SUMMARY

Professor Harold Koh, Keynote Address: The 21st Century National Security Constitution at *The George Washington Law Review*'s Fall 2022 Symposium: The Law of U.S. Foreign Relations

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Harold Hongju Koh, Sterling Professor of International Law at Yale Law School, delivered the keynote address of *The George Washington Law Review*'s Fall 2022 Symposium: *The Law of U.S. Foreign Relations*. The address was entitled "The 21st Century National Security Constitution," a moniker it shares with Professor Koh's forthcoming book. The system that governs the creation and practice of U.S. Foreign Relations Law within the sphere of national security, *i.e.* "the National Security Constitution," has undergone several iterations through Professor Koh's five decades studying the issue. Following years of systematic attack and neglect, the National Security Constitution's current iteration is its most dysfunctional to date. Professor Koh's address identified a framework of synergistic dysfunction that characterizes the United States' modern approach to foreign relations law: executive overreach enabled by congressional passivity and judicial tolerance.

There exist two competing legal theories of executive authority in U.S. foreign relations law: *Youngstown Sheet & Tube v. Sawyer*[1] and *Curtiss-Wright Corp., v. General Electric Co.*[2] Justice Jackson's concurring opinion in *Youngstown* articulates three categories within which the President's powers "fluctuate, depending upon their disjunction or conjunction with those of Congress"[3] with executive power being at its strongest when the President acts pursuant to congressional authorization and at its "lowest ebb" when acting contrary to it.[4] In contrast, the unilateralist approach of *Curtiss-Wright* underscores the President's plenary power over national security.[5] In Koh's experience within the government, practitioners often invoked the "*Curtiss-Wright*, so I'm right cite"

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[1] Youngstown Sheet & Tube v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[2] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

[3] *Youngstown* 343 U.S. at 635.

[4] *See id.* at 635–638 (articulating three categories of presidential power: (1) "When the President acts pursuant to an express or implied authorization of Congress his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate" (2) "When the President acts in absence of either a congressional grant or denial of authority," there exists a "zone of twilight in which he and Congress may have concurrent authority," and (3) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter").

[5] *See Curtiss-Wright*, 299 U.S. at 319–20 (referring to the President's authority in international relations as the "plenary and exclusive power of the President as the sole organ of the federal government . . . a power which does not require as a basis for its exercise an act of Congress").

to justify exercises of Presidential power. Between the 1980s and today, the United States' national security vision has transformed from one of *Youngstown* to one of *Curtiss-Wright*.

The dysfunctional *Curtiss-Wright* framework of governmental authority begins with overreach by the Executive Branch—a phenomenon that has intensified during both Republican and Democratic presidential administrations and which reached its zenith during the Trump Administration. Power has flowed from Congress to the Executive, and within the Executive, there is now a strikingly greater centralization of control within the presidency and National Security Council. Power has flowed away from diplomatic and justice agencies toward national security bureaucracies with the military and intelligence apparatus.

Congress's response to executive overreach has been passive inaction. The process for international lawmaking has virtually broken down due to increased polarization, politicization of foreign affairs issues, and the proliferation of an obstructionist approach to lawmaking. The public has accepted congressional inaction as the norm, licensing lawmakers to do nothing, because if they did something, they might get voted out of office. One function Congress has not abandoned is blocking confirmation of executive branch nominees, which further incentivizes the Executive to centralize power in unconfirmed officials who are less beholden to Congress.

The Judiciary has responded by deferring and doling out rubber stamps. The Supreme Court relies on justiciability doctrines, procedural obstacles, or immunity defenses to avoid reaching the merits of civil disputes that even *arguably* touch on national security. When the Court does reach the merits, it has exerted itself to uphold the President's actions.[6] Some exceptions to judicial deference exist, but in practice, these cases enjoy little influence in the government.[7]

The legal academy, for its part, has engaged in sideshows. It has focused too much on judicial issues that do not address the core structural challenges caused by interbranch dysfunction. These sideshows include the status of customary international law as U.S. law and the question of foreign affairs exceptionalism versus normalization. These issues are not discussed at all in the government. Courts, though convenient to study and teach, constitute the branch least involved in U.S. foreign relations law. The academic debates miss the key issue: "the unilateral capacity of the president to establish foreign relations law."[8] Debates should instead focus on the dysfunctional interactive dynamic between the legislative and executive branches and talk directly about how to restore the balance of institutional participation in foreign affairs decision making.

Donald Trump's presidency revealed the magnitude of the imbalance of power between the Executive and Congress. President Trump once bragged, "I have an Article II where I have the right to do whatever I want as President."[9] The Trump Administration represented a new kind of danger: the President of the United States as a national security threat—an individual willing to expose, exploit, and invite attacks against vulnerabilities

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[6] *See*, *e.g.*, Zivotofsky v. Kerry (*Zivitofsky II*), 576 U.S. 1 (2015) (construing President's actions as authorized under the U.S. Constitution's Reception Clause; "The Reception Clause directs that the President 'shall receive Ambassadors and other public Ministers'" (quoting U.S. Const. art. 2 § 3)).

[7] *See*, *e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Zivotofsky v. Clinton, 566 U.S. 189 (*Zivitofsky I*) (2012).

[8] Edward T. Swaine, *Consider the Source: Evidence and Authority in the Fourth Restatement*, *in* RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW, 509, 525 (Paul B. Stephan & Sarah H. Cleveland ed., 2020).

[9] *The Impeachment Inquiry into Donald J. Trump: Constitutional Grounds for Presidential Impeachment: Hearing Before the H. Comm. on Jud.*, 116th Cong. 274 (Dec. 4, 2019), https://www.congress.gov/116/chrg/CHRG-116hhrg38933/CHRG-116hhrg38933.pdf [https://perma.cc/XN9V-C55U].

in the U.S. electoral process. President Trump exhibited a pattern of invoking *Curtiss-Wright* to nullify the rule of law.

The persistent response to executive overreach has been undercorrection. Two failed impeachments, one Mueller Report, and a January 6th Committee later, we are no closer to solving the problem. To this failure, we can compare historical responses to presidential wrongdoing: Nixon left office after Watergate; Congress passed statutes increasing oversight of intelligence agencies and constraining presidential war powers following Vietnam; and after the Iran-Contra affair, the Legislature initiated bipartisan investigatory commissions to avoid repetition in the future. The response now is nothing.

There is a better path forward: a path of institutional reform to establish a strong Chief Executive *within* a strong system of internal and external checks and balances that make the President constitutionally accountable to the electorate. To accomplish this, we must break the interactive institutional cycle that leads to executive unilateralism. Strengthen internal checks and balances to discourage *Curtiss-Wright* and instead encourage *Youngstown* tendances by the Executive Branch. Enact reforms in Congress to increase speed and expertise in foreign affairs functions. And in the Judiciary, reduce barriers to justiciability and revise doctrines to increase judicial oversight of executive overreach in national security.

First, the Executive Branch. President Biden should enact institutional reforms protecting the independence of law enforcement. The Office of Legal Counsel should revise its opinions to clarify that no person is above the law and that a lawless President may be indicted for criminal wrongdoing. The President should clarify and regularize procedures for use of the Executive's constitutional powers.[10] Legal roles within the Executive Branch should be clarified: the Office of Legal Counsel should be shrunk to its historically small size and its scope confined to interpreting documents from component executive agencies rather than writing its own documents or incorrectly rewriting documents from component agencies; expand the role of the National Security Council's Legal Advisor's office. Strengthen the Special Counsel by authorizing a public report—like the bipartisan 9/11 Commission's report[11]—containing a factual background, specific public recommendations to prevent recurrence, and a public finding as to whether the facts gathered are sufficient to show the President has committed a crime.

Next, Congress. The Legislature should strengthen checks on covert operations, including inter-agency review of legal opinions authorizing covert action, designate the Attorney General as a statutory member of the National Security Council, release certain legal opinions to congressional intelligence committees, pass statutes requiring that the President make "findings" for all covert action, and enact legislation requiring that the National Security Advisor be a civilian. Congress should expand repositories of national security expertise and legal advice by creating a Congressional Legal Adviser, and it should forbid secret agency legal opinions and instead require their submission to Congress for review. Congress should clarify the need for its approval in withdrawal from key international agreements,[12] restore its role in international trade and appropriations, and pass new legislation to limit the Executive's use of emergency powers for use of force.[13]

Finally, the Judiciary. The Court should reduce the barriers to justiciability in foreign affairs by narrowing political questions and increasing competence in foreign affairs to normalize courts' role in this field. Courts should closely scrutinize executive

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[10] The pardon power, as one example.

[11] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1 (2004) https://9-11commission.gov/report/911Report.pdf [https://perma.cc/EJ47-DJG2].

[12] *E.g.*, Paris Climate Accord, the World Health Organization, and the World Trade Organization.

[13] *See*, *e.g.*, conflicts in Yemen and Iran.

justifications for foreign affairs actions.[14] The Court should revise presumptions and canons of deference by abandoning or limiting the non-self-executing treaty doctrine and softening the presumption against extraterritoriality. Courts should again refer to foreign and international law in interpretation, just as America's first judges did. To that end, the *Charming Betsy*[15] canon should be updated to direct that when a U.S. judge is faced with an interpretive question regarding a statute or a provision of the Constitution, she should construe the provision in the manner most consistent with the modern consensus of the international legal community, if one can be clearly discerned. The Court should narrow foreign affairs preemption to genuine conflict preemption to encourage states and localities to experiment on issues such as emissions trading and international human rights.

Are these reforms too much? It's possible, but not likely. Our challenge is to recognize the urgency of the task before us. Let's build on this and other symposia to begin restoring *Youngstown*'s vision of a balanced institutional participation in foreign relations. But first, we must recognize, "Washington, we have a problem."

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[14] *Compare* Trump v. Hawaii 138 S. Ct. 2392 (2019) (Sotomayor, J., dissenting) (calling the Trump Administration's justification a "national security masquerade"), *with* Department of Commerce v. New York (Roberts, C.J.) (rejecting "contrived" pretextual justifications for agency decisions and requiring that the agency "offer genuine justifications for important decisions . . . that can be scrutinized by courts and the interested public").

[15] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").