TO DECLARE WAR

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INTRODUCTION

> Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative.
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> — James Madison (1788)[1]

> The science of warfare has itself been greatly changed; the interrelationships between states have become much more numerous, more complicated, and more important; and the community of nations has developed an organization and has accepted new principles through which it attempts to control the right to make war. These forces have all had their impact upon the declaration of war; and recent happenings raise doubt as to whether war will ever again be declared by belligerents. Under these changed circumstances, the declaration of war seems to be regarded by some as an anachronism to be discarded.
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> — Professor Clyde Eagleton (1938)[2]

Recent events give cause to contemplate these two observations, made 150 years apart, on the function served by that provision in the Constitution that empowers Congress "To declare War."[3] Iraq invaded Kuwait on August 2, 1990. Six days later, President Bush ordered Operation Desert Shield, the deployment of the largest American combat force since the Vietnam War, to protect Saudi Arabia from an Iraqi attack.[4] On November 8, Mr. Bush ordered a virtual doubling of the existing 230,000 American troops in the Persian Gulf, and stated that such additional strength would provide the United States "an adequate offensive military option."[5] On November 29, at the urging of President Bush, the United Nations Security Council passed Resolution 678, which demanded that Iraq unconditionally withdraw from Kuwait by January 15, 1991.[6] This resolution also authorized member nations to "use all necessary means" to liberate Kuwait[7] and to achieve compliance with the

1. THE FEDERALIST No. 41, at 269-70 (James Madison) (Jacob Cooke ed., 1961).

2. Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 19 (1938).

3. U.S. CONST. art. I, § 8, cl. 11.

4. These events are summarized in Andrew Rosenthal, *Bush Sends U.S. Forces to Saudi Arabia As Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1; *see also* Address to the Nation Announcing the Deployment of United States Armed Forces to Saudi Arabia, 26 WEEKLY COMP. PRES. DOC. 1216 (Aug. 8, 1990).

5. The President's News Conference, 26 WEEKLY COMP. PRES. DOC. 1789, 1790 (Nov. 8, 1990); *see also* Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of Additional United States Armed Forces to Saudi Arabia, 26 WEEKLY COMP. PRES. DOC. 1834 (Nov. 16, 1990).

6. U.N. SCOR, 46th Sess., 2693d mtg. (1990).

7. *Id.*

eleven other Security Council resolutions passed in response to Iraq's invasion of Kuwait.[8]

After President Bush's November 8 announcement of his intention to secure an "offensive military option," eleven law professors, led by Professor Harold Hongju Koh of Yale, whom I shall call collectively the "Koh Signatories," filed a memorandum of law *amicus curiae* in support of a complaint, styled as *Dellums v. Bush*, which had been filed by fifty-four members of Congress to enjoin preliminarily President Bush from ordering United States armed forces to make war on Iraq "absent meaningful consultation with and genuine approval by Congress."[9] In brief, the Koh Signatories argued that Congress alone has the power to declare "war"; that the judiciary is competent to say what "war" is and should issue a declaratory judgment stating that the offensive use of the American forces in Operation Desert Shield implied by President Bush's November 8 remarks would constitute a "war"; and that the President consequently should be preliminarily enjoined from taking offensive military action in the Gulf until Congress had the opportunity to approve a declaration of war or to express its approval for offensive military action in some other manner.[10] On December 13, 1990, Judge Harold Greene

8. The eleven prior resolutions were U.N. SCOR, 46th Sess., 2932d mtg. (1990) (condemning the invasion of Kuwait and demanding Iraq's unconditional and immediate withdrawal); U.N. SCOR, 46th Sess., 2933d mtg. (1990) (imposing economic sanctions on Iraq); U.N. SCOR, 46th Sess., 2934th mtg. (1990) (declaring Iraq's annexation of Kuwait null and void); U.N. SCOR, 46th Sess., 2937th mtg. (1990) (demanding release of foreign nationals from Iraq and Kuwait); U.N. SCOR, 46th Sess., 2938th mtg. (1990) (authorizing the use of force to intercept maritime shipping to or from Iraq or Kuwait); U.N. SCOR, 46th Sess., 2939th mtg. (1990) (establishing guidelines for provision of foodstuffs to Iraq in humanitarian circumstances); U.N. SCOR, 46th Sess., 2940th mtg. (1990) (demanding that Iraq protect diplomatic and consular personnel); U.N. SCOR, 46th Sess., 2942d mtg. (1990) (limiting the cases in which the United Nations would permit exceptions to the economic sanctions imposed on Iraq); U.N. SCOR, 46th Sess., 2943d mtg. (1990) (regulating air and water transportation to and from Iraq and Kuwait); U.N. SCOR, 46th Sess., 2951st mtg. (1990) (reminding Iraq of its liability for loss of life or property due to its invasion and occupation of Kuwait); U.N. SCOR, 46th Sess., 2962d mtg. (1990) (condemning Iraq's attempt to change the demographic composition of Kuwait and Iraq's destruction of Kuwaiti civil records). For a discussion of these various resolutions, see George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991*, 1991 DUKE J. COMP. & INT'L L. 25, 29-40.

9. Memorandum *Amicus Curiae* of Law Professors at 3, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866), *reprinted in* 27 STAN. J. INT'L L. 257 (1991) [hereinafter Memorandum of Koh Signatories]. The ten other law professors were Bruce A. Ackerman of Yale, Abram Chayes of Harvard, Lori Fisler Damrosch of Columbia, John Hart Ely of Stanford, Erwin N. Griswold (formerly) of Harvard, Gerald Gunther of Stanford, Louis Henkin of Columbia, Philip B. Kurland of Chicago, Laurence H. Tribe of Harvard, and William W. Van Alstyne of Duke. *See also* L. Gordon Crovitz, *Lawsuit Offensive Against the Commander in Chief*, WALL ST. J., Dec. 5, 1990, at A17. Professor Koh's memorandum is reminiscent of the constitutional challenge to the Vietnam War led a generation earlier by his predecessor at Yale, Professor Alexander Bickel. *See* Alexander M. Bickel et al., *Indochina: The Constitutional Crisis*, 116 CONG. REC. 15,409 (1970).

10. *See* Memorandum of Koh Signatories, *supra* note 9.

rejected the motion for preliminary injunction for lack of ripeness, but nonetheless accepted a number of the plaintiffs' constitutional arguments.[11]

While the prelimmary injunction motion was still pending, another Yale law professor, Stephen L. Carter, argued on the editorial page of the *Washington Post* that congressional critics of the American military build-up in the Gulf were focusing on the wrong provision of the Constitution.[12] According to Carter, both a declaration of war and the War Powers Resolution[13] are, as a practical matter, unnecessary to restrain the President in light of the appropriations power: "At any time that enough members care to do so, the Congress can refuse to fund a war that the president wants to fight."[14]

This advice from Yale on the constitutional implications of the Iraq crisis, both from Professor Koh and Professor Carter, would appear to have been mooted by events now familiar to all. On January 8, 1991, President Bush formally requested that Congress pass a resolution *supporting* (not authorizing) "the use of all necessary means" to implement Security Council Resolution 678.[15] On January 12, three days after a meeting between Iraq's foreign minister and Secretary of State James Baker proved futile,[16] Congress passed a joint resolution that approved the use of American military force against Iraq after January 15—once the President had determined and reported to Congress that all diplomatic avenues had been exhausted.[17] An eleventh-hour meeting on January 13 between Iraqi President Saddam Hussein and United Nations Secretary General Javier Perez de Cuellar also failed.[18] In the early morning of January 17, the United States and its allies unleashed Operation Desert Storm with over 1400 air sorties against Iraqi military targets.[19] Within days, Iraq retaliated by attacking Saudi Arabia and Israel with ballistic missiles, igniting oil facilities in occupied Kuwait,

11. *See* Dellums v. Bush, 752 F. Supp. 1141, 1144-46, 1152 (D.D.C. 1990).

12. Stephen L. Carter, *Going to War Over War Powers*, WASH. POST, Nov. 18, 1990, at C1.

13. 50 U.S.C. §§ 1541-1548 (1988).

14. Carter, *supra* note 12, at C4.

15. Letter to Congressional Leaders on the Persian Gulf Crisis, 27 WEEKLY COMP. PRES. DOC. 17, 18 (Jan. 8, 1991); *see also* Adam Clymer, *Bush Asks Congress to Back Use of Force If Iraq Defies Deadline on Kuwait Pullout*, N.Y. TIMES, Jan. 9, 1991, at A1.

16. *See* Thomas L. Friedman, *Baker-Aziz Talks on Gulf Fail; Fears of War Rise; Bush Is Firm; Diplomatic Effort to Continue*, N.Y. TIMES, Jan. 10, 1991, at A1.

17. Authorization For Use of Military Force Against Iraq Resolution, H.R.J. Res. 77, Pub. L. No. 102-1, 105 Stat. 3 (1991); *see also* Adam Clymer, *Congress Acts to Authorize War in Gulf; Margins Are 5 Votes in Senate, 67 in House*, N.Y. TIMES, Jan. 13, 1991, at A1.

18. *See* Patrick E. Tyler, *U.N. Chief's Talks With Iraqis Bring No Sign of Change*, N.Y. TIMES, Jan. 14, 1991, at A1.

19. *See* Andrew Rosenthal, *U.S. and Allies Open Air War on Iraq, Bomb Baghdad and Kuwaiti Targets; "No Choice" But Force, Bush Declares*, N.Y. TIMES, Jan. 17, 1991, at A1; *see also* Statement

and dumping millions of barrels of crude oil into the Persian Gulf.[20] On February 24, 1991, the United States and its allies launched the land invasion of Kuwait.[21] Three days later, President Bush announced that Kuwait had been liberated and ordered a cease-fire.[22] Within hours, Iraq announced that it would comply with all United Nations Security Council resolutions regarding the crisis, including the resolution that declared Iraq's annexation of Kuwait null and void.[23]

The transition from peace to war and back again fundamentally alters many legal relationships, whether they are privately ordered through contract or publicly ordered through statutes, common law doctrines, treaties, or even the Constitution. As one would expect from the Vietnam War experience, lawsuits filed by parties ranging from insurance companies to conscientious objectors turned on the question of whether the Persian Gulf War was lawfully authorized by Congress in the absence of a formal declaration of war.[24]

In Part I of this Article, I begin by documenting what is perhaps obvious—that Congress did not declare war against Iraq on January 12, 1991. I agree with the Koh Signatories (and disagree with President Bush's lawyers in the Department of Justice) that it is a justiciable political question for a federal court to determine whether armed conflict of a certain level or ferocity constitutes "war" for purposes of the War Clause

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by Press Secretary Fitzwater on Allied Military Action in the Persian Gulf, 27 WEEKLY COMP. PRES. DOC. 50 (Jan. 16, 1991).

20. *See* Michael R. Gordon, *Iraqis Fire Missiles at Israeli Cities After Second Day of Allied Bombing; U.S. Discourages An Israeli Response*, N.Y. TIMES, Jan. 18, 1991, at A1; Philip Shenon, *Iraq Sets Oil Refineries Afire As Allies Step Up Air Attacks; Missile Pierces Tel Aviv Shield*, N.Y. TIMES, Jan. 23, 1991, at A1; Rick Atkinson & Dan Balz, *Iraq Dumping Flood of Oil Into Gulf, U.S. Says; More Scud Missiles Strike Israel, Saudi Arabia*, WASH. POST, Jan. 26, 1991, at A1.

21. *See* Rick Atkinson & Dan Balz, *Allied Forces Invade Kuwait As Bush Orders Ground War: The Liberation of Kuwait Has Now 'Entered a Final Phase'*, WASH. POST, Feb. 24, 1991, at A1.

22. *See* Rick Atkinson & Steve Coll, *Bush Orders Cease-Fire: President Declares Kuwait Free, Iraq Defeated, Sets Conditions for Permanent End to Hostilities*, WASH. POST, Feb. 28, 1991, at A1; Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf, 27 WEEKLY COMP. PRES. DOC. 224 (Feb. 27, 1991).

23. *See Iraqi Letter on Compliance*, N.Y. TIMES, Mar. 1, 1991, at A8.

24. So far, the Persian Gulf War has occasioned court orders in Farsaci v. Bush, 755 F. Supp. 22 (D. Me. 1991); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y. 1991); Centa v. Stone, 755 F. Supp. 197 (N.D. Ohio 1991); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991); Wallace v. Bush, 1991 U.S. Dist. LEXIS 1068 (N.D. Cal. Jan. 29, 1991) (denying private citizen standing to sue for preliminary injunction of presidential action); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); *see also* Doe v. Sullivan, 756 F. Supp. 12 (D.D.C. 1990), *aff'd*, 938 F.2d 1370 (D.C. Cir. 1991) (challenging mandatory administration of drug to soldiers in Persian Gulf to counteract chemical and biological weapons); Sherman v. United States, 755 F. Supp. 385 (M.D. Ga. 1991) (holding that the President has authority to extend enlistments of active duty Air Force enlisted personnel); The Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (challenging press restrictions). For representative cases from the Vietnam War, see Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

of the Constitution. To commence warfare on the scale witnessed against Iraq, the President needed to receive a formal declaration of war. He did not. Although there is a category of warfare that the President may initiate without a prior declaration of war, the Persian Gulf War was too mammoth to be characterized as a police action. And although there are cases—poorly reasoned in my view—establishing that Congress may authorize "limited" war, the Persian Gulf War from its very inception did not fit within this category. Although politically significant, Congress's joint resolution of January 12, 1991 was a legal nullity, a merely precatory or hortatory gesture. By failing to declare war against Iraq, Congress produced an anomaly in our representative democracy: The Persian Gulf War lacked constitutional legitimacy despite its overwhelming support among the American electorate. Why is Congress more willing to let the country go to war than to declare war? How can the evils of permitting America to wage war be any less than the evils of formally declaring war?

In Part II, I argne that, in the interest of enhancing political accountability, Congress should authorize war only through formal declaration. Congress should not be able to implicitly "authorize" the initiation of war merely by appropriating funds for war purposes.[25] A declaration of war fulfills Congress's representative function because it is more immediately visible to the electorate, less susceptible to ambiguity and disagreement once it is made, and thus more conducive to effective monitoring of the performance of political actors. Further, no legal significance should attach to a joint resolution that members of Congress have represented to be "tantamount to a declaration of war."[26] Congress should have a duty to declare war if it favors war and believes that the level of hostilities envisioned require the President to receive prior congressional authority. It is my purpose in Part II to show that insights into the economics of organization shed light on the genius of the Framers, and counsel us to maintain strict formality in the separation of government functions relating to the decision to go to war.

In Part III, I examine the formality of the declaration of war against Japan on December 8, 1941. I show how this brief congressional resolution substantially exceeded the degree of formality required by the letter of the Constitution. The declaration reflected a different, and in my view a superior, conception of the process for the authorization of war than

25. *See, e.g.*, Berk v. Laird, 317 F. Supp. 715, 721-27 (E.D.N.Y.) (finding that Congress had authorized the use of armed forces in Vietnam in the absence of an explicit declaration of war), *aff'd*, 429 F.2d 302 (2d Cir. 1970); Orlando v. Laird, 317 F. Supp. 1013, 1018-19 (E.D.N.Y. 1970) (same), *aff'd*, 443 F.2d 1039 (2d Cir. 1971).

26. 137 CONG. REC. H390, H449 (daily ed. Jan. 12, 1991) (statement of Rep. Dellums).

one finds either in the actions of President Bush and Congress in the Iraq crisis or in the recommendations of the Koh Signatories or Professor Carter.

In Part IV, I examine the proposals of Professor Carter and of the Koh Signatories. Although I concede that the prosecution of war could be regulated through either Professor Carter's proposal to use the appropriations process, or through the Koh Signatories' proposal to use the equitable powers of the judiciary to enjoin the President, the degree of political accountability that would correspond to these arrangements would be inferior to that which would accrue under a formal declaration of war. In addition, in Part IV and throughout this Article, I use the circumstances of the Persian Gulf War as an opportunity to assess and to critique the growing body of work on the war powers by Professor John Hart Ely.[27] Although I agree with many of Ely's premises regarding political accountability, I disagree with most of his major conclusions regarding what the Constitution requires, or should require, in matters of war.

My thesis that Congress should use a formal declaration to initiate war is hardly academic. On October 24, 1990, when American troop strength in the Gulf was still about 200,000, Senator Wallop introduced a joint resolution calling for a declaration of war against Iraq.[28] His motivation was not impatience to start a fight, but the desire to avoid "operational failure and needless loss of life."[29] A declaration of war, in his view, "is a congressional obligation, in the right circumstances," because "[i]t contributes to victory by ensuring first a clear understanding of the war aims, and of gaining the Nation's commitment to those aims."[30]

Nonetheless, I couch my thesis in the normative word "should" because I do not want to overstate my case by arguing that the Constitution clearly requires such a rule. Constitutional scholars spanning the ideological spectrum have been criticized for exaggerating the certitude of

27. *See* John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 862 (1991) [hereinafter Ely, *Another Such Victory*]; John H. Ely, *The American War In Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) [hereinafter Ely, *American War in Indochina (Part I)*]; John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990) [hereinafter Ely, *American War in Indochina (Part II)*]; John H. Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 CONST. COMMENTARY 1 (1991); John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988) [hereinafter Ely, *A War Powers Act That Worked*].

28. *See* 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990).

29. *Id.* at S16,590.

30. *Id.*

what selected provisions of the Constitution mean.[31] Professor Ely, for example, who is not noted for his reliance on originalism,[32] announces that although " 'original understanding' of the document's framers and ratifiers is often unclear," in the case of the War Clause "it is not."[33] This is too tall a claim.[34] Professor Charles Lofgren observed in his study of the War Clause that "Madison and Hamilton, who presumably knew something about the original intent, came to contradictory conclusions within a few years of the Constitutional Convention" on the power of the President to wage war without prior congressional authorization.[35] Thus arose the famous exchange between Pacificus and Helvidius, the respective pseudonyms of Hamilton and Madison.[36] Professor Eugene Rostow, whose reading of the War Clause markedly differs from Lofgren's, has an equally valid insight into the ambiguities of the original meaning of the Clause: "When in office, Jefferson, Madison, and Hamilton all discovered that they could not quite live according to the brave rules they had pronounced as theorists of the Constitution."[37] It should be no surprise, therefore, that two centuries later the debate over the original meaning of the War Clause provokes disagreement among the most highly regarded of contemporary interpreters of the Constitution, and that these scholars have squeezed the last imaginable drop of interpretative significance from the story of how—during a debate that lasted less than one full day—the Framers changed Congress's power to "wage War" to the power to "declare War" and, in the course of so doing, emphasized that the President must have the power to repel sudden attacks without a prior declaration of war.[38]

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31. *See, e.g.*, Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 642-44 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

32. *See, e.g.*, BORK, *supra* note 31, at 178-79 (discussing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

33. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1386.

34. Professor Koh, for example, argues that "there lurks within our constitutional system an identifiable National Security Constitution, a normative vision of the foreign-policy-making process that emerges only partially from the text of the Constitution itself." HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 68 (1990).

35. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 673 (1972).

36. *See* ALEXANDER HAMILTON, *Pacificus* (July 1793), *in* 4 THE WORKS OF ALEXANDER HAMILTON 135-91 (Henry Cabot Lodge ed., 1885); JAMES MADISON, *Letters of Helvidius* (Aug.-Sept. 1793), *in* 6 THE WRITINGS OF JAMES MADISON 138-88 (Gaillard Hunt ed., 1906).

37. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 851 (1972).

38. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 475-77 (Norton 1966) (1840). For the scholarly analysis of the debate on the War Clause at the Constitutional Convention, see Raoul Berger, *War-Making By the President*, 121 U. PA. L. REV. 29,

I. DID AMERICA'S ENTRY INTO THE PERSIAN GULF WAR REQUIRE A PRIOR DECLARATION OF WAR?

Many contemporary constitutional scholars, including some of the Koh Signatories, seem to believe that the balance of power found today between Congress and the President is most accurately described as the "Imperial Presidency."[39] This is the outspoken view of Justice White as well, who recently wrote that "[i]t cannot be seriously maintained . . . that the basis for fearing legislative enroachment [sic] [of the executive] has increased or even persisted rather than substantially diminished."[40] In words characteristic of this school of thought, Professor Philip Kurland, one of the Koh Signatories, argues that:

> [T]he legislative branch has become the least of the three both as a threat to and protector of the people's liberty. The executive branch has become imperial and imperious. And the judiciary has developed from that "98-lb. weakling" into the muscular giant, just as the ads of Charles Atlas said he could in the pulp magazines of yesteryear.[41]

40-43 (1972); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 132 (1971); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 109-11 (1984); Ely, *A War Powers Act That Worked*, *supra* note 27, at 1386-88; J. Terry Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME L. REV. 187, 209-12 (1975); Lofgren, *supra* note 35, at 673-74 n.6, 675-76; Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Tools*, 44 S. CAL. L. REV. 461, 466-67 (1971); W. Taylor Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1283 (1969); Rostow, *supra* note 37, at 865-66; William A. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5-7 (1972); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 625 (1972); Note, *Congress, The President, and The Power to Commit Forces To Combat*, 81 HARV. L. REV. 1771 (1968).

39. This view is, of course, associated most strongly with ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973). *See also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 270 (1980); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 35-69 (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 30, 41-43 (1990); KOH, *supra* note 34, at 7, 73; PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 153 (1978); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-1, at 209-10 (2d ed. 1988); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW 247 (1986); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 483 (1976); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1083-84 (1987); Michael J. Glennon, *The Gulf War and the Constitution*, FOREIGN AFFAIRS, Spring 1991, at 84, 84; Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1293 (1988); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 609-10 (1986); Van Alstyne, *supra* note 38, at 3.

40. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2317 n.3 (1991) (White, J., dissenting).

41. Kurland, *supra* note 39, at 607.

One need not embrace this Imperial Presidency characterization—as I do not, particularly in matters of domestic policy[42]—to justify a reason for reflection and concern about the separation of powers in the events leading to the Persian Gulf War. After the vote on the January 12, 1991 resolution, a somber President Bush emphasized that in our political system, unlike Iraq's, the decision to wage war was made only after open debate and democratic consensus.[43] Although no doubt sincere, such sentiments are beside the point, for Hussein's Iraq never should be the yardstick by which the United States measures the morality of its political and legal institutions. Instead, when we correctly compare the conduct of Congress, the President, and the judiciary in the Iraq crisis with the requirements of the Constitution, the three branches reveal themselves to have been far less proficient in discharging their duties than the American military subsequently proved itself to be in prosecuting the war.

A. *Overture to War: Are the Political Branches Willing to Say* Ex Ante *What a "War" Is?*

In October of 1990, Secretary of State James Baker created the impression that President Bush might initiate a war with Iraq without seeking a prior congressional declaration of war. When repeatedly asked during testimony before the House Foreign Affairs Committee whether the President would request a declaration of war before deploying the massive force of Operation Desert Shield in an offensive manner, Secretary Baker seemed to regard the matter as negotiable. He appeared to believe that consultation by the President is a substitute for congressional approval and that it is impossible for the executive to make an across-the-board commitment to honor Congress's power to declare war.[44]

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42. *See* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162; J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990) [hereinafter Sidak & Smith, *Four Faces of the Item Veto*]; J. Gregory Sidak & Thomas A. Smith, *The Veto Power: How Free Is the President's Hand?*, AM. ENTERPRISE, Mar.-Apr. 1991, at 58.

43. The President's News Conference, 27 WEEKLY COMP. PRES. DOC. 39, 39 (Jan. 12, 1991) ("Those who may have mistaken our democratic process as a sign of weakness now see the strength of democracy.") (remarks of President Bush). Members of Congress voiced the same opinion before and after the January 12 vote. *See, e.g.*, 137 CONG. REC. 7, H356 (daily ed. Jan. 11, 1991) (remarks of Rep. Boehlert) ("Mr. Hussein, don't let a lack of understanding of a true democracy lead you to the wrong conclusion about what is taking place in this Chamber and this land.").

44. *See Crisis in the Persian Gulf: Hearings and Markup Before the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 101-02 (1990) [hereinafter *Hearings on the Crisis in the Persian Gulf*]; *see also U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. 103 (1990) (testimony of Secretary Baker that "we want and would seek the support of the elected representatives of the American people, and we will consult").

Secretary Baker also refused to give Congress any indication of what a workable understanding of war requiring prior congressional approval might be. During the same hearings of the House Foreign Affairs Committee, he left the impression that the definition of "war" is a question so enigmatic that the two political branches cannot agree in the abstract on an answer any more specific than the understatement that an unprovoked attack on American forces on the scale of Pearl Harbor would present a situation in which the President would "very definitely want to consider" requesting a declaration of war.[45]

In a sense, Secretary Baker's comments should not be surprising: they reflect the preceding sixteen years of deadlock over the meaning and constitutional legitimacy of the War Powers Resolution. Professor Carter has described this debate, with some exaggeration, as "nothing more or less than a congressional definition of the word 'war' in article I."[46] Enacted by a congressional override of President Nixon's veto in 1974, the War Powers Resolution was no meeting of the minds between the President and Congress. I have argued in a different context that attempts to resolve disputes between Congress and the President by such so-called "framework legislation" enacted by congressional override is constitutionally dubious under the separation of powers.[47] Secretary Baker's testimony might simply be the political manifestation of that constitutional condition.[48]

Whether one likes or dislikes the War Powers Resolution, it is regrettable that the executive and legislative branches cannot agree on a definition of a term so essential and elemental to the wise governance of the nation in times of crisis. Whatever its true cause—and indeed there might have been some compelling diplomatic justification that could not be disclosed to the public—Secretary Baker's discursive answers to numerous variants of the question, "What does the President regard as a 'war' requiring a prior congressional declaration?," became more troubling by November 8, 1990. On that day, President Bush increased troop strength in the Persian Gulf to create "an adequate offensive military option."[49]

45. *Hearings on the Crisis in the Persian Gulf, supra* note 44, at 104-05.

46. Carter, *supra* note 38, at 101-02.

47. *See* Sidak, *The Recommendation Clause, supra* note 42, at 2130 n.221.

48. *See Hearings on the Crisis in the Persian Gulf, supra* note 44, at 31-32 (testimony of Secretary Baker asserting the unconstitutionality of 60-day limit on hostilities under the War Powers Resolution).

49. *See supra* note 5 and accompanying text.

B. *Is It a Political Question for the Judiciary to Issue a Declaratory Judgment Saying* Ex Ante *What Is or Will Constitute a "War"?*

President Bush's November 8 statement prompted Representative Dellums and fifty-three other members of Congress to file suit to enjoin any Presidential order of an attack on Iraqi forces.[50] Although Judge Harold Greene ultimately denied the motion for a preliminary injunction,[51] holding that the controversy was not ripe for judicial decision,[52] he nonetheless rejected all of the Justice Department's substantive arguments.

The Justice Department argued on behalf of President Bush that it is a political question to say what "war" is, and thus to say what it is that the War Clause grants Congress the power to declare. Quoting the familiar phrase from *Baker v. Carr*,[53] the Justice Department maintained that "there is 'a lack of judicially discoverable standards' for determining whether hypothetical military actions in the Persian Gulf area would constitute an 'offensive war' or an 'offensive military attack.' "[54] The Justice Department argued that the judiciary is incapable of saying whether and when a declaration of war is or would be a constitutional necessity: "History emphatically confirms that the use of armed forces can be so varied in character, motivated by so many considerations, and have such varied consequences for the international relations of the United States, that definitive characterizations of those deployments are simply beyond the competence of a court."[55]

One would expect this political question argument by the Justice Department in the zealous representation of its client, President Bush. Nevertheless, the argument was strained, for the Department euphemistically spoke of "the Korean and Vietnam *Conflicts*" as being "significant engagements" among the "scores of instances from the presidency of John Adams to the present" in which "U.S. armed forces have acted without a declaration of war."[56] The Justice Department evidently did

50. *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

51. *See id.* at 1152.

52. *See id.*; *see also id.* at 1150 (" '[A] dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.' ") (quoting Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring)).

53. 369 U.S. 186, 217 (1962).

54. United States Department of Justice, Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Relief and in Support of Defendant's Motion to Dismiss at 21, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866) [hereinafter Motion to Dismiss].

55. *Id.*

56. *Id.* at 21 n.12 (emphasis added).

not recognize the irony of arguing that Korea and Vietnam provide persuasive precedents for an undeclared war against Iraq. To use Dean Acheson's words, the Korean War engendered the "frustration of a limited and inconclusive war."[57] Surely Vietnam was worse in this respect, distinguishing itself as the least successful undeclared war in American history. Yet the President's lawyers in *Dellums v. Bush* implied that one can capitalize the word "conflict" and, regardless of the scale on which such "conflict" is waged, the offensive military force used to prosecute it will be less dependent on prior congressional approval than if the "conflict" were called a "war."

Judge Greene rejected the Justice Department's political question argument: "If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive."[58] In Operation Desert Shield, he noted, "the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat."[59] The ferocity of the air attack on Iraq that began on January 17, 1991 vindicated Judge Greene's skepticism.

Moreover, Judge Greene noted that "courts have historically made determinations about whether this country was at war for many other purposes—the construction of treaties, statutes, and even insurance contracts."[60] He could have added that the plain text of the Constitution would seem to presume that a federal court is competent to say what "war" is, for it would be difficult otherwise for a court to know what to make of the provision in Article III that "Treason against the United States, shall consist . . . in levying War against them . . . ."[61] He might also have added the observation of Professor Clyde Eagleton in 1938 that "courts in one state have often passed judgment as to whether a state of war existed between two other states; and the conclusion reached by such a neutral court might be in utter disagreement with the declared intentions of those states."[62]

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57. DEAN ACHESON, PRESENT AT THE CREATION 414 (1969).

58. *Dellums*, 752 F. Supp. at 1145.

59. *Id.*

60. *Id.* at 1146. *See* Ely, *A War Powers Act That Worked*, *supra* note 27, at 1409 n.88 (collecting insurance cases interpreting war-risk clauses).

61. U.S. CONST. art. III, § 3, cl. 1.

62. Eagleton, *supra* note 2, at 27 (citing Compania Minera v. Bartlesville Zinc Co., 275 S.W. 388 (Tex. 1915); The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885); The Nayade, 4 C. Rob. 251, 165 Reprint 602 (1802); The Teutonia, 8 Moore N.S. 411, 17 Reprint 366 (1872)). Eagleton did note,

Judge Greene also rejected the Justice Department's interpretation of *Mitchell v. Laird*,[63] a decision from the Vietnam era that addressed the competency of a court to determine whether America's military involvement in Vietnam was a "war" subject to Congress's power to declare war. At issue in *Mitchell* was whether President Nixon's military orders issued from the time he took office in January 1969 constituted the prosecution of an undeclared war or were merely necessary to terminate the conflict that had grown to its substantial scale under President Johnson.[64] The Court of Appeals for the District of Columbia Circuit held that it was not competent to say whether the various military actions of the United States since January 1969 amounted to a merely good-faith effort to end the war.[65] A court "cannot procure the relevant evidence"[66] and "would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area."[67] "Otherwise," said the D.C. Circuit, "a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of nations."[68]

But the same court believed that the judiciary was competent to say whether the American involvement in Vietnam constituted a "war" whose prosecution by the President required a prior congressional declaration of war. The D.C. Circuit did not "see any difficulty in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval."[69] It noted that the cost of America's involvement in Vietnam had already exceeded 50,000 American lives and $100 billion.[70] Two similar cases of the Vietnam era yielded the same conclusion.[71]

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however, that American courts had declined to opine on whether their own country was at war. *See id.*

63. 488 F.2d 611 (D.C. Cir. 1973).

64. *See id.* at 615-16.

65. *See id.* at 616.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 614.

70. *Id.*

71. *See* Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971); Berk v. Laird, 429 F.2d 302, 304-05 (2d Cir. 1970); *see also* Mora v. McNamara, 389 U.S. 934, 934-35 (1967) (Stewart, J., dissenting from denial of certiorari) (contending that the Court should have granted certiorari in a case in which the plaintiff brought an action to prevent the Secretary of Defense from carrying out draft orders, and to obtain a declaratory judgment that the U.S. military activity in Vietnam was illegal). *But see* Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972) (three-judge panel) (stating that

In *Dellums*, however, the Justice Department read this passage from *Mitchell v. Laird* as *supporting* the President's position that the complaint against Operation Desert Shield posed a purely political question: "Rather than relying upon an established record of ongoing hostilities in which tens of thousands of lives have already been lost, plaintiffs here ask the Court to enjoin military actions that might or might not be taken in the future, under circumstances that are yet entirely unknown."[72] The Justice Department had it exactly backwards. True, the potential carnage from a war with Iraq was unknown in the fall of 1990; but the speculative nature of injunctive relief—which I agree in Part IV was indeed an insuperable problem in *Dellums v. Bush*—did not arise from the fact that America's war dead from the Persian Gulf had not yet been tallied at the time of the preliminary injunction hearing. It would be curious indeed if, after months of diplomacy and military build-up, the President could suffer the loss of thousands of American lives in combat in the Persian Gulf before the judiciary could consider under the political question doctrine whether the events that produced those dead constituted a "war" within the meaning of the War Clause.

Judge Greene reached the same result, expressing "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a 'war' within the meaning of Article I, Section 8, Clause 11, of the Constitution."[73] And, in his State of the Union Address on January 29, 1991, President Bush removed any semantic fig leaf that might have remained, referring to the then-ongoing American attacks against Iraq as "the war in the Gulf."[74]

It is disturbing that, if the definition of "war" is indeed a nonjusticiable political question as the Justice Department argued, the executive branch seemed so unwilling (as evidenced by Secretary Baker's October

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characterization of American involvement in Southeast Asia is a nonjusticiable political question), *aff'd mem. sub nom.*, Atlee v. Richardson, 411 U.S. 911 (1973).

72. Motion to Dismiss, *supra* note 54, at 23 n.13.

73. *Dellums*, 752 F. Supp. at 1146.

74. Address Before a Joint Session of the Congress on the State of the Union, 27 WEEKLY COMP. PRES. DOC. 90, 94 (Jan. 29, 1991). Because the President's State of the Union Address is constitutionally mandated, *see* U.S. CONST. art. II, § 3, and because of its extreme formality and publicity, there is reason to place greater legal significance on these remarks than on casual remarks by the President. For earlier and less formal statements by President Bush characterizing the hostilities in the Persian Gulf as a war, see Remarks to Reserve Officers Association, 27 WEEKLY COMP. PRES. DOC. 72, 73 (Jan. 23, 1991); Remarks to Arab-American Leaders, 27 WEEKLY COMP. PRES. DOC. 74, 75 (Jan. 25, 1991); Remarks at the Annual Convention of the National Religious Broadcasters, 27 WEEKLY COMP. PRES. DOC. 87 (Jan. 28, 1991). For a subsequent and relatively formal statement to the same effect, see Address Before a Joint Session of Congress on the Cessation of the Persian Gulf Conflict, 27 WEEKLY COMP. PRES. DOC. 257, 257 (Mar. 6, 1991) ("The war is over.").

1990 congressional testimony) to identify publicly to the other political branch how the President defines the term. How else is a "political" question ever to be answered with a degree of specificity any higher than what the quadrennial electoral cycle provides? Instead, the Bush Administration seemed to adopt the position that the meaning of "war" for purposes of the War Clause is both nonjusticiable and politically indeterminate—and thus somehow committed to the President's sole discretion.

C. *The Iraq Resolution of January 12, 1991*

If President Bush and Secretary Baker sent disturbing signals about the executive's willingness to ignore constitutional principles before going to war against Iraq, Congress's actions were no less alarming. Only two weeks before the American attack on Iraq, it appeared that President Bush would not request and Congress would not on its own initiative debate and vote on a declaration of war or a resolution that purported to authorize an attack to liberate Kuwait. The Bush Administration vacillated over whether such a congressional vote would be useful in its attempts at diplomacy—maintaining all along that the President did not even need such congressional authorization to use military force.[75] Likewise, members of the newly elected 102d Congress appeared willing to avoid confronting the issue so as to maintain immunity from political repercussions.[76] This situation in the 102d Congress in January 1991 fol-

75. *See, e.g.*, Adam Clymer, *102d Congress Opens, Troubled on Gulf but Without a Consensus*, N.Y. TIMES, Jan. 4, 1991, at A1 (describing meeting on January 3, 1991 between President Bush, Speaker Foley, and Senate Majority Leader Mitchell in which Mr. Bush asserted that he needed no congressional authorization to attack Iraq); Clifford Krauss, *Top Bush Advisers Called In to Meet on Iraq Strategy*, N.Y. TIMES, Jan. 2, 1991, at A1 ("A White House spokesman said he was not aware of any reconsideration of previously stated Administration policy not to request a resolution from Congress similar to the one adopted by the United Nations Security Council authorizing the use of force to remove Iraq from Kuwait."); *see also* Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey, 27 WEEKLY COMP. PRES. DOC. 589, 590 (May 10, 1991) [hereinafter Princeton Speech] ("I have great respect for Congress, and I prefer to work cooperatively with it whenever possible. Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolutions, I solicited congressional support before committing our forces to the Gulf war.").

76. The *Wall Street Journal* reported the following on January 4, 1991:

> The new Congress has picked up where the old one left off on the Persian Gulf crisis: willing to make noise, but unwilling to act.
>
> With the United Nations-imposed deadline for Iraq to withdraw from Kuwait only 11 days away, congressional leaders and the Bush administration have tacitly agreed on a strategy of political inaction. The president, seeking to avoid a bruising fight with Congress on the eve of possible hostilities, won't ask lawmakers for advance authorization on using force. And Congress's Democratic leaders, in what many critics regard as either political cowardice or opportunism, have spread the word that they aren't scheduling any vote that could affect the current situation in the Gulf.

Jeffrey H. Birnbaum, *New Congress, Full of Sound and Fury Over Iraq, Fuels Bipartisan Outrage by Signifying Nothing*, WALL ST. J., Jan. 4, 1991, at A8.

lowed the decision by the leadership of the 101st Congress not to call its members back into session after the November 1990 election to debate an authorization of the use of military force against Iraq. In Congress's partial defense, it should be noted that President Bush declined to exercise his own clear constitutional power "on extraordinary occasions . . . [to] convene both Houses,"[77] so that Congress would have been made to vote on a declaration of war in late 1990. In January 1991, it appeared that the strategy of evasion would continue in the 102d Congress. According to the *Wall Street Journal* of January 4, 1991: "Senate Majority Leader George Mitchell (D., Maine) says flatly that Congress would reject an open-ended declaration of war against Iraq. As for something more limited—perhaps a resolution authorizing the use of force and modeled on the one approved by the U.N.—it might be conceivable."[78]

On January 8, 1991, President Bush requested congressional "support" for the use of military force, but ouly, according to the *New York Times*, "after Congressional leaders said in recent days that he was almost certain to receive Congressional endorsement."[79] After debate on January 10-12, 1991, Congress passed House Joint Resolution 77, the Authorization for Use of Military Force Against Iraq Resolution (the "Iraq Resolution"), by which "[t]he President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation" of the eleven Security Council resolutions passed in response to Iraq's invasion of Kuwait.[80] The votes, 52-47 in the Senate and 250-183 in the House,

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The motivation for such inaction, according to the newspaper, was to avoid political accountability on an inevitably controversial matter:

> From the Democratic leaders' point of view, speaking loudly while doing nothing preserves all their political options . . . . If the president emerges from the Gulf crisis with what appears to be a triumph, they can say they allowed him to pursue his successful policies; if things go wrong, they can blame him for the failure while citing their own publicly expressed—but not acted upon—misgivings.

Id.

77. U.S. CONST. art. II, § 3, cl. 1.

78. Birnbaum, *supra* note 76, at A8; *see also* Thomas L. Friedman, *White House Hints It May Talk If Iraq Offers A New Date: Compromise Is Seen*, N.Y. TIMES, Jan. 3, 1991, at A1 ("White House officials said that if Congress would not endorse the President's gulf strategy, the White House prefers that there be no Congressional debate on the issue at all, to avoid sending a mixed signal to Baghdad.").

79. Clymer, *supra* note 17, at A6.

80. Pub. L. No. 102-1, 105 Stat. 3 (1991), *reprinted in* 137 CONG. REC. S403-04 (daily ed. Jan. 12, 1991) [hereinafter Iraq Resolution]. The Iraq Resolution reads:

> Whereas the Government of Iraq without provocation invaded and occupied the territory of Kuwait on August 2, 1990;
>
> Whereas, Iraq's conventional, chemical, biological, and nuclear weapons and ballistic missile programs and its demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace;

were preceded by debate described as notably eloquent and emotional.[81] Of the fifty-four members of the 101st Congress who had complained in *Dellums v. Bush* that President Bush was denying them the opportunity to vote for or against a declaration of war, fifty-one were members of the 102d Congress, and fifty voted on the joint resolution on January 12, 1991;[82] of those fifty members, forty-nine voted against the Iraq Resolu-

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Whereas the international community has demanded that Iraq withdraw unconditionally and immediately from Kuwait and that Kuwait's independence and legitimate government be restored;

Whereas the United Nations Security Council repeatedly affirmed the inherent right of individual or collective self-defense in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the United Nations Charter;

Whereas, in the absence of full compliance by Iraq with its resolutions, the United Nations Security Council in Resolution 678 has authorized member states of the United Nations to use all necessary means, after January 15, 1991, to uphold and implement all relevant Security Council resolutions and to restore international peace and security in the area; and

Whereas Iraq has persisted in its illegal occupation of, and brutal aggression against Kuwait: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.

(b) REQUIREMENT FOR DETERMINATION THAT USE OF MILITARY FORCE IS NECESSARY.—Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—

(1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a); and

(2) that those efforts have not been and would not be successful in obtaining such compliance.

(c) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supersedes any requirement of the War Powers Resolution.

SEC. 3. REPORTS TO CONGRESS.

At least once every 60 days, the President shall submit to the Congress a summary on the status of efforts to obtain compliance by Iraq with the resolutions adopted by the United Nations Security Council in response to Iraq's aggression.

81. *See* John E. Yang, *Somber Decision: At End of Emotional Debates, Votes Cast Without Enthusiasm*, WASH. POST, Jan. 13, 1991, at A1; Clymer, *supra* note 17, at A1; *see also* The President's News Conference, 27 WEEKLY COMP. PRES. DOC. 39, 41 (Jan. 12, 1991) ("The compassion and the concern, the angst of these Members, whether they agreed with me or not, came through loud and clear.") (remarks of President Bush); 137 CONG. REC. H6441 (daily ed. Jan 12, 1991) (remarks of Speaker Foley).

82. Representative Dymally did not vote. 137 CONG. REC. H485 (daily ed. Jan. 12, 1991). Representatives Bates, Crockett, and Kastenmeier from the 101st Congress were not elected to the 102d Congress.

tion.[83] In his signing statement, President Bush called the resolution "the best hope for peace."[84]

Notwithstanding the solemnity and professed anguish over the vote on the Iraq Resolution, confusion surrounds its legal and constitutional significance. The Iraq Resolution does not purport to be a declaration of war. Section 2(a) of the Resolution simply states that "[t]he President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 . . . in order to achieve implementation" of eleven enumerated Security Council resolutions regarding Iraq's conquest of Kuwait.[85] The word "war" is absent from the Iraq Resolution except in the title of the War Powers Resolution, which is discussed in subsection 2(c). The closest that the Iraq Resolution textually comes to maintaining that it constitutes a declaration of war is a sentence in its preamble that paraphrases the objective of Security Council Resolution 678 to be, in part, "to restore international peace and security in the area."[86] If one purpose of authorizing the President's use of military force is to restore peace, one can infer that the Iraq Resolution is premised on there being an absence of "peace"—a word defined, colloquially if not legally, to be "that condition of a nation . . . in which it is not at war with another."[87] Although not frivolous, such a reading of the Iraq Resolution seems overly athletic when one considers that Congress could have far more directly said, "a state of war is hereby declared," if it had so desired. Indeed, as early as October 24, 1990, Senator Wallop expressly called upon Congress to issue a declaration of war against Iraq and introduced a joint resolution to that effect.[88]

Despite the absence of textual evidence that the Iraq Resolution was a declaration of war, during the congressional debate Speaker of the House Foley, who opposed the Resolution, called it "unquestionably . . . the virtual declaration of war."[89] This statement invites one to ask what

83. *Id.* at S403, H485. Only Representative Luken voted for the joint resolution. Those voting against it were Representatives Dellums, AuCoin, Bonior, Boxer, Clay, Collins (Ill.), DeFazio, Durbin, Edwards (Ca.), Evans, Foglietta, Frank, Hayes (Ill.), Johnson, Kaptur, Kennedy, Kostmayer, Markey, McDermott, McHugh, Mfume, Miller (Ca.), Mineta, Moody, Oakar, Oberstar, Owens (N.Y.), Owens (Utah), Panetta, Payne (N.J.), Pease, Pelosi, Rangell, Roybal, Savage, Schroeder, Serrano, Sikorski, Stark, Stokes, Studds, Towns, Traficant, Traxler, Washington, Weiss, Wheat, and Yates, and Senator Harkin.

84. Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48, 48 (Jan. 14, 1991).

85. Iraq Resolution, *supra* note 80, § 2(a).

86. *Id.* at pmbl.

87. 11 OXFORD ENGLISH DICTIONARY 383 (2d ed. 1989).

88. Senator Wallop's resolution obviously failed. *See* 136 CONG. REC. S16,589-92 (daily ed. Oct. 24, 1990).

89. 137 CONG. REC. H442 (daily ed. Jan. 12, 1991) (remarks of Rep. Foley); *see also* R.W. Apple, Jr., *Bush's Limited Victory*, N.Y. TIMES, Jan. 13, 1991, at A1 (quoting Speaker Foley describ-

difference there is as a matter of constitutional law between a "virtual" declaration of war and an actual one. The Speaker's remarks do not answer this question. What is even more puzzling, however, is that Representative Solarz, the co-sponsor of the Iraq Resolution, *also* characterized the joint resolution as being equivalent to a declaration of war.[90] One would think that the proponents of the Iraq Resolution would have wanted to avoid making such a representation for fear that it would drive away votes of members of Congress who marginally favored the Resolution but were averse to such bellicosity.

On the other hand, opponents of the Iraq Resolution supported the Bennett-Durbin Resolution, House Concurrent Resolution 32, which reaffirmed in its first sentence that the Constitution "vests all power to declare war in the Congress" and stated in its second and concluding sentence that "[a]ny offensive action against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated."[91] The Bennett-Durbin Resolution obviously implied that Congress had not yet exercised its power to declare war on Iraq. It passed in the House, 302-131.[92]

Despite the curious claim of functional equivalence to a declaration of war by both proponents and opponents of the Iraq Resolution, and despite the failure of the Bennett-Durbin Resolution to articulate clearly an alternative interpretation of the Iraq Resolution, nowhere does the Iraq Resolution simply say: "A state of war will hereby be declared to exist if Iraq does not comply with the various United Nations Security Council resolutions by January 15, 1991." Is the Iraq Resolution, therefore, something less than a declaration of war? Such legal confusion can be politically convenient if not intentional. Representative Fascell, the chairman of the House Foreign Affairs Committee, said on January 12, 1991, that the Iraq Resolution, "while not using the constitutional lan-

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ing the joint resolution to be "the practical equivalent" of a declaration of war); 137 CONG. REC. H463 (daily ed. Jan. 12, 1991) (remarks of Rep. Miller) ("This is an American declaration of war."); *id.* at H390 (remarks of Rep. Bennett); *id.* at H159 (daily ed. Jan. 10, 1991) (remarks of Rep. Gibbons) ("We are being asked to declare war. Oh, yes, it does not have all the ribbons on it, and all the high-sounding phrases, but it is just as strong as any declaration of war that has been issued in my lifetime.").

These remarks about the legal significance of the Iraq Resolution are reminiscent of the assertion by Undersecretary of State Nicholas Katzenbach during the Vietnam War that the Tonkin Gulf Resolution was the "functional equivalent" of a declaration of war. *See Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 82 (1967).

90. *See* Clymer, *supra* note 17, at A11 (paraphrasing Rep. Solarz); *see also* 137 CONG. REC. H283 (daily ed. Jan. 11, 1991) (remarks of Rep. Hamilton) ("two of the chief sponsors of the President's resolution in the House have called it the 'functional equivalent of a declaration of war' and the 'practical equivalent' of a declaration of war").

91. H.R. Con. Res. 32, 102d Cong., 1st Sess., 137 CONG. REC. H390 (daily ed. Jan. 12, 1991).

92. 137 CONG. REC. H405 (daily ed. Jan. 12, 1991).

guage, is the legal and practical equivalent thereof and meets all the constitutional tests" of a declaration of war.[93] "This is equivalent to a conditional declaration of war," he said.[94] Yet on January 23, 1991, Representative Fascell asserted that the same resolution "is not an unlimited, unconditional authorization of the use of force, *nor is it a formal declaration of war.*"[95] The Congressman made this remark while claiming that Operation Desert Shield was subject to the War Powers Resolution, and he did so in a statement in which he praised the "strength and wisdom of the War Powers Resolution" because it "establishes procedures and a process by which Congress can authorize the use of force in specific settings for limited purposes short of a total state of war."[96]

In light of the tremendously destructive allied air raids waged on Iraq between Representative Fascell's statements on January 17 and January 23, and in light of the expectation that such devastation would continue for weeks if not months, it is astonishing that any member of Congress could assert that the United States had not placed itself in "a total state of war" with Iraq. Surely the first six days of the Persian Gulf War revealed that the warfare undertaken vastly exceeded in scale and ferocity the invasions of Grenada in 1983 and Panama in 1989, or the bombing of Libya in 1986. And surely many in Congress understood beforehand that such intense violence would be the case in Iraq. Speaker Foley, addressing his colleagues "as a Member rather than as Speaker"[97] shortly before the vote on the Iraq Resolution on January 12, forthrightly said that the congressional debate focused solely on the question of whether "to give final approval to the President to initiate the maximum offensive force in our command, the terrible, terrible force that this country has the power to inflict."[98]

D. *Why Do We No Longer Declare War When We Wage War?*

Why is Congress more reluctant to declare war formally than to permit the President to fight a war? After the military successes achieved on the first day of the Persian Gulf War, the political liability of voting for a declaration of war would seem slight. If we rule out that the 102d Congress simply doubted the ability of the American military when it voted on January 12, 1991, we are left groping for answers as to why

93. *Id.* at H444.

94. *Id.* at H444-45.

95. *Id.* at E247 (daily ed. Jan. 23, 1991) (emphasis added); *see also id.* at S262 (daily ed. Jan. 11, 1991) (remarks of Sen. Stevens) ("[T]his is not a declaration of war.").

96. *Id.* at E247 (daily ed. Jan. 23, 1991).

97. *Id.* at H442 (daily ed. Jan. 12, 1991).

98. *Id.*

Congress evaded the formalism of a declaration of war. One possibility is the Cold War fear that a declaration of war against our adversary—usually a communist country—might escalate tensions between the United States and the Soviet Union, and eventually place the superpowers in direct military conflict. The absence of a declaration of war would enable both sides to back away, as in the Cuban Missile Crisis, from the danger of nuclear confrontation without the embarrassment of "losing" a war. A related possibility is that, since Hiroshima, America has suffered from a collective *ennui* about ever again being formally "at war," knowing that a commitment to wage total war might cause the United States once more to resort to nuclear weapons.[99]

Another explanation of Congress's reluctance to declare war does not require such moral introspection. It is simply the predictable institutional bias of Congress to prefer and to gravitate toward parliamentary government.[100] Congress, I suspect, would gladly trade the power to initiate war for the power to manage and direct the President's prosecution of war. Indeed, three weeks after the air attack of Operation Desert Storm began, members of Congress publicly opined on whether it was time to commence the ground war against Iraq.[101] By not declaring war, Congress can impose conditions on the prosecution of hostilities based on the circular reasoning that, should the President permit things to get out of hand on the battlefield, the nation could be faced with a genuine "war"—which Congress alone has the power to declare. It is significant that section 2(c) of the Iraq Resolution explains the relationship of the War Powers Resolution to the authority being conferred on the President, concluding in subsection 2(c)(2): "Nothing in this resolution supersedes any requirements of the War Powers Resolution."[102] In other words, Congress purported to permit the President to use military force against Iraq (which the War Powers Resolution implicitly presumes he

99. For example, in a remarkable encyclical that surveyed the political and economic history of the twentieth century, Pope John Paul II addressed total war and the condition of "the whole world . . . oppressed by the threat of an atomic war capable of leading to the extinction of humanity." JOHN PAUL II, CENTESIMUS ANNUS: ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM 38 (Encyclical Letter May 1, 1991), *reprinted in* 21 ORIGINS 1, 8-9 (1991). He argued that "if war can end without winners or losers in a suicide of humanity, then we must repudiate the logic which leads to it: the idea that the effort to destroy the enemy, confrontation and war itself are factors of progress and historical advancement." *Id.*

100. For an unapologetic diagnosis of this congressional predilection, see Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT'L L. 740 (1989).

101. *See, e.g.*, Steve Daley, *Ground War Delay Delights Congress*, CHI. TRIB., Feb. 13, 1991, at 5 (reporting that congressional leaders urged President Bush not to commence a ground war prematurely so as to keep American casualties low).

102. Iraq Resolution, *supra* note 80, at § 2(c)(2).

could do for sixty days—or even ninety days—anyway[103]), while it also claimed a bi-monthly option to terminate the prosecution of the Persian Gulf War.

The President, of course, is hardly inert in the face of such legislative jockeying. The events surrounding the Persian Gulf War suggest that Congress and the President agreed (or perhaps were tacitly guided by reciprocal and mutually dependent expectations) to be governed by constitutional improvisation. They treated the declaration of war as precisely the dispensable anachronism that Clyde Eagleton, writing on the eve of the Second World War, feared that it would become[104]—a formality, deserving of mothballing along with Congress's power to grant letters of marque and reprisal.[105] Judging from Secretary Baker's congressional testimony and from the ultimate action taken by Congress on January 12, 1991, the two political branches today seem willing to declare war only in unequivocal situations. Pearl Harbor was such a situation, but as I shall explain,[106] the Constitution probably does not even require a prior declaration of war for the President to order extensive use of offensive military force to respond to, or avenge, an attack already made on American forces or territory. When confronted by hostile acts or strategic threats falling short of such devastation, Congress declines to declare war and instead passes resolutions that euphemistically authorize the use of violence but avoid mentioning the one word foremost in everyone's mind: war.

E. *The President's War-Making Duties as Commander in Chief*

Professor Carter asserts that "[q]uite apart from its international-law significance, the declaration power was designed to provide a measure of control over the president's ability to launch an offensive war—to make America the belligerent who started things."[107] To be sure, it is questionable whether Congress has been able to check the President's suspected tendency to provoke foreign wars. In the case of the Mexican War, President Polk intentionally placed the U.S. Army in harm's way—

103. *See* 50 U.S.C. § 1544(b) (1988); Carter, *supra* note 38, at 104 n.15; *see also* KOH, *supra* note 34, at 39 ("Congress's silence has freed the executive branch to treat that statutory limit as de facto congressional permission to commit troops abroad for a time period of up to sixty days.").

104. *See supra* text accompanying note 2; *see also* Ely, *American War in Indochina (Part I)*, *supra* note 27, at 888 n.41 ("[S]ince World War II declarations of war have essentially vanished, world-wide.").

105. *Compare* U.S. CONST. art. I, § 8, cl. 11 (Congress shall have the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;") *with* Eagleton, *supra* note 2, at 33 ("letters of marque and reprisal are no longer legitimate").

106. *See infra* text accompanying notes 114-32, 244-48.

107. Carter, *supra* note 12, at C4.

in territory claimed by both Texas and Mexico between the Rio Grande and the Nueces River. When hostilities ensued, Polk requested and received a declaration of war from Congress. As a result of the war and Polk's inclinations toward manifest destiny, the United States acquired the vast Mexican Cession, but not without the subsequent admonishment of Congress, whose members in 1848 denounced President Polk for "unnecessarily and unconstitutionally" starting the Mexican War.[108]

The Mexican War also produced an early Supreme Court decision that narrowly construed the President's powers as Commander in Chief. In *Fleming v. Page*,[109] the Court faced the issue of whether goods shipped from Tampico while that city was under U.S. military control during the Mexican War were exempt from duties on Mexican goods imported into the United States.[110] The Court held that they were not, because the acquisition of territory for the United States is not incidental to the President's powers as Commander in Chief: "A war, . . . declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country."[111] Tampico could have become American territory "only by the treaty-making power or the legislative authority," neither of which had been employed.[112] Although this much would have sufficed to make the point, the Court went further: The President's "duty and his power" as Commander in Chief "are purely military," consisting of the authority "to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[113]

The Commander in Chief Clause does not explicitly address defending the United States against attack. But a more obscure provision in Article I does directly address defending the country against invasion: "No State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of*

108. *See* David Adler, *The President's War-Making Power, in* INVENTING THE AMERICAN PRESIDENCY 119, 138 (Thomas Cronin ed., 1989) (discussing CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848)); *see also* Ratner, *supra* note 38, at 473.

109. 50 U.S. (9 How.) 603 (1850).

110. *See id.* at 614.

111. *Id.*

112. *See id.* at 615.

113. *Id.*; *see also* THE FEDERALIST No. 69, at 465 (Alexander Hamilton) (Jacob Cooke ed., 1961) (stating that the President's powers as Commander in Chief "amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy").

delay."[114] Surely the Commander in Chief would have as much constitutional authority as one of the states to engage in undeclared war in such circumstances.[115] And, as mentioned earlier, the records of the Constitutional Convention confirm at least this proposition relating to the war powers. James Madison and Elbridge Gerry made the famous motion "to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks."[116] The motion carried, 7-2, with one abstention.[117] Moreover, to the extent that customary international law in 1787 informs the meaning of the War Clause, the treatises on international law published before or contemporaneously with the Constitutional Convention uniformly espoused the view that no declaration of war was necessary in a defensive war for the defender's conduct to be legal as a matter of international law.[118] Today, section 2(c) of the War Powers Resolution acknowledges the President's independent right to use armed forces in hostilities if there arises "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[119] Finally, if there is any inherent presidential power that arises from the sovereignty of the United States, as Justice Sutherland capaciously maintained in *United States v. Curtiss-Wright Export Corp.*,[120] and many contemporary scholars dispute, surely it is the power to engage in self-defense.

In his earlier analysis of the War Powers Resolution, Professor Carter proposes a disturbing and demonstrably incorrect answer to a hypothetical regarding the President's duty and power to ensure national self-defense:

> If the restrictions contained in the War Powers Resolution are neither intrusive nor unreasonable, then an interesting question arises. Suppose a foreign power invaded the territory of the United States, and the President, relying on his inherent "sudden attack" authority, used force to repel that invasion. Could the Congress require him to stop, even if that would mean letting the invaders triumph? It is tempting and easy to say, "No, that would clearly be unreasonable," and perhaps it would be. But the result is not so clear. Congress would be remarkably foolish, even unpatriotic, to take this step, and it probably would never happen. But if the question is one of congressional au-

114. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

115. I therefore dispute Professor Charles Lofgren's conclusion that the presence of this Clause "in the Constitution at least . . . suggests that Americans of [the late 1780s] need not have envisaged that the President as Commander in Chief would have an especially broad role in repelling sudden attack." Lofgren, *supra* note 35, at 683.

116. MADISON, *supra* note 38, at 476.

117. *Id.*

118. *See* Lofgren, *supra* note 35, at 690.

119. 50 U.S.C. § 1541(c) (1988).

120. 299 U.S. 304 (1936).

> thority, the Constitution might permit a definition as broad as this one. In a nation governed by a constitution, it is impossible to arrange matters so that the good guys always win.[121]

Carter ignores four important provisions of the Constitution that would prevent such a result and require the President not to acquiesce to a foreign invasion, despite what Congress thought its powers to be in that circumstance. First, the Preamble states that one elemental purpose of the Constitution and all the trappings of constitutionalism is to "provide for the common defence . . . and secure the Blessings of Liberty to ourselves and our posterity."[122] Although the Preamble is often wrongly dismissed as constitutional window dressing,[123] given its direct textual relevance, it is entitled to more deference than Carter's conclusion would permit in his self-defense hypothetical. In essence, when Carter addresses the question, "Is it possible to lose the nation and yet preserve the Constitution?," he chooses the answer that Abraham Lincoln rejected in 1864.[124] Lincoln believed that a President must do what is "indispensable to the preservation of the Constitution through the preservation of the nation."[125] Carter's hypothetical would deny the President the power to save the nation, and with it, the Constitution—all for the curious cause of fidelity to the document that presently would cease to be worth the paper on which it was printed.

Second, the Guarantee Clause explicitly states that "[t]he United States shall gnarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion."[126] This constitutional mandate, which takes precedence over any act of Congress, is sufficient by itself to dispose of Carter's hypothetical.

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121. Carter, *supra* note 38, at 128 (footnotes omitted).

122. U.S. CONST. pmbl.

123. Consider, for example, the Supreme Court's view in Jacobson v. Massachusetts, 197 U.S. 11 (1905):

> Although [the] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.

Id. at 22; *see also* United States v. Boyer, 85 F. 425, 430-31 (W.D. Mo. 1898); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 221, at 164 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833). For a notable exception to this view, see Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1455-56 (1987).

124. *See* Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), *reprinted in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN 65, 66 (John Nicolay & John Hay eds., 1894). Lincoln, of course, was addressing the Civil War, not a foreign invasion. But that distinction does not limit the applicability of his belief in the President's duty to preserve the nation.

125. *Id.*

126. U.S. CONST. art. IV, § 4. *See generally* Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984).

Third, the President's oath of office requires him to "the best of [his] Ability, *preserve,* protect, and defend the Constitution"[127]—which presumably would not be preserved, but rather discarded or substantially attenuated, under the boot of a foreign invader. Carter conjectures in a footnote that the Speech and Debate Clause[128] might save members of Congress from subsequent prosecution for treason, but he does not explain how *their* oaths to support the Constitution possibly could be effectuated by their demanding that the President stop repelling an invading army, contrary to the directive of the Guarantee Clause.

Fourth, much like his oath of office, the President's Article II duty to execute faithfully the laws encompasses his faithful preservation of the Constitution and the form of republican democracy in the United States that it envisions.[129] In this respect, the duty might be regarded as a kind of Guarantee Clause on a national scale. The first and highest law is the Constitution. "*This* Constitution," the Framers took pains to emphasize, "shall be the supreme Law of the Land."[130] How could that supreme law be preserved, so that future Presidents might execute it faithfully, if the President acquiesced to Congress's demand that he surrender the nation to a foreign invader?

In short, contrary to Carter's suggestion, the Constitution for at least four reasons does demand that the good guys win—or at least go down fighting—when confronted by a foreign invader.[131] As Justice Grier wrote in the *Prize Cases* in 1862, "if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."[132]

The same logic of self-defense would justify the President's ordering of a preemptive strike to thwart an imminent attack on the United States,

127. U.S. CONST. art. II, § 1, cl. 8 (emphasis added). In addition, the President's oath requires him to execute "faithfully" the Office of the President of the United States. *Id.*; *see also id.* art. VI, cl. 3 (Senators and Representatives bound by oath to support the Constitution).

128. *Id.* art. I, § 6.

129. *See id.* art. II, § 3. Justice Story wrote that this requirement "results from the plain right of society to require some guaranty from every officer, that he will be conscientious in the discharge of his duty." STORY, *supra* note 123, § 969, at 688; *see also* Brown v. United States, 12 U.S. (8 Cranch) 110, 149 (1814) (Story, J., dissenting) ("By the constitution, the executive is charged with the faithful execution of the laws; and the language of the act declaring war authorizes him to carry it into effect.").

130. U.S. CONST. art. VI, cl. 2 (emphasis added).

131. In this respect, Professor John Hart Ely makes a specious distinction when he argues that Lincoln's authority to use the military to suppress the Civil War could be inferred from the Take Care Clause, U.S. CONST. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."), but a President's authority to use military force against a foreign adversary (in the absence of congressional authorization) could not. *See* Ely, *A War Powers Act That Worked, supra* note 27, at 1389 n.34.

132. 67 U.S. (2 Black) 635, 668 (1862).

just as the Framers intended the states to wage undeclared war when faced with "such imminent Danger as will not admit of delay."[133] Even Professor Laurence Tribe, one of the Koh Signatories, agrees with this logic:

> The executive's use of force in anticipation of an enemy attack implicates similar concerns [about prior congressional approval]. The Framers no doubt imagined that Congress would have time to evaluate the military options, albeit hurriedly, when an attack was imminent. In the nuclear era, such sober deliberations might prove too costly a procedural luxury. Fortunately, the courts have had no occasion to pass on the propriety of a presidentially ordered preemptive strike.[134]

Even more so than in 1789, the President today is elected in part for his capacity for grace under pressure. The premier example in modern times is the Cuban Missile Crisis, during which President Kennedy, by executive proclamation rather than act of Congress, imposed a naval quarantine upon the importation of offensive weapons into Cuba.[135] In such a case, even John Hart Ely, a vocal opponent of the President's use of military force without prior congressional authorization, concedes that "we must depend on the good faith of the President of the United States" rather than a legal rule.[136] Perhaps it was this kind of appeal to respect the good faith of the President (despite the absence of a threat of imminent attack on American forces or territory) that motivated the Justice Department's overdrawn arguments regarding the political question doctrine in *Dellums v. Bush*.

The President's power to use or threaten military force in self-defense encompasses more than actual or imminent attacks on U.S. territory or forces. Professor Carter correctly notes that: "The difficulty comes in working out what constitutes an offensive war that the Congress must declare and what amounts instead to an action in defense of the nation's interests that the president can undertake without prior approval."[137] There is no indication that the Framers intended to require the President to get the prior authorization of Congress before deploying armed forces to rescue or protect American citizens or to provide a counterweight, short of combat, to possible aggression that jeopardizes the

133. U.S. CONST. art. I, § 10.

134. TRIBE, *supra* note 39, § 4-7, at 233; *accord* Ratner, *supra* note 38, at 469. Contrary to Tribe's assertion in this passage, the mere existence of Clause 3 in Section 10 of Article I shows that the Framers did *not* imagine that Congress always would have time to evaluate military options when an attack was imminent.

135. Interdiction of the Delivery of Offensive Weapons to Cuba, Proclamation No. 3504, 3 C.F.R. § 232 (1959-63), *reprinted in* 77 Stat. 958 (1962).

136. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1420 n.118.

137. Carter, *supra* note 12, at C4.

national interests of the United States.[138] Certainly recent Presidents have not considered prior congressional approval to be necessary in such cases. President Ford did not seek prior congressional authorization to use American troops to free the *Mayagüez* by force;[139] nor did President Carter seek prior congressional authorization to undertake the attempt to rescue American hostages in Iran.[140] President Reagan did not seek prior congressional authorization for the invasion of Grenada or for the ill-fated deployment of Marines to Beirut.[141] None of these presidents was impeached.

F. *The Specious Dichotomy Between "General War" and Undeclared "Limited War"*

There exists a long history of the United States waging undeclared war and of Congress issuing "limited" declarations of war.[142] Much of the contemporary argument that Congress has the exclusive power to authorize undeclared warfare have evolved from a misreading of some of the early and arcane Supreme Court decisions as discussions of separation of powers between Congress and the President, when they are actually essays on sovereignty.

The first notable limited war was the Quasi-War with France in 1798-1800 in which President Adams did not seek and Congress did not issue a formal declaration of war in response to the French seizure of American ships. Instead, Congress authorized reprisals at sea against French vessels.[143] In 1800, the Supreme Court decided *Bas v. Tingy*,[144] a

138. *See* Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185 (1980).

139. *See, e.g., War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayagüez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975).

140. Rescue Attempt for American Hostages in Iran: Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation (Apr. 26, 1980), PUB. PAPERS 1980-81, at 777 (1981).

141. Address to the Nation on Events in Lebanon and Grenada (Oct. 27, 1983), PUB. PAPERS 1983, at 15,176 (1985).

142. *See* JAMES ROGERS, WORLD POLICING AND THE CONSTITUTION: AN INQUIRY INTO THE POWERS OF THE PRESIDENT AND CONGRESS, NINE WARS AND A HUNDRED MILITARY OPERATIONS, 1789-1945 (1945).

143. *See* Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578 ("[T]he President . . . is hereby authorized . . . to subdue, seize and take any armed French vessel."); *see also* Act to Authorize the Defence of the Merchant Vessels of the United States Against French Depredations (June 25, 1798), *in* 1 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 135 (1935); ALEXANDER DECONDE, THE QUASI WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801 (1966); ROGERS, *supra* note 142, at 45-46; Simeon E. Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 AM. J. INT'L L. 1, 2 (1918).

prize case arising from the Quasi-War. The Court held that the right of prize existed because the hostilities between the two countries constituted "war" despite the absence of a formal declaration of war by the United States against France (or vice versa).[145] Justice Washington distinguished "perfect and general war" from "imperfect and limited war,"[146] a dichotomy commonly (though somewhat mysteriously) attributed to the writings of Grotius and Vattel.[147] Justice Chase said that "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time."[148] One year later, the Court reaffirmed this dichotomy in *Talbot v. Seeman*,[149] but with no explanation of the legal significance of the distinction.[150] As late as 1886, the Supreme Court was still distinguishing between general and limited war as a way to decide cases. In *Gray v. United States*[151] the Court regarded "public general war" to be that which "operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations."[152] Such war was to be distinguished from "limited war," which the Court described as being "in its nature similar to a prolonged series of reprisals."[153]

Legal scholars since the Vietnam War have used the concept of limited war to assert that the War Clause envisions that Congress has the exclusive power to authorize the use of military force in *any* offensive manner. Professor Koh, for example, reads *Bas* and *Talbot* to constitute a "delineation and delimitation of the executive's authority in foreign affairs" that recognized Congress's power "to authorize limited hostilities by means other than formally declared war."[154] Similarly, Professor Ely reads these cases to support his conclusion that the original meaning of

144. 4 U.S. (4 Dall.) 37 (1800).

145. *See id.* at 46; *see also* Clyde Eagleton, *The Attempt to Define War*, INT'L CONCILIATION, June 1933, at 9, 46; Lofgren, *supra* note 35, at 701; Abraham Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, LAW & CONTEMP. PROBS., Spring 1976, at 12, 19-21.

146. *Bas*, 4 U.S. (4 Dall.) at 40-41.

147. The principal discussions by Grotius and Vattel of the categories of war do not contain this dichotomy. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 314-22 (Archibald H. Campbell ed., 1901) (1625); EMMERICH DE VATTEL, THE LAW OF NATIONS 291-93 (Joseph Chitty ed., 1859) (1758).

148. *Bas*, 4 U.S. (4 Dall.) at 43.

149. 5 U.S. (1 Cranch) 1 (1801).

150. *See id.* at 8.

151. 21 Ct. Cl. 340 (1886).

152. *Id.* at 375.

153. *Id.*

154. KOH, *supra* note 34, at 81. *But see* Rostow, *supra* note 37, at 850 n.28 (criticizing the view that the War Clause gives Congress alone "the complete and exclusive right to initiate all forms of hostility recognized under international law, including, *e.g.*, reprisals"); Eugene V. Rostow, *"Once More Unto the Breach": The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986).

the War Clause was that "all wars, whether declared or undeclared, had to be legislatively authorized."[155]

All of this constitutional theorizing based on there being identifiable categories of war is precarious at best, for the legal notion of "limited war" is itself indeterminate. The notion may have significance as a matter of military strategy, as Professor Walt Rostow observed of the decision by the United States, the Soviet Union, and China not to resort to their most powerful weapons in the Korean War.[156] But as a matter of law to be laid down by Congress and applied prospectively to uncertain situations, "limited war" is a nebulous concept. In 1933, Professor Clyde Eagleton observed of the Supreme Court's reasoning in *Gray* that, if limited war is different from general war and "similar" to reprisals, then "one may have war which is neither war nor reprisals!"[157] How could one distinguish general war from limited war? Evidently, most members of Congress believed that they had not given President Bush a formal declaration of war against Iraq on January 12, 1991; yet, especially in light of the ferocity of the American invasion of Panama only a year earlier, surely no member of Congress expected the American attack on Iraq to be militarily "limited" in any sense other than being non-nuclear. In fact, some members of Congress contemplated that the United States should use tactical nuclear weapons rather than launch a ground attack against Iraq.[158] If a supposedly limited war erupted into a general war, would Congress then have to issue a formal declaration of war to authorize the President to continue the war? Obviously, Congress did not do so in the Persian Gulf War. Or would the President already be empowered to prosecute a general war of this nature by virtue of his duties, as Commander in Chief, to defend American territory or forces? This possibility would seem to amount to the outright delegation of Congress's power to declare war to the President.[159]

155. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1386; *accord* Ratner, *supra* note 38, at 465 & n.16; Van Alstyne, *supra* note 38, at 18-19.

156. *See* WALT ROSTOW, THE UNITED STATES IN THE WORLD ARENA 231-32 (1960).

157. Eagleton, *supra* note 145, at 275.

158. *See* 137 CONG. REC. H648 (daily ed. Jan. 23, 1991) (statement of Rep. Burton); Mary McGrory, *Chilling Talk of Using Nukes*, WASH. POST, Feb. 14, 1991, at A2.

159. John Hart Ely, for example, believes that the Tonkin Gulf Resolution, which he concludes "was not the equivalent of a declaration of war," Ely, *American War in Indochina (Part I)*, *supra* note 27, at 896, would nonetheless have been sufficient authorization for the President to "bomb supply lines or depots in China if they were being employed in the assault on South Vietnam." *Id.* at 905 n.125. Another of the Koh Signatories, William Van Alstyne, disagrees. According to Van Alstyne, if, during the Vietnam War, the question arose:

> whether executive action ordering troops or planes into *China* would exceed the bounds of the Tonkin Gulf Resolution, then I should think it might quite sensibly be argued that so great a quantum leap in the executive escalation of the Vietnam War would have required

Moreover, what authority does the President have as Commander in Chief to redefine or expand without prior congressional approval the objectives of a limited war in the event of changed circumstances or new information? On February 14, 1991, for example, the United Nations Security Council considered, at the request of Cuba and Yemen (nations friendly to Iraq), whether the heavy allied bombing of Iraq exceeded the scope of Security Council Resolution 678.[160] If a congressional resolution that authorized a limited undeclared war implicitly rules out the President's pursuit of unenumerated war objectives, then the same question examined by the Security Council could be asked domestically of President Bush's prosecution of the Persian Gulf War. This is so because section 2(a) of the Iraq Resolution merely incorporated by reference the objectives of Security Council Resolution 678.[161] Similarly, it soon appeared after Operation Desert Storm began that toppling Saddam Hussein's regime was an unstated objective of the war as important as achieving Iraqi compliance with the United Nations Security Council resolutions. In response to Iraq's conditional offer on February 15, 1991 to withdraw from Kuwait, President Bush stated the following: "[T]here's another way for the bloodshed to stop. And that is for the Iraqi military and the Iraqi people to take matters into their own hands—to force Saddam Hussein, the dictator, to step aside . . . ."[162] If the Persian Gulf War were a limited war, would President Bush's use of military force (or his lending of American assistance to Kurdish and Shiite insurgents) to overthrow or assassinate Saddam Hussein exceed the President's authority?[163] Both the answer to this question and the means for resolving it, whether legal or political, are unclear.

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that the President return to Congress, before taking that leap, so as to secure a modified and expanded declaration of the limited war previously declared.

Van Alstyne, *supra* note 38, at 27.

160. *See* Ken Fireman, *U.N. Rejects Open Meeting on War*, NEWSDAY, Feb. 14, 1991, at 15.

161. *See* Iraq Resolution, *supra* note 80, § 2(a).

162. Remarks to the American Association for the Advancement of Science, 27 WEEKLY COMP. PRES. DOC. 173, 174 (Feb. 15, 1991); *see also* Rick Atkinson & Dan Balz, *Iraq Offers Conditional Withdrawal; Bush Rejects Proposal as 'Cruel Hoax'*, WASH. POST, Feb. 16, 1991, at A1.

163. In evident contradiction with President Bush's statements during the Persian Gulf War that the United States was not attempting to assassinate Saddam Hussein, the *Washington Post* subsequently reported that an exhaustive effort by American forces had been undertaken to locate and destroy Saddam Hussein's motor home, which had been outfitted to serve as his mobile military command center. *See* Patrick J. Sloyan, *Air Force Hunted Motor Home In War's 'Get Saddam' Mission*, WASH. POST, June 23, 1991, at A16. It seems likely that section 2.11 of Executive Order 12,333, 3 C.F.R. § 200, 213 (1981), prohibiting assassinations, would not have prohibited the assassination of Iraqi military leaders during the Operatiou Desert Storm because the United States obviously was at war with Iraq, and a state of war creates a justification for homicide under established principles of international law. *See, e.g.*, Alexander Hamilton, *The Examination No. 1* (Dec. 17, 1801), *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 455 (Harold C. Syrett ed., 1977)

Saying that Congress has the power to authorize limited war does not necessarily imply that it holds that power exclusively. The President might share the power to wage limited war, although Professor Lofgren has asserted that that implication should be rejected by virtue of the dichotomy in *Bas* between general war and limited war.[164] Lofgren suggests that Congress's power to issue letters of marque and reprisal creates the residual category of all forms of undeclared war. The Constitution is most plausibly read, in Lofgren's view, as having granted only to Congress the power to commence war, whether it is through a formal declaration or the informal process of authorizing reprisals.[165]

Professor Eugene Rostow disagrees. He summarizes the contrary view of the original meaning of the War Clause as follows: "Under international law, to which the relevant paragraphs of Article I refer, declarations of war are required only for the rare occasions when states engage in unlimited general war."[166] This view has been espoused by various scholars at least since World War II. Professor James Grafton Rogers concluded in 1945 that, on the basis of the historical practice since 1789, the concept of war that the Constitution empowers Congress to declare "is considered a special category in the uses of force, apparently confined to cases of great effort, to major contests designed to crush and conquer another nation."[167] Writing four decades later, after the experiences of Korea and Vietnam, Professor Joseph Bishop reaffirmed Rogers' conclusion: "If there is any historical difference between wars declared by Congress and other wars, it seems to be that the former have usually been larger in scale and have had as their goals not some more or less limited objective, such as rescuing American citizens or defending an ally from attack, but the total defeat of the enemy."[168]

The historical practice—that Congress has rarely declared war despite numerous deployments of force—is made more explicable as a matter of constitutional law if one reads *Bas* as a case about sovereignty rather than the separation of powers.[169] *Bas* might simply have anticipated the kind of reasoning that Justice Sutherland expounded more than

("War, of itself, gives to the parties a mutual right to kill in battle .... This is a rule of natural law; a necessary and inevitable consequence of the state of war.").

164. *See* Lofgren, *supra* note 35, at 701.

165. *See id.* at 695-97.

166. Rostow, *supra* note 100, at 744; *see also* Rostow, *supra* note 37, at 834-35.

167. ROGERS, *supra* note 142, at 87.

168. Joseph W. Bishop, Jr., *Declaration of War*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 549 (Leonard Levy et al. eds., 1986).

169. From Professor Charles Warren's account, it would appear that the separation of powers overtones in *Bas v. Tingy* and *Talbot v. Seeman*, to the extent there were any, arose from the political friction between President Jefferson's Republican lawyers and President Adams' Federalist appointees to the judiciary—and not from a dispute between the President and Congress. *See* 1 CHARLES

a century later in *United States v. Curtiss-Wright Export Corp.*,[170] that the power to use limited military force belongs to the federal government as an incident to the sovereignty of the United States, regardless of whether the Constitution expressly lists a power (in either Article I or Article II) to use such force. So viewed, *Bas* merely acknowledged that there exists a lacuna of undeclared war, which might be "authorized" by Congress, but which might also be directly waged by the President as Commander in Chief without prior congressional authorization (in which case Congress's "authorization" of such warfare, either prospective or retroactive, would be no more than hortatory).

Once we recognize the tendency to mistake the implications of sovereignty for decisions regarding the separation of powers, we incidentally discover the fallacy of trying to read the War Clause in a manner that places interpretative significance on the fact that the Articles of Confederation lodged the power over foreign affairs and the power to declare war in the national Congress. Where else could such powers have been lodged in a federal government that had no separate executive branch? I suspect that it is essentially this point regarding sovereignty and war-making to which Professor Carter alludes when he asserts that the proposition "that the president must consult with Congress, and perhaps obtain its permission, before launching an attack on Iraq's forces" rests on the "almost certainly wrong" proposition "that under the Constitution, U.S. forces cannot undertake such a fight without a formal declaration of war, a power vested solely in the Congress."[171]

Although I am sympathetic to Carter's thesis that not all uses of military force require prior congressional approval, I believe that he overstates his case. He finds "nothing in the history of the ratification of the Constitution to suggest that the Founders imagined that a congressional declaration of war would be needed whenever American troops fought an engagement"[172] and specifically concludes that a declaration of war "had nothing to do with the ability of a sovereign nation to defend its interests."[173] Perhaps so. But did this dispensable nature of the declaration of war imply that the President alone could decide what interests were sufficiently advantageous for the nation to defend? If it does, this interpretation would imply, relative to our contemporary understanding, a massive shift of power from Congress to the President; certaiuly the

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WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 156-57, 198-200 (rev. ed. 1926). Warren described *Bas v. Tingy* as a case "of slight historical importance." *Id.* at 156.

170. 299 U.S. 304, 319-20 (1936).

171. Carter, *supra* note 12, at C4.

172. *Id.*

173. *Id.*

legal scholars who concluded that the Tonkin Gulf Resolution was an unlawful delegation to the President would choke on such a proposition.[174]

If, as Carter argues, "at the time that the Constitution was adopted, a declaration of war was not considered necessary before a sovereign state could engage in war,"[175] why did the Framers bother to draft the War Clause at all? They wanted war to be waged through a unitary and civilian Commander in Chief. If they thought the power to declare war to be supererogatory, why did the Framers not assigu it to the President?[176] Although Carter seems to recognize the confusion between sovereignty and the separation of powers in the scholarly analysis of the War Clause, he does not clarify what purpose the Clause is supposed to serve if we conclude that it cannot be dismissed as surplusage.

Of course, it does not follow that because the Framers did not believe that a declaration of war was necessary "whenever American troops fought an engagement"[177] they also believed that a declaration of war would be unnecessary before the President could order an American attack on Iraq on the scale plainly suggested before January 15, 1991. Senator Boren, Chairman of the Senate Intelligence Committee, recognized this distinction in debate on January 10, 1991 on the Iraq Resolution:

> [T]here are many gray areas in conflicts where Congress has permitted and supported military action by the President as Commander in Chief without explicit authorization or a declaration of war. I have supported such action in the past in places like Grenada, Libya and Panama. Had the President acted to destroy by targeted strikes the chemical, nuclear and biological warfare facilities of Iraq, I would have fully supported that action without a declaration of war. But . . . or-

174. *See, e.g.*, Van Alstyne, *supra* note 38, at 13-19 (arguing that the power to declare war resides solely in Congress and is subject to no delegation whatsoever).

175. Carter, *supra* note 12, at C4.

176. In fact, the Framers specifically considered and rejected a proposal by Pierce Butler, no doubt made with the personage of George Washington in mind, that would "vest the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." MADISON, *supra* note 38, at 476. For a discussion of Butler's expectation that the Presidency would ultimately be defined by its most likely first occupant, George Washington, see CLINTON ROSSITER, 1787: THE GRAND CONVENTION 221-22 (1966). Alexander Hamilton (who, of course, was Washington's protégé during the Revolutionary War and subsequently his first Secretary of the Treasury) is reported to have proposed to the Constitutional Convention that the chief executive be granted the power "to make war or peace, with the advice of the senate." 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 300 (rev. ed. 1966). This account of Hamilton's proposal is taken from the notes of Robert Yates, *see id.* at xiv, which curiously does not reconcile with Madison's notes describing Hamilton's proposal of the same day. *See* MADISON, *supra* note 38, at 292 ("The Senate to have the sole power of declaring war."); STORY, *supra* note 123, § 570, at 410. In any event, Hamilton's proposal, as reported by Yates, was obviously rejected by the Convention.

177. Carter, *supra* note 12, at C4.

> dering more than 400,000 American troops into battle to restore the previous government in Kuwait is no gray area. Clearly if the constitutional provision requiring Congress to declare war is to have any meaning at all, it is applicable to this situation. There is no way therefore that we can duck or dodge our own responsibility. We must do our duty under the Constitution.[178]

Early estimates after the cease-fire in the Persian Gulf War placed the death toll for Iraqi troops at 25,000 to 50,000.[179] By May 22, 1991, the Defense Intelligence Agency estimated that between 50,000 and 150,000 Iraqi soldiers had been killed during Operation Desert Storm.[180] Although I agree that it was in the best interests of the United States to liberate Kuwait, it requires either a peculiar indifference to human suffering or an uncommon capacity for euphemism to characterize so much killing as "limited" war. My concern, and perhaps Senator Boren's, is that, even if we all agreed that the President can in certain circumstances order the use of military force without congressional approval, the War Clause is reduced to a nullity if Congress permits the President to initiate war, however noble its purpose, on the scale witnessed in the Persian Gulf without a formal declaration.

II. THE COASE THEOREM AND THE DECLARATION OF WAR: POLITICAL ACCOUNTABILITY AS A NORMATIVE PRINCIPLE FOR IMPLEMENTING THE SEPARATION OF POWERS

The Constitution makes initial assignments of property rights in different governmental functions—such as in the making of laws, in the judging of cases, and in the execution of laws. Just as in private life, public actors will contract around legal rules or property rights to reach desired results. Regardless of the initial assignment of powers under the Constitution, and as long as transaction costs are not too high, the Coase Theorem[181] suggests that the three branches will be able to reassign those powers in any manner that achieves greater efficiency in the production of public goods.[182]

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178. 137 CONG. REC. S169 (daily ed. Jan. 10, 1991).

179. *See* John Cushman, *Military Experts See a Death Toll of 25,000 to 50,000 Iraqi Troops*, N.Y. TIMES, Mar. 1, 1991, at A1.

180. *See* Caryle Murphy, *Iraqi Death Toll Remains Clouded*, WASH. POST, June 23, 1991, at A1, A17.

181. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

182. *Cf.* Jonathan R. Macey, *Transactions Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988) (discussing parties' abilities to contract among themselves). For a succinct discussion of the Coase Theorem and its implications, see Robert D. Cooter, *Coase Theorem*, *in* 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 457 (John Eatwell et al. eds., 1987); *see also* JULES L. COLEMAN, MARKETS, MORALS

A. *Coasean Trespasses and Bargains Between the Branches of Government*

Violations of the principle of separation of powers fall into two categories. The first involves nonconsensual transfers (or diminutions) of constitutional responsibilities. These cases embody "the encroaching spirit of power" that Madison described in *The Federalist No. 48*.[183] They evoke analogies to tort law: One branch unilaterally appropriates the property rights initially assigned to another branch;[184] or one branch trespasses on, or intentionally interferes with, another branch's property right.[185] Such cases might be called "Coasean trespasses." The legislative veto is an example. Although the legislative veto aids in congressional oversight of the execution of law, particularly by the innumerable bureaucrats of the modern administrative state,[186] its constitutionality has long been doubted because of its aggrandizement of congressional power and its impairment of the President's execution of law. For example, President Franklin Roosevelt accepted a legislative veto in the Lend-Lease Act in 1941, even though he privately complained to Attorney General Robert Jackson that the provision was "clearly unconstitutional" and that his acquiescence to it should not be regarded as precedent supporting the lawfulness of such provisions in future laws.[187] Eventually, the Supreme Court in *INS v. Chadha*[188] concurred with

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AND THE LAW 69-71 (1988) (discussing Coase Theorem). I thank Professor Daniel Farber for first suggesting to me the relevance of the Coase Theorem to the separation of powers.

183. THE FEDERALIST NO. 48, at 332, 333 (James Madison) (Jacob Cooke ed., 1961).

184. *See, e.g.*, Freytag v. Commissioner, 111 S. Ct. 2631, 2638 (1991) (stating that separation of powers doctrine focuses on the danger of one branch increasing its power at the expense of another); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (prohibiting "the aggrandizement of congressional power at the expense of a coordinate branch"); *see also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2311 (1991) (holding that Congress and its members may not exercise the executive power or the judicial power); Bowsher v. Synar, 478 U.S. 714, 722 (1986) (holding that Congress is not empowered to execute the laws it enacts).

185. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 695 (1988) (holding that Congress would violate the separation of powers if it were to undermine impermissibly the powers of the executive or prevent it from "accomplishing its constitutionally assigned functions") (quoting Nixon v. Administrator of General Servs., 433 U.S. 425, 443 (1977)); *see also* Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 201-02 (1991).

186. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 516 (1989) ("[T]he legislative veto served to advance the true purposes of the principle of separation of powers that the Framers built into the Constitution by giving elected legislative officials an effective check over lawmaking by administrative bureaucrats.").

187. Memorandum from President Franklin D. Roosevelt to the Attorney General (Apr. 7, 1941), *reprinted in* Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953).

188. 462 U.S. 919 (1983).

President Roosevelt, although on the rather formalistic rationale that the legislative veto violates the Presentment Clause.[189]

The separation of powers can be violated in a second way—through voluntary exchanges that might be termed "Coasean bargains" rather than Coasean trespasses. A political bargain of this sort constitutes the more serious of the two categories because the probability of detection is lower. Specifically, the consensual nature of such bargains makes it less likely that the electorate will learn of them and recognize that their cumulative effect is to erode the diffusion of political power that the Framers devised to protect individual liberty and national security.[190] At the same time, however, because no aggrieved political branch will complain about the Coasean bargain or seek judicial review of it, private parties are left to enforce compliance with the Constitution. A recent example of such a bargain is the 1989 Bipartisan Accord on Central America, which Secretary of State Baker negotiated with congressional leaders.[191] The Accord provided limited funding for the Nicaraguan *contras*, but it contained an explicit legislative veto lodged in several congressional committees and thus bargained away the property rights that *Chadha* had clearly determined to leave to the President.[192] Another example is Secretary Baker's congressional testimony in the fall of 1990, implying that the President's consultation with Congress before initiating offensive war against Iraq would be a constitutionally permissible substitute for prior congressional approval to wage offensive war.[193] Like the politically successful Bipartisan Accord on Central America, Secretary Baker's testimony displayed a willinguess to bargain around the formal legal rules for the separation of powers contained in the Constitution.

With rare exceptions, constitutional scholars have downplayed Coasean bargains as innocuous.[194] Philip Kurland, one of the Koh Signatories, has observed:

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189. U.S. CONST. art. 1, § 7, cl. 2. The device in *Chadha* also was unconstitutional for the separate reason that, because it was a one-house legislative veto, it violated bicameralism. *See Chadha*, 462 U.S. at 954-56.

190. *See, e.g.*, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2312 (1991) (notwithstanding mutual consent of Congress and local government, plan to transfer ownership and control of airports to local government subject to congressional veto power violates separation of powers).

191. Bipartisan Accord on Central America, 25 WEEKLY COMP. PRES. DOC. 420 (Mar. 24, 1989); *see also* IMPLEMENTATION OF THE BIPARTISAN ACCORD ON CENTRAL AMERICA OF MARCH 24, 1989, H.R. REP. NO. 23, 101st Cong., 1st Sess. (1989).

192. *See* Sidak, *The President's Power of the Purse*, *supra* note 42, at 1215-17.

193. *See supra* Part I(A).

194. One articulate exception is Robert F. Nagel, *The American Constitutional Tradition of Shared and Separated Powers: A Comment on the Rule of Law Model of Separation of Powers*, 30 WM. & MARY L. REV. 355 (1989).

> Where the alleged overreaching of one branch or another impinges on the rights of a person, association, or corporation, the judicial branch has more and more often been called on to determine whether the challenged authority is legitimate. With the extension of national power to a general hegemony over the lives of the people living within its domain, however, the question thus raised ordinarily is not whether the governmental power exists, but by which office can it be exercised. For this reason, the claims resolved by judicial action have tended to be of not much moment because, at least as between the legislature and the executive, whichever choice the judiciary makes is subject to direct renegotiation by the principals.[195]

It is curious that Kurland speaks of renegotiation by the *principals* rather than by the agents. Similarly, on the Supreme Court, a vocal group of dissenters led by Justice White believes that no violation of the principle of separation of powers has occurred if "both Congress and the Executive argue for the constitutionality of the arrangement which the Court invalidates."[196] Perhaps, in contrast to these views, the closest statement of concern over Coasean bargains in existing constitutional theory is the moribund doctrine of unlawful delegation,[197] which Professor Gerald Gunther has aptly described as having arisen not from "conflicts between President and Congress but, if anything, excessive harmony."[198]

B. *Political Accountability, Agency Costs, and War*

Traditionally, the separation of powers doctrine has been regarded as an anti-monopoly principle. In his famous dissent in *Myers v. United States*,[199] Justice Brandeis emphasized that the Framers crafted the separation of powers into the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power."[200] The doctrine's purpose was "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[201] One straightforward interpretation

195. Kurland, *supra* note 39, at 606.

196. *Washington Airports*, 111 S. Ct. at 2313 (White, J., dissenting). Justice White's dissent was joined by Chief Justice Rehnquist and Justice Marshall. *See also id.* at 2317 ("Yet never before has the Court struck down a body on separation-of-powers grounds that neither Congress nor the Executive oppose.").

197. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-88 (1980) (Rehnquist, J., concurring); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

198. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 365 (11th ed. 1985). For a somewhat contradictory public choice perspective on the unlawful delegation doctrine, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 78-87 (1991).

199. 272 U.S. 52 (1926) (Brandeis, J., dissenting).

200. *Id.* at 293 (Brandeis, J., dissenting).

201. *Id.*

of this passage is that the separation of powers is a kind of Sherman Act for government—thus preventing any one branch from monopolizing the coercive powers of the federal government. Madison warned in *The Federalist No. 51* of "a gradual concentration of the several powers in the same department";[202] more recently Judge Richard Posner offered this same monopoly rationale for the separation of powers.[203] This interpretation follows from the conventional understanding of autocracy to be the aggregation of absolute power in the hands of one person.

An alternative interpretation of Justice Brandeis's remark addresses another possible market failure—externality. This concern was expressed more recently in Justice Scalia's powerful dissent in *Morrison v. Olson*.[204] The separation of powers guards against the unrepresentative and unaccountable exercise of political power, quite apart from whether a single person or branch of government has monopolized all such power. Any contract having a third-party beneficiary encompasses a kind of externality, for the interests of the two contracting parties are not sufficient to determine whether the contract increases or decreases societal welfare. In contracts struck between any two branches of the federal government, the national electorate is a third-party beneficiary. John Hart Ely is therefore correct when he states that "[t]he laws of the United States are not private deals between the legislators who enact them and the Presidents who sign them, subject to whatever secret restrictive covenants they may have attached."[205] If for no other reason than good fortune, the principal-agent externalities associated with autocracy present a greater practical concern to American constitutional governance than would monopolization of governmental powers, particularly during prolonged periods of divided government.

One implication of the Coase Theorem is that high transaction costs impede voluntary contracting, and thus lead in the extreme case to the complete immobility of resources. Ordinarily, we would regard this as a bad result. However, the principle of the separation of powers is at odds with the Coase Theorem, and, it would appear, intentionally so. As Justice Scalia noted in a dissent on separation of powers grounds, "the Constitution guarantees not merely that no Branch will be forced by one of the *other* Branches to let someone else exercise its assigned powers—but

202. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob Cooke ed., 1961).

203. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 583 (3d ed. 1986). Professor Rostow has described Hamilton's vision of divided powers as "the only effective way to prevent a monopoly of power in any one branch of government." Rostow, *supra* note 37, at 847; *see also* CHOPER, *supra* note 39, at 264 (concentration of government powers would inevitably "lead to state despotism").

204. 487 U.S. 654, 729 (1988) (Scalia, J., dissenting).

205. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 894.

that none of the Branches will *itself* alienate its assigned powers."[206] By requiring formality, the Constitution raises transaction costs and thus intentionally discourages certain bargains that otherwise could be struck between the branches of the federal government in the production of public goods.

It is my premise that adherence to formalism in matters that affect the separation of powers, including the initiation of war, is more likely than constitutional informality and political improvisation to produce predictability and clarity in the specification of the responsibilities of political officials in Congress and the executive branch; to facilitate the effective monitoring of these political officials as they discharge their responsibilities; and to permit the electoral process to function as an effective means to reward fidelity, good judgment, and resourcefulness, and likewise to punish infidelity, folly, and indolence.[207] One of the most important of all constitutional formalities is the declaration of war.

Judge Posner has noted that the transaction costs of coordinated action among two or all of the branches of the federal government may be low relative to such costs in private settings.[208] In retrospect, therefore, it is understandable why the Framers intentionally drafted the Constitution to elevate transaction costs associated with bargaining among the branches—to promote judiciousness and accountability.[209] Although the Framers did not speak in terms of transaction cost economics or public choice theory, their intuition regarding agency costs is remarkable.[210] The most fundamental choice that the Framers made in terms of elevating transaction costs was to reject a parliamentary system in favor of a system separating the executive from the legislature. This choice is so elemental that it scarcely can be found in the Constitution other than in a statement so grand as "The executive Power shall be vested in a President of the United States of America."[211] Probably the second most fundamental choice conducive to elevating transaction costs was the

206. Peretz v. United States, 111 S. Ct. 2661, 2680 (1991) (Scalia, J., dissenting).

207. Senator Wallop made a similar point several months before the United States attacked Iraq:

> [I]t is possible for democratic nations to fight wars without declaring them, or by calling them by other names—police actions for example—just as it is possible for men and women to live together without declaring marriage, or by calling their cohabitation by other names. But declarations of war, like declarations of marriage, are useful because they force people to ask themselves, 'What am I doing?', and, once they understand, to make the sort of commitment that enhances the prospects of securing our long-term interests.

136 CONG. REC. S16,591 (daily ed. Oct. 24, 1990).

208. *See* POSNER, *supra* note 203, at 583.

209. *See* THE FEDERALIST NO. 51, *supra* note 202, at 349-50.

210. *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 179-85 (1984); JEREMY A. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 64-69 (1989); Macey, *supra* note 182, at 494-95.

211. U.S. CONST. art. II, § 1, cl. 1.

Framers' creation of a bicameral legislature—a choice that raised the size of the coalition required for collective action, and whose practical importance was perceived to be so substantial that it occasioned the Great Compromise at the Constitutional Convention.[212]

To be sure, it is virtually impossible to complain politically about Coasean bargains when they achieve their objectives, as was the case with the Bipartisan Accord (which pressured the Sandinistas to hold a national election in 1990 that ultimately produced the defeat of Daniel Ortega's Marxist regime at the hands of Violeta Chamorro[213]). It is understandable, therefore, that some constitutional analogue to *Realpolitik* might impel us to accept the invitation of Yale Professor E. Donald Elliott to reject as "glorified crudities" the "simplistic notions about our tripartite structure of government and how the roles of the three branches of government should be kept 'separate.' "[214]

Over the long run, however, some Coasean bargains might fail at substantial cost to the vital interests of the United States. This point eludes Elliott and, more importantly, eluded the Courts of Appeals during the Vietnam War. Presaging Justice White's view of the presumption of legitimacy that should attach to Coasean bargains between the President and Congress, the Court of Appeals for the Second Circuit stated in *Orlando v. Laird*:[215]

> If there can be nothing more than minor military operations conducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the President were agreed that they were necessary and were also agreed that a formal

212. *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 221 (1984). Specific instances of this general principle regarding the elevation of transaction costs are numerous. The disparate terms and modes of election for Representative, Senators, and the President are an obvious example, upon which Madison remarked. *See* THE FEDERALIST NO. 51, *supra* note 202, at 350. The effect of this feature has attenuated somewhat since 1913 due to the direct election of senators required by the Seventeenth Amendment. *See* U.S. CONST. amend. XVII, § 1. Another intentionally cost-increasing decision rule is the supermajority roll-call vote required to override a presidential veto. *See id.* art. I, § 7, cl. 2.

213. *See* Mark A. Uhlig, *Turnover in Nicaragua; Nicaraguan Opposition Routs Sandinistas; U.S. Pledges Aid, Tied to Orderly Turnover*, N.Y. TIMES, Feb. 27, 1990, at A1.

214. Elliott, *supra* note 186, at 511. Elliott's colleague at Yale, Professor Paul Gewirtz, similarly maintains that the Supreme Court's recent decisions on the separations of powers have "invoked mediating principles based on a textual literalism that is very unsatisfactory," decisions whose "rigid categories of branch power simplistically disregard the real complexities of government structure as we know it and as our country has known it for a very long time." Paul Gewirtz, *Realism in the Separation of Powers*, 30 WM. & MARY L. REV. 343, 343 (1989). For similar views, see Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

215. 443 F.2d 1039 (2d Cir. 1971).

> declaration of war would place the nation in a posture in its international relations which would be against its best interests.[216]

Rather than dwell on constitutional formality, the Second Circuit emphasized that the President and the Congress had reached "a consensus on the advisability of *not* making a formal declaration of war because it would be contrary to the interests of the United States to do so."[217] Similarly, in *Mitchell v. Laird*, the D.C. Circuit said that "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences without any obvious compensating advantages other than a formal declaration of war does have special solemnity and does present to the legislature an unambiguous choice."[218]

With the benefit of hindsight it seems that just the opposite judgment about the advisability of constitutional formality should be drawn from the Vietnam debacle.[219] Contrary to the D.C. Circuit's pronouncement in *Mitchell*, it is hardly trivial in terms of enhancing the accountability of the legislative and executive branches that a formal declaration of war would "have special solemnity" and "present to the legislature an unambiguous choice."[220] Nothing less than solemnity and clarity is sufficient and appropriate for the decision that Justice Story warned is "so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation."[221] A decade after *Mitchell v. Laird*, the Supreme Court in *INS v. Chadha*[222] exalted bicam-

216. *Id.* at 1043. Similarly, the D.C. Circuit in Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), "unanimously agreed that it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war such as is involved in the protracted and substantial hostilities in Indo-China." *Id.* at 615.

217. *Orlando*, 443 F.2d at 1043.

218. *Mitchell*, 488 F.2d at 615.

219. John Hart Ely has come the closest to identifying the agency costs associated with the implementation of the War Clause since the Korean War. Although, like most contemporary commentators, Ely criticizes the President for usurping Congress's powers, he also criticizes Congress for "ducking an issue it is constitutionally obligated to decide." Ely, *A War Powers Act That Worked*, *supra* note 27, at 1411 n.91; *see also id.* at 1419 (criticizing "congressional spinelessness" regarding the implementation of the War Powers Resolution). In my view, he argues correctly (or at least most plausibly) that the Framers' concern when drafting the War Clause "was not with the prerogatives of Congress vis-a-vis the President," but rather "that a single individual should not be able to lead the nation precipitously into war and thus risk the lives of all of us, especially our young men." *Id.* at 1411. However, although Ely astutely points out the danger to individual liberty from congressional shirking in the decision to initiate war, he only fleetingly considers that the same danger to individual liberty can arise from Coasean bargains between Congress and the President—bargains whose circumvention of constitutional formalism reduces the transaction costs of reaching agreement on an issue of greatest importance. *See* Ely, *American War in Indochina (Part I)*, *supra* note 27, at 894.

220. *Mitchell*, 488 F.2d at 615.

221. STORY, *supra* note 123, § 570, at 410.

222. 462 U.S. 919 (1983).

eralism as providing, in the case of a rather mundane immigration statute, the assurance that "the legislative power would be exercised only after opportunity for full study and debate in separate settings."[223] Six months after the Persian Gulf War commenced, the Court proved that *Chadha* was not a fluke; instead it was made the cornerstone of the *Washington Airports* decision.[224] Surely the legislative authorization to commence war is weighty enough and infrequently invoked enough to warrant an opportunity for study and debate beyond what the Constitution requires for the most routine legislation. Consider the alternative: If no particular formalism need be obeyed by Congress when the United States decides to initiate war against another nation—the act that Justice Story called "the highest sovereign prerogative"[225]—then it is doubtful that any constitutional event could command obedience to form. In such a case, the Supreme Court's rejection of the legislative veto in *Chadha* on the grounds that it violated bicameralism and presentment would be simply pedantic.

C. *American Sovereignty and the United Nations*

Perhaps the greatest constitutional concern raised by the Persian Gulf War is that the United Nations emerged as a convenient institution to which Congress and the President together could delegate the decision of whether the United States should commence warfare against another nation. From the perspective of minimizing political accountability, it is unsurprising that, although the President lobbied the United Nations to issue Security Council Resolution 678, he displayed no similar determination to have Congress debate and vote on whether it should authorize the war. When Congress did finally debate the Iraq Resolution, it was only after armed conflict was inevitable, and then the decision itself was styled in terms of whether Congress should approve or disapprove of the warmaking instructions that the United Nations was putatively giving the United States. Indeed, President Bush said after the war that he believed he "had the inherent power to commit our forces to battle after the U.N. resolution."[226]

The Persian Gulf War undermined the integrity of American constitutionalism. The allied response to the Iraq crisis was hailed by international law scholars as an achievement not simply laudable but millennial in its portentousness. Many argued, in effect, that the allied war against

223. *Id.* at 951.

224. *See* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2308-09 (1991).

225. STORY, *supra* note 123, § 570, at 410.

226. Princeton Speech, *supra* note 75, at 590.

Iraq was the first true international enforcement action under Articles 42 through 50 of the U.N. Charter, rather than an effort of collective self-defense under Article 51; that, as a member of the United Nations, the United States was merely enforcing a Security Council resolution when it attacked Iraq; that congressional approval for the American attack was unnecessary because the necessary congressional approval had already been provided decades earlier by the Senate's ratification of the U.N. Charter[227] (and perhaps also by the implementing legislation enacted by Congress after the chartering of the United Nations[228]); and, that once the war between the United States and Iraq had begun, the discretion of the President of the United States was circumscribed by the contours of Security Council Resolution 678. Lest this sound like exaggeration, I quote the leading proponents of this view, Professors Thomas M. Franck and Faiza Patel, writing shortly after the war's conclusion:

> That [United Nations] police force must continue to operate under the general guidance of the Security Council for as long as the Council is able to exercise its supervisory role. For U.S. hawks, this meant that they had to await the Council's consent before the United States could take offensive military action in the gulf. It also limits the purposes to which force may be directed.
>
> Implementing the new police power, however, also curbs the power of the doves in Congress. While the President was no doubt politically well-advised to consult fully with Congress in this instance, time allowing, he is not obliged to secure what the new system was created to make unnecessary: the nation's unilateral decision to go to war.
>
> If this is the correct position in international law, it also comports with the intent of the drafters of the Constitution. The purpose of the war-declaring clause was to ensure that this fateful decision did not rest with a single person. The new system vests that responsibility in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress.[229]

Unfortunately, in the United States, we are familiar with actions by Congress and the President that transfer difficult choices (such as military base closings and tax increases) over to blue-ribbon commissions so that the responsibility for unpopular decisions cannot be traced to any

227. 59 Stat. 1031 (1945).

228. United Nations Participation Act of 1945, 22 U.S.C. § 287 (1988).

229. Thomas Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 74 (1991). For a rebuttal to Franck & Patel's international law premise that the Persian Gulf War represented an entirely new legal genre of war, see Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 511 (1991).

particular elected official. With the Persian Gulf War, however, we witnessed the most controversial of all American foreign policy decisions being delegated to a commission that contains but a single American. Franck and Patel applaud this development as the embodiment of the original intention of the Constitution, but they explain neither how Congress can delegate away such power, nor how the President can acquiesce to the delegation of his Commander in Chief powers to a body that, save the American ambassador, is not appointed by him.[230] Nor do they explain how Senate ratification of the U.N. Charter in 1945 (or even subsequent legislation implementing the Charter that was subject to bicameralism and presentment) could provide the constitutional authorization, years later, for the President to initiate war, when, as I explain in Part III, a declaration of war requires bicameralism and presentment. Little discussion in Congress or the press focused on the legal justification claimed by the President for his "inherent" right to initiate war on Iraq—which appeared to be nothing more than the proposition that the U.N. Charter, as a ratified treaty of the United States, is self-executing even to the extent of authorizing war without any subsequent bicameral action by Congress.[231]

III. THE ACCOUNTABLE FORMALISM OF DECLARING WAR: LESSONS FROM THE DECLARATION OF WAR ON JAPAN

Two centuries of American history tend to repudiate Madison's belief that no explanation is needed for why the Constitution must contain the power to declare war.[232] Despite the recurrence of war, the custom of issuing a declaration of war has been honored more in the breach, particularly in this century. Although the United States fought the two world wars pursuant to declarations of war, the wars in Korea and Vietnam—and now in the Persian Gulf—were commenced without formal declarations of war. If the declaration of war has been reduced to an

230. In recent signing statements, President Bush emphasized the constitutional illegitimacy of such executive delegation. *See, e.g.*, Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, 26 WEEKLY COMP. PRES. DOC. 1772 (Nov. 5, 1990) ("Because this constitutes the exercise of significant authority pursuant to the laws of the United States, the members of the [Central European Small Enterprise Development] Commission must be appointed in conformity with the provisions of the Appointments Clause.").

231. *See, e.g.*, Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991) (discussing the legislative history of the implementing legislation of the U.N. Charter, and arguing that there was clear intent not to permit such a delegation of constitutional war-making power to the United Nations); *cf.* Rostow, *supra* note 37, at 871 (discussing concern over President Truman's reliance on the U.N. Charter to justify America's entry into the Korean War).

232. *See supra* text accompanying note 1.

anachronism, as Professor Eagleton feared in 1938 that it might,[233] what disadvantage is there to issuing one? Maybe it is really no better for Congress to say: "A state of war is hereby formally declared," rather than: "After meaningful consultation with the President, we hereby affirmatively authorize the President to engage in hostilities." But, if so, why not indulge the ritual of declaring war? This is no idle question. In the Spanish-American War, Congress passed a joint resolution on April 19, 1898, directing the President "to use the entire land and naval forces of the United States" to secure the independence of Cuba and to force Spain to relinquish its claim of authority over Cuba.[234] President McKinley signed the resolution the following day. Spain declared war on the United States on April 23.[235] On April 25, in response to President McKinley's request the same day,[236] Congress issued a formal declaration of war against Spain.[237]

By historical standards, Congress's deliberation over the Iraq Resolution and its alternatives consumed as much time and effort as would debating and voting on a formal declaration of war. Nonetheless, the political process that lead to the American attack on Iraq on January 17, 1991, produced confusion over the war's constitutionality that could have been readily avoided, as Senator Wallop urged in October of 1990, by voting on a formal declaration of war. The formality of the declaration of war against Japan on December 8, 1941 is instructive. Styled as Senate Joint Resolution 116, the declaration read in its entirety:

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America; Therefore be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared;

233. *See supra* text accompanying note 2.

234. J. Res. 24, 55th Cong., 2d Sess., 30 Stat. 738, 739 (1898).

235. DAVID F. TRASK, THE WAR WITH SPAIN IN 1898, at 57 (1981).

236. Letter from President McKinley to the Congress of the United States (Apr. 25, 1898), *reprinted in* 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS app. at 153-55 [hereinafter McKinley's War Message].

237. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364. The declaration was retroactive to April 21 because, it would seem, following a blockade proclamation on April 21, American forces had already begun to capture Spanish merchant ships and to engage in hostilities. *See* THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 509-10 (3d ed. 1946) (McKinley's War Message sent to Congress two days after the Spanish capitulation); ELBERT J. BENTON, INTERNATIONAL LAW AND DIPLOMACY OF THE SPANISH-AMERICAN WAR 109-10 (1908) (capture of Spanish vessels occurring on the day of the blockade proclamation); HENRY CABOT LODGE, THE WAR WITH SPAIN 44 (1902) (shots fired by American ships on April 23); TRASK, *supra* note 235, at 57 (American ships ordered to blockade Cuba on April 21); *see also* The Pedro, 175 U.S. 354, 355-62 (1899) (discussing opening events of Spanish-American War).

> and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.[238]

This language is patterned after that used by Congress on April 6, 1917, when it declared war on Germany—the only substantive difference being the characterization of Germany's "repeated acts of war" in 1917 and Japan's "unprovoked acts of war" in 1941.[239] Several practical lessons of constitutional governance, if not constitutional law, can be gleaned from examining the declaration of war on Japan and the surrounding events. President Franklin Roosevelt and Congress voluntarily adhered to a degree of accountable formalism that exceeded the Constitution's minimal requirements, thus creating (or perpetuating) a set of constitutional customs.[240] The Iraq Resolution contains a number of the formalisms found in America's last formal declaration of war. In this respect, those formalities in the declaration of war on Japan that the Iraq Resolution conspicuously omits illuminate my view that the principal function of a declaration of war in American constitutionalism is to increase political accountability to the electorate.

A. *Provocation and Culpability: Is America Initiating War or Is Pre-Existing War "Thrust Upon" It?*

The first notable aspect of the declaration of war on Japan is that its preamble blames Imperial Japan for already having "committed unprovoked acts of war" and having "thrust upon" the United States a "state of war." The declaration denied American provocation and acknowledged that a state of war already existed. President Roosevelt's message to Congress on December 8, 1941 provided greater detail of the scope of the Japanese attack throughout the Pacific and Southeast Asia on December 7.[241] Although it may seem utterly obvious, the declaration of

238. S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941) [hereinafter Declaration of War on Japan].

239. *See* S.J. Res. 1, ch. 1, 40 Stat. 1 (1917) [hereinafter 1917 Declaration of War on Germany].

240. *See* KOH, *supra* note 34, at 70-71 (discussing "quasi-constitutional custom"); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984). Justice Frankfurter called such customs "the gloss which life has written upon" "the words of the Constitution." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

241. Address to the Congress Asking That a State of War Be Declared Between the United States and Japan (Dec. 8, 1941), *reprinted in* 10 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1941, at 514 (Samuel Rosenman ed., 1950) [hereinafter FDR's War Message] *and in* 87 CONG. REC. 9504-05 (1941).

war against Japan implicitly conveys the understanding that further diplomatic efforts to resolve differences with Japan would be futile. Similarly, the declarations against Germany and Italy on December 11, 1941, and against Bulgaria, Hungary, and Rumania on June 5, 1942, were predicated on those nations having already declared war on the United States.[242]

America's formal entry into World War II also demonstrates that military circumstances can be manipulated by the President, through acts or omissions, to produce the provocation that ignites popular sentiment for war. By late July of 1941, President Roosevelt had demanded that the Japanese withdraw from French Indochina, which Japan had invaded after the fall of France in 1940. President Roosevelt sought to use a presidential order freezing all Japanese assets in the United States and imposing an embargo on the sale of oil to Japan as political leverage.[243] Diplomatic efforts to resolve the crisis foundered during the summer and fall of 1941, and President Roosevelt's war cabinet met on November 28 to consider whether the United States should preemptively strike Japanese forces in Indochina or wait for Japan to attack British or American forces there. The cabinet decided, obviously, to wait. After the war, Roosevelt's Secretary of War, Henry Stimson, testified in hearings on the Pearl Harbor attack:

> If war did come, it was important, both from the point of view of unified support of our own people as well as for the record of history, that

242. *See* S.J. Res. 119, Pub. L. No. 77-331, 55 Stat. 796 (1941) (Germany); S.J. Res. 120, Pub. L. No. 77-332, 55 Stat. 797 (1941) (Italy); H.R.J. Res. 319, Pub. L. No. 77-563, 56 Stat. 307 (1942) (Bulgaria); H.R.J. Res. 320, Pub. L. No. 77-564, 56 Stat. 307 (1942) (Hungary); H.R.J. Res. 321, Pub. L. No. 77-565, 56 Stat. 307 (1942) (Rumania).

243. Assessing the predictable military implications of the oil embargo, Lord Hart subsequently wrote:

> In earlier discussions, as far back as 1931, it had always been recognised that such a paralysing stroke would force Japan to fight, as the only alternative to collapse or the abandonment of her policy. It is remarkable that she deferred striking for more than four months, while trying to negotiate a lifting of the oil embargo. The United States Government refused to lift it unless Japan withdrew not only from Indo-China but also from China. No Government, least of all the Japanese, could be expected to swallow such humiliating conditions, and such "loss of face." So there was every reason to expect war in the Pacific at any moment, from the last week of July onward. In these circumstances the Americans and British were lucky to be allowed four months' grace before the Japanese struck. But little advantage was taken of this interval for defensive preparation.

B.H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 199, 202 (1970); *see also* The President Explains Our Policy Concerning the Exportation of Oil to Japan. Informal, Extemporaneous Remarks to Volunteer Participation Committee of the Office of Civilian Defense (July 24, 1941), *reprinted in* 10 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1941, *supra* note 241, at 277 (demand for Japanese withdrawal from Indo-China); The President Freezes Japanese and Chinese Assets in the United States. White House Statement and Executive Order No. 8832 (July 26, 1941), *reprinted in* 10 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1941, *supra* note 241, at 281 (order freezing Japanese assets in the United States and placing an embargo on sales of oil to Japan).

> we should not be placed in the position of firing the first shot, if this could be done without sacrificing our safety, but that Japan should appear in her true role as the real aggressor.[244]

Although self-serving, an exculpatory preamble reciting the preexistence of hostile acts against the United States can be found in every American declaration of war since 1846. *None* of those declarations of war was necessary if we accept the representation in each that a state of war already had been thrust upon the United States by a foreign aggressor. This reasoning can be traced to Alexander Hamilton, who cogently argued this position in 1801 in an essay that harshly criticized President Jefferson's report to Congress on the war in the Mediterranean against the Tripoli pirates. Although the Tripolitan ruler had declared war against the United States, Jefferson maintained that, in the absence of congressional authorization, the Constitution required him to disarm and release, rather than confiscate, captured vessels. Hamilton considered this position to be ridiculous and wrote that the Constitution:

> has only provided affirmatively, that, 'The Congress shall have power to declare War;' the plain meaning of which is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace,* to change that state into a state of war; whether from calculations of policy or from provocations or injuries received: in other words, it belongs to Congress only, *to go to War.*[245]

On the other hand, Hamilton argued, "when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory: it is at least unnecessary."[246] Hamilton asserted that it "is a rule of natural law" that a state of war between two nations is:

> completely produced by the act of one—it requires no concurrent act of the other. It is impossible to conceive the idea, that one nation can be in full war with another, and this other not in the same state with respect to its adversary. The moment therefore that two nations are, in an absolute sense, at war, the public force of each may exercise every

244. *Pearl Harbor Attack: Hearings Before the Joint Comm. on the Investigation of the Pearl Harbor Attack (pt. 11)*, 79th Cong., 2d Sess. 5419 (1946). Similarly, Professor Rostow suggests that the United States avoided two armed confrontations with the Soviet Union—during the Berlin Blockade and the Cuban Missile Crisis—in part by the skill of Presidents Truman and Kennedy in maneuvering the Soviets into the position of having to fire the first shot if they insisted on thwarting the respective American foreign policy objectives at issue. Rostow, *supra* note 37, at 896. For a discussion regarding the degree of foreign provocation surrounding the events in the Tonkin Gulf in 1964, see Ely, *American War in Indochina (Part I)*, *supra* note 27, at 889-90.

245. Hamilton, *The Examination No. 1*, *supra* note 163, at 455-56.

246. *Id.* at 456.

> act of hostility, which the general laws of war authorize, against the persons and property of the other.[247]

In none of the declarations of war since 1846 has the United States purported to *initiate* war against another nation.[248] This historical pattern is curious, for it invites the question: Why did Congress bother to issue declarations of war on so many occasions when they were not constitutionally necessary?

The experience of Congress with Iraq in 1991, however, less resembled Pearl Harbor than it did Britain's experience in September 1939 when it presented Nazi Germany with an ultimatum that a state of war would exist unless it retreated from Poland.[249] The Iraq Resolution identified only unprovoked acts of "aggression" on Kuwait; although the Resolution could be read to say that a state of war already existed, it was not a preexisting war between Iraq and the United States. Yet Professor Carter wrote in November 1990: "It is not possible for President Bush to start a war in the Gulf because war has already begun: Saddam Hussein started it when he invaded Kuwait."[250] "At best, then," Carter concluded, "it might be said that American forces are poised to enter a war that is already underway, at the invitation of one of the belligerents, and perhaps . . . at the invitation of the United Nations as well."[251] But this argument is overdrawn. The War Clause cannot merely mean, as Carter asserted, that "[i]t is the decision to begin a war where none exists that the Congress under the Constitution must share."[252] Surely Congress's power to initiate war includes the power to refuse the request for the United States to enter an ongoing war. That is the reason, presumably, why President Wilson did not send American troops to Europe before April of 1917, and why President Roosevelt did not go to war against Germany until well after the fall of France and the worst of the Battle of

247. *Id.* at 455. The Supreme Court embraced this reasoning in 1862, though without attribution to Hamilton, in the *Prize Cases*: "A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other." 67 U.S. (2 Black) 635, 668 (1862).

248. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 231 (Randall W. Bland et al. eds., 5th rev. ed. 1984) ("[C]ongressional declarations of war have always taken the form of merely recognizing a state of war begun by the hostile acts of the other party."). Writing in 1908 about the Spanish-American War, Elbert Benton asserted that the American declaration of war, issued after the United States had begnn hostilities, "was a useless formulary, out of accord with better opinion," and he asked rhetorically: "If the declaration is at all a necessity, it ought to precede hostilities; if it is not necessary, why take a meaningless step several days after the first blows have been struck?" BENTON, *supra* note 237, at 114.

249. *See* WINSTON CHURCHILL, THE SECOND WORLD WAR: THE GATHERING STORM 407 (1948).

250. Carter, *supra* note 12, at C4.

251. *Id.*

252. *Id.*

Britain—despite having already ordered supposedly neutral American forces to defend Iceland and attack German submarines on sight.[253]

B. *The Objectives of War: The President's Legislative Role as Recommender of War*

Before Congress exercised its power to declare war against Japan, President Roosevelt took an antecedent legislative step to initiate war pursuant to the President's important but often-neglected duty, under Section 3 of Article II, to make recommendations to Congress on matters of his choosing.[254] Immediately before the House and Senate voted on the declaration of war against Japan, President Roosevelt addressed a joint session of Congress, and concluded his remarks with this request: "I ask that the Congress declare that, since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire."[255] After less than an hour, both houses of Congress approved a joint resolution declaring war.[256]

The formalities surrounding the declaration of war on December 8, 1941, suggest a call-and-response model for the issuance of declarations of war, particularly since the President, as Commander in Chief, will have been fully briefed on the nature and extent of the hostilities by his military commanders before Congress can possibly be.[257] Thus, his report of such fighting and his request for a declaration of war are likely to collapse into a single message. Not surprisingly, in every war in which the United States commenced hostilities pursuant to a declaration of war, the declaration has been preceded by the President's formal request for it—or, in the case of President Madison's message in 1812, by the statement that whether the country should go to war "is a solemn question which the Constitution wisely confides to the legislative department of the Government."[258]

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253. *See* CORWIN, *supra* note 248, at 232-34.

254. U.S. CONST. art. II, § 3; *see* Sidak, *The Recommendation Clause*, *supra* note 42.

255. FDR's War Message, *supra* note 241, at 515.

256. *See* 87 CONG. REC. 9505 (1941) (Senate approval of joint resolution); *id.* at 9536-38 (House approval of joint resolution).

257. *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (In international affairs, "the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature.").

258. Letter from James Madison to the Senate and House of Representatives of the United States (June 1, 1812), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 499, 505 (James D. Richardson ed., 1897) [hereinafter Madison's War Message]; *see* Letter from James K. Polk to the Senate and House of Representatives (May 11, 1846), *in* 4 *id.* at 437, 442-43 [hereinafter Polk's War Message]; McKinley's War Message, *supra* note 236; War Message (Apr. 2, 1917), *in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 8226

A presidential recommendation to initiate war is not, of course, a condition precedent to a congressional declaration of war. Like any presidential recommendation, a request for war is submitted to Congress for its "Consideration" and requires no response by Congress.[259] But if the President provokes hostilities before recommending a declaration of war, as President Polk did in 1846 before seeking a declaration of war against Mexico, Congress admittedly may be left with no choice but to "authorize" the continuation, if not the speedy conclusion, of the ongoing war.[260]

The President's recommendation for war serves a useful function. The typical declaration of war itself tends to be rather brief, and its explanation of the repeated or unprovoked acts of war against the United States usually has been nonexistent. Professor William Van Alstyne, one of the Koh Signatories, asserts that "[t]he war-authorizing powers invested in Congress commit to that body, and not the president, these fundamental political responsibilities and powers: to declare the reasons for war and the authority of the president as commander in chief in the conduct of that war."[261] History has ignored this platonic vision. In his 1918 study of American declarations of war, Professor Simeon Baldwin concluded that only the declaration of imperfect war against France in the Quasi-War of 1798-1800 had explained the nature of warlike provocation—in that case, the capture of American vessels by French warships.[262] In light of the traditional exiguity of declarations of war, presidential statements that request such declarations can serve to elaborate on the grounds for, and the objectives of, going to war. This was true of President Wilson's message of April 3, 1917, requesting a declaration of war on Germany, in which he listed more than a dozen reasons for entering the war, including some so vaporous as his famous plea to "make the world safe for democracy."[263] It was also true of President Roosevelt's war message of December 8, 1941, in which he explained with calculated repetition that on December 7 Japan had launched a surprise attack not only on Hawaii, but also on Malaya, Hong Kong, Guam,

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[hereinafter Wilson's War Message]; FDR's War Message, *supra* note 241; *see also* ROGERS, *supra* note 142, at 45; Baldwin, *supra* note 143, at 10-11.

Two weeks before Congress declared war on Spain in 1898, President McKinley sought a joint resolution authorizing the use of force to eject Spain from Cuba, which Congress willingly gave him. *See supra* notes 234-37 and accompanying text. McKinley's message began by reciting his duty under the Recommendation Clause. Letter from William McKinley to the Congress of the United States (Apr. 11, 1898), *in* 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 139, 139.

259. *See* Sidak, *The Recommendation Clause*, *supra* note 42, at 2082-83, 2121.

260. *See* CORWIN, *supra* note 248, at 229-31.

261. William A. Van Alstyne, *Letting Slip the Dogs of War*, WASH. POST, Dec. 23, 1990, at C7.

262. *See* Baldwin, *supra* note 143, at 2-3, 6.

263. Wilson's War Message, *supra* note 258, at 8231.

the Philippines, Wake Island, and Midway.[264] In this respect, presidential war messages have become an informative part of the legislative history for America's various declarations of war.[265]

C. *Bicameralism and Presentment: The President's Legislative Role as Signatory to War*

The declaration of war against Japan was a public law of the United States, presented to the President pursuant to Article I, Section 7, Clause 3. As it appears in *Statutes at Large*, the text of the joint resolution is followed by the phrase, "Approved, December 8, 1941, 4:10 p.m., E.S.T.,"[266] referring to the time at which President Roosevelt signed the resolution.[267] At a minimum, the expectation that both the President and Congress regarded the declaration of war to be presented for the President's signature adds a remarkably neglected perspective on the popular understanding that Congress *alone* has the power to declare war. The declarations of war in the War of 1812, the Mexican War in 1846, and the Spanish-American War in 1898, were all formally characterized as acts of Congress and are followed in *Statutes at Large* by the word "Approved."[268] The declarations of war against Germany and against the Austro-Hungarian Empire in 1917, styled as resolutions, also bear the word "Approved."[269] The same is true of the proclamation of a state of insurrection in 1861 (namely, the Civil War),[270] the Tonkin Gulf Res-

264. *See* FDR's War Message, *supra* note 241, at 515.

265. *See, e.g.*, Baldwin, *supra* note 143, at 8-9 (discussing effect of President's war messages on World War I legislation). However, at least one of the Koh Signatories, Professor Laurence Tribe, believes that presidential statements may not be used in statutory construction. I dispute that view in Sidak & Smith, *Four Faces of the Item Veto*, *supra* note 42, at 453 & n.70 (discussing TRIBE, *supra* note 39, § 4-13, at 265 n.24). *See generally* Kathryn M. Dessayer, Note, *The First Word: The President's Place in "Legislative History"*, 89 MICH. L. REV. 399 (1990).

266. S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941).

267. *See* 87 CONG. REC. 9539 (1941) ("[O]n December 8, 1941, at 4:10 p.m., eastern standard time, the President approved and signed the joint resolution (S.J. Res. 116) declaring that a state of war exists between the Imperial Government of Japan and the Government and people of the United States and making provisions to prosecute the same.").

268. *See* Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaration of war against the United Kingdom of Great Britain and Ireland); Act of May 13, 1846, ch. 16, 9 Stat. 9 (recognizing an existing state of war with the Republic of Mexico); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (declaration of war against the Kingdom of Spain); *see also* Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (not explicitly declaring war, but authorizing the President "to cause to be done all such other acts of precaution or hostility, as the state of war will justify, and may in his opinion require" against "the Dey of Algiers, on the coast of Barbary").

269. S.J. Res. 1, ch. 1, 40 Stat. 1 (1917); H.R.J. Res. 169, ch. 1, 40 Stat. 429 (1917) (declaration of war against the Imperial and Royal Austro-Hungarian Government); *see also* James B. Scott, *War Between Austria-Hungary and the United States*, 12 AM. J. INT'L L. 165 (1918) (discussing congressional approval of the President's recommendation to declare war on Austria-Hungary).

270. Act of July 13, 1861, ch. 2, 12 Stat. 255. The United States did not declare war against the Confederate States of America, for to do so would have conceded the sovereignty of the Confeder-

olution in 1964,[271] and the Iraq Resolution of January 12, 1991,[272] though none of these three was a formal declaration of war.

1. *The Constitutional Error of Conventional Wisdom.* It is possible, of course, that Congress has been wrong on all occasions since 1812 in believing that a declaration of war must be presented to the President. There are two ways of viewing the question.

a. The view that presentment is unnecessary. The first view is that a declaration of war is fundamentally different from an ordinary Act of Congress. Perhaps, like the unicameral ratification of treaties by the Senate, the bicameral declaration of war by Congress is a legislative hybrid that does not require presentment to the President, notwithstanding the requirement in Article I, Section 7, Clause 3 that any joint action of Congress be presented to the President. This argument might appear to some as a straw man. Yet Professor Carter, relying on Justice Chase's terse statement in *Hollingsworth v. Virginia*[273] in 1798 that a constitutional amendment does not require presentment,[274] argues that, "even after *Chadha,* there appear to be two categories of legislation: 'ordinary' legislation, which requires presentment to the President, and what might be called 'extraordinary' legislation, which does not."[275] "If the President lacks the power to veto a decision to go to war," Carter reasons, "then the congressional role in exercising its war power is arguably much like its role in exercising its power to propose amendments to the Constitution."[276]

The view that a declaration of war does not require presentment is consonant with the popular notion—expressed succinctly by Professor Louis Henkin, one of the most respected of the Koh Signatories on constitutional matters relating to foreign affairs—that "[t]he Constitution gave the decision as to whether to put the country into war to Con-

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acy. *See, e.g.*, United States v. Keehler, 76 U.S. (9 Wall.) 83, 86-87 (1869) ("The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its Congress or an order of one of its departments, any right or property of the United States."). Before undertaking my present research into the War Clause, I erroneously referred to the Act of July 13, 1861 as a declaration of war. *See* Sidak, *The President's Power of the Purse*, *supra* note 42, at 1190 n.134.

271. H.R.J. Res. 1145, Pub. L. No. 88-408, 78 Stat. 384 (1964).

272. Iraq Resolution, *supra* note 80.

273. 3 U.S. (3 Dall.) 378 (1798).

274. *See id.* at 381 n.*.

275. Carter, *supra* note 38, at 130.

276. *Id.* at 131. I do not think that Carter's model of ordinary and extraordinary legislation is helpful. Indeed, he readily acknowledges that "formalism alone does not tell which powers are ordinary and which are extraordinary" and that "[j]ust what the test should be is not at all clear." *Id.* at 132.

gress."[277] Similarly, the *Washington Post* reported the day after the passage of the Iraq Resolution that Steven R. Ross, legal counsel to the House of Representatives, had "insisted that Congress's war-making authority is so clear under the Constitution that a non-binding resolution is sufficient as 'a clear signal' of congressional intent. 'You don't have to go through the full legislative process,' he said."[278] Even Judge Harold Greene ultimately stated in his opinion in *Dellums v. Bush*[279] that "if the War Clause is to have its normal meaning, it excludes from the power to declare war *all branches other than the Congress.*"[280]

One can bolster these modern interpretations with the statements of the usual titans of American constitutional law and political theory. James Madison wrote as Helvidius that it was "the simple, the received and the fundamental doctrine of the Constitution, that the power to declare war is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war . . . ."[281] Chief Justice Marshall said in *Talbot v. Seeman*[282] that "[t]he whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone be resorted to as our guides in the enquiry of whether 'war' existed."[283] And Thomas Jefferson conceded in 1805 that "Congress alone is constitutionally invested with the power of changing our condition from peace to war."[284]

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277. HENKIN, *supra* note 39, at 39.

278. Howard Kurtz, *Measure to Have Force of Law*, WASH. POST, Jan. 13, 1991, at A23.

279. 752 F. Supp. 1141 (D.D.C. 1990).

280. *Id.* at 1145 n.5 (emphasis added).

281. MADISON, *supra* note 36, at 174.

282. 5 U.S. (1 Cranch) 1 (1801).

283. *Id.* at 28; *see also* KOH, *supra* note 34, at 83 (discussing United States v. Smith, 27 F. Cas. 1192, 1230-31 (C.C.D.N.Y. 1806) (No. 16,342), which asserts that the power to make war "is exclusively vested in Congress").

284. 15 ANNALS OF CONG. 19 (1805). To similar effect, Professor William Van Alstyne, *supra* note 38, at 8-9, cites Jefferson's message to Congress in 1801 reporting of fighting in the Mediterranean Sea between American warships and the Tripolitan cruisers of the Barbary Pirates. First Annual Message to Congress (Dec. 8, 1801), *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 326 (James D. Richardson ed., 1897). There, Jefferson maintained that "[u]nauthorized by the Constitution, without the sanction of Congress," he could not employ "measures of offense." *Id.* at 327. Yet Van Alstyne does not place any significance on Jefferson's own statement that he sent the American squadron to the Mediterranean after the Bey of Tripoli, leader of the Barbary Pirates, "had already declared war." *Id.* at 326.

This point did not elude Alexander Hamilton, who with brutal sarcasm excoriated the logic of Jefferson's message nine days later:

> The Message of the President, by whatever motives it may have been dictated, is a performance which ought to alarm all who are anxious for the safety of our Goverument, for the respectability and welfare of our nation. It makes, or aims at making, a most prodigal sacrifice of constitutional energy, of sound principle, and of public interest, to the popularity of one man.

b. The view that presentment is necessary. Text and early historical practice, however, contradict the view that presentment is unnecessary. Even if not styled as an ordinary "Bill," a declaration of war must be presented to the President because it indisputably constitutes an "Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary."[285] After Congress voted for a declaration of war against Great Britain in 1812, it "presented the said bill to the President of the United States, for his approbation, and . . . they were instructed by the President . . . that he had approved and signed the same."[286] This bill was ratified by the same James Madison who, as Helvidius nineteen years earlier, had asserted that the Constitution, of which he was the principal draftsman, "fully and exclusively vested in the legislature" the power to declare war.[287] The consistency of custom since President Madison's ratification of war in 1812 supports the interpretation that Congress must present a declaration of war to the President for his approval.

There is considerable scholarly support for this view. Writing in 1918, Professor Simeon Baldwin concluded that a declaration of war "must be then the product of an agreement of mind between three depositaries of governmental power."[288] "The two Houses of Congress first successively agree," he wrote, "and the President then manifests his assent."[289] Even Professor Alexander Bickel, an outspoken critic of executive war-making, conceded in 1970 that "the power to initiate hostilities

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> The first thing in which it excites our surprise, is the very extraordinary position, that though *Tripoli had declared war in form* against the United States, and had enforced it by actual hostility, yet that there was not power, for want of *the sanction of Congress*, to capture and detain her cruisers with their crews.
>
> When the newspapers informed us, that one of these cruisers, after being subdued in a bloody conflict, had been liberated and permitted quietly to return home, the imagination was perplexed to divine the reason. The conjecture naturally was, that pursuing a policy, too refined perhaps for barbarians, it was intended by that measure to give the enemy a strong impression of our magnanimity and humanity. No one dreamt of a scruple as to the *right* to seize and detain the armed vessel of an open and avowed foe, vanquished in battle. The enigma is now solved, and we are presented with one of the most singular paradoxes, ever advanced by a man claiming the character of a statesman. When analyzed, it amounts to nothing less than this, that *between* two nations there may exist a state of complete war on the one side—of peace on the other.

Hamilton, *supra* note 163, at 454-55. Hamilton believed, to the contrary, that a "declaration by one nation against another, produces at once a complete state of war between both; and that no declaration on the other side can at all vary their relative situation." *Id.* at 456.

285. U.S. CONST. art. I, § 7, cl. 3; *see also* 1 BLACKSTONE'S COMMENTARIES app. at 345 (St. George Tucker ed., 1803) ("[T]he president . . . is *sub modo* a branch of the legislative department[] since every bill, order, resolution, or vote, to which the concurrence of both houses of congress is necessary, must be presented to him for his approbation, before it can take effect.").

286. 24 ANNALS OF CONG. 1683 (1812).

287. *See supra* note 281 and accompanying text.

288. Baldwin, *supra* note 143, at 1.

289. *Id.*

was clearly meant to be reserved to the Congress, with the President participating in that initiative only so far as his signature was necessary to complete an act of Congress."[290]

2. *The Historical Operation of Bicameralism and Presentment in the War-Making Context.* Bicameralism and presentment have some remarkable implications in the context of a declaration of war. A President could be presented a declaration of war and permit it to take effect without his signature ten days after presentment. Such an event actually occurred in the case of a joint resolution in 1890, a so-called limited declaration of war, which authorized the President to "employ such means or exercise such power as may be necessary" to obtain indemnity from Venezuela for three steamships seized in 1871.[291] President Benjamin Harrison did not sign the resolution, and the Department of State added the following notice in *Statutes at Large*: "The foregoing resolution having been presented to the President of the United States for his approval and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval."[292] Although this Venezuelan dispute was ultimately resolved through arbitration,[293] one could imagine the odd case of the nation going to war without the Commander in Chief being a signatory to the declaration of war, yet with him obligated under the Constitution to execute faithfully the law by prosecuting the declaration of war.

If the Constitution requires that a declaration of war must be presented to the President before it can take effect, what would happen if the President vetoed it?[294] The curious answer is that Congress would have to muster a supermajority in both houses to declare war over the President's dissent. During the ratification debates, New York actually proposed that the power to declare war require a two-thirds majority in each house of Congress.[295] Today, of course, we are so accustomed to thinking of Presidents as more hawkish than Congress that the hypothetical of a dovish President would strike many as preposterous. Yet, history provides a number of commonly ignored examples: John Adams resisted calls for a declaration of war against France in 1798 and instead

290. Bickel, *supra* note 9, at 15,410.

291. H.R.J. Res. 28, 26 Stat. 674, 675 (1891) (received by the President on June 7, 1890).

292. *Id.*, 26 Stat. at 675.

293. *See* Bickel, *supra* note 9, at 15,413 n.29.

294. *See, e.g.*, ROGERS, *supra* note 142, at 25 (arguing that the President "can veto even a declaration of war").

295. *See* Lofgren, *supra* note 35, at 683 & n.41; *see also* 1 BLACKSTONE'S COMMENTARIES, *supra* note 285, app. at 272.

sought authority for the limited and undeclared Quasi-War;[296] James Madison was ambivalent about declaring war on Britain in 1812;[297] Grover Cleveland in 1896 rebuffed the proposal by various members of Congress to declare war on Spain;[298] William McKinley in 1898 reluctantly conceded to the same war fervor;[299] and Woodrow Wilson successfully campaigned for reelection in 1916 on the slogan, "He kept us out of war."[300]

The Presentment Clause provides that a two-thirds vote of both houses of Congress is required to enact any piece of legislation vetoed by the President. But this procedure contradicts the common understanding of the War Clause—namely, that a simple majority vote of both houses, irrespective of the President's subsequent approval or disapproval, places the nation at war with another sovereign. Thus, rather surprisingly, a dovish President today could stop Congress's formal declaration of war (as McKinley contemplated doing in 1898[301]) if he could find thirty-four senators or 146 representatives to side with him. Congress's affirmative power to declare war is thus no greater than its affirmative power to enact an ordinary statute. Although George Mason likely did not have this particular situation in mind at the Constitutional Convention, this process of bicameralism and presentment embodies his preference "for clogging rather than facilitating war."[302] It is another manifestation of the Framers' handiwork in elevating the transaction costs of reaching political decisions of great moment.[303]

3. *Barriers to Exit: The Peace-Keeping Implications of Congress's Limited Power to End War.* It is commonly accepted that Congress's real war-making power is the negative power to deny the President the authority to start a war that he, but not Congress, would like the country to fight. In Professor Van Alstyne's words, the War Clause "establishes in Congress a more definite power of veto, to arrest what is otherwise an executive power to make war, to declare *against* a war and thereby to

296. *See* Rostow, *supra* note 37, at 855-56.

297. *See* GAILLARD HUNT, THE LIFE OF JAMES MADISON 316-27 (1902).

298. *See* BAILEY, *supra* note 237, at 496; 2 ROBERT MCELROY, GROVER CLEVELAND, THE MAN AND THE STATESMAN 249-50 (1923).

299. *See* BAILEY, *supra* note 237, at 508-10; TRASK, *supra* note 235, at 56.

300. *See* HARLEY NOTTER, THE ORIGINS OF THE FOREIGN POLICY OF WOODROW WILSON 531 (1937).

301. *See* MARGARET LEECH, IN THE DAYS OF MCKINLEY 184-85 (1959).

302. MADISON, *supra* note 38, at 476.

303. There is another (admittedly freakish) manner in which the executive could participate in the legislative decision to declare war: If the Senate were deadlocked in a tie vote, the Vice President, in his role as President of the Senate, would cast the tie-breaking vote. *See* U.S. CONST. art. I, § 3, cl. 4. Recall that the Senate vote on the Iraq Resolution was rather close: 52-47.

check the executive from further pursuit of specific hostilities."[304] But there exists another intriguing implication of presentment in the war context. If it takes the enactment of a statute to initiate war legitimately under the Constitution, what does it take to terminate war?

A "declaration of peace" could perhaps be inferred from Congress's enumerated power to declare war.[305] Blackstone, for example, believed that under English law, "wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace."[306] During the debate on the War Clause, however, the Framers *unanimously* rejected the proposal of Pierce Butler of South Carolina and Elbridge Gerry of Massachusetts "to give the Legislature power of peace, as they were to have that of war."[307] Therefore, the wording in the Constitution is more limited than that in the Articles of Confederation, which gave Congress (at a time, of course, when there was no executive branch) "the sole and exclusive right and power of determining on peace and war."[308] Despite the absence from Article I of the Constitution of an enumerated power to declare peace, Congress has claimed the right to rescind the authorization for war—for example, by the authority of the Necessary and Proper Clause.[309] It did so in 1971, when it repealed the Tonkin Gulf Resolution.[310] It did so again in 1974, when it enacted the War Powers Resolution, which places a sixty-day limit on the President's authority to use military force.[311]

At the Constitutional Convention, Oliver Ellsworth of Connecticut stated: "It should be more easy to get out of war, than into it."[312] This statement is cited by scholars as a rationale to place the power to declare war with Congress rather than the President.[313] In the process, however, these scholars ignore that Ellsworth's premise is, in at least one very important legal respect, demonstrably false: It is more difficult under the

304. Van Alstyne, *supra* note 38, at 5.

305. *See, e.g.*, Ratner, *supra* note 38, at 470 ("Congress may terminate as well as authorize hostilities, *i.e.* declare peace as well as war.").

306. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *250.

307. MADISON, *supra* note 38, at 477. The proposal was to insert "and peace" at the end of the clause "To declare War." Gerry ultimately refused to sign the Constitution. *See id.* at 657-59.

308. ARTICLES OF CONFEDERATION art. IX, § 1.

309. U.S. CONST. art. I, § 8, cl. 18.

310. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055; *see also* Baldwin, *supra* note 143, at 13-14 ("As a declaration of war takes the shape with us of a statute, it would seem that it can be repealed by a statute.").

311. 50 U.S.C. §§ 1541-1548 (1988).

312. 2 FARRAND, *supra* note 176, at 319. Although Ellsworth supported the Constitution, he left the Convention before signing it. 3 *id.* at 476 (citing 2 TIMOTHY PITKIN, POLITICAL AND CIVIL HISTORY OF THE UNITED STATES 262 n.1 (1828)).

313. *See, e.g.*, Ely, *A War Powers Act That Worked*, *supra* note 27, at 1411 ("[A] single individual should not be able to lead the nation precipitously into war and thus risk the lives of all of us.").

Constitution for Congress to get the country out of war than into it. Suppose the President vetoed a congressional declaration of peace (or Congress's repeal of a declaration of war). Thus would emerge the converse of the dovish-President hypothetical presented earlier:[314] The President could continue to prosecute the war if he could muster the votes of either thirty-four Senators or 146 Representatives who agreed with him.[315] In such circumstances, Congress could halt a war through a declaration of peace only by means of a supermajority vote in both houses.[316] Similarly, if Congress refused to appropriate funds for the war, and if the President vetoed all appropriations bills that failed to provide war funding, again Congress could end the war only by the same kind of bicameral supermajority vote.[317] Bicameralism and presentment thus have a rude and belligerent implication that countermands the normative principle that Ellsworth posited during debate on the War Clause in 1787.

Recognizing this outcome, Louis Fisher, a specialist on the separation of powers with the Congressional Research Service, has argued that it "is not a constitutionally acceptable result" for "an executive-initiated war [to] persist so long as the President maintains the support of one-third plus one in one House."[318] On the most elementary level of analysis, Fisher's complaint is a *non sequitur*: The President's strict compliance with the Presentment Clause of the Constitution cannot be said to be outside the bounds of constitutional acceptability in any respect other than it may conflict with the contemporary preferences of individuals who dispute the wisdom of the Framers' decisions. Despite their stated preferences to avoid war and to make the decision to initiate war procedurally rigorous, the Framers obviously did not outlaw the waging of war.[319] At a deeper level of analysis, the curious case of a hawkish President (along with only thirty-four Senators or 146 Representatives) keeping the nation at war illustrates that bicameralism and presentment

314. *See supra* notes 294-300 and accompanying text.

315. *See* Casper, *supra* note 39, at 484-85.

316. *See* Ely, *A War Powers Act That Worked*, *supra* note 27, at 1384. Obviously, if peace were instead procured by treaty, the President, as the nation's negotiator, would have complete agenda control over when he would present the treaty to the Senate for ratification.

317. *See* Ely, *American War in Indochina (Part I)*, *supra* note 27, at 916, 920-21 (discussing President Nixon's threat in 1973 to veto appropriations legislation for the federal government if it contained the original Eagleton Amendment, which would have immediately prohibited funding of combat activities in Laos or Cambodia).

318. Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 763 (1989).

319. Eugene Rostow, for example, disputes with rhetorical flourish the view (which he attributes to the original proponents of the War Powers Resolution) that the Framers "wanted America to remain aloof from the quarrels of a naughty world" and to "wrap a foreign policy of nearly pacifist isolationism in the priestly mantle of constitutional command." Rostow, *supra* note 37, at 841.

function as a barrier to exit from war. The constitutional procedure makes it harder to reverse the decision to enter war. Economists recognize that a barrier to exit from an industry also functions *ex ante* as a barrier to entry into that industry.[320] The same insight regarding "reversible entry" applies to constitutional governance. By raising the expected cost of entering war, this interplay of bicameralism and presentment should serve a peace-keeping function. This implication eludes Fisher, who views this constitutional curiosity instead as the means by which President Nixon sought to prolong a Vietnam War initiated by an earlier President despite Congress's attempts to eliminate funding for the war.[321]

D. *Voluntarily Enhancing Political Accountability Over the Decision to Initiate War Beyond What Bicameralism and Presentment Require*

In the declaration of war against Japan, Congress intentionally followed three procedures that enhanced legislative accountability over the decision to initiate war. First, it bifurcated the decision to wage war from the war effort's cost. Second, the declaration of war was voted by roll call rather than by voice vote. Third, the declaration was not bundled with any other piece of legislation. The Iraq Resolution also had each of these three features.

1. *Declining to Convert the Decision to Wage War into a Continuous Variable Through the Appropriations Process.* By converting basic policy decisions into spending decisions, Congress can use its appropriations power as a kind of vector, in which otherwise discrete decisions have not only direction but magnitude. Congress did not do so, however, when declaring war on Japan. The joint resolution of December 8, 1941 "authorized and directed" the President "to employ" not only "the entire naval and military forces of the United States," but also "the resources of the Government."[322] In other words, one consequence of that declaration of war was that Congress voluntarily relinquished its superior bargaining power over spending so as to further the President's prosecution of the war. The Iraq Resolution is similar: Funding for the war

320. *See, e.g.*, WILLIAM BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 6-7 (1982); William Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 3-4 (1982) (stating that absolute freedom of exit is one way to guarantee freedom of entry into a market).

321. *See* Fisher, *supra* note 318, at 763 (discussing Second Supplemental Appropriations Act, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973); Continuing Appropriations for Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973)).

322. S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941).

was to be addressed in a supplemental appropriations bill that Congress began to consider a month after Operation Desert Storm began.[323]

The declaration of war against Japan suggests that whether the text of the Constitution speaks to the issue or not, Congress should not convert every major issue of public policy, particularly war-making, into a decision over the expenditure of public monies. Admittedly, this rule may be better characterized as a principle of constitutional goveruance rather than constitutional law.

2. *Precluding Anonymity by Voting on War by Roll Call.* The declaration of war on Japan embodied a second voluntary elevation of formality by Congress—a formal roll-call vote, which, as a general rule, the Constitution does not require. At most, it provides that twenty percent of a quorum may require that a roll call vote be taken on any subject.[324] And, of course, each house "may determine Rules of its Proceedings."[325] Although nothing in the Constitution therefore required such formality, the joint resolution declaring war against Japan was passed in each house by a roll-call vote.[326] Those members of Congress absent from Washington on December 8, 1941 took pains to clarify subsequently in the *Congressional Record* that they would have voted "yea" had they been present.[327]

Ascribing so much significance to roll-call votes might strike some as obsessive. Yet, Judge Stephen Breyer has identified the avoidance of roll-call votes to be one of the political benefits to members of Congress from the supposedly defunct legislative veto.[328] Viewed in these terms, the roll-call vote for a declaration of war against Japan was thus another example of Congress raising the accountability of its actions. Congress

323. *See* Joe McQueen, *Bush Asks Congress for $15 Billion to Pay for War, Says Predicting Cost Is Difficult*, WALL ST. J., Feb. 25, 1991, at B6. Among Congress's formal declarations of war, however, there is one exception to this blank-check approach to war funding. The declaration of war on Mexico on May 13, 1846 was bundled with an appropriation of only $10 million to the prosecution of the war, and permitted the President to call no more than 50,000 volunteers into service for tours of duty not to exceed 12 months. *See* Act of May 13, 1846, ch. 16, § 1, 9 Stat. 9. As I explain in this Section, the declaration of war on Mexico was aberrant in other respects of legislative process.

324. U.S. CONST. art. I, § 5, cl. 3. The only occasion in which a roll-call vote is constitutionally required is to override a presidential veto. *Id.* § 7, cl. 2.

325. *Id.* § 7, cl. 2.

326. Only one member of Congress voted "nay"—Representative Rankin of Montana, who unsuccessfully moved to delay the House vote. *See* 87 CONG. REC. 9520 (1941).

327. *See id.* at 9505-06.

328. *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 794 (1984). The Senate's vote in 1898 for a declaration of war against Spain was conducted behind closed doors. The *Congressional Record* simply reports that the bill passed unanimously. *See* 31 CONG. REC. 4244 (1898).

followed this example on January 12, 1991, when approving the Iraq Resolution.

3. *Declining to Convert the Decision to Wage War into a Bundled Decision*. Congress contributed in a third way to political accountability when it declined to channel the decision to initiate war against Japan to a legislative process that permitted logrolling, as in the case with the annual enactment of appropriations bills. Of course, there are other possible explanations for the absence of logrolling that relate to the declaration of war on Japan. Perhaps the urgent circumstances in December 1941 did not permit legislative bargains to be struck before a declaration of war was necessary. Moreover, it is possible, given that only one "nay" was cast in the vote for war on December 8, 1941, that the preferences among members of Congress were almost uniformly in favor of taking the nation to war, notwithstanding the anti-war sentiment that was prominent before Pearl Harbor. Thus, there might have been no divergence of opinion necessary to sustain any legislative bargaining in which one faction's support for a declaration for war would be the *quid pro quo* for another faction's support on another issue.[329] But not all wars engender the same unanimity of support as did the declaration of war on Japan. The 52-47 vote on the Iraq Resolution in the Senate was not exceptional in reflecting ambivalence toward going to war. The declarations of war on England in 1812 and on Spain in 1898 were highly contentious.[330]

The prospect of logrolling producing a declaration of war where one would not have been issued in the absence of such legislative bundling is obviously greatest when support for and opposition to war are nearly evenly divided, and when time permits the requisite dickering over the items to be bundled together. In light of the ambivalence in the Senate over going to war against Iraq, and in light of the relative luxury of time that Congress had to debate the Iraq crisis, one could imagine, for example, that a declaration of war on Iraq would have been tacked onto a newly introduced version of the Civil Rights Act of 1990, which President Bush had vetoed in the fall of 1990.[331] Suppose the bundled bill passed Congress and was signed into law, but the Persian Gulf War became for the United States a disastrous reprise of the Vietnam War. Those who had voted for the bill subsequently could claim that they

329. *See* JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 131-45 (1962).

330. *See, e.g.*, 24 ANNALS OF CONG. 1489-92 (1812) (presenting petitions and addresses opposing war with Great Britain); *id.* at 1510 (same); LODGE, *supra* note 237, at 31-44.

331. *See* Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

voted for the declaration of war only because it was the *quid pro quo* to enact what they considered to be more important civil rights legislation. Bundling thus would permit deniability.

This concern is not so academic as might initially appear. An episode of bundling actually occurred in the declaration of war against Mexico in 1846, although not on the scale that I have posited here. The declaration of war was tacked on an existing bill, reported from the House Committee on Military Affairs nearly four months earlier, that authorized the President to accept the military service of volunteers.[332] The opposite scenario occurred during the Vietnam War: The repeal of the Tonkin Gulf Resolution in 1971 was one of thirteen sections in a bill that dealt with subjects ranging from coastal fishing rights to chemical weapons on Okinawa.[333]

To be sure, the argument against bundling a declaration of war with other legislation, like the expenditure of public monies to control the prosecution of war, is more a rationale of constitutional governance than constitutional law. The Constitution, of course, does not contain any general provision that prohibits the bundling of legislation. Thomas A. Smith and I have argued, however, that a limiting principle on legislative bundling might reasonably be inferred so as to prevent the President's veto power from being vitiated by Congress.[334] Perhaps this and other arguments could be offered to support the constitutional view that the decision to make war on another nation is one that the Framers intended, because of its gravity, to be made by Congress on its own merits, unadulterated by logrolling. With the exception of the declaration of war against Mexico, Congress has made such constitutional conjecture unnecessary, for every other declaration of war from 1812 to 1942 has been voted on its own merits, independent of irrelevant legislation.[335] Even the declarations of war against Germany and Italy in 1941, although voted on the same day, were styled as separate resolutions.[336]

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332. *See* 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 3368, at 289 (1907).

333. *See* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055. Similarly, when Congress sought to invoke the War Powers Resolution in response to the American invasion of Grenada in 1983, the Senate's resolution to that effect was bundled with legislation that raised the federal debt ceiling. *See* Carter, *supra* note 38, at 106 n.27.

334. *See* Sidak & Smith, *Four Faces of the Item Veto*, *supra* note 42, at 449-52, 466-79.

335. *See* 24 ANNALS OF CONG. 1679-83 (1812) (United Kingdom); 31 CONG. REC. 4244 (1898) (Spain); 55 CONG. REC. 261, 412-13 (1917) (Germany); 56 CONG. REC. 67, 99-100 (1917) (Austro-Hungary); 87 CONG. REC. 9505-06, 9536-37 (1941) (Japan); *id.* at 9652-53, 9665-66 (Germany); *id.* at 9653, 9666-67 (Italy); 88 CONG. REC. 4816-17, 4854 (1942) (Bulgaria); *id.* at 4817-18, 4855 (Hungary); *id.* at 4818, 4855-56 (Rumania).

336. *See supra* note 242.

Thus, to the extent that custom since 1789 informs constitutional interpretation,[337] Congress's predominant custom since 1812 has been that a declaration of war shall not be tacked to legislation that addresses other subjects. This custom represents a voluntary adherence to formality in excess of what the Constitution explicitly requires. It is a custom that Congress continued to follow in 1991 when enacting the Iraq Resolution.

E. *Summary and Implications: Credible Threats and the Public and Private Orderings of War*

The declaration of war against Japan challenges a number of familiar notions, evident in the discussion of the Iraq crisis, of what "declaring war" entails. A declaration of war is legislation. Like other legislation, it is subject to bicameralism *and* presentment. Thus, contrary to the innumerable claims that Congress alone can decide whether to take the nation to war, if the President seeks war, he may actively participate in the legislative process as a recommender of war. Indeed, he *must* actively participate as a signatory to its declaration unless a supermajority in each house of Congress favors war. Although, as the Supreme Court emphasized in *INS v. Chadha,*[338] bicameralism and presentment promote greater political accountability,[339] when declaring war, Congress has not historically limited itself to these political formalities specified in the Constitution. In recognition of the gravity of its undertaking, Congress has voluntarily imposed on the process by which war is declared a custom of greater formality than is explicitly required by the text of the Constitution.

The Iraq Resolution does not differ from the declaration of war on Japan with respect to most of these formalities, whether they be textual or customary. In what salient respect, if any, can one therefore say that the Iraq Resolution differs from a formal declaration of war?

Professor Carter states that a declaration of war, as it was understood at the time of the Framers, "had little practical significance in domestic law."[340] Consider treason. Whether an American citizen's assistance to a foreign nation constitutes treason depends on whether the

337. *See, e.g.*, Pocket Veto Case, 279 U.S. 655, 688-90 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this sort.").

338. 462 U.S. 919 (1983).

339. *See id.* at 951.

340. Carter, *supra* note 12, at C1.

United States is at war with that nation.[341] Yet in the Quasi-War with France, acts were considered treasonous despite the absence of a formal declaration of war.[342] In this respect it might be concluded, as Carter asserts, that a declaration of war does not affect domestic law.

The experience of the twentieth century, however, suggests the contrary. Congress's reluctance to issue a formal declaration of war since World War II reflects a domestic concern over the aggregation of power within the executive branch, and perhaps also within the federal government (although there is far less, if any, reason to suppose that Congress would oppose the growth of the latter). Put differently, a declaration of war is, one would hope, a credible threat.[343] In his book, *The Strategy of Conflict,* Professor Thomas Schelling observed that a credible strategy of any sort is predicated "on the paradox that the power to constrain an adversary may depend on the power to bind oneself."[344] In 1941, Congress essentially told Japan that the President was empowered to prosecute *successfully* the war, using whatever public or private resources were necessary. Professor Rostow has similarly argued that "[t]he war power, the Supreme Court has remarked, is the power to wage war successfully."[345] But, resorting to the expansive reasoning of *McCulloch v. Maryland*,[346] Rostow too quickly dismisses the proposition that "Congressional support for the use of force by the President can be given only through a document labelled a 'Declaration of War.' "[347] To the contrary, there is an appealing rationale for why Congress's support for the use of force should be recorded in a formal declaration of war: A credible threat of the sort found in the declaration of war on Japan represents to America's enemy as well as to its own people that the United States is willing to subordinate to the war effort all preferences for other public goods. One even finds some hint of this reasoning in the writings of Blackstone (with whom the Framers were familiar) when he wrote:

> [T]he reason . . . why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is [a] matter rather of magnanimity than right) but that it may be certainly

341. *See, e.g.*, A Proclamation (Apr. 14, 1917), *reprinted in* 16 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8247 (statement by President Wilson warning of "the penalties . . . for any failure to bear true allegiance to the United States").

342. Treason, 1 Op. Att'y Gen. 84 (1798).

343. *See* OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 167 (1985) (explaining credible threats).

344. THOMAS SCHELLING, THE STRATEGY OF CONFLICT 22 (1960).

345. Rostow, *supra* note 37, at 892; *see also* Hirabayashi v. United States, 320 U.S. 81, 93 (1943); Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 262 (1929).

346. 17 U.S. (4 Wheat.) 316, 415-16 (1819), *quoted in* Rostow, *supra* note 37, at 891.

347. Rostow, *supra* note 37, at 886.

> clear that the war is not undertaken by private persons, but the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society.[348]

To Blackstone, the purpose of a declaration of war was not ceremonial, but rather "to make a war completely effectual."[349] A declaration of war is, relative to the fine tuning of appropriations bills or the periodic congressional review of hostilities under the War Powers Resolution, difficult to reverse. And the greater the difficulty for a nation to gracefully extricate itself from a "war," the greater the incentive for that nation not to enter it—and the stronger the message to its enemy when it declares its intention to resort to war.

It has been clear since 1939—certainly in Europe, Japan, and the Soviet Union—that "total war" not only entails the mobilization of a nation's entire civilian economy, but also threatens to destroy all lives and property. Historian Paul Johnson has attributed the growth of the state (and, in his view, the concomitant decline in individual freedom) in the twentieth century to a ratchet effect accompanying such public mobilization during periods of war.[350] Perhaps one reason that the threat embodied in the declaration of war on Japan was credible was the accompanying willingness to suspend limited constitutional government in two respects: expanding the powers of the state by officially blurring the boundaries between the public and private sectors, and by expanding the powers of the President relative to the two other branches. In his acceptance speech at the Democratic Convention seventeen months before the attack on Pearl Harbor, President Roosevelt warned of "successful armed aggression, aimed at the form of Government, the kind of society that we in the United States have chosen and established for ourselves," and he stated:

> Today all private plans, all private lives, have been in a sense repealed by an overriding public danger. In the face of that public danger all those who can be of service to the Republic have no choice but to offer themselves for service in those capacities for which they may be fitted.[351]

On December 8, 1941, Congress echoed this rather collectivist message. Congress must be understood to have authorized the President

348. 1 BLACKSTONE, *supra* note 285, at *249-50.

349. *Id.* at *250.

350. *See* PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES (1983); *see also* MICHAEL OAKESHOTT, ON HUMAN CONDUCT 272-74 (1975). *See generally* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

351. Acceptance Speech at Democratic Convention (July 19, 1940), *reprinted in* 9 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1940, at 296-97 (Samuel I. Rosenman ed., 1950).

to use any *private* property as well as public property to win the war, for its joint resolution concluded: "[T]o bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."[352] This statement followed a clause pledging to the President "the resources of the *Government*."[353] Given the terseness of the declaration of war (only three operative clauses consisting of a total of ninety words), the possibility of redundancy in draftsmanship, either intentional or unintentional, is unlikely. No similar authorization can be found in the Iraq Resolution. Further, President Bush's domestic actions taken pursuant to his declaration of a national emergency on August 2, 1990 were considerably more modest than those taken by President Roosevelt during World War II.[354]

Perhaps it is this concern over the curtailment of individual liberty and economic freedom that motivates the War Powers Resolution and the notion that the United States can successfully wage limited undeclared wars. The sixty-day time limit of the War Powers Resolution is long enough to engender patriotism at home, but short enough to ensure that civilians will not face domestic sacrifices like the rationing and censorship during World War II, much less any curtailment of liberty approaching the humiliating internment of Japanese-Americans.[355]

However, when the reluctance to declare war is coupled with an announced preference to wage only wars whose duration can be limited to the President's sixty-day "free pass" under the War Powers Resolution, and whose magnitude can be finely calibrated by appropriations legislation, the result can be the erosion of the credibility of America's threat to use force of sufficient duration to protect or advance its foreign policy interests. In such a situation, we appear unwilling to prosecute a war to its successful conclusion should the job take more than sixty days. John Hart Ely dismisses the problems associated with this appearance of irresolution as the inevitable implication of our Constitution having imposed limits on the President's war-making power.[356] Moreover, he evidently considers the harm to American foreign policy and national security of this appearance to be so empirically insignificant that he would reform the legal process for American war-making not by insisting

352. S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795.

353. *Id.* (emphasis added).

354. *See* Letter to Congressional Leaders Reporting on the National Emergency With Respect to Iraq, 27 WEEKLY COMP. PRES. DOC. 158 (Feb. 11, 1991).

355. The major domestic inconvenience occasioned by the Persian Gulf War appears to have been the suspension of curbside check-in at airports. *See* Steven Bates, *Curbside Check-in Is Coming Back, Other Gulf War Security Measures Remain In Effect at Airports*, WASH. POST., Mar. 30, 1991, at A5.

356. *See* Ely, *A War Powers Act That Worked*, *supra* note 27, at 1384.

that the President receive in advance a formal declaration of war, but instead by shortening the free pass under the War Powers Resolution to thirty days:

> It is true that if the enemy knows the deal—that if the war is not approved by Congress within 30 days the troops will have to be withdrawn—they may be encouraged to "hold out" for that period. However, in terms of carnage, 30 days of "holding out" is preferable to 60 or 90. And to the extent that the opponents of the War Powers Resolution would use the "holding out" phenomenon to argue against *any* deadline, there is plainly a sense in which they are right: if we don't let the President fight unauthorized wars for as long as he wants, that does indeed reduce his opportunity to pursue them to total victory. However, this attitude argues not simply against establishing a clock, but against enforcing the Constitution generally: an inevitable by-product of any sort of constitutional requirement of congressional approval is that the enemy also will know that approval is required. The only way around this is to make the President a dictator, but that wasn't, and shouldn't be, the idea.[357]

Ely is correct that nobody wants a constitutional dictatorship. But he is wrong to argue that congressional approval in war-making also requires the kind of "clock" that the War Powers Resolution imposes on the President's use of military force. The alternative that both embodies congressional approval and avoids the strategic credibility problems inherent in the time limit of the War Powers Resolution is the broad, and temporally unbounded, congressional delegation of war-making authority found in the formal declarations of war that Congress issued in World Wars I and II. To be sure, Ely elsewhere argues: "Unless Congress has unequivocally authorized a war at the outset, it is a good deal more likely to undercut the effort later, leaving a situation that satisfies neither the allies we induced to rely on us, our troops who fought and sometimes died, nor anyone else except, conceivably, the enemy."[358] Yet Ely fails to heed his own advice as it pertains to the temporal constraints of the War Powers Resolution. He fails to consider seriously that the foreign policy interests of the United States—and ultimately its ability to deter a substantial act of aggression by a major foreign power—would be compromised if the President were denied the ability to make a credible threat to use military force sufficient to prosecute a conflict to its successful conclusion, even if the task at hand were likely to take more than thirty, sixty, or ninety days.

The interplay of the War Powers Resolution and the disinclination to declare war also makes the military prosecution of the war by the Commander in Chief less flexible. Although "flexibility" in the process

357. *Id.* at 1399-1400.

358. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 923.

by which the United States decides to initiate war on another nation invites an abdication of political accountability and moral responsibility because it trivializes war, it is nonetheless absolutely necessary for the protection of American lives to permit the President flexibility in the command of military forces once hostilities have commenced—regardless of the process by which the decision was made. Despite this need for flexibility in the execution of war, the time limit of the War Powers Resolution skews the incentives of American military strategists and tacticians toward the massive use of force for a relatively short period of time. An ironic implication, borne out by the Persian Gulf War, thus presents itself to those who might have hoped that the War Powers Resolution would produce a more pacifist or isolationist American foreign policy: The proclivity to rely on the War Powers Resolution rather than a formal declaration of war creates an incentive—apart from whatever incentives might exist for purely military reasons—for the United States to undertake extremely violent engagements that compress the ferocity of war into a sixty-day period. If the President is not steered toward complete pacifism, he is steered toward extreme violence. All things being equal, the reluctance to grant the President the temporally unbounded delegation of authority found in the declaration of war on Japan provides less opportunity for the United States to explore a middle course of military action that might claim fewer lives.

IV. WAGING WAR FROM NEW HAVEN

Thus far, I have examined the declaration of war on Japan in 1941 and the Iraq Resolution of 1991 from the perspective of a model of the separation of powers intended to enhance political accountability. My conclusions about the desirability of constitutional formality in the Iraq crisis differ markedly from those of the Koh Signatories and Professor Carter, whose recommendations I now more closely scrutinize.

The Koh Signatories' recommendation of injunctive relief is neither feasible, politically accountable, nor conducive to an effective American foreign policy for which the credible threat to use military force is an important source of security. I believe this is the case even though I agree with the premise of the Koh Signatories that President Bush needed to secure a formal declaration of war before unleashing offensive military force against Iraq.

Professor Carter is also misguided to the extent that he proposed that Congress should have tried to regulate a Persian Gulf war through the appropriations power.[359] A declaration of war demands greater

359. *See* Carter, *supra* note 12.

political accountability than does the passage of the annual Department of Defense appropriations bill. This heightened accountability was warranted in the case of the Persian Gulf War, given that the effect of Congress's decision was to authorize legally the killing of a foreign people and the devastation of their nation. If the American people are ambivalent about waging war (which public opinion polls strongly suggested that they were not with respect to Iraq, either on January 12 or when President Bush began prosecuting the Persian Gulf War[360]), then it is better for Congress to acknowledge that ambivalence up front and decline to declare war than to try to accommodate popular ambivalence by making half-hearted appropriations of money to fight a half-hearted war. Whether one considers this exercise in candor to be required by principles of constitutional law or simply by common sense or human decency, Professor Carter's reliance on the appropriations power would obscure it.

A. *Professor Carter: Waging War Through the Appropriations Power*

Professor Carter observes that in America's "engagement" of Iraq, "as in most of our nation's military history, the true rein on executive power lies not in the declaration clause but in Congress's control of the power of the purse."[361] A related argument (although not one that Carter explicitly makes) can be made regarding Congress's power to refuse appropriations for any nonmilitary purpose pursuant to Article I, Section 9, Clause 7, for one can readily conceive of a congressional threat to defund one of the President's favorite domestic programs unless he "de-escalated" a war against Iraq.[362]

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360. *See, e.g., American Opinion On The Gulf*, AM. ENTERPRISE, Mar.-Apr. 1991, at 74-81 (between January 16 and February 24, never less than 75% of the population approved of the United States having gone to war with Iraq); *The Bush Barometer*, *id.* at 91-92 (George Bush's approval rating at beginning of air war was 65%; after beginning of ground war, rating exceeded 80%).

361. Carter, *supra* note 12, at C1. I understand Carter to mean Congress's power to refuse to appropriate funds "To raise and support Armies" and "To provide and maintain a Navy" pursuant to U.S. CONST. art. I, § 8, cls. 12 & 13. *See* Carter, *supra* note 38, at 118 (Congress's powers to restrain presidential war-making includes "the congressional power over the military budget").

362. Congress's power to appropriate funds for an army and a navy is an explicit grant of power to the legislature under Section 8 of Article I. On the other hand, the Appropriations Clause is found in Section 9 of Article I, which expressly limits the enumerated powers of Congress. *See* Sidak, *The President's Power of the Purse*, *supra* note 42, at 1166. To my knowledge, the differing scope of Congress's "power of the purse" in military and nonmilitary matters has escaped scholarly analysis. Because of the textual difference between military and nonmilitary appropriations, some of my conclusions regarding the impropriety of limiting presidential action through the Appropriations Clause in Section 9 of Article I, *see id.*, might not apply to military appropriations. I have not undertaken a detailed study of what the differences would be, since such differences are not critical to my thesis in this Article that the War Clause provides Congress a more politically accountable means of regulating war-making.

I do not dispute the factual accuracy of Carter's proposition about the importance of the various appropriations powers. It is quite another matter, however, whether the Framers envisioned the separation of powers to work so informally in the war-making context. The informality that Carter's recommendation comprehends would impair the effective execution of foreign policy and thus contravene a major objective of the Constitution—the achievement of collective security.

1. *The Dichotomous Choice of War.* Professor Carter's advice that Congress regulate a war against Iraq through the appropriations power is compatible with the Congress's actions at the beginning of the Mexican War, but not in the declarations that brought America into war in 1898, 1917, and 1941. Carter notes that a declaration of war "is an either/or decision—one is in a state of war or one is not."[363] Although I agree, I do not share Carter's evident preference for the continuous policy instrument of funding and defunding a war, rather than the discrete policy instrument of declaring a state of war and subsequently rescinding it (whether by an act of Congress or by a treaty subject simply to Senate ratification). Regulating war-making through the appropriations powers permits the decision to initiate war to be made on a sliding scale and to be bundled with (and hence obscured by and made conditional on) unrelated political issues.

Carter's proposal is essentially the *ex ante* version of Alexander Bickel's recommended means in 1970 to end the Vietnam War—namely, using appropriations riders to forbid the expenditure of public funds to prosecute the war.[364] This view is popular today. John Hart Ely, for example, believes that "virtually everyone, including apologists for broad presidential power in this area, agrees that Congress has constitutional authority to end a war by terminating its funding."[365] He is evidently correct that the view is widespread, for even President Bush's lawyers in the Justice Department argued in *Dellums* that "the ultimate check" on the President's "right and power to deploy our military forces . . . [is] with the Congress itself which, under Article I, Section 8, has the power of the purse in raising and supporting Armies and providing a Navy."[366] Nevertheless, this evident unanimity of opinion is misguided.

363. Carter, *supra* note 12, at C4.

364. *See* Bickel, *supra* note 9, at 15,411-12; *see also* KOH, *supra* note 34, at 52-53.

365. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1401.

366. Motion to Dismiss, *supra* note 54, at 20; *see also* Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) (discussing Congress's "many options to check the President," including exercising "its appropriations power to prevent further offensive and/or defensive military action in the Persian Gulf").

Professor Carter implies that, when entering a war, Congress can reasonably expect to be able to regulate the war's intensity through the magnitude of appropriations for that cause.[367] This view is not only wishful thinking, but also contrary to the congressional sentiment in the declarations of war in 1917 and 1941, which used the formality of the declaration of war to issue a credible threat. Carter's proposal resembles the approach of the numerous Boland Amendments that greatly varied the level of funding for the Nicaraguan *contras* between 1983 and 1989.[368] But this strategy surely sent conflicting signals about the foreign policy interests and commitments of the United States. As John Hart Ely shows, a more poignant example of this approach gone awry is the incredibly convoluted series of appropriations restrictions regarding the American bombing of Cambodia after our ground forces left that country in 1970.[369] Such continued reliance on the appropriations power impairs political accountability in war-making, including the accountability of Congress and the President for the moral premises of their political judgments regarding war. This outcome is ironic. In his earlier analysis of the War Powers Resolution, Carter asserts that "the existence of other means[ ] clearly indicated in the Constitution[ ] by which Congress can accomplish its ends ought to be sufficient to strike down a fresh check that Congress develops."[370]

To be sure, Carter's proposal to wage war through the appropriations power would offer "flexibility." But it would trivialize the debate over whether the United States should be at war at all, presuming that this antecedent question can be finessed by leapfrogging to the subsequent question of whether we want to fund a no-frills war or a gold-plated war. This view misses the distinction between a declaration of war and congressional authorization for the President to spend public funds to prosecute an undeclared war. In evident recognition that these two separate legislative acts were incorrectly regarded in Congress as having equal constitutional legitimacy, the chairman of the House Foreign Affairs Committee, expressing concern over the escalating Iraq crisis, said, "We do not want to leave [the decision to go to war] simply to the back door of the appropriators who say they will either finance or will not finance the action of the President."[371]

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367. *See* Carter, *supra* note 12.

368. *See Legislation Relating to Nicaragua*, 26 I.L.M. 433, 440 (1987). For a summary of the fluctuation in the amount of, and conditions on, financial support to the *contras* under the various Boland Amendments, see Sidak, *The President's Power of the Purse*, *supra* note 42, at 1225 n.279.

369. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 908-22.

370. Carter, *supra* note 38, at 118.

371. *Hearings on the Crisis in the Persian Gulf*, *supra* note 44, at 23. John Hart Ely also misses this point in his analysis of the appropriations legislation that funded (and eventually eliminated

Professor Carter seems to view the separation of powers solely as an anti-monopoly principle in the Constitution, and not also as a principle aimed at controlling agency costs. In his study of the War Powers Resolution, Carter celebrates that the Resolution "guarantees that unless the Congress of the United States gives its approval, all of [the] awesome power [of the American military] will not be concentrated in the hands of a single individual."[372] He also brings this perspective to bear on the Persian Gulf War—thus overlooking a point of great practical significance: By issuing a declaration of war rather than merely appropriating money for an undeclared war, Congress obligates itself to be far more specific in stating the nation's foreign policy objectives and the reasoning by which they were derived, and far more candid in confronting the moral consequences of using military force to achieve those objectives. Without a formal declaration of war, it is unclear to the American people whether they are at war with Iraq "to end this aggression against Kuwait"[373] or to protect American jobs.[374] Such ambiguity in turn erodes the legitimacy and obscures the purpose of using military force.[375]

2. *The Decision to Appropriate Money Does Not Render Unlawful Actions Lawful.* Professor Carter overlooks that the appropriation of funds by itself does not legitimate the invasion of a foreign nation by American forces without a declaration of war. Consider a hypothetical that involves a different constitutional issue. If Congress appropriated funds for the President to order the Federal Bureau of Investigation to

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funding for) the Vietnam War. He maintains that, "assuming sufficient notice of what was going on, appropriations may in some ways constitute unusual evidence of approval, in that typically Congress acts twice—once to authorize the expenditure and again to appropriate the money." Ely, *American War in Indochina (Part I)*, *supra* note 27, at 898.

372. Carter, *supra* note 38, at 134.

373. Remarks Following Discussions With Amir Jabir al-Ahmad al-Jabir Al Sabah of Kuwait, 26 WEEKLY COMP. PRES. DOC. 1476 (Sept. 28, 1990); *see also* The President's News Conference in Orlando, Fla., 26 WEEKLY COMP. PRES. DOC. 1719 (Nov. 1, 1990) ("Iraq's brutality against innocent civilians will not be permitted to stand. And Saddam Hussein's violations of international law will not stand. His aggression against Kuwait will not stand.").

374. *See* Thomas L. Friedman, *U.S. Jobs at Stake in Gulf, Baker Says*, N.Y. TIMES, Nov. 14, 1990, at A14 (paraphrasing Secretary of State James Baker).

375. General Norman Schwarzkopf, the Supreme Commander of American forces in the Persian Gulf War, observed: "When you commit military forces, . . . [y]ou ought to know what you want that force to do . . . . But when I hearken back to Vietnam, I have never been able to find anywhere where we have been able to clearly define in precise terms what the ultimate objectives of our military were." C.D.B. Bryan, *Operation Desert Norm*, NEW REPUBLIC, Mar. 11, 1991, at 20, 26. Nonetheless, John Hart Ely argues: "The idea that pulling the financial plug on a war represents a failure 'to support our boys in the field' doesn't really make sense, because an order to withdraw can always be accompanied by ample provision to protect the boys as the withdrawal is proceeding." Ely, *A War Powers Act That Worked*, *supra* note 27, at 1399. I suggest that Ely's willingness to end a war by eliminating funding for it would exacerbate the problem that Schwarzkopf observed in Vietnam.

wiretap all telephones in the United States, this grant of spending authority plainly would not trump the Fourth Amendment and by itself make such wiretapping lawful.

If the President cannot use offensive military force to initiate a "war" without a formal declaration, Congress cannot purport to make the President's unlawful prosecution of that war lawful simply by authorizing him to draw funds from the Treasury. Congressional approval is not synonymous with conformity to the rule of law under the Constitution. One might argue that, under the War Clause, Congress's power to authorize the greater encompasses the power to authorize the lesser. But this reasoning rests on two fallacious premises. The first is that war is a continuous variable rather than a discrete one. Legal gradations of war are specious and impair both political accountability and the moral visibility of collective action. When American bombs kill Iraqis in Baghdad, it would insult one's intelligence to be told by the U.S. Government that these "hostilities" are limited in scope because Congress has appropriated only X billion dollars for this "engagement," and these funds run out at the end of the current fiscal year.

The second fallacy of this notion of lesser-included war-making powers is that it presumes that when Congress appropriates money it does so only for lawful purposes. This argument is akin to saying that the King cannot violate the law because he is the sovereign. The argument need not detain us. The appropriations power does not authorize Congress to trump constitutional guarantees. The cases are numerous in which unconstitutional laws enacted in the form of appropriations restrictions were subsequently invalidated.[376]

3. *The Decision Not to Appropriate Money to Continue Prosecuting a Validly Declared War Is Not Equivalent to Repealing a Declaration of War.* Professor Carter also overlooks a problem regarding the constitutionality of using appropriations prohibitions to end a war. Perhaps Congress has "repealed" a valid declaration of war for one year at a time when it refuses to appropriate funds for the President to execute faith-

376. *E.g.*, United States v. Lovett, 328 U.S. 303, 313 (1946) (holding that the Urgent Deficiency Appropriation Act of 1943 violated Article I, Section 3, Clause 9 of the Constitution because its purpose was not merely to cut off certain employees' compensation, but also to bar them permanently from government service); Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989) (holding that congressional amendment that made expenditure of funds appropriated for District of Columbia contingent on District of Columbia council's enactment of certain legislation violated council members' free speech rights); News Am. Publishing Corp. v. FCC, 844 F.2d 800, 815 (D.C. Cir. 1988) (holding that provision in appropriations legislation precluding use of funds to extend time period of current grants of temporary waivers of newspaper-broadcast cross-ownership rules violated First and Fifth Amendments).

fully that declaration. This argument must fail, however, for two reasons. First, repeals by implication are strongly disfavored, and Congress will not be deemed to have repealed a statute unless its intent to do so is unmistakable.[377] Second, to regard Congress's refusal to fund the prosecution of a validly declared war as equivalent to a repeal of that declaration of war ignores the procedure of presentment that is required to repeal or amend a statute of any sort. As explained in Part III(C), a declaration of war requires presentment to and approval by the President, or supermajority approval in each house of Congress if the President vetoes the declaration.[378] The same process is required to amend or repeal a declaration of war.

The purported repeal or modification of a declaration of war through a denial of appropriations avoids presentment. Without appropriations, the President cannot execute a preexisting law,[379] unless he can show that he has an overriding and unrepealed legal or constitutional duty or prerogative to spend public money.[380] And, unlike a repeal or amendment of the declaration of war, the legislative decision not to appropriate money for the execution of the war can be implemented without presentment to the President because no veto power exists over Congress's *failure* to appropriate the money necessary for him to execute that statute.[381] Thus, if Congress could effectively repeal a declaration of war by refusing to appropriate funds, Congress could avoid present-

377. *See, e.g.*, Rodriquez v. United States, 480 U.S. 522, 524 (1987).

378. *See supra* notes 266-321 and accompanying text.

379. *See* Office of Personnel Management v. Richmond, 110 S. Ct. 2465, 2471-73 (1990).

380. *See id.* at 2477 (White, J., concurring):

> [T]he Court does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution . . . or if they encroach on the powers reserved to another Branch of the Federal Government. Although Knote v. United States, 95 U.S. 149, 154 (1877), held that the President's pardon power did not extend to the appropriation of moneys in the treasury without authorization by law for the benefit of pardoned criminals, it did not hold that Congress could impair the President's pardon power by denying him appropriations for pen and paper.

(citation omitted); Walker v. United States Dep't of Hous. & Urban Dev., 912 F.2d 819, 830 (5th Cir. 1990) ("The Constitution confers on Congress the authority under the appropriations clause to withdraw financial support" only "if . . . no *constitutionally protected* interest is implicated by the reduced federal funding."); *see also* Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230, 233 (1955); Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933); Appropriations Limitation for Rules Vetoed by Congress, 4B Op. Off. Legal Counsel 731, 733 (1980).

381. *See* Ely, *American War in Indochina (Part I)*, *supra* note 27, at 920 ("[A] bare majority of both houses of Congress *can* get us out of a war, as indeed they can extricate us from any program requiring ongoing appropriations, by refusing to supply further funds. Such a refusal cannot be vetoed.").

ment—one of the two grounds on which the Supreme Court invalidated the legislative veto in *INS v. Chadha.*[382]

An appropriations rider defunding a war would be styled as part of legislation presented to and signed by the President. However, the President's veto of a bill that contained such a rider would not restore funding for him to perform his duty to prosecute the war pursuant to the declaration. With or without a veto, the President would continue to be disempowered to discharge his duty as Commander in Chief, unless he could show that a preexisting and unrepealed constitutional or legal right authorized him to spend public funds for that purpose. Thus, a denial of appropriations to prosecute a war is not equivalent to repeal of a declaration of war.[383] Instead, it would be an exercise of the appropriations power that would prevent the President from discharging his constitutional duty to execute faithfully the prior declaration of war.

This opportunity—to make the decision to initiate war more reversible by evading presentment in order to terminate it—might explain Congress's modern reluctance to declare war formally, as well as the political appeal of modulating war through appropriations: What is "authorized" solely through appropriations can be terminated by a legislative decision to discontinue funding, a decision that needs neither the President's approval nor a two-thirds vote in both houses of Congress. Thus, if a war is never formally commenced, it need not be formally terminated through the full process of bicameralism and presentment. Although politically expedient, this rationale would flout the reasoning of *Chadha* and *Washington Airports.*

4. *The Struggle Over the Unitary Executive.* The Iran-Contra Affair demonstrated the debilitating effect that squabbling between the President and Congress has over an important component of American foreign policy. That controversy ultimately involved the separation of powers and the wisdom of retaining a unitary executive. It is ironic that the dispute between Congress and the President over policy toward Nicaragua was resolved through a Coasean bargain—the Bipartisan Accord

382. 462 U.S. 919, 958-59 (1983). I owe this insight to E. Edward Bruce, who first suggested this presentment argument to me in the context of statutes more familiar than declarations of war. The argument can be carried further to efforts to evade bicameralism, the other ground for invalidating the legislative veto in *Chadha*: A simple majority in either house of Congress could "repeal" a declaration of war by refusing to approve an appropriations of funds for its execution.

383. This constitutional deficiency has been overlooked by even those commentators who question the use of appropriations riders. *See, e.g.*, Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 472 ("Limitation riders are as much an act of Congress as are authorizations.").

on Central America—which vested in a number of congressional committees a legislative veto over funding to the *contras*.[384]

As I have argued elsewhere, the 1987 *Iran-Contra Report* is most interesting as a matter of constitutional law for its attempt to characterize the President as a dependent of Congress, certainly in foreign affairs if not in all political matters, due to the President's putative dependence on Congress for appropriations of funds.[385] To his credit, Professor Carter acknowledges in his assessment of the Iraq crisis that the separation of power limits Congress's powers to dictate the President's military decisions as Commander in Chief.[386] Yet Carter's interpretation of the interplay between the Appropriations Clause and the separation of powers is not fundamentally different from the view of his Yale colleague, Professor Kate Stith. Professor Stith has articulated and subsequently narrowed the proposition that Congress's power to appropriate money permits it to impose conditions on the President's ability to execute his duties and perform his prerogatives under Article II.[387] An unqualified variant of Stith's theory is embodied in the *Iran-Contra Report*, and it is expressed again (though less rigorously than in Stith's article) in a subsequent article by Louis Fisher, one of the *Report*'s principal draftsmen.[388] The fallacy of this constitutional theory is that it subordinates the unitary executive to the appropriations power and causes the entire scheme of the separation of powers to be trumped by a single clause in Article I that most probably was intended to serve the modest goal of ensuring fiscal accountability.[389]

The gravity of such a result is immediately evident in the President's conduct of foreign affairs and national defense. It was to overcome the ineffectiveness and unaccountability of a plural executive in such matters

384. *See* Bipartisan Accord on Central America (Mar. 24, 1989), *in* 1 PUB. PAPERS 307 (1989).

385. *See* Sidak, *The President's Power of the Purse*, *supra* note 42, at 1168-70 (discussing SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 411-12 (1987)).

386. *See* Carter, *supra* note 12, at C4.

387. *See* Kate Stith, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 644 (1990); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

388. *See* Fisher, *supra* note 318, at 761-65. The same overdrawn reading of the Appropriations Clause is found in GLENNON, *supra* note 39, at 286-95.

389. *See* Sidak, *The President's Power of the Purse*, *supra* note 42. Arguments similar to mine are presented by Deputy Attorney General William Barr and Professor Geoffrey Miller. *See* Stith, *The Appropriations Power and the Necessary and Proper Clause*, *supra* note 387, at 640; *see also* Geoffrey Miller, *The President's Power as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 42 (1988); Robert F. Turner, *The Power of the Purse: Controlling National Security Policy by Conditional Appropriations*, 26 ATLANTIC COMMUNITY Q. 79 (1988).

under the Articles of Confederation that the Framers established a President who, in Hamilton's words, would be instilled with "energy."[390] Hamilton wrote: "Energy in the executive is a leading character . . . of good government. It is essential to the protection of the community against foreign attacks."[391] Hamilton believed that "unity" was the first ingredient of energy in the executive: "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[392]

Experience had taught the Framers that the plural executive embodied in the Confederation Congress was inept in foreign affairs and national security; the Confederation Congress had been unable, for example, to persuade or coerce Great Britain to relinquish its forts along the Great Lakes pursuant to the Treaty of Paris.[393] Two weeks into the Constitutional Convention, Edmund Randolph of Virginia presented his resolution to amend the Articles of Confederation and listed as their first defect "that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority."[394]

Professor Carter, therefore, is correct to recognize and criticize the temptation for Congress to micromanage the President's day-to-day military decisions as Commander in Chief. But it is ironic that he views micromanagement as a problem associated with Congress's power to declare war but not with its appropriations power. In recent years, Congress has routinely sought to micromanage the President's powers over

390. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob Cooke ed., 1961).

391. *Id.*

392. *Id.* at 472.

393. *See* BAILEY, *supra* note 237, at 37-52; 3 JAMES T. FLEXNER, GEORGE WASHINGTON AND THE NEW NATION, 1783-1793, at 73 (1969); FREDERICK W. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973); RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789, at 196 (1987); CHARLES R. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES, 1783-1795, at 49, 141-43, 151-63 (1969); J. LEITCH WRIGHT, JR., BRITAIN AND THE AMERICAN FRONTIER, 1783-1815 (1975); *see also* THE FEDERALIST No. 25, at 158, 158 (Alexander Hamilton) (Jacob Cooke ed., 1961) ("The territories of Britain, Spain and of the Indian nations in our neighbourhood, do not border on particular States; but incircle the Union from Maine to Georgia.").

I disagree with Professor Lofgren's assertion that: "Criticism of the Confederation government for its ability to support federal objectives, both domestic and foreign, had not included the complaint that the Confederation was deficient in its ability to commit the nation to war." Lofgren, *supra* note 35, at 675. Committing the nation to war is not an objective in itself; and if the Confederation government proved to have what historian Thomas Bailey described as "humiliating impotence in foreign affairs," Bailey, *supra* note 237, at 52, it might simply have ruled out the possibility of ever resorting to warfare to vindicate its rights in disputes with other sovereigns.

394. MADISON, *supra* note 38, at 29.

foreign affairs through conditions placed in appropriations legislation.[395] Carter's theory that the appropriations power authorizes Congress to direct the initiation of war on a finely calibrated basis would embody the Jeffersonian penchant for extensive itemization in appropriations bills,[396] and thus it would lack a limiting principle. Ultimately, it would swallow the Commander in Chief Clause, because the authorization to spend funds for offensive military purposes could be minutely defined and budgeted, and be made full of provisos that barred the use of funds for certain activities, even going so far as to address the execution of specific military tactics.

At the heart of Carter's argument about waging war and peace through the Appropriations Clause is the insight that any Coasean bargain can be struck through constitutional informality. Although I agree, I find this insight troubling rather than reassuring for the same reason that the Court emphasized in *Washington Airports*: The separation of powers does not pervade the Constitution so that each branch can defend its turf, but so that individual freedom and collective strength are protected.[397]

B. *The Koh Signatories: In Curious Defense of Ambiguity*

At first inspection, Professor Koh and the other Signatories seem to avoid the problems that weaken not only Professor Carter's analysis, but also the reasoning of *Mitchell v. Laird*[398] regarding the constitutional permissibility of initiating war by any means that Congress and the President find mutually agreeable. The Koh Signatories do so by insisting on the formality of a declaration of war before President Bush could use offensive military force against Iraq. Citing the War Clause, they state: "The Constitution specifies that Congress shall publicly manifest its approval for a determination to make war via a formal declaration of

395. For examples of recent presidential signing statements that objected to such riders, see Statement on Signing the Urgent Assistance for Democracy in Panama Act of 1990, 26 WEEKLY COMP. PRES. DOC. 247 (Feb. 14, 1990); Statement on Signing the Foreign Relations Anthorization Act, Fiscal Years 1990 and 1991, 26 WEEKLY COMP. PRES. DOC. 266 (Feb. 16, 1990); Statement on Signing the Dire Emergency Supplemental Appropriations Bill, 26 WEEKLY COMP. PRES. DOC. 847 (May 25, 1990); Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 26 WEEKLY COMP. PRES. DOC. 1766 (Nov. 5, 1990); Statement on Signing the Department of Defense Appropriations Act, 1991, 26 WEEKLY COMP. PRES. DOC. 1768 (Nov. 5, 1990); Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, 26 WEEKLY COMP. PRES. DOC. 1770 (Nov. 5, 1990).

396. *See* Sidak, *The President's Power of the Purse*, *supra* note 42, at 1180-83.

397. *See* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2309 (1991).

398. 488 F.2d 611 (D.C. Cir. 1973).

war."[399] They insist "that Congress must manifest its genuine approval through formal action, not legislative silence, stray remarks of individual Members, or collateral legislative activity that the President or a court might construe to constitute 'acquiescence' in executive acts."[400]

But the initial suggestion of a distinction between the Koh Signatories and Carter vanishes when the Koh Signatories assert that something less formal than a declaration of war suffices to authorize the President to wage war. Citing the Necessary and Proper Clause (the same underwhelming constitutional hook on which Congress hung the War Powers Resolution in 1974[401]) they state:

> We do not read [the War Clause] as rigidly stipulating the *only* political mechanism whereby Congress may meaningfully manifest its understanding and approval. We do, however, understand the structure and history of the Constitution to require that the President meaningfully consult with Congress and receive its affirmative authorization—not merely present it with *faits accompli*—before engaging in war.[402]

This willingness to settle for a legislative action less formal than a declaration creates a strange self-contradiction in the Koh Signatories' position. They express concern that the President will violate the principle of separation of powers by initiating "war" without legislative authorization. Yet, they are willing to disregard the most explicit formality that the Framers devised to constrain presidential war-making—the declaration of war. Instead, the Koh Signatories would rely on the amorphous rule of "meaningful consultation with and genuine approval by Congress."[403]

It is especially ironic that the Koh Signatories would reach this conclusion when many of them have emphasized in their individual writings the link between formality and accountability. For example, although Professor Van Alstyne has questioned in depth the constitutionality of the Vietnam War,[404] as one of the Koh Signatories he would settle for a congressional expression of approval to initiate war against Iraq that would less resemble a formal declaration of war than it would the Tonkin Gulf Resolution,[405] which authorized (illegitimately, in Van Alstyne's view) the use of military force in Vietnam. With similar irony, Professor Koh has argued that "we must reject notions of either executive or con-

399. Memorandum of Koh Signatories, *supra* note 9, at 6.

400. *Id.* at 7.

401. *See* 50 U.S.C. § 1541(b) (1988); Rostow, *supra* note 37, at 835.

402. Memorandum of Koh Signatories, *supra* note 9, at 6-7; *see also* KOH, *supra* note 34, at 75 (describing Necessary and Proper Clause as having "embellished" Congress's enumerated powers over foreign affairs).

403. Memorandum of Koh Signatories, *supra* note 9, at 3.

404. *See* Van Alstyne, *supra* note 38.

405. H.J. Res. 1145, Pub. L. No. 88-408, 78 Stat. 384 (1964).

gressional supremacy in foreign affairs in favor of more formal institutional procedures for power sharing, designed clearly to define constitutional responsibility and to locate institutional accountability."[406] Most recently, Professor Lori Fisler Damrosch has argued that "[t]he Persian Gulf crisis has shown all too vividly what dangers lie in the persistence of processes that put awesome amounts of force at the disposition of single individuals, and how much is at stake in developing and nurturing structures of deliberation and accountability."[407]

C. *Professor Ely and the War Powers Resolution*

Of the eleven Koh Signatories, none is so paradoxical in his resort to legal formalism on the question of war-making as John Hart Ely. After painstakingly analyzing the numerous pieces of appropriations legislation purporting to authorize the Vietnam War, Ely concludes not simply that "Congress authorized all the phases" of the war, but that "it invariably did so with enormous ambiguity."[408] His solution to eradicate such congressional ambignity, articulated in an earlier article, is to amend the War Powers Resolution.[409] The culmination of Ely's section-by-section recommendations for amending the Resolution is a discussion of section 8(a) of the Resolution, which purports to make the Resolution a superstatute that limits the ways that subsequent Congresses may enact legislation that authorizes the President's use of military force. In relevant part, section 8(a) provides:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred from any provision of law . . . , including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this [War Powers Resolution].[410]

It is unclear how, unless the Constitution is amended in the interim to incorporate the War Powers Resolution, the 93d Congress that passed the Resolution could bind the present 102d Congress and its successors. Nonetheless, Ely asserts that the argument that "an earlier statute does not trump a later one" simply "doesn't work" in this case.[411] He main-

406. KOH, *supra* note 34, at 6-7.

407. Lori F. Damrosch, *Constitutional Control of Military Actions: A Comparative Dimension*, 85 AM. J. INT'L L. 92, 92 (1991).

408. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 922.

409. *See* Ely, *A War Powers Act That Worked*, *supra* note 27.

410. 50 U.S.C. § 1547(a)(1) (1988).

411. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1418.

tains that "the War Powers Resolution gave us . . . a strong rule of construction, telling us how to read the intent of later Congresses."[412]

This proposition is strained as a matter of statutory interpretation, since a subsequent statute modifies, or creates a limited exception to, a prior statute. It is no rule of *statutory* construction to say that a legitimately enacted statute is invalid to the extent that it conflicts with an earlier act of Congress. Indeed, such a rule of interpretation would be profoundly undemocratic. Before we purport to bind the citizens of the United States to immutable legal structures across generations, we insist on a constitutional amendment—in part because the transaction costs of reaching consensus should be high if we are to deny future generations a part of their right to self-governance. Viewed in these terms, Ely proposes to apply a rule of *constitutional* construction to an ordinary statute, thereby invalidating any subsequent statute to the extent that it is inconsistent.

Ely's preferences about the inviolability of the War Powers Resolution reveal a paradoxical disregard for the explicit textual provisions of the Constitution that bear upon the separation of powers. We need, in Ely's view, "to devise a bright-line test of authorization as a way of forcing our representatives in Congress to take a clear stand, up front, on questions of war and peace."[413] In the War Powers Resolution, he believes, we should hear a paternalistic 93d Congress announcing sagely to subsequent generations:

> We know that we have incentives to be ambiguous in this area, and that is very costly in terms of the lives of our young men and the risk to the rest of us. We are therefore hereby providing an unambiguous set of conventions whereby you will be able to tell in the future whether or not we intend the authorization that is constitutionally required. When we do intend such authorization, we will make specific reference to this Resolution. Without such reference, do not construe us as authorizing the war in question.

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412. *Id.* Ely augments this rule of construction with a strong endorsement for congressional standing to enforce the War Powers Resolution:

> Servicemen under orders to report to the war zone would clearly have standing to bring suit. This, however, is clearly inadequate. Expecting such persons to step forward as plaintiffs demands courage and incentive that rarely exist in members of the armed forces (whose success depends on eliminating independent thinking, at least in enlisted personnel).

Id. at 1412. Even if Ely is correct that congressional standing is necessary (which might or might not be true), it would not be for the reasons that he offers. Contrary to Ely's supposition, several of the lawsuits that challenged the constitutionality of the Persian Gulf War were in fact filed by members of the armed forces. *See, e.g.*, Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990). Moreover, given the courage soldiers are called upon to display in battle, I think that a soldier who believed a war to be unconstitutional could summon the courage to sue the President of the United States. Why the two species of courage are mutually exclusive, as Ely's remark might suggest, is unclear.

413. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 924.

> It is true that the "we" in question will not necessarily be the same people who have enacted this Resolution. However, our successors will certainly be well aware of this Resolution and the conventions it establishes, and thus, until the Resolution is repealed, they also should be presumed not to have intended to authorize a war unless they have referred to it.
>
> History, and particularly Vietnam, teaches that what is needed is a "bright line test" for construing our intention. Others might work as well—such as a requirement of a declaration of war, or a special seal on the document alleged to constitute authorization—but this is the one we are choosing.[414]

Despite the Koh Signatories' view that Congress can authorize war through a variety of political mechanisms, Ely himself recommends strict formalism when it comes to the handiwork of the 93d Congress: "If subsequent Congresses don't like this they can repeal the Resolution. Until they do, however, the conventions it establishes should control."[415]

But the formalism by which Ely prefers to keep the nation from lurching hastily into war is not the one that the Framers readily provided—namely, the declaration of war. Elsewhere, Ely calls the declaration of war "the paradigmatic combat authorization."[416] Yet, he does not explain why his preference (and the preferences of the 93d Congress in 1974) for an alternative process to authorize offensive combat is superior in any respect to the Framers' preferences in 1787. Although Ely says that Congress should authorize "hostilities" only by following the War Powers Resolution with exacting literalism, he evidently fails to see that the same literalism applied to the War Clause would produce the kind of bright-line rule that he extols. Indeed, Ely's argument becomes almost farcical when he asserts that, even if the War Powers Resolution did not exist, "a sort of 'clear statement doctrine' requiring unusual explicitness in congressional combat authorizations,"[417] which Ely believes section 8(a) of the Resolution exemplifies, "might properly be inferred

414. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1418-19.

415. *Id.* at 1419. Ely would do well to consult what Jefferson wrote in the Statute of Virginia for Religious Freedom regarding the binding effect of that law, surely no less a legislative milestone than the War Powers Resolution: "[W]e well know this Assembly, elected by the people for the ordinary purposes of legislation only, ha[s] no power to restrain the acts of succeeding Assemblies constituted with the powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law . . . ." An Act for Establishing Religious Freedom [1779], passed in the Assembly of Virginia in the Beginning of the Year 1786, *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 311, 313 (Adrienne Koch & William Peden eds., 1944). Jefferson drafted the Statute to state that it obligated future legislatures only by the authority of "natural right," which does not seem a particularly plausible rationale for Ely's preferred authority of the 93d Congress to bind future Congresses.

416. Ely, *American War in Indochina (Part I)*, *supra* note 27, at 895.

417. *Id.* at 926.

from the requirements of the Constitution."[418] Perhaps it is obsessively literal to attribute legal significance to Congress expressly saying: "A state of war is hereby declared against Iraq." But if so, then Ely's theory of the inviolability of the War Powers Resolution is even more obsessive. At least the former obsession with literalism has the virtue of being directed at words that the Framers placed in the Constitution.

D. *Is the Judiciary Competent to Specify, Monitor, and Enforce an Injunction Circumscribing the President's Use of Offensive Military Force?*

As I explained in Part I, Judge Greene agreed with the Justice Department in *Dellums* that the case was not ripe in November 1990 because war was not imminent. In a provocative footnote, however, Judge Greene stated that "if the Congress decides that United States forces should not be employed in foreign hostilities, and if the executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision"[419]—namely, the War Clause. This conclusion was nothing less than the essence of the legal theory espoused by the Koh Signatories.

Judge Greene and the Koh Signatories are, on this score, largely misgnided. It does not follow that, just because a court is competent to determine in a declaratory judgment whether certain hostilities constitute a "war" (and thus require a formal congressional declaration to prosecute) the court also is competent to specify, monitor, and enforce an injunction against the President that would circumscribe his military options in a situation like the Iraq crisis. Put another way, although the political question doctrine does not necessarily prevent a court from issuing a declaratory judgment stating whether a particular military engagement would be a "war," the reasoning that underlies the doctrine (and related principles of justiciability) almost certainly makes it inappropriate for a court to issue an injunction against the President in his capacity as Commander in Chief.[420] This conclusion does not turn on whether one relies on the judicial competence factors included in *Baker v. Carr*'s taxonomy of cases raising political questions, or whether one appeals to

418. *Id.* at 926 n.217.

419. Dellums v. Bush, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990).

420. *See generally* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 681-706 (1978). I leave it to others to debate, if there is any doubt on the question, whether the Supreme Court's historical refusal to issue advisory opinions does not, as a general matter, render illegitimate the equitable remedy of a declaratory judgment. *See* TRIBE, *supra* note 39, § 3-9, at 73-77.

the court's "remedial discretion," or even whether one determines that intractable problems of ripeness and mootness preclude the effective issuance of an order to enforce the President's violation of such an injunction. These considerations all merge when the court reaches the point of whether a feasible remedy exists.

It is curious and ironic, therefore, that I find myself agreeing with Professor Louis Henkin, one of the Koh Signatories, when he writes separately about the political question doctrine. Henkin has no doubt that it is a justiciable question to say "whether a particular military action is a war, which only Congress can make."[421] But he recognizes the limits of judicial competence in fashioning remedies, and expresses his reservations in terms incompatible with the position taken by the Koh Signatories in *Dellums v. Bush*:

> I am not suggesting that federal judges, contemporary successors to the practical men that sat as courts of equity of old, should issue orders to end a war or drop (or not drop) a bomb. We have entrusted those decisions to Congress and the President, and nothing in our constitutionalism requires or warrants judicial second guesses on such issues.[422]

Nonetheless, in a constitutional dispute between the President and Congress, "equitable discretion might shape the remedy."[423] I agree that this dichotomy between constitutional rights and constitutional remedies is no hollow gesture toward justiciability, for, as Henkin observes, "even if a remedy were denied or delayed, a judgment declaring what constitutionalism and our democracy require will defuse tensions in the twilight zone between President and Congress."[424]

The Koh Signatories overlook that ripeness and mootness create a Scylla and Charybdis that would foreclose the possibility, at any time, of the judiciary's competent monitoring and enforcement of an injunction against the President's use of offensive military force. Professor Koh and his colleagues assert that "[a]lthough Article II, § 2, cl. 1 names the President 'Commander in Chief of the Army and Navy,' the President may not invoke that authority to make war without consulting with and gain-

421. HENKIN, *supra* note 39, at 88. Henkin's views on the political question doctrine are presented more fully in Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

422. HENKIN, *supra* note 39, at 88.

423. *Id.* at 89.

424. *Id.* Although it is a quibble, I therefore disagree with Judge Greene's characterization in *Dellums* that the D.C. Circuit's doctrine of "remedial discretion," *see* Riegel v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), is a prudential consideration separate from the justiciability issues addressed in *Baker v. Carr*. *See Dellums*, 752 F. Supp. at 1148-49.

ing the genuine approval of Congress."[425] They distinguish "the President's power to make war" from "his authority to use force to repel sudden attacks upon United States territory or armed forces."[426] But the fact that the power to repel sudden attacks has always been clear under the Constitution does not elucidate under what circumstances and to what extent the President possesses the war-making power. Furthermore, the judiciary's task of constitutional interpretation has been complicated by technological change. In an era of electronic weaponry, it takes fewer than ten minutes for an Iraqi Scud missile to reach its target in Tel Aviv or Riyadh. Could a federal judge seriously be expected to review the movements of battle on a fateful day to determine whether the President and his generals had lawfully confined themselves to "defensive" force or unlawfully had deployed "offensive" force without a declaration of war?[427] By their very nature, military decisions must be made and revised in battle on a real-time basis; judicial decisions rarely are or can be. That is what it meant for the Framers to instill the executive with "energy." As President Franklin Roosevelt said after Nazi submarines attacked the *U.S.S. Greer* in September 1941, "when you see a rattlesnake poised to strike, you do not wait until he has struck you before you crush him."[428]

Not surprisingly, therefore, in *Crockett v. Reagan*, a lawsuit brought to enforce the War Powers Resolution, the district court considered it "inappropriate for the judiciary" "to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist."[429] Another court concluded that with respect to a First Amendment challenge to the press restrictions imposed during the Persian Gulf War, "[e]ven with efforts by all parties, the judicial process often will not be able to resolve legal controversies . . . before hostilities have ceased."[430] In short, there would never be a moment when judicial enforcement of an injunction barring

425. Memorandum of Koh Signatories, *supra* note 9, at 3.

426. *Id.* at 4 n.2.

427. *Cf.* Ratner, *supra* note 38, at 468-69 (criticizing the "amorphous distinction between offense and defense" as a guide to the President's war powers).

428. "When You See a Rattlesnake Poised to Strike, You Do Not Wait Until He Has Struck Before You Crush Him"—Fireside Chat to the Nation (Sept. 11, 1941), *reprinted in* 9 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1941, at 384, 390 (Samuel I. Rosenmen ed., 1950); *see also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827) ("One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.").

429. 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

430. The Nation Magazine v. Department of Defense, 762 F. Supp. 1558, 1569 (S.D.N.Y. 1991).

> The war in the Persian Gulf, like many recent military conflicts involving the United States, was short and swift . . . . Because of the speed with which recent wars have termi-

the President's use of offensive military force would not be premature or moot.

E. *Judges as Generals*

In October 1988, American military forces declined to apprehend a captive Manuel Noriega during the early hours of what ultimately became a failed coup attempt in Panama. Gun-shy after the Iran-Contra Affair, the Bush administration passed up the opportunity to achieve this foreign policy victory at a fraction of the loss of life to both American soldiers and Panamanian civilians that was required by the invasion of Panama only two months later.[431] Injunctions of the sort that Professor Koh and his colleagues regard as desirable in the war-making context would skew the President's military choices in the same direction of timidity, but with far graver potential consequences in a confrontation on the scale of Operation Desert Shield. Suppose that before January 12, 1991 President Bush decided not to order an air strike on Iraqi Scud missile launchers in southern Iraq for fear that it might be deemed "offensive" and thus violative of an injunction issued by a federal judge. Suppose further that as a direct consequence 100 American soldiers were killed or maimed by an Iraqi missile strike on Saudi Arabia. Popular respect for the judiciary would promptly erode under such circumstances. Any President would find it politically catastrophic and militarily foolish to abide by such an injunction in the future.[432] Thus, I believe that John Hart Ely reaches precisely the wrong conclusion when, after conceding that judicial "manageability is certainly a consideration . . . at the stage of devising principles and remedies as opposed to the stage of deciding whether to decide the issue at all,"[433] he dismisses as exaggerated the advice "that the courts should not weaken their standing by issuing orders that are likely to be disobeyed."[434]

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nated, as is clearly documented by the sequence of events in Panama and Grenada, the evading review test [for mootness] is satisfied.

Id.

431. *See* Elliot Abrams, *Panama: How America Lost Its Will to Act*, WASH. POST, Oct. 15, 1989, at B1 (editorial by former Assistant Secretary of State).

432. *Cf.* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) ("While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.").

433. Ely, *A War Powers Act That Worked*, *supra* note 27, at 1408.

434. *Id.* at 1410. Strangely, when discussing judicial remedies for the President's failure to "start the clock" by filing a report to Congress under section 4(a)(1) of the War Powers Resolution, Ely takes seriously the problem of "presidential disobedience" and observes that "while Presidents do not ordinarily disobey the Court, it must be that one reason they don't is that the Court has been careful to shape its orders so as to minimize the possibility." *Id.* at 1417.

Again, the issue is the political accountability of the public actors who ultimately direct American national security and foreign affairs. Unlike a federal judge, a President responsible for a military debacle or foreign policy embarrassment can be voted out of office, along with his party. Similarly, the President's generals can be relieved of command.[435] Finally, the Secretary of State and the Secretary of Defense can be pilloried in congressional hearings and hounded into resigning.[436] But there is no similar political recourse against the federal judge. To borrow Madison's phrase, federal judges enjoy "the firm tenure of good behaviour."[437] It seems implausible that even a court-induced bloodbath for American soldiers could constitute a deviation from "good behaviour" and thus justify impeachment.[438] And, although the bad military or diplomatic judgment of a federal judge is eventually held in check by certiorari, the possibly bad judgment by Justices of the Supreme Court in these areas is not.

One of the Koh Signatories, Professor Louis Henkin, acknowledges this point in his own scholarship:

> [I]f we accept the President's quadrennial election as 'democratic,' contemporary events may warrant some doubt as to the effectiveness of that election as Presidential accountability in foreign affairs and therefore as gnarantees of a democratic foreign policy. On the other hand, it must be granted, *the selection of judges remains indirect and life terms make judges less accountable.*[439]

Remarkably, however, Henkin believes that the lower relative accountability of the judiciary in matters of foreign affairs "does not necessarily render the courts less 'democratic.' "[440] This conclusion is doubly puz-

435. President Lincoln, for example, relieved General George McClellan of command of the Army of the Potomac shortly after the bloody standoff at Antietem in 1862. *See, e.g.*, JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 562 (1988). Four months before the American attack on Iraq, Secretary of Defense Cheney, acting after consulting President Bush, fired General Michael Dugan, Chief of Staff of the Air Force, for discussing American contingency plans for air warfare in the Persian Gulf with the press. *See* Eric Schmitt, *Air Force Chief Is Dismissed for Remarks on Gulf Plan; Cheney Cites Bad Judgment*, N.Y. TIMES, Sept. 18, 1990, at A1.

436. In a related manner, a cabinet secretary can punish the President by tendering his resignation in protest over a decision to deploy military force, as Secretary of State Cyrus Vance did in 1980, when President Carter overrode Vance's advice not to undertake the disastrous hostage rescue mission in Iran. *See* Bernard Gwertzman, *Vance Resigns, 'Heavy Heart,' Saying He Opposed Rescue Bid*, N.Y. TIMES, Apr. 29, 1980, at A1; *see also* Department of State: Exchange of Letters on the Resignation of Cyrus R. Vance as Secretary (Apr. 28, 1980), *in* 1 PUB. PAPERS 1980-81, at 781 (1981).

437. THE FEDERALIST No. 39, at 252 (James Madison) (Jacob Cooke ed., 1961); *see also* U.S. CONST. art. III, § 1, cl. 1. ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

438. *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 159-65 (1973).

439. HENKIN, *supra* note 39, at 78 (emphasis added).

440. *Id.*

zling because Henkin asserts that accountability is one of the "key elements" of suffrage, and hence democracy, and that it "requires being subject not only to periodic judgment at election time, but to frequent and candid communication to those represented."[441] Evidently, Professor Henkin wonld find among the judiciary new meaning in Madison's observation that, "[i]f angels were to govern men, neither external nor internal controuls on government would be necessary."[442]

Collectively as well, the Koh Signatories ignore the diminished political accountability of federal judges. They confidently assert that "[p]recisely because federal judges enjoy life tenure and salary independence, they have both the power and a special obligation to say what the law is in warmaking cases, which invariably implicate controversial legal issues and affect private interests."[443] To be sure, federal judges are well-situated to opine on the legality of war-making. But the decision to wage war is not strictly a *legal* decision. It is also a decision of politics and morals. The Koh Signatories ignore the danger of permitting all facets of the decision to wage war to be cast as legal questions susceptible to resolution by a judiciary that, although sagacious, is immune to the political and moral consequences of its own decisions.

F. *The Moral Visibility of Collective Action*

There is a temptation to use constitutional law as a smokescreen to avoid public discussion of the moral consequences of a political act. The Koh Signatories, for example, say that, regarding military action against Iraq, they "speak[ ] solely to . . . matters of constitutional principle, not to the morality or political wisdom of any executed or contemplated governmental action."[444] The exiguity of their legal analysis[445] suggests that the legality of the decision to wage war is both straightforward and neatly severable from its moral and political justifications and consequences. The Koh Signatories believe that if war against Iraq can be shown to be "unconstitutional," at least in the absence of Congress granting prior authorization, then there is no need to debate whether such a war would be moral or immoral.[446]

441. *Id.* at 13.

442. THE FEDERALIST NO. 51, *supra* note 202, at 349.

443. Memorandum of Koh Signatories, *supra* note 9, at 10-11.

444. *Id.* at 1.

445. This analysis consists of 11 typewritten pages, two-and-a-half of which simply recite the credentials of the 11 scholars.

446. As Rostow insightfully stated: "Accustomed as we are to treat nearly all questions of policy as questions of constitutional law, we find it easy to conclude that whatever we dislike intensely must also, and therefore, be unconstitutional as well." Rostow, *supra* note 37, at 835. One can extend this criticism to international law. *See* Robert H. Bork, *Erosion of the President's Power in*

Collectively, the Koh Signatories fail to consider that one reason why an "authorized" but undeclared war against Iraq might violate the principle of the separation of powers is that it would reduce the political accountability of the President and Congress on a matter that deserves the greatest moral solicitude. A formal declaration of war, on the other hand, would increase political accountability and thus tend to make the moral premises of political judgments more visible to the electorate. In Christian theology, for example, there is a theory of "just war" that can be traced to the writing of Augustine and Aquinas.[447] I do not suggest that just war theory is incorporated into the War Clause of the Constitution any more than pacifism is.[448] But the electorate ought to be able to ascertain which (if either) of these opposing moral principles—just war theory or pacifism—animated the decisions of Congress and the President to go to war. For this reason, it is significant that on January 28, 1991, President Bush argued that Operation Desert Storm met the criteria of just war in being a war to "support a just cause," "declared by legitimate authority," "fought . . . for moral, not selfish reasons," and begun as "a last resort."[449] Surely President Bush's claim of moral superiority over Iraq more troubled Americans than did his legal claims regarding the authority of the United States to intervene (and subsequently not intervene) in the Iraq crisis when Mr. Bush later declined to use military force to assist Kurdish and Shiite insurgents who attempted to overthrow Saddam Hussein.[450] On the margin, more public discourse on this level by the two political branches would probably be more useful to the electorate in their monitoring of their political agents than would be

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Foreign Affairs, 68 WASH. U. L.Q. 695, 697 (1990) ("The major difficulty of international law is that it converts what are essentially problems of international morality into arguments about law that are largely drained of morality.").

447. *See* DE VATTEL, *supra* note 147, at 301-14; GROTIUS, *supra* note 147, at 73-84; *see also* PAUL RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY (1968); MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977).

448. For applications of just war theory to the Persian Gulf War, see Richard J. Neuhaus, *Just War and This War*, WALL ST. J., Jan. 29, 1991, at A18; Michael Walzer, *Perplexed: Moral Ambiguities in the Gulf Crisis*, NEW REPUBLIC, Jan. 28, 1991, at 13. For a pacifist analysis, see Edmond L. Browning, *The Church and War*, WASH. POST, Jan. 12, 1991, at A21 (editorial by presiding bishop of the Episcopal Church warning that "war will not liberate Kuwait, it will destroy it"); *cf.* Richard J. Neuhaus, *More on the Gulf*, FIRST THINGS, Apr. 1991, at 62, 63 (criticizing pacifist position adopted by the U.S. Jesuit Conference). An informative exchange between a pacifist and a just war theorist is Stanley Hauerwas & Richard J. Neuhaus, *Pacifism, Just War & The Gulf*, FIRST THINGS, May 1991, at 39.

449. Remarks at the Annual Convention of the National Religious Broadcasters, 27 WEEKLY COMP. PRES. DOC. 87, 87-88 (Jan. 28, 1991).

450. *See, e.g.*, *Desert Shame*, NEW REPUBLIC, Apr. 29, 1991, at 7.

more hours of abstruse debate about the War Powers Resolution or justiciability.[451]

V. CONCLUSION

The quick military victory over Iraq evokes the famous assessment of the Spanish-American War by John Hay, the United States Ambassador to England: "It has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favored by that fortune which loves the brave."[452] If, as President Bush proudly asserted, the Persian Gulf War has signaled America's awakening from the so-called Vietnam Syndrome,[453] it has caused the nation to reassess the wisdom and efficacy of using conventional military force as a tool of American foreign policy. The Persian Gulf War also has clarified certain problems of constitutional law and constitutional governance. I do not agree with my friend, Gordon Crovitz, when he writes: "A war fought to restore the international rule of law by ejecting the occupiers of Kuwait also restored the rule of the Constitution at home."[454] To the same effect (but for different reasons), constitutional litigator Floyd Abrams has concluded, also incorrectly in my view, that "one of the many victories of the war was that of adherence to constitutional principle."[455]

On the contrary, the manner in which Congress and the President agreed to initiate war against Iraq was inattentive to constitutional duty. Nor was the advice of leading constitutional scholars any better. Quite apart from its strategic military merits, the graduated approach to authorizing war advocated by some of those scholars distorts the Constitution's War and Commander in Chief Clauses. If hostilities do not amount to "war," the President requires no prior congressional authorization to engage in them; if Congress "authorizes" the President to use offensive military force in such a situation, its action is precatory or hortatory, but legally insignificant. On the other hand, if hostilities do amount to war (as one reasonably would have expected before the war

451. On the tension between moral values and constitutionalism, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 106-20 (1989).

452. FRANK FREIDEL, THE SPLENDID LITTLE WAR 3 (1958) (quoting letter from Hay to then-Colonel Teddy Roosevelt of the Rough Riders).

453. *See* Remarks at a Meeting of the American Legislative Exchange Council, 27 WEEKLY COMP. PRES. DOC. 232, 233 (Mar. 1, 1991) ("By God, we've kicked the Vietnam syndrome once and for all.").

454. L. Gordon Crovitz, *How Bush Outflanked Iraq and Liberated the Constitution*, WALL ST. J., Mar. 6, 1991, at A9.

455. Floyd Abrams, *Congress Reaffirmed Right to Declare War*, WALL ST. J., Mar. 26, 1991, at A23 (letter to the editor).

against Iraq to liberate Kuwait, and as Judge Greene so concluded in *Dellums v. Bush*), then a declaration of war by Congress is the constitutionally preferred means to authorize the initiation or continuation of the offensive use of American military forces. Both the euphemistic issuance of "limited" declarations of war, and the attempt to calibrate the intensity of warfare by adjusting appropriations, beg the antecedent question of whether America's political representatives favor or oppose the use of warfare in a particular instance. Compared to the Iraq Resolution in particular or the War Powers Resolution in general, a formal declaration of war is a more politically accountable means to record these representatives' approval or rejection of war and, therefore, a more credible threat to our enemies. It is what the Constitution provides; it is what the American people should demand.