

Symposium Comment

War and Uncertainty

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INTRODUCTION

When the current phase of our conflict with Iraq began in March 2003, much was unknown. Our political leaders based the case for war on the conviction that Iraq possessed weapons of mass destruction (WMD) that had not been eliminated despite twelve years of grinding sanctions. Congress voted in October 2002 to authorize renewed use of military force against Iraq,¹ acting on the basis of representations by the Bush Administration that Iraq had been actively concealing WMD stockpiles and programs from the United Nations inspectors who had a mandate to verify the complete destruction of Iraq's WMD capability. Facts were alleged; evidence was proffered; inferences were drawn from the record, or from Iraq's failure to rebut what the record seemed to show.

The factual premises for this war turned out to be, in a word, mistaken. Whether the case was overstated, misstated, knowingly misrepresented, or deliberately falsified was a point of debate in the campaign season of 2004.

The tale is dismaying but all too familiar. We can recognize a pattern established by the Mexican-American, Spanish-American, and Indochina Wars: The President of the United States goes to Congress with an assertion of an outrage that cannot be ignored and that requires a prompt and decisive forcible response. Congress accepts the Executive's claim without much inquiry into whether the factual premises are well founded and approves the initiation of combat. War ensues; the world is transformed; the facts, however, turn out to be different from how they were portrayed when Congress acted.

John Hart Ely grappled with this recurrent feature of American warmaking in his elegant book *War and Responsibility*.² For Ely and his generation, the searing conflict was Indochina. Ely strove, through meticulous reconstruction of what was known at the time and what became known later, to lay bare the failures of all three branches of American government and to prescribe structural reforms to prevent their tragic repetition. Above all, he stressed that Congress has the constitutional responsibility to determine whether to go to war, and he called on Congress to exercise that responsibility prudently, with investigation as appropriate into the factual predicate on which the Executive makes the case for war:

It was *Congress's job* not simply to insist on getting the facts straight before giving the president a functional declaration of war,

1. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 2002 U.S.C.C.A.N. (116 Stat.) 1498.

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

but also to decide for itself just how great an emergency there was. That's why we have separate branches. That's why the war power is vested in Congress.³

Ely's treatment of congressional responsibility in the context of the Indochina War holds much wisdom for the recent Iraq conflict and the war with al Qaeda.

Another lens through which to view congressional responsibility at the threshold of war is the problem of the interaction between Congress and the judiciary. In *War and Responsibility*, as in his *chef-d'oeuvre*, *Democracy and Distrust*,⁴ Ely saw the judicial role as enhancing the ability of the legislative branch to carry out its own constitutional duties. While *Democracy and Distrust* emphasizes the judicial role in correcting process failures that interfere with democratic politics, the thesis of *War and Responsibility* is that the judicial branch must become an instrument for "inducing Congress to face up to its constitutional responsibilities."⁵ Ely envisioned that the courts could properly instruct Congress on the existence of factual circumstances triggering Congress's duty to vote on whether to authorize military action. He called this trigger a "judicial 'remand' as a corrective for legislative evasion."⁶ I am in general agreement with Ely that war powers disputes can entail justiciable elements and that judicial determinations of trigger points for congressional action could in principle be constitutionally proper.⁷ My concern here, however, is not so much with a potential judicial role in inducing Congress to overcome its tendency not to act, but rather with those rare but fateful instances when Congress has indeed voted to approve military action. There seems little room for judicial oversight of war initiation once Congress has explicitly authorized war. Even if Congress acted on the basis of a mistaken fact, such failures of responsibility would find no judicial corrective.

I propose to build on Ely's concern with Congress's duty to investigate the factual predicate for going to war in circumstances of uncertainty. My main themes are that Congress should exercise its constitutional power to decide for war with the fullest feasible understanding of policy-relevant factual context, but that the contextual investigation that Congress should undertake in order to determine whether to authorize military conflict should not be confused with a kind of incident-specific fact-finding that Congress is ill suited to perform. Congress has a bad track record in

3. *Id.* at 20 (footnote omitted).

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

5. ELY, *supra* note 2, at 47 (capitalization altered). This phrase is the title of chapter three of *War and Responsibility*.

6. *Id.* at 54 (capitalization altered).

7. We both signed onto an amicus brief endorsing the justiciability, in principle, of war powers issues. See Brief of Amicus Curiae of Law Professors, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (Civ. A. No. 90-2866 (HHG)), reprinted in 27 STAN. J. INT'L L. 257 (1991).

establishing (or rather, speculating about) the facts of specific situations at the threshold of war. In circumstances of uncertainty, Congress's job is not a forensic one of ascertaining historical truth, but rather one of assessing the justifiability of present and future military action in evolving conditions. This necessarily forward-looking inquiry should specify the parameters of such uncertainties as are likely to become relevant to presidential action within the broad policy contours established by Congress.

Uncertainty about the future is inevitable when war looms. In this context I explore Ely's insistence that part of Congress's constitutional responsibility is to determine specifically who "the enemy" is,⁸ even when the factual picture of that enemy is murky, as it was in Indochina and as it is again in the war against the invisible perpetrators of the attacks of September 11, 2001. While I endorse Ely's general propositions about congressional responsibility for war-and-peace decisionmaking, I offer a somewhat different approach to the roles of Congress and the President once Congress has established policies for future execution. Congress, as the constitutionally proper organ to specify the policy determinants of prospective military action, can leave it to the President to make future judgments about whether particular factual conditions for initiating military action have been met.

I. WARS ON FLAWED FACTS

Only nine times has Congress acted with bright-line clarity to authorize initiation of major combat. In addition to five instances of the war-declaring mode of Article I, Section 8, Clause 11 of the Constitution—the War of 1812, the Mexican-American War, the Spanish-American War, and World Wars I and II—we can count the Tonkin Gulf Resolution of August 1964 and the specific statutory authorizations adopted under the War Powers Resolution⁹ to eject Iraq from Kuwait in 1991, to approve the use of military force against those responsible for the terrorist attacks of September 11, and to renew military action against Iraq in 2002-2003. Of these nine authorizations, four recite factual premises that in hindsight appear to have been questionable. Two out of five declarations of war (Mexican-American and Spanish-American) and two out of four statutory authorizations functionally equivalent to congressional approval of war (Tonkin Gulf and Iraq 2002) proceeded on the basis of congressional acceptance of unproven, unsupported, or even patently misleading executive representations about the facts of the matter.

8. ELY, *supra* note 2, at 26 ("The War Clause means only two things, but they are something: that Congress is to decide whether we go to war, *and* whom we go to war against.").

9. War Powers Resolution, Pub. L. No. 93-148, 1978 U.S.C.C.A.N. (87 Stat. 555) 614 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)).

Thanks to Ely's study of the Tonkin Gulf incident, we can take his penetrating critique as illustrative of the four instances in which Congress unreflectively approved use of force on the basis of flawed facts.¹⁰ The Johnson Administration went to Congress in the wake of reported attacks in the Tonkin Gulf on two U.S. vessels, the *Maddox* and the *Turner Joy*, in order to obtain endorsement for what became known as a "blank check" for war in Indochina. After perfunctory debate—forty minutes in the House, less than nine hours in the Senate—Congress enacted the Tonkin Gulf Resolution, which recited that "naval units of the Communist regime in Vietnam . . . have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters"¹¹ and authorized the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."¹²

As Ely recounted, many in Congress came to regret their votes for the Tonkin Gulf Resolution, and several judicial challenges were eventually brought contesting its validity. Among those who rued their votes was Senator J. William Fulbright—the floor manager who rounded up virtually unanimous passage of the Resolution—who later claimed that Congress had been unaware of the significance of the measure and that he had been "hoodwinked" by the Johnson Administration, which had misrepresented the facts of the alleged incidents.¹³ Fulbright denied that Congress could have given constitutionally valid consent under those circumstances: "Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion, is null and void."¹⁴

Ely quite properly did not let Fulbright or his congressional colleagues off the hook. He agreed that the Johnson Administration may very well have "flagrantly misled" Congress about the Tonkin Gulf attacks—one of which probably did not occur at all (the *Turner Joy*), and the other of which, if it occurred, probably was provoked by the United States and in any event did little damage to the vessel (the *Maddox*).¹⁵ Nonetheless, although the administration's behavior was "outrageous," it is "difficult to make [it] count legally,"¹⁶ because only Congress has the responsibility to determine whether to accede to the President's request for urgent authority or whether to pause for further investigation into such facts as may be material to its own consideration of the request. That's "*Congress's job*."¹⁷

10. ELY, *supra* note 2, at 12-46.

11. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 1964 U.S.C.C.A.N. (78 Stat. 384, 384) 441, 441 (1964).

12. *Id.* § 1, 1964 U.S.C.C.A.N. (78 Stat. at 384) at 441.

13. ELY, *supra* note 2, at 19 (internal quotation marks omitted).

14. *Id.* (internal quotation marks omitted).

15. *Id.* at 20, 19-20.

16. *Id.* at 20.

17. *Id.*

In chapters two and four of *War and Responsibility*, Ely distinguished between “The (Troubled) Constitutionality of the War They Told Us About,” referring to Vietnam, and “The (Unenforceable) Unconstitutionality of the ‘Secret War’ in Laos, 1962-1969,” referring to the war they didn’t tell us about.¹⁸ Ely saw a crucial difference between the troubled but nonetheless constitutional war that Congress knew *something* about (though what it knew may have been at least partly false) and the unconstitutional war that Congress didn’t know about at all. In the case of the Tonkin Gulf Resolution, Congress had the opportunity to quiz the administration about the nexus between the alleged facts and the requested authority. It was Congress’s fault, and Congress’s problem, that Congress chose to pass up that opportunity.

It is important to distinguish between constitutional and unconstitutional wars on the one hand and judicially enforceable remedies for unconstitutional actions on the other. Ely held a nuanced position on each of these issues. President Johnson’s actions in provoking and misrepresenting the Tonkin Gulf incident may merit condemnation in constitutional terms similar to those that the House of Representatives (and Ely) applied to President Polk’s precipitation of the Mexican-American War.¹⁹ Once Congress enters the picture and approves what the President is doing, however, the war becomes Congress’s responsibility. Therefore, the Vietnam War (like the Mexican-American War), even if unconstitutionally commenced on mere executive authority, passed into the realm of constitutionality (though of a “troubled” sort) once Congress acted. If Congress did an inadequate job of checking the President’s facts—indeed, even if the President “hoodwinked” Congress—Congress in effect assumed the risk that the President might not have been fully candid. Only if Congress had attempted to fulfill its own responsibility, and the Executive frustrated that fulfillment, would it be correct to say that the war was unconstitutional notwithstanding congressional approval:

Had Congress been diligent in pressing for the facts, but had the administration continued to lie and the Tonkin Gulf Resolution emerged, I would think the correct legal position would be that the war was unconstitutional, albeit not in any way that would be judicially cognizable; our only recourse would therefore be to impeach the president or take other legislative action.²⁰

The remedies for this form of unconstitutionality would be political rather than legal.

18. *Id.* at 12, 68.

19. *Id.* at 175 n.36 (arguing that Polk’s “provocation was so flagrant it can responsibly be labeled unconstitutional, as indeed it was by the House of Representatives”).

20. *Id.* at 159 n.55.

Elsewhere in *War and Responsibility*, Ely adverted to the possibility of impeaching a President for preventing Congress from exercising its constitutional responsibilities for war—a drastic remedy but one that should not be overlooked.²¹ Ely thought that impeachment should have been considered for misleading Congress about facts relevant to the Indochina War, though his candidate was not President Johnson for the Tonkin Gulf incident but President Nixon for the secret bombing of Cambodia. Indeed, on July 30, 1974, the House Judiciary Committee considered a draft article of impeachment asserting that Nixon had “authorized, ordered, and ratified the concealment from Congress of the facts and the submission to Congress of false and misleading statements” concerning the Cambodia bombing, though a divided Committee voted against submitting that draft article to the full House.²² On these facts, Ely asserted, “I’d have impeached him for it.”²³

On the same facts, should a judicial remedy be available? Dissenting in one of the Vietnam-era cases in which a federal appellate court declined to pass judgment on whether Congress had fulfilled its constitutional responsibility for war authorization (in connection with the sequence of legislative maneuvers that repealed the Tonkin Gulf Resolution while continuing appropriations for the Indochina War), Judge Oakes wrote,

I am aware of only one instance in which it has previously been argued that a war was illegal as a result of Congress being misinformed as to the underlying facts surrounding American participation in that war. While the argument was unique and unsuccessful to boot, however, time has vindicated it, I believe. Furthermore, it was advanced by one whose views are worth consideration, even if they were expressed in “dissent,” so to speak. I refer of course to Abraham Lincoln and his argument as a lone Congressman on January 12, 1848, in opposition to our “incursion” into Mexico and what later was called the Mexican War.²⁴

Oakes doubted that Congress could have constitutionally authorized a military campaign in Cambodia when the facts of the Cambodian bombardment had been concealed from the Congress that voted appropriations for the war in Vietnam. With the events of 2002-2004, we can now add to Oakes’s list a second instance in which misinformation conveyed to Congress has cast doubt on whether the constitutional system for war authorization was fulfilled.

21. *Id.* at 97.

22. *Id.* at 103 (internal quotation marks omitted). On impeachment as a remedy for undermining Congress’s war powers responsibilities, see Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525, 1545 (1999).

23. ELY, *supra* note 2, at 104.

24. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1316 (2d Cir. 1973) (Oakes, J., dissenting).

Ely was convinced that Congress should have taken hold of the military situation concerning Iraq and neighboring states as long ago as 1988, when the U.S. Navy became involved in hostile fire in protection of merchant shipping in the Persian Gulf during the naval phase of the Iran-Iraq War.²⁵ By the time Ely wrote *War and Responsibility*, Congress had finally taken the first steps toward accepting its constitutional duty to share in making the decision for war in the Persian Gulf region by enacting the Authorization for Use of Military Force Against Iraq on January 14, 1991.²⁶ Ely was moderately encouraged by this development but presciently warned that Congress would have to do more than merely vote “yes” on a one-time presidential request in order to ensure fulfillment of its constitutional role.²⁷

In the fall of 2002, the second President Bush went to Congress for authorization for the renewal of military force against Iraq.²⁸ As with the Tonkin Gulf Resolution, the preamble to that authorization postulates a state of affairs in the real world that turned out to be mistaken in light of subsequent events. Specifically, Congress proceeded on the belief that “Iraq . . . remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations.”²⁹ No evidence to support the core of these assertions has been found on the ground in Iraq during the U.S. invasion or the prolonged occupation of that country.

Following a pattern familiar from the Indochina conflict, the fact that Congress gave an apparently unambiguous grant of authority to the President (just as much a “blank check” as the Tonkin Gulf Resolution) has not immunized the 2002 authorization from constitutional question. In February 2003, six members of Congress and several members of the armed forces brought suit claiming that Congress had fallen short of the requirements of the Constitution by failing to adopt a formal declaration of war.³⁰ Although this suit was predictably unsuccessful, many believe that the authorization was somehow constitutionally defective—for example, by leaving it to the President to determine whether the conditions set by Congress to trigger military action had been met.

25. See John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1381-83 (1988). Our “enemy” (if any) at that time was Iran rather than Iraq.

26. Authorization for Use of Military Force Against Iraq, Pub. L. No. 102-1, 1991 U.S.C.C.A.N. (105 Stat.) 3 (1991).

27. See ELY, *supra* note 2, at 49-52.

28. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 2002 U.S.C.C.A.N. (116 Stat.) 1498.

29. *Id.*, 2002 U.S.C.C.A.N. (116 Stat.) at 1498.

30. See *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003).

One of the most severe critics has been Senator Robert Byrd, who has complained that Congress abdicated its responsibility by failing to conduct its own inquiries into whether the case for war had been established. “A supine Senate declined to debate the issue at length, succumbing to the political siren song urging members to ‘get it behind us’”³¹ As Ely had predicted a decade earlier, Congress was hardly likely to take an active part in a dialogue with the President on war authorization. Thus, the hard questions that might have unsettled groupthink were never asked.

II. CONGRESS’S RESPONSIBILITY TO CLARIFY UNCERTAINTY AT THE THRESHOLD OF WAR

We can reframe the problem common to these flawed wars as one of congressional decisionmaking for war under circumstances of uncertainty. We should distinguish between uncertainty about past events and uncertainty about future contingencies, such as the prospective targets in the evolving “war on terrorism.” Ely’s thesis in *War and Responsibility* includes the argument that Congress must be reasonably specific in identifying our “enemy”: A general delegation to the President to make war on anyone he chooses would not pass any test of a meaningful constitutional role for Congress. Although I share Ely’s basic orientation toward congressional policy setting, I differ with him with respect to the specificity required. In my view, Congress fulfills its responsibility by determining the category of adversary against which military force is to be used, even if Congress does not give that adversary a name.

Alongside the problem of uncertainty is the more serious problem of lack of candor—even of misleading, deceptive, or false representations—from the executive branch in making the case for war to Congress and the public. Congress’s responsibility extends to making appropriate investigations into the quality of the information on which it acts and to ensuring accountability when it learns that it was misled. The usual repertory of political techniques, up to and including impeachment, would be available for this purpose.

A. *Uncertainty: Past Events and Future Contingencies*

Congress has not had a good track record in establishing forensic truth at the times that it has authorized the President to proceed with military action. The disabilities under which Congress labors include a reliance on the executive branch for most of the information on which judgments about

31. ROBERT C. BYRD, *LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY 79-80* (2004).

a military situation are based, an absence of procedures (adversarial or otherwise) to test the reliability of that information, and a tendency to accept the Executive's assertions about the need for urgent action. Even if Congress could improve its fact-finding capabilities—for example, by seeking alternative sources of information from outside the executive branch, through subpoena powers if appropriate; by subjecting executive representations to processes analogous to cross-examination instead of accepting them at face value; or by deliberating at a length appropriate to the gravity of the matter instead of yielding to the Executive's view on urgency—Congress is still not institutionally well suited to becoming a retrospective trier of fact and can hardly be expected to succeed at a task so far from its own institutional competence. The facts it ought to concentrate on developing (in war-and-peace decisions even more than in ordinary legislative enactments) are those that have relevance and salience for the charting of future policy directions.

The role of factual mistake in the Tonkin Gulf incident and in assumptions about Iraq's WMD capabilities needs to be understood in light of the multiple motivations operating in the minds of our policymakers at the time of the congressional authorizations for war in 1964 and 2002. Inaccuracy in the factual portrayal of the attacks on the *Turner Joy* and the *Maddox* was not the crux of the failure of responsibility embodied in the Tonkin Gulf Resolution. Even if the attacks had taken place exactly as represented in the Johnson Administration's accounts, Congress still fell short in its appreciation of the policy underpinnings for the war. Congress's mistake was not that it neglected to press for a forensic investigation into the incidents but rather that it failed to clarify the policy context for taking sides in the struggle over Indochina's postcolonial future.

The Iraq War launched in March 2003 has produced a variety of ex post rationalizations, none of which were the stated policies of the United States as endorsed by Congress when it enacted the authorization for use of military force. The most prominent is the claim that Saddam Hussein had to be removed because of the horrors he inflicted on the Iraqi people during his decades in power.³² The problem with the discrepancy between the justifications offered before and after the invasion is that Congress never conducted a focused debate on the merits of initiating war in order to bring about regime change in Iraq, and it certainly never authorized commencement of military action on that rationale.

What Congress should have been doing was shaping the broad contours of future policy, not trying to sit in judgment on the facts of a particular incident or a particular state of affairs. Thus, the relevant kind of fact-

32. Those horrors included the use of chemical weapons against the Kurds of Iraq in 1987-1988. See HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ'S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS 6, 181-90 (1995).

finding for Congress is not the same as what juries and judges regularly do when determining who shot whom first or what caused an explosion, and it should not be confused with judicial functions. Congress necessarily operates in a sphere of uncertainty, with different margins of tolerance for error and different appreciations of contextual facts than the finder of fact in a judicial process. Its task at the threshold of war should be to determine what kinds of uncertainties need to be resolved prior to initiation of military action and what kinds may remain open for future determination.

Because war is so extraordinary and its consequences so unpredictable and potentially dire, congressional fact-finding in anticipation of war should be especially careful but should be contextual rather than incident-specific and continue past the enactment of a specific authorization. In our current strategic environment, for example, Congress should become as informed as possible about the universe of likely threats and make considered judgments about what modes of military force may be required to counter them. In response to the attacks of September 11, Congress authorized the President to use

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.³³

Congress exercised a measure of responsibility when it enacted this authorization at an intermediate level of specificity, but it did not exhaust that responsibility once and for all time. On a continuing basis, Congress needs to equip itself with the facts to determine what kinds of uses of force will and will not be effective in fighting terrorism.

B. *Have We Met the "Enemy"? How Do We Know?*

This brings us to the problem of the nonspecific congressional authorization against an uncertain foe. The authorization enacted after September 11 did not name al Qaeda or Osama bin Laden or even identify Afghanistan as a nation that might have harbored such an organization or individual. Was it constitutionally defective on that ground?

Ely had a firm conviction that at the core of Congress's constitutional war powers role is a duty to decide *whether* we go to war and *against whom*. He spelled out more than once his view that an authorization for war

33. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 2001 U.S.C.A.N. (115 Stat.) 224, 224 (2001).

must be specific in identifying “who it is we’re prepared to go to war against—that is, that it not be a wholesale delegation of authority to the president to make war against whomever he regards as a suitable foe.”³⁴ His intuition on this point is somewhat plausible, but I was not persuaded when I first read his argument and remain unconvinced. In the post-September 11 world, it is necessary to revisit this issue and find the right level of specificity at which Congress can define proper objects of military action—perhaps by clarifying policies and categories rather than by identifying “enemies” as such.

One day in 1992, a package with the manuscript for *War and Responsibility* arrived in my mailbox from John Ely, whom I had yet to meet in person. He invited me to comment on the manuscript, which I did with the trepidation that a relatively junior academic probably always feels when a luminary asks for a candid reaction. The only point on which I felt I had a *responsibility* to try to change his mind was this one, because I was convinced that already as of the early 1990s we were no longer in a world where Congress would be able to know with certainty who the adversary might be, though Congress might be well advised to equip the President with the tools to meet an unknown foe in advance. The 1991 collective security operation against Iraq seemed to augur a new era in which the U.N. Security Council could fulfill the urgent need for a rapid reaction force to respond to conflicts such as those then breaking out in Yugoslavia, Haiti, and Somalia, where the future “enemy” (if any) might not be knowable. To that example, I added that it might be appropriate for Congress to grant an authorization to the President “to respond in specified ways to defined types of terrorist activity, even without knowing at the time of the delegation what the future enemy or locale would be.”³⁵ Apparently Ely found a grain of plausibility in that suggestion, because he added a note to leave open such a possibility.³⁶ Our exchange only hinted at the existence of the problem and did not get very far toward solving it.

CONCLUSION

To my mind, the problem of the unknowable foe is the biggest challenge for our constitutional system of war powers. President Bush has claimed that the United States has the right under international law to take preemptive action against incipient threats of a highly indeterminate sort. This would be a radical and dangerously destabilizing change from the law

34. ELY, *supra* note 2, at 26; *see id.* at 108 (“Not only must Congress make the decision whether we go to war, it must decide whom we go to war against.”); *supra* note 8.

35. Letter from Lori F. Damrosch to John Hart Ely 2 (May 1, 1992) (on file with author).

36. ELY, *supra* note 2, at 163 n.91 (“Arguably there should be a rare exception for the situation where the enemy cannot be designated because it is neither a state nor another entity susceptible to unambiguous description . . .”).

of the U.N. Charter as we have known it since 1945. Congress has never endorsed this preemption doctrine, nor should it. But it would be entirely consistent with the congressional responsibility for war-and-peace matters for Congress to try to enunciate, in the most careful way, a category of threats that might in principle warrant a military response and to instruct the President how to proceed in such a case.
