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WAR, RESPONSIBILITY, AND THE AGE OF TERRORISM

John Yoo*

Just as John Hart Ely made a defining and singular contribution to the problem of judicial review with *Democracy and Distrust*,¹ so too he contributed to the study of war powers with *War and Responsibility*.² Like *Democracy and Distrust*, *War and Responsibility* crystallized a generation's thinking about a problem, wrought consensus out of myriad views, and accomplished these tasks while firmly grounding its argument and analysis in constitutional structure.³ Also like *Democracy and Distrust*, *War and Responsibility* found its answer in process, rather than substance. Ely believed that deliberation by multiple institutions, and ultimately the electorate, would produce good public policy. Finally, both books called on the federal judiciary to play a central role in maintaining the functioning of that process. Process itself is important and monitoring process is a job that judges can largely perform without injecting their personal views into the controversies before them.

Ely's framework for war powers can be clearly and simply stated. Not only did the Constitution vest in Congress the power to declare war, he concluded, but "the [Framing] debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not—most weren't, even then—had to be legislatively authorized."⁴ Once Congress had given ex ante approval for military hostilities, the Commander-in-Chief Clause allowed the President to conduct military hostilities. The only exception allowed unilateral

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1. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

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

3. Ely's conclusions are shared by, among others, LOUIS FISHER, *PRESIDENTIAL WAR POWER* 203 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997).

4. ELY, *WAR AND RESPONSIBILITY*, *supra* note 2, at 3 (footnotes omitted).

presidential action in response to a direct attack on the United States. According to Ely, the Constitution imposed a duty on the federal courts to intervene if Presidents waged wars without congressional approval. “[T]he court would ask whether Congress had authorized [the war], and if it hadn’t, rule the war unconstitutional unless and until such authorization was forthcoming.”⁵ This process, Ely concluded, was designed with the substantive goal in mind of making it difficult for the United States to enter into war. It is fair to say that Ely’s view represents the majority view among academics and has a certain intuitive attraction by appealing to the standard working model of the separation of powers that prevails in domestic affairs.

To honor Professor Ely’s contribution to the field, this Article will discuss various elements of *War and Responsibility* with particular attention to the current war on terrorism. It is my hope, however, that this Article will make a contribution that goes beyond a critique aimed solely at *War and Responsibility*—in part this is because Ely’s views are shared so broadly among those who study war powers, constitutional law, and international politics. Part I critiques Ely’s approach, both his method of constitutional interpretation and his substantive goals for the war-making process. It will propose a different vision for war powers that provides more flexibility to the political branches. Part II asks whether Ely’s process actually produces his desired substantive outcomes, and questions whether the costs and benefits of different war-making processes are sufficiently clear to cement one into place as a matter of constitutional law. Part III discusses the transformation of warfare and threats to American national security since *War and Responsibility*. International terrorism of the kind that attacked our nation on September 11, 2001, rogue nations, and the proliferation of weapons of mass destruction (WMD), place new demands on the Constitution’s system for making war. This Article counsels against establishing a fixed constitutional process for war powers when the struggle against al Qaeda is still early and the costs and benefits of different approaches cannot yet be measured with any confidence. In such times of uncertainty and of new challenges to American national security, I argue that the more effective constitutional framework would allow the political branches to shape war decisions without any interference from the federal judiciary.

I.

By requiring Congress to preapprove all wars through the Declare War Clause, Ely believed that the Framers had used process to seek a substantive end. Introducing multiple institutions into the decision to make war simply would limit the number of conflicts. The Framers sought to remove the war power from the Executive because they believed it to be the most prone to

5. *Id.* at 54.

military conflict. If the President and Congress had to agree on war, Ely believed, then the United States would enter fewer wars and those conflicts would arise only after reason and deliberation. As Ely put it, “the point was not to exclude the executive from the decision—if the president’s not on board we’re not going to have much of a war—but rather to ‘clog’ the road to combat by requiring the concurrence of a number of people of various points of view.”⁶ The resulting deliberation would ensure not just fewer wars, but also that those wars that did occur would have the backing of the people.

This Part will focus on Ely’s reliance on the original understanding of the Constitution. I am not the one to question his decision to base his theory on the Framing, as I (along with most other war powers scholars) have sought the answers there as well.⁷ I think, however, that he narrowly relied on a few well-known statements by leading Framers to such an extent that he missed important pieces of historical evidence that would have led away from his strict reading of the Declare War Clause. Unlike *Democracy and Distrust, War and Responsibility* finds the original understanding so conclusive that it overlooks textual and structural sources that undermine the notion that Congress must approve all military conflicts *ex ante*. These sources suggest that the Constitution does not impose a fixed method for going to war, but instead allows the political branches a substantial amount of flexibility to shape the decision-making process for engaging in military hostilities.

First we turn to the constitutional text and structure. Ely bases his argument on a commonsense understanding of the power to “declare” war as the power to decide whether to start a war. This comports with a popular imagery of declarations of war as marking American entry into the most significant conflicts of the twentieth century, World Wars I and II. The Constitution, however, does not consistently use the word “declare” to mean “begin” or “initiate.” Article I, Section 10, for example, withdraws from states the power to “engage” in war; if “declare” meant “begin” or “make,” the provision should have prohibited states from “declaring” war.⁸ Article III defines treason as “levying War” against the United States.⁹ Again, if “declare” had the clear meaning of “begin” or “wage,” then Article III should have made treason the crime of “declaring war” against the United States. Eighteenth-century English speakers would have used “engage” and “levy” broadly to include beginning or waging warfare, but not declare, which carried the connotation of the

6. *Id.* at 4 (quotation and footnote omitted).

7. See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1669-71 (2002); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1686-1704 (2000); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1221 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 188-296 (1996).

8. U.S. CONST. art. I, § 10.

9. *Id.*; U.S. CONST. art. III, § 3.

recognition of a legal status, rather than of an authorization.¹⁰

The structure of different constitutional provisions supports the notion that declaring war did not mean the same thing as beginning, conducting, or waging war. As just mentioned, Article I, Section 10 generally prohibited the states from engaging in war. It allowed states to conduct hostilities, however, if Congress approved. “No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”¹¹ Here, in a nutshell, is a constitutional provision that creates that exact process that Ely wants: states cannot engage in war without congressional permission. It even contains the unwritten exception he needs for unilateral responses to actual attacks. If one believes that the Framers were consistent throughout the Constitution, they should have written that “the President may not, without the Consent of Congress, engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” Instead, the Constitution gives Congress the Declare War power and the President the Commander-in-Chief power without any description of process.

We also should not overlook Article I, Section 8, Clause 11—the very provision that houses the Declare War Clause. In addition to the power to declare war, that provision also vests in Congress the power to grant letters of marque and reprisal and to make rules concerning captures.¹² Both are provisions relating to the recognition or declaration of a legal status, rather than the authorization to carry out the activities. Rules on capture, for example, do not authorize captures in wartime but only determine their ownership, while letters of marque and reprisal extend the benefits of combat immunity to private forces.¹³ Reading the clauses to share a common nature, because of their grouping, suggests that the Declare War Clause similarly vested Congress with a power devoted to declarations of the international legal status of certain actions.

The absence of a defined process is telling, because the Constitution usually makes very clear when it requires a specific process before the government can take action. Most saliently, Article I establishes the finely tuned system of bicameralism and presentment necessary to enact federal statutes.¹⁴ The *only* method that the Constitution permits for the enactment of a statute is through the precise process set out in Article I, Section 7. Other forms of governmental action have their own detailed procedures. Article II, Section 2 declares that Presidents can make treaties subject to the Advice and Consent of two-thirds of the Senate, while appointments can be made subject to a majority

10. See Yoo, *War and the Constitutional Text*, *supra* note 7, at 1669-71.

11. U.S. CONST. art. I, § 10.

12. U.S. CONST. art. I, § 8.

13. See Yoo, *The Continuation of Politics*, *supra* note 7, at 250-52.

14. U.S. CONST. art. I, § 7. For a valuable discussion of this point, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

of the Senate.¹⁵ Both provisions establish a process, the order in which each institution acts, and the minimum votes required. Contrast that with the Constitution's procedural requirements for making war. There are none. There is no process set out anywhere, only a distribution of different war-related powers between the President and Congress. This suggests that the Constitution does not establish a fixed procedure for going to war.

The Treaty and Appointments Clauses also supply a significant contrast to the war power similar to that created by the prohibition on state warmaking in Article I, Section 10. Both clauses divide the war power exactly as Ely wishes. They give the President the initiative in deciding on treaties or appointments, but they also prevent his action from becoming final until the Senate has given its approval. The Constitution could have easily included the power to initiate military hostilities in Article II, Section 2 alongside the Treaty and Appointments Clauses and reached the exact result that Ely believed should govern war powers. The Framers, however, chose instead to leave undefined the process for making war.

Looking to the broader historical context of the Framing raises more doubt about the Ely thesis. On this point, a reading of *War and Responsibility* immediately brings to light some fundamental differences with his earlier landmark work, *Democracy and Distrust*. Perhaps the most striking difference between the works is in their methodologies of constitutional interpretation. In *Democracy and Distrust*, Ely took an eclectic approach to reading the Constitution that relied on judicial decisions and commonsense readings of constitutional provisions and structures. He drew from these sources the principle that the Constitution and most of its provisions seek to reinforce political representation.¹⁶ Ely did not make a serious effort to defend his conclusions on the ground that they were consistent with the original understanding of the Constitution held by its Framers at the time of ratification. In *War and Responsibility*, however, Ely built his structure on the foundation of the Framers' intentions. While he acknowledged that "the 'original understanding' of the document's Framers and ratifiers can be obscure to the point of inscrutability," he flatly concluded that "[i]n this case, however, it isn't."¹⁷ While he buttressed his argument with policy considerations or appeals to commonsense, the core of his argument rests on the Framers' intent.

Ely relied on three pieces of evidence from the Framing to support this conclusion. First, during the Federal Convention James Madison moved, and the delegates agreed, to change Congress's power from "make" to "declare" war.¹⁸ Second, James Wilson defended the Constitution in the Pennsylvania

15. U.S. CONST. art. II, § 2.

16. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 1. For a well-known critique of Ely's thesis, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

17. ELY, *WAR AND RESPONSIBILITY*, *supra* note 2, at 3.

18. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 318 (Max Farrand ed.,

ratifying convention by declaring that “[t]his system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress” because the “important power of declaring war” is vested in Congress.¹⁹ Third, Joseph Story observed in his *Commentaries* that “the power of declaring war . . . is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation.”²⁰ Ely summed up the reason for the Framers’ decision to vest the declare war power in Congress: “[A]uthorization by the entire Congress was foreseeably calculated, for one thing, to slow the process down, to insure that there would be a pause, a ‘sober second thought,’ before the nation was plunged into anything as momentous as war.”²¹

Attention to the broader historical background, however, clouds Ely’s dramatic conclusion that the Framers intended Congress to approve all uses of force (except those in national self-defense from a direct attack). The quotations by Madison and Story are not directly relevant to the original understanding of those who drafted and ratified the Constitution. The former was made in a private letter to Thomas Jefferson in 1798, over a decade after the ratification and in the midst of a sharp partisan battle with the Federalists.²² Madison’s private letter to Jefferson could not have influenced the federal or state ratifying conventions, and, as I will show below, it was inconsistent with Madison’s public arguments during the ratification itself. Story’s comment is similarly irrelevant. It was made in 1833 (*46 years* after the Federal Convention) by a commentator who, no matter how astute, was only eight years old at the time of the ratification of the Constitution. Justice Story had no personal experience that should require us to give his interpretation any authority as to the understanding of the document’s framers.

Ely correctly relied upon Wilson’s statements in the Pennsylvania ratifying convention. Wilson’s comments admittedly espouse a pro-Congress view of war powers. And Wilson himself was a prominent leader of the Federalists, perhaps second only to Madison in influence.²³ When placed in their broader historical context, however, Wilson’s comments may be seen as less

1911).

19. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (Merrill Jensen ed., 1976).

20. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833).

21. ELY, WAR AND RESPONSIBILITY, *supra* note 2, at 4.

22. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, at 312 (Galliard Hunt ed., 1906). For a discussion of the historical context of the letter, see Yoo, *Clio at War*, *supra* note 7, at 1183; STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 581-618 (1993).

23. See, e.g., Akhil Amar, *Of Sovereignty and Federalism*, 97 YALE L.J. 1425, 1439 n.57 (1987) (“Although his name has unfortunately faded from American constitutional folklore, Wilson’s role as a chief architect of the Constitution has long been recognized by historians.”).

representative of what the Framing generation would have thought on this question. It is worth identifying briefly here a few elements of the historical context that point the story in a different direction.²⁴ First, the Framers would have understood the Constitution's distribution of war powers against the background of the British Constitution, which had supplied many of the legal concepts present in the proposed document. Under the formal British system, as described by the widely read Blackstone, the Crown exercised all of the war power, in which the declaration of war itself played the role of announcing to foreign enemies and domestic citizens a change in legal relations from peacetime to wartime.²⁵ Second, British governmental practice in the eighteenth century indicates that Parliament's control over funding, rather than the role of the declaration of war, provided a sufficient functional check over executive war-making. During the century before the American Constitution, for example, Great Britain engaged in eight significant conflicts; in only one did the nation issue a declaration of war before the start of hostilities.²⁶

Third, the political context of the American colonies and newly independent states also would have led to the understanding that the executive possessed the bulk of the war power. Reading the Constitution to maintain the executive's commander-in-chief authorities bears more consistency with the general development of American constitutional thought from the Revolution through the Framing. Under the British imperial system, colonial governors had exercised unilateral control over the military under their command, subject to control by the assemblies over funding. State experiments in fragmenting the executive and frustration with the limited powers of the Continental Congress led nationalist reformers to seek the restoration of authority in a unified presidency.²⁷ Reading the Framers' treatment of war powers as vesting the power over war in Congress would run counter to this larger historical trend.²⁸ Fourth, details from the Framing debates themselves provide evidence that some of the Constitution's supporters believed that it replicated the British system. When pressed during the Virginia ratifying convention, for example, with the charge that the President's powers could lead to a military dictatorship, James Madison argued that Congress's control over funding would provide enough check to control the executive.²⁹

These points should not only raise doubts about Ely's account of the original understanding, but they also point the way toward a different model of

24. For a more complete account, see Yoo, *Continuation of Politics*, *supra* note 7, at 196-290; Yoo, *Clio at War*, *supra* note 7, at 1191-1208.

25. 1 WILLIAM BLACKSTONE, COMMENTARIES *249-50, 254-58; see Yoo, *Continuation of Politics*, *supra* note 7, at 204-08.

26. Yoo, *Continuation of Politics*, *supra* note 7, at 214-17.

27. *Id.* at 252-54.

28. *Id.* at 222-23, 228-34.

29. 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare Saladino eds.) (State Historical Society of Wisconsin, 1990).

war powers. Defenders of both congressional and presidential prerogatives have locked themselves into a formalist debate over which branch has the absolute authority to send the nation into war.³⁰ They seek a system in which one branch makes the formal decision, for the entire government, on whether the nation is at war. A model similar to the eighteenth-century British constitution suggests a more fluid, flexible approach. Rather than a strict process, like that of legislation or treaty-making, war powers are exercised either through the cooperation or conflict of the plenary powers of the different branches. The branches might work in concert, in which case congressional authorization and funding would accompany presidential military action. But the branches also might work to frustrate each other, with Congress cutting off funds for military hostilities or the President refusing to direct the military to fight a war desired by Congress. Unlike the approach in *War and Responsibility*, this approach does not weight a process for or against war, but instead recognizes that the Constitution simply establishes no fixed, required process at all. Rather, it allows the political branches to shape the war-making process as they see fit based on the contingencies of the historical period and the international situation that they face.

II.

Scholars of different interpretive stripes might agree that the Constitution does not contain a specific war-making process. Even if those who share Ely's fidelity to a clear original understanding disagree with the flexible war powers model just sketched, they must at least admit that the historical evidence above shows that there was no clear understanding in 1787-1788 on war powers. Those who have never been won over by appeals to the Framing must at least recognize that the constitutional text and structure, standing alone, do not impose a defined decision-making process for entering into hostilities. If we admit that the Constitution does not demand a specific war-making process, then we must ask whether Ely's instrumental goals independently justify his "Congress-first" approach. After all, if the Constitution permits a variety of war powers systems, Ely's theory might present some very good substantive reasons for its adoption over any others.

One obvious attraction of *War and Responsibility* is that its Congress-first, President-second approach is a familiar one. It is identical to the process that governs the enactment of legislation. Its effort to deploy that process to achieve deliberation, consensus, and clarity of legislative purpose builds upon the best ideals of the legal process school of the 1950s. It also has clear attraction to

30. See, e.g., J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 99 (1991) (arguing that constitutional war requires Congress to fund the President's decisions on conduct of war); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993) (arguing that President cannot wage war without Congress's consent).

those working on the new legal process approaches that have so heavily influenced thinking about legislation and administrative law for the last twenty years.³¹ Its reliance on the federal courts to ultimately referee the warring process appeals to the confidence in, or at least obsession with, judicial review on the part of most American constitutional scholars, and in the American tendency to legalize and judicialize important areas of life.³² And lastly, its effort to reduce the amount of war itself draws upon deeply ingrained American notions that, as the exceptional nation, the United States can either withdraw from the conflict-torn affairs of the Old World or change the world as to render war itself obsolete.³³

First, it would make sense to ask whether Ely's approach produces the benefits it claims, before turning to its potential costs. It is difficult to judge with any confidence whether a Congress-first approach indeed generates sufficient deliberation and consensus to ultimately result in good policy (i.e., fewer wars). History suggests that congressional participation does not necessarily correlate with this goal. The Mexican-American War of 1848, for example, did not result from extensive deliberation and consensus in Congress or the nation, but rather a rush to war after an alleged attack on Sam Houston's forces along the Rio Grande River.³⁴ Indeed even Congressman Abraham Lincoln argued the war was illegal and unnecessary.³⁵ It resulted in the

31. See William Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART JR. & ALBERT M. SACKS, *MATERIALS ON LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Foundation Press 1998).

32. For some very notable exceptions, see, for example, ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117, 321 (1996); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 99-102, 154 (1999); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *But see* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (criticizing these arguments against judicial review as inconsistent with constitutional text, structure, and history).

33. See, e.g., WALTER A. MCDUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776*, at 15-38 (discussing the tradition of exceptionalism in American foreign policy); FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* 72 (1961) (discussing relationship between isolationism and idealism in early American foreign policy).

34. The events leading up to the Mexican-American War are detailed in 1 THOMAS G. PATERSON, *MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY* 258-62 (1989); DAVID M. PLETCHER, *THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR* (1973).

35. Abraham Lincoln, *Speech in United States House of Representatives: The War with Mexico (Jan. 12, 1848)*, in 1 *The Collected Works of Abraham Lincoln* 439 (Roy P. Basler ed., 1953); see also 2 ABRAHAM LINCOLN, *WRITINGS* 51-52 (A. Lapsley, ed. 1905) (speaking in the same context against the potential for executive abuse against war-making power).

conquest of large amounts of territory that clearly benefited the United States in the long run, yet raised the divisive question of the extension of slavery to the territories.³⁶ Similarly, Congress did not declare war against Spain in 1898 after long discussion and consultation, but rather after the destruction of the U.S.S. Maine in Havana harbor.³⁷ Again, the conflict benefited the United States through the acquisition of an overseas empire and the United States' emergence as a world power.³⁸ One wonders, however, whether Ely would agree that these were "good" wars. While World Wars I and II fit Ely's model much better, one wonders whether a declaration of war was necessary to achieve the consensus that prevailed in those conflicts, or whether—particularly in the case of World War II—the attack on the United States and its citizens itself produced it. Even if Congress had not declared war, the positives of American objectives in both wars would have probably remained unaffected. If Congress had simply participated in World Wars I and II by authorizing and funding the standing military needed to fight both conflicts, defeating Wilhelmine and Nazi Germans would still have been in the best interests of the United States at the time. A constitutional requirement of a declaration of war would not have made any difference.

It is also not obvious that congressional deliberation ensures consensus. Legislative authorization might reflect *ex ante* consensus before military hostilities, but it also might merely represent a bare majority of Congress or an unwillingness to challenge the President's institutional and political strengths regardless of the merits of the war. It is also no guarantee of an *ex post* consensus after combat begins. Thus, the Vietnam War, which Ely and others admit satisfied their constitutional requirements for congressional approval, did not meet with a consensus over the long term but instead provoked some of the most divisive politics in American history.³⁹ It is also difficult to claim that the

36. See JERALD A. COMBS, *AMERICAN DIPLOMATIC HISTORY: TWO CENTURIES OF CHANGING INTERPRETATIONS* 56-61 (1983) (discussing accusations of slavery interests behind Mexican-American War).

37. The Spanish-American War and the events leading up to it are detailed in ERNEST R. MAY, *IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER* 196-254 (1961); H. WAYNE MORGAN, *AMERICA'S ROAD TO EMPIRE: THE WAR WITH SPAIN AND OVERSEAS EXPANSION* (1965).

38. McDougall, *supra* note 33, at 117-21 (evaluating significance of Spanish-American War); see also WALTER LAFEBER, *THE AMERICAN SEARCH FOR OPPORTUNITY, 1865-1913* 180 (1993); AKIRA IRIYE, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, VOL. III: THE GLOBALIZING OF AMERICA, 1913-1945* 34-35 (1993) ("[I]n the wake of the Spanish-American War, the nation had steadily extended its influence [in Central America and the Caribbean] through various means: annexation (Puerto Rico), a protectorate (Cuba), military occupation (the Canal Zone), customs receivership (Santo Domingo), and political intervention (Nicaragua).").

39. See, e.g., WALTER LAFEBER, *THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD, 1750 TO THE PRESENT* 614-18 (1994) (describing domestic opposition to Vietnam War); DECONDE, *supra* note, at 364-365 (describing the increasingly bitter anti-American sentiment during the war, and noting the effect this had on some members Congress)..

congressional authorizations to use force in Iraq, of either the 1991 or 2002 varieties, reflected a deep consensus over the merits of war there.⁴⁰ Indeed, the 1991 authorization barely survived the Senate and the 2002 one received significant negative votes and has become an increasingly divisive issue in national politics and the 2004 presidential election.⁴¹ Congress's authorization for the use of force in Iraq in 2003 has not served as a guarantee of political consensus.

Conversely, a process without congressional declarations of war does not necessarily result in less deliberation or consensus. Nor does it seem to inexorably lead to poor or unnecessary war goals. Perhaps the most important example, although many might not consider it a "war," is the conflict between the United States and the Soviet Union from 1946 through 1992.⁴² War was fought throughout the world by the superpowers and their proxies during this period. Yet the only war arguably authorized by Congress—and even this is a debated point—was Vietnam. The United States waged war against Soviet proxies in Korea and Vietnam, the Soviet Union fought in Afghanistan, and the two almost came into direct conflict during the Cuban Missile Crisis. Despite the division over Vietnam, there appeared to be a significant bipartisan consensus on the overall strategy (containment) and goal (defeat of the Soviet Union, protection of Europe and Japan), and Congress consistently devoted significant resources to the creation of a standing military to achieve them.⁴³ Different conflicts during this period that did not benefit from congressional authorization, such as conflicts in Korea, Grenada, Panama, and Kosovo, did not suffer from a severe lack of consensus, at least at the outset. Korea initially received the support of the nation's political leadership, and it seems that

40. The 1991 authorization to use force in the Persian Gulf barely passed. Pub. Law No. 102-1, the authorization to use force against Iraq, passed the House by 250-183 and in the Senate by 52-47. <http://thomas.loc.gov/cgi-bin/bdquery/D?d102:1:./temp/~bd1cWX:@@L&summ2=m&/bss/d102query.html>.

41. H.R. 114, 107th Cong., became Pub. L. No. 107-243 by a vote of 296-133 in the House and 77-23 in the Senate. <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1:./temp/~bdjiq6:@@L&summ2=m&/bss/d107query.html>. The continuing controversy over the war in Iraq is perhaps most salient in the 2004 presidential campaign, in which John Kerry has attacked the merits of the Bush administration's decision to go to war and tracking polls show that Iraq is considered by a plurality of voters to be the most important issue in the election (26 percent) <http://www.washingtonpost.com/wp-srv/politics/elections/2004/charting.html>.

42. See generally JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* (1987).

43. The strategy of containment and its demand for greater military resources is discussed in JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY* 89-126 (1982) (describing buildup in American military required by NSC-68 and containment); McDougall, *supra* note 33, at 147-71; DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* (1977); MELVYN P. LEFFLER, *A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR* (1992).

support declined only once battlefield reverses had occurred.⁴⁴ Grenada and Panama did not seem to suffer from any serious political challenge, and while Kosovo met with some political resistance, it does not appear to have been significant.⁴⁵

It is important to ask whether the absence of congressional preapproval has led the nation into wars that it should not have waged. Ely's thesis is just as concerned with using constitutional process to stop "bad" wars as it is to promote political consensus for "good" ones. While trying to put aside the fortunes of war itself (a war may lead to defeat due to circumstances that could not be anticipated *ex ante*), we might say that a war results in bad policy when the expected costs of war outweigh its expected benefits. Or perhaps another way of viewing this would be that the nation should not enter war when the expected value of victory (future benefits of victory minus the future costs, correcting for the probability of victory) is outweighed by the expected value of defeat. One can understand Ely and others as arguing that unilateral presidential war power, in which Congress does not approve hostilities *ex ante*, somehow leads the nation into more military hostilities where the expected value of defeat exceeds the expected value of victory. In a related vein, Dean William Treanor argues that the Framers believed that executives were more prone to military adventurism because of the pursuit of fame and glory.⁴⁶ Some presidents may have higher discount rates than either Congress or the nation as a whole because of the desire for some type of historical legacy, which distorts the government's ability to accurately judge the benefits and probabilities of victory versus defeat. If this is true, then presidents may well be willing to engage the nation in unwise conflicts in which the expected costs might outweigh the expected benefits when evaluated using the discount rate held by Congress or, more broadly, the American people. Ely's view, in other words, assumes that adding more institutional actors *ex ante* will lead to more accurate judgments about the variables involved in optimally deciding between war and peace.

There are two reasons, however, why this assumption may not be true. First, it is not clear whether the experience of the Cold War period, which provides the best examples of major military hostilities conducted without congressional support, so clearly comes down on the side of a link between more institutional deliberation and better conflict selection. Most of the wars in this period, including Kosovo, Panama, and Grenada, in addition to many of the smaller conflicts, ended successfully for the United States. To be sure, the Korean War did not. But, it is worth asking whether it succeeded in its objectives—whether either *ex ante* it made sense for the United States to

44. See Yoo, *Original Understanding*, *supra* note , at 178 (describing widespread support for American intervention at outset of Korean War and later against the war).

45. See Yoo, *Kosovo*, *supra* note 7, at 1879-85 (describing votes on authorizing and funding conflict).

46. Treanor, *supra* note 3, at 695.

engage in the conflict or whether American war goals were achieved *ex post*. *Ex ante* it appeared that United States intervention had every expectation of being successful, as American forces (once they could reach the theater) outmatched those of North Korea.⁴⁷ The event that eventually led to the stalemate was the intervention by the People's Republic of China once American forces neared the Yalu River between Korea and China. American leaders simply erred in estimating the chances that this would occur, but it does not appear that any congressional involvement in the decision to go to war in Korea would have made any difference. We might even consider the possibility that the United States may have succeeded in its *ex ante* war aims at an acceptable cost. Although casualties from the conflict were high, the United States succeeded in preventing the conquest of South Korea, which has clearly benefited the American and other Western economies since, and successfully contained any expansion of Soviet or Chinese Communist influence in East Asia. Historians, of course, will continue to argue about whether the Korean War ultimately ran to the benefit of the United States, but it does not stand as an obvious example of presidential adventurism or of a failure to measure the strategic costs and benefits of the conflict.

Second, it is not clear that congressional participation, *ex ante*, in authorizing hostilities would lower error costs in deciding on war. In the normal legislative process, the participation of interest groups can serve as an additional source of information about the costs and benefits of the legislation itself. It is not obvious, however, whether Congress can play a similar role in regard to foreign affairs. Congress does not have independent sources of information but relies on information provided by the executive branch.⁴⁸ It is also not clear whether members of Congress will have a discount rate that more accurately represents the discount rate held by the American people than the executive. While a senator's six-year term may give him or her a lower discount rate than a president, representatives might be expected to have higher discount rates due to their two-year terms. Neither, however, is elected by the nation as a whole as is the President and Vice President. We can expect, at best, that Senators and Members of the House will hold expectations of future costs and benefits that more closely align with those of their constituents, who are organized by geographic region. Collective action problems within the legislature may well prevent Members of Congress from aggregating their individual preferences into one that represents the overall view of their nation

47. See WARREN I. COHEN, *AMERICA IN THE AGE OF SOVIET POWER* 68 (1993) (describing reversal of North Korean gains upon arrival of American forces). For more detailed historical discussion of the Korean War, see generally 1 & 2 BRUCE CUMINGS, *ORIGINS OF THE KOREAN WAR (1981-1990)*; BURTON I. KAUFMAN, *THE KOREAN WAR (1986)*; WILLIAM STUECK, *RETHINKING THE KOREAN WAR: A NEW DIPLOMATIC AND STRATEGIC HISTORY* (2002).

48. WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 24-54* (2003) (discussing Congress's structural disadvantages in informationally complex areas such as foreign affairs).

as a whole.⁴⁹ Because of its election by the nation as a whole and its unitary organization under the Constitution, the Presidency does not suffer from such collective action problems in representing the preferences of the American people as a whole.

Ely and others only focus on one type of error when they suggest that our legal system should be designed to discourage war. This only understands an error to be one of going to war when the costs outweigh the benefits. An error, however, can also run in the other direction: when the United States does not enter a conflict where the expected benefits to the nation outweigh the costs, such as launching a preemptive strike against a nation harboring a hostile terrorist group. Thus, the question is not whether the President has a higher discount rate than Congress (the President as military adventurer), but rather whether the President's discount rate more closely approximates that which is in the best interests of the nation.

In order to weigh the advantages of the Congress-first approach, it is also important to understand its potential costs. The costs may not be obvious, since grounding the use of force in ex ante congressional consent bears a close resemblance to the process for enacting legislation. The legislative process increases the costs of government action. It is heavily slanted against the enactment of legislation by requiring the concurrence not just of the popularly elected House but also the state-representing Senate and the President.⁵⁰ This raises decision costs by increasing the delay needed to get legislative concurrence, requiring an effort to coordinate between executive and legislature, and demanding an open, public discussion of potentially sensitive information. Decision costs are not encapsulated merely in the time-worn hypotheticals that ask whether the President must go to Congress for permission to launch a preemptive strike against a nation about to launch its own nuclear attack. Rather, these decision costs might arise from delay in using force that misses a window of opportunity, or one in which legislative discussion alerts an enemy to a possible attack, or the uncertainty over whether congressional authorization will be forthcoming.

In the rules-standards debate, it is usually thought that an increase in decision costs by placing an activity under a legal standard (such as reasonableness) rather than a rule (such as never drive over fifty-five miles per hour), can yield a reduction in error costs.⁵¹ A standard increases decision costs

49. See generally DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999) (discussing transaction cost problems with organization of Congress).

50. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 12-25 (1980) (discussing constitutional, procedural, and political obstacles to enactment of legislation).

51. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 30-36 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 *CAL. L. REV.* 953 (1995); Adrian Vermeule, *Interpretive Choice*, 75 *N.Y.U. L. REV.* 74, 91 n.68 (2000) (collecting sources).

because it costs more in terms of process and it increases unpredictability and uncertainty *ex ante*, but it lowers error costs by allowing for the consideration of more information and shaping the legal decision to the facts of the case. In the context of choosing whether to expand *ex ante* decision-making from the executive to the legislature in war, it seems apparent that decision costs would be increased. On the other hand, however, it is not clear that there is any corresponding reduction in error costs. Error here is bringing the United States into a war where the costs outweigh the benefits, on an expected basis, or failing to wage a war where the opposite is true. My claim about the lack of a correlation between consensus and good policy, on the one hand, and *ex ante* legislative approval on the other, is merely another way of saying that the Congress-first approach does not significantly reduce error costs, or that, if it does, the value of any such savings are uncertain. We simply do not know, judging from the historical record, whether *ex ante* legislative authorization leads to lower error costs.

The observation that a Congress-first approach is not functionally superior to the current system, in which the President wages war with *ex post* congressional control through funding, has important implications for the model favored by this Article. If it is not clear which approach does a better job of managing error and decision costs, then it seems apparent that the model proposed in Part I will perform better than the Congress-first process. It would only make sense to lock the nation into a single procedure for making war—one that could not be changed except through the supermajority vote required for a constitutional amendment—when the costs and benefits of the different possible processes are fully known and the procedure chosen maximizes the benefits. If the costs and benefits of different procedures are unclear, then the better option is to create a system with sufficient flexibility to allow the decision-making process to change in response to developments in the international system, the United States' position in the world, and the nature of warfare. This would especially be the case, it seems, if the international system and the challenges to American national security themselves are undergoing rapid or significant change, as Part III will discuss.

Thus, rather than argue whether a specific war was constitutional, we should ask whether a certain war-making process instrumentally is more effective for the type of conflict when understood in its historical context. At times when the United States was more removed from great power conflict, as for much of the nineteenth century, a Congress-first approach was affordable. During this period, a conflict would not begin immediately and the absence of a standing military meant that the nation required substantial time and resources to construct a fighting force before it could engage in significant military hostilities. When hostilities were generally necessary only to participate in large-scale, total wars, such as in the first half of the twentieth century, then a Congress-first system based on a declaration of war was also effective because it helped the nation quickly convert from peacetime to a status of total war, and

it helped rally people and institutions to the political commitments necessary for widespread mobilization of the economy and society. At other times, such as the Cold War period, these purposes were not as important. During the Cold War, the United States maintained a quasi-permanent military establishment, pursued a long-term strategy against a persistent and capable opponent, and had consistent interests and involvement throughout the world. Rather than building political support for a rapid transformation from peacetime to total war, the nation benefitted instead from a system that allowed it to conduct quick attacks or interventions with limited goals and restricted means. Congress provided continuing support by committing resources to the construction and maintenance of a standing military capable of acting swiftly and with global reach.

This approach has important implications for the question of the role of the courts. Ely's approach calls upon the courts to adjudicate war powers disputes and to declare conflicts to be unconstitutional if they do not receive congressional authorization. An enlarged role for judicial review makes sense if the Constitution requires an exclusive method for making a decision, or if the optimal process among several possible options is clear. In other words, we should employ judicial review to police adherence to a process that we are certain that we wish to constitutionalize. On the other hand, when we are unsure of the costs and benefits, embedding a single war-making process in the Constitution makes less sense, as would an enhanced role for the federal courts. It seems that judicial review should not be called for when several different processes are available and the costs and benefits of each are unclear due to changes in the international system and the national security environment.

Many scholars have observed that courts work best at interpreting formal sources of law and applying that law to facts that are easily gathered and understood in the context of a bipolar dispute.⁵² They do less well the more a dispute becomes polycentric, in that it involves more actors, more sources of law, and complicated social, economic, and political relationships. Choices by the two branches as to how to structure the decision-making process for going to war, or even a struggle between the branches for primacy over the issue, would entail calculation and comparison of costs and benefits that would be difficult, if not impossible, for courts to perform. It is hard to see how a court, in the context of a lawsuit, could accurately measure the costs and benefits to the nation of adopting one or the other system for going to war. Indeed, it may very well be the case that no permanent rule makes sense, but rather the

52. See John Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1137-39 (1996) (collecting sources critical of expanded judicial role in structural remedies); Paul Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). But see Owen Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

question depends on the security or historical context, which makes any judicial decision even more difficult.

A comparison of the role of the courts in warmaking to the role of judicial review in the organization of the administrative state may help illustrate this point. The Constitution provides for the enactment of federal legislation through a clear process that centers on bicameralism and presentment. Although there will always be some hard cases at the margins, the federal courts can monitor whether the political branches have satisfied that process because it is marked by clear, formal steps.⁵³ If a bill has not been approved by both houses of Congress, or has not received presidential approval within the required time, it is not a law. Once, however, Congress began engaging in broad delegations of authority to administrative agencies, the role for judicial review became far more difficult. While courts have suggested that a nondelegation doctrine exists, they also have found it difficult to develop any substantive standards to apply when Congress delegates authority to an agency.⁵⁴ Courts have also found it difficult to develop standards for reviewing agencies' exercise of discretion over rulemaking,⁵⁵ or even interpreting agencies' organic statutes.⁵⁶ This Article does not enter the ongoing debates over the proper role of the courts in reviewing the actions of the administrative state. Rather, it only wishes to highlight the fact that when courts have no formal, constitutionally established standards to apply, they have difficulty in choosing among different possible processes or structures for decision-making.

In this sense, the debate over war powers bears a resemblance to arguments over the legitimacy of the administrative state. Ely argues in favor of adherence to a single, formal process that requires congressional legislation under Article I, Section 8, followed by presidential implementation and judicial review. In this respect, he appeals to the same vision of lawmaking held by critics of the administrative state, who believe that all laws that affect private individuals must undergo bicameralism and presentment.⁵⁷ The approach presented here, in which several possible decision-making procedures are possible, is similar to the arguments that have justified the administrative state. It is for the political

53. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (concerning the constitutionality of Line Item Veto Act); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (concerning the constitutionality of the Immigration and Nationality Act's authorization of a one-House congressional veto of an Executive Branch decision);

54. Compare John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

55. See discussion in Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

56. Compare *Chevron v. NRDC*, 467 US 837 (1984) with *United States v. Mead Corp.*, 533 US 218 (2001).

57. Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237-41 (1994).

branches to choose how to structure decision-making in war, just as they do in most areas of domestic regulation. Indeed, the incentives for Congress to delegate authority in foreign and domestic areas remain similar. Congress may not wish to take a stand on a war *ex ante*, just as it does not want to choose a particular regulatory standard, because it does not have the technical expertise to make the right choice and it cannot predict whether the policy will be successful. Congress takes on less risk by allowing the executive branch to make the choice and bear the political costs.

Under this approach, it is the federal judiciary's job only to police the outer boundaries of the process. Anything more would require the courts to second-guess technical decisions or policy judgments for which they have little expertise or legitimacy, just as courts' refrain from reviewing the substantive merits of administrative decision-making would require courts to second-guess such decisions or judgments for which they have little expertise or legitimacy.⁵⁸ One might respond, of course, that unlike the case of the administrative state, war powers do not involve a clear statutory delegation of congressional authority. That is true. On the other hand, unlike the case with domestic regulatory authority, there is no clear constitutional text that delegates the war power directly to Congress rather than the President. Meanwhile, Congress has created and funded an unrivaled military designed not just for homeland defense but to project force throughout the world, which might be seen as an implicit delegation of authority.

Comparing the administrative state with the current war-making system also suggests possibilities for Congress's subconstitutional methods for control and influence over the warmaking process. Although Congress formally delegates broad authority to the administrative agencies, it also exercises many effective political and procedural checks on that power after transferring it to the executive branch. If Congress disagrees with agency policy, for example, it can hold hearings to question the decision.⁵⁹ It can use its funding power to frustrate implementation of agency policies. It can restructure the agency or change agency jurisdictions, and it can refuse to approve nominations to agency positions. All of these tools remain available even in a system characterized by presidential initiative and congressional acquiescence. If Congress disagrees with presidential war-making, it can refuse to approve the funds necessary to wage the war—witness that in the Persian Gulf War and the conflicts in Kosovo, Afghanistan, and Iraq the executive branch needed supplemental appropriations to conduct hostilities—it can refuse to approve the promotion or

58. See, e.g., *Chevron v. NRDC*, 467 U.S. 837, 843-44 (1984) (mandating judicial deference to reasonable agency interpretation of ambiguous statutes because of greater agency expertise and democratic accountability); see also Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 *GEO. WASH. L. REV.* 821 (1990) (elaborating on legitimacy rationale for judicial deference).

59. See generally Peter Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573 (1984).

appointment of officers, or it can use hearings and negative publicity to force a change in policy. If it is distrustful of executive policy, Congress could even restructure the military to deny the President certain offensive weapons systems or large numbers of quickly deployed professional soldiers, as was the case in the United States before World Wars I and II.

The point here is not that the Constitution creates a war-making system that permits the President, in all cases, to decide whether to take the nation into war. Such an approach might lead to the unwarranted conclusion that Congress would be constitutionally required to fund these presidential war decisions or that Congress could not interfere with them.⁶⁰ Rather, the Constitution creates a system of war-making with substantial flexibility provided to the political branches to shape a range of decision-making systems generated by the interaction of their plenary constitutional powers. Ultimately, this approach better explains the record of practice than does the Ely thesis, which is forced to conclude that many of the nation's wars have been unconstitutional. It allows the federal government to adjust the costs and balances of a particular decision-making system to the contemporary demands of the international system. This means that the constitutional system could permit a variety of different decision-making methods, much as the administrative state has, depending on the historical context. We will see in the next Part how the Constitution's war-making process might adapt to the world we live in today.

III.

The last Part responded to what I take to be Ely's first point on process, that congressional participation leads to better governmental decisions on making war by slowing down a rush to war. Putting to one side functional considerations, Part II argued that the historical record does not appear to support the notion when considered along two dimensions. Congressional participation does not seem to prevent the nation from entering into unwise wars, nor does the absence of congressional participation seem to prevent the nation from entering into good wars. This Part addresses the second substantive point that Ely makes with regard to process, that increasing institutional participation in war and slowing down the decisionmaking process will lead to less war and more peace. Ely essentially believes that rendering the warmaking process more difficult will produce benefits because he assumes that inaction by the United States generally results in peace. This Part argues that changes in the international system and the nature of new threats to the United States mean that the default state of the security environment may no longer be peace.

In *War and Responsibility*, Ely argues in favor of more process, more deliberation, and a congressional veto on war. He clearly believes that the more

60. See, e.g., J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

institutions that participate in a decision and the slower their proceedings, the more likely that deliberations on war will prove less emotional and more rational. But it would misunderstand his argument to assume that he was interested solely in more process for its own sake. Rather, layers of process would advance his substantive goal of promoting peace. Ely assumes that more process will bias the government against making war, and that government inaction would leave a steady state of peace. Ely believed that his methods and goals promoted the wishes of the framers themselves. “The founders assumed that peace would (and should) be the customary state of the new republic—James Madison characterized war as ‘among the greatest of national calamities’—and sought to arrange the Constitution so as to assure that expectation,” Ely argued.⁶¹

Ely’s vision depends on a certain understanding of the costs of war. He believes that war is a perilous undertaking that more likely than not will lead to disaster. Even if the nation is lucky enough to avoid disaster, war certainly will produce the loss of blood and treasure, often for little corresponding benefit. While war may be legal, Ely wants it to be rare. Because Ely views war as perhaps the greatest danger for the United States, it should only be entered into after careful deliberation by a number of different institutional actors. Slowing the process for war by creating more institutional obstacles will allow the necessary consideration and thought to occur. As Ely put it, “To invoke a more contemporary image, it takes more than one key to launch a missile: It should take quite a number to start a war.”⁶² Ely’s procedural interpretation of the Constitution is based on a view of the world that sees war itself as a disfavored activity. To his mind, the current system of presidential leadership and congressional ex post financial support is prone to breed undesirably high levels of warfare. We might think of *War and Responsibility* as arguing that war is the opposite of a public good, and so the Constitution should discourage the government from creating more of it.

Ely buttresses his substantive argument with appeals to effectiveness. If we live in a world where war is going to occur, the United States should at least have a process that results in the optimal amount of war. Because executives, he fears, are prone to initiate unnecessary wars, a balanced institutional approach is more likely to result in the right amount of conflict. Congressional and judicial participation, Ely believes, will also make those few moments when the United States goes to war more likely to produce victory. If Congress is involved, it is more likely that the American people as a whole will support the war. If Congress approves, it is also on record as supporting the war and less likely “later to undercut the effort.”⁶³ Institutional participation and deliberation, under this line of thinking, more accurately reflect the wishes of

61. ELY, *WAR AND RESPONSIBILITY*, *supra* note 2, at 3 (footnotes omitted). Madison’s comment comes from 1 RECORDS OF THE FEDERAL CONVENTION 316, *supra* note 18.

62. ELY, *WAR AND RESPONSIBILITY*, *supra* note 2, at 4.

63. *Id.*

the American people than can the views of any single branch of government. It is fair to say, I think, that Ely's arguments represent the views of the majority of legal academia.

I believe that significant changes in the international system and the national security interests of the United States have swept aside the assumptions that underpin Ely's substantive war powers goals. Ely wrote *War and Responsibility* in 1993. Although the Cold War had recently ended at the time *War and Responsibility* was written, the nature of war continued to be thought of as occurring solely between nation-states. The Persian Gulf War had just witnessed an American-led coalition's defeat of Iraq's grab for Kuwait—a traditional war over territory fought by the regular armed forces of nation-states. Nation-states are usually presumed to be both rational and susceptible to various levels of coercion, with force often being used only as a last resort.⁶⁴ Warfare, if it were to come, would take predictable forms with clearly identified armed forces seeking to take control over territory and civilian populations. In 1993, the United States had begun to so out-distance its nearest nation-state competitors in terms of military strength and economic size that American thinkers may well have assumed that there were no significant military threats on the horizon. The Soviet Union's dissolution seemed to render hypothetical what had been the most compelling case against a requirement of ex ante congressional approval for military hostilities—the need for swift presidential action to respond to a Soviet nuclear first strike. The end of the Cold War and the first Gulf War seemed to reaffirm the centrality of the nation-state in world affairs and did nothing to dispel the prospect that any future threats to the United States would come solely from the aggressive military plans of other nations. The historical context at the end of the Cold War seemed to indicate that the threat of a direct attack on a dominant United States was extremely unlikely.

The disappearance of the threat of a war that could directly harm American national security allowed policymakers and intellectuals the luxury to envision a future in which they could reduce the overall level of international armed conflict. If anything, the rest of the 1990s might have further reinforced that point. There were wars, to be sure, but they were not the sort of conflicts generated by competition among the great powers. Rather, the need for the use of military force arose from the collapse of centralized authority within nation-

64. See, e.g., John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, 9-14 (1994-1995) (discussing structural realism) ("States are instrumentally rational. . . . [E]ach state in the international system aims to guarantee its own survival."); see generally KENNETH N. WALTZ, *A THEORY OF INTERNATIONAL POLITICS* (1979); see also John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 416 (2004) ("[A]n examination of historical case studies overwhelmingly suggests rational actors in decisions to commit aggression and other insults to the international community. Such decisions certainly are ruthless, indeed, sometimes barbaric in their inhumanity, and they are frequently mistaken about ultimate consequences. But they are not the actions of those unable to consider consequences.").

states, or from ethnic or religious hatreds within nations, or from simply humanitarian disasters wrought by authoritarian regimes. Conflict in places such as Somalia, Haiti, and the former Yugoslavia allowed sufficient time for deliberation, did not raise direct threats to American national security, and appeared to be undertaken more for humanitarian than security reasons.⁶⁵ They did not require the overwhelming application of large units of the American military, as did the wars in Korea and Vietnam, nor did they call for outright combat with the regular armed forces of another nation (except for Kosovo). Instead, they demanded smaller interventions that focused on nation-building or peacekeeping roles. These wars were clearly discretionary—America sent its troops out into the world to promote human rights, or to bring stability to a region. They were not demanded by the needs of self-defense.

Involving more domestic institutions in the decision-making process for these conflicts would have made some sense. Without the demands for a rapid process brought about by the threat of Soviet attack, the President and Congress had the time to consult and deliberate before undertaking any of these military actions. A slower process might have led to more optimal war-making because these smaller interventions were not so clearly in the American national security interest. Because the balance between costs and benefits of these types of military actions was more delicate, broader institutional perspectives and more time for deliberation might have produced better decision-making. The costs to American national security of inaction were low. If the humanitarian troubles in Somalia, Haiti, and Kosovo had been allowed to continue, global welfare as a whole would have dropped, but it is difficult to claim that continuing conflict in those areas would have directly harmed U.S. security. Indeed, the United States never sought to justify its intervention in any of these places as an exercise of self-defense.

With the Cold War over, a general presumption against war might have proved beneficial to the United States. Unlike the contest with the Soviet Union, the general costs of inaction to American national security did not appear significant. It may have been terrible from a moral perspective, for example, that the United States did not send the small numbers of troops to Rwanda that might have stopped the genocide there.⁶⁶ But it is difficult to conclude that the Clinton administration's refusal to intervene had any negative impact on American national security interests, narrowly understood. Moreover, the benefits of military action for the United States were not as obvious, or at least did not appear to clearly outweigh the costs. Bringing stability to parts of the world distant from core American interests in Europe

65. See Yoo, *Kosovo*, supra note 7, at 1675-85, 1706-08 (discussing these new conflicts).

66. Some argue that involvement by the United States is the lynchpin to heightened awareness and global criticism of humanitarian disasters. Without U.S. intervention, disasters continue unanswered by the international community. See Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487-88 (2003).

and East Asia did not seem, at the time, to promise any great advantages to the United States. The relative benefits of humanitarian intervention have always been controversial in American foreign policy circles, and the United States' hasty retreat after the loss of eighteen U.S. Army Rangers in Somalia in 1993 suggests that American policymakers at the time did not believe even those losses to be worth ending the humanitarian crisis there.⁶⁷ Declining to intervene in places such as Rwanda, Haiti, or Kosovo would not have allowed a rival nation-state to rise up and alter the distribution of power in the international system in a manner detrimental to the United States.

The world after September 11, 2001, however, is very different from the world of 1993. It is no longer clear that the United States must seek to reduce the amount of warfare, and it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force. It is no longer clear that the default state for American national security is peace. Rather than disappearing from the world, the threat of war may well be increasing. Threats now come from at least three primary sources: the easy availability of the knowledge and technology to create weapons of mass destruction; the emergence of rogue nations; and the rise of international terrorism of the kind practiced by the al Qaeda terrorist organization.⁶⁸ Because of these developments, the optimal level of war for the United States may no longer be zero, but may actually be dramatically higher than in the 1990s. In particular, the emergence of direct threats to the United States of a kind more difficult to detect and prevent may demand that the United States undertake preemptive military action to prevent these threats from coming to fruition. Further, it seems that the costs of inaction, for example, allowing the vetoes of multiple decision-makers to block warmaking, could entail much higher costs than Ely had envisioned. At the time of the writing of *War and Responsibility*, the costs to American national security of refraining from the use of force in a Haiti or Kosovo would have appeared negligible. The September 11, 2001 terrorist attacks, however, demonstrate that the costs of inaction in a world of terrorist organizations, rogue nations, and more easily available WMD are extremely high—the possibility of a direct attack on the United States and the deaths of thousands of civilians.

First, the al Qaeda terrorist network and similar organizations pose a threat that, to be successfully defeated, very well may require a resort to warfare on a more consistent and frequent basis than in the past. To be sure, terrorism has existed in places such as the Middle East and Europe for many decades. What makes the terrorism of September 11 different, however, is that it demonstrates that those using this tactic can cause a level of destruction that once rested only in the hands of nation-states. At the same time, terrorist attacks are more difficult to detect and prevent due to the unconventional nature of their

67. See Moore, *supra* note 64, at 400-01.

68. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

operations. Al Qaeda terrorists, for example, blend into civilian populations, use the channels of open societies to transport personnel, material, and money, and then target civilians with the object of causing massive casualties. Terrorist groups like al Qaeda seek to acquire WMDs, are less likely to be reluctant to use them, and—since they have no population or territory to defend—may be immune to traditional concepts of deterrence.⁶⁹ Normal methods of diplomacy and detection of an enemy's preparations for attack, which help address the threats posed by hostile nations, are of little use against terrorists who seek to attack civilian targets by surprise.

Terrorism of this kind may require that the United States use preemptive force well before a terrorist attack might materialize. Temporal imminence finds little application here because, as September 11 showed, terrorist attacks can occur without warning because their unconventional nature allows their preparation to be concealed within the normal activities of civilian life.⁷⁰ Terrorists have no territory or regular armed forces from which to detect signs of an impending attack. Yet, they can inflict a magnitude of destruction that would have once only been achievable by a nation-state using conventional arms. The prospect of terrorists in possession of WMD only multiplies the possible magnitude of harm. To defend itself from such an enemy, the United States might need to use force earlier and more often than was the norm during a time when nation-states generated the primary threats to American national security. It might also need to use force in many different geographic locations in response to the stateless terrorist organization's dispersal of its own assets. Thus, for example, the United States is currently fighting terrorists in places such as Afghanistan, Yemen, Iraq, and the Philippines not because of hostility toward their governments, but because al Qaeda has hidden part of its operations there.

In addition to the dispersed, camouflaged nature of such terrorist groups, a second characteristic may render the use of force more necessary than in previous conflicts. Because al Qaeda is not a nation, and has no territory or population, it may well be more difficult to defeat than a nation-state. Al Qaeda is similar to a traditional nation-state enemy in the resources it can command and the damage it can inflict, and it also uses military force to achieve political, rather than personal or financial, ends. But, al Qaeda is different from the nation-state enemy in the sense that the traditional means of engaging in, let alone ending, a conflict do not seem to apply. Capture of a city or control over a population will not end the conflict with al Qaeda. It is not clear whether al Qaeda could sign a peace treaty, and even if captured leaders such as Osama bin Laden did seek to enter into an agreement ending hostilities, it is unclear whether they could enforce it on their dispersed cells and operatives. Al Qaeda's decentralized network structure likely could require a longer conflict

69. The National Security Strategy of the United States of America 15 (Sept. 2002), <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Oct. 4, 2004).

70. See Yoo, *Using Force*, *supra* note 68.

than against a nation-state, because there is no clear way to prevail aside from defeating the organization in detail.

Second, rogue nations pose perhaps even more dangerous challenges. The Bush administration defines rogue nations as regimes that brutalize their citizens and exploit natural resources for the personal gains of their rulers, that threaten their neighbors and disregard international law, that seek to develop or possess weapons of mass destruction (WMD), that sponsor terrorism, and that “reject basic human values and hate the United States and everything for which it stands.”⁷¹ Both the Clinton and Bush administrations seemed to agree that nations such as Iran, Iraq, Libya, and North Korea fell into this category.⁷² Putting the political rhetoric to one side, these nations share certain characteristics such as the development of WMD, repression of their civilian populations, and isolation from the international political and economic systems. But, it appears as though there is something more entering the categorical structure of the definition, or this definition seemingly would have included the Soviet Union during the Cold War.

Rogue nations seem to pose a special threat to American national security interests not just because they seek to acquire and threaten the use of WMD, but because they seem to be willing to take more risks in their foreign policy. Such nations might irrationally threaten to deploy or even use WMD, and they also may engage in the proliferation of WMD technology to other nations or perhaps to terrorist groups.⁷³ Before the spread of WMD and missile technology, rogue nations could not have posed a direct threat to the United States. Now, however, they can, at much higher levels and magnitudes than in the past. Witness, for example, the looming threat of North Korean intercontinental ballistic missiles tipped with nuclear warheads, capable of reaching the west coast of the United States, and the large expenditure of funds to construct a rudimentary missile defense system capable of countering them.⁷⁴

As with terrorism, the threat posed by rogue nations may again require the United States to use force earlier and more often than it would like. Rogue nations may very well be immune to pressure short of force designed to stop their quest for WMD or their threat to the United States. Rogue nations, for example, have isolated themselves from the international system, are less integrated into the international political economy, and repress their own populations. This makes them less susceptible to diplomatic or other means of resolving disputes short of force, such as economic sanctions. Lack of concern

71. National Security Strategy, *supra* note 67, at 13-14.

72. These nations were listed as terrorist-sponsoring states long before President Bush took office. *See Moore, supra* note 64.

73. National Security Strategy, *supra* note 69.

74. *See John Yoo, Review Essay, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 901-14 (2001) (discussing policy imperatives behind national missile defense program).

for their own civilian populations renders the dictatorships that often govern rogue nations more resistant to deterrence. North Korea, for example, appears to have continued its development of nuclear weapons despite years of diplomatic measures to change its course.⁷⁵ Meanwhile international inspectors today are having trouble dealing with what appears to be Iran's clandestine nuclear weapons program.⁷⁶ The United States has employed economic sanctions against both countries for decades.⁷⁷ Suppose the United States were confronted with a North Korea armed with nuclear weapons and intercontinental ballistic missiles, and could only deploy a missile defense shield whose effectiveness was questionable. Given North Korea's bellicose threats against the United States and its refusal of diplomatic efforts, the United States might resort to force to prevent deployment of the nuclear missiles.

Third, the nature of warfare against such unconventional enemies may well be different from the set-piece battlefield matches between nation-states. Gathering intelligence, from both electronic and human sources, about the future plans of terrorist groups may be the only way to prevent September 11-style attacks from occurring again. Covert action by the Central Intelligence Agency or unconventional measures by special forces may prove to be the most effective tool for acting on that intelligence. Similarly, the least dangerous means for preventing rogue nations from acquiring WMD may depend on secret intelligence gathering and covert action, rather than open military intervention. A public revelation of the means of gathering intelligence, or the discussion of the nature of covert actions taken to forestall the threat by terrorist organizations or rogue nations, could render the use of force ineffectual or sources of information useless. Suppose, for example, that American intelligence agencies detected through intercepted phone calls that a terrorist group had built headquarters and training facilities in Yemen. A public discussion in Congress about a resolution to use force against Yemeni territory and how Yemen was identified could tip-off the group, allowing terrorists to disperse and to prevent further interception of their communications.

These new threats to American national security, unanticipated by Ely in *War and Responsibility* and driven by changes in the international environment, should change the way we think about the relationship between the process and

75. James A. Kelly, Assistant Secretary for East Asian and Pacific Affairs, *Dealing With North Korea's Nuclear Programs*, Statement to the Senate Foreign Relations Committee (July 15, 2004), <http://www.state.gov/p/eap/rls/rm/2004/34395.htm> (discussing North Korea's nuclear weapons program).

76. John R. Bolton, Under Secretary for Arms Control and International Security, *Iran's Continuing Pursuit of Weapons of Mass Destruction*, Testimony Before the House International Relations Committee Subcommittee on the Middle East and Central Asia (June 24, 2004), <http://www.state.gov/t/us/rm/33909.htm> (discussing Iran's WMD programs).

77. See International Economic Emergency Powers Act (IEEPA), 50 U.S.C. §§ 1701-06 (2000) (grandfathering sanctions regime on North Korea under the Trading with the Enemy Act). President Carter first imposed sanctions on Iran under IEEPA; those sanctions were reviewed in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

substance of the war-making system. Ely's approach might have made more sense at the end of the Cold War, when conventional warfare between nation-states remained the chief focus of concern and few threats seemed to challenge American national security. The international system allowed the United States to choose a war-making system that placed a premium on consensus, time for deliberation, and the approval of multiple institutions. If, however, the nature and the level of threats are increasing, the magnitude of expected harm has risen dramatically, and military force unfortunately remains the most effective means for responding to those threats, then it makes little sense to commit our political system to a single method for making war. Given the threats posed by WMD proliferation, rogue nations, and international terrorism, at the very least it seems clear that we should not adopt a war-making process that contains a built-in presumption *against* using force abroad. Ely's process was built upon a desired substantive outcome. That outcome assumed that in the absence of government action peace would generally be the default state. September 11 demonstrated that this assumption has become unrealistic in light of the new threats to American national security. As a result, the reasons that justified Ely's procedural system no longer have the force that they once did.

These developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past. Use of force under international law, to be consistent with the United Nations Charter, must be justified by self-defense against an imminent attack (in those cases when not authorized by the Security Council).⁷⁸ Elsewhere, I argue that the rise of WMD proliferation, rogue states, and terrorism ought to lead to a reformulation of self-defense away from temporal imminence and toward a calculation of expected harm of an attack.⁷⁹ If we understand the use of force as a function of the magnitude of possible harm from an attack adjusted by the probability of such an attack, the United States might need to use force in situations when an attack is not temporally imminent, but nonetheless threatens massive casualties and remains probable.⁸⁰ In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the executive branch needs the flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence. By acting earlier, perhaps before WMD components have been fully assembled or before an al Qaeda operative has left for the United States, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force.

Rather than Ely's Congress-first approach, the constitutional system permits different war-making systems that might better address the new

78. U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations")

79. See Yoo, *Using Force*, *supra* note 68.

80. *Id.*

challenges of the post-September 11 world. One possible approach might be the one currently favored by the Bush administration, which sought and received a broad congressional authorization for the war against al Qaeda.⁸¹ While somewhat similar to the Congress-first approach, the resolution was different in important respects from previous enactments, which had authorized force in a certain place for certain goals.⁸² Rather, the 2001 authorization was of such broad scope and without geographic or temporal limitation that it leaves to the President the choice where and when to use force and what type of action to undertake. Because it authorizes force against a nonstate actor, the 2001 congressional authorization conceivably authorizes military intervention from Afghanistan to East Africa to Indonesia. When it thought it might wish to use force against Iraq, the administration sought and received a country-specific authorization that bore closer similarities to resolutions in previous conflicts.⁸³ Such *ex ante* approval, however, could require extensive discussion of the sources of and methods for gathering intelligence, and the nature of any covert action to be used against the opponent. While it might play a useful part in mobilizing public opinion, especially as part of a series of escalating signals to a potential enemy, *ex ante* congressional approval might not make sense in the context of terrorist organizations or rogue nations already armed with WMD.

A different approach could look more like the system that had prevailed before the current Bush administration. That system permitted presidents to initiate military hostilities abroad in places from Korea to Kosovo. Even if it were not involved *ex ante*, Congress still maintained a check on presidential initiative through its control over funding. This provides maximum flexibility to the executive branch to act with greater secrecy and expedition, but potentially sacrifices public and congressional support should the use of force encounter difficulties. More consistent with a formalist approach to the separation of powers that views the branches as hermetically sealed rather than intertwined, this approach relies on the plebiscitary nature of the presidency for *ex post* accountability. If an open public discussion of intelligence gathering methods or covert action might cause more harm than good, then the electorate can voice its support or rejection of executive branch policies at the next presidential election.

Again, this is not to argue that a president-first approach is the only one. Rather, it is only to illustrate that different methods for deciding on war exist. It is not to deny that the joint agreement of the President and Congress can prove politically helpful even if not constitutionally necessary. As Ely argued,

81. Authorization for Use of Military Force Against Those Responsible for Attacks Launched Against United States on Sept. 11, 2001 (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

82. *See, e.g.*, Pub. L. No 102-1, 105 Stat. 3 (1991) (authorizing use of force against Iraq to achieve specific United Nations Security Council Resolutions calling on member nations to remove Iraq from Kuwait).

83. Pub. L. No. 107-243, 116 Stat. 1498 (Oct. 16, 2002).

congressional approval not only can help to mobilize public opinion but it can also lock Congress into long-term support for a conflict, thereby increasing the chances of success. Congressional resolutions may also prove more than just politically useful in the context of terrorism. September 11 wrought another significant change in the U.S. national-security situation by blurring the line between war and the home front. Because of the United States' envious geographic position, wars traditionally had occurred abroad and hostilities never reached the homeland. It was this distinction that allowed the Court in the *Steel Seizure Case* to distinguish between the Commander-in-Chief's broad powers in a foreign theater of war and Congress's authority over domestic industrial regulation.⁸⁴ The struggle against al Qaeda, however, does not follow those neat lines, as the September 11 attacks themselves demonstrated. Al Qaeda agents clearly have operated, and continue to seek to operate, within the United States itself, and the federal government correspondingly may need to take the rare step of conducting military operations domestically. Congressional authorization will bolster the legal and political authority of the executive branch for domestic operations, as we saw this Term in *Hamdi v. Rumsfeld*.⁸⁵ Regardless of the Court's view of the President's inherent powers as Commander-in-Chief, it was easier to uphold the authority to detain U.S. citizens as enemy combatants when the political branches had jointly agreed on the use of force in the 2001 authorization.⁸⁶

CONCLUSION

Professor John Hart Ely exerted an outsized influence on constitutional law, no less on the subject of war powers than on questions of judicial review. *War and Responsibility* brought together a generation's thinking about the relative roles of the President, Congress, and the federal courts in the decision to make war. He welded different arguments and thoughts into the most compelling case possible by appealing to the Framers' intentions, constitutional structure, history, and the lessons of recent practice. It was all done with a certain panache, thanks to his irrepressible writing style.

84. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring) (“[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.”).

85. 124 S. Ct. 2633, 2639-40 (2004) (“[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s requirement that a detention be ‘pursuant to an Act of Congress’ (assuming, without deciding, that § 4001(a) applies to military detentions).”).

86. *Id.* at 2657 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (relying on congressional authorization for power to detain enemy combatants, and refusing to reach question of President's Commander-in-Chief power).

I have sought to honor his contribution by paying him the compliment I believe he would have wanted—a continuation of the conversation. I believe that the original understanding of the Framers about war powers was less definitive than Ely's, and I argue here that other important textual and structural arguments allow for a broader range of possible decision-making processes. None of this, I imagine, would have persuaded Ely, who would have responded with his commonsense arguments about constructing a war-making process that would increase political deliberation and hence reduce the likelihood of war. Thus, I have sought to examine whether a Congress-first approach would actually enhance the substantive values that he seeks. Despite his well-made arguments, it is far from clear that his framework would lead to less military conflict and more peace. It does not seem prudent to establish as a matter of constitutional law a single war-making process when we cannot yet accurately judge the costs and benefits of the different options during a time of rapid technological, political, and economic change.

Finally, it seems that unfortunate developments in the international system have rendered somewhat obsolete Ely's admirable substantive goals. Ely believed that war was a scourge and that our constitutional processes should be designed to discourage its use. WMD proliferation, the rise of international terrorism, and the persistence of rogue states, however, may make the use of force more necessary and the prospects for a millennial peace less likely. At the same time, the demands of rapid strikes against international terrorists and rogue states may make ex ante consultation with Congress impractical if not self-defeating, although Congress would retain a substantial check on presidential war-making through its ex post funding powers. Nonetheless, Ely's view contains considerable wisdom, especially in regard to the prospect of domestic operations against a terrorist enemy that has already struck the American homeland once. Balanced institutional participation and greater deliberation may do a better job than sole presidential initiative in committing the nation to a war today that shows no sign of disappearing. We should understand, however, that the Constitution permits, but does not compel, this choice.