Reply

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Professor Lobel premises his review on a flattering, but ultimately ill-chosen, comparison between my book and John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review*. Both books, in his view, erroneously develop a "process-based theory of the Constitution," and must therefore answer the same, familiar objection: that "it is theoretically impossible to divide process from substance."[1] Perhaps both books could be called "process-based" in the broad sense that each offers proposals to protect and improve the decision making processes of American governmental institutions. But there fruitful comparison largely ends. As its subtitle makes clear, Professor Ely's book sought to address Alexander Bickel's "counter-majoritarian difficulty" by endorsing a constitutional theory of *judicial review* that would limit courts to policing the processes of representative government.[2] My book addresses a wholly different problem — the decline of our constitutional system of checks and balances in foreign affairs — and proposes an entirely different solution: legislative reform, through enactment of a framework statute (a "national security charter") to promote the balanced participation of all three branches of government in national security decision making.

Unlike *Democracy and Distrust*, *The National Security Constitution* does not propound process-protecting principles to limit judicial involvement in constitutional adjudication. To the contrary, it urges legislation that would encourage both the courts and Congress to resume their constitutionally prescribed involvement in foreign affairs decision making. Thus, far from propounding a theory that would place a constitutional ceiling upon judicial review, my book proposes a legislative "floor" devised to guarantee meaningful judicial and congressional participation in

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1. Lobel, *The Relationship Between the Process and Substance of the National Security Constitution*, 15 YALE J. INT'L L. 360, 369 (1990).

2. *Compare* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.") *with* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87, 181 (1980) (urging a "participation-oriented, representation-reinforcing approach" that "bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack").

national security decisions. With particular regard to the courts, my book argues not that judges have engaged in unprincipled activism, but rather, in unprincipled abstention from constitutional and statutory adjudication, through indiscriminate application of such slippery concepts as the political question doctrine, congressional standing, and equitable discretion.[3]

These differences not only spare me from having to refight Professor Ely's battles; they also undermine Professor Lobel's specific criticisms of my book. For my book nowhere makes the untenable claim that the substance and process of our foreign policy can be artificially separated. I merely suggest, as Professor Lobel himself anticipates, "that even if substantive goals were linked to structural reforms, the way to begin is to reform the process. A process-oriented approach would not . . . be an end in itself, but simply the first step in redefining both the structure and substance of American foreign policy."[4]

Professor Lobel responds that such procedural reform "is the same approach that was tried in the 1970s and failed."[5] But as my book demonstrates, the procedural reforms of the 1970s failed not because they focused on improving process, but because they overlooked institutional incentives: the executive's incentives to act secretly and without consultation, Congress' incentives to acquiesce, and the courts' incentives to defer.[6] The book's specific legislative proposals, most of which Professor Lobel approves, aim to restore the constitutional roles of Congress and the courts in a system of balanced institutional participation "not by ignoring, but by accounting for and revising, the incentives of the regulated institutions."[7]

Professor Lobel finally claims that a fundamental transformation of the substance of United States foreign policy must precede the kind of procedural reform that I endorse. But how is such a substantive transformation to occur when those who make our foreign policy lack effective institutional procedures for interbranch dialogue? My book argues

3. *See* H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 146-49 (1990) [hereinafter cited by page number only]. Ironically, another reviewer has already faulted me for *not* urging that judicial review in foreign affairs be restricted to examination of procedural issues. *See* Cole, *Youngstown v. Curtiss-Wright* (Book Review), 99 YALE L. J. 2063, 2080 (1990) (arguing that "Koh's proposal is not modest enough," because "the judicial role [in foreign affairs should be] narrowly *circumscribed* in the first instance to enforcing procedures for congressional-executive interaction") (emphasis in original).

4. Lobel, *supra* note 1, at 371.

5. *Id.*

6. Pp. 203-07.

7. P. 204.

that the existing legal structure has too often allowed the branches to *avoid dialogue*, thus impairing the creation of foreign policy consensus.[8] My reform proposals would promote institutional dialogue by forcing the President to consult with Congress before he acts, by forcing Congress to declare its approval or opposition to his actions promptly after they occur, and by encouraging both political branches to turn to the courts for quick resolution of interbranch disputes over the legality of Presidential conduct.[9]

I do not deny the undeniable: the Cold War's end has confronted the United States with many difficult foreign policy choices. *The National Security Constitution* fully acknowledges that the branches of the United States government must address these substantive questions.[10] But if Vietnam and the Iran-Contra Affair teach us anything, it is that in the 1990s, such substantive decisions should not be made by the executive branch alone, but through executive action supplemented by congressional role delineation and judicial guidance, a process that "would be flexible enough to respond to unforeseen world events while remaining true to the Founders' constitutional concept of balanced institutional participation."[11] I agree with Professor Lobel that the political branches, like partners in a marriage, must seek accord on matters of substance as well as process. But how can the branches hope to forge the new substantive foreign policy consensus that Professor Lobel envisions unless they first learn how to talk to one another and to respect each other's right to participate in decision making?

At least Professor Lobel accepts *The National Security Constitution*'s major premise: that fundamental defects exist in the structure of our national security decision-making process. Professor Trimble's review both rejects that claim and repeats a troubling assertion that he has made elsewhere: that the current state of foreign affairs decision making is justified because Congress, the courts, and the American people not only accept, but affirmatively "want," the systematic accretion of Presidential power in foreign affairs.[12] But his review misunderstands three key points. First, the problem is systemic, not merely congressional. Second, the congressional acquiescence Professor Trimble cites is not the justifi-

8. *See* pp. 8, 158-60, 205, 226.

9. Pp. 153-207.

10. *See, e.g.*, pp. 7, 120-21, 212, 224-28.

11. P. 227.

12. *Compare* Trimble, *The Acquiescent Congress and Foreign Affairs*, 15 YALE J. INT'L L. 345, 346 (1990) [hereinafter Trimble] *with* Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750 (1989) *and* Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461 (1989).

cation, but part of the problem. Third, and most important, even if Congress does want to acquiesce in Presidential action, what ultimately matters is not what Congress wants, but what the Constitution requires.

In reviewing American foreign policy since Vietnam — specifically warmaking, treaty affairs, emergency economic powers, arms sales, military aid, and covert operations — *The National Security Constitution* reveals a recurrent historical pattern.[13] In each of these areas, Congress reacted to Presidential overreaching by enacting legislation, which nevertheless failed to prevent new overreaching. As my book repeatedly emphasizes, the President is not the only culprit in this recurring scenario. The pattern has recurred in part because Congress has acquiesced in Presidential initiatives and in part because the courts, through unjustifiably deferential techniques of abstention and statutory construction, have repeatedly read congressional silence or disapproval to constitute acquiescence in or approval of Presidential action.[14] Thus, over time, our national security decision-making process "has degenerated into one in which the president (or his people) acts, Congress reacts belatedly (if at all), and the courts validate or defer."[15]

My intent in *The National Security Constitution* is not to engage in President-bashing, but to expose this systemic imbalance. For Presidents, I argue, have been as much the victims as they have been the villains in this continuing drama. The current decision-making system "places too great a burden upon the president and the presidency, while allowing Congress and the courts too easily to avoid constructive participation in important national decisions."[16] The solution thus is not to blame particular Presidents, so much as to restructure institutional incentives.[17]

It is against this systemic background that the particular problem of congressional acquiescence must be viewed. As I argue, congressional acquiescence results not merely from the fecklessness of individual members, but from deeper institutional problems within Congress — what my book describes as legislative myopia, inadequate drafting, ineffective leg-

13. Pp. 38-64.
14. *See* pp. 123-49.
15. P. 226.
16. P. 156.
17. [T]he current structure of our national security system gives the executive branch incentives to act; Congress, incentives to acquiesce; and the courts, incentives to refrain from passing judgment on the conduct of the other two branches. The *synergy among these institutional incentive structures*, not the motives of any single branch, best explains the recurring pattern of executive adventurism and interbranch conflict in our postwar foreign policy.
P. 156 (emphasis added).

islative tools, and an institutional lack of political will.[18] The currently fragmented and decentralized congressional structure has promoted a state of near perpetual "institutional acquiescence," in which many individual members hold strong views on foreign policy but lack the institutional mechanisms for receiving information, building internal consensus, or expressing their views collectively. Furthermore, a series of broadly worded judicial decisions have not only construed legislative silence as tacit approval for Presidential actions, but have also invalidated some of the few institutional mechanisms for collective expression that did exist (the legislative veto, for example).[19] Over time, I argue, these factors have systematically deprived Congress of much of its ability to register nonacquiescence in Presidential initiatives. Thus, many of my reform proposals are specifically directed at correcting this grave institutional problem.[20]

Professor Trimble's own analysis of Congress' institutional failings largely tracks my own.[21] This makes particularly puzzling his conclusion that congressional and public acquiescence in Presidential *faits accomplis* somehow equals affirmative approval of those acts. From pronouncing "accretions of Presidential power . . . for the most part *acceptable* to Congress and the American public," he moves inexplicably to the conclusion that such accretions are strongly desired.[22] "The foreign policy implicated in Iran-Contra," he says, "unlike the Vietnam War, was not deeply unpopular."[23] But it is a long way from a "not deeply unpopular" executive policy to a policy that Congress and the people affirmatively want. Did Congress or the people "want" President Reagan to trade arms for hostages? Did they "want" President Bush to send his National Security Assistant secretly to China after the Tiananmen Square massacre? In both cases, of course, the President or his men acted unilaterally, without checking to see what Congress and the people "wanted," then presented the results of their actions as *faits accomplis*. That Congress and the public have, to varying degrees, acquiesced in

18. Pp. 123-33.

19. *See* pp. 134-46 (describing, *inter alia*, Dames & Moore v. Regan, 453 U.S. 654 (1981); Regan v. Wald, 468 U.S. 222 (1984); INS v. Chadha, 462 U.S. 919 (1983)). Professor Trimble doubts that these cases would have been better decided under Justice Jackson's concurring analysis in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952), an analysis he deems "obscure". *See* Trimble, *supra* note 12, at 356. But as my book demonstrates, the problem with Jackson's *Youngstown* analysis lies not in its lack of clarity, but in the way the Burger and Rehnquist Courts have misapplied it in these cases. *See* pp. 138-43.

20. *See generally* pp. 166-81, 189-202.

21. *Compare* Trimble, *supra* note 12, at 351-54 *with* pp. 123-33.

22. Trimble, *supra* note 12, at 346 (emphasis added).

23. *Id.* at 347.

these initiatives hardly means they would have approved if consulted in advance.

To this Professor Trimble answers that Congress and the people don't want to know in advance. They "want Presidential leadership, which requires correlative Presidential power."[24] But as my book makes clear, the only true way to reflect what the people "want" in foreign policy is to ensure that their chosen congressional representatives have regular opportunity to participate in the decision-making process.[25] In response, Professor Trimble cites the failure of the War Powers Resolution,[26] the National Security Act of 1947,[27] the International Emergency Economic Powers Act,[28] and other post-Vietnam framework statutes as proof that "the dominant view in Congress is that the President should be, almost always, free to act."[29] But as my book illustrates, the fact that the executive branch has been able, with judicial complicity, to exploit and expand loopholes in these framework statutes hardly demonstrates that Congress enacted them with the intent that they be emasculated. Certainly, Congress enacted many of these statutes with an intent to delegate to the President additional powers. But at least equally important was Congress' determination to subject those powers to the procedural constraints of consultation, reporting, committee oversight, and public declaration. The Executive has repeatedly sought to decouple these delegated authorities from their accompanying constraints.[30] During recent military interventions in Grenada, Libya, the Persian Gulf, and Panama, for example, the President ignored or paid lip service to the War Powers Resolution's clear procedural requirements of consultation, notice, and mandatory withdrawal.[31] During the Iran-Contra affair, the executive branch ignored numerous procedural requirements in the arms export

24. *Id.* at 346.

25. My book rejects the notion that unilateral Presidential decision making is somehow "more democratic" than decision making made through balanced institutional participation. *See* pp. 225-26 ("Although the president and vice-president are now essentially popularly elected, they are the only two members of the executive branch who are, and even they do not face re-election during their second terms."). Presidential elections hardly constitute binding votes on foreign policy issues, and as we have recently seen, first-term presidents may not feel bound even by campaign promises that are prefaced by the words "Read my lips." The Iran-Contra affair offers a particularly vivid example of undemocratic decision making, in which unelected executive officials nullified numerous statutory provisions enacted through the democratic process, allegedly without the supervision or authorization of any elected officials. *See* pp. 113-16.

26. 50 U.S.C. §§ 1541-48 (1982).

27. 50 U.S.C. §§ 401-05 (1982).

28. 50 U.S.C. §§ 1701-06 (1982).

29. Trimble, *supra* note 12, at 352.

30. *See* pp. 45-48.

31. *See* pp. 38-40.

statutes and read the requirement of "timely notice" in the intelligence laws to mean "no notice."[32] Congress intended all of these statutory contraints to be self-executing, but the courts have refused to enforce them and members have been unable to muster the bicameral two-thirds votes necessary to sustain new laws to enforce those already on the books. That such a structurally disempowered Congress often acquiesces hardly constitutes proof that "Congress wants it that way."[33]

Professor Trimble further mistakes a widely held desire for Presidential leadership — which I share[34] — as somehow mandating blanket congressional approval of unrestrained Presidential unilateralism. Yet here again, he confuses a *strong* President with an *autonomous* President. My reform proposals may reduce Presidential autonomy, but their larger goal is to enhance Presidential strength. By encouraging Congress not simply to acquiesce, but to go on record as approving or disapproving the President's initiatives, my goal is to enable Presidents to initiate policies that will later command congressional support.[35] While accepting most of my proposals as "good ideas," Professor Trimble treats them as somehow threatening to Presidential strength.[36] As my book clarifies, however,

> [t]o the extent that these reform proposals . . . authorize certain presidential activities, clarify zones of constitutional responsibility, promote interbranch dialogue and cooperation, and avert cyclical interbranch conflict, they

32. *See* pp. 49-51, 57-62.

33. Trimble, *supra* note 12, at 351.

34. *See* p. 7 ("Today's world demands not simply a strong president, but one who operates within an institutionally balanced constitutional structure of decision making."); p. 206 (my "approach seeks to preserve the respective roles of the three branches under our National Security Constitution with the president in the lead, Congress in a participating, partnership role, and the courts as crucial arbiters of a lawful foreign policy"); p. 215 ("we need 'to devise means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control.' ")(quoting A. SCHLESINGER, THE IMPERIAL PRESIDENCY x (1973)).

35. As President Bush discovered when he sought emergency aid for Panama some time after his invasion, short-term freedom to act unilaterally with respect to a particular country hardly guarantees long-term congressional support for his policies. *See, e.g.*, 48 CONG. Q. 253, 345 (1990).

36. *See* Trimble, *supra* note 12, at 356. Professor Trimble takes serious issue only with my endorsement of the Biden-Byrd condition to ratification of the Intermediate-Range Nuclear Force (INF) Treaty, a provision he claims "has no place in our modern foreign affairs jurisprudence." *Id.* at 358. But as I make clear elsewhere in this volume, I do not view the Biden-Byrd Amendment as a radical departure, but rather as a hornbook statement of constitutional law, which would govern the interpretation of all duly ratified treaties, even if not expressly enunciated in a Senate condition to treaty ratification. *See generally* Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 337 & n.2 (1990) (describing Biden-Byrd condition).

should ultimately strengthen, not weaken, the president's hand vis-à-vis the outside world.[37]

Professor Trimble finally speculates not only that Congress desires acquiescence, but that the courts also "would normally prefer to avoid assessing" the legality of executive conduct in foreign affairs.[38] Even assuming that this is so, what ultimately matters is not what Congress and the courts want to do, but what the Constitution *requires* them to do. There are many famous cases, including *Youngstown Sheet & Tube Co. v. Sawyer*,[39] which I am sure the Supreme Court would have preferred to avoid deciding. But as my book argues, it is "[p]recisely *because* federal judges enjoy life tenure and salary independence and owe nothing to those who appointed them, [that] it is their business to say what the law is in foreign affairs."[40] Similarly, the Constitution assigns Congress many functions that I am sure it does not relish exercising, such as its power to declare war or its power to lay and collect income taxes.[41] But surely "the framers did not entrust the war power to Congress for the benefit of congressmen; they did so for the benefit of the citizenry."[42] The Constitution does not require, nor should it tolerate, judicial or congressional acquiescence in unconstitutional Presidential behavior.

In sum, I fear that Professor Lobel has misjudged my mission, while Professor Trimble has misunderstood my message. My mission is not to exalt process over substance, but to propose a constitutional, procedural framework in which important substantive discussions about our post-Cold War foreign policy can take place. My message is not that Presidential strength or leadership is evil, but that the Constitution demands a national security decision-making process in which the President leads, Congress oversees rather than acquiesces, and the courts vigilantly police the boundaries of unlawful conduct.

At bottom, *The National Security Constitution* is about dialogue. By answering my colleagues' careful reviews, I hope that I, too, have opened

37. P. 218.
38. Trimble, *supra* note 12, at 358.
39. 343 U.S. 579 (1952).
40. P. 224 (emphasis in original).
41. U.S. CONST. art. I, § 8, cl. 11; *id.* amend. XVI.
42. F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 214 (1986). *See also* Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 876, 922-23 (1990) ("[T]he constitutional prerogatives of Congress are not what's at stake [in the war powers debate]. What is at stake — and the framers understood this well — is the judgment that a single individual should not be able to lead the nation precipitously into war and thereby risk the lives of all of us, especially our young people.").

dialogue on issues that are far too important to be ignored and far too rarely discussed with the thoughtfulness that my colleagues display.