

Elaine Scarry

The Matter of Consent



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Everyday life continually puts before us the claim that in the emergency of war, when our own survival is at stake, some of the operations of consent have to fall away because of the speed required to respond. But in Social Contract theory in general — as well as in specific instances of social contract such as the United States Constitution — provisions were made so that consent and the express act of contract became more explicit, not less explicit, at moments of war.

The book I am writing, *The Matter of Consent*, identifies consent as the basis of the radical discontinuity between conventional and nuclear war. Each form of war necessitates widespread bodily injury, but in conventional fighting, the population authorizes this use of the human body while in nuclear war, such authorization is a structural impossibility. Underlying the book's argument is the conviction that nuclear arms *can* be negotiated out of existence: the concept of consent is the lever across which this can be made to happen. It is the goal of the book to give this issue a stable place in philosophic discourse, and to make it a tool of argument available to public policy makers, arms negotiators, and members of the legal community.

Before arriving in Berlin, I had completed the central theoretical chapters identifying a set of structural attributes common to consent in medicine, marriage law, political philosophy, aesthetics and feminist discourse. My goal at the Wissenschaftskolleg was to complete two large

chapters specifically dealing with the United States Constitution, the one on the Second Amendment protection of the Right to Bear Arms, the other on the constitutional requirement for a Congressional Declaration of War. Both provisions are incompatible with formal strategic doctrines now in force in the United States; both therefore provide legal tools for dismantling existing nuclear arrangements.

The chapter on "The Right to Bear Arms" argues that the most familiar applications of the Second Amendment (protecting the right of criminals to carry guns; protecting the right of sportsmen to hunt) are less plausible than its application to nuclear arms. The history of its formulations makes clear that, whatever its relation to the realm of individuals and the private uses they have devised for guns, the Amendment came into being primarily as a way of dispersing military power across the entire population. Like voting, like reapportionment, like taxation, what is at stake in the Right to Bear Arms is a just distribution of political power. The Amendment is incompatible with the current U. S. strategic policy of Presidential First-Use, which by enabling a small number of persons to carry out large scale war acts, bypasses the contractual and distributional requirement.

At the heart of the argument is the claim that ordinary soldiers exercise powers of consent and dissent in conventional war. Not all of my colleagues at the Wissenschaftskolleg find this claim uncontroversial, and the chance to present the argument in a November colloquium gave rise to a year of (for me) helpful debate and conversation. Events in Europe in 1989-90 provided stark evidence of the role played by soldiers' consent. Soldiers' strikes, acts of desertion, and disobedience were steadily visible. The East German Army, once renowned for its discipline and training, was drastically reduced by desertions between November and March: its size fell by half, from 173000 to 90000. In late December, Romanian soldiers took the side of the population they had been ordered to suppress, and in doing so brought about the fall of Ceausescu. At the end of March, after the Soviet Army in Lithuania had received "permission to use violence" against the population, almost two thousand Lithuanian soldiers deserted, formally registering their names at the parliament building in Vilnius. So, too, the contractual requirement for an even distribution of arms across a population was vibrantly at issue in 1989-90, beginning in November with the Swiss Referendum on the Army and extending into early winter when East Germany began to reverse the existing arrangements that permitted exclusive control of arms by the Communist Party.

Because I had spent more than a year working on the 2nd Amendment, work on that chapter was complete by mid-December and it will appear

in winter 1991 in the *University of Pennsylvania Law Review*. In contrast, long months throughout the winter, spring, and summer were required to research and write the manuscript on the Congressional Declaration of War (Article I, section 8 of the Constitution).

My manuscript contemplates the Declaration of War as a speech act. The Congressional deliberations for the country's five Constitutional wars — the War of 1812, the Mexican War of 1846, the Spanish-American War of 1898, World War I and World War II — contain many different forms of highly charged language: roll call, prayer, formal messages, presidential address, procedural votes. But the central speech act is the declaration. The sentence — "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that war be and is hereby declared to exist" — occurs in two radically different forms: as a hypothetical or tentative verbal sketch at the opening, and then in a materialized state following the closing vote, now with hundreds of voices enfolded into it. This framing verbal act, along with the intervening deliberation, has (in each of the five wars) a set of structural attributes that have no counterpart in the councils of presidents.

A comparative study of congressional and presidential language is made difficult by the fact that presidential deliberations are "top secret"; the record is not subject to public scrutiny and challenge, even after the fact. But some formerly classified papers of Presidents in office prior to the early sixties have now been declassified, and my own study focuses on the deliberations of President Eisenhower with advisors during both the 1954 Taiwan Straits crisis and the 1959 Berlin crisis. This chapter (which will be the opening lecture at the political science series on Law and Violence at Amherst and will appear in the Hart-Nebbrig collection on theory of Representation) compares the way populations who are about to be injured appear before the minds of solitary Presidents and of Congressional assemblies.

In addition to *The Matter of Consent*, my year at the Wissenschaftskolleg enabled me to prepare several manuscripts for publication. A collection of my essays, *Resisting Representation* (Oxford University Press, 1991), identifies a set of phenomena that "resist representation" and shows the linguistic structures through which that resistance is overcome. I also prepared two articles on the material grounding of consent for *New Literary History* and the *Yale Journal of Law and the Humanities*. I was able to participate in the publication process of the German translation of the *Body in Pain* because of the generous collaboration of Axel Honneth of the Kolleg and Ursula Brumm of the Freie Universität who advised me on the manuscript.

In these projects — as in my central research on the nature of Assembly

— the library continually found inventive and immediate solutions to every problem. The microfilm collection of Congressional Records at the Kennedy Institute was especially important, as was the International Law Library at the Freie Universität. The Kolleg staff also made it possible for me to obtain through embassies in Bonn current translations of twenty European constitutions so that their war clauses could be compared. Acutely pleasurable to me were the evening sessions of the "Philosophy and Constitutional Law Seminar", as well as lunch hour arguments on language formation, constitution making, military history, and naval law.

It would be a privilege to do research in Berlin in any year; to be working there in the year the wall opened seemed a small miracle. Historical events moved with a rapidity that adrenalized all intellectual life (whether in the seminar room or in moon walks by the Brandenburg Gate), magnifying and intensifying the very scholarship it so effortlessly outpaced. In the afternoon it took to re-read Austin's *How to Do Things with Words*, a population nominated a former political prisoner for president; in the months of outlining a chapter on congressional assembly, a population (through the agency of improvisational assembly) peacefully disassembled and then reassembled its nation.

More striking for me than the discontinuity was the continuity between external and internal events. The sudden availability of the flowering East German orchards was continuous with the startlingly beautiful lilacs and forget-me-nots in the Wallotstrasse garden. In his lecture on friendship, Iso Camartin spoke of language as "the esplanade of the soul", and of the expansive threshold that bilingual and trilingual people have. The largesse of the Kolleg — its spirit of intellectual generosity — comes in part from the fact that the staff (in the library, reception, kitchen, secretarial floor) is gifted in one, two, three or four languages, and intent on enabling research, so that the November 9 sentence "the border's open" holds true all year door to door at the Wissenschaftskolleg.