

FOREIGN RELATIONS, STRATEGIC DOCTRINE, AND PRESIDENTIAL POWER

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ABSTRACT

There is a central debate in foreign relations law between scholars who argue that the President inherited great power from the founding and those who contend that only after World War II was there a significant shift in the balance of powers over foreign relations. This Article highlights a third perspective by focusing on the significance of presidential assertions of power during the decade after the Spanish–American War. In this period, presidents asserted unprecedented power to dispatch the armed forces of the United States into foreign conflicts and to independently enter into binding international agreements without the participation of Congress. The Article concludes that shifting international relations, shaped by strategic foreign policy doctrine, have been central drivers of presidential assertions of authority over foreign relations.

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I. INTRODUCTION

Defining the boundaries of the President's power to act unilaterally around the world is one of the most important debates of our times.¹ In foreign relations law, historical practice is of great interest in answering this question because of the limited text in the Constitution allocating power over foreign affairs between the branches of government.² A major divide exists between those scholars who argue that the President inherited great power over foreign relations from the founding and those who contend that only after World War II was there a major shift in the balance of power over foreign relations. This Article highlights a third perspective, which focuses on the significance of developments in the early twentieth century. It connects expanded assertions of presidential power to the emergence of the United States as a world power and to the strategic foreign policy doctrines that shaped that era.

At the center of this controversy are divergent perspectives on the President's power to form binding agreements with other nations³ and to send forces into foreign conflicts without the authorization of Congress.⁴ These two powers are generally understood to be among the most

1. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 97–100 (1990); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (2011); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 181 (2009); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377 (2011) (book review); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450 (2006) (book review).

2. Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, LAW & CONTEMP. PROBS., Autumn 2004, at 169, 171.

3. KOH, *supra* note 1, at 41–45; GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* 9 (1997); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 815–20 (1995); Hathaway, *supra* note 1, at 144; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

4. KOH, *supra* note 1, at 38–40; Prakash & Ramsey, *supra* note 1, at 234–35; Yoo, *supra* note 1, at 1676–78.

important of all foreign affairs powers.⁵ According to one leading view, decisions over war were essentially reserved to Congress in the era before World War II,⁶ and the treaty power was the central mechanism for the United States to enter into international agreements until the mid-twentieth century.⁷ In contrast, some scholars have argued that broad presidential power over foreign relations can be traced back to the adoption of the Constitution and to a “residual” foreign affairs power held by the President.⁸ The historical account on which this view relies, however, has been challenged as an untenable interpretation of the Framers’ intentions by scholars examining the founding period.⁹ Yet few scholars have closely examined the possibility that America’s emerging global leadership in the early twentieth century transformed presidential power over foreign relations before World War II.¹⁰ Even fewer have suggested this period as a source of innovation in the instruments of presidential power.¹¹

Both of the dominant narratives miss the full significance of early twentieth-century presidents who asserted unprecedented power to dispatch the armed forces of the United States into foreign conflicts and to independently form binding international agreements without the participation of Congress. Many scholars completely overlook the role of Theodore Roosevelt in shaping the boundaries of foreign relations law.¹² Others argue that this period was not significant because Roosevelt articulated a self-limiting view of executive power, or because he left little lasting legacy in terms of successors.¹³ Yet Roosevelt self-consciously sought to create precedents for expanded presidential power and both the expanded use of executive agreements and the deployment of armed forces without congressional approval continued after his time in office.

5. THOMAS M. FRANCK & EDWARD WEISBAND, *FOREIGN POLICY BY CONGRESS* 135 (1979) (“Of the various foreign relations initiatives open to a country, the most crucial are the making of war and the undertaking of solemn commitments.”).

6. KOH, *supra* note 1, at 96–97; SILVERSTEIN, *supra* note 3, at 65.

7. Hathaway, *supra* note 1, at 144; *see also* Ackerman & Golove, *supra* note 4, at 897–900.

8. Prakash & Ramsey, *supra* note 1, at 234; Yoo, *supra* note 1, at 1676–78.

9. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004).

10. *See* Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003).

11. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).

12. Mortenson, *supra* note 1, at 382 n.20; *see also* JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2009).

13. KOH, *supra* note 1, at 90–91 (highlighting the fact that Roosevelt’s immediate successor, William Howard Taft, explicitly retreated from many of the positions on executive power taken by Roosevelt); Ackerman & Golove, *supra* note 4, at 818 (arguing that Roosevelt “strained existing categories” but did not break them); Barron & Lederman, *supra* note 1, at 1034–35 (suggesting that Roosevelt “expressly conceded Congress’s ultimate control over executive powers” in his stewardship theory); Hathaway, *supra* note 1, at 175 n.107.

The decade after the Spanish–American War reveals how shifting international relations, shaped by strategic foreign policy ideas, drive claims of presidential authority over foreign relations. Although scholarship in international relations suggests that domestic political structures are significantly influenced by external factors,¹⁴ this insight has rarely been utilized by legal scholars in examining the United States.¹⁵ Too often, accounts that incorporate international dimensions of change assume that shifting international relations directly alter the behavior of states due to external constraints. For example, some scholars have argued that expanded presidential assertions of authority reflected a functional response to external threats during the Cold War.¹⁶ Some constitutional scholars at the time even suggested that the Cold War required constitutional dictatorship.¹⁷ In our own time, the rationales of strategic necessity and functionalism remain central arguments for those who defend expanded presidential authority over foreign relations.¹⁸

Yet the evolving security demands of the United States, and the constitutional implications of these demands, are shaped by interpretations of the challenges and opportunities presented in any given era. Ideas and strategic doctrines significantly shape the way in which presidents comprehend and respond to shifting international relations.¹⁹ Strategic foreign policy doctrines are particularly powerful animating ideas because they frame understandings of how basic security can be maintained and enhanced.²⁰ From the Founding until the turn of the twentieth century, America’s ambitions in the world were quite limited, and few presidents directly challenged the central role of Congress in foreign relations. In the early twentieth century, Theodore Roosevelt developed a comprehensive

14. Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT’L ORG. 881, 883 (1978) (highlighting the fact that “political development is shaped by war and trade”).

15. One recent exception is KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 26 (2009); see also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

16. SILVERSTEIN, *supra* note 3, at 9 (arguing the “Cold War allowed the executive to accrue extraordinary power by arguing that the United States was engaged in a national emergency”).

17. See CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948).

18. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2535 (2006) (arguing that recent “developments in the international system may demand that the United States have the ability to use force earlier and more quickly than in the past”).

19. Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 3, 12 (Judith Goldstein & Robert O. Keohane eds., 1993) (“Ideas help to order the world. By ordering the world, ideas may shape agendas, which can profoundly shape outcomes.”).

20. BARRY R. POSEN, *THE SOURCES OF MILITARY DOCTRINE: FRANCE, BRITAIN, AND GERMANY BETWEEN THE WORLD WARS* 13 (1984) (defining grand strategy as a “theory about how [a state] can best ‘cause’ security for itself”).

foreign policy doctrine, grounded in the idea of naval supremacy as the key building block of national power, which drove his assertions of presidential power. The Roosevelt corollary to the Monroe Doctrine reflected his ambitions to build the Panama Canal, aggressively intervene to counter European ambitions in the Americas, and preserve the “open door” in Asia. This strategic vision shaped the emergence of the modern executive agreement and an international police power justifying unilateral intervention. This Article argues that a major fulcrum of change in foreign relations law that emerged in the early twentieth century was the strategic foreign policy constructs of presidents.

Part I analyzes early presidential practice from the Founding to the end of the nineteenth century, with particular attention to the war power and the treaty power. Part II examines unprecedented assertions of presidential power in the decade after the Spanish–American War through the expanded use of executive agreements and the unilateral presidential deployment of troops. It finds that emerging foreign policy doctrines drove unprecedented presidential unilateralism in the international arena. Part III analyzes the legacy of this early twentieth-century shift in the balance of power over foreign relations and its continuing significance in our own time.

II. INTERPRETING PRESIDENTIAL POWER

A. War Power

While U.S. presidents in the eighteenth and nineteenth centuries generally sought congressional approval for military operations abroad, by the early twentieth century international police actions based solely on the President’s authority became commonplace. In the wake of the Spanish–American War, presidents increasingly asserted broad inherent power to act in the arena of foreign relations. President Roosevelt articulated a consistent grand strategy in foreign policy that drove him to assert unprecedented executive power in order to secure the future of the United States among the world’s powers. A survey of presidential practice in foreign relations during the late eighteenth and nineteenth centuries reveals just how much of a departure the claims of expanded presidential authority in the wake of the Spanish–American War represented.

One of the important innovations of the U.S. Constitution was that it vested the power to determine whether the country went to war in more than one individual, in contrast to the royal tradition of much of Europe. The idea of placing the solemn decision to engage in military conflict in the legislative branch was a crucial and deliberate decision by the Framers of

the Constitution.²¹ It was designed to slow the country's entry into war by requiring wider deliberation before the United States entered into any foreign conflict.²² As the Framers themselves explained, lodging the power to declare war in the Congress was meant to slow the rush to war.²³

While some scholars have argued for a broader interpretation of executive power over foreign relations dating back to the period of the Founders,²⁴ this view has been challenged by the close historical analysis of other scholars in recent years.²⁵ The neutrality controversy and Alexander Hamilton's famous defense of executive power are often cited as evidence that the President had powers beyond those enumerated in the Constitution in the arena of foreign relations.²⁶ However, Curtis Bradley and Martin Flaherty suggest a much narrower interpretation of Alexander Hamilton's views on executive power.²⁷ When it came to matters of war, even Hamilton was quite respectful of the power of other branches, insisting that "Congress possessed the sole and exclusive authority to commence hostilities on behalf of the American people."²⁸ Evidence of this view is found in Hamilton's own reference to the "plain meaning" of the War Clause as being "the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*."²⁹ Early presidents generally respected the primacy of Congress over decisions to go to war and explicitly sought congressional approval for military conflicts.³⁰

The Supreme Court, led by Chief Justice Marshall, offered strong support for the authority of the Congress over decisions to engage in even limited hostilities. In 1801, the Court made clear in *Talbot v. Seeman* that Congress has the ultimate power over war, not only when it comes to

21. Lori Fisler Damrosch, *Constitutional Control over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. MIAMI L. REV. 181, 182 (1995).

22. David Gray Adler, *The Constitution and Presidential Warmaking*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 183, 186 (David Gray Adler & Larry N. George eds., 1996).

23. *Id.* ("This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress . . .") (quoting James Wilson).

24. Prakash & Ramsey, *supra* note 1, at 234; Yoo, *supra* note 1, at 1676.

25. Bradley & Flaherty, *supra* note 9, at 551.

26. Prakash & Ramsey, *supra* note 1, at 297.

27. Bradley & Flaherty, *supra* note 9, at 551.

28. David Gray Adler, *Presidential Power and Foreign Affairs in the Bush Administration: The Use and Abuse of Alexander Hamilton*, 40 PRESIDENTIAL STUD. Q. 531, 536 (2010).

29. 7 ALEXANDER HAMILTON, *Examination of Jefferson's Message to Congress of December 7, 1801*, in THE WORKS OF ALEXANDER HAMILTON 744, 746 (John C. Hamilton ed., 1851).

30. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 78-79 (1990).

general war, but also to “partial hostilities.”³¹ The case involved the recapture of a French military vessel by a U.S. warship during the naval conflict between the United States and France from 1798 to 1800. Although there was no declaration of war against France at the time, Congress had authorized the seizure of French ships. In determining the legitimacy of the capture of the French vessel, Chief Justice Marshall reaffirmed that Congress is the arbiter of any decision to enter into a military conflict, stating: “The whole powers of war being, by the [C]onstitution of the United States, vested in [C]ongress, the acts of that body can alone be resorted to as our guides in this inquiry.”³²

President Thomas Jefferson articulated a similar view with regards to the authority of Congress over even smaller conflicts: “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”³³ Jefferson sought congressional approval for an embargo against Great Britain in the undeclared war of 1807.³⁴ Although Jefferson did unilaterally send warships to the Barbary Coast when Congress was out of session, he subsequently sought congressional authorization and publicly conceded that non-defensive actions required congressional approval because “under the Constitution, actions beyond the line of defense were unauthorized without the sanction of Congress.”³⁵ James Madison later defended Jefferson’s actions in this situation precisely because he viewed them as defensive in nature: “The only case in which [t]he Executive can enter on a War, undeclared by Congress, is when a state of War has been actually produced by the conduct of another power”³⁶

Even some of the most assertive foreign policy presidents of the early nineteenth century rejected the idea that the executive could initiate hostilities. President James Monroe, who outlined the influential Monroe Doctrine, repeatedly disavowed that he had the power to launch military action on his own.³⁷ Even when the safety of Americans was in jeopardy in Latin America, President Andrew Jackson still sought support from Congress before acting.³⁸ Jackson asked the Congress to “clothe the

31. Talbot v. Seeman, 5 U.S. 1, 28 (1801).

32. *Id.*

33. President Thomas Jefferson, Special Message to Congress on Foreign Policy (Dec. 6, 1805), available at <http://millercenter.org/scripps/archive/speeches/detail/3492>.

34. Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 53 (1999).

35. DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805*, at 98 (1970).

36. Letter from James Madison to James Monroe (Nov. 16, 1827) (on file with the Library Of Congress).

37. Adler, *supra* note 22, at 202.

38. GLENNON, *supra* note 30, at 79.

Executive with such authority and means as they may deem necessary for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in [those areas].”³⁹

A tougher test for the nineteenth century balance of powers over foreign relations can be found in the Mexican–American War. President James Polk deployed forces to the disputed southern border of Texas, which catalyzed the conflict with Mexico before he sought congressional authorization. However, Polk did subsequently seek a declaration of war from the Congress against Mexico.⁴⁰ Although Polk’s actions were heavily criticized at the time by members of Congress, including Abraham Lincoln, he made no formal assertion of expanded executive power. Instead, Polk justified his actions entirely in defensive terms that did not give rise to any lasting conceptions of expanded executive power.⁴¹

Although Lincoln was himself a formidable wartime President, he relied upon domestic statutory and constitutional powers rather than any foreign relations power during the Civil War.⁴² Lincoln’s successors were even less inclined to bold assertions of presidential power in foreign relations, and Congress enjoyed an expanded role in foreign policymaking during the late nineteenth century.⁴³ As late as 1885, Woodrow Wilson could still write that “Congress is fast becoming the governing body of the nation,”⁴⁴ and ask whether “the President has any very great authority in matters of vital policy?”⁴⁵

B. Executive Agreements

The rise of the modern executive agreement is viewed by many scholars as one of the most fundamental changes in the foreign relations of the United States.⁴⁶ Many scholars point to the mid-twentieth century as the key turning point in the rise of the executive agreement.⁴⁷ These accounts focus on the sharp growth in the use of executive agreements after World

39. *Id.* at 79–80 (quoting President Andrew Jackson, Third Annual Message to Congress (Dec. 6, 1831)).

40. CONG. GLOBE, 29TH CONG., 1ST SESS. 783 (1846) (“I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor . . .” (statement of President James Polk)).

41. *Id.*

42. KOH, *supra* note 1, at 85.

43. *Id.* at 86.

44. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 301 (1885).

45. *Id.* at 332.

46. GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 2 (2009); Hathaway, *supra* note 1.

47. Hathaway, *supra* note 1, at 179–80.

War II and generally argue that “executive agreements were a relative rarity before the mid-twentieth century.”⁴⁸ Although the roots of the modern executive agreement are located in the 1890s, the early twentieth century is often viewed as a period in which the potential of the executive agreement went unrealized.⁴⁹

In fact, however, the use of executive agreements rose to unprecedented levels in the early twentieth century.⁵⁰ Between the founding of the United States and 1910 there were only 124 executive agreements in total, an average of just one per year. However, President Theodore Roosevelt concluded fifty-three executive agreements in just eight years, which represented forty-two percent of the total number of such agreements by the United States up to that time.⁵¹ The early twentieth-century experience reflected a break with how previous presidents understood the boundaries of their authority to form binding agreements.

For over a century after the ratification of the Constitution, the treaty power remained the central vehicle for securing international agreements between the United States and other countries.⁵² For example, Jefferson doubted his own constitutional authority to make the Louisiana Purchase and submitted it to the Senate for ratification as a treaty. Monroe similarly doubted the constitutionality of the Rush–Bagot agreement with Britain, limiting the use of the military in the Great Lakes, and he sought Senate ratification of the agreement as a treaty.⁵³ The origins of the modern executive agreement, which emerged as an alternative to the use of treaties, can be found in the McKinley Tariff Act of 1890.⁵⁴

The McKinley Tariff Act allowed the President to negotiate trade agreements with other nations on commercial matters without returning to the Congress for authority. Although previous proclamation statutes had provided for presidential negotiations on an ad hoc basis, the McKinley Tariff Act was the first such statute that was part of a broad programmatic effort to shift the trade policies of a range of different countries. It led to the finalization of twelve different reciprocal trade agreements in just a few years.⁵⁵ In 1892, in *Field v. Clark*, the Supreme Court upheld the McKinley Tariff Act and the authority of Congress to empower the President to make

48. *Id.* at 144.

49. *Id.* at 145.

50. KRUTZ & PEAKE, *supra* note 46, at 38. *But see* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 964 (2001).

51. David M. O'Brien, *Presidential and Congressional Relations in Foreign Affairs: The Treaty-Making Power and the Rise of Executive Agreements*, in CONGRESS AND THE POLITICS OF FOREIGN POLICY 70, 72 (Colton C. Campbell et al. eds., 2003).

52. *Id.*

53. *Id.*

54. Hathaway, *supra* note 1, at 173.

55. Ackerman & Golove, *supra* note 4, at 822.

reciprocal agreements with other nations.⁵⁶ The legislation allowed the President to reduce tariff revenue and equalize duties on imports for many goods in order to expand reciprocal trade with other countries. The Supreme Court rejected the claim that Congress had unconstitutionally delegated its legislative power to the executive. The Court concluded that “the authority conferred upon the [P]resident [by the McKinley Tariff Act] is not an entirely new feature in the legislation of [C]ongress, but has the sanction of many precedents in legislation.”⁵⁷ The increased use of these limited executive agreements blurred the separation between the branches and their respective roles in forming binding international agreements.⁵⁸

However, unlike modern executive agreements, these early reciprocal agreements were authorized by Congress and valid only until Congress repealed the authorization. In 1894, when Congress repealed the McKinley Tariff Act, the Secretary of State explained the immediate termination of an agreement with Brazil to his Brazilian counterpart by referencing the fact that treaties are made by the President, based only upon “the advice and consent of the Senate.”⁵⁹

The shift toward wider use of executive agreements reflected the tremendous difficulty in securing Senate ratification of treaties in the late nineteenth century and early twentieth century. The Senate failed to give its approval to every major treaty between 1871 and 1898.⁶⁰ The Senate jealously guarded its prerogatives with respect to the treaty process—as Senator Henry Cabot Lodge explained, “a treaty sent to the Senate is not properly a treaty but merely a project.”⁶¹ Richard Olney, who served as Secretary of State until 1897, ultimately concluded that the defeat of the President’s treaties were better than wholesale changes often imposed by the Senate.⁶²

Responding to the challenge posed by Senate ratification, presidents increasingly turned to executive agreements to form binding international commitments. Executive agreements were used to implement the annexation of new territories, to establish the terms of peace of major wars, and for other far-reaching diplomatic objectives. A number of contemporary legal scholars in the early twentieth century recognized the significance of the United States’ rise to the status of a world power for the constitutional balance of powers between the Congress and the President in foreign relations. Simeon Baldwin, who later criticized Roosevelt’s broad

56. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

57. *Id.* at 690.

58. *Id.*

59. Ackerman & Golove, *supra* note 4, at 823.

60. JAMES M. LINDSAY, *CONGRESS AND THE POLITICS OF U.S. FOREIGN POLICY* 15 (1994).

61. KRUTZ & PEAKE, *supra* note 46, at 32.

62. *Id.*

use of executive agreements, nonetheless praised executive authority for its “promptitude, decision and secrecy” and criticized the Senate for having become “too large to fulfill properly the functions of a privy council.”⁶³ In the wake of the Spanish–American War, executive agreements became much more attractive as flexible and timely instruments of a rising global power.⁶⁴

III. EVOLUTION OF PRESIDENTIAL POWER (1898–1908)

A. *Legacy of the Spanish–American War*

The presidency of William McKinley spanned the turn of the century and his deference to Congress before going to war with Spain contrasted sharply with subsequent presidential deployment of troops without congressional authorization in the wake of the conflict. In 1898, McKinley sought authorization from Congress not once but twice before engaging in hostilities with Spain. After the explosion on the U.S. battleship *Maine* in Havana Harbor, President McKinley faced escalating pressure from the Congress and the press to go to war with Spain. McKinley initially went to Congress to secure authorization “to use the military and naval forces of the United States as may be necessary.”⁶⁵ Later, when McKinley went back to Congress a second time because of the limited powers granted by the first resolution in order to seek expanded powers he stated: “I have been constrained, in exercise of the power and authority conferred upon me by the joint resolution . . . to proclaim . . . a blockade of certain ports of the north coast of Cuba.”⁶⁶ McKinley’s actions prior to the Spanish–American War indicate that congressional authorization retained a central role in shaping and constraining presidential actions in foreign relations until at least the late nineteenth century.

The protocol which ended the hostilities and established the essential terms of peace, including the cession of Puerto Rico, was entered into without congressional approval.⁶⁷ In the year after the war, McKinley entered into more executive agreements than any previous president.⁶⁸ After the war, McKinley relied on broad assertions of presidential power to engage in hostilities in the Philippines and establish governance over the

63. Simeon E. Baldwin, *The Entry of the United States into World Politics as One of the Great Powers*, 9 YALE REV. 399, 404 (1901).

64. *Id.* at 403.

65. 31 CONG. REC. 3702 (1898) (statement of President William McKinley).

66. 31 CONG. REC. 4228 (1898) (statement of President William McKinley).

67. White, *supra* note 11, at 20.

68. LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 103 (1986).

islands. President McKinley's decision to occupy the Philippines after the Spanish–American War raised a range of novel legal questions.⁶⁹ In an 1899 message to Congress, McKinley explained that “[u]ntil Congress shall have made known the formal expression of its will I shall use the authority vested in me by the Constitution and the statutes to uphold the sovereignty of the United States in those distant islands.”⁷⁰ In *Downes v. Bidwell*, the Supreme Court ultimately upheld the actions of McKinley in the newly acquired territories.⁷¹

Later, in the context of the Boxer Rebellion, McKinley asserted that his unilateral power was sufficient to send American troops to China. In response to a growing nationalist movement that threatened foreign delegations in Beijing, the United States and a number of European nations dispatched an international military force to China.⁷² During the election campaign of 1900, McKinley committed five thousand troops to China without consulting Congress.⁷³ President McKinley's actions were justified with reference to his inherent power as President in the absence of a law forbidding his actions.⁷⁴ McKinley publicly explained his actions in China as a mission to protect the life and property of Americans in that country as well as to prevent the spread of disorder.⁷⁵ His Secretary of War, Elihu Root, later offered China as the leading example for the proposition that intervention was justified when countries could not protect their own ambassadors, stating that “in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens, as in the case of the Boxer rebellion in China.”⁷⁶

69. ELIHU ROOT, *The Civil Government of the Phillipines*, in THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS 250, 252 (Robert Bacon & James Brown Scott eds., 1916) (“The sole power, however, which the President was exercising in the Philippine Islands was a military power derived from his authority under the Constitution as Commander-in-Chief of the Army and Navy.”). See generally Zasloff, *supra* note 10.

70. 33 CONG. REC. 35 (1900) (statement of President William McKinley).

71. *Downes v. Bidwell*, 182 U.S. 244, 285 (1901) (“If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise . . .”).

72. DIANA PRESTON, THE BOXER REBELLION: THE DRAMATIC STORY OF CHINA'S WAR ON FOREIGNERS THAT SHOOK THE WORLD IN THE SUMMER OF 1900, at 253 (1999).

73. MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER 78 (2002); James L. Tryon, *International Organizations and Police*, 25 YALE L.J. 513 (1916).

74. 48 CONG. REC. 10,929 (1912) (statement of Elihu Root) (“In my judgment, there is no law which forbids the President to send troops of the United States out of this country into any country where he considers it to be his duty as Commander in Chief of the Army to send them, unless it be for the purpose of making war, which, of course, he can not do.”).

75. 34 CONG. REC. 2 (1900) (statement of President William McKinley).

76. Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 520 (1910).

The Boxer Protocol resolving the conflict was entered into by the United States without any action by the Congress.⁷⁷ Under the Boxer Protocol, China agreed to pay an indemnity and guaranteed to prohibit the importation into its territory of arms and ammunition.⁷⁸ The Protocol also provided for punishment for the instigators of the revolt and authorized the creation of extraterritorial quarters for foreigners in Beijing. It was signed on behalf of the United States by the special commissioner to China, who was appointed solely by the President. The Congress had no role at all in shaping the Protocol or in ratifying it on behalf of the United States.⁷⁹

Just as the Boxer deployment reflected unprecedented assertions of executive power over foreign relations, the Boxer Protocol reflected the growing significance of executive agreements. One contemporary commentator characterized the Protocol as “practically of a treaty character” because its scope extended to agreements regarding indemnities and commitments by China that went well beyond a mere framework for concluding hostilities.⁸⁰ Another legal commentator observed that for the first time the United States had adopted the European practice of forming an executive agreement which was almost entirely political in character. Purely political treaties are, under constitutional practice in Europe, usually made by the executive alone.⁸¹ Yet there was only limited objection to President McKinley’s failure to submit the Protocol to the Senate for approval.⁸² President McKinley’s successor, Theodore Roosevelt, justified his expansive vision of presidential power over foreign relations in terms of a new strategic foreign policy doctrine for a rising global power.

B. Roosevelt’s Strategic and Constitutional Vision

As President, Theodore Roosevelt’s commitment to building a strong navy, constructing a U.S.-controlled canal in Central America, and defending an aggressive formulation of the Monroe Doctrine supported by a vision of enhanced presidential power led to a series of constitutional conflicts with the Congress.⁸³ From early in his life, Theodore Roosevelt was focused on the role of naval power in determining the outcome of

77. EDWARD S. CORWIN, *THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS* 151 (Princeton Univ. Press 1917).

78. WALLACE McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 97–98 (AMS Press 1967) (1941).

79. John Bassett Moore, *Treaties and Executive Agreements*, 20 *POL. SCI. Q.* 385, 392 (1905).

80. 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 470 (1910).

81. See James F. Barnett, *International Agreements Without the Advice and Consent of the Senate* (pts. 1 & 2), 15 *YALE L.J.* 18, 63 (1905).

82. WILLOUGHBY, *supra* note 80, at 470–71.

83. CORWIN, *supra* note 77, at 168–69.

major military conflicts. In 1882, he published *The Naval War of 1812*, which he began writing while still in college.⁸⁴ In public life, Roosevelt consistently made the case for the expansion of the Navy and for enhancing its preparedness.⁸⁵ Roosevelt's strong support for the Spanish–American War was closely tied to his belief that “such a war would result at once in getting a proper navy.”⁸⁶

In a shrinking world, naval power was seen as central to national power. Roosevelt shared this view with Alfred Mahan, who observed that “the fundamental truth, warranted by history, [is] that the control of the seas, and especially along the great lines drawn by national interest or national commerce, is the chief among the merely material elements in the power and prosperity of nations.”⁸⁷ After the Spanish–American War, the United States also centralized and professionalized its military. The modernization of the U.S. military was based on the Prussian model, which enabled the Commander-in-Chief to control a large permanent fighting force in contrast to past American presidents of the eighteenth and nineteenth centuries.⁸⁸

Roosevelt viewed the construction of the Panama Canal, and control of the waters around it, as crucial to America's security. He argued that “if we are to hold our own in the struggle for naval and commercial supremacy, we must build up our power without our own borders. We must build the isthmian canal, and we must grasp the points of vantage which will enable us to have our say”⁸⁹ In order to ensure its self-determination, the United States had to have ready access to two oceans and control over the major artery between them. As Mahan elaborated:

If . . . our interest and dignity require that our rights should depend upon the will of no other state, but upon our own power to enforce them, we must gird ourselves to admit that freedom of interoceanic transit depends upon predominance in a maritime region—the Caribbean Sea—through which pass all the approaches to the Isthmus.⁹⁰

84. THEODORE ROOSEVELT, *THE NAVAL WAR OF 1812* (1882), reprinted in 6 *THE WORKS OF THEODORE ROOSEVELT* 1 (Hermann Hagedorn ed., 1926).

85. Peter Karsten, *The Nature of “Influence”: Roosevelt, Mahan, and the Concept of Sea Power*, 23 *AM. Q.* 585, 589 (1971).

86. *Id.* (quoting Roosevelt's sentiments to Secretary John D. Long).

87. A.T. MAHAN, *THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE* 52 (1897).

88. Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 *GEO. L.J.* 1573, 1590 (1994).

89. THEODORE ROOSEVELT, *THE STRENUOUS LIFE* (1899), reprinted in 13 *THE WORKS OF THEODORE ROOSEVELT* 317, 324 (Hermann Hagedorn ed., 1926).

90. Alfred T. Mahan, *The Isthmus and Sea Power*, 72 *ATLANTIC MONTHLY* 459, 471–72 (1893).

Roosevelt was also a strong proponent of the Monroe Doctrine, which provided that European intervention in the Americas would be viewed “as the manifestation of an unfriendly disposition towards the United States.”⁹¹ In 1896, Roosevelt suggested that “if the Monroe Doctrine did not already exist it would be necessary forthwith to create it.”⁹² As Roosevelt’s Secretary of War explained, the Panama Canal heightened the importance of the Monroe Doctrine:

It is plain that the building of the Panama Canal greatly accentuates the practical necessity of the Monroe Doctrine as it applies to all the territory surrounding the Caribbean or near the Bay of Panama. . . . [T]he potential command of the route to and from the Canal must rest with the United States and . . . the vital interests of the nation forbid that such command shall pass into other hands.⁹³

Central to Roosevelt’s constitutional vision—and to his strategic doctrine—was the idea of international police power. He was particularly concerned about the potential for unrest in the Caribbean and Central America to open the door for major European powers to gain a greater foothold in the region. Roosevelt’s corollary to the Monroe Doctrine was integrally connected to the concept of international police power, and many of his major military interventions were justified by this concept. In his State of the Union address in 1901, Roosevelt linked shifting international relations to the need for great powers to serve an expanded policing function: “More and more the increasing interdependence and complexity of international political and economic relations render it incumbent on all civilized and orderly powers to insist on the proper policing of the world.”⁹⁴

Several of President Roosevelt’s unilateral actions in the Caribbean were closely tied to his extension of the Monroe Doctrine. In his 1904 Annual Message to Congress, Roosevelt spelled out what came to be known as the Roosevelt Corollary, justifying intervention in the affairs of neighboring countries:

91. 41 ANNALS OF CONG. 22–23 (1823) (“With the existing colonies or dependencies of any European Power, we have not interfered, and shall not interfere. But, with the Governments who have declared their independence, and maintained it, and whose independence we have, on great consideration, and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling, in any other manner, their destiny, by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States.”).

92. THEODORE ROOSEVELT, AMERICAN IDEALS (1913), reprinted in 20 THE WORKS OF THEODORE ROOSEVELT xv, 168 (Hermann Hagedorn ed., 1926).

93. Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT’L L. 427, 440 (1914).

94. 36 CONG. REC. 10 (1903) (statement of President Theodore Roosevelt).

Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.⁹⁵

Although his corollary focused on the Americas, Roosevelt cited as precedent the deployment of troops to China during the Boxer Rebellion as serving both the interests and ideals of the United States.

The most sophisticated elaboration of Roosevelt's views on the concept of international police power is found in his 1905 correspondence with Carl Schurz. President Roosevelt's conception of international police power reflected his analysis of the weakness of the European approach to the balance of power in the nineteenth century. In a letter to Schurz, Roosevelt highlighted the widespread killings of civilians in Armenia while European powers "kept the peace," which contributed to his view that "the aggregate of hideous wrong done, surpassed that of any war of which we have record in modern times."⁹⁶ Roosevelt sought to answer the questions of whether the United States could "extend its police power overseas, and [whether] it would be wise to do so."⁹⁷ He recognized the limits of the concept of police power in the international context where, unlike at the national level, there was generally no effective sanction of force. Roosevelt concluded that "until international cohesion and the sense of international duties and rights are far more advanced than at present" the major powers should "serve the purposes of international police."⁹⁸

The concept of international police power connected the diverse interventions by Roosevelt in the Caribbean and Central America. Roosevelt's conception of international police power drew on the British use of this term to justify Britain's administration of territories around the world. He relied on it as a justification for his actions to forestall European intervention in the Americas and for his unprecedented assertions of presidential power over foreign relations.⁹⁹

95. 39 CONG. REC. 19 (1905).

96. Letter from Theodore Roosevelt, President, to Carl Schurz (Sept. 8, 1905) in 5 THE LETTERS OF THEODORE ROOSEVELT 16, 16 (Elting E. Morison ed., 1952) [hereinafter Roosevelt Letter to Schurz].

97. JAMES R. HOLMES, THEODORE ROOSEVELT AND WORLD ORDER: POLICE POWER IN INTERNATIONAL RELATIONS 95 (2006).

98. 39 CONG. REC. 19 (1905).

99. HOLMES, *supra* note 97, at 186.

Consistent with his foreign policy doctrine, President Theodore Roosevelt asserted an extremely broad conception of executive power, especially in the area of foreign affairs. Roosevelt articulated what became known as the “stewardship theory” in which the President served as “a steward of the people bound actively and affirmatively to do all he could for the people.”¹⁰⁰ Unlike predecessors who generally denied any effort to exceed their limited authority in foreign relations, Roosevelt self-consciously defended his inherent power under the Constitution to act unilaterally. He argued that the President had a “legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it.”¹⁰¹

Roosevelt self-consciously sought to establish precedents that would empower future presidents by building a foundation for expanded executive power in the area of foreign relations. After his presidency, Roosevelt wrote: “[W]herever I could establish a precedent for strength in the executive, as I did for instance as regards external affairs in the case of sending the fleet around the world, taking Panama, settling affairs of Santo Domingo and Cuba . . . I was establishing a precedent of value.”¹⁰² He viewed these broad assertions of presidential power as key to the success of his Administration:

The most important factor in getting the right spirit in my Administration . . . was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.¹⁰³

Roosevelt echoed Hamilton’s vision of a residual power for the President in foreign relations that extended beyond the explicit powers specified in the Constitution.¹⁰⁴

Just as Roosevelt viewed the President as bound only by direct limitations in the Constitution, so too did he view only the most explicit congressional limits as relevant to the exertion of presidential power. Writing to Secretary of War William Howard Taft in 1908, Roosevelt

100. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 357 (1913) [hereinafter ROOSEVELT AUTOBIOGRAPHY].

101. *Id.* at 464.

102. Letter from Theodore Roosevelt to George Otto Trevelyan (June 19, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT 1085, 1087 (Elting E. Morison ed., 1952).

103. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 357.

104. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett ed., 1969).

explained: “If Congress wishes us to follow a certain course, let it *direct* by law that this course be followed; but if it does not absolutely *direct* that this course shall be followed, I am clear that it is to the public interest that the Executive should have an absolutely free hand”¹⁰⁵ Roosevelt believed that since the President was a direct representative of the people, only the people should have the final word on the constitutionality of his actions.¹⁰⁶

Roosevelt did not see any major drawbacks to vast presidential power so long as the tenure of the President was limited. In 1908, Roosevelt explained:

[T]here inheres in the Presidency more power than in any other office in any great republic or constitutional monarchy of modern times. . . . I don’t think that any harm comes from the concentration of powers in one man’s hands, provided the holder does not keep it for more than a certain, definite time, and then returns to the people from whom he sprang.¹⁰⁷

Roosevelt saw the President as the principal, and often exclusive, actor in key foreign affairs matters. He contrasted the decisiveness of presidents with the slow pace of deliberation in Congress on important international questions. He claimed powers beyond the text of the Constitution and repeatedly took unilateral action based on his far-reaching conception of presidential power justified by his strategic foreign policy objectives. President Roosevelt’s constitutional vision led to unprecedented assertions of executive power over the deployment of U.S. forces in the early twentieth century.

C. Canals, Customs Houses, and Cuba

Building a canal across Panama was among the highest priorities for Roosevelt in the international arena. Yet this ambition was made more challenging by the resistance of the government of Colombia, which still controlled Panama. Once Roosevelt became aware that a revolution was imminent in Panama, the President ordered three ships into the area to support the revolutionaries.¹⁰⁸ He ordered U.S. forces to “[p]revent landing

105. Letter from Theodore Roosevelt to William Howard Taft (Nov. 29, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT 1391, 1391 (Elting E. Morison ed., 1952).

106. William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920) 643, 653 (Michael Grossberg & Christopher Tomlins eds., 2008).

107. Letter from Theodore Roosevelt to George Otto Trevelyan (June 19, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT 1085, 1086 (Elting E. Morison ed., 1952).

108. RICHARD H. COLLIN, *THEODORE ROOSEVELT’S CARIBBEAN: THE PANAMA CANAL, THE MONROE DOCTRINE, AND THE LATIN AMERICAN CONTEXT* 258 (1990).

of any hostile force'” in Panama.¹⁰⁹ Roosevelt subsequently recognized the new government of Panama and quickly formed a binding agreement to secure U.S. control of territory for building the Panama Canal.

Although Roosevelt acted entirely without congressional advice, he claimed that his actions were consistent with those of prior presidents when he wrote, “there was much accusation about my having acted in an ‘unconstitutional manner’—a position which can be upheld only if Jefferson’s action in acquiring Louisiana be also treated as unconstitutional.”¹¹⁰ Of course, Jefferson himself viewed the acquisition of Louisiana as an action that required ratification by the Congress, but this point seemed lost on Roosevelt.

Roosevelt actually drafted a message to Congress in advance of the events of 1903 in which he planned to raise the merits of building a canal in Nicaragua or Panama.¹¹¹ Yet Roosevelt ultimately justified his actions with reference to the limited capacity of Congress to act quickly: “If I had followed traditional, conservative methods . . . the debates on it would be going on yet. But I took the Canal Zone and let Congress debate”¹¹² He defended the urgency of his actions with the argument that it was required to protect the security of the United States: “[U]nless we acted in self-defense, Colombia had it in her power to do us serious harm”¹¹³

In the case of Panama, Roosevelt’s conception of unilateral presidential action extended not just to the exclusion of Congress, but also to the exclusion of his own Cabinet in a number of important foreign policy decisions. Roosevelt later explained that he did not even consult his Cabinet over the Panama intervention: “I took Panama without consulting the Cabinet. A council of war never fights, and in a crisis the duty of a leader is to lead and not to take refuge behind the generally timid wisdom of a multitude of councillors.”¹¹⁴ In sharp contrast to the eighteenth- and nineteenth-century practice of seeking congressional support for most international interventions, Roosevelt understood the Presidency only to be limited by the most explicit of direction from Congress. Roosevelt’s Attorney General famously responded to the President on the matter of the legality of his actions in Panama by advising that he “not let so great an achievement suffer from any taint of legality.”¹¹⁵ Yet Roosevelt

109. *Id.* at 263 (internal quotation marks omitted).

110. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 512.

111. *Id.* at 530.

112. EDMUND MORRIS, COLONEL ROOSEVELT 134 (2010).

113. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 531.

114. *Id.* at 548.

115. WALTER LAFEVER, THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE 27 (1989).

nonetheless considered his actions to secure the Panama Canal to be “[b]y far the most important action” he undertook in the international arena.¹¹⁶

Building on the strategic objective of protecting the waterways that led to the Canal, President Theodore Roosevelt’s actions in assuming control of the customs house in Santo Domingo contributed to a major expansion in the scope of executive agreements. At the beginning of the twentieth century, a number of commentators rejected executive agreements as legitimate vehicles for the United States to form binding legal obligations. Charles Henry Butler, writing in 1902, denied that executive agreements were capable of creating binding legal obligations on the United States.¹¹⁷ Yet by 1905, John Bassett Moore concluded that a range of important executive agreements could legitimately bind the United States with foreign nations.¹¹⁸ In the same year, James Barnett expressed support for the idea that through executive agreements Presidents could impose binding obligations on the United States.¹¹⁹

Roosevelt’s intervention in the Dominican Republic grew directly out of the concerns that he articulated in his Corollary to the Monroe Doctrine. As early as May of 1904, Roosevelt wrote Secretary Root that the Monroe Doctrine required the United States to intervene in order to prevent European interference: “[I]f we intend to say ‘Hands off’ to the powers of Europe, then sooner or later we must keep order ourselves.”¹²⁰ Absent intervention by the United States, Roosevelt feared that Europeans would themselves use force to resolve their outstanding debts.¹²¹ Specifically, Roosevelt believed that a European power would very likely gain a foothold in the region through the occupation of Santo Domingo: “This meant that unless I acted at once I would find foreign powers in partial possession of Santo Domingo”¹²²

President Roosevelt’s actions in Santo Domingo reflected the emerging importance of the practice of executive agreements in reshaping the balance between the President and Congress in foreign relations. In response to a major foreign debt crisis which raised the specter of European intervention, Roosevelt dispatched negotiators to Santo Domingo to reach an agreement for the United States to assume control of the customs house. Initially, the Administration did not plan to seek any Senate action with regards to the final protocol. However, in the face of hostile reaction from

116. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 512.

117. 2 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES §§ 462–63 (1902).

118. *See generally* Moore, *supra* note 79.

119. Barnett, *supra* note 81, at 69.

120. H.W. BRANDS, T.R.: THE LAST ROMANTIC 526–27 (1997).

121. BOOT, *supra* note 73, at 135–36.

122. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 507.

Democrats in Congress, Roosevelt ultimately submitted the final protocol to the Senate for approval. It provided for the United States to designate “a receiver of ‘the revenues of all the customs houses’” and established a deposit in a New York bank for the benefit of creditors and for the eventual distribution of these funds to pay for the debts of the Dominican Republic.¹²³ Roosevelt viewed the agreement as a fundamental test of the Monroe Doctrine: “[E]ither we must submit to the likelihood of infringement of the Monroe doctrine or we must ourselves agree to some such arrangement”¹²⁴

As Congress approached its scheduled adjournment, the protocol still remained short of the two-thirds majority it required in the Senate. Roosevelt called the Senate into special session for two weeks but only accomplished getting the treaty voted out of committee without successfully securing final approval from the full Senate.¹²⁵ Instead of waiting for further action by the Congress, Roosevelt implemented the protocol as an executive agreement after the Senate adjourned without having ratified the agreement. Roosevelt justified his actions on the grounds that the Constitution did not explicitly forbid his action: “The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did.”¹²⁶

In response to the implementation of the executive agreement with Santo Domingo, members of the Senate challenged the President’s authority in acting without congressional approval. One commentator suggested that this conflict was “among the most significant in the long contest between President and Senate.”¹²⁷ At the time, Senator Culberson questioned whether the President had put into operation a treaty before it “ha[d] been ratified” and suggested that Roosevelt was “exerting the power of the Senate and the President combined.”¹²⁸ Senator Teller denied that Roosevelt had the authority to implement the agreement even on a temporary basis “unless this body here, by two-thirds of the Senators present, shall agree that he may make such a treaty.”¹²⁹ Teller further recognized the unprecedented nature of the assertion of executive power, which he referred to as the “absolute claim for independence on the part of

123. McCLURE, *supra* note 78, at 94.

124. LEWIS L. GOULD, *THE PRESIDENCY OF THEODORE ROOSEVELT* 177 (1991).

125. *Id.*

126. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 510.

127. W. STULL HOLT, *TREATIES DEFEATED BY THE SENATE* 202 (Lawbook Exch., Ltd. 2000) (1933).

128. 40 CONG. REC. 1431 (1906) (statement of Sen. Culberson).

129. *Id.* at 1475 (statement of Sen. Teller).

the State Department.”¹³⁰ Senator Bacon also rejected the idea that the President had the authority to implement such an agreement: “I deny that anybody has the right to bind the United States in that way.”¹³¹

Roosevelt’s defenders, such as Henry Cabot Lodge, argued that the President “has the right to interpret the Constitution, as we have,” and justified his action as a case of strategic necessity: “It is a question whether we are going to maintain in the West Indies a condition of peace and progress and ordered liberty.”¹³² Other defenders, such as Senator Beveridge, suggested that the treaty clause was “merely a limitation upon” executive power because the document fully vested this power with the President.¹³³ Even within the Senate, some of Roosevelt’s defenders echoed the claim that the President’s powers over foreign relations were not limited merely to those explicitly enumerated in the Constitution.

Despite this debate in Congress, Roosevelt took pride in the fact that there was not more significant public controversy over his actions: “Our Santo Domingo solution has worked so well that the public is now paying no heed to the matter whatever.”¹³⁴ He also cited the fact that Congress had acquiesced as a vindication of his approach: “We have taken the necessary step . . . Apparently every body has acquiesced in what I have done in Santo Domingo.”¹³⁵ According to one contemporary scholar, John Bassett Moore, “no question as to [the President’s] possession of such a power [to make executive agreements] . . . appears ever to have been seriously raised.”¹³⁶

Yet Roosevelt’s cabinet was critical of his unilateral use of presidential power and his rejection of consultation with Congress. William Howard Taft criticized Roosevelt for his unwillingness to respect constitutional boundaries such that he “ought more often to have admitted the legal way of reaching the same ends.”¹³⁷ Yet Roosevelt himself viewed his actions as valuable in creating precedent for presidential power in the future: “[T]he action there taken should serve as a precedent for American action in all similar cases.”¹³⁸

In examining the actions of Theodore Roosevelt, a number of scholars have focused on one particular passage to conclude that his constitutional

130. *Id.* at 1476.

131. *Id.* at 2137 (statement of Sen. Bacon).

132. *Id.* at 1475 (statement of Sen. Lodge).

133. *Id.* at 2129 (statement of Sen. Beveridge).

134. Letter from Theodore Roosevelt, President, to Henry Cabot Lodge (May 15, 1905), in 4 THE LETTERS OF THEODORE ROOSEVELT 1179, 1179 (Elting E. Morison ed., 1952).

135. HOLMES, *supra* note 97, at 187.

136. Moore, *supra* note 79, at 403.

137. THE AMERICAN PRESIDENCY: THE AUTHORITATIVE REFERENCE 288 (Alan Brinkley & Davis Dyer eds., 2004).

138. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 507.

vision was actually relatively constrained. Although Roosevelt justified his actions in Santo Domingo at the time with broad claims of presidential power, he also subsequently wrote that such an executive agreement “would lapse when that particular executive left office.”¹³⁹ A number of scholars cite this reference as a “remarkable act of self-limitation coming from an activist President” because the statement suggested that Roosevelt did not think he could bind the next President.¹⁴⁰

However, Roosevelt’s actions in the case of the Dominican Republic actually reflected his ambitious views of executive power and narrow view of the appropriate role of the Senate. Roosevelt believed that the Senate’s role in ratifying treaties was disgraceful and reflected an abandonment of its duty to approve agreements negotiated by the President.¹⁴¹ In the case of Santo Domingo, Roosevelt claimed that the agreement did not require Senate approval in order to implement it on his own authority: “I went ahead and administered the proposed treaty anyhow, considering it as a simple agreement on the part of the Executive which would be converted into a treaty whenever the Senate acted.”¹⁴² Furthermore, commentators at the time pointed out that this “limitation often does not apply in practice” since many executive agreements remained in force across different presidencies.¹⁴³ Even Roosevelt’s more conservative successor, William Howard Taft, recognized that a *modus vivendi* could sometimes be sustained across different administrations, as in the case of Panama: “It was attacked vigorously in the Senate as a usurpation of the treaty-making power [B]ut the *modus vivendi* continued as the practical agreement”¹⁴⁴ Rather than reflecting a limited assertion of presidential power, Roosevelt’s intervention in Santo Domingo signaled that strategic foreign policy objectives would guide his actions regardless of congressional objections and that when the Senate objected he would act unilaterally to implement international agreements.

When a major political crisis in Cuba arose in 1906, then Secretary of War Taft questioned whether President Roosevelt had the right to intervene

139. *Id.* at 510.

140. Ackerman & Golove, *supra* note 4, at 819; *see also* Barron & Lederman, *supra* note 1, at 1035; Hathaway, *supra* note 1, at 175 n.107.

141. Letter from Theodore Roosevelt, President, to Andrew Carnegie (Aug. 6, 1906), in 5 THE LETTERS OF THEODORE ROOSEVELT 345, 346 (Elting E. Morison ed., 1952) (“[T]he Senate, which has undoubtedly shown itself at certain points not merely to be an inefficient but often a dangerous body as regards its dealings with foreign affairs, so amended the [arbitration] treaties as to make them absolutely worthless.”).

142. ROOSEVELT AUTOBIOGRAPHY, *supra* note 100, at 511.

143. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 238 (1922).

144. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 111–12 (1916).

there without first seeking congressional permission.¹⁴⁵ Taft advised Roosevelt to submit the question to the Attorney General in order to secure a clear interpretation of the President's power by asking whether "the President [is] authorized, under the laws and treaties of the United States . . . to direct the Army or any part of it to be transported to Cuba . . . without further authority from Congress?"¹⁴⁶ Within two weeks of the exchange, Roosevelt sent the Marines to Cuba and established a provisional government that lasted for twenty-nine months and ultimately included an army of 5,000 soldiers.¹⁴⁷

As Roosevelt explained to Taft in the case of Cuba, he would intervene on his own authority if he felt compelled to do so as President. Roosevelt elaborated that he was against seeking congressional authority on the principle that it undermined his objective of expanding presidential power over foreign relations: "I should not dream of asking the permission of Congress."¹⁴⁸

Roosevelt self-consciously sought to establish "a precedent for good by refusing to wait for a long wrangle in Congress."¹⁴⁹ In Roosevelt's view, such a precedent would be valuable to his presidential successors: "You know as well as I do that it is for the enormous interest of this Government to strengthen and give independence to the Executive in dealing with foreign powers . . . to establish precedents which successors may follow even if they are unwilling to take the initiative themselves."¹⁵⁰

Roosevelt's effort to establish precedents for presidential action reflected his low opinion of the capacity of Congress to respond to major issues of "foreign policy on occasions when instant action is demanded."¹⁵¹ Roosevelt consistently rejected consultations with Congress because he viewed its slow pace of decision making as a major impediment to his strategic foreign policy objectives. In justifying his decision to send troops to Cuba, Roosevelt suggested that paralysis in Congress and bloodshed on the ground would have been the only alternative.¹⁵² In Cuba, Roosevelt

145. Letter from William Howard Taft, Sec'y of War, to Theodore Roosevelt, President (Sept. 15, 1906), in *1 ANNUAL REPORTS OF THE WAR DEP'T FOR THE FISCAL YEAR ENDED JUNE 30, 1906*, H.R. DOC. NO. 59-2, exh. 3, at 492-93 (1906).

146. *Id.*

147. *BOOT*, *supra* note 73, at 138.

148. Letter from Theodore Roosevelt, President, to William Howard Taft, Sec'y of War. (Sept. 17, 1906), in *5 THE LETTERS OF THEODORE ROOSEVELT* 414, 414 (Elting E. Morison ed., 1952).

149. *Id.*

150. *Id.* at 414-15.

151. *Id.* at 415.

152. Letter from Theodore Roosevelt, President, to Henry Cabot Lodge (Sept. 17, 1906), in *5 THE LETTERS OF THEODORE ROOSEVELT* 427, 428 (Elting E. Morison ed., 1952) ("[I]f . . . I had stated I could take no action until Congress decided what to do—just imagine my following the Buchanan-like course of summoning Congress for a six weeks' debate . . . as to whether I ought to land marines to

asserted the presidential prerogative to act unilaterally in order to implement the strategic vision he articulated in the Monroe Corollary and forestall the possibility of European intervention in the Americas.

D. Naval Power and Japan

In projecting the United States as a great power in the world, Roosevelt perceived a powerful navy as indispensable. Since the expansion and preparedness of the United States Navy was a central strategic objective for Roosevelt, he was often prepared to ignore the will of Congress when it came to the Navy. Roosevelt viewed a strong navy as a key to national greatness because it enabled expanding trade, which could serve as the foundation of national power.¹⁵³ Roosevelt was one of the most forceful proponents of building a fleet to rival the great powers of Europe and in each of his messages to the Congress he urged the expansion of the U.S. Navy. Roosevelt also was concerned about naval readiness and he sought to demonstrate its newfound power to the rest of the world as a deterrent against foreign aggression. In 1907, Roosevelt sent the entire fleet around the world “on what would practically be a practice voyage” in the face of strong congressional opposition.¹⁵⁴ Many voices in Congress opposed the President sending the entire fleet on such a voyage and worked to eliminate funding for the trip. In response, Roosevelt claimed that he had sufficient funds and dared Congress to “try and get [the fleet] back.”¹⁵⁵ Roosevelt’s actions in sending the battleship fleet to the Pacific also raised concerns among other nations and prompted the Japanese Ambassador in Washington to seek a new agreement with the United States.¹⁵⁶

Just as Roosevelt’s corollary to the Monroe Doctrine shaped his unilateral actions in the Americas, his commitment to maintaining an open door in Asia and preserving America’s influence in the region led him to enter into executive agreements of unprecedented scope. During his second term, Roosevelt entered into several important agreements with Japan without either the advice or the consent of Congress. In 1905, the Taft–Katsura Agreement established an agreement over the future of northern Asia that extended well into the sphere of diplomacy and went beyond the

protect American life and property—the fighting would have gone on without a break, the whole Island would now be a welter of blood.”).

153. HENRY J. HENDRIX, *THEODORE ROOSEVELT’S NAVAL DIPLOMACY: THE U.S. NAVY AND THE BIRTH OF THE AMERICAN CENTURY* 8 (2009).

154. Letter from Theodore Roosevelt, President, to Henry Cabot Lodge (July 10, 1907), in 5 *THE LETTERS OF THEODORE ROOSEVELT* 709, 709 (Elting E. Morison ed., 1952).

155. Barron & Lederman, *supra* note 1, at 1035 (alteration in original).

156. Thomas A. Bailey, *The Root–Takahira Agreement of 1908*, 9 *PAC. HIST. REV.* 19, 19 (1940).

scope of executive agreements of the nineteenth century.¹⁵⁷ The so-called “Gentlemen’s Agreement” intruded into the role of Congress with respect to regulating immigration. The 1908 Root–Takahira Agreement was recognized by contemporary scholars as unprecedented in scope, but it did not generate substantial resistance from Congress.

In the case of Japan, one of Roosevelt’s key strategic objectives was to prevent the Japanese from interfering with the United States in the Philippines. Roosevelt later explained to Taft that “[o]ur vital interest is to keep the Japanese out of our country, and at the same time to preserve the good will of Japan” and that Taft should therefore not take any steps regarding Japan’s interests in Manchuria that would be perceived as in conflict with Japan’s ambitions.¹⁵⁸ Yet, Roosevelt was initially reluctant to establish a formal alliance with Japan without any support from Congress. In a letter to George Kennan explaining his interest in such an alliance, Roosevelt wrote: “As to what you say about the alliance, the trouble is . . . you are talking academically. Have you followed some of my experiences in endeavoring to get treaties through the Senate? I might just as well strive for the moon as for such a policy as you indicate.”¹⁵⁹

In 1905, Secretary Taft and the Japanese Prime Minister engaged in a confidential exchange of views commonly known as the Taft–Katsura Agreement. Although the memorandum of the conversation between the two explicitly stated that the President could not enter into “a confidential informal agreement, without the consent of the Senate,” it also stated that the agreement “could be counted on by [Japan] quite as confidently as if the United States were under treaty obligations.”¹⁶⁰ President Roosevelt later explained that “[b]y my direction, Taft reiterated this in a talk with the Japanese Prime Minister, Katsura; saying specifically that we entirely approved of the Japanese position about Korea as set forth in the Anglo-Japanese treaty, and as acknowledged in the treaty of Portsmouth.”¹⁶¹ The memorandum supported Japanese authority over Korea in exchange for a guarantee regarding noninterference with the United States in the Philippines.¹⁶²

Building on this earlier informal agreement, Secretary of State Root and Japanese Ambassador Takahira entered into a subsequent agreement

157. MCCLURE, *supra* note 78, at 95–96.

158. Letter from Theodore Roosevelt to William Howard Taft, President (Dec. 22, 1910), in 7 THE LETTERS OF THEODORE ROOSEVELT 189, 189 (Elting E. Morison ed., 1952).

159. Letter from Theodore Roosevelt, President, to George Kennan (May 6, 1905), in THE SELECTED LETTERS OF THEODORE ROOSEVELT 380, 380–81 (H.W. Brands ed., 2001).

160. MCCLURE, *supra* note 78, at 96 (quoting the Taft–Katsura Agreement, July 29, 1905).

161. Letter from Theodore Roosevelt, President to Cecil Arthur Spring Rice (Nov. 1, 1905), in 5 THE LETTERS OF THEODORE ROOSEVELT 61, 61 (Elting E. Morison ed., 1952).

162. Charles E. Neu, *Theodore Roosevelt and American Involvement In the Far East, 1901–1909*, 35 PAC. HIST. REV. 433, 434 (1966).

through an exchange of letters in November of 1908. The Root–Takahira Agreement formally endorsed the policy of the “open door” in China but, at the same time, allowed Japan a free hand in Manchuria in exchange for a further guarantee regarding the Philippines and the “Gentlemen’s Agreement,” limiting Japanese immigration into the United States.¹⁶³ The agreement provided that both countries were “firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.”¹⁶⁴

The Root–Takahira Agreement was criticized by some scholars, such as Simeon Baldwin, as an unprecedented assertion of presidential power. Baldwin cited the Agreement as “one of a series of official acts by which he has extended the exercise of executive power beyond limits ordinarily observed by his predecessors.”¹⁶⁵ Baldwin considered but rejected the possibility that the Agreement fit within the category of *modus vivendi* and instead concluded that “there is no precedent in the history of American diplomacy for such a declaration of an international entente as that found in the notes in question.”¹⁶⁶ Ultimately, Baldwin viewed the Agreement as a serious challenge to traditional constitutional understandings by shifting the control over foreign policy from Congress to the President.¹⁶⁷ Nonetheless, there was no serious outcry by Congress against the Agreement once it became public.¹⁶⁸

Roosevelt’s view of the overriding strategic importance of a strong navy led him to reject any influence by Congress over its deployment in his final letter as President to William Howard Taft. Roosevelt gave what appears to be an order to his successor to ignore the direction of Congress:

One closing legacy. Under no circumstances divide the battleship fleet between the Atlantic and Pacific Oceans prior to the finishing of the Panama canal. . . . I should obey no direction of Congress and pay heed to no popular sentiment, no matter how strong, if it went wrong in such a vital matter as this.¹⁶⁹

In essence, Roosevelt believed that on many vital questions of national security, the President alone should decide.

163. *Id.* at 434–35.

164. MCCLURE, *supra* note 78, at 99 (quoting the Root–Takahira Agreement, Nov. 30, 1908).

165. Simeon E. Baldwin, *The Exchange of Notes in 1908 Between Japan and the United States*, 3 ZEITSCHRIFT FÜR VÖLKERRECHT UND BUNDESSTAATSRECHT 456, 463 (1909).

166. *Id.* at 459.

167. *Id.* at 464–65.

168. Bailey, *supra* note 156, at 26.

169. Letter from Theodore Roosevelt, President, to William Howard Taft, President-elect (Mar. 3, 1909), in 6 THE LETTERS OF THEODORE ROOSEVELT 1543, 1543 (Elting E. Morison ed., 1952).

IV. LEGACY OF PRESIDENTIAL POWER

In the wake of the Spanish–American War, presidents increasingly asserted expanded power to act in the arena of foreign relations. President Theodore Roosevelt articulated a consistent grand strategy in foreign affairs that drove him to assert unprecedented executive power to accomplish his foreign policy objectives. When these strategic objectives ran up against congressional opposition, Roosevelt consistently acted unilaterally and defended an expansive view of presidential power over foreign relations. The concept of international police power and the modern executive agreement ultimately shifted the balance of power over foreign relations in important and enduring ways.

A number of scholars point to the more restrained views of President Taft on executive power as evidence that Roosevelt did not truly alter the balance of power over foreign relations.¹⁷⁰ Yet even Taft accepted and relied upon the concept of international police power while serving as President. Taft echoed the core argument of de-coupling military intervention from the power of Congress to declare war:

In countries whose peace is often disturbed, and law and order are not maintained, as in some Central and South American countries, the landing of U.S. sailors or marines in order to prevent destruction or injury to the American consulates or to the life or property of American citizens, is not regarded as an act of war but only a police duty¹⁷¹

Taft claimed that such interventions were different from the perspective of international law because of the risk of instability: “The unstable condition as to law and order of some of the Central American Republics seems to create different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order.”¹⁷² Taft once again distinguished these actions from war, declaring that “the use of the naval marines for such a purpose has become so common that their landing is treated as a mere local police measure.”¹⁷³

Taft’s successor, Woodrow Wilson, clearly recognized the significance of the shift in the early twentieth century toward presidential power over foreign relations. Writing in 1908, Wilson proclaimed that “[o]ne of the

170. See, e.g., KOH, *supra* note 1, at 91.

171. William Howard Taft, *The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government*, 25 YALE L.J. 599, 611 (1916).

172. TAFT, *supra* note 144, at 95.

173. *Id.*

greatest of the President's powers . . . [is] his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely."¹⁷⁴ As President, Wilson continued Roosevelt's legacy during his first term "when he sent an army into Mexico despite the Senate's refusal to give its consent."¹⁷⁵ President Wilson subsequently sent forces to Haiti and the Dominican Republic without congressional approval.

The Administration of Wilson's successor, Warren Harding, reaffirmed the basic tenets of the Roosevelt Corollary. President Warren Harding's Secretary of State, future Chief Justice Charles E. Hughes, declared that "in the interest of our national safety we could not yield to any foreign Power the control of the Panama Canal, or the approaches to it" and applied Roosevelt's logic of police power to defend the idea that given "the unsettled condition of certain countries in the region of the Caribbean it has been necessary to assert these rights and obligations."¹⁷⁶ President Calvin Coolidge subsequently sent troops to Panama and deployed marines to Nicaragua.¹⁷⁷

After the Spanish–American War, unauthorized deployments took place in the Philippines in 1899, China in 1900, Venezuela in 1902, Cuba in 1906, Nicaragua in 1910, Honduras in 1911, Haiti in 1915, and the Dominican Republic in 1916, all before World War I ended.¹⁷⁸ Between 1890 and 1933, there were forty-eight occasions in which a U.S. President deployed forces to Latin America.¹⁷⁹ The Marines came to be known as "State Department Troops," and the concept of international police power served to justify presidential action in sending troops without congressional authorization.¹⁸⁰ By the 1930s, the *Small Wars Manual* defined a small war as one not requiring congressional authorization and:

As applied to the United States, small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external

174. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77 (Columbia Univ. Press 1908) (1961).

175. Walter LaFeber, *The "Lion in the Path": The U.S. Emergence as a World Power*, 101 POL. SCI. Q. 705, 718 (1986).

176. Charles E. Hughes, *Observations on the Monroe Doctrine*, 17 AM. J. INT'L L. 611, 620 (1923).

177. CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2001, at 17 (2002), available at <http://dodreports.com/pdf/ada463153.pdf>.

178. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651, 668–70 (1997).

179. JEFFREY W. BARRETT, *IMPULSE TO REVOLUTION IN LATIN AMERICA* 172 (1985).

180. HOLMES, *supra* note 97, at 215.

affairs of another state whose government is unstable, inadequate or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.¹⁸¹

The other major transformation in the early twentieth century was the expansion of the scope and use of the executive agreement. One recent study of the Supreme Court and international law cited the development of “alternatives to the Article II treaty-making process” as one of the “more significant set of developments” of this period.¹⁸² President Theodore Roosevelt’s pace of entering into executive agreements was unprecedented and nearly matched the total number of such agreements by the United States before his presidency.¹⁸³ Roosevelt’s executive agreements, sometimes in the face of clear congressional opposition, also expanded their scope into areas of diplomacy that had previously been subject to Senate ratification as treaties. President Wilson later matched Roosevelt’s total number of agreements and President Coolidge surpassed it, as both continued to use these agreements for a wide range of matters.¹⁸⁴ In the fifty years leading up to World War II, there were nearly twice as many executive agreements entered into as there were treaties ratified to obligate the United States in the international arena.¹⁸⁵

In 1912, in a major affirmation of the growing importance of executive agreements, the Supreme Court ruled in *B. Altman & Co. v. United States* that an executive agreement required similar legal treatment as a treaty.¹⁸⁶ The ruling in *Altman* gave substantial support to the expanding role of executive agreements by interpreting that one such agreement could be considered the equivalent of a treaty under federal law:

While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, . . . and dealing with important commercial relations between the two countries, and was proclaimed by the President. . . . We think such a compact is a treaty¹⁸⁷

181. BOOT, *supra* note 73, at 284.

182. INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 592 (David L. Sloss et al. eds., Cambridge Univ. Press 2011); *see also* White, *supra* note 12, at 3.

183. O’Brien, *supra* note 51.

184. *Id.* at 76.

185. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 983 (2001).

186. *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912).

187. *Id.*

The Supreme Court's ruling in *Altman* set the stage for its later decision in *United States v. Belmont*, which held that executive agreements were equal to treaties in almost every respect.¹⁸⁸ Thus, the practice inaugurated in the early twentieth century was subsequently ratified by the Supreme Court and later contributed to the still wider use of executive agreements after World War II.¹⁸⁹

A. Curtiss-Wright

Future Justice George Sutherland, who served in Congress beginning in 1900, was greatly influenced both by the emergence of the United States as a world power and the constitutional vision of Roosevelt. As a member of the Senate, Sutherland elaborated on his views about the vast powers of the President over matters of foreign affairs.¹⁹⁰ While in Congress, he developed an expansive vision of national power in the international arena that formed the basis for his Supreme Court decision in *United States v. Curtiss-Wright Export Corp.*¹⁹¹ Sutherland was present for the debate in the Senate over the executive agreement with Santo Domingo and the limited enumerated powers of the President in foreign affairs.¹⁹² As a strong supporter of the ambitious foreign policy of President Roosevelt, Sutherland was concerned that an orthodox conception of foreign relations law might limit the future of the United States as a world power.¹⁹³

Sutherland published his views on these questions while still in the Senate and made few additions to this basic framework in a later book entitled *Constitutional and World Affairs*.¹⁹⁴ Sutherland recognized the significance of the Spanish–American War as a turning point in America's role in the world.¹⁹⁵ He sought to reconcile his vision of the Constitution with his view that “[a]ny rule of construction which would result in curtailing or preventing action on the part of the national government in the enlarged field of world responsibility which we are entering, might prove highly injurious or embarrassing.”¹⁹⁶ His analysis started from the

188. MARGOLIS, *supra* note 68, at 61–62.

189. Hathaway, *supra* note 1, at 179–80.

190. George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910).

191. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); White, *supra* note 11, at 48.

192. *Id.* at 14.

193. *Id.* at 52–53.

194. *Id.* at 56.

195. GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 17 (1919) (“[W]e emerged a broadened empire with overseas possessions, and a flag carried half around the world. Our comfortable seclusion had gone; our political activities could no longer be confined to the Western Hemisphere.”).

196. *Id.* at 21.

objectives of the United States in the international arena and turned on the idea that “[t]he *powers* of government must be commensurate with the *objects* of government.”¹⁹⁷ Sutherland identified the source of authority in the “power recognized by the principles of *international* law as belonging inherently to every sovereign nation.”¹⁹⁸ Sutherland specifically referenced the early twentieth century experience for the proposition that the President has broad authority to “send citizens composing our military forces into foreign countries.”¹⁹⁹

Once on the Supreme Court, Justice Sutherland elaborated on these earlier views in several crucial decisions that shaped foreign relations law. Although Sutherland’s theory of inherent plenary power had roots dating back to the nineteenth century,²⁰⁰ the presidential practice that he sought to ratify was actually a product of the early twentieth century. In *Curtiss-Wright*, Justice Sutherland articulated a vision of foreign relations law which echoed Roosevelt and justified expansive presidential power in terms of the functional demands of achieving “success for our aims.”²⁰¹ Specifically, Sutherland argued that:

It is important to bear in mind that we are here dealing . . . with . . . 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 Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.²⁰²

While the full legal significance of Sutherland’s opinion remains quite contested, with many scholars highlighting that it represents *dicta*,²⁰³ it has nonetheless been frequently cited by presidents seeking to assert their unilateral authority and its origins can be clearly traced to the early twentieth century.

197. Sutherland, *supra* note 190, at 379–80 (emphasis in original).

198. *Id.* at 384.

199. SUTHERLAND, *supra* note 195, at 109.

200. Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1131–1133 (1999).

201. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

202. *Id.* at 319–20.

203. See, e.g., Robert D. Sloane, *The Puzzling Persistence of Curtiss-Wright-Based Theories of Executive Power*, 37 WM. MITCHELL L. REV. 5072, 5084 (2011); see also KOH, *supra* note 1, at 94.

B. International Police Power

One of the more enduring legacies of the early twentieth century is the concept of international police power. The idea was central to the proposals for new forms of international cooperation that were put forward by Franklin D. Roosevelt at the founding of the United Nations.²⁰⁴ The image of an international policeman was also important to his effort to build support for the expanded executive authority required for participation in the United Nations:

A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the Town Hall and call a town meeting to issue a warrant before the felon could be arrested.

. . . [O]ur American representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act.²⁰⁵

Defenders of the United Nations pointed to the precedent of using smaller deployments of forces earlier in the twentieth century “to protect American citizens abroad, to prevent an invasion of the territory, or to suppress insurrection.”²⁰⁶

In the Korean War, President Truman also borrowed from Theodore Roosevelt’s legacy in characterizing his deployment of troops as a “police action.” Responding to a reporter’s question at a press conference in which Truman characterized the UN action as one “to suppress a bandit raid,” he agreed with the characterization of it as a “police action.”²⁰⁷ President Truman justified sending troops to Korea on his own authority as part of a “police action” to protect international peace and security.²⁰⁸ Many leading accounts highlight the Korean War as a key turning point in the balance of power over warmaking between the President and Congress.²⁰⁹ John Hart Ely highlights President Truman’s framing of the Korean War as a police

204. Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 *TRANSNAT’L L. & CONTEMP. PROBS.* 377, 381–82 (1994).

205. David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 *U. COLO. L. REV.* 1491, 1514 (1999) (quoting Franklin Delano Roosevelt).

206. Jane Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 *U. MIAMI L. REV.* 145, 158 n.62 (1995) (quoting 91 *CONG. REC.* 8066 (1945)).

207. ALONZO HAMBY, *MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN* 537 (1995).

208. See Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 *GEO. L.J.* 597, 607–09 (1993).

209. SILVERSTEIN, *supra* note 3, at 9; Adler, *supra* note 22, at 183.

action in his conclusion that that conflict marked the shift toward a “tacit deal” in which presidents take responsibility for hostilities.²¹⁰

In tracing the roots of unprecedented assertions of presidential power over war, Senator Fulbright wrote from the vantage point of the Vietnam War:

The use of the Armed Forces against sovereign [sic] nations without authorization by Congress began to occur early in this century. . . . Presidents Theodore Roosevelt, Taft, and Wilson used these powers to engage in military action against sovereign states, thereby greatly expanding the scope of executive power and setting precedents for the even greater expansions of executive power which followed.²¹¹

As with Roosevelt, Truman developed an expansive vision of executive power under which the Constitution implicitly empowered the President to do what he saw as necessary to defend the national interest.²¹² He also interpreted his constitutional role through the prism of the strategic doctrine of containment, which viewed the Cold War as a global struggle to prevent Soviet expansion at every turn.²¹³ In explaining his actions without congressional authorization, Truman stated simply, “I just had to act as Commander-in-Chief, and I did.”²¹⁴ In response to the Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*,²¹⁵ rejecting Truman’s seizure of the steel mills during the Korean War, he defended his actions with reference to the strategic necessity and inherent authority of the President:

We live in an age when hostilities begin without polite exchanges of diplomatic notes. There are no longer sharp distinctions between combatants and noncombatants, between military targets and the sanctuary of civilian areas. . . . [The] President, who is Commander in Chief and who represents the interests of all the people, must be

210. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 5–11 (1993).

211. J. William Fulbright, *Congress, the President and the War Power*, 25 *ARK. L. REV.* 71, 77 (1971).

212. Bruce Buchanan, *Presidential Accountability for Wars of Choice*, *ISSUES IN GOVERNANCE STUD.*, Dec. 2008, at 1, 3.

213. Barton J. Bernstein, *The Truman Administration and the Korean War*, in *THE TRUMAN PRESIDENCY* 410, 419 (Michael J. Lacey ed., 1989).

214. *Id.* at 425.

215. 343 U.S. 579 (1952).

able to act at all times to meet any sudden threat to the nation's security.²¹⁶

CONCLUSION

In the decade after the Spanish–American War, presidential assertions of power over foreign affairs took on a new cast. With America emerging as a global power, grand strategy overtook past practice in defining the boundaries of presidential action in foreign relations. Ideas and strategic doctrines significantly shaped the way in which presidents understood and responded to shifting international relations. Strategic foreign policy doctrines proved to be a major fulcrum of change in foreign relations law in the twentieth century and beyond.

President Theodore Roosevelt was the first President to consistently act on the basis of a broad foreign policy doctrine reflecting the status of the United States as a world power. When existing constitutional constraints served as obstacles to Roosevelt's grand strategy, he self-consciously asserted broad claims of presidential authority. Even when prior presidents took significant unilateral actions to deploy forces, they generally sought support from Congress and almost never justified their actions in terms of a wide-ranging vision of expanded executive power. But beginning in the early twentieth century, military forces were deployed and wide-ranging executive agreements were entered into without the participation of Congress. With the entrance of the United States into the ranks of world powers, presidents justified implementing their strategic foreign policy visions through expanded assertions of executive power.

While the evidence advanced in this Article demonstrates that the dominant narratives regarding foreign relations power remain incomplete, it does not answer the crucial question of what the distribution of powers over foreign relations ought to be. Many scholars treat past controversies as precedents of varying degrees of authority "along a continuum of strong to weak,"²¹⁷ which establish norms for the behavior of each branch.²¹⁸ Others reject such precedent absent a self-conscious popular constitutional moment²¹⁹ or simply treat current practice as nothing more than usurpation.²²⁰ Historical practice reveals that these powers are likely to

216. 2 H. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE* 478 (1956).

217. GLENNON, *supra* note 30, at 58.

218. Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. Rev. 1338, 1355 (1993) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)).

219. Ackerman & Golove, *supra* note 4, at 907–08.

220. ELY, *supra* note 210, at 9 ("[P]ast violations are only that—violations—and cannot change the meaning of the Constitution . . .").

fluctuate over time.²²¹ In particular, it reveals the ways in which assertions of presidential power are shaped by strategic foreign policy doctrine and highlights the influence of shifting international forces on the distribution of foreign relations power. A deeper understanding of how and why presidential power evolved in the twentieth century informs our ultimate conclusions regarding what the proper balance of powers should be.²²²

Until the United States emerged as a world power, few presidents self-consciously asserted expanded power over foreign relations. Yet the impact of shifting international relations was mediated by ideas in the form of strategic foreign policy doctrines. The rise of the modern executive agreement and the concept of international police power were important innovations that altered the balance between the President and Congress. The growing power of the President in foreign relations reflects the emergence of powerful doctrines that interpret the world and seek to justify unilateral action as essential to preserving security. If the Constitution is “an invitation to struggle”²²³ over the direction of America’s foreign policy, then debates that fail to engage the broader terrain of who defines America’s strategy and objectives in the world are unlikely to significantly alter the balance of power over foreign relations.

221. Flaherty, *supra* note 2, at 171.

222. *See supra* notes 3–8 and accompanying text.

223. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 171 (4th ed. 1957).