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War and Responsibility in the Dole-Gingrich Congress

HAROLD HONGJU KOH*

I speak today of John Hart Ely's past; of our present shared enterprise—what I call the Legal Process Scholarship of War Powers—and of the future: how the concept of war and responsibility will play out in the uncharted world of the Dole-Gingrich Congress.

I. JOHN HART ELY AND THE NEW LEGAL PROCESS

It is no hyperbole to say that John Hart Ely has had one of the great legal careers of our time. Any one of the milestones that has marked his life would have made the career of most other lawyers: from his days as a law student, researching Abe Fortas' brief in *Gideon v. Wainwright*¹ and writing a famous *Yale Law Journal* note on the bill of attainder clause,² to his service as a law clerk for Chief Justice Warren, working on *Hanna v. Plumer*³ and *Griswold v. Connecticut*,⁴ to staff duty on the Warren Commission, to his early professorial days at Yale, where he wrote two of the *Yale Law Journal*'s most cited articles, *The Wages of Crying Wolf: A Comment on Roe v. Wade*,⁵ and *Legislative and Administrative Motivation in Constitutional Law*.⁶ During his Harvard years,

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"You don't need many heroes if you choose carefully." With that dedication to Earl Warren, John Hart Ely began *Democracy and Distrust*, and with that tribute to John Ely, I dedicate this essay. An earlier version of these remarks was presented at *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, University of Miami School of Law, February 23, 1995.

1. 372 U.S. 335 (1963).

2. John H. Ely, Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

3. 380 U.S. 460 (1965).

4. 381 U.S. 479 (1965).

5. 82 YALE L.J. 920 (1973).

6. 79 YALE L.J. 1205 (1970).

he produced classic pieces on *Erie R.R. Co. v. Tompkins*,⁷ conflict of laws,⁸ flag desecration,⁹ and reverse discrimination,¹⁰ capped by his great book *Democracy and Distrust: A Theory of Judicial Review*. At Stanford, he turned to deaning, followed now by his return to research into the war in Indochina, in *War and Responsibility*.¹¹

This review omits John's years as a litigator: as a public defender in San Diego and as President Ford's General Counsel for the Department of Transportation. But far from being unconnected to Ely's world view, that practical experience has in fact proven central to it. For at bottom, John Ely is not an economist or a philosopher, but a gifted lawyer, who came to maturity during the Warren Court's era of public law litigation. Even today, Ely believes in litigation campaigns to foster judicial development of doctrine as the most productive way to police constitutional requirements, to enforce underenforced statutes like the War Powers Resolution, to define the boundaries of executive and congressional power, and to keep government honest—by controlling covert war, forcing disclosure of national security expenses, and preventing government constraints on publications in the name of war or national emergency. That is why Ely still teaches war powers litigation, and why he has coauthored various briefs and letters over the years challenging executive branch decisions to wage war without congressional consent.¹² At base, John believes—as I do—in the normative power of legal process and in the checking function of federal courts. It is that “new legal process” vision that has driven John's work and given it its elegant power.

To see this point, one need only observe the parallel structure of argument that runs through Ely's two books. *Democracy and Distrust*

7. 304 U.S. 64 (1938); John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

8. John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

9. John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

10. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

11. The book was primarily developed in three prior law review articles. John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990); *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990); *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988). Movie buffs (of whom John himself is one) might consider Ely the *Forrest Gump* of American public law, (not in intellect, I hasten to add) in the way he seems to turn up at every critical juncture in recent constitutional history to change the flow of events.

12. See, e.g., Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 STAN. J. INT'L L. 247 (1991); Correspondence With Assistant Attorney General Walter Dellinger re Legality of United States Military Action in Haiti, reprinted in 89 AM. J. INT'L L. 127 (1995) [hereafter *Haiti Correspondence*].

developed the notion that judges should intervene when they have reason to distrust the political process; *War and Responsibility* offered the complementary notion that judges should intervene when necessary to require the political branches to fulfill their constitutional responsibility to decide on war. Both books' analytic force grew out of their simplicity, which determines both what courts must do and what they may not do. According to Ely, courts may not intervene when they have no valid reason to distrust the political process; yet they must intervene to enforce the proper working of the political process in war powers cases whether they—or the political branches—want that responsibility or not. In both cases, the courts' job is to police process: "the courts' relative insulation from the democratic process suggests," Ely says, "that it's no business of theirs to decide what wars we fight, [but] it does situate them uniquely well to police *malfunctions* in that process, including [what] essentially amounts to a conspiracy between the executive and legislative branches to enhance their own political fortunes at the expense of the interests of the people at large."¹³

I would slight Ely's evolution, however, if I did not note two key differences between his books that overshadow the continuities between them. First, the times in which they were written explain in part how each has been received. *Democracy and Distrust* was both a product and a shaper of its times. It was written in the late 70's and appeared in 1980, at a time when many feared a Burger Court counter-revolution against the Warren Court's legacy.¹⁴ The political literati—the audience for a book like John's—hungered for a scholar who could respond to the Warren Court's critics, to give its decisionmaking analytic coherence, and to defend a principled position that saw courts not just as neutral umpires of the federal system—a core tenet of the "old legal process" vision¹⁵—but as playing a unique structural role to protect individuals against the state and fundamental values against political expediency. Ely's call for courts to clear the channels of political change and to strike down laws that unfairly punish discrete and insular minorities filled this deeply felt need.

Democracy and Distrust became popular precisely because it ren-

13. JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54 n.41 (1994).

14. See generally VINCE BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983).

15. This was, of course, the approach of such "old legal process" scholars as Henry Hart and Herbert Wechsler. See, e.g., Herbert Wechsler, *Foreword: Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (1994).

dered legitimate what had previously seemed suspect: the Warren Court's activism. As Bill Eskridge and Phil Frickey wrote in their perceptive introduction to Hart and Sacks' *The Legal Process*: "By characterizing the Warren Court's agenda as substantially a procedural and pluralist one, rather than one seeking massive social dislocation, Ely presented that agenda in a manner most acceptable to mainstream legal culture."¹⁶

But *War and Responsibility*, written in the late 1980's and published in the early 1990's, accomplished the opposite. Rather than resurrecting a fallen idol—the Warren Court—the book refused to let a sleeping dog lie: the Indochina war. By so doing, it rendered suspect what many had come to accept as, if not legitimate, at least bearable. Rather than returning to the Warren years—an era for which many Americans were nostalgic—*War and Responsibility* dragged us back to a time that many had hoped to forget. Ely's book dug through the documentary entrails of our most horrific war, examined the unconstitutionality of a secret war in Laos that most of us had forgotten, and found, in the end, that things were even worse than we had remembered. Rather than characterizing the war in Indochina in the manner most acceptable to the legal culture—that in the end, everything came out okay—Ely told us that Vietnam had helped create the war powers mess we are still in today.¹⁷

Unlike *Democracy and Distrust*, which had majestic heroes like Chief Justice Warren, *War and Responsibility* teaches that Vietnam had fewer heroes than victims: the disadvantaged men and women of color on both sides who marched off to die while the executive branch lied and covered up, Congress was complicit, and the courts ran for cover.¹⁸ Ely showed that Congress authorized every new phase of American involvement, without ever facing up to its responsibility to accept or reject the stated aims of the intervention, and that the courts resolutely avoided the merits, hiding behind "a congeries of excuses for avoiding deciding issues otherwise properly before the court," such as the political question doctrine, standing, ripeness, mootness, and equitable discretion.¹⁹

16. William N. Eskridge, Jr. & Phillip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* cxvii (1994).

17. See generally HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 38-64 (1990) (arguing that the roots of our current foreign policy disorder trace back to Vietnam). To extend the movie analogy, *War and Responsibility* reads far more like *Apocalypse Now* or *Full Metal Jacket* than *Forrest Gump*: it is hardly "feel-good" constitutional theory.

18. See Harold Hongju Koh, *Reflections on Kissinger*, 5 CONST. 40 (1993).

19. ELY, *supra* note 13, at 55.

There is a second, methodological difference between the books that tells us much about Ely's evolution as a scholar-activist. *Democracy and Distrust* was first and foremost a book about *theory*, and only secondarily about constitutional history. *War and Responsibility* took the opposite tack, and by writing it, Ely moved closer to his core.²⁰ For as time has passed, he has found less and less to like about democracy as it actually operates, even as he has found more and more to distrust about our political process. Thus, while the rhetorical undercurrent of *Democracy and Distrust* is slyly reassuring, the subtext of *War and Responsibility* is anger about our lost innocence. "Before Watergate," Ely writes, "we were all more innocent and it took a genuine radical to believe allegations that our government was lying to us."²¹ Now, he suggests, virtually everyone acknowledges that our government lies, and many believe that it lies to us much of the time. By painstakingly documenting how this was done, Ely's historical case study is both unsettling and radicalizing, for it reveals a government that deliberately lied to its people, a President who probably should have been impeached, a Congress that spent the war scrambling for political bomb shelters, and a judiciary that time and again refused to live up to its constitutional duties.

As I have argued in my own work, this recurrent pattern of executive activism, congressional passivity, and judicial tolerance has fostered both public cynicism and a tradition of government dissembling that led to the foreign policy abuses of the 1980s—most prominently, the Iran-Contra Affair.²² That pattern has hardly abated with the November 1994 shift in control of both the White House and Capitol Hill.

Thus, the irony: in the end, Ely's two books are misnamed. *Democracy and Distrust* is really about *responsibility* and how honest judges should fulfill that responsibility by acting like judges, not elected officials. *War and Responsibility* is really about *distrust*, and how to make our war powers decisions honest again, by reinvolving both Congress and the courts in war powers decisions. But in the end, the same ideas unify both books: the checking function of federal judges and the normative power of the legal process.

20. This is just what one might expect from Ely the maverick. Most leading scholars write detailed archival history in order to get tenure, then speculate about theory *after* they've been Dean. (And if this footnote sounds like Ely, it is because his wonderful rhetorical voice set the cadence for a generation of legal scholars, much as Chuck Yeager's did for a generation of airline pilots. Cf. TOM WOLFE, *THE RIGHT STUFF* 43 (1979) ("Anyone who travels very much on airlines in the United States soon gets to know the voice of *the airline pilot* . . . coming over the intercom . . . with a particular drawl, a particular folksiness," that characterized Yeager's own voice.) (emphasis in original).

21. ELY, *supra* note 13, at 92.

22. KOH, *supra* note 17, at 113-16.

II. POLITICAL AND SUBSTANTIVE CRITIQUES OF LEGAL PROCESS

Against that backdrop, let me note that Ely is not alone in his legal process view of war powers. During the 1980s, several of us in this symposium, including Louis Henkin, Michael Glennon, and myself, wrote books in which we expressed similar concerns about executive overreaching in foreign affairs.²³ In subsequent literature, we have been called many names—legalist, formalist, congressionalist, even “liberal,”—but what we share, I believe, is our common commitment to the new legal process. By and large we made the same diagnosis: that the foreign policymaking problem is not just presidential, but systemic, created not just by executive activism, but also by the passivity of Congress and the courts.²⁴ We shared the understanding that the Constitution requires both interbranch dialogue and legislative approval before the President makes decisions about war. Finally, we agreed on the outlines of a policy prescription: that Congress and the courts need to get more involved in war powers cases to check executive overreaching and to safeguard constitutionalism and individual rights.

Ely and I went so far as to propose legislation as a way to deal with the problem. Ely would replace the War Powers Act with what he calls a “Combat Authorization Act,” the provisions of which are set forth in the appendix to *War and Responsibility*.²⁵ I proposed a National Security Charter that would replace the National Security Act of 1947 with a framework statute that would modernize, after nearly half a century, the way our country deals not just with war powers, but with emergency economic powers, agreement-making, intelligence oversight, disclosure of information, and the like.²⁶

If you have been reading the headlines, you might conclude that we are about to get our wish. For Senator Robert Dole has proposed a Peace Powers Act and the House has passed something called the “National Security Revitalization Act.”²⁷ But on examination, the provisions of these acts in no sense resemble anything Ely and I would have drafted. What lessons should we draw from this?

Since the Dole-Gingrich Congress seized power in the winter of 1995, the war powers scholars of the 1980’s who ally with the legal process school have been regularly asked two questions. The first I call the *political* critique: “now that the Democrats control the White House

23. KOH, *supra* note 17; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).

24. See generally Harold Hongju Koh, *Reply*, 15 YALE J. INT’L L. 345 (1990).

25. ELY, *supra* note 13, at 132-38.

26. ELY, *supra* note 13, at 154-210.

27. S. 5, 104th Cong., 1st Sess. (1995); S. 564, 104th Cong., 1st Sess. (1995); H.R. 7, 104th Cong., 1st Sess. (1995).

and the Republicans control Congress, do you still insist upon restoring congressional prerogative in foreign affairs?" And second, the *substantive* critique: "in a post-Cold War era, how can legal process alone restore constitutional *values* to national decisions about warmaking?"

Implicit in the political critique is the suggestion that legal process scholars will likely swing with changing political times. Citing Edward Corwin and Arthur Schlesinger, two political commentators who favored presidential power in the 1950s but later feared it, depending upon who was in the White House, some suggest that our opposition to presidential overreaching in the 1980s was similarly based on politics, not process.²⁸

Yet in fact, the legal process scholars of the 1980s have remained demonstrably consistent. We have always advocated not a weak President, but a strong president *within* a strong constitutional system.²⁹ We urged creation not of a legislative system of constraints on presidential discretion, but "a dynamic legal process that will allow our postimperial National Security Constitution to evolve over time. . . . Such a process would operate equally well with a Republican Congress and a Democratic president . . . as with any other combination."³⁰ Thus, those of us who signed letters and amicus briefs in 1990 opposing a war without congressional authorization in Iraq did not hesitate to sign a similar letter in 1994 with respect to Haiti, even though different members of the group felt quite differently about the substantive goals of such an intervention.³¹

But there is a second, substantive critique of the legal process school, which has been put forward at this symposium and elsewhere by Professor Jules Lobel. Indeed, Lobel first sounded this theme in a prescient book review written half a decade ago.³² Echoing Laurence Tribe's critique of Ely's process-based theory of judicial review,³³ Lobel argued that war powers scholars should focus not on process, but on substance. The problem with our foreign policymaking, he argued, has

28. Critics usually cite the example of Bob Dole and Bill Clinton, who effectively traded places during the Haiti incursion of 1994 on the need for congressional approval for presidential warmaking.

29. See, e.g., KOH, *supra* note 17, at 216.

30. *Id.* at 227-28.

31. See *Haiti Correspondence*, *supra* note 12 (signed, inter alia, by Professors Ely, Henkin and Koh). As a lawyer for Haitian refugees during the previous two years, I for one, had felt strongly that the United States should have intervened in Haiti earlier, but I could not accept the Administration's claim that no new congressional authorization was required before President Clinton could dispatch tens of thousands of troops to depose the military junta.

32. Jules Lobel, *The Relationship Between Process and Substance in the National Security Constitution*, 15 YALE J. INT'L L. 360 (1990).

33. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980).

not been our process of decisionmaking, but our substantive goals, which Lobel ultimately identified as extending American hegemony. Post-Vietnam efforts to reform our national security system have failed, he argued, because they sought to reform process without modifying these substantive goals. Thus, Lobel concluded, we cannot regain constitutionalism in foreign policy through procedural tinkering with legal rules; what we need instead is to mobilize popular movements to restrain America's hegemonic impulses.

While I concede that process and substance cannot be entirely separated, I do not believe that we can work a fundamental transformation of the substance of foreign policymaking, when the *process* of making that policy is so fundamentally defective. In my view, a well-functioning process is the prerequisite to any kind of political agreement on substance. The goal of a constitutional process should not be to specify policy results, but to force the institutional players into a dialogue about which political ends they collectively seek and which they prefer to avoid. If interbranch dialogue occurs, it may produce a consensus for war (as occurred, for example during the Gulf War); but if no dialogue occurs, the Constitution mandates peace as the default position.

The problem with our current process is that such institutional dialogue almost never occurs. As Ely's book points out, debates about war powers are rare, most debates are not "dialogue," but largely for show, and the branches almost never talk about our national goals regarding military intervention. Worst of all, as Ely shows, our current law, particularly the War Powers Resolution, lets them get away with it.

A process-based view envisions a very different, three-step political procedure: one in which decisions to make war are preceded by intrabranch debate and deliberation, interbranch dialogue, and the creation and delineation of institutional precedent. Again, the exception that proves the rule was the debate over the congressional authorization of Operation Desert Storm, one of the few cases where judicial action helped force a dialogue about prior legislative approval before it was too late.³⁴ In that case, both the executive and legislative branches engaged in lengthy intrabranch deliberation before ultimately committing to war, an interbranch dialogue ensued that culminated in the congressional resolution authorizing use of force in Iraq, and the episode helped delineate an important institutional precedent which has served as a touchstone for subsequent deliberations. Regardless of what one thinks of the substance of the current Dole-Gingrich legislation, the process is at least working to the extent that after nearly two decades, Congress is once again proposing new framework legislation to govern war powers, which the

34. See Koh, *supra* note 12, at 251-56.

President may sign, veto, construe, or execute, and which the courts may end up interpreting.

Even when the branches do not conduct direct dialogue, another lesson recent history has taught is that academic debate can force valuable "shadow dialogue" between private parties and the government, particularly when lawyers and academics challenge particular government legal interpretations. The debate over the correct interpretation of the Anti-Ballistic Missile Treaty was one famous recent example.³⁵ But the best recent illustration was the Clinton Administration's military incursion into Haiti in the fall of 1994, based on dubious legal authority. Instead of sending troops without justification, the Attorney General's lawyer, Walter Dellinger of the Office of Legal Counsel (and Duke Law School), put forward a legal explanation of the invasion of Haiti. That opinion letter responded to both public and congressional pressure and two joint letters from a group of law professors that had argued for the opposite position.³⁶ By sending the letter, the academics placed a burden of explanation upon the executive branch, forced internal debate within the legal circles of the executive branch, and prompted development of a nuanced governmental legal position, which not only clarified the precedential value of the episode for the future, but also made clear what legal claims the executive branch was *not* relying upon in Haiti (e.g., the claim that the President could commit troops abroad without congressional approval, based solely on United Nations Security Council authorization).³⁷ In sum, legal process is hardly irrelevant to politics in the war powers area. We simply cannot develop new substantive goals for our foreign policy without a better process, one that requires the active institutional participation of all three branches and that promotes the creation and internalization of legal norms. Far from being peripheral to politics, legal process can cabin politics. Properly designed process thus makes political actors accountable, by forcing them to live up to their constitutional responsibilities.

III. WAR AND RESPONSIBILITY IN THE DOLE-GINGRICH ERA

The ultimate test of any theory, legal process or otherwise, is its predictive capacity. What specific predictions can we make about how Ely's concept of war and responsibility will play out in the Dole-Gingrich Congress? How will the institutional players interact in the making of war powers decisions over the next few years?

35. The ABM Treaty debate is discussed in Koh, *supra* note 17, at 43, 154-55.

36. See *Haiti Correspondence*, *supra* note 12.

37. See Jane Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145 (1995).

Let me suggest four, basically pessimistic, maxims that will likely govern the warmaking issue before the next presidential election. First, divided government invites executive unilateralism. Second, weak presidents are more dangerous than strong ones. Third, even with strong leadership and a clearly defined political agenda, Congress will continue to try to avoid collective responsibility. Fourth and finally, unless judges can be reeducated to their constitutional duties, they are likely to remain as much the problem as they are the answer.

Turning to the first maxim, divided government is nothing new. The twelve years before the 1994 congressional election also saw divided government, but with the Republicans controlling the White House and the Democrats running Congress. What history shows is that when government is divided, the political branches rarely reach a substantive consensus on war, much less any other kind of major policy decision.³⁸ The prospect of deadlock makes it far more likely that the executive branch will resort to unilateralism in a crisis, particularly unilateralism of two kinds: covert activities (*e.g.* the secret war in Central America) and short-term military strikes (of the kind that the Reagan and Bush Administrations undertook in Grenada, Panama and Libya).³⁹ Yet this kind of executive unilateralism follows a reactive, not proactive, pattern. The President perceives a threat, recognizes the need for American response, sincerely believes that he has a duty to act, but simultaneously realizes he can't get Congress to support him. Rather than raising the issue openly and forcing Congress to vote on the question of approval, the President has powerful incentives to take another route.⁴⁰

We saw this pattern, for example, the last time we had a Republican Congress and a Democratic President, during the Truman era. The parallels are striking. More of Truman's domestic program was rejected by Congress in 1952 than in any prior year. Immigration issues stood at the forefront of public debate; the Republican Congress was investigating allegations of fraud and influence-peddling within the administration; a senior senator (Taft, not Dole) had his eye on the Presidency; a retired general of ambiguous political affiliation (Eisenhower, not Colin Powell) stood portentously in the wings; the President was facing challenges within his own party; and foreign policy issues centered around creating a post-war (World War II, not Cold War) world order, of which the GATT formed one critical plank. Overseas, the United States pursued a

38. Witness, for example, the incredible 1996 New Year's gridlock over whether the national budget should be balanced, and if so, in how many years.

39. See generally Koh, *supra* note 17, at 38-40.

40. To his credit, President Clinton did not take this route when he finally decided to send U.S. peacekeepers to Bosnia to enforce and monitor the Dayton Peace Accords in 1996, nor did Majority Leader Dole in deciding reluctantly to support the President's decision.

series of aid bailouts; in Congress, several "loose cannons" had just been elected (Senators Joseph McCarthy and John Bricker, as opposed to today's Republican House freshmen); and the administration's domestic weakness led it to turn to the United Nations as a vehicle for the exercise of United States military power.

What historical episodes did this power alignment trigger? First, the Korean war, the major undeclared war of our period, which foreshadowed the later tactic of presidents resorting to the United Nations as a means of avoiding congressional approval.⁴¹ Second, the *Steel Seizure Case*⁴² signaled the use of foreign policy power by a president to enhance his weakened domestic situation, in the face of congressional silence or even implicitly disapproving legislation.

Both precedents have obvious parallels today, not to mention a third possibility: that temptation might draw the executive branch into a "splendid little war" — like Grenada or Panama — with an eye toward a possible presidential bounce in the polls. That possibility raises Maxim Two: that weak presidents are more dangerous than strong ones. Jimmy Carter, for example, in the last two years of his presidency, engaged in perhaps the most dramatic nonwartime exercise of emergency foreign power ever seen, not because he was strong but because he was so politically weak.⁴³ In foreign policy, weak presidents all too often have something to prove.⁴⁴ In a gridlock situation, the president's difficulty exhibiting strength in domestic affairs—where Congress exercises greater oversight and must initiate funding proposals—makes it far easier for him to show leadership in foreign affairs. At the same time, weak presidents may underreact to looming crises that demand strong action, for fear that they cannot muster the legislative support necessary to generate the appropriate response. But when these weak presidents do finally respond, they tend to *overreact*: either to compensate for their earlier underreaction, or because by that time, the untended problem has escalated into a full-blown crisis, Bosnia and Haiti being the two prime Clinton Administration examples.⁴⁵ When private parties bring suits to challenge these presidential policies, courts tend to defer to weak presidents, because they view them not as willful, so much as stuck in a jam,

41. See generally Testimony of Harold Hongju Koh, "The Constitutional Roles of Congress and the President in Waging and Declaring War," before the Senate Judiciary Committee, 102d Cong., 1st Sess. (Jan. 8, 1991); Stromseth, *supra* note 37.

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

43. Koh, *supra* note 17, at 122.

44. In foreign policy, President Clinton carries the particular baggage that he is perceived as lacking expertise and conviction because of his lack of military service.

45. See generally Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (illustrating this pattern with regard to the Haitian refugee crisis).

lacking other political options. Finally, weak presidents are more prone to give away the store, namely, to undercut their own foreign policy program in order to preserve their domestic agenda. This raises the question of whether this Democratic president may be forced to sign restrictive congressional legislation—or whether Congress might pass such legislation over presidential veto, as Congress did with the War Powers Resolution in 1974—which may later come back to haunt future presidents. Nor, in this media age, is any president's strength truly secure. These days every president, whatever his current popularity rating, is potentially weak. We sometimes forget that just after the Gulf War, George Bush's popularity rating stood at 91%, only ten months before he lost reelection, and five years before he recanted about his actions during the war itself.

Congress' problem is not so much weakness as accountability, of two kinds. First, Congress has traditionally been too disaggregated and disorganized to be held accountable as an entity. Second, members of Congress have a strong proclivity to avoid, rather than to accept, responsibility.⁴⁶ These two factors lead to a "good news-bad news" situation. Anyone who has been paying attention must be impressed by the way the Dole-Gingrich Congress has organized itself, with the leadership providing central decisionmaking and (with the Contract for America) real direction in the form of a detailed policy agenda. Particularly in the first half-year of the Dole-Gingrich Congress, party discipline was enforced to a remarkable extent, and individual legislators' actions were carefully monitored through floor votes, supervision by party whips, and similar devices.

But how solid is this party discipline, and will it hold up over time? For example, in the recent vote on the proposed National Security Revitalization Act, a critical number of Republicans defected over provisions that would have revived the building of anti-ballistic missile systems.⁴⁷ Moreover, to what extent will Congress be able regularly to garner enough votes to pass veto-proof legislation, either now, or after the next biennial election in 1996? Finally, to what extent will even a willful Republican Congress try to use its legislative power to show "leader-

46. For example, in *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir.), *cert. denied*, 116 S.Ct. 299 (1995), Cuban refugees and legal service organizations challenged the Clinton Administration's Cuban policies before an Eleventh Circuit panel dominated by judges appointed by Republicans hostile to Clinton, who were also presumably anti-Castro. Nevertheless, the court ultimately ruled in the Administration's favor, in part, I suspect, because the judges were hesitant to insert themselves in an offshore dispute in which the President appeared to have so few policy options.

47. By January of 1996, significant cracks had started to appear with the split between Speaker Gingrich and his freshmen over the timing and content of a balanced budget deal with the Clinton Administration.

ship" in foreign affairs by imposing various gimmicky solutions which actually require little or no real collective deliberation on its part? We have seen too many of such devices during recent debates over so-called "automatic deficit reduction" in the context of the Gramm-Rudman Balanced Budget Act⁴⁸ and more recently, in provisions of the National Security Revitalization Act that called for dollar-for-dollar proposals automatically to defund United Nations peacekeeping operations.⁴⁹

Finally, there are the courts. As Ely's dedication of *Democracy and Distrust* (to Chief Justice Earl Warren) shows, the heroes of his scholarship have largely been judges. But here, too, there's a catch: Ely's herculean judges are mostly judges (like Earl Warren) we *wish* we had, not those who are actually sitting on the bench. That reality raises troubling questions for Ely's policy recommendations. For in *War and Responsibility*, Ely's ultimate solution for getting Congress to vote on war is to get the *courts* to force Congress to act. But that solution does not solve the problem, so much as create a second-order one: namely, what should we do if no private litigant can get the courts to issue a legislative action-forcing order?

Litigation I have been involved with during the last few years in the foreign affairs and human rights areas has made me far more pessimistic that the problem of judicial diffidence can be easily solved. Litigators who forum-shop for judges in war powers, international affairs and separation-of-powers cases are all too aware that there are very, very few sitting federal judges who are willing even to entertain the thought of enjoining the president. Take, for example, a favorite case of Ely's, *Dellums v. Bush*,⁵⁰ in which Judge Harold Greene issued a detailed opinion denying the Bush Administration's claim that it did not need prior congressional approval before launching the Persian Gulf war. But even Judge Greene's opinion was more hesitant than many remember. Despite its strong and important language, the challenge in *Dellums* was dismissed as unripe; it did not reach the merits and enjoin the Administration from waging an unauthorized war, no doubt because Judge Greene knew that such an injunction would have been reversed almost immediately on appeal.⁵¹ And this was a judge who had previously reorganized the telephone company and tried Admiral John Poindexter for his Iran-Contra activities, thus proving himself no shrinking violet in complex national security cases. Even looking at those few cases in which the courts have ruled against the President (the *Steel Seizure Case* or the

48. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (addressing the constitutionality of this mechanism).

49. H.R. 7, 104th Cong., 1st Sess. (1995).

50. 752 F. Supp. 1141 (D.D.C. 1990).

51. See Koh, *supra* note 12, at 251-55.

Nixon Tapes Case,⁵² for example), a surprising amount of their analysis is devoted to giving the President guidelines for how extremely he may act, without acting illegally.

My greatest fear is that the dominant game during the Dole-Gingrich era will become what I call "Find the Statute," or less colloquially, "The Hunt for Allegedly Delegated Prior Executive Authority." The classic example is the Iranian Hostages Crisis, in which the Carter Justice Department unearthed a hoary statute, which it dubbed "The Hostage Act," and sought to use as a blank check to justify all manner of executive reaction to the crisis.⁵³ In the game, the President faces a foreign policy crisis, but does not ask the legislature for authority, fearing that it will be withheld. Instead, his lawyers search the U.S. Code for preexisting statutes that they can claim already authorize the challenged activity. Congress will act affronted, and might even hold hearings to complain, but deep down, the legislators are secretly relieved that the President, not they, will bear public responsibility for the policy, leaving them free to criticize and dissemble. The courts will invoke justiciability doctrines to try to avoid hearing private challenges to such cases, and if forced to decide on the merits, will defer to executive discretion, citing such cases as *Dames & Moore v. Regan*,⁵⁴ *Regan v. Wald*,⁵⁵ or that perennial executive branch favorite, *United States v. Curtiss-Wright Export Corp.*⁵⁶

The first Clinton years have already seen three examples of this "find-the-statute" strategy. The first, inherited from the Bush Administration, was the claim that the Immigration and Nationality Act had implicitly authorized the extraterritorial seizure and return of Haitian refugees on the high seas, a claim later upheld by the courts.⁵⁷ The second was the 1994 Haiti invasion, which Assistant Attorney General Dellinger defended, in part, as authorized by a clearly more limited statute introduced the previous year by Senator Dole, one of the leading opponents of the Haitian action.⁵⁸ The third has been the Mexican peso bailout, and various other finger-in-the dike measures employed by Secretary of the Treasury Robert Rubin to keep the country from defaulting

52. *United States v. Nixon*, 418 U.S. 683 (1974).

53. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

54. 453 U.S. 654 (1981). For a devastating critique of the government's Hostage Act claims, see Abner J. Mikva & Gerald L. Neuman, *The Hostage Crisis and the "Hostage Act"*, 49 U. CHI. L. REV. 292 (1982).

55. 468 U.S. 222 (1984) (upholding President's authority, without statutory change, to restrict travel of U.S. citizens to Cuba).

56. 299 U.S. 304 (1936); see Koh, *supra* note 17, at 94 (noting that executive branch lawyers call this case "the 'Curtiss-Wright, so I'm right' cite").

57. See generally Koh, *supra* note 45.

58. See *Haiti Correspondence*, *supra* note 12.

on its external debt during periodic government shutdowns caused by interbranch deadlock over balancing the budget.⁵⁹

If this pattern continues, who will suffer? Like the victims of Vietnam sensitively highlighted in Ely's account, the most aggrieved will likely be those individuals adversely affected by these actions. Take, for example, the thousands of Cubans who fled by boat in the summer of 1994, who were interdicted and held on Guantanamo as a result of an abrupt policy shift by the Clinton Administration.⁶⁰ These individuals fled in reliance on more than thirty-five years of consistent executive and legislative condemnation of Castro's Cuba, coupled with an essentially open legislative invitation for Cuban refugees to come to the United States.⁶¹ Playing "Find The Statute," the executive branch reversed that policy nearly 180 degrees without the benefit of legislative debate, new legislative action, or open public discussion of the policy reversal, and was upheld in that reversal by the courts.⁶² Thousands of detainees were left stranded in an offshore limbo (until the Attorney General exercised her discretion to parole them in), without any specific interbranch discussion or agreement that their liberties should be so grievously restrained.

In sum, I share John Ely's commitment to legal process as a way to protect constitutionalism in foreign affairs and war powers. I also believe that that commitment to legal process can be defended against both political and substantive critiques. But after we have lost our innocence, how can we learn from experience? Will Congress and judges learn to face up to their constitutional duties, having gotten away with shirking them for so long? I suspect and fear that *Democracy and Distrust* may offer a more successful policy prescription for judicial action than *War and Responsibility*, if only because most judges—like most human beings—tend to act more readily on suspicion than on duty. In the end, the success of John Hart Ely's accountability project in war powers will depend on how well his book succeeds in reeducating lawyers, judges, and government officials about the need to face up to, and accept, their constitutional obligations.⁶³

59. For an analysis of the legal authorities relied on by the Treasury, see generally Russell Covey, *Adventures in the Zone of Twilight: Separated Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. — (forthcoming Feb. 1996).

60. See Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994) (reviewing history of these policies).

61. See Cuban Adjustment Act of 1966, 18 U.S.C. § 1255 (1990).

62. *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), cert. denied, 116 S. Ct. 299 (1995).

63. For a recent parallel effort at such a reeducation exercise, with respect to international law, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994).