Review Essays

The Acquiescent Congress and Foreign Affairs

THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR. *By* Harold Hongju Koh.† *New Haven and London: Yale University Press*, 1990. Pp. x, 340. $35 (hardbound), $14.95 (paper).

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In *The National Security Constitution*,[1] Professor Harold Hongju Koh uses the Iran-Contra affair as a vehicle for examining the adequacy of the constitutional framework for making national security policy. He first argues that the various investigators of the affair failed to identify the appropriate historical antecedent for their work. The more appropriate precedent, in his view, was the Vietnam War in that, in both instances, the executive branch arrogated constitutional power at the expense of the Congress in pursuit of an illegitimate foreign policy. Koh particularly faults the Iran-Contra congressional investigation for its prosecutorial focus, modeled after the Watergate hearings. According to Koh, the problem in the Iran-Contra affair was not that misguided officials violated the law, as the Tower Commission and congressional committees concluded, but rather that the basic institutional structure of government failed. He finds particularly alarming the tendency of executive branch representatives, such as Colonel Oliver North, to claim unbounded constitutional power, a claim he sees as frustrating the proper role of Congress. To meet this assault on the "National Security Constitution," Koh recommends new legislation designed to force a more active participation in foreign-policy making by Congress and the courts.

The theme is familiar, but Koh's analysis joins Michael J. Glennon's *Constitutional Diplomacy*[2] in presenting the most scholarly and sophisticated exegesis of the topic to appear in recent years.[3] Drawing on an

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1. H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990) [hereinafter cited by page number only].
2. M. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).
3. The classic text is L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

impressive array of constitutional law and political science, Koh shows how the law of foreign affairs is based on an eclectic mixture of constitutional text and structure, historical practice, treaty commitments, legislation and executive orders, in addition to the traditional nuggets of wisdom from the "Founding Fathers" and dictum selected from sporadic judicial decisions.

Koh's rich exposition of the legal culture, however, is incomplete in one important respect. He does not sufficiently explore the implications of congressional acquiescence in a process that has yielded not only Vietnam and Iran-Contra, but also most of the other "abuses" of executive power that the critics cite.[4] The cultural and political forces affecting congressional and judicial behavior in this field virtually assure the executive hegemony that Koh decries. Indeed, the accretions of Presidential power that Koh condemns are for the most part acceptable to Congress and the American public. Both want Presidential leadership, which requires correlative Presidential power. The initial reaction to President Bush's foreign policy illustrates my thesis. President Bush has systematically asserted broad claims of constitutional authority in foreign affairs,[5] and yet he has been criticized for not acting quickly and boldly enough, whether in invading Panama, deposing Noriega, or in responding to events in Eastern Europe. In this political environment Koh's prescriptions for reform seem unlikely to be accepted by the institutions he wants to engage. Finally, and most fundamentally, Koh does not address the question of why it would be better for legislators and judges to have more of an impact on U.S. foreign policy.

I. The Botched Investigation

Koh argues that, from the start, the Iran-Contra investigators misunderstood the problems confronting them. They assumed they were dealing with a potential Watergate while, in fact, they had just slumbered through another Vietnam. By misunderstanding the nature of the situation, they chose inappropriate models, roles and investigative approaches. Koh points out that the congressional committees investigating the affair chose to play the dual role of prosecutor and judge in a morality play rather than concentrating on the constitutional issues and the need for legislative reforms. The committees used prose-

4. *See* Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750 (1989); Trimble, *The Constitutional Common Law of Treaty Interpretation*, 137 U. PA. L. REV. 1461 (1989).

5. *See, e.g.*, Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 WEEKLY COMP. PRES. DOC. 266 (Feb. 16, 1990).

cutors rather than foreign affairs law experts, and were too large and unwieldy to sustain a coherent focus of analysis. As Koh writes: "[A]t times all twenty-six members and three different sets of staff counsel questioned a single witness. . . . The televising of the hearings greatly enhanced the opportunity for individual members to engage in grandstanding and 'credit-claiming.'" [6]

Koh considers the format of the process to be part of the problem while a politician might consider it to be the point of the exercise. By modeling the process on Watergate, the politicians no doubt hoped to gain comparable public stature for their efforts. It is true that the Iran-Contra affair raised separation of powers issues, as did the end of the Vietnam War, but it is not surprising that Congress did not find the models of that time either applicable or appealing. The early Vietnam hearings had an impact because they resonated with and reinforced a broad public opposition to the war. No similar opposition developed to the Reagan Administration's efforts to release the hostages or to improve relations with Iran. The foreign policy implicated in Iran-Contra, unlike the Vietnam War, was not deeply unpopular. Moreover, the American public, along with Congress, was sharply and almost evenly divided over support for the Nicaraguan Contras. In addition, when the Senate Foreign Relations Committee held hearings on the causes of the Vietnam War,[7] little attention was paid to them by the American public. Although the Foreign Relations Committee brought before it an impressive parade of witnesses, the press and public ignored the hearings and, consequently, so did the Senators. Members of Congress pay attention to the public, and the public is not much interested in history lessons or constitutional theory. Congress did not miss the point when setting up its Iran-Contra investigation; it only misjudged the viability of the affair as a policy failure and the vulnerability of the Chief Executive as a culprit.

II. The Assault on the National Security Constitution

In the course of the hearings and subsequent litigation, executive branch proponents and their lawyers no doubt made extreme claims regarding Presidential power in foreign affairs. To constitute a true assault on the Constitution, however, their claims must be backed by deeds.[8] It is not enough to assert, or to deny the assertion, that the President has

6. P. 18.

7. *Causes, Origins and Lessons of the Vietnam War: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (May 9-11, 1972).

8. *See* M. GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 2, at 54-65.

the authority to make foreign policy and can therefore use any resource of the government to that end, whether sending armies abroad or conducting covert operations. Words alone do not amount to law. One must instead look at the particular action, in the particular context, and determine what principles or rules emerge from the "case." Since there are very few judicial cases, most "case law" in this area must be extracted from the often inarticulate actions of the House, the Senate and the Executive.

Koh recognizes the importance of historical practice and unconventional sources in giving shape and substance to the constitutional law in this area:

> [U]ltimate judgments regarding how the Constitution allocates particular powers in foreign affairs cannot be reached solely by looking at constitutional text, for the problem is not simply one "of correctly discerning or stating the legitimate bounds of the presidential and congressional powers respectively." Rather, allocations of authority must be identified by "reasoning from the *total structure* which the text has created." Accordingly at this first level, the core principles of the National Security Constitution must be ascertained not only through textual exegesis of particular constitutional clauses, but also through inferences drawn from the broader structure and relationships created by the Constitution . . .
>
> The historical examination of constitutional structure and relationship that follows suggests that our National Security Constitution rests upon a simple notion: that generally speaking, the foreign affairs power of the United States is a *power shared* among the three branches of the national government . . .
>
> At a second, subordinate hierarchical level, more specific rules governing the legal rights and duties of the three branches in national security decision making can be found in *"framework statutes"*: laws that Congress enacts and the president signs within their zone of concurrent authority, not simply to "formulate policies and procedures for the resolution of specific problems, but rather . . . to implement constitutional policies." Such legislation . . . reinforces and elaborates the constitutional foundation of power sharing by constructing a statutory superstructure that declares in greater detail how power should be distributed among institutions in specific areas of foreign policy . . .
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> At the third and lowest level in this legal hierarchy stands a body of historical precedent that may be thought of as *quasi-constitutional custom*. This term embraces a set of institutional norms generated by the historical interaction of two or more federal branches with one another: executive practice of which Congress has approved or in which it has acquiesced, formal and informal congressional actions with which the president has consistently

complied, and certain vacated judicial opinions that have acted as influential advisory opinions to the other two branches.[9]

Since World War II, the National Security Constitution can be found in the web of Presidential proclamations, treaty commitments, legislation and executive orders. In addition, Congress has regularly authorized and appropriated funds for a defense, foreign policy and intelligence bureaucracy appropriate to a superpower.

Koh's book provides a thorough guide to this evolving national security structure. He calls particular attention to "framework statutes," like the National Security Act of 1947,[10] that established broad outlines of authority, and to the post-Vietnam and Watergate legislative reforms that instituted a network of "reporting and consultation requirements [that] have now attained quasi-constitutional status."[11] This framework legislation provides detail and structure for the allocation of decision-making authority. The framework itself, however, turns out to be rather pliable and unstable. Koh states that the President has often construed legislation designed to constrain his action as authorizing additional Presidential powers. "[T]he President has won because, for all of its institutional activity, Congress has usually complied with or acquiesced in what the President has done, through legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will."[12]

Koh marshals arguments against this result, but he does not adequately explore the most important of his assigned reasons, the "lack of political will." In my view Congress' lack of political will explains the unsatisfactory (for Koh) state of constitutional law in foreign affairs. However, I would eschew his pejorative description of the term as implying congressional weakness. To me Congress is enormously strong, not weak, and Congress is wise enough to recognize that it is not in the national interest to exercise its prerogative to the extent that Koh and others advocate. In particular, I am skeptical that "bad drafting," or loose and ambiguous drafting, or very precise and specific drafting is an accident. The legislative constraints found in some of the most important framework legislation may not be as well defined as some commentators — and some legislators — would like. However, that is not because of bad drafting, "loopholes," or executive perfidy. If executive

9. Pp. 68-70.
10. 50 U.S.C. §§ 401-05 (1982).
11. P. 112.
12. P. 117.

action represents "a continuing pattern of evasion of Congressional restraint,"[13] it is because Congress prefers it that way.

The War Powers Resolution[14] is a good example. Enacted in the wake of Watergate to restrain Presidential use of troops abroad for not more than sixty days without congressional approval, the Resolution was rejected by the executive branch on constitutional grounds from the beginning, so it seems dubious to count it as heavily as other attempts at framework legislation that the President has accepted. Moreover, experience with the operation of the Resolution reflects its impotence as effective legislation. President Reagan used unilateral force in Grenada, Lebanon and Libya without any serious effort at constraint by the Congress. During the Persian Gulf intervention, it became clear that the President had no intention of complying with the sixty day stricture. Yet, after considerable discussion, Congress did not seek to halt the intervention. By the time of the Panama invasion, a consensus seemed to have developed that the War Powers Resolution was obsolete. The principal reason is political. Congress and the public want the President to use force, so long as it successfully projects the nation's status as a superpower. Perhaps what is needed, given the criticism of President Bush for not intervening quickly enough in Panama, is a War Powers Resolution that prevents Congress from authorizing the President to conduct unpopular wars.

Koh cites The National Security Act of 1947[15] as another failure in framework legislation. The Act's language is oblique, but the intent to authorize paramilitary actions does not seem to have been questioned until the formation of the *Church Committee*.[16] The Committee's skepticism seems unjustified given the record of the OSS. Moreover, immediate subsequent practices, such as the overthrow of Mossadegh in Iran, and of Arbenz in Guatemala, and the Bay of Pigs invasion may illuminate Congress' intent. Congress certainly knew at the time about the Executive's practical construction of the Act. In this light, Koh's basis for questioning whether covert operations were permitted by the 1947 act and his assertion that "there seems little doubt that Congress expected such operations to be tightly controlled by the President and the N.S.C."[17] seem questionable. It seems equally plausible to surmise that Congress wanted

13. P. 122.
14. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-48 (1982)).
15. *Supra* note 10.
16. *Final Report of the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans*, Book II, S. REP. No. 755, 94th Cong. 2d Sess. (1976).
17. P. 104.

the President to conduct such operations, secretly and successfully, without engaging their own responsibility. If the President's policy seems undesirable, then Congress could always step in and rescue the nation — and the Executive — from its more egregious foreign policy misjudgments, as Congress did in the case of the Reagan administration's ill-conceived attempts to overthrow the government of Nicaragua.

A third example offered by Professor Koh of executive arrogation of power is the Presidential use of informal agreements in trade and arms control, made without the formal participation of Congress or the Senate. For twenty years presidents, on their own authority, have negotiated voluntary export restraints on steel and automobiles and have executed arms control agreements like the SALT I extension, SALT II observance, and the Stockholm Declaration. Congress has accepted the results of such agreements without complaint. It would seem appropriate to take account of this congressional acquiescence, rooted as it is in the American political culture, in sketching the fabric of constitutional law. Congressional acquiescence is often treated as implicit support for executive authority to perform these actions.

Koh also criticizes the abuse of delegated legislative power. Discussing the post-Vietnam/Watergate reforms such as IEEPA,[18] the Trade Act of 1974,[19] the Export Administration Act of 1979[20] and the Arms Export Control Act of 1976,[21] he states that "this generation of statutes [generally] created not only procedural constraints, but also substantial fresh delegations of foreign-affairs authority. By the late 1980s, 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."[22] Congress certainly recognizes the need for quick action and hence the necessity for delegated power. Congress also recognizes that even paying "lip service" to procedural requirements can have an effect on substantive policy-making. More importantly, these requirements create a public record and political accountability, thus enhancing the effectiveness of congressional oversight.

It is true that the restraints are not as tight as they could be, but I believe that Congress wants it that way. Koh correctly diagnoses the political incentives that induce Congress not to overly bind executive action — the tendency of Congress to deal with past problems, to respond

18. 50 U.S.C. §§ 1701-06 (1982).
19. 19 U.S.C. §§ 2101-2487 (1982).
20. 50 U.S.C. §§ 2401-2413 (1982).
21. 22 U.S.C. §§ 2751-2796 (1982).
22. P. 46.

to interest groups, and to be co-opted through the interconnections among committees, executive agencies and constituencies. Koh laments bad drafting but the real culprit is compromise. Congress is a deliberative, collective body where the final product reflects many different, sometimes inconsistent, considerations. Compromise, in such a context, does not result in pure restraint because many members do not believe that the Executive should be hampered. To the contrary, the dominant view in Congress is that the President should be, almost always, free to act.

As the author of an exhaustive study of recent congressional activism has pointed out, "[t]he powers of the modern presidency clearly were not wrested by self-seeking chief executives from a struggling but ultimately yielding Congress in a series of constitutional coups d'etat."[23] Presidential power was accumulated pursuant to law, and by congressional initiative.[24] In addition to IEEPA, the Export Administration Act and extensive trade legislation cited by Koh, Congress has also authorized and funded a standing armed force of over two million men and women, a vast intelligence bureaucracy, and dozens of agencies with thousands of officials participating in all facets of international organization and activity. For the most part, having created the bureaucracies, Congress has been content to let the Executive run them.

It does so for good reason. Congress is above all a political body. Its members are practical politicians who see themselves as responsible for the effective functioning of the government, in addition to being accountable to their particular constituencies. Because of their role as national statesmen, they recognize that many foreign policy problems are truly national in scope and require that the nation speak with "one voice," which a legislative body cannot provide. Being practical politicians they also understand that foreign policy decisions require compromises of competing interests, and, often, trade-offs between regional or factional constituencies are needed to promote the overall national interest. Most fundamentally, the strictly political interests of Congress lead it to expect, and eventually defer to, Presidential leadership. Those interests include, most obviously, the desire to be reelected. To that end, a member must advance special interests and also maintain a favorable public posture as an effective legislator and politician. Those interests inevitably

23. J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 155 (1981). The remaining text in this section is adapted from, Trimble, *The President's Foreign Affairs Power*, *supra* note 4.

24. *See generally* C. ROSSITER, THE AMERICAN PRESIDENCY (2d ed. 1960 & Introduction (1987)); L. FISHER, PRESIDENTIAL SPENDING POWER (1975).

dictate positions, for example, on trade and military programs, or on foreign aid to Greece and Israel.

But most foreign policy is far removed from immediate political concerns. Politically, there is almost no advantage in having to take a position, through a recorded vote, on pressing foreign policy questions with no immediate implication for local constituencies and with uncertain long-term consequences. To the contrary, it may be preferable to accept Presidential leadership and preserve the ability to criticize policy decisions when they become politically unpopular. Acquiescence here enables Congressmen to take credit for popular decisions and to criticize, while gathering helpful publicity and stature, those that go awry. Thus, a member may see no advantage, for example, in taking a position on Cambodia. Stopping communism may be popular, but if victory results in advancing the fortunes of Pol Pot, it may not be so desirable. As Koh points out, voting for a policy necessarily entails taking responsibility for its failure.

> In many cases, a critical mass of congressional members has simply been unwilling to take responsibility for setting foreign policy, preferring to leave the decision — and the blame — with the president. As Senator Fullbright recalled, long before the mid-1970s, "[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."[25]

It may serve a member's political interest to let the President take the heat for decisions that may be desirable in the overall national interest but are unpopular in certain sectors. For example, voting for or against retaliatory tariffs, like those imposed in response to the European Community's ban on hormone treated beef, may be politically awkward for congressmen. Such tariffs will hurt some importers while helping some farmers, but will also risk a general trade war that would hurt everyone.

Congress is subject to other obvious limitations in setting foreign policy, of which thoughtful members are certainly aware. Diplomacy requires a long-term perspective while Congress tends to be influenced by short-term interests. Congress often concentrates on narrow or immediate issues, dealing with broad problems as if a single factor should be of determinative significance. Additionally, Congress acts through the blunt instrument of legislation. Once a policy has been legislatively directed, it remains in force until someone can overcome the inertia preventing new legislative action. When a problem vacates the headlines,

25. P. 132.

it may not be easy to get the legislature to focus on the significance of changed circumstances.

Members also recognize that the executive branch can act quickly and has access to expertise and secret information unavailable to Congress. These classic justifications for Presidential power are less persuasive today than they were in the 18th century, because of expanded congressional staffs, regular travel abroad, greater access to information and the effects of international interdependence generally. Nevertheless, the information/expertise gap must still induce members to be somewhat wary of taking responsibility for matters the consequences of which they feel less confident than of issues wholly domestic in nature.

III. The Counter-Assault on Behalf of Congress

Although Koh concludes that the Iran-Contra affair, viewed in the perspective of other Presidential initiatives in the past two decades, adds up to "a continuing pattern of evasion of congressional restraint,"[26] his recommendations point to incremental reform. He advocates new framework legislation incorporating a number of specific reforms, some of which have already been enacted. Koh's general objective seems uncontroversial (except perhaps to an unreflecting criminal defendant bent on preserving his liberty):

> Any charter legislation should aim, primarily, to reaffirm the core constitutional notion of balanced institutional participation, not to encourage congressional micromanagement or improvident judicial activism in foreign-policy matters. Thus, any reform legislation should acknowledge the Executive's leading constitutional role in foreign affairs, at the same time as it seeks to reduce the isolation that currently surrounds executive branch activities, to enhance internal executive branch deliberations, and to increase congressional-executive dialogue while foreign-policy objectives are being set and initiatives implemented. The goal of the reform effort should be to assign institutional responsibility by clarifying the legal and constitutional framework within which foreign-policy decisions shall be made.[27]

This analysis is clearly correct and should be uncontroversial. That is not to say that some lawyers or academics, seeking to justify a specific policy objective, will not trot out the usual broad claims supported by ritualistic invocations of Hamilton or Madison. But in the real world no one would dispute that constitutional power is shared among the three branches of government. The question is where the balance should be struck.

26. P. 122.
27. P. 160.

Koh suggests that we discard the "vision" of Presidential power that some commentators may divine from the Supreme Court's decision in *U.S. v. Curtiss-Wright Corp.*,[28] a vision he accuses the Burger court of blessing. He correctly notes that Presidential lawyers often quote the famous dictum of the case asserting inherent, sovereign powers in the presidency. After a mysterious explanation of the passing of sovereignty to the United States federal government, Justice Sutherland states that "[t]he President alone has the power to speak or listen as a representative of the nation . . . he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[29] Sutherland expansively refers to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[30]

The language makes a nice quote for an executive branch brief, but it is not very helpful in an analysis of the real issues and, as Koh points out, it is woefully deficient as a "vision" of constitutional law. The dictum is both incomplete and unnecessary to the decision in the case, although the existence of some virtually exclusive Presidential power seems generally accepted. In deciding the case, it was unnecessary to rest the decision on inherent Presidential power because Congress had fully delegated ample authority to the President to support the action taken. Neither Justice Sutherland nor subsequent justices have sought to articulate the specific content or scope of this power. Aside from the dicta, there is little additional authoritative material on the scope of this elusive power.

Koh suggests substituting a *Youngstown* vision for the *Curtiss-Wright* vision, based on dictum from the *Youngstown Sheet & Tube Co. v. Sawyer*[31] [steel seizure] case. In that case, Justice Jackson introduced a framework for analysis that Justice Rehnquist has described as representing as much "analysis and common sense as there is in this area":[32]

> 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. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.
> 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

28. U.S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936).
29. *Id.* at 319.
30. *Id.* at 320.
31. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
32. Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

> authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
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> 3. When the President takes measures incompatible with the expressed 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.[33]

It may be the best attempt at analytic coherence to date, but it does not provide much guidance in actually contested situations.

The *Youngstown* vision is not much more focused than the *Curtiss-Wright* vision. Each case recognizes some inherent Presidential power, but neither provides any guidance for articulating its scope. Koh credits the Jackson analysis with an "unusual clarity with which it articulates the concept of balanced institutional participation that underlies the National Security Constitution."[34] This vision recognizes that Congress plays a role, and that when Congress authorizes Presidential action, or acquiesces in it, Presidential foreign relations power is strong. But the Jackson "vision" evaporates when it comes to determining what is within the scope of that "lowest ebb" of Presidential power, where the Executive acts against congressional will. We know from *Youngstown* that it does not include seizing the nation's steel mills to solve a labor dispute, and we know from Iran-Contra that it does not include lying to Congress. But the rest is obscure and is not elucidated by "applying" the Jackson "analysis."

When one attempts to articulate the content of the President's exclusive foreign affairs power, the sources of law range from statements made by the President, members of Congress and Supreme Court justices to formal acts of Congress and particular assertions of Presidential authority that went uncontested. The resulting "common law" is mixed, and much depends on congressional acquiescence. Critics like Koh seem to want to abolish acquiescence and to substitute express congressional approval or rejection. Hence Koh favors the idea of centralizing congressional decision-making in foreign affairs through a smaller national security-type committee, and using fast-track procedures to assure rapid action without extraneous amendments. These proposals are good ideas. Indeed, I would favor a procedure for regular executive-legislative con-

33. Youngstown Sheet & Tube Co. v. Sawyer, *supra* note 31, at 635-38 (Jackson, J. concurring).

34. P. 105.

sultations, using leadership committees on both sides, meeting once a week and covering the entire range of national security policy issues, instead of Koh's program of ad hoc consultations on war powers. The National Security Council (NSC) adviser could conduct sessions with a consultative group such as that suggested by Koh, assuring the President a second opinion while avoiding the barriers created by the need to call a special meeting. I would also favor strengthening the role of the NSC adviser, and, in that connection, would agree with Koh that the position should be subject to Senate confirmation. These reforms would systemize and arguably facilitate congressional participation in the making of foreign policy.

Along these lines, "centralizing Congressional procedures for deciding whether particular substantive agreements should be ratified by treaty or executive agreement,"[35] might also be desirable. The decision has been to date a Presidential prerogative. In light of the increased effects of foreign policy, especially economic policy, on domestic affairs, it is sensible to move toward greater use of congressional-executive agreements. Such a move would also be beneficial in the area of arms control. Some of the political factors discussed earlier, however, may inhibit acceptance of the Koh proposal. The Senate would surely resist.

The establishment of a congressional legal adviser would also be beneficial, at least for the foreign affairs legal profession. The principled argument in its favor, however, is less persuasive. While some would argue that more legislative procedures would contribute to the development of the "rule of law," I am skeptical because most decisions at the margin in this field are political decisions. Koh also seems to place excessive faith in the mandatory effects of the "rule of law" approach in his other recommendations. For example, in suggesting that executive legal opinions be submitted for review by congressional lawyers, he seems to assume that participants render neutral, objective legal opinions reflecting a single correct view of "the law." Koh obviously knows that most legal issues, in the government as elsewhere, can be argued both ways, and that most lawyers attempt to fashion legal advice to help clients achieve legitimate objectives. It seems doubtful that more systematic exchanges of legal opinions would make much difference in the grand legal scheme. Nevertheless, it might inhibit the most egregious excesses of advocacy and, in that light, would be a desirable development.[36]

35. P. 195.

36. Koh also proposes the establishment of an independent intelligence oversight administration. That proposal seems to assume that there is a single, correct "bipartisan" policy that can be agreed upon. Like the single "rule of law" assumption discussed earlier, this approach

In addition to revitalizing the congressional role, Koh would also activate the judiciary. The courts have invoked numerous doctrines — lack of standing, ripeness, political question — to avoid settling controversies between the President and Congress. As Koh points out, the courts can and do decide whether a "war" exists for purposes of determining coverage under an insurance policy, and could do so under the Constitution as well. The consequences are somewhat different, however, and I suspect that the courts would normally prefer to avoid assessing, for example, the legality of the invasion of Panama for reasons similar to those that lead Congress to defer to Presidential power in the first place. I also suspect that if the courts did get into the foreign affairs law business, they would greatly expand the explicit scope of Presidential power. I am not sure that this would be a desirable result, and I know it is not what Koh has in mind.

Two of Koh's proposals seem out of step with his general approach to constitutional law as an evolving body of law consisting of many formal and informal sources. He argues that the Byrd amendment[37] should be applied mechanically across the board. The Byrd amendment was applied in ratification of the INF Treaty as a reaction to the untenable "reinterpretation" of the ABM Treaty and the "Sofaer Doctrine" invented to justify it. The Byrd amendment provided that the President can not change an interpretation of the INF treaty adopted by the Executive at the time of Senate action, without the consent of the Senate or the Congress. It thus embodied a notion of "entrenched" meaning of legal norms that is at odds with the normal development and adaption of law to changed circumstances. It fails to permit executive reinterpretations, with congressional acquiescence, to take account of changed circumstances. Like the constitutional development that Koh so perceptively describes, treaties evolve over time in informal and mysterious ways. A Byrd amendment has no place in our modern foreign affairs jurisprudence.

Finally, the idea of more congressional involvement in foreign affairs has a populist — and popular — ring. Yet the underlying assumption is untested. How would foreign policy be different toward China, the USSR, Japan, Iran, and the Uruguay Round? Would it be better as a result of congressional and judicial involvement, subjecting it to more rules and procedures? Whose interests would be advanced and whose for-

seems unlikely to stand the test of events. What is the current bipartisan view of support for rebels in Angola, Cambodia, Afghanistan, and Lithuania? The choices on these matters are political choices. Reform should enhance political accountability, not obfuscate it.

37. 134 CONG. REC. S6937 (daily ed. May 27, 1988).

feited? Those inquiries, however, would require another book, which has not yet been written. I hope that it will soon be undertaken by a scholar as thoughtful, careful and perceptive as Professor Koh.