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BOOK REVIEW

POWER AND DUTY: THE LANGUAGE OF THE WAR POWER

WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH. By *John Hart Ely*.^{*} Princeton University Press 1993. 244 pp. \$24.95.

Peter D. Coffman[†]

INTRODUCTION

Since the Korean War, voices inside and outside of government have decried presidentially initiated military action in Haiti, Somalia, the Persian Gulf, Panama, the Gulf of Sidra, Lebanon, the Dominican Republic, Indochina, and elsewhere¹ as encroachments on Congress's "Power . . . to declare War."² Others perceive not presidents actively usurping legislative power but rather an acquiescent Congress "sit[ting] back and let[ting] the President act in its place."³ On the other hand, proponents of presidential power have argued that the President holds, through practice or necessity, an inherent power to

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¹ See, e.g., MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80 (1990). In regard to the planned invasion of Haiti, President Clinton was criticized for consulting the United Nations but "disregard[ing] . . . Congress's constitutional role." George F. Will, . . . *Political Woodstock*, WASH. POST, Aug. 7, 1994, at C9. Minority members of Congress similarly saw the invasion as treading on a clearly congressional prerogative. E.g., 140 CONG. REC. S12,760-61 (daily ed. Sept. 13, 1994) (statement of Sen. Specter) ("[T]he Constitution is unequivocal. It is only the Congress of the United States which has the authority to declare war.").

² U.S. CONST. art. I, § 8, cls. 1, 11.

³ 129 CONG. REC. 26,176 (1983) (statement of House Speaker Thomas P. O'Neill, Jr.) (discussing efficacy of War Powers Resolution in forcing Congress to address presidential war making); see also 137 CONG. REC. S330 (daily ed. Jan. 12, 1991) (statement of Sen. Leahy) ("It would surely be a grave and historic abdication if this great assembly were to voluntarily forswear its right and its duty to stand and make a choice for war or for peace."); Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 148 (1993) (noting "Congress's indifference toward protecting its decisional war powers from the President").

initiate war in a variety of circumstances, and that an aggressive Congress treads on that right.⁴

As Justice Jackson noted in 1951, the boundary dispute between Congress and the President in foreign affairs is not a recent development:

A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.⁵

Neither side has moved the dispute substantially closer to a resolution in succeeding years.⁶ Congressional proponents continue to rely upon the specific constitutional grant of the "decisional"⁷ war power and the record of debates upon this grant at the Constitutional Convention.⁸ Supporters of presidential initiative counter with the textual grants of the Executive power and the Commander-in-Chief role to the President, buttressed with realist arguments about the necessity of

⁴ See W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 135-69 (1981); ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULES OF LAW IN U.S. FOREIGN POLICY* 109-69 (1991); Senator Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 *Geo. L.J.* 367, 371 n.8 (1988) (citing testimony in favor of broad presidential war power in *The War Power After 200 Years: Congress and the President at a Constitutional Impasse, Hearings Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations, 100th Cong., 2d Sess.* (1989) [hereinafter *War Powers After 200 Years*]).

⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (footnote omitted). Thus, "[a] Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft." *Id.* at 635 n.1 (citations omitted); REVELEY, *supra* note 4, at 9 ("With unsettling frequency the same luminaries (Madison and Hamilton without peer) have varied their constitutional conclusions with changing times."); see also Biden & Ritch, *supra* note 4, at 372 ("[C]ustom and practice . . . offer a wealth of examples that are cited to support both sides of the argument [over war powers]."); Donna H. Henry, Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 *VA. L. REV.* 1037, 1038 n.7 (1984); Martin Wald, Note, *The Future of the War Powers Resolution*, 36 *STAN. L. REV.* 1407, 1409-13 (1984).

⁶ W. Taylor Reveley III thoroughly sets out the materials of the debate, REVELEY, *supra* note 4, at 29-189, and notes: "Most plausible and many quaint allocations of the war powers between the two branches are supported by one bit of precedent or another." *Id.* at 8-9. Senator Lloyd Bentsen noted the countervailing arguments in debate over the deployment of Marines to Lebanon in 1983. 129 *CONG. REC.* 26,252-53 (1983). The continuing difficulty this has presented in litigation was noted in one of the cases addressing the Gulf War. See *Ange v. Bush*, 752 F. Supp. 509, 513 (D.D.C. 1990).

⁷ Kelly, *supra* note 3, at 118 ("the decisional war powers—the power to authorize any use of force and to set limits on the nature of that use"). The term "war power" generally refers to the decisional component.

⁸ See, e.g., 137 *CONG. REC.* S329-30 (daily ed. Jan. 12, 1991) (statement of Sen. Leahy); Biden & Ritch, *supra* note 4, at 372-81 (discussing intent of the Framers and past practice preceding Korean War).

a strong Presidency in the modern world.⁹ Supreme Court jurisprudence has not conclusively placed any of these argumentative gambits off limits.¹⁰ As a result, ample numbers of intelligent lawyers continue to hold each position on the basis of "respected [legal] sources on each side of [the] question."¹¹

The failure of legal analysis to bring effective closure to this issue leaves the allocation of the war power squarely in the political arena.¹² The stresses of the Cold War have resulted in the de facto delegation of the power to commence combat to the President. Congress, by its own acquiescence, is involved only to the extent it affirmatively acts to intervene (as in Nicaragua with the Boland Amendment,¹³ in Somalia,¹⁴ and in Lebanon by agreement with the President¹⁵)—which it all too often fails to do (as in the planned invasion of Haiti,¹⁶

⁹ See, e.g., Eugene V. Rostow, "Once More Unto the Breach": *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986); Abraham D. Sofaer, *The War Powers Resolution: Fifteen Years Later*, 62 TEMP. L. REV. 317 (1989).

¹⁰ Justice Scalia emphasized the ad hoc nature of separation of powers jurisprudence generally in dissenting from the Court's decision upholding Congress's investiture of prosecutorial functions in a special prosecutor appointed and controlled by the Judiciary. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting). Further, Reveley found that "[w]ielding one abstention doctrine or another, judges successfully withstood an unprecedented surge of opportunity to define [the rights of the President and Congress] in Indochina cases." REVELEY, *supra* note 4, at 11.

¹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952); see also W. Michael Reisman, *War Powers: The Operational Code of Competence*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, 68 (Louis Henkin et al. eds., 1990) ("The original terms of the Constitution have been invoked by partisans of opposing views, but debate in those terms has proved inconclusive.") (footnote omitted).

¹² See Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 346 (1989) ("[T]he relationship and interaction between President and Congress in the foreign policy areas is shaped more by the respective political power of the two branches at a particular time than by any charter of legal rights."); Reisman, *supra* note 11, at 68-69.

¹³ See 128 CONG. REC. 29,468-69 (1982); THEODORE DRAPER, A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS 18 (1991).

¹⁴ National Defense Authorization Act for Fiscal Year 1994, § 1512, 50 U.S.C. § 1541 note (Supp. V 1993) (entitled "Involvement of Armed Forces in Somalia"); Department of Defense Appropriations Act of 1994, § 8151, 50 U.S.C. § 1541 note (Supp. V 1993) (entitled "Duration of Authorization for United States Participation in Multinational Force in Somalia").

¹⁵ Multinational Force in Lebanon Resolution, 50 U.S.C. § 1541 note (1988); Henry, *supra* note 5, at 1050-51 (discussing interbranch compromise over introduction of troops into Lebanon).

¹⁶ Congress did pass a "Sense of Congress" statute as part of the Department of Defense Appropriations Act of 1994, stating that those funds "should not be obligated or expended for United States military operations in Haiti unless . . . authorized in advance by the Congress" or necessary to the country's national security. Sense of Congress on the Use of Funds for Military Operations in Haiti, Pub. L. No. 103-139, § 8147, 107 Stat. 1474, 1474-75 (1993). Republicans, in September 1994, attempted to pass a binding resolution prohibiting military action in Haiti, see 140 CONG. REC. S12,677 (daily ed. Sept. 12, 1994) (Statement of Sen. Gregg), but no further congressional action was taken as the planned invasion loomed imminent. 140 CONG. REC. S12,947 (daily ed. Sept. 14, 1994) (statement

the invasion of Panama, and the no-fly zones over Iraq¹⁷ and Bosnia-Herzegovina¹⁸)—or is invited to do so by the President (as in Kuwait¹⁹). Thus, post-war practice has the President taking the initiative until Congress mobilizes to stop him.²⁰ By refusing to review cases addressing these questions, at least when less than a majority of both houses of Congress have petitioned, the courts have let this practice stand under varying political question, standing, and ripeness rationales designed to let the political branches sort it out.²¹

In Indochina,²² this pattern led to disaster. Emboldened by congressional expressions of initial consent through the broad language of the Tonkin Gulf Resolution²³ and later passivity, Presidents Johnson and Nixon accelerated the pace of the nation's military commitment.²⁴ They also held the full extent of that commitment secret

of Sen. Mitchell); see also Elaine Sciolino, *Clinton Offering Haitian Leaders Chance to Leave*, N.Y. TIMES, Sept. 15, 1994, at A1, A8 ("Democrats did . . . block an effort by Republicans to force an immediate vote on a non-binding resolution in the Senate to prevent an invasion of Haiti.").

¹⁷ See Authorization for Use of Military Force Against Iraq, 50 U.S.C. § 1541 note (Supp. V 1993) (authorizing military action pursuant to United Nations Resolutions regarding Kuwait, but not authorizing military actions in Iraq to protect Kurdish or Shiite rebels).

¹⁸ Although President Clinton repeatedly informed Congress of military acceleration in Bosnia-Herzegovina by reports "consistent with," but not pursuant to, the War Powers Resolution, THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, REPORTS, CORRESPONDENCE, SUBCOMM. ON INT'L SECURITY, INT'L ORGS. AND HUMAN RIGHTS OF THE COMM. ON FOREIGN AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, 103d Cong., 2d Sess. 248-53, 255-61 (Comm. Print 1994) (reports dated Apr. 13, 1993; July 9, 1993; Oct. 13, 1993; Feb. 17, 1994; Mar. 1, 1994; and Apr. 1994), Congress did not pass a law challenging that exercise of military power pursuant to the Commander-in-Chief Clause. As part of the Department of Defense Appropriations Act of 1994, however, Congress passed a "Sense of Congress" resolution advising that none of the funds appropriated "should" be used for military activities implementing a peace settlement in Bosnia-Herzegovina. Department of Defense Appropriations Act of 1994, Pub. L. No. 103-139, § 8146, 107 Stat. 1474 (1993).

¹⁹ See 137 CONG. REC. H444 (daily ed. Jan. 12, 1991) (statement of Rep. Fасcell) (citing letter from President Bush).

²⁰ Indeed, the State Department's Legal Adviser in the Reagan Administration, Abraham D. Sofaer, has argued that Congress's tendency to "allow[] presidents wide authority to act to achieve commonly held aims, while at the same time second-guessing, criticizing, and placing responsibility upon the executive for initiatives that fail" reflects "the constitutionally intended pattern." Sofaer, *supra* note 9, at 324.

²¹ See *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); REVELEY, *supra* note 4, at 11 (quoted *supra* note 10).

²² I use the term "Indochina," as Ely does, in order to include the wars in Cambodia and Laos, as well as the war in Vietnam.

²³ Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971) (authorizing the President to "take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression").

²⁴ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 13 (1993).

from Congress and the American people while bombing Laos and Cambodia.²⁵ Although the politics of the war made life hotter for individual Members of Congress, many chose the easy route of criticizing fighting which they were "consistently unwilling to end . . . [and] in fact quite willing (until the very end) to continue to fuel."²⁶ Congress's evasion of duty and accountability was reflected in a conscripted army bereft of a solid front of support at home.²⁷ This history demonstrates the bloody consequences of the Supreme Court's failure to act authoritatively to impose clear institutional roles.

I

WAR AND RESPONSIBILITY

John Hart Ely's *War and Responsibility* seeks to break the stalemate over constitutional allocation of the war powers. Dean Ely's most direct attempt is a legislative proposal embodied in an appendix to his book entitled "Toward a War Powers (Combat Authorization) Act That Works."²⁸ The meat of *War and Responsibility*, however, sets forth a representation-reinforcing theory of the war powers that, when viewed against the backdrop of the war in Indochina, persuasively argues for the necessity of fixing the decisional war power in Congress, subject to judicial review to keep it there.

Ely starts with a vigorous and concise argument that the Constitution has spoken univocally on the "Power . . . [to] declare War,"²⁹ delegating it solely to Congress in "all wars, big or small, 'declared' in so many words or not."³⁰ In this regard, Ely's views spring from the

²⁵ *Id.* at 72, 98.

²⁶ *Id.* at 12.

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 115-38 app. The appendix introduces and defends a proposed "Combat Authorization Act" that remedies many of the real and perceived problems with the current War Powers Resolution, 50 U.S.C. § 1541-1548 (1988). Although a thorough overhaul for a much-criticized piece of the war powers puzzle, Ely's legislative proposal was previously published in a 1988 article, John Hart Ely, *Suppose Congress Wanted A War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988).

²⁹ U.S. CONST. art I, § 8, cl. 11.

³⁰ ELY, *supra* note 24, at 3. The core of Ely's textual and intentional argument lies in Article I's delegation of the power to "declare War [and to] grant Letters of Marque and Reprisal" to Congress. U.S. CONST. art. I, § 8, cl. 11; *see also* U.S. CONST. art. I, § 8, cl. 12-16 (empowering Congress to raise, maintain, and regulate army, navy, and militia). Taken together, in the context of the times, these included both the power to make full, declared war, and (as was more common even then) limited, undeclared war. ELY, *supra* note 24, at 66-67, 74; *see also* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 56-57 (1973) (quoting President Buchanan's statement that Congress's power to declare war was "'without limitation'" and extended to "'every species of hostility, however confined or limited'"); ROBERT J. SPITZER, *PRESIDENT AND CONGRESS: EXECUTIVE HEGEMONY AT THE CROSSROADS OF AMERICAN GOVERNMENT* 151-52 (1993); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 53-59 (1986). This reading has been rejected by some who seek to create a space between

"liberal" tradition of the eighteenth century *philosophes* who viewed popular assemblies as a bulwark against the temptation of ill-advised aggressive war.³¹ Ely's treatment satisfyingly addresses the Cold War-era realist critiques, strengthening itself by co-opting and taming them where possible.³²

Using the terms and values of a representation-reinforcing constitutional theory, Ely argues that since 1950 Congress and the President have forged the current allocation by an illicit transfer of the decisional war power. Congress acquiesced to the President on matters of

declared wars and reprisal by emphasizing the formal aspects in eighteenth-century international law of each. See Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850-51 (1972); Rostow, *supra* note 9, at 6-9. Ely does not delve deeply into this debate. However, this counter-reading is treated fully and convincingly rejected in Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 697 (1972); see also EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 31-40 (1982) (discussing drafting of war clauses at Constitutional Convention); WORMUTH & FIRMAGE, *supra* at 17-18; Raoul Berger, *War, Foreign Affairs, and Executive Secrecy*, 72 NW. U. L. REV. 309, 318-23 (1977); Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U. L. REV. 54, 54-58 (1986). Nonetheless, Professor Lofgren stresses that "one cannot pretend that the matter is beyond all doubt," a charge to which Ely's peremptory analysis is liable. Lofgren, *supra*, at 697; see also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 26-27 (1990); Gregory J. Sidak, *To Declare War*, 41 DUKE L. J. 27, 35 (1991) (rejecting Ely's position as "too tall" and using snippets from Lofgren in support). On the other hand, one can list numerous occasions throughout the life of the republic in which presidents can be inferred to have acknowledged by their actions an exclusively congressional war power. See ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 31-35 (1982); WORMUTH & FIRMAGE, *supra*, at 75-85. *Contra* TURNER, *supra* note 4, at 56-61; Rostow, *supra*, at 851 (noting that Jefferson, Madison, and Hamilton all retreated from their initial contentions that the President was powerless to initiate hostilities). The persistence of this debate demonstrates the pliability of the traditional materials.

Ely buttresses his conclusions with policy arguments encompassing both the Framers' hatred of war (especially the tyranny of an individual Executive's wars) and the common-sense contention that if we must have war, it should be decided by the full representatives of the Nation (a) in order to ensure its necessity, (b) to serve democracy generally by ensuring that the body closest to the people is on board, and (c) to enlist the deepest grass-roots support. The onset of war in Indochina, as Ely stresses, evidenced a fatal lack of deliberation, public debate, and popular support. ELY, *supra* note 24, at 4-5.

³¹ See KEYNES, *supra* note 30, at 18-22; Rostow, *supra* note 9, at 40 (discussing Whiggish view of war powers); Note, *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637, 640-42 (1989).

³² For example, Ely admits the force of the realist position that in a nuclear age one person, rather than a deliberative body, must be alone at the center of the network of intelligence that assesses the threat, as well as at the controls of our response. ELY, *supra* note 24, at 6. Rather than letting that exception open the floodgates, however, Ely states his concession as a federal analogue to the states' constitutionally reserved power to "repel sudden attacks." *Id.* That textual grounding, and the emergency rationale underlying it, provides the criteria for delimiting the exception. The President's power extends only to situations requiring an immediate response where accompanied by "swift and full disclosure to the legislature and [in which hostilities] subside[] if [Congress] do[es] not approve." *Id.* at 7. Since "[i]f troops and equipment can be dispatched to the front, a cabinet officer can surely be dispatched to Capitol Hill (even faster, one would suppose)," *id.* at 144 n.29, this provides a potentially effective limitation.

war to avoid the "frightening" accountability that comes with making the wrenching decisions of war and peace.³³ Such congressional abdication, Ely believes, has deprived the public of a vital check on executive war, of the central forum for expressing its will and venting conflicting views, and of the opportunity to hold Members of Congress accountable for their decisions.³⁴ Given this political failure, Ely calls upon the courts to intervene and reestablish the constitutional equilibrium. Specifically, Ely proposes that the Judiciary accept jurisdiction in war powers cases and remand decisions regarding the propriety of wars, large or small, to Congress where they belong.³⁵ Only in a congressional forum can the triple benefits of a check on presidential power; public, adversarial debate; and full accountability be achieved. That insight generates both the rationale for judicial involvement and the criteria for limiting the courts' role.

This Review describes and assesses Ely's view of the war power. Section II discusses how *War and Responsibility* draws strength from the general, process-oriented theory of judicial review that Ely articulated in the influential *Democracy and Distrust: A Theory of Judicial Review*.³⁶ Section III analyzes the rhetoric carrying Ely's theory. By turning emphasis away from the terms of the stalemate to deeper constitutional concepts, Ely offers and demonstrates the tools for a richer, more productive discussion of the war power.

II

A REPRESENTATION-REINFORCING THEORY OF WAR POWERS

Modern political realities make Ely's stated task of reinjecting meaningful congressional participation into war powers decisions over the inertia of a quiescent Congress a challenging one. Ely's solution relies on judicial review to determine whether Congress has fulfilled its role in the constitutionally (or legislatively) prescribed debate:

[T]he judiciary is the most politically insulated branch of our government. But if the courts' relative insulation from the democratic process suggests that it's no business of theirs to decide what wars we fight, it does situate them uniquely well to police malfunctions in that process³⁷

³³ *Id.* at ix.

³⁴ *Id.* at 4.

³⁵ *Id.* at 54.

³⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*]. *Democracy and Distrust* won the triennial Order of the Coif award for 1980 to 1982 as the best book in any field of law. A symposium held on the tenth anniversary of its publication reviewed its lasting impact. *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

³⁷ ELY, *supra* note 24, at 54. Not all scholars agree that the Judiciary's role should be cabined to this procedural question:

Framing the question and solution in terms of process—as opposed to the substance of wise governance³⁸—evinces the same effort to define substance in terms of procedure that animates Ely's general theory of judicial review in *Democracy and Distrust*.³⁹ The strength that Ely's proposal draws from that theory distinguishes *War and Responsibility* from prior calls for judicial review of war power decisions.⁴⁰

A. Process Theory

Drawing upon footnote four of *Carolene Products*,⁴¹ Ely seeks in *Democracy and Distrust* to ground the judicial protection of minority rights in something other than interpretivism and the shifting sands of judges' values. The book succeeds by integrating within a democratic structure majoritarian impulses and solicitude for minority rights. Ely charts a path based on an extended exposition of how judicial attention to "process writ large—with ensuring broad participation in the processes and distributions of government"⁴²—offers a value-neutral basis for protecting the rights of minorities.⁴³

If I have a quibble with Ely, it is this: he never mentions the constitutional relevance of international law to war making, and thus ignores the Constitution's Supremacy Clause and, in turn, the more substantive obligation to refrain from aggressive war. If I read Ely correctly, he would have us believe that if Congress properly authorized the President to invade Mexico, the action would then be constitutional. I believe that the Constitution incorporates duly ratified treaties, including the United Nations Charter, into its framework of constraint, and that, in some sense, this mandate to respect international law is even less observed and understood than is the duty of Congress to authorize a war for it to be valid.

Richard Falk, *Whose War Powers?*, PRINCETON ALUMNI WKLY., Mar. 9, 1994, at 19, 20 (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)). The courts, however, eschew any substantive role. See, e.g., *Ange v. Bush*, 752 F. Supp. 509, 513 (D.D.C. 1990).

³⁸ An example of "wise governance" includes the predetermined goal of avoiding all wars as "the greatest of national calamities." ELY, *supra* note 24, at 3 (quoting JAMES MADISON, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (M. Farrand ed., 1911)); see also 129 CONG. REC. 26,386 (1983) (excerpt from THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 223 (1974) (quoting Justice Story's characterization of war as "calamitous")); KEYNES, *supra* note 30, at 76 ("[T]he courts merely determine whether the political departments have taken the constitutionally prescribed action necessary to exercise the discretionary power conferred.").

³⁹ Ely makes this connection in a note. ELY, *supra* note 24, at 140 n.10; cf. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833, 878-79 (1991) ("[T]he courts can play a useful role in forcing Congress to perform its constitutionally-contemplated functions. Helping devise such judicial Congress-prodding doctrines thus seems to me the most productive use that can currently be made of a constitutional scholar's time; at any rate it's how I've been spending mine lately.").

⁴⁰ Such as GLENNON, *supra* note 1, at 111-13, 117-18.

⁴¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

⁴² ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36, at 87.

⁴³ This version of the procedural basis of rights has been characterized as "running from process to rights." Lawrence G. Sager, *Constitutional Triage*, 81 COLUM. L. REV. 707, 717 (1981) (reviewing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS*

Ely's solution takes the form of

a representation-reinforcing approach to judicial review, [that,] unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy.⁴⁴

Ely portrays the subjugation of minority rights by the political branches as breakdowns in the American political and constitutional process:

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic affairs—rather than dictate substantive results it intervenes only when the "market," in our case the political market, is systemically malfunctioning.⁴⁵

This approach casts the judiciary as playground umpire, dusting off the plate when the minority comes to bat and making sure that sides are picked fairly and everyone gets to play. With that level playing field, and the commonality of interests inherent in participating in the same game, the players' skill, not the umpire, decides the score.⁴⁶ Minority and majority alike should feel a part of a participational enterprise, whether ultimately on the winning or losing side.

This "representation-reinforcing approach to judicial review" emphasizes leaving the burden of articulating substantive values on the political branches elected for that purpose. The interplay of this concern with Ely's larger theory is illustrated by his use of a quotation

(1980)). Sager explains, "There are no applicable claims of right that are understood as external to the political process, and it is defects in that process that are seen as the source of rights. The legitimate role of the judiciary, then, lies in identifying and enforcing these process-based, process-correcting rights." *Id.* In vindicating these rights, therefore, "the claim is that the majoritarian process is being cured or purified, not defeated." *Id.* This approach contrasts with one that posits rights existing in inevitable opposition to the political process. *Id.* Ely recaps this "legal process school" of thought in Ely, *supra* note 39, at 833 n.4.

⁴⁴ ELY, DEMOCRACY AND DISTRUST, *supra* note 36, at 88.

⁴⁵ *Id.* at 102-03. As Ely's antitrust analogy reveals, politics is in itself a regulated market that does not tolerate monopolies, from whatever genesis, and may force dealing between parties that would prefer to be left apart. The latter is inherent in Ely's updated theory of "virtual representation," which ties "the interests of those without political power to the interests of those with it." *Id.* at 83. This concept undergirds numerous American constitutional structures. By keeping the majority from distributing benefits and burdens along lines that single out powerless groups, this concept ensures that the majority virtually represents the minority. *Id.* at 100-01. Thus, for example, states may not deny privileges and immunities to residents of other states, and states may not single out corporations chartered in other states for special taxes for their in-state business. *Id.* at 83-87.

⁴⁶ See *id.* at 103; see also Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653 (1991) (discussing the implicit distrust of the courts as a source of substantive policy wisdom).

from Alexander Bickel, discussing his "career-long quest for a satisfactory approach to constitutional adjudication":

The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.⁴⁷

B. War Powers and the Political Market

The challenge taken up in *War and Responsibility* is to cure a systemic failure of the political market in the war powers area while respecting the roles of all three branches. Dean Ely argues that Congress—the institution designated to represent the people's interests in this decision—is systematically failing to enter the political "market" and make decisions upon which its members can be judged at the polls.⁴⁸ Although the accountability of the President creates a different political "market" (including his own accountability to the electorate), it is not the market created by the Constitution for the decisional war power.⁴⁹ Moreover, the vague allocation of roles forged in the political arena allows the two branches to play a shell game in which members of Congress claim that it is the President's war⁵⁰ and the President claims that Congress has acquiesced through silence or ambivalent appropriations measures.⁵¹ As a result, the public is left to wonder whether or not their individual legislators really are responsible for the war.

Ely charges the courts with fixing the responsibility for initiating war clearly on Congress in order to ensure that the electorate has a clear opportunity to hold their representatives responsible on issues of war and peace.⁵² This theory of judicial review does not include a substantive judicial determination of which wars are appropriate.⁵³

⁴⁷ ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36, at 103-04 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (1962)).

⁴⁸ ELY, *supra* note 24, at 59. Ely expressed the same view in regard to Congress' delegation of other legislative functions in *Democracy and Distrust*. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36, at 131-34.

⁴⁹ See ELY, *supra* note 24, at 3-10 (decisional war power is devolved unequivocally on Congress alone).

⁵⁰ *Id.* at 53.

⁵¹ *Id.* at 32-46.

⁵² *Id.* at 54-56.

⁵³ At least one commentator suggests international law could provide such standards. See Falk, *supra* note 37, at 20 (quoted *supra* note 37). Compare Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in an Era of Presidential Warmaking*, 80 VA. L. REV. 1723,

Therefore, Ely's theory is not susceptible to the majoritarian charge that it substitutes platonic guardians for elected representatives. Instead, the courts are invoked only to "police malfunctions in [the democratic] process" itself.⁵⁴

This grounding of the court's role in the protection of an accountable, democratic process distinguishes Ely's proposal. While many proponents of congressional power have called on the courts to vindicate a primary congressional role, they do so primarily for textual, historical, and other policy reasons.⁵⁵ Although he repeats many of these arguments in summary,⁵⁶ Ely's focus on how judicial review can safeguard the public's ability to hold their representatives responsible for decisions on war adds an important analytic principle.

This principle, however, is not foreign to constitutional jurisprudence. *War and Responsibility's* emphasis upon Congress's duty to exercise the power granted it by the Constitution recalls the nondelegation doctrine of the 1930s. That doctrine, developed in regard to Congress's constitutionally granted "legislative" power, holds that "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."⁵⁷ Chief Justice Rehnquist has explained that the rationale of the doctrine prevents Congress from "simply abdicat[ing] its responsibility for the making of a fundamental and most difficult policy choice . . . [that] must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch."⁵⁸ In other words, members of Congress should not be able to vitiate the electorate's right to hold them accountable for the "'hard policy choices' properly the task of the legislature"⁵⁹ by shunting those questions to the Executive Branch. The decision to go to war is both the most difficult of choices as well as one specifically committed to Congress.

1756-70 (1994) (book review) (raising possibility that Congress could by statute specifically apply international law regarding aggressive war to presidentially initiated hostilities, but rejecting that approach as judicially unworkable).

⁵⁴ ELY, *supra* note 24, at 54.

⁵⁵ See GLENNON, *supra* note 1, at 71-122; HENKIN, *supra* note 30, at 78 (discussing "commitment to constitutionalism" which undergirds judicial review in foreign affairs); cf. BERGER, *supra* note 30, at 318-23 (addressing intent of the Framers); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1326-35 (1988) (urging greater congressional expertise and involvement in foreign affairs in order to avoid excesses such as the policies underlying the Iran-contra affairs); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 166-81 (1990) (same).

⁵⁶ ELY, *supra* note 24, at 3-11.

⁵⁷ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *accord A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

⁵⁸ *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

⁵⁹ *Id.* at 543 (Rehnquist, J., dissenting) (quoting *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in judgment)).

Unfortunately, as Ely recognizes,⁶⁰ the nondelegation doctrine has been “‘virtually abandoned’” by the Supreme Court because the administrative state that has flourished since the 1930s “could not operate without” broad delegations.⁶¹ This is especially true of delegations to the President in foreign affairs,⁶² as then Assistant Attorney General William H. Rehnquist argued of the Tonkin Gulf Resolution.⁶³ Indeed, even the most strident proponents of a strictly congressional war power acknowledge that the courts have never applied the doctrine to presidential military ventures, including the war in Indochina.⁶⁴

Nonetheless, the basic principle of the delegation doctrine, that Congress should not sidestep democratic accountability for its most serious responsibilities, remains available if not absolute. First, although broad delegation of general legislative power appears to be tolerated, it is not clear that the courts should approve similar delegations of specific powers, such as the power to declare war, or the power to impeach.⁶⁵ Ely’s extended illustration of how Congress’s abdication of its duty to deliberate and vote on the Indochina War frustrated accountability argues powerfully that decisions on war are also different from normal, delegable legislative functions.⁶⁶ Second, presidential assumption of Congress’s war power does not reflect an affirmative congressional delegation. Even standardless statutory delegations demonstrate some exercise of legislative functions upon which individual members of Congress can be judged. A duty forsaken by silent acquiescence, however, is more difficult for the electo-

⁶⁰ ELY, *supra* note 24, at 23-24.

⁶¹ 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:2 (2d ed. 1978) (quoting *FPC v. New England Power Co.*, 415 U.S. 345, 352-53 (1974)). For a general discussion of the nondelegation doctrine and its potential viability, see David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

⁶² ELY, *supra* note 24, at 24 (discussing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); see also SPITZER, *supra* note 30, at 144-45.

⁶³ WORMUTH & FIRMAGE, *supra* note 30, at 206.

⁶⁴ *Id.* at 213-14 (discussing *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971)); see also *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971). The exception is *Mora v. McNamara*, 389 U.S. 934 (1967), in which the dissent from a denial of certiorari in a case challenging the legality of the Vietnam War questioned whether the Tonkin Gulf Resolution sufficed to provide authorization to the Executive in the absence of a declaration of war. *Id.* at 935 (Stewart, J., dissenting). Despite these and the other problems noted above, Professors Wormuth and Firmage contend that the nondelegation doctrine as set forth in *Schechter Poultry* and *Panama Refining* is not only alive and well, but that it applies fully to foreign affairs. WORMUTH & FIRMAGE, *supra* note 30, at 206-14; see also LAWRENCE R. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE 75-84 (1970) (contending that the Tonkin Gulf Resolution was an unconstitutional delegation of legislative power). As set forth below, Ely maintains his credibility by appealing to the principle behind that doctrine rather than joining the hopeless attempt to unring its death knell and make it legally binding in the unlikely area of war powers. See *supra* notes 48-56 and accompanying text.

⁶⁵ DAVIS, *supra* note 61, § 3:4.

⁶⁶ ELY, *supra* note 24, at 12-46.

rate to assess. Despite the death of nondelegation as a doctrine, its underpinnings demonstrate the depth of accountability as a touchstone for judicial intervention.

C. Practical and Theoretical Problems

Despite the foregoing, Ely's representation-reinforcing theory of war powers is still subject to two complaints. First, on a theoretical level, it is not clear that Congress's frequent abdication reflects a systemic political breakdown of the sort supporting judicial intervention in *Democracy and Distrust*. Specifically, unlike a purely majoritarian system's tendency to scapegoat minorities and box them permanently out of both the process and the spoils, Congress's failures in war powers are largely of the will, not the system. Absent a determined secret usurpation such as the Executive pursued in Laos or the Contra war,⁶⁷ Congress's choice to focus myopically on local, domestic issues is reviewable at the polls.

By contrast, a true market failure by definition precludes such self-correction. For example, a congressional choice to seize the property of an individual on behalf of the majority presumably will be validated electorally by the benefitted majority.⁶⁸ Similarly, successful disenfranchisement, whether direct or through gerrymandering, logically insulates itself from correction at the polls.⁶⁹ This is a systemic, procedural breakdown requiring help from outside the democratic system. It simply cannot fix itself.

⁶⁷ Such covert actions constitute potentially impeachable crimes that the system can address. As Congressman William Hungate put it: "It's kind of hard to live with yourself when you impeach a guy for tapping telephones and not for making war without authorization." ELY, *supra* note 24, at 104 (citation omitted); see also *id.* at 95-97 (discussing the war in Laos as an impeachable offense). This sentiment coincides with the purpose of impeachment to protect the public from "the misconduct of public men, or, in other words, from the abuse or violation of some public trust." JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 29 (1978) (quoting THE FEDERALIST No. 65 (Alexander Hamilton)); see also RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 75 (1973) (tracing constitutional language to debates in the Constitutional Convention); PETER C. HOFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 118 (1984) (maintaining that "corrupt motive" sufficed for American founders); OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, *LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW* 15-16 (1974) (discussing views of state ratification conventions). "Impeachments in the United States, James Wilson wrote soon after the Constitution was ratified, 'are confined to political characters, to political crimes and misdemeanors, and to political punishment.'" LABOVITZ, *supra*, at 27 (citation omitted). Deliberate misuse of the President's political authority as Commander-in-Chief, accompanied by deliberate concealment, calls for the political punishment of impeachment. *But see* CHARLES L. BLACK, *IMPEACHMENT: A HANDBOOK* 44 (1974) ("[T]here is often some fairly plausible claim of authorization in the particular case, and where experts disagree on justification, it is hard to find clear and wanton abuse of power.").

⁶⁸ See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36, at 97-98.

⁶⁹ *Id.* at 117 (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969)).

If, however, the electorate wants a Congress that cares about foreign affairs, including its bloodiest manifestation, there is no structural or theoretical impediment to their electing one. Congress need not take seriously a "halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority";⁷⁰ the electorate can apply the incentive. Indeed, it is presumably the electoral incentive to concentrate on domestic matters to which the faint-hearted in Congress respond in choosing to reserve the option of cheering or booing as the war progresses. Also, an outside opponent could excoriate a legislator, even one trying to end a war, for years of quiet acquiescence. If a defeat in the next election is probable, it should awaken the legislator to her duty to deliberate at the outset. Congress's choice to forego its responsibility, therefore, appears a legitimate move within a democratic system, theoretically allowing for correction by that system.

Dean Ely's discussion of the Indochina War, however, demonstrates that the public has consistently failed to apply that electoral discipline, and that members of Congress know it.⁷¹ Thus, congressmen who sought to end a war over which they had declined to deliberate at inception were frequently rewarded by re-election despite earlier failures of leadership.⁷² Despite the possibility of accountability for inaction, the probability remains so low as to be practically indistinguishable from a "true" malfunction in the process itself. Members of Congress have gotten the message that failing to address the wisdom of presidentially proposed, planned, or initiated hostilities does not result in voter backlash, whereas a vote against a popular war, or in support of what becomes an unpopular war, can.⁷³ This constitutes a *de facto* failure of the political market and calls for judicial intervention.

⁷⁰ ELY, *supra* note 24, at 52. A thorough exhortation, with concrete suggestions for internal changes designed to centralize expertise on national security issues within Congress, is contained in Koh, *supra* note 55, at 1326-35.

⁷¹ E.g., ELY, *supra* note 24, at 19, 49, 59 (quoting Thomas Eagleton on Congress's preference to avoid difficult decisions over foreign affairs).

⁷² See ELY, *supra* note 24, at 17-23 (discussing Senator Fulbright's record of "voting with the administration forces" at the outset only to later take up the mantle of resistance). Ironically, in 1961 Senator Fulbright decried the "localism and parochialism" of Congress:

At no point in his rise to powerful office does the typically successful politician find it imperative to school himself in the requirements and problems of foreign policy. Indeed his pre-occupation with local matters and with political machinery is virtually *bound* to prevent him from acquiring any breadth or depth of knowledge in the field of foreign affairs.

J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 6 (1961).

⁷³ Kelly, *supra* note 3, at 147 ("Voters simply do not elect members of Congress based on their position regarding the war powers or even foreign relations. . . . In modern times, national security and foreign relations are complex and politically hazardous. Congress generally is content to leave that responsibility with the President.").

Second, critics may oppose Ely's proposal because, as a practical matter, it may not always be possible to limit judicial involvement to a simple remand to Congress, with the President automatically enjoined from commencing or continuing hostilities until Congress acts. Ely's vision of a clear, manageable judicial remedy departs sharply from Professor Bickel's pessimistic assessment of the effect of a judicial decision ending the Vietnam War as unconstitutional:

For my part, I think the Court has been wise to exercise its discretion so as to avoid passing on the constitutionality of the war. . . . If the Court were to hold the war unconstitutional, the effect would not be to cause Congress to spring into action. The effect would be to make it less likely than otherwise that Congress will assume its responsibility, now and in the future. There would be sighs of relief on Capitol Hill to have had the responsibility taken off Congress' shoulders; and, in the future, likely as not, Congress would continue to tolerate presidential initiatives and wait for the Supreme Court to hold them unconstitutional.⁷⁴

Under Ely's program too, we can ask whether Congress would not frequently decline to act upon the remand, preferring to let the courts take the lead in confronting the President and dealing with the potentially messy business of supervising a reluctant withdrawal.

Ely would distinguish his proposal by its timing; it is designed to halt the march to a presidential war, not to end a full-fledged war like the Indochina War in 1971.⁷⁵ Nonetheless, Professor Bickel's insight retains substantial force for two reasons. First, it is often hard to see the results of sabre rattling without the benefit of hindsight. Second, even a judicial delay of a few days or weeks (which seems a minimum before a court could decide a matter of this magnitude and novelty) plus even a short delay for a remand to Congress, would put the courts in the position of ordering, and possibly overseeing, a withdrawal if the President resists. Moreover, the judicial remand could practically turn out to be no different from an injunction should Congress routinely fail to act.

Ely addresses these problems in an enormous endnote,⁷⁶ and concludes that if Congress is paralyzed and the President is defiant of the courts, "we will all be in very deep water, and certainly will have passed the point where judicial action is very relevant."⁷⁷ At its least, a judicial remand deprives individual legislators of the cover story that they did not really acquiesce in the ensuing war. At its greatest, it calls

⁷⁴ Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 144-45 (1971).

⁷⁵ Ely, *supra* note 24, at 237 n.61 (distinguishing judicial remand to Congress from later enforcement orders should the President resist).

⁷⁶ *Id.* at 183 n.86.

⁷⁷ *Id.* at 237 n.61.

upon the powerful rhetorical platform of the judicial opinion to mobilize the public and prod Congress.⁷⁸

D. Unforeseen Implications for the Commander-in-Chief Function

Finally, although Ely does not discuss it, identification of accountability as the touchstone of war-powers allocation sheds light on another potential constitutional imbalance. Judicial insistence on a formal, self-conscious congressional exercise of the decisional war power minimizes the opportunity for Congress to micro manage the President's exercise of the operational war power⁷⁹ embodied in his functions as Commander-in-Chief.⁸⁰ An incidental or implied authorization of hostilities reflects a fluid delineation of roles. This allows the congressional committees a foothold to kibitz on strategy through hearings with administration and military officials and allows Congress to offer advice against the backdrop of explicit or implicit threats to legislate *how* the war is conducted. If the hostilities in question constitute a war, however, the Constitution commits responsibility for conducting it to the President just as clearly as it devolves the responsibility to begin war on Congress.⁸¹ Congressional meddling in the President's duties provides the President an excuse for failure,⁸² but does not pin any responsibility firmly on individual legislators. Thus, it clouds the question of whom the public can hold accountable for the conduct of the war. This runs afoul of Ely's accountability principle as surely as does unfettered presidential war making.

⁷⁸ See *id.* at 130-31.

⁷⁹ Congressional and presidential war powers can be distinguished as "decisional" and "operational." Kelly, *supra* note 3, at 113-21. Thus, "[w]hile the zenith of congressional power is during the decisional phase, the apex of the President's power is during the operational phase." *Id.* at 163; see also J. Terry Emerson, *Making War Without a Declaration*, 17 J. OF LEGIS. 23, 33 (1990); GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 71 (1919) (distinguishing "the power to declare and the power to wage war").

⁸⁰ Cf. W. Taylor Reveley III, *Congressional Practice: An Overview and Case Histories, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY* 129 (Steven P. Soper ed., 1984) (discussing the "new congressional activism"); Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUSTON J. INT'L L. 83, 122-23 (1988) (arguing that Congress has arrogated presidential power by seeking to "micromanage foreign affairs in the post-Vietnam era").

⁸¹ See U.S. CONST. art. II, § 2, cl. 1. In debating Congress's role in authorizing the presence of Marines in Lebanon in 1983, Senator Lloyd Bentsen stressed this division of roles: "Congress is not trying to run a war. That is the sole responsibility of the Executive." 129 CONG. REC. 26,252 (1983). Similarly, Chief Justice Salmon Chase opined in 1866 that "Congress cannot direct the conduct of campaign." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

⁸² See, e.g., TURNER, *supra* note 4, at 31-33 (arguing that congressional interference, through the Cooper-Church Amendment, Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973), with the Nixon Administration's campaign of bombing North Vietnam while offering negotiations encouraged Hanoi to further resistance).

Within the War Powers Resolution lurks a similar opportunity for Congress to interfere with the functions of the Commander-in-Chief.⁸³ The Resolution states in pertinent part:

Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred—

(1) from any provision of law . . . unless such provision . . . states that it is intended to constitute specific statutory authorization within the meaning of this chapter.⁸⁴

Although this rule of construction is primarily a limit on the President's ability to manufacture congressional consent from inconclusive legislative acts, it also allows Congress to participate in a war without taking the dose of accountability that such action should require. That is, under the Resolution, Congress can "fund warfare without actually taking responsibility for war itself," retaining the right to "backseat drive []"⁸⁵ through debates and appropriations, pressing or easing the accelerator without taking a stand on whether to start down that road.⁸⁶ The flexibility of Ely's focus on accountability to protect both congressional and presidential areas of responsibility attests to its potential to serve as a guiding principle in the debate over war powers, and perhaps in separation of powers disputes generally.

⁸³ The most frequently heard criticism of the War Powers Resolution, 50 U.S.C. § 1547(a) (1988), of course, emanates from congressional partisans who argue that its 60-to-90 day grace period unlawfully "creates a legal base for the continuing claims of virtually untrammelled Presidential authority to take the Nation to war without a prior congressional declaration." EAGLETON, *supra* note 38, at 208 (quoting his own comments on the floor of the Senate in opposition to the War Powers Resolution as reported from the Conference Committee); *see also* Bush, *supra* note 53, at 1749 & n.143 (discussing criticism of the statutory grace period).

⁸⁴ 50 U.S.C. § 1547(a) (1988). Michael Glennon proposes amending the War Powers Resolution to strengthen this provision. GLENNON, *supra* note 1, at 117.

⁸⁵ George S. Swan, *Presidential Undeclared Warmaking and Functional Theory: Dellums v. Bush and Operations Desert Shield and Desert Storm*, 22 CAL. W. INT'L L.J. 75, 116 (1991-92); *see also* Dick Cheney, *Congressional Overreaching in Foreign Policy*, in FOREIGN POLICY AND THE CONSTITUTION 101, 119-20 (Robert A. Goldwin & Robert A. Licht eds., 1990) ("Congress typically tries to avoid responsibility for a clear decision, avoids confrontation when presidents refuse to invoke the [War Powers Resolution's] terms, and prefers instead to praise successful presidential actions or criticize unsuccessful ones after the fact."); Edmund S. Muskie, *The Reins of Liberty—Congress, the President, and American Security*, in FOREIGN POLICY AND THE CONSTITUTION, *supra*, at 90-91 (comparing caricatures of a "seriously misguided president," against "Congress as a quarrelsome throng of 535 backseat drivers—local politicians who imagine themselves the secretary of state").

⁸⁶ The respective roles of Congress and the President have been aptly analogized to those of someone who decides to commence an ocean trip, and the captain, who guides the ship once the trip is begun. GLENNON, *supra* note 1, at 85 & n.78 (quoting *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 504 (1971)).

III

A NEW LANGUAGE FOR WAR POWERS

Critics acclaim both *Democracy and Distrust* and *War and Responsibility* as "written in a relaxed, almost colloquial, but always handsome prose"⁸⁷ remarkably "readable . . . and somehow manag[ing] humor and a kind of conversational elegance."⁸⁸ Recently, the intelligent humor of Ely's style has been compared to that of Joseph Heller.⁸⁹ Ely's writing style and rhetoric, however, serve much more than to coat in elegance what might otherwise be a dry pill. In *War and Responsibility*, Ely's method of argumentation breaks down the language⁹⁰ structuring the traditional debates over the war power, remaking it and recasting the constitutional players. Like Ely's stress on accountability, this reconstitution of the language of the argument presents an alternative to the stalemated terms of the current war power debate.

A. The Ely We Know: The Ideal Reader and the Model Author in *Democracy and Distrust*

The accessible, candid prose for which Ely is best known is most pronounced in *Democracy and Distrust*, which demonstrates a remarkable synergy of substance and form.⁹¹ To convey the character of Ely's voice, I will borrow and edit a quotation from a leading student of legal rhetoric: "As I . . . read through it I have [a] sense of the kind of life one associates with the reading of literary texts: [a] sense of a mind responding and learning, [a] sense of puzzle and illumination, . . . [a] sense indeed of the presence of another mind with whom the

⁸⁷ Michael Boudin, *Book Review*, 67 VA. L. REV. 1251, 1254 (1981) (reviewing ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36); *see also* Eric M. Freedman, *Book Review*, 48 BROOK. L. REV. 391 (1982) ("Professor Ely's exposition of constitutional theory is both deceptively simple . . . and satisfyingly rich . . ."); Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 642 (1991) ("an uncommonly lucid and unaffected prose style").

⁸⁸ Falk, *supra* note 37, at 19.

⁸⁹ 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, 1364, 1400 n.110 (1994).

⁹⁰ I use the term "language" broadly to encompass the words of value to which a speaker can turn to make, in this case, legal claims of authority and persuasion. *See* JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 20-21 (1984). Used in this sense, "to imagine a language is to imagine a whole form of social life." TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 60 (1983).

⁹¹ *See* Mark V. Tushnet, *Foreword*, 77 VA. L. REV. 631, 633 (1991) ("[T]he consequence of Ely's style is to draw readers into his theoretical universe—to attract them. . . . The style, therefore, is integral to the success of Ely's enterprise."). Indeed, Tushnet argues that the primary value of Ely's theory of representation-reinforcing judicial review is precisely its rhetorical skill in encapsulating for this generation the recurring theme that the Constitution concerns itself primarily with process, not substantive policy. *Id.* at 638-39.

author is engaged."⁹² Ely's engagement with the constitutional scholars and actors who have preceded him, with the Court, and with the text of the Constitution itself is palpable.

Perhaps as a result, or as a corollary, the "ideal reader"⁹³ that *Democracy and Distrust* presupposes includes the full range of predispositions on the ultimate issue. It does not ask or assume that the reader already agrees on techniques of constitutional interpretation or substantive results. Nor does the ideal reader's dialectical partner, the "model author"—the "voice that speaks to us affectionately (or imperiously, or slyly), that wants us beside it 'and is' identified with what every aesthetic theory calls 'style,'"⁹⁴—operate with a series of argumentative conventions indicating that the ideal reader is committed to a contrary position. By its example, the model author of *Democracy*

⁹² James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2014-15 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)). I have inverted the original meaning of this passage by substituting in brackets the word "a" in place of White's "no."

⁹³ The concept that a text teaches the reader how it ought to be read and hence seeks to define the character of the relationship between text and reader—personified by an ideal reader—is the central insight underlying reader response theory.

The reader is also a character in the world created by the text. For in acting on the reader as he does, the writer calls on him to function out of what he knows and is—for one who brings nothing to a text cannot be a reader of it—and to realize some of his possibilities for perception and response, for making judgments and taking positions. To engage with a text is to become different from what one was. There is a sense in which every text may be said to define an ideal reader, which it asks its audience to become, or to approximate, for the moment at least and perhaps forever.

WHITE, *supra* note 90, at 15; *see also* EAGLETON, *supra* note 90, at 84 ("Every literary text is built out of a sense of its potential audience, [and] includes an image of whom it is written for."); *cf.* Susan Mann, Note, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 STAN. L. REV. 959, 978-80 (1989) (challenging White's ideal reader concept). Umberto Eco conceptualizes the "model reader—a sort of ideal type whom the text not only foresees as a collaborator but also tries to create." UMBERTO ECO, *SIX WALKS IN THE FICTIONAL WOODS* 9 (1994). These literary concepts coexist with the insight that an argument, either explicitly or, more interestingly, implicitly, asks the reader to accept a certain character, i.e., to accept the assumptions and attitudes about the world which underlie the argument. Jerry Frug, *Argument as Character*, 40 STAN L. REV. 869, 872-73 (1988).

⁹⁴ ECO, *supra* note 93, at 15. In Eco's theory, and in White's, the character of the ideal or model reader is determined by the text's interpretive strategy—"a set of instructions which is given to us [as readers] step by step and which we have to follow when we decide to act as the model reader"—which is Eco's model author. *Id.* "[T]he competence of Model Readers is determined by the kind of genetic imprinting that the text has transmitted to them Created with—and imprisoned in—the text, they enjoy as much freedom as the text is willing to grant them." *Id.* at 16 (quoting Paola Pugliatti, *Reader's Stories Revisited: An Introduction, in Il lettore: modelli, processi ed effetti dell'interpretazione*, 52-53 VS 5-6 (1989)); *see also* EAGLETON, *supra* note 90, at 76-78 (discussing various reader-response theorists' formulation of the "cues," "codes," "strategies," and "schemata" imbedded in texts for the discovery of empirical readers and the definition of ideal readers); STANLEY FISH, *DOING WHAT COMES NATURALLY* 71 (1989) (discussing Wolfgang Iser's claim that texts contain not an objective meaning, but a "set of directions for assembling a meaning, directions [the reader] will carry out in his own way").

and *Distrust* strongly invites the reader to open her mind to dialogue with the text.

Thus, Ely treats the discussion in *Democracy and Distrust* like an intellectual journey, testing traditional approaches and examining anew the assumptions of the system. He assesses the strengths of varying schools of constitutional interpretation as well as his own motivations, misgivings, and aspirations.⁹⁵ The journey leads the reader, whatever his disposition, to an examination of a deeper order of regularity underlying judicial review. Ely's identification of representation and process as the proper subjects for judicial review is the synthetic principle he discerns organizing those disassembled materials. The process of demolition and construction in which the ideal reader has participated, however, is an education in itself. The educative process leaves the reader with a platform from which to judge for himself whether the reconstitutions of the legal language in which he has participated reflect a satisfying culture of argument. Therefore, *Democracy and Distrust* not only proposes an active but limited democratically rooted role for the courts, but also illustrates the intellectual and political character that discourse in such a constitutional community should exhibit.

Put differently, *Democracy and Distrust* demonstrates and recommends a character of open dialogue. "[I]n making arguments the speaker or writer 'show[s] himself to be of a certain character' and seeks to have his listeners (or readers) identify with that kind of character."⁹⁶ Likewise, the character of the relationship between the author and the reader in the community created in the text—be it good or bad, equal or manipulative—defines the ideal reader's character in that textual community.⁹⁷ The footnotes of *Democracy and Distrust*, which openly acknowledge difficulties lurking in Ely's positions, doubts he had in making them, and positions abandoned upon further inquiry, serve both to demonstrate that the model author is candid and to suggest an interpretive technique of shared inquiry. It is Socratic in its implication that both parties to the textual community are open to refutation. The character of the idealized law professor in dialogue with her class comes to mind as an analogy. More relevant to the task pursued in *Democracy and Distrust*, however, is the character of an appellate judge in dialogue with colleagues. When Ely's rhetorical effort asks us, the readers, to "be like me" in order to "expose and foster an aspect of our own character, advancing a conception of who

⁹⁵ This is especially notable in the footnotes. E.g., ELY, *DEMOCRACY AND DISTRUST*, *supra* note 36, at 102 n.*.

⁹⁶ Frug, *supra* note 93, at 872-73 (quoting ARISTOTLE, *THE "ART" OF RHETORIC* 1377b (J.H. Freese trans., 1926)).

⁹⁷ WHITE, *supra* note 90, at 17-18.

we consider ourselves to be,"⁹⁸ he asks us to react like an idealized, Socratic judge in open dialogue with herself, her colleagues, and her legal audience of litigants, other courts, the legislature, and the public. This identification seeks a transformation of character.

Ely's rhetorical style performs the substance of his theory of judicial review in another way. It demonstrates the character of a successful judicial opinion: open to counter argument and refutation, rooted in common language and experience, calling upon the public to be watchful, engaged readers, and respectful of the limits of the judge's role. The ideal reader is invited to map this model author onto judicial opinions.⁹⁹

B. The Complex Voice of *War and Responsibility*

War and Responsibility's model author is much more complex and changing than that of *Democracy and Distrust*. In its three chapters examining directly disputes about elements of the Indochina War,¹⁰⁰ Ely's voice nonetheless demonstrates a similar character of candid inquiry. For example, it acknowledges weaknesses in the traditional congressional arguments—going so far as to find that the Tonkin Gulf Resolution¹⁰¹ was sufficient to legitimize the war in Vietnam itself,¹⁰² and that the secret war in Laos, although unconstitutional, was practically unremediable.¹⁰³ Unlike *Democracy and Distrust*, however, the model author in these chapters also rings out with the character of a particularly eloquent expert witness. Ely presents historical facts as he understands them and offers expert analysis of the theories of his opponents in light of those facts. Rather than shade every fact or infer-

⁹⁸ Frug, *supra* note 93, at 873.

⁹⁹ It has been suggested that this kind of stylistic character in judicial opinions serves as a guard against substantively defective legal decisions. "No opinion with a misguided outcome has ever in fact been 'well-crafted.'" RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 7 (1992). This concept is critiqued in John Fischer, Note, *Reading Literature/Reading Law: Is There a Literary Jurisprudence?*, 72 TEX. L. REV. 135, 144-48 (1993).

¹⁰⁰ ELY, *supra* note 24, at 12-46, 68-104.

¹⁰¹ Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971).

¹⁰² ELY, *supra* note 24, at 46-47, 69. Congressional leaders, such as Senator Richard Russell, recognized the breadth of their authorization: "I knew that the joint resolution conferred a vast grant of power upon the President. It is written in terms that are not capable of misinterpretation, and about which it is difficult to become confused. . . . Personally, I would be asbamed to say that I did not realize what I was voting for when I voted for that joint resolution." 112 CONG. REC. 4370-71 (1966) (quoted in TURNER, *supra* note 4, at 20) (also citing statements of numerous other congressional leaders); *see also* ELY, *supra* note 24, at 16-19; Gerald R. Ford, *Foreword* to TURNER, *supra* note 4, at viii (noting, as a congressman, "when some of my colleagues began pretending in the early 1970s that Congress had been an innocent bystander as the nation had committed its young men to conflict in Southeast Asia, I felt a great sense of sadness").

¹⁰³ ELY, *supra* note 24, at 68.

ence his way, as an advocate might, he maintains a fairly objective tone, as in his early willingness to concede the basic constitutional legitimacy of the war in Vietnam.¹⁰⁴

Moreover, since the military, political, and legal events surrounding the war in Indochina are recent and well known, Ely's model author also implicitly invites the ideal reader to become a witness to how the allocation of war powers played out at that time. In reading his testimony, we can use our remembrance either to rebut his factual assertions or to assent to them, becoming a corroborating witness. Although this technique is not necessarily uncommon, most constitutional debate deals with events of much earlier history, interpreting a body of eighteenth- and nineteenth-century texts and precedent, rather than testifying to events of recent memory. For example, whereas the reader can either dispute or agree with Ely's contention that the public did not know about the war in Laos by reference to her own experience, she cannot similarly testify as to what happened at the Constitutional Convention or as to what was publicly known about the situation in the Philippines from 1896 to 1898. Thus, *War and Responsibility* engages the faculties of the reader in a way that most treatments of the War Clause do not.

The model author of *War and Responsibility*, however, does not speak as a witness throughout. The voice of *War and Responsibility* shifts dramatically in two chapters: the first, discussing the "Constitutional Framework,"¹⁰⁵ and the third, entitled "Inducing Congress to Face Up to Its Constitutional Responsibilities."¹⁰⁶ The model author speaks in these two chapters with a voice of assertive, derisive authority. Why does Ely adopt this tone in order to make these arguments?

As noted above, the necessary premise of Ely's argument—the unequivocal delegation to Congress of all authority to commence combat, save in immediate emergencies—is set forth in only three pages,¹⁰⁷ with six pages addressing counterarguments.¹⁰⁸ This is startlingly peremptory treatment of topics that form the grist of the sizeable body of war powers scholarship and debate.¹⁰⁹

¹⁰⁴ *Id.* at 47.

¹⁰⁵ *Id.* at 3-11.

¹⁰⁶ *Id.* at 47-67. The latter is reproduced bluntly in the header of the chapter as "Inducing Congress to Do Its Job."

¹⁰⁷ *Id.* at 2-5.

¹⁰⁸ *Id.* at 5-10.

¹⁰⁹ Nonetheless, concentration on this small, opening aspect of Ely's book has led one reviewer, Professor Philip Bobbitt, to conclude that Ely allowed himself to become "ensnare[d] . . . in the terms of the current debate." Bobbitt, *supra* note 89, at 1378. Professor Bobbitt calls the procongressional constitutional framework the "Standard Model," and criticizes Ely primarily for too quickly assuming in the first chapter that it is valid as a matter of text, history, prudence, and precedent, while not addressing structural and ethi-

Moreover, although Chapter One takes issue with the most aggressive arguments for Executive war, it omits discussion or accommodation of the popular middle view that use of force (at least short of full war) often flows from the conduct of diplomacy, and so lies within what Justice Jackson termed a "zone of twilight" in which powers are concurrently held.¹¹⁰ Whereas *Democracy and Distrust* sought to persuade a full spectrum of opinion holders by integrating all the respectable theories of judicial review, *War and Responsibility* does not similarly seek to integrate or co-opt all positions or reach all the constituencies and viewpoints regarding the war powers. Rather, Chapter One implies a narrow readership.

Taken as the opening move in the book's longer argument, however, the opposite is true. As its subtitle suggests and as noted above, the vast bulk of *War and Responsibility* submerges the basic question of the war powers in the shared experience of Vietnam reconstructed in the text. A lengthy discussion of how Congress chose to use, or misuse, its power in this generation and of the effects of that choice subordinates the necessary premise, congressional supremacy. This reflects the model author's call to a more broadly conceived ideal reader: one who will test the author's perceptions and prescriptions primarily against experience, witnessed (and possibly rebutted) within the textual community, rather than against the traditional materials of the debate. This represents a stark departure from the debates about early precedents that were noted by Justice Jackson in 1951 and that continue to polarize the debate today.

In Chapter Three, Ely shifts again, unsheathing a poison pen and taking an acerbic, mocking tone unlike the gentlemanly, conversational discourse for which he is known. He accuses Congress of hav-

cal arguments. *Id.* at 1375-88. Bobbitt proposes a middle position on the war powers by reference to the latter two sources of authority. *Id.* at 1389-1400.

¹¹⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (discussed in Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics than Law*, 78 AM. J. INT'L L. 571, 576 (1984)); KEYNES, *supra* note 30, at 91-94, 117-18 (applying Justice Jackson's test to the invasion of Cambodia in 1970). Compare REVELEY, *supra* note 4, at 191-95 ("Given congressional silence, the President should be constitutionally free to act, limited only by (1) the necessity to inform the legislators fully of developments on a continuing basis, (2) defensive purpose, and (3) the availability of implementing tools.") and Sofaer, *supra* note 9, at 324 (arguing that pattern of executive action in foreign affairs, including hostilities, pending full congressional vote to the contrary, is consistent both with the intended constitutional system and with Justice Jackson's concurrence), with GLENNON, *supra* note 1, at 93; Charles Bennett et al., *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 36-37 (1988) (comments by Professor William Van Alstyne) and; Biden & Ritch, *supra* note 4, at 394-97 (arguing that Justice Jackson's framework provides an opportunity for Congress to legislate a new allocation of responsibilities) and Kelly, *supra* note 3, at 151 (arguing that "the judicially created concept of fluctuating powers" offers Congress the tools to reestablish the "original conceptual model").

ing entered into a cynical "conspiracy between the executive and legislative branches to enhance their own political fortunes at the expense of the interests of the people at large (now more than ever, its least advantaged segments)."¹¹¹ This conspiracy seeks to "retain[] for Congress the option (depending on how the war went) of pointing with pride or viewing with alarm."¹¹² "[W]hen things went wrong [in Vietnam, Congress] could continue to claim mere bystander status. Who, us? This isn't *our* war. It's Johnson's war. Or maybe Nixon's."¹¹³ An ineluctable urge to keep "the embarrassing monkey of accountability off their backs"¹¹⁴ drives Congress to leave the decision whether to go to war to the President.

In Ely's view, no amount of exhortation can shake this devotion to unaccountability in foreign affairs.¹¹⁵ "Congress' proclivity to hide on issues of war and peace [is] legendary,"¹¹⁶ rendering bootless scholars' "efforts to stiffen Congress's back."¹¹⁷ Even Congress's success in deliberating over the invasion of Kuwait provides no grounds to predict that it will be repeated before the next war: "[T]he prediction probably underestimates Congress's sophistication on the subject of self-preservation."¹¹⁸ Ely foresees a quick

return to the tradition of evasion, a resolve of still greater doggedness in resisting suggestions . . . that casting a vote on whether Americans are to die might be part of their job. The next war might be another Desert Storm or it might not: better to keep your options open and claim vindication either way.¹¹⁹

¹¹¹ ELY, *supra* note 24, at 54. Ely states in the preface that the conspiracy involves all the branches:

It is common to style this shift a usurpation, but that oversimplifies to the point of misstatement. It's true our Cold War presidents generally wanted it that way, but Congress (and the courts) ceded the ground without a fight. . . . [T]he legislative surrender was a self-interested one: Accountability is pretty frightening stuff.

Id. at ix.

¹¹² *Id.* at 49.

¹¹³ *Id.* at 47. Stated differently, "the president will take the responsibility (well, most of it) so long as he can make the decisions, and Congress will forego actual policy-making authority so long as it doesn't have to be held accountable (and can scold the president when things go wrong)." *Id.* at 54.

¹¹⁴ *Id.* at 65-66.

¹¹⁵ See also GLENNON, *supra* note 1, at 109 ("That Congress has an operative institutional memory is another false assumption" identified by critics as undercutting Congress's ability to discipline itself.).

¹¹⁶ ELY, *supra* note 24, at 180 n.82.

¹¹⁷ *Id.* at 65.

¹¹⁸ *Id.* at 51-52.

¹¹⁹ *Id.* at 52.

Ely derides any suggestion that Congress can be cured by itself,¹²⁰ by a President mindful of Congress's proper role,¹²¹ or by the electorate.¹²²

C. Ely's Audience

We can ask again, why does Ely quickly assume the strongest congressional position in the first chapter and then launch this caustic attack on Congress and the capacity of our constitutional system to cure itself? In sharp contrast to *Democracy and Distrust*, these mocking accusations certainly do not demonstrate or recommend a public judicial voice appropriate to the proposed circumscribed role of judicial review.¹²³

The answer lies in Ely's audience. He speaks not to persuade an ideal reader with an open mind but to beat down the passive resister. He seeks to convert and catalyze those who accept the strong congressional position and identify with Congress by lampooning the "tradition of evasion" forged by the silent majority in Congress.¹²⁴ The lengthy footnotes carry a virtual indictment of the overreaching of

¹²⁰ Ely analogizes: "Ulysses tried, genuinely I think, to tie himself to the mast in 1973, but the knots were loose, and he was soon back to his old ways of avoiding responsibility." *Id.* at 53.

¹²¹ Although President Eisenhower is frequently praised as the last President to take Congress's role seriously, that example is not held out as a probable candidate for repetition. *Id.* at 54, 62.

¹²² As a sizeable political science literature has documented, congressmen today have found the most comfortable road to survival—and do they ever survive—to lie in combining a maximum of individual services for constituents, and other interest groups seen as critical to reelection, with a minimum of actual legislative policy-making.

Id. at 59 (citations omitted). As discussed above, this tendency is particularly remarkable in the paradigmatically nonlocal topic of foreign affairs. *See id.* at 175 n.32; *see also* Kelly, *supra* note 3, at 147 (quoted *supra* note 73).

¹²³ Failure to examine Ely's rhetoric in *War and Responsibility*—despite the book's startlingly abrupt changes in tone—has led one reviewer to scold Ely for having "ignored or conclusively dismissed the possibility of congressional initiative." Note, *The Least Interested Branch*, 107 HARV. L. REV. 2117, 2122 (1994) (book review). Conversely, since the courts have "tended to view questions of war powers as involving substantive policy choices," rather than procedural line drawing, the same review criticizes the book's arguments regarding judicial review as feckless. *Id.* at 2121. Ignoring the method of Ely's argument, the reviewer laments Ely's lack of a "realizable plan to make the institutions of government care about their responsibility to each other and to the constitutional regime." *Id.* at 2122. Absent a concrete "plan," the review seems to ask, what benefit can a book on war powers offer? The answer lies below; *War and Responsibility* exemplifies and recommends a reconstituted language in which the problems can be argued. The book's plan, process-oriented judicial review, seeks to educate the other branches in this language, but offers no coercive statutory plan capable of boxing them into a positivist cage. *See* ELY, *supra* note 24, at 237-38 n.61.

¹²⁴ This is not to say that *War and Responsibility* absolves the Presidency of arrogation of the war power. It certainly does not. It does, however, self-consciously choose to indict the other two branches for abetting the Executive's move towards predominance. ELY, *supra* note 24, at ix. Ely's emphasis on the self-inflicted nature of Congress's and the courts'

presidents and the complicity of Congress.¹²⁵ This rhetoric of ridicule, much like that more commonly associated with back-benchers in Britain's Parliament, invites those who hold or influence congressional authority to distance themselves from passive complicity with a constitutional usurpation and assert congressional initiative.

He also uses ridicule to jar a complacent Judiciary accustomed to relying on recantation of the principles of democracy to avoid addressing the allocation of the war powers. These principles invoke accountability, and call for Congress and the political system to diagnose and heal itself, rather than resorting to the unaccountable Judiciary for a cure. Therefore, although the questions raised concern the meaning of a constitutional command, the courts claim, in the name of democracy, to be justified in neglecting their "province and duty . . . to say what the law is."¹²⁶ In particular, Ely criticizes the judicially created political question doctrine, as well as narrow notions of congressional standing.¹²⁷ By juxtaposing the judicial resort to democratic theory against the history of political hypocrisy surrounding the Indochina War, and then wringing it through a mocking account of Congress's "legendary" success in frustrating accountability, Ely attempts to make the easy, habitual rejoinders of the Judiciary unspeakable, or at least unpalatable. Committing this question to the political branches, in Ely's reconstitution, does not enhance accountability and democracy but rather undermines them. Textual witness to the costs and hypocrisies of the war in Indochina renders the invocation of democratic values in favor of abstention hollow. Indeed, any grounds for abstention, whether based in democratic theory or prudence in regard to judicial capital, nonetheless will drag the courts into complicity in the evasion of accountability. In the end, Ely invites the Judiciary to either laugh with him at Congress's excuses, or to join the object of laughter.

From this devastation of the preexisting constitutional language legitimating presidential initiative (now viewed as congressional "evasion"¹²⁸) Ely offers both Congress and the courts a new language and structure of war powers. On the last page of the text, Ely's model author offers the ideal reader a clue that the rhetoric of war powers is his point:

wounds furthers his attempt to motivate them, rather than simply castigating the Executive.

¹²⁵ *Id.* at 171-74 nn.10-19.

¹²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

¹²⁷ ELY, *supra* note 24, at 54-60. For a discussion canvassing in detail application of the political question doctrine and other doctrines of judicial abstention to the war in Indochina, see KEYNES, *supra* note 30, at 120-60; see also Note, *The Least Interested Branch*, *supra* note 123, at 2120-21.

¹²⁸ ELY, *supra* note 24, at 52.

[W]e would be injecting the judiciary into the process. Rhetoric is the courts' most powerful weapon. It should be within the capacity of most federal judges (certainly within the Supreme Court's capacity) to write an opinion explaining that the Constitution entrusts the choice between war and peace to the legislative process¹²⁹

D. Power and Duty

The central term of meaning in Ely's language of war powers is the newly complicated term "power" in the Constitution's grant of the "Power . . . [t]o declare War."¹³⁰ A typical war powers debate treats "power" as synonymous with "right," and addresses the question of whether the President has invaded Congress's right to declare war.¹³¹ Justice Jackson in *The Steel Seizure Case* characterized the allocation of foreign affairs powers in terms of Congress's power "slipping through its fingers."¹³² Conversely, others ask whether the President has a right to take the initiative in foreign affairs, including war.¹³³ This traditional use of the term "power" corresponds with the view of the Constitution as a structure that operates by balancing competing institutions, counting on them to protect their turf.¹³⁴

Ely complicates this term with the corresponding concept of duty, which he calls Congress's "job."¹³⁵ Congress was granted the power in order to fulfill a duty—to provide an institutional check against executive war making and to facilitate a forum for a deliberate, public de-

¹²⁹ *Id.* at 130-31. Similarly, the last page of the notes stresses that judicial review, with a potential remand, offers an "educational process" capable of persuading Congress and the President to change the current pattern; rather than putting forward judicial remands as "the way the system typically should work." *Id.* at 238 n.61.

¹³⁰ U.S. CONST. art. I, § 8, cls. 1, 11.

¹³¹ *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973) (It is "'plaintiffs' Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war' Implicit in [this] contention is the[] assumption that the Constitution gives to the Congress the *exclusive* right to decide whether the United States should fight *all* types of war."); *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982) (discussing "[p]residential usurpation of congressional warmaking power"), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984); 129 CONG. REC. 26,286 (1983) (statement of Sen. Heinz) (discussing war powers in terms of "the President's right to conduct the foreign policy of this Nation and the right of the Congress to carefully evaluate and approve the commitment of U.S. troops"); Sidak, *supra* note 30, at 63 ("The Constitution makes initial assignments of property rights in different governmental functions").

¹³² *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

¹³³ *See e.g., Rostow, supra* note 9, at 40 (asserting "the President's right to use force without the prior approval of Congress").

¹³⁴ Ely operates within this conception *arguendo* in addressing what he calls an "adverse possession" theory of how presidential practice has shifted title over the war power from the Congress to the President. ELY, *supra* note 24, at 10.

¹³⁵ *Id.* at 52.

bate preceding hostilities.¹³⁶ This job gives meaning to the constitutional grant, which cannot be waived without damaging the animating purpose for which the power was delegated.¹³⁷

Indeed, in the language of "rights-talk," this process vests a corresponding right in the electorate: the democratic right to witness elected representatives deciding whether to go to war. This is not simply an empty right to procedure. Many Americans have sacrificed in unwise presidential wars. Numerous others have paid the price in covert actions for questionable gains.¹³⁸ From this right flows a requirement of accountability. Congress must do its job clearly and publicly so that the electorate will have the benefit not only of having wars carefully contemplated, but of being able to exercise their "right" to hold their representatives accountable for that decision.

Thus, Ely dismisses the traditional focus of war power debates on Congress's right to decide as merely the "prerogatives of congressmen."¹³⁹ This prerogative pales beside the underlying "judgment that no single individual should be able to take the nation into war and thereby risk the lives of all of us, especially our young people."¹⁴⁰ Af-

¹³⁶ Professor Bickel performed the same complication in a 1971 lecture. Rather than concentrating on a process-based judicial check, however, he relied on exhortation to Congress.

No, the answer lies with Congress. Whatever aggrandizement of presidential power we have witnessed, the practice of recent decades or of a century cannot have worked a reduction of the residual legislative power of Congress, if Congress should but exercise it. The power of Congress may have lain in disuse, but it is as legitimate as the day it was conferred. From it flows the duty to act.

Bickel, *supra* note 74, at 145.

¹³⁷ By reconstituting this pivotal constitutional term, Ely rejects for war powers, and potentially for all congressional powers, the conception that "constitutional values of 'principle' [regarding individuals] do not overlap with issues of federalism or separation of powers." Sager, *supra* note 43, at 715.

¹³⁸ ELY, *supra* note 24, at 224 n.22. The inherent tendency of covert war to breed an obsessive secrecy subversive of democratic institutions highlights the importance of the public's "right" to open congressional participation in the initiation of all wars. See *id.* at 225 n.23 (discussing historical incidents of national security personnel keeping the nastiest projects out of sight).

¹³⁹ *Id.* at 47; see also John Hart Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 CONST. COMMENTARY 1, 6 (1991). Some scholars use a framework of institutional "prerogative" explicitly. E.g., REVELEY, *supra* note 4, at 25; Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, *supra* note 11, at 38. In rejecting, as Ely does, the claim that the power to declare war is a "proprietary perquisite[] of Congress," Professors Wormuth and Firmage rely too heavily on the thin reed of the nondelegation cases from the early 1930s, as discussed above. WORMUTH & FIRMAGE, *supra* note 30, at 214.

¹⁴⁰ ELY, *supra* note 24, at 47. Ely states:

Dean Choper, following Professor Wechsler, has recently argued that 'separation of powers' quarrels between Congress and the president—which appear to include claims that the executive is acting beyond his authority—should not be judicially resolved because the 'put upon' branch can protect itself politically. . . . There is some surface sense in this suggestion: Absent

ter the shared witness to the human cost of the Indochina War performed in the text, it is difficult for the reader sensibly to contest this statement. Only a truly detached mind would continue to contend that solicitude for the democratic process requires tolerance of Congress's indulgence in the anti-democratic urge to avoid accountability when its cost is measured in the lives of others.¹⁴¹

The courts, as the authoritative "expounders" of the document creating Congress's job, are invoked only when the system has broken down beyond the capacity of politics to fix it. At that impasse "the assistance of the courts thus appears to have become essential if Congress is to be induced to discharge its constitutional responsibilities in this area."¹⁴² The courts intervene on behalf of the electorate whose "rights" are truly at stake, not in order to protect Congress from itself.

This construction of the constitutional term "power" and the role of the courts parallels the conception of the Constitution as itself the equivalent of a trust document:

Such an instrument will typically define with finality and in detail the property that belongs to the trust, the beneficiaries of the trust, how long it should run, and so forth. But in its other directions to the trustee it will normally be very general; he will be able to do with the property whatever seems appropriate, given the purposes set forth in the instrument, so long as he acts reasonably and in the best interests of the beneficiaries.¹⁴³

Congress and the President act as executors of the trust created by the Constitution's ratifiers. The courts' role in expounding the Constitution is the familiar one of a probate judge: to hold the trustee to the purposes of the trust and to the duty to administer it in the benefi-

a pretty specific constitutional direction to the contrary, courts should not intervene to take care of those who can take care of themselves. The argument doesn't work in this context, however, as the prerogatives of Congress aren't really what's at stake here.

Id. at 175-76 n.43; *see also id.* at 57. Compare 140 CONG. REC. H9031 (daily ed. Sept. 12, 1994) (Statement of Rep. Skaggs) ("This is not a turf issue. Having Congress act is a means to a more important end, and that is making sure that the country understands and supports such a grave decision [i.e., to invade Haiti]."); KEYNES, *supra* note 30, at 168 ("The classical (Marshall-Hamilton-Warren-Wechsler) argument for judicial review suggests that the courts have a special obligation to limit the legislative and executive branches to the exercise of their respective constitutional powers. . . . At the very least, the judiciary has an obligation to determine whether . . . a demonstrable commitment [to a particular branch] exists and to determine the scope of the power . . .").

¹⁴¹ *See also* *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) ("The constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war.").

¹⁴² ELX, *supra* note 24, at 67.

¹⁴³ WHITE, *supra* note 90, at 244.

ary's, not their own, interests.¹⁴⁴ Similarly, under Ely's conception, the courts address challenges under the War Clause and are called upon to protect the rights of the beneficiary, not those of the trustees. This does not involve the Judiciary administering the trust but rather monitoring the political branches' actions as trustees to see that they conform to its procedures and purpose.

There is also a practical litigation benefit to Ely's approach. Contrary to the most recent judicial pronouncement in this area,¹⁴⁵ redefinition of "power" as "job" logically vitiates any requirement that Congress as a body petition the courts for redress of a presidential trespass. That was Judge Greene's approach in *Dellums v. Bush*, which dismissed on ripeness grounds a challenge by members of Congress to President Bush's build-up towards the Persian Gulf War because a majority of Representatives and Senators had not joined the suit.¹⁴⁶ Judge Greene's reasoning stems from a proprietary view of constitutional power and is worth repeating in full:

[P]laintiffs in an action of this kind [must] be or represent a majority of the Members of the Congress: the majority of the body that under the Constitution is the only one competent to declare war, and therefore also the one with the ability to seek an order from the courts to prevent anyone else, *i.e.*, the Executive, from in effect declaring war. In short, unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.¹⁴⁷

¹⁴⁴ See *id.* at 256 (discussing Chief Justice Marshall's vision, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), of the Court's role in expounding the Constitution); *cf.* 129 CONG. REC. 26,294 (1983) (statement of Sen. Byrd) ("The people of the United States, through their votes, invest in us a trust.").

¹⁴⁵ *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990), discussed in ELY, *supra* note 24, at 59.

¹⁴⁶ *Dellums*, 752 F. Supp. at 1151. Ripeness, equitable discretion, and the political question doctrine are closely related. Judge Revercomb dismissed on equitable discretion and political question grounds a suit by 100 members of the House of Representatives challenging, under the War Powers Resolution, President Reagan's decision to reflag Kuwaiti freighters in the Persian Gulf in 1987. He reasoned that "[j]udicial review of the constitutionality of the War Powers Resolution is not, however, precluded by this [political question] decision. A true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review." *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987). *Lowry*, which rests on prudential rather than constitutional foundations, has been described as "[a]n open invitation" to rule upon the constitutionality of the War Powers Resolution should it be presented by a unified Congress. Michael M. Uhlmann, *Reflections on the Role of the Judiciary in Foreign Policy*, in FOREIGN POLICY AND THE CONSTITUTION, *supra* note 85, at 52. For a thorough discussion of congressional standing generally, see Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63 (1992).

¹⁴⁷ *Dellums*, 752 F. Supp. at 1151. It is unclear how such a majority must express its views in Judge Greene's view. However, it is clear that neither a nonbinding resolution by

In a system in which powers are delegated for the benefit of the institutions, this holding makes perfect sense.

In Ely's language of duty and accountability, however, the holding is absurd. Stated in that language, the reasoning becomes: Since Congress has refused to address the issues of war and peace—depriving the public of the chance to hold individual members accountable for their choices and preventing the congressional minority from doing its duty—it is not yet time to examine whether Congress has evaded its duty. Moreover, only when a majority in Congress has done its duty by voting to stop a military buildup, or by going to court *en masse*, may the court properly reach the issue. In other words, the issue will not ripen until it is effectively moot. The congressional majority, therefore, is allowed to shirk its responsibility to protect the public from ill-considered executive war (the very purpose for which the power was vested in Congress) until it stops shirking, at which point it does not really need judicial help. The interests of the public in procedure and accountability are completely absent as a subject of judicial concern. *War and Responsibility* succeeds by bringing those interests into the center of the debate.

CONCLUSION

For the reader who engages with Dean Ely's text, the terms of evaluation and debate will in the future focus not only on disputes over the scope and viability of Congress's institutional right (which looks towards the interests of the right holder), but on the animating character of Congress's duty towards the people it serves. Ely's prescription, therefore, calls on Members of Congress and the Judiciary not to protect an institution that will not protect its own prerogatives, but to hold Congress to its duties to the public. This transformation of the debate forges rhetorically what the book's title promises: a bond of accountability between the people who bear the costs of war and the members of Congress charged with the responsibility for deciding when to send them to fight. The character of Ely's discourse

the majority party in one chamber, nor expressions by the majority leadership, is enough. *Id.* at 1151 n.28. Judge Revercomb would have required a joint resolution, as in *Lowry v. Reagan*, 676 F. Supp. 333, 339, 341 (D.D.C. 1987). Compare with *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) ("The Court need not decide here what type of congressional statement or action would constitute an official congressional stance . . . because Congress has taken absolutely no action Certainly, were Congress to pass a resolution . . . and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented.") (citing *Goldwater v. Carter*, 444 U.S. 996 (1976) (Powell, J., concurring)). See Thomas M. Franck, *Rethinking War Powers*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION*, *supra* note 11, at 56, 65 (suggesting that Congress set up as a procedural rule a triggering mechanism whereby a "motion by any ten members of each House" would require an accelerated consideration of a "resolution of disapproval").

and the touchstone of accountability it advocates offer an opportunity to break the continuing stalemate of debate perceived by Justice Jackson in 1951.