CONGRESS AND THE EXECUTIVE:
WHO CALLS THE SHOTS FOR NATIONAL SECURITY?

The panel was convened by the Chair, Andreas F. Lowenfeld,* at 8:00 p.m. on April 9, 1987.

REMARKS BY EDWIN B. FIRMAGE**

We are now, in our relations with Iran and Nicaragua, suffering the results of our own acts of war against these two countries. Decades ago our government, through the Central Intelligence Agency (CIA), brought down the popular Iranian Government of Mohammed Mossadegh. Our involvement, under the direction of Allen Dulles and Kermit Roosevelt, came to be known. We are now roundly hated by the Iranians. Congress played no role in this act of war long ago that toppled the Iranian Government of Mossadegh.

Now we are engaged in attempting to overthrow the Nicaraguan Government by private war waged on the behest of the Reagan Administration by privateers. Buccaneers and privateers, so-called “soldiers of fortune,” citizens of the United States, help equip and train the Contras, the Nicaraguan remnants of former Nicaraguan President Anastasio Somoza's hated National Guard. This force, which President Reagan has compared with the patriots who led our revolution and founded our country, is attempting to bring down the Nicaraguan Government.

Two branches of law are violated by what we did decades ago in Iran and are doing now in Nicaragua. International law requires that we respect the sovereignty of other nations. We are forbidden to give aid to any insurgent force in rebellion against its government. And our Constitution provides in article I, section 8, that any act of war, other than our response to attack upon our country, be authorized by Congress. This provision that “Congress shall declare war” also provides that Congress shall “grant letters of marque and reprisal.” This is the 18th-century form of providing governmental authority for private parties, privateers and “soldiers of fortune,” to make war on an enemy of our country. This private war must also be authorized by Congress or be in violation of the Constitution. But by the Boland Amendment, Congress, to the contrary, had forbidden this administration from providing military aid to those in insurrection against the incumbent Government of Nicaragua, whose legitimacy we have recognized formally.

This administration is in flagrant violation of the laws of Congress, our Constitution and international law. Illegal behavior abroad will infect our own society. The trench mentality of a beleaguered and besieged administration during another illegal war, in Vietnam, was the matrix within which the Watergate scandal was born. When an administration by its own illegal acts is forced to wage war secretly without the knowledge of Congress and the American people, subterranean means of financing and supply must be established. Hence the skimming operation by which part of our own war against Nicaragua was funded by sale of weapons to a terrorist-sponsoring government in Iran, through Israel. Giving weapons to a government engaged in war with Iraq, an Arab state supported by most Arab states in the Middle East, is not in our interest. Providing weapons to Iran in exchange for hostages can only encourage terrorists to take more hostages for barter. Found out, once again an American govern-

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ges remarks were based upon research for his book, F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR (1986).
ment does serious injury to its own legitimacy by violating common sense, statutory law of Congress, international law, and the Constitution.

The war power of Congress is an institutional means of controlling the inclination to make war precipitously, presumptuously. For us today, this provision is a structural, horizontal check on war—while arms control measures and the laws of war hit at vertical, singular issues.

In 1789, Thomas Jefferson made this insightful statement: "We have already given . . . one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay."1

Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, de jure or de facto. The only exception is the power in the President to respond self-defensively to sudden attack upon the United States.

Three points also follow from constitutional text, our history, and pragmatic necessity. First, power over foreign relations was meant by the Framers to be jointly held by the Congress and the President. But much congressional direction and control have been allowed to wither by congressional default and presidential usurpation. Second, the existence of nuclear weapons and missile delivery systems cuts in the direction of this original understanding, not the reverse. That is, the argument by Presidents and presidential counselors that the President must have the power instantaneously to wage nuclear war because of nuclear missile delivery time of a few minutes simply does not hold. Rather, the cosmic implications of nuclear war mitigate in favor of more institutional restraint, collegial decision rather than the potential frailty and impetuosity of one human being who decides for or against the continuation of human society and, possibly, the human species. Third, Congress possesses the power through control over expenditure, appointment, the direction of foreign policy, the government of the armed forces, censure of the President and, if necessary, his impeachment, to reassert its primary power in foreign relations and its singular power to decide for peace or war.

This position—that Congress possesses the sole power to decide for war or peace—is supported by absolute clarity of intent of the Founding Fathers. And our history, while checkered with congressional ratification of presidential acts and by presidential abuse and congressional malefiancence on occasion, clearly reveals the norm of congressional control and presidential dependence in the decision for war and peace. This is so through the Indian wars, the Whiskey Rebellion, the Barbary pirates to the Civil War, and from our endemic preoccupation with intervention in the Caribbean to border crossings into Mexico and Canada. Our pattern continued through two world wars until Korea and Vietnam.

In the Constitutional Convention, debates in the Committee on Detail centered around an original printed draft of the war power clause providing that "[t]he legislature of the United States shall have the power . . . to make war . . . ." One member of the Committee, Charles Pinckney, opposed giving this power to Congress, claiming that its proceeding would be too slow. Pierce Butler instead said that he was "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Butler's motion received no second.

15 PAPERS OF THOMAS JEFFERSON (J.P. Boyd ed. 1978).
James Madison and Elbridge Gerry, however, were not satisfied with the proposal of the Committee on Detail that the legislature be given the power to make war. Instead, they moved to substitute “declare” for “make,” “leaving to the Executive the power to repel sudden attacks.” The meaning of this motion, which eventually was carried by a vote of seven states to two, was clear. The power to initiate war was left to Congress, with the reservation from Congress to the President to repel a sudden attack on the United States.

James Madison noted: “[T]he executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.” Hamilton, the advocate of presidential power in the Philadelphia Convention, nevertheless recognized that the President’s power “would amount to nothing more than the supreme command and direction of the military forces,” since the president lacked the British Crown’s authority to declare war and raise armies. The power given Congress rests upon the constitutional text that Congress be empowered to “declare war and grant letters of marque and reprisal.” This entails the power to decide for war declared or undeclared, whether fought with regular public forces or by privateers under governmental mandate. While letters of marque and reprisal originally covered specific acts, by the 18th century letters of marque and reprisal referred to sovereign use of private and sometimes public forces to injure another state. It was within this context that the constitutional Framers vested Congress with the power to issue letters of marque and reprisal. Clearly, only Congress has the constitutional power to wage war by private parties as well as by the armed forces of our country.

In a special message to Congress on December 6, 1805, President Jefferson described a dispute with Spain over the boundary between Louisiana and Florida, and the course of conduct adopted by Spain:

   Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen, or his property; and the Spanish officers remaining at New Orleans are to depart without further delay . . . .
   The present crisis in Europe is favorable for pressing such a settlement, and not a moment should be lost in availing ourselves of it. Should it pass unimproved, our situation would become much more difficult. Formal war is not necessary—it is not probable it will follow; but the protection of our citizens, the spirit and honor of our country require that force should be interposed to a certain degree. It will probably contribute to advance the object of peace.

   But the course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny.2

Congress took no action, and more significantly, neither did President Jefferson.

While Lincoln in our Civil War would use that crisis to push to the limit of original constitutional intent, he did so with theories of constitutional empowerment and congressional acts, prospective and retrospective. As Harold Hyman has noted in Quiet Past and Stormy Present (1986), clearly he rejected European notions of etat de siege. Franklin Roosevelt would do the same in moving us from isolation and neutrality into

2 A Compilation of the Messages and Papers of the Presidents (J. Richardson ed., 20 vols., 1911) at 37.
alliance and war. The theme before Korea and Vietnam could be summarized by Illinois Whig Representative Abraham Lincoln’s opposition to President Polk’s adventures into Mexico. Polk asserted a presidential right to invade another nation as an act of self-defense as Commander-in-Chief. “Allow a President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at his pleasure.” The Framers gave this singular power to Congress, not one person, Lincoln said, so that “no man should hold the power of bringing this oppression upon us.”

It was in Korea and Vietnam that presidents, their counselors and some academics would assert a presidential power apart from congressional act to wage war under whatever name. The State Department in 1950 attempted to justify President Truman’s entry into the Korean War by referring to the President’s executive power, his power as Commander-in-Chief, his power to conduct foreign relations of the United States, and the U.N. Charter. The State Department argued that if the Commander-in-Chief may send forces into foreign countries, this may well entail war; therefore, the President may send forces abroad to initiate war and asserted:

In many instances, of course, the Armed Forces have been used to protect specific American lives and property. In other cases, however, United States forces have been used in the broad interests of American foreign policy and their use could be characterized as participation in international police action.³

Perhaps the closest we came to proposing that foreign crisis or war produced extra-constitutional executive power was the government’s position during the Korean War in the Steel Seizure Case, a position rejected most purely by Justice Black, most pragmatically and practically by Justice Jackson, and most narrowly by Justice Frankfurter.

In 1952, during the Korean War, a strike interrupted the production of steel. On April 8, President Truman, acting “by virtue of the authority vested in me by the Constitution and the laws of the United States,” ordered the Secretary of Commerce to take possession of the plants in order to maintain production. Despite the reference to the laws of the United States, Truman acted without statutory authority. (In fact, by invoking the Taft-Hartley Act, the president might have kept the steel plants open. But for partisan political reasons, the President did not want to use this provision of law.) The challenge to this action reached the Supreme Court.

Justice Black flatly rejected any claim of inherent executive power stating that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁴

Justice Jackson viewed Presidential exercise of power in three settings. In the first, when the President acts pursuant to the express will of Congress, his power is most legitimate. In the second, when the President acts in an area outside congressional directive, the Court should balance the interests of Congress and the President. In the third area, when the President acts in direct contravention of congressional will, his power is most suspect. Justice Jackson, in the Steel Seizure Case, rejected the Truman Administration’s claim of inherent executive power as falling in this third area of action.

Finally, Justice Frankfurter, while rejecting Truman’s argument in the Steel Seizure Case, noted that the executive power has an additional “gloss” resulting from a sys-

³Authority of the President to Repel the Attack in Korea, 23 DEP’T ST. BULL. 174 (1950).
tematic, unbroken, executive practice long pursued, and acquiesced in by Congress. Congress, in the period following the Vietnam War, did take note of this statement.

Leonard Meeker, then Legal Adviser of the State Department, attempted to defend President Johnson's entry into war in Vietnam by arguing that the President had a constitutional power to repel a sudden attack by North Vietnam on South Vietnam. Mr. Meeker, in a memorandum published in 1966, argued:

In 1782, the world was a far larger place and the framers probably had in mind attacks upon the United States. In the twentieth century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO Treaty, for example, it is formally declared that an armed attack against Vietnam would endanger the peace and safety of the United States.5

The abuses of congressional prerogatives in foreign affairs during the Korean and Vietnam Wars proved these constitutional provisions alone to be insufficient. Congress responded to this realization by passing the War Powers Resolution of 1978 and the Intelligence Authorization Act of 1981, in order to provide a means of congressional oversight over the power to initiate hostilities and over the intelligence gathering process. Congressional intent behind the passage of these statutes was clear. Section 2(a) of the War Powers Resolution states that “[i]t is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”

The War Powers Resolution allows the President to introduce the United States into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances in three specific situations: (1) following a declaration of war; (2) pursuant to a specific statutory authorization; or (3) in a national emergency caused by an attack on American territory or armed forces. The resolution carries consultation and reporting procedures that a President must follow whenever the military engages in other than routine activities.

The Intelligence Authorization Act of 1981 was passed to provide a means of congressional oversight of U.S. intelligence activities. The Act imposes the following duties on executive branch officials, in particular the Central Intelligence Agency: (1) to keep the congressional intelligence committees “fully and currently informed” of intelligence activities; (2) to provide prior notification of “significant anticipated intelligence activities,” chiefly covert operations; (3) to furnish any information or materials requested by the intelligence committees concerning intelligence activities; and (4) to “report in a timely fashion” on any illegal intelligence activities or significant intelligence failures.

The Neutrality Act, an additional restriction on executive military discretion, has existed since 1794. Several factors existing at that time provided the impetus for passage of the act. In 1794, the United States was a fledgling nation faced with severe political and military threats to its sovereignty. In response to these threats, Congress passed the Neutrality Act to prevent foreign interference in U.S. affairs and to strengthen the authority of the central government in respect to its citizens. The Neutrality Act also was intended to have the constitutional purpose of implementing Congress’ war powers. The act accomplishes this by denying the executive the power unilaterally to authorize hostile expeditions and foreign recruiting, and the discretion

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not to enforce the statute's prohibitions. By doing this, the Neutrality Act reaffirms the original constitutional intent of collegiality, ensuring that no individual is allowed to threaten the peace by unilateral acts of warfare.

The power of Congress over the conduct of foreign relations rests upon many constitutional statements of sweeping empowerment. Under article I, section 8, Congress may lay and collect taxes for the common defense, regulate commerce among the nations, define and punish offenses against the law of nations, declare war and grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, make rules for the government of land and naval forces, provide for organizing and calling out the militia, and establish forts and arsenals; the Senate as well has a collegial responsibility with the President in making treaties. Congress finally has the power to make all laws necessary and proper to accomplish these enumerated objectives.

Presidential text is limited to three statements in article II: he (or she) is Commander-in-Chief, possesses executive power, and is to "take care" that the laws of Congress are faithfully executed. As Commander-in-Chief the President was intended simply to be Congress' general. No power not given by other text was conveyed by the statement on executive power. The "take care" clause simply obligated the President to execute congressional laws. The latter has been asserted to be an executive "necessary and proper" clause by ironic, if not cynical, bootstrapping.

Under these provisions Congress not only possesses sole power to decide for war, establish and govern our military forces and determine rules for their governance and use and establish our commercial relations with other states, but also Congress with the President should establish and direct the strategy of our foreign relations. As Louis Henkin has observed, the treaty power invested in the President and the Senate gives the tip-off to the Framers' intent. Since foreign relations were conducted primarily by treaty in the 18th century, the bestowal upon the Senate and the Presidency of the treaty power reveals the determination that our foreign relations should be governed collegially.

Congress recently passed several statutes directly affecting the Reagan Administration's activities in Iran and Nicaragua. On December 21, 1982, Congress passed the Boland Amendment to the National Security Act of 1947, forbidding any U.S. military assistance to the Contras from October 1984 through October 1986. In early 1984, however, the Reagan Administration established a private covert paramilitary network to ensure continued monetary and military aid to the Contra movement. The Tower Commission Report has found that President Reagan was informed of this private aid network orchestrated by the National Security Council. The diversion to the Nicaraguan Contras of public funds received from the sale of weapons to Iran directly violates the Boland Amendment. If it turns out that the President knew and approved of this diversion, he should be impeached and removed from office immediately.

The active role played by both the President and the Vice President, George Bush, in raising private funds to support the Contras subverts an express policy of that branch which has the sole power over the decision for war or peace for our country, the Congress of the United States. The President and the Vice President are our country's highest officers in the executive branch of government. They are not simply private citizens. Mr. Reagan's reference to the Abraham Lincoln Brigade, private American citizens who fought in the Spanish Civil War, is hopelessly inappropriate. He is not Ernest Hemingway. He is the President for now. If he wishes the freedom of action of a private citizen, there are ways that may be accomplished.
On August 27, 1986, a new section was added to the Arms Export Control Act, which prohibited the export of arms to countries that the Secretary of State has determined support acts of international terrorism. Such a determination was in effect for Iran at the time of arms sales to Iran. Section 662 of the Foreign Assistance Act, the so-called Hughes-Ryan Amendment, prohibits covert operations by the CIA unless and until the President "finds such operation is important to the national security of the United States."

The current crisis over arms sales to Iran and the diversion of millions of dollars to Nicaraguan Contras should be analyzed from this background. Secret arms sales to Iran in exchange for hostages, purposely done without congressional assent or even knowledge, violates statutory law of Congress and invades congressional prerogatives as determined by the Constitution. A skimming operation saw weapons sold to Iran after being laundered and brokered through Israel and, perhaps, Saudi Arabia. This was done by members of the National Security Council pursuant to a presidential finding of January 17, 1986, specifically directing the CIA to refrain from reporting to Congress as required by the Intelligence Authorization Act of 1981.

After another laundering process in Swiss bank accounts, the difference in our sale price and the Iranian purchase price went to the CIA and the Contras. All this was conducted by the National Security Council, formerly an advisory body, turned operational by the Reagan Administration with the sole purpose of avoiding statutory restrictions over the activities of other agencies of government, thus subverting the laws of Congress. These actions are illegal and unconstitutional usurpations of congressional prerogatives done by members of this administration with no regard for law. It reveals a President either ignorant of these major offenses, hence revealing substantial incompetence, or, acting with knowledge, a conspirator in illegal and unconstitutional acts. But the record of abuses did not begin with the current scandal involving illegal weapon sales and laundering funds to fight an illegal war waged by modern pirates or terrorists.

The earlier years of the Reagan Administration, when measured by constitutional standards, reveals loss of life in a Lebanon adventure without congressional authorization in its initiation; violation of the War Powers Act in El Salvador; waging war in Grenada without congressional assent; and waging continuing subversion and war against a sovereign state we formally recognize, Nicaragua. There, we violate the Neutrality Act as well as the Constitution and the law of nations. We do this by encouraging a generation of buccaneers and soldiers of fortune to wage private war against another state with whom we are legally at peace. Only Congress, under the "grant letters of marque and reprisal" clause of the war power provisions of the Constitution, possesses such power.

Against Libya and most personally against its head of state, Muammar Qadhafi, Mr. Reagan has authorized a plan of disinformation by which we lie to our own press and mislead our Congress, which is as dependent upon the press as are the rest of us in acquiring information upon which to act. The supposed plot to assassinate Mr. Reagan was concocted by our own government, not the Libyans. (Whether or not this was also a murderously revealing psychological projection is another and far more serious matter.) How far short is this from lying to a subcommittee of Congress, or the American people? Mr. Nixon lost the Presidency for lying to the American people. Mr. Reagan might take note.

If indeed an attempt was made to assassinate a head of state as an act of reprisal in the American bombing raid upon Libya, then again exclusive congressional control over reprisal by this country—as stipulated in the war clause—was violated. Serious
questions of proportionality, as required by international law, also exist. Factual questions have also been raised as to whether Qadhafi was indeed responsible for the terrorist attacks to which our bombing was in response.

International and domestic law protect innocent civilians against intentionally inflicted violence in time of war or peace. Such law very well may not protect Qadhafi, although the intentional killing of a head of state raises other legal, moral and practical issues of a most serious nature. But Qadhafi's family is protected by our prohibitions against violence aimed at innocent civilians. An adopted child of Qadhafi was killed, and other family members were wounded, in our bombing raid. If an attempt was made, with partial success, to kill Qadhafi's wife and children by intentionally bombing his private quarters, then murder and attempted murder have been committed, and those who approved and commissioned such acts should be removed from office and tried by the courts of this land for acts of homicide.

What did President Reagan know about the sale of arms to Iran through Israel? What should Congress do about presidential directives to violate congressional bans on such trade, and about presidential orders to keep the matter from congressional knowledge? What did President Reagan know of the diversion of millions of dollars to the Nicaraguan Contras, against the law of Congress and the Constitution? As important, why didn't the President know of these actions, if indeed he didn't know? The President's approval of covert CIA activities directed at overthrowing the Nicaraguan Government, without a full disclosure to Congress and without congressional empowerment, raises serious constitutional issues, as does the apparent "disinformation" campaign aimed at Libya's Qadhafi. Consider, for example, the earlier covert mining of Nicaraguan harbors and now the Iranian-Nicaraguan scandal in light of the following statement by James Iredell, a member of the Constitutional Convention in Philadelphia and later a justice of the Supreme Court:

[The president] must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them—in this case, I ask whether, upon an impeachment for . . . such an account, the Senate would probably favor him. 6

The argument to this point has been scrupulously conservative. The vital point of analysis has been our adherence to the original intent of the Founders of the Constitution. But what has been the impact of the modern technology of war upon an 18th-century understanding? How do nuclear weapons and intercontinental missiles affect our constitutional provisions for war? It has been suggested that nuclear weapons capable of continental destruction borne by missiles minutes from our shores make it essential that we be able to decide for war instantaneously, by one man, without debate or restraint.

It is a misstatement to equate collegiality with lack of effective, immediate response. Congress in the past has proven that it can deliberate quickly when required. One day after President Eisenhower asked Congress for authority to use American armed forces to protect Taiwan from attack by mainland China, the Chairman of the House

6See WORMUTH & FIRMAGE, supra n. 1, at 277.
Rules Committee called up the resolution under a closed rule permitting only two hours of debate and no amendment. The House passed the resolution that same day. But what is the hurry? If we are obliterated by a massive salvo, we presumably can still respond by whatever remains of land-based missiles of our own, plus submarine and air-launched missiles. Unless we plan to strike first, under what situation beyond self-defense, which exists in any event in the President if we are under sudden attack, must we respond with such alacrity?

To the contrary, with the evidence we now have of genocidal pandemic following nuclear war, with human society destroyed and human life in the balance, modern technology demands all the more our adherence to every institution we possess that ensures debate and reflection, negotiation, conciliation, and peaceful resolution of disputes.

The Founders’ prescription that Congress possess the sole war power to unchain the dog of war remains essential still.

Congress possesses the power under the Constitution, as evidenced by constitutional text and statutes passed thereunder, to remedy an abuse of its prerogatives under the war power and the constitutional provisions empowering Congress regarding the conduct of foreign relations. The courts can and should do more to define the jurisdictional lines between the political branches. Whether we should go to war is not a justiciable issue. But the way we go to war may be. The courts therefore need not, but nevertheless are likely to, consider this issue to be a political question and thereby avoid resolution. In any event, the only realistic counterweight to an overreaching President is a Congress bold enough to assert its own constitutional power. In this area there is no question that the judiciary is the least dangerous and the least helpful branch.

Congress, by appropriation, by its role in presidential appointments, by its power over commerce, by its power to define and punish violation of international law, by its power to raise, support and govern the armed forces, to censure and, if necessary, to impeach, has the power necessary to regain its constitutional role as definer of foreign policy, governor of the military, and our representative in the decision for peace or war.

Congress, balanced against the President, is the only other big buy on the block. And Congress assuredly possesses great power. It is no accident but rather careful construction that placed congressional power in article I, presidential power next, and judicial power third. Congress exclusively possesses the two most potent powers of government: to tax, spend, and appropriate; and to decide for war and peace. Congress has come to possess a general power, if not indeed a general welfare power over commerce most broadly defined. With additional power to define and punish violation of international law, to raise, support, and govern the armed forces, to censure and, if necessary, to impeach the President, the Congress of the United States has the power necessary to regain its constitutional role as definer of foreign policy, governor of the military, and our representative in the decision for peace or war.

Remarks by Jim Leach*

Congressman Leach began his presentation by proposing that national security could be divided into politics and economics. The Constitution established some guidelines as to separation and sharing of powers in these areas but so had “the move-

*U.S. House of Representatives (Republican, Iowa).
ments of events.” Indeed, history had helped establish an order where, in foreign relations, the executive branch had predominated on political issues and the Congress on economic issues. Yet both branches of government and both political parties currently had been fundamentally letting down the country and the world community. On the economic side, a Democratic Congress had been pushing for parochial economic policies. On the political side, the Reagan Administration had been tapping irrational nationalist tendencies and making the world less safe, as in the case of its policies in Central America and its withdrawal from the jurisdiction of the International Court of Justice (ICJ) in the Nicaragua litigation.

Whenever Congress had succumbed and abdicated any of its constitutional powers, it often had reacted by trying to intrude on the constitutional turf of the Executive, Congressman Leach maintained. It had done this by getting involved in the treatymaking, rather than the treaty-ratifying, process, as in the case of the nuclear freeze issue, and by interfering in U.S. treaty obligations, as in the case of acting to reduce U.S. contributions to the United Nations and interfering with U.S. obligations under the General Agreement on Tariffs and Trade. The illegal funding of the Contras in Nicaragua by the administration was an example of congressional abdication of its constitutional responsibilities. There Congress did not seek to exact any penalties on the executive for intruding on congressional purse-string authority. Beyond this, Congress, even its liberal-minded ranks, had turned its back on foreign aid and multilateral diplomacy. Congress had not resisted energetically enough such policies as the savaging of the U.N. system, the torpedoing of the law of the sea negotiations, the emasculation of the U.N. Educational, Scientific and Cultural Organization, the U.S. withdrawal from the ICJ in certain circumstances, the Madison Avenue attempt to sell a fictitious nuclear shield (SDI), and the privatization of the war in Central America.

Congressman Leach then asked what could be expected in the long and short term. If the first century of U.S. history was about establishing a republic based on the rights of man, and the second century was about whether these rights apply to people who are not “simply male or pale,” he said that we were entering a third century where the task would be to determine whether there was a right to peace, whether civilization itself had rights.

Success in this last area could not take place unless we could expand international law as applied to arms control, dispute resolution and trade. But to do this leadership was needed, and it appeared that those in power at the time lacked the will and backbone to make the requisite progress. Nonetheless, it might surprise some that if any such leadership were to materialize, it was more likely to come from the Republican side than from the party out of power, the Democrats. The Republicans had shown themselves more able to shift directions than the Democrats on important issues, and soon such shifts by the current administration might be seen in arms control and in Central America.

Thus, Congressman Leach concluded, the grounds for impeachment that some might argue to exist would likely disappear, but the right of impeachment of an entire Congress would persist.

**Remarks by Harold Koh**

Professor Koh broke down the question at hand into three—who should call shots in national security, who actually did call them, and what determined who called

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them. Professor Koh questioned whether the views advanced by Professor Firmage represented what the state of the world actually was. While one might argue that Congress should be the body that called the shots in foreign affairs, Professor Koh argued that it was the President and his people and not Congress who actually did. This remained true even after the Iran-Contra affair. In fact, the principal recommendation of the report of the Tower Commission, which included two former Senators, was not that Congress should call more shots in national security, either by making substantive changes in the National Security Act or by subjecting the National Security Adviser to congressional confirmation, but rather that the President should call more shots than he actually did. The failure of the President, then, from the Tower Commission’s perspective, was not that he called too many shots, but that he called too few, and then could not remember the ones he did call.

Putting the Iran-Contra affair to one side, the historical reality, Professor Koh argued, had been that when Congress and the President had disagreed, the President had (almost) always won. Why had this been so? The short answer, Professor Koh suggested, was that the story had involved not just the President and Congress but also the federal courts. The President had consistently prevailed in national security affairs in the preceding 10 years, and this, in turn, had been due to three reasons. The first reason was that the Executive not only took the initiative in foreign affairs, but did so by construing laws that were meant to restrain him in a way that authorized Executive action. A second reason was that Congress had acquiesced and been too compliant with regard to such presidential initiatives. Even when Congress had opposed the President, it had lacked both the political will and the necessary legislative tools to confront the President. The third reason was that the courts had tolerated and condoned what the President had sought to do by refusing to hear challenges to the President’s actions or, when they had heard them, by affirming his actions on the merits.

The result of this combination of Executive initiative, congressional acquiescence, and judicial tolerance, Professor Koh argued, was that there had been a net transfer of foreign affairs authority from Congress to the President. The action or inaction of the courts had played a big role in promoting that transfer of authority.

To illustrate how this had happened, Professor Koh examined the reasoning that executive branch lawyers had usually gone through when writing a legal opinion supporting or, as others might say, “justifying” a proposed foreign policy initiative. The first question such lawyers would ask was: “Does the President have the legal authority to carry out such action?” Although they would look first for an answer to the enumerated Executive powers found in article II of the Constitution, the government lawyers would then move very quickly to two other sources of power that had proven much more important for their purposes than the enumerated powers. One such source was the broad unenumerated powers of the President as the sole organ of the nation in foreign affairs. This source was recognized by Justice Sutherland in United States v. Curtiss-Wright Export Corporation and had become the obligatory first citation by government lawyers in most foreign affairs briefs. The other source was the various foreign affairs authority that Congress, either implicitly or explicitly, intentionally or unintentionally, had delegated to the President by statute. Although Congress had often conditioned these grants of delegated authority on a number of procedural requirements (reporting requirements, consultation, etc.), in reality the President had been able to satisfy these procedural hurdles fairly easily, with the result that these statutes often had had the paradoxical effect of broadening, rather than restricting, Executive power.
Perhaps the classic example was the International Emergency Economic Powers Act. During the past decade, this act had allowed the President to engage in widescale economic warfare against, inter alia, Iran, Libya, Cuba, Nicaragua and South Africa. He had accomplished this merely by declaring a national emergency with respect to the particular country, by consulting in advance with a few key members of Congress, and by sending a report to Congress every six months thereafter.

Even statutes that had stated expressly that they were not delegations of authority had operated in practice like congressional blank checks. For example, the provisions in the War Powers Resolution, which were intended to prevent the President from introducing armed forces into imminent hostilities for more than 60 days without a declaration of war, in a number of cases had been interpreted by the Executive as de facto congressional permission to send in troops for up to 60 days, so long as the President consulted in advance with a few key congressional leaders and reported to the Hill 48 hours and regularly thereafter. And in recent days, as had been seen, 60 days had provided plenty of time to introduce and then withdraw troops or airplanes into Grenada and Libya, for example.

What role had the courts played in all this? Since 1980, the Supreme Court had had three chances to restrain Executive practice and in each instance it had ruled in favor of the Executive. The most famous case was *Dames and Moore v. Regan*, where the Court unanimously upheld the Carter Administration's hostage settlement with Iran. The Court reached this decision even while recognizing that the statute invoked was silent on the question whether the President could suspend private claims against Iran. The Court chose to construe the fact of the statute's existence as an implied authorization by Congress of the actions taken. The other two cases with similar results were *Regan v. Wald* (upholding President Reagan's ban on certain travel to Cuba) and *Japan Whaling Association v. American Cetacean Society*.

The second question that government lawyers would ask when writing a legal opinion was: "Can Congress stop us?" With respect to this question, a marked ineffectiveness of statutes passed by Congress to curb presidential power in foreign affairs had resulted from the fact that the Executive had pretty much learned how to evade or minimize the burden of nearly all the procedural restraints that Congress had devised.

How had the courts viewed the congressional efforts to set up procedural controls of Executive power? Once again, in the one instance where the Supreme Court had directly confronted the constitutionality of such controls, the Court had ruled against Congress. In *Immigration and Naturalization Service v. Chadha*, the Supreme Court struck down the legislative veto and thus dramatically restricted congressional authority to check presidential discretion in foreign affairs. Since neither a simple nor concurrent congressional resolution henceforth had legal effect, Congress would have to do one of two things if it wished to challenge presidential actions in foreign affairs: it either would have to cut off funds or pass a statute specifically prohibiting what the President had done and then override the expected presidential veto by two-thirds of the votes. Either of these steps, Professor Koh noted, would require an extraordinary measure of political will which, as Representative Leach earlier suggested, Congress generally had been unable to muster.

The third and final question which lawyers for the Executive usually asked when writing a legal opinion had been what the chances were that someone might challenge a particular Executive initiative in the courts successfully. Professor Koh argued that these chances, contrary to Professor Firmage's suggestion, were extremely low. Since *Youngstown Sheet & Tube Co. v. Sawyer*, the famous steel seizure case decided in 1952, the Executive had not lost a single major foreign affairs case in the Supreme Court,
and this did not even include the many victories of the Executive in the lower courts. The reality had been that when Congress had tried to challenge the President in a court of law, it had had to overcome so many preliminary legal obstacles that its chances for victory had been negligible from the start. Depending upon the particular issue in question, the court might decide not to hear the case on political question grounds, on grounds of the act of state doctrine, on congressional standing or equitable discretion grounds, or on grounds that the case was either not ripe or was moot. Even if Congress could get by all these preliminary hurdles and could persuade a court to hear a case on the merits, its chances of prevailing there had been rendered minimal by the substantive case law. In short, under almost every scenario, the President had won whenever Congress and the President had disagreed over national security matters.

That was why, Professor Koh suggested, that Professor Firmage's analysis did not coincide with the way things were at the time. In the tug of war between Congress and the Executive, the involvement by the judiciary had only helped strengthen the already-strong foreign policy powers of the Executive.

As to the point raised by Congressman Leach with regard to the treatymaking and treaty-breaking process, Professor Koh observed that it was clear in this area, too, that the Executive had dramatically diminished the role of Congress over the preceding 10 years. If the President did not like an existing treaty, he had a range of options. He might terminate the treaty unilaterally in accordance with its terms, without congressional consent, as in Goldwater v. Carter (the Taiwan treaty termination case). He could attempt to "modify" it, without congressional consent, by relying on the precedent set in 1984 when the United States temporarily modified its acceptance of the ICJ's compulsory jurisdiction in regard to Nicaragua. He could also seek to reinterpret a treaty, as President Reagan had done in the recent past with the Anti-Ballistic Missile (ABM) Treaty (via the State Department's Legal Adviser) in order to accommodate the strategic defense initiative (SDI). He also could comply selectively with an unratiﬁed treaty in the event he did not like parts of it, as President Reagan had done with respect to the Strategic Arms Limitation Talks II Treaty, or he might submit it to the Senate for ratification, while insisting upon numerous reservations under the treaty, as he did with the Genocide Convention. Finally, the President could recharacterize a treaty as an executive agreement or "voluntary restraint agreement," as he had done in the area of international trade and thereby largely or totally avoided congressional review.

If the foregoing represented the state of affairs at the time, Professor Koh asked, what could or should Congress do about it? To reassert itself, Congress would have to attack each of the three sources of the problem: Executive adventurism, its own acquiescence, and judicial tolerance, all of which had permitted Executive excesses to take place.

To curb Executive adventurism, Congress could discourage, by statute if necessary, the use of secret, unchallenged, Executive legal opinions to authorize covert operations based upon a single agency general counsel's dubious reading of a particular statute. Thus the legal opinion of the CIA's general counsel in the Iran-Contra affair, for example, should have been made subject to interagency review before it was acted on. Alternatively, Congress could require that opinions authorizing covert actions be submitted to the intelligence committees of Congress for adversarial review by those committees' legal staffs, as had been done not long before, for example, with respect to the Reagan Administration's new interpretation of the ABM Treaty.
As for congressional acquiescence, Congress needed a constitutional substitute for the legislative veto. The fast-track approval procedure was one alternative, but another was to tie appropriations more explicitly to foreign policy objectives, as had been done with some success with the various Boland Amendments. Another alternative was to reenact certain key foreign policy statutes to specify more clearly that Congress was neither authorizing nor acquiescing in certain types of presidential conduct. If the President vetoed these revised measures, then Congress would have an opportunity to test its political will in these areas by voting to override the veto, as it had done in 1986 with respect to the South African sanctions bill.

Finally, as for curbing judicial tolerance of Executive excesses, Professor Koh suggested that Congress could increase the justiciability of certain questions by incorporating congressional standing provisions into statutes, as had been done in the Gramm-Rudman bill, and could be more diligent in wording statutory delegations of powers so that they would contain clear statements of Executive authority the Executive could not manipulate so easily. If Congress truly desired a greater role in national security policymaking, then it would have to seize the initiative to express its nonacquiescence in what the Executive had been doing. Only time would tell if Congress would exploit that opportunity wisely.

Professor Lowenfeld commented on how difficult it was to be a lawyer for an agency like the CIA or for the State or Defense Department. There the temptation was to be a “can do” lawyer and offer the kind of legal opinions that would ingratiate one with the President or the Secretary of State. Yet such lawyers needed to realize that the more they were called upon to give opinions on matters where there was ambiguity or the probability of nonjusticiability, the more they should try to play a neutral role, much like a judge. It was interesting that in France, for example, the legal adviser of the government, i.e., of the executive, was the same person as the legal adviser of the legislature. He was a professional, and somehow in the United States we had not developed that same notion for our agency legal advisers.

REMARKS BY LORI FISLER DAMROSCHE

Professor Firmage’s reaffirmation of the Framers’ conception of a President who would wait for congressional instructions appeals to traditional values of democratic control and congressional primacy that have deep roots in our national consciousness. But this model of presidential passivity has some of the same strengths and weaknesses as the advocacy of chastity to solve today’s problems of teenage pregnancy and sexually transmitted disease. The basic values may be sound, but when one moves from the assertion of those values to the identification of policy prescriptions, then it becomes clear that contemporary problems are too complex to be solved by simply returning to traditional values. Even though Professor Firmage made a strong case for reassertion of congressional prerogatives, the difficult questions facing the political system today need to be examined in their real-life complexities.

In the covert action area, contrary to Professor Firmage’s vision, Congress has made a conscious decision to lodge with the President a rather generous measure of authority to initiate and carry out policies, subject to ex post facto review rather than ex ante congressional approval. Several statutes illustrate this trend. If, as recent events seem to suggest, the Executive may have violated the congressional intent in certain cases, the policy prescriptions would be quite different from calling for a return to the Framers’ original conception. In such cases, the policy decision would be

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whether to amend existing statutes so that Congress can tighten the controls over authority that it has previously delegated. It is all the more important to identify statutory ambiguities and defects to determine whether Congress expressed its intention imperfectly or whether there were other reasons why the President was able to get away with so much.

A first illustration would be the relationship of the War Powers Resolution to covert actions. Professor Firmage treated the War Powers resolution as if it were relevant to the conflict in Central America, but the legislative history of the resolution shows that Congress deliberately chose not to make it applicable to covert actions. Rather, Congress intended to establish a separate structure for oversight of covert actions that expressly would permit the President to initiate and to carry out covert actions without obtaining congressional approval. The War Powers Resolution by its terms applies to involvement in hostilities by “United States Armed Forces,” and the legislative history relevant to that term includes the rejection by the Congress of a proposed amendment that would have expanded the resolution to cover “any person employed by, under contract to, or under the direction of any U.S. agency.” The fact that Congress rejected that proposed amendment by a vote of 34 to 53 is persuasive evidence that covert military operations were not intended to be covered by the War Powers Resolution.

The year after the War Powers Resolution was passed, Congress adopted the Hughes-Ryan Amendment to the Foreign Assistance Act that began the current structure for congressional oversight of covert actions. There are sound policy reasons why Congress chose to divorce the treatment of covert actions from the War Powers Resolution. The framework of the War Powers Resolution for reporting and for congressional consideration would assume a public debate on the merits of the operation. In contrast, covert actions must remain secret. Congress could have chosen to forswear covert capability, but it declined to do so. Rather, Congress adopted a system of committee oversight of intelligence activities in 1974 and gave that system more elaborate expression in the Intelligence Oversight Act of 1980. The 1974 Hughes-Ryan Amendment (as amended in 1980) and the Intelligence Oversight Act now require that the President make a finding that a covert action is important to the national security of the United States, and they further require that he keep the intelligence committees of the House and Senate “fully and currently informed” of intelligence activities, including “any significant anticipated intelligence activity.” One issue being studied in the current congressional investigations is whether there are circumstances under which “prior” notice need not be given.

But regardless of the outcome of the “prior notice” debate, it is very clear that Congress deliberately and unambiguously renounced one of the constitutional prerogatives that Professor Firmage has claimed for it, namely the power to decide whether a covert action should be initiated. Section 501(a)(1)(A) of the National Security Act provides that the provisions concerning notice to the committees “shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity.” This statute is easily read as a delegation from Congress to the President of authority to go ahead and initiate a covert action: if Congress doesn’t like it, the President will find out in due course.

Congress does want and expect to be involved with a covert action before the fact—not in order to approve, but to be notified. As previously mentioned, a heated debate has been in progress about the concept of prior notice under the Intelligence Oversight Act. Unfortunately, the statute is drafted quite badly. Congress thought it was getting a prior notice provision, while the Executive thought that it had avoided that
outcome. The legislative history reads as if the statute did require prior notice, but the statutory language is open to other constructions. Admiral Stansfield Turner, who is a strong proponent in general of a cooperative oversight process, has written in his book, *Secrecy and Democracy*, that the 1980 compromise specifically did not require prior notice. Admiral Turner has given various reasons why he held out against the concept of prior notice and why that bargain should not be changed. In recent testimony to the House Intelligence Committee, Admiral Turner has reaffirmed his position and has argued against efforts to require prior notice in circumstances where the lives of the persons undertaking the covert operation could be jeopardized.

On the question of statutory interpretation, Congress probably does have the better argument. The preferable construction of the statute would be that in general, covert operations are to be notified in advance to the intelligence committees. In extraordinary circumstances, prior notice can be limited to eight designated congressional leaders. In extra-extraordinary circumstances, where the window of opportunity will close in a matter of hours unless the President acts first and notifies later, he can act and then give notice “in a timely fashion,” with timeliness being measured in hours or days rather than months or years. In no circumstances would a deferral of notice for months or years be justifiable. Thus, by deferring notice, the Iranian arms sales for some 11 or more months, the President did act contrary to the will of the Congress as expressed in the statutory law governing intelligence oversight. But there is enough ambiguity in the statute resulting from the murkiness of the 1980 compromise that the President’s legal advisers apparently were prepared to defend the decision to defer notice indefinitely. Under Professor Koh’s suggestion, perhaps such legal opinions of the executive branch could be subjected to some sort of congressional scrutiny. In any event, much of the blame for the prior notice problem has to be attributed to the fact that when the two sides compromised in 1980 on the question of the timing of notice, they had different understandings of what that compromise was.

As to policy prescriptions, it makes a difference whether one believes, as Professor Firmage does, that the President cannot do anything until Congress gives him a green light or whether one believes on the other hand that the light blinks yellow until Congress decides that the time has come to switch the signal to red. Congress has been considering a proposal that would amend the existing law to limit the period for deferral of notice to 48 hours. That change would be a desirable improvement to the law. Significantly, however, the bill would not make any change in the existing concept that neither Congress nor the oversight committees must give prior approval of a covert operation. Under the proposed bill the operation would go forward on Presidential initiative; notice would occur within 48 hours, and Congress would have to act affirmatively in order to stop it. In my judgment, it would not be wise to change the law to require advance congressional approval at the present time.

Concerning arms sales and the Arms Export Control Act, there is no doubt that as a matter of constitutional power Congress can reserve to itself total control over what arms may be exported and to whom. We have seen some hard-fought battles over controversial exports to Saudi Arabia, Jordan, and elsewhere, which show our democratic processes working so that every interest group can be heard and every argument considered. What went wrong in the Iranian case? Apparently, because of imperfections in the way the Arms Export Control Act is now formulated, the executive branch was able to exploit some loopholes and ambiguities in the law, such as a $14-million cut-off point before the act’s requirements come into play. The provision that bars exports of arms to states that support international terrorism is subject to a presidential waiver. Once again, therefore, the issue is not one of constitutional power in
the Congress to regulate such exports, but rather of statutory authorization and procedural regularity in the application of the statute. If the President did make such a waiver, it was apparently not transmitted to Congress, but even if it had been, it is not clear that Congress could or would have been able to act on the information.

The final issue concerns funding. Congress can exercise its most meaningful leverage under the power of the purse. If Congress has the political will, it can impose funding limitations either before or after the fact. The funding controls that Congress imposed in the Central American program are far more complex than is sometimes realized. There were various controls in effect at various times, including controls on the purposes for which funds could be expended and on the agencies that could disburse them. A total temporary suspension was in effect for a period of time, and during part of the relevant period there was a ban on using funds for military as opposed to humanitarian purposes. Sweeping statements that Congress did not permit aid to the Contras in the period of diversion of the proceeds of the Iranian arms transfers are an oversimplification. If Congress is to reassert itself, it must make progress toward positive and detailed control in the funding area.

Many other statutes, such as the National Emergencies Act and the International Emergency Economic Powers Act, embody a congressional decision to allow the President to act without prior congressional approval: if it wishes, Congress can complain after the fact. Under the emergency powers legislation, the President by executive order may trigger a sweeping array of statutory emergency powers, including powers in the area of foreign commerce where Congress indisputably could reserve plenary authority to itself if it wished. The emergency powers legislation even has been used to affect individual liberties, such as in the area of travel control. If we are unhappy with this model of presidential initiation subject to congressional oversight and ex post facto control, we need what Congressman Leach has suggested: a Congress that will no longer abdicate its responsibilities. We do not need an exhortation that we should return to the original conception of the Framers.

If Congress is to take these matters in hand and assert its own policies affirmatively, it will have to make changes in the many statutes that either confer upon or confirm in the President authority to act first and take instructions later. Congress then would have to replace those provisions with a significantly different system of procedures or prohibitions. In the area of covert action, Congress could decide whether it wanted to write off the covert capability entirely, or it could decide to set up a system for congressional deliberation and approval in secret in advance. Such a system might not be feasible, and in any event it would be quite different from anything tried to date.

On the other hand, if we accept the idea that at least in the area of covert actions a debate prior to the approval of the operation is not feasible, then energy must be directed to strengthening congressional oversight of policy decision and implementation in ways that are more likely to make covert actions effective and acceptable than to render them impossible. The procedural improvements could include requiring written findings, transmitting the findings to the oversight committees as well as to key executive branch officers, limiting specifically the circumstances when notice could be deferred and imposing an outside limit of 48 hours on deferral of notice. Finally, the recommendation in the Tower Commission report for consolidating the intelligence oversight committees into a single joint committee with a common staff in theory could improve security and possibly help to foster the conditions of trust between the branches that have been sorely lacking in recent year. What is needed is the congressional will to take these matters in hand and to act affirmatively to establish new procedures.