The Relationship Between the Process and Substance of the National Security Constitution


Jules Lobel‡

I. Introduction

The relationship between the processes of government established by our Constitution and the substantive values underlying those processes has been a subject of debate for many years. Scholars such as Burt Neuborne and John Hart Ely have articulated process-based theories of the Constitution that seek to avoid using the Constitution as interpreted by the judiciary to resolve disputes over substantive values.¹ Harold Koh’s excellent book, The National Security Constitution,² is a prominent addition to this rich tradition, extending the analysis to the foreign affairs provisions of our Constitution.

In many respects, Professor Koh’s book reminds me of John Hart Ely’s masterpiece, Democracy & Distrust.³ Koh’s work, like Ely’s, is an ambitious project. Both books contain a breadth of vision and argument, designed not merely to explain one particular event, case, or narrow area of law, but to develop a theory to explain a fundamental problem of American constitutional law.

† Professor of Law, Yale Law School.
‡ Professor of Law, University of Pittsburgh School of Law. I would like to thank my research assistant Richard T. Williams, Carl Liederman of the Yale Journal of International Law, David Cole and Susan Koniak for their invaluable assistance with this essay. Thanks also to Lu Ann Driscoll and the staff of the Word Processing Center at the University of Pittsburgh for their assistance in preparing the manuscript.
3. J. ELY, supra note 1.
Koh and Ely are both wonderful writers, able to capture complexity in powerful and clear prose. *Democracy & Distrust* immediately exercised a powerful influence on the debate over the role of the federal judiciary in our society. Similarly, I believe that *The National Security Constitution* is destined to play an important role in the constitutional debates over foreign policy making in years to come.4

Finally, Koh, as Ely, has developed a process-based theory of the Constitution. While Ely sought to justify judicial review by means of a representation-reinforcement model that allowed the courts to avoid substantive value judgments, Koh views the National Security Constitution through a procedural lens. Both Ely's and Koh's theories require a separation of substance from process, a separation which is both appealing, yet ultimately problematic.

Ely's process-based approach immediately sparked criticism among legal scholars. Professor Tribe, for example, wrote of the puzzling persistence of process-based theories of the Constitution, arguing that the separation of process from substantive values was artificial.5 Harold Koh's wonderfully insightful book suffers from the same weakness. Koh makes a major contribution to our understanding of the Iran-Contra affair by treating it not as an isolated incident, but as one more example of the breakdown of constitutional processes of governance over foreign policy. This breakdown of constitutional process, however, fundamentally reflects our nation's deviation from the framers' Republican values as to how the new nation should conduct its policies with respect to the rest of the world. Executive dominance over the other branches of government in the making of foreign policy is an outgrowth of our nation's effort to dominate other countries. Rejuvenating our constitutional processes requires recharting the substantive course of American foreign policy. It requires recasting our internationalism so that we become more multilateral, co-operative and respectful of international law, and less militaristic and interventionist. Fortunately, the ending of the Cold War has brought the opportunity for rethinking old dogmas that pervade American foreign policy, distorting our constitutional values.

II. The Lessons of Iran-Contra

For Harold Koh, the Iran-Contra affair reflects an ongoing assault on the National Security Constitution. The affair was "not just a passing

5. Tribe, supra note 1.
Although Koh uses the Iran-Contra affair as a starting point, his goal is to utilize that unfortunate episode to illuminate a deeper problem — "systemic flaws in our foreign policy-making process." The core notion of the National Security Constitution is that the foreign affairs power of the United States is constitutionally shared among the three branches of government. This principle, which Professor Koh terms "balanced institutional participation," recurs throughout the book. It is precisely this fundamental principle that the Iran-Contra players ignored, secretly violated, and when confronted, challenged.

In its fact-laden search for the smoking gun, the congressional Iran-Contra committees virtually ignored this basic problem and treated the affair as an isolated incident. The Congress, Special Prosecutor, Tower Commission and public all analogized the Iran-Contra affair to the Watergate break-in and cover-up 15 years earlier. The more appropriate analogy, according to Professor Koh, is Vietnam. Iran-Contra, like Vietnam, reflected not merely a particular lapse of executive truthfulness and compliance with the law, but a consistent pattern of executive circumvention of legislative constraint in the conduct of U.S. foreign policy. It is that pattern of history that the Iran-Contra investigators ignored and that Professor Koh illuminates.

Koh's discussion of the pattern of history reflected in Iran-Contra effectively demonstrates the connection between a wide range of foreign policy issues — treaty powers, war powers, international economic emergency powers, covert action — that are too often dealt with separately. While the framers of the Constitution had devised a careful balance between the branches in conducting foreign affairs, a pattern of executive dominance developed during the post-World War II era, of which the Vietnam War and Iran-Contra are simply two of the more visible examples.

This executive dominance pervades all areas of foreign policy-making and has proven to be relatively impervious to reform. For example, while the framers provided that treaties would be a part of federal law and therefore binding on the Executive, recent presidents have sought to unilaterally modify, bend or simply violate U.S. treaty commitments. Moreover, although early administrations such as the Adams Adminis-

7. P. 3.
8. P. 5.
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tration turned to Congress when it sought to terminate our treaty obligations, modern Chief Executives exercise no such restraint. Congress and the courts have declined to provide serious resistance to unilateral executive action in foreign affairs. Congress, for example, took no action when the Reagan Administration unilaterally modified our commitment to jurisdiction in the World Court or when it unilaterally terminated our Friendship and Commerce Treaty with Nicaragua. Moreover, the Supreme Court refused to intervene to prevent the Carter Administration from terminating the U.S. Mutual Defense Treaty with Taiwan, a decision which the Reagan Administration read to confirm executive power to terminate U.S. treaty commitments.

Similarly, modern Presidents have transgressed the clear constitutional intent of the framers that Congress must first approve the offensive use of force against another nation. Presidents in the post-World War II era have repeatedly sent U.S. troops into combat abroad in Asia, Central America and the Middle East without congressional approval. Moreover, post-World War II Chief Executives have articulated a constitutional power to send U.S. armed forces into combat without congressional approval whenever they detect threats to national security.

With the passage of the War Powers Resolution in 1973, Presidents have increasingly turned to covert paramilitary operations to accomplish policy objectives that they could not achieve by overt military intervention. They did so despite a constitutional framework requiring joint congressional/executive agreement before such covert paramilitary operations could be launched.

Professor Koh also demonstrates a pattern of executive ascendancy in addressing international economic emergencies. In this area, executive dominance has occurred due to congressional delegation of broad statutory authority, rather than executive assertion of unilateral constitutional authority. From the 1950s to 1970s the Executive exercised broad emer-

11. See, e.g., Letter from Thomas Jefferson to James Madison (May 31, 1798), reprinted in 10 WRITINGS OF THOMAS JEFFERSON 41 (A. Lipscomb ed. 1903) (all agree that legislature is the only power that can control a treaty); Letter from Secretary of War James McHenry to President Adams (Mar. 14, 1798), reprinted in THE ADAMS PAPERS (Part IV: Letters Received and Other Loose Papers, Chronologically arranged, 1639-1889) (1958) (suspending the treaties with France would “require the deliberation of Congress”).

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ergency power under the Trading With The Enemy Act. In 1977, Congress enacted the International Emergency Economic Powers Act (IEEPA), designed to narrow the President's emergency authority in non-war time situations. Nevertheless, the Executive has utilized IEEPA to undertake economic warfare against nations such as Iran, Libya, Nicaragua, South Africa and Panama, despite the absence in most cases of a true national emergency as required by the statute. The judiciary has regularly rebuffed challenges to Presidential uses of these broad emergency powers. Even worse, in INS v. Chadha, the Supreme Court invalidated the legislative veto provision that Congress had relied upon to provide a check on executive action.

Professor Koh does not merely demonstrate this pattern of increasing executive dominance throughout the various arenas of foreign policy; he also traces the process historically. In chapter three, he outlines the historical process by which we have reached this unfortunate state of affairs. That chapter analyzes the connection between America's position and role in the world and our National Security Constitution. Our Constitution reflected a militarily weak and geographically isolated nation. The framers concluded that the new republic's cautious and isolationist foreign policy would be best served by a constitutional framework that gave Congress an important role in foreign policy.

In the late nineteenth and early twentieth centuries, however, the United States turned toward globalism and international power. With the extrusion of American power abroad, the limitations on Presidential power, so carefully guarded by the early leaders of the Republic, began to erode. The United States' assertive exercise of military power abroad, the increasing use of executive agreements to bypass the treaty procedure, and the unilateral executive use of force beyond merely protecting American citizens contributed to the evisceration of the limitations on executive power.

The process that started at the end of the nineteenth century culminated after World War II. Every challenge to United States hegemony anywhere in the world began to be perceived as a threat to na-

20. While Presidents certainly took the lead in foreign affairs, 'and took actions that sometimes exceeded the constitutionality permissible, "our first Presidents were overtly deferential to Congress" and never claimed to have "inherent" power to initiate military actions. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 378-79 (1976).
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tional security. In a process culminating with the Vietnam War, the Presidency overwhelmed the other branches and asserted virtually unlimited power over the conduct of foreign affairs.

Congress responded, during the post-Vietnam reform movement, by enacting various statutes designed to curb executive dominance in foreign affairs. The War Powers Resolution, IEEPA, and the Hughes-Ryan Amendment (requiring executive notice to Congress of anticipated covert activities) all attempted to reinvolve Congress in the nation's foreign policy. In a devastating critique of these statutes, Professor Koh demonstrates that they have failed miserably in restoring the balance between the branches. Two key problems have been the lack of political will on the part of Congress to enforce these reform measures and judicial toleration of executive adventurism. In a sense, the failure of Congress and the judiciary to stem the tide of executive overreaching is a failure to be truly committed to our constitutional scheme of balanced participation, a failure that at an extreme would render law meaningless.21

For example, Congress in 1977 sought to curb executive emergency power by providing that future Congresses shall meet to consider a vote on a joint resolution to terminate Presidential emergency proclamations within six months of their promulgation.22 Congress has never followed this provision and the courts have held it to be unenforceable.23 One now questions if this provision of law has any legal meaning. Similarly, the judicial failure to uphold constitutional principles in the area of foreign policy is a failure of constitutional commitment to challenge the misuse of power.24 In a sense, it was a recognition of that failure of commitment that led Justice Stewart to view the Supreme Court's refusal to grapple with the constitutional implications of the Vietnam conflict as the Court's greatest single failure during his tenure as a Justice.25

The National Security Constitution thus demonstrates that a growing gap exists between constitutional doctrine and practice with respect to the U.S. foreign policy decision-making process. For Koh, the Supreme Court's decision in Youngstown Sheet & Tube Co. v. Sawyer26 is a

21. See, e.g., Cover, The Supreme Court, 1982 Term — Foreward: Nomos and Narrative, 97 Harv. L. Rev. 4, 44-45 (1983) (legal meaning depends on a commitment to live by one's interpretation of the law). I am indebted to Susan Koninak for pointing out the role that commitment plays in Robert Cover's thinking. See also H. Koh, supra note 2, at 184, and Cover, supra, at nn. 114, 115 (role of judges).
23. See Beacon Products Corp. v. Reagan, 814 F.2d 1, 4-5 (1st Cir. 1987).
24. See P. 184; Cover, supra note 21, at 58-60.
landmark decision in expressing the constitutional vision of balanced institutional participation. That vision is challenged by Justice Sutherland's dicta in his 1936 opinion, United States v. Curtiss-Wright, where he stated that the President is the "sole organ" of foreign affairs.\footnote{27} But Professor Koh argues that "[a]s a strict matter of constitutional law, . . . Curtiss-Wright has only challenged, not displaced, the prevailing constitutional vision of a shared power in foreign affairs."\footnote{28}

I would go even further than Koh. While I am unsure what is a "strict" matter of constitutional law, Curtiss-Wright certainly has displaced Youngstown in executive branch theory.\footnote{29} But more importantly, Koh decisively demonstrates that both Congress and the judiciary have essentially acquiesced in executive branch unilateral decision making in the area of foreign affairs. For example, there was virtually no dissent in Congress this past winter when the Bush Administration unilaterally decided to invade Panama. Koh is so effective at demonstrating the congressional and judicial reluctance to challenge executive dominance that he undermines his argument that the Youngstown vision of shared power is still predominant. From an empirical, legal realist conception of constitutional law, rather than a prescriptive view, unilateral executive action seems firmly established in constitutional practice.\footnote{30} The Executive acts, Congress acquiesces and the judiciary abstains. In such a circumstance, "the gloss which life has written"\footnote{31} upon the text of the Constitution inevitably illuminates executive power.\footnote{32}

III. Substance and Process

Professor Koh accurately describes the constitutional problem in its multitude of manifestations and draws each thread together in a coherent whole. He provides us with the historical dimensions of the contempor...
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...ary situation, as well as the connection between the constitutional issues and U.S. foreign policy. The question remains, however, what to do about the growing gap between doctrine and reality. It is here that Professor Koh, as did Ely in *Democracy & Distrust*, turns to process as prescription.

Professor Koh's solution to the problems he describes is to reinvigorate the foreign policy processes. "[W]hat the Iran-contra affair actually reveals is that our national security system is *inadequately* regulated."\(^{33}\) Congress must enact "framework legislation" and "a new national security charter" to regulate and protect many aspects of the foreign policy making process.\(^{34}\)

Professor Koh has a number of procedural suggestions, many of them quite good. For example, he suggests improving internal accountability within the executive branch by such mechanisms as making the Attorney General a statutory member of the National Security Council. Koh considers these principles a sort of "‘due process of foreign policy administration,' parallel to those found in the Administrative Procedure Act."\(^{35}\) Similarly, Koh has suggestions for improving congressional oversight of foreign policy, such as developing a core consultative group and making more extensive use of "fast track" legislation. Finally, framework legislation should remove many of the prudential obstacles to judicial review of executive foreign policy actions.

Koh avoids substantive policy recommendations in favor of suggestions for procedural reforms. Eschewing Yogi Berra's wonderfully inane substantive recommendation to avoid close plays at first base by moving the base closer to home, Koh would instead "reinvolve the first baseman and the umpire in the game."\(^{36}\) For Koh, the Iran-Contra scandal fundamentally revealed the "defects in our *process* of national security decision making."\(^{37}\) A new national security charter will succeed in restraining executive adventurism because "*it imposes no substantive view*, but rather embodies a *procedural* notion that already lies at the heart of our National Security Constitution — the principle of balanced institutional participation."\(^{38}\)

33. P. 3 (emphasis in original).
34. Framework legislation is a “quasi-constitutional variety of congressional action, delineating not substantive policy, but processes and relationships.” G. GUNThER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 429 n.3 (9th ed. 1975), cited in Casper, supra note 29, at 482 n.69.
35. P. 110; see also. P. 114 (Iran-Contra violated the legal principles that make up the due process of foreign policy administration).
36. P. 204 (emphasis in original).
37. P. 226 (emphasis in original).
38. P. 226 (emphasis both added and in the original).
Professor Koh’s perspective resonates with the words of Ely’s monumental work on judicial review, published a decade earlier. Ely sought to legitimate judicial review as a mechanism to police democratic processes and not as a means to impose substantive values. He pointed out that the Constitution is overwhelmingly “dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.”39 He recognized that the Constitution has always been substantively concerned with preserving liberty, but argued that it does so by ensuring procedural protections and, more importantly, by prescribing an open process for all to participate in making substantive decisions. The Constitution is thus distinguished by being “a process of government, not a governing ideology.”40 Quoting Justice Hans Linde, Ely concludes that “as a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes.”41

These general principles lead Koh to recommend new legislation to ensure that the foreign policy-making process is shared between the different branches of government. In Ely’s terms, his argument is that “the selection and accommodation of substantive values [in foreign policy] is left almost entirely to the political process and instead the document is overwhelmingly concerned . . . with ensuring broad participation in the processes and distributions of government.”42 For Koh, this means ensuring broad participation between the branches of government in the making of foreign policy.43

Ely’s book immediately caused widespread controversy and comment. His effort to separate process from substance was criticized as fundamentally misguided. Professor Tribe argued that “the Constitution may appear in large part to address the structure and arrangement of government . . . but the concerns that underlie and explain the structures and arrangements ordained by the Constitution are themselves undeniably substantive.”44 For Tribe, there is no reason to believe that the “framework” rules constituting our constitutional processes are, or can be, neutral, with respect to underlying substantive values.

39. J. Ely, supra note 1, at 92.
40. Id. at 101.
41. Id.
42. Id. at 87.
43. Interestingly, Koh does not address the problem of the increasing distance between the government as a whole and the citizenry in the conduct of foreign policy, a problem which is connected to the increasing centralization of power in the executive branch.
44. Tribe, supra note 1, at 1066 n.9 (emphasis in original); see also id. at 1064, 1067-68.
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Professor Paul Brest also argued that one could not isolate constitutional process from substantive decision making.\textsuperscript{45} Decisions about what sorts of discrimination are unconstitutional and which are permissible cannot be made simply by a process-oriented inquiry, but require value judgments about what sort of "prejudice" is justifiable.\textsuperscript{46} Thus, according to Brest, Ely's assumption that the Constitution manifests a clear separation of substance from procedure is flawed.\textsuperscript{47}

Probably the best illustration of the relationship between substantive values and fair and open procedures is to be found in Frank Michelman's work on welfare rights.\textsuperscript{48} Michelman responded to criticism of his theory that welfare rights could not be derived from the Constitution by invoking Ely's process representation-reinforcing approach. Michelman argued that people are not able to participate in the political process when they have nothing to eat, no education or no shelter. Therefore, a theory of judicial review that eschews substantive values and focuses purely on the goal of achieving an open and fair process requires the State to ensure that citizens have at least the minimum wherewithal to participate in the process. Michelman's clever approach simply illustrates the direct connection between substantive values and procedural openness, for one needs a certain degree of substantive liberty in order to be able to utilize the representative process. How much and what kinds of liberty require substantive choices.

The debate over Ely's book is clearly instructive in the foreign policy arena. Professor Koh's attempt to separate process from substance and to address only the procedural aspects of our constitutional crisis in foreign affairs is problematic for two basic reasons. First, as Koh himself suggests, it is theoretically impossible to divide process from substance. Indeed, one of the book's strengths is that it discusses constitutional structures in relation to the international context of U.S. foreign policy. Second, such a separation will not work practically. Why should Koh's solution of more and better legal regulation work any better now than it did in the 1970s when a similar approach was tried and failed?

Professor Tribe's general observation, that the processes and structures of government are intertwined with and reflect substantive goals and values, accurately describes the foreign affairs provisions of the Constitution. The war powers provisions of the Constitution reflect 18th-century Republican ideology that rejected extreme pacifism, but limited the use

\begin{itemize}
\item 46. \textit{Id.}
\item 47. \textit{Id.}
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of force to defensive actions. Therefore, the Constitution gave the federal government the power to raise armies and navies and to use force against other nations, yet attempted to circumscribe such uses by structural mechanisms. The framers sought to ensure popular control over the Executive's resort to force, accepting a basic Republican premise that monarchy was the source of warfare.\(^49\)

Similarly, the constitutional provision requiring the advice and consent of two-thirds of the Senate before a treaty could be ratified promoted the substantive goal of avoiding entangling alliances with European powers. Finally, the constitutional provision providing that treaties would be a part of the supreme law of the land was designed to promote the policy goal of ensuring that the United States would comply with its international obligations.\(^50\) As one recent scholar has noted, "[the foreign policy] provisions of the Constitution meant more than structure. [They] expressed the political and social ideology of the Revolutionary Leaders."\(^51\)

The separation of powers provisions thus served two basic purposes. The first was to promote the democratic value of ensuring that major foreign policy decisions would not be made by one person alone, but would require "the assent of other independent minds."\(^52\) Yet probably more important were the instrumental values sought to be achieved by shared decision-making. To a militarily weak America, constitutional separation of powers was a procedural device designed to achieve the substantive goal of limiting the use of American troops abroad. This cautious U.S. foreign policy was reflected in a constitutional structure that made military and political adventurism difficult. Thomas Jefferson desired an "effectual check to the Dog of War"; James Wilson of Pennsylvania argued that the Constitution was designed not to "hurry us into war"; while Representative George Mason of Virginia stated that the Convention should be "clogging rather than facilitating war."\(^53\) The fact


\(^50\) THE FEDERALIST No. 63, at 437 (J. Jay) (J. Cooke ed. 1961).

\(^51\) R. STUART, supra note 49, at 66.


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that Congress, not the President, was given the power to commit the nation to armed conflict, represented a substantive judgment on the part of the framers that entry of American troops into armed conflict abroad should be difficult. As James Madison noted, “[t]he Constitution supposes... that the Ex[ecutive] is the branch of power most interested in war and most prone to it. It has accordingly[,] with studied care, vested the question of war in the legis[lature].”\footnote{6 Writings of James Madison 312 (G. Hunt ed. 1906).} Congress, as the more cumbersome and popular branch, would presumably move more slowly and check what was believed to be the Executive’s tendency to resort to force.\footnote{Professor Koh’s separation of process and substance leads to problems with his specific reform suggestions. As David Cole has pointed out, a number of Koh’s procedural suggestions such as developing a core consultative group within Congress to share in foreign policy decision making “[m]akes Congress look and act more like the President.” Cole, Youngstown v. Curtiss-Wright, 99 Yale L.J. 2065, 2076 (1990). In reinvolving Congress in an efficient, centralized fashion, Koh ignores the substantive values to be served by a cumbersome, deliberative and representative body that would hinder the use of American forces abroad.} That substantive judgment was conditioned on both general principle and the historical circumstances in which the leaders of the Republic found themselves.

Professor Koh’s view that the principle of shared decision making in the area of foreign policy “imposes no substantive view” is untenable, at least when one defines “substantive view” broadly. While it may be true that a process approach does not yield a substantive outcome in any particular foreign policy dispute, the approach is certainly linked to a substantive policy framework.\footnote{See Gewirtz, Realism in Separation of Powers Thinking, 30 Wm. & Mary L. Rev. 343, 347-48 (“we tend to examine structural issues as if they involved only debates about neutral framework principles that are unconnected to fluctuating substantive policy debates”); see generally Trimble, The Constitutional Common Law of Treaty Interpretation: A Reply to The Formalists, 137 U. Pa. L. Rev. 1461 (1989); Lobel, supra note 17; M. Hunt, Ideology and U.S. Foreign Policy (1987).} Indeed, Professor Koh recognizes that unilateral American action abroad is tied to executive constitutional unilateralism, and that a policy of multilateral international cooperation is consistent with shared constitutional decision making.\footnote{P. 216.} But if that is the case, how can process be separated from substance, how is it possible that Koh’s process vision is substantively neutral?

One might argue 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, under this view, be an end in itself, but simply the first step in redefining both the structure and substance of American foreign policy. The trouble with this approach is that it in essence is the same approach that was tried in the 1970s and failed.

54. 6 Writings of James Madison 312 (G. Hunt ed. 1906).
55. Professor Koh’s separation of process and substance leads to problems with his specific reform suggestions. As David Cole has pointed out, a number of Koh’s procedural suggestions such as developing a core consultative group within Congress to share in foreign policy decision making “[m]akes Congress look and act more like the President.” Cole, Youngstown v. Curtiss-Wright, 99 Yale L.J. 2065, 2076 (1990). In reinvolving Congress in an efficient, centralized fashion, Koh ignores the substantive values to be served by a cumbersome, deliberative and representative body that would hinder the use of American forces abroad.
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57. P. 216.
The aftermath of the Vietnam War brought a host of process-oriented, framework reforms. But, despite a brief period of soul-searching in the 1970s, the United States never fundamentally redefined its aggressive, imperial vision of its role in world affairs. As Henry Steele Commager noted in reflecting upon the Vietnam War, the "abuse of executive power cannot be separated from abuse of national power. If we subvert world order and destroy world peace, we must inevitably subvert and destroy our own political institutions first." Therefore, he wisely recommended that the answer to the abuse of executive power lies in the dissipation of the "forces, motives and fears which underlie the exercise and the rationale of excessive presidential power." Post-Vietnam America never seriously addressed those "forces, motives and fears," and therefore the best intentioned reforms are now, twenty years later, conceded to be failures.

The futility of proceeding with framework legislation in the absence of a substantive change in policy direction can be seen in Koh's book itself. Professor Koh recognizes that "there is no current shortage of legislative proposals [designed to reform our foreign policy-making process], only of congressional will to act upon them." The key reason that Congress refuses to enact such legislation is that most Congresspersons share the perspective that modern U.S. foreign policy interests require a President who can intervene forcefully around the globe and not be tied down by constitutional restrictions. U.S. actions such as kidnapping suspected criminals abroad, invading other nations to capture suspected drug operators, aiding in the assassination of foreign leaders, and using military force to wage the war against drugs abroad are increasingly accepted by all branches of government. All these actions further reinforce executive dominance over foreign policy. The congressional will to enact framework legislation requires redefining U.S. foreign policy to promote multilateral cooperation instead of unilateral adventurism.

Similarly, the judiciary is willing to distort constitutional principles and statutory interpretation because it fears restraining the Executive's functioning in a dangerous world. For example, just this past term the Supreme Court held that the Fourth Amendment did not apply to a search by U.S. agents of a non-resident alien. The case was decided against the background of the Panama invasion and Manuel Noriega's capture, with his subsequent removal to the United States for trial. Chief Justice Rehnquist reasoned that

59. Id. at 57.
60. P. 187.
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For better or for worse, we live in a world of nation-states in which our Government must be able to 'function[] effectively in the company of sovereign nations.' [cite omitted] Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.62

Examples of nations reforming their constitutional processes illustrate the relationship between procedural reforms and substantive changes in foreign policy. In the United States, the "process" reforms of the 1970s, while ultimately unsuccessful, reflected the nation's revulsion at the Vietnam War and a desire to limit our role as the world's policeman. Unfortunately, this substantive retrenchment was short-lived and did not survive the 1970s.

Similarly, the Soviet Union now is attempting to apply separation of powers principles to foreign policy decision making, an effort that reflects Soviet caution about military intervention around the world. While Gorbachev's ascension to the Soviet Presidency in March 1990 occasioned a dramatic increase in his domestic powers at the expense of the Communist party apparatus, he, at the same time, recognized the constitutional principles of shared power in certain key areas of foreign policy. President Gorbachev expressly committed himself to refrain from using armed force outside the country without approval from the Soviet Legislature.63 He would depart from this otherwise categorical rule only to defend the country from a surprise armed attack.

It is no accident that President Gorbachev's acceptance of procedural restraints on his Commander-in-Chief powers coincides with Soviet military retrenchment and renewed interest in multilateral co-operation. While clearly the internal dynamics of Soviet politics are different from ours, Gorbachev's verbal embrace of the principle contained in Article I § 8 of our Constitution at a time when our President refuses to even rhetorically accept that principle emphasizes the relationship between process and substance. Gorbachev's new thinking on international relations allows him to accept certain separation of powers restraints, albeit in the context of continued dominance by one party. Our lack of new thinking

62. Id. at 1066.
permits us to view Iran-Contra as an isolated incident and to continue our de facto reliance on executive assertiveness.

Learned Hand once admonished that "a society so riven that the spirit of moderation is gone, no court can save." While I am not as mistrustful of courts as was Judge Hand, and agree with many of Professor Koh's views on reinvigorating the judiciary's role in foreign policy disputes, there is a certain basic truth to Hand's remark. To rephrase it, "in a society so riven with the quest for world dominance that it must constantly intervene around the globe, procedural reform simply will not be able to resuscitate separation of powers in foreign policy." Framework legislation will certainly play a role in reinvigorating our democratic processes, but only insofar as it proceeds apace with a dramatically transformed vision of America's role in the world.

Professor Koh analogizes the relationship between the branches to that of a marriage, arguing that "[just] as one spouse cannot and should not win in a marriage, one branch of government cannot and should not permanently defeat another." To carry the analogy further, a marriage is based not merely on a commitment to a fair decision-making process, but to certain substantive values. Some substantive values, such as the value of eradicating male chauvinism, further equality in decision making while others do not. To repair a relationship gone sour would seem to require not merely a recommitment to process, but an inquiry into the substantive values which make the marriage work or fail.

IV. Foreign Policy in the 1990s

For the first time in forty years, the international situation presents an opportunity for a dramatic transformation in the overall direction of U.S. foreign policy. If the United States can grasp that opportunity and chart a new course, we could revitalize our own constitutional processes and structures and accept the principle of shared institutional power over foreign policy.

65. P. 153.
66. Commentators from various political perspectives have recognized that the 1990s present an opportunity for rethinking American foreign policy. Hoffman, What Should We Do in the World, Atlantic Monthly, Oct. 1989, at 84 ("one of those periods, which obliges the United States to rethink its role in the world"); Kristol, The Map of the World Has Changed, Wall Street J., Jan. 3, 1990, at A6, col. 3 (we need "new, imaginative thinking about America's role in this world"); Maynes, America Without the Cold War, Foreign Pol'y, Spring 1990, at 1; Hyland, America's New Course, Foreign Aff., Spring 1990, at 1 ("opportunity to reconstruct foreign policy").
The United States and the international community face decisive choices in the 1990s. The convergence of the decline of America's economic dominance, the end of the Cold War, and the emergence of worldwide environmental and economic problems present opportunities for a "Grotian" transformation in international relations, comparable to the development of the present nation-state system in the 16th and 17th centuries.\(^6\)

The choice facing U.S. policy is not simply one of internationalism versus isolationism, activism versus passivity. It is fundamentally a task of redefining our internationalism and redirecting our activism. Our internationalism of the past forty years has been directed to maintaining U.S. hegemony and dominance over the globe. Our activism was that of an overzealous policeman, actively intervening militarily and economically in other nations' affairs to ensure stability and to remove threats to U.S. interests. The task for the 1990s will be to develop an internationalism based on multilateral co-operation and not unilaterialism, to reorient our activism towards such projects as protecting the world's environment or eradicating hunger.

Since World War II, the Cold War and fear of world communism provided the underlying logic driving American foreign policy.\(^6\) The period of our greatest power was paradoxically perceived by Americans as being one of our greatest insecurity. The development of nuclear weapons brought about a pervasive anxiety about our national survival.\(^6\) Our foreign policy was guided by the imagery of national survival, exemplified by Oliver North's justification of his actions: "[T]his nation is at risk in a dangerous world."\(^7\) A crisis mentality underlay American foreign policy, a mentality that perceived enemies around the world constantly seeking to undermine our society.\(^7\)

This crisis perspective aided American dominance and hegemony as it provided a convenient rationale justifying American intervention around the world.\(^7\) Expansionism was conducted under the banner of contain-

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71. See Lobel, *supra* note 17, at 1400-03.

72. For example, the sense of crisis was used to justify Reagan era interventionism. Paul Nitze wrote shortly before Reagan's 1980 victory that the situation was "the gravest that the United States and the West have faced at least since the Soviet threat to Berlin in 1958-1962".
As Arthur Schlesinger noted, the American state of mind coincided with that of the Roman Empire:

There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome's allies; and if Rome had no allies, then allies would be invented . . . . Rome was always being attacked by evil-minded neighbors, always fighting for breathing space.74

The end of the Cold War has removed the main military crisis rationale from U.S. policy. The decline of U.S. economic domination has forced policy makers to grope for new policies. The threat of world wide environmental catastrophe has led to a search for new strategies. In each of these areas American policy is basically adrift, searching for a foreign policy to meet the challenges of the 1990s.75 In this situation a fundamental transformation of U.S. foreign policy is both necessary and conceivable. Such a transformation would inevitably bring in its wake much of the framework legislation that Professor Koh urges.

There are four basic directions that American foreign policy can take in the 1990s.76 The first is to continue the same basic policies of interventionism around the world. Indeed, United States policy makers may simply view Soviet restraint as an opportunity to more freely intervene in Third World conflicts. We appear poised to locate new enemies, be they drug dealers, terrorists, dictators, foreign competitors, nationalist revolutionaries, in order to rationalize continued military intervention abroad. In seeking continued high levels of defense spending, President Bush recently urged a policy outline for the future to combat "‘new threats' such as terrorism and drugs, rather than the ‘traditional East-West antagonism of the last 45 years.'"77 The President warned that we could and possibly at any time since the end of World War II." Quoted in Hyland, Setting Global Priorities, FOREIGN POL'y, Winter 1988-89, at 22, 24.

73. Justice William O. Douglas once noted that "subconsciously we are not reacting to external threats but to a desire to extend our own economic realm and our political zones of action." W. DOUGLAS, INTERNATIONAL DISSENT: SIX STEPS TOWARD WORLD PEACE 47 (1971); see also N. CHOMSKY, TURNING THE TIDE 66-72, 85-89 (1985) (describing United States view that we are "a pitiful, helpless, giant" as a mechanism "undoubtedly believed at some level of consciousness," but cynically invoked to justify intervention abroad).


76. These choices I propose are somewhat different, but follow the basic outline of the positions articulated by Charles Maynes, supra note 66.

77. Lauter, Bush Defends His Policies on Eastern Europe, L.A. Times, Feb. 8, 1990, at A3, col. 4. General John T. Chain also asserted that even the Pentagon's proposed 5 year defense plan projecting a mere 2% annual reduction, "could cost the United States its status as a superpower." Healy, Military Spending Cuts Could Cost U.S. 'Superpower Status', SAC Chief
not “let down our guard against a worldwide threat.”78 Others, such as former Army Chief of Staff E.C. Meyer, have suggested that a united Germany and a militarized Japan will become “[t]he two biggest threats” when the Cold War is over.79 “Nations need enemies,” states neo-conservative commentator Charles Krauthammer. “Take away one and they find another . . . [p]arties and countries need mobilizing symbols of ‘otherness’ to energize the nation and to give it purpose.”80

Apart from locating new enemies, a second variant of the interventionism theme is a renewed and more vigorous crusade to proscribe democracy around the world. For example, Senators Richard Lugar and Nancy Kassenbaum both argue that our main foreign policy task for the 1990s is to ensure the growth of worldwide democracy.81 As Senator Kassenbaum noted, while in the post-World War II world our greatest challenge was containing the spread of communism, now our task is more affirmative, to create and nurture democracy.

The crusade for democracy has a universalist, internationalist and ultimately interventionist underpinning. Preserving democracy has always been a favorite justification for intervening to overthrow governments we do not like.82 Institutions such as the National Endowment for Democracy are playing an increasingly interventionist role in the election campaigns of other nations. While the crusade for democracy may change the imagery and rhetoric from the old crusade against communism, at bottom it still seeks to remake the world in America’s image.

A third possible perspective for the 1990s is that of an increasing focus on domestic problems and a retreat from the internationalism that has driven American foreign policy for the past half century. Our nation has emerged victorious from the Cold War, but is one of only two industrial-
ized nations that does not provide health care insurance for all its citizens (the other being South Africa), and ranks nearly last among industrialized nations in infant mortality. Children in the United States are more likely to die before their first birthday or live in poverty than children in 11 other industrialized nations. Some 20 million Americans go hungry sometime each month, and between 600,000 and 1.2 million are homeless. It is therefore understandable that many Americans wish to redirect our energies to domestic needs. Some commentators have argued that “[t]he main threats to our international position are domestic in kind,” and that therefore we must redirect our energies to rebuilding our economy and infrastructure and attending to human needs at home. From this perspective, the main focus for the future ought not to be on extending democracy abroad, but on providing equality here at home.

While refocusing our attention to domestic needs would certainly be welcome, the United States is and will continue to be a major international actor. A retreat into pre-World War II isolationism is simply impossible. Thus, the fourth alternative is for United States policy to shift to a new type of internationalism from that which it has practiced for the past century. It would be an internationalism based more strongly on multilateral cooperation, international law and respect for the sovereignty of other nations. We ought to renounce the practice of unilaterally invading other nations to overthrow governments, or to kidnap suspected criminals abroad, or to assassinate or aid in the assassination of foreign leaders. We should recognize that a respect for international law requires accepting World Court decisions even where, as in the Nicaragua case, the Court rules against us. We ought to initiate multilateral efforts to protect the world’s environment, instead of unilaterally opposing agreements made by other industrial nations because of our view that such environmental agreements “impose a system of global management.”

83. Lewis, But We Close Our Eyes, N.Y. Times, Feb. 20, 1990, at A21, col. 5.
86. Rosenblatt, supra note 84, at 44.
87. Beatty, supra note 84, at 74.
88. Shabecoff, U.S. Is Assailed At Geneva Talks For Backing Out of Ozone Plan, N.Y. Times, May 10, 1990, at A1, col. 1. In what was termed “a major embarrassment for the United States,” the Bush Administration opposed setting up a fund to help poor countries adhere to phase out chemicals that are destroying the Earth’s ozone layer. The fund had been agreed to by all the other major industrialized countries. Richard Darman, the Director of the Office of Management and Budget, “assailed ‘radical Greens,’ for seeking to impose a system of ‘global management’ to protect the environment.” Id. at A6, col. 2.
The debate over foreign policy is therefore not between internationalism versus isolationism, as various commentators suggest.\textsuperscript{89} It is between two different concepts of internationalism. Whereas the present form of internationalism practiced by the United States seeks to dominate other nations, a new form would attempt to live cooperatively with them in an interdependent world. Recognizing the limits of our power does not mean withdrawing from the international arena, just entering it with a new approach.

Therefore, Professor Koh’s criticism of those on the left who would have the United States “simply renounce activism in an international regime”\textsuperscript{90} misses the point. It is not United States activism that is at issue; rather, it is the substantive nature of that activism. Broad terms like activism, globalism, and internationalism, can serve to obscure concrete policy choices. I would like to see the United States be more active in developing a multilateral approach to the serious environmental problems afflicting the world. I would urge more action on resolving the debt crisis affecting third world nations and on combatting world hunger. I urge a United States more actively committed to international institutions such as the World Court. I object, however, to certain types of activities such as military intervention abroad, while not to the concept of activism itself. Gorbachev’s foreign policy has certainly been an activist one, probably more activist than Bush’s. It has simply been more activist in promoting international law and self-determination for foreign nations than either Brezhnev’s or Bush’s. Our constitutional separation of powers is not undermined by internationalism or globalism per se, but by the drive for domination over the globe, by hegemony or imperialism.

While clearly each of the four directions will be present in American foreign policy of the 1990s, the question is which one will predominate. The path I would choose would mean both refocusing on domestic needs and changing the nature of our activism abroad to a more multilateral, less aggressive approach. The conjuncture in world politics today of the end of the Cold War and our own declining economic dominance provides a virtually unique possibility for choosing to resolve the tension between empire and republicanism that has been present since our country’s founding.\textsuperscript{91} We can respond to our own and the Soviet Union’s


\textsuperscript{90} P. 225.

\textsuperscript{91} W. LAEBER, THE AMERICAN AGE (1989) (describing the tendency to expansionism in American history); M. HUNT, supra note 56; W. WILLIAMS, EMPIRE AS A WAY OF LIFE (1980).
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decline by choosing to do what many great powers have done in the past — becoming more assertive about our national security and "spending more on security, thereby diverting potential resources from investment and compounding [the] long-term domestic dilemma."\(^9\) Or we can recognize both the limits of our power and the opportunity to help develop a more just world order in which we would live among other nations instead of lording over them.

Choosing the latter alternative would have several long-term effects on our constitutional foreign policy framework. First, it would create the climate for enacting much of the framework legislation that Professor Koh advocates. Removing the crisis mentality of American policy would free the body politic from the dogma that the President must have maximum flexibility and autonomy to act in international affairs. Secondly, the restoration of a more “republican” vision of foreign policy that views America as “a model, not a molder,”\(^9\) would involve reviving communitarian politics. The citizenry, often acting through local communities, would play a more active role in determining our relations with people of other nations. Some commentators have even suggested national referenda on foreign affairs issues.\(^9\)

Such a Republican revival of communitarian politics is already occurring to some extent. Localities have passed resolutions on foreign policy issues and have adopted sister cities in other parts of the world,\(^9\) and citizens across the country have engaged in acts of civil disobedience to protest certain aspects of U.S. foreign policy.\(^9\) While still nascent, these trends offer some hope of transforming the “managerial globalism of international banks and multinational corporations” to a democratic globalism from below that “joins peoples across borders, regions, and cultures.”\(^9\) To Koh’s “balanced institutional participation,” therefore, must be added this concept of informed “civic participation” in foreign policy making.

\(^9\)3. See M. HUNT, supra note 56, at 192-96. The alternative I present here has certain aspects of what Hunt terms “Republicanism” in that it does seek to focus more on our internal needs, and not remake the world in our image. But, in today’s context, Republicanism is not isolationism, but a redefined activism in the world.
The Relationship Between Process and Substance

Finally, following the substantive suggestions presented here would allow us to change the way we think about the foreign policy provisions of our Constitution. At present, we speak of a National Security Constitution. By using that terminology, we immediately substantively characterize our Constitution in a negative, defensive posture. Would it not be better in the future if we could refer to this constitutional framework as our Peace Constitution, or International Order Constitution, or (more neutrally) our International Affairs Constitution? But to do so would require us to change our pattern of thinking and established dogma, to view foreign policy not primarily as defending our country from real or imagined enemies abroad, but as providing a framework for living in a just international order.

V. Conclusion

Larry Tribe, in his essay of 1980, viewed the continued insistence on process-based constitutional theories as puzzling.98 In one sense, it is puzzling that scholars persist in the effort to undertake better and more comprehensive procedural reform despite the lessons of the failure of the post-Vietnam War reform movement. Why should this effort turn out any better than the last? Indeed, if the response to Iran-Contra is any indication, it appears that any new round of procedural reform will be even weaker than the post-Vietnam reforms.

Yet from another perspective, the continued focus on process is not puzzling at all. Process-based theories seek to solve hard problems without the necessity of making difficult substantive choices. In The National Security Constitution, this means attempting to fix the process without dealing with the hard policy choices that lie behind the ruptured processes. The problem is that in constitutional law, as in life, there is no such thing as a free ride, and it is impossible to ignore the difficult choices that lie before us. My hunch is that as to those substantive policy choices Professor Koh and I would generally agree, and that if he addressed them, his insights would be as perceptive and articulate as are his perceptions on the processes of government contained in this book.

98. Tribe, supra note 1.