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The Power Over War

Abraham D. Sofaer

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The Power Over War

ABRAHAM D. SOFAER*

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I. INTRODUCTION

I welcome the opportunity to participate in this Symposium, in honor of John Ely's book, *War and Responsibility*.¹ Not surprisingly, it is an important book, on an enduring subject. John Ely is a formidable scholar, who writes with vigor and grace. He brings deep moral convictions to the task. While this unquestionably affects his conclusions, his convictions are openly announced and give his effort purpose and meaning.

The *University of Miami Law Review* did not need to convene this symposium to bring attention to *War and Responsibility*. It has already generated a considerable literature.² While I hope that its recommendations are never implemented, I join John and the most fervent supporters of legislative power in urging that those who govern read the book. They will profit from the experience, and will perhaps avoid some of the more egregious failures of responsibility that he so dramatically documents.

Like John Ely, I have always believed that, under our Constitution, Congress, not the President, has the ultimate power over war.³ The

* George P. Shultz Distinguished Scholar and Senior Fellow, The Hoover Institution, Stanford University; Legal Adviser, U.S. Department of State, 1985-90.

1. JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

2. See, e.g., Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364 (1994); Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in An Era of Presidential Warmaking*, 80 VA. L. REV. 1723-1782 (1994); Sean D. Murphy, 88 AM. J. INT'L L. 843 (1994); Robert E. Paradise, *The Least Interested Branch*, 107 HARV. L. REV. 2117 (1994); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338 (1993).

3. See, e.g., Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, LAW & CONTEMP. PROBS. 12 (1976):

[O]ur early Presidents at no time asserted at least two claims heard frequently of late. The first is that the President may use whatever raw power he has — monetary, diplomatic and military — in the national interest. . . . The second is that the President's so-called inherent powers as Chief Executive and Commander in Chief do not merely authorize actions in the absence of legislative directions, but are

powers to declare war, raise taxes and control expenditures, ratify treaties, legislate, and to impeach, among others, confer upon Congress the capacity to prevent the President from commencing, or continuing, any form of military action. One would think that, from such a starting point, Ely and I would have ample common ground upon which to build a viable system for enabling Congress and the President to exercise their separate and collective responsibilities. That, however, is not the case.

For Ely, Congress not only possesses the power over war, it is duty-bound to exercise that power. Until it does so, the President has no power to use military force, Ely claims, other than in response to exigencies that preclude legislative action, and then only until Congress is able to convene. In my view, the President is not so powerless, nor the nation so helpless.

The difference between Ely's position and mine with regard to the Constitution's allocation of the war power is subtle but fundamental. Ely believes in the constitutional necessity of legislative approval for all wars, large and small, yet concedes that Congress often permits the President to act independently. This inevitably leads Ely to embrace the peculiar notion that Congress must somehow compel itself to use its own powers, or must order the courts to come to its rescue. Given what he regards as a sorry record of congressional failure in this respect, despite the War Powers Resolution,⁴ Ely calls for judicial intervention. Courts would pass on the legality of executive decisions to involve the nation in hostilities. Ely is hopeful that either the President would comply with judicial decisions, or Congress would be embarrassed into action. I believe such efforts are not only futile, but harmful to our national interests.

Nothing in the Constitution or its history requires the nation to devise such artificial and rigid procedures for the regulation of matters as complex and risky as the use of force. The scheme devised by the

beyond legislative control. No early President suggested that Congress was significantly limited in the control it potentially had over assigned executive powers.

Id. at 36-37. Contrary to the suggestion casually advanced by Professor Bush, *supra* note 2, at 1732, I maintained this position as Legal Adviser at the State Department. In my testimony during the hearings on war powers before the Senate's Special Subcommittee on War Powers, I noted that "[n]o President has been able for long to exercise exaggerated claims of power to act in the face of legislative constraints. As Madison stated in arguing for a balance among the branches: 'In republican government, the legislative authority necessarily predominates'." *The War Powers After 200 Years* Congress and the President at a Constitutional Impasse: Hearings Before the Special Subcommittee on War Powers of the Senate Committee on Foreign Relations, 100th Cong., 2d Sess. 1046, 1049 (1988) (statement of Abraham D. Sofaer). Professor Bush's reference to my analysis of the legality of the intervention into Panama is inapposite. Bush, *supra* note 2, at 1732 n.50. Congress, in that instance, did nothing to suggest that the President should not take the action he decided was necessary and legally justified.

4. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1991).

Framers of the Constitution enables the President in certain situations to use force without prior legislative approval, but subject to Congress' ultimate control. Over two hundred years of practice have led to understandings between the branches concerning the use of force that have worked reasonably well. Significant changes can and should be made, both to ensure that Congress always receives the information it needs to use its authority effectively, and to prevent secret uses of force. Ely and others who share his view, however, are driven to more extreme principles. They ironically believe their views must be implemented to save the Constitution and the nation from practices which at the very least have not prevented America from becoming the greatest and most enlightened nation in human history. Moreover, if Ely has his wish and the Supreme Court pronounces definitively on the President's authority to use force, the far greater weight that the Court will give to the nation's practices and to traditional notions of authorization and responsibility than Ely, may well provide him with as great a surprise as the Court provided those who insisted that the President has no "executive privilege."

II. THE ORIGINAL UNDERSTANDING

My study of the original understanding of the Constitution as it relates to war and foreign affairs led me to several conclusions.⁵ Congress clearly has the upper hand with regard to war, as it controls the means of warmaking, and can punish Presidents for disregarding its instructions. On the other hand, the President has substantial powers related to war that the Constitution enables the President to use independently. The President's powers over the conduct of foreign affairs, for example, can lead the nation into conflicts, and can even cause war. Similarly, the President's power as Commander in Chief encompasses the power to utilize the troops, ships, planes, and missiles supplied by Congress to defend the territory, armed forces, citizens, and commerce of the United States, even though such actions involve the use of force and can lead to broader conflict amounting to war.

Nothing in the record of the Constitution's adoption justifies Ely's view that the President's powers cannot be exercised if they involve the use of force, until and unless Congress authorizes such action. According to Ely "[T]he power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not—most

5. See generally ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* (1976).

weren't, even then—had to be legislatively authorized.”⁶ In reaching this position, he relies heavily on debate excerpts and related literature which evidence an intent by the Framers to fashion a system that made going to war difficult, and subjected executive decisions in this regard to legislative control. However, neither the decision to clog the road to combat, nor the determination to design a system that forces legislative review of war-related issues, establishes an intent to require the legislature to exercise the power conferred, to interfere with a decision by the President to use force, or to reach a conclusion on these issues in any respect.

Ely notes the change in the Constitution's draft, substituting Congress's power to “make” war with the power to “declare” war. He concludes that the change was made only in order to make clear that the President controls the conduct of war, and to enable the President to repel sudden attacks. How can he be so sure the change was intended to do no more? What, for example, would Madison or Hamilton have said if asked whether the President had authority to protect an American vessel on the high seas, or to come to the rescue of American citizens or military personnel in a foreign state that was not affording them protection? Must the sudden attack be on U.S. territory? These questions should not be viewed in the abstract. Since they necessarily assume that Congress has already provided the nation with the means for military actions, an examination of the historical record often makes quite clear the reasons Congress was providing military resources. Are Presidents to be precluded from relying on evidence which is used by courts and agencies to ascertain legislative intent? If so, on what basis?

Ely recognizes that the President's power to defend the nation is not limited to U.S. territory. He grants that the power to repel sudden attacks extends functionally to other situations of clear danger, where prior authorization cannot be awaited. He is also willing to find legislative authorization in appropriations legislation and other acts, where the program approved is conspicuous, and presumably, therefore, where congressional approval of a particular policy involving the use of force is explicit.

It hardly surprises me that Ely reaches these conclusions. He is a scholar of the highest order, so I would expect no less. What I find surprising is how casually he concludes that an authorization for the use of force must specify whom we go to war against.⁷ Why? What evidence requires such a conclusion? Suppose Congress authorized the President to defend our merchant vessels on the high seas. Would this

6. ELY, *supra* note 1, at 3 (citations omitted).

7. *Id.* at 26.

be insufficient authority to defend attacks by the vessels of any state not specified? What if Congress authorized military action against Country A, and Country B joined the fight on A's side. Would the President not have the power, normally assumed under international law, to take such actions against Country B necessary to achieve the objectives authorized with regard to Country A?

More generally, I am stunned by Ely's peremptory dismissal of the proposition that the President was expected to exercise the nation's rights under international law. He finds this concept unacceptably loose, and claims it has no serious support in the Framers' thinking, noting that self-defense is used to justify virtually every war today.⁸ One would assume, however, that, since the Framers were of the same generation as our early Justices, they were educated to believe that international law was part of the law of the land, and that every nation could be expected to exercise its rights under that law, through its executive branch.⁹ Moreover, Congress was given explicit power over the meaning of international law, and nothing would suggest that Congress lacks authority to order the President either to disregard or forego some right of the nation under international law.¹⁰ In the absence of any such direction, the Framers would have expected the President to exercise the nation's international rights throughout the world when circumstances arose that called for such action.¹¹ The very notion that the President should be permitted to respond to sudden attacks is rooted in the principle of self-defense. Our Framers were not merely delineating the lines of authority among the branches, they were setting those lines on the basis of assumptions derived from the law of nations.

Finally, my study of *The Federalist Papers* and their sources convinced me that the Framers attempted, not only to separate powers, but also to mix them.¹² Overlapping authority was provided in many critical areas of government, in order to give each branch the capacity to act independently and defend its own powers. The President in particular

8. *Id.* at 144-45 n.31 (citing GEOFFERY PERRET, *A COUNTRY MADE BY WAR: FROM THE REVOLUTION TO VIETNAM—THE STORY OF AMERICA'S RISE TO POWER* 150 (1989)).

9. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 221-22 (1972) (discussing relevant principles and authorities, including *The Paquete Habana*, 175 U.S. 677 (1900)).

10. U.S. Const. art. I, § 8 ("The Congress shall have power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .").

11. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* at 320 (Sutherland, J.)).

12. SOFAER, *supra* note 5, at 41-43.

was to have the capacity for both independence and vigor.¹³ So I am not convinced that the Framers intended any single, neat pattern for the exercise of war powers. The danger of unpopular wars, the need to prevent tyranny by either branch, and the importance of permitting due deliberation were all objectives that the Framers sought to secure. But all these ends, including the need to have an effective and independent leader, were attainable by giving Congress the power to check and control war, without necessarily requiring a formal determination by Congress in advance of each instance force is used.

III. EARLY PRACTICE

The manner in which Ely treats early practice reflects his conclusion that the Constitution demands prior legislative approval for every use of force. This premise leads him to regard the history of unilateral executive actions as evidence that the original demand of the Constitution were being ignored. Naturally, he concludes "that past violations are only that—violations—and cannot change the meaning of the Constitution."¹⁴ He admits that some presidents did play a little fast and loose with congressional prerogatives,¹⁵ but claims that they only occasionally failed to comply with the constitutional plan, and that they obscured their conduct rather than acting openly. He belittles the value of the historical evidence of over two hundred unilaterally implemented military incidents, relying in particular upon the conclusion reached by many scholars, including myself, that early presidents did not claim an inherent, independent power to use force. Not until Truman's Secretary of State, Dean Acheson, was such a claim clearly advanced.¹⁶

Ely's appraisal of early practice misses the point at issue. For those who agree with his general conclusion, that Congress has the power to control war, irrespective of the sweeping claims of Dean Acheson and some others, early practice *is* relevant to determine whether Ely's reading of the Constitution is in fact supported by the words and conduct of our early leaders. Did Congress in those instructive times exercise its authority over war in every instance, as Ely contends was intended? Or

13. *Id.* at 45-47. Hamilton called for energy in the Executive and independence of judgment, even of the public, and certainly of the Congress. *THE FEDERALIST* NOS. 69-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "[H]owever inclined we might be to insist upon an unbounded complaisance in the executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature." *THE FEDERALIST* NO. 71 at 433. When the people either disagreed with the legislature or were neutral, Hamilton wrote, "it is certainly desirable that the executive should be in a situation to dare to act his own opinion with vigor and decision." *Id.*

14. ELY, *supra* note 1, at 9.

15. *Id.* at 10.

16. *Id.* at 10-11.

did Congress exercise its authority as it saw fit, allowing the Executive to lead in foreign and military affairs, with varying forms and degrees of guidance and support? Did early Presidents act as though they needed congressional approval for all exercises of force, or did they act as though they possessed the power to exercise the nation's international rights and fulfill its duties, subject to congressional guidance and control? Did those Congresses and Presidents act consistently with Ely's claim that prior legislative approval had to be specifically framed, even naming in advance the particular nation against which Congress was authorizing force to be used? Or was authority to use force conferred in any manner that Congress saw fit, or found by Presidents to exist regardless of whether Congress had explicitly approved the use of force?

The record of early Constitutional practice fails to support Ely's views on these key questions. The pattern of executive initiative and responsibility in the areas of foreign and military affairs supports the view that the first few Presidents, though subject to Congress' ultimate control, acted without specific, prior legislative approval on matters involving force. Nor did Congress behave as Ely's thesis would have predicted. Congress did not fault Presidents for acting unilaterally, but rather frequently delegated broad authority to use force, in some instances with great specificity but in other instances in the most general terms. The relevant instances are few, but instructive.

The most significant foreign policy decision made during George Washington's presidency was to remain neutral in the war between Britain and France. This was a legally complex and politically hazardous question, because the United States had treaties with both nations which required the United States to engage in conduct that could have drawn it into the war.¹⁷ Washington and his Cabinet (including Thomas Jefferson) unanimously decided to remain neutral, and to announce that decision without calling Congress back into session.¹⁸ Washington also enforced the proclamation through arrests, seizures and trials. In the famous *Pacificus*—*Helvidius* Debate, Alexander Hamilton and James Madison specifically debated whether only Congress could decide every question of war and peace. Madison argued that the President should have convened Congress to decide the nation's course, because "only Congress may decide whether war shall be declared, or whether public

17. See SOFAER, *supra* note 5, at 104-06.

18. Among the 13 questions posed by Washington to his Cabinet was whether it was necessary or advisable to call Congress back into session. Despite earlier statements to Madison, Jefferson went along with the unanimous view that Congress should not be called. Two months later, he argued that Congress should be convened a month earlier than scheduled, but by that time the Administration's neutrality policy had been fully implemented. *Id.* at 104.

stipulations require it"¹⁹ Hamilton was willing to assume that Congress' power to declare war includes the right of judging, whether the nation is or is not under obligations to make war.²⁰ But he argued that this did not preclude the President's exercise of concurrent authority, including the power to interpret treaties and the executive power in general.²¹

Hamilton's view prevailed. Washington acted in accordance with it, and Congress approved the President's determination.²² In an earlier incident, after Britain suspended relations with Spain in 1790, Washington had asked his Cabinet what to do if the British impermissibly marched across U.S. territory to attack Spanish forces. Both Henry Knox and Hamilton advised that, in such event, Congress should be immediately convened in order to take appropriate measures. But both also advised the President that he could unilaterally determine whether to adopt a policy of neutrality and whether to grant or deny a British request for permission to cross U.S. territory, decisions which could well have caused the crisis they felt would require Congress to be convened.²³

More generally, Washington's presidency was important for the pattern it established for governing the nation. The Executive took the lead in planning the financial, foreign, and military affairs of the nation.²⁴ Congress very consciously allowed this to occur. Washington asserted, and Congress accepted, a privilege to withhold information when he believed its disclosure would be contrary to the public interest.²⁵ Congress also allowed the President to control his Cabinet officers through the power of removal.²⁶

Washington sought to keep the new nation out of foreign conflicts. However, he urged Congress to expand the regular Army and build a Navy to defend American interests, because he believed peace could be maintained only through strength. Despite fears expressed by some Members of Congress that a standing army or navy would inevitably

19. 6 WRITINGS OF JAMES MADISON 153 (G. Hunt, ed. 1901).

20. 7 WORKS OF ALEXANDER HAMILTON 76-83 (J. Hamilton, ed. 1850-51).

21. *Id.* at 84-85.

22. SOFAER, *supra* note 5, at 116. Washington regarded Congress as empowered to "correct, improve, or enforce" the plans he had put into place, but that did not cause him either to call Congress into session or to remain inactive. He was cautious, however, always attempting to preserve the existing legal state of things. *Id.*

23. *Id.* at 101-03.

24. This was "a period of the greatest importance, as having fixed upon the federal government that character and those methods of administration which it has ever since retained." *Id.* at 63 (quoting 4 RICHARD HILDRETH, THE HISTORY OF THE UNITED STATES viii (1851)).

25. SOFAER, *supra* note 5, at 77-83, 88.

26. *Id.* at 63-65.

lead to war, Congress expanded the Army, primarily to deal with Indian tribes, and then developed the Navy in order to defend the coast and commerce of the United States. The debates and statutes by which this process occurred, and those instances in which Washington authorized or used force, reflect the President's capacity for unilateral action.

In general, Washington relied on legislative grants of authority in using force, and took care to avoid drawing the nation into war. But the statutes did not meet the rigid criteria suggested by Ely, and Washington did take risks without prior legislative authorization. For example, Washington used force against the Wabash Indians pursuant to a statute that provided forces and authorized the call-up of militia to protect frontier inhabitants from the hostile incursions of Indians.²⁷ This statute, along with the requests and debates that accompanied it, and the appropriations that followed its adoption, made clear that Congress approved the military engagements Washington undertook against the Wabash. But the law was written in general terms, and would have applied to any Indian incursion. Furthermore, despite the law's defensive cast, Washington treated it as permitting offensive actions. He authorized General Anthony Wayne to dislodge a British force at Fort Miamis, if such action became necessary, even though such an action was not explicitly authorized by Congress and could have drawn the United States into war with Britain.²⁸

The Administration of John Adams established the legitimacy of undeclared war. Congress authorized a naval war against France, but it did so by law, rather than by formal declaration. The action was therefore called the "Quasi-War," and its legality was explicitly upheld by the Supreme Court.²⁹ While Ely properly gives no weight to the baseless contention that Congress may only authorize war through a declaration, he reads too much into the early Supreme Court cases concerning the war against France, and erroneously concludes that they insisted on congressional authorization without pausing to evaluate the size of the conflict.³⁰ Those cases did not insist upon congressional authorization. They did restrict the seizure of enemy vessels to the grounds upon which such seizures had been specifically allowed, but they did not deal with the President's authority in the absence of any legislative instruction.³¹

27. *Id.* at 120.

28. *Id.* 125-27. General Wayne defeated the Indians without needing to attack the British. He threatened the British nonetheless, no doubt because the British had no proper basis for being there, and because they had assisted the Indians.

29. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

30. ELY, *supra* note 1, at 139 n.4.

31. Thus, in relying on *Bas v. Tingy*, Ely quotes language in which the Court merely states that even undeclared conflicts can be public wars. In both *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1,

More probative of the Framers' views in this regard were the debates and actions of Congress respecting the control of the frigates and other vessels Congress provided during Adams's Presidency.³² Congressman Albert Gallatin's efforts notwithstanding, Congress provided the President with the frigates without any restriction on their use.³³ Many legislators assumed that the President could and would use the vessels in a manner consistent with international law, and argued that he should be left free to do so, so long as he did not change the state of things.³⁴ They assumed that acts consistent with international law were proper, even if war resulted, but that such acts as reprisals and captures would be improper without legislative approval.³⁵ When Adams issued the naval orders to his first American fleet of warships, he limited their commanders' authority to convoying and defense of commerce on the high seas, but the vessels were allowed to use force for those purposes, and thus, could have caused war.³⁶ Further, after the Quasi-War, Adams authorized the frigate *George Washington* to convoy American trade in the Mediterranean, and to protect American vessels and citizens from the hostile acts of any of the Barbary powers.³⁷

An important illustration of the President's power to cause war occurred in 1798. A British naval squadron, patrolling in the Carribean, stopped and boarded the American public vessel *Baltimore*, commanded by Captain Isaac Phillips. The British took fifty-five men off the *Baltimore*, and impressed five of them. This unprecedented humiliation of an American public vessel led Adams to strip Phillips of his command and to discharge him from the Navy. He also ordered the Secretary of the Navy to instruct all naval commanders as follows:

[O]n no pretense whatever, [will] you permit the public Vessel of

18 (1801), and *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804), the Court determined whether specific laws had authorized, or implicitly forbidden, seizures of vessels. In *Little*, in fact, Chief Justice Marshall wrote that the President might have been able to authorize seizure of the vessel involved, given the then existing state of things between the United States and France, even had Congress not adopted the legislation at issue. 6 U.S. at 177-78.

32. See SOFAER, *supra* note 5, at 147-54.

33. Gallatin successfully sought to limit the President's authority to use certain small vessels to U.S. coastal waters but failed to have Congress limit authority to use the frigates in such waters, or to prohibit convoying, even though all recognized that war might result. *Id.*

34. *Id.* at 153.

35. *Id.* at 153-54.

36. Secretary of War McHenry sought advice from Hamilton as to the instructions that should be given. Hamilton advised caution, to avoid any claim that the President had gone beyond his authority, but suggested, without knowing what the statutes provided, that the President could Constitutionally "employ the ships as convoys, with authority to *repel* force with *force* (but not to capture) and to repress hostilities within our waters . . ." *Id.* at 155. McHenry read the relevant statutes more narrowly than was intended, perhaps to encourage Congress to grant broader authority, which soon thereafter occurred. *Id.* at 154-58.

37. *Id.* at 161.

War under your command, to be detained, or searched. . . . If force should be exerted to compel your Submission, you are to resist that force to the utmost of your power — and when overpowered by superior force, you are to Strike your flag and thus yield your Vessel as well as your Men — but never your men without your Vessel.³⁸

This instruction required commanders of public vessels to cause an act of war rather than permit the nation to be humiliated. A policy of honor and valor made war a possible consequence of the exercise of American commanders' rights under international law.

Jefferson and his Republican Party promised changes in the manner in which the government was being conducted. Congress should control more, they said, and delegate less. More authority should be exercised by the States. The national government should spend less, especially on the Army and Navy. Virtually nothing changed, however. The pattern of executive-congressional relations that developed under the Federalists continued under Jefferson and his successors. In fact, in some areas, Jefferson, Madison, and Monroe all pushed the limits of executive power to new lengths. While Jefferson, and to an extent his successors, occasionally claimed to adhere to a different view of the Presidency than Washington and Adams, he fully maintained in practice the Federalist conception of executive power.³⁹

Presidential use of military force increased substantially under Jefferson and his Republican successors. In general, while Jefferson used threats and arguments with great skill and liberality, he avoided measures that would have committed the nation to war.⁴⁰ His principal military engagement was against Tripoli in 1801. He would have preferred to dismantle the Navy, but when he heard of the aggressive activities of some of the Barbary powers, he ordered Commodore Richard Dale's naval squadron to the Mediterranean. In doing so, Jefferson relied on no specific delegation of authority to use force. Rather, he relied on a statute which provided that certain vessels be kept in service in times of peace, and on the obvious fact that Congress had provided oceangoing, public vessels for the purpose of protecting American commerce from what American leaders regarded as piratical depredations.⁴¹ It was during this expedition that Lieutenant Andrew Sterrett, commanding the twelve gun schooner *Enterprise*, encountered and defeated a fourteen

38. *Id.* at 159.

39. LEONARD D. WHITE, *THE JEFFERSONIANS* 35 (1951).

40. Thus, for example, when the American ship *Chesapeake* was attacked by the British vessel *Leopard*, Jefferson issued a proclamation rather than taking any military action. He did, however, purchase equipment and issued orders for the protection of U.S. harbors, without legislative authority. SOFAER, *supra* note 5, at 198-99.

41. *Id.* at 210.

gun Tripolitan cruiser, stripped it of masts and guns, and set it adrift. In a famous message to Congress Jefferson claimed that Sterrett had released the Tripolitan vessel because, under the Constitution, he could not go beyond the line of defense. In fact, Jefferson had authorized the seizure and destruction of vessels that attacked the U.S. fleet, and Sterrett had released the Tripolitan vessel because he was on his way to get water at Malta and was instructed to seize such vessels only on his way back. Jefferson's Cabinet felt that America was authorized to act offensively if attacked by vessels of a State that declared or made war upon the United States. Even Gallatin agreed with Hamilton in this regard. Jefferson's statement was therefore factually erroneous and legally baseless. He later authorized the seizure of the armed vessels of any Barbary state which declared or made war upon the United States.⁴²

The practices of Madison and Monroe went beyond those of their predecessors with regard to the use of unilateral executive authority. Madison used his power over information and the discretion delegated to him by Congress in a manner that may well have caused the War of 1812. He deliberately and secretly withheld from Congress letters that tended to prove that a French decree, purporting to end the seizure of neutral vessels, was a phony, designed to pressure the British into publishing a similar decree. The British offered to repeal their decrees if the French decree could be proved genuine, but Madison rejected that offer, and recommended a declaration of war, which Congress issued despite widespread suspicion regarding the French decree. Soon thereafter, Madison received word from his Minister to France, that while the French decree was in fact fraudulent, the British had nonetheless revoked their decrees. Madison again chose to withhold this news from Congress, and he caused the war with Britain to continue by insisting that the British would have to stop the practice of impressing American seamen as an additional condition for peace.⁴³

Madison and Monroe conducted several secret initiatives designed to win the territories of West and East Florida from Spain. Jefferson and Madison had claimed that West Florida, from Baton Rouge past Mobile, became U.S. territory as part of the Louisiana Purchase. Congress arguably approved this claim when it authorized the President to take control of all territories ceded by France in the Purchase, and provided

42. *Id.* at 210-22. Jefferson's motive for misstating the facts to Congress is unclear, but the effect of his message was to get Congress to bestow upon the President sweeping authority for military actions against Tripoli. *Id.* at 214-15.

43. *Id.* at 279-91. The Supreme Court made clear that Congress could choose to delegate discretion to the President that enabled him to decide, on the basis of an erroneous but unreviewable determination, that a law would become effective against a particular nation. See *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813).

that the President, whenever he shall deem it expedient, could establish a customs district in Mobile.⁴⁴ When the Spanish Government expressed concern over this legislation, Madison assured them that the Administration would not extend U.S. control beyond the acknowledged limits of the United States, without the approval of the Spanish government.⁴⁵ Both Jefferson and Madison were determined, however, to bring the Floridas (and if possible other Spanish territories) into the United States. Soon after becoming President, Madison worked with Governor Claiborne of the Orleans Territory to encourage residents of the disputed areas of West Florida to form a convention of delegates and request a takeover by the United States. This plan very quickly succeeded. In August 1810, Madison remarked to Gallatin that he saw many legal difficulties in taking control of West Florida without obtaining further authority from Congress. Gallatin saw no legal difficulty in inferring such authority from existing legislation, and persuaded Madison to act without further legislative consultation. Several Members of Congress, complaining that Madison had, in effect, made war without Congress' approval, cited his own initial construction of the laws on which he now relied. But Henry Clay and others argued, not only that the President could use force to take control of West Florida pursuant to the Mobile Customs Act, but that "he would have violated that provision which requires him to see that the laws are faithfully executed, if he had longer forbore to act"⁴⁶ The Supreme Court refused to question the conclusion reached by both Congress and the President.⁴⁷

Madison's actions concerning West Florida can be justified on Hamilton's, or perhaps even Ely's, views of Presidential powers. The United States had no similar claim to East Florida, but that did not prevent both Madison and Monroe from seeking to acquire control of that area as well. When the Spanish Governor of East Florida suggested that he might turn it over to the United States, Madison asked for and received a confidential resolution from Congress, underscoring America's concern that any part of the Spanish Provinces adjoining the States might pass from Spain to any other foreign Power.⁴⁸ This was promptly followed by the secret No-Transfer Act, authorizing the President to take possession of East Florida should any foreign power attempt to take control, or if it was surrendered by the local authority.⁴⁹ Confi-

44. See Act of Oct. 31, 1803, ch. 1, 2 Stat. 245, and Act of Feb. 24, 1804, ch. 13, 2 Stat. 251, discussed in SOFAER, *supra* note 5, at 292.

45. SOFAER, *supra* note 5, at 292.

46. *Id.* at 300.

47. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 274, 308-09 (1829).

48. SOFAER, *supra* note 5, at 305.

49. *Id.* at 305-06.

dential agents, appointed by Madison, worked with and supplied local patriots, who managed to take control of Amelia Island. Protests by the Spanish government and the War of 1812 caused Madison to withdraw from the project,⁵⁰ but the United States continued to hold the areas taken, based on the instructions issued by Secretary of State Monroe that restoration of the areas should occur only when it could be accomplished without any harm befalling the individuals who had cooperated with the United States in its earlier effort to gain control. Monroe ordered his representative, Governor David B. Mitchell of Georgia, to retain control of the area, in the hope that Congress would authorize permanent possession. When Congress refused such authority in July 1812, Monroe not only permitted Mitchell to continue to control the area, he treated the enhanced threat from the British as a basis under the No-Transfer Act to increase the U.S. forces available to maintain the occupation. Congress once again refused to authorize the takeover, however, and Monroe finally acceded and ordered a withdrawal.⁵¹

Monroe eventually succeeded in acquiring all of Spain's Florida territory through a combination of armed intervention and diplomacy. In 1817, a group of adventurers took control of Amelia Island, a part of Spanish East Florida. When the island became a center for piracy and the slave trade, Monroe authorized its occupation by force, if necessary. Some Members of Congress claimed such an action would be illegal, but others, including a House committee appointed to look into the matter, concluded the President's order was justified by a law prohibiting the importation of slaves, and also by the No-Transfer Act, on the theory that the adventurers were attempting to set up a foreign government. When U.S. forces eventually occupied the island, Secretary of State John Quincy Adams convinced the President to retain possession. The Spanish protested the seizure, but Adams justified it on the ground that Spain had failed to fulfill its treaty and international law obligation to maintain authority on the island, asserting "[w]e had not . . . committed any hostility against her. We had been obliged, in our defence, to take the place in defence of our laws, of our commerce, and that of the nations at peace with us, Spain included."⁵² Adams and Secretary of War John C. Calhoun correctly predicted that retaining the island would place pressure on Spain to speed up the process of giving up the remainder of Florida through negotiation. Upon learning of the U.S. occupation, Spain's Foreign Minister wrote to the Spanish Minister of War that

50. *Id.* at 306-17.

51. *Id.* at 317-26. The war with Britain gave General Andrew Jackson reason to take Pensacola; although not expressly approved in advance, Madison upheld Jackson's claim that violations of Spanish neutrality by the British justified the incursion. *Id.* at 326-36.

52. *Id.* at 340 (citation omitted).

"the difficult negotiation based on the cession of the Florida will be useless, as we shall not have them to cede."⁵³

The pressure increased when Calhoun authorized General Edmund Gaines to attack the Seminole Indians in Spanish Florida, in response to their attacks on Americans. Calhoun authorized Gaines to cross into Florida and attack, if necessary, unless the Seminoles should shelter themselves under a Spanish post, in which case he was immediately to notify the War Department.⁵⁴ Ten days later, Calhoun turned the task of suppressing the Seminoles over to Andrew Jackson, authorizing him to call on the Governors of the adjacent States for such militia as he required, and to adopt the measures necessary to succeed. The President, from considerations of humanity, desired to end all settled hostilities. While Jackson was aware of the limitation in Gaines' orders concerning attacks on Spanish posts, that limitation was not repeated in the orders Calhoun issued to Jackson.⁵⁵

Meanwhile, Jackson confidentially advised Monroe of his willingness to take all of Florida and hold it as an indemnity for Spain's failures. When he received word of his new command and assembled a force of volunteers, Jackson advised Calhoun of his intention to seize the Spanish fort at St. Marks. "The Spanish Government is bound by treaty to keep her Indians at peace with us. They have acknowledged their incompetency to do this, and are consequently bound, by the law of nations, to yield us all facilities to reduce them."⁵⁶ Jackson proceeded to take, not only St. Marks, but Pensacola as well, which he claimed represented another Indian threat. While Monroe supported Jackson's actions as justified at his discretion as a field commander acting in self-defense, the President conceded they were unauthorized and that therefore the Spanish forts would have to be returned. In fact, only Pensacola was returned, and only after Spain agreed to give up all the Floridas and any claim it had to the Columbia River Basin.⁵⁷

A long and important Congressional debate followed these events. The House Committee on Military Affairs proposed a resolution disapproving of Jackson's execution of two Englishmen he had tried before a military court. Congressman Thomas Cobb broadened the proposed condemnation to include resolutions disapproving Jackson's seizures of Spanish posts as contrary to orders and in violation of the Constitution. Cobb also called for legislation to prohibit the U.S. Army from entering

53. *Id.* at 341 (citation omitted).

54. *Id.* at 342.

55. *Id.* at 343.

56. *Id.* at 344 (citation omitted).

57. *Id.* at 344-57.

"into any foreign territory, without the previous authorization of Congress, except it be in the case of fresh pursuit of a defeated enemy of the United States, taking refuge within such foreign territory."⁵⁸ The classic arguments concerning the meaning of the power to declare war were made on both sides of the issue, including the argument that Congress had authorized the actions in Florida by providing the funds to pay the militia.⁵⁹ Henry Clay and others vehemently attacked the notion that the power to declare war had no application to military actions short of formal war, and argued that no basis for a self-defense argument had ever been established.⁶⁰

After one month of debate—highly sophisticated even by present standards—the House overwhelmingly rejected every effort to criticize or condemn the Administration's conduct. A Senate committee investigation had condemned both Gaines and Jackson for exceeding their authority by raising volunteers instead of militia, and concluded that Jackson's overall conduct had an unjustifiable tendency to involve the Nation in a war without the people's consent. The Senate, however, took no action on the report and on the same day it was presented voted advice and consent to the treaty with Spain. "Jackson was not to be condemned for conduct that had, in [John Quincy] Adams's words, 'been among the most immediate and prominent causes that produced' a treaty the nation had so earnestly sought."⁶¹

A final subject worth examining for the purpose of evaluating early practice concerning the use of force is the suppression of piracy. Piracy and privateering led Congress to adopt the Piracy Act of March 3, 1819,⁶² which authorized the President to employ armed public vessels to protect merchant shipping "from piratical aggressions and depreda-

58. *Id.* at 359 (citation omitted).

59. *Id.* at 360. Representative Alexander Smyth of Virginia broadly argued that the President could authorize military actions short of war:

The power to declare war is a power to announce regular war, or war in form, against another Power. But it never was intended, by reserving this power to Congress, to take from the President the power to do any act necessary to preserve the nation's rights, and which does not put the nation into a state of war with another Power.

Id. at 359 (citation omitted).

60. Congressman Henry R. Storrs of New York rejected the argument that the President could enforce the Nation's treaty rights:

If the treaty had been violated, the Executive possessed no authority to enforce our rights by arms. It is the exertion of national force for the redress of wrong or the preservation of right, which constitutes the precise definition of war, and the Congress alone was vested with the authority to declare it.

Id. at 361 (citation omitted).

61. *Id.* at 363-64 (citation omitted).

62. Act of March 3, 1819, ch. 77, 3 Stat. 510.

tions," and to capture any ship which committed a "piratical aggression."⁶³ Captains of commercial American ships were empowered to defend their vessels from piratical acts and capture any offending ship, other than a public armed vessel of a nation in amity with the United States.⁶⁴ This law effectively allowed the President to treat as piratical those privateers armed with commissions from various countries, which were essentially permits for piracy. It did not specify the privateers of any specific nation as being subject to seizure. President Monroe and his Cabinet discussed these ambiguities, and issued instructions authorizing commanders to seize and bring into port for adjudication any ship suspected of piracy without inquiring as to what flag or commission it had acted under. Ships sent to enforce this policy made several captures, including a notorious Spanish privateer, *The Pancheta*. Even though the Spanish captain admitted looting an American merchantman, Calhoun opposed the seizure, questioning whether a Spanish privateer bearing a lawful commission could be considered piratical. Adams supported the seizure, noting that the Act authorized the President to instruct commanders to capture and send into port any armed vessel "which shall have attempted or committed any piratical aggression . . . upon any vessel of the United States . . . or upon any other vessel"⁶⁵ Monroe agreed with Adams.

Continued depredations led Monroe to suggest that U.S. commanders should remonstrate against Spain's blockade of South American ports, the basis upon which commissions were being issued to privateers. Adams argued for a more forceful measure: specifically, convoying American merchant ships to and from all such ports. Calhoun protested that to resist the search would be war, and questioned the power of the Executive to give such instructions. Adams replied that the issue was settled during the Tripolitan War, when U.S. public vessels authorized to convoy defended themselves and the convoyed vessels. Calhoun suggested that the President authorize only the merchant vessels to resist searches of themselves, but Monroe sided with Adams, who argued: "If we could instruct our officer to give convoy at all, we cannot allow him to submit to the search by foreigners of a vessel under his charge; for it is placing our officer and the nation itself in an attitude of inferiority and humiliation."⁶⁶

Congress was prepared to go beyond authorizing convoys. Responding to Monroe's request for prompt and decisive measures,

63. *Id.* at 511, 513.

64. See SOFAER, *supra* note 5, at 366.

65. Act of March 3, 1819, ch. 77, 3 Stat. 513.

66. SOFAER, *supra* note 5, at 369.

including sending vessels capable of pursuing pirates into shallow waters, the House authorized the President "to purchase or construct a sufficient number of vessels . . . for the purpose of repressing piracy, and of affording effectual protection to the citizens and commerce of the United States in the Gulf of Mexico, and the seas and territories adjacent."⁶⁷ One Member objected that the phrase "the seas and territories adjacent," would enable commanders to make war on Spain. But House supporters made clear that the language was intended only to authorize pursuit of pirates as authorized by the law of nations, not to seek them out in foreign territory. When the Senate quickly followed suit, Monroe chose the aggressive Captain David Porter to command the new force. The instructions issued to Porter authorized landings in cooperation with local authority, where it was felt to exist, and much broader power in unsettled areas, so long as he did not act against specific orders of the local government. For two years Porter patrolled and convoyed around Cuba, capturing and destroying many vessels and conducting at least four landings, only one of which was in hot pursuit. Adams dismissed protests filed by Spain, citing its failure to suppress the pirates.⁶⁸

The Administration sought broader authority to pursue pirates to settled and unsettled parts of the islands, as well as to impose a blockade. The House refused to permit a blockade, which could have led to war with the British or French, but authorized landings on Cuba, or any other of the Spanish islands when necessary to capture pirates. The Senate, however, deleted any reference to an authority to pursue pirates, with Administration supporters arguing that no need existed for granting such authority, since the President had it already by the law of nations. All references to the purpose for which the new vessels were provided, and the areas in which piracy was to be suppressed, were deleted as well. If the right to pursue exists, Senator John Forsyth argued, "it exists in relation to all other places," not just Puerto Rico and Cuba.⁶⁹ These changes clearly support the premise that the President would be free to determine the use of the vessels, and the conditions for landings, based on the understandings that had been developed between the President and Congress, consistent with the law of nations.

In summary, Ely correctly concludes that early practice lends no support to the notion that Presidents are free to disregard laws that restrict their use of force. At no point during the first forty years of activity under the Constitution, did a President or any other important

67. *Id.* at 369 (citation omitted).

68. *Id.* at 369-72. Porter went too far when he landed in Puerto Rico to demand an apology for the manner in which one of his officers had been treated. He was convicted by court martial for this behavior. *Id.* at 373.

69. *Id.* at 375-76.

participant claim that Presidents could exercise force independently of congressional control. In fact, Congress demonstrated its capacity to control the President's use of force by delineating how and where force could be used during the Quasi-War with France, and by denying Monroe authority to use force to seize East Florida from Spain.

On the other hand, Congress at no point claimed the exclusive authority to permit or cause the use of force, and Congress did not uniformly authorize the use of force in any specific manner. Rather, Congress seems to have accepted the fact that Presidents possess concurrent authority to act in ways that could cause war, and may properly use force for purposes consistent with international law. This is true at least where a clear consensus existed with regard to the propriety of the activities involved, such as protecting American nationals from Indians, or protecting American vessels from piratical activities. Congress, at times, delegated authority to Presidents to use force by general terms, or simply by providing the means for the use of force in a context that clearly justified the President's inference that the use of those means was contemplated. Presidents for their part did not invariably go to Congress for authority in situations potentially involving the use of force. While they occasionally used deferential language, their conduct demonstrates that the Framers succeeded in their purpose of creating an Executive with independence and initiative.

IV. THE PROBLEM OF IRRESPONSIBILITY

The greatest contribution of Ely's book is its call for a more responsible process with regard to "use of force" issues. Ely is deeply disturbed by aspects of the conduct of all three branches of our government. He objects, of course, to any unilateral use of force by a President that is not strictly defensive and necessary. Beyond this, he objects to treating covert operations involving the use of force any differently than overt ones. He has especially harsh words for uses of force that are kept secret from Congress, and for the deliberate misleading of Congress.⁷⁰ He faults Congress for allowing Presidents to use force without prior legislative approval, for giving Presidents broad authority and then disclaiming responsibility, and for failing to force Presidents to comply with key aspects of the War Powers Resolution (WPR). Finally, he faults the courts for refusing to become involved in suits seeking to require Presidents to obtain specific legislative authority for military actions, where Congress has failed explicitly to approve or prohibit the conduct involved. Ely argues that courts can readily distinguish

70. ELY, *supra* note 1, at 103-04.

between situations in which prior legislative approval has and has not been obtained. While courts should not attempt to enjoin the President from acting in the absence of legislative approval, he proposes they should issue declaratory judgments as to whether the President has complied with the WPR, or with the WPR substitute Ely recommends. Such decisions (he hopes), would either shame the President into compliance, or shame Congress into using its power to stop him.⁷¹

Given my differences with Ely as to what the Constitution requires concerning the use of force, I naturally disagree with some of his prescriptions. He is fundamentally correct, however, in contending that our nation's practices with regard to planned or potential uses of force should be more responsible. To the extent Congress sees fit to regulate covert uses of force, the President must comply, absent some extraordinary limitation that unduly restricts the power to conduct military operations, or otherwise prevents the President from performing the executive function. Presently Congress is informed of military operations under the WPR,⁷² and of covert operations through the issuance of findings.⁷³ Congress can and should request greater specificity, or more extensive consultation, when it sees fit. More efficient consultation mechanisms, such as the leadership group idea in the Byrd-Nunn-Warner bill,⁷⁴ are likewise unobjectionable. Congress has the ultimate power over war, and must be given a fair opportunity to exercise it.

With regard to the actual use of force, I oppose Ely's proposed law. Where Congress specifically instructs the President, expressly or impliedly, to refrain from using force, both Congress and the courts have ample authority and incentive to enforce the law. Where the President acts secretly, and fails adequately to inform or consult with Congress, similar remedies are available. In such circumstances the President uses force at his or her peril. Where the President acts openly but without prior, explicit approval, the legality of that conduct should continue to depend upon its consistency with the practices and expectations developed over the last two hundred years.

The President does not act irresponsibly merely because Congress has not specifically authorized the action taken. Presidents must answer to the American people and to America's allies, not only for every use of force, but also for every failure to use force and its consequences. While Congress can attempt to evade responsibility even for what it has author-

71. *Id.* at 54, 66-67.

72. War Powers Resolution, 50 U.S.C. § 1543 (1991).

73. *See* Intelligence Act of 1991, 105 Stat. 441 (codified at 50 U.S.C.A. §§ 413-414 (1991 & Supp. 1995)); National Intelligence Act of 1980, S. 2284, 96th Cong., 2d Sess. (1980).

74. S.J. Res. 323, 100th Cong., 2d Sess. § 3 (1988).

ized, Presidents are unable to avoid blame for the consequences either of action or inaction. International law also tends to make a President's unilateral uses of force more responsible. While the United States has never accepted, and likely will never accept, the view that the United Nations Charter limits the right of national self-defense to defending American territory from attack,⁷⁵ it does accept and respect the traditional concept of self-defense, and the fundamental elements of "use of force" doctrine, including necessity, proportionality, and the rules against deliberate attacks on civilian targets. I have personally seen these rules have a restraining effect on our political leaders. As Ely recognizes, Presidents have used force more than two hundred times, yet most of those instances were minor engagements, and virtually all of them fit into a handful of categories of activities, which have over time become accepted as appropriate, regardless of their status under present views of international law. Actions which fit these categories—e.g., protection of U.S. military and civilian personnel, protection of trade, exercise of treaty or other international rights—tend to obtain widespread acceptance in Congress and the public.⁷⁶

While Presidents often act without formal, advance legislative approval, they rarely do so without extensive exchanges with congressional committees and leaders. Most uses of force are signaled to Congress well in advance, through direct contacts with Members and via the press. Often, individual Members, or groups of Members, signal back their approval, in one form or another. Take, for example, two uses of force by the United States during the 1980s: the first against Libya, for its support of terrorist attacks on Americans; the second against Iranian naval forces in the Gulf, for mining the Gulf and attacking U.S. vessels. Those uses of force were clearly anticipated by all interested parties. The United States issued public warnings, and deliberately exhausted all measures short of force. Congress held numerous hearings on the subjects and fully examined all options.⁷⁷ Both situations involved long-

75. Abraham D. Sofaer, *International Law and the Use of Force*, 1988 AM. SOC'Y INT'L L. PROC. 82ND ANN. MEETING 420, 421 (1990).

76. See ELY, *supra* note 1, at 117-18 (discussing the situations in which commentators generally agree that the President is justified in using force without prior congressional authorization, and describing former Legal Adviser Monroe Leigh's testimony expounding on the list of situations in Section 2(c) of the WPR).

77. *U.S. Military Forces to Protect "Re-Flagged" Kuwaiti Oil Tankers: Hearings Before the Senate Comm. on Armed Services*, 100th Cong., 1st Sess. (1987); *United States Policy Toward Iran: Hearings Before the Senate Comm. on Foreign Relations*, 100th Cong., 1st Sess. (1987); *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the House Subcomm. on Arms Control, International Security, and Science of the Comm. on Foreign Affairs*, 99th Cong., 2d Sess. (1986); *Libyan-Sponsored Terrorism: A Dilemma for Policymakers: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) (on the nature and extent of Libya's direct involvement in international terrorism).

standing bipartisan national security policies which called for effective action to prevent erosion of rights of international passage, and to deter state-sponsored terrorist attacks on American nationals abroad.

Similarly, before force was used in Panama, congressional committees repeatedly discussed the legal and political issues involved. Very clear, albeit informal, signals of approval—indeed, of impatience—were given to the Bush Administration. Such signaling does not constitute “legislative approval,” but the process is generally sufficient to give Congress ample notice of the President’s intentions, and ample opportunity to act, one way or the other.

When the President acts precipitously, greatly escalates a minor conflict, or goes beyond the traditional grounds for utilizing force without prior legislative approval, he assumes a grave risk. The fact that such an action is consistent with international law will be of little or no significance. Thus, the United States would have acted consistently with international law by unilaterally joining with Kuwait to drive Saddam Hussein’s forces back into Iraq. But even an argument based on self-defense, or a U.N. Security Council resolution, would have been an insufficient basis for unilateral action of the scope actually undertaken in Kuwait. President Bush wisely sought congressional approval.⁷⁸ The American intervention in Haiti also lacked precedential support, but Congress provided an ample basis for President Clinton to act, even though the legislation involved neither referred to the WPR nor explicitly authorized an intervention based on the threat or use of force.⁷⁹

Ely’s complaint that Congress has sought to avoid responsibility is valid. It would be preferable, legally and politically, for Congress to participate more often in decisions concerning force. That option is almost always deliberately considered by Congress, and usually rejected. For a variety of reasons, some soundly based on congressional capacities and priorities, Congress often chooses to allow the President to act, and thereby to assume the associated risks. If one believes, as Ely appears to, that the Constitution mandates that Congress act in every instance that it is able, then one must live with the possibility that forcing Congress into such decisions may harm our national interests and security. I do not believe that Congress has any such duty. Hence, I am concerned that compelling its involvement, even when most Members may be gen-

78. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(c)(1), 105 Stat. 3 (1991) (codified as amended at 50 U.S.C. §§ 1541-1548 (1991)).

79. See Letter from Walter Dellinger, Asst. Att’y Gen., to Sens. Robert Dole, Alan Simpson, Strom Thurmond, and William Cohen (Sept. 27, 1994), *quoted in Word for Word: A President’s Ability to Declare War*, N.Y. TIMES, Sept. 30, 1994, at A29.

uinely unsure as to what measures should be authorized, will cause more harm than good.

Assuming, however, that Congress should be encouraged to act in every "use of force" situation, I fail to understand why the WPR, or a statute such as Ely's redraft, is the approach best calculated to bring about that result. I share Ely's scorn for the legislators who voted to support the war in Vietnam, and then blamed Presidents Johnson and Nixon. Yet how could the WPR, or Ely's proposal, help correct such irresponsibility if it allows legislators to claim they have not approved a military action under circumstances which would lead a court or any fair-minded person to disagree? Why is Ely not shocked at the irresponsibility of setting out, in advance and in a statute, the very untenable and scornworthy defense that legislators advanced during Vietnam: "We approved and paid for it, but it's not our war"?

The proper legislative device for putting pressure on Congress to assume responsibility (at least for its own actions, if not for its inaction), would be a rule exactly the opposite of the WPR. Such a rule would provide that, as a matter of law, a use of force is duly authorized under the Constitution if Congress takes any action that a court would find constitutes approval, such as knowingly providing the necessary funds. In our legal system, people and entities are generally held responsible for enterprises they knowingly and intentionally support with funds, especially where they possess the power to prevent such activities from happening. Section eight of the WPR⁸⁰ allows Congress to behave in a manner that the law in other contexts would judge as downright fraud. Congress might act more responsibly if it were held to generally accepted standards of legal responsibility.

With regard to the courts, I cannot agree with Ely that the judiciary will find it easy to decide "use of force" cases under the WPR or under his revision. I do not believe that the federal courts should or would permit themselves to be used in a process that requires them to find an action was unauthorized, where constitutionally sufficient evidence of authorization is present.⁸¹ The courts would inevitably be dragged into evaluating the propriety of each challenged action. As Ely's chapters on Laos and Cambodia reflect (and as later legislation concerning Nicaragua demonstrated again), this would be no easy task. Figuring out what was and was not authorized in these initiatives, at various points in time,

80. War Powers Resolution, 50 U.S.C. § 1547 (1991).

81. The idea is akin to the exercise of judicial power by the legislature. *Cf. Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868); *accord* *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) (holding that Congress may not override a final judicial determination through retroactive legislation).

is extremely complicated. Furthermore, what if a court should declare that the President acted without the authority required by the WPR or Ely's revision? A President would not necessarily go to Congress to get authority in the required form, for example, if authority had already been given in a form normally considered sufficient, or if the declaratory action were brought by a minority of legislators. Nor is it clear that a congressional majority, satisfied with the President's conduct, would insist on compliance with the WPR. Several Presidents and Congresses have disregarded the WPR when they saw fit to do so. It would be unseemly for the federal courts to be dragged into a process which essentially amounts to an attempt to embarrass a majority in Congress into exercising power that could have been readily exercised without judicial intervention.

Judicial involvement in separation of powers conflicts is also undesirable because it tends to create hard-and-fast rules in areas of overlapping authority. The branches normally utilize varying degrees of pressure to reach different accommodations, depending on how strongly each feels about particular situations. It would not necessarily be helpful to create an artificial rigidity with regard to the outcome of issues that are intensely political and often require subtle handling. The persistence of absolute claims of the sort advanced by Ely has created what is perhaps an equally harmful situation, where the law as applied by Presidents and Congress differs markedly from the law as it is written in a statute that is openly ignored. A Supreme Court decision regarding the President's authority to use force might do as much to clear the air as the Court's decision in *United States v. Nixon* did in unanimously settling that the President does indeed have an executive privilege.⁸² Some of the same scholars on whom Ely relies, and with whom he agrees with regard to the war power, were equally emphatic in denying the President's executive privilege and asserting that the notion was an unconstitutional concept concocted by executive power aficionados and overreaching Presidents (beginning, of course, with George Washington).⁸³

My guess is that the Court will reach the same conclusion with regard to the use of force as it did with regard to executive privilege, by relying on the clear historical record that supports executive authority to initiate military action for certain purposes, in the absence of legislative

82. 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.").

83. At least one of Ely's authorities took the position that the President lacks any independent power to assert an executive privilege. See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974).

direction to the contrary. If Ely were truly open to judicial review to determine what the Constitution requires, he would test the issue by choosing a vehicle other than his WPR revision. The courts should be allowed to determine what the Constitution requires, not whether Congress could further restrict the President if it chooses to do so.

V. CONCLUSION

John Ely's book is a stimulating and perceptive work. Its basic thesis is valid. War is a matter of such great importance that Congress and the President should use their constitutional authority over war in a responsible manner. Wars such as the one in Vietnam can waste a nation's human and material resources, and tear it apart politically. Secret, unauthorized wars are particularly unacceptable, in that they are conducted without legitimate authority or political support. Congress should participate as fully as practicable in decisions concerning war, to ensure that any determination to use force receives thorough scrutiny. Congress has the power under the Constitution to prevent or limit a use of force, though it is free to allow the use of force on any basis it determines to be convenient.

Ely goes beyond these principles, presumably in order to prevent the damage he feels the Nation endured during and after the Vietnam War. Yet in claiming that the President lacks authority to use force without specific, prior approval of Congress, Ely advocates a conclusion that is not mandated by the Constitution's text or the history of its adoption, and which is refuted by the conduct of Presidents and Congresses throughout American history.

Moreover, the remedy he propounds would have little or no effect in preventing the perceived damage resulting from recent American uses of force. As he recognizes, the war in Vietnam was clearly authorized by Congress, in a form and with a degree of awareness as to potential consequences that met the most exacting constitutional standards. The extension of the war into Cambodia was, he concludes, probably also defensible under the Constitution. Even if it was not, and even assuming the actions in Laos were indefensible, those activities were not the cause of the national trauma we know as Vietnam. Furthermore, Congress eventually demonstrated its capacity to stop such actions. The other recent military disaster suffered by the United States was the debacle in Lebanon, yet that operation was fully approved under the WPR. The process through which that approval was obtained, and its temporal limitation, may well have contributed to the mission's failure by signaling to

our enemies our ambivalence and lack of resolve.⁸⁴

At least two recent military operations can also be classified as disasters: Bosnia and Somalia, both United Nations approved. While Bosnia is not yet a threat to ground-based U.S. troops (unless Macedonia is drawn into the conflict), the United States has been greatly damaged by the Bosnia operation. Our threats have been exposed as idle, and we have been forced by effective Serbian aggression to offer more and more concessions in the form of Bosnian territory. In Somalia, we not only lost several of our troops, we once again were humiliated by issuing and then withdrawing a warrant for the arrest of Mohammed Farah Aided, a warlord who would not capitulate to ultimately hollow American threats. These activities, and all such U.N. operations, should be presented to Congress for its consideration in a much more systematic manner than has heretofore been the pattern. The remedy for this deficiency, however, is not the WPR or Ely's revision, but a statute requiring the President to inform Congress fully and more regularly of U.N. activities that could involve the use of U.S. armed forces. The House of Representatives has adopted such legislation,⁸⁵ and Senator Dole has introduced a bill to achieve this result in the Senate.⁸⁶ It is certainly desirable to apply the WPR's requirements of notice and consultation to U.N. operations in which U.S. forces participate. However, to apply the WPR's other provisions, especially its deadlines, would be undesirable, for they are as likely to be disregarded in the U.N. context as they have been in the context of unilateral operations.

Finally, one cannot escape the impression from Ely's book that he (like many of his supporters) believes that the United States too readily utilizes force. His effort seems intended to make the decision to use force more difficult in order to make such activities less frequent.⁸⁷ If that is, in fact, Ely's belief, he should say so, and should argue the merits of that position as a matter of national strategic doctrine in the post-Cold War era. My impression is that Ely and other lawyers who agree with this perspective would find little support in the national security community or the public, which may explain why they attempt to justify their position as constitutionally mandated.

84. See GEORGE P. SHULTZ, *TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE* 229 (1993).

85. The proposed National Security Revitalization Act, H.R. 7, 104th Cong., 1st Sess. (1995), passed the House on February 16, 1995.

86. S. 5, 104th Cong., 1st Sess. (1995) (proposed Peace Powers Act of 1995). Other aspects of both the House and Senate bills are of questionable wisdom or utility.

87. Ely suggests as much. See ELY, *supra* note 1, at 8-9. Others, such as Harold Koh, another symposium participant, have openly declared that we live in a world that no longer requires an Executive with independence and initiative in military affairs. HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

To the extent that Ely seeks a more informed process for approvals of force, he is on solid ground. The need to ensure that Congress obtains the information necessary to enable it to exercise its war powers is real. Beyond that, formalizing the process is unwise and likely to disrupt long-established expectations regarding the handling of "use of force" issues.⁸⁸ But if the process is to be formalized the procedure established should permit each branch to decide how it wishes to handle each issue. The courts in particular should be allowed to determine what the Constitution in fact requires of the President with regard to the use of force. The remedies for irresponsibility should encourage responsible conduct by all the branches, rather than enable Congress to pretend it has denied authority for a use of force which it has deliberately allowed and facilitated.

88. This is the gist of the position argued by Peter Spiro in his valuable comment on Ely's book. Spiro, *supra* note 2.