
Hail to the Congress

WAR AND RESPONSIBILITY:
CONSTITUTIONAL LESSONS
OF VIETNAM AND ITS
AFTERMATH

John Hart Ely
Princeton University Press, x +
244 pp.

As I write these lines, an American soldier, no doubt the first of many to come, has been killed while taking part in the American “peacekeeping” mission in Bosnia. Many in Congress, including most of the Republican candidates for President, oppose sending our troops to “a far away country of which we know nothing.” Opinion polls unanimously declare that the American people do not want to go to war in Bosnia.

But in foreign affairs, the rule nowadays seems to be, “Congress (and the American people) propose; the President decides.” President Clinton has committed our troops to Bosnia; and patriotic duty, it is alleged, demands that we support the Commander-in-Chief.

War and Responsibility appeared long before President Clinton’s costly effort to make Bosnia safe for democracy, but it has never been more relevant. John Hart

Ely’s brilliant book establishes incontrovertibly that it is Congress, not the President, who has under the Constitution the sole power to involve U.S. forces in war.

Many areas of constitutional law generate issues of Byzantine complexity, but this one does not. “The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, ‘declared’ in so many words or not—most weren’t, even then—had to be legislatively authorized. Indeed, only one delegate to either the Philadelphia [Constitutional] convention or any of the state ratifying conventions, Pierce Butler, is recorded as suggesting that authority to start a war be vested in the president” (p. 3, notes omitted). Butler’s view was at once repudiated.

For most of our history, presidents scrupulously obeyed the command of the Constitution. “And when certain presidents did play a little fast and loose with congressional prerogatives—Polk at the start of the Mexican War; Wilson and Roosevelt, respectively, in the events leading up to the First and Second World Wars—they obscured or covered up the actual facts, pledging public fealty to the constitutional need for congressional authorization of military action” (p. 10, note omitted).

Ely does not include Lincoln’s actions at the start of the Civil War

in his list of exceptions, since “for constitutional purposes a domestic rebellion is quite different from a foreign war” (p. 150). Though I think this a mistaken view, this is not the place to argue the point; and even if Lincoln is added to the list of violators, Ely’s main contentions stands.

But if most presidents on this issue obeyed the constitution, how did we get where we are today? The key figure in the transition is that much-overrated haberdasher, Harry Truman. During the Korean “police action,” Truman went out of his way not to seek Congressional approval for his actions. His supporters claimed that as Commander-in-Chief it was within his power to start wars without congressional approval. Ely, not one to mince words, calls this an “outrageous rationale” (p. 152).

Since Truman, the presidential record has been a sorry one. With the exception of Dwight Eisenhower, presidents have continued the path of usurpation pioneered by the man who gave us Hiroshima. But the blame for the violation of the Constitution does not lie solely with our recent presidents. Congress has colluded with them: as

Ely sees matters, Congress prefers that the president assume the burden of committing our troops to battle. If a war turns out badly, he, not Congress, will be blamed; if it turns out well, Congress can bask in the president’s reflected glory. In addition, individual members of Congress aim primarily to serve the inter-

ests of their constituents: they have little to gain by voting to send troops into combat. Presidential usurpation of the war power suits many Congressmen quite well.

Should we go along with the new order of things? Ely thinks not. The original understanding of the war powers clause makes eminent good sense. The framers of the Constitution wished to make wars difficult to start. It is easier for a single person to plunge the country into war, should the decision rest with him alone, than for a group continually sensitive to popular approval to do so.

At one juncture Ely could strengthen his case. He states: “Of course, if he asked, the president would usually receive rather readily the support of both Congress and the American people when he decided to have a war. . . . [But] the constitutional strategy

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was to require more than one set of keys to open the Pandora's box of war" (p. 9). Ely's argument, then, is that having Congress declare war will slightly reduce the probability of war. The chances of war will be reduced, since both Congress and the president must agree, if a war is to occur; but they will be reduced only slightly, since Congress will probably grant the president's request for a declaration.

The last step of the argument does not follow from Ely's premises. Ely I think has reasoned as follows: the president wants a certain number of wars. If the decision is solely up to him, we will have just that number. But Congress, though it will usually go along with him, will on occasion not do so. Therefore, the number of wars with Congressional approval will be slightly less than without it. This argument wrongly assumes that the requests submitted to Congress will consist of the wars the president would have started on his own, had he the power to do so. But this might be false. Perhaps the president, knowing a request will not be approved, will decline to submit it. More simply put, if the president realizes his requests may be turned down,

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he will be apt to ask for fewer wars than he would have started on his own.

I hope that readers will forgive me for going on too long about this point. Ely is a dialectician of immense subtlety, and the temptation to try to catch him out proved too difficult to resist. Besides, the point materially strengthens his case.

Defenders of the present order will no doubt dismiss the appeal to Congress as an anachronism. Do not the imperatives of modern war demand swift and sudden action? How can one insist on a leisurely appeal to Congress, when the fate of the world may require instant response?

As usual, Ely has anticipated the objection: "Occasionally—though nowhere near as often as enthusiasts would have us believe—military emergencies can develop faster than Congress can convene and react. This was also true in the

late eighteenth century—it was probably truer than it is today. . . . The founders understood this, though, and consequently reserved to the president authority to respond on his own to ‘sudden attacks’ until there was time for Congress to convene and confer. In such situations the president could respond militarily and seek authorization simultaneously” (p. 6, note omitted).

If Ely is right, a difficult problem confronts us. The war powers clause should be obeyed as originally meant; but Congress prefers the present situation. What is to be done?

Ely rests his hopes on the federal judiciary. If the president has committed us to war without the approval of Congress, the courts should declare the executive action unconstitutional and remand the matter to Congress for its decision. I am inclined to think that Ely vastly overestimates the interest of the federal courts in constitutional government; but here readers must judge for themselves.

In one instance, Ely’s zeal to bring in the courts leads him to a rare misstep. Supporting the plaintiffs in *Dellums v. Bush*, a suit brought by several members of Congress to enjoin President Bush from sending troops to Kuwait without the consent of Congress, Ely writes: “it was a suit that said ‘The president’s unilateral actions . . . [are] depriving the fifty-four of

us of a right the Constitution guarantees us, that of voting on wars before the president starts them” (p. 60). If Congress alone has the right to declare war, then should the president begin a war without consent of Congress, he has violated *its* right. But it does not follow that groups of members within Congress have separate rights that have been violated. At any rate, this is an independent step for which argument is needed. But this is a minor matter.

I fear that I have given a skewed account of Ely’s book. Much of it is concerned to analyze, in painstaking detail, whether the American involvement in Indochina was constitutional. I have emphasized the underlying thesis, rather than Ely’s historical application, since the issue he raises is of vital current interest. He suggests during his historical account that presidents who violated the war powers clause should have been impeached. I hope that readers will not fail to apply the point to the current occupant of the White House. ♦

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The Merchants of Death

WALL STREET, BANKS,
AND AMERICAN
FOREIGN POLICY

Murray N. Rothbard

Rothbard-Rockwell Report, 1995, vii
+ 100 pp.

Defenders of the free market are often stigmatized as uncritical apologists for big business. Nothing could be further from the truth, as readers of this book will at once discover. Written by one of the two greatest twentieth century champions of free-market capitalism, Murray Rothbard, it is nevertheless a searing indictment of the influence of investment bankers on twentieth-century American foreign policy.

But “nevertheless” is the wrong word. Rothbard’s criticism of certain big business interests directly follows from his free-market position. Like Franz Oppenheimer and Albert Jay Nock, Rothbard distinguished two means by which people can attain their ends. One of these, voluntary exchange, constitutes the basis of the free society to which he devoted his life. The other, the “political means” is inimical to freedom. For Rothbard, in an even more unqualified way than for St. Augustine, the state is

“a great robbery.” Its guiding principle is coercion, and its revenues are plunder extracted from producers.

Business interests who ally with the state, then, find no favor with our author. He maintains that investment bankers are especially liable to form alliances of this sort; hence their activities must be viewed with the greatest suspicion. “*Investment* bankers do much of their business underwriting government bonds, in the United States and abroad. Therefore, they have a vested interest in promoting deficits and in forcing taxpayers to redeem government debt. Both sets of bankers [i.e., commercial and investment], then, tend to be tied in with government policy, and try to influence and control government action in domestic and foreign affairs” (p. 1).

For Rothbard this view was no mere abstract speculation; it was the linchpin of much of his historical research. And his adoption of this theory makes his history all the more fascinating to read. Economic history too often is disguised sociology: forces such as Business, Labor, and Government confront one another in an “unearthly ballet of bloodless categories.”

There is none of this in Rothbard. For him history is a matter of who did what to whom. As Justin Raimondo points out in the