

Book Reviews

Youngstown v. Curtiss-Wright

The National Security Constitution: Sharing Power After the Iran-Contra Affair. By Harold Hongju Koh.* *New Haven: Yale University Press*, 1990. Pp. x, 330. \$35.00 (cloth), \$14.95 (paper).

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Harold Hongju Koh has written a truly conservative book that conservatives will truly dislike. Some will dislike it because it portrays Oliver North not as a national hero, but as a subversive radical who did more to undermine the democratic processes of our government than the Communists or Sandinistas ever have. But Koh's book will also disturb conservatives who distance themselves from North. In Koh's eyes, North's transgressions were not the isolated acts of a rogue agent, but a synecdoche for the executive branch's political assault on the Constitution. North's acts were premised on the view that the executive is the "sole organ" of the foreign affairs power.¹ Koh demonstrates that this view, generally propounded by conservatives,² is in fact a radical perspective that would have

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1. The phrase comes from *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), a case North expressly relied upon in justifying his actions before the congressional Iran-Contra Committee. *Iran-Contra Investigation: 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. 38 (1987) (testimony of North).

2. See, e.g., Cheney, *Clarifying Legislative and Executive Roles in Covert Operations*, GEO. MA-

shocked the Constitution's Framers, to whom those same conservatives purport to pay great deference.

The Framers were deeply suspicious of men who, like Oliver North, would arrogate policymaking authority to themselves in the face of popular democratic opposition. While the Framers did not foresee the precise threat posed by National Security Council staff, they did locate such a threat in the executive branch. They therefore limited the executive to implementing laws and policies dictated by Congress, the most representative branch, in *both* internal and external affairs. And they assigned to Congress the most important of all national security and foreign policy authorities: the power to declare war.

When conservatives discuss the foreign affairs power, however, they tend to leave the Framers' intent behind. Instead, they sound either like liberals, urging that we look to how the Constitution has evolved through a history of executive aggrandizement, or like legal realists or critical legal studies scholars, advancing a *realpolitik* analysis that whatever the Constitution says, political necessity mandates unilateral executive action in foreign affairs.³

SON L. REV., Fall 1988, at 203; Turner, *Separation of Powers in Foreign Policy: The Theoretical Underpinnings*, GEO. MASON L. REV., Fall 1988, at 97. See generally *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*, 43 U. MIAMI L. REV. 1 (1988) (Federalist Society Symposium).

3. As Peter Weiss wrote, commenting on a symposium entitled *Legal and Policy Issues in the Iran-Contra Affair: Intelligence Oversight in a Democracy*, published in the *Houston International Law Journal*:

The general theme running through the presentations, enunciated on behalf of those charged with—or charging themselves with—carrying out covert operations, is DON'T FENCE ME IN. The theme is played alternately in a scholarly (Van Cleve), querulous (Fein), aggressive (Gray), vitriolic (Turner), conciliatory (Rindskopf) and mellowly reminiscing (Pforzheimer) mode, but the message throughout is loud and clear: These are dangerous times; "special activities" are a risky business; Congress can neither be trusted to keep secrets nor to "micromanage" foreign affairs. Ergo, while going through the motions of oversight may be a necessary concession to popular concern and congressional pride, the mechanics of oversight should be kept to a bare minimum.

Weiss, *If the News Offends You, Kill the Messenger: A Comment on the U.H. Law Center/A.B.A. Iran-Contra Symposium*, 11 HOUS. J. INT'L L. 355, 355 (1989); see also S. REP. NO. 220, 93d Cong., 1st Sess. 9 (1973) (noting that in hearings on War Powers Act, supporters cited intent of Framers while opponents cited historical evidence of unilateral presidential military action and need for rapid action in nuclear age).

Some conservatives do attempt to maintain both the appearance of fidelity to original intent and the position that the executive should exercise unilateral foreign affairs power, but this requires an extremely strained reading of the Framers. Thus, for example, then-Vice President George Bush, addressing the Federalist Society in the midst of the Iran-Contra controversy, argued that the problem in foreign affairs was too much congressional oversight, not too little, and invoked the Framers for support: "My understanding is that Hamilton and the founders fought to focus the conduct of our foreign policy in one man, the president, so that we as a nation would be able to act quickly, decisively, and where necessary, secretly to achieve his goals." Vice President George Bush's Remarks to the Federalist Society 4 (Jan. 30, 1987) (transcript on file with author). In fact, Hamilton argued of the treaty power, a crucial element of foreign policy, that it would be "imprudent to confide in [the President] solely so important a trust." THE FEDERALIST No. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961). Bush's verbal slip from "we as a nation" to "his [the President's] goals" demonstrates perfectly why the Framers sought to require prior congressional approval of virtually all important foreign affairs actions.

Koh's *The National Security Constitution: Sharing Power After the Iran-Contra Affair*,⁴ by contrast, is truly conservative, in the sense that it reaffirms a traditional notion: The foreign affairs power, like virtually all other authorities in our constitutional structure of government, is "a power shared" by all the branches. Koh maintains that this principle, so fundamental to the founding of our national government, is a prerequisite to a sound, democratic foreign policy. The Constitution's checks and balances are just as critical to forestalling abuse of power in foreign affairs as in domestic policy. The requirement that foreign policy initiatives be the product of shared power is designed to ensure that our foreign policy reflects a broad national consensus.

Since the administration of Franklin Delano Roosevelt, however, the executive has launched an effort to undermine the principle of shared power by openly asserting and covertly exercising unilateral foreign policy authority. Koh argues that the Iran-Contra affair reflects the extent to which the executive has seized unilateral power, and he suggests wide-ranging reforms to resurrect the balance of power. His is a work of restoration rather than revolution. The revolution—or, more accurately, the coup—has already taken place.

No one disputes that the executive's powers in foreign affairs have mushroomed dramatically since the founding of our country, a development matched in intensity perhaps only by the sheer volume of commentary on the subject.⁵ Koh's book stands out from this mass of scholarship, however, in its clarity, its breadth of vision, and its common sense. This compelling position paper for the restoration of a working balance should be read by all those, in government or out, who want to address the institutional problems so starkly exemplified by the Iran-Contra affair. Koh provides the comprehensive perspective too often wanting in the piecemeal reforms that usually follow a disaster like the Iran-Contra affair.

Although much of Koh's argument attacks the unaccountable, unilateral decision-making that marked the Reagan era, Koh does appear to share one trait with the former President: irrepressible optimism. Koh spends many pages describing Congress' past attempts to recover its authority in the national security context through "framework legislation," all of which turned out to be in vain. His prescription, however, is for more of the same: a new, improved, more comprehensive framework. I am far less sanguine.

I read Koh's book from the point of view of a litigator who has been involved in a series of dramatically unsuccessful challenges to unilateral

4. H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) [hereinafter by page number only].

5. "Perhaps not since the Volstead Act ushered in the Prohibition Era has a federal law been talked about more and respected less than the War Powers Resolution of 1973." San Francisco Daily Banner J., Nov. 30, 1977, at 1, col. 6.

executive foreign affairs actions during the Reagan presidency.⁶ From that perspective, I wholeheartedly concur in Koh's account of the Iran-Contra affair as only the latest manifestation of a consistent pattern of executive lawbreaking, congressional acquiescence, and judicial toleration.⁷ Major changes are necessary to stem this pattern, but many of Koh's prescriptions for change within the legislative and executive branches are either double-edged or insufficient.

In the end, Koh's most important proposal concerns legislation to invite judicial involvement in foreign affairs disputes. But Koh's proposed invitation to the courts is too broad. The judiciary's role must be carefully circumscribed if we expect it to exercise anything other than rubber-stamp review. If the judiciary is limited in the first instance to procedural oversight and asked simply to ensure that foreign policy decisions are made pursuant to democratic processes, judicial oversight might indirectly help to bring our foreign policy in line with substantive democratic principles.

I. LESSONS FROM OLLIE

Reportedly, one of the more compelling moments during Oliver North's criminal trial was his presentation to the jury of his "save the Contras" sales pitch. With a slide show and abundant misinformation, North urged the jury, in Dale Carnegie style, to dig down deep and support a Contra today so that the Sandinistas would not overrun the United States tomorrow. The jury's verdict suggests that it was somewhat more discriminating than North's wealthier audiences.

Koh argues that we, too, need to be more discriminating in the lessons we draw from Oliver North. In the Iran-Contra affair, members of the executive branch lied to Congress and the American people, negotiated with terrorists, diverted funds, and engaged in a wide range of criminal activity in order to provide support to the contras—support which Con-

6. Virtually from the outset of the Reagan Administration's forays into Central America, the Center for Constitutional Rights sought to challenge those actions in court. I was involved in all of those challenges, which included *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (suit under War Powers Act challenging President's dispatch of military advisers to El Salvador); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (challenging human rights violations by Contras and unilateral executive support thereof); *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (suit under Ethics in Government Act seeking appointment of Special Prosecutor to investigate criminal violations by President Reagan and National Security Council in supporting Contras); *Beacon Products Corp. v. Reagan*, 814 F.2d 1 (1st Cir. 1987) (challenge to constitutionality of trade embargo against Nicaragua); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (suit by U.S. citizens living in Nicaragua to require United States to honor World Court injunction against military aid to Contras). The only two challenges which were successful were *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (successful challenge to President Reagan's pocket veto of legislation requiring certification that human rights were improving in El Salvador), *vacated as moot*, 479 U.S. 361 (1987); and *Veterans Peace Convoy v. Schultz*, 722 F. Supp. 1425 (S.D. Tex. 1988) (successful challenge to U.S. Customs' attempt to halt humanitarian aid being shipped to Nicaragua).

7. In fact, it is not even the most recent example, as President Bush has provided yet another in the invasion of Panama. See Draper, *The Constitution in Danger*, N.Y. REV. BOOKS, Mar. 1, 1990, at 41, 46-47.

gress had specifically prohibited, but which President Reagan wanted to continue. When news of the affair broke, the press and Congress focused principally on whether President Reagan knew (or could remember) what was going on in his basement, where the National Security Council is housed. Koh urges a broader view of North's actions as symptomatic of the pitfalls of unilateral executive foreign affairs power. He argues persuasively that the Iran-Contra affair should have been treated not as another Watergate, in which the inquiry was appropriately directed toward the "smoking" tapes, but as another Vietnam, in which the inquiry and response were ultimately more structural in nature. The important question was not who knew what and when did they forget it, but how did we reach such a state of affairs in a purportedly constitutional democracy.

Koh criticizes the focus of each of the three governmental inquiries in the Iran-Contra affair. The first, the Tower Commission, was an executive initiative, and therefore it is hardly surprising that it failed to identify unilateral executive power as the root of the problem. The Tower Commission's purpose was damage control; it sought to reinforce rather than to challenge presidential prerogative.⁸ It characterized the Iran-Contra affair as an aberration, specifically rejected any need for legislative reform, and limited its critique to management style, a "problem" that, not coincidentally, could be dealt with by the executive branch itself.

The second inquiry, run by Independent Counsel Lawrence Walsh, was equally limited. The initial indictments, charging conspiracy to defraud the United States by conducting a covert, illegal, foreign policy, promised to put on trial the very notion of unilateral executive foreign policy actions. Ironically, however, the covert nature of the policy frustrated the attempt to subject its architects to criminal prosecution. Because proving such a covert foreign policy appeared to require the introduction in open court of secret information, the Independent Counsel was forced to drop the broad charges and to proceed with more routine charges of graft and perjury.⁹

8. P. 15.

9. The peculiar relationship between the Independent Counsel and the executive branch allowed the latter to set up a number of logistical roadblocks that to date have ensured that at best a very limited version of the truth would come out in the Iran-Contra trials. The purpose of an Independent Counsel is to investigate and prosecute criminal activity by high-level executive officials and to avoid the conflict of interest posed by the Attorney General, the nation's top law enforcement officer, investigating and prosecuting his client, the President. Ethics in Government Act, 28 U.S.C. §§ 591-598 (1982); H.R. REP. NO. 1307, 95th Cong., 2d Sess. 1 (1978). But even though the executive branch was not running the Iran-Contra prosecution, it appears to have done all it could to control and limit the prosecution's scope.

The executive argued that the statute creating the Independent Counsel was unconstitutional because prosecution was an exclusively executive prerogative. It successfully opposed attempts to have President Reagan and Vice President Bush testify in North's trial and blocked the production of Reagan's diaries in Poindexter's trial. And it appears to have abused its authority over classified information to bar the introduction of assertedly secret information at several trials. *See, e.g., Use of Secret Data Barred in Trial*, N.Y. Times, Nov. 23, 1989, at A1, col. 1; *Case Dismissed in Contra Affair, Clearing Agent*, N.Y. Times, Nov. 25, 1989, at A1, col. 1. Some of the information that the

Koh correctly suggests that a forum to determine individual criminal liability is not the ideal locus for an inquiry into the structure of government.¹⁰ From Koh's vantage point, the congressional hearing before the Iran-Contra committee presented the ideal forum.¹¹ Congress had both the institutional incentive to investigate the affair as a separation of powers problem and the ability to pass structural legislation to attempt to resolve it. But the committee got off on the wrong foot, Koh argues, by treating the affair as another Watergate.¹² The official committee report reflects the committee's misguided decision to focus on factual rather than structural issues: It devotes 690 pages to recounting the facts and only four and one-half pages to recommendations for legislative reform. Its few reforms appear in disjointed fashion, without any systematic analysis of their purpose or effect.¹³ And it undercuts even these modest proposals by stating that the need is "not for new laws but for a renewal of the commitment to constitutional government and sound processes of decision making."¹⁴

In Koh's view, President Reagan and Oliver North were no innovators; they simply followed in the footsteps of some of their more illustrious executive forebearers.¹⁵ Koh retraces the history of executive circumvention of congressional restrictions on foreign policy and demonstrates that the only Presidents who did *not* seek to circumvent Congress were those whom we now view as weak: Andrew Johnson, Ulysses S. Grant, and William Howard Taft. Until recent times, however, presidential usurpation of Congress' role was treated much like adultery; it was widely practiced but rarely admitted and never openly condoned. Before the Korean War, the executive branch rarely openly asserted an inherent foreign affairs power.¹⁶ Although Presidents frequently initiated foreign affairs ac-

Justice Department would not allow to be divulged had already been revealed during the congressional hearings and was common knowledge in the media. *Thornburgh Accused of Deliberate Delays*, N.Y. Times, Oct. 17, 1989, at A21, col. 1 (Independent Counsel Walsh accuses Attorney General Thornburgh of "repeatedly thwart[ing]" prosecution of CIA agent Joseph Fernandez "by last-minute, unannounced procedural maneuvers designed only to tie this case in a knot of endless litigation," and maintains that information Thornburgh seeks to protect "is widely known to the public"). Thus, it is not surprising that North's trial was ultimately reduced to matters such as purchasing a security fence with government money.

10. P. 29.

11. P. 16.

12. P. 20.

13. P. 21.

14. HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & 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. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 423 (1987).

15. Pp. 38-64.

16. See Firmage, *Rogue Presidents and the War Power of Congress*, GEO. MASON L. REV., Fall 1988, at 79, 82; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1253-65 (1969). Koh and Professor Jules Lobel date the beginnings of unilateral executive exercise of foreign affairs power to the turn of the century, with the United States' rise to an imperial power. Pp. 88-89; Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1398-99 (1989).

tions unilaterally, they generally sought congressional ratification soon thereafter, or argued that their actions were short of war and therefore did not require congressional approval. Moreover, throughout our nation's first century, the courts reviewed suits involving military and foreign affairs on the merits, and held executive conduct in that realm illegitimate if unauthorized by Congress.¹⁷ For much of our country's history, in other words, all three branches operated with the understanding that the foreign affairs authority was "a power shared."

That understanding was first openly challenged in 1950, when President Truman unilaterally committed 83,000 United States troops to fight the North Koreans and became the first President to assert inherent executive power to conduct a war without congressional authorization. The Supreme Court indirectly rebuffed President Truman's claims of inherent power by invalidating his seizure of a steel mill in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁸ despite his claim that the seizure was necessary to the military effort. Truman's unprecedented assertion of unilateral authority thus led to the strongest judicial statement to the contrary on record. Administrations after Truman's, however, have consistently claimed and exercised unilateral foreign affairs power, and the courts have done little to stop them.¹⁹

Presidential usurpation reached crisis proportions in the Vietnam War and Watergate, prompting Congress to fight back. Congress enacted a series of statutes designed to reassert and formalize its role in foreign affairs.²⁰ The War Powers Act,²¹ for example, was designed to get Congress back into the business of declaring (or not declaring) war, and was designed particularly to forestall the type of creeping involvement that characterized the Vietnam War. Congress sought to reclaim its emergency powers by passing the National Emergencies Act²² and the International Economic Emergency Powers Act.²³ The Case-Zablocki Act²⁴ attempted to restrict executive attempts to bypass the Senate's treaty ratification powers by obligating the President to notify the Senate of all international agreements. Other laws addressed the allocation of congressional and ex-

17. Pp. 81-83, 92.

18. 343 U.S. 579 (1952).

19.

Since World War II we have engaged in overt and covert war and acts of war, often initiated by the president without the authorization of Congress. By presidential directive we have conducted full-scale war; initiated coups; mined harbors; encouraged political assassination; aided insurrection and sabotage; trained, equipped, and set loose our own brigands and terrorists; and responded to terrorist acts against our citizens by executively approved reprisals.

Firmage, *supra* note 16, at 79.

20. Pp. 38-64, 104.

21. 50 U.S.C. §§ 1541-1548 (1982).

22. 50 U.S.C. §§ 1601-1651 (1982).

23. 50 U.S.C. §§ 1701-1706 (1982); Pp. 47-49.

24. 1 U.S.C. § 1126 (1988).

executive authority over arms sales, foreign trade, military aid, and domestic surveillance for foreign intelligence purposes.²⁵

As Koh demonstrates in the most devastating chapter of his book, however, all of these laudable attempts to rein in the Presidency were frustrated by new strategies of executive circumvention.²⁶ The War Powers Act is a good example. The heart of that Act is a sixty-day automatic termination period, triggered by a presidential report to be submitted whenever troops have been introduced into a situation of "imminent hostilities." Since the Act's passage in 1973, Presidents have committed armed forces to El Salvador, Grenada, Lebanon, the Persian Gulf, and Panama, where they have inflicted and suffered hundreds of casualties. President Reagan conducted an extended war in Nicaragua by proxy, using a "private" army trained, directed, and supported by the CIA. Not once, however, has a President filed the required report.²⁷ The courts have been unwilling to get involved,²⁸ and now virtually all agree that the War Powers Act has failed.²⁹

When viewed from the vantage point of this history of executive avoidance of congressional oversight, the Iran-Contra affair is no aberration. On the contrary, it fits all too comfortably into "the pattern of history" that Koh reveals:

In short, Congress's 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, each succeeding congressional effort to catch up with executive evasion of its legislative controls served only to shift executive activity into a new pattern of evasion.³⁰

It remains to be seen whether Congress's response to the Iran-Contra affair will replicate its response to Vietnam. On the one hand, history suggests that Congress will be sparked by the affair to address through legislation some of the problems revealed. On the other hand, the same

25. P. 46.

26. Pp. 38-64.

27. Presidents have sent "communications" and informal reports to Congress, but have consistently declined to file the particular report that triggers the termination period. See Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 *LOY. L.A.L. REV.* 715, 742-50 (1984).

28. See, e.g., *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *appeal dismissed per curiam*, No. 87-5426 (D.C. Cir. Oct. 17, 1988).

29. Koh tells a similar story about the treaty power. Under the Constitution, the President cannot enter into a treaty without Senate ratification. U.S. CONST. art. II, § 2. To avoid this inconvenience, President Franklin Delano Roosevelt dramatically expanded the practice of "executive agreements." In 1972, Congress passed the Case-Zablocki Act, which simply required the President to notify Congress of all executive agreements. Presidents have developed a number of Orwellian methods to avoid even that mild directive, however, including the "nonagreement agreement," the "voluntary export restraint," unilateral statements that the United States would comply with unratified treaties, and treaty reinterpretation. Pp. 41-43.

30. Pp. 62-63.

history predicts that such efforts will ultimately prove futile.³¹ Koh asks us to suspend disbelief in order to consider some possible reforms.

II. KOH'S MODEST PROPOSAL AND ITS LIMITATIONS

The consistency with which Presidents have managed to bypass congressional constraints in foreign affairs, Koh argues, demands that we re-examine the structural characteristics and institutional incentives of the three branches.³² What is it about these institutions that frustrates every attempt to vest Congress with foreign affairs authority and responsibility? Why does "the president almost always seem to win in foreign affairs?"³³

Political analysts have long recognized that the executive is more suited to initiate foreign policy measures and to respond quickly to international events. Koh suggests that this institutional advantage is exacerbated by the United States' declining position in contemporary global politics: "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."³⁴ Our role as an engaged participant in new multilateral regimes appears to require ongoing diplomacy particularly suited to executive action. Professor Jules Lobel has argued that since the beginning of the Cold War, our government has operated in a state of perpetual crisis, and that in crises the public most often looks to the President to lead.³⁵

Koh notes that Congress, as a broadly representative body, is ill-suited to take emergency action in foreign affairs and, like the public, it often looks to the President for leadership.³⁶ At least formally, Congress can act only through legislation, which, if it challenges presidential action, requires a two-thirds vote to survive a veto.³⁷ Congress is frequently de-

31. See, e.g., Chicago Tribune, Dec. 12, 1989, at C23 (describing legislation enacted in response to Iran-Contra affair); Washington Post, Dec. 1, 1989, at A16 (enactment of law creating position of outside inspector general to oversee CIA). But see Washington Post, Nov. 17, 1989, at A58 (intelligence committees drop key reforms proposed in wake of Iran-Contra affair that would have required presidential approval and notification to Congress of covert operations); Washington Post, Oct. 27, 1989, at A1 (Senate Select Committee on Intelligence drops demand for requirement that President notify it within 48 hours of all covert operations, in exchange for President Bush's voluntary pledge to notify it as soon as possible).

32. Pp. 117-18.

33. P. 117.

34. P. 120.

35. Lobel, *supra* note 16, at 1399-1412. The extent of the change that has occurred since 1950 is demonstrated by comparing Professor Lobel's article to Clinton Rossiter's book *Constitutional Dictatorship*, written in 1948. At that time, Mr. Rossiter reported, crisis government was extremely rare in the United States. Rossiter wrote that "[s]trong government and abnormal government alike are anathema to the traditional American philosophy of politics," and that the Constitution "has created in the American people whether ruled or ruling . . . a widespread belief that there is something essentially wrong about emergency government." C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 210-11 (1948).

36. Pp. 123-33.

37. For example, when Congress recently sought to assert itself with respect to United States-China relations after the Tiananmen Square massacre by passing a bill to protect Chinese students in

railed by special interest groups and often responds to public outcry with symbolic action rather than substantive reform.³⁸

For its part, the judiciary is generally unwilling to play a responsible foreign affairs role.³⁹ When confronted with executive circumvention of congressional and constitutional mandates in the foreign affairs context, the courts either decline to rule altogether or rule for the President. The judiciary appears to believe that in this realm, politics rather than law should govern. Whether a court declines to hear a controversy or simply rubber-stamps the President's action, the effect is the same: It leaves the political status quo unaltered.

Koh argues that if change is to succeed, foreign-affairs reforms must address these institutional roots of the problem. His guiding principle is that all three branches should share authority and responsibility for foreign affairs. Therefore, Koh maintains, the President must yield some of his or her *de facto* power, Congress should assert its constitutional responsibility, and the judiciary must insist that law play a role in this political arena.

The mechanism Koh proposes to attain this sea-change in the status quo is "framework" legislation, by which he means legislation designed to establish a procedure for implementing the constitutional balance of power.⁴⁰ Like many of the structural reform bills passed in the wake of Watergate and Vietnam, the War Powers Act is a paradigmatic example of framework legislation. It sought to redress a constitutional imbalance in the exercise of war powers by reasserting Congress' role through a procedural framework. As Koh demonstrates, however, the War Powers Act and many other framework laws have proved to be dismal failures, unable to forestall repeated presidential end-runs.

Koh argues that we need a broader framework, a comprehensive national security "charter" that would address the whole range of foreign policy issues from a "shared power" perspective—something of an Administrative Procedure Act for foreign affairs.⁴¹ Otherwise, he predicts, "interstitial efforts to amend particular foreign-affairs laws will inevitably fail, serving only to push executive conduct toward new statutory lacunae and pockets of unregulated activity."⁴²

As the Internal Revenue Code makes clear, however, comprehensive

the United States, President Bush's veto was sustained even though he had the support of only 62 of the 535 members of Congress. *N.Y. Times*, Jan. 28, 1990, § 4, at 3, col. 4.

38. However, President Bush's self-styled "visceral" reaction to *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Supreme Court's flag desecration decision, not to mention eight years of President Reagan, suggests that Presidents are at least as likely to substitute symbol for substance in the search for a good sound bite. And, as President Bush's opposition to gun control legislation demonstrates, Presidents are also equally susceptible to special interests.

39. Pp. 134-49.

40. Pp. 156-58.

41. Pp. 156-58.

42. P. 158.

legislative efforts cannot close all interstitial loopholes. This is particularly true where the party to be regulated has demonstrated facility at reinterpreting or ignoring clear statutory directives,⁴³ and asserting exclusive, unilateral authority. Even if Congress were capable of enacting comprehensive legislation from the overarching perspective Koh offers, what is to stop Presidents from acting first, notifying later, and simply refusing to abide by the statute's terms, as they have done in the war powers area?

The history of framework legislation suggests that the problem is not so much in the drafting as in the enforcement. If Congress were to pass an airtight Internal Revenue Code, but the courts announced that they would no longer adjudicate violations, the problem of tax evasion would not be solved. Koh recognizes that the balance will not be restored until Congress asks the courts to play a role, and the courts have the courage to respond. Even if Congress followed all of Koh's suggestions for reforming executive and congressional roles, its efforts would likely fail without properly circumscribed judicial participation.

Unenforced framework legislation, moreover, can generate perverse effects. Enacted to rectify executive encroachment on Congress' powers, it may well have the practical effect of legitimizing the encroachment, simply by recognizing its existence in legislation. For example, the War Powers Act has been read to *authorize* executive-initiated actions of up to sixty days. Thus, in building a structural response to the reality of executive unilateral action, Congress arguably legitimated and perpetuated that reality.⁴⁴

Before turning to the broader problem of unenforced legislation, however, I will briefly address some of Koh's specific proposals for reform directed at the executive and legislative branches. While many of these proposals are sound, many are also paradoxical and underscore the fundamental difficulty of involving the most representative branch in foreign affairs.

To address executive adventurism, Koh proposes several measures to

43. The Boland Amendment is a perfect example. Passed to forbid all government support of the Contras, it was grossly misinterpreted or ignored by the White House. Because the measure clearly forbade CIA support, the White House designated the National Security Council to provide the support instead. When President Reagan was asked, in a deposition for the criminal trial of Admiral Poindexter, to explain his interpretation of the Boland Amendment, he responded:

I remember being told that there were certain levels of government or agencies and so forth that were not prohibited by the Boland Amendment, and I remember that. And this was in connection with my telling us that we must stay within the law and so forth. And I never challenged or questioned what I was told about that or something else because, not being a lawyer myself, but being surrounded by a number of them in government, I figured that I was hearing the truth when they told me that something could be done and still be exempt from the Boland Amendment.

N.Y. Times, Feb. 23, 1990, at A18, col. 1.

44. See Lobel, *supra* note 16, at 1409 ("By providing legislation to address every conceivable emergency situation, emergency power inevitably becomes routinized, normal, and by definition, lawful.")

increase the executive's internal and external accountability.⁴⁵ Congress' weaknesses, however, are far more troubling than the President's strengths. As a result, it is to Congress that Koh primarily directs his book; his call for framework legislation is essentially a plea to Congress to pull itself up by its bootstraps. That Koh relies on the assertiveness of the branch that has given up its powers is a sign of his optimism. But it is also the only way to solve the problem, because we cannot expect the President to hand over the reins, and the judiciary has shown no inclination to alter the status quo on its own. Moreover, Congress has to take on the responsibility itself; as the Framers unwittingly demonstrated, merely giving Congress greater substantive powers is not sufficient.

Koh suggests that an important reason Congress fails to hold its own in foreign affairs is its diffused responsibility and power.⁴⁶ He proposes to mitigate this by creating centralized foreign policy expertise in a core consultative committee, and by appointing a congressional legal adviser who would monitor the President's foreign affairs actions, respond to presidential reports and findings, and spur Congress to vote on matters that require its input.⁴⁷ In other words, Koh proposes making Congress look and act more like the President. This type of reform, however, is inherently problematic, for it is precisely because Congress is not like the President that the Framers initially gave it the lion's share of the power.⁴⁸ A core consultative committee is *less* representative of the nation than the Presi-

45. Pp. 161-66. Internally, he would mandate interagency review of legal opinions that authorize covert actions, and would require intelligence findings to be signed by the Attorney General as well as the President, in the hope that the Attorney General would be more attentive than executive policymakers to the *legality* of particular actions. To augment external accountability, he suggests that legal opinions justifying covert actions be transmitted to the congressional intelligence committees. To increase the political accountability of the National Security Assistant, Koh suggests that the Vice President play that role, or at a minimum that the position be subject to Senate confirmation.

While these suggestions seem sound from an abstract management-theory perspective, I doubt that reliance on Ed Meese or Dan Quayle would do much to solve the problem; while good people are not sufficient, they are necessary. It is possible that these structural revisions would lead to changes in the quality of personnel: if the Vice President and the Attorney General were required to play such responsible roles, people like Quayle and Meese might not be chosen in the first place. Ultimately, however, these reforms will only prove meaningful if Congress and the American public demand more independent judgment and less political pandering from the Vice President and Attorney General. As the Boland Amendment interpretation discussed above demonstrates, *see supra* note 43, the Attorney General's office has often provided only self-serving and disingenuous interpretations of legal restrictions on the President.

46. Pp. 166-67.

47. Pp. 167-71.

48. George Mason explained that Congress should be assigned the war power because he was "for clogging rather than facilitating war, [and] for facilitating peace." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314 (M. Farrand rev. ed. 1966) (remarks of George Mason). Similarly, James Wilson argued:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot 2d ed. 1888) (remarks of James Wilson).

dent, yet to get the most representative branch back into the picture it appears that we must empower such a committee. Similarly, the legal adviser, something of a "class representative" for Congress, would centralize in a non-elected official responsibility that now rests dispersed among the representatives.

The necessarily paradoxical nature of these reforms may suggest that the Framers were simply mistaken in valuing Congress for its more deliberative process and more representative character. One lesson that might be drawn from the history of the foreign affairs power is that no matter how much power is assigned to Congress, the executive will ultimately win out. The Framers' decision, first in the Articles of Confederation and then in the Constitution, to assign the most important of the foreign affairs powers to Congress rather than to the executive was a truly revolutionary act. Never before had a legislative branch been granted the power to declare war.⁴⁹ History suggests that this may have been a failed revolution.

But before abandoning the Framers' insight, it may be worthwhile to delineate those types of foreign affairs issues with respect to which Congress' deliberative procedures are advantageous. The United Nations and other multilateral international bodies act in a manner at least as deliberative as Congress, yet they are certainly able to address foreign policy issues and to play a role in mediating and resolving international disputes. Koh's suggestion that we streamline Congress in the foreign affairs field may be more useful for those instances where immediate response is required than for broader policy questions demanding more sustained and deliberative attention. Framework legislation may need to establish several different "frameworks," adapted to fit the particular procedural needs of a given set of foreign policy issues.

Koh also suggests a less structural but equally important reform: increasing Congress' access to classified information. As Koh points out: "Increased congressional exclusion from classified information has both buttressed executive claims to superior knowledge in foreign affairs and fostered uninformed legislative judgment in those decisions in which Congress does participate."⁵⁰ Here, of course, the oft-repeated objection is that Congress cannot keep a secret (as if the executive can), to which Koh responds by suggesting that access might be limited to the core consultative group. While this again raises the problem of centralizing power in a less-than-representative body, it seems a reasonable compromise given the need to maintain confidentiality.⁵¹

49. C. WARREN, *THE MAKING OF THE CONSTITUTION* 480-81 (1928).

50. P. 172.

51. Developments in the Iran-Contra trials only underscore the importance of this informational reform. The only Iran-Contra trial against a CIA operative, Joseph Fernandez, was dismissed when the CIA refused to allow disclosure at trial of classified (but already widely disseminated) information

Perhaps the single most devastating blow to Congress' ability to oversee the President's foreign affairs actions was the Supreme Court's invalidation of the legislative veto in *INS v. Chadha*.⁵² By holding that Congress may not delegate power subject to review by a "veto" of one or both Houses, *Chadha* removed an important oversight tool from the legislature. Now, if Congress wants to stop any presidentially initiated action, it must do so by a two-thirds majority of both Houses, since it will almost inevitably face a veto. Presidential initiative in areas of disputed authority thus creates a *de facto* shift in the balance of power. Were the President to go to Congress for authorization before committing troops, for example, a simple majority of one House could deny that approval. If the President shoots first and asks for approval later, congressional disapproval requires a two-thirds vote from *both* Houses. No wonder Presidents are trigger-happy.⁵³

The legislative veto allowed Congress to retain its approval authority while simultaneously permitting the President to take policy initiatives. As a substitute, Koh suggests broader use of fast-track approval.⁵⁴ Under this arrangement, which has been used in negotiating international trade agreements, Congress authorizes the President to undertake negotiations on the condition that the result of the negotiations be submitted to Congress for final approval. Congress also commits to an expedited vote on the policy initiative. In this way, Congress maintains its prerogative of choosing to disapprove of an action by voting it down by a simple majority, as it could with any legislation proposed by the President. At the same

about the existence of CIA bases in Central America. Because the CIA's own man was being prosecuted, and because the Iran-Contra prosecutions are not supported whole-heartedly by an administration headed by George Bush, *see supra* note 9, who has himself been charged as complicitous by Admiral John Poindexter, there is at the very least a basis for suspecting that the executive branch is using its power over classified information not to protect secrets, but to protect its own. Congressional access to and oversight of classified information would provide a much needed check on the executive branch's ability to forestall inquiries into its actions through manipulation of "secret" information.

52. 462 U.S. 919 (1983).

53. It might be argued that Congress' power of the purse gives it the ability to disapprove of presidential actions by a simple majority, by declining to appropriate funds. But this response is demonstrably insufficient, as the history of the Vietnam War amply reveals. For many reasons, it is unrealistic for Congress simply to cut off funds. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973). Appropriations bills generally include a broad range of projects, and Congress has been reluctant to decline to pass the whole bill on the basis of disagreement over individual items. For this reason, Congress in the War Powers Act specifically directed courts not to construe appropriations as authorizing military efforts without specific directions to that effect in the appropriations legislation. 50 U.S.C. § 1547(a)(1) (1982).

Cutting off funding, moreover, is clearly an insufficient response to quick strikes such as the invasions of Panama and Grenada. At least in the war powers context, stopping the war once it has started has proven next to impossible. The Framers sought to ensure that before *any* American lives were put on the line, the most representative branch would determine that a military effort is necessary. It seems likely, for example, that had the President put the question of invading Panama to Congress in advance, he would have been hard-pressed to obtain approval. Once he had launched the attack, however, virtually everyone rallied around the flag, and few Congresspersons voiced any criticisms.

54. Pp. 176-77.

time, the fast-track approval procedure allows the President to take policy initiatives without shifting the burden to Congress to *disapprove* of his actions by a two-thirds vote.⁵⁵

Fast-track approval is obviously not foolproof. If, for example, Congress amended the War Powers Act to require the President to submit for fast-track approval any decision to take military action abroad, Presidents probably would do just what they have done under the current Act—frustrate its triggering mechanism by denying that they are engaging in the type of military action described in the Act. Thus, the burden would still be on Congress to stop the President from acting, and this would require a two-thirds vote. In other words, the fast-track approval procedure requires good-faith cooperation from the executive, something history suggests will not be forthcoming. Because the lines of authority in foreign affairs are almost always disputed, the executive has little incentive to cooperate. The President can now control foreign affairs freely as long as he or she can muster the support of one vote more than one-third of either House.⁵⁶ Without judicial definition and enforcement of the lines of authority, fast-track approval is unlikely to alter this state of affairs.

An underlying limitation of all framework legislation is that it is, after all, *only* legislation. Often designed to spur later Congresses to take action in specified circumstances, it is not clear that later Congresses are bound by a prior Congress' directives. There is no question that a later Congress could repeal framework legislation. But could it simply ignore the legislation? This is not a theoretical problem. In the aftermath of crises like Vietnam and Watergate, Congress enacted structural reforms to reassert its proper role over the long term. But when it came time to confront a specific foreign policy issue, Congress most often preferred to look the other way. Thus, while it passed the War Powers Act over President Nixon's veto, the only time Congress managed to assert that the Act was triggered in a specific instance was with respect to Lebanon, and then it could only produce sufficient votes to do so by simultaneously authorizing continued deployment of U.S. forces for eighteen months.⁵⁷

55. Koh suggests two measures that can be combined with fast-track approval to allow Congress to do battle with the executive with even fewer votes. Committee "gatekeeping" procedures allow a majority of a committee to block a proposal before it reaches the floor, and are routinely used to screen proposed legislation. P. 177. Similarly, point-of-order procedures allow individual members to delay temporarily the consideration of bills. P. 177. Again, however, these mechanisms share the problem posed by the core consultative committee; to render Congress powerful enough to stand up to the President, they rely on less democratic procedures.

56. See *supra* note 37.

57. See 129 CONG. REC. H7593 (daily ed. Sept. 28, 1983) (text of Joint Resolution). President Reagan had sought authorization to deploy the troops in Lebanon for six months, but because the six month period would have expired just before the 1982 congressional election, Congress gave him eighteen months, "in order to avoid another authorization vote before the election." Cutler, *The Constitutional Sharing of the War Power*, GEO. MASON L. REV., Fall 1988, at 221, 223.

Robert Turner offers several similar examples of congressional weakness. In the *Mayaguez* incident, which involved intense fighting and the death of at least thirty-eight marines, President Ford

An even better example of Congress' nullification of its own enactments is the National Emergencies Act (NEA),⁵⁸ another of the post-Watergate statutes designed to reassert Congress' proper role and to limit presidential power. When the Act was passed in 1976, four states of emergency, including one declared in 1933, were still in effect, not because of any then-existing emergencies, but simply because prior emergencies, had never been terminated.⁵⁹ Under these states of emergency, the President exercised "extraordinary" and "authoritarian" powers pursuant to some 470 emergency laws.⁶⁰ In the NEA, Congress sought to create a procedure that would assure periodic congressional oversight over all future states of emergency.⁶¹ The statute established a procedure for terminating emergencies declared by the President,⁶² under which Congress is required to vote on a concurrent resolution "[n]ot later than six months after a national emergency is declared, and not later than the end of each six month period thereafter that such emergency continues"⁶³ Congress consid-

declined to provide the required report under the War Powers Act and instead dispatched an informal communication. Nonetheless, the Foreign Relations Committee unanimously passed a resolution praising President Ford for conduct "in the spirit" of the Act. Turner, *supra* note 2, at 111. When President Carter initiated the doomed airlift of the Iranian hostages, however, the ranking Republican on the Foreign Affairs Committee said his action violated the War Powers Act. *Id.* at 112. And when President Reagan invaded Grenada, House Speaker Tip O'Neill initially called for War Powers Act hearings, but backed off when it became clear that the invasion was popular among the American people. *Id.*

58. 50 U.S.C. § 1601 (1982).

59. See S. REP. NO. 922, 94th Cong., 2d Sess. 3 (1976); 120 CONG. REC. 29976 (1974) (remarks of Senator Church).

60. See S. REP. NO. 922, *supra* note 59, at 18; 120 CONG. REC. 29976 (1974) (remarks of Senator Church).

61. The legislative history is replete with spirited statements of the need to reassert congressional responsibility in this area. For example, Senator Pearson stated: "Congressional review is essential to checking the steady growth and accumulation of presidential emergency powers. We must insist upon our role to oversee the use of these and to terminate them when conditions are proper." 120 CONG. REC. 29984 (1974). Senator Ribicoff, introducing hearings on the NEA, was similarly adamant in his observation that "enactment of the legislation would . . . insure that the extraordinary powers which now reside in the hands of the Chief Executive . . . could be utilized only when emergencies exist, and then, only under safeguards provided by congressional review." *National Emergencies Act: Hearings on H.R. 3884 Before the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 2* (1976). And Senator Church expressed much the same sentiment:

[W]e were principally concerned in establishing statutory procedures to govern future emergencies that would insure Congress the proper legislative role. Presently . . . Congress has no method to pass judgment as to the nature, the extent of the emergency, nor its duration. We think that this bill remedies all of those present deficiencies in the law.

National Emergencies Act: Hearings on H.R. 3884 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 27 (1975).

62. 50 U.S.C. § 1622(a)-(c) (1982). Congress changed the concurrent resolution to a joint resolution (which must be presented to the President for his veto and thus avoids *Chadha* problems) shortly after the Center for Constitutional Rights filed a lawsuit challenging President Reagan's trade embargo against Nicaragua. In this case we argued that the embargo was invalid because it was imposed pursuant to a declaration of emergency under the National Emergencies Act, whose legislative veto rendered the Act unconstitutional. See *Beacon Products Corp. v. Reagan*, 814 F.2d 1 (1st Cir. 1987).

63. 50 U.S.C. § 1622(b) (1982). The statute also includes expedited procedures setting strict deadlines for when the resolution shall be reported out of committee, taken up as business by the originating House, referred to the appropriate committee of the other House, and finally acted upon by both Houses. 50 U.S.C. § 1622(c) (1982).

ered this six-month congressional review mandatory.⁶⁴ The Senate Report stated that "it should be clearly understood that Congress will not accept any claim that an emergency is so severe that the President can act without the congressional review required under this legislation."⁶⁵

In practice, however, Congress has *never* voted on such a resolution, even though the President has declared and continued for many years dubious "emergencies" with respect to Nicaragua, South Africa, Libya, and Panama.⁶⁶ Furthermore, in *Beacon Products v. Reagan*,⁶⁷ a lawsuit challenging the continuation of the Nicaraguan emergency in the absence of a congressional vote, the court of appeals concluded that no relief is available if Congress simply fails to vote on a continuing emergency.

Thus, existing "framework legislation" has not controlled Congress, much less the President. Congress ignores its own statutory dictates and all too often takes the easy road of declining to take a position on action that should not have begun without Congress' prior affirmative approval. Presidents can and have routinely ignored framework legislation, and, by seizing the initiative, have limited effective congressional action to those measures upon which a two-thirds majority of both Houses can agree. These facts of political life suggest that mere tinkering with legislative procedures governing congressional-executive interaction is unlikely to solve the problem.

Congress' repeated failure to live up to even its self-imposed demands in foreign affairs indicates that the problem may be deeper than any framework legislation can reach. Congress may simply not want to get involved.⁶⁸ If that is the case, Koh's modest proposal may be doomed from the start, for it requires Congress to show at least enough interest to enact framework legislation in the first place. Past legislative efforts in areas of war powers, emergency authority, international agreements, and trade relations could be viewed as evidence that Congress *is* interested in getting involved, at least in the abstract. But viewed alongside Congress' abysmal record in asserting its authority in specific instances, the evidence might also be read more cynically to suggest that Congress is interested only in a symbolic show of interest, to appease the public outcry that attends events like Vietnam and the Iran-Contra affair.

If Congress is seeking merely to look good while ducking the issue,

64. See H.R. REP. NO. 459, 95th Cong., 1st Sess. 14 (1977) (under NEA, "each House must vote . . . on whether to terminate the emergency"); S. REP. NO. 1168, 94th Cong., 2d Sess. 2, 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2288, 2291; 121 CONG. REC. 27635 (1975) (remarks of Representative Anderson) ("Congress must consider whether the emergency should be terminated at periodic intervals of every 6 months.").

65. S. REP. NO. 922, *supra* note 59, at 10-11; S. REP. NO. 1168, *supra* note 64, at 2, 5.

66. See Lobel, *supra* note 16, at 1415-16.

67. 814 F.2d 1, 4-5 (1st Cir. 1987).

68. This in turn may be a reflection of the American public's general apathy about foreign affairs. See, e.g., N.Y. Times, Mar. 14, 1990, at A14 ("one of the problems a lot of Congressmen say they're having is that foreign aid at this time is not a high priority for a lot of people").

however, there is no reason to tolerate such evasion. It's not Congress' choice; the Constitution allocates responsibilities as well as powers. But whether one believes that Congress is shirking its responsibilities or that the President has frustrated Congress' best efforts, the conclusion is the same: the only structural solution with the promise of real change is involvement by the judiciary.

III. DEFINING A JUDICIAL ROLE

Koh insists that the judiciary must be involved in the "shared power" over foreign affairs, and suggests that Congress pass legislation designed to override the doctrines by which courts have avoided addressing foreign affairs disputes.⁶⁹ I agree that judicial involvement is crucial, and that legislation must encourage such involvement. But here I believe Koh's proposal is not modest enough. Paradoxically, unless the judicial role is narrowly *circumscribed* in the first instance to enforcing procedures for congressional-executive interaction, judicial involvement is unlikely to prove meaningful.

As Professor Christopher May has argued, judicial involvement in times of foreign affairs crises may be more damaging than judicial abstention.⁷⁰ In the past, the courts have responded to challenges to executive action in foreign affairs in two ways. They have either declined to address such challenges at all, dismissing them as nonjusticiable, or, where they have reached the merits, they have simply rubber-stamped the President's actions. The latter, more "involved" response may have more serious long-term consequences because it gives in a time of emergency an imprimatur of legitimacy to acts that might well be viewed as unlawful from a sober second sight. Justice Jackson warned of this danger in a dissent from *Korematsu v. United States*,⁷¹ in which the Court upheld the roundup and detention of thousands of Japanese-Americans:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.⁷²

69. Pp. 181-84.

70. C. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918 (1989).

71. 323 U.S. 214 (1944) (Jackson, J., dissenting).

72. *Id.* at 246.

As *Korematsu* demonstrates, without careful guidelines, judicial involvement may only exacerbate the problem of extra-constitutional executive power.

In two hundred years of executive encroachment on congressional prerogative in matters touching on foreign affairs, one case stands out as a high water mark for Koh: *Youngstown Sheet & Tube Co. v. Sawyer*.⁷³ In that case, the Supreme Court invalidated President Truman's unilateral seizure of a steel mill, rejecting the President's claim that the seizure was necessary for the national defense during the Korean War. Koh relies heavily on this case as a statement of the substantive constitutional principles that should guide disputes concerning the separation of powers in foreign affairs.⁷⁴ Justice Jackson's concurrence, which has since been adopted by a majority of the Supreme Court,⁷⁵ sets forth a three-part test for determining the legitimacy of presidential actions.⁷⁶ The test turns on what steps Congress has taken to assume or delegate authority, and thus at its core it is based on a notion of shared power.

But at least as important as the substantive principles set forth in Justice Jackson's *Youngstown* concurrence is the precedent of judicial review that the case exemplifies. *Youngstown* demonstrates that the courts have a role in reviewing executive action, even where the executive relies on claims of foreign affairs powers or national security. It is one of the very few cases challenging executive action with foreign affairs implications where the Court not only reached the merits, but ruled against the President and enjoined his action. It should come as no surprise, then, that Koh returns again and again to *Youngstown* as his exemplar of judicial responsibility.

If *Youngstown* is the *Brown v. Board of Education*⁷⁷ of foreign affairs litigation, *United States v. Curtiss-Wright Export Corp.*⁷⁸ is the *Plessy v. Ferguson*.⁷⁹ *Curtiss-Wright* is the paradigmatic example of the danger posed by judicial review that Professor May describes. Reviewing a challenge to an executive prohibition on arms sales, the Court reached the merits only to affirm executive action. Moreover, in doing so it provided pages of broad dicta extolling the President's powers—language which Presidents have relied on ever since. The case *holds* only that the President may prohibit arms sales to belligerents in a foreign country where Congress has expressly authorized such a prohibition. Justice Sutherland's dicta, however, goes much further, suggesting that the executive is the

73. 343 U.S. 579 (1952).

74. Pp. 105-13.

75. See, e.g., *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 661-62, 668-69, 674 (1981).

76. 343 U.S. at 635-38 (Jackson, J., concurring).

77. 347 U.S. 483 (1954).

78. 299 U.S. 304 (1936).

79. 163 U.S. 537 (1886).

“sole organ” of the United States in foreign affairs and that the courts have no place in reviewing, much less overturning, executive foreign policy actions.⁸⁰

The Court in *Youngstown* refused to apply *Curtiss-Wright's* broad dicta,⁸¹ but the *Curtiss-Wright* ethos continues to pervade the executive branch, as reflected in its ubiquitous appearance in Justice Department briefs.⁸² Koh points out, “[a]mong government attorneys, Justice Sutherland’s lavish description of the president’s powers is so often quoted that it has come to be known as the ‘“*Curtiss-Wright*, so I’m right” cite.’”⁸³ And the judiciary’s reluctance to provide any meaningful scrutiny in modern-day foreign affairs disputes has resurrected *Curtiss-Wright* in spirit, if not in letter.

As noted above, the judiciary’s responses to challenges to executive foreign policy actions have waffled between abstention and rubber-stamp approval. But there are signs of a nascent awareness that the judiciary has an appropriate role to play in foreign affairs. Frequently, the court denies relief in the case before it while stating that it would have a role to play in a more egregious case. For example, in *Crockett v. Reagan*,⁸⁴ the district court ruled that it lacked sufficient judicial standards to determine whether the War Powers Act had been triggered by the dispatch of fifty-five military advisers to El Salvador, but stated that the case would be justiciable if there were more clear-cut, long-term “hostilities,” as in Vietnam.⁸⁵

Similarly, in *Committee of U.S. Citizens Living In Nicaragua v. Reagan*,⁸⁶ a suit challenging United States aid to the Contras as a violation of the judgment of the International Court of Justice in *Nicaragua v. United States*,⁸⁷ the court of appeals stated that if the aid had violated a *jus cogens* norm—an international norm considered so fundamental that it permits no abrogation under any circumstances—the court might have enjoined even joint congressional-executive action.⁸⁸ In the case before it, however, the court found that the particular norm violated—the obligation to respect and follow a judgment of an international tribunal by whose

80. 299 U.S. at 319–20. Although *Curtiss-Wright* is often cited for the proposition that executive foreign affairs actions are non-justiciable political questions, the *Curtiss-Wright* Court did reach the merits of the issue.

81. See 343 U.S. at 635–36 n.2 (Jackson, J., concurring); see also *American Int’l Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981) (rejecting *Curtiss-Wright* dicta).

82. P. 94 n.126.

83. P. 94.

84. 558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983).

85. 558 F. Supp. at 898.

86. 859 F.2d 929 (D.C. Cir. 1988).

87. 1986 I.C.J. 14.

88. 859 F.2d at 940–41. Examples of *jus cogens* norms include the customary human rights prohibitions against torture, summary execution, prolonged arbitrary detention, genocide, and slavery. *Id.*

judgments a country had agreed to be bound—did not rise to the *jus cogens* level.⁸⁹

The Vietnam War cases also reflect this pattern.⁹⁰ Again, the courts provided no relief (with one short-lived exception⁹¹), but were unwilling to write themselves out of the picture entirely. The judiciary grew marginally bolder as popular opposition to the war mounted. In the early going, before popular opposition became manifest, the courts simply declared the whole issue non-justiciable.⁹² In 1970, the courts began to hold that the question whether Congress had authorized the war was justiciable.⁹³ In these cases, however, they found sufficient authorization in the Gulf of Tonkin Resolution and subsequent appropriations, holding that the “form” of congressional assent was a political question.⁹⁴ And in the final round of litigation, when popular and congressional opposition to the war was at its peak, the courts reaffirmed that the question of authorization was justiciable, refused to infer such authorization from the Gulf of Tonkin Resolution and appropriations, but held that the President should be afforded wide latitude in deciding how to “wind down” the war.⁹⁵

Thus, the courts have not accepted the executive’s *Curtiss-Wright* arguments wholesale, and instead have insisted that some judicial oversight is appropriate (albeit always in another case). This pattern can be interpreted in at least two ways. On the one hand, the courts’ dicta could be construed as an attempt to rationalize and legitimate what is for all prac-

89. *Id.* at 942. The court treated plaintiffs’ due process claim similarly. Plaintiffs alleged that the government’s appropriation of \$100 million to a paramilitary force directed at them violated their rights to due process. The court denied the claim, but specifically stated that:

[W]e decline to hold that Congress’ “reckless” support for a foreign organization that harms Americans could never deprive those Americans of their constitutional rights. But, before such support could threaten a constitutional violation, the foreign organization’s deliberate infliction of harm upon Americans—as well as Congress’ awareness of this pattern of abuse—would have to be much clearer than appellants allege that it is in this case.

Id. at 952–53.

The Ninth Circuit issued a similarly ambivalent ruling in *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986). That suit, also litigated by the Center for Constitutional Rights, invoked the Ethics in Government Act, 28 U.S.C. §§ 591–598 (1982), and sought to require the Attorney General to determine whether a Special Prosecutor should be appointed to investigate President Reagan and the National Security Council for criminal violations of the Neutrality Act, 18 U.S.C. § 960 (1988), in funding the Contras. Plaintiffs won in the district court. 573 F. Supp. 1489 (N.D. Cal. 1983). On appeal, the court denied plaintiffs standing, but left open the possibility that members of the Judiciary Committee of either House might have standing to seek such relief. 797 F.2d at 823.

90. The Vietnam War cases are explored in more detail in Ratner & Cole, *supra* note 27, at 730–35.

91. In *Holtzman v. Richardson*, 361 F. Supp. 553, 564 (E.D.N.Y. 1973), Judge Judd enjoined the bombing of Cambodia because it was unauthorized by Congress. The Second Circuit stayed the injunction, however, and ultimately reversed the decision *sub nom.* *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

92. *See, e.g.,* *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968).

93. *See* *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).

94. *DaCosta*, 448 F.2d at 1369; *Orlando*, 443 F.2d at 1042–43; *Berk*, 429 F.2d at 305.

95. *See* *Mitchell v. Laird*, 488 F.2d 611, 614–16 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d at 1311.

tical purposes judicial abdication. To abdicate altogether would be to hold the rule of law inapplicable to a large part of what the executive does, and thereby to delegitimize courts, to question the efficacy of the rule of law, and to direct protests elsewhere, where they might be more explosive. It would, in short, invite civil resistance.⁹⁶ Thus, a cynic might read these decisions as holding out an elusive carrot to maintain the facade of a legal remedy and thereby derail forms of protest that would be more threatening to the establishment.⁹⁷

On the other hand, these statements could also be read less cynically as a sign of genuine ambivalence. Judges in our society are assigned the responsibility of enforcing the law, and many judges may be reluctant to see themselves as abdicating that responsibility in any context. It takes real courage, however, to enforce the law against a President's foreign initiative in the face of Congress' general unwillingness to challenge the President, the populace's often jingoistic support of such actions, and the courts' history of abdication. By asserting that in another case they might provide relief, judges assure themselves, as well as the public, that they are playing a role, that they are not powerless, and that the law does pose some limits even on foreign policy.⁹⁸

Both motivations probably play some part in the judicial response to foreign affairs disputes. But while I may be falling prey to the same optimism that has captured Koh, I believe judicial concern for the enforce-

96. Cf. F. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW 5 (1987) (contending that in response to Reagan Administration's international lawlessness and Federal courts' unwillingness to challenge it, "large numbers of American citizens have decided to act on their own cognizance in order to demand that the Reagan administration adhere to the principles of international law, of U.S. domestic law, and of our own Constitution in its conduct of foreign affairs"); see also Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 46-48 (1984) (section on civil disobedience).

97. In the same way that judicial dicta asserting the power to provide relief legitimizes judicial abdication in the case at hand, so from a broader perspective the mere existence of *Youngstown* may legitimize subsequent judicial deference. Courts and commentators can point to *Youngstown* for the proposition that meaningful judicial review is possible, even as it is denied in case after case. Koh and I may both be falling into this trap. But until Congress invites the courts to play a meaningful role, we cannot know whether to write off the judiciary.

98. The assertion of judicial power in the abstract and the simultaneous refusal to apply it in the case at hand is a familiar first step toward realizing that power in a specific case. The classic example is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Justice Marshall asserted the power to enjoin executive action contrary to the Constitution while declining to exercise that power in the immediate case. See also *Toscanino v. United States*, 500 F.2d 267, 273-76 (2d Cir. 1974) (declining to invalidate criminal trial because of manner in which defendant was brought to trial, but asserting that if Federal agents act particularly egregiously, invalidation would be appropriate); cf. Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1153-66 (1985) (urging courts to declare presidential action unlawful even where they are unwilling to provide injunctive relief).

Such abstract assertions of judicial power, like Congress's passage of framework legislation, could be interpreted cynically as empty rhetoric, but the rhetoric may also serve two functions: (1) to build a record of dicta, so that when a court does take the courageous step, it will have a certain level of precedent upon which to rely; and (2) to restrain the executive at least minimally, by threatening to intervene should it engage in particularly egregious action. As long as there is the possibility of judicial sanction, some level of deterrence probably operates.

ment of law provides a ray of hope. If a properly circumscribed role could be articulated for the courts, they might be willing to assume it. Judicial participation, furthermore, is crucial. As demonstrated above, the executive's strengths and Congress' weaknesses virtually assure that the executive will prevail as long as all it has to worry about is surviving an override vote. The Framers were not satisfied with establishing a balance of power solely between Congress and the executive; they created a tripartite system of checks and balances. Without the judiciary's input, the system simply cannot work.

Koh's most important suggestions are therefore those designed to involve the judiciary in regulating foreign affairs decision-making. Koh urges Congress to pass legislation to "override the abstention doctrines that the courts have wrapped around themselves."⁹⁹ He recommends that the legislation specify "particular plaintiffs, defendants, claims, and forms of relief that would be properly subject to adjudication."¹⁰⁰ The suggestion that the courts be nudged into the fray through framework legislation is a good one. As deferential as the courts are to the President, they are also deferential to Congress. In many foreign affairs cases, Congress has not acted, or has acted ambiguously, and the courts are faced with deciding whether to confront the President where Congress has not. Were Congress to state clearly that the courts should play a role in a given type of dispute, it would be much more difficult for the courts to bow out. As the Supreme Court said recently, "*unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."¹⁰¹ And in *Youngstown*, it should be recalled, Congress had expressly repudiated President Truman's request to authorize seizure of the steel mills.

Koh's suggestion that judicial participation be encouraged by legislation, however, does not address the risk that once the courts are involved, they may only legitimate and rationalize executive encroachments on legislative prerogatives. Other than *Youngstown*, the judiciary's modern-day record on challenging executive foreign affairs actions is disastrous. As Koh and Professor May have both ably demonstrated, when the courts reach the merits, they almost invariably uphold executive action.¹⁰² May speculates that this may be because courts get caught up in the "crisis" of the moment, and, like Congress and the American public, they are content to rely on the President at such times.¹⁰³ May suggests that courts should

99. P. 182 (emphasis omitted).

100. P. 182.

101. *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).

102. Pp. 134-46; C. MAY, *supra* note 70.

103. C. MAY, *supra* note 70, at 257-59. Professor May is among distinguished company in this analysis. Justice Jackson noted that during wartime, the Constitution "is interpreted by judges under the influence of the same passions and pressures" that affect the public at large. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring). Learned Hand similarly remarked,

use prudential avoidance techniques to delay deciding such disputes until the crisis is over and clearer heads can prevail.¹⁰⁴ But this solution is unsatisfactory where, as is often the case, a plaintiff seeks immediate redress from irreparable harm.

A more realistic solution would be to circumscribe the nature of the remedy, at least in the first instance. Recognizing that courts are reluctant to second-guess the merits of particular substantive policy decisions by the President, Congress should authorize the courts to play the role of procedural referee rather than fully engaged combatant. The judiciary's function should be to ensure that the processes established by Congress in its framework legislation (and ultimately by the Constitution) are followed, and that Congress' constitutional role is not eviscerated by presidential initiatives and congressional disincentives that short-circuit those processes. If the courts are asked only to ensure that the democratic processes of decision-making are followed, they may be less deferential than where they are asked to enjoin the President's action altogether.¹⁰⁵

Thus, while I agree with Koh's assessment that Congress should expressly invite judicial involvement, I believe that the terms of the invitation must make clear that the court's principal function is to require Congress and the President to comply with procedures for inter-branch

discussing the World War I sedition cases, that "the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct.'" Letter from L. Hand to Z. Chafee (Jan. 2, 1921), quoted in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975).

104. C. MAY, *supra* note 70, at 270-75.

105. See, e.g., *INS v. Chadha*, 462 U.S. 919, 940-43 (1983) (dispute concerning constitutional process for legislative action is justiciable). There is some support in the history of the Center for Constitutional Rights' foreign affairs litigation for the common-sense notion that the courts are more likely to provide relief to the extent that the relief is circumscribed. When we sought to enjoin aid to the Contras as a violation of the War Powers Clause, the court found the claim non-justiciable as a matter of "equitable discretion." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). But when we sought solely to have the Attorney General conduct a preliminary investigation to determine whether the President had violated a criminal law by aiding the Contras without congressional approval, we were successful in the district court, and lost in the court of appeals only on standing grounds. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983), *motion to reconsider denied*, 577 F. Supp. 1449 (N.D. Cal. 1984), *rev'd*, 797 F.2d 817 (9th Cir. 1986).

Similarly, when we sought to require removal of the military advisers from El Salvador, the courts found the case non-justiciable. *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983). But when we challenged aid to El Salvador on the ground that the President had improperly used a pocket veto to block legislation barring such aid absent a certification of improvement in the human rights situation there, we prevailed at the court of appeals level. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985). The Supreme Court dismissed the case as moot only because the legislation at issue had terminated by its own terms. *Burke v. Barnes*, 479 U.S. 361 (1987); see also *Flynn v. Shultz*, 748 F.2d 1186, 1195 (7th Cir. 1984) (refusing to review merits of presidential investigation into circumstances of U.S. citizen detained abroad, but stating that if executive simply refused to conduct investigation, court could require executive to conduct one).

Regan v. Wald, 468 U.S. 222 (1984), also supports this point. In that case, plaintiffs challenged a ban on travel to Cuba, but asked the Court only to require the President to declare an emergency under National Emergency Act procedures if he sought to continue the ban. Thus, plaintiffs sought to mandate executive participation in a dialogic procedure established by framework legislation. Plaintiffs were successful in the court of appeals, *Wald v. Reagan*, 708 F.2d 794 (1st Cir. 1983), and received four votes in the Supreme Court. 468 U.S. 222. That is the closest the Court has come since *Youngstown* to invalidating executive action in foreign affairs.

dialogue set forth in the framework legislation itself. Where Koh would rely on the courts to enjoin unilateral executive action, I would ask them merely to require the President or Congress to take the next step in the procedure established by statute—be it a presidential report, a finding, or a congressional vote. Framework legislation should be drawn up with this limited judicial role in mind, by specifying particular procedures and authorizing standing to members of Congress or the public to challenge executive or congressional failure to follow the prescribed procedures.

Of course, if Congress or the President ignore the court's procedural mandate, we are back at square one. But we may never reach that point; there is nothing to suggest that either body would ignore a clear judicial mandate. If they were to ignore the court, a substantive injunction would then be appropriate, and at that point a court might be more willing to grant such an injunction. By taking the procedural route first, the court would have given the representative branches a clear opportunity to exercise their responsibilities, and ultimate responsibility would therefore remain with those branches. And by issuing a procedural mandate, the court would have entered the fray, making its later abdication more difficult.

There is arguably room for such a circumscribed judicial role in some existing framework legislation. For example, Michael Ratner and I have suggested that where military action extends beyond the War Powers Act's sixty-day period, the courts should play a "triggering" role.¹⁰⁶ Rather than enjoining the challenged military action in the first instance, a court finding a War Powers Act violation could declare that the Act's sixty-day period has begun as of the date of the court's decision, thereby forcing the President to seek affirmative approval from Congress if the two branches agree that the action should continue. More recently, Professor John Hart Ely has recommended, in light of the history of judicial unwillingness to play even that limited role absent an explicit legislative invitation, that Congress should amend the War Powers Act expressly to authorize the judiciary to play such a triggering role.¹⁰⁷

If framework legislation in the area of foreign affairs is to work, the judiciary should be authorized to play a similar "referee" role over all such legislation. To the extent possible, the event that triggers the legislation's procedural requirements should be an objective set of circumstances and should not be left to the discretion or judgment of the President or Congress. Such a framework would allow the President to take initiatives without necessarily shifting the burden to Congress to disapprove by a two-thirds majority, because the judiciary would be available to require the President to seek affirmative congressional approval. This proposal

106. Ratner & Cole, *supra* note 27, at 757-58.

107. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1406-17 (1988).

recognizes that presidential initiatives may be inevitable, while retaining Congress' prerogative to halt such initiatives where it does not affirmatively approve of the President's action. Similarly, the courts would be available to require Congress to follow the procedural requirements it imposes on itself, as in the National Emergencies Act.

This proposed limitation on the judiciary's role is also responsive to concerns about the judiciary's countermajoritarian character, which may at least in part explain the courts' reluctance to enjoin presidential action. Where the courts are asked to halt a presidential foreign policy initiative that Congress has not taken upon itself to stop, the courts might well be reluctant to impose their non-representative will. But where the relief authorized simply asks the court to require a dialogue between the two representative branches, the court furthers rather than disrupts the democratic process.¹⁰⁸ If Congress chooses to approve of a presidential initiative, it will need to do so on the record, not by avoiding the issue as it did for years during the Vietnam War. Thus, this suggested judicial role would not only make the President more accountable to Congress, but would also make members of Congress more accountable to their electorate.

IV. CONCLUSION

In foreign affairs, conservatives generally argue for flexibility over formal adherence to the Constitution, particularly where adherence to the Constitution might constrain the President.¹⁰⁹ They emphasize that in the modern world the nation will be more effective and efficient if the President has a free hand in conducting external affairs. But the pursuit of efficiency potentially knows no limits. It would be more efficient, and we might well be more effective internationally, if the President were assigned dictatorial powers. The Framers no doubt recognized that an imperial executive was an effective and efficient way to run a government. But they also realized that it is not the way to run a democracy.¹¹⁰ The test is to square our internal democratic principles with the conduct of our foreign affairs. It is a test we have all too often failed. The Framers suggested that the best way to succeed would be to assign responsibility for our most important external decisions to the most representative branch. Others have argued that the foreign affairs power will only be consistent with democratic principles when we adopt a foreign policy that is substantively true to those principles, that is, not imperialist.¹¹¹ Koh's most valua-

108. Cf. J. ELY, *DEMOCRACY AND DISTRUST* (1980) (countermajoritarian judicial review most legitimate where its purpose is to protect and further democratic processes of government).

109. See *supra* note 3 and accompanying text.

110. See, e.g., *THE FEDERALIST* No. 69, *supra* note 3, at 415 (A. Hamilton) (comparing President's powers to those of King of England).

111. See, e.g., Lobel, *supra* note 16, at 1424-33.

ble insight is that one way to get there might be to return *as a matter of process* to the democratic principles that led the Framers to require that foreign affairs, like domestic affairs, be the product of the representative branches' shared powers. Such a return will be possible, however, only if Congress inscribes a properly limited role for the judiciary. If the courts were to begin to play a role of ensuring that legal processes are not bypassed for political ends, perhaps we would eventually stop sacrificing democratic principles (both our own and those of other countries) for self-interested external goals.

