



Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series

Yale Law School Faculty Scholarship

1988

Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair

Harold Hongju Koh
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Koh, Harold Hongju, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). *Faculty Scholarship Series*. 2071.

https://digitalcommons.law.yale.edu/fss_papers/2071

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

The Yale Law Journal

Volume 97, Number 7, June 1988

Articles

Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran- Contra Affair

Harold Hongju Koh†

*The Iran-Contra Affair, the latest in a line of disturbing American foreign
policy imbroglios, has forced national reexamination of the process by which*

© Copyright 1988, Harold Hongju Koh.

† Associate Professor, Yale Law School. From 1983-85, the author served as an Attorney-Adviser in the Office of Legal Counsel, United States Department of Justice.

Portions of this article were first presented at the April 1987 Annual Meeting of the American Society of International Law, the November 1987 Federalist Society Conference on "Foreign Affairs and the Constitution" (proceedings to be published in 42 U. MIAMI L. REV. (forthcoming 1988)), and the November 1987 Hofstra University Presidential Conference on "Richard Nixon: A Retrospective on His Presidency" (proceedings forthcoming, Greenwood Press). An expanded version of this article, tentatively entitled THE NATIONAL SECURITY CONSTITUTION AFTER THE IRAN-CONTRA AFFAIR, is forthcoming from Yale University Press (1989).

I am grateful to the many friends who challenged and supported me through earlier drafts of this article: Bruce Ackerman, Akhil Amar, Zöe Baird, Boris Bittker, Kay Bradley, Guido Calabresi, Gene Coakley, Drew Days, Bob Ellickson, Mary-Christy Fisher, Owen Fiss, Mike Fitts, Tom Franck, Paul Gewirtz, David Halperin, Morton Halperin, David Hayes, Geof Hazard, Paul Kahn, Bob Keohane, Geoff Klineberg, Leon Lipson, Jules Lobel, Jerry Mashaw, Jeff Meyer, Gerry Neuman, Roberta Romano, Susan Rose-Ackerman, Peter Schuck, John Simon, Peter Simons, Kate Stith, Harry Wellington, Alex Whiting, and the participants in the Yale Law School Faculty Workshop.

the United States conducts its foreign affairs. In this Article, Professor Koh suggests that, contrary to popular perception, the Iran-Contra Affair was not simply an historical aberration. Rather, he argues, the Affair is symptomatic of a chronic dysfunction in the current foreign policy process. After tracing the Affair's historical roots, Professor Koh suggests that the flaws in the current decisionmaking system stem from a growing trend of executive initiative, abetted by congressional acquiescence and judicial tolerance. He further asserts that this dramatic accretion of presidential power contravenes the constitutional and policy visions of foreign policymaking set down more than forty years ago. This diagnosis leads Professor Koh to call for a reform of the foreign policy process to restore and reinvigorate the constitutional roles properly envisioned for Congress and the federal judiciary.

TABLE OF CONTENTS

I.	HOW THE IRAN-CONTRA INVESTIGATORS FAILED	1259
A.	<i>Recognizing Historical Patterns</i>	1259
B.	<i>Role Definition</i>	1275
C.	<i>Normative Vision</i>	1279
II.	WHY THE PRESIDENT ALMOST ALWAYS WINS IN FOREIGN AFFAIRS	1291
A.	<i>Executive Initiative</i>	1292
B.	<i>Congressional Acquiescence</i>	1297
C.	<i>Judicial Tolerance</i>	1305
D.	<i>The Road to the Iran-Contra Affair</i>	1317
III.	LEARNING THE LESSONS OF THE IRAN-CONTRA AFFAIR	1318
A.	<i>Restraining the Executive</i>	1323
B.	<i>Revitalizing Congress</i>	1326
C.	<i>Reinvolving the Courts</i>	1335
D.	<i>Legislative Prospects</i>	1338
IV.	CONCLUSION	1342

For those who lived through the Watergate summer of 1974, the Con-
tragate summer of 1987 painted eerie historical parallels.¹ A congressional
panel and special prosecutor convened to question the President's men
about the legality of their activities, asking what the President knew and
when he knew it. The congressional committees concluded that the Presi-
dent's men had been running an illegal secret operation out of the White
House and placed ultimate blame upon the President himself.² But even

1. See, e.g., *This Is Watergate*, NEW REPUBLIC, Mar. 16, 1987, at 7 (editorial).

2. "[T]he ultimate responsibility for the events in the Iran-Contra Affair must rest with the President. If the President did not know what his National Security Advisers were doing, he should have." HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO.

after those committees had completed their work,³ the President continued to deny responsibility and Washington rang with talk of pardons for the accused.⁴

Of the many noteworthy findings in the Iran-Contra committees' majority report, the most controversial was "that the Iran-Contra Affair resulted from the failure of *individuals* to observe the law, not from deficiencies in existing law or in our system of governance."⁵ Declaring that "Congress cannot legislate good judgment, honesty, or fidelity to law,"⁶ the majority implied that all would be well again once the current crop of rascals either leave or are thrown out. The minority report agreed "that the underlying cause of the Iran-Contra Affair had to do with people rather than with laws,"⁷ thereby dismissing the majority's accompanying legislative recommendations as either "unconstitutional and unwise" or "unconscionably meddlesome."⁸

Before these conclusions harden into conventional wisdom, it seems worth inquiring whether the Iran-Contra committees asked the right questions, much less reached the right answers. In my judgment, the committees misjudged the Iran-Contra Affair's true import in three crucial respects. First, they failed to recognize that the relevant historical *precedent* for the Affair was not Watergate at all, but rather, Vietnam. Second, they misdiagnosed the underlying *problem*. The Iran-Contra Affair represented not simply an aberration, a failure on the part of certain individuals within a particular administration, but deeper systemic flaws in the current legal structure of our foreign policymaking process. Third, the committees' misunderstanding of both the precedent and the problem inevitably led them to the wrong *prescription*. For if, as the committees concluded, the Iran-Contra Affair sprang mainly from the wayward acts of a few colorful personalities, then the proper policy prescription would indeed be to enforce the laws currently on the books. But if the Affair stemmed from a more fundamental failure of legal *structure*, then a legislative revamping of the statutory framework that governs our foreign affairs is now in order.

Section I analyzes three decisive errors committed by the Iran-Contra

216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 21 (1987) [hereinafter IRAN-CONTRA REPORT.]

3. The committees formally concluded business at the end of February 1988. See N.Y. Times, Feb. 29, 1988, at B6, col. 5.

4. See *Beg Pardon*, ECONOMIST, Jan. 9, 1988, at 23.

5. IRAN-CONTRA REPORT, *supra* note 2, at 423 (emphasis added). The other nonjudicial investigation of the Affair reached the same conclusion. See PRESIDENT'S SPECIAL REVIEW BOARD, THE TOWER COMMISSION REPORT 4 (N.Y. Times ed. 1987) [hereinafter TOWER REPORT] ("The problems we examined in the case of Iran/Contra caused us deep concern. But their solution does not lie in revamping the National Security Council system."). For discussion of the Tower Report, see *infra* notes 80-83 and accompanying text.

6. IRAN-CONTRA REPORT, *supra* note 2, at 423.

7. *Id.* at 583 (minority report).

8. *Id.*

committees: their failure to place the Affair within the pattern of history; their misconception of their legislative role; and their failure to articulate either a coherent *policy* vision of how the various branches of government should deal with national security issues or a coherent *constitutional* vision of how the President, the Congress, and the courts should participate in the foreign policymaking process. Had the committees placed the Iran-Contra Affair in proper perspective, they would have recognized that the Iran-Contra Affair was not quintessentially a presidential scandal, but a failure of foreign policy process: the latest episode in a history of executive avoidance of legislative constraint in foreign affairs that stretches back to Vietnam.

If the Iran-Contra committees had drawn the proper historical parallels, they would have seen that a far more important question than "what did *this* President know and when did he know it?" is "why does the President almost always seem to win in foreign affairs?" Had the committees addressed this structural question, Section II suggests, they would have found the answer in a combination of three institutional factors: executive initiative, congressional acquiescence, and judicial tolerance. Furthermore, had the investigators acknowledged that the Iran-Contra Affair indicated a systemic failure within America's foreign policy apparatus, rather than an isolated episode of individual wrongdoing, they would have recognized that Congress' work, far from ending, is just beginning. For the right questions would have forced the committees toward a prospective, legislation-oriented inquiry, rather than toward the retrospective, fault-allocating exercise in which they ultimately engaged.

If, as I believe, the Iran-Contra Affair resulted not from bad people violating good laws (as the investigators concluded), or from good people violating bad laws (as Oliver North maintained), but from misguided people violating ineffective laws, then the time is now ripe for a systematic legislative reconsideration of the proper relationship among the President, Congress, and the courts in foreign affairs. Section III argues that while memories of the Iran-Contra Affair remain fresh, the incoming Administration and Congress should make a comprehensive effort to enact a new national security charter. That charter should aim to restructure the incentives that executive branch officials face when they consider whether to violate or circumvent existing foreign affairs laws. To accomplish this goal, national security reform efforts should focus not only on restraining executive adventurism, but also on attacking the institutional sources of congressional acquiescence and judicial tolerance that have contributed equally to recent executive excesses. Only a structural solution aimed at revitalizing both Congress and the courts as institutional counterweights to the President can fully redress the constitutional imbalance in national security decisionmaking that the Iran-Contra Affair has exposed.

I. HOW THE IRAN-CONTRA INVESTIGATORS FAILED

The Iran-Contra committees and the Tower Commission have already drawn the most obvious analogies between the Iran-Contra Affair and Watergate.⁹ Yet both of their final reports reflect three fundamental failings: of historical understanding, of role definition, and of normative vision about how the foreign policy process should operate.

A. *Recognizing Historical Patterns*

The Iran-Contra investigators failed first by focusing exclusively upon what happened during the Affair itself, rather than trying to understand the broader pattern of history into which that event fit. To comprehend fully how history repeated itself during the Iran-Contra Affair, the committees should have reviewed not just the immediate history of presidential scandals, but rather, the string of congressional-executive conflicts that have recently swept across the spectrum of United States foreign policy concerns. Had the committees conducted a more comprehensive survey of warmaking, treaty affairs, emergency economic powers, arms sales, military aid and covert operations, they would have uncovered a pattern of executive circumvention of legislative constraint in foreign affairs that stretches back to the Vietnam War and persists even after the Iran-Contra Affair.

1. *War Powers*

This pattern emerges most clearly in the realm of the war powers. In August 1964, American ships conducting covert operations were attacked in the Tonkin Gulf. Their response, allegedly in self-defense, led President Johnson to ask Congress for a joint resolution of support, the infamous Tonkin Gulf Resolution.¹⁰ Construing that Resolution as broad congressional authorization,¹¹ the President dramatically escalated the Vietnam War. By 1973 that foreign policy nightmare had triggered the passage, over President Nixon's veto, of the War Powers Resolution,¹² a

9. In both cases, high executive officials disregarded or stretched the rule of law. Both incidents stemmed from executive efforts to sustain a war in a Third World country by bypassing established channels of command and using unaccountable funds and private agents to conduct covert actions directly from the White House. See *infra* note 64. The Iran-Contra Affair proved more extreme, however, insofar as the means chosen were not simply covert operations, but a covert *foreign policy* run by a private cadre, upon whose judgments neither Congress, the people, nor other parts of the executive branch had opportunity to pass. See *Testimony of Richard V. Secord: Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions with Iran and the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong., 1st Sess. 2 (1987) (statement of Sen. Daniel K. Inouye) [hereinafter *Iran-Contra Hearings*].

10. Joint Resolution of August 10, 1964, H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384, repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

11. See Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1102-06 (1966).

12. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1982)).

statute imposing consultation and reporting requirements and a sixty-day time limit upon the President's commitment of troops overseas without express congressional authorization.

Congress passed the War Powers Resolution to prevent future Vietnams: undeclared creeping wars that start and build before Congress or the public are fully aware. Yet Congress undercut the Resolution's effectiveness by failing to address two new types of military action that have come to dominate the 1980's: covert wars, in which intelligence operatives acting under civilian supervision conduct paramilitary activities against foreign governments,¹³ and short-term military strikes that can be completed well within the Resolution's sixty-day time limit.¹⁴ Nor has the Resolution consistently prevented even the creeping escalation it was expressly designed to control.¹⁵

Thus today, nearly two years after the Iran-Contra furor began, American ships patrol the Persian Gulf, protecting reflagged Kuwaiti tankers. To forestall Iranian attacks on United States ships, which could lead the President to ask Congress for another joint resolution of support, the Senate has passed a bill that imposes a new sixty-day reporting requirement on the President and that contemplates a future resolution setting durational limits on his commitment of troops overseas without express congressional authorization.¹⁶ In short, fifteen years after the War Powers

13. Because the Resolution chose to regulate only "United States Armed Forces," 50 U.S.C. §§ 1542-1543 (1982), it did not reach the allegedly "private" activities of operatives such as Eugene Hasenfus, who worked during the Iran-Contra Affair for the "Enterprise" supervised by Lt. Col. Oliver North. See IRAN-CONTRA REPORT, *supra* note 2, at 144-47, 287-88 (describing Hasenfus affair).

14. Since 1973, the executive branch has treated the Resolution's time limits as *de facto* congressional permission to commit troops abroad for up to sixty days, at times eschewing even minimal consultation and reporting requirements. See Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" A Decade Later*, 16 VAND. J. TRANSNAT'L L. 915, 964-1013 (1983) (describing, *inter alia*, President Ford's May 1975 dispatch of troops to Cambodia to release the *Mayaguez*, President Carter's April 1980 attempt to rescue American hostages in Iran, and President Reagan's October 1983 military action in Grenada). More recently, the Reagan Administration has conducted "surgical" strikes against Libya in April 1986, against Iranian oil platforms in the Persian Gulf in October 1987 and April 1988, and, even as the first Iran-Contra indictments were being announced in March 1988, a brief introduction of U.S. troops into Honduras. See Statement by the Assistant to the President for Press Relations on the Deployment of United States Armed Forces to Honduras, 24 WEEKLY COMP. PRES. DOC. 355 (Mar. 16, 1988).

15. For example, President Reagan sent U.S. troops to Lebanon in August 1982 without prior consultation with Congress, and kept them there until February 1984. After more than two hundred combat fatalities, Congress finally sought to force troop removal. The President then bargained successfully for a joint resolution that extended the time deadlines of the War Powers Resolution from 60 days to 18 months, without ever articulating what policy the U.S. military presence was meant to serve. See Multinational Force in Lebanon Resolution, S.J. Res. 159, 97 Stat. 805 (1983) (codified at 50 U.S.C. §§ 1541-1544 (Supp. II 1987)). See generally Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 94-95 (1984).

16. See War Powers Act Compliance Resolution, S.J. Res. 194, 133 CONG. REC. S14630 (daily ed. Oct. 21, 1987). At this writing, the House has taken no action on the Senate's resolution, preferring instead to await the D.C. Circuit's ruling in a suit brought by more than 100 representatives to invoke the reporting requirements of the War Powers Resolution with respect to U.S. activities in the Persian Gulf. See Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), *appeal filed*, No. 87-5426 (D.C. Cir. 1988); *infra* notes 205, 283.

Resolution was first passed, Congress has contemplated reenacting a variant of it in order to enforce the Resolution's original purpose. As Yogi Berra would say, "it's *déjà vu* all over again": years of congressional-executive struggle over the war powers have brought us from the Tonkin Gulf only so far as the Persian Gulf.

2. *The Treaty Process*

Had the investigators turned their gaze to the realm of treaty affairs, they would have detected a similar historical pattern of executive circumvention of legislative constraint. Despite the constitutional suggestion that such affairs should be managed through congressional-executive partnership,¹⁷ by 1972 the President had firmly asserted his prerogative to conclude international accords through means that avoid prior congressional consent, principally, the executive agreement.¹⁸ During the Vietnam War, congressional objections to presidential treaty-making culminated in fears that the President would employ secret executive agreements to make binding commitments about overseas bases and troop deployment.¹⁹

To curb that possibility, Congress enacted the Case-Zablocki Act, which required the President to notify Congress of any recently concluded agreements.²⁰ In response, modern administrations have developed innovative methods to create or amend international obligations without congressional review: the techniques of "nonagreement agreement,"²¹ selective treaty compliance,²² parallel unilateral policy declaration,²³ and most re-

17. See U.S. CONST. art. II, § 2 (authorizing President to "make" treaties with advice and consent of two-thirds of Senate, but otherwise saying nothing about respective congressional-executive roles in treaty process).

18. President Roosevelt's famous 1940 "Destroyer Deal" with Great Britain triggered the expanded use of the executive agreement for national security ends and paved the way for the postwar rise of the United Nations and Bretton Woods multilateral treaty systems. See *infra* text accompanying notes 171-74, 237. Subsequently, the Supreme Court has largely validated the President's use of the executive agreement on the merits. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding Iranian Hostages Agreement); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937) (upholding Litvinov Assignment). See generally McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945).

19. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 607 (2d ed. 1976).

20. See Transmittal Act, Pub. L. No. 94-303, 86 Stat. 619 (1972) (codified at 1 U.S.C. § 112b (1982)) [hereinafter Case-Zablocki Act]. Before settling for this relatively toothless restraint, Congress had considered a more stringent law calling for legislative review of all executive agreements. See generally *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

21. Presidents Nixon and Reagan expanded the use of executive agreements in international trade by characterizing some not as agreements, but as "unilateral voluntary export restraints." See, e.g., *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (upholding President Nixon's voluntary restraint agreement with Japan on steel); J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 617-22 (2d ed. 1986) (similar Japanese restraints on auto exports); *Administration Announces Import Restraints, Other Measures to Aid Machine Tool Industry*, 3 Int'l Trade Rep. (BNA) 1537 (Dec. 24, 1986) (Japanese and Taiwanese restraints on machine tools); 25 I.L.M. 1408 (1986) (similar "arrangement" with Japan regarding semiconductors).

22. To avoid adhering to all provisions of the United Nations Convention on the Law of the Sea,

cently, the "treaty reinterpretation."²⁴ Moreover, since the Supreme Court's 1979 decision in *Goldwater v. Carter*,²⁵ the executive branch has developed an array of gambits to terminate,²⁶ modify,²⁷ selectively nullify,²⁸ or circumvent²⁹ existing treaties without Congress' prior consent. In

President Reagan refused to sign it, then selectively complied with its provisions as a matter of customary international law. See United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (1983), reprinted in 22 I.L.M. 464 (1983); Proclamation No. 5030 of March 10, 1983, 3 C.F.R. 22-23 (1984).

23. In 1977, President Carter unilaterally declared that the United States would comply with the expired SALT I treaty so long as the Soviet Union did the same. See Unilateral Policy Declaration by the United States with respect to the SALT II Treaty, reported in 123 CONG. REC. S31,901 (daily ed. Oct. 3, 1977) (letter from Secretary of State Cyrus Vance to Senator John Sparkman, Chairman, Senate Foreign Relations Committee, dated Sept. 21, 1977). President Reagan similarly complied with the warhead limits in the unratified SALT II treaty until December 1986. See *Over the Top*, TIME, Dec. 8, 1986, at 43.

24. The Reagan Administration has sought to accommodate its Strategic Defense Initiative with the 1972 Anti-Ballistic Missile (ABM) Treaty by giving that treaty a reading far broader than that originally accepted by the Senate when it initially gave its advice and consent. See generally R. GARTHOFF, POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY (1987); Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986); Nunn, *The ABM Reinterpretation Issue*, 10 WASH. Q. 45 (Autumn 1987) (all arguing that this constitutes *de facto* treaty amendment without congressional approval). For a defense of the Administration's position, see Sofaer, *The ABM Treaty: Legal Analysis in the Political Cauldron*, 10 WASH. Q. 59 (Autumn 1987). Cf. *Rainbow Navigation, Inc. v. Dep't of the Navy*, 686 F. Supp. 354 (D.D.C. 1988) (holding that Navy may not unilaterally reinterpret United States-Iceland memorandum of understanding regarding military cargo routes).

25. 444 U.S. 996 (1979) (dismissing on justiciability grounds Senator's challenge to President's unilateral decision to terminate U.S. Mutual Defense Treaty with Taiwan in accordance with its terms). In *Goldwater*, only one Justice voted to uphold the President's treaty-termination decision on the merits, and even then, only because the case involved recognition of foreign governments, an issue over which the President exercises plenary power. See *id.* at 1006 (Brennan, J., concurring).

26. See, e.g., *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986), *aff'd*, 841 F.2d 1 (1st Cir. 1987) (dismissing private challenge to State Department's notice of termination of bilateral U.S. Friendship, Commerce, and Navigation Treaty with Nicaragua); see also Letter from Secretary of State George P. Shultz to Secretary-General of the United Nations Javier Perez de Cuellar (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985) (terminating U.S. acceptance of compulsory jurisdiction of International Court of Justice).

27. See Letter from Secretary of State George P. Shultz to Secretary-General of the United Nations Javier Perez de Cuellar (Apr. 6, 1984), reprinted in 23 I.L.M. 670 (1984) (immediately and temporarily "modifying" United States' 1946 acceptance of International Court of Justice's compulsory jurisdiction, notwithstanding treaty provision requiring six months' notice of termination).

28. The Reagan Administration has applied a "line-item veto" approach to certain multilateral treaties, attaching so many conditions to its request for Senate advice and consent that those exceptions have significantly altered the terms of the acceptance. See, e.g., Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612-22 (1986) (describing conditions offered by Reagan Administration to secure advice and consent to ratification of Genocide Convention); Message to the Senate Transmitting the Convention Against Torture and Other Inhuman Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 642 (May 20, 1988); Letter of May 10, 1988 from Secretary of State George P. Shultz to President Ronald Reagan regarding the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment (copy on file with author) (advising transmittal of that convention to Senate with seventeen reservations, understandings and declarations); Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. III (1987), reprinted in 81 AM. J. INT'L L. 910 (1987) (refusing to submit for advice and consent Protocol I of Geneva Convention, which the United States had previously signed, while accepting some of its provisions as customary international law).

29. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (upholding Commerce Secretary's refusal to certify that new executive agreement authorizing Japanese fishermen to evade "zero quota" on whale-killing "diminishes the effectiveness" of the International Convention

short, just as the years leading up to Vietnam witnessed dramatic presidential domination of the process of agreement-making, the years since Vietnam have marked a parallel era of executive aggrandizement of the coordinate phases of agreement-breaking and "bending."³⁰

3. *Emergency Economic Powers*

The vast majority of the foreign affairs powers the President exercises daily are not inherent constitutional powers, but rather, authorities that Congress has expressly or impliedly delegated to him by statute. Yet closer examination of the foreign affairs areas in which Congress has extensively legislated reveals a pattern of executive ascendancy in statutory realms even more striking than the President's continued domination of the constitutional realms of warring and treaty affairs.

During the 1970's, the Vietnam debacle, coupled with dramatic institutional changes within Congress,³¹ stimulated the enactment of statute after statute subjecting the President's delegated foreign affairs powers to stringent procedural constraints.³² These enactments typically conditioned

for the Regulation of Whaling). In a decision construing dicta from the Supreme Court's famous opinion in *The Paquete Habana*, 175 U.S. 677, 700 (1900), the U.S. Court of Appeals for the Eleventh Circuit recently sustained the President's authority "to disregard international law in service of domestic needs . . ." *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied*, 107 S. Ct. 289 (1986). As Professor Henkin has noted, the Eleventh Circuit's dicta could be read to support an "assertion that . . . the President and lesser executive officials may disregard a treaty or a rule of international law." See Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987).

30. Compare *infra* notes 171-74 and accompanying text with *infra* notes 179-83 and accompanying text. In two important respects, however, the presidential agreement-making years of the 1950's and 1960's differed markedly from the agreement-breaking and bending years of the 1980's. First, in the former era, the President used his agreement-making powers primarily to enhance multilateral cooperation, while in the latter, he has employed new techniques to withdraw from this postwar vision of multilateralism, often breaking or modifying preexisting commitments without consulting either Congress or our treaty partners. Second, although the Supreme Court has generally validated the President's executive agreement-making authority, *see supra* note 18, it has yet to approve on the merits the President's more recent techniques of treatybreaking and bending. *See supra* note 25.

31. Between 1970 and 1974, the seniority system was substantially transformed (particularly in the House) and congressional rules were altered to enhance the independence of subcommittee chairmen and the influence of rank-and-file members. See Ornstein, *The House and the Senate in a New Congress*, in *THE NEW CONGRESS* 363 (T. Mann & N. Ornstein eds. 1981). An extraordinarily large number of reformist liberal Democrats were elected in the Watergate-driven congressional election of 1974. Ornstein, *Interest Groups, Congress and American Foreign Policy*, in *AMERICAN FOREIGN POLICY IN AN UNCERTAIN WORLD* 49, 54 (D. Forsythe ed. 1984) [hereinafter Ornstein, *Interest Groups*]. To close the expertise gap between itself and the executive branch, Congress augmented committee staffs with foreign policy specialists (the so-called "S. Res. 4" staffers). *See* T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 228 (1979). Congress also developed important in-house foreign affairs research capability within the Congressional Research Service, the General Accounting Office, the Congressional Budget Office, and the Office of Technology Assessment. *Id.* at 228, 242-45.

32. *See, e.g.*, International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982); National Emergencies Act, 50 U.S.C. §§ 1601-1651 (1982); Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982); Export Administration Act of 1979, 50 U.S.C. §§ 2401-2413 (1982); Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (1982); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, 89 Stat. 849 (codified as amended in scattered sections of 7 and 22 U.S.C.); Hughes-Ryan Amendment to the Foreign Assistance Act, 22 U.S.C. § 2422 (1982)

presidential exercises of delegated authority upon adherence to elaborate statutory procedures, including factual findings, public declarations, prior reporting, subsequent consultation requirements, and the legislative veto—the congressional control technique of choice in the post-Vietnam era.³³

Virtually overlooked at the time, however, was that this generation of statutes created not only procedural constraints, but also substantial fresh delegations of foreign affairs authority.³⁴ By 1988, it had become clear that the executive branch had successfully tapped many of these broad new authorizations while paying only lip service to the accompanying procedural strictures.

The most glaring example has been the International Emergency Economic Powers Act (IEEPA),³⁵ which Congress enacted in 1977 to limit executive abuses of the national emergency powers conferred on the President sixty years earlier by the Trading with the Enemy Act (TWEA).³⁶ TWEA had authorized the President to wield an enormous store of delegated power in both wartime and nonwartime situations, simply by declaring the existence of a national emergency. Stung by perceived abuses of that delegated power, Congress drafted IEEPA specifically to narrow the President's authority in *nonwartime* situations, conditioning his exercise of emergency powers upon prior congressional consultation, subsequent review, and legislative veto termination provisions.³⁷ Yet three successive Supreme Court decisions quickly emasculated IEEPA's various congressional control devices.³⁸ Those rulings freed the President to invoke

(intelligence oversight); International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2751-2796 (1982); Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. § 2304 (1982); and the Nuclear Non-Proliferation Act of 1978 (codified as amended in scattered sections of 22 and 42 U.S.C.). For descriptions of this intense period of legislative activity, see generally T. FRANCK & E. WEISBAND, *supra* note 31; THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER (T. Franck ed. 1981).

33. See generally Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1204-08 (1986) (describing typical post-Vietnam legislative package); Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912 (1985).

34. The most prominent exception was the War Powers Resolution, which expressly denied the President new warmaking authority. See 50 U.S.C. § 1547(d)(2) (1982) ("[n]othing in this [joint resolution] . . . shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces . . ."). But see *supra* note 14 (describing how executive branch has treated Resolution's time limits as de facto congressional permission to commit troops abroad for up to sixty days).

35. 50 U.S.C. §§ 1701-1706 (1982).

36. 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1982).

37. Presidents rarely terminated TWEA national emergencies. See Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1104 (1983) (while Congress was considering IEEPA's enactment in 1977, President Roosevelt's 1933 TWEA declaration of national banking emergency was still in force). Thus, "TWEA emergency authority operated as a one-way ratchet to enhance greatly the President's discretionary authority over foreign policy." *Regan v. Wald*, 468 U.S. 222, 245 (1984) (Blackmun, J., dissenting).

38. See *Regan v. Wald*, 468 U.S. 222 (1984) (upholding President's authority to exercise statutory authorities against Cuba pursuant to IEEPA's grandfather clause); *INS v. Chadha*, 462 U.S. 919

IEEPA to conduct widescale economic warfare merely by declaring a national emergency with respect to a particular country, as Presidents Carter and Reagan have subsequently done against Iran, Libya, Nicaragua, South Africa, and Panama.³⁹ Moreover, lower court decisions have afforded the President broad discretion in complying with IEEPA's procedural requisites and allowed him to use these "emergency" powers to combat conditions that have persisted for years.⁴⁰ Thus, in only one decade, the executive branch has succeeded in extracting from IEEPA the same sweeping delegation of authority that Congress had expressly sought to remove from it after Vietnam.

4. *Arms Sales, Military Aid, the NSC, and Covert Operations: The Iran-Contra Affair*

Had the committees placed the Iran-Contra Affair against this broader historical background, they would have recognized that it represented not just a passing historical aberration, but merely the latest act in a foreign policy drama that has been playing out since the early 1970's. Indeed, far from being unprecedented, each of the four aspects of the Iran-Contra tableau upon which the committees focused—the covert sale of arms to Iran, the diversion of funds to the contras in apparent violation of the Boland Amendments,⁴¹ the "operationalization" of the National Security Council (NSC), and the abuse of covert operations—repeated historical events that had first occurred during the Nixon era. Thus, viewed in light of events of the early 1970's, the Iran-Contra Affair emerges as an ex-

(1983) (invalidating IEEPA's legislative veto provision); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (generously construing President's IEEPA authorities). *See also infra* notes 211-14, 250-68 (describing Court's technique of statutory interpretation in these cases).

39. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979) and Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980) (Iran); Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985) (Nicaragua); Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986) and Exec. Order No. 12,544, 51 Fed. Reg. 1235 (1986) (Libya); Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985) (South Africa); Exec. Order No. 12,635, 50 Fed. Reg. 12,134 (1988) (Panama).

40. *See, e.g.,* *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986), *aff'd*, 841 F.2d 1 (1st Cir. 1987) (whether particular country poses sufficient threat to trigger IEEPA declaration of national emergency constitutes nonjusticiable political question). Like the TWEA national emergencies that preceded it, *see supra* note 37, the IEEPA national emergency with respect to Iran has now persisted for nearly a decade. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979) (promulgated November 1979). Ironically, administration officials have recently characterized as "draconian" even the requirement that the President declare an emergency before invoking his IEEPA powers. *See Trade Policy: Administration Weighing Emergency Powers Act Changes, State Department Official Says*, 4 Int'l Trade Rep. (BNA) 1300, 1300 (Oct. 21, 1987) (statement of Ambassador-at-Large L. Paul Bremer III).

41. The Boland Amendments, which were attached to successive appropriations bills between 1982 and 1986, generally prohibited the expenditure of funds "available" to any "entity of the United States involved in intelligence activities" for assistance to the "Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua." *See also IRAN-CONTRA REPORT, supra* note 2, at 395-407; 133 CONG. REC. H4982-87 (daily ed. June 15, 1987) (cataloging various amendments).

treme, but foreseeable, episode in the continuing post-Vietnam flow of foreign affairs power from Congress to the Executive.

a. *The Arms Sale*

The Reagan Administration was not the first to sell weapons systems secretly to Iran. In May 1972, President Nixon sold fighter aircraft and associated equipment to the Shah over the opposition of both the State and Defense Departments.⁴² The public furor over that and later weapons sales to Saudi Arabia and Kuwait stimulated passage of arms export control legislation that authorized Congress to veto, by concurrent resolution, all government-sponsored arms sales above certain dollar amounts.⁴³ But the Supreme Court's 1983 invalidation of the legislative veto⁴⁴ prompted an amendment to that law, which authorized Congress to nullify planned arms sales only by joint resolutions that are subject to presidential veto.⁴⁵ Moreover, executive branch lawyers successfully embedded into the successor legislation numerous provisions for presidential waiver of reporting requirements in "exceptional circumstances" or "in the national interest."⁴⁶ This subsequent legislation also left ambiguous whether the executive branch could transfer weapons abroad secretly, so long as that transfer occurred as part of an intelligence operation conducted under other laws.⁴⁷ Consequently, even a joint resolution of disapproval would not bar the President from selling arms abroad openly, so long as he could veto that resolution and defeat an override by securing more than one-third of the votes in either chamber of Congress. At the same time, he could sell

42. See H. KISSINGER, *WHITE HOUSE YEARS* 1264 (1979). Because that sale was primarily for cash on commercial terms, it evaded the legislative controls built into the 1949 Mutual Defense Assistance Act, which authorized the President to approve government-to-government cash sales to foreign countries without congressional approval. See Madison, *The Arms Sale Say-So*, 19 NAT'L J. 667, 668-69 (1987).

43. See Nelson-Bingham Amendment to the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, 1814 (codified as amended at 22 U.S.C. § 2776 (1982)) (requiring President to give Congress advance notice of any offer to sell to foreign countries defense articles and services valued at \$25 million or more and empowering Congress to disapprove such sales within 20 calendar days by concurrent resolution). Congress later incorporated this legislative veto provision, along with numerous reporting and certification requirements designed to reach commercial sales and third-country transfers of U.S. arms, into the comprehensive International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. § 2318 (1982 & Supp. III 1985)).

44. *INS v. Chadha*, 462 U.S. 919 (1983).

45. See Arms Export Control Act, Legislative Veto, Pub. L. No. 99-247, 100 Stat. 9 (1986).

46. See generally Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT'L L. 696, 698-713 (1987) (enumerating numerous loopholes in arms sale statutes that were exploited during Iran-Contra Affair).

47. See *id.* at 698 ("The Reagan administration's covert sale of military arms to Iran falls into a legal quagmire because of the conflict between the laws governing the export of military arms and the laws governing covert activities by the United States Government."); IRAN-CONTRA REPORT, *supra* note 2, at 451, 539-46 (minority report) (arguing that covert transfers under National Security Act and Economy Act can substitute for transfers under Arms Export Control Act). But see *id.* at 418-19 (majority report) (disputing minority's conclusion).

arms abroad *covertly*, so long as he could claim to be acting pursuant to the intelligence, rather than the arms control, laws.

This precise scenario played out in 1986, when the now-infamous covert arms sales to Iran took place. Perhaps more important, but largely unnoticed by the general public, was the executive branch's simultaneous *overt* sale of advanced missiles to Saudi Arabia over the objection of large majorities in both Houses.⁴⁸ Thus, fourteen years after covert arms sales to Iran had first sparked the enactment of restrictive arms export legislation, Members of Congress enraged by new Middle East arms sales were once again introducing a statute "designed to restore a balance between the executive and legislative branches on foreign arms transfers."⁴⁹

b. *Funding Secret Wars*

Nor did the Boland Amendments mark the first time that Congress had invoked its appropriations power to harness executive funding of secret warmaking. The prototype for such legislation had aimed not at Central America, but at Southeast Asia. The unmasking of the Nixon Administration's secret Cambodian incursions in 1970 revealed that the President had used his special funds and transfer authorities to allot millions of dollars in secret military aid to Cambodia without prior congressional approval.⁵⁰ In 1973 and 1974, Congress enacted seven separate provisions declaring that no funds authorized or appropriated pursuant to various laws could be expended to support United States military or paramilitary forces in Vietnam, Cambodia, or Laos.⁵¹ As Central Intelligence Agency

48. The \$354 million Saudi arms sale dwarfed the \$20 million in arms transferred during the Iran-Contra Affair. Congress originally supported the joint resolution disapproving the Saudi deal by votes of 356-62 in the House and 73-22 in the Senate. Madison, *supra* note 42, at 669. But after vetoing the resolution, President Reagan persuaded eight Senators to switch their positions and four others who had not previously voted to support his position. He thereby averted an override of his veto by a single vote. See N.Y. Times, June 6, 1986, at A1, col. 6.

49. See Letter from Senator Joseph R. Biden, Jr. and Representative Mel Levine, N.Y. Times, Apr. 2, 1987, at A30, col. 3 (supporting S. 419 and H.R. 898, their bills to amend Arms Export Control Act).

50. See generally Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69, 73-76 (1988) (chronicling presidential abuses of military aid process from 1961 to 1972). In one instance, the Administration had sent Cambodia "7.9 million in military aid and, *after the fact*, obtained a Presidential determination which was made retroactive in an effort to legalize what had already been done." S. REP. NO. 431, 92d Cong., 2d Sess. 13 (1972) (emphasis in original). The CIA's general counsel made a similar retroactive finding during the Iran-Contra Affair. See IRAN-CONTRA REPORT, *supra* note 2, at 185-86; Victor, *CIA Counsel's Role Questioned*, NAT'L L.J., Feb. 2, 1987, at 3, col. 1.

51. These provisions employed language almost identical to the Boland Amendments. Compare provisions cited *supra* note 41 with Section 30 of the Foreign Assistance Act of 1973, 22 U.S.C. § 2151, 87 Stat. 732, as amended by Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 30, 80 Stat. 714 ("[n]o funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operations by the United States in or over Vietnam, Laos, or Cambodia"). See also Department of Defense Appropriation Act of 1975, Pub. L. No. 93-437, § 839, 88 Stat. 1212, 1231; Department of Defense Appropriations Act of 1974, Pub. L. No. 93-238, 87 Stat. 1026 (1973); Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-55, § 806, 87 Stat. 615 (1973); Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-

(CIA) involvement in the Cambodian operations became public, Congress enacted the Hughes-Ryan Amendment of 1974,⁵² which imposed reporting requirements on the CIA as a prerequisite to its expenditure of appropriated funds.

Yet even these Vietnam-era statutory funding limitations did not curtail the Executive's foreign military and paramilitary campaigns. President Ford contravened the Vietnam funding restrictions less than a year after their enactment.⁵³ Even after the Hughes-Ryan Amendment became law, secret United States paramilitary aid to Angola persisted, forcing Congress in 1976 to pass the Boland Amendments' direct ancestor: a funding restriction specifically barring aid to private groups that would have the purpose or effect of aiding military or paramilitary operations in that country.⁵⁴

c. *The NSC Operationalized*

Similarly, the operationalization of the NSC commenced not with the peregrinations of Oliver North, or Robert McFarlane's odyssey to Tehran with Bible and birthday cake, but with Henry Kissinger's secret trip to mainland China nearly two decades earlier.⁵⁵ The National Security Act of 1947,⁵⁶ which established both the NSC and the CIA, did not create the NSC as a decision-making, much less a decision-executing, body.⁵⁷

126, § 13, 87 Stat. 454 (1973); Continuing Appropriations Resolution of 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973); Fulbright Amendment to Second Supplemental Appropriations Act, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 129 (1973). The progenitor for all of these provisions was the famous 1971 Cooper-Church Amendment to the Foreign Military Sales Act, which cut off funds for U.S. troops, advisers and air support in and over Cambodia. See Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229, 237 (1981/82).

52. Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804-05 (1974) (codified at 22 U.S.C. § 2422 (1982)).

53. The President sent U.S. armed forces to rescue the *Mayaguez* and to evacuate personnel from Vietnam and Cambodia, notwithstanding express statutory funding prohibitions barring use of United States forces to carry out "military operations" or "combat activities" in, over, or off the shores of Cambodia or South Vietnam. See Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1, 21-22 (1975).

54. See Clark Amendment to the Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976), as amended by Pub. L. No. 96-533, tit. I § 118(a)-(d), 94 Stat. 3141 (codified as amended at 22 U.S.C. § 2293 note (1980)). The executive branch apparently complied with the Clark Amendment, but successfully lobbied for its repeal in July 1985. See G. TREVERTON, *COVERT ACTION* 220 (1987).

55. See H. KISSINGER, *supra* note 42, at 698-763.

56. 50 U.S.C. §§ 401-405 (1982).

57. Congress no more designed the NSC to execute national security policy than it designed the Council of Economic Advisers to print the money. See National Security Act of 1947, 50 U.S.C. § 402(a) (1982) (NSC's function "shall be to *advise the President* with respect to the integration of domestic, foreign, and military policies relating to the national security . . .") (emphasis added). Congress made only the President, the Vice-President, and two cabinet officers—the Secretaries of State and Defense—statutory members of the NSC. *Id.* Thus, the President, not the National Security Assistant, presides over NSC meetings, and the Director of Central Intelligence, like the Chairman of the Joint Chiefs of Staff and the Attorney General, attends NSC meetings only by invitation. See TOWER REPORT, *supra* note 5, at 6.

The position of Assistant to the President for National Security Affairs, which did not exist until six years later, was founded to supervise the NSC staff, not to act as a policy advocate or executor.⁵⁸ By the same token, in 1947 Congress did not envision that the Central Intelligence Agency would formulate, as opposed to execute, intelligence policy, but rather, authorized the CIA to act only under close NSC direction.⁵⁹

By the early 1960's, however, both institutions had deviated noticeably from their original organizational mandates. The National Security Assistant's peculiar legal status effectively immunized his activities from congressional examination.⁶⁰ The NSC's accumulation of decisionmaking, then decision-executing, power at the expense of the State Department culminated in National Security Assistant Kissinger's secret negotiating missions to Vietnam, China, Berlin, and the Soviet Union.⁶¹ Over the Defense Secretary's initial objections, Kissinger and his deputy, Major General Alexander Haig, directly supervised the secret bombing of Cambodia.⁶² Meanwhile, even before the Bay of Pigs, the CIA had begun to move in the opposite direction, executing and then formulating policy governing not just foreign intelligence, but covert operations and covert war as well.⁶³ By 1974, the NSC had taken on significant operational respon-

58. In 1947 Congress established no position called "National Security Adviser," authorizing only the creation of a small executive secretariat to serve as the NSC's staff. See Franck, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 AM. J. INT'L L. 634, 635 (1980). In 1953, President Eisenhower created the National Security Assistant's position under an obscure statute authorizing the appointment of "employees in the White House Office," 3 U.S.C. § 105(a)(1) (1982), to set the Council's agenda, to brief the President on national security matters, and to supervise the Council's staff. Although McGeorge Bundy substantially upgraded the position during the Kennedy Administration, it was not until Richard Nixon's initial presidential press conference that a President first referred to the National Security Assistant as "my Adviser for National Security Affairs . . ." Brzezinski, *The NSC's Midlife Crisis*, 69 FOREIGN POL'Y 80, 86-7 (1987) (emphasis added).

59. See 50 U.S.C. § 403(d)(5) (CIA shall "perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.") (emphasis added).

60. Because the National Security Assistant has been treated as an "inferior Officer" whose appointment Congress has vested "in the President alone" for purposes of the appointments clause, he has not been subjected to Senate confirmation. See U.S. CONST. art. II, § 2. Nor does any statute require the Assistant to report to Congress. Indeed, until the Iran-Contra Affair, every President had refused to allow his National Security Assistant to testify before Congress on grounds of executive privilege. See Franck, *supra* note 58, at 634-39.

61. See H. KISSINGER, *supra* note 42, at 277-82, 733-87, 823-33, 1124-64. When Kissinger returned from China, President Nixon instructed him to give the Secretary of State only a "sanitized" account of his trip. *Id.* at 756-57.

62. See *id.* at 242-54; Sharpe, *The Real Cause of Irangate*, 68 FOREIGN POL'Y 19, 24 (1987) (Kissinger created elaborate covert network to keep Cambodian bombing secret even from Strategic Air Command).

63. See generally J. PRADOS, *PRESIDENTS' SECRET WARS* (1986); G. TREVERTON, *supra* note 54. Congress created the CIA with expectations that it would follow three internal control principles. First, Congress expressly denied the CIA "police, sub[p]ojena, law-enforcement powers, or internal-security functions" to ensure that it would act as a national security agency, not as a domestic law enforcement unit. 50 U.S.C. § 403(d)(3) (1982). Second, an early NSC directive instructed the CIA to employ covert means only in pursuit of announced American foreign policy ends. See A. WHITING, *COVERT OPERATIONS AND THE DEMOCRATIC PROCESS: THE IMPLICATIONS OF THE IRAN/CONTRA AFFAIR* 8-27 (1987). Third, subsequent NSC directives made clear that the CIA's covert activities

sibility and the CIA had become an important national security policy player.⁶⁴ Thus, the revelations that during the Iran-Contra Affair the NSC staff had conducted, with private monies, a covert operations policy partially formulated by the Director of Central Intelligence only brought full circle an inversion of institutional responsibility that had surfaced during the Vietnam era.

d. *Covert Operations*

Once the Executive's Vietnam-era abuses came to light, Congress sought to prevent future executive adventurism by amending existing intelligence legislation to reach covert activities. Yet even a brief review of this revisionary movement unveils eerie historical parallels between 1974 and 1988. In late 1974, as revelations of executive misconduct multiplied, the President declared that he would not tolerate illegal activities by intelligence agencies, and formed a presidential commission to investigate intelligence abuses.⁶⁵ Congress enacted a law that sought to ensure future accountability for covert operations through stiffer certification and reporting requirements.⁶⁶ The President replaced the Director of Central Intelligence, and Congress established select, and later permanent, House and Senate Committees to study governmental intelligence operations.⁶⁷ Oversight advocates then offered a comprehensive 263-page charter for the

should proceed only after full consultation and coordination with other executive branch agencies and Congress. *Id.* at 28-36, 41-55.

By 1974, the CIA had violated each of these three internal control principles. During the Vietnam War, the agency conducted secret illegal domestic break-ins, mail intercepts, wiretaps, and domestic surveillance. *See generally* M. HALPERIN, J. BERMAN, R. BOROSAGE & C. MARWICK, *THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES* 135-54 (1976). Congressional investigations uncovered CIA death plots against foreign leaders in Cuba and the Congo and secret CIA military and paramilitary activities in Vietnam, Laos, Cambodia, and Chile, all conducted contrary to stated foreign policy objectives and without accountability to either Congress or the rest of the executive branch. *See generally id.* at 15-57; J. PRADOS, *supra*, at 171-296; Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940*, *LAW & CONTEMP. PROBS.*, Spring 1976, at 58, 81-84.

64. Indeed, the Watergate break-in was itself executed by the "Plumbers"—a White House unit funded with private campaign contributions, partly staffed by former CIA agents, and supported by the CIA—which was formed to "plug leaks" by government officials suspected of having exposed the secret bombing of Cambodia. *See* P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER, CASES AND MATERIALS* 138 (1988). Thus, any relevant historical parallels between Watergate and the Iran-Contra Affair ultimately derive from Watergate's own place atop the much larger iceberg that was our Southeast Asian foreign policy in the 1970's.

65. *See* COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, *REPORT TO THE PRESIDENT* (1975); J. PRADOS, *supra* note 63, at 333.

66. The Hughes-Ryan Amendment of 1974, 22 U.S.C. § 2422 (1982), abandoned the prior practice of denial of presidential responsibility. The amendment required the President to make an explicit "finding" that each covert operation is "important to the national security of the United States" and to report "in a timely fashion, a description and scope of such operation" to the appropriate congressional committees. *See* A. WHITING, *supra* note 63, at 36-41.

67. The most famous of these was the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities (the "Church Committee"). *See generally* L. JOHNSON, *A SEASON OF INQUIRY* (1985) (describing Church Committee investigations).

intelligence community, which opponents trimmed down into the two-page Intelligence Oversight Act of 1980.⁶⁸

As finally enacted, the 1980 Oversight Act did little more than codify the executive practice followed by the Carter Administration over the previous four years.⁶⁹ The Act's effectiveness therefore hinged upon informal congressional-executive accords and the President's willingness to issue and enforce the executive orders and national security decision directives necessary to discharge his statutory responsibilities.⁷⁰ In the Reagan years, this choice of informality proved costly. As public memories of CIA misconduct in the 1970's dimmed,⁷¹ the Administration began to protest the stringency of the statutory reporting and consultation requirements and unilaterally modified previously issued executive orders and national security decision directives.⁷² Even after the intelligence committees reached

68. Pub. L. No. 96-450, 94 Stat. 1981 (1980) (codified at 50 U.S.C. § 413 (1982)), described in Paterson, *Oversight or Afterview?: Congress, the CIA, and Covert Actions Since 1947*, in CONGRESS AND UNITED STATES FOREIGN POLICY: CONTROLLING THE USE OF FORCE IN THE NUCLEAR AGE 164-65 (M. Barnhart ed. 1987). The 1980 Oversight Act stiffened the reporting requirements of the Hughes-Ryan Amendment by requiring the Executive to provide the intelligence committees with prior notice of any "significant anticipated intelligence activity" (including covert operations). 50 U.S.C. § 413(a)(1) (1982). In exchange, Congress reduced from eight to two the number of congressional committees to which the President was required to report and permitted him to act without prior notice if he reported on the operation "in a timely fashion." *Id.* § 413(b). In "extraordinary circumstances affecting vital interests of the United States," the number of members to be notified of pending covert actions was reduced to the so-called "Gang of Eight": the chairmen and ranking minority members of both intelligence committees, plus the majority and minority leaders of the Senate and the Speaker and minority leader of the House. *Id.* § 413(a)(1)(B).

69. The Act included almost verbatim the provisions for intelligence oversight contained in President Carter's 1978 Executive Order restricting intelligence activities. Compare § 3-4 of Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978), as amended by Exec. Order No. 12,139, 44 Fed. Reg. 30,311 (1979) with 50 U.S.C. § 413(a) (1982). See 126 CONG. REC. S13,106 (daily ed. June 3, 1980) (remarks of Senator Moynihan) ("[W]hat we have here is a codification in law of the practice our committee has followed with the administration for the past 3 ½ years."). Even so, the Carter Administration opposed provisions of that Act that were identical to those in its own regulations "because the President did not want to give those restraints the force of law." Note, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 327, 357 (1982).

70. See Paterson, *supra* note 68, at 165 (the 1980 Act "hardly satisfied those who preferred a major statutory charter; it carried a certain ambiguity permitting the president to skirt prior notification; it placed no time limit on covert actions and did not provide for a congressional veto In essence, then, Congress only had to be informed.").

71. The fall of the Shah of Iran and the Soviet invasion of Afghanistan, both viewed as intelligence failures, helped dampen public concern over CIA misconduct. See Goodman, *Reforming U.S. Intelligence*, 67 FOREIGN POL'Y 121, 123-24 (1987).

72. President Carter's Executive Order governing intelligence had required consistency between covert and overt policies by defining "special [i.e. covert] activities" as secret "activities conducted in support of national foreign policy objectives abroad which are designed to further official United States programs and policies abroad" Exec. Order No. 12,036, 43 Fed. Reg. 3674, 3692 (1978) (emphasis added). But President Reagan's 1981 Executive Order dropped that limiting language. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981), reprinted in 50 U.S.C. § 401 (1982). In defense of the Iran-Contra Affair, Justice Department officials later reasoned that "[a]ctivities authorized by the President cannot 'violate' an executive order in any legally meaningful sense . . . because his authorization creates a valid modification of, or exception to, the executive order." Memorandum from Assistant Attorney General Charles J. Cooper for the Attorney General, *Legal Authority for Covert Arms Transactions to Iran*, Dec. 17, 1986, at 14, cited in IRAN-CONTRA REPORT, *supra* note 2, at 542 n.** (minority report) (making similar argument with regard to National Security Decision Directives).

accords with the Director of Central Intelligence requiring notice of new covert actions "as soon as practicable," the CIA went on to violate those accords almost immediately.⁷³

Following the Iran-Contra revelations, one might have expected Congress now to have learned the lesson of the last war. But current signs are that in covert operations, as in other fields, history will repeat itself. To forestall future Iran-Contra Affairs, both houses are considering amendments to the Intelligence Oversight Act that would require the President to inform Congress in writing about all new covert operations within forty-eight hours after they begin.⁷⁴ Rather than promptly enacting those amendments into law, however, key legislators have again entered an accord with the President to achieve the same result.⁷⁵ With the appointment of a new CIA director pledged to internal procedural reforms,⁷⁶ public outcry for new legislation has subsided and restrictive intelligence oversight legislation will become increasingly difficult to secure.⁷⁷ Because

73. After learning in 1984 that the CIA had secretly mined Nicaraguan harbors without giving the statutorily required notice, the Senate initially passed a nonbinding resolution proclaiming that no money could be spent for such purposes. *See* B. WOODWARD, *VEIL* 325 (1987). Rather than embodying that resolution into binding legislation, however, the Senate settled for the so-called "Casey Accords," which imposed strict new reporting requirements on the Director of Central Intelligence. *See* Scheffer, *supra* note 46, at 722. Yet "[w]ithin days . . . , the Reagan administration began planning the secret arms sale to Iran." Goodman, *supra* note 71, at 125-26.

74. *See* H.R. 3822, 100th Cong., 1st Sess., 133 CONG. REC. H11,866 (daily ed. Dec. 18, 1987) (introduced by Congressman Stokes); S. 1721, 100th Cong., 1st Sess., 133 CONG. REC. S12,852 (daily ed. Sept. 25, 1987) (introduced by Senator Cohen). Under the terms of the Senate bill, "[e]ach finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight (48) hours after the decision is made." S. 1721, 100th Cong., 1st Sess. § 2, 133 CONG. REC. at S12,853. If, however, the President should determine that "it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States," he may report that finding to the "Gang of Eight," described in *supra* note 68.

75. *See* Wall St. J., Aug. 10, 1987, at 10, col. 1; Covert Action Programs, Letter to the Chairman and Vice Chairman of the Senate Select Committee on Intelligence Regarding Procedures for Presidential Approval and Notification of Congress, 23 WEEKLY COMP. PRES. DOC. 910 (Aug. 7, 1987) (remarks of President Reagan) (accepting accord, but declaring his belief "that the current statutory framework is adequate").

76. Although the new CIA director has disciplined the officers responsible for the Iran-Contra Affair, N.Y. Times, Dec. 25, 1987, at A19, col. 1, he has rejected the need for legislative reform of the CIA. *See The Director: 'We're Not Out of Business,'* NEWSWEEK, Oct. 12, 1987, at 30 (remarks of CIA Director William Webster) ("As far as covert action [is concerned] . . . the procedures are already there. We need only people who will follow the procedures.").

77. At this writing, the Senate bill, *see supra* note 74, has passed the Senate by a vote of 71-19. N.Y. Times, Mar. 16, 1988, at A8, col. 4. After being jointly referred to both the House Intelligence and Foreign Affairs committees, the House bill was marked up and reported out of both, and is currently awaiting floor action. *See* H.R. Rep. No. 705, 100th Cong., 2d Sess., pt. I (June 15, 1988) (Intelligence Committee); pt. II (July 6, 1988) (Foreign Affairs Committee). President Reagan has already suggested that he would veto any such measure as an unconstitutional limit on his prerogative to initiate, direct, and control extremely sensitive national security activities. *See* Morrison, *An Eye on the CIA*, 20 NAT'L J. 1009, 1010 (1988); Testimony of Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Before the Senate Select Committee on Intelligence, on S. 1721, at 3 (on file with author) ("We believe . . . that by purporting to oblige the President, under *any and all circumstances*, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on [a] constitutional prerogative of the President.") (emphasis in original).

any future President could claim that President Reagan's intragovernmental accord is not binding, Congress could once again be left remediless should a future President violate the terms of the latest covert action deal.⁷⁸

5. *Missing The Pattern of History*

In sum, if the Iran-Contra committees had looked back past Watergate to the Vietnam era, they would have seen that all of the congressional-executive struggles that occurred during the Affair merely replicated battles that had transpired during that earlier period. That history should have repeated itself across so many spheres of foreign affairs, even after Congress had passed so many statutes to avoid repetition of the Vietnam-era evasions, suggests that the Iran-Contra Affair exposed systemic, rather than localized, problems in the American foreign policy process.

Had the Iran-Contra investigators asked why we have been forced to relive this history, they would have recognized a pattern familiar to any student of regulation. It was the Vietnam War that originally spurred Congress to pass the War Powers Resolution in an attempt to regulate overt executive warmaking. Yet far from eliminating such warmaking, the War Powers Resolution only drove it underground, stimulating the Executive to substitute covert for overt operations and to transfer control of those operations from the military establishment to the intelligence agencies, particularly the CIA. Increased congressional regulation of the CIA through the special oversight committees then led to the partial capture of those committees by that agency⁷⁹ and a shifting of agency activities to-

78. Even if the new oversight legislation were to pass over the President's veto (or if the President were to sign it while expressing doubts about its constitutionality), the President could still instruct his Director of Central Intelligence not to implement it, citing the constitutional infirmities alleged in *supra* note 77. Cf. N.Y. Times, Dec. 15, 1987, at B12, col. 1 (President's directive to Attorney General not to implement provision in annual spending bill for intelligence agencies requiring annual report to Congress on certain movements of Soviet diplomats). To challenge that action in court, Members of Congress or private citizens would have to overcome the numerous obstacles to justiciability. See *infra* notes 270-84 and accompanying text.

79. During the 1960's and 1970's, numerous economists and political scientists advanced the notion that regulated entities "capture" the governmental bodies that regulate them. See generally Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341-44 (1974). Although most versions of the capture theory address the claim that regulatory agencies become dominated by the private industries they regulate, some scholars have described situations in which a government "bureau and [its congressional] review committee [are] 'in bed with each other.'" See W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 148 (1971); see also Fiorina, *Congressional Control of the Bureaucracy*, in CONGRESS RECONSIDERED 332, 337 (L. Dodd & B. Oppenheimer eds. 2d ed. 1981) ("The federal agencies exist in a symbiotic relationship with the congressional committees and subcommittees to which they report. . . . [An agency] purchases freedom . . . by playing ball in the areas that are of concern."). Claims of this second form of "capture" have recently beset the congressional intelligence committees. See N.Y. Times, July 7, 1986, at A1, col. 1 (remarks of Senator Moynihan) ("Like other legislative committees, [the Senate Select Committee on Intelligence] came to be an advocate for the agency it was overseeing."); T. FRANCK & E. WEISBAND, *supra* note 31, at 132 ("Senate committees face an unenviable dilemma when they attempt to oversee government secrets. If they expect to get data, the Agencies will expect discretion in return.").

ward an unregulated alternative, the NSC. When the NSC found its own resources inadequate to execute covert operations, it subcontracted its duties to private agents and financed the payments with contributions from private parties and foreign governments. Existing laws limiting overt arms sales then inspired NSC officials and their delegates to sell arms covertly. And after the Boland Amendments restricted any official U.S. funding to the contras, military aid was privatized. In short, Congress' postwar efforts to enact legislation that would stop the last war simply channeled executive action into new, unregulated forms of warfare. In a familiar regulatory pattern, Congress' successive efforts to catch up with executive evasion of its legislative controls served only to shift executive activity into a new pattern of evasion.

If the Iran-Contra investigators had recognized this broader historical pattern, they would have seen that new patchwork legislation would not prevent—but only alter the form of—future Iran-Contra Affairs. Yet the principal investigators of the Affair sharply disputed the need even for patchwork legislation. The Tower Commission's only structural recommendations were that the National Security Assistant should have greater access to legal counsel,⁸⁰ and that Congress should combine the existing intelligence committees into a smaller joint committee (which would be even more vulnerable to CIA capture).⁸¹ Moreover, the Tower Commission pointedly rejected proposals that Congress either stiffen the National Security Act of 1947 or subject the National Security Assistant to congressional confirmation.⁸² By criticizing President Reagan's lax "management style," rather than the structure of the national security laws, the Tower Commission implicitly reaffirmed the view that the President, not Congress, should call *more* shots in foreign affairs than he currently does.⁸³

80. See TOWER REPORT, *supra* note 5, at 97-98. The President's curious response to this recommendation was to create a new post of NSC Legal Adviser, ignoring the Tower Commission's more important suggestion that NSC actions be subjected to *interagency* legal review by the Justice Department or the Legal Adviser to the Department of State. Compare TOWER REPORT, *supra* note 5, at 97 with *infra* notes 323-29 and accompanying text.

81. TOWER REPORT, *supra* note 5, at 98. The President and the Iran-Contra minority report have made the same recommendation. See Iran Arms and Contra Aid Controversy: Statement by the Assistant to the President for Press Relations on the Report of the Congressional Investigating Committees, 23 WEEKLY COMP. PRES. DOC. 1344 (Nov. 18, 1987); IRAN-CONTRA REPORT, *supra* note 2, at 583 (minority report). But see *id.* at 427 (majority report) ("such consolidation would inevitably erode Congress' ability to perform its oversight function . . .").

82. See TOWER REPORT, *supra* note 5, at 94-95. The Commission reasoned that "if the National Security Advisor were to become a position subject to confirmation, it could induce the President to turn to other internal staff or to people outside government to play that role." *Id.* at 95; accord IRAN-CONTRA REPORT, *supra* note 2, at 583 (minority report). But see *infra* note 147 and accompanying text (Executive may not constitutionally delegate national security functions to private or governmental entities that were created to operate outside the existing national security apparatus). Although the Iran-Contra majority recommended "that Presidents adopt as a matter of policy the principle that the National Security Adviser . . . should not be an active military officer," IRAN-CONTRA REPORT, *supra* note 2, at 426, the President promptly ignored that recommendation, appointing Army Lt. General Colin Powell as his new National Security Assistant.

83. See TOWER REPORT, *supra* note 5, at xviii ("The N.S.C. system will not work unless the President makes it work."). Thus, under the Tower Commission's view, the President failed during

Unlike the Tower Commission, the congressional committees investigating the Iran-Contra Affair at least recognized the need for more extensive structural reform of the foreign policy process, recommending a number of laudable, but unconnected, legislative proposals.⁸⁴ But the committees blunted the force of those proposals with their central conclusion: that the national need is "not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking."⁸⁵ Having rejected the need for new framework legislation to reassert legislative control over national security matters, the committees issued some hortatory pronouncements⁸⁶ and moved on, with most participants acting as if the scandal were over and the last word spoken.⁸⁷

B. *Role Definition*

By adopting a quasi-judicial tone for their report, the Iran-Contra committees compounded their failure to recognize historical patterns with a serious error of role definition. In the end the Report treated the Affair as a morality play, in which the American public played the jury, and Congress played both the judge and prosecutor.⁸⁸ By taking this approach, the committees narrowly defined the role of a congressional investigation as a retrospective search for individual responsibility—a search far better

the Iran-Contra Affair not by calling too many shots, but by personally calling too few (then forgetting those shots that he did call). *See id.* at 28-29 (President claimed first that he had approved August 1985 arms sale to Israel, then that he had not, and finally that he could not remember). Although two Tower Commission members, John Tower and Edmund Muskie, were former Senators, the former had long favored executive prerogative, *see* Tower, *supra* note 51, and the latter had served as Jimmy Carter's Secretary of State. Thus, it came as no surprise that their report, co-authored with former National Security Assistant Brent Scowcroft, should generally favor the *Presidency*, even while laying the blame at the door of a specific President.

84. IRAN-CONTRA REPORT, *supra* note 2, at 423-27 (listing 27 recommendations). The majority's principal recommendations were: stiffening the "finding" and reporting requirements in the intelligence oversight laws; modifying the laws governing the NSC; creating a CIA Inspector General; mandating Senate confirmation of the CIA's general counsel and revitalization of the Intelligence Oversight Board; calling for congressional review of numerous statutes at issue in the Affair; and recommending several policy changes (e.g., that the National Security Assistant not be an active military officer). *See infra* note 312. The minority report countered with five recommendations, all of which were designed to strengthen presidential discretion. *See id.* at 583-85 (minority report).

85. IRAN-CONTRA REPORT, *supra* note 2, at 423 (majority report).

86. *See, e.g., id.* (President has "moral and legal responsibility" to take care that laws are faithfully executed; "[g]overnment officials must observe the law, even when they disagree with it;" "[o]pposing views must be weighed, not ignored;" and "Congress is the partner, not the adversary of the executive branch, in the formulation of policy.").

87. *See* Madison, *A Puzzle That's Missing Some Pieces*, 19 NAT'L J. 2982, 2983 (1987) (remarks of Sen. Inouye) (it is "time to put the Iran-contra affair behind us"); New Haven Register, Mar. 3, 1988, at 2, cols. 4-5 (remarks of Chief Senate Counsel Arthur Liman) ("We can't be preoccupied with one scandal for the rest of our lives.").

88. *See* Berns, *Public Trial by Public Jury*, Wall St. J., July 24, 1987, at 16, cols. 4-6. This, of course, is what Lt. Col. Oliver North said that Congress would do. *See* O. NORTH, TAKING THE STAND 264 (1987) ("I believe that this is a strange process that you are putting me and others through. . . . It's sort of like a baseball game in which you are both the player and the umpire. It's a game in which you call the balls and strikes and where you determine who is out and who is safe. And in the end you determine the score and declare yourselves the winner.").

sued to the Independent Counsel than to Congress—rather than as a prospective quest for legislative reform.⁸⁹

Once the committees had so misdefined their task, institutional constraints inherent in the unwieldy congressional investigation process disabled them from completing it. The Affair's high public profile engendered two select committees of larger than optimal size,⁹⁰ and subjected them to severe time pressures.⁹¹ The jurisdictional jealousy of the permanent committees then denuded the select committees of meaningful legislative clout.⁹² The House's failure to agree upon a single staff counsel and the absence of hierarchy among the questioners led to endless multiple questioning of the most important witnesses and to disjointed questioning of logically related witnesses.⁹³ The televising of the hearings greatly enhanced the opportunity for individual Members to engage in grandstand-

89. The vast bulk of the 690-page Report recounts facts and legal violations, with only four and one-half pages of the majority report and three pages of the minority report discussing recommendations for legislative reform. Compare IRAN-CONTRA REPORT, *supra* note 2, at 20-22 ("Who was responsible for the Iran-Contra Affair?") with *id.* at 423-27 (majority report); 583-85 (minority report) (legislative recommendations).

90. The Senate Watergate committee had only seven members plus majority and minority counsel; the Iran-Contra committees, by contrast, numbered 26 Members and close to 100 staff. *Much Ado About Not Much: An Inquiry Out of Questions*, INSIGHT, Aug. 10, 1987, at 14. The committees conducted parallel investigations for about two months before those inquiries were finally merged, and even then the committees continued working with separate staffs (and with separate Democratic and Republican staffs on the House side). See N.Y. Times, Nov. 20, 1987, at A6, col. 1. The Affair's high public profile led the Speaker of the House to include on the House committee the chairmen of the House Armed Services, Foreign Affairs, Government Operations, Intelligence, and Judiciary Committees. See Madison, *Turf Wars, Long Waits May Defuse Iran Probe*, 19 NAT'L J. 29, 30 (1987). Those Members' other assignments left them with little time to prepare for the hearings or to attend planning sessions, and their questioning suffered accordingly. See Speech by John Nields, Jr., Chief Counsel, House Select Committee, Iran-Contra Hearings, at Yale Law School (April 7, 1988) (on file with author) [hereinafter Nields Speech].

91. Nields Speech, *supra* note 90 (noting that the two committees had only five months before the hearings began to prepare a case that would have occupied 18 months of a prosecutor's time).

92. Ordinarily, Members of Congress use a process of self-selection to sort themselves into committees. See generally K. SHEPSLE, *THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* (1978). Those committees then exercise "gatekeeping powers" to wield special influence regarding particular pieces of legislation over which they have jurisdiction. See Denzau & Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740 (1983). The numerous permanent committees with legislative jurisdiction over various aspects of the Affair were reluctant to cede their jurisdiction to one another or to the Iran-Contra committees that they would create. The leadership therefore chose to constitute those *ad hoc* bodies as two temporary investigative committees, which ultimately held joint hearings, but lacked continuing legislative jurisdiction. As a result, Congress created a transient entity with significantly less institutional influence than its permanent committee counterparts. Cf. Weingast & Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143-48 (1988) (permanent committee system restricts ability of legislators to form coalitions on issues that transcend committee boundaries).

93. Although the committees generally used a "designated hitter" system, whereby a single Member bore chief responsibility for questioning each witness, all 26 Members and three different sets of staff counsel questioned Lt. Col. Oliver North and Vice Admiral John Poindexter. Madison, *Iran: Act Two*, 19 NAT'L J. 1050, 1053-54 (1987). See The Maui News, Feb. 19, 1988, at A1, col. 4-5 (interview with Arthur Liman, Chief Counsel of Senate Select Committee) (explaining why Liman led questioning of Poindexter, while John Nields, Chief Counsel of House Select Committee, questioned North).

ing and "credit-claiming,"⁹⁴ and reduced inquisitorial control by the committee counsel as the hearings proceeded.⁹⁵ The use of trial lawyers and former prosecutors as committee counsel, rather than experts in administrative process or foreign affairs law, enhanced the proceedings' flavor as a quasi-criminal prosecution.⁹⁶ Finally, the absence of a judge to rule on the numerous objections made by the witnesses' attorneys created the odd spectacle of the chief investigator, the Senate committee chairman, repeatedly overruling objections to his own rulings.⁹⁷

Despite their institutional disqualification from prosecuting the responsible individuals, the committees' errant role definition led several members to fasten on the question asked endlessly about President Nixon during Watergate: "What did he know and when did he know it?"⁹⁸ Yet that question would have been central only if the principal issue before the committees had been whether or not to seek *impeachment* of those responsible. The committees' inability to find a "smoking gun" damning the President effectively mooted the impeachment question, leading several members to act as if their inquiry were exhausted.⁹⁹

More egregiously, the superficial analogies between the Iran-Contra Affair and Watergate misled some committee members—particularly those in the minority—to argue that the Affair, like Watergate, represented an extreme case of "politics as usual."¹⁰⁰ The Watergate analogy implies that the defendants dispute only the facts and not the validity of

94. Compare D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-61 (1974) (defining credit-claiming as a prime congressional incentive) with IRAN-CONTRA REPORT, *supra* note 2, at 438 (minority report) (decrying "'j'accuse' atmosphere with which witnesses were confronted . . . as Members used the witnesses as objects for lecturing the cameras").

95. See The Maui News, *supra* note 93, at col. 4 ("Members of Congress got so jumpy during Olliemania, Liman said, that Liman's questioning of North was cut short by several days.").

96. See IRAN-CONTRA REPORT, *supra* note 2, at 661 (additional views of Rep. William S. Broomfield). Because each questioner was left to define his own role, some counsel aggressively questioned witnesses in the style of a traditional courtroom lawyer, while others allowed the same witness to testify at length without discrediting or challenging their testimony. Compare O. NORTH, *supra* note 88, at 10-260 (aggressive cross-examination of North by Chief House Counsel), with Liman, *The Iran-Contra Hearings: From the Inside*, YALE L. REP., Fall 1987, at 70 ("[M]y role [in cross-examining North] was very different from the one I was accustomed to as a trial lawyer. . . . My role, as I saw it, was . . . to try to avoid . . . mak[ing] this into a classic case of lawyer versus hostile witness.").

97. See, e.g., O. NORTH, *supra* note 88, at 7-10 (Senate committee chairman's compulsion of testimony pursuant to committee subpoenas over North's Fifth Amendment objection).

98. See, e.g., *Iran-Contra Hearings*, *supra* note 9, at 6 (introductory statement of Rep. Lee H. Hamilton) ("Who was responsible for devising these policies and supervising their execution? . . . What was the extent of the President's knowledge and involvement?"); *id.* at 29 (introductory statement of Sen. Orrin G. Hatch) ("In my mind, there are two questions for us to try to answer: What did the President know? And where did the money go? Almost everything else centers on those two questions.").

99. See, e.g., IRAN-CONTRA REPORT, *supra* note 2, at 659 (supplemental views of Sen. James A. McClure); *id.* at 661 (additional views of Rep. William S. Broomfield). Even after the investigation has concluded, the mass media remains fascinated with that question, now asking it obsessively about the Vice-President, rather than the President. See, e.g., The President's News Conference, 24 WEEKLY COMP. PRES. DOC. 255, 258 (Feb. 24, 1988).

100. See IRAN-CONTRA REPORT, *supra* note 2, at 437 (minority report).

the laws allegedly violated, making the appropriate remedy retrospective individual punishment rather than prospective structural reform.¹⁰¹ But in the Iran-Contra Affair, unlike Watergate, the defendants admitted the facts but denied that they had violated valid laws. Excepting a few charges of unlawful personal enrichment,¹⁰² the defendants claimed that the charges leveled against them by the Independent Counsel sought to punish their patriotic decisions to carry out the President's, rather than Congress', foreign policy.¹⁰³

Given this fundamental interbranch dispute over what the *rules of law* governing national security should be, the committees' majority members simply begged the question when they claimed that the real issue was executive accountability to the "rule of law." For if the majority had truly believed that the Iran-Contra Affair represented more than "politics as usual," it should have gone on to conclude that structural reform was necessary.¹⁰⁴

Furthermore, had the committees contrasted their institutional role to that of their fellow investigators, the Tower Commission and the Independent Counsel, they would have recognized that their unique mission was to recommend *legislative*, rather than executive or judicial, action. As a blue-ribbon special review board created by Executive Order, the Tower Commission had an institutional mandate to recommend changes in exec-

101. See Liman, *supra* note 96, at 70 ("The only issue in Watergate . . . was, who was involved? In particular, what was the president's involvement? No one tried to justify the burglary. It was accepted that it was wrong and that if the president or anyone else participated . . . they would have to bear the consequences.").

102. See, e.g., Counts 2, 17-22, Indictment, United States v. Poindexter, No. 88-0088 (D.D.C., filed March 16, 1988) (on file with author) (charging defendants with payment and receipt of illegal gratuities and conversion of government property to private uses).

103. The Affair's apologists have argued that most of the criminal charges stem from congressional attempts "to criminalize policy differences between co-equal branches of government and the Executive's conduct of foreign affairs." O. NORTH, *supra* note 88, at 266. Under their reasoning, exigent political circumstances justified false statements to and the withholding of information from Congress. See Indictment, *supra* note 102, Counts 4-13, 15-16. See O. NORTH, *supra* note 88, at 256 ("we all had to weigh in the balance the difference between lives and lies"); IRAN-CONTRA REPORT, *supra* note 2, at 659 (remarks of Sen. James A. McClure) ("Would you lie to save the life of your wife or child?"); Wall St. J., Mar. 17, 1988, at 3, col. 2 (remarks of President Reagan) (former National Security Assistant Robert McFarlane "just pleaded guilty to not telling Congress everything it wanted to know. I've done that myself."). Under this view, circumventing the Boland Amendments cannot constitute "conspiracy to defraud the United States," see Indictment, *supra* note 102, Count 1, because those statutory provisions are not only ambiguous, but also unconstitutional exercises of the appropriations power. See IRAN-CONTRA REPORT, *supra* note 2, at 489-500 (minority report); *infra* note 218 and accompanying text. Nor, the apologists contend, can diverting profits from the Iran arms sales to the contras constitute "theft of government property," see Indictment, *supra* note 102, Count 2, because the U.S. government received the full legally required payment for the arms. See IRAN-CONTRA REPORT, *supra* note 2, at 556 (minority report); N.Y. Times, Mar. 17, 1988, at D27, col. 5 (remarks of President Reagan) (no laws were broken by the arms sale to Iran because "we got the purchase price we asked for").

104. Cf. Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317, 350 (1987) (discussing Professor Ackerman's theory of "constitutional moments") ("A constitutional moment . . . begins when people realize that throwing the rascals out will not suffice; the problem is no longer perceived as solvable merely by replacing the people in authority. Rather, the structure of authority itself must be changed.").

utive policy. As a special prosecutor appointed by a special court, the Independent Counsel had an institutional mandate to investigate individual wrongdoing, bring indictments, and obtain convictions.¹⁰⁵ As select committees chosen by the congressional leadership, the Iran-Contra committees were charged not only with uncovering the particular facts of the Iran-Contra Affair, but also with recommending future legislative action.¹⁰⁶ By narrowly focusing on particular events and retrospective questions of individual responsibility, the committees paid insufficient attention to this critically important second part of their institutional mandate.

C. Normative Vision

The committees' decision to lay blame, rather than legislative groundwork, allowed them to avoid specifying what the foreign policy process should look like and how the statutes regulating that process should be structured.¹⁰⁷ Indeed, the fact-intensive, personality-oriented nature of the hearings left unclear to many viewers which foreign policy processes were normal and which were aberrational.¹⁰⁸ Yet viewed against the historical background outlined above, the Iran-Contra Affair stands revealed not as a collection of unconnected statutory violations, but as a fundamental assault on the assumptions underlying our postwar national security system. Undergirding that system are complementary visions of how governmental decisions regarding national security issues should be made: a *policy* vision embodied in the National Security Act of 1947 and the post-Vietnam era

105. The committees' decision partially to replicate the Independent Counsel's work has already engendered one cost: the obstacles placed before the special prosecutor's efforts by the committees' broad grants of testimonial immunity. See N.Y. Times, June 20, 1988, at B6, col. 3 (recounting costs to prosecution of congressionally granted immunity).

106. See H.R. Res. 12, 100th Cong., 1st Sess. (1987), reprinted in *Iran-Contra Hearings*, *supra* note 9, at 607 (resolution creating House Select Committee); S. Res. 23, 100th Cong., 1st Sess., reprinted in *Iran-Contra Hearings*, *supra* note 9, at 619 (resolution creating Senate Select Committee).

107. Although their report speaks of the "seriously flawed policymaking process" that led to the Iran-Contra fiasco, IRAN-CONTRA REPORT, *supra* note 2, at 12, the committees offer only homilies regarding what the appropriate relationship between Congress and the President in foreign policymaking should be. See, e.g., *id.* at 423 ("Decisionmaking processes in foreign policy matters, including covert action, must provide for careful consideration of all options and their consequences. . . . Congress is the partner, not the adversary of the executive branch, in the formulation of policy.").

108. As a tactical matter, the committees clearly erred by waiting until the end of the hearings to hear testimony from the Secretaries of State and Defense. Cf. W. COHEN & G. MITCHELL, MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS 65 (1988) (committees considered calling panel of so-called "Wise Men" as first witnesses, but eventually chose not to do so "because they would be too dull"). One would have expected those witnesses to have been called first, to describe how the foreign policy process ideally *should* operate. Only then should the committees have called Lt. Col. North and Vice Admiral Poindexter, to demonstrate how thoroughly the players in the Iran-Contra Affair had misunderstood and subverted that process. Instead, the committees allowed the hearings to climax with North's and Poindexter's melodramatic testimony, leaving many observers with the impression that those witnesses' conduct had been normal and necessary. See *The Curtain Begins to Fall*, ECONOMIST, Aug. 1, 1987, at 19 (describing flow of hearings).

statutes, and a *constitutional* vision guided by those statutes and Justice Robert Jackson's 1952 concurring opinion in the *Steel Seizure Case*.¹⁰⁹

1. *The Policy Vision: The National Security System*

The central innovation of the 1947 National Security Act was to place American governmental decisions regarding warmaking, intelligence, covert operations, military sales, and military aid under the control of a national security *system* centered in the executive branch.¹¹⁰ As originally structured by that Act, the system had two key features. First, the system was designed to be personally managed by a strong plebiscitary President,¹¹¹ with the support of a bureaucratic institutional presidency.¹¹² Second, the system was intended to operate not just in times of declared war, but also during false peace.¹¹³ The system envisioned not just an *overt* warmaking power wielded by military officials subject to civilians under the control of the President,¹¹⁴ but also a *covert* warmaking power with

109. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

110. See Sharpe, *supra* note 62, at 20-21. Because the Act was designed to unify the President's capacity to make and coordinate national security decisions, it was known informally as the "Unification Act." See T. LOWI, *THE PERSONAL PRESIDENT* 165-66 (1985).

111. Professor Lowi defines the "plebiscitary presidency" as a presidency in which "[t]he lines of responsibility run direct to the White House, where the president is personally responsible and accountable for the performance of government." See T. LOWI, *supra* note 110, at 99. Although presidential power had expanded since the beginning of the republic, constitutional scholars and political scientists agree that a change in kind occurred after World War II, when Franklin Roosevelt established the model of personal presidential leadership central to the postwar national security system. See Patterson, *The Rise of Presidential Power Before World War II*, LAW & CONTEMP. PROBS., Spring, 1976, at 39, 56. Roosevelt personalized his role in world leadership through summitry and personalized his role as America's leader through frequent press conferences and fireside chats. See generally Leuchtenburg, *Franklin D. Roosevelt: The First Modern President*, in LEADERSHIP IN THE MODERN PRESIDENCY 7 (F. Greenstein ed. 1988) [hereinafter F. GREENSTEIN].

112. Franklin Roosevelt did not simply centralize national power unto himself, he *institutionalized* it into a bureaucracy that would wield the executive power. See Greenstein, *In Search of a Modern Presidency*, in F. GREENSTEIN, *supra* note 111, at 347 ([F]our major changes . . . beginning in 1933, produced the modern presidency—increased unilateral policy-making capacity, centrality in national agenda setting, far greater visibility, and acquisition of a presidential bureaucracy . . ."). When Roosevelt took office, his personal staff consisted only of a press secretary and a few special assistants. But following the recommendations of the President's Committee on Administrative Management, Roosevelt created an Executive Office of the President that eventually came to include the Council of Economic Advisers in 1946, the National Security Council in 1947, the Special Trade Representative in 1963, the Council of Environmental Quality in 1970, the Office of Management and Budget (previously the Bureau of the Budget) in 1970, and the White House Office of Science and Technology Policy in 1976. See generally S. HESS, *ORGANIZING THE PRESIDENCY* 1-2 (1976); STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, SUBCOMM. ON EMPLOYEE ETHICS AND UTILIZATION, *PRESIDENTIAL STAFFING—A BRIEF OVERVIEW*, 95th Cong., 2d Sess. 52-53, 55-61 (1978). By the end of the Truman Administration, the White House staff had grown to more than 200, a figure that has stood at close to 600 under the Reagan Administration. See T. LOWI, *supra* note 110, at 4.

113. The Cold War, overt undeclared wars such as the Korean conflict, and overt creeping wars such as Vietnam all fit this description.

114. To deal with overt declared and undeclared wars, the National Security Act of 1947 converted the Department of War into a Department of Defense comprising all three military departments. It also integrated all military services under the command of a Joint Chiefs of Staff subject to "unified direction under civilian control of the Secretary of Defense," who was in turn answerable to

accompanying intelligence capability exercised by agencies directed by a President advised by a National Security Council.¹¹⁵ Thus, in much the same way as the Administrative Procedure Act of 1946¹¹⁶ imposed the concept of due process of administration upon the domestic actions of executive officials, the National Security Act of 1947 formalized the principle of centralized presidential *management* of those officials' external acts.

Significantly, the 1947 Act made no explicit mention of the role of either Congress or the courts in foreign policy decisionmaking, an omission that enabled the Presidency increasingly to aggrandize foreign affairs authority over the next quarter-century.¹¹⁷ But the sweeping legislative enactments of the post-Vietnam era¹¹⁸ dramatically reasserted Congress' right to participate in nearly all arenas of foreign policy decisionmaking by expressly allocating policymaking responsibility not just *vertically* within the executive branch, but also *horizontally* between the President and Congress.¹¹⁹ By imposing on the President a range of notification, reporting, and certification requirements,¹²⁰ those statutes sought to ensure that the President and Congress would jointly agree upon broad foreign policy objectives. Furthermore, they envisioned that after the President, with the aid of the NSC, had coordinated a full internal debate within the executive branch and secured a consensus among the major foreign policy bureaucracies (particularly the Departments of State and Defense), he would then propose particular policy initiatives to Congress to carry out those objectives. Experts outside the executive branch—particularly the congressional committees—would then consider and test the wisdom of those initiatives.¹²¹ With committee approval, the relevant executive agencies would then execute those initiatives, subject to

a civilian President. 50 U.S.C. § 401 (1982). In my judgment, Congress' decision to vest the overt warmaking power in civilians was constitutionally compelled. See *infra* notes 150, 334.

115. See *supra* note 57. The Church Committee concluded that Congress had never expressly intended to authorize covert action in 1947. see SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE: FINAL REPORT (BOOK I), S. REP. NO. 755, 94th Cong., 2d Sess. 132 (1976). Recently, however, one drafter of the 1947 Act has testified that Congress did intend the CIA to perform such operations, but expected those operations "to be restricted in scope and purpose." See Statement of the Honorable Clark M. Clifford on S. 1721 to the Senate Select Committee on Intelligence 4 (Dec. 16, 1987) (on file with author) [hereinafter Clifford Statement]. Thus, the 1947 system apparently envisioned that the intelligence agencies (particularly the CIA) would conduct covert operations subject to presidential and cabinet direction, albeit according to the three "internal control" principles described in *supra* note 63. See 50 U.S.C. §§ 402-403 (1982); see also *supra* text accompanying notes 56-59.

116. 5 U.S.C. §§ 551-559, 701-706 (1982).

117. See J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 107 (1981) (In 1947 "[n]o corresponding steps were taken to bring into coordination in the Congress the separate committees handling foreign and military affairs.").

118. See provisions cited *supra* note 32.

119. See generally J. SUNDQUIST, *supra* note 117, at 238-314; T. FRANCK & E. WEISBAND, *supra* note 31, at 61-154 (recounting how post-Vietnam Congress legislated a role for itself in virtually every area of foreign policy).

120. See *supra* text accompanying note 33.

121. See *supra* note 31 (describing post-Vietnam rise in foreign affairs power and expertise of congressional committees).

congressional consultation, oversight, and a meaningful opportunity for objection.¹²² While a particular policy initiative was being executed, the President would seek political support for it from both Congress and the public, giving each access to all information necessary to evaluate the action's legality.

2. *The Constitutional Vision: The National Security Constitution*

Justice Jackson's famous concurrence in the *Steel Seizure Case*,¹²³ issued five years after the passage of the National Security Act, complemented this policy vision of the national security system with a *constitutional* vision of how Congress, the courts, and the Executive should interact in the foreign policy process. That vision rests principally not on the Constitution's text—which vests relatively few foreign affairs powers in the President¹²⁴—but on what I have elsewhere called “quasi-constitutional custom,”¹²⁵ a category that includes norms generated by all three federal branches: executive practice of which Congress has approved or in which it has acquiesced,¹²⁶ “framework legislation” enacted by Congress to provide a legal framework for government decisions,¹²⁷ and certain

122. This was the purpose of the “finding” requirements in the intelligence laws, the “consultation” provisions in the warmaking, emergency economic powers, and military aid statutes, and the various legislative veto provisions described above. See *supra* text accompanying notes 12, 20, 32-33, 37 & 45-47.

123. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

124. See U.S. CONST. art. II (enumerating President's commander-in-chief power, power to make treaties, power to appoint and to receive ambassadors, and general grant of “executive Power”).

125. See Koh, *Introduction: Foreign Affairs Under the United States Constitution*, 13 YALE J. INT'L L. 1, 3 & n.7 (1988); see also Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984).

126. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

127. “[C]onstitutional ‘framework’ legislation . . . interprets the Constitution by providing a legal framework for the governmental decisionmaking process.” Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976); accord Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187-93 (1985) (including National Emergencies Act of 1976, Congressional Budget and Impoundment and Control Act of 1974, and War Powers Resolution as examples of such framework statutes). See also Elliott, *supra* note 104, at 318-19, 361-62 (also including Gramm-Rudman-Hollings Act of 1985 in this category); Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 278-89 (1977) (treating the Budget and Accounting Act of 1921 and the Congressional Budget and Impoundment and Control Act of 1974 as quasi-constitutional); Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1363 & n.98 (1988) (including as “framework statutes governing appropriations and spending processes” the Anti-Deficiency Act of 1905, the Miscellaneous Receipts statute, and other provisions defining terms in appropriations statutes). For reasons set forth in the text, I would add to this list the National Security Act of 1947 and the various foreign affairs statutes cited in *supra* note 32. Committees of Congress may also seek to state norms of constitutional law through means other than legislation, as the Iran-Contra committees did, for example, by issuing their joint report. Cf. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 462, 477-81 (1987) (describing various nonlegislative means Congress has used to develop customary law of executive privilege).

vacated judicial opinions.¹²⁸

In *Youngstown*, the Court invalidated President Truman's Korean War attempt to invoke "emergency powers" enumerated nowhere in the Constitution to seize domestic steel mills that were under nationwide strike.¹²⁹ Justice Black's formalistic opinion for the Court found that the President's acts were not authorized by the congressional statute dealing with such strikes, and concluded that the President had transgressed Congress' exclusive prerogative to engage in lawmaking.¹³⁰ But Justice Jackson's classic concurring opinion articulated a more flexible theory, whereby these separated institutions could share power: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."¹³¹ Using congressional action as a guide, he went on to establish the three-tiered hierarchy of presidential actions now so familiar to first-year law students.¹³²

Read together with the constitutional text and the sources of quasi-constitutional custom enumerated above, Jackson's *Youngstown* concurrence describes a "National Security Constitution" that both facilitates and constrains the national security policy process outlined above.¹³³ That "Con-

128. See, e.g., *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (invalidating pocket veto at intersession adjournment), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (enjoining executive action overseas infringing American citizen's enjoyment of private property), *vacated and remanded for reconsideration in light of subsequent legislation*, 471 U.S. 1113 (1985); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (upholding presidential termination of treaty in accordance with its terms), *vacated and remanded with directions to dismiss complaint*, 444 U.S. 996 (1979). Each opinion ruled on the merits of a foreign affairs claim, but was vacated by the Supreme Court on procedural grounds. Although these vacated opinions carry no precedential weight, the President and Congress frequently cite them against one another as predictions of how a court *would* rule were a particular constitutional claim to arise again in the future. These opinions have therefore contributed to the creation of "customary norms" in the realm of foreign affairs law. Cf. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 reporters' note 2, § 444 reporters' note 4 (1987) (treating some of these as rulings with persuasive, although not dispositive, weight).

129. For a recent evocative account of the case by Justice Jackson's then-law clerk, see W. REHNQUIST, *THE SUPREME COURT* 41-98 (1987). The Iran-Contra committees made only fleeting mention of *Youngstown's* role in the constitutional framework of the foreign policymaking process. See IRAN-CONTRA REPORT, *supra* note 2, at 389.

130. See 343 U.S. at 589. In *INS v. Chadha*, 462 U.S. 919 (1983), an equally formalistic opinion issued more than three decades later, the Court applied the flipside of this reasoning, holding unconstitutional congressional efforts to regulate executive action by nonlegislative means. See *infra* note 213.

131. 343 U.S. at 635 (Jackson, J., concurring).

132. 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id. at 635-37 (Jackson, J., concurring).

133. Cf. Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 159-60 (describing contours of analogous "administrative

stitution" specifies first, the role of Congress in the foreign policy decisionmaking process; second, the role of the courts; and third, normative principles to guide foreign policy decisionmaking *within* the executive branch.

Justice Jackson's opinion first defined *Congress'* role in national security decisionmaking. In essence, Jackson's three-part schema recognized that, except within those limited areas in which the Constitution grants the President "conclusive and preclusive" power,¹³⁴ Congress must have an opportunity to *participate* in the setting of broad foreign policy objectives or those objectives cannot truly be called policies of the "United States."¹³⁵ To be meaningful, Congress' constitutional right to participate in the setting of foreign policy objectives must carry an attendant right to information and consultation.¹³⁶ When the President and Congress jointly agree upon broad foreign policy objectives in a particular area, and Congress has by statute expressly authorized the President to proceed, presidential initiatives taken to implement those broader objectives fall within Jackson Category One, *i.e.*, they are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."¹³⁷ But when Congress has not specifically authorized a particular initiative, the case drops down to Jackson Category Two, where the dispositive questions become whether the initiative has occurred within a constitutional zone of concurrent congressional-executive authority, and if so,

constitution"); Dam, *supra* note 127; Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988) (describing analogous "fiscal constitution"). To paraphrase Professor Elliott, "the central idea of a [national security] constitution is the insight that one core function of a constitution—creating the basic institutions of government and defining power relationships among them—is being performed for [national security] matters in the United States by legal structures that are not part of the Constitution." Elliott, *supra*, at 169.

134. 343 U.S. at 638 (Jackson, J., concurring). Although Justice Jackson did not attempt precisely to define the scope of the President's sole constitutional authority, he included within that authority the President's textually enumerated powers, *see supra* note 124, as construed with "the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism." 343 U.S. at 640 (Jackson, J., concurring).

135. Jackson's tripartite analysis would be rendered meaningless if the President could constitutionally deny Congress even the *opportunity* to approve or disapprove foreign affairs actions that he takes within the scope of concurrent congressional-executive authority.

136. The proliferation of post-Vietnam era statutes mandating some form of notification, reporting, certification, and consultation buttress this requirement's claim to quasi-constitutional status. *See* provisions cited in *supra* note 32. Even when President Nixon vetoed the War Powers Resolution in 1973, he praised the "constructive measures [in the Resolution] which would . . . enhance the flow of information from the executive branch to the Congress." He also approved the Act's consultation requirements as "consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances" than commitment of armed forces. *See MESSAGE FROM THE PRESIDENT VETOING H.J. RES. 542, A JOINT RESOLUTION CONCERNING THE WAR POWERS OF CONGRESS AND THE PRESIDENT*, H. Doc. No. 171, 93d Cong., 1st Sess. 3 (1973). Subsequent Presidents have largely complied with those requirements, albeit without conceding that their actions have occurred under legal compulsion. *See Note, supra* note 14, at 1040-48 & n.831 (recounting cases). Thus, consistent executive practice could be read to validate a "customary constitutional norm" of reporting and consultation in foreign affairs matters. *Cf. supra* note 126.

137. 343 U.S. at 637 (Jackson, J., concurring).

whether Congress and the President have in fact agreed about the broad policy objectives that initiative was designed to serve.¹³⁸ Finally, if Congress has expressly or impliedly *objected* to the President's actions, then in most cases, Jackson Category Three would require him to abstain from acting (as the Court ordered in *Youngstown* itself), and either to modify his policy initiative or to seek additional congressional support for his original proposal.¹³⁹

Far from excluding the judiciary from the national security process, Jackson's opinion secondly defined a pivotal role for the courts as arbiters within it. When others challenge the President's sweeping claims of exclusive control over foreign affairs matters, Jackson suggested, the courts should not abstain, but rather, "must . . . scrutiniz[e those claims] with caution, for what is at stake is the equilibrium established by our constitutional system."¹⁴⁰ Furthermore, he intimated, courts should not invoke constitutional bases to uphold presidential action when express statutory authorization is present.¹⁴¹ Finally, even while recognizing the President's dramatic accretion of power in the postwar era and the peculiar need for flexibility, secrecy and dispatch in foreign affairs, Justice Jackson refused to find that foreign policy matters so differ from domestic affairs that the courts must defer whenever the President invokes his Commander-in-Chief power, his general Executive Power, or his "inherent" emergency foreign affairs powers.¹⁴² Thus, Justice Jackson expressly rejected the diminished role for the courts in the national security process that the federal courts have more recently come to embrace.¹⁴³

Read together with the 1947 National Security Act and the post-Vietnam era foreign affairs statutes, Jackson's *Youngstown* concurrence thirdly suggested quasi-constitutional principles regarding lines of author-

138. Here both constitutional text and congressional and executive practice become relevant, for in cases where the President and Congress share "concurrent authority, or in which its distribution is uncertain," "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id.*

139. The exception would be the rare case in which the President possessed the plenary constitutional power to execute the foreign policy initiative without congressional approval, as, for example, if he unilaterally chose to recognize a foreign government. In such a case, Justice Jackson suggested, a court could "sustain exclusive presidential control . . . [but] only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). *See, e.g.,* *United States v. Belmont*, 301 U.S. 324 (1937) (upholding, pursuant to recognition power in article II of Constitution, President's authority to make sole executive agreement without congressional approval).

140. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

141. *Id.* at 635-36 n.2 (reading *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), as involving not "the question of the President's power to act without congressional authorization, but the question of his right to act under and in accord with an Act of Congress.").

142. *Id.* at 640-47, 653-54 (Jackson, J., concurring); *see also id.* at 646-47 (rejecting "[l]oose and irresponsible use of adjectives" such as "[i]nherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers . . ."). Justice Black's opinion for the Court also declined to sustain the President's actions based on these claims of exclusive executive authority. *See id.* at 587-88.

143. *But cf. infra* notes 246-69 and accompanying text (discussing Burger and Rehnquist Courts' growing acceptance of a "*Curtiss-Wright*" vision of judicial deference to executive authority).

ity and internal accountability *within* the executive branch. These principles may be thought to describe a "Due Process of Foreign Policy Administration" constraining the discretion of executive foreign policymaking officials. In 1947 Congress designed the National Security Act to consolidate the President's control over the national security apparatus by establishing "a clear and direct line of command."¹⁴⁴ Justice Jackson's *Youngstown* analysis rested on an implicit assumption that the executive actions being challenged were either the President's own, or those carried out in his name and with his clear approval.¹⁴⁵ These principles suggest that an executive official's action cannot carry the weight of presidential authority unless the President either directly controls or authorizes that act through a clear line of authority.¹⁴⁶ They further bar executive branch agencies created by Congress from subdelegating their governmental responsibilities for foreign policymaking or execution to inappropriate official entities or private parties.¹⁴⁷

In 1947 Congress further directed the President not only to coordinate through the NSC the development and implementation of national security policy, but also to keep his subordinate foreign policy bureaucracies carefully separate.¹⁴⁸ That directive, coupled with the President's constitutional responsibility to "take Care that the Laws be faithfully executed,"¹⁴⁹ imposes a solemn duty upon the President to maintain civilian control of the military,¹⁵⁰ to establish intrabranch procedures that will en-

144. 50 U.S.C. § 401 (1982) (congressional declaration of purpose). See also J. SUNDQUIST, *supra* note 117, at 107.

145. See *supra* note 132. Congress has made this assumption explicit in the post-Vietnam intelligence and arms export control statutes by erecting "presidential finding" requirements, which eliminate the possibility of presidential deniability. See *supra* note 66; Scheffer, *supra* note 46, at 698-713 (describing these provisions).

146. Thus, individuals on the NSC staff, such as Oliver North, could not lawfully invoke the President's constitutional authority to justify their covert actions unless they could also establish that they were acting under direct presidential order or under a line of executive supervision that led directly to the President. Nor could the executive branch defend, as "presidential," decisions that were in fact reached by a junta within the government, rather than through a genuine process of intra-executive branch debate. Cf. Draper, *The Rise of the American Junta*, N.Y. REV. BOOKS, Oct. 8, 1987, at 47; Draper, *Reagan's Junta*, N.Y. REV. BOOKS, Jan. 29, 1987, at 5 (characterizing the Iran-Contra Affair as government by junta).

147. Under this reasoning, both the NSC and the CIA act unconstitutionally when they deviate from the foreign policy tasks that Congress expressly created them to perform. Compare *supra* notes 55-64 and accompanying text with L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-17, at 363 (2d ed. 1988) ("an agency can assert as its objectives only those ends which are connected with the task that Congress created it to perform."). Accordingly, the President may not constitutionally delegate national security functions to governmental entities that were created to operate outside the existing national security apparatus. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976) (Civil Service Commission may not assert foreign policy ends to defend its challenged regulation, because "[t]hat agency has no responsibility for foreign affairs."). Nor may the President or his subordinates constitutionally delegate their public responsibilities for national security matters to private citizens. See generally Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

148. See 50 U.S.C. § 402 (1982).

149. U.S. CONST. art. II, § 3.

150. The bedrock principle of civilian supremacy over the military suggests that the President acts unconstitutionally when he permits military officials to formulate foreign policy. See *Youngstown*, 343

able him to supervise the foreign affairs bureaucracies,¹⁵¹ and to preserve those bureaucracies' accountability both to Congress and to the people.¹⁵²

Simply put, the 1947 National Security Act and Justice Jackson's *Youngstown* opinion state quasi-constitutional principles of institutional *balance* among the branches of government in foreign affairs.¹⁵³ This "National Security Constitution" both protects and facilitates the constitutional functioning of the national security system by articulating a normative vision of the policymaking process, in which all three branches of government play integral roles. In zones of shared constitutional authority, the President and Congress must share information about and jointly agree upon the United States' broad foreign policy objectives. The President must then coordinate full internal debate among the decision-formulating entities of the executive branch; from that debate emerge particular policy proposals to Congress to fulfill those broad objectives. When Congress has endorsed particular initiatives, the appropriate decision-executing agencies must then execute them in accordance with law, under direct presidential supervision, and subject to the watchful eyes of Congress, the public, and the courts.

U.S. at 646 (Jackson, J., concurring) ("The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office."). See also The Declaration of Independence paras. 2, 14 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, . . . He has affected to render the Military independent of and superior to the Civil Power."); U.S. CONST. art. I, § 8, cls. 10, 13 (Congress, a civilian entity, shall have power to declare war and make rules for governing the armed forces.); *id.* art. II, § 2 (naming President, a political not military leader, as commander-in-chief); *id.* amend. XXV, § 1 (naming civilian Vice-President President in case of President's death). Even if the Constitution could not be read to oblige the President to prevent the mixing of military and civilian functions within his subordinate agencies, the National Security Act of 1947 reflects Congress' intent to impose such a requirement by statute. See 50 U.S.C. § 401 (1982) ("each military department shall be separately organized . . . and shall function . . . under civilian control of the Secretary of Defense but [Congress' purpose is] not to merge these departments or services.").

151. Cf. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-604, 662-66 (1984) (discussing constitutional requirement that President be unitary, politically accountable head of government with authority to direct all law-administrators); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463 (1987) (suggesting wisdom of centralized presidential supervision of federal bureaucracy).

152. See *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring) (when the President acts in accordance with authority delegated by Congress, "[t]he public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties."). This language suggests that the President bears a quasi-constitutional duty to ensure that he and his subordinates will remain accountable to institutions outside the executive branch, see Strauss, *supra* note 151, at 600, and to provide the people and their representatives with at least as much information as is necessary to evaluate the legality of his actions. Cf. A. BICKEL, *THE MORALITY OF CONSENT* 18 (1975) (citing Edmund Burke) ("Consent will not long be yielded to faceless officials, or to mere servants of one man, who themselves have no 'connexion with the interest of the people.' . . . [W]e may today oppose excessive White House staff-government by private men whom Congress never sees.") (citation omitted).

153. See *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) ("what is at stake is the *equilibrium* established by our constitutional system") (emphasis added); accord T. LOWI, *supra* note 110, at 175 ("[W]ithout a constitutional balance the presidency flies apart."). In practical terms, this means "that while the President is usually in a position to *propose*, the Senate and Congress are often in a technical position at least to *dispose*." Katzenbach, *The Constitution and Foreign Policy*, in *A WORKABLE GOVERNMENT?* 62 (B. Marshall ed. 1987) (quoting E. Corwin) (emphasis in original).

3. *Policy Inversion: What Really Went Wrong During the Iran-Contra Affair*

If this is how American foreign policy should be made, then during the Iran-Contra Affair, the Reagan Administration conducted a major foreign policy initiative in precisely the opposite manner. The Iran-Contra Affair occurred in two constitutional areas of shared congressional-executive authority: military aid and covert operations.¹⁵⁴ Before the Iran-Contra Affair, the President made two deals with Congress in each of these areas regarding the nation's broad foreign policy objectives. Acting together, the President and Congress reached *substantive* policy agreements not to negotiate with terrorists over hostages and, through congressional passage and presidential signature of the Boland Amendments, not to fund military activities by the contras. Furthermore, by congressional enactment and presidential signature of the arms export control and covert operations statutes, the branches reached a related *procedural* accord: that the President would personally participate in decisions authorizing covert operations and arms sales, and that he would always keep Congress informed of those decisions. Yet during the Iran-Contra Affair, the President secretly breached both the substantive and the procedural accords. Without consulting with Congress, the President unilaterally endorsed two opposite policy objectives: release of the Lebanon hostages by any means, and private support for the contras. By so doing, he denied Congress its constitutional entitlement to participate in the setting of broad foreign policy objectives, as well as its attendant rights to information and consultation.

After authorizing the initial phases of the initiative, by his own admission, the President became disengaged from the process of decisionmaking.¹⁵⁵ Acting without the knowledge of the major foreign affairs bureaucracies,¹⁵⁶ and apparently without the full awareness of the President or

154. See Meyer, *supra* note 50, at 89-94; Note, *Keeping Secrets: The Church Committee, Covert Action, and Nicaragua*, 25 COLUM. J. TRANSNAT'L L. 601, 606-24 (1987) (discussing constitutional allocations of competence in these two areas). One commentator has argued that covert war is not subject to concurrent congressional-executive authority, but as a use of force short of declared war, falls within Congress' *exclusive* authority to issue letters of marque and reprisal under article I, § 8 of the Constitution. See Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

155. See IRAN-CONTRA REPORT, *supra* note 2, at 37, 167-68, 271-73 (President authorized initial arms sales to Iran and ordered his subordinates to keep the contras together "body and soul"); TOWER REPORT, *supra* note 5, at 79 (by his own account, President then placed "the principal responsibility for policy review and implementation on the shoulders of his advisors").

156. The Constitution explicitly refers to "executive Departments." U.S. CONST. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 1 & 2. Of these, the Departments of State and Defense have historically held special status. Early drafts of the Constitution actually referred to the Department of Foreign Affairs and the Department of War by name, and those were the first two departments Congress established by statute. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (M. Farrand ed. 1911); Act approved July 27, 1789, 1 Stat. 28-29 (1789) (Department of Foreign Affairs); Act approved August 7, 1789, 1 Stat. 49-50 (1789) (Department of War). The Secretaries of State and Defense are statutory NSC members, while the Director of Central Intelligence and the National Security

the Vice-President, the CIA (a decision-executing entity) then helped *formulate* the details of a policy initiative to meet those objectives.¹⁵⁷ The National Security Assistant and his staff (an advisory entity that included active military officers¹⁵⁸) then *executed* that initiative with the aid of private parties and third countries, without meaningful internal debate within the executive branch and in violation of internal agency control principles.¹⁵⁹ All of these actions were taken without the legally required congressional notification, knowledge or oversight.¹⁶⁰ The executive branch then concealed the existence of the entire initiative from both Congress and the public, manipulating information to dampen public debate.¹⁶¹

Assistant are not. See *supra* note 57. Yet during the Iran-Contra Affair both Secretaries testified that they were cut out of a deliberative process regarding a policy initiative that centrally involved both foreign and military policy. See Sorenson, *The President and the Secretary of State*, FOREIGN AFF. 231 (1987/88) ("the Iran-contra hearings . . . revealed a pattern of White House disdain for the Department of State so pervasive that Secretary George Shultz's own blunt testimony, while preserving his personal reputation, confirmed his department's emasculation").

157. See IRAN-CONTRA REPORT, *supra* note 2, at 20 ("At the operational level, the central figure in the Iran-Contra Affair was Lt. Col. North [of the NSC staff], who coordinated all of the activities and was involved in all aspects of the secret operations. . . . [W]e believe that the late Director of Central Intelligence, William Casey, encouraged North, gave him direction, and promoted the concept of an extra-legal covert organization [while] for the most part, insulat[ing] CIA career employees from knowledge of what he and the NSC staff were doing.").

158. North and Poindexter were both active military officers. Robert McFarlane, the third member of the NSC triumvirate, and Richard Secord were retired military officers, as were numerous other functionaries in the Iran-Contra "Enterprise," such as Eugene Hasenfus. See *supra* note 13; *infra* note 334.

159. Contrary to the internal agency control principles described in *supra* note 63, the NSC's actions during the Iran-Contra Affair ran counter to announced U.S. foreign policy objectives and were conducted without the knowledge of either Congress or the rest of the executive branch.

160. The first shipments of arms to Iran in August and September of 1985, which took place through Israeli intermediaries, were authorized by "oral" findings not mentioned in the intelligence statutes. The second shipment in November 1985, which was executed in part by the CIA, was subsequently deemed authorized by a novel "retroactive" finding generated by the CIA's general counsel, which Vice Admiral Poindexter later destroyed. See *supra* note 50. The third finding of January 6, 1986 (and its amended version of January 17, 1986) President Reagan admittedly signed, but later claimed he never actually read. See IRAN-CONTRA REPORT, *supra* note 2, at 208.

161. The cumulative use of information control techniques to shape or limit foreign policy debate has characterized not only the Iran-Contra Affair, but also the conduct of much of U.S. foreign policy during the 1980's. Like previous administrations, the Reagan Administration has denied visas to foreigners with views critical of American foreign policy. See, e.g., *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 108 S. Ct. 252 (1987); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987). It has followed earlier administrations in using statutory and constitutional devices to restrict the travel of Americans abroad. See *Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981). It has labeled imported foreign films as "political propaganda," see *Meese v. Keene*, 107 S. Ct. 1862 (1987), and refused to certify disfavored domestic films as "educational" materials qualified for duty-free export. See *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492 (C.D. Cal. 1986), *aff'd*, 847 F.2d 502 (9th Cir. 1988) (invalidating under First and Fifth Amendments U.S. Information Agency regulations regarding exemptions of certified material from customs duties and licensing requirements). The Administration has supplemented these statutory information control devices with new regulations narrowing the access of journalists to events occurring abroad. See Comment, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press A Right of Access to Wartime News?*, 58 TEMP. L.Q. 873 (1985). Through polygraph tests, secrecy pledges, and prosecutions brought under the espionage statutes, it has sought to restrain leaks by government employees. See *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (upholding conviction under espionage and theft statutes of government employee who leaked

The Iran-Contra Affair thus ran afoul of both the constitutional and policy visions of the national security process described above. The Affair proves remarkable not simply because the President failed to take care that individual laws were faithfully executed, but because he condoned a near-total subversion of the United States foreign policy process. By the President's own account, the only constitutionally authorized players in that process—the President, the Vice-President, and Congress—as well as the key statutory players, the Secretaries of State and Defense, were largely excluded from decisionmaking. Within the executive branch, the process turned upside-down, as the CIA formulated and the NSC executed policy without presidential supervision. Each of the legal principles comprising the “Due Process of Foreign Policy Administration” described above was violated: executive officials claimed presidential authority for actions the President had not directly approved; foreign policymaking and execution were delegated to private entities and foreign governments; military personnel ran foreign policy; and the President failed either to supervise his own foreign affairs apparatus or to preserve that apparatus’ accountability to Congress and the people.

Had the Iran-Contra committees stated their analysis in these terms, they would have encountered far less difficulty in demonstrating the correctness of their two central conclusions: that individual laws were broken and that “[t]he Administration’s departure from democratic processes created the conditions for policy failure.”¹⁶² For once the constitutionally prescribed foreign policy process became inverted, it was only a matter of time before the spirit, if not the letter, of particular laws that were meant to constrain and guide that process were also violated. It also became inevitable that such an upside-down process would yield fundamentally unsound foreign policy initiatives.¹⁶³

The broader lesson of the Iran-Contra Affair is that Congress’ ambitious attempts during the post-Vietnam era to reassert its constitutional role in foreign policymaking have met with only mixed success. In statute after statute enacted during that period, Congress sought to impose upon the President restrictions whose fundamental premises he apparently did not accept. Although the President signed nearly all of those statutes, ex-

classified information to press), *cert. denied*, 57 U.S.L.W. 3275 (Oct. 18, 1988); Nat’l Fed’n of Fed. Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988) (preliminary ruling regarding government employees’ constitutional challenge to Administration’s use of secrecy pledge forms); Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22 (discussing proposed polygraph testing). And by the admission of its own officials, the Administration has spread “disinformation” abroad and conducted “spin control” at home. See *Mega-Spin Don*, NEW REPUBLIC, Dec. 8, 1986, at 11.

162. IRAN-CONTRA REPORT, *supra* note 2, at 11 (majority report).

163. Cf. O. NORTH, *supra* note 88, at 741 (statement of Rep. Lee H. Hamilton) (“the [arms-for-hostages] policy achieved none of the goals it sought. The Ayatollah got his arms, more Americans are held hostage today than when this policy began, subversion of U.S. interests throughout the region by Iran continues.”).

executive officials later jumped through those statutes' loopholes, or simply defied them. The President's growing willingness to break his deals with Congress has gradually eviscerated Congress' post-Vietnam attempts to increase its participation in foreign policymaking, thereby disrupting the institutional equilibrium envisioned by the National Security Constitution.

But why hasn't Congress been able to force the President to keep his bargains in foreign affairs? Why have these painstakingly negotiated statutes proven so porous? Whenever Congress and the President differ over foreign policy, why does the President almost always seem to win? In the end, these *structural* inquiries, not questions about individual responsibility, remain the real unanswered questions of the Iran-Contra Affair. For unless we consider and answer these structural questions, we can have no guarantee that the Iran-Contra Affair itself will not happen all over again.

II. WHY THE PRESIDENT ALMOST ALWAYS WINS IN FOREIGN AFFAIRS

Why does the President almost always seem to win in foreign affairs? The reasons may be grouped under three headings, which not coincidentally, mirror general institutional characteristics of the executive, legislative, and judicial branches, respectively. First, and most obviously, the President has won because the executive branch has taken the *initiative* in foreign affairs, and has often done so by construing laws designed to constrain his actions as authorizing them. Second, the President has won because Congress has usually complied with or *acquiesced* in what he has done, because of legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will. Third, the President has won because the federal courts have usually *tolerated* his acts, either by refusing to hear challenges to those acts, or by hearing those challenges and then affirming his authority on the merits. This simple three-part combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the President almost invariably wins in foreign affairs.¹⁶⁴

164. This three-part reasoning enters directly into the calculus of an executive branch lawyer asked to draft a legal opinion justifying a proposed foreign affairs initiative. If asked, for example, whether the President can impose economic sanctions on Libya or bomb Colonel Qaddafi's headquarters, the President's lawyers must answer three questions: (1) "Do we have the legal authority to act?"; (2) "Can Congress stop us?"; and (3) "Can anyone challenge our action in court?" Or, to use the framework outlined in the text: (1) "Do the Constitution and laws of the United States authorize the President to take this executive *initiative*?"; (2) "If the executive branch takes the initiative, will Congress *acquiesce*?"; and (3) "If Congress does not acquiesce and challenges the President's action, will the courts nevertheless *tolerate* it, either by refusing to hear Congress' challenge, or by hearing the challenge and ruling in the President's favor?"

A. *Executive Initiative*

What drives the executive branch to take the initiative in foreign affairs? Most critics of the Iran-Contra Affair have offered no explanation, simply assuming that the President's men were foolish, misguided, or evil. However true this explanation might be, two institutional explanations—based on domestic constitutional structure and international regime change—plausibly supplement it.

The simple yet sensible domestic explanation, offered by Charles Black, attributes executive seizure of the initiative in foreign affairs to the structure of the Constitution. Although article I gives Congress almost all of the enumerated powers over foreign affairs, and article II gives the President almost none of them, Congress is poorly structured for initiative and leadership, because of "its dispersed territoriality of power-bases and . . . its bicamerality."¹⁶⁵ The Presidency, in contrast, is ideally structured for the receipt and exercise of power:

[W]hat very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise, has flowed, through the inactions, acquiescences, and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration. . . . The result has been a flow of power from Congress to the presidency.¹⁶⁶

The notion that the Presidency is institutionally best suited to initiate government action is hardly new.¹⁶⁷ Nor, in theory, is there anything wrong with the President initiating international action. As in the domestic context, a plebiscitary President is uniquely visible, and hence accountable, to the electorate; he is the only individual capable of centralizing and coordinating the decisionmaking process; and he can energize and direct policy in ways that could not be done by either Congress or his own bureaucracy.¹⁶⁸ His decisionmaking processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match.¹⁶⁹

165. Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17 (1980); see also *infra* notes 179-80 and accompanying text.

166. Black, *supra* note 165, at 17, 20.

167. To the contrary, the notion underlies most of the vast literature on the Presidency since Hamilton's Federalist No. 70. See THE FEDERALIST No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961) ("Energy in the executive is a leading character in the definition of good government."). For a now-classic discussion of the same concept, see generally R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* (rev. ed. 1980).

168. Cf. Sunstein, *supra* note 151, at 452-53 (articulating these reasons as arguments favoring presidential control of the bureaucracy).

169. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, at 24, (Feb. 15, 1816)) ("The President . . . manages our concerns with foreign nations and must necessarily be most competent to determine

But the structural fact that the President may more easily exercise the foreign affairs power than Congress does not explain why he *chooses* to wield it. International relations theorists might explain such choices in terms of the rise and fall of American hegemony during the postwar era.¹⁷⁰ Franklin Roosevelt's activist presidency triggered an "extrovert phase" in American foreign policy, which was marked by wars, military spending, treatymaking, and international summitry.¹⁷¹ This era, which began before Pearl Harbor and ended with Vietnam, marked the President's emergence as not only America's leader, but also the world's.¹⁷² During this era of the United States as world hegemon, America acted through its President to erect the entire postwar multilateral political and economic order. The era was marked by the creation of international institutions governed by written constitutions: on the political side, the United Nations and its regional and functional agencies, and on the economic side, the so-called Bretton Woods System.¹⁷³ The President spurred an optimistic vision of world public order with an orgy of treatymaking, which secured our participation in international organizations and led us into the brave new era of multilateralism. An entire generation of Americans grew up and came to power believing in the wisdom of muscular presidential leadership of foreign policy, while Congress played a reactive, relatively isolationist role.¹⁷⁴

when, how, and upon what subjects negotiation may be urged with the greatest prospect of success The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.'").

170. The implications of declining American hegemony for world order have been extensively treated by the recent work of political economists David Calleo, Robert Gilpin, Charles Kindleberger and Stephen Krasner, historian Paul Kennedy, and economist Mancur Olson. See D. CALLEO, *BEYOND AMERICAN HEGEMONY* (1987); R. GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987); R. GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981); R. GILPIN, U. S. POWER AND THE MULTINATIONAL CORPORATION (1975); P. KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987); M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982) (explaining U.S. economic decline as a function of special interest group government fostered in part by nation's hegemonic status); Kindleberger, *Systems of International Economic Organization*, in *MONEY AND THE COMING WORLD ORDER* 15, 33 (D. Calleo ed. 1976); Krasner, *Transforming International Regimes: What the Third World Wants and Why*, 25 INT'L STUD. Q. 119 (1981); see also R. KEOHANE, *AFTER HEGEMONY* (1984) (recognizing decline of American postwar hegemony but questioning whether hegemony constitutes either necessary or sufficient condition for stable international order). But see Russett, *The mysterious case of vanishing hegemony; or, Is Mark Twain really dead?* 39 INT'L ORG. 207 (1985) (questioning predictions of American decline); Strange, *The persistent myth of lost hegemony*, 41 INT'L ORG. 551 (1987) (questioning notion of America's lost hegemony).

171. See generally S. AMBROSE, *RISE TO GLOBALISM* (1971); Huntington, *Coping With the Lippman Gap*, 66 FOREIGN AFF. 453 (1987/88); Vasquez, *Domestic contention on critical foreign-policy issues: the case of the United States*, 42 INT'L ORG. 643 (1988).

172. See generally A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973); T. LOWI, *supra* note 110.

173. That system envisioned a World Bank to stimulate international development and reconstruction, an International Monetary Fund to monitor balance of payments, and an International Trade Organization to manage international trade. See generally F. KIRGIS, *INTERNATIONAL ORGANIZATIONS* (1977). Congress refused to ratify the charter of the proposed International Trade Organization, leaving the provisional General Agreements on Tariffs and Trade (GATT) as the principal operating world trade entity. See J. JACKSON & W. DAVEY, *supra* note 21, at 293-96.

174. See Roskin, *From Pearl Harbor to Vietnam: Shifting Generational Paradigms and Foreign*

The activist logic of this extrovert era made presidential initiatives virtually inevitable. Yet Vietnam caused an entire generation to rethink its attitude toward foreign policy.¹⁷⁵ National elites became less willing to intervene to defend other nations and to bear the costs of world leadership.¹⁷⁶ Why then, have presidential initiatives not only continued, but appeared to accelerate, in the post-Vietnam era?

Put simply, America's declining role as world hegemon has forced changes in the postwar structure of international institutions, which have in turn stimulated further presidential initiatives. In place of formal multilateral political and economic institutions, which enact bodies of positive international law through treaties, have arisen newly minted informal regional and functional regimes. Those regimes—which the United States may not dominate, but in which it must participate—now manage global economic and political events through bargaining and soft quasi-legal pronouncements.¹⁷⁷ Within these regimes, the United States can no longer simply suppress conflicts of national interest; it must constantly manage relations even with close historic allies through repeated applications of economic carrots and political sticks.¹⁷⁸ And the rise of new and unanticipated problems not subject to the control of any nation-state, such as global terrorism and the debt crisis, have increasingly forced the United States into a reactive international posture.

Given the President's superior institutional capacity to initiate governmental action, it does not surprise that the burden of generating reactive responses to external challenges has fallen on the President. Although

Policy, 89 POL. SCI. Q. 563 (1974). Congress revealed its initial antipathy toward multilateralism by refusing to ratify the Charter of the League of Nations, the Charter of the International Trade Organization, the Genocide Convention, and other human rights conventions. The Senate also imposed the Connally Resolution on the United States' acceptance of the compulsory jurisdiction of the International Court of Justice, see H. STEINER & D. VAGTS, *supra* note 19, at 326, and repeatedly attempted to pass the Bricker Amendment to limit the treaty power. See Buerghenthal, *International Human Rights: U.S. Policy and Priorities*, 14 VA. J. INT'L L. 611, 612-14 (1974).

175. See Vasquez, *supra* note 171, at 646; Vasquez, *A Learning Theory of the American Anti-Vietnam Movement*, 13 J. PEACE RES. 299 (1976); E. MAY, "LESSONS" OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY 143-71 (1973).

176. O. HOLSTI & J. ROSENAU, *AMERICAN LEADERSHIP IN WORLD AFFAIRS: VIETNAM AND THE BREAKDOWN OF CONSENSUS* 29-78 (1984); Russett, *The Americans' Retreat from World Power*, 90 POL. SCI. Q. 1, 5 (1975); see Ornstein, *Interest Groups*, *supra* note 31, at 52-55 (describing the rise of influential national antiwar interest group composed of students, parents of potential draftees, and alumni of the 1960's civil rights movement).

177. Examples on the political side include: the Contadora Process, the International Atomic Energy Agency, the Helsinki Accords, and the international peacekeeping and nuclear nonproliferation regimes; on the economic side, the Group of Seven nations, the "COCOM" (Coordinating Committee on Multilateral Export Controls), the Paris Club, and other regimes that have been the subject of intensive political science analysis. See, e.g., R. PUTNAM & N. BAYNE, *HANGING TOGETHER* (rev. ed. 1987) (studying cooperation and conflict in the Seven-Power summits); R. KEOHANE, *supra* note 170; Keohane & Nye, *Two Cheers for Multilateralism*, 60 FOREIGN POL'Y 148 (1986). For a survey of international regimes, see generally *INTERNATIONAL REGIMES* (S. Krasner ed. 1983).

178. See, e.g., Koh, *supra* note 33, at 1227 (describing how reorientation of the world economy has stimulated United States to turn to unilateral economic sanctions, bilateral free trade agreements and investment programs, and plurilateral monetary bargaining within Group of Seven and Paris Club).

post-Vietnam congressional reforms have stimulated a resurgence of congressional interest and activism in foreign policy,¹⁷⁹ those reforms have left Congress too decentralized and democratized to generate its own coherent program of foreign policy initiatives.¹⁸⁰ Increasingly, Congress has exhibited its interest and activism in foreign affairs by exerting pressure on the President through means short of legislation. Particularly in fields such as international trade, which directly affect congressional constituencies, Congress has forced the President into a range of recent preemptive strikes to respond to or forestall even more drastic congressional activity.¹⁸¹ The same public opinion that has empowered the plebiscitary President has simultaneously subjected him to almost irresistible pressures to act quickly in times of real or imagined crisis.¹⁸² Just as the 1950's constituted America's era of treatymaking, the 1980's have become its era of treaty-breaking and bending, as the Reagan Administration has largely led America's flight from multilateralism and international organizations as well as its movement toward alternative mechanisms of multilateral cooperation.¹⁸³

Thus, the relative weakening of America in the world arena may have promoted an increase, rather than a decrease, in executive initiatives. A pervasive perception that the Presidency must act swiftly and secretly to respond to fast-moving international events has almost inevitably forced the executive branch into a continuing pattern of evasion of congressional

179. See *supra* note 31. Moreover, the key foreign affairs committees have recently gained dramatically in both expertise and influence. See Koh, *supra* note 33, at 1211-21 (discussing enhanced powers of the House Ways and Means and Senate Finance Committees under the 1984 Trade and Tariff Act); R. FENNO, CONGRESSMEN IN COMMITTEES 26-35 (1973) (discussing power of foreign affairs committees); Hammond, *Congress in Foreign Policy*, in THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY 81 (E. Muskie, K. Rush & K. Thompson eds. 1986) [hereinafter E. MUSKIE] (listing informal congressional foreign policy caucuses).

180. Ornstein, *The Constitution and the Sharing of Foreign Policy Responsibility*, in E. MUSKIE, *supra* note 179, at 35, 57.

181. See, e.g., Koh, *supra* note 33, at 1225-33 (enumerating presidential preemptive strikes in trade field); Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985) (executive order imposing sanctions upon South Africa in order to preempt congressional enactment of comprehensive anti-apartheid legislation); Designation of Palestine Information Office as a Foreign Mission, 52 Fed. Reg. 37,035 (Oct. 2, 1987) (executive decision to close Palestinian office to forestall enactment of the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001-1005, 101 Stat. 1331, 1406-07); see also N.Y. Times, Sept. 17, 1985, at A1, col. 1 (Reagan Administration hostility toward United Nations in part reflects pressure imposed by enactment of Kassebaum Amendment, Pub. L. No. 99-93, § 143, 99 Stat. 405, 424 (1985) (codified at 22 U.S.C. § 287e note (Supp. 1985), which imposes preconditions upon U.S. payment of assessed contributions to United Nations and specialized agencies).

182. See T. Lowi, *supra* note 110, at 173 ("Mass pressure on plebiscitary presidents requires results, or the appearance of results, regardless of the danger.").

183. See *supra* text accompanying notes 17-30. See, e.g., U.S. Dep't of State File No. P85 0189-0461, reprinted in 24 I.L.M. 1742 (1985) (terminating U.S. acceptance of the compulsory jurisdiction of International Court of Justice); Science and Technology, 21 WEEKLY COMP. PRES. DOC. 336, 338 (Mar. 20, 1985) (announcing U.S. withdrawal from UNESCO). See generally Malawer, *Reagan's Law and Foreign Policy, 1981-1987: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L. J. 85 (1988) (enumerating Reagan Administration foreign policy decisions that have modified or deviated from preexisting international legal rules). But cf. *supra* note 181 (enumerating cases in which Congress has provoked the President's actions).

restraint.¹⁸⁴ During the Iranian hostage crisis of 1979-80, for example, President Carter reacted to both international and domestic pressures by conducting one of the most dramatic exercises of the President's peacetime foreign affairs power in United States history.¹⁸⁵ But when he left office, he was widely viewed not as an "Imperial President," but as the weakest, most reactive President in recent memory.¹⁸⁶

In the end, an unholy synergy between the executive branch's international incentives and domestic ability to act drove it toward the Iran-Contra Affair. A President dependent upon public opinion and sensitive to congressional pressure sought to respond to two perceived external threats—the taking of American hostages in Lebanon and the rise of a communist regime in Nicaragua—at the expense of compliance with the law.¹⁸⁷ Like earlier presidents, his commitment to action led him to condone an errant flow of decisionmaking power not just from Congress to the executive branch, but also *within* the Executive: away from the larger, more accountable, and more cumbersome foreign affairs bureaucracies, such as the State and Defense Departments, toward institutions such as the CIA and the NSC, which are closer to the Oval Office and more capable of swift, secret, and flexible action.¹⁸⁸ Although the resulting covert transfer of power to sub-executive entities facilitated swift and secret action, it inevitably sacrificed the technical expertise, institutional judgment, bureaucratic support, and bipartisan political approval that comes

184. This is what I understand to have been Oliver North's defense of the Iran-Contra Affair. See O. NORTH, *supra* note 88, at 12, 256 ("[T]his nation is at risk in a dangerous world. . . . [W]e all had to weigh . . . the difference between lives and lies.")

185. During the 444 days that the U.S. hostages were held captive, President Carter declared a national emergency under IEEPA, imposed a trade embargo and an extraterritorial assets freeze, cut off lines of communication and embargoed travel to Iran, sued Iran in the International Court of Justice, expelled Iranian diplomats, forced Iranian students to report to local immigration offices for visa checks, made a disastrous attempt to rescue the hostages by force, and concluded an executive agreement that suspended all private property claims against Iran, while consigning American commercial claimants to arbitration before a newly established international tribunal. See Koh, *supra* note 33, at 1229 n.112; 4A Op. Off. Legal Counsel 71-333 (1980).

186. See G. SMITH, *MORALITY, REASON & POWER* (1986) (recounting Carter's foreign policy failures); T. LOWI, *supra* note 110, at 173 (describing Carter's failed attempt to rescue Iranian hostages) ("Public opinion had forced upon the president an act of the sheerest adventurism.").

187. See NEWSWEEK, Aug. 13, 1987, at 16 (statement of Secretary of State Shultz, quoting President Reagan) ("[T]he American people will never forgive me if I fail to get these hostages out over this legal question.").

188. See, e.g., D. WARWICK, *A THEORY OF PUBLIC BUREAUCRACY* (1975); Clarke, *Why State Can't Lead*, 66 FOREIGN POL'Y 128 (1987) (decrying excessive bureaucratization of State Department). President Nixon's distrust of the State Department similarly spurred the NSC's dramatic ascendancy during his administration. See H. KISSINGER, *supra* note 42, at 806 (Because "Nixon feared leaks . . . he thus encouraged procedures unlikely to be recommended in textbooks on public administration that, crablike, worked privily around existing structures."). When Nixon ordered the Cambodian bombings, for example, he explicitly instructed that the "State [Department] is to be notified only after the point of no return." *Id.* at 245. Kissinger's elevation to Secretary of State abated only briefly the institutional struggle between the NSC and the State Department. The tension between the two offices has lingered, with two of the last four Secretaries of State, Cyrus Vance and Alexander Haig, resigning in good measure because of unsuccessful turf battles with the National Security Assistant. See Sorensen, *supra* note 156, at 231-32.

from consultative inter- and intrabranh decisionmaking in accordance with the National Security Constitution.¹⁸⁹

B. *Congressional Acquiescence*

If the President has such strong institutional incentives to take initiatives, why then, has Congress so consistently failed to check or restrain them? The short answer is that Congress has persistently *acquiesced* in what the President has done, because of legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional absence of political will. The case in point is the War Powers Resolution of 1973, which has failed in its intended purpose for each of these four reasons.

1. *Legislative Myopia*

The first reason, already illustrated, is that Congress legislates to stop the last war.¹⁹⁰ The War Powers Resolution was drafted to halt creeping wars like Vietnam, not short-term military strikes or covert wars of the kind that dominate modern warfare.¹⁹¹ Similarly, the covert action legislation currently under consideration would not reform the intelligence apparatus, but would instead fine-tune existing statutes to prevent the President from indefinitely delaying reports to Congress, which any future President mindful of the Iran-Contra Affair would already take care to avoid.¹⁹²

The institutional roots of congressional myopia lie in each phase of the legislative process. Like other legislation that attempts to be public-regarding, proposed foreign affairs legislation is not immune from undue influence or political veto by special interest groups.¹⁹³ Thus, broader public policy reform objectives can often become lost amid a welter of provincial or ethnic group concerns.¹⁹⁴ The need of individual Members

189. See IRAN-CONTRA REPORT, *supra* note 2, at 12, 387-92 (pointing out how Administration's departure from democratic decisionmaking processes not only violated the constitutional framework of foreign policymaking, but also rendered policy failure inevitable).

190. Congress legislates this way in large part because voters vote this way. See M. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

191. See *supra* notes 13-15.

192. See bills cited *supra* note 74.

193. See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

194. The trade field is the most extensively studied arena for private interest group influence upon Congress in foreign affairs. See generally R. BAUER, I. POOL & L. DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE (1963); I. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS (1986); R. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY (1980); E. SCHATTSCHNEIDER, POLITICS, PRESSURE AND THE TARIFF (1935); Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise of Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285 (1987) (arguing that U.S. trade policy results from political equilibrium struck between national policy and interest group pressures). In other areas, the defense lobby has proven highly successful in promoting the maintenance of military spending. See Madison, *supra* note 42. The Jewish lobby has exercised significant influence over Middle East and

to be viewed as addressing "this year's problem" encourages them to address last year's problems by tinkering with existing statutes rather than by investing energy into introducing and passing large-scale reform programs.¹⁹⁵ The Members' desire to choose legislative devices that can be easily explained to constituents leads to a "congressional penchant for the blunt, simple action," which may be insufficiently sensitive to the complexities of the underlying problem.¹⁹⁶ Even when sweeping legislative reforms are introduced, the competing objectives of the committees sharing jurisdiction over the omnibus bill may impede the coalition formation necessary to bring that bill to the floor.¹⁹⁷ And even when such bills are reported out of committee and floor majorities can be mustered, the supermajorities necessary to overcome filibusters often coalesce around only those specific incremental changes that would correct known policy defects.¹⁹⁸

arms sale policy. *See* T. FRANCK & E. WEISBAND, *supra* note 31, at 200-09 (discussing role of Jewish lobby in the enactment of Arab antiboycott legislation); *see also* Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001-1005, 101 Stat. 1331, 1406-07 (1988) (codified at 22 U.S.C. §§ 5201-5203) (Grassley Amendment to Foreign Relations Authorization Act of 1988 ordering closure of the Palestine Liberation Organization offices in the United States). The international human rights lobbies have successfully pressed for legislative action. Recent examples include the ratification of the Genocide Convention and the proposed ratification of the International Torture Convention, *see supra* note 28, and the enactment of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986); *see also* R. PASTOR, *supra* at 301-21 (describing interest group influence on U.S. human rights policy).

195. *See generally* D. MAYHEW, *supra* note 94, at 126-40 (net result of various institutional influences is that Congress lags behind public opinion in enacting major legislation and tends to wrap its policies in packages with largely symbolic value that offer particularized benefits to organized interest groups). In 1973, for example, Senator Eagleton attempted to modify the War Powers Resolution to reach paramilitary forces under civilian command, but his efforts failed because his colleagues did not wish to legislate against speculative problems. *See* 119 CONG. REC. 25,079-86 (1973).

196. D. MAYHEW, *supra* note 94, at 138. Thus, it hardly surprises that Congress embodied a "60-day withdrawal" provision into the War Powers Resolution, *see supra* note 16 and accompanying text, and has considered automatic phased numerical approaches to reduction of both the external and internal deficits. *Compare* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended in scattered sections of 2, 31, and 42 U.S.C.) (Gramm-Rudman-Hollings Act), *discussed in* Stith, *supra* note 133 (numerical approach to domestic deficit reduction) *with* Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100th Cong., 1st Sess. § 126, 133 CONG. REC. 2,755-57 (1987) (Gephardt Amendment to Trade Reform Act, subsequently dropped in conference) (requiring President to retaliate against countries running excessive and unwarranted trade surpluses with U.S. by forcing those countries to reduce their surpluses by 10% annually). This phenomenon also explains why only one legislative proposal arising out of the Iran-Contra Affair currently has any real prospect of enactment: the intelligence oversight legislation described in *supra* notes 74-77, which declares a simple, mandatory "48-hour notice rule" for all covert operations. *See* Madison, *It's Congress's Move*, 19 NAT'L J. 2017-18 (1987).

197. *See* Weingast & Marshall, *supra* note 92, at 146-47. One obvious example is the current intelligence oversight legislation, which was referred jointly to both the House Intelligence and Foreign Affairs committees, and thereby became subject to two separate markups. *See supra* note 77.

198. Under the Senate's modern filibuster rule, only 41 votes are required to sustain a filibuster and defeat legislation. *See Standing Rules of the Senate Revised to June 1, 1988*, S. Doc. No. 33, 100th Cong., 2d Sess., Rule XXII(2), at 15 (1988); *see also* N.Y. Times, Feb. 25, 1988, at A26, col. 1 (describing Republicans' use of that rule, along with the quorum requirement, to defeat Democrat-supported campaign reform bill). *See generally* Watson, *Legal Evolution and Legislation*, 1987 B.Y.U. L. REV. 353, 375-79 (explaining why legislatures often reject revolutionary proposals).

2. *Bad Drafting*

Even when enacted, legislation expressly designed to check executive adventurism has often failed because of faulty draftsmanship. The War Powers Resolution, the most ambitious piece of foreign affairs "framework legislation" enacted in the post-Vietnam era, offers three particularly glaring examples. First, the Resolution's consultation requirements oblige the President to consult "in every possible instance," but then allow the President to decide what that term should mean.¹⁹⁹ Second, the Resolution requires the President to consult with "Congress" before he sends troops abroad, but does not specify how many Members must be consulted or how far in advance.²⁰⁰ Third and most seriously, the Resolution permits the President to file three different types of reports to Congress upon committing armed forces abroad, but only requires the removal of troops within sixty days when one of those three types has been filed.²⁰¹ Thus, simply by his choice of report, the President can satisfy the Resolution's procedural reporting obligation, while evading the Resolution's substantive obligation to remove those troops within sixty days.

Some of these drafting errors were simply inadvertent.²⁰² Others resulted from the legislative tendency to draft new laws by inserting boilerplate language from other post-Vietnam era statutes.²⁰³ Some more stringent procedural provisions were substantially watered down in conference in a futile effort to avoid a presidential veto.²⁰⁴ But whatever the cause,

199. 50 U.S.C. § 1542 (1982). For example, although in both cases, prior consultation was clearly "possible," neither Presidents Carter nor Reagan consulted with Congress before sending troops to Iran and Grenada, respectively. See J. CARTER, *KEEPING FAITH* 518 (1982) (quoting from President Carter's diary) ("I had planned on calling in a few members of the House and Senate . . . before the rescue team began its move into Tehran . . . But I never got around to that.") (emphasis omitted); see also Note, *supra* note 14, at 1041.

200. See 50 U.S.C. § 1542 (1982). When President Reagan sent warplanes to bomb Libya in April 1986, for example, he consulted only fifteen congressional leaders, and even then only after the planes were already in the air. See Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 PACE L. REV. 661, 666 (1987).

201. The Resolution requires reports whenever U.S. Armed Forces are introduced "into hostilities" or imminent hostilities, 50 U.S.C. § 1543(a)(1) (1982); into foreign territory, airspace, or waters equipped for combat, *id.* § 1543(a)(2); or in numbers that substantially enlarge a preexisting combat unit, *id.* § 1543(a)(3). Yet the statute's sixty-day clock for removal of those troops runs automatically only from the date when a "hostilities" report is submitted or "required to be submitted" under 50 U.S.C. § 1543(a)(1). See *id.* § 1544(a).

202. See Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 571 (1984) (drafting error described in *supra* note 201 was simply "unnoticed at the time the resolution was enacted"). Such inadvertence may also have institutional roots. See D. MAYHEW, *supra* note 94, at 122 (once Members decide to vote for bill, and exhaust its credit-claiming possibilities, they "display only a modest interest in what goes into bills or what their passage accomplishes.").

203. The "in every possible instance" language, for example, appears verbatim in IEEPA, 50 U.S.C. § 1703(a) (1982), and numerous other statutory consultation provisions found in foreign affairs statutes enacted during this period. For a discussion of how and why such "legal transplants" occur, see generally A. WATSON, *LEGAL TRANSPLANTS* 21-30 (1974) (explaining cross-cultural transplants of law).

204. This phenomenon, known on the Hill as "being pecked to death by ducks," largely accounts for the numerous loopholes contained in the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No.

the net effect of these drafting mistakes has been to prevent the War Powers Resolution from being self-executing. Rather than putting the pressure where it should be—on the President to start thinking about removing armed forces sixty days after he has committed them to a hostile situation—the War Powers Resolution now puts pressure on *Congress* to declare that United States forces are “in hostilities,” just to trigger the sixty-day clock for troop removal. The ironic result is that even though Congress designed the War Powers Resolution to stop the last war—creeping wars like Vietnam—in recent years, the Resolution’s drafting flaws have undercut its effectiveness in restraining just such creeping escalation in Lebanon, Central America, and the Persian Gulf.²⁰⁵

3. *Ineffective Tools*

Why haven’t Congress’ legislative solutions worked even when it has both foreseen a problem and properly drafted provisions to address it? As we have seen, the post-Vietnam era statutes applied an array of innovative procedural devices to bring executive action under control, including statutory sunseting, reporting and consultation requirements, committee oversight procedures, legislative vetoes, and appropriations limitations.²⁰⁶ Each of the statutes whose enactment has been described above—the War Powers Resolution, the Case-Zablocki Act, IEEPA, the Arms Export Control Act, the Hughes-Ryan Amendment, and the Intelligence Oversight Act—was designed not only to restrain executive discretion, but also to increase congressional input into key foreign policy decisions. But if the Iran-Contra Affair teaches anything, it is that most of these provisions simply have not worked, particularly when executive officials are intent upon evading them and courts are unwilling to enforce them.

Each of these devices has its defects. As Dean Calabresi has recognized, mechanical sunset laws force Congress to redo its work every few years and “gives a tremendous weapon to those who oppose regulation itself; the

99-440, 100 Stat. 1086 (1986), which passed into law over presidential veto. See Remarks of Richard Messick, former Counsel to the Senate Foreign Relations Committee, Panel on Sustaining an International Human Rights Campaign in the United States: Passage of the Anti-Apartheid Act in Perspective, Symposium on Human Rights Advocacy and the U.S. Political Process, Yale Law School, April 9, 1988 (on file with author). For a description of these loopholes, see generally Paretzky, *The United States Arms Embargo Against South Africa: An Analysis of the Laws, Regulations, and Loopholes*, 12 YALE J. INT’L L. 133 (1987). Similarly, the 1980 Intelligence Oversight Act, which was originally drafted to require prior notice in all cases, was ultimately modified to require only “timely” notice, language which lent itself to twisting during the Iran-Contra Affair. See *supra* notes 50, 68-69, 160 and accompanying text.

205. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *appeal filed*, No. 87-5426 (D.C. Cir. 1988) (suit brought by more than 100 Members of Congress to compel President to comply with War Powers Resolution’s reporting requirement with regard to U.S. military activities in Persian Gulf); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (similar suit with regard to U.S. military activities in El Salvador); see also *supra* note 15 (describing War Powers Resolution’s ineffectiveness in Lebanon).

206. See *supra* notes 32-33 and accompanying text.

force of inertia shifts to their side."²⁰⁷ Reporting and consultation requirements lack teeth, and are all too easily evaded.²⁰⁸ Committee oversight invites committee capture and is usually conducted only after the executive action has been completed.²⁰⁹ The only supervisory methods with proven "bite" in foreign affairs have been the legislative veto and the appropriations cutoff.²¹⁰ Yet *INS v. Chadha*²¹¹ denied legal effect to legislative vetoes—one or two-House (simple or concurrent) resolutions that have not been presented to the President—thereby barring Congress from vetoing presidential foreign affairs actions of which it disapproves.²¹² Moreover, the Court has embroidered *Chadha* with a series of formalistic rulings whose broad language, read literally, would limit any congressional attempts to regulate executive exercises of delegated power by means other than legislation.²¹³ Thus, *Chadha* not only apparently killed the legislative veto, but also announced sweeping separation-of-powers principles that could be read to restrict Congress' authority to use functionally similar methods to check presidential discretion in foreign affairs.²¹⁴

207. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 61 (1982). Not only does time serve as an inadequate measure of the obsolescence of a statute, *id.* at 62, but complex legislative compromises will inevitably be difficult to replicate.

208. See *supra* notes 10-16, 31-40, 199-200 and accompanying text.

209. See *supra* note 79; Franck & Bob, *supra* note 33, at 934.

210. For accounts of the use or threatened use of the legislative veto in the areas of arms control and transfer of nuclear materials, see Pomerance, *United States Foreign Relations Law After Chadha*, 15 CAL. W. INT'L L.J. 201, 262-80 (1985). For descriptions of Congress' efforts to use appropriations cutoffs in foreign affairs, see L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 221-51, 318-23 (1985); G. TREVERTON, *supra* note 54, at 156-60 (describing legislative cutoff of funds for covert activities in Angola under Clark Amendment); Franck & Bob, *supra* note 33, at 944-48; Glennon, *supra* note 53.

211. 462 U.S. 919 (1983).

212. The Court's opinion apparently invalidated all uses of the legislative veto, although some commentators have suggested that some vetoes survived. See, e.g., Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 129-33 (1984) (discussing § 5(c) of War Powers Resolution). But see Koh, *supra* note 33, at 1209 n.53.

213. See *Bowsher v. Synar*, 478 U.S. 714 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). *Chadha* declared flatly that any congressional action which is "legislative in purpose and effect," in the sense of having the "purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," 462 U.S. at 952, must be effected "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.* at 958. Read broadly, *Chadha* and its progeny sketch a formalistic theory of separation of powers, which rests on four basic premises: first, that constitutional powers are functionally definable as inherently executive, judicial, or legislative in nature; second, that the Constitution allocates certain powers exclusively to the executive branch, thereby denying them to the other two branches; third, that Congress has limited constitutional discretion to regulate executive action by means other than formal legislation; and fourth, that these separation of powers concerns require that specific constitutional provisions—such as the appointments or presentment clauses—be construed to invalidate even those legislative control devices that plainly promote administrative efficiency or political compromise. See generally Sunstein, *supra* note 151, at 493-500 (criticizing *Chadha*'s constitutional formalism).

214. In *Morrison v. Olson*, 108 S. Ct. 2597 (1988), the Court recently declined to extend the formalistic separation-of-powers theory of *Chadha* and *Bowsher* to invalidate the independent counsel provisions of the Ethics in Government Act. Chief Justice Rehnquist's opinion for a nearly unanimous Court eschewed *Chadha*'s formalistic approach in favor of a functional separation-of-powers analysis. Under that analysis, the relevant question was whether the challenged legislation had ag-

Nor, as the saga of the Boland Amendments has revealed, does the alternative technique of appropriations cutoff necessarily ensure good executive behavior. When tacked to massive continuing appropriations measures, such limitations carry the political advantage of being nearly veto-proof,²¹⁵ but also the disadvantage of being subject to yearly reconsideration. When, as in the case of the Boland Amendments, the language of the restriction becomes more and less inclusive over time, executive officials can claim that the provision's vagueness impairs their ability to determine whether particular activities are proscribed.²¹⁶ Even before the Iran-Contra Affair broke, the Reagan Administration had shown how to sustain the Central American conflict by exploiting spending loopholes in the appropriations process, such as drawdown, special funds, contingency funds, transfer, or reprogramming authorities.²¹⁷ The more explicitly an appropriations limit is worded, the greater the force of the President's argument that Congress has unconstitutionally exercised its appropriations power to

grandized Congress' powers by means that impeded the President's ability to perform duties "central to the functioning of the Executive Branch." *Id.* at 2619. *But see id.* at 2622 (Scalia, J., dissenting) (applying formalistic approach to argue for invalidation of statute). Two pending separation-of-powers cases will shortly determine whether *Morrison* will be confined to its factual context, or will signal the Court's broader retreat from *Chadha*'s formalism. *See* *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo.), *cert. granted sub nom.* *United States v. Mistretta*, 108 S. Ct. 2818 (1988) (challenging constitutionality of sentencing guidelines issued by U.S. Sentencing Commission); *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 108 S. Ct. 1218 (1988) (challenging constitutionality of Competition in Contracting Act).

The recent elevation of Justice Anthony Kennedy—who did not sit in *Morrison* but authored the Ninth Circuit opinion affirmed in *Chadha*—may increase the likelihood that *Chadha* will be extended beyond its holding to enhance executive discretion in foreign policymaking. For several reasons, however, *Chadha*'s formalism could ultimately prove to be a double-edged sword cutting *against* executive authority. After all, it is the President, not Congress, who more frequently engages in foreign affairs activities that are not authorized by the Constitution's text. *See* Franck & Bob, *supra* note 33, at 951 n.274. Moreover, the lack of a device such as the legislative veto may simply lead Congress to take back foreign affairs powers it has previously delegated to the President. And, ironically enough, a strict application of *Chadha*'s formalistic reasoning may permit Congress to employ congressional control devices that are *functionally* as intrusive as the legislative veto, but which do not run afoul of *Chadha*'s literal holding. *See, e.g.,* Koh, *supra* note 33, at 1200-03, 1216-17 (describing fast-track regulatory device used in international trade statutes).

215. *See* C. ROSSITER, *THE AMERICAN PRESIDENCY* 157 (1956) ("The President often feels compelled to sign bills that are full of dubious grants and subsidies rather than risk a breakdown in the work of whole departments.").

216. *See* N.Y. Times, Jan. 15, 1987, at A12, col. 1 (describing claimed loopholes in Boland Amendments).

217. When Congress grants the President statutory "drawdown" authority, he may withdraw certain Defense Department funds simply by determining that such withdrawals are vital to the security of the United States. Similar statutory provisions allow the President access to "special" or "contingency" funds based upon nebulous findings that the use of those funds is "important to the security of the United States" or "to the national interest." *See* Meyer, *supra* note 50, at 74-75. When given statutory "transfer" authority, the President may apply to one appropriations account funds that were initially appropriated for another. Reprogramming, by contrast, constitutes executive shifting of appropriated funds *within* a single appropriation account, often without specific statutory mandate. *See* L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 110-32 (1972). Used in combination, these various authorities dramatically expand the Executive's discretion to spend appropriated funds. In the early 1980's, for example, the Reagan Administration used drawdown authority over special funds to increase military aid to El Salvador by nearly five times the amount actually appropriated in a given year, and routinely used reprogramming authority to fund Central American projects that Congress had not approved. Sharpe, *supra* note 62, at 33-34.

constrain his enumerated and unenumerated foreign affairs authorities.²¹⁸ The uncertain constitutional status of the General Accounting Office hinders Congress' ability to direct the Comptroller General to ensure executive compliance with spending legislation.²¹⁹ And finally, when the executive branch solicits private entities to act with wholly private monies that are neither receivable by the United States government nor subject to its control and expenditure, one could argue—as Oliver North has done—that its actions wholly escape Congress' power of the purse.²²⁰

Thus, if Congress wishes to restrict presidential initiatives directly, it can no longer simply impose procedural requirements upon the President or try to restrain his discretion by legislative veto. For purposes of Justice Jackson's Category Three, Congress retains only two meaningful ways to express its opposition to a presidential initiative: by disapproving the President's action by joint resolution or by voting an unambiguous and complete denial of appropriated funds for the disfavored program.²²¹ But in either case Congress would then need to override the President's inevitable veto by a two-thirds vote in each house. In the end, both "solutions" only trade one problem for another, for each requires Congress to exercise

218. Cf. *United States v. Lovett*, 328 U.S. 303 (1946) (Congress cannot use power of purse to effect bill of attainder). Reagan Administration supporters have argued by analogy to *Lovett* that the Boland Amendments place strict conditions upon the expenditure of authorized funds, and thereby encroach unconstitutionally upon the Executive's "inherent" authority to conduct foreign affairs. See, e.g., Crovitz, *Crime, the Constitution, And the Iran-Contra Affair*, COMMENTARY, Oct. 1987, at 23, 28; Quade, *The President Is His Only Client*, BARRISTER, Winter/Spring 1988, at 5, 7 (Interview with A.B. Culvahouse, Jr., Counsel to President) [hereinafter Culvahouse Interview] ("[I]t was clear in our mind and remains clear that the Boland Amendment could not circumscribe the efforts of the President to speak with foreign leaders about supporting the Nicaraguan freedom fighters."). Professor Stith has argued that Congress would violate the Constitution if it refused to appropriate funds for the President to execute his enumerated foreign affairs authorities. See Stith, *supra* note 127, at 1351 & n.32. It remains less clear, however, under what circumstances Congress would be deemed to have unconstitutionally impinged upon the President's ill-defined unenumerated foreign affairs authority, as described in the *Curtiss-Wright* case. See *infra* text accompanying notes 234-41 (discussing *Curtiss-Wright*). Cf. *Mendelsohn v. Meese*, 690 F. Supp. 1226, 1236 (S.D.N.Y. 1988) ("We are aware of no case striking down federal legislation as an encroachment of the executive's authority to conduct foreign affairs . . .").

219. See *Ameron, Inc. v. United States Army Corps of Eng'rs, Inc.*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 108 S. Ct. 1218 (1988) (challenging constitutionality of Comptroller General's authority under Competition in Contracting Act to stay awards of government contracts following bid protests); Stith, *supra* note 127, at 1390-92 & nn. 232-47 (describing constitutional difficulties of using Comptroller General to enforce appropriations requirements against the Executive); Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539 (1987).

220. Compare O. NORTH, *supra* note 88, at 473 ("We lived within the constraints of Boland, which limited the use of appropriated funds.") with IRAN-CONTRA REPORT, *supra* note 2, at 16 ("The Constitutional plan does not prohibit a President from asking a foreign state, or anyone else, to contribute funds to a third party. But it does prohibit such solicitation where the United States exercises control over their receipt and expenditure."). The difficult problem, of course, arises in determining when private monies solicited by government officials have become part of "public fisc"—i.e., monies receivable by the U.S. government and subject to its control and expenditure—and hence subject to Congress' appropriations power. See Stith, *supra* note 127, at 1358.

221. See provisions cited in *supra* notes 51 & 54; Stith, *supra* note 127, at 1361-62 (describing power of such categorical appropriations denials). See also *infra* notes 250-57 (demonstrating how *Dames & Moore v. Regan*, 453 U.S. 654 (1981), permits courts to construe any congressional measure short of these two as *de facto* acquiescence in President's initiative).

a measure of political will that historically, it has only rarely been able to muster.

4. *Political Will*

Congress could regularly block executive decisions by joint resolution or appropriations cutoff, so long as it could override a presidential veto by a two-thirds vote. Why hasn't Congress done this regularly?²²² In many cases, a critical mass of Members has simply been unwilling to take responsibility for setting foreign policy, preferring to leave the decision—and the blame—with the President.²²³ But even in those cases in which a majority in both houses is willing to take a stand against the President, Congress often falls victim to simple numbers. If Congress must muster a two-thirds vote in both houses to override a veto, only 34 Senators can undercut its efforts, and it is a crippled President indeed who cannot muster at least 34 votes for something he really wants.²²⁴ Professor Black has calculated that, assuming equal defections across party lines, a House of Representatives would need 308 Democrats and 127 Republicans to be "veto-proofed" against a Republican President.²²⁵ Although the Members could theoretically enforce an alternative solution—a binding political agreement to override any presidential veto regardless of its substance²²⁶—in a repeat-player game, such an accord would likely break down, for those Members who favored the President's position on a particular bill would always have an incentive to defect and support the President, notwithstanding Congress' longer-term institutional interests.²²⁷

222. Congress has overridden only seven percent (103 of 1417) of the presidential vetoes (excluding pocket vetoes) exercised between 1789 and 1988. See U.S. GOV'T PRINTING OFFICE, *PRESIDENTIAL VETOES, 1777-1984*, at ix (1985); 43 CONG. Q. ALMANAC 6 (1987).

223. See Fulbright, *Congress and Foreign Policy*, in Appendices to U.S. COMMISSION ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY 58, 59 (1975) [hereinafter MURPHY COMMISSION REPORT] ("A majority [of Congress] may have wished to end the war [in Indochina], but less than a majority of the two Houses were willing to take the responsibility for ending it."). The size of the critical mass varies from bill to bill. In committee, sometimes even a single Member can prevent a bill from reaching the floor, and in the Senate, forty-one votes (less than a majority) can defeat cloture. See *supra* note 198.

224. Even in his current weakened state, for example, President Reagan was able to get forty-two votes for the confirmation of Judge Bork as a Supreme Court Justice. See 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987). More recently, the President defeated Congress' effort to override his veto of the 1988 trade reform legislation, even though the House had voted overwhelmingly for an override. See *Trade Policy: New Trade Legislation Expected in Congress As Senate Sustains Reagan's Veto of HR 3*, 5 INT'L TRADE REP. (BNA) 879 (June 15, 1988) [hereinafter *New Trade Legislation*]. The President won because the Senate failed to gain the unanimous consent necessary to bring to a vote a concurrent resolution stripping from the bill an Alaskan oil export limitation. By retaining that single provision in its 1000-page bill, Congress lost the critical override votes of both Alaskan senators. See *Trade Policy: Trade Bill Goes to Reagan This Week For Certain Veto; Override Unlikely*, 5 INT'L TRADE REP. (BNA) 678 (May 11, 1988).

225. See Black, *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87, 93.

226. Cf. B. ECKHARDT & C. BLACK, *THE TIDES OF POWER* 62-65 (1976) (statement of Professor Black) (proposing that Congress simply follow convention of overriding all presidential vetoes, regardless of substance).

227. For precisely the same reason, Congress has been unable to circumvent the Supreme Court's

Collective action problems aside, individual Members face voting dilemmas when the President violates congressionally imposed procedural constraints in pursuit of substantive policies that they favor.²²⁸ Parliamentary manipulation by the President's congressional allies may force objecting legislators into untenable voting positions.²²⁹ Appropriations cutoffs leave legislators politically responsible for having stranded soldiers in the field.²³⁰ And even when Congress has successfully used its voting power to force the President to the bargaining table on foreign affairs questions, the President has usually been able to demand concessions or future support in exchange for agreeing to modify his conduct.²³¹ Thus, once again, the President remains largely free to execute initiatives without congressional check, except in those rare cases where he is politically weak and Congress's political will is unusually unified.

C. *Judicial Tolerance*

Neither the Executive's lack of self-restraint nor Congress' failure to enforce its will on the President directly preclude third parties from enforcing that will through the federal courts. But however attractive this strategy may be in theory, it fades in the face of a lengthy string of executive branch victories before the Supreme Court on foreign affairs questions.²³² Whether on the merits or on justiciability grounds, the courts have held for the President in these cases with astonishing regularity.

decision in *Chadha* by entering a political compact to enact all legislative vetoes by joint resolution, regardless of their content. See Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813 (1984).

228. Members faced these dilemmas, for example, when the Reagan Administration sent troops to Grenada and bombers to Libya without complying with the War Powers Resolution's terms. See Note, *supra* note 14, at 1008-14; *supra* note 200.

229. See, e.g., N.Y. Times, Oct. 22, 1987, at A3, col. 4 (Senator Lowell Weicker initially voted against War Powers Act Compliance Resolution, *supra* note 16, because it implied that War Powers Resolution was not self-enforcing, but ultimately voted for it to ensure that Congress would register some objection to President's noncompliance with War Powers Resolution in Persian Gulf); *New Trade Legislation*, *supra* note 224, at 880 (Senate majority leader, who led drive to override President's veto of trade bill, later voted to sustain veto in order to preserve his right to call for bill's reconsideration.).

230. "In Indochina, Congress had constitutional authority . . . through the appropriations process, to terminate, confine or otherwise limit our participation. But a large majority of Congress felt it could not break with the President without jeopardizing the lives of American troops . . ." Henkin, "A More Effective System" for Foreign Relations: *The Constitutional Framework*, in Appendices to MURPHY COMMISSION REPORT, *supra* note 223, at 9, 16; accord T. EAGLETON, WAR AND PRESIDENTIAL POWER 146 (1974).

231. See, e.g., *supra* note 15 (war powers negotiation regarding commitment of U.S. forces in Lebanon).

232. Since *Youngstown*, the Supreme Court has intervened consistently across the spectrum of U.S. foreign policy interests to tip the balance of foreign policymaking power in favor of the President. The Supreme Court's decision in *Chadha* gutted the legislative veto provisions in the War Powers Resolution, the Arms Export Control Act, the Nuclear Non-Proliferation Act, the National Emergencies Act, and IEEPA. See generally Pomerance, *supra* note 210. *United States v. Belmont*, 301 U.S. 324 (1937), *U.S. v. Pink*, 315 U.S. 203 (1942), and *Goldwater v. Carter*, 444 U.S. 996 (1979), all served to consolidate the President's authority over treaty-making and treaty-breaking. See *supra* notes 18, 25-30 and accompanying text. More recently, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), *Regan v. Wald*, 468 U.S. 222 (1984), and *Japan Whaling Ass'n v. American Cetacean*

1. *The Merits*

Given the relatively few presidential powers specifically enumerated in article II of the Constitution,²³³ one might have expected the President to encounter less success in the courts. Yet examination of the President's judicial victories reveals that he owes that success to two other sources of constitutional authority that have proven historically more important than the President's enumerated constitutional powers: his broad unenumerated powers as "the sole organ of the nation in its external affairs," identified in *United States v. Curtiss-Wright Export Corp.*,²³⁴ and the various foreign affairs powers that Congress has delegated to him by statute.²³⁵

That these two sources of presidential authority now overshadow the President's enumerated constitutional powers demonstrates that this is a tale of three branches, not two. For the player whose role in the foreign policy drama has most frequently been overlooked has not been Congress or the President, but the federal judiciary. Through both action and inaction, the federal courts have consistently upheld the President's authority to dominate the foreign affairs arena, over time working a net transfer of foreign affairs policymaking power from Congress to the President. Equally important, the net effect of the federal courts' actions has been to all but dismantle the *Youngstown* vision of the National Security Constitution described above. In its place the courts have begun to impress upon the foreign policy process a *Curtiss-Wright* vision that tips the scales dramatically in favor of executive power.

Bruce Ackerman has spoken of 1937 as an American "constitutional moment," when the New Deal legitimated the activist state and fundamentally altered America's constitutional politics.²³⁶ Yet the same era also redefined the constitutional politics of American foreign affairs, for it was during Franklin Roosevelt's four terms in office that the President became the world's leader as well as America's. As much as any other event, *Curtiss-Wright*, a 1936 Supreme Court decision, consolidated Roosevelt's transformation of the President's foreign affairs authority.²³⁷ Writing for

Soc'y, 478 U.S. 221 (1986), have provided the lower courts with a theory of statutory construction that has legitimated broad exercises of emergency economic powers under claims of delegated authority. See *supra* text accompanying notes 35-40; *infra* text accompanying notes 250-63.

233. See U.S. CONST. art. II (enumerating President's commander-in-chief power, power to make treaties, power to appoint and to receive ambassadors, and general grant of "executive Power").

234. 299 U.S. 304, 320 (1936).

235. See, e.g., provisions cited *supra* note 32.

236. Ackerman identifies the signing of the Constitution and the Reconstruction era as two other constitutional moments. See B. ACKERMAN, *DISCOVERING THE CONSTITUTION* (1988) (unpublished manuscript on file with author).

237. *United States v. Belmont*, 301 U.S. 324 (1937), which was decided one year after *Curtiss-Wright*, and executive practice during the years leading to World War II proved decisive in helping FDR to consolidate his foreign affairs supremacy. In *Belmont*, *Curtiss-Wright*'s author, Justice Sutherland upheld the constitutional validity of a sole executive agreement with the Soviet Union. See *supra* note 18. Three years later, President Roosevelt concluded the notorious Destroyers-for-Bases deal with Great Britain, thereby legitimizing a broader use of the executive agreement instead of the

the Court, Justice Sutherland validated the President's unenumerated constitutional authority to conduct foreign affairs in the most sweeping terms, claiming that the President's "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress" ²³⁸ As *Curtiss-Wright's* numerous critics have recognized, this language was mere dicta, for Congress had passed a joint resolution in that case expressly authorizing the President to take the action under challenge. Moreover, Justice Sutherland's historically flawed theory of how the President had come to possess such plenary power represented "the farthest departure from the theory that the United States is a constitutionally limited democracy." ²³⁹ Nevertheless, later Presidents have sought to treat *Curtiss-Wright* as what Ackerman would call an "amendment-analogue"—an effective *judicial* amendment of article II of the Constitution to add to the powers enumerated there an indeterminate reservoir of executive foreign affairs authority. ²⁴⁰

Curtiss-Wright painted a dramatically different vision of the National Security Constitution from that found in *Youngstown*. *Youngstown* envisioned a narrowly limited realm of exclusive presidential power in foreign affairs. Outside that realm, most foreign affairs decisions would occur in a

treaty as a method of entering foreign alliances. See generally T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 379-86 (1987). In concluding that deal, Roosevelt expressly relied upon a controversial opinion by then-Attorney General Robert Jackson, which found the transfer supported not only by the President's Commander-in-Chief power and *Curtiss-Wright* authority, but also by two statutes. Compare 39 Op. Att'y Gen. 484 (1940) with Borchard, *The Attorney General's Opinion on the Exchange of Destroyers For Naval Bases*, 34 AM. J. INT'L L. 690, 690 (1940) ("[T]he transaction was sustained under statutes which hardly bear the construction placed upon them."). In early 1941, Roosevelt employed executive agreements to send American troops to Greenland and Iceland, declared a state of "unlimited national emergency," and ordered the Navy to convoy American ships and shoot Nazi U-boats on sight, all without express congressional consent. See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 110-13 (1973). After Pearl Harbor, Congress' declaration of war authorized FDR to lead the nation into all-out war. By the close of the Truman Administration, the President had dropped the atomic bomb without consulting Congress, conducted the Korean conflict without a declaration of war, and molded the institutional presidency into its modern shape. See *supra* note 112; Hamby, *Harry S. Truman: Insecurity and Responsibility*, in F. GREENSTEIN, *supra* note 111, at 41.

238.

[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

299 U.S. at 319-20.

239. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493 (1946). See also Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972); Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 12 (1988); LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 710-14 (1987); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

240. B. ACKERMAN, *supra* note 236, ch. 12, at 77.

sphere of concurrent authority: under presidential management, bounded by the checks provided by congressional consultation and judicial review. Within that sphere, the courts would closely examine congressional enactments to determine whether they implicitly or explicitly empowered the President to undertake particular actions. *Curtiss-Wright*, by contrast, viewed the entire field of foreign affairs as falling under the President's inherent authority. While accepting the norm of presidential management of foreign policy that *Youngstown* would later embrace, it rejected the attendant conditions of congressional consultation and participation. Furthermore, over time the *Curtiss-Wright* vision also came to embrace the notion that courts should wholly defer to executive branch judgments, once they have made an initial determination that foreign affairs are at stake.²⁴¹

In *Youngstown* itself, both the Court's opinion and Justice Jackson's concurrence read *Curtiss-Wright* as resting not on inherent presidential power, but on whether Congress had *authorized* the executive action under challenge.²⁴² During the Warren Court years, the *Youngstown* theory appeared to take hold, as the Court carefully scrutinized statutes cited by the Executive to determine whether they had specifically empowered the President's actions, and if so, whether Congress and the President acting together had entrenched upon protected constitutional rights.²⁴³ In *Kent v. Dulles*,²⁴⁴ the Warren Court demanded a clear statutory statement that Congress had authorized the executive act in question before condoning a direct infringement upon an individual's constitutional right to travel. By so requiring, the Court ensured that rules regulating rights will "reflect the political consent and public participation embodied in legislation, rather than the self-interested bureaucratic discretion that is likely to be the character of executive action" when claimed national security interests are at stake.²⁴⁵

241. Significantly, nothing in *Curtiss-Wright* itself suggested that executive actions in foreign affairs should be immune from judicial review. To the contrary, in *Curtiss-Wright*, Justice Sutherland reviewed the President's action and upheld it on the merits as authorized by Congress. Yet twelve years later, in *Chicago & S. Air Lines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103 (1948), the Court declared that "the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which ha[ve] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.* at 111 (citing, inter alia, *Curtiss-Wright*).

242. See *Youngstown*, 343 U.S. at 585 (Black, J., for the Court) ("The President's power, if any, to issue the order [under challenge] must stem either from an act of Congress or from the Constitution itself."); *id.* at 635-36 n.2 (Jackson, J., concurring) (*Curtiss-Wright* involved not "the question of the President's power to act without congressional authorization, but the question of his right to act under and in accord with an Act of Congress.").

243. See, e.g., *United States v. Robel*, 389 U.S. 258, 263 (1967) (refusing to accept executive invocation of congressional war power as "talismanic incantation" to support violation of constitutional rights).

244. 357 U.S. 116 (1958); accord *Greene v. McElroy*, 360 U.S. 474, 507-08 (1959).

245. Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 351, 355-56 (1986).

Yet *Youngstown's* vision assumed the existence of both a genuine dialogue and a general consensus between Congress and the President about substantive foreign policy ends. Vietnam largely unraveled both assumptions. When Congress responded to Vietnam in the early 1970's by attempting to impose the *Youngstown* vision upon the President by statute, the Court threw its weight toward *Curtiss-Wright*, which has now reemerged as the touchstone of the Court's foreign affairs jurisprudence. This pattern first appeared in 1971, when the Burger Court rejected the Nixon Administration's efforts to enjoin publication of the Pentagon Papers without statutory authorization.²⁴⁶ Although the votes of the First Amendment absolutists then sitting on the Court sealed a rare presidential defeat, the separate opinions in the *Pentagon Papers Case* unveiled a strong undercurrent favoring *Curtiss-Wright's* vision of executive supremacy in foreign affairs.²⁴⁷

Since the *Pentagon Papers* case, that undercurrent has come to the surface, as the Court has newly invoked *Curtiss-Wright*, not so much in constitutional interpretation as in the realm of statutory construction. Language in *Curtiss-Wright* suggested that courts should read foreign affairs statutes with a presumption that they permit executive conduct.²⁴⁸ Executive branch attorneys have read that language as defining a canon of differential statutory construction for courts construing foreign affairs statutes. Thus, even when Congress has enacted statutes which apparently

246. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*Pentagon Papers Case*). One year later, in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), the Court similarly ruled against the President by invalidating warrantless wiretaps for domestic intelligence-gathering that had been authorized only by the Attorney General. Like the *Pentagon Papers Case*, however, the *Keith* decision did not represent an unmitigated defeat for the Executive because the Court carefully declined "judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308; *see also id.* at 322 (reiterating that case did not involve issues "with respect to activities of foreign powers or their agents").

247. As Professors Edgar and Schmidt have recently recognized, "in the *Pentagon Papers* case, . . . the Supreme Court was caught in a state of tension between the precepts of *Steel Seizure* and *Curtiss-Wright*." *See Edgar & Schmidt, supra* note 245, at 359. Three Justices rejected the President's claim based primarily on the First Amendment, one relied principally upon the absence of congressional authorization, and the three dissenters rested heavily on *Curtiss-Wright*. *See id.* at 362-64 (discussing opinions). Justices Stewart and White, the two swing Justices, not only acknowledged the need for executive supremacy in foreign affairs, but openly contemplated other situations in which they might be willing to approve a prior restraint against publication based on national security claims. *See Pentagon Papers Case*, 403 U.S. at 728-29 (Stewart, J., joined by White, J., concurring) ("If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully."). *Cf. United States v. Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979) (relying on standard set forth in Stewart opinion to uphold government effort to enjoin publication of magazine article).

248. "It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U.S. at 320 (emphasis added).

limit executive power in foreign affairs, executive branch attorneys have liberally construed loopholes in those statutes to permit or authorize executive initiatives that Congress never anticipated.²⁴⁹

The Burger Court had several opportunities to read *Curtiss-Wright* strictly, and thereby to rein in this executive practice. On each occasion, however, it ruled in the President's favor, approving rather than rejecting his self-serving construction of the statute in question. In the most famous of these, *Dames & Moore v. Regan*,²⁵⁰ the Supreme Court construed IEEPA in light of the President's unenumerated constitutional powers in order to uphold President Carter's authority to conclude the Iranian hostages deal. Writing for the Court, Justice Rehnquist introduced a three-part technique of statutory construction that the Supreme Court has subsequently applied to most foreign affairs statutes that have come before it.²⁵¹ First, he ignored the statute's legislative history, which clearly evinced congressional intent to restrict presidential power, in favor of the statutory language, which he read unambiguously to authorize the executive action under challenge. Second, notwithstanding *Kent v. Dulles*' "clear statement" principle, Justice Rehnquist broadly construed the delegated grant of executive authority, despite the impact of that construction upon individual rights.²⁵² Third, he relied on the absence of express congressional disapproval of the President's action, the existence of general legislation in the area, and a history of unchecked executive practice to conclude that Congress had *endorsed* the President's initiative, thereby elevating the President's power from the "twilight zone," Jackson Category Two, to its height in Jackson Category One.²⁵³

Read together with the Court's later decision in *INS v. Chadha*, *Dames & Moore* dramatically alters the application of *Youngstown*'s constitu-

249. See *supra* notes 50, 160; *infra* note 324 (recounting examples of this practice during Iran-Contra Affair).

250. 453 U.S. 654 (1981).

251. For further criticism of the Court's technique of statutory construction in *Dames & Moore*, see W. ESKRIDGE & P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 317-21 (1987); L. TRIBE, *CONSTITUTIONAL CHOICES* 38-39 (1985).

252. In *Dames & Moore*, the plaintiffs argued that the executive branch, by entering a hostage accord with Iran, had taken their private property interests in attachments against Iranian assets and claims against Iran in violation of the Fifth Amendment. Justice Rehnquist found that the nullification of the attachments did not constitute a taking and held the remaining takings claims to be nonripe. Compare 453 U.S. at 674 n.6 & 688-90 with *id.* at 690-91 (Powell, J., concurring in part and dissenting in part) (dissenting from Court's decision with respect to attachments). In *Haig v. Agee*, 453 U.S. 280 (1981), a case decided almost contemporaneously with *Dames & Moore*, Chief Justice Burger gave similar short shrift to the individual rights being infringed by executive action. See *id.* at 309 (upholding Secretary of State's content-based revocation of Agee's passport as "'an inhibition of action,' rather than of speech.") (citation omitted). But see *supra* notes 244-45 and accompanying text.

253. See *supra* note 132. On its face, IEEPA was silent as to whether the President could suspend private claims against Iran in exchange for the release of American hostages. But rather than construing IEEPA's silence to reflect Congress' intent to preempt the President's claim of inherent power to take such action, Justice Rehnquist construed the *fact of the statute's existence* as implied authorization for such an act. He thereby delegated to the President authority which Congress itself had arguably withheld. See *Dames & Moore*, 453 U.S. at 675-79.

tional analysis in foreign affairs cases. For under Justice Rehnquist's *Dames & Moore* reasoning, a court may construe congressional inaction or legislation in a related area as implicit approval for a challenged executive action. Yet under *Chadha*, Congress may definitively *disapprove* an executive act only by passing a joint resolution by a supermajority in both houses that is sufficient to override a subsequent presidential veto.²⁵⁴ These rulings create a one-way "ratchet effect" that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence. For by treating all manner of ambiguous congressional action as "approval" for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson Category One, where the President's legal authority would be unassailable. Yet because *Chadha* demands an extraordinary display of political will to disapprove a presidential act, Congress could only rarely return those acts to Jackson Category Three, where they might be declared invalid.²⁵⁵ These decisions have the net effect of dramatically narrowing Jackson Category Three to those very few foreign affairs cases in which the President both lacks inherent constitutional powers and is foolish enough to act contrary to congressional intent clearly expressed on the face of a statute.²⁵⁶

Coupled with *Chadha*, Justice Rehnquist's statutory interpretation in *Dames & Moore* radically undercuts *Youngstown*'s vision of a balanced national security process. The decisions enhance the President's power against Congress by making it both easier to find congressional "approval" and more difficult for Congress to express institutional opposition to particular executive acts. The decisions simultaneously strengthen the President vis-à-vis the judiciary by encouraging the courts to apply a special measure of deference to executive acts in foreign affairs, a requirement that Justice Jackson had soundly rejected in *Youngstown* itself.²⁵⁷

In subsequent cases, the Court has built on *Dames & Moore* to construct a *Curtiss-Wright* orientation toward statutory construction that now challenges *Youngstown*'s vision of institutional and constitutional balance. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,²⁵⁸ Justice Rehnquist accepted at face value the government's claim of a national security interest, without considering statutory provisions mandating close judicial scrutiny of the Executive's acts.²⁵⁹ Three years later, in

254. See *supra* notes 211-14 and accompanying text (*Chadha* holds that only measures passed by both houses and signed by the President may be given legal effect outside the legislative branch).

255. See *supra* note 139 and accompanying text.

256. See, e.g., *United States v. Guy Capps*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (refusing to give effect to sole executive agreement regulating trade because agreement was inconsistent with statute enacted under Congress' foreign commerce power regulating same subject matter).

257. See *supra* notes 140-43 and accompanying text.

258. 454 U.S. 139 (1981).

259. The Court accepted at face value the Navy's refusal to confirm or deny that it had stored

Regan v. Wald,²⁶⁰ the Court applied the *Dames & Moore* technique of statutory construction to uphold President Reagan's power to regulate travel to Cuba under IEEPA's "grandfather clause," despite unambiguous statutory language and legislative history to the contrary.²⁶¹ More recently, in *Japan Whaling Association v. American Cetacean Society*,²⁶² the Court construed yet another statute that appeared to constrain executive discretion as permitting the executive branch to conclude a whaling agreement with Japan that undercut a pre-existing international treaty.²⁶³ Significantly, Congress had designed none of these statutes to shift the balance of foreign affairs decisionmaking power from Congress toward the President; all were enacted for precisely the opposite purpose. But the Supreme Court's reading of these statutes has enhanced presidential power by encouraging lawyers throughout the executive branch to construe their agency's authorizing statutes generously.

In reaching these decisions, the Court has rejected virtually every doctrinal technique offered it to narrow the substantive scope of executive power.²⁶⁴ When urged to apply the nondelegation doctrine to invalidate a

nuclear weapons at a Hawaiian facility because the information was classified, even though the 1974 Freedom of Information Act amendments required the courts to make a *de novo* determination whether such a classification was proper. See 5 U.S.C. § 552(a)(4)(B) (1982); Halperin, *The National Security State: Never Question the President*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986*, at 50, 54 (H. Schwartz ed. 1987).

260. 468 U.S. 222 (1984).

261. See *Edgar & Schmidt*, *supra* note 245, at 385-86 ("The majority opinion by Justice Rehnquist simply overrode the intent of Congress in order to permit the Executive to impose general restrictions on travel to Cuba without going through the congressional notice and consultation requirement imposed by [IEEPA] for new peacetime emergencies."). *Wald* went beyond *Dames & Moore* by construing IEEPA to override not simply property rights, see *supra* note 252, but the right to international travel guaranteed by the due process clause of the Fifth Amendment. Although the Court of Appeals had concluded that that right required the application to IEEPA of the *Kent v. Dulles* "clear statement" principle, see *Wald v. Regan*, 708 F.2d 794, 800 (1st Cir. 1983), Justice Rehnquist cited *Curtiss-Wright* to mandate "traditional deference to executive judgment '[i]n this vast external realm.'" 468 U.S. at 242 (citation omitted).

262. 478 U.S. 221 (1986).

263. The Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978(a)(1) (1982), and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2) (1982), imposed a mandatory duty on the Secretary of Commerce to certify to the President any determination that foreign nationals were conducting fishing operations which "diminish the effectiveness" of an international fishery conservation program. Although the International Whaling Commission established a "zero quota" against the taking of whales in accordance with the International Whaling Convention, the Court upheld the Commerce Secretary's decision not to certify Japan, based upon an executive agreement under which the United States had agreed that Japan could continue whaling at certain harvest levels for a fixed period of years. 478 U.S. at 227-29. In a dissent joined, extraordinarily enough, by Justice Rehnquist, Justice Marshall concluded that the Secretary had "substitute[d] . . . his judgment for Congress' on the issue of how best to respond to a foreign nation's intentional past violation of quotas . . . [and had] flouted the express will of Congress and exceeded his own authority." See *id.* at 241, 246 (Marshall, J., dissenting).

264. Although the Court has recently twice ruled against the Executive in cases bearing on foreign affairs, in neither case did it deny the Executive's claim of substantive power. In *Reagan v. Abourezk*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 108 S. Ct. 252 (1987), an equally divided six-Justice Court affirmed without opinion a decision remanding for clarification the INS' construction of § 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27) (1982). In *Webster v. Doe*, 108 S. Ct. 2047 (1988), the Court held that Congress did not enact the National Security Act of 1947 with the intent to preclude judicial review of a constitutional challenge

grant of power to the President, the Court held that that doctrine did not apply equally to foreign affairs.²⁶⁵ When asked to construe the existence of a statute in the field to preempt a claim of inherent presidential power to make foreign policy, the Court declined.²⁶⁶ When asked to read narrowly a statute that impinged on constitutional rights, the Court refused to apply the "clear statement" rule.²⁶⁷ When urged to uphold the constitutionality of a congressional control device, the Court invalidated it.²⁶⁸

In short, far from maintaining a rough balance in the congressional-executive tug-of-war, the Court's decisions on the merits of foreign affairs claims have encouraged a steady flow of policymaking power from Congress to the Executive. Through unjustifiably deferential techniques of statutory construction, the courts have read *Curtiss-Wright* and its progeny virtually to supplant *Youngstown*'s constitutional vision. As a result, the courts have become the President's accomplices in an extraordinary process of statutory inversion. It hardly surprises, then, that Oliver North should have cited *Curtiss-Wright* to Congress as the legal basis justifying all of his actions during the Iran-Contra Affair.²⁶⁹

2. *Justiciability*

Perhaps even more important than these scattered rulings on the merits have been the many cases in which the Court has condoned executive initiatives in foreign affairs by refusing to hear challenges to the President's authority. In *Goldwater v. Carter*²⁷⁰ and *Burke v. Barnes*²⁷¹, the Court dismissed congressional challenges to presidential authority, with various Justices finding the challenges not ripe, moot, or presenting nonjusticiable

to a CIA employment termination decision. The Court did not, however, pass on the merits of the employee's constitutional claim. *Id.* at 2054 n.9. Both *Webster's* construction of the National Security Act and its attitude toward judicial review of executive action in national security affairs seem wholly consonant with the *Youngstown* vision I have described. See *supra* text accompanying notes 140-43. Nevertheless, two Justices dissented from *Webster's* finding of reviewability, not surprisingly citing *Curtiss-Wright*. See 108 S. Ct. at 2055 (O'Connor, J., dissenting in part); *id.* at 2060 (Scalia, J., dissenting).

265. In *Curtiss-Wright*, Justice Sutherland rejected a claim that the statute under challenge constituted an unlawful delegation of legislative power to the Executive. See *supra* note 248; see also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress—in giving the President authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic affairs.").

266. See *Dames & Moore*, 453 U.S. at 684-86; *supra* note 253. In *Youngstown*, Justice Jackson had taken the opposite position on this issue. See *supra* note 141 and accompanying text.

267. On three recent occasions, the Court has avoided applying the clear statement principle of *Kent v. Dulles*, 357 U.S. 116 (1958). See *supra* notes 244-45 and accompanying text. See *Regan v. Wald*, 468 U.S. 222, 240-42 (1984), *supra* note 261; *Haig v. Agee*, 453 U.S. 280 (1981) (upholding Secretary of State's authority to remove Philip Agee's passport on ground that his foreign travel was likely to damage U.S. national security); *Snepp v. United States*, 444 U.S. 507 (1980) (imposing constructive trust upon former CIA operative for publishing book without previously clearing his manuscript).

268. *INS v. Chadha*, 462 U.S. 919 (1983).

269. See O. NORTH, *supra* note 88, at 523-25, 527.

270. 444 U.S. 996 (1979).

271. 479 U.S. 361 (1987).

political questions.²⁷² These Supreme Court decisions stand atop much larger congeries of lower federal court cases that, over the years, have refused to hear challenges to the legality of the Vietnam War²⁷³ and to various aspects of the Reagan Administration's support for the contras.²⁷⁴

Even when the courts have not relied on abstention doctrines tied to the nature, ripeness, or mootness of the question presented, they have invoked the identity of the plaintiff, the defendant, the cause of action, and the requested relief as grounds for dismissing the case. Recent decisions have erected standing bars to foreign affairs suits by aliens,²⁷⁵ citizens,²⁷⁶ taxpayers,²⁷⁷ and Members of Congress.²⁷⁸ Courts have held government officials immune from suits by citizens for monetary damages,²⁷⁹ and the United States government immune from suits by servicemen for all manner of injuries.²⁸⁰ They have dismissed state, federal, and international

272. In *Barnes*, the Court dismissed as moot a congressional challenge to President Reagan's pocket veto of a foreign aid bill that would have required him to certify El Salvador's progress in protecting human rights. In *Goldwater*, *supra* note 25, the Justices voted to reject Senator Goldwater's challenge to the President's treaty termination on a variety of grounds: ripeness, 444 U.S. at 997-98 (Powell, J., concurring in the judgment); the political question doctrine, *id.* at 1002-03 (Rehnquist, J., concurring in the judgment); and the merits, *id.* at 1006-07 (Brennan, J., dissenting). Had the case been heard today, Justice Scalia would almost certainly have voted to deny Goldwater's claim for lack of congressional standing. See *Moore v. United States House of Representatives*, 733 F.2d 946, 960-61 (D.C. Cir. 1984) (Scalia, J., concurring in the result), *cert. denied*, 469 U.S. 1106 (1985).

273. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). See generally Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974) (collecting cases).

274. See, e.g., *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded for reconsideration in light of subsequent legislation*, 471 U.S. 1113 (1985); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983). See generally Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985); Note, *Covert Wars and Presidential Power: Judicial Complicity in a Realignment of Constitutional Power*, 14 HASTINGS CONST. L.Q. 683 (1987) (reviewing decisions).

275. In *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), the Supreme Court ruled that because an excluded foreigner seeking entry into the United States has no right to enter, he lacks standing to challenge his exclusion. Consequently, challenges to ideological exclusions of aliens have generally been raised not by the excluded foreign speaker, but by American citizens who want to hear her message. See, e.g., *Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 108 S. Ct. 252 (1987); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525 (D. Mass.), *vacated*, No. 86-1371 (1st Cir. June 18, 1986).

276. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972); *Velvel v. Nixon*, 415 F.2d 236 (10th Cir.), *cert. denied*, 396 U.S. 1042 (1969).

277. *United States v. Richardson*, 418 U.S. 166 (1974); *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987).

278. *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The Supreme Court considered, but did not decide, the constitutionality of congressional standing in *Burke v. Barnes*, 479 U.S. 361 (1987). See *supra* notes 271-72 and accompanying text. See generally Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982) (reviewing cases).

279. See *Anderson v. Creighton*, 107 S. Ct. 3034 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

280. See, e.g., *United States v. Johnson*, 107 S. Ct. 2063 (1987); *Feres v. United States*, 340 U.S.

law claims against federal defendants for want of a cause of action,²⁸¹ and they have denied claims for both monetary and equitable relief on fuzzy "equitable discretion" grounds.²⁸² In recent years, lower courts have dismissed so many challenges to executive conduct by so many carefully selected plaintiff groups that their opinions now seem to pick and choose almost randomly from among the available abstention rationales.²⁸³ By contrast, when Congress has raised similar defenses to suits brought by the executive branch, the Court has uniformly rejected them.²⁸⁴

The question why the courts have deferred so broadly to the Executive in foreign affairs cases deserves far broader treatment than it can be given here.²⁸⁵ Suffice it to say that this deference stems from a complex admix-

135 (1950); see also Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979). Cf. *United States v. Stanley*, 107 S. Ct. 3054 (1987) (barring former serviceman from maintaining *Bivens* action against military officers and civilians who administered experimental drug to him without his consent). Cf. *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) (creating federal common-law immunity barring serviceman's estate from suing independent contractor who had allegedly supplied defective military helicopter to United States).

281. See, e.g., *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

282. See, e.g., *Sanchez-Espinoza*, 770 F.2d at 207-09; *Crockett v. Reagan*, 558 F. Supp. 893, 902-03 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984). See generally T. FRANCK & M. GLENNON, *supra* note 237, at 824-27 (discussing equitable discretion doctrine).

283. See, e.g., *Johnson v. Weinberger*, 851 F.2d 233 (9th Cir. 1988) (dismissing on standing grounds private challenge to implementation of U.S. strategic defense policy, after district court had previously dismissed on political question grounds); *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988) (dismissing suit under Hostage Act as political question and for want of cause of action); *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194 (3d Cir.) (dismissing establishment clause challenge to dispatch of ambassador to Vatican on mixed standing and political question grounds), *cert. denied*, 107 S. Ct. 314 (1986); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (dismissing suit on grounds of sovereign immunity, equitable discretion, absence of *Bivens* remedy and implied statutory causes of action, mootness, and as nonjusticiable political question); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (rejecting congressional suit for declaratory judgment requiring President to remove U.S. armed forces from El Salvador, reasoning that whether War Powers Resolution's 60-day cutoff provision had been triggered was political question), *cert. denied*, 467 U.S. 1251 (1984); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing suit brought by Members of Congress to compel President to report on U.S. military activities in Persian Gulf on mixed political question and equitable discretion grounds); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986), *aff'd mem.*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988) (dismissing as political question suit by shipowner whose vessels were damaged by U.S. mines in Nicaraguan port); *Cranston v. Reagan*, 611 F. Supp. 247 (D.D.C. 1985) (dismissing suit brought by Members of Congress seeking determination that bilateral treaties violate Atomic Energy Act as nonjusticiable political question and, alternatively, on grounds of remedial discretion).

284. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (ruling for President on merits after rejecting intervenor House and Senate's claim that President's challenge to constitutionality of legislative veto raised political question). See 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, 1084 (1987) ("[T]he Burger Court was totally deferential in reviewing challenges to executive conduct, but was very willing to declare unconstitutional congressional statutes as violating separation of powers.").

285. I plan to address this question at greater length in a forthcoming article, which describes a phenomenon I call "transnational public law litigation." See generally Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 193-201 (1987) (describing this phenomenon). Transnational public law litigation melds two modes of litigation that traditionally have been viewed as distinct: *domestic* litigation, in which private individuals bring private domestic law claims against one another in municipal courts seeking retrospective judgments; and *international* litigation, in which state parties bring public international

ture of judicial attitudes stemming in equal parts from confusion, cowardice, and concerns about judicial competence and the Constitution. In good measure, the courts' deference reflects the generally relaxed attitude toward judicial review of executive action that has dominated domestic administrative law after *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.²⁸⁶ Additional impetus to defer derives from legitimate judicial concerns about the separation of powers and judicial incompetence to decide particular foreign affairs cases.²⁸⁷ In certain contexts, particularly immigration cases, concerns about national sovereignty may enhance the judicial drive to abstain.²⁸⁸ Nor can one wholly discount the possibility that federal judges and justices demonstrate a pro-executive bias because of past service in the executive branch.²⁸⁹

Yet however powerful these concerns may be, they provide no intellectual support for the sweeping statements of judicial abdication that have recently begun to appear in the *Federal Reporters*.²⁹⁰ Nor do they explain the troubling confusion that judges have exhibited in attempting to distinguish cases where they find the President's conduct unreviewable from those in which they review his conduct and find it authorized.²⁹¹ Finally, they do not explain the courts' persistent reluctance to look behind talismanic executive assertions of "national security,"²⁹² "military neces-

law claims against one another before international tribunals, seeking enunciation of public norms that will stimulate negotiated political settlements. In transnational public law litigation, private individuals, government officials, and nations sue one another in domestic courts, making "transnational" legal claims that blend private and public, domestic and international law. As in domestic litigation, the transnational public lawsuit seeks redress for individual victims, but as in international litigation, the transnational plaintiff's underlying aim is to prompt judicial enunciation of a legal *norm* that can be used to provoke a political settlement. My forthcoming article suggests that many of the recent federal court decisions abstaining in suits challenging United States foreign policy decisions result from judicial unwillingness or inability to cope with this new type of litigation.

286. 467 U.S. 837 (1984). See generally Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986). But see Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15 (1984) ("Such talk is a venerable aspect of the courts' protective coloration, and should not necessarily be taken too seriously.").

287. See Koh, *supra* note 285, at 185-89. For a recent statement of this view, see *Abourezk v. Reagan*, 785 F.2d 1043, 1063-64 (D.C. Cir. 1986) (Bork, J., dissenting); see also *Mathews v. Diaz*, 426 U.S. 67 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

288. See Schuck, *supra* note 286, at 17.

289. No fewer than four members of the current Supreme Court—Chief Justice Rehnquist and Justices White, Marshall, and Scalia—previously held high executive branch positions.

290. See, e.g., *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) (Robb, J.) ("Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy."), *cert. denied*, 446 U.S. 957 (1980).

291. See, e.g., *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948); *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987); *Chaser Shipping v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986), *aff'd mem.*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988). See generally Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that cases allegedly decided under political question doctrine actually involved judicial determinations that executive decisions were authorized).

292. See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Snepp v. United States*, 444 U.S. 507 (1980).

sity,"²⁹³ or the need for judicial deference to the political branches in matters of "military discipline"²⁹⁴ and "military affairs."²⁹⁵

This trend toward executive insulation in foreign affairs from judicial review is neither salutary policy nor hornbook law. As described by Justice Jackson's opinion in *Youngstown*, the National Security Constitution envisions an important role for the courts in maintaining the constitutional equilibrium of the national security system.²⁹⁶ That role requires judges to look skeptically upon broad claims of inherent presidential authority and to reject assertions that the President should prevail simply because foreign affairs are involved. Even under existing doctrine, executive action that relies upon unenumerated presidential powers shared with Congress,²⁹⁷ that infringes directly upon individual rights,²⁹⁸ or that is directly contested by Congress acting as a whole²⁹⁹ remain subject to judicial review. Nor is judicial deference to presidential action warranted when the executive branch claims to derive its authority from a carefully drafted foreign affairs statute.³⁰⁰ Thus, recent cases in which courts have abstained from making these decisions ultimately betray not doctrinal fidelity, but reflexive timidity of a sort that affronts *Youngstown's* vision of the National Security Constitution.

D. *The Road to the Iran-Contra Affair*

The broader lesson that emerges from this study of executive initiative, congressional acquiescence, and judicial tolerance is that under virtually

293. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

294. See, e.g., *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987); *Chappell v. Wallace*, 462 U.S. 296, 301-02 (1983); *Brown v. Glines*, 444 U.S. 348, 354-57 (1980); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

295. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 64-68 & n.6 (1981); *Parker v. Levy*, 417 U.S. 733, 743, 756-57 (1974).

296. See *supra* notes 140-43 and accompanying text.

297. See, e.g., *Youngstown*, 343 U.S. 579 (1952).

298. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Kent v. Dulles*, 357 U.S. 116 (1958).

299. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983). Although greater judicial deference to the Executive may be warranted in cases where there is no interbranch dispute, see Schuck, *supra* note 286, at 18, no such rationale applies when a constitutional impasse arises between the two political branches. See *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

300. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987) (holding that "judiciary is final authority on issues of statutory construction") (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (political question doctrine does not apply to foreign affairs cases which involve straightforward statutory interpretation). Even in *Curtiss-Wright*, the Court reviewed the challenged executive action to determine whether Congress had authorized it. See *supra* note 241. In cases where the statutory mandate for the executive act has been unclear, the courts have remanded for clarification of executive agency practice. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by equally divided Court*, 108 S. Ct. 252 (1987) (remanding for further evidence that INS had previously construed statute to deny visas to aliens on ground that their entry would prejudice foreign policy); see also *Abourezk v. Reagan*, Civ. No. 83-3739, 1988 U.S. Dist. LEXIS 5203 (D.D.C. June 7, 1988) (decision on remand ordering INS to issue visas).

every scenario, the President wins. If the executive branch possesses statutory or constitutional authority to act and Congress acquiesces, the President wins. If Congress does not acquiesce in the President's act, but lacks the political will either to cut off appropriations or to pass an objecting statute, and then to override a veto, the President again wins. If a Member of Congress or a private individual sues to challenge the President's action, the judiciary will likely refuse to hear that challenge on grounds that the plaintiff lacks standing; the defendant is immune; the question is nonjusticiable, not ripe, or moot; or that relief is inappropriate. And even if the plaintiffs somehow surmount each of these obstacles and persuade the courts to hear their challenge on the merits, the courts will usually rule in the President's favor. In sum, whatever the scenario, the bottom line stays the same: the President almost always seems to win in foreign affairs.

One need not be a cynic to recognize that this doctrinal tangle affords presidential judgment extraordinary insulation from external scrutiny. Thus, it should not surprise us when an institutional presidency so rarely held accountable for its acts stops trying to keep account. During the Iran-Contra Affair, several interrogators expressed disbelief that the President's subordinates thought they could get away with what they were doing.³⁰¹ But their arrogance was not born of ignorance, but of habit. NSC secretary Fawn Hall's suggestion that "sometimes [the Executive has] to go above the written law"³⁰² was not a new thought. Ten years earlier, an unchastened Richard Nixon had told an interviewer, "When the President does it, that means that it is not illegal."³⁰³

III. LEARNING THE LESSONS OF THE IRAN-CONTRA AFFAIR

Even with all of these advantages, the President does not invariably win in foreign affairs. As the Iran-Contra Affair demonstrates, sometimes the President loses. Furthermore, upon examination, even many of the President's recent foreign affairs "victories" prove to have been either illusory or short-lived. The President's victories in court have cumulatively occupied only a small corner of the foreign policy spectrum. Presidential vetoes, even when sustained, have rarely directed affirmative policies.³⁰⁴

301. See O. NORTH, *supra* note 88, at 555 (remarks of Rep. Fascell); *id.* at 358-62 (remarks of Arthur Liman).

302. *Testimony of Fawn Hall: Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions With Iran*, 100th Cong., 1st Sess. 5, at 552 (1987).

303. Interview with David Frost (May 19, 1977), *quoted in* Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 923 (1986).

304. For example, during the summer of 1988 the President vetoed omnibus trade reform legislation, citing his opposition to a provision requiring certain employers to give mandatory sixty-day notice of plant closings. Although Congress narrowly failed to muster the votes necessary to override that veto, *see supra* note 224, it quickly repassed only slightly modified versions of both the plant-closing legislation and the omnibus trade package. Under severe pressure from members of his own

Some "initiatives" ostensibly taken by the President have in fact been driven by congressional pressure or external events.³⁰⁵ Apparently successful executive end-runs around Congress have been answered, months or years later, with new congressional restraints.³⁰⁶ Presidential decisions to act without consulting our allies have won short-term freedom, but at long-term costs.³⁰⁷

These outcomes bear witness to the false promise of a foreign policymaking system overdominated by the Executive. As the Iran-Contra Affair revealed, secretive unilateral executive decisionmaking guarantees neither wise nor efficient foreign policymaking. In the long run, a foreign policy system domineered by the Executive and beset by chronic conflict among the branches serves neither the interests of the executive branch nor of the nation as a whole. For all of the expansion of executive power that occurred during their administrations, the Johnson, Nixon, Carter, and now the Reagan presidencies have all ultimately foundered on the rock of foreign policy. And as Alton Frye has recognized, the familiar description of the Constitution as an invitation for Congress and the President to struggle for control of foreign policy misses the reality that "[t]he objective of the struggle is not control but wise policies acceptable to the American people."³⁰⁸ American foreign policy grows out of a long-term political process in which "wins" and "losses" are often incremental, anticipated rather than imposed, and traded in intricate, low-visibility ways. One branch of government should not—and ultimately cannot—permanently "defeat" another in a constitutional system where sepa-

party, the President then signed the trade bill and allowed the plant-closing bill to become law without signing it. See Wall St. J., Aug. 24, 1988, at 40, col. 1; N.Y. Times, Aug. 3, 1988, at A1, col. 2. Thus, as the President's own Trade Representative conceded, the Administration's initial veto served little purpose. See *Nothing Was Gained By Administration Veto of Original Omnibus Trade Bill*, Yeutter Says, 5 Int'l Trade Rep. (BNA) 1161, 1161 (Aug. 17, 1988) (remarks of U.S. Trade Representative Clayton Yeutter).

305. See *supra* notes 179-86 and accompanying text.

306. For example, after the President unilaterally "reinterpreted" the 1972 Anti-Ballistic Missile Treaty to take a broad view of its terms, see *supra* note 24 and accompanying text, several Senate committees conducted hearings and subsequently reported a resolution reaffirming the pre-existing "narrow" interpretation. See S. Res. 167, 100th Cong., 1st Sess., 133 CONG. REC. S12,498 (daily ed. Sept. 22, 1987); THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 164, 100th Cong., 1st Sess. (1987). The Senate then attached a condition to its resolution of ratification of the Intermediate-Range Nuclear Force Treaty. That condition declared that the United States shall not adopt an interpretation of a treaty that differs from the common understanding of that treaty shared by the Executive and the Senate at the time of Senate advice and consent, unless the Senate has consented to the new interpretation by protocol or legislative enactment. See N.Y. Times, May 28, 1988, at A4, col. 5-6. The President has now challenged that condition as infringing upon his constitutional powers to interpret treaties. See Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Force Treaty, 24 WEEKLY COMP. PRES. DOC. 779, 780 (June 10, 1988); see also Koh, *Remarks on the Treaty Power* (forthcoming in 42 U. MIAMI L. REV., 1988) (enumerating other ways in which ABM Treaty reinterpretation battle with Congress has proven counterproductive for Executive in areas of executive privilege, defense appropriations, and negotiating flexibility).

307. See Koh, *supra* note 306 (arguing that unilateral presidential treaty-breaking and bending have impaired U.S. ability to mobilize international institutions to deal with other global problems).

308. Frye, *Congress and President: The Balance Wheels of American Foreign Policy*, 49 YALE REV. 1, 2 (1979).

rated institutions share foreign policy powers and interbranch disputes ultimately determine critical national positions in the international realm.³⁰⁹

In recent months, two competing conventional wisdoms about the Iran-Contra Affair have taken hold among Members of Congress and the American public. On one hand, presidential critics have treated the Affair as a lesson in hubris. Like Watergate, they argue, the Iran-Contra Affair shows that second-term Presidents riding high on landslide political victories begin to believe that the President *always* wins. Their confidence leads them to overreach, at which point the checks and balances within our constitutional system bring them into line. Thus, Contragate, like Watergate, is ultimately a cause for celebration, because in the end, the "system worked."³¹⁰

The opposing view holds that the President "lost" the Iran-Contra Affair not on November 3, 1986 (the day that *Al-Shiraa*, a Lebanese weekly, reported that the United States had secretly sold arms to Iran), but one day later, when the Republicans lost control of the United States Senate. Under this view, the committee hearings were not about the rule of law, but rather, a cynical attempt by a Congress now controlled by presidential opponents to "micromanage" foreign policy.³¹¹

Both perspectives, in my view, are fundamentally misguided. The first suggests that our foreign policy system is self-regulating; the second avers that it is overregulated. Both camps would consider further structural change unnecessary. But if, as I have argued, the Iran-Contra Affair represented a nearly successful assault upon our postwar national security system, we must ask whether the existing legal structure affords that system sufficient protection. In my view, what the Iran-Contra Affair reveals is that our national security system is *inadequately* regulated. Congress has been effectively unable to force the President to keep his bargains in foreign affairs. Moreover, this problem will not soon abate, nor will it be cured simply by a change in executive branch personnel. As America continues to lose hegemony internationally, the occasions for executive initiative will likely increase. The current likelihood that Congress will acquiesce and that the courts will tolerate such initiatives will impose few costs on any President who stretches bargains in a haste to act.

In my judgment, many of the legislative proposals contained in the

309. See, e.g., O. NORTH, *supra* note 88, at 745 (remarks of Rep. Lee H. Hamilton to Oliver North) ("You said . . . the Congress would declare itself the winner [in the Iran-Contra Affair]. . . . [B]ut may I suggest . . . [w]e all lost. The interests of the United States have been damaged by what happened.").

310. See, e.g., Liman, *supra* note 96, at 72 ("I saw these hearings, in a way, as a birthday present for the Constitution. . . . [T]he Constitution has built into it a kind of immune system like that of the human body. When an alien concept enters, we expel it. The Iran-contra hearings were part of the process of disgorging this alien concept.").

311. See, e.g., IRAN-CONTRA REPORT, *supra* note 2, at 665 (supplemental views of Senator Orrin G. Hatch).

Iran-Contra committees' majority report are worthwhile.³¹² But the report presents that grabbag of proposals without coherent explanation of the relationship among them or analysis of how those suggestions comprise a legislative *strategy* for attacking the deeper institutional causes of the Af-fair. Without such a regulatory strategy, interstitial efforts to amend particular foreign affairs law will inevitably fail, serving only to push executive conduct toward new statutory lacunae and pockets of unregulated activity.

The momentum of the Iran-Contra Affair, coupled with the Democrats' control of Congress for the last months of the Reagan Administration, presented Congress with a rare window of opportunity to reassert itself in the foreign policymaking process. In the late 1970's, Congress exploited a similar opportunity by legislating a broader ongoing role for itself across the realms of foreign policy, a role which the executive branch has since sought systematically to undercut. The Iran-Contra watershed offered the legislators yet another legislative opening, which Congress has thus far largely squandered. If Members of Congress wish to learn the lessons of the last war, they should now consider new omnibus legislation, designed broadly to redefine the roles of Congress, the President, and the courts in national security matters.

What the Iran-Contra Affair underscores is the need for a new national security "charter"—an omnibus statutory "amendment" to the National Security Constitution—in the form of new framework legislation designed to regulate and protect many aspects of the foreign policymaking process.³¹³ Unlike the current patchwork of laws, executive orders, national security directives, and informal accords that govern covert and overt warmaking, emergency economic power, foreign intelligence and arms sales, such a statute would act as a statutory successor to the National Security Act of 1947. An ideal statute would reenact, in five separate titles: the War Powers Resolution; IEEPA;³¹⁴ the arms export control

312. See *supra* note 84 (describing recommendations). I suggest below how some of those recommendations may be incorporated into the legislative package that I would propose. See *infra* notes 316-17, 326, 330, 333-34, 371 and accompanying text.

313. See *supra* note 127 (defining framework legislation).

314. In my view, a sensible revision of IEEPA would require the President to make a more detailed showing of the nature of the "national emergency," and strengthen the consultation requirement by requiring the President to consult with a core group of congressional leaders before declaring such an emergency. See *infra* notes 338-39 and accompanying text. The bill could further state that any declared national emergency would automatically expire within a fixed period, for example, one year, and require face-to-face consultation between executive and congressional officials before the emergency was extended. The bill could also provide that a joint resolution affirming the existence of the emergency and approving any executive orders issued under it be given fast-track legislative treatment, to ensure express congressional approval or disapproval of the President's emergency actions before the emergency expired. See *infra* notes 358-60 and accompanying text (describing "fast-track" approval mechanism). Any such joint resolution could also contain a mandatory sunset provision, of perhaps two years. This revision would allow the President to conduct his emergency actions pursuant to express congressional approval at all times, but require him to return to Congress for extension of his emergency authority. Ideally, IEEPA would also be integrated with the other statutory trade

laws;³¹⁵ the Intelligence Oversight Act;³¹⁶ and the NSC provisions of the 1947 Act. At the same time, the charter would repeal other lingering statutes that have fallen into desuetude.³¹⁷ Accompanying procedural titles would address modes of congressional-executive consultation in international agreement-making,³¹⁸ internal and external agency control procedures,³¹⁹ and provisions for judicial review of executive action. Perhaps most important, the legislation would create new congressional structures and effect certain modest, but important, revisions in internal House and Senate rules.

sanctions that are currently available. For a recent comprehensive recommendation for restructuring the current U.S. statutory regime governing international economic sanctions, see Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1254 (1987).

315. One such proposal is the Biden-Levine bill, *supra* note 49. For criticisms of that bill, and discussion of other reform proposals in the arms export control area, see generally Note, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L. J. 1439, 1448, 1453-57 (1988).

316. Intelligence reform should focus primarily upon strengthening both the internal and external institutional mechanisms for oversight of intelligence activities. The Iran-Contra committees suggested two structural reforms to promote internal oversight: the creation of an independent CIA Inspector General and Senate confirmation of the CIA's general counsel. See IRAN-CONTRA REPORT, *supra* note 2, at 425. Senator Specter has recently proposed two bills that would implement those recommendations, as well as create a politically appointed director of national intelligence and reform the congressional intelligence committees. See S. 1818, 100th Cong., 1st Sess., 133 CONG. REC. S15,190 (daily ed. Oct. 27, 1987); S. 1820, 100th Cong., 1st Sess., 133 CONG. REC. S15,193 (daily ed. Oct. 27, 1987). To enhance external oversight, the Iran-Contra committees suggested that the President's Intelligence Oversight Board "be revitalized and strengthened." See IRAN-CONTRA REPORT, *supra* note 2, at 426. An expert working group on intelligence oversight has made that proposal more concrete by suggesting that Congress create a bipartisan national intelligence board that would oversee and review the performance of the intelligence agencies for purposes of regular reporting and recommendation to the President. The board's membership would be drawn from outside the intelligence community, serve on a full-time, compensated basis for periods overlapping presidential administrations, and be granted statutory access to information under agency control as well as a sufficient budget to maintain a qualified professional staff. See ABA STANDING COMM. ON LAW AND NATIONAL SECURITY, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES 107-09 (1985); see also Goodman, *supra* note 71, at 130-36 (suggesting other structural reforms of intelligence agencies).

317. A prime candidate for legislative overhaul would be the so-called "Hostage Act of 1868," 22 U.S.C. § 1732 (1982), which Oliver North claimed provided the executive branch with "the authority to do whatever [was] necessary" during the Iran-Contra Affair. See O. NORTH, *supra* note 88, at 503-04; *id.* at 606 (remarks of Rep. Henry Hyde). The Iran-Contra committees had suggested that the statute might be amended or repealed. See IRAN-CONTRA REPORT, *supra* note 2, at 426. For an analysis of the statute's legislative history and a convincing argument that Congress never intended it to be a "blank check" authorizing the President to use any means to rescue hostages, see Mikva & Neuman, *The Hostage Crisis and the "Hostage Act"*, 49 U. CHI. L. REV. 292 (1982).

318. For possible reforms of the agreement-making process, see S. Res. 536, 95th Cong., 2d Sess., 124 CONG. REC. 27,851 (daily ed. Aug. 25, 1978); Rehm, *Making Foreign Policy Through International Agreement*, in *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY* 126, 133-37 (F. Wilcox & R. Frank eds. 1976). Any reform effort would have to reconcile the Senate's desire that every major agreement be done in treaty form with the House's preference for congressional-executive agreements, which afford it a role in agreement ratification. Professor Henkin has suggested that Congress form a joint committee on international agreements, perhaps drawn from the two foreign affairs committees, which would receive prior notice of the negotiation of an agreement and advise the Executive on whether the agreement should go to the Senate or both houses for consent. See Henkin, *supra* note 230, at 19. The same joint committee could be notified of pending treaty terminations and modifications. See *supra* notes 25-29 and accompanying text.

319. The statute could codify, for example, the three internal agency control principles and the due process principles of foreign policy administration described above. See *supra* note 63; *supra* text accompanying notes 144-52.

Without detailing every provision of such a charter, let me observe that the congressional committees considering such legislation cannot focus solely upon organizational problems *within* the White House. For the sources of executive adventurism lie not only there, but also in the outside world and the operation of the two coordinate branches of government.³²⁰ Admittedly, Congress cannot legislate executive self-restraint, legislative will or judicial courage. But Congress can and should seek to alter recurrent patterns of executive behavior by restructuring the *institutional* attributes that now create incentives for executive officials to act irresponsibly, but impose few costs on their lawless conduct. Any national security reform bill should therefore target the institutional sources of executive adventurism, congressional acquiescence, and undue judicial tolerance that have contributed equally to recent executive excesses. Its goal should be to restructure existing laws not only to restrain executive initiative, but also to revitalize both Congress and the courts as institutional counterweights to the Presidency.

A. *Restraining the Executive*

Since 1949, more than a dozen private and public studies have sought to determine how best to organize the executive branch's foreign policy apparatus.³²¹ The Iran-Contra Affair underscores the need to promote the development not simply of more efficient policymaking mechanisms, but also of more effective internal and external devices for *legal* oversight, review, and accountability of executive branch decisions. Two general principles should guide Congress' efforts to augment institutional sources of executive self-restraint. First, the legality of proposed foreign policy initiatives should be tested wherever possible by processes of *adversarial review* both within and without the executive branch. Second, Congress should seek to specify the content of the President's responsibility to "take Care that the Laws be faithfully executed" in foreign affairs by making explicit the "Due Process Principles of Foreign Policy Administration" regarding internal executive branch accountability that are currently implicit in our National Security Constitution.³²²

Alexander George has made the case for creating a foreign policy decisionmaking system that encourages the clash of the competing views that

320. See *supra* Section II.

321. See, e.g., G. ALLISON & P. SZANTON, REMAKING FOREIGN POLICY (1976); MURPHY COMMISSION REPORT, *supra* note 223; see also Gelb, *Why Not the State Department?*, in DECISIONS OF THE HIGHEST ORDER: PERSPECTIVES ON THE NATIONAL SECURITY COUNCIL 229, 240 nn.1 & 16 (K. Inderfurth & L. Johnson eds. 1988) (listing twelve other studies dating back to 1949 Hoover Commission Report on Foreign Affairs).

322. See Brest, *Congress As Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 61-65 (1986) (arguing that Congress has both the power and the responsibility to interpret Constitution); Shane, *supra* note 127 (describing ways that Congress had done so with regard to doctrine of executive privilege); *supra* text accompanying notes 144-52.

may be presented to the President for final decision.³²³ This adversarial approach, extended to test the *legality* of policy initiatives, would have discouraged the proliferation of secret, unchallenged agency legal opinions that allowed the Iran-Contra Affair to proceed. Executive initiatives should not commence based upon a single agency general counsel's questionable reading of his or her agency's organic statute.³²⁴ Here, Congress could act on two fronts. First, it might choose to require interagency review of legal opinions that authorize covert actions. Such interagency review would mimic the current centralized review of agency rulemaking being conducted in the Reagan Administration by the Office of Management and Budget.³²⁵ Ideally, such review would be conducted by the Office of Legal Counsel of the Justice Department, which should be less prone to influence by any particular agency's policy mission than either the State Department Legal Adviser's Office or the General Counsel's Office of the CIA.³²⁶ Alternatively, the task of obtaining and coordinating competing legal analyses could be confided in the White House Counsel's office or in the newly established office of the Counsel to the NSC.³²⁷ Second, Congress could require that those legal opinions be submitted in confidence to the intelligence committees so that they may be subjected to adversarial review, not within the executive branch, but by the committee legal staffs.³²⁸ Far from being unprecedented, a version of this process

323. See George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POL. SCI. REV. 751 (1972).

324. Two such legal opinions permitted the Iran-Contra affair to proceed: one by the CIA's general counsel permitting a retroactive intelligence "finding," *supra* note 50, and another by the benighted counsel to the Intelligence Oversight Board which found the Boland Amendments inapplicable to NSC activities. See N.Y. Times, June 9, 1987, at A1, col. 2, A15, col. 4 (only executive branch legal analysis of applicability of Boland Amendments was based on cursory review of facts by attorney who had failed the bar examination four times).

325. Cf. Sunstein, *supra* note 151, at 454-60 (enumerating advantages of such centralized review); Diver, *Presidential Powers*, 36 AM. U.L. REV. 519 (1987) (such centralized review does not create imbalance in constitutional order).

326. But see Ehrlich, *Remarks*, in Appendices to MURPHY COMMISSION REPORT, *supra* note 223, at 26-27 (urging that Legal Adviser to State Department conduct such review). A former Assistant Attorney General has recently described a number of restrictions which the Reagan Administration placed upon the Attorney General's participation in the approval and review of sensitive foreign policy and intelligence matters. The "cumulative effect [of those restrictions] . . . was to minimize the ability of the Attorney General to participate in the deliberations or to render meaningful legal advice. He was even asked at times to render off-the-cuff oral advice on complex legal situations [so that others could] claim that the Attorney General had given a legal seal of approval to various proposals without permitting them to undergo real legal scrutiny." R. Willard, *Remarks at a Conference on Legal and Policy Issues in the Iran-Contra Affair: Intelligence Oversight in a Democracy* 5-6, (May 12, 1988) (on file with author). To address this problem, the Iran-Contra committees proposed that all proposed intelligence findings be transmitted to the Attorney General for legal review. See IRAN-CONTRA REPORT, *supra* note 2, at 424.

327. Apparently, neither of the legal opinions cited in *supra* note 324 was ever subjected to White House review. See Culvahouse Interview, *supra* note 218, at 7 (statement of Counsel to the President) ("One of the real problems with the entire Iran-contra episode was that not only was it not well-lawyered, but it was not lawyered in most respects. White House office lawyers were not consulted about the reach of the extent of the Boland Amendment.").

328. Despite the impression that Administration witnesses sought to convey during the Iran-Contra hearings, Congress' record of keeping covert actions secret has been excellent. See Goodman, *supra*

recently transpired with respect to the State Department Legal Adviser's advocacy of a broad interpretation of the Anti-Ballistic Missile Treaty.³²⁹

Congress' second objective should be to promote the President's discharge of his "take Care" responsibilities by requiring his personal involvement in important foreign policy decisions and encouraging the creation of clearer and more accountable lines of command within the executive branch. To foster presidential involvement, Congress could extend amendments currently being proposed to the "presidential findings" requirements in the intelligence laws to all forms of covert action, including those which involve arms transfers, emergency economic powers, military aid, or uses of armed force.³³⁰ Devising more accountable lines of command within the executive branch is a more intractable problem, whose ultimate solution rests more appropriately with the President than with Congress. Although most Presidents and commentators have agreed that the Secretary of State should be the President's principal foreign policy adviser,³³¹ they have also recognized the powerful institutional pressures that drive presidents to build the policymaking apparatus around themselves, relying principally upon the NSC.³³² Reform proposals have thus run in two directions: commentators have urged debureaucratization of the State Department, as well as reformation or diminution of the NSC's policymaking role.³³³ So long as the current uneasy division of la-

note 71, at 132. Indeed, the executive branch has been responsible for the vast bulk of recent national security leaks. See Morrison, *Blabbermouths*, 19 NAT'L J. 2002, 2002 (1987) (only nine percent of leaked national security news stories published during first five months of 1986 originated in Congress).

329. See *supra* note 24. For justiciability reasons, it seems unlikely that that opinion will ever be tested in a court. See Chayes & Chayes, *supra* note 24, at 1971. Accordingly, Senator Sam Nunn and others have opted to test the Administration's interpretation adversarially, not in court, but through extensive congressional hearings. See *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comms. on Foreign Relations and on the Judiciary*, 100th Cong., 1st Sess. (1987); see also *supra* note 306 (describing legislative output of those hearings).

330. See *supra* note 66. In addition to the intelligence reforms currently under legislative consideration, see *supra* notes 74, 77 & 316, the Iran-Contra Report suggested several other worthwhile modifications of the "findings" requirements: to reach more agencies, to identify participants in covert actions, to recertify those findings periodically, and most important, to require that all findings be in writing, personally signed by the President, and reported to the intelligence committees. The committees also suggested that the obligation to report findings, which currently rests with agency heads, be placed directly upon the President. IRAN-CONTRA REPORT, *supra* note 2, at 423-24.

331. See, e.g., I. DESTLER, *PRESIDENTS, BUREAUCRATS AND FOREIGN POLICY* (1972); Gelb, *supra* note 321, at 230 ("For the last twenty years or so most public commissions, organization experts and foreign policy commentators . . . have consistently recommended that the authority to make policy should be clearly and firmly lodged in the Department of State.").

332. See, e.g., D. WARWICK, *supra* note 188; Clarke, *supra* note 188; Gelb, *supra* note 321; Rockman, *America's Departments of State: Irregular and Regular Syndromes of Policy Making*, 75 AM. POL. SCI. REV. 911 (1981).

333. See, e.g., D. WARWICK, *supra* note 188, at 205-15 (proposing institutional reforms to debureaucratize State Department); G. ALLISON & P. SZANTON, *supra* note 321, at 78-80 (urging that NSC be abolished and its functions assumed by executive committee of cabinet); Clarke, *supra* note 188, at 137-40 (urging that National Security Assistant be reduced from policy adviser to neutral policy broker); Destler, *A Job That Doesn't Work*, 38 FOREIGN POL'Y 80 (1980) (proposing abolition of position of National Security Assistant). Both the Tower Commission and the Iran-Contra committees also suggested possible organizational reforms of the NSC. See *supra* notes 80-84 and accompa-

bor between the NSC and State prevails, however, Congress should impose express statutory requirements that the National Security Assistant be a civilian rather than a military officer, and that he or she be subject to Senate confirmation as well as regular appearances at oversight hearings. The requirement of Senate confirmation would require the National Security Assistant to establish personal contact with, as well as direct accountability to, the relevant congressional committees. Moreover, should the National Security Assistant continue to play a major role in the development of defense policy, such a statutory provision would arguably be constitutionally compelled, rather than merely desirable as a matter of policy.³³⁴

B. *Revitalizing Congress*

When Congress enacted the National Security Act of 1947, its greatest error was its failure to address its own role in the national security system.³³⁵ Although Congress partly redressed that oversight in the wave of statutes it enacted in the decade after Vietnam, the institutional changes that transformed Congress during those same years transferred substantial power from the congressional leadership to the rank and file.³³⁶ This dis-

nying text.

334. See *supra* note 82. Responding to the constitutional principle of civilian control over the military, the National Security Act of 1947 placed the military departments under the civilian control of a Secretary of Defense, who was in turn to operate under the civilian control of the President. See *supra* note 150. So long as the NSC continues to exert direct supervisory control over *covert* warmaking operations, the same principle would seem to require that its head also be a civilian. Along with Col. Robert McFarlane and Vice Admiral John Poindexter, Lt. General Colin Powell is the third of President Reagan's six National Security Assistants to hold military office. See Kirschten, *White House Notebook*, 19 NAT'L J. 2808, 2808 (1987). Active military officers have also held important lower political posts in the NSC, including most prominently Major Gen. Alexander Haig (later White House Chief of Staff), *supra* text accompanying note 62, and Lt. Col. Oliver North. See Bamford, *Carlucci and the N.S.C.*, N.Y. Times, Jan. 18, 1987, § 6 (Magazine), at 26 (in fall of 1986, NSC staff included 19 active-duty officers, and numerous retired officers). During the Iran-Contra Affair, some of these military officers managed elaborate covert transfers of military weapons with little or no supervision by civilians, including the President.

Legislation requiring Senate confirmation of the National Security Assistant could also require the President to make periodic confidential reports to a core congressional consultative group regarding NSC activities. Cf. IRAN-CONTRA REPORT, *supra* note 2, at 425 (making similar recommendation). Even without congressional action, however, any President could enhance the political accountability of the National Security Assistant simply by appointing his or her Vice-President to the post. Such a decision would have numerous potential advantages: it would preserve and clarify the civilian chain of command; it would render the National Security Assistant directly accountable to both the electorate and the Senate (over which the Vice-President would preside); it would make the Vice-Presidency more attractive to politicians of presidential caliber; it would make the Vice-President a more integral part of the administration; and it would prepare that individual for possible future presidential service. For a thoughtful response to the various constitutional and policy objections to such a proposal, see generally Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1714-24, 1731-34 (1988).

335. See *supra* note 117 and accompanying text.

336. See *supra* notes 31 & 180 and accompanying text; see also Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1628-33 (1988) (tracing history of power diffusion in Congress); Ornstein, *supra* note 180, at 57 (to extent that Congress has been able to reassert itself in foreign affairs, it has done so in decentralized manner, which has given too much power to congressional rank and file and insufficient

persion of decisionmaking capacity has doubly undercut Congress' ability to create a centralized delivery system in foreign affairs: by hampering Congress' capacity as a whole to confront the President, and by rendering Congress less able to withstand interest-group influence.³³⁷ To overcome these institutional deficiencies, Congress should now channel its reform efforts in three directions: toward creating counter-arenas of centralized foreign affairs expertise within Congress that may act to counter the President; toward building a central repository of *legal* expertise within Congress regarding international and foreign relations law; and toward equalizing its access to sensitive information that otherwise lies solely within the Executive's control.

By creating a core group of Members—perhaps the chairs of the existing foreign affairs committees, with whom the President and his staff could regularly meet and consult on national security matters—Congress could provide the Executive with the benefit of its deliberative judgments without demanding unacceptable sacrifices in flexibility, secrecy, or dispatch.³³⁸ Even if consultation with such a group would marginally delay presidential responses, “[t]here are few crises short of battlefield disasters and the instant calamity of a nuclear strike in which properly briefed members could not play a valuable part.”³³⁹ Moreover, unlike a special legislative committee, which would be susceptible to capture by the executive entity or interest group being regulated, this core group would consist of congressional leaders who would be directly accountable to the entire membership, and who would have the stature to express to the President views that might not come from his own subordinates.

Second, Congress should consider creating an entity, comparable to the Comptroller General and his or her staff, to monitor the output of the Executive's national security apparatus.³⁴⁰ That unit would include a le-

power to leadership); T. FRANCK & E. WEISBAND, *supra* note 31, at 210-26.

337. See Fitts, *supra* note 336, at 1629-30; cf. *supra* note 194 (illustrating interest group influence in foreign affairs).

338. A bill recently introduced in the Senate by Senators Byrd, Nunn, Warner, and Mitchell to amend the War Powers Resolution represents one promising attempt to achieve such centralization. See S.J. Res. 323, 100th Cong., 2d Sess., 134 CONG. REC. S6239 (daily ed. May 19, 1988) (text on file with author). That bill would require the President, before using force, to consult with a “Gang of Six,” consisting of the majority and minority leaders of both Houses, the Speaker of the House and the President pro tempore of the Senate. In addition, the bill would oblige the President to maintain continuing consultations with a “permanent consultative group” composed of the Gang of Six, plus the chairs and ranking minority members of the Armed Services, Foreign Affairs, and Intelligence Committees of each house. This latter group would be consulted for the purpose of designing legislative remedies regarding termination or approval of particular military involvements. This group would have formal authority to invoke the War Powers Resolution even if the President chose not to do so, and its legislative proposals would be accorded special “fast-track” status in the legislative process. See *infra* notes 358-59 and accompanying text. Furthermore, money to pay troops that the President had committed abroad would be automatically cut off once Congress voted to withdraw them. See N.Y. Times, May 20, 1988, at A3, col. 3; see also Halperin, *Lawful Wars*, 72 FOREIGN POL’Y 173, 176 (1988) (endorsing creation of special leadership committee).

339. Frye, *supra* note 308, at 15.

340. For a similar proposal that Congress create a “Foreign Policy Monitor,” who would be

gal staff, headed by a congressional legal adviser (corresponding to the Legal Adviser's office in the State Department or the Office of Legal Counsel in the Justice Department), which would coordinate the work of the various committee staff counsel, act as liaison with executive legal staffs, and brief and advise the core consultative group on questions of international and foreign relations law.³⁴¹ Equally important, the congressional legal staff could also issue legal opinions regarding presidential conduct. By internal rule, Congress could require that either the congressional legal adviser or the staff counsel of the relevant congressional committee issue a "counter-report" whenever the executive branch transmitted a declaration of national emergency, a war powers report, or an intelligence finding. These counter-reports would establish a contemporaneous record either accepting or rejecting the President's legal justification, thereby creating a written record against which to test any future executive claim of congressional acquiescence.³⁴²

Third, and finally, Congress should seek to enhance its access to both the classified and unclassified information regarding national security matters that the Executive currently controls. "The principal inefficiency in our system," Professor Henkin has argued, "is the distorting effect on the congressional function resulting from the President's monopoly of information and communication"³⁴³ Congressional exclusion from classified information both buttresses executive claims to superior knowledge in foreign affairs and ensures uninformed legislative judgment in those decisions in which Congress does participate. Yet classification of United

appointed for an extended term and subject to removal by a majority vote of either House, see *id.* at 11-15. Frye would assign the Monitor three tasks: "to alert the Majority and Minority Leaders of both houses of impending issues and decisions regarding which they might wish to request full consultation; to identify for senior executive officials potential problems on which they might wish to seek legislative counsel; [and] to brief appropriate congressional leaders in advance of major consultations in order to make such exchanges more focused and meaningful." *Id.* at 13.

341. See Falk, *Remarks*, in Appendices to MURPHY COMMISSION REPORT, *supra* note 223, at 29 (urging the creation of such a congressional unit). Although the staff counsel to the Senate Foreign Relations and House Foreign Affairs Committees currently play a similar role, the proposed congressional legal adviser's jurisdiction would be wider, encompassing the issues of constitutional and foreign relations law that are currently scattered across the judiciary, armed services, intelligence, and government operations committees. In this respect, her role would be similar to, but broader than, that currently played by the House and Senate Legal Counsel (whose offices could be merged or affiliated with this new entity).

342. These reports would be analogous to the independent assessments that the Congressional Budget Office currently provides to the foreign affairs committees regarding the likely cost of proposed administration programs. See T. FRANCK & E. WEISBAND, *supra* note 31, at 245. In 1986, Congress took a similar step when it created an independent five-person commission to monitor and report on Central American negotiations and the contras' internal reform efforts and to prepare and submit reports similar to those required of the President. See Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, § 213, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1783, 1783-305 to-306; see also Meyer, *supra* note 50, at 88.

343. Henkin, *supra* note 230, at 19; accord Frye, *supra* note 308, at 10 ("The exclusion of Congress from access to classified products of . . . the National Security Council system is a virtual guarantee of inadequately informed legislative participation in foreign policy decisions."). For discussion of the two branches' relative proclivity to leaks, see *supra* note 328.

States government information remains largely controlled by the Executive, not Congress.³⁴⁴ To overcome this information gap, Congress should either promise the Executive that its core consultative group will maintain the confidentiality of highly classified information, as it has done with respect to its two select intelligence committees, or it can take a more active role in governing the declassification of information by enacting a more comprehensive classification statute than currently exists.³⁴⁵

Congressional movement toward each of these basic institutional reforms would go a long way toward curing the four specific causes of congressional acquiescence identified above: legislative myopia, bad drafting, ineffective tools, and political will. Creation of the core consultative group would partly redress the problem of legislative myopia. Because the group would be drawn from the congressional leadership, its members would view themselves, like the President, as representing a broad national constituency as well as all other members of Congress, and would thus presumably be less susceptible to particularistic interest group influence.³⁴⁶ Over time, the group and its staff would develop an overview of the foreign policy terrain comparable to the President's own, without forsaking the expertise of the existing specialized committees and committee staffs.³⁴⁷ As the group gained greater understanding of the interrelationship among the various arenas of national security policy, it would be less likely to urge the introduction of fragmented legislation to solve different

344. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982), currently sets classification standards for the entire government. Congress has enacted only a few statutes regarding classified documents, including the Espionage Act, 18 U.S.C. §§ 793-794 (1982); the Atomic Energy Act, 42 U.S.C. §§ 2161-2163, 2165, 2274 (1982); and the Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (1982), which governs the disclosure of classified information in federal criminal prosecutions. The last of these statutes has been prominently featured in the ongoing prosecution of Oliver North, John Poindexter, Richard Secord, and Albert Hakim. See N.Y. Times, Apr. 7, 1988, at A17, col. 1.

345. The Espionage Act, for example, specifies that "[n]othing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House . . . or joint committee thereof." 18 U.S.C. § 798(c) (1982). This provision could be modified and incorporated into a broader declassification statute to ensure congressional access to various forms of national security information that would otherwise remain solely in the Executive's hands. Nor would the doctrine of executive privilege pose as serious an obstacle as one might expect. Although the Supreme Court declared in *United States v. Nixon*, 418 U.S. 683, 706 (1974), that utmost judicial deference must be paid to a claim of privilege based on a need to protect military, diplomatic, or sensitive national security secrets, "[e]xecutive privilege has not often been formally asserted in foreign affairs matters." Henkin, *supra* note 230, at 14 n.32. During the Iran-Contra committees' investigation, the President did not claim executive privilege, IRAN-CONTRA REPORT, *supra* note 2, at 689, and the privilege was extensively waived during the Senate Armed Services Committee's recent study of the reinterpretation of the ABM Treaty. See Koh, *supra* note 306.

346. See Fitts, *supra* note 336, at 1603-07 (because centralized institutions tend to represent broad constituencies and experience fewer collective action problems, they are more likely to promote public-regarding action).

347. Indeed, the core legislative group might come to gain greater perspective and expertise than its executive branch counterparts, given the relative longevity in office of members of Congress. Compare L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 59 (1979) ("Once elected, today's members . . . tend to develop congressional careers that often span twenty, thirty, forty years.") with Frye, *supra* note 308, at 3-4 (Cabinet officers currently average only two years' consecutive service and Assistant Secretaries serve an average of only eighteen months).

facets of a common problem. For example, as originally enacted, the War Powers Resolution took no account of either covert warfare or short-term military strikes.³⁴⁸ The core consultative group could choose to address covert warmaking by treating it as a warmaking, rather than as merely an intelligence issue, and establish a joint "covert action" subcommittee of the Armed Services and the Intelligence Committees in each House to take jurisdiction over covert initiatives. The deeper familiarity of the core group with the subtleties of past cases would also allow it to craft more effective legislation, without resorting to largely symbolic legislative gimmicks. Thus, for example, the core group could address the currently unregulated problem of short-term military strikes by attempting to revise the original Senate version of the War Powers Resolution, which enumerated circumstances under which Congress would approve in advance the introduction of United States Armed Forces into actual or imminent hostilities without a declaration of war.³⁴⁹

A skilled central legal staff sensitive to the need for more carefully worded statutes would help to address Congress' second institutional problem: bad drafting.³⁵⁰ For example, that staff could amend the War Powers Resolution to include more detailed definitions of the terms "armed forces" and "hostilities." Moreover, the drafters could use the newly created core consultative group to give greater operative content to the notion that the President must genuinely "consult" with "Congress" before committing troops abroad, rather than merely brief a few selected members at the last minute.³⁵¹ Once the staff had developed a standard definition of these terms, variations upon them could be inserted into both the modified IEEPA and the modified Arms Export Control Act, depending upon the core group's assessment of the relative need for executive flexibility under each of these titles.

Even without these institutional reforms, better drafting would result almost inevitably from a congressional effort to integrate the variegated national security statutes into a single omnibus law. Congress could, for example, decide whether to subject nonuniformed operatives carrying out covert warmaking operations, who are not currently regulated as "armed forces" under the War Powers Resolution, to the terms either of that Res-

348. See *supra* notes 13-14 and accompanying text.

349. See S. 440, 93rd Cong., 1st Sess. (1973), reprinted in T. FRANCK & M. GLENNON, *supra* note 237, at 590; S. 2956, 92d Cong., 1st Sess., 117 CONG. REC. 44,794-95 (1971) (similar bill proposed by Sen. Javits). As Charles Black once pointed out, it is a peculiar War Powers Act indeed that defines how many months United States troops may stay abroad, but "utterly refus[es] even to begin the task of defining the conditions under which the president should not commit troops for even ten minutes—the really crucial matter." Black, *supra* note 165, at 18. The Lebanon case illustrates the truth of this insight. See *supra* note 15.

350. See generally W. ESKRIDGE & P. FRICKEY, *supra* note 251, at 829-43 (presenting nine drafting commandments).

351. See *supra* note 200. For example, Congress could require discussions between the President or his advisers and the core group before any troops are irrevocably committed abroad.

olution or of the covert operations laws. It could attempt to word its new statutory delegations more precisely and narrowly. For example, to avoid judicial manipulation of the type that occurred in *Dames & Moore*, the new legislation could declare Congress' intent to preempt presidential claims of inherent constitutional authority.³⁵² To ensure that Congress clearly withholds statutory authority from executive activities it does not wish to authorize, the law could emulate the current War Powers Resolution and declare that a court may not read silences or limited delegations in the statute as congressional endorsement of related presidential initiatives.³⁵³ Finally, Congress could specifically require judicial application of the *Kent v. Dulles* "clear statement" principle when executive action taken pursuant to the statute infringes upon individual rights.³⁵⁴

Enhanced congressional access to better information would partially solve Congress' third problem of ineffective tools. "Congress must have the sense of our foreign policy . . . in important detail, be aware of attitudes as they are being formed and commitments as they are being made, and be able to inject influence earlier in matters on which it has constitutional responsibilities, especially those on which it will have to take formal action."³⁵⁵ To ensure that Congress will have sufficient information to express its views *before* executive action becomes a *fait accompli*, the new legislation should insist that prior notice of proposed covert actions and uses of force be given in *every* case, rather than "in every possible instance," to afford key Members a meaningful opportunity to argue with the President before he purposefully and irreversibly commits the United States to a covert or forceful course of action.³⁵⁶

Congress can also redress the current ineffectiveness of its tools in three other ways: by developing a constitutional substitute for the legislative veto, by making more effective use of its appropriations power, and by experimenting with limited application of criminal penalties for executive violations of its national security statute. Under the legislative veto regime, Congress delegated statutory authority to the President, while retaining a right of subsequent review in particular cases. Despite its constitutional infirmities, the legislative veto effected a crucial political compromise: while the President gained current legislative authorization for his acts, his need to return to Congress for subsequent approval gave Congress

352. See *supra* note 253 and accompanying text.

353. See *supra* note 34 (citing § 8 of the War Powers Resolution, 50 U.S.C. § 1547 (1982)).

354. Cf. *supra* notes 244-45 and accompanying text (discussing "clear statement" principle).

355. Henkin, *supra* note 230, at 19.

356. See *supra* notes 199-200, 351. In extreme situations, the number of Members consulted could even be reduced to a subgroup of the core group. Nevertheless, the President should always be required to notify at least a "Gang of Four," on the assumption that any action that cannot secure at least their minimal backing should not proceed, because it could not garner sufficient legislative support to be sustained. The four could either comprise the minority and majority leaders in each house (including the Speaker) or the chair and ranking Member of the House and Senate intelligence committees, who have perhaps even greater expertise in deciphering cryptic executive notifications.

some assurance that consultation would continue while his action proceeded. As a policy tool, the legislative veto had numerous disadvantages, most prominently, the freedom it gave Members to avoid visible responsibility for their actions.³⁵⁷ One alternative that lacks this disadvantage, while largely preserving the veto's beneficial political compromise, is the so-called "fast-track" approval procedure, which has recently been employed, inter alia, to ensure ongoing congressional input into the negotiation of international trade agreements.³⁵⁸ If triggered by objectively determinable circumstances, rather than by specific presidential acts, fast-track procedures could be used to privilege certain joint resolutions introduced by any interested Member, thereby compelling Congress to vote up or down quickly on resolutions challenging executive acts.³⁵⁹

The fast-track approval method also has the advantage of versatility, inasmuch as it can be combined with "committee gatekeeping," "point-of-order," and appropriations procedures to vary the intensity of its regulation. Under a committee gatekeeping procedure, a majority vote of a single congressional committee may "derail" a presidential proposal from the

357. See generally Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 794 (1984) (legislative veto resolutions were rarely subject to roll-call vote); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1309 (1977) (recounting inefficiencies and constitutional defects of the legislative veto).

358. "Fast-track approval" is an expedited legislative procedure, found most prominently in the Trade Act of 1974, 19 U.S.C. §§ 2191-93 (1982), whereby Congress authorizes the President to initiate a foreign affairs action (for example, negotiation of a trade agreement), in exchange for a commitment that he will submit the product of that action back to Congress for final approval. Under modified House and Senate rules, Congress "promises" the President that it will require automatic discharge of the completed initiative from committee within a certain number of days, bar floor amendment of the submitted proposal, and limit floor debate, thereby ensuring that the package will be voted up or down within a fixed time period. See Koh, *supra* note 33, at 1211-21 (describing how this technique has been used in trade area). The fast-track procedure does not constitute a legislative veto, because it requires bicameral action and presentation to the President, albeit on an expedited basis. Cf. *supra* note 213 (describing *Chadha's* rule).

As a congressional control device, the fast-track procedure has two disadvantages that the legislative veto lacked. First, in cases where the President's action will take effect unless Congress expresses fast-track *disapproval*, both houses must disapprove that act by supermajorities in order to override a presidential veto. Second, because fast-track procedures are simply statutory modifications in internal house rules, they are theoretically subject to change at any time by each house. See U.S. CONST. art. I, § 5, cl. 2; Koh, *supra* note 33, at 1217 n.79; Meyer, *supra* note 50, at 98-99. The procedure's central advantage, however, is that it allows Congress to overcome both the political inertia and the procedural obstacles that most frequently prevent a controversial measure from coming to a vote at all. Furthermore, because one-fifth of the Members present in each house retain the power to require a roll-call vote on any matter, U.S. CONST. art. I, § 5, cl. 3, an individual Member's vote on any particular fast-track approval resolution would almost invariably be made visible to the public. See Breyer, *supra* note 357, at 794. These considerations have contributed to the fast-track procedure's inclusion in several other foreign affairs statutes, including the foreign assistance and war powers legislation. See Meyer, *supra* note 50, at 78-79 & n.38, 86-88.

359. The War Powers Resolution provides fast-track procedures for considering certain joint resolutions introduced after a presidential "hostilities" report is submitted or "required to be submitted" to Congress. See 50 U.S.C. §§ 1544(b), 1545 (1982) (expedited procedures for joint resolutions); *supra* note 201 (describing "hostilities" report). Reasoning that a presidential report was "required to be submitted" after U.S. forces had destroyed an Iranian oil platform, Senator Brock Adams recently attempted to invoke this procedure to force a vote on the President's compliance with the War Powers Resolution in the Persian Gulf. See Adler, *Senator Adams' Gambit Paves the Way for Vote on Tanker-Escort in the Persian Gulf*, FIRST PRINCIPLES, Feb.-Mar. 1988, at 4.

fast track—and in many cases, effectively kill it—thereby giving the Executive strong incentives to consult with the committee's members at each step of the process.³⁶⁰ Point-of-order procedures, by contrast, exploit the loophole in *Chadha* specifying that each House of Congress, acting alone, retains the power to determine its own rules and procedures.³⁶¹ When a House or Senate rule triggers a point of order in a certain circumstance, any Member can raise that point of order and halt consideration of the bill until the presiding officer considers and rejects the point of order.³⁶² Thus, such rules could be used to block temporarily appropriations bills that would fund a program that the President has implemented without satisfying a prior statutory requirement, such as notice or prior consultation.³⁶³

The proposed charter should also make more effective use of the appropriations process to police executive compliance with statutory terms. While Members ought not use the appropriations process indiscriminately to accomplish what they cannot agree upon by legislation, Congress as a whole could properly use appropriations cutoffs to enforce other substantive provisions of the charter, for example, by tying continuation of appropriations to the President's compliance with the charter's terms.³⁶⁴ Congress could either seek to make these appropriations cutoffs self-executing, by tying them to objectively determinable facts, or judicially enforceable, through judicial review provisions.³⁶⁵ Moreover, Congress could also demand executive accountability at another point in the appropriations process, namely, when it is *authorizing* those programs which are to receive appropriations.³⁶⁶ As Professor Casper has suggested, Congress could adopt a long-term authorization review process, in which a joint subcom-

360. The fast-track provision of the Trade and Tariff Act of 1984, 19 U.S.C. § 2112(b)(4)(A) (1982), represents the most prominent and effective recent use of such a gatekeeping procedure. For a recounting of the influence that this procedure afforded the House Ways and Means and Senate Finance Committees over the United States-Canada Free Trade Agreement, see Koh, *supra* note 33, at 1211-21; Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 208-18 (1987).

361. See *Chadha*, 462 U.S. at 955 n.20; U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

362. PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES, ch. 31, § 1, at 697 (looseleaf ed. 1982).

363. See Franck & Bob, *supra* note 33, at 942-43 (suggesting that each chamber could adopt rules triggering point of order against such a bill).

364. For example, Congress could amend the War Powers Resolution to declare that "no funds made available under any law may be obligated or expended for any presidential use of force not authorized by Congress" under the terms of the amended War Powers title. Cf. Vance, *supra* note 15, at 93-94; S.J. Res. 323, 100th Cong., 2d Sess., 134 CONG. REC. S6239 (daily ed. May 19, 1988) (text on file with author); *supra* note 338 (proposing similar amendment).

365. See, e.g., Clifford Statement, *supra* note 115, at 9 (urging Senate to amend S. 1721, *supra* note 74, to add provision automatically terminating and prohibiting expenditure of funds for any covert activity with respect to which President failed to follow oversight process, e.g., by failing to notify committees or to sign finding as required by statute); Stith, *supra* note 127, at 1387 n.213 (collecting cases in which courts have determined whether Executive has exceeded specified appropriations limitations).

366. See Stith, *supra* note 127, at 1370 n.135 (defining authorization).

mittee of the foreign affairs and defense committees would evaluate and review existing national security programs as a way of conducting regular comprehensive congressional reviews of foreign policy.³⁶⁷

Finally, Congress could choose to supplement its appropriations measures with criminal penalties. One of the original drafters of the 1947 National Security Act has recently proposed that criminal penalties be imposed upon any government officer or employee who knowingly and willfully violates or conspires to violate an express statutory prohibition against the expenditure of funds for a particular foreign policy purpose.³⁶⁸ At the same time, Congress could reenact the Neutrality Act to provide criminal penalties for private adventurism conducted at the Executive's behest.³⁶⁹ Enforcement of all of these criminal provisions could be confided in an independent counsel,³⁷⁰ in an independent branch of the Justice Department analogous to the Office of Special Investigations, or in departmental Inspectors General.³⁷¹

If enacted, this package of provisions would greatly alleviate Congress' fourth and most intractable problem, namely, the problem of political will. For each of these proposals is designed to be enforced by a considerably lesser showing of congressional will than the two-thirds majority in both houses that is currently required to enforce existing laws. Many of these proposals, including the creation of the core consultative group, the congressional legal staff, and the long-range authorization process, could be implemented by concurrent resolution if necessary. The core consultative group and gatekeeping committees could express their will to the

367. See Casper, *Remarks*, in Appendices to MURPHY COMMISSION REPORT, *supra* note 223, at 24-25. An analogous process has transpired with regard to foreign aid. See *Hearings on the Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 43 (1967) (statement of Sen. J. William Fulbright) ("foreign aid provides the closest thing we have to an annual occasion for a general review of American foreign policy.").

368. See Clifford Statement, *supra* note 115, at 9. Such a penalty does not seem overly harsh, given that once Congress has determined to deny appropriations to a particular activity, "the specific activity is no longer within the realm of authorized government actions." Stith, *supra* note 127, at 1361.

369. See Neutrality Act, 18 U.S.C. §§ 959, 960-961 (1982) (criminalizing organization or initiation of hostile expeditions on U.S. territory against a foreign country with which U.S. is "at peace"). Six individuals, including a former U.S. military officer, have recently been indicted under the Act on charges of recruiting, training, and arming mercenaries to fight in Nicaragua. See N.Y. Times, Aug. 23, 1988, at A10, col. 1. See generally Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983); Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982).

370. See, e.g., Official Accountability Act of 1987, H.R. 3665, 100th Cong., 1st Sess., 133 CONG. REC. H10,723 (daily ed. Nov. 20, 1987) (introduced by Rep. Conyers) (bill authorizing independent counsel to indict and convict U.S. government officials who "order or engage in the planning of, preparation for, initiation or conduct of intelligence activity which violates any statute or Executive Order in force or international agreements to which the United States is a party").

371. Cf. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983), *vacated on other grounds*, 797 F.2d 817 (9th Cir. 1986) (holding Neutrality Act applicable to actions of government officials and enforceable by independent counsel). The Iran-Contra committees also recommended that an independent CIA Inspector General be created to conduct internal intelligence agency investigations. See IRAN-CONTRA REPORT, *supra* note 2, at 425.

President even without formal votes. The fast-track and point-of-order procedures could be adopted by modification of chamber rules, and subsequently triggered automatically or by the action of a single interested Member. The appropriations provisions could be made either self-enforcing or enforceable civilly and criminally by the courts. Thus, even if Congress cannot create political will where none exists, it can modify existing institutions and procedures to give quicker and fuller expression to viewpoints that remain dispersed under Congress' current institutional structure.

C. *Reinvolving the Courts*

Congress cannot legislate judicial courage, any more than it can legislate executive self-restraint or congressional will power. Congress can, however, seek to stem the Supreme Court's migration away from the *Youngstown* vision and toward *Curtiss-Wright* by embedding into legislation the judicial role originally anticipated by Justice Jackson.³⁷² With respect to the courts, Congress' strategy should be to enact legislation that would *override the abstention doctrines* that the courts have wrapped around themselves. To authorize challenges to executive conduct, Congress could insert "private attorney general"³⁷³ or "congressional standing" provisions of the type that it placed in the Gramm-Rudman-Hollings budget-balancing bill.³⁷⁴ Congress could create a statutory cause of action to challenge violations of the statute,³⁷⁵ accompanied by a sense-of-Congress resolution that violations of the national security charter do not con-

372. See *supra* notes 140-43 and accompanying text.

373. See Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorney Generals*, 88 COLUM. L. REV. 247, 295-327 (1988) (describing utility of such provisions in deterring constitutional violations by government officials).

374. Congressman Synar invoked such a clause to bring his successful challenge to that legislation. See *Synar v. United States*, 626 F. Supp. 1374, 1378, 1381 (D.D.C. 1986) (per curiam) (citing Pub. L. No. 99-177, § 274, 99 Stat. 1037, 1098). But see *Bowsher v. Synar*, 478 U.S. 714 (1986) (avoiding congressional standing issue by relying upon standing of co-plaintiff). Cf. S.J. Res. 323, § 4, 100th Cong., 2d Sess., 134 CONG. REC. S6239 (daily ed. May 19, 1988) (text on file with author) ("Any Member of Congress may bring an action in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief on the ground that the President or the United States Armed Forces have not complied with any provision" of the amended War Powers Resolution.). Although such a statutory provision could not confer standing for purposes of article III of the Constitution, the Supreme Court could explicitly adopt the District of Columbia Circuit's view finding congressional standing at least in those cases in which a Member alleges that the challenged action nullified a past or future vote. See, e.g., *Barnes v. Kline*, 759 F.2d 21, 25-30 (D.C. Cir. 1985), vacated as moot sub nom. *Burke v. Barnes*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). To limit a dramatic influx of litigation, Congress could impose a statutory requirement that such suits should not be brought until an individual Member had exhausted his or her legislative remedies.

375. Alternatively, Congress could modify the relevant provisions of the Administrative Procedure Act (APA) to afford private plaintiffs a cause of action under that statute. See 5 U.S.C. § 553(a)(1) (1982) (foreign affairs exception); *id.* § 702 (right of review); *id.* § 706 (scope of review). Cf. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207, 209 (D.C. Cir. 1985) (Scalia, J.) (finding discretionary nonmonetary relief under the APA "arguably available" against federal officials for unlawful foreign affairs actions).

stitute nonjusticiable political questions.³⁷⁶ Additionally, it could reconsider the various immunities against money damages afforded to official defendants under extant law³⁷⁷ and seek to direct the manner in which a federal court might award equitable relief against wayward executive officials.³⁷⁸

If Congress sought more extensive judicialization of the national security area, it could lay venue for all claims of statutory violation in a particular court, for example, the District of Columbia Circuit.³⁷⁹ By laying statutory venue in one circuit court of appeals, as it has frequently done in administrative law statutes, Congress could create a counter-arena of centralized foreign affairs expertise within the judiciary analogous to that which I have encouraged it to create within itself. By inculcating expertise in a group of judges in the nation's capital who are comfortable handling foreign affairs cases, Congress could reduce judicial deference and promote constitutional line-drawing by institutions other than the President.

Yogi Berra has been accused of another famous saying: "We could eliminate all those close plays at first base if only we moved the bag one foot further from home plate."³⁸⁰ In the same way, one could argue that it would be pointless to enact new national security legislation so long as the courts fail to adjudicate violations of those statutes that already exist. But

376. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987) (judiciary is final authority on issues of statutory construction); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("Under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); see also Henkin, *supra* note 291 (political question doctrine serves only to mask de facto affirmances on merits); Redish, *Judicial Review and the "Political Question"*, 75 Nw. U.L. Rev. 1031 (1985) (arguing that political question doctrine should play no role whatsoever in exercise of judicial review power).

377. Congress might also, as Justice Scalia has recently urged, amend or overrule the *Feres* doctrine, a judicially created exception to the immunity waivers in the Federal Tort Claims Act, which effectively immunizes the U.S. government from suits by servicemen. See *United States v. Johnson*, 107 S. Ct. 2063, 2071 (1987) (Scalia, J., dissenting). In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court granted the President absolute immunity from civil damages for actions taken within the outer perimeter of his official duties, but left ambiguous whether Congress could expressly override that immunity by statute. See *id.* at 748-49; accord *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.31 (1982). Thus, Congress could also state exceptions to the doctrine of official immunities for particularly egregious constitutional violations. See generally P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983); K. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions* (Aug. 1988) (unpublished manuscript on file with author) (arguing that confused *Harlow* standards require clarification).

378. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded for reconsideration in light of subsequent legislation*, 471 U.S. 1113 (1985) (refusing to invoke equitable discretion to dismiss injunctive suit against American government officials which claimed that they acted in excess of their statutory or constitutional powers).

379. Cf. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1391(f)(4) (1982) (laying venue in the D.C. Circuit for suits against foreign sovereigns). An alternative form of judicialization would establish a secret court along the lines of the one created by the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (1982) (FISA), to which Congress could require the executive branch to submit its justifications for not informing Congress of a particular covert action. Cf. Saltzburg, *National Security and Privacy: Of Governments and Individuals Under the Constitution and the Foreign Intelligence Surveillance Act*, 28 VA. J. INT'L L. 129 (1987) (describing how FISA judicial process has operated).

380. I am grateful to Professor Burt Neuborne for this Berraism.

the point would not be simply to move the base, but rather, to reinvolve the first baseman and the umpire in the game. The legislative goal here should be not simply to pass new laws, but more fundamentally, to restore the constitutional roles of both Congress and the courts as active national security players. One need not advocate widescale judicialization of the foreign affairs field to accept that the courts have currently excluded themselves too thoroughly from the national security area, thereby removing themselves as a meaningful check on executive action. The courts have too readily read *Curtiss-Wright* as standing for the proposition that the Executive deserves an extra, and often dispositive, measure of deference in foreign affairs above and beyond that necessary to preserve the smooth functioning of the national government. Even apart from the judicial review provisions proposed above, legislative clarification of the substantive rules of foreign affairs law would encourage courts to speak more frequently to the merits of foreign affairs claims.³⁸¹ Those rules would serve as lines against which both congressional and executive actors could evaluate the legality of proposed presidential conduct. Even if litigation were to ensue over the constitutionality of particular provisions, judicial resolution of those disputes would help to clarify currently ambiguous boundaries of constitutional responsibility.

As the late Bob Cover recognized, judging is a quintessential act of violence, with violence flowing as much from a refusal to judge as from the act of judging itself.³⁸² The role of judges is to define the rule of law by drawing the line between exercises of power and authority. In my judgment, the federal judiciary failed in that task during the Vietnam War.³⁸³ Even without new legislation, judges retain a duty in the post-

381. I have elsewhere called for courts to promote the development of "transnational public law litigation," even if Congress fails actively to support that trend. See Koh, *supra* note 285, at 193-202. That phenomenon is also the subject of a forthcoming article described in *id.* at 200 n.104.

382. See Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence*]. The social consequences of judicial complicity in executive acts formed a recurrent focus of Cover's work. See R. COVER, JUSTICE ACCUSED 226-38 (1975); Cover, *Violence, supra*, at 1622 n.48 (A judge "may or may not be able to bring a good prison into being, but she can refrain from sentencing anyone to a constitutionally inadequate one."); Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 57 (1983) ("The jurisdictional principles of deference are problematic precisely because, as currently articulated by the Supreme Court, they align the interpretive acts of judges with the acts and interests of those who control the means of violence."); Cover, Book Review, 68 COLUM L. REV. 1003, 1008 n.31 (1968) ("[T]he judiciary as enforcers of [the selective service] law cannot help but be accomplices in that which the Executive perpetrates."). Although Cover's outrage at what he viewed as "judicial complicity in the crimes of Vietnam" sparked his research about slavery and the judicial process, see R. COVER, *supra*, at xi, he did not live long enough to conduct a systematic assessment of the role of judges in evaluating executive conduct in foreign affairs. But see Cover, *Violence, supra*, at 1619-21 (describing judicial role in restraining executive action abroad in *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979)).

383. Cf. Cover, Book Review, *supra* note 382, at 1005-08 (1968) (reviewing R. HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)).

Vietnam era to ensure that in the field of foreign affairs, legal authority does not become permanently decoupled from legal constraint.³⁸⁴

D. *Legislative Prospects*

I harbor no illusions that any legislation as ambitious as that described here will be enacted. But I do believe that a congressional attempt to consider omnibus legislation along these lines will at least focus national attention on the right questions. In the same way as the Gramm-Rudman-Hollings Budget Act and the War Powers Resolution constituted first cuts at constitutional line-drawing in their respective fields, so too would new omnibus national security legislation redefine and unify the terrain of national security law.

The overriding purposes of any charter legislation should not be to encourage congressional micromanagement or improvident judicial activism in foreign policy matters, but rather, to reduce the isolation that currently surrounds executive branch activities, to enhance internal executive branch deliberations before the Executive acts, and to increase congressional-executive dialogue while broad foreign policy objectives are being set and particular initiatives are being implemented. More important than any of the individual proposals set forth above should be Congress' recognition that *executive practice* has gained undue predominance as a source of customary constitutional law in the foreign affairs area. Given this primacy of executive practice, it hardly surprises that in the post-*Youngstown* years, the constitutional balance that Justice Jackson sought to preserve has shifted decidedly toward executive power. Enactment of national security framework *legislation* that would also promote occasional *judicial decisionmaking* in the foreign affairs realm would supply two countervailing sources of quasi-constitutional custom in this area, which would serve as much-needed counterweights to unchallenged executive practice. Even rudimentary legislation in this area would replace the barnacled National Security Act of 1947 with a more recent, considered statement—made jointly by Congress and the President and construed by the courts—of how national security policy should be made.

The central problem of such a proposal, of course, is that it would test the political will of Congress as a whole to rethink the national security problem. If President Reagan's successor should veto this post-Iran-Contra statute, as President Nixon vetoed the War Powers Resolution, recent history suggests that the current Congress would be less inclined than past

384. Cf. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1543-44 (D.C. Cir. 1984) (en banc) (Wilkey, J.) (responding to Judge Scalia's suggestion that no "special charter" authorizes judges to keep Executive in line in foreign affairs: "[T]he Judiciary does operate under a '*special* charter' to help preserve the fundamental rights of this nation's citizens. That charter is commonly known as the United States Constitution.").

Congresses to acquiesce.³⁸⁵ Yet a presidential veto need not be inevitable. To make its restrictive charter provisions more palatable to the President, Congress could couple them with others that expressly *authorize* the President to engage in certain forms of activities for which he currently lacks express statutory authorization.³⁸⁶ For example, the legislation could include provisions expressly authorizing the President to commit troops overseas for the short-term purpose of rescuing American citizens endangered abroad or invoking the taking of American hostages as a factual trigger for the President's exercise of extraordinary emergency powers. Not only would these provisions eliminate existing ambiguities regarding the scope of the President's statutory authorities, they would render Congress' legislative package more attractive to the President by unambiguously elevating his newly authorized activities into Jackson Category One.

A bipartisan congressional-executive effort to enact new charter legislation would help to restore the balance between executive flexibility and congressional oversight in national security matters.³⁸⁷ To those who say that it would be politically impossible to draft and enact such wide-ranging legislation, let me note that there is no shortage of current legislative proposals, only of the congressional will to act upon them.³⁸⁸ All Mem-

385. Only nine of President Reagan's 65 vetoes have been overridden. As of this writing, however, Congress has overridden three of the six vetoes issued during the 100th Congress, after the Republicans lost the Senate. N.Y. Times, Mar. 23, 1988, at D26, cols. 5-6. See the overrides of the presidential vetoes of the Water Act of 1987, 133 CONG. REC. H515 (daily ed. Feb. 3, 1987) (House override), 133 CONG. REC. S1691 (daily ed. Feb. 4, 1987) (Senate override); the Federal-Aid Highway Act of 1987, 133 CONG. REC. H1635 (daily ed. Mar. 31, 1987) (House override); 133 CONG. REC. S4408 (daily ed. Apr. 2, 1987) (Senate override); and the Civil Rights Restoration Act of 1988, 134 CONG. REC. H1037 (daily ed. Mar. 22, 1988) (House override), 134 CONG. REC. S2730 (daily ed. Mar. 22, 1988) (Senate override). Despite its failure to override a fourth veto—of the omnibus trade bill—Congress later ultimately secured nearly identical trade legislation. See *supra* note 304.

386. For example, the National Security Agency supported the 1980 Intelligence Oversight Act in part because that statute was the first congressional enactment to recognize and endorse that agency's existence. See Remarks of Daniel Silver, former General Counsel to the National Security Agency, American Society of International Law Annual Meeting, Washington, D.C. (Apr. 20, 1988) (on file with author). President Reagan eventually signed the 1988 omnibus trade bill, which contained numerous provisions restricting his discretion, primarily to secure the congressional authorization to engage in future multilateral trade talks. See *supra* note 304; N.Y. Times, Aug. 26, 1988, at D2, col. 1.

387. The swift ratification of the Intermediate-Range Nuclear Forces Treaty, even after the Iran-Contra Affair, is only one recent indicator that bipartisan agreement remains possible so long as there is full consultation and significant consensus about substantive foreign policy ends. Significantly, nine of the Senators on the Senate Iran-Contra committee, including three Republicans, endorsed all of the Iran-Contra committees' legislative recommendations.

388. At this writing, Senator Cohen's bill to amend the Intelligence Oversight Act has passed the Senate with sufficient votes to override a presidential veto, and Congressman Stokes' companion bill has been reported out of the House Intelligence and Foreign Affairs Committees. See *supra* note 77. Subcommittee hearings have been held on the promising bill to amend the War Powers Resolution recently offered by Senators Byrd, Nunn, Warner, and Mitchell. See *supra* note 338. The proposal of Senator Biden and Congressman Levine to amend the Arms Export Control Act remains viable. See *supra* note 49. Although the intelligence committees have not endorsed Senator Specter's bills to reform the intelligence community, see *supra* note 316, they have modified the fiscal 1989 intelligence authorization bill to require that the CIA's Director report to Congress more regularly about the activities of the CIA Inspector General. See 46 CONG. Q. 2344, 2345 (1988). After subcommittee hearings, Congressman Conyers' bill to impose criminal penalties against executive adventurism is still pending before the House Judiciary Committee. See *supra* note 370.

bers of Congress must accept the commonsense proposition that these various proposals should be integrated because they address different facets of the same problem: the need to restore the constitutional and institutional balance in foreign affairs.

Equally important, both branches should recognize that each of these reforms would ultimately serve not only Congress' long-term interest, but also the Executive's. The creation of a core consultative group would eliminate the President's chronic complaint that in emergencies, the consultation requirements impose an intolerable burden upon the President to find Members with whom to consult.³⁸⁹ If Congress were to mandate regular confidential meetings between its core consultative group and the President or his principal cabinet officers at the start of the new Administration, the likelihood would increase that a practice of true consultative decisionmaking between the branches would evolve.³⁹⁰ Ideally, regular interactions among the congressional legal staff and its executive counterparts would help to foster common constitutional understandings between the branches regarding matters that would rarely be resolved in court. And finally, as the experience of the intelligence committees has revealed, regular sharing of confidential information has tended to advance the development of congressional-executive partnership.³⁹¹ In short, the proposed reform package ultimately promotes the long-term cooperation and balance in foreign affairs decisionmaking that *Youngstown's* vision of the National Security Constitution seeks to foster.

A bipartisan effort to enact the charter I have proposed could take place any time during the early years of the next Administration. Both political parties have good reason to embrace national security reform as a foreign policy priority. A Republican President eager to engage in such an exercise could use the concept of a national security charter as a way of putting the Iran-Contra Affair behind him.³⁹² A Democratic President could use it as a means of declaring his seriousness about foreign policy reform.³⁹³ Moreover, if the presidential candidates were to engage in the

389. See, e.g., G. FORD, *A TIME TO HEAL* 252 (1979) (President could not consult with key congressional leaders about 1975 Da Nang evacuation, because 10 were abroad and 12 were scattered throughout U.S.).

390. Cf. C. VANCE, *HARD CHOICES* 14 (1983) (pointing out that during Iranian hostage crisis, Secretary of State or his deputy spent up to two hours each day in meetings or briefing sessions with Members of Congress).

391. See N.Y. Times, July 7, 1986, at 1, col. 1 (describing cooperative atmosphere between intelligence committees and executive branch).

392. Vice-President Bush, the Republican nominee, has promised to establish a strict code of ethics in government and a new ethics panel in the White House "to avoid the excesses of the past." *Indictment Day*, *ECONOMIST*, Mar. 19, 1988, at 30, 31. Significantly, neither of these proposals would involve legislation.

393. Michael Dukakis, the Democratic nominee, has criticized the Reagan Administration's handling of the Iran-Contra Affair, but apparently has not proposed any structural reform of the foreign policymaking processes. See N.Y. Times, Sept. 2, 1988, at A16, col. 4; cf. N.Y. Times, Sept. 12, 1988, at A18, col. 3 (statement of Michael Dukakis) ("the way we're going to make national security policy beginning in January 1989 [is] with a President and Congress that work together").

kind of "competitive credit-claiming" for revamping the national security laws that has occurred in past campaigns, they could achieve the kind of "aspirational lawmaking" that led to the dramatic environmental reforms of the late 1960's and early 1970's.³⁹⁴

But even if impetus for national security reform does not quickly come from the electorate or the presidential candidates, the time for a new national security charter will not have passed. Many of the most lasting foreign affairs reforms of recent years became law some time after the events that sparked their enactment, rather than in the immediate aftermath of the scandal.³⁹⁵ Consequently, there seems no reason why this proposal for a national security charter should not remain ripe well into the next decade. Nor is there any good reason why impetus for enactment of that charter must come from the President, rather than from Congress itself. Making Congress aware of the threat of letting pass a rare legislative opportunity that will not return until after the "next Watergate" could serve to overcome the "politician's dilemma" that would ordinarily prevent individual legislators from pursuing such an initiative.³⁹⁶ Similar incentives have recently driven Congress to lead broadscale legislative efforts in the areas of trade, tax, regulation, environmental, and civil rights reform.³⁹⁷ The problem of national security reform is at least as important as any of these. Since Vietnam, many notable foreign affairs reforms have passed into law without significant presidential guidance or even over presidential opposition.³⁹⁸ Thus, even without strong presidential leadership, a Congress committed to bipartisan national security reform could pass a legislative charter that would redefine the allocation of national security responsibility among the branches for the next forty years.

In sum, the release of the Iran-Contra Committees' report last fall should have marked the beginning, not the end, of Congress' efforts to deal with the national security crisis exposed by the Iran-Contra Affair. As Justice Jackson suggested in his concurring opinion in *Youngstown*,

394. See Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (arguing that competitive credit-claiming between Richard Nixon and Edmund Muskie contributed to enactment of strict environmental laws); see also Elliott, *supra* note 104, at 350.

395. Recent examples include the Trade Act of 1974, the 1976 Foreign Intelligence Surveillance Act, and the 1980 Intelligence Oversight Act.

396. See Elliott, Ackerman & Millian, *supra* note 394, at 324-26 (using this concept to help explain congressionally-led environmental reform movement of late 1960's and early 1970's).

397. See, e.g., J. BIRNBAUM & A. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987) (describing enactment of Tax Reform Act of 1986); W. ESKRIDGE & P. FRICKEY, *supra* note 251, at 2-28 (Civil Rights Act of 1964); J. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 9-13 (1984) (describing deregulation movement of late 1970's); Koh, *supra* note 33, at 1200-08 (Trade Act of 1974).

398. For example, the War Powers Resolution of 1973 became law over presidential veto, while the Trade Act of 1974 was enacted without significant presidential leadership. More recently, even before the Democrats took control of the Senate, Senator Lugar, a moderate Republican, led the successful floor fight to override President Reagan's veto of the South African sanctions bill. See 132 CONG. REC. S14,629 (daily ed. Oct. 2, 1986).

"[a] crisis that challenges the President equally, or perhaps primarily, challenges Congress. . . . We may say that power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."³⁹⁹

IV. CONCLUSION

The Iran-Contra Affair has started the pendulum of foreign policymaking power swinging back to Congress for the first time since Vietnam. If Congress aspires to preserve its role in national security policymaking, the time could not be more ripe for it to seize the legislative initiative. The undertaking is formidable and the time late. But if we do not learn the lessons of the Iran-Contra Affair, we will surely be condemned to relive it.

399. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (Jackson, J., concurring).