

1991

Book Review: Constitutional Diplomacy. by Michael J. Glennon; Constitutionalism, Democracy, and Foreign Affairs. by Louis Henkin; the National Security Constitution: Sharing Power After the Iran-Contra Affair. by Harold Hongju Koh.

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Recommended Citation

Kaufman, Robert G., "Book Review: Constitutional Diplomacy. by Michael J. Glennon; Constitutionalism, Democracy, and Foreign Affairs. by Louis Henkin; the National Security Constitution: Sharing Power After the Iran-Contra Affair. by Harold Hongju Koh." (1991). *Constitutional Commentary*. 926.

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this institution from the same position in society. The book's failure to recognize and explore this difference is a weakness that preserves the marginalization of non-lesbian women and lesbians in legal discourse.

Similarly, the authors fail to explore the intersection of race, gender, and sexual orientation. There is no acknowledgement in the book of the diversity of experiences of lesbians and gay men.

In short, while I have some criticisms of this work, the authors are to be commended for choosing to focus on the issue of sexual orientation and the law for serious analysis. However, their failure to question heterosexist assumptions about culture and society perpetuates the essential invisibility of lesbians and gay men.

CONSTITUTIONAL DIPLOMACY. By Michael J. Glennon.¹ Princeton, New Jersey: Princeton University Press. 1990. Pp. 353. Cloth, \$35.00.

CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS. By Louis Henkin.² New York and Oxford: Columbia University Press. 1990. Pp. 125. Cloth, \$24.50.

THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR. By Harold Hongju Koh.³ New Haven: Yale University Press. 1990. Pp. 340. Cloth, \$35.00; paper, \$14.95.

*Robert G. Kaufman*⁴

These books address a subject fraught with a long history of controversy, the constitutional dimension of American foreign policy. Since 1793, when President Washington risked war by declaring neutrality in violation of a treaty with France, presidents and the Congress have continued to debate their respective legal powers in the realm of foreign affairs.⁵ The executive branch has consist-

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5. For an excellent discussion of the origins of this controversy, see R. TUCKER & D. HENDRICKSON, *EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON* 48-63 (1990).

ently claimed that the Commander and Chief Clause and rights inherent in sovereignty give presidents authority to use force, to take actions which risk war, and to make international agreements, even without congressional consent. The legislative branch has claimed that article I grants the Congress primacy in the making of war and foreign policy, so that unilateral executive action in these areas violates the constitutional mandate of shared powers.

Scholarly opinion on this subject has moved in cycles, reflecting shifts in the prevalent world-view of American liberals. From the New Deal until the Vietnam War, the regnant theory was that broad executive power in the areas of foreign policy and national security is constitutionally sound and politically wise. Then dissatisfaction with the Vietnam War led to a new orthodoxy: Congress and the courts must restore the proper constitutional balance by restraining Presidents from exercising "untrammelled national security power." This movement reached its apotheosis with the War Powers Act of 1973 ("the Act"). Passed over President Nixon's veto, considered unconstitutional by every president since, the Act limits the duration of involvement of any U.S. armed forces in hostilities or in situations where hostilities are clearly imminent, unless Congress allows it, or U.S. forces or territory come under attack.

The analyses of Professors Michael Glennon, Louis Henkin, and Harold Hongju Koh all exemplify the new orthodoxy. Each considers excessive executive power to be the fundamental constitutional and practical problem for American foreign policy today. Each castigates Congress and the courts for ceding to presidents too much constitutional authority. Although these books preceded President Bush's deployment of troops and warships in the Persian Gulf, each bears directly on that crisis, and the constitutional problems arising from it. Alas, the authors' analyses are less persuasive than their subject was timely. Koh and Glennon base their argument on flawed reasoning, dubious and selective constitutional history, and even more dubious policy judgments. Henkin adopts a more nuanced approach and reaches more balanced conclusions. Ultimately, however, his argument also fails because his policy prescriptions do not follow from his questionable premises.

Glennon and Koh emphasize that the Constitution grants the president only paltry war-making authority, compared with the extensive powers article I grants the Congress. Relying on the Advise and Consent Clause, both also argue that presidents' extensive reliance on executive agreements has usurped Congress's constitutional role in the process of formulating U.S. foreign policy. Glennon and Koh also base their argument on their reading of the *Federalist Pa-*

pers and court decisions. From the obviously valid premise that the framers intended to limit the exercise of arbitrary national security authority, both authors reach the questionable conclusion that presidents lack the constitutional authority to risk war, undertake covert action, or interpret treaties, without express congressional consent. Both recognize, grudgingly, the constitutional problems that *Immigration and Naturalization Service v. Chadha* poses for the legislative veto in the War Powers Resolution, an act which they lament has not done enough to curb the executive. To strengthen the act, both recommend amendments to make it even more difficult for presidents to dispatch forces abroad without congressional consent. Both thus endorse a variant of S.2, a proposal which Senators Byrd, Nunn, Warner, and Mitchell introduced in 1989. This bill would replace the War Powers Act's unconstitutional automatic requirement for withdrawal of troops after sixty days with an expedited process for a joint resolution authorizing the action or requiring disengagement. Further, it would require the president to consult regularly with a standing congressional core group. In addition, both authors urge Congress to strengthen statutory controls requiring consultation about and centralized congressional oversight over covert operations and treaty making. As both Glennon and Koh recognize, their preferred outcome requires that courts enforce executive compliance, which Congress can accomplish by statutory directive or the Supreme Court can facilitate by abandoning its "excessive" reliance on the political question doctrine in cases involving foreign policy.

Glennon and Koh seem to consider unconstitutional virtually every presidential use of armed force without explicit congressional consent. Henkin is more moderate: he defends the constitutionality of the Vietnam War, stressing that the Gulf of Tonkin Resolution authorized it. Nor does he believe that the framers' intentions and the text of the Constitution resolve these questions as clearly as Glennon and Koh suggest. He argues that not just the presidents, but the judiciary and the Congress have aggrandized their constitutional powers and developed large extraconstitutional powers. Still, his interpretation of the framers' intent and his policy judgments closely correspond with theirs. He bases his argument for greater congressional and judicial assertiveness in foreign affairs on two competing principles: greater democratization; and the need, implicit in constitutionalism, to limit arbitrary power.

None of these authors makes a cogent case. What they demolish is a caricature, a theory of absolute executive prerogative which no executive has ever claimed. There are two related but separate

issues involved in separation of powers questions, which the authors sometimes treat as synonymous. One, what is the proper allocation of authority? Two, when should courts enforce that allocation?

On the first question, there are powerful justifications for granting the president much greater national security power than the authors recognize. Begin with the constitutional text. Article II defines the office of the presidency only vaguely; article I defines the responsibilities of Congress more extensively. These provisions leave many issues unresolved. What is executive action? What is the scope of the advise and consent power? Do all resorts to force require a declaration of war, or prior congressional consent? What, if any, is the distinction between the authority to declare war, and the broader authority to make war, which the framers decided after debate not to grant the Congress? Reasonable people can disagree, then, about the textual allocation of national security authority. Or as Edward Corwin aptly put it: the Constitution is an invitation to struggle for the privilege of directing our foreign policy.⁶

What does the concept of separation of powers tell us about the problem? This inquiry requires reasoning, not from the individual meanings of the words in the text, but from the structure of government established by the text.⁷ Glennon, Koh, and Henkin interpret article II's reticence about executive power restrictively, but an expansive interpretation is even more plausible. One can construe the "herein granted" language of article I as limiting congressional authority. Conversely, the absence of this language in article II suggests that the executive has the responsibility for foreign policy arising from the prerogative of sovereignty, subject only to article I's specific, not implied, limits.⁸ After the dismal failure of the Articles of Confederation, the framers recognized that an effective foreign policy required a strong executive, capable of decision, activity, secrecy, and dispatch. They considered Congress ill-suited for these tasks. This is why the Constitutional Convention rejected the idea of giving Congress the authority to make war in favor of the more limited grant of authority to declare war.⁹

Precedent also supports the idea that the executive branch possesses a unilateral prerogative to respond to aggression with force. Since 1789, the President has sent troops or arms abroad more than

6. E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 201 (5th ed. 1964).

7. See *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Crovitz & J. Rabkin eds. 1989).

8. See L. Crovitz, *Micromanaging Foreign Policy*, 102 *THE PUBLIC INTEREST* No. 100 (Summer, 1990).

9. See Sofaer, *Separation of Powers and the Use of Force*, in CROVITZ & RABKIN, *supra* at 16.

200 times, while Congress has declared war on only five occasions. To be sure, in some of these cases Congress may be said to have authorized the president's action, but presidents acted without specific congressional authorization in two-thirds of the uses of force abroad without a declaration of war.¹⁰

As even the most ardent proponents of executive power concede, the president should not have absolute authority in foreign affairs or national security policy. Nevertheless, Glennon, Henkin, and Koh slight the effective constitutional and political mechanisms which Congress has always had at its disposal in these areas. There is the power over the purse, which no president, including Nixon, has challenged. However ambiguous their contours, the Declaration of War and Advise and Consent Clauses circumscribe the frequency and extent of arbitrary executive action. There are also political restraints: If the Vietnam War proved anything, it is that presidents cannot ignore Congress and public opinion, without courting political disaster. Why are further restraints on executive power necessary?

One answer for the authors, is that lately our presidents have been doing things of which the authors disapprove. Worse, Congress and the public have generally supported presidents' using force abroad, if not affirmatively then at least by acquiescence. This being so, judicial intervention seems necessary to save us from presidents like Reagan.¹¹ But if the president's powers depend on whether one approves of his use of those powers, what is the point of constitutional theory?

As an example of this result-oriented jurisprudence, consider Professor Glennon's analysis of the president's authority to enforce treaties. He argues astonishingly that the NATO Treaty actually amounted to a bluff, because the president could not enforce the American obligation without a formal congressional decision to declare war.

This argument flies in the face of long-established law and precedent. Treaties are the supreme law of the land. By consenting to the NATO Treaty, the Senate clearly authorized the president to fulfill our responsibilities thereunder, until the Senate acted to ratify or reject his decision. The framers explicitly recognized the executive's authority to respond to sudden attack without prior congress-

10. *Ibid.*

11. A revisionist interpretation of U.S. foreign policy underlies the analysis and policy prescriptions of all three authors. Their polemical treatment of Ronald Reagan and neuralgic criticism of his decisions to use force in the Persian Gulf, Libya, and Grenada highlight this in bold relief.

sional approval. This principle surely extends to enforcing treaty obligations to which the Senate has given its formal advice and consent. In the case of NATO, all American presidents have thought so. So, generally, had the American people, our allies, our potential adversaries, and the Congress. When occasionally legislators have sought to limit the president's discretion, presidents have prevailed, as Senator Taft found out when he objected to President Truman's decision to deploy four divisions in Europe unilaterally after North Korea attacked the South in 1950. True, President Washington warned against entangling alliances, but as a matter of policy, not constitutional doctrine. The framers intended to make alliances difficult, but not to rule out altogether a security option which they recognized as vital in certain circumstances.

Contradictions also abound in Glennon's analysis of the treaty power. On the one hand, he defends the constitutionality of President Carter's abrogation of the Mutual Defense Treaty of 1954 with the Chiang government. On the other hand, he rebukes President Reagan for rejecting the Senate's interpretation of the ABM Treaty, even though the Soviet Union, the other Treaty party, also did not subscribe or adhere to the Senate's interpretation. Glennon's positions are hard to reconcile: The act of interpreting a treaty is a much more modest claim of executive power than the act of abrogating one. Again, Glennon's policy preferences seem to resolve this apparent paradox. He favored the recognition of Red China. He opposes SDI.

Glennon and Koh also shift the premises of their legal theories to achieve their preferred results. Arguing for an executive with limited powers in foreign affairs, both invoke original intent and construe the text of the Constitution restrictively. Arguing for broad congressional powers to make foreign policy, both happily discard the principles of original intent and strict construction by inferring powers which the Constitution does not explicitly confer.

Their interpretation of the leading Supreme Court decisions and their argument for a more assertive judiciary betray similar inconsistencies and logical flaws. The courts have long deferred to presidents exercising wide unilateral powers in the areas of national security and foreign affairs. In *United States v. Curtiss-Wright Export Corp.*, the Court recognized the plenary and exclusive powers of the president as the sole organ of the federal government in foreign affairs. Justice Sutherland, writing for the Court, also distinguished separation of powers controversies involving foreign policy from those involving domestic affairs: "Assuming that the challenged delegation, if it were confined to internal affairs, would be

invalid, may it nevertheless be sustained on the grounds that its exclusive aim is to afford a remedy for a hurtful condition within a foreign territory?" The Court said yes. According to Sutherland, the president may exercise foreign policy powers not explicitly granted to him in the Constitution as a necessary prerogative of sovereignty. Sutherland did not claim, as Koh and Glennon imply, that the president has unlimited authority. Rather, Sutherland stressed "the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

Glennon, Koh, and Henkin consider *Curtiss-Wright's* reasoning spurious and anomalous. As they see it, courts ought to apply rigorously Justice Jackson's tripartite formula, which he set forth in *Youngstown Sheet & Tube Co. v. Sawyer* for resolving separation of powers disputes: 1. When a president acts pursuant to express or limited authorization of Congress, his authority is at a minimum. 2. When the president acts in the absence of either a constitutional grant or a denial of authority, he can rely on his own independent powers, but there is a twilight in which he and the Congress may have concurrent authority. 3. When the president takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for there he can rely on his own constitutional power minus any constitutional power of Congress over the matter.

The Court's reasoning in *Youngstown* does not support the authors' assertion that presidents have routinely exceeded their constitutional authority in the area of foreign affairs. In *Youngstown*, six Justices (three concurers and three dissenters) sustained *Curtiss-Wright's* vision of the president's authority in foreign affairs. Justice Jackson envisaged *Youngstown* as a *domestic* separation of powers controversy: "I shall indulge in the widest latitude of interpretation to sustain . . . [the president's] exclusive executive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But when it is turned inward, not because of rebellion, but because of lawful economic struggle between industry and labor, it shall go no farther." Similarly, the logic of Justice Frankfurter's concurrence supports the executive branch's prerogative to use armed force unilaterally in a wide array of circumstances: he argued that a systematic, unbroken executive practice long before

pursued with the knowledge of Congress and never before questioned, engaged in by presidents who have sworn to uphold the Constitution, making as it were such exercise of power part of the structure of government, must be treated as a gloss of the Executive Power vested in the president by article II. Justice Clark also defined the power of the Executive broadly, while the dissenters—Justices Minton, Reed, and Vinson—would have sustained Truman's seizure of the steel mill.

Subsequent Supreme Court decisions have repudiated the authors' broad reading of *Youngstown*. Generally, the courts have simply refused to hear separation of powers cases involving foreign affairs, invoking the political question doctrine.¹² When judges have decided such cases on the merits, resounding majorities have generally upheld executives' claims of broad national security powers.¹³ Glennon and Koh argue that the political question doctrine should not be so broadly interpreted, but their analysis is sharply at odds with the selective original intent analysis by which they judge the executive branch. Witness, for example, their coolness to the Court's reasoning in *Chadha*, even though the majority relied on strict construction of the Constitution to strike down legislative vetoes such as those contained in the War Powers Resolution.

Professor Henkin's analysis avoids this blatant double-standard, but suffers from an equally severe shortcoming: once he discards original intent as a standard of analysis, he lacks a compelling criterion for evaluating separation of powers controversies. His formula of democracy, accountability, and protection against arbitrary authority is hopelessly vague and subjective. Nor, even if one accepts this formula, do his prescriptions follow from his premises. According to Henkin, the need for greater accountability in and democratization of the making of foreign policy require greater congressional involvement. Actually, the opposite is true. In foreign affairs, where prompt and decisive action are often essential, the executive has a greater claim to primacy than in any other field. The executive branch has the capacity, vital in foreign affairs, to initiate action: Congress generally performs best in its oversight function, as a reactive institution. While congressional authority is diffuse and its procedures ponderous, presidential authority is unitary, hierarchical, and centralized. Legislators have unique and limited constituencies; the president, in contrast, represents the nation. Where numbers and procedures blur accountability for 535 legisla-

12. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979).

13. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

tors making foreign policy, the public can draw a clear link between executive action and responsibility.

Obsessed by executive power and writing from a narrow legal perspective, the authors seem oblivious to the dangers of an Imperial Congress or a paralyzed government. Yet these dangers are real. A combination of developments over the past two decades—notably the weakening of political parties and the Watergate reforms—has shifted the institutional balance of power away from the executive and congressional leadership to the individual legislators themselves. There are now more than 25 subcommittees in both houses dealing with foreign policy, with which the president must negotiate. This is the Congress to which our authors would like to assign even greater power!

Congress, of course, has a vital role to play in making foreign policy. The framers wisely did not consider efficiency an absolute value. Constitutionalism presupposes some inefficiencies as the price of limited government, protection of individual liberties, and popular sovereignty. In the long run, moreover, these apparent inefficiencies may better reflect and achieve a nation's interest than the superficial efficiency of closed societies. Congress performs an essential constitutional function in its capacity for oversight, for dissent and debate, and for reflecting various strata of public opinion. Institutionally, it serves as a salutary check on the excesses of the executive branch.

The problem is to strike a reasonable balance. Suppose, for the sake of argument, that the Constitution permits, even if it does not mandate, the types of restrictions on presidential authority that the authors want. We should still reject them. Historically, an effective American foreign policy has depended on a president able to lead. The Cold War consensus and the Imperial Presidency, which the authors malign, succeeded in taming the nation's most dangerous and relentless adversary at less cost and risk than even the most optimistic observers had a right to hope. Similarly the most effective periods of American foreign policy before the Second World War coincided with and probably depended on strong executive leadership in foreign affairs. In the post-Cold War era, the prospects for creating and sustaining a stable and prosperous world order will continue to depend on an executive branch that is able to act vigorously in foreign affairs, as recent events in the Middle East eloquently attest.

Of course presidents have blundered and lied from time to time. The same can be said of any institution with power. What we need is a judicious appraisal of the *relative* performance of the two

branches, in the long perspective of history. Our authors fail to provide this. They ignore the story of how congressional isolationism nearly crippled President Roosevelt's correct and critical effort to resist Hitler. Nor, to cite another obvious example, do they mention the malignant effects of Senator McCarthy on the conduct of American foreign affairs. Lacking the historical long view, they remain traumatized by the anti-war version of the Vietnam experience, which the boatpeople, glasnost, and the demand for freedom in Eastern Europe should have utterly discredited. Their legalistic prescriptions would divert the proper focus of the enduring and necessary foreign policy debate away from the realm of politics, where it belongs, to the courts of law, where it does not.

POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION. By Paul Gordon Lauren.¹ Boulder, Colorado: Westview Press. 1988. Pp. xv, 388. Cloth \$50.50; paper, \$19.95.

*Mary L. Dudziak*²

Professor Paul Gordon Lauren takes on an ambitious task: an examination of the importance of race and racism in international politics and diplomacy, particularly in the twentieth century. The result is a well written and carefully researched study of the impact of racial ideologies and racist practices on world events.

Although at times he paints with a rather broad brush, discussing major political and ideological developments with great brevity, the strength of Professor Lauren's book is that it brings so many different pieces together. We can view *Plessy v. Ferguson*, for example, not only in the context of American racism in the 1890s, from lynching to the massacre at Wounded Knee, but also in the context of European racial theories, and of efforts to promote white supremacy in Australia and Canada through restrictive immigration laws. By adopting this comparative perspective, Lauren is able to isolate factors that he believes influenced policies on race.

The book begins with an historical overview of white racism, from the assumptions of racial inequality held by Aristotle and Saint Augustine to the "scientific" racism of the nineteenth century. Ideas about racial differences had profound consequences when

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