Vanderbilt Journal of Transnational Law

Volume 25
Issue 5 *Issue 5 - February 1993*

Article 6

2-1993

Customary Practice and the People's Voice: Separation of Powers and Foreign Affairs

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REVIEW ESSAY

Customary Practice and the People's Voice: Separation of Powers and Foreign Affairs

CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS. By Louis Henkin. New York: Columbia University Press, 1990. Pp. viii, 125.

Reviewed by *Harold G. Maier**

This short book brings to bear Professor Henkin's vast experience as a teacher and scholar in United States foreign relations law on a contemporary examination of constitutional separation of powers principles in determining the appropriate roles of the three federal governmental branches in the conduct of foreign affairs. In this context, the author asks, "Is our two-hundred year old constitution satisfactory for its third century?"[1] After an excursion through the principal issues most germane to an answer, he concludes that "there is no need for radical constitutional surgery . . . but that, where appropriate, we [should] be guided in constitutional construction by principles of constitutionalism and democracy."[2] The remainder of the book seeks to identify these principles and to examine their past and future role in guiding the nation's conduct of foreign affairs.

Like all Professor Henkin's work, this book is thoughtful, forceful,

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1. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS at vii (1990).

2. *Id.* at 107.

thorough and clearly written. In a space that occupies little more than that required for a substantial law review article, he raises and addresses fundamental questions about the appropriate methods for conducting international affairs in the context of a democratic society.[3]

The author comes neither to praise nor to bury the "old organs" of government. They are vigorous and we have done well with them, or at least we have "muddled through."[4] His focus is not upon prescriptions for radical amendment but "to attend anew to how we interpret, apply and implement the Constitution we have."[5]

Beginning with the proposition that the textual power allocations between the political branches are "holy writ,"[6] he concludes, nonetheless, that the constitution contains no "unambiguous grand design".[7] Whatever the framers' intention, the document's assignments of power have been shaped by the acts of government and, in the foreign affairs field especially by the executive branch.[8] As he notes,

> The life of the Constitution, too, has not been logic or textual hermeneutics, but experience, and constitutional history has supplied answers to some of the questions that constitutional text and 'original intent' left unanswered. . . . The President's place in the configuration of government combined with the character of foreign relations to shape the modern presidency, as well as to launch it on the paths of uncertainty and controversy.[9]

While recognizing the great accretion of power to the executive branch throughout constitutional history, Henkin argues that this development has not necessarily reduced congressional authority. Because of his ability to act and the exercise of that power over the years, "[t]he issue today is no longer the President's power, but the power of Congress."[10] The President firmly holds the power of initiative in foreign affairs but that

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3. The book has a preface, an introduction, and five chapters whose titles reflect the selective but relatively comprehensive nature of the author's comments: "Tension in the Twilight Zone: Congress and the President," "Treaties in a Constitutional Democracy," "The Courts in Foreign Affairs," and "Foreign Affairs and Individual Rights." The final chapter, "The Last Word," is a short summary and epilogue. The book is not, of course, exhaustive. Especially short is the author's treatment of the war powers. *Accord* Kenneth C. Randall, Book Review, 91 COLUM. L. REV. 2097, 2117-18 (1991).

4. HENKIN, *supra* note 1, at 3.

5. *Id.*

6. *Id.* at 18.

7. *Id.* at 21.

8. *Id.* at 27.

9. *Id.* at 26-27.

10. *Id.* at 30.

power ceases to be legitimate when it is resisted by Congress.

The congressional power to apply the brakes to executive actions lies principally in the power of the purse. The author concludes that interpreting the Constitution to determine the appropriate relationship between separation of powers values and the principle of democracy should emphasize the importance of the latter so that "the institutions and procedures it established will promote maximum attention to the will of the people and the consent of all the governed. . . ."[11]

The author argues that appropriate attention to the popular will necessarily requires increased recognition of legislative authority in the foreign affairs field:

> In foreign affairs, the President represents the people of the United States to the world. Congress represents the people at home. . . . Both are accountable, but the President's accountability is essentially plebiscitarian quadrennially. Congress—its members—are accountable directly, daily. . . Only Congress can assure both checks and balances and democracy in foreign affairs.[12]

The issue for today's Constitution is no longer *whether* the President can exercise initiatives in foreign affairs. It is rather whether he *should* do so without congressional authorization. Professor Henkin's answer is clear. Constitutionalism demands greater participation by Congress for war or in peace.[13]

Chapter 2 asks whether the constitutional provisions governing treaties, designed for "an aristocratic republic, are appropriate to the constitutional democracy we have become."[14] The author points out that although the framers probably intended that the Senate consult with the President during treaty negotiations, the practice today is that the Senate as a body does not become involved until after the treaty has been signed and forwarded by the President for advice and consent. Consequently, the relationship between the President and the Senate has become adversarial, rather than collaborative. Treaty making today is essentially a presidential power, subject to Senate veto.[15] When the President acts by executive agreement, the veto is informal only—the Senate may block the

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11. *Id.* at 37. For a discussion of a similar proposition outside the foreign affairs context, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991). Professor Brown focuses principally on those cases in which the judiciary plays an active role in resolving separation of powers issues. *Id.* at 1516 n.9.
12. HENKIN, *supra* note 1, at 37-38, 41.
13. *Id.* at 42-43.
14. *Id.* at 46.
15. *Id.* at 51.

implementation of the agreement if it disagrees.[16] Professor Henkin asks whether the treaty power, as it has developed, is appropriate in light of the contemporary democratic ideals that should inform the operation of the government.[17] He argues that increased efforts at cooperation between the executive and legislative branches in the treaty-making process would be more likely to give effect to these democratic values.[18]

The chapter on judicial review in foreign affairs cases begins with a generalized discussion of the role of the courts in constitutional interpretation, noting the truism that while there may be reason for some deference to the executive branch in foreign affairs matters, there is no reason for undue deference.[19] This chapter is principally a call for greater judicial involvement in matters relating to foreign affairs, flowing from the proposition that the Constitution is "inherently" supreme and that part and parcel of this supremacy is the necessity for judicial review. Professor Henkin opts for increased judicial involvement in foreign affairs cases. He is "troubled by the increasing tendency of courts not to hear foreign affairs issues, even constitutional issues, or otherwise to avoid constitutional scrutiny, a tendency that has infected judicial practice particularly in foreign affairs."[20]

With respect to individual rights and foreign affairs, Professor Henkin describes what he calls an "explosion of rights." Matters especially related to immigration and the rights of aliens in the United States have focused attention on serious issues about the role of international law, human rights and the courts. These issues require careful balancing of the need to conduct foreign affairs in the best interests of the people of the United States as a whole and the need to take account of the importance of protecting individuals.[21]

Professor Henkin's goal of increased attention to "democratic principle" is hardly exceptionable. Whether increased involvement by Congress, encouraged by the additional activity in the courts, is likely to accomplish this objective is much more problematic. While recognizing that the roles of the political branches in these matters is largely a product of history rather than of commands in the constitutional text, Professor Henkin seems concerned that the process he calls "muddling through"

16. *Id.* at 58.

17. *Id.* at 58-60.

18. *Id.* at 66-68.

19. *Id.* at 72. The recurring issue, of course, is at what point deference becomes undue.

20. *Id.* at 79.

21. *Id.* at 93-105 *passim.*

does not reflect those true democratic principles that he believes have come to inform the interpretation and operations of the Constitution.

In this he is not alone. Professor Harold H. Koh makes a similar call for increased judicial involvement in his recent book, *The National Security Constitution: Sharing Power After the Iran-Contra Affair.*[22] He is much more pessimistic about the ability of congressional and executive cooperation to put this house in order than is Professor Henkin. Professor Koh traces the growth of presidential power in foreign affairs to construction of laws to create statutory authorization for executive acts, to legislative myopia and to lack of political will to address these issues legislatively. He, too, complains of tolerant federal courts that have refused to enter disputes or have affirmed presidential authority on the merits.[23] Both Henkin and Koh urge greater congressional involvement in foreign affairs decisionmaking. Koh's discussion of Congress' difficulties in actually restraining the executive branch, however, holds out much bleaker prospects for an increased congressional-legislative role in the future than does Henkin.[24]

Focused as it is on the Iran-Contra Affair, Koh's discussion ultimately calls for much tighter legislative and judicial controls on executive initiative with a greater emphasis on the role of the judiciary than that proposed by Henkin.[25] But both Koh and Henkin call for increased judicial activity in determining the limits and distribution of foreign affairs decision-making authority. Henkin, however, sees the judiciary's role as appropriately dedicated to calibrating the mechanisms of government with Congress having "constitutional authority over navigation in the twilight zone between Congress and the President."[26] In this respect, Professor Henkin envisions a less heavy-handed role for the courts than does Koh. Both, however, seem to view the judicial power as a repair mechanism, appropriately applied to revitalize congressional activity and, thus, to increase the democracy factor in the conduct of foreign affairs equation.

It is not entirely clear why an increased role for Congress and a decreased one for the executive branch would necessarily increase the impact of democratic principles on the conduct of foreign affairs. Professor

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22. HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

23. *Id.* at 117.

24. *Id.* at 117-33.

25. For a more extensive discussion and critique of Professor Koh's position, see Harold G. Maier, Book Review, 4 EMORY INT'L L. REV. 477 (1990) (reviewing HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990)).

26. HENKIN, *supra* note 1, at 109.

Henkin argues that the legislative branch is more representative of the people than is the executive. He calls for an adjustment to achieve what he labels "dual responsibility, ultimately congressional responsibility."[27] In so doing, he attempts to distinguish the representative functions of the Congress from those of the President:

> The President leads and initiates; Congress deliberates, legislates, confirms (or rejects); Congress can also anticipate and regulate, even in foreign affairs. The presidency is confidential, classified; Congress is open and more accessible for citizen participation. Both are accountable, but the President's accountability is essentially plebiscitarian quadrennially. Congress—its members—are accountable directly, daily.[28]

Professor Henkin seriously overstates his case. While it may be true that an individual member of Congress is accountable daily to his or her constituency, the Congress as a body is accountable to the people as a whole only in the vaguest theoretical sense. The people do not vote for a Congress. Rather, they vote for individual congresspersons; and those votes are generally most strongly influenced by the extent to which each representative serves the needs of his or her district or state, or at least has the reputation for doing so. Thus, the congressperson's attention is necessarily directed to the desires of the voters in the district or state in order to remain in office. Those parochial needs and interests may or may not necessarily reflect the needs of the nation as a whole. In these circumstances, the whole may sometimes be lesser than the sum of its parts. Only in the most troubled times when a national consensus builds with respect to foreign affairs matters can one reasonably be sure that these local constituencies will react in response to their perceptions of the good of the entire nation. Rather, each constituency is more likely to react in behalf of local interests when national and local values appear to conflict.

Put another way, although in many circumstances, what is good for the United States is good for the state of New York, it is not necessarily true that what is good for New York is good for the United States. There is little impetus for members of Congress to take a global or a national view of a problem when strong local interests create pressures to act in response to local concerns.

A lack of party discipline, especially at the national level, makes it very difficult to gather and control a consensus for what might be an unpopular but necessary national policy. A constituency is far less likely

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27. HENKIN, *supra* note 1, at 42.
28. *Id.* at 38.

to be concerned about the extent to which a particular congressperson supports the views of his or her political party than about whether that representative serves the local concerns of the district well. This lack of meaningful party discipline at the national level and the propensity of the members of Congress to structure a system that favors the reelection of incumbents regardless of party or political viewpoint not only permits but encourages congresspersons to insulate themselves from political retribution with respect to difficult international decisions. As long as each individual congressperson acts according to the will of his or her own constituency, reelection is likely. In this sense, of course, the Congress is more "democratic" than is the executive branch. But this locally focused democracy is not one likely to encourage difficult decisions in matters touching international affairs.[29]

Despite the greater availability of secrecy to the executive branch, the President has nowhere to hide with respect to actual—or apparent—responsibility for events in the international arena. He (and the Vice President) are the only officials elected, effectively, by all the people, the electoral college notwithstanding. The President is often blamed unjustly or praised undeservedly for situations for which he is not, in fact, responsible.

Presidential actions are much more highly visible than those of individual congresspersons. It is the executive *who does things*. Although, as Professor Henkin correctly points out, the President's decisions are sometimes hidden behind a security shield, the results of his actions necessarily surface eventually. If he acts in conflict with the will of the people or if the results that flow during his watch are unpopular, it is the President—not the Congress—who pays the political price. My point is not that the executive branch is *more* democratic than the Congress. Rather, the two branches serve as separate, parallel, but interacting conduits for the power of the people. Neither has a special claim to reflecting "democratic principles" more effectively than the other. Together they perform this function reasonably well.

Despite his heavy emphasis on the "democratic" role of Congress, Professor Henkin recognizes that constitutional interpretation and development by the interaction of the political branches, monitored sparingly by the courts, is the appropriate road to constitutional development of increased influence for democratic decisionmaking in foreign affairs matters. The author writes:

> Perhaps, *without formal amendment but by constitutional adaptation be-*

29. KOH, *supra* note 22, at 117-33.

> *tween the political branches with some judicial guidance*, we can reshape institutions and institute procedures that will adjust old machinery to new ideology.[30]

In fact, it seems clear that such reshaping of institutions and procedures has been going on all along. That is the process that Professor Henkin characterizes as "muddling through."[31] The interaction of the political branches as well as the authority of the courts has preserved the voice of the people as an important component of historic constitutional development with respect to separation of powers in foreign affairs.[32] The practice of the political branches as they interact permits the people to exercise their will to determine within the broad parameters of the separation of powers principle the legitimacy of governmental conduct on a situation-by-situation basis. The courts step in when that process bogs down[33] or when one branch of the other gets too far out of line.[34] Generally, however, they let the players play.

The manner in which governmental practice gives meaning (and sometimes new content) to the constitutional structure has not been the subject of extensive jurisprudential exploration. Like the weather, everyone talks about prior governmental practice but there is little discussion of the manner in which it influences the constitutional scope of the overlapping but separated powers.

Because judicial interpretation of the Constitution is a central element in the constitutional process, lawyers, including many legal scholars, tend to treat only those rules that have been articulated by the courts or that seem to be clear in the document itself as "real" constitutional law. Even those who are willing to admit that constitutional law can be created or changed by governmental practice tend to treat such practice as relevant only to "give meaning" to the constitutional text or to serve as evidence of the intent of the framers.

There is a significant resistance to any recognition that creation of norms of intergovernmental conduct without ultimate judicial participation has the same legitimacy as a process of constitutional law creation that begins and ends in the document and is articulated by the courts.[35]

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30. *Id.* at 108-09 (emphasis added).

31. *See supra* text accompanying note 4.

32. HENKIN, *supra* note 1, at 77-79.

33. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 997 (1979) (mem.) (Powell, J., concurring).

34. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983), Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

35. Hans A. Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227,

The unspoken (and inaccurate) logical corollary of this identification between judicial pronouncements and legitimate constitutional law is that where there has been no Supreme Court review and none is likely because of the subject matter involved, there is no operative constitutional norm except, perhaps, in the purely theoretical sense. An "insistence on a determinate constitutional law" presumes that the Constitution must always be viewed from a judicial perspective. Thus, no room is left for the recognition that constitutional law, like that created by prior government practice, might be viewed in certain type-fact situations as a series of "open-textured norms," unreduced to specific verbal formulae by the pronouncement of a single authoritative decisionmaker.[36]

In fact, the interaction between the governmental branches is itself law-creating and law-interpreting. That process strongly resembles the process by which customary international law is created in the community of nations. Professor Myres McDougal has described the creation of customary international law between nation-states as a process of demand-response-accommodation. Each nation asserts its position, others respond with either objection or approval, and the ultimate legal norm reflects an accommodation among the conflicting views of the nation-states.[37] Generalized descriptions of the results of this interactive process take the form of "rules" of international law.[38] Those rules are, in fact, nothing more than abstract summaries of the results of the demand-response-accommodation process as it has operated in the past. This description of customary law formation is less a theory than it is an accurate description of what occurs in the world community as independent nations assert rights and accept duties with respect to specific issues.[39]

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250 (1972).

36. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 30 (1978).

37. *See* Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 358 (1955).

38. "It is not of course the unilateral claims but rather the reciprocal tolerance of the external decision-makers which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law." *Id.* at 358 n.7.

39. There is, of course, much debate today about the theory of customary international law-formation, spawned in part by many scholars who are unable to find affirmative evidence of international consent to the legal results that they believe should prevail. *See* Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 458 (1989). Professor McDougal's description remains the most accurate account of the way in which foreign offices actually treat international law on a day to day basis. For a critique and explanation of McDougal's theory, see ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). Whether McDougal's neo-realist approach is accurate with respect to the world

The parallels between the international law formation process and the interaction of the political branches of the United States government in determining the relative scope of their separated powers is not exact but the two systems have sufficient similarities to make the analytical process of customary international law formation instructive. In the conduct of foreign affairs, one branch, usually the executive, asserts authority to act. There may be legislative objection and debate. Ultimately, the Congress either acquiesces or legislates to limit or reject the executive's asserted authority, often using the power of the purse.[40] If the President continues to exercise the power he has claimed, in time (sometimes a very short time) the mechanisms of government may come to rely upon it as a legitimate constitutional power.[41]

Illustrations abound. The legal authority to negotiate executive agreements as an element of the general executive power is a creation of customary constitutional practice.[42] The authority of the President to commit troops abroad, although often verbally challenged, has so often been supported by congressional appropriations that its constitutionality is hardly in doubt.[43] The President's authority to create private law pursuant to the exercise of conferred powers has been recognized by the courts

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community is not the subject of this Review Essay. The demand-response-accommodation analysis does provide a useful tool for considering the process of customary constitutional law formation with respect to separation of powers between the political branches.

40. For example, in 1973 Congress forced the withdrawal of troops from Southeast Asia by cutting off funds for the prosecution of the Vietnam War. *See* Continuing Appropriations Law for the Fiscal Year 1974, 87 Stat. 134, Sec. 108 (1974).

41. For earlier statements of this theme, see Harold G. Maier, *Unarmed Conflict Between the President and Congress: A Process Analysis,* for the Panel, *Rules for Unarmed Conflict in the Intermediate Status Between Peace and War*, 1976 PROC. AMER. SOC. INT'L L. 159, 161; Harold G. Maier, *Testimony on the Proposed Repeal of Sec. 5(b), Trading with the Enemy Act,* Hearings, *Emergency Controls on International Economic Transactions*, Hearings before the Subcommittee on International Economic Policy and Trade, Committee on International Relations, H. REP., 95th. Cong., 1st. Sess., March 29, 1977, 21-32 [hereinafter Testimony].

42. "The development of the executive agreement as a vital instrument of foreign policy is a prime illustration of long-sanctioned practice which ripens into contemporary constitutional doctrine. The analogy to state practice which ripens into customary international law is evident." HENRY STEINER & DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS 615 (3d ed. 1986); Congress recognized the constitutionality of executive agreements by enacting the Case Act, 1 U.S.C. § 112b (1982). The U.S. Supreme Court did the same when it made no distinction between executive agreements and treaties in deciding Reid v. Covert, 354 U.S. 1 (1957).

43. Congress implicitly recognized that authority in The War Powers Resolution as part of an effort to limit it. Pub. L. No. 93-148, 87 Stat. 555, (codified as amended at 50 U.S.C. §§ 1541-48 (1991)).

as a necessary concomitant of conferred authority.[44] The existence of executive privilege with respect to national security matters, regularly asserted by Presidents in the face of congressional and judicial summonses, was ultimately recognized by the courts.[45] One of the best illustrations of the accretion of executive authority as a result of congressional acquiescence is the development of executive emergency powers under section 5(b) of the Trading the with Enemy Act:

> As a result of continuing interplay between the Executive and the Congress, Section 5(b) has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to trading with the enemy. . . . .We know of no indication of Congressional disagreement with the legality of this practice or criticism of it.[46]

For almost 40 years the United States remained in the state of emergency declared by President Roosevelt in 1933 to support the declaration of a bank holiday. When the Congress sought to limit those emergency powers by legislation, it found it necessary to grandfather several emergency power regulations implementing emergency declarations because the functions of government had come to depend upon them.[47] Each of these instances represents not the creation of new constitutional principles by the courts or by Congress,[48] but rather the recognition that the power in question exists, created and confirmed by governmental prac-

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44. *See* United States v. Belmont, 301 U.S. 324 (1937) (dealing with the recognition power).

45. *See* United States v. Nixon, 418 U.S. 683 (1974). The court explicitly recognized the privilege while denying Nixon's claim that the Watergate Tapes were privileged. Nixon's problem was not that there was no privilege. 418 U.S. at 705-06. Rather, he had not met the requirements for claiming privilege. 418 U.S. at 707-13.

46. Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to J.T. Smith, General Counsel, Department of Commerce (Sept. 29, 1976), *reprinted in* Int'l Trade Rep. (BNA), No. 128, Oct. 19, 1976.

47. *See* National Emergencies Act, Pub. L. No. 94-412, tit. II § 502, 90 Stat. 1258. *Cf.* United States v. Yoshida International, Inc., 526 F.2d 560, 576 (3d Cir. 1975).

48. "[T]he combination of legislative permissiveness and executive assertiveness over the past forty years has created a significant shift in the functional constitutional allocations of power to regulate foreign commerce from the legislative to the executive branches. Except in the case of a most serious abuse of this emergency power by the executive branch, this shift in authority will be upheld by the courts." Maier, Testimony, *supra* note 40, at 31. *Cf.* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1 (1990), employing a similar analysis for separation of powers issues between the courts and the Congress with respect to statutes creating or limiting judicial jurisdiction: "Over time certain patterns emerge, and it becomes somewhat easier to predict what the reaction of either branch will be." *Id.* at 56.

tice. This is, I believe, the process of "constitutional adaptation" for which Professor Henkin calls.[49]

Recognition that customary constitutional law is created by interaction of the branches is not an abnegation of judicial authority. Rather, it reflects solely an affirmation that constitutional interpretation of interbranch constitutional authority by the political branches (whose members are bound by oath to support constitutional principles) is no less a form of constitutional interpretation than that engaged in by the courts. This is the thrust of Justice Jackson's famous description of the process of political branch interaction in the *Steel Seizure* case.[50] When the political branches are in agreement, the argument for constitutionality is at its strongest.[51] The courts need intervene only to prevent the political branches from trampling on constitutional restrictions on the power of government generally.[52]

Disagreement between the political branches reflects differing institutional interpretations of constitutional authority.[53] When this occurs, however, the reliability of the constitutional determinations by the legislative and executive representatives of the people diminishes because each becomes more an advocate of institutional power and less an interpreter of constitutional power allocation. Each branch reads the same text and the same history and arrives at a different result. At some point, the judiciary must necessarily act as a referee to resolve the impasse,[54] not because it has greater expertise but because it has greater objectivity.

But the judicial solutions are not always the most desirable. It is the separate actions of the two political branches that represents the people. When that single popular voice seems to speak with different tongues, it is for the political process to resolve that conflict with the judiciary standing by as an ultimate, but reluctant, referee. Contrary to what Professor Henkin suggests,[55] it may often be better to leave interbranch dis-

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49. *See supra* text accompanying note 31.

50. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

51. *Id.* at 634-35.

52. *See, e.g.,* Reid v. Covert, 354 U.S. 1 (1957), holding that an otherwise valid executive agreement, implemented by Congress, could not deprive persons of individual rights guaranteed in the constitution.

53. *See* Dames & Moore v. Reagan, 453 U.S. 654, 680-83 (1981).

54. *See* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (mem.) (Powell, J., concurring). Justice Powell, of course, couched his conclusion in terms of a lack of ripeness. The general policy question, whether the Court should decide he constitutional question presented to it, is exactly the same whether the refusal to hear the case is rested on concerns for ripeness or standing or on the political question doctrine.

55. *See* HENKIN, *supra* note 1, chapter 3. In this chapter, the author seems to aban-

putes unresolved by a third-party decisionmaker. This is sometimes best accomplished, not by a denial of the judiciary's power to resolve the dispute, but by wise abstention in the exercise of that power.

If the referees at a basketball game call every foul they see, the game is not thereby improved, nor does the strength of the teams get a better test. Rather, the game cannot go forward because the players become so inhibited that they cease to be able to function. Similarly, too heavy a judicial hand too frequently inserted to determine the "correct" constitutional allocations of political power would both stifle the engines of government and inhibit the voice of the people as it speaks through its dual legislative and executive tongues. The current willingness of the courts to "let them play" reinforces and nurtures the already significant democratic factor at work to inform, energize, and limit the relative roles played by the political branches in the conduct of foreign affairs.

With the exception of issues related to the protection of individual rights, the "muddling through" process that necessarily results from the vagueness and tensions created by our eighteenth-century constitution is exactly the process most likely to reflect the desires and serve the needs of the people of the United States in the conduct of foreign policy, not only now but in the future. Although the ideal of bright-line rules may be comforting, the dynamic operation of the system of separated but overlapping powers calls for controls that are much more sophisticated. Professor Henkin's formula of constitutional adaptation between the political branches with some judicial guidance reflects the ideal combination to maintain the dynamism of a constitutional arrangement that, despite occasional missteps, has generally served us well throughout two centuries.

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don his own wise formula of "adaptation between the political branches with some judicial guidance," *id.* at 109, by calling for considerably more judicial intervention in foreign affairs matters than this phrase suggests.