzenbach called for the abandonment of all covert operations designed to influence political results in foreign nations. Nicholas deB. Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFFAIRS 1, 15 (1973). In 1976, the House Select Committee on Intelligence recommended a prohibition on "all paramilitary activities . . . except in times of war," H.R. REP. NO. 833, 94th Cong., 2d Sess. 2 (1976), while a Senate select committee recommended prohibiting all "[e]fforts to subvert democratic governments" and two other specific types of covert action. SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 755, 94th Cong., 2d Sess., bk. 1, at 448 (1976). But the furor over covert warfare subsided and Congress eventually settled for the weak procedural scheme of mere presidential notice of anticipated covert operations to the Intelligence Committees. Intelligence Authorization Act of 1991, Pub. L. No. 102-88, §§ 601-02, 105 Stat. 441 (1991) (codified at 50 U.S.C. §§ 413, 413b (Supp. 1992) (repealing Hughes-Ryan Amendment and adopting notice scheme). That weak procedural scheme reflects a general consensus that the President ought to maintain covert action capability as one of the tools of U.S. foreign policy.

rest of the fifty year period witnessed a steady accretion of executive power and an elite acceptance of such power as a necessary concomitant of the new U.S. role in the world.

John Ely was right when he entitled, *Suppose Congress Wanted a War Powers Act that Worked*, a precursor article to *War & Responsibility*.²⁰ If Congress wanted a War Powers Act that worked then Professors Ely, Koh, Glennon, and others have admirable suggestions. But Congress does not and has not wanted a War Powers Act that worked, as Professor Ely's article's title implies. Procedural reform proposals are thus important to instruct Congress on what it could do if it were so inclined, but those reforms must be integrated with substantive national security arguments that challenge Congress' underlying reluctance to reform.

III. LETTERS OF MARQUE AND REPRISAL

The nation has become accustomed over the past half-century to the Executive's use of American military power to accomplish limited foreign policy objectives. While at times these relatively small uses of force have escalated into major, protracted confrontations, often—as was the case in the Dominican Republic in 1965, Grenada in 1983, Libya in 1985, and Panama in 1989—the U.S. military has launched a quick strike that was over in a relatively short period of time. Despite protest in Congress and by the general public, Presidents have been able to get away with these less-than-full-scale wars. American casualties often are minimal, although as the Panamanian invasion demonstrates, casualties and destruction among the people we purport to be saving are sometimes substantial.²¹ Congress probably would approve many of these invasions anyway, so the constitutional defect is arguably procedural but not outcome determinative.

The latest example of these kind of military actions was the 1994 bloodless invasion of Haiti. The Clinton Administration's constitutional justification of the invasion—which at the time commenced expected to meet armed Haitian resistance—was that war in the constitutional sense

20. Ely, *Suppose Congress Wanted*, *supra* note 1.

21. Estimates of civilian casualties during the U.S. military invasion of Panama vary widely. The U.S. Southern Command's official estimate is 202 civilian dead, while former Attorney General Ramsey Clark reportedly had evidence of 2,000-4,000 civilians killed during the invasion. *E.g.*, Kenneth Freed, *Invasion Ghosts: Panama Tries to Bury Rumors of Mass Graves*, L.A. TIMES, Oct. 27, 1990, at A3. Several Panamanian residents have filed a complaint with the Inter-American Commission on Human Rights of the Organization of American States seeking damages from the U.S. Government for losses they suffered during the invasion, but the Government has been unwilling to pay their claims. *E.g.*, Colman McCarthy, *The Price of a "Just Cause"*, WASH. POST, May 20, 1990, at F2.

does not exist where U.S. troops are deployed at the invitation of a fully legitimate government in circumstances where the nature, scope, and function of the deployment are such that the use of force involved does not rise to the level of war.²² This constitutional interpretation assumes that the President may unilaterally authorize at least some nondefensive uses of force not undertaken to protect U.S. troops, territories, or citizens, because such hostilities do not rise to the level of war as that term is used in Article I, Section 8.

Executive unilateral use of military force short of all-out-war (whatever that means in today's world) raises three basic issues. First, was the original design of the Constitution to prohibit the President from authorizing these hostilities short of full-scale war without the consent of Congress? Second, assuming that was the framers' original intent, does the historical practice override the original intent? Finally, as a practical matter, shouldn't we give the President this kind of flexibility?

A. *Original Intent*

The Administration's letter on the Haitian invasion assumes that the President need not obtain congressional consent prior to initiating military actions that do not constitute war in the constitutional sense. One answer to this argument is that all military actions constitute war in the meaning of that term in the Constitution. There is, however, another answer based on an obscure provision of the Constitution that Judge Sofaer omitted—as do most Executive officials and members of Congress—when he listed the war powers of Congress. The War Powers Clause gives Congress the power “[t]o . . . grant Letters of Marque and Reprisal”²³

Technically, letters of marque and reprisal were authorizations usually given to private merchantmen to go out and fight the enemy. In the eighteenth century, nations would issue letters of marque and reprisal to authorize merchant ships to put guns on their boats, sink or capture enemy ships, and keep a percentage of the prize thus captured.

From a hypertechnical perspective, the clause can be viewed as

22. Letter from Walter Dellinger, Assistant U.S. Attorney General, to Sens. Robert Dole, Alan Simpson, Strom Thurmond, and William Cohen (Sept. 27, 1994), reprinted in Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 122-26 (1995).

23. The full text of the War Powers Clause states, “The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[.]” U.S. CONST. art. I, § 8, cl. 11. Professor Ely relies on this clause to support the proposition that the framers of the Constitution “provided that all acts of armed combat performed on behalf of the United States—even if they didn't amount to ‘war’—had to be authorized by Congress.” ELY, WAR & RESPONSIBILITY, *supra* note 1, at 66-67.

obsolete, since we now have destroyers and aircraft carriers and no longer need armed fishing boats to fight the enemy. However, scholars who have discussed the Marque and Reprisal Clause, including Professor Ely, conclude that the phrase had a much broader meaning at the time.²⁴ Letters of marque and reprisal were one way of referring to what were known as imperfect wars, special wars, limited wars—all of which constituted something less than full-scale warfare. For example, Sir Matthew Hale, a well-known legal scholar in the seventeenth century familiar to the constitutional framers, wrote: “Special kinds of wars are that which we usually call marque and reprisal.”²⁵ James Kent, in his authoritative *Commentaries on American Law* referred to special letters of marque and reprisal as “imperfect war[s],”²⁶ which are “compatible with a state of peace.”²⁷ Blackstone noted that the “prerogative of granting [letters of marque and reprisal] . . . is nearly related to . . . making war; this being indeed only an incomplete state of hostilities.”²⁸

The framers and early leaders of the nation thus viewed letters of marque and reprisal as falling within the notion of imperfect war, incomplete hostilities, or limited warfare. Joseph Story, citing Blackstone, noted that the power to issue letters of marque and reprisal was “plainly derived from that of making war,” being “an incomplete state of hostilities,” often ultimately leading to a formal declaration of war.²⁹ Albert Gallatin argued that the grant of letters of marque and reprisal was “an

24. See ELY, *WAR AND RESPONSIBILITY*, *supra* note 1, at 66-67; LOUIS FISHER, *PRESIDENTIAL WAR POWER* 3, 180 (1995) (arguing that President's use of private persons to engage in covert paramilitary activities abroad usurps Congress' exclusive power to issue letters of marque and reprisal); EDWARD KEYNES, *UNDECLARED WAR* 37 (1982) (arguing that framers intended the Marque and Reprisal and War Clause to vest both general and limited war-making power in Congress, not in the President); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 63-65 (1981) (arguing that framers' grant to Congress of power to issue letters of marque and reprisal and to declare war was intended to convey legislative control over all uses of American force in combat, except when in response to a sudden attack); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 17-22 (1986) (arguing that the Marque and Reprisal and War Clause limits the President's authority to use offensive force to instances of hostile invasion and congressionally declared wars); Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986) (discussing Marque and Reprisal Clause generally and its application to covert warfare); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679-80, 695-97, 699-700 (1971-72).

25. M. HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 162 (S. Emlyn ed. 1736) (1st ed. London 1680).

26. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 62 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (1826).

27. *Id.* at 61.

28. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 258 (Garland Publishing, photo. reprint 1978) (1765).

29. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 64 (Boston, Hilliard, Gray 1833).

intermediate state between peace and war,"³⁰ and generally preceded war, "[w]hen it has not been thought proper to come to open war at once."³¹

The original drafts of the Constitution did not mention letters of marque and reprisal.³² Immediately after the substitution of "declare war" for "make war,"³³ Elbridge Gerry recommended that something be "inserted concerning letters of marque, which he thought not included in the power of war."³⁴ The timing of Gerry's amendment indicated that he and others probably believed that any possible narrowness implied by the authority to "declare war" made it necessary to include the use of force in time of peace among the enumerated congressional powers. Indeed, Joseph Story and others recognized that, while the power to declare war would itself carry the incidental power to grant letters of marque and reprisal, the delegates to the Constitutional Convention may have thought the express power to grant letters of marque and reprisal necessary, "because it is often a measure of peace, to prevent the necessity of a resort to war."³⁵ By including the Marque and Reprisal Clause in Article I, Section 8, the framers attempted to ensure that only Congress would have the power to commence armed hostilities against foreign nations, whether those hostilities constituted full-scale war or some lesser or imperfect warfare.

The early history of the nation also supports a reading of the Marque and Reprisal Clause that provides Congress the power to authorize a

30. 8 ANNALS OF CONG. 1511 (1798).

31. *Id.*

32. REVELEY, *supra* note 24, at 74-86 (documenting that marque and reprisal provisions were not discussed until the fourth month of the Constitutional Convention and were not part of earlier drafts of the Constitution).

33. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-29 (Max Farrand ed., 1911) (chronicling the debate).

34. *Id.* at 326. Gerry made his motion on Aug. 18, 1787, the day after the "make war" debate. The only significant mention of letters of marque and reprisal in the pre-convention and ratification debates is Madison's comment that, while the Articles of Confederation granted Congress, as opposed to the states, sole power to grant such licenses during peacetime, the Constitution extended this authority to wartime as well. See THE FEDERALIST NO. 44, at 299 (James Madison) (Jacob E. Cooke ed., 1961). The removal of State power to grant letters of marque and reprisal during wartime was designed to "insure uniformity in all points which relate to foreign powers," according to Madison, and to ensure "immediate responsibility to the nation in all those, for whose conduct the nation itself is responsible." *Id.*

35. STORY, *supra* note 29, at 63. James Kent noted, "Reprisals by commission, or letters of marque and reprisal . . . is another mode of redress for some specific injury, which is considered to be compatible with a state of peace . . ." KENT, *supra* note 26, at 61. Thomas Jefferson noted, "[G]eneral letters of marque and reprisal" may be preferred to a formal declaration of war, "because on a repeal of their edicts by the belligerent, a revocation of the letters of marque restores peace without the delay, difficulties and ceremonies of a treaty." Letter from President Jefferson to Mr. Lincoln (Nov. 13, 1808), 12 THE WRITINGS OF THOMAS JEFFERSON, 195 (Albert E. Bergh ed., 1907).

broad spectrum of armed hostilities not rising to the level of declared war. For example, as President Washington's Secretary of State, Thomas Jefferson included within the congressional power to issue letters of marque and reprisal the power to order general reprisals against a foreign nation using the public armed forces.³⁶ Similarly, James McHenry, John Adams' Secretary of War, and Alexander Hamilton, a former Secretary of the Treasury, advised President Adams that any executive exercise of American naval force beyond defending the nation's seacoast, American vessels, or commerce within American waters "come[s] within the sphere of reprisals and . . . require[s] the explicit sanction of that branch of the government which is alone constitutionally authori[z]ed to grant letters of marque and reprisal."³⁷

Thus, the Marque and Reprisal Clause was inserted in Article I to ensure that lesser forms of hostilities came within congressional power. Even a technical reading of the clause to cover only letters authorizing privateers supports that interpretation. Why would the framers give Congress power to authorize minor uses of force by private parties, if they did not also mean for Congress to have power to authorize major use of American armed forces for invasions of other countries or other hostile military actions against other nations. The Marque and Reprisal Clause probably was intended to cover all reprisals or uses of force against other nations short of declared war. At minimum, the clause supports a broad interpretation of the Declare War Clause to include all acts of warfare initiated against other nations.

B. *Historical Practice*

Despite the clear evidence that the Marque and Reprisal Clause required that even "little wars" be authorized by Congress, Presidents in the twentieth century and particularly in the past fifty years have regularly engaged U.S. armed forces in hostile actions without first seeking

36. Jefferson noted that "making a reprisal on a nation is a very serious thing" often leading to war. Therefore "the right of reprisal [is] expressly lodged with [Congress] by the Constitution, and not with the Executive." Opinion of Thomas Jefferson, Sec'y of State (May 16, 1793), 7 JEFFERSON'S WORKS 628, reprinted in 7 MOORE, DIGEST § 1095, at 123 (emphasis added).

37. Letter from James McHenry to John Adams (May 18, 1798), reprinted in ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 155 (1976). Hamilton had advised McHenry that the president's constitutional power went no further than the authority "to *repel* force by *force* Any thing beyond this must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war." Letter from Alexander Hamilton to James McHenry (May 17, 1798), reprinted in 21 THE PAPERS OF ALEXANDER HAMILTON 461-62 (Harold C. Syrett ed., 1974). Hamilton reiterated that the power to authorize any reprisal was a congressional power when he noted that the effect of the 1795 Jay Treaty with England was "to restrain the power and discretion of Congress to grant reprisals till there has been an unsuccessful demand for Justice." *The Defence No. XXXVII*, reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 17 (footnote omitted) (emphasis added).

congressional approval. Professor Ely's answer to the historical practice argument is right: "[T]he War Clause made an unmistakable point that needed no further gloss Usurpation isn't precedent, its usurpation."³⁸ The clarity of the constitutional command removes the War Powers Clause from the Jacksonian and Frankfurterian *Youngstown* analysis,³⁹ which should apply only when constitutional ambiguity, vagueness, or silence requires a more careful analysis of the practice of the executive and legislative branches.⁴⁰ Moreover, if usurpation could make a difference, the historical practice here does not meet the standard articulated by Frankfurter in *Youngstown*: "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress"⁴¹

Even if the recent practice of post-World War II Presidents could be viewed as demonstrating a consistent pattern of unilateral executive use of force, it fails to override Article I, Section 8 for yet another reason. New constitutional custom, similar to international custom, requires not merely systematic practice, but also the element of "opinio-juris,"⁴² that the branches accept or at least acquiesce that the practice constitutes law.⁴³ Section 2(c) of the War Powers Resolution, albeit nonenforceable and hortatory, does reflect Congress' constitutional view that the President does not have the constitutional authority to introduce American troops into limited hostilities except in narrowly defined emergency situations. Thus, executive practice to the contrary has been at least formally rejected by Congress and cannot constitute constitutional custom.⁴⁴

Yet, while I agree with Professor Ely's rejection of historical practice modifying the text de jure, in effect the Constitution has been amended de facto. What has arisen in the past forty to fifty years is a growing gap between what Michael Reisman and James Baker term

38. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 10.

39. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 593-628, 634-55 (1952).

40. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 9-10.

41. *Id.* at 10, quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

42. The term is defined as:

The concept of *opinio juris sive necessitatis*, which apparently derives from the writings of the French jurist Francois Geny, describes a distinction between legal custom and acts of the sort that 'remain outside the positive legal order.'

MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 59 (1990) (quoting FRANCOIS GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE § 110 (1898)).

43. GLENNON, *supra* note 42, at 59-60; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); see also *Youngstown*, 343 U.S. at 610 ("systematic, unbroken, executive practice . . . never before questioned").

44. While Congress has clearly acquiesced in presidential adventures that violate the War Powers Resolution, and on occasion has suggested that certain of its provisions, such as § 2(c)'s disallowance of unilateral executive action to rescue citizens, ought no longer be law, the War Powers Resolution has not been repealed or amended, and therefore still formally retains the law.

law's "myth system" (reflected, for example, in the hortatory 2(c) of the War Powers Resolution) and law's "operational code," which can be found "in elite behavior" (executive initiation of quick strikes and congressional and judicial acquiescence).⁴⁵ The formal law is accurately described by Professor Ely; the operational code corresponds to elite behavior.

The problem of unilateral executive warmaking has not resulted from the formal amendment or de jure modification of constitutional restraints on the President, and therefore the solution cannot lie simply in the amendment of the formal, de jure law. Rather, the de facto development of an alternative code of constitutional warmaking, like the development of de facto segregation, can only be rooted out by attacking the social structure that creates it: in this case, elite values and expectations.

The elite has abandoned the constitutional warmaking process de facto because that process is seen as obsolete and inconsistent with American foreign policy needs as *the* world power. If the original design of the Constitution is obsolete, if it no longer reflects our values and foreign policy goals, then holding fast to the framers' original intent would contradict my jurisprudential views with respect to the abortion controversy and constitutional interpretation generally. In the due process or equal protection context, I would argue that the Constitution should be interpreted as a living document, reflecting the fundamental changes that have occurred in American society since 1787 or 1868. Consistency would require taking a similar position with respect to the foreign affairs provision of the Constitution.⁴⁶ So for me, the key question becomes: is the framers' design obsolete?

C. *Obsolescence*

The Constitution's war powers provisions originally served several important goals and values. Some continue unabated into the late twentieth century, while others have been undermined. The first, democratic, value was that congressional deliberation would ensure that major foreign policy decisions would not be made by one person alone, but rather

45. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 23-24 (1992).

46. The original intent theorists have not been consistent, eschewing a careful analysis of the original meaning of the foreign policy provisions of the Constitution. See generally Jules Lobel, *Foreign Affairs and the Constitution: The Transformation of the Original Understanding*, in THE POLITICS OF LAW 273 (D. Kairys ed., 2d ed. 1990).

would require "the assent of other independent minds."⁴⁷ Moreover, the framers sought to ensure popular control over decisions to initiate hostilities by placing power in the branch that was structurally most closely connected to the people. This democratic value has become even more important in today's era of centralized government and a powerful Executive branch.

But several other substantive values served by the War Powers Clause have been undermined by late twentieth century developments. The framers believed that a militarily weak America should avoid foreign entanglements and emphasize commerce rather than military power.⁴⁸ Moreover, they worried that Executive adventurism might risk both the young nation itself and many American casualties.⁴⁹ Limited wars still can become major wars, as Vietnam demonstrates, and therefore the framers' concerns that the United States follow a foreign policy of emphasizing commercial relations and not military power continue unabated. Indeed, as Paul Kennedy and others have persuasively argued, a great power's extension of its military power globally often chokes its economic life, leading to its decline. But, our country is no

47. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1512, at 342 (Melville M. Bigelow ed., 5th ed. 1891).

48. Peace was a necessary condition for the new nation's success. As Secretary of State Randolph observed in 1795:

An infant country, deep in debt; necessitated to borrow in Europe; without manufactures; without a land or naval force; without a competency of arms or ammunition; with a commerce, closely connected beyond the Atlantic, with a certainty of enhancing the price of foreign productions, and diminishing that of our own; with a constitution little more than four years old; in a state of probation, and not exempt from foes; such a country can have no greater curse in store for her than war. That peace was our policy has been admitted by Congress, by the People, and by France herself.

Letter from Randolph to James Monroe (June 1, 1795), *reprinted in* 1 AMERICAN STATE PAPERS 706 (Walter Lowrie & Matthew St. Clair Clark eds., Washington, Gales and Seaton 1832). Jefferson, in his Third Annual Message, in 1803, makes this point:

Separated by a wide ocean from the nations of Europe, and from the political interests which entangle them, together with products and wants which render our commerce and friendship useful to them and theirs to us, it cannot be the interest of any to assail us, nor ours to disturb them. We should be most unwise, indeed, were we to cast away the singular blessings of the position in which nature has placed us, the opportunity she has endowed us with of pursuing, at a distance from foreign contentions, the paths of industry, peace, and happiness; of cultivating general friendship, and of bringing collisions of interest to the umpirage of reason rather than of force.

Neutrality, 3 WHARTON DIGEST § 402, at 594 (1887). Similarly, Washington in his Farewell Address made clear that "[t]he great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connexion as possible." George Washington, Farewell Address (Sept. 17, 1796), *reprinted in* 1 AMERICAN STATE PAPERS, *supra*, at 37.

49. See James Madison (Helvidius), No. 4 in 6 WRITINGS OF JAMES MADISON 174 (G. Hart ed., 1906) ("War is, in fact, the true nurse of executive aggrandizement.").

longer isolated, and a powerful America flexing its muscles is unlikely to lose or suffer substantial American casualties when we invade a Grenada, Panama or Haiti, or launch an air strike against Libya or Iraq. Therefore, the elite and the population mostly accept, if not approve of, executive unilateralism.

Yet, even splendid little wars with few American casualties often have substantial costs that implicate the values underlying the War Powers Clause. The framers believed that the Republic should and would behave generally in a peaceful, non-hegemonic way toward the world.⁵⁰ The foreign policy provisions of the Constitution “expressed the political and social [republican] ideology of the Revolutionary leaders,” that rejected pacifism, but limited the use of force to defensive actions.⁵¹ That monarchies were generally thought to be the source of warfare accounts in part for Elbridge Gerry’s remark at the Constitutional Convention that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁵²

Therefore, the framers sought to prevent “monarchical” or “imperial” warfare driven by executive adventurism even if the lives lost in those adventures were primarily Panamanian, Libyan, or Grenadian.⁵³ The moral indefensibility of implicitly discounting Panamanian lives—which is inherent in the view that the Panamanian invasion was merely a “little war” (little for whom?)—is reflected in war powers provisions that ensured that all hostile armed actions be subject to searching constitutional scrutiny. A republic demands no less. An adventurist military policy overseas is inconsistent with Republican values, even if no American lives are thereby lost. The inconsistency between an Imperial foreign policy and a Republican domestic constitutional order is not merely immoral, but will eventually wreak havoc on our domestic institutions. As Henry Steele Commager noted during the Vietnam War, “If we subvert world order and destroy world peace, we must inevitably subvert and destroy our own political institutions first.”⁵⁴ Therefore, the repub-

50. REGINALD C. STUART, *WAR AND AMERICAN THOUGHT: FROM THE REVOLUTION TO THE MONROE DOCTRINE* 37-38 (1982) (because of republican institutions, the framers thought America would only get involved in defensive wars); MICHAEL HOWARD, *WAR AND THE LIBERAL CONSCIENCE* 25 (1978) (explaining that liberal philosophers of the 18th century assumed that “‘peace and moderation are the spirit of a republic’”) (quoting 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155 (T. Nugent trans., New York 1912) (1750)).

51. STUART, *supra* note 50, at 66.

52. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 33, at 318.

53. Of course, the scholarly community has debated the merits and the “imperial” nature of these military actions. I cannot in this essay revisit that debate. I merely argue here that an imperial American foreign policy is inconsistent with both the framers’ values and what I believe American values ought to be today, even if very few American casualties result.

54. HENRY STEELE COMMAGER, *THE DEFEAT OF AMERICA: PRESIDENTIAL POWER AND THE NATIONAL CHARACTER* 58 (1974).

lican values underlying the War Powers Clause are still relevant in today's world, and ought to motivate our foreign policy even though they currently do not.

IV. PROCEDURAL V. SUBSTANTIVE REFORM APPROACHES

Professor Ely and I start from the same basic proposition that all acts of combat engaged in on behalf of the United States must have to be authorized by Congress, unless such action repels a sudden attack. But, to parry arguments that the constitutional design no longer meets the current situation, Professor Ely somewhat reluctantly agrees that the phrase "repel sudden attacks" ought to be read to permit the President to act unilaterally whenever she is "unable" to secure Congress' advance authorization, either because time does not permit or military effectiveness would be undermined.⁵⁵ Therefore, his Proposed Combat Authorization Act requires the President to obtain advance authorization prior to placing U.S. forces in potential combat situations, except "where a clear threat to the national security has developed so rapidly as to preclude Congress's advance consideration of such authorization, or keeping the pendency of the United States' response to such a threat secret prior to its initiation is clearly essential to its military effectiveness"⁵⁶

Those two broad exceptions render the entire advance authorization provision hortatory. As Ely recognizes, judicial enforcement of such an open-ended provision is inconceivable, and voluntary compliance is unlikely.⁵⁷ Recent history suggests the President will almost always argue that time or military effectiveness require unilateral action. For example, the executive branch would have argued that the Grenada and Panama invasions, and the air strikes against Libya and Iraq all fell within Professor Ely's exceptions. Secretary of State Christopher more recently claimed that the Haiti invasion which had been threatened and telegraphed for weeks was within the President's constitutional authority because "[W]e can't tie the hands of the President. The President may have to act in a situation very quickly and on his own constitutional authority."⁵⁸ Because of the obvious inability of any statute to define substantively with precision the limits of the Executive's unilateral war-making power once the "repel sudden attacks" phrase is reinterpreted to mean "respond to a serious emergency," Ely believes that the "procedural" approach of setting forth time restraints on executive power

55. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 6-7, 76-77, 108-09.

56. *Id.* at 133.

57. *Id.* at 118, 126.

58. Neil A. Lewis, *Clinton Has Authority He Needs to Invade Haiti, Top Aides Say*, N.Y. TIMES, Sept. 12, 1994, at 1.

“shows greater promise of making a difference.”⁵⁹ Thus his main operative suggestions are to lower the time limit to twenty days and provide judicial enforceability of that limitation.

I agree that Professor Ely’s approach would make a major difference, presuming a different substantive climate permitting the enactment and enforcement of his proposed statute. The President would have to request congressional authorization whenever she launched a “little war,” or strike, or intervention, and twenty days is a relatively short period within which to operate. I would be quite happy to see Professor Ely’s statute enacted.

But I’m not convinced it is the best approach. After the President launches an armed expedition, public approval will undoubtedly be high, and the impetus to rally around the flag (or in this case the President) tremendous. The statute will probably work to create congressional debate and vote, but in the worst circumstances—while U.S. forces are fighting and possibly dying abroad. Moreover, recent history demonstrates that many “little wars” are basically over in twenty days—Grenada, Panama, Haiti, Libya, Baghdad air strike—leaving Congress and the President to wrangle about the mop-up, policing operations. Of course, if the “little war” went unexpectedly badly and turned into a protracted conflict, then congressional debate would ensue, but that generally happens anyway. Congress did eventually debate the Lebanon operation and the Nicaraguan covert war, although Professor Ely’s statute would require that debate to take place within twenty days. While a vote within twenty days would probably be a positive development, the proposed statute might place Congress at the disadvantage of voting when the war fever was at its height, and not before commencement of military action or after months of protracted struggle when the popular support for the war was low.

For Professor Ely, there is no alternative to the procedural approach based on time. He foreclosed a substantive approach by his concession that “repel armed attacks” must be read more broadly today than in 1787. There is no need for Ely’s concession. Can one think of any case in the past several decades where the President launched an armed action against another nation and was unable to secure advance authorization from Congress because of time or military effectiveness? The Libyan or Baghdad air strikes could have been authorized by Congress—military effectiveness merely required that the details and timing of the operation be secret. The Panamanian and Haitian invasions were threatened for months and involved long-standing problems. As Judge

59. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 119.

Sofaer recounts,⁶⁰ both the Panamanian and Libyan operations were discussed for many months before actually launched. The Grenada invasion was arguably time driven, but only if you buy the implausible and factually inaccurate proposition that the operation was a direct response to the threat that American medical students would be taken hostage. And as Professor Ely convincingly argues, even covert operations become known to the enemy within hours or days of their undertaking, and therefore constitutional authorization would generally be required fairly rapidly.⁶¹ Moreover, launching a surprise attack against an enemy who has not attacked us ought not be a reasonable justification for avoiding the constitutional process. The phrase “repel sudden attacks” simply cannot, with any rationality, be turned into a justification for “launching sudden attacks.” For example, the Bay of Pigs operation could be an example (albeit a bad one) of an invasion that required secrecy for military effectiveness (or ineffectiveness), but that turns out to be simply because we wanted to launch a surprise attack. Ely’s concession turns out to be driven by hypotheticals, not reality.

Today, as in 1787, the reality is that American national security can be adequately served if the President’s power to use American forces in combat unilaterally is reserved to repelling sudden attacks on American troops, territory, and citizens.⁶² That substantive line written into a Combat Authorization Act would be both politically and judicially enforceable. And repelling means just that; it does not mean retaliating for an attack on an American citizen or soldier that took place several days, weeks or months before. The President can respond defensively to attacks that have been launched, not to rumors, reports, intuitions, or informed intelligence warnings of attacks. President Roosevelt could not have and should not have attacked Japan in the fall of 1941 based on intelligence reports that the Emperor was planning war. He could send American fighter planes to intercept Japanese planes once the attack was launched. While there may be difficult cases where determining when an armed attack has been launched (was it when Japan sent out the aircraft carriers or when the planes were airborne?), most situations will be clear.

60. Sofaer, *supra* note 9, at 53-54.

61. ELY, WAR AND RESPONSIBILITY, *supra* note 1, at 110-12.

62. I do not accept an exception for repelling an imminent attack on civilians or troops. Such an exception is subject to tremendous abuse, as Presidents can easily claim that American citizens around the globe might be subject to “imminent” attack, and the facts would be difficult to determine dispositively. Generally, one can defend against imminent attacks by bolstering citizens’ or troops’ protection, or withdrawing them to safer more secure positions, and if necessary seeking congressional authorization to militarily respond. Actual attacks require military action, imminent threats do not.

There are, of course, hypothetical situations that do not meet the test I articulate in which we all nevertheless would want the President to respond unilaterally. If the President had overwhelming evidence that some terrorist nation would have a destructive chemical weapon operational within a week and was planning to detonate it over New York City, all of us—except perhaps extreme New York haters—would allow the President to use American air power to destroy the weapon. But one can always find hypotheticals that undermine established legal doctrine. I once saw a movie in which a police officer brutally tortured a vicious criminal in order to get the criminal to divulge where he had buried a little girl with only a few hours' supply of oxygen. Do I support a legal doctrine in which police officers can torture victims when it is such an emergency that they need to get at information immediately? I don't. Yet while watching this movie I hoped the police officer got the information in time using any method necessary.

Many of the founders had a theory of "emergency" that dealt with these kinds of hypotheticals,⁶³ but it was not that the Executive could act *lawfully* in excess of constitutional or statutory authority in the emergency situations posed by these hypotheticals. Rather, it was that there may be some exigent situations where an Executive official may have to act in violation of the Constitution.⁶⁴ But the official must openly acknowledge that he or she acted *unlawfully*, and allow for review of the unlawful conduct by Congress or the courts and terminate the action when the emergency ended. Most early leaders of the Republic believed that the problems associated with creating a constitutional basis for the exercise of emergency power outweighed the dangers of allowing the President to act extra-constitutionally and unlawfully in extreme crisis situations.⁶⁵ They believed that a grant of emergency power with vague limitations like "military necessity" inevitably would lead to a vast assertion of executive power unjustified by actual emergencies. Justice Jackson's more recent comment that "[E]mergency powers . . . tend to

63. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1392-97 (1989).

64. *Id.*

65. Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 214 (1944), sounded the same theme. He recognized that military necessity might often require that the "paramount consideration" be that the government's

measures be successful rather than legal. . . . But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

Id. at 244, 246 (Jackson, J., dissenting).

kindle emergencies”⁶⁶ has proved true in the war powers area.

A return to the original design of allowing the Executive emergency power only to repel actual attacks would in all likelihood eliminate the purported emergencies that have driven U.S. policy for decades. And if a real emergency did arise, Jefferson’s and Lincoln’s policy of acting extra-constitutionally to save the nation and later seeking congressional ratification for their actions is an appropriate response.

The imagery of crisis and emergency pervaded the Cold War era, and was utilized to justify an extension of American power around the globe.⁶⁷ The end of the Cold War has led to several contradictory impulses. Probably the dominant trend amongst policy makers has been to search for new crises, new rationales, and new justifications for using U.S. military power abroad. The post-Cold War world may yet, however, provide an impetus for a substantive reassessment of the U.S. role in the world. Such a substantive transformation might breathe new life into an original constitutional design that was largely abandoned during the Cold War era.

66. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

67. See Lobel, *supra* note 63, at 1400-03.