

COMMENT

THE COASE THEOREM AND THE WAR POWER: A RESPONSE

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In January 1991, our nation narrowly avoided a constitutional crisis, as President Bush requested and Congress passed a joint resolution that authorized the use of military force against Iraq.¹ In the weeks preceding that vote, the nation had witnessed a now-familiar dance: The President had threatened to make war without seeking congressional consent, Congress had avoided taking a stand, and the courts had declined to enjoin an unauthorized war.²

In ways not fully appreciated by the public, Judge Harold Greene's decision in *Dellums v. Bush*³ helped break the looming impasse between the political branches. Although Judge Greene held unripe a request by members of Congress to enjoin an unauthorized war, he accepted two

* Professor, Yale Law School. I am grateful to Henry P. Davis, Yale Law School Class of 1993, for his exceptional research assistance. I also thank Jules Coleman, Walter Dellinger, Bob Ellickson, and Alan Schwartz for their insights into the Coase Theorem and other issues. This Comment incorporates ideas developed in Harold H. Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 STAN. J. INT'L L. 247 (1991). The views expressed here are mine, and are not necessarily shared by any of the other signatories to the Memorandum *Amicus Curiae* of Law Professors, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) [hereinafter Memorandum], reprinted in Koh, *supra*, at 257.

1. See Authorization for Use of Military Force Against Iraq Resolution, 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 resolution, which was enacted by votes of 52-47 in the Senate, 137 CONG. REC. S403 (daily ed. Jan. 12, 1991), and 250-183 in the House, *id.* at H485, authorized the President to use military force against Iraq, subject to substantive and procedural limits. Substantively, the resolution specified that U.S. armed forces were to be used "pursuant to" and "in order to achieve implementation of" the various United Nations Security Council Resolutions that had condemned Iraq's invasion of Kuwait. *Id.* § 2(a). Section 2(c)(2) further declared that "[n]othing in this resolution supersedes any requirement of the War Powers Resolution." *Id.* § 2(c)(2). As a procedural precondition to using force, the Resolution required the President to determine and report to Congress that all diplomatic avenues had been exhausted. *Id.* § 2(b). It further required the President to report to Congress once every 60 days on the status of efforts to obtain Iraq's compliance with the Security Council Resolutions. *Id.* § 3.

2. See generally HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) (arguing that this recurrent pattern of executive initiative, congressional acquiescence, and judicial tolerance pervades U.S. foreign affairs).

3. 752 F. Supp. 1141 (D.D.C. 1990).

key claims made both by plaintiffs and in an *amicus curiae* memorandum filed by a group of law professors: First, that the Constitution did not permit the President to order U.S. armed forces to make war without meaningful consultation with Congress and receiving its affirmative authorization; and second, that the political question doctrine did not bar a federal court from deciding that constitutional question in an appropriate case or controversy.⁴ In what amounted to an unappealable declaratory judgment *against* the government, Judge Greene concluded that “in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization.”⁵ Had President Bush proceeded to wage war without congressional authorization, he undoubtedly would have faced scores of suits citing that proposition, brought by soldiers who claimed (unquestionably ripe) rights *not* to fight and die in an unconstitutional, unauthorized war.⁶

The eleventh-hour joint resolution averted that outcome and established a piece of “quasi-constitutional custom” around which future institutional expectations will likely coalesce.⁷ All three branches effectively acknowledged Congress’s constitutional right to approve the war. Judge Greene found that “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, and it is therefore clear that congressional approval is required if Congress desires to become involved.”⁸ Congress’s authorizing resolution expressly invoked the War Powers Resolution⁹ and the House’s Bennett-Durbin Resolution

4. Compare Memorandum, *supra* note *, at 259, 262 (urging these positions) with *Dellums*, 752 F. Supp. at 1144-46 (adopting them as holdings).

5. *Dellums*, 752 F. Supp. at 1149. Judge Greene ruled against the government on all issues except ripeness. See *id.* at 1149-51. As the technical victor, however, the government could not appeal the ruling, except by cross-appeal from an appeal that plaintiffs chose not to pursue.

6. This assertion rests on the scores of inquiries I received in the days following the filing of the memorandum from counsel for soldiers who were either resisting, or anticipating resisting, call-ups to fight against Iraq. Cf. Sidak, *To Declare War*, 1991 DUKE L.J. 27, 32 n.24 (citing cases actually filed); *id.* at 111 n.412 (agreeing that soldiers “who believed a war to be unconstitutional could summon the courage to sue the President of the United States”). It seems plausible that the prospect of litigating numerous unpopular post-*Dellums* suits was at least one factor that helped dissuade our President from waging an unauthorized war against Iraq.

7. See KOH, *supra* note 2, at 70, which defines “quasi-constitutional custom” as “a set of institutional norms generated by the historical interaction of two or more federal branches.” The customary rules that comprise this body of historical precedent “represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters.” *Id.*

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

9. 50 U.S.C. §§ 1541-1548 (1988); see Iraq Resolution, *supra* note 1, § 2(c)(1) (“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

reaffirmed that “[a]ny offensive action taken against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated.”¹⁰ Most telling is that the President (despite his disclaimers) came to Congress and asked for its approval.¹¹ Thus, Iraq joins the two World Wars and Vietnam as four of the five relevant historical instances in this century in which the President has sought formal approval for war.¹²

There things sat, satisfactorily if not happily, until J. Gregory Sidak penned the preceding piece.¹³ Although styled as a critique of those “[w]aging [w]ar from New Haven,”¹⁴ Sidak’s article assiduously wages war *against* virtually every law professor, in New Haven or elsewhere, who took a position on the constitutionality of the looming Iraq war. Sidak’s detailed argument reduces to a curious claim: The Constitution, political accountability, and the Coase Theorem all required Congress to issue nothing less than a formal declaration of war against Iraq. Under this view, the joint resolution that Congress so agomizingly enacted had no more legal force than a letter to my mother.¹⁵

Powers Resolution.”); *id.* § 2(c)(2) (“Nothing in this resolution supersedes any requirement of the War Powers Resolution.”).

10. H.R. Con. Res. 32, 102d Cong., 1st Sess. 2 (1991) (Bennett-Durbin Resolution), *reprinted in* 137 CONG. REC. H390-01, H390-01 (daily ed. Jan. 12, 1991) (reiterating that the Constitution “vests all power to declare war in the Congress”).

11. *See* Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48 (Jan. 21, 1991), *reprinted in* 1991 U.S.C.C.A.N. 3 (statement of President Bush) (“[M]y request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.”); *see also* Speech of President Bush at Princeton University, 27 WEEKLY COMP. PRES. DOC. 590 (May 10, 1991) (“Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf war.”).

12. Congress approved the two world wars by formal declaration. *See* S.J. Res. 1, ch. 1, 40 Stat. 1 (1917) (declaration of war against Germany in World War I); S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941) (declaration of war against Japan in World War II). For a persuasive argument that at least the publicly known aspects of the Vietnam War were congressionally authorized, *see* 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). In Korea, the remaining example of a large-scale, sustained war, I believe that the President committed troops unconstitutionally, but Congress cured the violation almost immediately with ratifying actions. *See The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 10-12 (1991) (statement of Harold H. Koh).

13. Sidak, *supra* note 6.

14. *Id.* at 98.

15. *See id.* at 33 (“Although politically significant, Congress’s joint resolution of January 12, 1991 was a legal nullity, a merely precatory or hortatory gesture.”); *id.* (“[N]o legal significance should attach to a joint resolution that members of Congress have represented to be ‘tantamount to a declaration of war.’”).

The editors of the *Duke Law Journal* have invited me to answer Sidak, no doubt because he trains one barrel of his attack on the group of law professors (whom he dubs the "Koh Signatories") with whom I filed the *amicus curiae* memorandum in *Dellums*.¹⁶ Upon reading Sidak's article, I was surprised to find that, for all of his rhetorical flourishes, he agrees with virtually every position that our memorandum adopted! Where he does not side with us, he either misreads us¹⁷ or his arguments are inherently unconvincing. Let me suggest first why we ought not take seriously Sidak's arguments regarding the constitutional requirement of a declaration of war, and second why his ill-advised ambition to marry constitutional originalism with law-and-economics should be killed before it spreads.

Our memorandum argued, and Judge Greene later held, that the political question doctrine did not bar the federal courts from deciding issues regarding the President's authority to conduct war without congressional approval.¹⁸ On this point, Sidak unambiguously sides with us, for he "agree[s] with the Koh Signatories (and disagree[s] 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 of ferocity constitutes 'war' for purposes of the War Clause."¹⁹ Similarly, we asserted (and Sidak apparently accepts) that the President may not, absent meaningful consultation with and genuine approval by Congress, order U.S. armed forces to make war.²⁰ Finally,

16. Sidak's other main targets are John Hart Ely (one of our number) and my colleague Stephen Carter. Both are fully capable of defending themselves.

17. In one important respect, Sidak simply overreads our memorandum. Throughout his article, he attacks us for "recommending" that the court issue injunctive relief "Circumscribing the President's Use of Offensive Military Force." Sidak, *supra* note 6, at 113. Yet even a casual reading of our memorandum shows that, as a group in *Dellums*, we took absolutely no position on the appropriateness of injunctive relief, nor did we draw any distinction between offensive and defensive uses of force. Speaking only for myself, I believe that in cases such as *Dellums*, courts can issue not only declaratory judgments (a point Sidak concedes), but also injunctive relief, without triggering Sidak's parade of horrors. All the judge need say is that an imminent likelihood of war exists (overcoming nonripeness claims), and that the President may not conduct such a war absent the constitutionally required congressional authorization. Notwithstanding Sidak's claims, such an order would not substitute the judge for either a general or a politician. To the contrary, it would remand the matter to political branches to do their constitutional duty. The President and his subordinates would need to decide whether to go to Congress to obtain its approval or to conduct an illegal war in the face of the court order. Cf. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1531 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985) (enjoining executive branch from conducting unlawful American military movements upon American citizen's land in Honduras). More important, the order would force Congress to face up to its constitutional duty to decide whether it approved the war in question.

18. See Memorandum, *supra* note *, at 257; *Dellums*, 752 F. Supp. at 1145-46.

19. Sidak, *supra* note 6, at 32.

20. See Memorandum, *supra* note *, at 259.

Sidak contends that in the interests of enhancing political accountability, Congress should manifest its approval for war with a high degree of formality.²¹ Far from disputing that claim, our memorandum insisted “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.”²²

Where, then, do we disagree? Sidak insists that a formal declaration of war is the *only* political mechanism whereby Congress may constitutionally manifest its understanding and approval for a presidential determination to make war. To support this claim, Sidak invokes an odd blend of constitutional history and Coasean economics. He draws lessons about political accountability from, *inter alia*, the 1941 declaration of war against Japan, and concludes that declarations are thus constitutionally necessary for all wars. Furthermore, using the jargon of Nobel laureate Ronald Coase’s famous theorem,²³ Sidak argues that formal declarations of war are necessary to raise the “transaction costs” of going to war, by making more difficult “Coasean trespasses”—whereby the President would “trespass” with impunity upon Congress’s constitutionally specified power to declare war—and “Coasean bargains”—whereby Congress would “bargain away,” explicitly or by acquiescence or cowardice, its constitutional entitlement to declare war.

Sidak’s first argument can be quickly dispatched. To argue that Congress may only approve war by formal declaration makes about as much sense these days as a claim that Congress may only approve an international commitment by a treaty ratified by two-thirds of the Senate.²⁴ The Necessary and Proper Clause grants Congress authority to “make all Laws which shall be necessary and proper for carrying into Execution *the foregoing [congressional] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in*

21. See Sidak, *supra* note 6, at 68 (“[A]dherence 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 . . .”).

22. Memorandum, *supra* note *, at 261 (emphasis added); see also Sidak, *supra* note 6, at 109 (quoting this language).

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

24. Over time, with the blessing of all three branches, the so-called “Congressional-Executive agreement”—an executive agreement that has been approved by joint resolution—has become viewed as effectively interchangeable with an Article II treaty for forging our international commitments. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”).

any Department or Officer thereof.”²⁵ In the face of this language, Sidak’s conclusion that the resolution was a “legal nullity” seems nothing less than bizarre. Congress’s joint resolution that authorized the Iraq war was a duly enacted statute, passed by both houses and signed by the President, and made for the stated purpose of authorizing use of armed forces by the government of the United States.²⁶ The resolution clearly had legal force, whether one views it as carrying into execution Congress’s “foregoing Power” to declare war (and hence as falling within Congress’s *exclusive* constitutional authority), or as executing all the powers to use military force that the Constitution vests in the two political organs of the national government (and hence, as falling within Justice Jackson’s famous “zone of twilight in which [the President] and Congress may have concurrent authority”²⁷).

Sidak chides our “willingness to settle for a legislative action less formal than a declaration” and “to disregard the most explicit formality that the Framers devised to constrain presidential war-making—the declaration of war.”²⁸ Yet when recounting the supposed policy advantages of formal declarations of war—that they are bifurcated from decisions regarding funding, handled by roll-call (not voice) vote, and less susceptible to being bundled with other legislation—he readily concedes that “[t]he Iraq Resolution also had each of these three features.”²⁹ As Sidak recounts, before voting on that resolution, members of Congress were painfully aware not only that they were voting on the functional equivalent of a declaration of war, but also that their votes would be intensely scrutinized.³⁰ Pre-vote speeches were nationally televised, and the roll-call votes were published in every newspaper—both the next day and during the war. Given these indicia of public accountability, it is difficult to see what additional accountability would have been gained had the resolution been styled as a declaration of war.

While trumpeting the advantages of formal declarations, Sidak overlooks that “political accountability” was not the only policy value at issue in the Iraq case. Declarations of war have fallen into desuetude since World War II,³¹ partly because they have substantial policy defects.

25. U.S. CONST. art I, § 8, cl. 18 (emphasis added).

26. See *supra* note 1.

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

28. Sidak, *supra* note 6, at 109.

29. *Id.* at 89; see also *id.* at 93 (“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.”).

30. See sources cited in *id.* at 43 nn. 75-76.

31. Congress has formally declared war only four times: the War of 1812, the Spanish-American War, World War I, and World War II. See GEOFFREY PERRET, A COUNTRY MADE BY WAR:

Formal declarations are blunt instruments that do not lend themselves as easily as joint resolutions to modulated uses of force. They tend to be tersely worded documents, enacted hastily in crisis situations, and with only minimal deliberation.³² They announce that a state of war exists with an enemy, but they neither name our allies nor detail our objectives; nor do they generally set either substantive or procedural limitations upon the authorities being granted to the President.³³ In short, formal declarations—like meat cleavers—have their uses, but not in delicate situations that call for scalpels. To suggest that the Constitution leaves Congress no finer options for approving uses of force smacks of mindless originalism, the charge that some mistakenly leveled against our memorandum.³⁴

I am tempted to dismiss Sidak's Coasean argument simply by suggesting that the Constitution no more enacts the Coase Theorem than it

FROM THE REVOLUTION TO VIETNAM—THE STORY OF AMERICA'S RISE TO POWER 106, 280, 313 (1989); see also Ely, *supra* note 12, at 888 n.41 (“[S]ince World War II declarations of war have essentially vanished, world-wide.”).

32. Sidak himself notes that Congress deliberated for less than an hour before returning its declaration of war against Japan, a document of barely 100 words. See Sidak, *supra* note 6, at 79.

33. Compare S.J. Res. 1, ch. 1, 40 Stat. 1 (1917) (declaration of war against Germany in World War I) and S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941) (declaration of war against Japan in World War II) (granting the Presidents unlimited authority to prosecute the wars) with Iraq Resolution, *supra* note 1 (circumscribing the President's power to use military force against Iraq within the strictures of the War Powers Resolution and a 60 day reporting requirement).

34. Some have cast the recent dispute over the war powers as one between the rigid literalism of original intent and a flexible pragmatism that views the Constitution as a living document that must adapt to modern times. The irony, as they see it, is that some of the same scholars who urged a flexible, evolutionary view to defend a domestic constitutional right to privacy applied a literal, originalist reading of the War Clause when the war powers were at issue. See, e.g., W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203, 212 (1991). But as my critique of Sidak's originalism suggests, this view misses the point: The recent war powers debate was really about constitutional *structure*, not text. The war powers debate was no more confined to the narrow meaning of the War Clause than the controversies over the constitutionality of the Gramm-Rudman Budget-Balancing Act, see *Bowsher v. Synar*, 478 U.S. 714 (1986), and the legislative veto, see *INS v. Chadha*, 462 U.S. 919 (1983), were confined to the Appointments or Presentment Clauses, respectively. In each case, what the Constitution required turned not just on exegesis of particular textual snippets, but on broader inferences drawn from structural principles of shared governmental power and checks and balances. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11-41, 225 n.48 (1980) (on impossibility of “clause-bound interpretivism”); KOH, *supra* note 2, at 68-69. Thus, the issue in the Iraq crisis was not simply the meaning and history of the words “The Congress shall have Power . . . [t]o Declare War.” U.S. CONST. art. I, § 8, cl. 11. Rather, the question was how that language and history should be viewed in light of the broader constitutional mandate that Congress authorize many gradations of force (ranging from declarations of war to grants of letters of marque and reprisal to rules concerning captures on land and sea) and the animating principle of separated institutions *sharing* powers in foreign affairs. See KOH, *supra* note 2, at 69.

does Herbert Spencer's *Social Statics*.³⁵ But on inspection, Sidak's law-and-economics argument carries disturbing overtones that warrant more detailed rebuttal. The argument runs like this: In his famous article, Coase used the example of a cattle rancher whose herd trespasses on the territory of a neighboring farmer to demonstrate that where two parties, *inter alia*, are perfectly rational, have complete knowledge, and are totally free to negotiate (i.e., the costs of transacting with one another are zero), any initial assignment of property rights to them will serve only as the starting point for inter-party negotiations. Even if the rancher were held legally liable for the damage done by his trespassing cattle, he and the farmer would contract around that legal rule to the efficient result, when the law does not create it.³⁶

Invoking Coase, Sidak posits that "[b]y 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."³⁷ In layperson's terms, he is saying that the President is like the cattle rancher and Congress like the farmer. On its face, the Constitution requires Congress to declare war and the President to obtain congressional approval, and hence assigns each institution "legal turf," but both sides have incentives to bargain around these initial "property assignments." Congress's notorious desire to escape responsibility for hard decisions and the President's instinct to seize the initiative will lead them to avoid, through presidential trespasses or congressional bargaining, the textual allocations of responsibility specified in the Constitution. Sidak concludes that formal declarations of war are normatively desirable because they raise transaction costs, and thus make it harder for both Congress and the President to escape their legal responsibilities through bargaining or acquiescence.

None of this is new, and could just as easily have been said without the forced Coasean terminology.³⁸ Moreover, empirical studies have identified numerous preconditions that must be met for the Coase Theorem to hold; few (if any) of which apply in this situation.³⁹ Scholars

35. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*.").

36. Coase, *supra* note 23, at 2-8.

37. Sidak, *supra* note 6, at 68.

38. For much the same argument, without the law-and-economics jargon, see KOH, *supra* note 2, at 153-228 (advocating new national security framework legislation to assign institutional responsibility and promote political accountability, particularly with regard to war powers).

39. See, e.g., Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73, 73 (1982) (listing eight assumptions—such as "two agents to each externality (and bargain)," "profit-maximizing producers and expected utility-maximizing consumers," and "no wealth effects"—that must hold for Coase Theorem to apply).

differ over whether Coase's theorem can be extended beyond individuals to multiparty transactions.⁴⁰ Ironically, although Sidak invokes one branch of law-and-economics literature, he virtually ignores another—the “public choice” literature—that gives myriad reasons why complex institutions like Congress may not necessarily behave like individual farmers.⁴¹ Finally, analogizing constitutional powers to “property rights” oversimplifies to the point of distortion. As I have argued elsewhere, separation of powers principles do not draw sharp boundaries between congressional and presidential authorities in foreign affairs; those powers are generally shared, not exclusive in one branch or another.⁴² Most important, the Constitution bestows the power to declare war on Congress to protect the people, and not to vest power (like property rights) in individual members.⁴³

But let us put these objections to one side and assume for a moment that Presidents are like cattle ranchers, Congress like farmers, and that Coase's analysis does apply. If Sidak's goal is to construe the Constitution so as to raise the transaction costs of interbranch bargaining, why are formal declarations of war necessarily superior to other formal acts (like joint resolutions) in raising such costs? Once the Iraq Resolution was enacted, transaction costs to bargaining away Congress's “legal rights” became plenty high, even without taking the additional step of a formal declaration of war. Nor, as I have already suggested, did the public have any difficulty monitoring the votes of their elected officials.

40. See, e.g., H.E. Frech III, *The Extended Coase Theorem and Long Run Equilibrium: The Nonequivalence of Liability Rules and Property Rights*, 17 *ECON. INQUIRY* 254, 265 (1979) (reconciling the disparate views regarding the validity of the Theorem in an extended framework); Elizabeth Hoffman & Matthew L. Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 *J. LEGAL STUD.* 149, 171 (1986) (supporting Theorem's usefulness in analyzing decisions of groups of 20 persons or fewer, when bargaining, coordination, and enforcement costs are low and few information problems exist).

41. See, e.g., Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 *AM. J. POL. SCI.* 27 (1979) (demonstrating how institutional structure and individual preferences produce structure-based equilibrium); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 *PUB. CHOICE* 503 (1981) (arguing that stability in a pure majority rule system stems from a complex institutional arrangement); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized As Markets*, 96 *J. POL. ECON.* 132 (1988) (providing theory of legislative institutions that does not follow simple market mechanisms).

42. See KOH, *supra* note 2, at 69, 75-76.

43. See 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (Jonathan Elliot ed., Burt Franklin 1968) (1888) (statement of James Wilson) (“This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . .”); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 214 (1986) (“The framers did not entrust the war power to Congress for the benefit of congressmen; they did so for the benefit of the citizenry.”).

Finally, the joint resolution, with its various conditions and caveats, was almost certainly more clear than a formal declaration would have been in producing Sidak's *desideratum*, "predictability and clarity in the specification of the responsibilities of political officials in Congress and the executive branch."⁴⁴

Why argue, then, that a formal declaration of war is constitutionally necessary? Sidak invokes political accountability and separation of powers, but in fact his approach could easily undermine both principles. History teaches that congressional declarations of war are extraordinarily rare.⁴⁵ The crucial question thus becomes: Can the President use force abroad unilaterally, without any form of congressional approval, *in the absence of such a declaration* (i.e., in most circumstances)? At various points, Sidak suggests (without explicitly saying so) that the President could do so, citing the Commander in Chief power.⁴⁶ But if that is so, then our situation resembles the following quasi-Coasean parable: Suppose farmers grow corn to feed the people (and thus are like Congress in that their public role is to protect third-party beneficiaries). To prevent their neighboring cattle rancher (i.e., the President) from letting his cattle roam over their property with impunity (i.e., taking us regularly to war without congressional consent), territorial boundaries (*viz.*, constitutional rules regarding congressional approval) should presumably be strictly enforced. Suppose local law specifies that when a majority of the farmers and the cattle rancher agree (i.e., a joint resolution), the cattle can roam in limited, specified areas. Suppose, however, that in the name of greater formality, a judge finds such agreements to be "legal nullities" and decides that the law in fact requires a more extraordinary expression of farmer approval for such actions (expressed only four times in local history). He further finds, as Sidak would, that farmers may not obtain injunctions to stop unauthorized cattle wanderings.⁴⁷ The result, of course, is that such cattle wanderings will increase, not decrease, and more, not fewer, crops will be destroyed. Some farmers may abhor that result, but now lack the political wherewithal or the judicial tools to stop it; other farmers may not mind, or, more likely, will acquiesce in this outcome because the rancher is their close friend and protector.

The point is that Sidak's rule in fact undercuts political accountability because it plays into the convergent incentives of both President and Congress to "let George do it." If rarely obtained declarations of war were the only occasions for approving wars, then the President would

44. Sidak, *supra* note 6, at 68; *see also supra* text accompanying notes 32-33.

45. *See supra* note 31.

46. *See Sidak, supra* note 6, at 54-56, 113-14.

47. *See supra* note 17.

gain greater freedom to use force abroad without the need for congressional consent in "situations short of war," while Congress would gain yet another excuse for not going on the record regarding the President's conduct (namely, "the danger is not sufficiently clear or present to justify a declaration of war"). The irony is that in the name of protecting the original allocation of constitutional authorities, Sidak's "more formal" rule (coupled with his ban on injunctions) would permit a major reallocation of those authorities. Thus, far from enforcing a system of separation of powers, Sidak's rule would undercut it by broadening the President's *de facto* authority to conduct unauthorized wars. If the goal is to prevent the President from involving us in wars without congressional approval, then the costs of obtaining congressional approval should be lowered—not raised. By insisting on a formal declaration of war Sidak would raise the costs to Congress of expressing its views, and, thus, widen the sphere of uncontrolled executive discretion.

In sum, the world would have been better off had Sidak simply sided with us completely. Had he done so, formal declarations of war would have been left to their special historical place, the Coase Theorem left to its other domains, and the meat cleaver left in the kitchen drawer, where it belongs.