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Joel R. Paul

UC Hastings College of the Law, paulj@uchastings.edu

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The Geopolitical Constitution: Executive Expediency and Executive Agreements

Joel R. Paul†

From the Founding through the Second World War well established understandings constrained executive power over foreign relations. Since the Cold War, the executive has enlarged its foreign relations power. Courts and commentators justified and defended the growth of executive power in relation to two geopolitical phenomena. First, the executive was better positioned to command the United States' wider global responsibilities. Second, the threat posed by Soviet expansionism and nuclear missile technology did not afford time for congressional deliberation. While scholars have debated whether the Cold War actually justified the extent of executive power, they have generally accepted as self-evident the proposition that the President's authority should expand in response to geopolitical circumstances. Professor Paul characterizes the proposition that presidential power expands relative to geopolitical exigencies as a "discourse of executive expediency." Paul traces the origin of this discourse to the domestic debates over the Bricker Amendment, McCarthyism, and the war in Indochina and shows how courts used this justificatory rhetoric to construct a new

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† Professor, University of Connecticut School of Law. This Article has benefited from the valuable contributions of my colleagues David Kennedy, Nell Jessup Newton, Richard Parker, Jeremy Paul, Tanina Rostain, Reva Seigel, and Eileen Silverstein, and my research assistants, Chris Camara, Keith Hirokawa, Robert Rimmer, Theresa Swinehart, Tim Tomcho, and especially, Vincent Pace. The author dedicates this Article to his colleague and friend Burt Wechsler on his retirement from teaching constitutional law.

method for interpreting the President's constitutional powers. Focusing particularly on the use of executive agreements, Paul argues that even in the absence of any external threat, courts willingly suspended critical judgments and embraced expediency discourse. In Paul's view, the expansion of the President's foreign relations power obstructed public accountability, facilitated interventionism, and corrupted the policy-making process. Paul challenges the continued reliance on Cold War discourse and offers an alternative approach to adjudicating questions on the reach of executive foreign relations power.

INTRODUCTION

The Cold War has ended, but the experience of the Cold War continues to shape the way that courts interpret the Constitution's allocation of presidential power.¹ The Cold War offered courts a ready excuse to justify the shift in foreign relations power from Congress to the President as an expedient response to an external threat. Through the Cold War to the present, defenders and critics have debated the extent of the President's foreign relations powers.² That debate has turned on the question of whether the Cold War in fact justified the expansion of presidential power over the last half century. The debate assumed that the President's powers should expand in response to geopolitical exigencies. This way of framing the issue, which I call the "discourse of executive expediency," was invented at the dawn of the Cold War by liberal and moderate defenders of the Truman administration. By interpreting constitutional powers in light of the executive's claim of geopolitical necessity, courts have colluded with the President and Congress in legitimating the growth of executive hegemony. Some conservative

1. Historians disagree as to precisely when the Cold War began and ended. Certainly, by 1946, following Churchill's famous "Iron Curtain" address at Fulton, Missouri, it was clear that the United States was prepared to resist Soviet expansion by military force, if necessary. See JOHN L. GADDIS, *THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947*, at 353-61 (1972); WALTER LAFEVER, *AMERICA, RUSSIA, AND THE COLD WAR, 1945-1992*, at 38-48 (7th ed. 1993). By the end of 1989, with the dissolution of the Soviet hegemony in Central and Eastern Europe, the Cold War had definitely ended. It is contestable whether a strong executive branch contributed to the end of the Cold War. See WILLIAM G. HYLAND, *THE COLD WAR: FIFTY YEARS OF CONFLICT 190-205* (1991) (arguing that the Soviet Union collapsed both because of the economic burden of competing with the NATO alliance and the inherent flaws in the Soviet system); GADDIS, *supra*, at 155-67 (arguing that the Soviet Union collapsed as a result of three fundamental long-term global historical trends: the emergence of new criteria for defining national power; the failure of communist ideology; and the decrease in the use of violence as an instrument of statecraft both domestically and internationally); but see Brian Hall, *Overkill is Not Dead*, N.Y. TIMES MAG., Mar. 15, 1998, at 42 (arguing that the risk of nuclear war has increased with the end of the Cold War).

2. Some of the leading scholars critical of the growth of the executive's foreign policy-making role include Louis Fisher, Thomas Franck, Michael Glennon, Harold Koh, Jules Lobel, Arthur Schlesinger, and Laurence Tribo. Some of the leading scholars defending the executive's role and critical of congressional interference include Monroe Leigh, Myers McDougal, John Norton Moore, Eugene Rostow, and Judge Abraham Sofaer.

critics of the Democratic Congress during the Reagan and Bush administrations argued, on the other hand, that congressional interference in foreign policy-making threatened to diminish the executive's power.³ The debate has survived the Cold War, precisely because scholars have failed to examine the relationship between constitutional powers and geopolitical reality. This Article changes the terms of that debate by identifying and explaining this interpretive mechanism.⁴

In questioning the relationship between claims of geopolitical necessity and constitutional meaning, I am not rejecting a contextual interpretation of the Constitution. As Professor Lawrence Lessig has argued, fidelity to the Constitution may require courts to engage in a "factual" or "structural translation" when historical or theoretical contexts shift.⁵ My concern is that courts have been unduly deferential to the executive's self-serving characterization of the geopolitical context. In the name of expediency, the executive has lulled courts and Congress alike into a collective fantasy about the nature of the foreign threat. Geopolitics, as a basis for a claim of executive authority, has become a talisman that overrides critical judicial analysis.⁶

This Article is not another argument for giving more power to Congress. Rather, it is an argument against the reliance of judges on executive expediency as an interpretive mechanism. Admittedly, rejecting the discourse of executive expediency may result in an expansion of

3. See, e.g., Eugene V. Rostow, *Prime Minister or Constitutional Monarch?* 83 AM. J. INT'L L. 740 (1989).

4. My contention is that the discourse of executive expediency has determined the static character of the debate. The assertion of executive power in opposition to congressional power is an example of what Derrida called a "dangerous supplement." JACQUES DERRIDA, *OF GRAMMATOLOGY* 141-64 (G.G. Spivak trans., 1976). Derrida has shown how two supposedly opposite terms may actually both contain the other and threaten to displace each other. The executive's power is a necessary supplement to congressional power: there are some things that Congress cannot do, such as negotiating treaties or commanding military forces in the field. But the executive's supplemental role has developed in tension with congressional power such that the supplement threatens to displace the dominance of Congress over law making. Our idea of congressional power contains an idea of what we mean by executive power. Thus, every assertion of congressional power reinforces executive power.

5. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, *Fidelity and Theory*]. Lessig shows by example how changes in economic conditions and in political understanding led to a re-interpretation of the Constitution during the New Deal. According to Lessig, this changed interpretation represented a translation of the Constitution's meaning from the nineteenth century to contemporary circumstances. See *id.* at 410-14. In this way, the Court kept faith with the Constitution's true purposes. See also Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*].

6. For example, the President's power to make executive agreements expanded dramatically during this period even though the articulated claim of necessity was unfounded, as discussed below. See *infra* Part III. I am not denying that there may be extraordinary crises in which the executive may need to take action that exceeds his constitutional authority. However, in such emergencies, courts should avoid giving their imprimatur to the executive's action by a finding of nonjusticiability. As a practical matter, in a real emergency, the executive is unlikely to wait for judicial interpretation.

congressional power. However, my preference for shifting power back toward Congress is based upon neither a nostalgia for the past nor originalist claims about the Framers' intentions. Rather, I believe that, on balance, foreign policy works best when there is an opportunity for public deliberation and consensus building. As foreign relations power has shifted to the executive, the process of policy-making has become less open, visible, and responsive to democratic interest-group politics. Foreign policy will fail in the absence of strong public support, as even U.S. military leaders have acknowledged.⁷ The Constitution should be read to restrain the executive from intervening abroad without congressional support, not to isolate the United States from the world, but to ensure a more effective, coherent, and democratic foreign policy.

A. *Nature of Executive Expediency Discourse*

As the United States assumed global leadership and the threat of nuclear war required rapid decision-making in crisis situations, a sense of urgency characterized U.S. foreign policy. To U.S. Cold Warriors, the threat of Soviet communism changed constitutional norms.⁸ Proponents of executive power argued that the President needed a free hand to conduct foreign relations to protect national secrets and expedite decision-making in crises.⁹ The executive branch alone had the necessary

7. The Powell Doctrine articulated by Chief of Staff General Colin Powell advocated the same principle that the United States should not use military force overseas unless there is a clear public consensus favoring it. See Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter 1992/93, at 32-45. This position is not an argument for isolationism. Rather, it calls for the political leadership to generate the necessary public support for intervention when U.S. national interests are threatened.

8. In 1950 President Truman adopted a policy statement known as "N.S.C. 68," which forecast a permanent state of high tension with the Soviet Union until the Soviet system collapsed and warned that "the integrity and vitality of our [democratic] system is in greater jeopardy than ever before in history." NATIONAL SECURITY COUNCIL, N.S.C. 68: A REPORT TO THE NATIONAL SECURITY COUNCIL BY THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY 34 (1950), reprinted in 1 FOREIGN RELATIONS OF THE UNITED STATES 1950: NATIONAL SECURITY AFFAIRS; FOREIGN ECONOMIC POLICY 234, 262 (1977). N.S.C. 68 recommended a rapid military expansion to counter Soviet power worldwide. It also provided the justification for executive control of foreign policy to confront the Soviets decisively and without time for public deliberation. See WILLIAM TAUBMAN, *STALIN'S AMERICAN POLICY: FROM ENTENTE TO DÉTENTE TO COLD WAR 198-203* (1982).

9. See WILLIAM F. MULLEN, *PRESIDENTIAL POWER AND POLITICS* 39-40 (1976) ("In an age when crisis has become perpetual and the everyday condition of life, however, the trend has been toward lodging ever-increasing and permanent authority in the one institution [the presidency] judged capable of a unified response."); JAMES A. NATHAN & JAMES K. OLIVER, *FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM* 6-28 (3d ed. 1994) (describing the expansion of the executive's foreign policy-making as a consequence of the Cold War); GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* 65-100 (1997) (tracing the growth of executive control over foreign policy from the administrations of Truman through Nixon); John M. Berry, *Foreign Policy-making and the Congress*, in *RESOLVED: THAT EXECUTIVE CONTROL OF THE UNITED STATES FOREIGN POLICY SHOULD BE SIGNIFICANTLY CURTAILED*, 90th Cong., 2d Sess., H.R. Doc. No. 298, at 183 ("As the

expertise to process complex information concerning foreign relations and military threats. Reliance upon the Constitution's quaint eighteenth-century process for conducting foreign affairs was no longer practical. Centralized executive control was the most expedient response to a hostile external environment. Thus, the discourse of executive expediency¹⁰ legitimated executive power and relieved Congress of responsibility for foreign affairs. The discourse of executive expediency justified the executive's virtual monopoly power over foreign affairs and constituted the method of constitutional interpretation accepted by the Cold War generation. As long as the historically contingent origin of the discourse remained invisible, its legitimating power was ensured. Judges and scholars reasoning about constitutional powers did not question the core assumption that the Constitution dispersed powers depending upon geopolitical exigencies. The discourse made this relationship appear natural, thereby transforming the way we think about the Constitution.

Cold War exigencies offered convincing rationales for the use of presidential power in deploying military forces,¹¹ conducting covert

cold war replaced the hot, Congress, under the pressures of modern crises, began deferring more and more to the Executive Branch."'); Robert H. Bork, *Foreword* to *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Gordon Crovitz & Jeremy B. Rabkin eds., 1989). Bork writes:

The president's [sic] powers are not susceptible of definition in advance. Changes in power relations, the shifting nature of alliances and adversarial postures, and most certainly, the rapid development of military technologies mean that he must often act in ways that no one can foresee even a day in advance, much less in the ages to come.

Id. at ix-xii; see also Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 118-19 (1995) ("Today we must understand the constitutional division of authority between the President and Congress with respect to the use of the armed forces in light of evolving modern day realities concerning the multivariied uses of military forces."); Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, reprinted in 75 YALE L.J. 1085, 1101 (1966); Edgar E. Robinson, *Presidential Power in the Nuclear Age*, in *RESOLVED: THAT EXECUTIVE CONTROL OF THE UNITED STATES FOREIGN POLICY SHOULD BE SIGNIFICANTLY CURTAILED*, *supra*, at 58-64 ("The President's power in foreign affairs appears to have undergone a qualitative transformation. . . . But the use of these powers is now conditioned not only by the possession of the nuclear deterrent but by a change in the actual practice of war."); George Szamuely, *The Imperial Congress*, 84 COMMENTARY, Sept. 1987, at 3, 27-32 ("the exigencies of exerting the nation's will in a world full of rivals required the expansion of the executive's discretionary powers."); Caspar W. Weinberger, *Dangerous Constraints on the President's War Powers*, in *THE FETTERED PRESIDENCY*, *supra*, at 95-101; Aaron Wildavsky, *The Two Presidencies*, in *RESOLVED: THAT EXECUTIVE CONTROL OF THE UNITED STATES FOREIGN POLICY SHOULD BE SIGNIFICANTLY CURTAILED*, *supra*, at 71-82.

10. By "discourse," I mean that expediency rhetoric represented more than a mere argument; it formed a common ideology that colored how both proponents and opponents of executive foreign policy thought about constitutional authority to conduct foreign relations.

11. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310-12 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (holding nonjusticiable the bombing of Cambodia); *DaCosta v. Laird*, 448 F.2d 1146, 1147 (2d Cir. 1971) (holding nonjusticiable the President's decision to mine harbors and bomb targets in North Vietnam without congressional authorization); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (holding that congressional funding and extension of the Military Selective Service Act were sufficient to authorize the executive to send military forces to Vietnam).

operations,¹² classifying information,¹³ suppressing publication of sensitive information,¹⁴ restricting the export of sensitive technology and data,¹⁵ denying the entry of some immigrants and permitting others,¹⁶ conducting internal surveillance,¹⁷ requiring loyalty pledges,¹⁸ and

12. See, e.g., *Snepp v. U.S.*, 444 U.S. 507 (1980) (upholding a secrecy agreement required of all CIA employees which prevented appellant from publishing even unclassified material about CIA activities without prior approval by the Agency); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (holding nonjusticiable a presidential decree that denied the airline an overseas route based upon secret intelligence information bearing upon national security). In *Chicago & S. Air Lines*, the Court opined that "the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility. . . ." *Id.* at 111; *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (holding that a member of Congress has no standing to seek a declaration that certain activities of the CIA are illegal or an injunction prohibiting the Agency from using funds undisclosed to Congress). See generally Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1109-10 (1986) (arguing that the increased use of covert paramilitary operations has supplanted Congress' authority under the Constitution's Article I, § 8, cl. 11 to grant letters of marque and reprisal for the purposes of empowering private persons to use force against foreign states).

13. See, e.g., *United States v. Morison*, 604 F. Supp. 655, 660 (D.Md.), *appeal dismissed*, 774 F.2d 1156 (4th Cir. 1985) (holding that disclosure of classified information to the press is a criminal violation of the Espionage Act of 1917, ch. 30, tit. I §§ 1, 6, 40, Stat. 217, 219, *as amended by* 18 U.S.C. §§ 793-794, even though Congress did not expressly authorize the classification system and even though the Act was not amended to refer to classified information); see also *Department of the Navy v. Egan*, 484 U.S. 518 (1988) (holding that the executive has plenary authority to classify information and to determine whether a grant of security clearance is inconsistent with the national interest). See generally Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906 (1990) (arguing that courts should scrutinize executive classification decisions).

14. See, e.g., *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (holding that technical information on the hydrogen bomb fell within the narrow exception to the "rule against prior restraint"). Cf. *New York Times Co. v. United States*, 403 U.S. 713, 720-21 (1971) (Douglas, J., concurring) (noting that Congress did not authorize a government injunction to restrict publication of the Pentagon papers based upon national security considerations).

15. See, e.g., *United States v. Edler Indus., Inc.*, 579 F.2d 516, 521 (9th Cir. 1978) (holding that the Mutual Security Act of 1954, which empowered the President to control the export of technical data regarding arms and other implements of war, prohibited the exportation of certain technical information); see also *United States v. Van Hee*, 531 F.2d 352, 356-58 (6th Cir. 1976) (holding that the Munitions Control Act protects blueprints of an armored vehicle as "technical data").

16. I am thinking here of the Haitian boat people who fled political terror and were denied entry even for humanitarian medical purposes. See Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L TRADE 1 (1994); Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 290-91 (1993). On the other hand, Cuban immigrants were welcomed to the United States as opponents of the Castro regime. See Katherine Tonnas, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295, 314-18 (1993).

17. See, e.g., *United States v. Clay*, 430 F.2d 165, 172 (5th Cir. 1970), *rev'd*, 403 U.S. 698 (1971) (holding that the Communications Act of 1934 did not prohibit the President from ordering wiretap surveillance to obtain intelligence information when he was acting to further national security objectives); see also *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (holding that reasonable warrantless searches and surveillances are justified in preliminary espionage investigations); *United States v. Butenko*, 318 F. Supp. 66, 71-73 (D.N.J. 1970), *aff'd*, 494 F.2d 593 (3rd Cir. 1974) (allowing the Attorney General to conduct telephone surveillance in espionage investigation).

scrutinizing the private lives, beliefs, and associations of military personnel¹⁹ and civilians.²⁰ The commander-in-chief's authority expanded exponentially in response to the new reality of "permanent" war against communism waged in multiple facets of military, civilian, commercial, and technological life.

Unexamined, the assumption that geopolitical exigencies may require shifts in constitutional authority appears to be a commonplace example of contextual interpretation. In fact, expediency discourse perverts contextualism. Contextual interpretation requires courts to judge the relevant circumstances independent of the political branches; expediency discourse relies upon the executive's own representation of geopolitical events. By invoking geopolitical circumstances as a justification for its own actions, the executive has secured the judiciary's acquiescence in expanding executive power. Geopolitics have obscured judicial analysis, rather than facilitated it. Congress and the courts have abdicated constitutional responsibility for checking the executive's power to conduct foreign relations.²¹

The extraordinary growth of executive agreements concerning foreign trade relations provides perhaps the clearest and least justifiable instance of expediency discourse expanding executive power. The most recent examples are the United States' accession to the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). These executive agreements are binding under international law

18. *See, e.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 89-92 (1953) (affirming the President's power to mandate that a military physician take a loyalty oath prior to receiving a promotion in rank). *But see* *Ozanoff v. Berzak*, 744 F.2d 224, 228 (1st Cir. 1984) (holding that loyalty oath's chilling effect on free speech is a cognizable real injury); *Hinton v. Devine*, 633 F. Supp. 1023 (E.D. Pa. 1986) (holding that a "loyalty" requirement for employees of the United Nations and other international organizations was unconstitutionally vague and overbroad).

19. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., dissenting in part) (stating that courts should not review the Director of the CIA's decision to discharge an employee especially where, as here, termination may be necessary to control access to sensitive national security information); *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986) (holding that the military interest in maintaining uniformity in the wear and appearance of the military uniform while on duty outweighed an individual soldier's interest in wearing religious items); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (holding that the Naval Academy had a rational basis to presume that, where a midshipman admitted being a homosexual, he was likely to engage in illegal homosexual conduct and could be discharged).

20. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 575-78 (9th Cir. 1990) (holding that the Department of Defense's policy of conducting expanded investigations into the backgrounds of gay and lesbian applicants for secret and top-secret security clearances did not violate the applicants' equal protection rights under the Fifth Amendment); *see also* *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that homosexuality was not a suspect or quasi-suspect classification and that the FBI's reasoning that homosexual conduct could adversely affect the Bureau's responsibilities was rational).

21. *See* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 134-48 (1990).

as treaties.²² They obligate the United States to comply with the decisions of multilateral entities.²³ Yet, the President never submitted these agreements as treaties for the advice and consent of two-thirds of the Senate. Instead, the executive negotiated and signed both agreements as "executive-congressional agreements,"²⁴ and simple majorities of both houses of Congress approved them pursuant to "fast-track authority."²⁵ An agreement submitted on a fast track must be voted on by both houses within a limited time frame, and each house agrees to suspend their respective rules and prohibit any amendments to the agreements. Supporters of fast-track authority for NAFTA and WTO argued that the President "knows best" what is good for the country and that delicate trade negotiations would be threatened if the President had to bargain with Congress.²⁶ There was no security threat justifying the use of executive agreements in lieu of treaties. Yet, the appeal to economic expediency moved majorities in both houses of Congress to approve NAFTA and WTO, even though the agreements intruded upon the Senate's exclusive authority to advise and consent to treaties.

B. *The Consequences of Reasoning from Geopolitics*

The Constitution "diffuses power . . . to secure liberty."²⁷ Constitutional checks and balances create resistance to the exercise of power.²⁸

22. Any international agreement in writing governed by international law, is a treaty for purposes of international law. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 20, 1986, U.N. Doc. A/CONF.129/15.

23. Although the decisions the WTO's dispute settlement panel renders are not *ipso facto* U.S. law, such decisions are international law, and a U.S. court is "bound to utilize international law obligations in its interpretation of national law." John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT'L L. 60, 61 (1997). As the Supreme Court stated in *The Paquete Habana*, 175 U.S. 677 (1900), "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.

24. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987) [hereinafter RESTATEMENT (THIRD)].

25. In recent years, Congress has delegated to the President authority to negotiate trade agreements to be submitted to Congress on a "fast track." On the fast track, both houses of Congress approve or disapprove the trade agreement without amendment within a limited time-frame. Technically, the fast track is merely a suspension of the rules of each house, and the rules could be restored by a simple majority of either house at any time. In principle, the executive invites congressional leaders to advise and participate in the negotiating process in order to assure that they will support the final agreement. See generally Harold Hongju Koh, *The Fast Track and United States Foreign Policy*, 18 BROOK. J. INT'L L. 143 (1992).

26. See *id.* at 176.

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

28. See *Myers v. United States*, 272 U.S. 52, 82 (1926) (Brandeis, J., dissenting) ("The purpose [of the doctrine of the separation of powers] was not to avoid friction, but, by means of the inevitable

So long as constitutional authority over foreign affairs remained divided between the executive and Congress, neither branch was able to commit the nation abroad without a popular consensus.²⁹ These institutional obstacles are not merely quaint vestiges of an earlier era of relative isolationism. They serve the normative value of discouraging foreign adventures to which the nation is not fully committed.

The discourse of executive expediency undermined this constitutional structure.³⁰ Specifically, the expansion of executive power allowed Congress to avoid public accountability for U.S. foreign policy, facilitated more frequent foreign interventions, undermined the coherence of our foreign policy, and exposed foreign policy-making to "capture" by foreign governments.

First, the shift in power from the Congress to the President has diminished the degree of democratic accountability in foreign policy.³¹ While the executive may be no less "representative" than Congress as an institution, accountability results from the way in which Congress operates, which tends to be more open than the executive. Congressional business is conducted on the record and in public. With rare exceptions, all of the information available to members of Congress is also available to the public. By comparison, the executive operates behind closed doors. The executive has access to information that is unavailable to the public, and only when a decision is reached is the policy outcome known to the public. The executive can often justify its decisions by claiming to know something the public does not know, which makes it more difficult to challenge the executive's decision. For these reasons, the shift of foreign relations power from Congress to the executive has shrouded the policy-making process from public view and diluted democratic accountability.

Second, the growth of executive power has created a bias in favor of internationalism that has often led to failure. Possessing a virtual monopoly power over foreign relations has tempted presidents to send troops abroad or to make foreign commitments. Time and again the executive has stumbled into foreign conflicts, like Bosnia, Lebanon, Iran and Somalia, with tragic results.³² At a minimum, congressional

friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

29. See KOH, *supra* note 21, at 74-84.

30. A formalistic approach to separation of powers doctrine is not useful in resolving the allocation of foreign affairs power. For an intelligent discussion of the interpretive problems of separation of powers in the context of foreign relations, see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 35-70 (1990).

31. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1821-28 (1996).

32. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1288-1313 (1988) (describing how the absence

participation might have slowed decision-making, leaving time for public deliberation.³³

Third, the absence of congressional debate has often accounted for the lack of public support for foreign commitments. When U.S. forces have suffered casualties, such as in Somalia or Beirut, public opinion turned against the executive. Without the popular will to stay the course, presidents have withdrawn U.S. forces in some cases. As a result, U.S. policy has often lacked coherence. Though Congress was blamed for this inconsistency in many cases, one reason members of Congress so readily changed their minds was that they were not politically invested in the policy.

Fourth, concentrating power in the executive has made it easier for foreign governments to influence U.S. foreign policy. Leaving foreign policy to the sole discretion of the President has invited foreign regimes to pressure, cajole, and ultimately capture the executive. Foreign governments have employed former executive branch officials in the executive branch to represent them as lobbyists and attorneys.³⁴ Foreign governments also have influenced the executive in more subtle ways through "personal diplomacy." Recent allegations that the Chinese government and foreign business interests attempted to buy influence with President Clinton³⁵ highlight both the importance of the executive's control over foreign policy and the possibility that foreign constituencies could capture the executive. If Congress shared the responsibility for U.S. foreign policy, foreign governments would have to influence the decisions of a broader group of decision-makers. The diffusion of policy-making authority might help deter foreign governments from influencing policy. In sum, the expansion of executive power over foreign relations has both undermined the constitutional value of democratic accountability and distorted foreign policy-making.

Courts often articulate reasons other than executive expediency for deferring to the executive branch. Courts may reason that the executive

of congressional oversight contributed to the Iran-Contra fiasco); Adam Clymer, *Foreign Policy Tug-of-War: Latest in a Long String of Battles*, N.Y. TIMES, Oct. 19, 1993, at A18; Michael Kinsley, *Free-Lunch Foreign Policy*, NEW REPUBLIC, Nov. 1, 1993, at 6; Michael Lind, *Beirut to Bosnia*, NEW REPUBLIC, Dec. 18, 1995, at 20.

33. Even FDR, in the years leading up to and during World War II, insisted upon consulting with Congress and obtaining congressional support every step of the way. See ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* 105-19 (1989). Perhaps a modern President would be in a stronger position to act earlier than FDR, but FDR's political sensitivity toward Congress ensured that throughout the War the nation was united in support of his policies. See *id.*

34. See PAT CHOATE, *AGENTS OF INFLUENCE* 49-63, 216-57 app. A (1990) (listing former federal officials who later represented foreign interests from 1980-1990).

35. See Brian Duffy & Bob Woodward, *FBI Probes China-Linked Contributions*, WASH. POST, Feb. 28, 1997, at A1.

possesses greater expertise in foreign affairs,³⁶ that a judicial determination would risk interfering with and embarrassing the executive in the conduct of foreign relations,³⁷ or that the court lacks any justiciable standards.³⁸ Courts do not always distinguish these reasons from expediency discourse, and sometimes these rationalizations merely disguise an appeal to expediency. In reality, courts rarely require any special expertise to judge the legal issues presented in such cases. Judicial pronouncements rarely offend foreign states or embarrass the executive, so long as it is clear that the courts are acting independently. As a practical matter, in a federal democracy with a divided government, it is likely that one branch of government may express views in opposition to another's with regard to foreign affairs, and foreign states can be expected to distinguish among the governmental branches and not react hastily. Finally, courts are often faced with mixed questions of law and fact to which they can bring justiciable standards, even where the law is unclear.³⁹ Nevertheless, in principle, I will concede that in some cases there may be good reasons, other than expediency, for courts to defer to the political branches in the conduct of foreign relations. However, courts should examine those reasons critically, and should not automatically defer to the executive as opposed to the Congress.

C. Summary of the Argument

The Cold War normalized a sense of crisis, and the discourse of executive expediency legitimated a permanent expansion of executive power. This Article rebuts two forms of argument about presidential powers. The first, more familiar argument, is that the Framers intended that the President would be the "sole organ of foreign relations."⁴⁰ The intentionalist, or originalist mode of interpretation, upon which this argument rests, has been rebutted elsewhere, and there is no point in reiterating the case against it.⁴¹ In fact, the "sole organ" theory is

36. See, e.g., *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (holding that the court is incompetent to judge whether the President's actions in Indochina are consistent with ending the war).

37. See, e.g., *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985) (holding, *inter alia*, that claims by members of Congress that U.S. action in Nicaragua were unauthorized cannot be adjudicated because of the risk that multiple pronouncements would embarrass the executive in the conduct of foreign relations).

38. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (holding that there were no justiciable standards for judging whether the bombing of Cambodia constituted a basic change in the war in Indochina requiring additional congressional authorization).

39. See, e.g., *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (rejecting the executive's argument that there were no justiciable standards for deciding whether the appellant's crimes fit within the political offense exception to the Treaty of Extradition with Great Britain).

40. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936).

41. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3-22 (1996); William J. Brennan, Jr., *Construing the Constitution*, 19 U.C.

peculiarly ahistorical, as I will show. Focusing on executive agreements in particular, my reading of the history from the Framers' time to the present reveals a clear, consistent understanding of a more limited role for the President in foreign affairs up until the Cold War.⁴² My own interpretation of presidential power, which is evident throughout this Article, rests instead on a structuralist analysis.⁴³ I intend not merely to disprove claims about the Framers' intentions, but more significantly, to show that the Cold War brought about a fundamental shift in the way courts interpreted the executive's constitutional authority in foreign relations.

The second argument I address is the contention that the Constitution's allocation of presidential powers was changed by a transformative exercise in popular sovereignty under President Franklin Roosevelt. Professors Bruce Ackerman and David Golove advanced this argument with regard to executive agreements during the congressional debates over the approval of WTO and NAFTA.⁴⁴ The Ackerman-Golove thesis, which is a variation of Professor Ackerman's famous theory of popular sovereignty,⁴⁵ deserves particular attention.⁴⁶ I argue that Ackerman and Golove read too much into the historical record. In my view, the courts turned toward executive expediency under the cloud of Soviet expansionism. Expediency discourse, rather than popular support for the United Nations, as Ackerman and Golove contend, enlarged the executive's control of foreign relations.

This Article has four Parts. Part I outlines the origin of executive expediency rhetoric and jurisprudence during the early years of the Cold War. In Part II, I show how expediency discourse transformed the full scope of presidential powers in foreign relations, effectively insulating executive power from either congressional check or judicial

DAVIS L. REV. 1, 2 (1985); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Lessig, *Fidelity and Theory*, *supra* note 5; Lessig, *Fidelity in Translation*, *supra* note 5; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

42. My effort to rebut the originalists' historiography of the executive's foreign relations powers is similar to the approach taken by Professors Lessig and Sunstein, who refuted originalist historiography about the executive branch while questioning the validity of originalism. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994).

43. By "structuralism" I mean interpreting the Constitution based upon the relationships it established among the institutions of government and the citizen. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-22 (1991).

44. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (tracing the rise of the congressional-executive agreement in U.S. diplomacy).

45. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

46. Ackerman and Golove's thesis has been the subject of serious scholarly debate. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). Professor Tribe criticizes Ackerman and Golove's conclusion as based upon an illegitimate form of constitutional interpretation. *Id.* at 1223.

review. Then in Part III, I contend that this transformation did not depend upon any actual emergency. To demonstrate this point, I discuss how during the Cold War the executive justified the expanded use of executive agreements as substitutes for Article II treaties by reference to economic interests, as opposed to any actual threat to security. Finally, in Part IV, I conclude that courts should refuse to legitimate executive actions based upon claims of necessity. Failing this, they should independently evaluate those claims in light of contemporary circumstance, rather than rely upon the executive's own version of events.

I

THE ORIGIN OF EXECUTIVE EXPEDIENCY DISCOURSE

A. Overview: Normalizing Emergency Powers

The Constitution balanced the political branches to avoid the dangers that a concentration of power in one branch might invite. It divided power between the executive and Congress over domestic and foreign responsibilities.⁴⁷ That division of authority institutionalized the diplomatic isolation of the United States in the early days of the Republic and ensured that the United States would remain officially neutral during a century of European wars.⁴⁸

The rise of industrialization and the accompanying drive for world markets transformed both the economic potential and the national interests of the United States. By the First World War, the United States could no longer hope to exist in isolation.⁴⁹ It now possessed both the ambition and the economic and military means to project its influence on the exhausted nations of Europe. The United States rose to the challenge posed by fascism in the Second World War and Soviet communism during the Cold War.⁵⁰

47. See THE FEDERALIST NOS. 50, 63 (James Madison), NOS. 68, 69, 74, 75 (Alexander Hamilton).

48. See HENRY KISSINGER, DIPLOMACY 32-36 (1994).

49. See FOSTER R. DULLES, AMERICA'S RISE TO WORLD POWER, 1898-1954, at 59-107 (1955).

50. See, e.g., GADDIS, *supra* note 1, at 353-61 (arguing that the United States was drawn reluctantly into the Cold War by the aggressive moves of the Soviet Union and domestic political constraints on U.S. policy); PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 359-72 (1987) (arguing that the United States occupied a power vacuum after the War as a result of its economic dominance); KISSINGER, *supra* note 48, at 429-47 (concluding that at the close of the Second World War the United States resisted British realpolitik in favor of a more conciliatory approach toward the Soviet Union and later felt it had to assume the role of power politics to preserve the peace in Europe); TAUBMAN, *supra* note 8, 3-9, 166-92 (1982) (contending that misunderstandings and miscalculations between the Soviet Union and the United States resulted in the Cold War).

Innovations in military technology and the spread of nuclear weapons marked the Cold War period. The technology reduced the time available for decision-making and raised the stakes of an attack by the Soviet Union. The executive claimed that increased control over foreign policy-making was necessary both to expedite military decision-making and to guard national security secrets.⁵¹ Thus, the rise of U.S. power led to the expansion of executive power over foreign relations.⁵² Courts and commentators justified the transformed relationship between the executive and Congress as a necessary expedient for survival in an increasingly complex and threatening world.⁵³

It is a general feature of constitutional democracies that in time of crisis the ordinary constitutional norms and processes are relaxed.⁵⁴ John Locke defended the use of extra-legal measures necessary for the survival of the society.⁵⁵ Locke argued that a society has a right and a duty to protect itself, even at the expense of individual liberties, in order to preserve liberty.⁵⁶ In particular, it was the prerogative of the executive to exercise emergency power, even where contrary to law, in order to preserve the society. Locke characterized the rule of necessity as distinct

51. See SILVERSTEIN, *supra* note 9, at 67-82.

52. See SENATE FOREIGN RELATIONS COMMITTEE REPORT ON NATIONAL COMMITMENTS, S. REP. NO. 91-129, at 7-8 (1969); HERMAN FINER, *THE PRESIDENCY: CRISIS AND REGENERATION* 51, 87 (1960); EDGAR E. ROBINSON ET AL., *POWERS OF THE PRESIDENT IN FOREIGN AFFAIRS, 1945-1965*, at 3-7 (1966); Craig Matthews, *The Constitutional Power of the Executive to Conclude International Agreements*, 64 YALE L.J. 345, 365, 389 (1955) (arguing that the President's power to respond in crisis has grown as U.S. interests have grown globally) ("The experience of recent years has shown that the United States must be capable of prompt and sometimes secret action as an indispensable condition of survival. . . . If the Executive does not possess powers adequate for these occasions, no branch of government does."); Eugene V. Rostow, *The War Powers Act*, 50 TEX. L. REV. 833, 870-71 (1972); see also ROBERT J. SPITZER, *PRESIDENT AND CONGRESS: EXECUTIVE HEGEMONY AT THE CROSSROADS OF AMERICAN GOVERNMENT* 37-39 (1993).

53. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (holding that the President has the power to settle claims that are necessarily incident to the resolution of major foreign policy disputes where Congress has acquiesced in the President's action). In the *Pentagon Papers Case*, Justice Stewart opined,

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and the Judicial branches, has been pressed to the very hilt since the advent of the nuclear age.

New York Times Co. v. United States, 403 U.S. 713, 727 (1971) (Stewart, J., concurring). See also Koh, *supra* note 32, at 1310-12.

54. Liberal jurisprudence posits a clear separation between the rule of law and emergency situations. See Jules Lobel, Comment, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1388-89 (1989); see also CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 290-97 (1948).

55. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 159-64 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

56. See *id.*

from the rule of law. Exigent measures occurred outside of the legal system and did not affect legal norms.⁵⁷

The Lockean dichotomy between the rule of law and the rule of necessity shaped our Constitution, which did not provide for any emergency powers.⁵⁸ Early presidents embraced the Lockean idea of extra-legal executive powers.⁵⁹ While U.S. courts have long recognized that extraordinary actions are sometimes required by the exigencies of the moment, they refused to endorse extra-legal measures,⁶⁰ with the notable exception of the internment of U.S. citizens of Japanese descent during the Second World War.⁶¹ Extra-constitutional powers might be tolerated as a necessary evil to protect the security of the state and preserve constitutional government; but such powers lasted only for the duration of a crisis.⁶² In this way, a shared understanding of the distinction between "normalcy"⁶³ and emergency⁶⁴ sustained constitutional democracy. Justice Robert Jackson wrote that "[i]t would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality."⁶⁵ Jackson cautioned, "But if we cannot confine military expedients by the Constitution, neither would I distort the

57. See *id.*

58. See SCHLESINGER, *supra* note 33, at 7-10.

59. Thomas Jefferson, for example, invoked this argument in defense of the Louisiana Purchase. See *id.* at 23-25. Jefferson later wrote that

[a] strict observance of the written laws is doubtless one of the *high* duties of a good citizen, but it is not the *highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Letter from Thomas Jefferson to John B. Colvin (Sept. 10, 1810), *quoted in* 4 DUMAS MALONE, JEFFERSON THE PRESIDENT 320 (1970).

60. See, e.g., *Reid v. Covert*, 354 U.S. 1, 16 (1956) (holding that international treaties and executive agreements must be consistent with the Constitution); *Korematsu v. United States*, 323 U.S. 214, 247 (1944) (Jackson, J., dissenting) (noting that civil courts must abide by the Constitution in reviewing military orders even if such orders are considered to be reasonable exercises of military authority).

61. See *Korematsu*, 323 U.S. at 214 (upholding the constitutionality of the internment of U.S. citizens of Japanese descent).

62. Extra-constitutional power has been exercised over immigrants and Indian tribes throughout U.S. history. Recently, scholars have attacked this form of plenary power as unconstitutional. See, e.g., Nell J. Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

63. I use the term "normalcy" in an ironic sense to refer to what is regarded as the ordinary or normal state of society. Though *normal* often implies the absence of government intervention in society, in fact, government often constructs what is regarded as *normal*. See, e.g., Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995).

64. Justice Cardozo warned, "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

65. *Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

Constitution to approve all that the military may deem expedient.”⁶⁶ Once a court legitimates a military expediency, “[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”⁶⁷

Thus, the rule of law maintained the appearance of neutrality and procedural fairness even in circumstances where the executive suppressed individual liberties, such as suspending *habeas corpus*⁶⁸ or detaining civilians without a warrant.⁶⁹ The argument for executive expediency eviscerated the Lockean dichotomy between a rule of necessity and the rule of law, so that extraordinary actions undertaken in the face of external threats, real or imagined, were seen as “legal” rather than “extra-legal.” In this way, the judiciary, like the military and intelligence apparatus, came to occupy a permanent “militarized” status. What accounted for this transformation of a core principle of liberal jurisprudence?

A conventional history of the “imperial presidency” would parallel the growth of the United States as world power and the growth of executive power over foreign affairs from the Monroe Doctrine, through the Spanish-American War to the World Wars, Korea, and Indochina. In the conventional view, presidential power grew in response to external events.⁷⁰ Conventional histories assume the relationship between geopolitical exigencies and presidential power as the norm. The Cold War triggered a rapid expansion in the scope of presidential power, but the normative foundation for this expansion was already well established, according to this view. Before World War II, a series of landmark Supreme Court opinions had held that the President was the “sole organ” of foreign relations.⁷¹ Thus, the President as the sole organ of foreign relations exercised greater authority in response to the geopolitical conditions of the Cold War.

66. *Id.*

67. *Id.* at 246.

68. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 46 (1942) (holding that a naturalized U.S. citizen acting as a German agent can be denied access to civilian courts in wartime).

69. *See, e.g., Korematsu*, 323 U.S. at 223-24.

70. *See, e.g.,* SCHLESINGER, *supra* note 33, at 5-67, 208-16, 377-92. *See generally* GLENNON, *supra* note 30; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (1996); NATHAN & OLIVER, *supra* note 10; SILVERSTEIN, *supra* note 9; ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWERS: THE ORIGINS* (1976).

71. *See* *United States v. Pink*, 315 U.S. 203 (1942) (holding that under the Litvinov Agreement the property in question passed to the U.S. Government); *United States v. Belmont*, 301 U.S. 324 (1937) (upholding the President's power to settle outstanding claims against the Soviet Union by the sole executive agreement known as the Litvinov Agreement, even though the settlement may conflict as a condition for establishing diplomatic relations); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding Congress' broad delegation of authority to the executive to ban the export of arms to Latin America).

In my view, this conventional history has overlooked fundamental shifts in the justificatory rhetoric of presidential power that took place during the Cold War. Expediency discourse developed out of earlier Supreme Court opinions, but it did not emerge until the Cold War. The Truman administration and its defenders first articulated executive expediency discourse in response to domestic political critics. The political discourse of the Cold War shaped a new method of constitutional interpretation. This new discourse, rather than objective geopolitical circumstances, formed the imperial presidency.

In the next Section, I distinguish pre-Cold War judicial opinions from those subsequent. These early opinions recognized broad executive power in the Constitution's own structure without regard for geopolitical conditions. Then, I show how defenders of the Truman administration employed the discourse of executive expediency. The appearance of expediency discourse also marked a dramatic change in judicial attitudes toward the executive. This geopolitical jurisprudence fundamentally transformed the relationship among the federal branches in ways unforeseen prior to the Cold War and led to the collapse of the Lockean dichotomy.

*B. Judicial Interpretations of the Executive's
Foreign Relations Powers before the Expediency Discourse*

The discourse of executive expediency did not emerge until the Cold War. Before that period, it was well established that the President bore important responsibilities for foreign relations, but that his authority was limited by the Constitution and acts of Congress.⁷² Faced with the first foreign military threat to the new Republic, President Adams armed U.S. vessels against the French in the undeclared naval war of 1798. Congress authorized the President to order the seizure of any U.S. vessel bound for French territory. The President ordered the seizure of any U.S. vessel bound to or from French territory, but Congress prescribed his authority to issue orders. The owner of one of the vessels seized on route to French territory challenged the legality of the President's order. The Supreme Court held that the President's authority as commander-in-chief was subordinate to Congress' authority to regulate the armed forces.⁷³ Writing for the Court, Chief Justice Marshall expressly left open the question whether the President had plenary authority to issue orders to seize U.S. vessels in the absence of any congressional

72. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that U.S. Captain Little was personally liable for seizing a foreign vessel under orders from the President that contradicted the Non-Intercourse Act of 1799). Chief Justice Marshall opined that the President's "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179.

73. See *id.*

action.⁷⁴ Ten years later, the Court answered that question in a case arising out of the executive's seizure of enemy alien property without congressional authorization during the War of 1812.⁷⁵ The Supreme Court held that the executive did not have any plenary power even in a declared war to affect the property rights of enemy aliens without an act of Congress.⁷⁶ During the Civil War, the Court held that the President had "no power to initiate or declare a war either against a foreign nation or a domestic State."⁷⁷ Instead, the Court found that Congress had granted to the President explicit statutory authority "to suppress insurrection against the government of a State or of the United States."⁷⁸ Moreover, even if Lincoln had exceeded his authority at the beginning of the conflict by ordering federal ships to blockade the South, Congress' subsequent ratification legalized his actions. Thus, even in the country's most desperate moment, the Court minimized any implication that the President had plenary authority to use military force under the Constitution without congressional authority.⁷⁹

74. "It is by no means clear that the president . . . might not, without any special authority for that purpose . . . have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce." *Id.* at 177.

75. *See Brown v. U.S.*, 12 U.S. (8 Cranch) 110, 128-29 (1814). During the War of 1812, a U.S. district attorney seized a shipment of timber purchased for export to Britain for construction of enemy ships. The Court held that the appellant's timber could not be confiscated without an act of Congress giving the President that authority. Both Chief Justice Marshall in his majority opinion and Justice Story in his dissenting opinion concurred that the authority to confiscate enemy alien property lies with Congress. Story, however, opined that such authority was implicit in the declaration of war. *See id.* at 143-54.

76. *See id.* at 128-29.

77. *The Prize Cases*, 67 U.S. (2 Black) 635, 666-71 (1862). At the outbreak of the Civil War, President Lincoln deployed federal naval vessels to impose a blockade on southern ports without authorization by Congress, which had not yet convened. In upholding President Lincoln's unilateral action, the Court held that the capture of enemy vessels was authorized both by the Acts of February 28, 1795, and March 3, 1807, authorizing the President to suppress insurrection against the United States and ratified by Congress subsequently. Justice Grier opined that "[w]ithout admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress . . . this ratification has operated to perfectly cure the defect." *Id.* at 671.

78. *Id.* at 668.

79. *See Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) (holding that President Lincoln could not subject civilians to military trial where the civil courts remained open). The Court declared that "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government." *Id.* at 121. *Cf. Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186). In *Durand*, a U.S. national brought suit for trespass against a naval commander responsible for firing upon Greytown, Nicaragua, and destroying the plaintiff's property. The commander claimed he was acting under orders of the President to retaliate for a public disturbance in which a bottle was thrown at a U.S. diplomat. The circuit court found that the President had both constitutional authority as the chief executive to protect U.S. nationals abroad and statutory authority to establish and oversee the Department of State and its diplomats stationed abroad. *See id.* at 112. Although Judge Nelson interpreted the President's power to protect Americans overseas very broadly, he based his holding

The Court's narrow construction of executive power over foreign relations began to change in 1936. The Court's widely cited and generally misunderstood opinion in *United States v. Curtiss-Wright Export Corp.*⁸⁰ planted the seed of a more expansive interpretation of the executive's foreign relations powers. Writing for the Court, Justice Sutherland upheld a statute authorizing the President to proclaim a ban on arms sales to certain Latin American countries if the President found it would preserve hemispheric peace.⁸¹ Sutherland's opinion suggested in dictum that the federal government's external sovereignty derived wholly from the British Crown and that the Constitution only prescribed the federal government's *domestic* powers.⁸² The federal government exercised a monopoly on foreign relations power unregulated by the Constitution. In a stunning non sequitur, Sutherland concluded from this that the President was

on the explicit language of Article II of the Constitution. Unlike the discourse of expediency, Nelson's opinion did not relate the extent of presidential power to the nature of the threat faced. *See id.* Indeed, the facts suggested to the contrary that the President's authority to act was broad even where there was no serious threat to the United States.

80. 299 U.S. 304 (1936). The defendant appealed a conviction for violating an arms embargo imposed by FDR pursuant to congressional statute. The defendant argued that Congress could not delegate such unrestricted authority to the President. The Court upheld the statute authorizing the President's embargo. *See id.* at 327.

81. *See id.* at 318. In three nearly contemporaneous opinions the Court had held that Congress could not delegate legislative authority to the executive absent clear instructions. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 289-90 (1936) (invalidating the Bituminous Coal Conservation Act, in part, because it delegated to local coal boards broad power to set wages and prices); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29, 551 (1935) (invalidating the National Industrial Recovery Act's (NIRA) authorization to the President to adopt "codes of fair competition"); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (invalidating the NIRA's authorization to the President to regulate the interstate shipment of oil). In all three cases, the Court found that the legislation did not contain an "intelligible principle" to inform the President when and in what manner he was authorized to regulate and to what end. According to the non-delegation doctrine, by conferring on the executive a plenary authority to regulate commerce, Congress effectively assigned to the executive its own legislative power in violation of the principle of separation of powers. By disposing of congressional authority in this way, Congress avoided accountability for the rule-making. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 263-65 (2d ed. 1988).

82. *See Curtiss-Wright*, 299 U.S. at 316-18. However, Sutherland's opinion was not completely without precedent. *See Chisholm, Ex'r v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793). In *Chisholm*, Chief Justice Jay, whose experience negotiating the Jay Treaty shaped the Senate's role in making treaties, stated that

[t]he Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that Crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people . . . thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people. . . ."

Id. at 470 (emphasis added).

the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁸³

In support of the extravagant metaphor of the President as “sole organ,” Sutherland lifted out of context a quote from Chief Justice John Marshall, then a member of Congress, during a debate on the floor of the House of Representatives.⁸⁴ Marshall was defending President Adams’ request for extradition of a British subject pursuant to the Jay Treaty. He argued that the President “is the sole organ of the nation in its external relations” in the sense that

the demand of a foreign nation can only be made on him. He possesses the whole Executive power He is charged to execute the laws. A treaty is . . . a law. He must, then, execute a treaty, where, he, and he alone, possesses the means of executing it.⁸⁵

Clearly, Marshall meant that the President was bound by law to carry out treaties. Far from asserting the executive’s discretion in foreign relations, Marshall characterized the executive as the agent or “organ” of Congress.⁸⁶ Sutherland twisted Marshall’s statement to support the contrary proposition—that the President’s foreign relations powers were plenary and neither derived from, nor were limited by, Congress.

83. *Curtiss-Wright*, 299 U.S. at 320.

84. The context of Marshall’s statement was the famous debate that arose out of the arrest of Thomas Nash, who was responsible for the murder of officers on the British ship *Hermione* in 1797. Under the Jay Treaty, President Adams had Nash arrested in Charleston, South Carolina, where he arrived as a crew member on an American schooner. President Adams requested that Nash be delivered to the British consul as provided by the Treaty. Republicans in Congress argued that Nash was an innocent American and that the President was kowtowing to British bullies. The British insisted that Nash was a British subject. Nash claimed that his real name was Jonathan Robbins and that he was a U.S. national and resident of Danbury, Connecticut, who had been seized and impressed into the British navy. The evidence confirmed that Nash was, in fact, a British subject, after the Danbury selectmen certified that no one by the name of Robbins had ever resided there. Nevertheless, Jefferson and his party exploited Nash’s case as a winning issue in the 1800 presidential campaign. See 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 458-62 (1918); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *YALE L.J.* 229 (1990).

85. 6 *ANNALS OF CONG.* 596-619 (1800). Marshall argued that the Jay Treaty bound the United States to deliver over persons who committed criminal acts on British vessels on the high seas and that the United States had no jurisdiction over crimes committed on British ships outside U.S. territory. Thus, the U.S. courts could not decide the case; the British demand for the return of Nash was not judicially cognizable. See *id.*

86. See JEAN E. SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 261-62 (1996). In *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423, 432 (1813) (holding that U.S. courts must respect the judgment of a French court which upheld the illegal seizure of a U.S. vessel), Chief Justice Marshall emphasized that Congress governed the relationship between the United States and France, and unless Congress chose to disavow the judgment of the French courts, the federal courts must act out of comity.

Sutherland's opinion was flawed as a matter of both law and history. The real issue in the case was whether Congress could delegate to the President authority to regulate exports.⁸⁷ In sustaining the delegation of authority, the Court sought to distinguish the field of foreign commerce from the Court's contemporary precedents that had struck down New Deal legislation authorizing the executive to regulate domestic commerce.⁸⁸ It was unnecessary and irrelevant for the Court to decide that the federal government's authority to control foreign affairs was superior to the States and unlimited by the Constitution in order to reach the conclusion that this delegation was permissible. Sutherland's frothy rhetoric confused the plain fact that the President's decision to ban arms exports entailed no aspect of negotiation or diplomatic representation.

Sutherland's historical facts were wrong as well. He argued that the President's foreign relations powers derived from the British crown and not from the States.⁸⁹ Yet, both the Declaration of Independence and the Articles of Confederation acknowledged that the States retained certain powers to make international agreements and regulate trade and commerce with foreign nations.⁹⁰ The lack of cohesion and uniformity both in foreign commerce and foreign relations had contributed to the call to amend the Articles of Confederation.⁹¹

Contrary to Sutherland's argument that the Constitution did not refer to external sovereignty, Articles I and II of the Constitution extensively enumerated the foreign relations powers of the Congress and the President. Article I gave Congress extensive and explicit power to regulate foreign commerce, tax imports and exports, control immigration and naturalization, define and punish felonies on the high seas and offenses against the law of nations, declare war, grant letters of marque and reprisal, make rules concerning captures on land and sea, and raise,

87. See *supra* note 81 and accompanying text.

88. See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating the NIRA's authorization to the President to regulate the interstate shipment of oil); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act's (NIRA) authorization to the President to adopt "codes of fair competition").

89. *Curtiss-Wright Export Corp.*, 299 U.S. at 316-18.

90. See THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (stating that "as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do."); THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION (U.S. 1781), reprinted in ROBERT W. HOFFERT, A POLITICS OF TENSIONS 199-206 (1992).

91. Under the Articles, each of the thirteen states negotiated their own tariffs, frustrating the commercial policies of sister states. The disarray in the Confederation's foreign relations permitted Great Britain and Spain to remain in occupation of their western territories, which they had agreed to transfer to the new nation. See SAMUEL F. BEMIS, A SHORT HISTORY OF AMERICAN FOREIGN POLICY AND DIPLOMACY 32-37 (1959).

support, and regulate an army and navy.⁹² Article II conferred on the executive the power to command the military, receive foreign ambassadors, and with the Senate's advice and consent, appoint ambassadors and negotiate treaties.⁹³ The Framers did not grant the President exclusive power to make treaties committing the nation internationally.⁹⁴ Hamilton, the most ardent advocate of executive power, warned that

[t]he history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.⁹⁵

Sutherland's conclusion that the President was the sole organ of foreign relations later formed the foundation of the expediency argument. Yet, courts and scholars conveniently overlooked the outlandish premise of Sutherland's conclusion—that the President's power derives from the British crown and not from the Constitution.⁹⁶ Today, the conclusion appears as natural and sensible as the premise appears nonsensical and dangerous.

The potential for reshaping the Constitution into a legal foundation for the executive expediency argument emerged in the Court's judgments in *United States v. Belmont*⁹⁷ and *United States v. Pink*.⁹⁸ Both cases arose out of the Roosevelt administration's decision in 1933 to establish diplomatic relations with the Soviet Union and to settle outstanding claims by the United States and its nationals. The claims settlement was accomplished through a sole executive agreement known as the "Litvinov Assignment."⁹⁹ After the Bolshevik Revolution, the Soviet government dissolved certain Russian companies and expropriated their assets, including assets located in the United States. Under the Litvinov Assignment the Soviets assigned to the U.S. Government these assets in full settlement of all outstanding claims against the Soviet Union. In

92. See U.S. CONST. art. I, §8.

93. See U.S. CONST. art. II, §§ 2-3. Even Sutherland had acknowledged earlier that the executive's treaty-making authority was limited by the Constitution. See GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 118-27 (1919).

94. In his classic treatise on presidential powers, Professor Corwin acknowledged that the executive power included responsibility for foreign relations, but he distinguished the President's circumscribed powers from the Crown's much greater power. Speaking of the Virginia Constitution of 1776, Corwin pointed out that "[e]xecutive power . . . was cut off entirely from the resources of the common law and of English constitutional usage." EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 6 (5th rev. ed., 1984).

95. THE FEDERALIST No. 75, at 477 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

96. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1956); *Youngstown*, 343 U.S. at 579.

97. *Belmont*, 301 U.S. at 324.

98. *Pink*, 315 U.S. at 203.

99. See generally DONALD G. BISHOP, THE ROOSEVELT-LITVINOV AGREEMENTS (1965).

exchange, President Roosevelt agreed to release the Soviet Union from all public and private claims by the United States and its nationals arising out of the expropriations.¹⁰⁰

In *Belmont*, the federal government sued to recover funds deposited in 1918 by the Petrograd Metal Works Company with a private banker, Belmont, in New York City.¹⁰¹ The Soviets had expropriated the Russian company and claimed the funds. A New York court held that since the funds were deposited in New York, Soviet law did not govern and that since confiscation of private property offended the public policy of New York, the Litvinov Assignment would not be given effect by New York courts.¹⁰² Justice Sutherland, writing again for the Court, emphasized that the New York courts could not apply the public policy of the State of New York in a way that superseded federal policy as established by the Litvinov Assignment.¹⁰³ Citing *Curtiss-Wright*, Sutherland treated the recognition of the Soviet government, the establishment of diplomatic relations, and the assignment of claims as one transaction within the competence of the President.¹⁰⁴

The respondents argued that the Litvinov Assignment constituted a treaty, which required the advice and consent of two-thirds of the Senate under Article II. With circular reasoning Sutherland contended that the Litvinov Assignment was an "international compact," which was distinguishable from an Article II treaty in that "[a] treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' But an international compact, as this was, is not always a treaty which requires the participation of the Senate."¹⁰⁵ Surely, the Litvinov Assignment benefited the "public welfare" by easing the recognition of the Soviet Union, and thus improving the U.S.-Soviet relationship. According to Sutherland's tautology, only treaties required the

100. See *Pink*, 315 U.S. at 210-13.

101. See *Belmont*, 301 U.S. at 324-27.

102. See *id.* at 327.

103. See *id.* at 331-34.

104. See *id.* at 333.

105. *Belmont*, 301 U.S. at 330 (quoting *B. Altman & Co. v United States*, 224 U.S. 583, 600 (1912)). In *Belmont*, Justice Sutherland tried to turn a sow's ear into a purse by citing *Altman and Co. v. United States*, 224 U.S. 583 (1912). See *Belmont*, 301 U.S. at 330-31. In *Altman*, the issue before the Court was whether it possessed appellate jurisdiction under section 5 of the Circuit Court of Appeals Act to review an 1898 executive agreement with France. The agreement had been negotiated under the explicit congressional authority of the Dingley Tariff Act of 1897. The jurisdictional statute gave the Court jurisdiction to review treaties, and the Court held that for these purposes, the term "treaty" included executive agreements and Article II treaties. The Court's reading in *Altman* was a narrow construction of a jurisdictional statute, whereas Sutherland construed the term "treaty" for purposes of the Supremacy Clause of the Federal Constitution. Moreover, the Court in *Altman* sided with the appellant to check the power of the executive to negotiate executive agreements. By contrast, in *Belmont*, Sutherland assumed that the executive's power to negotiate was plenary. In sum, what *Altman* took away from the executive's authority to act without judicial scrutiny, *Belmont* paid back with interest. See *id.*

advice and consent of the Senate, and if it required the advice and consent of the Senate, it must be a treaty. In effect, the executive was free to present any form of agreement as a compact and thereby exclude the Senate's participation.

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . And while this rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts,¹ and in respect of our foreign relations generally, state lines disappear.¹⁰⁶

In Sutherland's view, the Supremacy Clause of Article VI made all international agreements the supreme law of the land. Sutherland assumed away two problems with the Litvinov Assignment. First, he denied the apparent conflict with the federal Constitution by overlooking the impact that the Litvinov Assignment had on domestic property rights.¹⁰⁷ Without congressional approval or the senate's advice and consent, President Roosevelt in effect transferred property rights from private parties to a foreign state for the purpose of compensating other private parties. Viewed that way, the Litvinov Assignment raised questions both of usurping congressional power as well as taking property without a public purpose, compensation, or due process.

Second, Sutherland avoided the conflict with state law and public policy respecting property rights by treating the assignment as part of a single transaction under the rubric of "foreign relations."¹⁰⁸ He could have disaggregated the assignment from the establishment of diplomatic relations, at least insofar as it violated state law. Here, the President's foreign relations powers were operating within the Territory of the United States to appropriate private property without due process or compensation. *Belmont* went even further than *Curtiss-Wright* by empowering the President, acting alone, to negotiate and enforce an

106. *Id.* at 331.

107. By holding that federal law had superseded New York law, the Court acknowledged implicitly that the expropriation of the Russian depositor had not extinguished the rights of Russian shareholders in the United States. *Id.* at 331-34.

108. *Id.*

agreement with a foreign state voiding private property rights contrary to both state law and arguably the Constitution.¹⁰⁹

In *Pink*,¹¹⁰ the Court considered a related case involving the Litvinov Assignment. The respondent argued that the Litvinov Assignment was *ultra vires* because it lacked either congressional approval as legislation or Senate approval as a treaty. Writing for the majority, Justice Douglas found that the President had the authority to conclude an executive agreement settling outstanding claims. Douglas read *Belmont* as holding that

the conduct of foreign relations is committed by the Constitution to the political departments of the federal government; that the propriety of the exercise of that power is not open to judicial inquiry; and that recognition of a foreign sovereign conclusively binds the courts.¹¹¹

In effect, Douglas treated the legitimacy of the Litvinov Assignment as if it were a non-justiciable political question. Unlike Sutherland, Douglas did not claim that the executive possessed some exclusive plenary authority to act in foreign affairs. Rather, he viewed foreign relations as a concurrent power of the executive and Congress. Although Douglas cited *Curtiss-Wright*,¹¹² he found a textual source for the President's authority to negotiate claims settlements. Article II gave the President power to receive foreign ambassadors.¹¹³ Douglas reasoned by painfully attenuated logic that if the President can "receive" ambassadors, then he has the power to decide what government to recognize and that included "the power to determine the policy which is to govern the question of recognition."¹¹⁴

Recognition is not always absolute; it is sometimes conditional. Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the president who is the "sole organ of the federal government in the field of international relations."¹¹⁵

Douglas concluded that the settlement of outstanding claims, which in this case meant the seizure of private property, was a coincident of the

109. See *id.* Still, *Belmont* did not contradict the traditional view of executive agreements, discussed below, as operating only as a contemporary exchange of property and not as legally binding the nation prospectively. See *infra* notes 326-356 and accompanying text. Even Justice Sutherland had expressed the view earlier that executive agreements constituted "only a moral obligation." SUTHERLAND, *supra* note 93, at 120.

110. 315 U.S. 203 (1942).

111. *Id.* at 222-23.

112. 299 U.S. 304 (1936).

113. *Id.* at 229.

114. *Id.*

115. *Id.* (citations omitted).

power to receive ambassadors.¹¹⁶ Moreover, Douglas embraced the proposition that a sole executive agreement was supreme over state law and could be self-executing.¹¹⁷

The Court's judgments in *Curtiss-Wright*, *Belmont*, and *Pink* favored the growth of executive power at a time when the shadow of fascism was spreading across Europe. Together they reinforced the core concept that the President was the sole organ of foreign relations. After the defeat of fascism, this concept might have died a natural death. Instead, following World War II, judicial opinions re-integrated the sole organ concept in light of Cold War exigencies and transformed it into a watchword in the discourse of expediency.

*C. Re-inventing the Sole Organ:
The Steel Seizure Case and the Cold War*

The Cold War reclaimed the Court's central conception in *Curtiss-Wright*. The Court's 1952 decision in *Youngstown (The Steel Seizure Case)*¹¹⁸ rejected Sutherland's extra-constitutional thesis and re-established the traditional, more limited, model of presidential powers.¹¹⁹ Ironically, by divorcing Sutherland's weak extra-constitutional thesis from the concept of the President as sole organ, *Youngstown* obscured the suspect lineage of the concept and thus shielded it from scholarly critique. In this way, *Youngstown* facilitated the discourse of expediency at the height of the Cold War.

The *Steel Seizure Case* arose out of President Truman's executive order to seize control of steel manufacturers in order to avert a threatened strike during the Korean War.¹²⁰ The President justifiably feared that a strike could have seriously interrupted the production of armaments for U.S. forces in Korea and Western Europe at a moment when Chinese and Soviet communists seemed especially threatening to U.S.

116. See *id.* at 228-29. In fact, the power to receive foreign ambassadors was intended originally to be merely a ceremonial power conferred on the executive. See THE FEDERALIST No. 69 (Alexander Hamilton). Hamilton described the power to receive ambassadors as "more a matter of dignity than of authority." *Id.* at 448.

117. See *Pink*, 315 U.S. at 230-34. Indeed, the *Restatement (Third) of Foreign Relations* suggests that *Pink* may support such a conclusion. See RESTATEMENT (THIRD), *supra* note 24, at § 303, note 11. By contrast, Justice Douglas' subsequent concurrence in the *Steel Seizure Case* emphasized that the executive cannot take private property without compensation authorized in advance by Congress. See *Youngstown*, 343 U.S. at 629, 631-32 (Douglas J., concurring).

118. *Youngstown*, 343 U.S. at 579.

119. *Youngstown* and *Curtiss-Wright* are often viewed as opposing paradigms of presidential power. See GLENNON, *supra* note 30, at 197-202. Critics of presidential power generally embrace *Youngstown* as a repudiation of *Curtiss-Wright*. I suggest that *Youngstown* also made possible the growth of presidential power in foreign affairs and thus reinforced *Curtiss-Wright's* conclusion that the President is the sole organ of foreign relations.

120. See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 58-82 (1977).

allies.¹²¹ The President had no statutory authority to seize control of the manufacturers, but relied on his plenary powers as chief executive and commander-in-chief. Rejecting the President's action, the Court declared that "[t]he president's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."¹²² The Court's judgment contradicted Sutherland's extra-constitutional theory of presidential powers. Writing for the majority, Justice Black did not even cite Sutherland's opinion in *Curtiss-Wright*.¹²³

However, Justice Jackson's celebrated concurrence directly addressed Sutherland's opinion and sliced it to the bare bone. Jackson asserted that *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress."¹²⁴ He dismissed Sutherland's theory as mere "dictum,"¹²⁵ and read *Curtiss-Wright* as affirming the power of Congress to delegate broad power to the President over foreign commerce. Both Jackson and Black stressed the distinction between the President acting as the commander-in-chief in the "theater of war" and the President acting internally.¹²⁶ In this way, the Court clearly distinguished President Roosevelt's authorized ban on arms exports from President Truman's unauthorized seizure of steel mills in wartime.

Many scholars regard Jackson's concurrence as the most authoritative statement on presidential powers.¹²⁷ He described presidential power as a function of congressional power.¹²⁸

When the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Justice Jackson's concurrence anticipated and rejected the expediency argument. Explaining why the Constitution did not grant the President emergency powers, he wrote:

121. See *id.* at 74-76.

122. *Youngstown*, 343 U.S. at 585.

123. See *id.* at 582-89.

124. *Id.* at 635 n.2 (Jackson, J., concurring).

125. *Id.*

126. Justice Black's majority opinion asserted that "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Youngstown*, 343 U.S. at 587. Justice Jackson stated that "the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants." *Id.* at 643-44 (Jackson, J., concurring) (emphasis in original).

127. See, e.g., GLENNON, *supra* note 30, at 8-13; HENKIN, *supra* note 70, at 94-96; KOH, *supra* note 21, at 135-37; MARCUS, *supra* note 120, at 228-48.

128. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.¹²⁹

Critics of executive power have cited *Youngstown* as representing the limits of executive power in foreign affairs.¹³⁰ However, *Youngstown* also advanced the proposition that the President is the sole organ of foreign relations, by clearing away the doctrinal debris from Sutherland's extra-constitutional thesis without disturbing the central holding. By removing the taint of Sutherland's twisted logic, *Youngstown* preserved the core concept of *Curtiss-Wright*. Since *Youngstown*, courts have reiterated that the President is the sole organ of foreign relations, but rather than relying upon Sutherland's historiography, courts have justified this conclusion by reference to the geopolitical necessities of the Cold War.¹³¹

D. The Liberals and the Cold War

Following the Second World War, the United States occupied a position of world leadership in containing the spread of communism, stabilizing friendly economies, and deterring the nuclear threat. Almost from the moment of the Japanese surrender, a continuing spiral of international crises—Berlin, China, Korea, Hungary, Suez, the Near East, Cuba, the Dominican Republic, Vietnam, Czechoslovakia—continuously destabilized the geopolitical environment. Traditional historians like George F. Kennan and W. W. Rostow blamed Soviet expansionism and U.S. weakness for the persistent crisis of the Cold War.¹³² Revisionist historians like Gar Alperovitz, Gabriel Kolko, and William Appleman

129. *Id.* at 649-50. It is clear that Jackson's views on emergency powers were shaped or at least supported by his own experience as the Chief Prosecutor at Nuremberg. His concurrence traced the history of the Weimar Constitution and the grant of emergency powers by the Reichstag to the President of the Republic and its tragic consequences. He concluded that recent history "suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652.

130. See, e.g., GLENNON, *supra* note 30, at 8-18.

131. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (holding that the President's sole executive agreement with Iran validly suspended claims filed in U.S. courts and transferred the appellant's property claims to the jurisdiction of the Claims Commission in The Hague). See also Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1105, 1127 (1982) (arguing that the Court sacrificed constitutional principle to geopolitical realities).

132. See GEORGE F. KENNAN, *RUSSIA AND THE WEST UNDER LENIN AND STALIN* (1961); W.W. ROSTOW, *THE UNITED STATES IN THE WORLD ARENA* (1960).

Williams argued that the United States overreacted to the Soviet Union's reasonable security concerns and that the United States sought to exploit the bipolar order for its own economic and political purposes.¹³³ Post-revisionists like John Lewis Gaddis, William Taubman, and Daniel Yergin concluded that the Cold War resulted from misunderstandings on both sides.¹³⁴

Whatever the complexity of causes that led to the Cold War—ideology, economics, power politics, Stalin's personality, Soviet intrigue, or American ineptitude—the tension of the bipolar order seemed real, immutable, and threatening to the U.S. public.¹³⁵ The broad consensus of U.S. leadership held that the immediacy of the nuclear threat, the need for covert operations and intelligence gathering, and the complexity of U.S. relations with both democracies and dictatorships made it impractical to engage in congressional debate and oversight of foreign policy-making.¹³⁶ The eighteenth-century Constitution did not permit a rapid response to twentieth-century foreign aggression. The reality of transcontinental ballistic missiles collapsed the real time for decision-making to a matter of minutes. Faced with the apparent choice between the risk of nuclear annihilation or amending the constitutional process for policy-making, the preference for a powerful executive was clear.¹³⁷ Early in the Cold War one skeptic of executive power, C.C. Rossiter, acknowledged that

[t]he steady increase in executive power is unquestionably a cause for worry, but so, too, is the steady increase in the magnitude and complexity of the problems the president has been called upon by the American people to solve in their behalf. They still have more to fear from the ravages of depression, rebellion, and especially atomic war than they do from whatever decisive actions may issue from the White House in an attempt to put any such future crises to rout [I]t is not too much to say that the destiny of this nation in the Atomic Age will rest in the

133. See GAR ALPEROVITZ, *COLD WAR ESSAYS* (1970); GABRIEL KOLKO, *THE LIMITS OF POWER: THE WORLD AND UNITED STATES POLICY, 1945-1954* (1972); WILLIAM A. WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (1988).

134. See GADDIS, *supra* note 1; TAUBMAN, *supra* note 8; DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* (1977).

135. See WILLIAM F. MULLEN, *PRESIDENTIAL POWER AND POLITICS* 39-42 (1976).

136. See SILVERSTEIN, *supra* note 9, at 9-17, 65-100.

137. President Truman warned that

[w]e 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. Nor can we separate the economic facts from the problems of defense and security. [The] President, who is Commander in Chief and who represents the interests of all the people, must be able to act at all times to meet any sudden threat to the nation's security.

2 HARRY S. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE* 478 (1956) (commenting on the Court's decision in the Steel Seizure Case).

capacity of the Presidency as an institution of constitutional dictatorship.¹³⁸

The call for executive leadership in the face of international crisis came not only from members of the executive branch,¹³⁹ but also from members of Congress,¹⁴⁰ academics,¹⁴¹ and legal commentators.¹⁴² Reviewing the history of this period, the Senate Foreign Relations Committee reported at the height of the Vietnam War,

[o]ur country has come far toward the concentration in its national executive of unchecked power over foreign relations, particularly over the disposition and use of the Armed Forces. So far has this process advanced that in the committee's view, it is no longer accurate to characterize our government, in matters of foreign relations, as one of separated powers checked and balanced, against each other¹⁴³

138. ROSSITER, *supra* note 54, at 308-09.

139. President Truman warned that upon the functioning of a strong executive "depends the survival of each of us and also on that depends the survival of the free world." THE POWERS OF THE PRESIDENCY 114 (Robert S. Hirschfield ed., 1968). See also, e.g., Speech by John F. Kennedy delivered to the National Press Club (Jan. 14, 1960), in HIRSCHFIELD, *supra*, at 129-31; Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l Sec. Policy and Scientific Developments of the House Comm. on Foreign Affairs, 91st Cong. 12-13 (1970) (statement of McGeorge Bundy, President, Ford Foundation); Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary, 92d Cong. 237-40 (1972) (statement of Nicholas Katzenbach, Former Attorney General and Former Undersecretary of State).

140. Reflecting on postwar foreign policy through Vietnam, Senator John Stennis, the powerful Democratic chair of the Armed Services Committee, concluded that "our urgent national interests would have been injured if the President had been forced to delay by coming to Congress. . . ." JOHN C. STENNIS & J. WILLIAM FULBRIGHT, THE ROLE OF CONGRESS IN FOREIGN POLICY 29-30 (1971). See also J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961).

141. See, e.g., HIRSCHFIELD, *supra* note 139, at 252-53 (arguing that the degree of executive power should vary directly with the degree of crisis). "Should the ultimate crisis of thermonuclear war occur, the President would necessarily have to assume dictatorial authority over every other aspect of whatever remained of our national existence. His power would be total, to meet the totality of the disaster, and the regimes of Lincoln, Wilson, and Roosevelt would seem pale in comparison." *Id.* at 253. See also, e.g., ROBINSON ET AL., *supra* note 52, at 5-7; Henry S. Commager, *Does the President Have Too Much Power?*, reprinted in 97 CONG. REC. 3101-02 (1951).

142. See, e.g., Eugene Rostow, *Great Cases Make Bad Law: The War Powers Resolution*, 50 TEX. L. REV. 833 (1972). Rostow stated that

the nation faces foreign policy problems today altogether different from those it faced in 1800, or even in 1900. . . . Our diplomacy. . . was peripheral to the overriding problem of maintaining the . . . direct responsibility for protecting [the United States'] primary security as a nation by direct and continuous involvement in world politics. . . . The circumstances of modern world politics, however, require Presidents to act quickly, and often alone.

Id. at 870-71. See also, e.g., Treaties and Executive Agreements: Hearings on S.J. Res. 130 before Subcomm. of the Senate Comm. on the Judiciary, 82nd Cong. 424-27 (1952) (statement of Myres S. McDougal, William K. Townsend Professor of Law, Yale University Law School).

143. Senate Foreign Relations Committee Report on National Commitments, S. Rep. No. 91-129 (1969) at 7.

In the committee's view, the continuing series of Cold War crises and the perceived need to expedite decision-making in the nuclear age led to a concentration of power in the executive:

Since 1940 crisis has been chronic and, coming as something new in our experience, has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been executive action. . . . Perceiving, and sometimes exaggerating, the need for prompt action, and lacking traditional guidelines for the making of decisions in an emergency, we have tended to think principally of what needed to be done and little, if at all, of the means of doing it.¹⁴⁴

Many liberals, who in the 1970s would become leading critics of the President's foreign policy, advocated the expediency of executive power in the 1950s. Liberals linked executive expediency with the centralization of power in the federal government during the New Deal and the subsequent creation of the welfare state. From their perspective, the presidency was the most effective and representative office from which to manage this centralization of power. In part, executive expediency represented the romancing of the White House by liberals, especially during the Roosevelt, Kennedy, and Johnson administrations. Only after the failure of U.S. policy in Vietnam and the subversion of constitutional government by the Nixon administration did liberals turn against the executive expediency argument.¹⁴⁵ By then, the idea of a permanent crisis in foreign policy and the unquestioned supremacy of the executive in the management of foreign affairs had become an accepted feature of U.S. government.

Three historical moments were critical to the development of the executive expediency discourse: the communist witch hunts of the 1950s, the Bricker Amendment debate in the early 1950s, and the debate through the 1960s and early 1970s over the war in Indochina. Each of these events crystallized the discourse, and in each moment, liberals used the executive expediency discourse to trump conservative opposition to the executive's foreign policy.

First, congressional Democrats employed expediency discourse in the 1950s as a strategic maneuver in defense of the Democratic Administration as well as the free world. With the recovery effort in Europe and the emergence of the Cold War, an isolationist Congress stymied President Truman's foreign policies. For example, Truman's decision to increase U.S. forces in Europe in 1950 ignited the "Great

144. *Id.* at 96.

145. See NATHAN & OLIVER, *supra* note 9, at 78-90; SILVERSTEIN, *supra* note 9, at 84-100, 123-38.

Debate" of the Eighty-second Congress concerning the commander-in-chief's authority to deploy troops without congressional authorization. The leader of the Republican opposition, Senator Robert A. Taft, later warned that

[t]here can be no question that the executive departments have claimed more and more power over the field of foreign policy at the same time that the importance of foreign policy and its effect on every feature of American life has steadily increased. If the present trend continues, it seems to me obvious that the president will become a complete dictator in the entire field of foreign policy and thereby acquire power to force upon Congress all kinds of domestic policies which must necessarily follow.¹⁴⁶

In response to legislative opposition, Truman tried to act outside the constraints of the legislative process. For example, in winning approval for the Bretton Woods Agreements,¹⁴⁷ Truman avoided the usual process of Senate advice and consent in establishing the World Bank and International Monetary Fund.¹⁴⁸ The perceived threat of internal subversion and congressional witch hunting for communists in the executive branch complicated Truman's posture toward Congress. Republican congressional leaders demanded that federal employees take loyalty oaths, and some called for the resignation of Secretary of State Acheson.¹⁴⁹

While many liberals worried about the implications of the right-wing backlash, congressional Democrats accepted President Truman's attempts to accommodate the right-wing.¹⁵⁰ Truman pre-empted congressional Republican investigations of his administration by establishing a security system that would deter both communist infiltration and congressional oversight. Without congressional authorization, Truman imposed a loyalty oath on federal employees, ordered the classification of sensitive government documents restricting access to information, and imposed a system of security clearances.¹⁵¹ In defense of the

146. ROBERT A. TAFT, *A FOREIGN POLICY FOR AMERICANS* 21 (1952).

147. The Bretton Woods Agreements negotiated in 1944 include the Charter of the International Monetary Fund (IMF), Dec. 27, 1945, 60 Stat. 1401, and the International Bank For Reconstruction and Development (World Bank), Dec. 27, 1945, 60 Stat. 1440. Both agreements were approved by Congress in The Bretton Woods Agreement Act, Pub. L. No. 79-171, 59 Stat. 512 (1945).

148. See generally RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* 348-81 (1969); JOHN H. JACKSON ET AL., *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 27-32 (1991); GEORG SCHILD, *BRETTON WOODS AND DUMBARTON OAKS: AMERICAN ECONOMIC PLANNING AND POLITICAL POSTWAR PLANNING IN THE SUMMER OF 1944*, at 109-38 (1995).

149. See DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 41-69 (1978).

150. See *id.* at 38-40, 50-53, 253.

151. See generally *id.* at 41-53, 267-93, 303-24; EARL LATHAM, *THE COMMUNIST CONTROVERSY IN WASHINGTON* 362-99 (1966).

administration, liberals in Congress argued that the threat posed by the Soviet bloc justified deference to the executive's primacy in foreign relations.¹⁵²

Beginning in the early 1950s, the debate over the Bricker Amendment triggered traditional isolationist support and a liberal backlash supporting the President.¹⁵³ The Amendment was proposed by Republican Senator John Bricker, Governor Thomas Dewey's vice-presidential nominee. The Bricker Amendment, which took various forms during the early 1950s,¹⁵⁴ would have amended Article VI of the Constitution to deny the supremacy of treaties or executive agreements over state or federal law.¹⁵⁵ Bricker's supporters opposed U.N. human rights conventions, such as the Genocide Convention,¹⁵⁶ which they feared could interfere with state laws.¹⁵⁷ They were particularly concerned with the impact of human rights conventions on racial segregation in the south.¹⁵⁸ Liberals opposed the Bricker Amendment both because it would undermine the effectiveness of the United Nations in outlawing violations of human rights and because they believed that the invocation of "states' rights" was designed to preserve racial apartheid

152. See SCHLESINGER, *supra* note 33, at 150-55.

153. See, e.g., LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 86-110 (1984); Brunson MacChesney, *The Fallacies in the Case for the Bricker Amendment*, 29 NOTRE DAME L. REV. 551 (1954); Felix Morley, *Treaty Law and the Constitution: A Study of the Bricker Amendment*, American Enterprise Institute No. 448, 21-48 (1953); John B. Whitton & J. Edward Fowler, *Bricker Amendment—Fallacies and Danger*, 48 AMER. J. INT'L L. 23 (1954).

154. See Whitton & Fowler, *supra* note 153, at 24.

155. In *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920), Justice Holmes suggested that a treaty could be used to grant the federal government authority over the states which otherwise was not provided for in the Constitution. The immediate catalyst for Senator Bricker's amendment was a California state court opinion striking down a state law which restricted the rights of aliens to own property because it interfered with the U.N. Charter. See *Fujii v. State*, 217 P.2d 481, 488 (Cal. Ct. App. 1950). See also JOHNSON, *supra* note 153, at 87-89.

156. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951).

157. See John W. Bricker & Charles A. Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529, 536-45 (1954) (arguing that treaties must not interfere with state law absent federal implementing legislation).

158. See *Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. 7 (1953) (statement of John W. Bricker, United States Senator). See generally Arthur H. Dean, *Amending the Treaty Power*, 6 STAN. L. REV. 589, 606 (1954) (noting that some legislators have expressed concern that "a presidential executive agreement which could hardly be justified as an exercise by the President of his own constitutional powers and which is primarily legislative in purpose and effect, such as an executive agreement purporting to . . . protect civil rights, will be enforced as the law of the land"); Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 913-26 (1959) (arguing in part that civil rights questions that affect foreign relations are subject to treaty power); Arthur E. Sutherland, Jr., *Restricting the Treaty Power*, 65 HARV. L. REV. 1305, 1310 (1952) (noting that legislators have offered several proposals to "eliminate the self-executing feature which a treaty may have under the Supremacy Clause of Article VI of the Constitution, . . . [thereby], preventing the use of treaties to invade the reserved powers of the states").

in the South.¹⁵⁹ In other words, both concerns for domestic civil rights, as well as internationalism, motivated liberals to support the President's power to make treaties and executive agreements. The Senate defeated the Bricker amendment in 1954 by one vote.¹⁶⁰ The battle over the Bricker Amendment persuaded liberals that they should defend the executive's prerogative in the conduct of foreign relations.¹⁶¹

The third historical moment that helped develop the expediency discourse was the debate over U.S. involvement in Indochina through the 1960s and early 1970s. As President Johnson escalated the U.S. military commitment following the Gulf of Tonkin Resolution and his landslide victory in 1964, he enjoyed the strong support of liberals in Congress.¹⁶² Liberals worried that criticism of President Johnson's foreign policy could undermine his domestic civil rights and anti-poverty programs. Therefore, they were willing to give the President a blank check in Indochina. Just as liberals had defended President Truman's foreign policy out of loyalty to his domestic policy, many liberals supported Johnson's war policy through the Tet offensive in 1968.¹⁶³

The linkage between foreign and domestic policy remained an important determinate of support for the executive. Faced with rising inflation and urban problems, liberals abandoned President Johnson on his Indochina policy.¹⁶⁴ Civil rights leaders and anti-poverty activists saw that the war was draining resources from domestic programs.¹⁶⁵ Senators Eugene McCarthy and Robert Kennedy linked their criticism of Johnson's domestic and foreign policy.¹⁶⁶ Following Nixon's election, liberals were free to question the wisdom of allowing the commander-in-chief to wage undeclared wars without explicit congressional authorization or oversight. President Kennedy's friend and counselor, the liberal historian Arthur Schlesinger, wrote his famous critique of the executive's control of foreign relations, *The Imperial Presidency*,¹⁶⁷ during the Nixon administration. By the time the book appeared in 1973, the twin shocks of the Pentagon Papers and the Watergate scandal

159. See generally Henkin, *supra* note 158, at 913-30.

160. See 100 CONG. REC. 2374-75 (1954). In *Reid v. Covert*, the Supreme Court reaffirmed that the treaty power was subordinate to other constitutional provisions. 354 U.S. 1, 12-19 (1957). The Court's opinion satisfied most of Bricker's supporters and the movement for an amendment died out. See JOHNSON, *supra* note 153, at 101-10.

161. See, e.g., J. William Fulbright, *Forward* to GLENNON, *supra* note 30, at xi.

162. See SILVERSTEIN, *supra* note 9, at 84-88.

163. See *id.* at 88-89; DAVID CHALMERS, *AND THE CROOKED PLACES MADE STRAIGHT: THE STRUGGLE FOR SOCIAL CHANGE IN THE 1960s*, at 101-134 (1991); WILLIAM L. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960's*, at 333-52 (1971).

164. See STANLEY KARNOW, *VIETNAM 558-66* (1983).

165. See generally CHALMERS, *supra* note 163, at 126-45; O'NEILL, *supra* note 163, at 180-94, 275-305.

166. See O'NEILL, *supra* note 163, at 360-78.

167. SCHLESINGER, *supra* note 33.

had revealed to the public the moral bankruptcy, incompetence, and illegality of the imperial presidency. These revelations triggered legislation, such as the War Powers Resolution, which limited the executive's discretion in foreign relations and required the executive to keep Congress informed of its military and covert activities abroad.¹⁶⁸

The maturing views of Senator William Fulbright aptly demonstrated the impact of these three historical events on congressional moderates and liberals. One of the preeminent Democrats in foreign affairs during the postwar era, Fulbright supported the United Nations early in his career and viewed the Bricker Amendment as a vestige of the traditional isolationism which kept the United States out of the League of Nations.¹⁶⁹ Senator Fulbright believed that isolationism was no longer a viable policy for a United States faced with the global challenge posed by the Soviet Union. What President Washington had extolled as "our detached and distant situation"¹⁷⁰ had ended abruptly with the outbreak of World War II and the uncertain peace that followed. As the anti-communist hysteria led to attacks on the foreign policies of the Truman and Eisenhower administrations, Fulbright rushed to the defense of the executive against the reckless intrusion of the Congress.¹⁷¹ He regarded Senator Joseph McCarthy and his cohorts as a national embarrassment.¹⁷² These episodes of congressional involvement with foreign policy convinced Senator Fulbright that Congress was ill-equipped to manage foreign affairs in a dangerous time:

It is highly unlikely that we can successfully execute a long-range program for the taming, or containing, of today's aggressive and revolutionary forces by continuing to leave vast and vital decision-making powers in the hands of a decentralized, independent-minded, and largely parochial-minded body of legislators.¹⁷³

The Senator possessed greater confidence in the Republican administration of President Eisenhower than in the Democratic Congress in which he served. He viewed the executive as inherently more internationalist than Congress and as better structured to conduct foreign policy:

The president alone can act to mobilize our power and resources toward the realization of clearly defined objectives and to wean

168. See War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. §§ 1541-48 (1973).

169. See J. William Fulbright, *The Bricker Amendment: "It is an Attempt to Escape the World"*, reprinted in FULBRIGHT OF ARKANSAS 124-30 (Karl E. Meyer ed., 1963).

170. Farewell Address by George Washington (Sept. 29, 1796), in BLOOM, *supra* note 90, at 144.

171. See Fulbright, *supra* note 161, at xi; FULBRIGHT OF ARKANSAS, *supra* note 169, at 69-91.

172. See Fulbright, *supra* note 161, at xi.

173. Fulbright, *supra* note 140, at 7.

the American people and their representatives from the luxuries of parochialism and self-indulgence that they can no longer afford.¹⁷⁴

Thus, Senator Fulbright concluded that "we must give the Executive a measure of power in the conduct of our foreign affairs that we have hitherto jealously withheld. . . . This proposition, valid in our own time, is certain to become more, rather than less, compelling in the decades ahead."¹⁷⁵

Fulbright characterized the ordinary politics of legislation as "luxuries of parochialism and self-indulgence."¹⁷⁶ Interest-group politics were "parochial" in the context of foreign affairs, and the idea of holding the government accountable through Congress appeared "self-indulgent." Fulbright implied that open democratic deliberation might be too costly. Employing the rhetoric of wartime—patriotism and self-sacrifice—Fulbright argued that democratic accountability should be surrendered to a higher purpose; that is, national survival. Looking back at the growth of executive power in the 1950s and 1960s, he explained,

[t]he cause of the constitutional imbalance is crisis. I do not believe that the executive has willfully usurped the constitutional authority of the Congress; nor do I believe that the Congress has knowingly given away its traditional authority, although some of its members—I among them, I regret to say—have sometimes shown excessive regard for executive freedom of action. In the main, however, it has been circumstance rather than design which has given the executive its great predominance in foreign policy. The circumstance has been crisis, an entire era of crisis in which urgent decisions have been required, decisions of a kind the Congress is ill-equipped to make with . . . the requisite speed. . . . The President has the means at his disposal for prompt action: the Congress does not. When the security of the country is endangered . . . there is a powerful premium on prompt action, and that means executive action.¹⁷⁷

Fulbright enthusiastically supported the Gulf of Tonkin Resolution and initially backed Johnson's escalation of the war. After the U.S. invasion of the Dominican Republic in 1965, the Senator began to harbor private doubts about Johnson's foreign policies.¹⁷⁸ Nevertheless, he

174. *Id.* at 12.

175. *Id.* at 2.

176. *Id.* at 12.

177. *United States Commitments to Foreign Powers, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary*, 90th Cong. (1967) (statement of J. William Fulbright, United States Senator), reprinted in *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong. 370 (1972).

178. See NAOMI B. LYNN & ARTHUR F. MCCLURE, *THE FULBRIGHT PREMISE* 123-32 (1973).

remained an advocate of executive expediency. Not until 1967 did Fulbright publicly criticize the President's policy in Indochina.¹⁷⁹

By Nixon's election in 1968, the Senator was a leading critic of presidential supremacy in foreign relations, which he characterized as "executive despotism."¹⁸⁰ In doing so, Fulbright frankly acknowledged his own responsibility in abdicating congressional leadership to the executive.¹⁸¹ He perceived that the actions undertaken by the President during the Cold War had altered the traditional relationship between Congress and the President.

After the tragic experience of Vietnam, the question for Fulbright was whether a constitutional amendment should legitimate the new relationship between the executive and legislative branches, or whether Congress should restore the Constitution's original design.¹⁸² The War Powers Resolution¹⁸³ resolved that question. Senator Fulbright's support for the Resolution signaled a dramatic change in his own and his party's view of the executive. Fulbright's transformation from executive apologist to critic epitomized a generational shift among liberals from the beginning of the Cold War to the end of the Indochina War.¹⁸⁴

E. Conclusion

In the early days of the Cold War, liberal and moderate Democrats countered Republican opposition to the domestic and foreign policies of the Truman administration with executive expediency discourse. We can distinguish three strains of expediency arguments. First, liberals argued that the gravity of the international situation did not permit time for a robust debate about amending the constitutional balance of power between the political branches. This argument suggested that the problem was confined to the duration of the crisis, and contained no prescription for what, if anything, needed fixing in the constitutional structure. Another strain of argument treated as disloyal any criticism of the executive's foreign policy. In the 1950s context of anti-communist hysteria, this argument may help explain why so few legal commentators and courts questioned the extra-constitutional conduct of the

179. *Id.* See also Karnow, *supra* note 164, at 418-23, 486 (tracing the emergence of Senator Fulbright as a leading critic of the war).

180. STENNIS & FULBRIGHT, *supra* note 140, at 35.

181. See STAFF OF SEN. COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWERS OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 8-31 (Comm. Print 1970).

182. See *id.*

183. See *supra* note 168.

184. Some conservatives had reached the same conclusion about executive power earlier. In 1964, Senator Barry Goldwater said, "I feel very strongly that the executive branch has taken too much power from the legislative branch." 110 CONG. REC. 19, 787 (1964) (statement of Barry Goldwater, United States Senator), reprinted in LYNN & McCCLURE, *supra* note 178, at 106.

executive at the height of the Cold War. Third, liberals and moderates claimed that Congress did not possess the institutional competence to conduct foreign policy. Congress was slow, deliberative, and unwieldy, while the executive could act with speed, certainty, and secrecy. The claim of institutional incompetence assumed that Congress could not effectively respond to the Cold War. Political leaders viewed the Cold War as *sui generis*, requiring extraordinary actions that would not be justifiable in ordinary times.¹⁸⁵

Expediency discourse began as a political rhetoric, but it quickly transformed legal doctrines as well. Already, the Supreme Court had set the scene for this transformation in *Curtiss-Wright*, *Pink*, and *Belmont*. Yet, the Court's later decision in *Youngstown* suggested that *Curtiss-Wright* may have been confined to its facts, and that even in a national emergency during wartime, the President only possessed the authority granted expressly by the Constitution or delegated by Congress. The judiciary might have held steadfast to that vision of the Constitution. Instead, expediency discourse changed the way that courts thought about the Constitution and its relationship to contemporary geopolitics. The next Part of this Article explores how courts translated the discourse into legal doctrines.

II

HOW EXECUTIVE EXPEDIENCY DISCOURSE TRANSFORMED LEGAL DOCTRINE

The liberal response to the Cold War undermined the traditional liberal legal dichotomy between normalcy and emergency rule. A different method of constitutional interpretation emerged from the Cold War, one shaped by the discourse of executive expediency. This new interpretive modality extended the President's plenary powers in relation to geopolitical events in two ways. First, courts looked to the executive for a signal that an overriding geopolitical interest required the executive to act on its own. Second, courts deferred to the executive to set its own limits on the exercise of power. Many conservative jurists, who otherwise favored a strictly textual or intentionalist reading of the Constitution, widely endorsed this non-textual approach to constitutional interpretation.

A detailed examination of how courts interpreted the executive's foreign relations powers more expansively during the Cold War would exceed the scope of this Article. What follows is a brief summary of some of the ways that judicial opinions entangled executive power as a consequence of the Cold War discourse. I offer this summary by way of

185. See SILVERSTEIN, *supra* note 9, at 65-82.

example to show that the discourse pervaded the whole field of foreign relations powers. Part III then traces in much greater depth how the Cold War judicial opinions profoundly altered the executive's power to make executive agreements, and the domestic legal consequences.

A. Foreign Act of State Doctrine

The foreign act of state doctrine is a well established bar against U.S. courts hearing claims based on acts of foreign governments.¹⁸⁶ Originally, the Court said that the principle of international comity¹⁸⁷ required that courts not sit in judgment on the acts of another sovereign.¹⁸⁸ In a string of cases since the 1950s, courts have shifted away from reliance upon the principle of international comity as the foundation for the doctrine.¹⁸⁹ Instead, courts based the foreign act of state doctrine on "constitutional underpinnings" of separation of powers.¹⁹⁰ Courts should not address questions arising out of foreign acts of state because of the risk of interference with the political branches' conduct of foreign policy. However, courts made an exception to this rule of judicial abstention where the executive branch expressed its view that adjudicating the claim would not damage U.S. foreign relations.¹⁹¹

The doctrinal shift began with the Second Circuit's opinion in *Bernstein*.¹⁹² Bernstein, a German Jew, made a claim against another private party who had purchased property that Berustein had owned before it was confiscated by the Nazi regime. The Second Circuit had rejected two prior claims brought by Berustein on the basis of the act of state doctrine.¹⁹³ In his third attempt to obtain compensation, Berustein obtained a letter from the Department of State affirming that

[t]he policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecutions in Germany, is to relieve

186. See RESTATEMENT (THIRD), *supra* note 24, at § 443.

187. See generally Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

188. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

189. See RESTATEMENT (THIRD), *supra* note 24, at § 443 cmt. a.

190. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

191. See RESTATEMENT (THIRD), *supra* note 24, at § 443 cmt. h, n.8.

192. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

193. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71, 78 (2d Cir. 1949), *modified by* 210 F.2d 375 (2d Cir. 1954); *Bernstein v. Van Heyghen Frères Societé Anonyme*, 163 F.2d 246, 249-51 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947).

American courts from any restraint upon the exercise of their jurisdiction to pass upon the acts of Nazi officials.¹⁹⁴

Based upon this expression of the executive's will, Judge Learned Hand held that the act of state doctrine did not bar Bernstein's claim.¹⁹⁵

The *Bernstein* opinion stood the act of state doctrine on its head. Originally, the act of state doctrine was designed as a doctrine of judicial abstention to avoid politicizing disputes in U.S. courts which might damage U.S. foreign relations. After *Bernstein*, some courts have treated the act of state doctrine as a rule of deference to the executive.¹⁹⁶ The *Bernstein* exception meant that the outcome of disputes in U.S. courts would depend in large part on the executive's intention. Far from insulating U.S. foreign policy from the effect of U.S. civil litigation, *Bernstein* assured that in the future all such litigation would depend upon whether the executive chose to intervene in the litigation. Now all such suits had the potential of becoming politicized by executive action.

The *Bernstein* opinion was limited to its facts by subsequent opinions,¹⁹⁷ until the Supreme Court reaffirmed the principle of the *Bernstein* letter.¹⁹⁸ In *First National City Bank*, then-Justice Rehnquist upheld the *Bernstein* exception in a plurality opinion joined by just two of his colleagues. All six other justices questioned the *Bernstein* exception, but for different reasons.¹⁹⁹ Rehnquist's opinion married the "sole organ of foreign relations" and executive expediency arguments, disguising their quite different lineage.²⁰⁰ Further, he defended the act of state doctrine as resting on both principles of international comity and separation of powers.²⁰¹ Yet, he concluded that respect for the executive should move courts to abstain from adjudicating foreign acts of state:

[W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.²⁰²

194. 20 DEP'T STATE BULL. 592, 593 (1949).

195. *Bernstein*, 210 F.2d at 375.

196. See, e.g., *Kalamazoo Spice Extraction Co. v. Government of Ethiopia*, 729 F.2d 422, 425-27 (6th Cir. 1984) (holding that appellant's counterclaim for the expropriation of its interest in an Ethiopian company was protected by the Treaty of Friendship, Commerce, and Navigation between the United States and Ethiopia and that the executive branch's intervention on behalf of the appellant eliminated any risk that the claim might interfere in the conduct of foreign relations).

197. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

198. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (approving the *Bernstein* exception to the act of state doctrine).

199. See *id.* at 772-73 (Douglas, J., concurring); *id.* at 774-76 (Powell, J., concurring); *id.* at 785-90 (Brennan, J., dissenting).

200. See *id.* at 762-70.

201. See *id.* at 762.

202. *Id.* at 768.

First National City Bank allowed the executive to tell courts whether civil litigation bearing on foreign acts of state should go forward. Expediency discourse justified the executive's intervention in the courts' subject-matter jurisdiction. In effect, the executive now stood as the gatekeeper to the judicial process in cases challenging foreign laws.²⁰³

B. Nonrecognition of Foreign Governments

The executive's new power as gatekeeper also applied to suits brought on behalf of unrecognized governments. The President's authority to recognize foreign states and governments based upon the Constitution's reception clause is well established.²⁰⁴ Courts have long held that an unrecognized government has no standing in a U.S. court.²⁰⁵ The executive determined whether to recognize a foreign government, but the executive could not instruct courts on a case-by-case basis whether to permit unrecognized governments to bring claims.

During the Cold War, this direct relationship between recognition and standing to sue began to break down. The executive intervened in some cases to advise courts to permit claims brought by unrecognized governments to go forward based upon the executive's assessment of the likely impact on foreign relations.²⁰⁶ Thus, an unrecognized government's access to a U.S. court was subject to the executive's control on an *ad hoc* basis. For example, at the recommendation of the U.S. Justice and State Departments, the Second Circuit allowed a company wholly owned by the Islamic Republic of Iran to file suit, even though the United States did not formally recognize that government.²⁰⁷

203. See generally RESTATEMENT (THIRD), *supra* note 24, at § 443 n.8.

204. U.S. CONST. art. II, § 3 provides that the President "shall receive Ambassadors and other public Ministers." Some claimed at the time of the founding that the recognition power belonged to Congress. Hamilton characterized the reception clause as "more a matter of dignity than of authority." THE FEDERALIST No. 69, at 448 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). Nevertheless, the executive has consistently performed the recognition function. See RESTATEMENT (THIRD), *supra* note 24, at § 204 cmt. a. See generally Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

205. See, e.g., *Russian Socialist Federated Soviet Republic v. Cibrario*, 139 N.E. 259, 261-63 (N.Y. 1929) (holding that the Soviet Republic had no standing to bring an action in a U.S. court because it was the policy of the United States to deny it recognition, according to a letter obtained from the State Department); see also RESTATEMENT (THIRD), *supra* note 24, at § 205.

206. See, e.g., *Upright v. Mercury Bus. Mach. Co.*, 213 N.Y.S.2d 417, 423-24 (N.Y. App. Div. 1961) (holding that where the United States did not intervene to express its views, the assignee of the unrecognized East German government had standing to sue).

207. See *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554-56 (2d Cir. 1988) (holding that the National Petrochemical Company could sue a Liberian oil tanker where the United States as amicus requested that Iran be given access to our courts); see also *Sabbatino*, 376 U.S. at 410 (holding that a foreign government cannot file suit in a U.S. court if the executive branch has refused "to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control"); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938) (holding that a "suit . . . may be maintained in our courts only by the government which has been

Acknowledging the complexity of U.S. foreign relations, the Second Circuit conceded that "courts are hardly competent to assess how friendly or unfriendly our relationship with a foreign government is at any given moment."²⁰⁸ If the executive wished to deny recognition and yet allow standing, the executive could have its cake and eat it, too. According to the court, the complexity of contemporary geopolitical relations required this extraordinary deference to the executive as gatekeeper:

It is evident that in today's topsy-turvy world governments can topple and relationships can change in a moment. The Executive Branch must therefore have broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships.²⁰⁹

Prior to the Cold War, U.S. courts would not question the foreign acts of state of any government, recognized or not. Courts held that fundamental justice required that "the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state."²¹⁰ During the Cold War, U.S. courts increasingly looked to the executive to decide when it was appropriate to apply the law of an unrecognized government.²¹¹ One prominent example of the shift away from the traditional understanding concerned a dispute between the Bank of China that was chartered by the People's Republic of China (P.R.C.) and the Bank of China that was chartered by the Government of Taiwan (Republic of China).²¹² Prior to the Chinese Revolution, the Bank of China deposited funds at the Wells Fargo Bank in San Francisco. Following the revolution, the Republic of China nationalized the Bank of China without compensating the Bank's shareholders and

recognized by the political department of our own government" and accepting "as conclusive here the determination of . . . [the] State Department that the Russian State was represented by the Provisional Government").

208. *National Petrochemical Co.*, 860 F.2d at 554 (citing *Sabbatino*, 376 U.S. at 410).

209. *Id.* at 555.

210. *Banque de France v. Equitable Trust Co. of New York*, 33 F.2d 202, 206 (S.D.N.Y. 1929), *aff'd*, 60 F.2d 703 (2d Cir. 1932) (holding that where a French bank's gold was expropriated by the Soviet Government and sold to the U.S. defendant, the effectiveness of the Soviet expropriation should be recognized, even though the government was not); *see also* *Sokoloff v. National City Bank of New York*, 145 N.E. 917, 919-21 (N.Y. 1924) (holding that a plaintiff who deposited money into a U.S. bank for transfer to a Russian branch that subsequently was nationalized was entitled to the return of his deposit because the U.S. bank still had a contractual debt in the United States); RESTATEMENT (THIRD), *supra* note 24, at § 205, n.3.

211. *See, e.g.,* *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003-04 (D.C. Cir. 1951) (holding that the nationalization of three Latvian flag vessels by the Latvian Soviet Socialist Republic in 1940 should not be given effect by U.S. courts because of the policy of the U.S. executive denying the legitimacy of the Soviet occupation of Latvia).

212. *See Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952), *aff'd in part and rev'd in part*, 209 F.2d 467 (9th Cir. 1953).

reconstituted the Bank. The People's Republic, which the United States had not recognized at that time, claimed that the Bank of China (P.R.C.) continued to exist and to do business as before the Revolution throughout China, Asia, and the British Commonwealth, and that the Bank of China (P.R.C.) remained under the control of its original shareholders. Both Banks of China claimed ownership of the Wells Fargo account.

Ordinarily, a court would judge a dispute between two private entities claiming the same property by reference to the factual circumstances of ownership. For example, a court could determine ownership based on the identity of the beneficial owners, which in this case would be the original shareholders. Although the court in this case conceded that the P.R.C. Bank was "more representative in ability to deal with the greater number of private stockholders and established depositors and creditors," the court opined that it could not decide the question "merely by balancing interests of a private nature."²¹³ Instead, the court framed the issue in terms of "which government best represent[ed] the interests of the Chinese State in the Bank of China."²¹⁴ Unsurprisingly, the court decided that only the executive was competent to make that determination. The court deferred to the executive's judgment in light of the international situation and the present relations between the United States and the People's Republic:

We have taken a stand adverse to the aims and ambitions of the People's Government. The armed forces of that Government are now engaged in conflict with our forces in Korea. We recognize only the Nationalist Government as the representative of the State of China, and are actively assisting in developing its military forces in Formosa.²¹⁵

Therefore, the court awarded the deposit to the Republic of China Bank.²¹⁶

Just as the courts accepted the intervention of the executive in cases concerning foreign acts of state, so too did the courts concede to the executive the power to pick and choose in each individual case whether to permit an unrecognized foreign government access to a U.S. court. As "sole organ of foreign relations," the executive now operated as

213. *Id.* at 66.

214. *Id.* By treating a property dispute between two banks and a stakeholder as if it were a foreign policy dispute, the court reframed the question and empowered the executive to decide it. This case illustrates how courts construct the public and private distinctions in international law in ways that mask political conflicts between sovereigns. See generally Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L. L.J. 149 (1988).

215. *Bank of China*, 104 F. Supp. at 66. It should be noted that since the P.R.C.'s assets in the United States were frozen and were ultimately used to settle claims by U.S. nationals against the People's Republic, the practical consequence of this opinion was to privilege the Republic of China's claim over the claims of U.S. nationals, not the People's Republic.

216. See *id.* at 66.

gatekeeper to our system of justice. Consistency and predictability, the hallmarks of the rule of law, were subordinated to the authority of the executive to conduct foreign relations.

C. *The Justiciability of the President's War Powers*

As discussed above, from the early days of the Republic the court established strong limits on the reach of the President's war powers.²¹⁷ Even during the War of 1812 and the Civil War, the courts acknowledged the limited nature of the President's power as commander-in-chief.²¹⁸ President Truman deployed U.S. forces in the Korean War without specific congressional authorization, and the executive defended its action by reference to the geopolitical stakes.²¹⁹ Democrats in the Senate rallied in support of the President's action, arguing that the President needed to respond quickly to deter communist aggression around the globe.²²⁰ The War in Indochina tested these limits, as numerous suits challenged the President's power to wage war in the absence of specific congressional authorization or a declaration of war.²²¹

217. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804) (holding that U.S. Captain Little was personally liable for seizing a foreign vessel under orders from the President that contradicted the Non-Intercourse Act of 1799). Chief Justice Marshall stated that the President's "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179.

218. See also *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126-27 (1814) (holding that the appellant's timber could not be confiscated without an act of Congress giving the President that authority). Both Chief Justice Marshall in his majority opinion and Justice Story in dissent concurred that the authority to confiscate enemy alien property lies with Congress. See *id.* at 126-27. Story, however, opined that such authority was implicit in the declaration of war. See *id.* at 145-46 (Story, J., dissenting). See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that neither the President nor Congress could authorize the trial of civilians by a military tribunal during the Civil War, so long as the civil courts remained open); *Prize Cases*, 67 U.S. (2 Black) 635, 666-71 (1862) (upholding President Lincoln's order to blockade Confederate ports while Congress was adjourned which Congress retroactively ratified).

219. See Jane E. Strömseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 624-37 (1993). Although President Truman claimed that he acted at the request of the United Nations, the U.N. Security Council did not authorize the U.S. action until after Truman had decided to act. See *id.* at 624-25. Congress appropriated funds four days after the President sent U.S. forces to Korea, but did not authorize the President's action expressly. See *id.* at 629. The executive insisted that "[r]epelling aggression in Korea or Europe cannot wait upon congressional debate." *Id.* at 637 (citing STAFF OF JOINT COMMITTEE MADE UP OF THE COMMITTEE ON FOREIGN RELATIONS AND COMMITTEE ON ARMED SERVICES OF THE SENATE, 82ND CONGRESS, 1ST SESSION, REPORT ON THE POWERS OF THE PRESIDENT TO SEND ARMED FORCES OUTSIDE OF THE UNITED STATES 27 (1951)).

220. *Id.* at 628-30. Senator Paul Douglas of Illinois, one of Congress' liberal leaders, argued that modern military technology and the Soviet threat demanded localized police actions to resist communism which did not justify a formal declaration of war. *Id.* at 634 (citing 96 CONG. REC. 9647 (1950) (statement of Senator Douglas)).

221. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (holding that whether additional congressional authorization was required for the President's actions in bombing Hanoi was a nonjusticiable political question); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (holding that the question whether the President's actions were authorized was nonjusticiable); *Orlando v. Laird*, 443

Repeatedly, courts either avoided the issue or upheld the President's power to act.²²² Even when Congress provided a justiciable standard, such as the Mansfield Amendment²²³ and the Fulbright-Eagleton Amendment,²²⁴ courts avoided confronting the executive by invoking the expediency argument.²²⁵

In response to the legal questions raised by the war in Indochina, in 1973, Congress passed the War Powers Resolution.²²⁶ The War Powers Resolution required the President to give Congress notice if he sent U.S. forces into hostile situations or "situations where imminent involvement in hostilities is clearly indicated."²²⁷ The Resolution required the President to withdraw forces within sixty days of giving notice unless Congress either ordered the President to withdraw forces sooner or authorized forces to remain overseas.²²⁸ Yet, no President has yet given Congress the required notice, and courts have declined to enjoin the executive to provide the required form of notice.²²⁹

Courts have used four alternate strategies to avoid judging the legitimacy of the President's power to send troops abroad.²³⁰ First, some courts have held that the question of what constitutes military action

F.2d 1039 (2d Cir. 1971) (holding that Congress had authorized the Indochina War by appropriating funds and approving the extension of the Military Selective Service Act). *See generally* Louis Henkin, *Viet-nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284 (1969).

222. *See id.*

223. Armed Forces Appropriations Authorization Act of 1971, Pub. L. No. 92-156, § 601(a), 85 Stat. 430, 431 (1971).

224. Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 131 (1973).

225. *See, e.g., Mitchell*, 488 F.2d at 611 (holding nonjusticiable the question whether the President was acting consistently with the Mansfield Amendment to end the War in Indochina); *Holtzman*, 484 F.2d at 1307 (holding that the court was not "competent" to decide whether the bombing of Cambodia violated the Mansfield Amendment, which called for the withdrawal of U.S. forces from Indochina by July 15, 1973).

226. War Powers Resolution, Pub. L. 93-148, § 10, 87 Stat. 555, 556 (1973) (codified at 50 U.S.C. §§ 1541-48 (1994)).

227. *Id.* at § 1541(a)(1).

228. *Id.* at § 1541(b).

229. *See, e.g., Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.C. Cir. 1987) (dismissing a case brought by members of Congress to enjoin the President to provide notice under the War Powers Resolution of U.S. military operations in the Persian Gulf because the case raised a nonjusticiable political question about whether the ceasefire constituted "imminent involvement in hostilities" for purposes of the Resolution). *See also Dellums v. Bush*, 752 F. Supp. 1141, 1150 (D.D.C. 1990) (dismissing a case brought by members of Congress to compel the President to provide notice under the War Powers Resolution of U.S. forces stationed in Saudi Arabia in preparation for the Gulf War, because the claim would not be "ripe" until "each branch has taken action asserting its constitutional authority").

230. The full history of how and why courts have not limited the President's power to send troops abroad exceeds the scope of this Article. My purpose is merely to offer a few prominent examples of some of the ways that courts weakened constitutional controls over the President's ability to send forces abroad. *See KOH, supra* note 21, at 1313-18; GLENNON, *supra* note 30, at 314-25.

requiring congressional authority is itself a nonjusticiable political question.²³¹ Second, courts have held that neither members of Congress²³² nor private citizens²³³ have standing to challenge the President's decision to send troops. Third, courts have held that even where there was a justiciable issue brought by a party with standing, the issue would not be ripe unless Congress took some further action to prohibit the President from exercising war powers without its consent.²³⁴ Finally, courts have implied congressional authorization for the President's war powers from a variety of legislative actions or inaction,

231. For example, in *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990), an officer in the National Guard sought a mandamus ordering the President to comply with the War Powers Resolution before deploying troops in the Persian Gulf. The court held that the question was nonjusticiable, because "the court would have to determine precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches." *Id.* at 512. The court found that such a constitutional determination "is one which the judicial branch cannot make pursuant to the separation of powers principles embodied in the court's equitable discretion and in the political question doctrine." *Id.* See also Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 322-34 (1991).

232. See, e.g., *Lowry*, 676 F. Supp. at 333. In *Lowry*, 110 members of Congress sought a declaratory judgment that the President should have filed a report under section 4(a)(1) of the War Powers Resolution before initiating naval escort operations during the Iran-Iraq War in the Persian Gulf for reflagged Kuwaiti oil tankers and ordering an attack on an Iranian vessel laying mines in the Gulf. The congressional plaintiffs also sought an injunction ordering the President to file the 4(a)(1) report within twenty-four hours. The court held, *inter alia*, that equitable discretion counsels judicial restraint in granting relief to congressional plaintiffs where there are congressional remedies available. See *id.* at 339. While the form of the court's judgment pertained to justiciability, the effect was to deny congressional plaintiffs standing to complain where the President exercised his powers as commander-in-chief without authority from Congress. The court stated that it could not "impose a consensus on Congress" unless a majority passed legislation to enforce the Resolution. *Id.* See also Blumoff, *supra* note 231, at 303-22.

233. See, e.g., *Johnson v. Weinberger*, 851 F.2d 233 (9th Cir. 1988) (a private citizen had no standing to challenge the U.S. strategic defense policy); *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972) (holding that three members of the Reserves and a draft registrant lacked standing to obtain a judgment enjoining the President from conducting military operations in Cambodia without congressional authorization); cf. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971) (persons ordered to Vietnam did have standing to challenge the constitutionality of the war). In general, only citizens who are under order to fight possess standing to object to a military deployment. See, e.g., *Holtzman*, 484 F.2d at 1315 (holding that whether additional congressional authorization was needed for the President's military action in Indochina was a nonjusticiable political question). In general, the Supreme Court has held that taxpayers do not have standing to challenge the government's actions unless the taxpayer has suffered a particularized harm. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974) (holding that plaintiff lacked standing to challenge CIA budget secrecy); *Flast v. Cohen*, 392 U.S. 83 (1968) (upholding taxpayer's standing to challenge aid to parochial schools).

234. See, e.g., *Dellums*, 752 F. Supp. at 1150-51 (holding that where fifty-three members of Congress sought a declaration that the President had violated the War Powers Resolution by stationing 230,000 U.S. troops in the Persian Gulf without congressional authorization or notice to Congress, as required under the Resolution, the issue was not ripe for review unless a majority of Congress took legislative action to enforce the Resolution); see also Blumoff, *supra* note 231, at 233-35 (arguing that instead of the political question doctrine, courts should only consider a question where there is a genuine conflict between Congress and the President); see generally J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991). But see David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083 (1992).

such as appropriations for defense that did not contain explicit restrictions on the use of funds for that purpose.²³⁵ All four strategies were justified by the claim that courts lacked institutional competence to judge the executive's actions, or that national security concerns compelled broad judicial deference to the President.

Courts framed the issue as if it involved a contest between judicial power and presidential power. Thus, by largely deferring to the President, the judiciary appeared respectful to the executive. In fact, judicial deference masked the real conflict between the executive and Congress. By deferring to the President, courts were choosing sides in this conflict—for executive power and against congressional control. Geopolitical concerns rationalized that choice, both for the judges themselves and for the nation.

D. National Security Controls on Information, Travel, and Communication

Since the Cold War began, the executive has justified a wide range of restrictions on individual access to information, travel, and communications by reference to national security concerns. In 1986, then-D.C. Circuit Judge Scalia wrote that “[t]he concept of a special rule for national security matters is no stranger to court-made law.”²³⁶ Instead, the whole structure of limitations on access to information, travel, and communication did not emerge until the Cold War. Prior to the Cold War, the Espionage Act of 1917 limited access to specific military information only during wartime.²³⁷ While President Roosevelt had issued an executive order during World War II authorizing the civil service to fire anyone on reasonable suspicion of disloyalty, no system of peacetime security clearance emerged until the Cold War.²³⁸

235. See, e.g., *Mitchell*, 488 F.2d at 615 (holding that the strategy chosen by the President to terminate the war is a nonjusticiable political question); *Holtzman*, 484 F.2d at 1310-12 (holding that the issue of whether Congress authorized the continuation of the war in Indochina after the passage of the Fulbright-Eagleton Amendment barring the deployment of U.S. forces in Indochina after Aug. 15, 1973, is nonjusticiable); *DaCosta*, 448 F.2d at 1368 (holding that the question of whether the President's unilateral decision to mine the harbors of North Vietnam and to bomb targets in that country constituted an illegal escalation of the war was a non-justiciable political question); *Orlando*, 443 F.2d at 1042 (holding that the question of whether Congress was required to take some action to authorize the war in Indochina was justiciable and finding such authorization in the Gulf of Tonkin resolution, the Selective Service Act, and the war appropriations).

236. *Halperin v. Kissinger*, 807 F.2d 180, 187 (D.C. Cir. 1986).

237. See Espionage Act, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792). Intended to prohibit foreign espionage in war time, the Act criminalized the possession and transfer of any information “respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation.” *Id.* at § 793(a).

238. See Executive Order 10,450, 18 Fed. Reg. 2489 (1953), as amended, which established the clearance procedure used throughout the federal government.

The threat of Soviet hegemony, the development of a vast defense and national security bureaucracy, and the fear of domestic communist infiltration aroused by McCarthyism led to the establishment of a wide range of controls on access to sensitive information. The principal source of authority for classifying information was a series of executive orders beginning with Truman's 1949 executive order reluctantly issued to quell Republican charges that communists had infiltrated the administration.²³⁹ Congress, however, never authorized these controls nor enacted specific criminal penalties for their violation. The only restriction imposed by Congress pertained to specific limits on information on atomic energy,²⁴⁰ the use of classified materials in criminal trials,²⁴¹ and declassification.²⁴² Yet, courts applied these executive controls to prevent or punish the release of both government documents²⁴³ and information in the public realm that might affect national security.²⁴⁴ The rhetoric employed by the courts in these cases demonstrates quite clearly the impact of geopolitics and weapons technologies on legal doctrine.

One dramatic instance of government censorship based on national security concerns involved a prior restraint on the publication of an article in the *Progressive*. The article in question purported to explain how to construct a hydrogen bomb, based on information available in a public library. No federal court had ever before issued a prior restraint on publication. The court reasoned that even if an injunction proved

239. See Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982); Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978); Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953). President Truman created a security system to respond to Republican congressional critics of the administration. See SCHLESINGER, *supra* note 33, at 152-55. Truman feared that the FBI would become a secret police operation like the Gestapo, and he believed that the entire issue had been manufactured by the Republicans without any substantive basis. Truman regretted the decision to establish a security program, but he saw no alternative politically. See DAVID McCULLOUGH, *TRUMAN* 550-53 (1992).

240. See Atomic Energy Act of 1946, Pub. L. No. 79-585, §134, 60 Stat. 755, 756 (1946) (codified at 42 U.S.C. §§ 2161-63, 2165, 2274).

241. See The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app.).

242. See, e.g., Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552); Internal Security Act of 1950, Pub. L. No. 81-831, Subversive Activities Control Act of 1950, 64 Stat. 987 (1950) (codified at 50 U.S.C. § 833).

243. See, e.g., *United States v. Morison*, 604 F. Supp. 655 (D.Md.), *appeal dismissed*, 774 F.2d 1156 (4th Cir. 1985), *cert denied*, 488 U.S. 908 (1988) (holding, *inter alia*, that the defendant's possession and transmittal of documents was criminally punishable under the Espionage Act because such documents had been classified by executive order).

244. See, e.g., *United States v. Progressive, Inc.*, 467 F. Supp. 990, 994-95 (W.D. Wis. 1979) (enjoining the *Progressive* from publishing an article that purported to describe how to construct a hydrogen bomb from information available in a public library). In *Progressive*, the government alleged that the publication would violate section 2274 of the Atomic Energy Act which prohibited anyone from communicating "restricted data 'with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.'" *Id.* at 994 (citation omitted). Thus, strictly speaking, it did not rely upon the President's executive order.

unconstitutional, it was justified under these facts. "A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."²⁴⁵ On its face, the magnitude of the threat justified some limits on access to some information concerning nuclear technology. Yet, the court assumed that only the executive could evaluate the potential risk of nuclear war and refused to address the absence of any congressional authorization for the executive's action. Thus, the gravity of the possible harm obscured the real issue: whether the President or Congress had the power to criminalize the use of information in the public domain when the information posed a serious threat to the public.

In the *New York Times*, "Pentagon Papers," case, the Supreme Court held that the government had failed to overcome the heavy presumption against preliminary injunctions on publications.²⁴⁶ Yet, Justices Brennan and Stewart reflected the view, in their respective concurrences, that the executive's power to control access to sensitive information was related directly to geopolitical circumstances. Justice Brennan concurred:

Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.²⁴⁷

In a similar vein, Justice Stewart concurred that

[i]n the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.²⁴⁸

245. *Id.* at 996.

246. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Note that the Court's brief three-paragraph per curiam opinion did not address the reach of the executive's power to restrict access to sensitive information.

247. *New York Times*, 403 U.S. at 726 (Brennan, J., concurring).

248. *Id.* at 727 (Stewart, J., concurring).

The executive's power over national security went beyond the scope of government employment or government operations to intrude upon the movement and communications of private citizens. An individual's right to travel abroad is a liberty interest protected by the Fifth Amendment,²⁴⁹ and as such, the Court has struck down McCarthy-era legislation denying the right of the individual to travel based upon his or her political beliefs.²⁵⁰ Nevertheless, the Court has allowed the executive without congressional authorization to ban travel to Communist countries on the grounds of national security.²⁵¹ The Court has distinguished the executive's authority to ban travel to a particular country, which implicates national security considerations, and an executive ban on a certain individual's travel based upon that individual's beliefs or associations.²⁵² In the Court's view, geopolitical exigencies empowered the executive to act without legislation to restrict the constitutionally protected right to travel abroad.²⁵³ Indeed, even after Congress prohibited the President from denying passports for the purpose of restricting travel to communist countries,²⁵⁴ the President continued to ban some foreign travel by restricting travel-related payments under economic boycott legislation.²⁵⁵ The Court has upheld these restrictions on foreign travel expenditures despite both the constitutional right to travel and Congress' explicit opposition.²⁵⁶ In upholding restrictions on travel to Cuba imposed by the executive, the Supreme Court reasoned:

249. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (holding that Congress had not delegated to the Secretary of State the authority to deny passports to communists).

250. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (invalidating a provision of the Subversive Activities Control Act of 1950 which prohibited issuing a passport to a member of the Communist Party). Writing for the majority, Justice Goldberg reasoned that because "freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association." *Id.* at 507.

251. See *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding the Secretary of State's denial of a passport for travel to Cuba).

252. See *id.* at 13. Chief Justice Earl Warren explicitly based the Court's judgment on geopolitical conditions: "That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months." *Id.* at 16.

253. See *id.*; see also *Haig v. Agee*, 453 U.S. 280, 306 (1981) (upholding the executive's power to revoke the passport of an ex-CIA officer who had threatened to identify other U.S. agents abroad; noting, "the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations"); *Regan v. Wald*, 468 U.S. 222 (1984) (upholding the executive's power to deny travel to Cuba).

254. See Foreign Relations Authorization Act, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978) (amending 22 U.S.C. § 211a).

255. See International Economic Emergency Powers Act of 1977, Pub. L. 95-223, § 201, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701 (1994)), as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 1101, 102 Stat. 1107, 1108 (1988) (codified at 19 U.S.C. § 2901 (1994)).

256. See *Wald*, 468 U.S. at 224.

[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress in giving the Executive authority over matters of foreign affairs must of necessity paint with a brush broader than that it customarily wields in domestic areas.²⁵⁷

The Court's reasoning contained all the classic elements of executive expediency discourse: the gravity of the international circumstances, the executive's superior knowledge and ability to act in foreign affairs, and the need for a rapid response justified broad deference to executive action, even without statutory authority. Similarly, a district court judge upheld travel restrictions imposed by the executive, finding that

[n]ational interest may require that American citizens be excluded from a specified area at a particular time for their own protection as well as to prevent their interference with the proper conduct of American foreign policy. This is especially true in this era in which the line of distinction between war and peace has been blurred by the less conventional hostility of cold war. The vast scope of the interwoven military, economic and propaganda activities of the nations of the world in furtherance of their foreign policies, without any declaration of war, has expanded the field of presidential action to further American policy.²⁵⁸

Courts also used concerns about contemporary geopolitics to sustain the President's power to engage in foreign intelligence operations. For example, in *United States v. Clay*,²⁵⁹ the Fifth Circuit affirmed the conviction of Cassius Clay, Jr., (Muhammad Ali), for refusing to submit to induction into the military. The Government had secretly recorded Clay's phone conversations without a warrant and without revealing the existence of these secret recordings to Clay's attorney.²⁶⁰ The court held that the executive had plenary authority to use electronic surveillance without a warrant if national security required it. The Fifth Circuit did not question the executive's dubious claim that Clay's refusal to serve in the military actually threatened the nation's security. Instead, the court asserted that

[n]o one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not

257. *Zemel*, 381 U.S. at 17. See also *Agee*, 453 U.S. at 280.

258. *MacEwan*, 228 F. Supp. at 308-09.

259. 430 F.2d 165 (5th Cir. 1970), *rev'd*, 403 U.S. 698 (1971).

260. See *id.* at 166-71.

believe such gathering is forbidden by the Constitution or by statutory provision. . . .²⁶¹

The executive's ability to control access to ideas, communication, and travel seriously undermined liberal principles of free expression and free movement of persons. Courts did not question the executive's authority to act. Rather, geopolitics eclipsed the fundamental constitutional issue: whether the President was acting *ultra vires*.

E. Conclusion

This brief survey of cases demonstrates that courts during the Cold War extended the reach of presidential power in a multitude of ways that collapsed the Lockean dichotomy between the rule of law and the rule of necessity. Questions of recognition, respect for foreign acts of state, the President's powers as commander-in-chief, or national security controls on sensitive information implicate international relations. It might have been appropriate for courts to consider the international context in interpreting the reach of their own jurisdiction or the separation of powers between Congress and the executive. However, the courts did not exercise independent judgment in these cases. Rather, they relied exclusively on the executive's description of reality.

Even in those cases in which it was highly improbable that judicial interpretation could affect geopolitical relations, the courts still yielded to the executive. The discourse of expediency obscured any judicial critique of the executive's own claims about the nature of the threat faced. Courts evinced the same degree of deference to executive authority regardless of whether geopolitics was even relevant to the executive's action. Courts simply assumed a nexus to the Cold War whenever the executive claimed one.

III

HOW EXPEDIENCY DISCOURSE TRANSFORMED THE STATUS AND PRACTICE OF EXECUTIVE AGREEMENTS

A. Introduction

One striking illustration of Cold War judicial deference to the executive arose in connection with the power to make international agreements. With judicial approval, presidents have relied increasingly upon executive agreements²⁶² in lieu of treaties as the primary form of

261. *Id.* at 172. See also *Chicago & S. Air Lines*, 333 U.S. at 109-10 (holding that the President had inherent authority both as commander-in-chief and as the "[n]ation's organ for foreign affairs," and that courts are not institutionally competent to review the relevant secret information on which the President relies).

262. Any international agreement made by the President which has not been approved by two-thirds of the Senate under Article II of the Constitution is an executive agreement. Sometimes the

international agreement.²⁶³ In particular, during this period almost all commerce and trade pacts were executed in the form of executive agreements, and courts regularly treated these executive agreements like treaties for purposes of domestic law. Generally, there was no logical nexus between these commercial agreements and the spectre of a Soviet threat. The need for speed or secrecy did not explain why an agreement, openly negotiated over a substantial period of time with a friendly foreign government, could not be submitted to the Senate. Yet, the courts accepted the executive's self-serving justification for ignoring the Senate's advice and consent powers, even when an agreement was obviously unrelated to the Cold War, and the Senate permitted the executive to intrude on its constitutional prerogative in this way. Part III examines how expediency discourse empowered presidents to make agreements that displaced Article II treaties even in the absence of any actual necessity.

Why should it matter whether the President made an agreement with the advice and consent of two-thirds of the Senate (Article II treaty), with the approval of a majority of both houses (congressional-executive agreement), or on his own (sole executive agreement)? The Constitution limits the powers of each branch and constructs checks and balances to prevent concentrations of power. If the President detours from the advice and consent procedure, he appropriates the power to make international and domestic law.²⁶⁴ Moreover, by short-circuiting the legislative process, the President lets Congress off the hook. Members of Congress are not held accountable for the President's actions. The situs for policy-making shifts from the Congress to the National Security Council, and to a large degree, the opportunity for public scrutiny closes. An international agreement without the Senate's advice and consent frustrates representative government.

First, why is it more democratic to allow thirty-four senators to decide whether to reject a treaty favored by the majority, than it is for the President to make a sole executive agreement? I am not arguing that the President is less "representative" than the Senate. However, the process of public deliberation by the Senate necessarily engages constituents

President will make an executive agreement without any congressional authorization. Such agreements are sole executive agreements. Alternatively, he may submit the agreement to Congress for its approval, or Congress may authorize the executive agreement before the fact. In that case, it is a congressional-executive agreement. For purposes of this paper, the term "executive agreement" refers to either form of agreement, unless otherwise noted. *See* RESTATEMENT (THIRD), *supra* note 24, at § 303 cmt. a.

263. *See generally* LAWRENCE MARGOLIS, *EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POWER* 105-06 app. (1986).

264. For example, as discussed below, the President has used this power to make agreements that directly affect individuals' civil rights, income tax, imports and exports, and private property rights. *See infra* notes 457-462.

more directly than policy-making by the executive. Senate proceedings are open and public, whereas the process of foreign policy-making by the executive is generally secret.²⁶⁵ One constituent surely has a larger voice in her state than she has in the nation as a whole. It is more likely that a senator will represent the concerns of a particular community, union, or industry affected by an international agreement than will the chief executive; the President has many constituencies, including foreign governments and future generations. The public has only one chance to fire a President, and it is unlikely that the voters would deny any President re-election because of a particular international agreement.²⁶⁶

Second, why is the Article II treaty process more democratic than allowing both houses of Congress to vote on a congressional-executive agreement? There is some facial appeal to the idea that an executive agreement that has been approved by a majority of both houses of Congress is at least as representative of the *demos* as a treaty approved by two-thirds of the Senate. The problem is that there is no principled distinction between congressional-executive and sole executive agreements. Neither were expressly authorized by the Constitution, but there is a long history of precedents for both. Presidents have used congressional-executive and sole executive agreements interchangeably, and courts have not articulated any limitation on which of the two instruments the President should employ. If one is permitted, then so is the other. The President has the sole discretion to decide whether to submit an agreement as a treaty, as a congressional-executive agreement, or as a sole executive agreement.²⁶⁷ In practice, presidents have chosen the path of least resistance, meaning that if the President does not think the Senate will support the treaty, he might treat it as a congressional-executive agreement. If the President cannot get a simple majority of both houses either, then he is more likely to treat it as a sole executive agreement.

A congressional-executive agreement is not necessarily subject to the same legislative process as an ordinary act of Congress.²⁶⁸ The usual indicia of legislation include extensive committee hearings, often by several committees, amendments, delays, sometimes filibusters, joint

265. See NATHAN & OLIVER, *supra* note 9, at 3-6, 149-51, 236-39.

266. Perhaps the only instance in which an unpopular treaty eventually contributed to the defeat of the incumbent party was the Jay Treaty ratified in 1796, which contained significant concessions to avoid war with Great Britain. Indeed, opposition to the treaty led to the creation of the Republican party. Nevertheless, the Federalists continued to hold power until 1800. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 415-36 (1993).

267. See UNITED STATES DEPARTMENT OF STATE, DEPARTMENT OF STATE CIRCULAR NO. 175 (1955), *reprinted in* 50 AM. J. INT'L L. 784 (1956).

268. See Koh, *supra* note 25, at 162.

committees of the House and Senate negotiating compromises, and then presentment to the President, whose veto can only be overridden by two-thirds of both houses. These aspects of the legislative process are frustrating, but they are important constitutional checks on the power of the executive and congressional majorities. Congressional-executive agreements like NAFTA or WTO, however, are subject to special "fast-track" procedures that shorten the time for committee hearings, do not allow amendments, and require Congress to vote within a relatively short time frame. Thus, the mere fact that a congressional-executive agreement is approved by both houses does not mean it is equivalent to ordinary legislation. Even if a congressional-executive agreement were subject to the regular legislative process, the fact remains that a simple majority vote overrides the Senate's Article II powers.

Whether the President acts with the approval of two-thirds of the Senate or with a simple majority of both houses matters because process has normative consequences. More democracy may not be better democracy. For example, imagine that the executive decided to submit a budget proposal to a popular referendum rather than to both houses of Congress. The President could argue that a referendum is more democratic, but no one would doubt that such a decision would have a different quality of democratic deliberation than the usual budget process. The normative consequences of such a procedure would not be all for the good. It would give the President much more authority to define the budget with no opportunity for amendment. There would be a temptation to appropriate funds for programs that appeal to specific voting blocs regardless of their effectiveness, while denying necessary funds for less appealing, but more critical expenses, like water treatment facilities, paying the interest on the national debt, or funding the highway police. The budget process would be unintelligible to most voters, and a popular referendum would open the way for interest groups to buy advertising that is more likely to confuse the issues. For these reasons, a popular referendum on the budget probably would not constitute effective democracy.

The Constitution requires a two-thirds vote of the Senate in order to check the President's negotiating power. The super-majority was a normative requirement that changed the dynamics of the ordinary legislative process. When the President knows that the agreement can be rejected by any thirty-four senators, he must insist on negotiating terms that command broad support; whereas he is not under the same negotiating pressure if he submits the agreement as a congressional-executive or sole executive agreement. In some respects, the President's negotiating position may be strengthened if the foreign government knows that the President needs the votes of two-thirds of the Senate. Often, it is not

easy to persuade a super-majority of senators to support a treaty. The Constitution creates obstructions to forming treaties for good reasons: both to protect state law from being readily overturned by foreign agreements and to discourage entangling alliances. Though the United States plays a larger role in the world today than it did in 1789, there is still wisdom in not undertaking foreign commitments lightly. When two-thirds of the Senate votes to ratify a treaty, our commitments have greater credibility. We are more likely to keep commitments that are endorsed by super-majorities and to stay the course through good times and bad. Finally, because treaties are the supreme law of the land, and are difficult to change without the participation of the other contracting parties, the Constitution requires two-thirds of the Senate to ensure that changes in domestic law reflect the will of a broad majority.

*B. Executive Agreements and Treaties
under International and U.S. Law*

To understand how the law of executive agreements has changed, it is first necessary to compare the attributes of treaties and executive agreements under international and domestic law. Any written agreement between two or more states governed by international law is a treaty for purposes of international law.²⁶⁹ International law does not distinguish between Article II treaties that have been approved by two-thirds of the Senate and executive agreements that are signed by the President either with, or without, the approval of a majority of both houses of Congress. Thus, Article II treaties and executive agreements bind the United States under international law with equal force. However, the legal consequences of a treaty and an executive agreement are both more complex and less certain for purposes of U.S. domestic law. These consequences fall into three categories: the effect of an international agreement on state law, the effect on federal law, and the degree to which the agreement grants private parties enforceable rights in domestic courts.

A treaty may be "self-executing," meaning that the treaty takes effect in domestic law at the moment of its adoption without implementing legislation.²⁷⁰ Self-executing treaties in some cases can create

269. See Vienna Convention, *supra* note 23.

270. This distinction was first drawn by Chief Justice Marshall, who opined:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally affect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial. . . .

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

rights and obligations enforceable by private parties without implementing legislation approved by Congress.²⁷¹ By contrast, a “non-self-executing treaty” has no effect on domestic law until Congress approves implementing legislation. A non-self-executing treaty may create rights or obligations under domestic law only if Congress approves implementing legislation. Whether a treaty is self-executing depends upon the parties’ intention at the time of negotiation.²⁷²

At least until 1945, no consensus existed among courts or legal scholars that an executive agreement could function like a treaty.²⁷³ As the Cold War intensified, the scholarly consensus began to shift. By 1965, the authors of the *Restatement (Second) of the Foreign Relations Law of the United States (Second Restatement)* concluded that congressional-executive agreements made pursuant to an Article II treaty or authorized by Congress could relate to any subject matter of international concern which did not contravene a constitutional limitation.²⁷⁴ A self-executing congressional-executive agreement would be effective as domestic U.S. law and could supersede both inconsistent state and prior federal law.²⁷⁵ The *Restatement* acknowledged that a sole executive agreement has a more limited scope and effect on domestic law. According to the *Restatement*, a sole executive agreement could deal only with subject matters within the President’s independent constitutional authority, for example, as commander-in-chief.²⁷⁶ A sole executive agreement could supersede inconsistent state law, but never federal law.²⁷⁷ Even with regard to state law, the *Restatement* cautioned that there were almost no examples of a sole executive agreement displacing state

271. See RESTATEMENT (THIRD), *supra* note 24, at § 111 cmt. h, n.5; §§ 703, 713, 906-07; see also *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

272. See RESTATEMENT (THIRD), *supra* note 24, at § 111 cmt. h; see, e.g., *Asakura v. Seattle*, 265 U.S. 332, 341-42 (1924) (holding that a 1911 Treaty of Friendship, Commerce and Navigation with Japan invalidated a Seattle ordinance that prohibited issuing pawnbroker licenses to aliens). Some authorities have concluded that under the Supremacy Clause, all treaties should be considered self-executing unless explicitly conditioned upon implementing legislation. See, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988). Whether the same argument would apply to executive agreements is uncertain.

273. See, e.g., Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 616 (1944) (arguing that executive agreements cannot substitute for Article II treaties). But see WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 330-53 (1967) (arguing that the President has broad authority to use executive agreements in lieu of Article II treaties); Myers S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 534 (1945) (arguing that executive agreements are interchangeable with Article II treaties).

274. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 117-20 (1962) [hereinafter RESTATEMENT (SECOND)].

275. See *id.* at §§ 141-43.

276. See *id.* at § 121.

277. See *id.* at § 144.

law.²⁷⁸ Indeed, the only examples cited by the *Restatement's* authors were the Supreme Court's opinions in *Belmont*²⁷⁹ and *Pink*,²⁸⁰ which concerned claims settlements coincident with the recognition of a foreign government.

With the growth of executive power over foreign relations through the 1960s,²⁸¹ a new consensus emerged favoring the expanded use of executive agreements. As early as 1972, Professor Louis Henkin, a leading authority in the field and subsequently the Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States (Third Restatement)*, pointed to *Belmont* and *Pink* as evidence that "[a]t least some [sole] executive agreements, then, can be self-executing and have some status as law of the land."²⁸² Assuming the expediency of the executive's power in foreign affairs,²⁸³ Henkin argued that

[i]f one sees the Treaty Power as basically a Presidential power (albeit subject to check by the Senate) there is no compelling reason for giving less effect to agreements which he has authority to make without the Senate. If one accepts Presidential primacy in foreign affairs in relation to Congress, one might allow his agreements to prevail even in the face of earlier Congressional legislation. If one grants the President some legislative authority in foreign affairs—as in regard to sovereign immunity—one might grant it to him in this respect too.²⁸⁴

278. See *id.* at § 144, n.2.

279. *United States v. Belmont*, 301 U.S. 324 (1937), discussed *supra* note 97.

280. *United States v. Pink*, 315 U.S. 203 (1942), discussed *supra* note 98.

281. See SILVERSTEIN, *supra* note 9, at 83-100; SCHLESINGER, *supra* note 33, at 177-263.

282. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 185 (1972).

283. Henkin argued that the executive possesses a natural advantage over Congress in confronting "the proliferating, complex affairs of a growing country with interests flung far about a growing international society." *Id.* at 38. Thus, Congress has found it necessary to delegate broad authority to the President over foreign relations. *Id.* In the second edition of his book, Henkin is even more explicit about the geopolitical concerns favoring centralized executive control of foreign policy: "[T]he realities and exigencies of international relations (particularly in the age of nuclear weapons and during the Cold War and its aftermath), and the practices of diplomacy have afforded Presidents unique temptations and unique opportunities to acquire unique and ever larger powers." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 31 (1996). Henkin now acknowledges that "[i]n the second half of the twentieth century, the President's control of information and expertise has loomed overwhelming, as military technology and foreign intelligence have become more complex and the need for secrecy appeared more compelling." *Id.* at 32-33.

284. HENKIN, *supra* note 282, at 186 (citation omitted). Of course, the assumption that the treaty power is the President's alone begs the question. As discussed below, the Senate's role is more than a mere formality. Indeed, the President has used executive agreements in large part to avoid the Senate's rejection of a treaty. See JOHNSON, *supra* note 153, at 56-79. Henkin might as well argue that since the President is the commander in chief, there is no compelling reason for insisting that he must wait for Congress to appropriate funds for use in military operations. Henkin's argument rests on the necessity for a strong, centralized executive directing foreign affairs. In an earlier 1959 article discussing the treaty power, he rejected the argument that the treaty power could be shared with Congress: "It is not the moment to attempt it when all ability, flexibility, wisdom are needed for

By 1986, the *Third Restatement* represented a consensus favoring broader executive agreement authority than the *Second Restatement* had endorsed. The *Third Restatement* provided that the President may make any agreement on any subject matter either in the form of a treaty or executive agreement.²⁸⁵ The *Third Restatement* confirmed that a self-executing congressional-executive agreement could supersede both state and federal law without implementing federal legislation.²⁸⁶ The authors of the *Restatement* added that a sole executive agreement could supersede at least state law, and possibly federal law, without implementing legislation.²⁸⁷ The *Restatement* suggested that even a non-self-executing executive agreement could be considered federal policy superseding inconsistent state policy or preempting a State from legislating in that subject matter.²⁸⁸ The status of sole executive agreements in domestic law remains contestable.²⁸⁹

cooperation for survival by a frightened race, on a diminishing earth, reaching for the moon." Henkin, *supra* note 158, at 936.

285. RESTATEMENT (THIRD), *supra* note 24, at § 303, n.8; § 111 cmts. d, h.

286. *Id.* See HENKIN, *supra* note 282, at 173-87. According to Henkin, "[I]t is now widely accepted that the Congressional-Executive agreement is a complete alternative to a treaty . . ." *Id.* at 175.

287. See RESTATEMENT (THIRD), *supra* note 24, at § 303 cmt. j. Some authorities have not distinguished between treaties, congressional-executive agreements, and sole executive agreements for purposes of domestic legal effect. See, e.g., MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 77-78 (1988); see also HENKIN, *supra* note 282, at 184-85. By contrast, in 1941, one of the leading proponents of the idea that executive agreements could substitute for treaties, Wallace McClure, had written that it would be contrary to "the entire tenor of the Constitution" for sole executive agreements to supersede federal law. McCURE, *supra* note 273, at 343. See also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (holding that a sole executive agreement regulating imports of Canadian seed potatoes was void because it contravened an act of Congress). See generally Peter J. Lesser, *Superseding Statutory Law by Sole Executive Agreement: An Analysis of the American Law Institute's Shift in Position*, 23 VA. J. INT'L L. 671 (1983). At one time even the State Department argued that GATT cannot supersede state law. Letter from Herman Phleger, Legal Advisor of the Department of State, to Mr. Sharpe, Acting Attorney General of Hawaii, February 26, 1957. Henkin has recanted his earlier view that executive agreements are completely interchangeable with treaties. He now takes the position that some forms of agreements can only be accomplished by an Article II treaty. See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 57 (1990).

288. See RESTATEMENT (THIRD), *supra* note 24, at § 115 cmt. e.

289. See *id.* at § 115, n.5. The doctrinal instability has resulted from apparently contradictory interpretations of the Supremacy Clause of Article VI. Article VI provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI. Article II treaties are supreme law, displacing all inconsistent state law, whether enacted prior to, or subsequent to, the adoption of the treaty. See *id.* at § 115. It is unclear why executive agreements should have any domestic effect on state law under the Supremacy Clause. After all, the Supremacy Clause refers solely to "treaties" and not to the more generic category of "international compacts or agreements" used elsewhere in the Constitution. According to at least some authorities, executive agreements have the same constitutional status as customary international law, which is regarded as federal common law. See RESTATEMENT (THIRD), *supra* note 24, at § 111 cmt. d. Under Article VI, federal common law is supreme over state law, though not supreme over prior treaties or federal law. See *id.*

Both the use and the effect of sole and congressional-executive agreements changed markedly during the Cold War. Prior to the Cold War, there was a well-established understanding of the limits of executive agreements that traced back to the founding. In the Sections that follow, I will trace the historical development of executive agreements from the founding through the Cold War to demonstrate that the modern executive agreement power had no historical antecedent.²⁹⁰

C. *Executive Agreements at the Founding*

The Framers carefully considered the treaty-making power in light of the experience of the Articles of Confederation.²⁹¹ The Articles of Confederation gave the Confederation Congress power to make treaties only with the consent of at least nine of the thirteen states.²⁹² The apparatus for negotiating and approving treaties proved unwieldy, and foreign governments were unwilling to negotiate with a thirteen-headed sovereign.²⁹³ The general weakness of the national government, its inability to finance itself, raise an army, or enforce the domestic tranquility undermined its credibility as an international partner. Congress could not effectively negotiate boundary and trade disputes with European powers. Britain refused to honor its commitments under the Treaty of Paris and retained forts along the Great Lakes for the purpose of denying the former colonists access to the waterway.²⁹⁴ Simultaneously, the Spanish had closed the Mississippi to the Americans, while

290. In reviewing the historical development, I am not contending that the Framers' original intention necessarily binds the United States today. The problems with originalism have been examined elsewhere. See, e.g., RAKOVE, *supra* note 41, at 3-22. The concept of separation of powers itself had multiple meanings for the Framers such that the original intention to define and limit legislative and executive powers is indeterminate. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989). For example, a strong originalist argument could be made in favor of either expanding congressional or executive power. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994). Thus, a formalist approach to separation of powers is difficult to defend based upon the Framers' own intentions. The most that may be said is that the separation of powers was intended to control government by setting the various departments into conflict so that the exercise of concentrated power was obstructed. See Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986).

291. See GLENNON, *supra* note 30, at 181-83 (1990). According to Glennon, the Framers intended to restrict the executive's authority to make international agreements. See *id.*; see also Arthur Bestor, "Advice" from the Very Beginning, "Consent" when the End is Achieved, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 6-15 (Louis Henkin et al. eds., 1990).

292. THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. III (U.S. 1781), reprinted in HOFFERT, *supra* note 90, at 199.

293. See RICHARD B. BERNSTEIN & KYM S. RICE, ARE WE TO BE A NATION?: THE MAKING OF THE CONSTITUTION 83-90 (1987); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 45-53 (1987); THE FEDERALIST No. 22, 41 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

294. See BERNSTEIN, *supra* note 293, at 83-84.

France restricted American trade with the Caribbean.²⁹⁵ In this context, the new republic was isolated and unable to engage in commerce. Alexander Hamilton warned that

[t]he treaties of the United States, under the present [Confederation] Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those Legislatures. The faith, the reputation, the peace of the whole union, are there continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the People of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?²⁹⁶

Committees of merchants called for amending the Articles of Confederation to give Congress exclusive power to impose a uniform interstate and foreign trade policy.²⁹⁷ Sympathetic to these commercial interests, the Framers agreed on the need to centralize control over foreign affairs and foreign commerce in the national government.²⁹⁸

The Committee of Detail's first draft of the Constitution gave the Senate the exclusive authority to negotiate and ratify treaties.²⁹⁹ Once the delegates reached the Great Compromise, establishing a bicameral legislature, they debated which house should exercise the treaty-making

295. *See id.* at 84.

296. THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Benjamin F. Wright, 1961).

297. *See* BERNSTEIN, *supra* note 293, at 90; MERRILL JENSEN, THE ARTICLES OF THE CONFEDERATION: AN INTERPRETATION OF THE SOCIAL CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, at 77 (1940).

298. Even Alexander Hamilton, who proposed establishing a life-tenured executive with powers like those of a British monarch, would have empowered the executive to make treaties only with "the advice and approbation of the Senate." *See* MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (June 18, 1787) (1911). The need for such commercial agreements contributed to the calls for reform of the Confederation. James Iredell, one of the leading legal minds at the Convention, wrote in defense of the Constitution that

[w]e must have treaties of commerce, because without them we cannot trade to other countries. . . . [W]e have none with Great Britain; which can be imputed to no other cause but our not having a strong respectable government to bring that nation to terms. And surely no man who feels for the honor of his country, but must view our present degrading commerce with that country with the highest indignation, and the most ardent wish to extricate ourselves from so disgraceful a situation.

ANSWERS to MASON: MARCUS IV, in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 386-87 (Bernard Bailyn ed., 1993).

299. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 131 (1913); BERGER, *supra* note 204, at 10-11 (concluding that the Framers assumed that the treaty power ought to be vested in the Senate and that the President was added to the process as a check on the Senate's prerogative).

power.³⁰⁰ There was concern expressed that a treaty might result in special advantages to some states over others.³⁰¹ The representatives of a few large states could dominate the House of Representatives. If the House possessed the treaty power, small states would have no recourse if they were adversely affected by a treaty. As between the two Houses of Congress, the Senate represented the states as equals, and therefore, the Senate's approval more closely followed the Confederation's requirement that the states themselves authorize treaties. Delegates from small states argued that vesting the treaty-making power in the Senate would be consonant with the principle of federalism and would preserve the sovereignty of the states.³⁰² Delegates from the large states responded that their states' interests were insufficiently represented in the Senate.³⁰³

As late as September 6, eleven days before completing the Constitution, the delegates had not resolved which house of Congress would have the power to make treaties, including the power to negotiate. The draft submitted to the "Committee on Postponed Matters" provided that the Senate retained the exclusive power to make treaties.³⁰⁴ The committee amended the draft in the final days of the Convention to provide that, "The president by and with the advice and consent of the Senate, shall have power to make Treaties . . . But no Treaty shall be made without the consent of two-thirds of the members present."³⁰⁵

It is uncertain why the delegates unanimously agreed to this sudden change which gave the President power to negotiate treaties.³⁰⁶ Most likely, the delegates from the large states hoped to counter the disproportionate representation of small states in the Senate by granting the

300. See RAKOVE, *supra* note 41, at 262-67; Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 94-96 (1979).

301. See *id.*

302. See 2 FARRAND, *supra* note 298, at 392-93; Ackerman & Golove, *supra* note 44, at 808-13. See generally Bestor, *Respective Roles*, *supra* note 300, at 91-98.

303. See Bestor, *Respective Roles*, *supra* note 300, at 95-96. See generally Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOUSTON L. REV. 413, 432-40 (1982).

304. See 1787: DRAFTING THE U.S. CONSTITUTION 1264-65 (Wilbourn E. Benton ed., 1986); McHenry's Notes, Sept. 6, in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 529-31 (Max Farrand ed., 1966).

305. See JAMES MADISON, NOTES OF DEBATE IN THE FEDERAL CONVENTIONS OF 1787, at 532 (Ohio Univ. Press 1966) (1840); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 220 (1987); FARRAND, *supra* note 299, at 171.

306. It is clear from Madison's notes that the delegates did not view the treaty power as naturally belonging to the executive. Indeed, the delegates generally viewed the executive's foreign relations powers as limited to ceremonial functions like receiving ambassadors and exchanging correspondence. On the other hand, many delegates, especially from the large and southern states, distrusted the Senate and feared that the executive and Senate would collude in making treaties against their commercial interests. Once it was clear that the electoral college would give the larger states a proportional voice in choosing the President, the President's participation in treaty-making was seen as a way to check the Senate's bias. See RAKOVE, *supra* note 41, at 262-68.

executive responsibility for negotiating.³⁰⁷ Clearly, the Framers did not entrust the executive with all of the treaty power.³⁰⁸ As Hamilton later cautioned:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.³⁰⁹

The President's negotiating role was a convenience to the Senate. To have denied the President any role would be "to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations."³¹⁰ Working together, the President and Senate would jealously check each other's power and provide greater security against tyranny or entanglement with foreign sovereigns.³¹¹ In this respect, the President's power to make treaties was far more limited than that of the British king. Hamilton pointed out by contrast that

the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. . . . In this respect. . . there is

307. James Wilson later explained to the Pennsylvania Constitutional Convention that the executive could check the power of the small States. See James Wilson's Summation and Final Rebuttal, Dec. 11, 1787, in Bailyn, *supra* note 298, at 843-45. It is interesting to note that in Wilson's discussion of the treaty clause he argued that the distance of three thousand miles and the difficulty of communication with the Europeans necessitated the reliance on the President as an agent for the Senate. "A long series of negotiations will frequently precede them; and can it be the opinion of these gentlemen, that the legislature should be in session during this whole time?" *Id.* at 844. (It seems especially ironic that twentieth-century scholars have argued that the immediacy of communication and the risk of air attack are rationales for relying on the President as the sole organ of foreign relations. See *supra* note 9 for examples of scholars making this assertion.) Further evidence of the collaborative, cooperative relationship envisioned concerning the relative roles of the Senate and the President is found in Bestor, *Respective Roles*, *supra* note 300, and Arthur Bestor, "Advice" From the Very Beginning, "Consent" When the End is Achieved, 83 AM. J. INT'L L. 718 (1989).

308. Hamilton distinguished the president's limited negotiating powers from the king's power to make treaties on his own. Hamilton specifically argued that the British monarch could make treaties concerning trade and tariffs on his own, whereas the President could only make trade agreements with the participation of Congress. See THE FEDERALIST No. 68, at 383 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); see also Lee B. Ackerman, *Executive Agreements, The Treaty-Making Clause, and Strict Constructionalism*, 8 LOY. L.A. L. REV. 587, 617 (1975) (noting that Hamilton had argued that the executive's power was subject to the "exceptions and qualifications" expressed in the Constitution).

309. THE FEDERALIST No. 75, at 477 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). Hamilton argued that the treaty power was not executive in nature, nor was it strictly speaking a legislative power. In the debate over the Jay Treaty in 1795, Hamilton rejected the argument that the House had any authority in treaty-making by insisting that the Article II power belonged exclusively to the President and Senate. See RAKOVE, *supra* note 41, at 356-58.

310. THE FEDERALIST No. 75, at 451 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

311. See *id.* at 454.

no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature.³¹²

In Hamilton's view, the President had no authority to make commercial agreements on his own; all trade agreements required the Senate's advice and consent.

The requirement of a supermajority was intended as a further check both on the influence of smaller states in the Senate and on regional rivals.³¹³ Some delegates feared that a bare majority of the Senate would compromise navigation rights on the Mississippi or access to Canadian fisheries.³¹⁴ Morris argued that if "[t]reaties are to be made in the branch of the Government where there may be a majority of the states without a majority of the people" the two-thirds majority requirement would preserve democracy.³¹⁵

We can draw two conclusions from this debate. First, the Framers viewed treaty-making as a legislative power. Second, the delegates' concern arose over protecting their own State from having a treaty imposed on them without fair representation in the treaty-making process. The Framers did not intend that the President act alone and make executive agreements that could displace state law.³¹⁶

The Constitution clearly provided that treaties would displace conflicting state law and constitutions.³¹⁷ The Court has interpreted the Supremacy Clause to mean that treaties can supersede state law or prior federal statute; subsequent federal statutes, by contrast, supersede

312. THE FEDERALIST No. 69, at 448 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

313. See Stein, *supra* note 303, at 436.

314. Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 FARRAND, *supra* note 298, at 306-07; McCURE, *supra* note 273, at 264-68.

315. JAMES MADISON, NOTES OF DEBATE IN THE FEDERAL CONVENTIONS OF 1787, at 533 (Ohio Univ. Press 1966) (1840). The Articles of Confederation required the consent of nine of the thirteen state legislatures to make a treaty. The Framers transformed the Confederation's requirement of two-thirds of the States into the constitutional requirement of two-thirds of the senators, who would be chosen by the state legislatures. Southern states in particular insisted on a supermajority requirement, because they feared that commercial treaties could disadvantage their regional interests in navigation and free trade. See RAKOVE, *supra* note 41, at 90.

316. This concern for defending state sovereignty was reflected in the public debate over ratification. See, e.g., Letters from the Federal Farmer, Letter VI, Oct. 12, 1787, in Bailyn, *supra* note 298, at 276; George Mason, Objections to the Constitution, Oct. 1787, in Bailyn, *supra* note 298, at 348.

317. In the minds of the Framers, it made sense for the Senate, as the representative of the States, to exercise the treaty power. States could only be expected to comply with a treaty approved by their own representatives in the Senate. Article VI was designed specifically to require the States to comply with the 1787 Treaty of Paris, which ended the War of Independence. States had refused to honor article 4 of the Treaty, which provided that all debts owed to British creditors before the War must be repaid in full in British sterling. The failure to repay these debts had aggravated relations with Britain. See generally Emory G. Evans, *Private Indebtedness and the Revolution in Virginia, 1776 to 1796*, 28 WM. & MARY Q. 373 (1971).

treaties.³¹⁸ Scholars dispute whether the Framers intended that both Article II treaties and executive agreements would supersede prior inconsistent federal and state law.³¹⁹ The term "treaties" was understood in the 1700s as referring to a broad variety of international instruments relating to commercial, navigational, political, diplomatic, religious, and property issues.³²⁰ Hamilton read the Treaty Clause broadly

to give to that power the most ample latitude—to render it competent to all the stipulations, which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations; and competent, in the course of its exercise for these purposes, to control and bind the legislative power of Congress. And it was emphatically for this reason, that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the president, being required to make any treaty whatever.³²¹

Nevertheless, treaties were distinguished from other forms of international agreements. Although the Constitution prohibits States from entering into "any Treaty," it allows States to enter into an "Agreement or Compact with another State, or with a foreign Power," with the consent of Congress.³²² What was the significance of the distinction between a treaty, agreement, or compact? Proponents of a wider executive agreement power have argued that the Founders intended to authorize two methods for obtaining ratification of international agreements.³²³ A "treaty" required the approval of two-thirds of the Senate, while an "agreement" could be approved by a majority of both houses or by the President acting alone. This interpretation relegated the Senate's advice and consent power to an optional procedure for making international agreements. If the States could make an international agreement with the consent of Congress, then surely the executive could as well.

This reading of the Constitution ignores the Founders' contemporaneous understanding of the meaning of an "Agreement or

318. See, e.g., *The Paquette Habana*, 175 U.S. 677 (1900) (holding that customary international law is part of U.S. law to be applied by our courts in the absence of any controlling legislative, executive, or judicial act); see also *RESTATEMENT (THIRD)*, *supra* note 24, at § 303 cmt. j.

319. See Ackerman & Golove, *supra* note 44, at 808 (concluding that the Framers believed that only Article II treaties could bind the nation). Cf. McClure, *supra* note 273, at 330 (concluding that since the founding, treaties and executive agreements have been interchangeable).

320. See *Treaties and Executive Agreements: An Analysis Prepared for the Committee on Foreign Relations* by Henry S. Fraser, 78th Cong., SEN. DOC. NO. 244, Sept. 21, 1944, at 5-13.

321. See Camillius Letters, in VII *THE WORKS OF ALEXANDER HAMILTON* 518 (J.C. Hamilton ed., 1851).

322. See U.S. CONST. art. I, § 10, cl. 1, 2.

323. See McClure, *supra* note 273, at 255-59; McDougal & Lans, *supra* note 273, at 237.

Compact." Their understanding is relevant for two reasons: first, to rebut the intentionalist argument advanced by proponents of the executive power, and second, to show that a consistent understanding about the limits of the executive agreement power prevailed from the time of the founding to the eve of the Cold War.

The distinction between treaties, agreements, and compacts appeared in the Articles of Confederation,³²⁴ and in both early and subsequent drafts of the Constitution,³²⁵ suggesting that the Framers chose these words deliberately.³²⁶ This distinction would have been familiar to the Framers through the work of the mid-eighteenth century Swiss publicist Emerich de Vattel. Vattel's treatise, *The Law of Nations or Principles of Natural Law*,³²⁷ first published in French in 1755, was the most authoritative contemporary source of international law among the thirteen States.³²⁸ The Framers relied upon Vattel in constructing the Constitution's foreign relations powers.³²⁹

Vattel outlined a temporal distinction between treaties and compacts or agreements. Vattel defined a treaty as "a pact made with a view

324. Under the Articles of Confederation, treaties and agreements between a State and a foreign government, or between two or more States, required the consent of Congress. THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. VI (U.S. 1781), reprinted in HOFFERT, *supra* note 90, at 200-01.

325. Borchard, *Replace the Treaty?*, *supra* note 273, at 667-70.

326. See Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 455-57 (1936) (discussing the inclusion and use of the terms "compacts" and "agreements" in the different drafts of the Articles of Confederation).

327. EMERICH DE VATTEL, *THE LAW OF NATIONS* (London, J. Newberry et al. 1760). Vattel's influence on the Constitution has been widely recognized. See SCHLESINGER, *supra* note 33, at 85-86; see also 1 FARRAND, *supra* note 298, at 437-42 (Luther Martin, Attorney General of Maryland, citing Vattel, *inter alia*, for the proposition that individuals are free and independent in the state of nature).

328. See Bailyn, *supra* note 298, at 348. Vattel's treatise was first published in English in 1760 and again for the American market in 1775. Three of the leading jurists at the Convention and members of the committee of detail cited Vattel during the Constitutional Convention and the ratification debates, including James Wilson, who helped Madison draft the Constitution, John Rutledge, chairman of the committee, and later-Chief Justice of the U.S. Supreme Court, and Oliver Ellsworth, a judge on the Connecticut Supreme Court of Errors and later-Chief Justice of the U.S. Supreme Court. See MADISON, *supra* note 315; Bailyn, *supra* note 298, at 348. Moreover, Benjamin Franklin wrote the publisher of the English edition of Vattel that it "has been continually in the hands of the members of our Congress now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author . . ." Letter by Benjamin Franklin to Dumas (Dec. 19, 1775), reprinted in 2 WHARTON, *UNITED STATES DIPLOMATIC CORRESPONDENCE* 64 (1889). See also Weinfeld, *supra* note 326, at 458. At least one of these copies was used at the Constitutional Convention in 1787 by the Framers. See *id.* at 459; see also Peter Haggennmacher, *Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function*, 67 CHI.-KENT L. REV. 313, 325-26 (1991).

329. See Bailyn, *supra* note 298, at 27; HERBERT A. JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATIES IN AMERICAN LIBRARIES, 1700-1799*, at 54, 63, 66 (1978) (listing Vattel as one of the writers whose work was contained in the libraries of prominent Americans).

[sic] to the public welfare by the superior power, either for perpetuity, or for a considerable time."³³⁰ By contrast, Vattel wrote,

The pacts with a view to transitory affairs are called agreements, conventions, and pactions. They are accomplished by one single act, and not by irritated oaths [repeated acts] [sic]. These pacts are perfected in their execution once for all: treaties receive a successive execution, the duration of which equals that of the treaty.³³¹

Thus, the Constitution's distinction between treaties, international agreements and compacts was deliberate, well-understood, and intended by the Framers in 1789.³³² While treaties would bind the nation in perpetuity, agreements and compacts functioned like contemporaneous exchanges which imposed no future obligations on any party; agreements and treaties were not interchangeable. Significantly, presidents, Congress, and courts alike respected this distinction until the advent of the Cold War. The question to pursue is, when did the understanding change, and what precisely brought about that change?

330. Vattel, *supra* note 327, at § 152.

331. *Id.* at § 153. The curious reference to "irritated oaths" appears to be a mistake in the 1760 translation from the 1758 French edition, which reads "prestations réitérées." EMERICH DE VATTEL, *LE DROIT DES GENS*, § 153 (1758). Subsequent editions of Vattel translated the French correctly as "repeated acts." Vattel, *THE LAW OF NATIONS* § 153 (Joseph Chitty, trans., T. & J. W. Johnson & Co. 1858) (1760).

Vattel's influence on the design of the treaty clause was further evidenced by the phrase "advice and consent" of the Senate. In explaining the constitutional processes for making treaties, Vattel wrote that while some sovereigns who possess "the full and absolute authority" make public treaties on their own, rulers whose authority is limited "are obliged to take the advice of a senate, or of the representatives of the nation." *Id.* at § 154. One of the early commentators, and a contemporary of the Framers, St. George Tucker, cited these specific sections of Vattel in his discussion of treaties, agreements, and compacts. *See* 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA*, app. 309 (1803), *cited in* Weinfeld, *supra* note 326, at 461.

332. The most obvious form of agreement or compact which the States likely would negotiate, either among themselves or with a foreign power subject to Congress' consent, would have involved boundary disputes. The cessation or acquisition of land on either side would have been an appropriate subject for the States. Consistent with Vattel's view on "international agreements and compacts," such agreements could be executed contemporaneously without committing the State or the nation in the future. *See* Weinfeld, *supra* note 326, at 461. Indeed, during the Confederation, there were many instances of States engaged in agreements with sister States pertaining to boundary lines and navigation, as permitted by the Articles. *See id.* at 464. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685 (1927). It does not appear that any State has entered into an agreement with a foreign power. *See* SUTHERLAND, *supra* note 93, at 121-22; Jill E. Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 *FLA. L. REV.* 1 (1997).

Since 1871, the House of Representatives has insisted that all cessations of land from the Indians to the United States be in the form of compacts rather than Article II treaties. *See* Nell J. Newton, *Federal Power Over Indians: Its Source, Scope, and Limitations*, 132 *U. PA. L. REV.* 195, 206 (1984).

D. The Use of Executive Agreements Prior to the Cold War

The evolution of the executive agreement parallels the growth of U.S. power and the increased role the United States plays in the world.³³³ Periods of relative isolation have been accompanied by periods of quietude in the use of executive agreements. By contrast, periods of expansionism, either military or economic, have been characterized by greater reliance on executive agreements.³³⁴

There is some historical dispute as to the first use of an executive agreement.³³⁵ In acquiring the Louisiana Purchase, President Jefferson contemplated the possibility of relying on his sole executive agreement with the French government. Concluding that the acquisition of territory exceeded his own constitutional authority, Jefferson submitted the agreement to the Senate as a treaty. In addition, he requested enabling legislation from both houses of Congress, suggesting that even an executive agreement approved by both houses would not have sufficed on its own.³³⁶ Strictly speaking, the first executive agreement was the 1817 Rush-Bagot Agreement, which was concluded by President Monroe.³³⁷ The agreement between the United States and Great Britain limited military forces on the Great Lakes.³³⁸ Arguably, as commander-in-chief, Monroe possessed the power to enter into military agreements and did not need the Senate's advice and consent. Yet, more than a quarter of a century after the founding of the Republic, there was no single

333. See SCHLESINGER, *supra* note 33, at 85-99.

334. There were no executive agreements in the first quarter century of the Republic while the avoidance of "entangling alliances" was the watchword of U.S. foreign policy. The assertion of a Manifest Destiny led to a number of important executive agreements. See MARGOLIS, *supra* note 263, at 7-12. The internationally-minded administrations of Theodore Roosevelt, Woodrow Wilson, and FDR relied on executive agreements in unprecedented numbers. Beginning with Harry Truman, the Cold War inaugurated an exponential growth in executive agreements, both in absolute number and relative to treaties. See *id.* at 5-23.

335. The earliest claim is that President Washington's Postmaster General, Timothy Pickering, negotiated an exchange of postal service with the Canadian colonies in 1792 by way of an executive agreement. More recent authorities dispute the characterization of the postal agreements as anything more than an exchange of letters between postmasters with no binding effect on either party. See EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 117 (1917); SCHLESINGER, *supra* note 33, at 86.

During the debate over the Jay Treaty in 1795, Jefferson argued that the treaty should be submitted to the House of Representatives essentially in the form of a congressional-executive agreement. See DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 250-52 (1962). Madison, however, dissuaded Jefferson from pursuing that extreme position, which Madison believed was inconsistent with Article II. Instead, Madison argued that the House could refuse to implement the treaty by denying funding. See JOSEPH L. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 161-62 (1997); RALPH KETCHAM, *JAMES MADISON* 359-63 (1990).

336. See 4 DUMAS MALONE, *JEFFERSON AND HIS TIME* 311-32 (1948).

337. See, e.g., HENKIN, *supra* note 283, at 211; Ackerman & Golove, *supra* note 44, at 816.

338. See 2 HUNTER MILLER, *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA* 645 (1931) (Rush-Bagot Agreement of 1817). See also Message from the President of the United States, S. Exec. Doc. No. 9, 52d Cong., 2d Sess. (1892).

precedent upon which Monroe could rely for the power to make executive agreements. After signing the agreement, Monroe doubted its constitutionality,³³⁹ and submitted the agreement to the Senate for its advice whether it was "such an arrangement as the Executive is competent to enter into, by the powers in it by the Constitution, or is such a one as requires the advice and consent of the Senate."³⁴⁰ The Senate confirmed Monroe's own doubts that a prospective military commitment could be accomplished by executive agreement and consented to Rush-Bagot as an Article II treaty.³⁴¹ It is therefore debatable whether the Rush-Bagot Agreement evidenced the general acceptance of a practice of making executive agreements, or conversely, whether it proved that such agreements were not contemplated by the generation of the Framers.

At the dawn of this century, executive agreements remained relatively rare, and were used only for contemporaneous exchanges.³⁴² Indeed, when President Theodore Roosevelt concluded an agreement for taking control of Santo Domingo's customs houses to prevent Santo Domingo from being pushed into receivership by European creditors, he acknowledged that his executive agreement with Santo Domingo could not bind future presidents. Therefore, like Jefferson and Monroe, Theodore Roosevelt felt obliged to ask the Senate to approve his executive agreement as an Article II treaty.³⁴³ After the acquisition of the Philippines in the Spanish-American War established the United States as a Pacific power, Roosevelt concluded several executive agreements with Japan to avoid conflict with the region's leading power.³⁴⁴ While Roosevelt used executive agreements more frequently than his

339. RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 169-70 (1974).

340. In submitting the Rush-Bagot Agreement to the Senate, President Monroe expressed his own doubts about the constitutionality of the executive agreement. "I submit it to the consideration of the Senate, whether this is such an arrangement as the executive is competent to enter into, by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate." McCLURE, *supra* note 273, at 31.

341. See SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 102-03 (1916).

342. By 1900 there were only 124 executive agreements, or an average of one per year since the Founding. See MARGOLIS, *supra* note 263, at 101-06.

343. Roosevelt subsequently explained that

[t]he 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 But it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office.

THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 551-52 (1920). This expression is further evidence that even as late as Theodore Roosevelt's administration, executive agreements were never used to bind the nation prospectively.

344. See MARGOLIS, *supra* note 263, at 10-11.

predecessors,³⁴⁵ he respected the traditional distinction between treaties and executive agreements.³⁴⁶

World War I occasioned another dramatic increase in the number of executive agreements, but without any fundamental change in their function.³⁴⁷ Despite the bitter defeat of the Treaty of Versailles, President Wilson did not attempt to join the League of Nations by an executive agreement, nor did he negotiate executive agreements to end the state of war.³⁴⁸ Like his predecessors, Wilson understood that executive agreements could not bind the nation prospectively.³⁴⁹

President Franklin Delano Roosevelt transformed the role of the federal executive. The executive branch grew with the expansion of the welfare state and the growth of the military. Mired in the Depression, the nation looked to a powerful activist presidency as a panacea; threatened abroad, the country rallied behind the commander-in-chief.³⁵⁰ Executive power offered an expedient solution to domestic and foreign crises. Nevertheless, Roosevelt respected the limits on his executive agreement power even in economic crisis and wartime. In order to relieve the world

345. In all, President Roosevelt concluded a total of fifty-two executive agreements, more than 40% of the total of all executive agreements negotiated in the previous century. *SEE MARGOLIS, supra* note 263, at 101-04 *app.*

346. Roosevelt's understanding of the executive agreement power was consistent with the view expressed in Professor Corwin's classic work on presidential power in foreign affairs, published in 1917. Corwin, a strong proponent of the President's powers, asserted that "[t]he national Government's power of entering into agreements with foreign states is not exhausted in treaty making, and there are agreements with such states which do not have to be submitted to the Senate for its advice and consent." CORWIN, *supra* note 335, at 116. After conceding the limited role of executive agreements in other administrations, Corwin concluded that "our final verdict must be that the president's prerogative in the making of international compacts of a temporary nature and not demanding enforcement by the courts is one that is likely to become larger before it begins to shrink." *Id.* at 125. Corwin, who clearly sought to enlarge the executive power in foreign relations, conceded that the executive agreement was merely "temporary" and that it cannot bind domestic courts; hence, it operated only as an agreement between the chief executive and a foreign government. The President, according to Corwin, was in effect bound by his honor. Neither the courts, Congress, nor future presidents could be held to an executive agreement. *See id.*

347. Wilson negotiated fifty-four executive agreements, compared to Roosevelt's fifty-two. *See MARGOLIS, supra* note 263, at 104.

348. Instead, Congress declared peace by joint resolution in 1921. Joint Resolution of July 2, 1921, 42 Stat. 105 (1921). Subsequently, formal treaties were approved by the Senate with Germany, Austria, and Hungary. Settlement of War Claims Act of 1928, Pub. L. No. 70-121, 45 Stat. 254 (1928).

349. From 1900 to 1920, there were some agreements that arguably substituted for Article II treaties, including an armistice with Spain. The consensus of opinion among legal scholars, however, was that these agreements did not bind succeeding presidents. *See Ackerman & Golove, supra* note 44, at 817-18. At the end of WWI, President Coolidge was unable to obtain congressional support for debt settlements; therefore, he negotiated settlements in the form of executive agreements. Coolidge negotiated 120 executive agreements, far exceeding all previous Administrations. *See MARGOLIS, supra* note 263, at 104.

350. *See SCHLESINGER, supra* note 33, at 100-26.

economy of the burden of the Smoot-Hawley Tariff,³⁵¹ President Roosevelt asked Congress for authority to renegotiate these tariffs on a reciprocal basis.³⁵² Facing a Congress that hesitated to commit the country to another European war, Roosevelt used the executive agreement as a device to aid the Allies without requiring congressional approval or appropriation.³⁵³ Then-Attorney General Robert Jackson counseled the President that his authority to exchange U.S. destroyers for British air and naval bases flowed from his authority both as commander-in-chief and as the "sole organ" of the government in foreign relations.³⁵⁴ Jackson reaffirmed the traditional view that an executive agreement could only be used to effectuate a contemporaneous exchange. The contemporaneous exchange of destroyers for bases would not bind future presidents, and therefore, it did not require the advice and consent of the Senate. Attorney-General Jackson advised the President that

[s]ome negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration . . . is completed upon transfer of the specified items It is not necessary for the Senate to ratify an opportunity that entails no obligation.³⁵⁵

351. The Depression partially can be attributed to the congressional intervention in foreign economic policy. Protectionist sentiments in Congress had led to the "beggar-thy-neighbor" policies exemplified by the excessive 1930 Smoot-Hawley Tariff. Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified at 19 U.S.C. § 1307). The Smoot-Hawley Tariff sought to protect U.S. producers from import competition, but led to retaliatory tariff increases from other trading partners and so aggravated the worldwide depression. See STEPHEN D. COHEN, JOEL R. PAUL & ROBERT A. BLECKER, *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY: ECONOMICS, POLITICS, LAWS AND ISSUES* 32-33 (1996).

352. Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934).

353. Secretary of State Hull and the British Ambassador Lothian, by an exchange of letters in 1940, concluded the destroyers-for-bases agreement by which the United States gained a ninety-nine-year rent-free lease to naval and air bases in the Atlantic in exchange for fifty U.S. naval destroyers. See JOSEPH PAIGE, *THE LAW NOBODY KNEW* 77-82 (1977).

354. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 485-86 (1940).

355. *Id.* at 487. The Republican presidential nominee, Wendell Willkie, denounced the agreement as "the most arbitrary and dictatorial action ever taken by any president in the history of the United States." James A. Hagerty, *Willkie Condemns Destroyer Trade*, N.Y. TIMES, Sept. 7, 1940, at 8. Yet, there was no general public outcry or significant opposition from Congress, and FDR proceeded to use the executive agreement to coordinate military defenses with other countries, including Great Britain, Canada, and Iceland. See United States-Canada Exchange of Defense Articles, April 26, 1941, reprinted in 6 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA: 1776-1949, at 216 (Charles I. Bevans ed., 1971); United States-United

During FDR's thirteen years in office, he signed 609 executive agreements, almost doubling the number of agreements signed by all his predecessors combined. FDR was the first President to sign far more executive agreements than Article II treaties. Nevertheless, FDR preserved the traditional limits on the use of executive agreements.³⁵⁶

E. When Did the Executive Agreement Power Change and Why?

At least through the Roosevelt Administration, presidents used executive agreements, with or without congressional approval, in a few limited circumstances. As traditionally understood, executive agreements were appropriate only for purposes of a contemporaneous exchange or performance. Because of this temporal limitation, they had no effect on U.S. domestic law. After World War II, presidents began to use executive agreements interchangeably with Article II treaties. Courts gave effect to those agreements in U.S. domestic law, regardless of whether Congress authorized the President's action. Like other aspects of presidential power over foreign relations, expediency discourse transformed executive agreement power. This argument contradicts a recent history of the executive agreement power by Professors Bruce Ackerman and David Golove,³⁵⁷ which helped to persuade Congress of the constitutionality of NAFTA and WTO. Ackerman and Golove raised critical issues about when and why the executive agreement power changed, and consequently, I am obliged to address these issues.

Writing in defense of the constitutionality of NAFTA, Ackerman and Golove trace the transformation of the executive agreement power to the 1944 presidential campaign. A central campaign issue was whether the United States should join the United Nations, and if so, whether doing so required the advice and consent of the Senate. According to Ackerman and Golove, FDR's re-election to a fourth term signaled popular support for joining the United Nations without the

Kingdom Lend-Lease Agreement, Feb. 23, 1942, *reprinted in* 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA: 1776-1949, at 603 (Charles I. Bevans ed., 1974).

356. Was the Litvinov Assignment, discussed above, a contemporaneous exchange of property rights, or should it have been subject to the Senate's advice and consent as an Article II treaty? The Litvinov Agreement settled outstanding claims against the Soviet Government in connection with mutual recognition and establishment of diplomatic relations. Arguably, the Senate did not need to advise and consent, because FDR was acting within his Article II authority "to receive foreign ambassadors" by removing an obstacle incident to establishing diplomatic recognition. The agreement merely facilitated the exchange of property rights between private persons and the two governments. Since the agreement did not bind the nation prospectively, it was appropriate for FDR to act by sole executive agreement. *See* *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *see generally* John Bassett Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 398, 403 (1905) (arguing that agreements to settle claims against foreign governments are within the executive's prerogative and do not require the Senate's advice and consent).

357. *See* Ackerman & Golove, *supra* note 44.

need for an Article II treaty. In their eyes, the 1944 election represented a "constitutional moment" which transformed the Constitution itself to permit congressional-executive agreements to be used interchangeably with Article II treaties.³⁵⁸

Ackerman and Golove find that until the end of World War II, executive agreements had a limited utility and effect. I agree with that conclusion, but disagree with three important points Ackerman and Golove derive from it: first, that the 1944 election triggered this transformation; second, that the change only pertained to the status of congressional-executive agreements and did not affect sole executive agreements; and third, that the change was "constitutional," in the sense that it permanently altered the way in which international agreements could be approved.³⁵⁹

First, Ackerman and Golove argue that the public's support for the interchangeability of executive agreements and treaties largely decided the 1944 election.³⁶⁰ Both FDR and the Republican nominee, Thomas Dewey, ran as internationalists firmly committed to the establishment of a United Nations Organization, which enjoyed the overwhelming support of the American public (according to public opinion polls).³⁶¹ FDR and Dewey agreed on the necessity of a United Nations. Moreover, both thought the charter could be approved as an executive agreement rather than as an Article II treaty.³⁶² Ackerman and Golove point out one respect in which the Republican and Democratic party platforms differed: the Republican platform provided that "pursuant to the Constitution of the United States any treaty or agreement to attain such aims [of creating a United Nations] . . . shall be made only by and with the advice and consent of the Senate."³⁶³ The Democratic platform merely provided that the President would "make all necessary and effective agreements and arrangements" for the establishment of the new international organization.³⁶⁴ Roosevelt defeated Dewey, and Democrats replaced four Republican isolationists in the Senate. From that electoral victory, Ackerman and Golove conclude that

358. See *id.* at 861-75.

359. Professor Ackerman's theory of constitutional moments has been discussed and debated widely. Professor Ackerman's theory sheds light on how the political reality of the popular will has influenced the Supreme Court's constitutional interpretation. See ACKERMAN, *supra* note 45. Professor Laurence Tribe has disputed Professor Ackerman's major thesis of "constitutional moments." See Tribe, *supra* note 46, at 1239-49, 1278-88. Even accepting Ackerman's general description of the political-constitutional process, in my judgment, this particular historical incident is not a persuasive example of his theory in practice.

360. See Ackerman & Golove, *supra* note 44, at 883-96.

361. See *id.* at 883.

362. See *id.* at 883-84.

363. REPUBLICAN PLATFORM FOR 1944, in NATIONAL PARTY PLATFORMS: 1840-1960, at 408 (Kirk Porter & Donald B. Johnson eds., 1961).

364. DEMOCRATIC PLATFORM OF 1944, in NATIONAL PARTY PLATFORMS, *id.* at 403.

[g]iven the overwhelming shift toward internationalism expressed by both leading candidates and the popular support given to the more internationalist slate, wouldn't the American citizenry support a much bolder challenge to the Senate monopoly?³⁶⁵

The "immediate consequence of the 1944 election" was that the "lame duck" House Judiciary Committee sent to the House floor a proposed constitutional amendment requiring treaties to be "made by the President with the advice and consent of both Houses of Congress."³⁶⁶ The following year, the House approved the amendment and sent it on to the Senate. Ackerman and Golove argue that the threat posed by this amendment forced the Senate to approve the Bretton Woods Agreements Act,³⁶⁷ rather than insist on each of the agreements being presented as a separate treaty. Ackerman and Golove's characterization of 1944 as a "triggering election" that transformed the power to make congressional-executive agreements does not adequately explain four historical facts.

First, Roosevelt and Dewey agreed about this issue, so it is difficult to see how the vote for the Democrats represented any sort of popular mandate to change the treaty-making power.³⁶⁸ After all, few Americans probably read and compared the party platforms. Rather, the Democratic victory reflected FDR's popularity and the Allied success in the war. In addition, the public probably trusted the Democratic party to support the United Nations with greater enthusiasm than the Republican party with its traditional isolationist wing. The treaty-making power was at best a peripheral issue, arousing interest only among constitutionalists.³⁶⁹

Second, despite FDR's victory, the U.N. Charter was in fact approved as an Article II treaty with the advice and consent of two-thirds

365. Ackerman & Golove, *supra* note 44, at 885.

366. H.R.J. Res. 320, 78th Cong. (1944); H.R. REP. NO. 2061 (1944).

367. Pub. L. No. 79-171, 59 Stat. 512 (1945).

368. Ackerman and Golove concede that Dewey actually objected to the inclusion of this plank in the Republican platform. Dewey never called for submitting the U.N. Charter as an Article II treaty to the Senate. Ackerman and Golove further concede that the 1944 election certainly was not "a European-style referendum on this key issue." Ackerman & Golove, *supra* note 44, at 884. Nevertheless, Ackerman and Golove speculate that if Dewey had won, the isolationist wing of his party would have insisted that the U.N. Charter be submitted as a treaty to the Senate. *See id.* at 884.

369. Ackerman and Golove do not present any evidence either from polling data or from popular debates to show that the public was strongly mobilized against the Senate's treaty-making monopoly. Ackerman and Golove characterize the defeat of four Republican senators as signaling the public's opposition to the Senate's monopoly on treaty-making. Conversely, Ackerman and Golove imply that if the public had voted out the Democratic majority, that would signal support for the Senate's treaty-making monopoly. Yet, it would seem illogical to interpret the loss of Senate control as a victory for the Senate's prerogatives. If Dewey had defeated FDR, Dewey might have resisted the isolationists in his own party and presented the U.N. Charter as a congressional-executive agreement. There is no way to know what would have happened.

of the Senate.³⁷⁰ It was not obvious that a congressional-executive agreement would have been equally as effective. Ackerman and Golove claim that the decision to introduce the Charter as an Article II treaty was part of a compromise by which the Senate implicitly conceded the larger argument that congressional-executive agreements could substitute for treaties.³⁷¹ They point to the Bretton-Woods Agreement Act as evidence that the House asserted its authority to make international agreements.³⁷² Yet, subsequent practice has been inconsistent. The President has continued to submit some international agreements to the Senate for its advice and consent, including important and controversial treaties like the Anti-Ballistic Missile Treaty,³⁷³ the Treaty on Chemical and Biological Weapons,³⁷⁴ and the Panama Canal Treaty.³⁷⁵ The House did not object to these treaties precisely because it is far from clear that the House had a constitutional role to play in treaty-making, and in any event, the House had no ready mechanism to prevent the Senate from enacting a treaty.³⁷⁶ This evidence suggests that the President's decision to submit the Bretton Woods Agreements to both houses as a congressional-executive agreement was not a concession to the power of the House. Rather, the claim that congressional-executive agreements were interchangeable with Article II treaties represented an acknowledgment of the enlarged power of the executive following the Second World War.

Third, the proposed 1945 constitutional amendment would have been superfluous if the constitutional transformation were apparent. Indeed, the Senate's rejection of that amendment further evidenced that public support for the United Nations did not translate into popular pressure to concede the Senate's prerogative. The plain fact was that after the 1944 election the U.N. Charter was subject to the Article II

370. See Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 (June 26, 1995) 3 Bevans 1153 entered into force on Oct. 25, 1945. The Senate approved the Charter by a vote of 89-2 on July 28, 1945. See 91 Cong. Rec. 8190 (1945).

371. See Ackerman & Golove, *supra* note 44, at 890-91. In fact, as early as 1934 FDR had used a congressional-executive agreement to accede to the International Labor Organization (ILO). See S. J. Res. 131, 73d Cong., 48 Stat. 1182 (1934); PAIGE, *supra* note 353, at 56. See generally Ackerman & Golove, *supra* note 44, at 853-54.

372. See *id.* at 891.

373. Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, signed May 26, 1972, entered into force October 3, 1972, 23 U.S.T. 3437, T.I.A.S. 7503.

374. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, entered into force March 6, 1975, 26 U.S.T. 585, T.I.A.S. 8061, Convention done April 10, 1972.

375. Panama Canal Treaty, signed Sept. 7, 1977, entered into force Oct. 1, 1979, 33 U.S.T. 40, T.I.A.S. 10030.

376. Indeed, DEPARTMENT OF STATE CIRCULAR NO. 175 (1955), *supra* note 267, which is the executive branch policy statement on the use of treaties and executive agreements, makes no mention of the claim that the House has a constitutional prerogative to make treaties.

procedure. The 1944 election did not influence the decision to submit the Charter as an Article II treaty.

Finally, Ackerman and Golove's argument does not explain the outcome of the debate over the International Trade Organization (ITO) Charter. Though Congress rejected the ITO Charter as a congressional-executive agreement, in 1948, President Truman signed a sole executive agreement to bring the United States into compliance with GATT.³⁷⁷ If the new congressional-executive agreement process were regarded as constitutionally mandated, Congress and the public should have strongly opposed Truman's action. In fact, no such opposition materialized.³⁷⁸ This experience suggests that whatever change had occurred in the status of congressional-executive agreements had also occurred in the status of sole executive agreements. Thus, it was not the authority of the House, but the authority of the President as the "sole organ of foreign relations," that was invoked to justify substituting executive agreements for treaties.

Ackerman and Golove characterize the 1944 presidential campaign as a signaling event in the nation's turn toward permanent international engagement. The historical significance of that election pales in comparison to the larger context of the Cold War. Contrary to Ackerman and Golove's thesis, the proliferation of congressional-executive agreements reflected the enlargement of executive—not congressional—power. All of the executive's foreign relations powers expanded in the same moment. What Ackerman and Golove characterize as an amendment to the Constitution was in actuality a new way of reasoning about the Constitution: reading the text through the lens of geopolitics.

A precursory form of expediency discourse shaped the question in 1944—whether to submit the U.N. Charter as an Article II treaty. Proponents of using an executive agreement as a vehicle for joining the United Nations blamed the Senate's failure to approve the Treaty of Versailles as a cause of the Second World War.³⁷⁹ In their view, expediency required a more flexible approach, allowing the President the discretion to make international commitments either by treaty or executive agreement.³⁸⁰

In 1944, Professor Edwius Borchard of Yale Law School summarized the constitutional argument in favor of the Senate's monopoly

377. See Protocol of Provisional Application, Oct. 30, 1947, 61 Stat. 2051; 55 U.N.T.S. 308. See generally John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 251-53 (1967).

378. Ronald A. Brand, *The Status of General Agreement on Tariffs and Trade in U.S. Domestic Law*, 26 STAN. J. INT'L L. 479, 482 (1990).

379. See Ackerman & Golove, *supra* note 44, at 861-65.

380. See *id.* at 889-96.

power to approve treaties in a widely cited series of law review articles.³⁸¹ Professor Borchard demonstrated that since the early days of the republic,³⁸² presidents have consistently relied upon Article II treaties whenever they sought to commit the nation prospectively.³⁸³ He defended the Senate's wisdom for approving all but a handful of treaties.³⁸⁴

Borchard's Yale colleagues, Professors Myers McDougal and Asher Lans, answered his argument in a highly influential law review article that justified the interchangeability of treaties and congressional-executive agreements in light of the new post-war responsibilities facing the United States.³⁸⁵ McDougal and Lans argued that the Constitution adapted to changed circumstances.³⁸⁶ In the aftermath of the Second World War, the nation recognized the need for creating international institutions for collective security:

Above the holocaust of the present war has arisen a demand from the people of the United States for a foreign policy that will do everything humanly possible to prevent future wars and to secure their other interests in the contemporary world.³⁸⁷

Technological changes in communication, transportation, and production shrank the modern world. Both developments in military technology and economic interdependence made it impossible for the United States to maintain its traditional isolation:

This basic condition of interdependence, the profound weakness of the world's present system of organization, and, conversely, the strong power position of the United States in the world society make it imperative that the United States not only participate, but take a leading part, in establishing a new order of political, economic, and cultural relationships and institutions, both in direct association with other nations, great and small, and through international organizations.³⁸⁸

The United States could not exercise world leadership without a shift in power from Congress to the executive. "Other governments must know, if they are to be willing to undertake indispensable joint commitments, that the United States can so act to implement integrated and responsible

381. See Borchard, *Replace the Treaty?*, *supra* note 273; Edwin Borchard, *American Government and Politics: Treaties and Executive Agreements*, 40 AM. POL. SCI. REV. 729 (1946); Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945); Borchard, *Replace the Treaty?*, *supra* note 273.

382. See Borchard, *Replace the Treaty?*, *supra* note 273, at 667-74.

383. See *id.* at 673-77.

384. See *id.* at 664-65.

385. McDougal & Lans, *supra* note 273.

386. See *id.* at 290-96.

387. *Id.* at 181.

388. *Id.* at 185.

policy."³⁸⁹ In McDougal and Lans' view, a foreign policy led by a powerful executive unhampered by Congress best served democracy. In the new world environment, the values of efficiency, flexibility, and secrecy took precedence over the deliberative process:

[E]xecutive officers, who are charged with the task of conducting negotiations with other governments, must be able to treat the national body politic as a whole and must be able to canvass it promptly and efficiently as a whole for the majority will, without being subjected to delays, obstructions, and disintegrating efforts by minorities A leisurely diplomacy of inaction and of deference to dissident minority interests supposedly characteristic of past eras when economic and political change proceeded at a slower pace and the twin ocean barriers gave us an effortless security is no longer capable, if it ever was, of securing the interests of the United States.³⁹⁰

McDougal and Lans' expediency discourse ultimately triumphed over Borchard's appeal to constitutional process. Courts or other legal commentators never clearly drew on McDougal and Lans' distinction between sole executive agreements and congressional-executive agreements. Instead, the expediency argument created a legal justification for a new executive power to make agreements that legally bound future generations both internationally and domestically.

F. The Cold War and the Transformation of the Executive Agreement Power

The modern understanding of executive agreements began with President Truman, who employed executive agreements in lieu of Article II treaties. This use reshaped both the postwar world and the role of the U.S. President in foreign affairs.³⁹¹ Prior to the Truman administration, most executive agreements concerned military or diplomatic affairs, which related to the President's power as commander-in-chief or as diplomatic representative. Departing from tradition, Truman used executive agreements primarily as an instrument of economic policy. Since Truman, the number of executive agreements has vastly exceeded the number of Article II treaties.³⁹² The largest portion of all executive agreements has concerned foreign trade and commerce.³⁹³ More significantly, Truman established the precedent of using a sole executive agreement to bind the country prospectively as a member of a

389. *Id.* at 186.

390. *Id.* at 185-86.

391. In seven years, he signed 1,466 executive agreements, more than double FDR's record in thirteen years in office. See MARGOLIS, *supra* note 263, at 104-05.

392. See *id.* at 105-06.

393. See JOHNSON, *supra* note 153, at 22-25; MARGOLIS, *supra* note 263, at 104-09.

multinational organization or framework, without any explicit congressional authorization *ex ante*.³⁹⁴

With the conclusion of the Second World War, the United States assumed global economic responsibilities for providing liquidity and stimulating economic growth among friendly trading partners. The growth of free-market economies was closely related to the twin Cold War objectives of stabilizing western democracies and containing communism.³⁹⁵ Containing communism was the over-arching goal of U.S. foreign policy, which required the United States to strengthen free market democracy by promoting trade. However, the objective of promoting free trade per se did not explain the need for expanding the executive agreement power. Arguably, the need for quick and secret decision-making in the face of the Soviet threat offered a plausible explanation for the executive to act alone in foreign policy-making. But neither speed nor secrecy could explain why the executive should act alone in negotiating agreements like the General Agreement on Tariffs and Trade (GATT). In the view of the executive, regulating foreign commerce was too important to leave to Congress, as the Constitution provided.³⁹⁶ Congressional parochialism and insularity made Congress ill-suited to directing trade policy. Since Congress could not be trusted to do the right thing, the executive insisted on acting alone. Executive agreements were expedient, both because they allowed the President to by-pass the Senate's advice and consent, and because they allowed senators to avoid responsibility for the consequences of imports on domestic competitors. Expediency discourse had established that presidential power is a function of foreign exigencies; economic concerns readily substituted for strategic threats. Once the President employed executive agreements in lieu of trade treaties, he established a precedent for negotiating military, diplomatic, tax, political, and economic

394. Truman used a sole executive agreement to accede to GATT. He also used congressional-executive agreements to accede to the IMF, the World Bank, the Food and Agricultural Organization, the United Nations Educational, Scientific, and Cultural Organization, and the World Health Organization, among other international agreements. See Ackerman & Golove, *supra* note 44, at 892. Truman was not the first president to use an executive agreement to accede to an international organization. In 1934, FDR used a congressional-executive agreement to join the ILO. Arguably, GATT is distinguishable on two counts. First, GATT Protocol of Provisional Application was a sole executive agreement which was employed to accomplish a specific objective that Congress had previously rejected. Second, GATT contained specific rules that bound the United States in the regulation of its foreign trade and obligated the United States to settle disputes with other contracting parties through GATT auspices.

395. Drawing a direct connection between economic and security interests, President Truman argued for foreign aid for Europe, "because we . . . cannot enjoy prosperity in a world of economic stagnation . . . [and] because economic distress anywhere in the world is a fertile breeding ground for violent political upheaval." Truman Army Day speech, PUB. PAPERS 186. See also GADDIS, *supra* note 1, at 342.

396. See generally Koh, *supra* note 21.

agreements without the Senate's advice and consent. Thus, the expediency discourse enlarged the President's powers to make executive agreements that infringed Congress' authority to regulate foreign trade, tax, spend, or transfer federal property.

At Bretton Woods, New Hampshire, in 1944, delegates from forty-four states drew up the blueprint for a new world economic system. The Bretton Woods Agreements established the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the International Trade Organization (ITO) as the pillars of a more open market system of trade and investment.³⁹⁷ In 1945, the Truman administration submitted the Bretton Woods Agreements Act,³⁹⁸ authorizing U.S. participation in the IMF and the World Bank, to both houses as a congressional-executive agreement.³⁹⁹ Truman chose not to submit these agreements for the Senate's advice and consent, because of their economic importance and the Senate's traditional opposition to international organizations.⁴⁰⁰ Although there was no clear precedent for asking Congress to approve a major commitment to an international organization by joint resolution,⁴⁰¹ the Senate acquiesced.⁴⁰² The Bretton Woods Agreements Act set a precedent for other congressional-executive agreements that facilitated U.S. involvement in international organizations. President Truman subsequently submitted for congressional approval executive agreements establishing U.S. participation in a number of such organizations, including the United Nations Educational Scientific and Cultural Organization, the International Refugee Organization, the World Health Organization, and most notably, the ITO.⁴⁰³

397. See generally Raymond F. Mikesell, *The Bretton Woods Debates: Essays in International Finance* No. 192, Princeton University (1994); SCHILD, *supra* note 148.

398. Bretton Woods Agreements Act, Pub. L. No. 79-171, 59 Stat. 512 (1945).

399. Moreover, the executive interest here coincided with the interest of the House of Representatives in supplanting the Senate's constitutional monopoly over treaties. The House sought to use congressional-executive agreements as a substitute for treaties to insinuate itself into the process. See Ackerman & Golove, *supra* note 44, at 890-92.

400. See *id.* at 889-91. See generally RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY* (1969); William Diebold, Jr., *The End of the ITO*, in *ESSAYS IN INTERNATIONAL FINANCE*, No. 16, at 6-37 (Princeton University 1952).

401. The Administration argued that both the U.N. Refugee Relief Association and the Food and Agricultural Organization previously had been approved as congressional-executive agreements. Of course, neither of these humanitarian organizations constituted the same level of obligation as the World Bank or the IMF. See *id.* at 891.

402. Ackerman argued that the Senate did not insist on exercising its Article II advice and consent powers because of popular support for internationalism expressed in the 1944 election and the fact that the Senate feared a constitutional amendment being considered in the House that would have required that all treaties be approved by a majority of both Houses. It is unclear why the Senate would be worried by such an amendment, since it could not have become law without the approval of two-thirds of the Senate. See *id.* at 886-91.

403. *Id.* at 892.

The ITO faced strong opposition from domestic political interests in the United States. Labor unions and some domestic industries feared import competition. Labor and industry opponents charged that foreign imports were “unfairly” advantaged by lower labor costs, lower levels of regulation, and hidden subsidies from their governments.⁴⁰⁴ Nationalists charged that U.S. sovereignty would be threatened by a multilateral organization dominated by countries with competing economic interests.⁴⁰⁵ Some opponents of the ITO warned that trade preferences, which the Europeans maintained with their former colonies, would disadvantage the United States and perpetuate colonial dependency.⁴⁰⁶ Finally, states-rights advocates opposed international commitments that threatened local autonomy, especially concerning race relations. These domestic interest groups combined to stop the ITO Charter. In 1950, President Truman acknowledged defeat and withdrew the ITO Charter from further consideration.⁴⁰⁷

While Congress never approved the ITO Charter, Truman found a back-door way to accomplish the same goal. Even before the parties completed the Charter, negotiators had reached an agreement to reduce tariffs and establish rules for regulating imports and exports, GATT. GATT would implement key rules immediately while the ITO Charter negotiations continued.⁴⁰⁸ Speed was paramount since the negotiating authority would lapse in mid-1948,⁴⁰⁹ and there was a risk that Congress might limit further authority to negotiate. Accordingly, the parties completed a Protocol of Provisional Application⁴¹⁰ which applied GATT temporarily, pending the ITO’s ratification. Truman signed the Protocol as a sole executive agreement.⁴¹¹ Under the authority of the Reciprocal Trade Agreements Act, as amended in 1945,⁴¹² which authorized the President to “proclaim” negotiated tariff rates, the President “proclaimed” GATT provisions as domestic law.⁴¹³

404. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1967); Jackson, *supra* note 377, at 297-312 (discussing the problems that GATT raised with federal control of foreign commerce, precluding state regulation of foreign imports and exports); GARDNER, *supra* note 400.

405. See Diebold, *supra* note 400, at 21-4.

406. See GARDNER, *supra* note 400, at 348-61 (discussing the U.S. interest in eliminating Imperial Preferences in the ITO negotiations).

407. See *id.* at 371-80.

408. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 32-37 (1991).

409. See Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, § 350, 48 Stat. 943 (1934). See generally Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States, in THE EUROPEAN COMMUNITY AND GATT* 196-99 (Meinhard Hilf et al. eds., 1986).

410. See Protocol of Provisional Application, 61 Stat. pt. 6, at A2051; 55 U.N.T.S. 308.

411. See Brand, *supra* note 378, at 482-85.

412. 59 Stat. 410.

413. See Jackson, *supra* note 377, at 253-69.

The GATT Provisional Protocol remained in effect as a sole executive agreement until it was replaced by the 1994 GATT.⁴¹⁴ Congress never approved the ITO Charter,⁴¹⁵ although between 1947 to 1994, Congress passed several trade acts implementing various GATT agreements.⁴¹⁶ Every trade bill from 1951 to 1979 provided that nothing in the legislation should be construed to imply congressional approval of GATT.⁴¹⁷ Despite the absence of congressional support for GATT, U.S. courts⁴¹⁸ and legal scholars⁴¹⁹ treated GATT like an Article II treaty, both for purposes of superseding inconsistent state law and for purposes of filling gaps in federal law.

Courts often cite numerous cases challenging the domestic application of GATT to support the general proposition that executive agreements could function like Article II treaties.⁴²⁰ GATT served as a striking example of executive power, because President Truman signed it despite congressional antipathy.⁴²¹ Congress maintained its distance from GATT

414. See STEPHEN D. COHEN, JOEL R. PAUL & ROBERT A. BLECKER, *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY* 162-72, 260-73 (1996).

415. See *supra* notes 377-378 and accompanying text.

416. See Brand, *supra* note 378, at 482-85.

417. From 1951 through 1988, Congress five times extended the President's authority to negotiate trade agreements with the proviso that the legislation "shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade." See, e.g., Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 10, 65 Stat. 72, 75 (1951) (codified at 19 U.S.C. §1351). In the Trade Act of 1974, Congress stated that it did not imply approval or disapproval "of all articles" of GATT. For the first time in 1974, Congress approved payment of the U.S. fees to GATT secretariat. Again, the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 3, 93 Stat. 144, 145 (1979) (codified at 19 U.S.C. §§ 2501-82 (1988)), provided that if any of GATT multilateral codes conflicted with federal law, federal law prevailed, and that the codes did not create "any private right of action or remedy" under U.S. law. Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified at 19 U.S.C. § 1307). See also Brand, *supra* note 378, at 486.

418. See *Bercut-Vandervoort & Co. v. United States*, 151 F. Supp. 942 (C.C.P.A. 1957) (holding that tax on wine gallon rather than proof gallon was consistent with GATT); *George E. Bardwil & Sons v. United States*, 42 C.C.P.A. 118 (1955) (upholding President's authority to terminate trade concession negotiable under GATT); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n of New Jersey*, 75 N.J. 272 (N.J. 1977) (stating that GATT is a treaty, but that GATT does not prohibit state government procurement policies that prefer domestic products), *appeal dismissed*, 435 U.S. 982 (1978); *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221 (Cal. Ct. App. 1969) (holding that state procurement law was precluded by the federal government's exclusive power over foreign relations); *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 209 Cal. App. 803 (Cal. Ct. App. 1962) (holding that California's Buy America law violated GATT); *Hawaii v. Ho*, 41 Haw. 565 (Haw. 1957) (invalidating under GATT a Hawaiian law requiring grocers who sold imported eggs to give public notice); see also 40 Op. Att'y Gen. (Cal.) 650 (1962) (concluding that GATT preempts contrary state law).

419. See RESTATEMENT (THIRD), *supra* note 24, at § 303j; Brand, *supra* note 378, at 486; Hudec, *supra* note 409, at 195-226; Jackson, *supra* note 377, at 280-92.

420. See *supra* note 418.

421. The record of congressional hostility toward GATT is well-established. After Congress rejected the ITO, GATT was never submitted to Congress for its approval. In 1951, Congress provided in the Trade Agreements Extension Act that "[t]he enactment of this Act shall not be construed to determine or indicate approval or disapproval by the Congress of the Executive

even after it was firmly established as an international framework for trade relations. Nevertheless, courts and legal academics invoked the expediency rationale to justify GATT's special status.⁴²²

Professor John Jackson provided the theoretical foundation for the legal status of GATT in a famous law review article published in 1967.⁴²³ Jackson found authority for the executive to negotiate GATT and to "proclaim" it as domestic law,⁴²⁴ under section 350 of the Trade Act of 1945.⁴²⁵ Section 350 authorized the President to negotiate bilateral

Agreement known as the General Agreement on Tariffs and Trade." Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 10, 65 Stat. 72, 75 (1951) (codified at 19 U.S.C. §1351). Congress reiterated this provision in trade legislation in 1953, 1954, 1955, and 1958. *See* Trade Agreements Extension Act of 1953, Pub. L. No. 83-215, § 103, 67 Stat. 472 (1953); Trade Agreements Extension Act of 1954, Pub. L. No. 445 §3; 68 Stat. 360 (1954), Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, § 3(a), 69 Stat. 162, 163 (1955); Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 10, 72 Stat. 673, 580 (1958). *See generally* Jackson, *supra* note 377, at 265-66. In 1955, Congress signaled its opposition to GATT by rejecting the Draft Charter for the Organization for Trade Cooperation, H.R. 5550, 84th Cong. (1955), which would have established an international trade organization to enforce GATT. *See* H.R. REP. NO. 2007 (1956). The Trade Act of 1974 provided in a curiously elliptical phrase that it was not implying approval or disapproval of "all of the articles" of GATT. *See* Trade Act of 1974, Pub. L. No. 93-618, § 121(d), 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-95). The Trade Agreements Act of 1979, provided that none of the implementing legislation should be construed as creating a private right of action and that in the event of a conflict with any act of Congress, federal law prevails over GATT codes. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 3, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§ 2501-82 (1988)). During the congressional debates over the 1994 WTO Charter, the leading GATT authority reassured critics of GATT that the approval of the WTO would not have any effect on domestic law. *See* Jackson, *supra* note 23, at 64 (concluding that neither the WTO rules nor a WTO panel report is binding on U.S. courts, and neither is a part of U.S. law).

Defenders of GATT have tried to diminish the significance of this legislative record. Professor Ronald Brand pointed to the fact that the 1988 Omnibus Trade and Competitiveness Act did not contain any language qualifying the domestic legal effect of GATT as implying "full legal status for GATT." Brand, *supra* note 378, at 501. Professor John Jackson has argued that despite congressional objections, "GATT is recognized by Congress as well as the executive branch as an important cornerstone of United States policy." Jackson, *supra* note 377, at 268. According to Jackson, Congress' authorization of specific tariff concessions negotiated through GATT signalled that Congress' opposition was "equivocal." *See id.* at 253-69. In light of the economic expediency of GATT, Jackson concluded that Congress must have intended it as domestic law: "GATT has been so central to Western foreign economic policies that Congress has as a practical matter recognized and accepted its existence." *Id.* at 268-69.

422. *See id.* at 260, 268.

423. *See id.* at 253-69.

424. Unlike the authors of the *Restatement (Third)*, Jackson did not claim that GATT was a self-executing agreement. *See id.* at 253-80, 312. Rather, Jackson contended that GATT was made effective in U.S. law only through the President's proclamation. *See id.* at 290-92, 312.

425. Section 350 provided in relevant part that

(a) For the purpose of expanding foreign markets for the products of the United States . . . by regulating the admission of foreign goods into the United States . . . by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

agreements to lower the Smoot-Hawley tariff rates and to "proclaim" the new tariff rates as domestic law overriding prior inconsistent federal and state law. Jackson warned that in any case "to disown GATT at this point would be a jolt to this nation's foreign policy and, indeed, to the stability of international economic relations throughout most of the world."⁴²⁶

Here was an unmistakable appeal to the exigencies of the Cold War. Jackson self-consciously linked the nation's trade policy to the economic foundations of the free world and the strength of U.S. world leadership. Jackson recognized that GATT was a Cold War institution, much like Bretton Woods, built to fortify democratic market economies against economic instability, which in turn bred authoritarianism. Having relied upon GATT structure for two decades, the United States was estopped from questioning its authority in domestic courts. If courts failed to honor GATT, they would both damage the nation's foreign relations and undermine free economies. The implication of his argument was that GATT was simply too important to leave up to Congress; the President alone could negotiate agreements that would serve U.S. economic and security interests. Thus, Jackson's argument rested firmly on the executive expediency principle. Professor Jackson's use of expediency discourse provided the basis for expanding the executive agreement power generally.⁴²⁷ Although Jackson treated GATT as *sui generis*, courts subsequently cited his work in particular to buttress the

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the president has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty or transferring any article between the dutiable and free lists.

Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, § 350(a), 48 Stat. 943, 943-44 (1934).

426. Jackson, *supra* note 377, at 260.

427. Other legal scholars also defended GATT's domestic legal status in terms of executive power. Professor Robert Hudec argued that GATT superseded all state law either because of the implicit authority in § 350 or because of the President's inherent foreign affairs powers. Hudec, *supra* note 409, at 200-10. Implicitly, Hudec acknowledged the power of the expediency discourse. He observed that judges have facilitated the expansion of executive powers out of "extreme caution toward the field of foreign affairs." *Id.* at 245. Hudec questioned whether foreign trade issues really entailed "matters of high foreign policy," and he suggested that by confusing trade and vital security issues the courts have abdicated judicial review of executive actions and undermined democratic accountability. *Id.* at 246-48. Professor Ronald Brand of the University of Pittsburgh Law School argued that Congress' failure to disapprove GATT over fifty years and its willingness to approve legislation consistent with GATT demonstrated a pattern of congressional acquiescence. See Brand, *supra* note 378, at 497-502.

general proposition that executive agreements would operate like Article II treaties.⁴²⁸

Jackson's rhetoric of expediency helped shape the way federal and state courts understood executive agreements in domestic law. One federal judge opined that "[i]t probably is not necessary to cite authority for the proposition that GATT, a multiparty trade agreement, has the legal force of a treaty and its obligations are treaty obligations," at least for purposes of certain federal statutes.⁴²⁹ More often, federal courts have assumed implicitly that GATT operates like a treaty. Although no federal court has held that GATT superseded a specific federal law,⁴³⁰ federal courts have implied that GATT could override federal law.⁴³¹ In an early federal case, the court asked whether GATT had modified certain provisions of the Internal Revenue Code.⁴³² The court held that since Congress had reenacted the statute in 1954, Congress must have intended that the Code be read as consistent with GATT.⁴³³ The court assumed that an executive agreement could modify a statute, and it

428. See, e.g., *China Liquor Distrib. Co. v. United States*, 343 F.2d 1005, 1009-10 (C.C.P.A. 1964) (upholding the federal tax on liquor as consistent with GATT). See also *Schieffelin & Co. v. United States*, 424 F.2d. 1396 (C.C.P.A. 1970) (holding that federal taxation of distilled spirits imported from Scotland and Ireland did not violate GATT).

429. *Bercut-Vandervoort & Co. v. United States*, 151 F. Supp. 942, 951 (Dunlon, J., dissenting) (Cust. Ct. 1957) (citing *B. Altman & Co. v. United States*, 224 U.S. 583 (1921)). The dissent distinguished that GATT's status as a treaty was for the purposes of the statute in question and not necessarily for the purposes of the Supremacy Clause in general. See *id.* at 951-52.

430. See, e.g., *United States v. Yoshida Int'l Inc.*, 526 F.2d 560, 575 n.22 (C.C.P.A. 1975) (holding that a tariff surcharge imposed by the President under the authority of the Trading with the Enemy Act was valid even if it violated Article II of GATT binding tariff concessions; "Though . . . it is true that the GATT forbids the use of surcharges, our Congress has never ratified GATT . . ."); *Select Tire Salvage Co., Inc. v. United States*, 386 F.2d 1008, 1013 (Ct. Cl. 1967) (holding that an excise tax imposed on imported used automobile tires in a discriminatory fashion violative of Article III of GATT was inconsistent with the federal statute); *American Express Co. v. United States*, 332 F. Supp. 191, 200-01 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973) (holding that a countervailing duty imposed on a foreign tax rebate arguably prohibited by Article VI(4) of GATT was authorized by U.S. countervailing duty law; "GATT is a trade agreement, which if in conflict with a law of Congress, must yield to the latter."). See generally Hudec, *supra* note 409, at 210-18.

431. See, e.g., *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 693 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (holding in a private antitrust action, *inter alia*, that an injunction against imports issued by a district court was permissible under an exception to GATT for measures necessary to enforce competition laws); *United States v. Star Indus., Inc.*, 462 F.2d 557 (C.C.P.A. 1972) (holding that the President may retaliate against unfair trade practices without violating GATT where Congress authorized the President to act "having due regard for the international obligations of the United States," which included the most favored nation provision of GATT); *Michelin Tire Corp. v. United States*, 2 C.I.T. 143, 146, 149 (C.I.T. 1981), *vacated*, 9 C.I.T. 38 (1985) (holding that an administrative determination of a subsidy did not violate GATT); see also *Talbot v. Atlantic Steel Co.*, 275 F.2d 4 (D.C. Cir. 1960); *Morgantown Glassware Guild, Inc. v. Humphrey*, 236 F.2d 670 (D.C. Cir.), *cert. denied*, 352 U.S. 896 (1956); *C. Tennant, Sons & Co. v. Dill*, 158 F. Supp. 63 (S.D.N.Y. 1957).

432. See *Bercut-Vandervoort & Co.*, 151 F. Supp. at 946-48 (interpreting § 2800(a)(1) of the Internal Revenue Code in a manner consistent with GATT).

433. See *id.* at 947.

implied a congressional intent to accept GATT, even in the absence of express congressional approval.⁴³⁴ A few federal courts have gone as far as finding that federal law was contrary to GATT, although the federal law was not expressly superseded.⁴³⁵

Other federal courts have suggested that GATT has some other hybrid status in U.S. law:

The GATT does not bind Congress or have the status of a treaty, because it has never been ratified. However, it is an agreed code of international good behavior. An unambiguous statutory command, contrary to the GATT, would of course prevail, but the one here involved can be construed to harmonize.⁴³⁶

Plainly, GATT did not "bind Congress;" but neither could an Article II treaty bind Congress; a later statute could always supersede a prior treaty.⁴³⁷ For that matter, GATT did not bind the President either.⁴³⁸

State courts have consistently held that GATT preempted state law. The most widely cited state court opinions have expressed the view that GATT superseded contrary state and local law.⁴³⁹ "Compacts and similar international agreements, such as GATT, which are negotiated and proclaimed by the President are 'treaties'" for purposes of the Supremacy Clause.⁴⁴⁰ In a few cases, state courts have side-stepped the

434. *See id.*

435. *See, e.g.,* *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1013, 1015 (D.C. Cir. 1971) (holding that where regulations on imports may have violated GATT, importers were entitled to an oral presentation on appeal to the Department of Agriculture, even though such an appeal was not specifically provided for by the federal law); *C. Tennant, Sons & Co. v. Dill*, 158 F. Supp. 63, 68 (S.D.N.Y. 1957) (stating that the requirements of the Agricultural Adjustment Act supersedes GATT, because a treaty is superseded by subsequent legislation).

436. *Select Tire Salvage Co.*, 386 F.2d at 1014 (holding that tire carcasses were not tires for excise tax purposes).

437. *See* RESTATEMENT (THIRD), *supra* note 24, at § 115(1)(a).

438. *See, e.g., Yoshida*, 526 F.2d at 583-84 (upholding the President's unilateral imposition of a surtax on imports, which was otherwise GATT illegal); *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771, 795 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (1979) (rejecting the claim that a marketing agreement negotiated by the executive to limit imports from Taiwan and South Korea violated GATT, "since the Congress has never ratified the GATT").

439. *See K.S.B. Technical Sales Corp.*, 75 N.J. at 272 (stating that GATT is a treaty, but GATT does not prohibit state government procurement policies that give a preference to domestically produced goods over foreign goods); *Ho*, 41 Haw. at 565 (holding that a requirement that all grocers selling foreign eggs post a notice to that effect violated the nondiscrimination provisions of GATT, which the court found was equivalent to a treaty); *Delta Chem. Corp. v. Ocean County Util. Auth.*, 554 A.2d 1381 (N.J. Super. 1988), *aff'd in part and rev'd in part*, 594 A.2d 1343 (N.J. Super. Ct. App. Div. 1991) (holding that, although GATT trumps inconsistent state and municipal law, the "buy American" requirement in municipal law did not violate GATT because it fell within GATT's exception for "products which were produced by a governmental agency for governmental purposes [and] not for commercial sale"); *American Inst. for Imported Steel, Inc. v. County of Erie*, 7 N.Y.S.2d 602 (N.Y. Sup. Ct. 1968), *rev'd on other grounds*, 302 N.Y.S.2d 61 (N.Y. App. Div. 1969).

440. *Baldwin-Lima-Hamilton Corp.*, 208 Cal. App. 2d at 820, 824-26 (holding that San Francisco must comply with GATT's nondiscrimination provisions in accepting bids for electrical generating equipment); *see also* 78 Op. Att'y Gen. (Tenn.) 303A (1978) (concluding that Tennessee's Buy

legal status of GATT by holding that state law was preempted by the federal government's exclusive control of foreign relations.⁴⁴¹ These opinions treated GATT as federal law, even though Congress had not exercised its exclusive power to regulate foreign commerce by adopting GATT.

Expediency discourse ran through these federal and state decisions. Courts have found that GATT derived its domestic legal status from the President's power to conduct foreign relations. By invoking the talisman of "foreign relations," the courts raised the stakes; implicating not merely economic interest, but national security as well. In *Bethlehem Steel Corp. v. Board of Commissioners*, one California Court of Appeal judge explained in his concurrence how the California Buy America statute violated the national treatment provision of GATT:

Juxtaposition of the text of the California Buy American Act alongside those of GATT and the Trade Agreements Act (19 U.S.C.A. § 1351) as amended and extended, not only makes manifest the seriousness of the potential, if not presently actual, interference by California with the federal government's power to conduct its foreign affairs, but lays bare California's unconstitutional intrusion into the congressional power "[t]o regulate Commerce with foreign nations"⁴⁴²

In effect, courts regarded GATT as an expression of the federal government's policy, even without the imprimatur of Congress. That conclusion rested on the assumption that the President is the "sole organ of foreign relations," and therefore, the President alone could speak for the entire nation in foreign trade, as well. Thus, the majority in *Bethlehem Steel* cautioned that the California Buy America law "has more than some incidental or indirect effect in foreign countries, and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle."⁴⁴³

The claim of expediency did not depend on an actual or threatened exigency or risk to foreign relations. When a few state courts held that GATT did not displace state procurement laws that discriminated against

America statute was allowable under GATT's Article II exception for "governmental purpose"); 36 Op. Att'y Gen. (Cal.) 147 (1960) (concluding that GATT is equivalent to a self-executing Article II treaty).

441. See, e.g., *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 224-26, 229 (Cal. Ct. App. 1969) (holding that federal power over foreign relations and commerce supersedes state legislation).

442. *Id.* at 230 (Aiso, J., concurring) (citing *Zschemig v. Miller*, 389 U.S. 429, 441 (1968)).

443. *Id.* at 228. A federal Court of Appeals court upheld President Johnson's retaliatory trade measures against the European Economic Community's poultry tariffs, the so-called Chicken War, as consistent with the Trade Expansion Act's stated purposes, *inter alia*, "to prevent Communist economic penetration." *Star Indus.*, 462 F.2d at 563 (citing 19 U.S.C. § 1801).

imported products, foreign relations were not damaged.⁴⁴⁴ Even where U.S. federal law has been held to contravene GATT, our foreign relations have not suffered.⁴⁴⁵ There was no serious risk of embarrassing the executive in the conduct of foreign relations when a state judge struck down as violating GATT a state law requiring merchants to post a sign stating, "We sell foreign eggs."⁴⁴⁶ Judicial deference toward GATT simply was not necessary for the purposes of protecting national interests.

G. *The New Supreme Law of the Land*

Early in this century the Supreme Court recognized the breadth of the treaty-making power.⁴⁴⁷ The Court hinted that treaties were not subject to the same constitutional limitations as acts of Congress.⁴⁴⁸ Before the Cold War, the Court was equally clear that an executive agreement was not the equivalent of an Article II treaty for purposes of domestic law.⁴⁴⁹ Since the Cold War, this distinction has disappeared in the courts.

As presidents increasingly relied upon executive agreements to perform the function of Article II treaties, questions frequently arose about the effectiveness of these agreements in domestic U.S. law.⁴⁵⁰ In only a

444. *K.S.B. Technical Sales Corp.*, 75 N.J. at 272 (stating that GATT is treaty, but GATT does not prohibit state government procurement policies that give a preference to domestically produced goods over foreign goods).

445. *See, e.g.*, GATT Dispute Settlement Panel Report: United States—Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993), *reprinted* in 30 I.L.M. 1594 (1992).

446. *Ho*, 41 Haw. at 566.

447. *See Missouri v. Holland*, 252 U.S. 416 (1920) (holding that an Article II treaty gave Congress power to regulate migratory birds within States, even though such power was not enumerated in the Constitution, and that such regulation did not interfere with the rights reserved to the States by the Tenth Amendment).

448. "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." *Id.* at 433.

449. Early in this century the Court opined that a commercial agreement negotiated and "proclaimed" by the executive, pursuant to the Tariff Act of 1897, "was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact . . ." *Altman & Co. v. United States*, 224 U.S. 583, 601 (1912). The Court held that such a commercial compact is a treaty for purposes of the jurisdictional requirements of the Circuit Court of Appeals Act. *See id.* at 601.

450. In 1957, the Court struck down a sole executive agreement as a violation of the Fifth and Sixth Amendment. *See Reid v. Covert*, 354 U.S. 1 (1957). The Court considered whether an executive agreement could transfer criminal jurisdiction over the civilian dependents of military personnel stationed abroad to a military court. Mrs. Covert was convicted by a military court of murdering her husband, a military officer, while stationed in England. *See id.* at 3. The military court claimed jurisdiction under the sole executive agreement regarding the stationing of forces then in effect with Great Britain. *See id.* at 3-4. Mrs. Covert argued that the executive agreement denied her Fifth and Sixth Amendment procedural rights. *See id.* at 4-5. Writing for the Court, Justice Hugo Black declared that the federal government is "entirely a creature of the Constitution" and cannot deny constitutional rights at home or abroad by an international agreement. *Id.* at 5-6. The opinion was greeted by proponents of the Bricker Amendment as support for the proposition that all treaties and

handful of cases have federal courts denied the effectiveness of a sole executive agreement in domestic law.⁴⁵¹ One such opinion concerned an importer's violation of an import restriction imposed by an executive agreement with Canada.⁴⁵² In striking down the import restriction, the court held that only Congress could legislate a penalty on imports. In another case, the court considered whether income earned abroad could be tax exempt under an agreement with Panama.⁴⁵³ The court concluded that since the Internal Revenue Code could not be altered by the President acting alone, the executive agreement was ineffective.⁴⁵⁴ Both of these decisions concerned sole executive agreements that involved specific enumerated powers of Congress. The Supreme Court refused to affirm either case on this ground, and neither has been followed by any other court.⁴⁵⁵

With these few exceptions, since the advent of the Cold War federal and state courts have treated both sole executive agreements and congressional-executive agreements as functional equivalents to Article II treaties for purposes of state and federal law.⁴⁵⁶ In some cases, courts have held that sole executive agreements are "treaties" for purposes of interpreting a treaty exception clause in a federal statute.⁴⁵⁷ Other courts

international agreements were subordinated to the Constitution. See THOMAS M. FRANK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 297-98 (1993). See also *Ozonoff v. Berzak*, 744 F.2d 224, 225 (1st Cir. 1984) (holding that a loyalty screening agreement with the World Health Organization could not justify an executive order requiring a loyalty check that otherwise violated the plaintiff's First Amendment rights).

451. One federal court went so far as to claim that "[t]he Supreme Court has never held an executive agreement ultra vires for lack of Senate consent." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *HENKIN*, *supra* note 282). In *Walczak*, the Ninth Circuit upheld a pre-border crossing search conducted by U.S. customs officials based upon an executive agreement with Canada. See *id.*, 783 F.2d at 853.

452. See *Guy W. Capps*, 204 F.2d at 658 (holding that executive agreement with Canada concerning limitations on the import of seed potatoes was not enforceable because only Congress could regulate trade).

453. See *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D.Colo. 1983) (holding that a sole executive agreement cannot supersede the Internal Revenue Code). Cf. *Coplin v. United States*, 6 Cl. Ct. 115, 122-25 (Cl. Ct. 1984) (holding that the executive agreement could exempt certain income where Congress had acquiesced and the Code provided for excluding some income by treaty), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.*, *O'Connor v. United States*, 479 U.S. 27 (1986). For a discussion of *Coplin*, see *infra* notes 486-488 and accompanying text.

454. See *Swearingen*, 565 F. Supp. at 1021-22.

455. See *id.*, *affirmed sub silentio*, 475 U.S. 27 (1986); *Coplin*, 6 Cl. Ct. 115, *reversed on other grounds*, 761 F.2d 688 (Fed. Cir. 1985); *O'Connor v. United States*, 479 U.S. 27 (1986).

456. See *HENKIN*, *supra* note 282, at 173-87.

457. For example, in *Weinberger v. Rossi*, 456 U.S. 25 (1982), U.S. nationals residing in the Philippines complained that the U.S. military had a preference for hiring Filipino nationals over U.S. nationals and that this violated a congressional statute protecting U.S. nationals from employment discrimination on foreign U.S. military bases. The military defended its policy under a sole executive agreement, the Base Labor Agreement. The congressional statute provided an exception for preferences granted by treaty to foreign nationals. The Court held that for purposes of the treaty exception clause in the statute, the executive agreement was a *treaty*, and therefore, the military

have held that executive agreements, like treaties, may effectively supersede federal law. For example, courts have held that sole executive agreements can be used to transfer property held by the U.S. Government to a foreign government,⁴⁵⁸ deny U.S. nationals the benefits of claims against foreign governments,⁴⁵⁹ and exempt foreign income of U.S. nationals from U.S. income tax.⁴⁶⁰ Similarly, congressional-executive agreements have been interpreted by courts, *inter alia*, to afford substantive rights and remedies to inhabitants of the Pacific Trust Territories,⁴⁶¹ to preclude the application of the Fair Labor Standards Act abroad,⁴⁶² and to permit the Palestine Liberation Organization to maintain its U.N. office contrary to federal statute.⁴⁶³

These judicial opinions evidenced a profound change in the understanding of executive agreements. Despite the claim by some scholars that GATT was *sui generis*, GATT had become a persuasive precedent for the general proposition that executive agreements could function like Article II treaties for purposes of domestic law. The expansion of the executive agreement power reflected a broader shift of authority from Congress to the President over foreign relations, as we have

could discriminate against U.S. nationals. *See id.* at 28-36. *See also* *Belk v. United States*, 858 F.2d 706, 711 (Fed. Cir. 1988) (Bennett, J., concurring) (stating that claims brought by former Iranian hostages against the United States in the United States Claims Court were barred by the Algiers Declarations, 20 INT'L. LEGAL MATERIALS 224 (1981), which the court held was a treaty for purposes of 28 U.S.C. § 1502, which provides that "the United States Claims Court shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations"); *Harris v. United States*, 768 F.2d 1240, 1247 (11th Cir. 1985), *vacated*, 479 U.S. 957 (1986) (holding that for purposes of the Internal Revenue Code's exclusion from gross income, an executive agreement constituted a *treaty*).

458. *See Dole v. Carter*, 569 F.2d 1109, 1110-11 (10th Cir. 1977) (holding that the power of President to return the Crown of St. Stephan to Hungary by executive agreement without a vote of Congress presented a nonjusticiable political question).

459. *See Dames & Moore*, 453 U.S. at 654 (holding that the Iran Hostage Agreement is enforceable against the property claims of U.S. nationals); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 247-49 (Cl. Ct. 1983), *aff'd*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985) (upholding claims settlement with P.R.C. by executive agreement).

460. *See Coplin v. United States*, 6 Cl. Ct. 115, 122-23 (Cl. Ct. 1984) (holding that a sole executive agreement has the force of law and repeals prior inconsistent portions of the Internal Revenue Code).

461. *See People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 96-98, 100 (9th Cir. 1974) (holding that Article 6 of the Trusteeship Agreement with the Pacific Islands gives the citizens rights to assert against the High Commissioner). This was a congressional-executive agreement signed by Truman in 1947.

462. *See Robinson v. Harbert Int'l, Inc.*, 743 F. Supp. 797, 801 (N.D. Ala. 1989), *aff'd*, 912 F.2d 1423 (11th Cir. 1990) (denying right to recover unpaid overtime wages required by § 213(f) of the Fair Labor Standards Act for work performed on Kwajalein Atoll because of a congressional-executive agreement, the Compact of Free Association, which superseded the Act).

463. *See United States v. P.L.O.*, 695 F. Supp. 1456, 1464-71 (S.D.N.Y. 1988) (holding that the Anti-Terrorism Act of 1987 could not be interpreted to apply to the P.L.O.'s U.N. offices unless Congress expressly stated its intention to violate the U.N. Headquarters Agreement, which was approved as a congressional-executive agreement in 1947).

already seen. The courts used the same justificatory discourse to defend this power shift, but GATT cases illustrate the transparency of that justification. The courts deferred to the executive's characterization of geopolitical relations, even where the executive defied common sense. This suspension of disbelief represented a collective fantasy about our relationship to the world.

Since the collapse of Soviet communism, that image of the world is more difficult to defend. Now that the Cold War has ended, the expediency discourse appears vulnerable to attack. There is a temptation to argue that after the emergency, the President's powers should retract to their "normal" boundaries. I want to turn to that argument in the concluding Part of this Article.

IV

EXECUTIVE EXPEDIENCY AFTER THE COLD WAR

A. *Dames & Moore: The Persistence of Expediency Discourse*

In the waning days of the Cold War, the Supreme Court set down one of the clearest and boldest formulations of the discourse of executive expediency. The opportunity to amplify expediency discourse arose in connection with the executive agreement that ended the Iran hostage crisis in 1980. The Court's opinion in *Dames & Moore*⁴⁶⁴ represented the full flowering of this line of cases in the context of a real international crisis. To appreciate the significance of the Court's decision, it is necessary to review the facts of the case in some detail.

On November 14, 1979, following the taking of U.S. diplomats as hostages by Iranian nationals at the U.S. Embassy in Tehran, President Carter, acting under the International Emergency Economic Powers Act (IEEPA),⁴⁶⁵ declared a national emergency and froze all assets of the Government of Iran subject to U.S. jurisdiction. The Treasury Department issued a regulation voiding any attachments, liens or judgments with respect to property owned by Iran.⁴⁶⁶ After prolonged negotiations

464. *Dames & Moore*, 453 U.S. at 654.

465. International Emergency Economic Powers Act of 1977, Pub. L. 95-223, § 201, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701). The IEEPA provided in relevant part that

[the President may act] to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the president declares a national emergency with respect to such threat

If the President declares such an emergency, he is authorized by the act to

investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exploitation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

Id. at §§ 202-03.

466. 31 C.F.R. 535.203(e)(1980).

with the Iranian government through the intermediation of Algeria, on January 20, 1981, President Carter signed the Declarations of Algiers to obtain the release of all U.S. hostages.⁴⁶⁷ The President had not requested negotiating authority from Congress, and the Declarations were submitted neither to the Senate for approval as a treaty nor to the Congress for implementing legislation. As a condition for the release of the hostages, the Declarations provided, *inter alia*, for the termination of all litigation against Iran and the transfer of all Iranian assets held by U.S. banks.⁴⁶⁸ Pursuant to the Declarations, one billion dollars of these assets were deposited at the Bank of England in a fund to satisfy awards rendered against Iran by a Claims Tribunal established in the Hague. To affect the transfer of the assets, President Carter issued a series of executive orders.⁴⁶⁹

On December 19, 1979, more than one month after the hostage crisis began and the executive order froze Iranian assets, Dames & Moore filed a claim in U.S. district court against the Government of Iran for breach of contract. Dames & Moore obtained a pre-judgment attachment against the property of certain banks owned by the Government of Iran.⁴⁷⁰ On January 27, 1981, a week after the Algiers Declaration was signed and President Carter had issued executive orders transferring the assets, Dames & Moore moved for summary judgment against the Government of Iran. The district court granted summary judgment, and awarded Dames & Moore \$3.4 million in damages, plus interest.⁴⁷¹ The Government of Iran appealed, and the district court stayed execution of its judgment and vacated all pre-judgment attachments. Dames & Moore then filed an action for declaratory and injunctive relief against the United States to prevent enforcement of the executive orders implementing the Algiers Declarations. The executive order would have prevented Dames & Moore from executing its lien and forced it to relitigate its claims through the Claims Tribunal with no prospect of obtaining full compensation for the breach of contract. Dames & Moore argued that the executive order and Treasury regulations were *ultra vires* and violated due process rights.⁴⁷²

In upholding the Algiers Declaration, the Supreme Court stressed the unique circumstances of the hostage crisis. Justice Rehnquist's opinion began by emphasizing that the Court was "acutely aware of the necessity to rest the decision on the narrowest possible ground capable

467. See Declaration of the Government of the Democratic and Popular Republic of Algeria, initiated Jan. 19, 1981, United States-Iran-Algeria, reprinted in 20 I.L.M. 224 (1981).

468. *Id.*

469. Exec. Order Nos. 12276-85, Fed. Reg. 7913-32 (1981).

470. See *Dames & Moore*, 453 U.S. at 663-64.

471. See *id.* at 664.

472. See *id.* at 666-67.

of deciding the case.”⁴⁷³ After setting out general principles of the Court’s power to review the President’s action, Rehnquist acknowledged the “episodic” ad hoc quality of the Court’s decisions regarding separation of powers:

[W]e are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.⁴⁷⁴

This excerpt revealed the extent to which expediency discourse shaped judicial reasoning about executive power. Here the Court acknowledged a permanent state of emergency, which had existed for some time. In the Court’s view, geopolitical circumstances have constituted a “never-ending” condition of constitutional life. The Court accepted without question that both the responsibility and the authority to respond rested primarily, if not exclusively, in the executive. Further, the Court candidly admitted that the executive was acting in opposition to normal constitutional life. The “tension” that the Court alluded to was the necessity for executive action counter-poised against “some sort of system of checks and balances.”⁴⁷⁵ In this way, the Court characterized the separation of power as a vague, fluid measure of day-to-day practicalities. This characterization hardly conformed to the Court’s conservative commitment to constitutional structures.

The Court admitted that the text of the IEEPA did not explicitly authorize the President to suspend claims by U.S. nationals against foreign governments.⁴⁷⁶ The statute only applied to “property in which any foreign country or a national thereof has any interest”⁴⁷⁷ and did not refer to judicial proceedings or claims by U.S. nationals. Setting aside normal principles of statutory construction, Justice Rehnquist’s opinion relied on the conjunction of two sets of circumstances.

First, Rehnquist noted that Congress had approved settlements of foreign claims against foreign governments by international arbitration in the past. To the Court, this suggested a pattern of acquiescence to claims settlements by the executive. Rehnquist insisted that Congress could not have anticipated every conceivable circumstance, and therefore, the failure of Congress to grant specific authorization did not imply disapproval, at least in the areas of foreign policy and national

473. *Id.* at 660.

474. *Id.* at 662.

475. *Id.*

476. *See id.* at 675-79.

477. International Economic Emergency Powers Act of 1977, Pub. L. 95-223, §§ 202-03, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701).

security.⁴⁷⁸ In making this argument, the Court accepted as a given that the case implicated foreign policy and national security because the President had invoked the national emergency provisions of IEEPA.

Second, the Court emphasized the uniqueness of the hostage crisis and the very real threat that it posed to the lives of U.S. diplomats.⁴⁷⁹ In evaluating the character of these dangers, the Court again deferred to the executive's characterization of the nature of the threat. The Court did not independently evaluate whether U.S. interests were actually at risk. In fact, the Court's decision in this case followed by many months the release of the hostages and the return of the assets. By the time the Court issued its opinion, Iran could no longer harm the freed hostages or refuse to participate in the claims settlement. While arguably an adverse decision might have embarrassed former President Carter, that in itself did not explain the Court's unquestioning attitude toward the executive.

Adding these two factors together and re-emphasizing "the narrowness of our decision" the Court concluded,

[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.⁴⁸⁰

The Court's analysis cannot be defended as a "functionalist" approach to separation of powers.⁴⁸¹ The opinion did not rest on an argument that the President generally should exercise this function. Rather, the Court relied upon the character of geopolitical events and an interpretation of congressional inaction as a justification for allocating powers in this way. By contrast, a truly functionalist approach would have been to argue that the executive was best situated to settle international claims in all cases.⁴⁸²

478. See *Dames & Moore*, 453 U.S. at 678.

479. See *id.* at 676.

480. *Id.* at 688.

481. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) Strauss notes that

[t]he Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.

Id. at 489.

482. By contrast, *Morrison v. Olson*, 487 U.S. 654 (1988), represents a good example of functionalist reasoning about the separation of powers. In *Morrison*, the Court found that Congress properly vested in the federal courts the power to appoint an independent counsel to investigate the executive.

By reading Congress' silence as acquiescence, the Court deferred to the President's primacy in foreign affairs. Congressional inaction was treated as equivalent to legislation approving a claims settlement procedure. Without the prerequisites of legislation—bicameral majority votes and presentment to the President—Congress had authorized executive seizure of private assets.⁴⁸³ In effect, the executive exercised a virtual monopoly to manage foreign relations so long as Congress did not have enough votes to override a presidential veto of restrictive legislation. In other words, the President's monopoly of foreign affairs power was protected so long as the President retained the support of at least one vote more than one-third of either house of Congress.⁴⁸⁴ According to this interpretation, *Dames & Moore* represented a radical shift away from the zones of presidential authority envisioned by Justice Jackson and consolidated the power of the Cold War President as sole organ of foreign relations. The Lockean dichotomy between conditions of normalcy and conditions of emergency had collapsed. Jackson had opined in *Youngstown* that presidential powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁴⁸⁵ Now presidential powers fluctuated according to the President's own characterization of geopolitical circumstance. The diffusion of constitutional power over foreign relations worked for more than 150 years before the Cold War to discourage foreign entanglements. In *Dames & Moore*, the Court legitimated the concentration of powers in the executive to facilitate foreign commitments and meet foreign challenges. Citing *Dames & Moore*, Judge Alex Kozinski, then sitting on the U.S. Claims Court, wrote that

the president had ample authority to bind the United States to all terms of the Implementation Agreement. *Dames & Moore v. Regan* . . . established—if doubt existed before—that the President has significant powers to bind the United States to international agreements without the advice and consent of the Senate. Such agreements supersede prior United States law to the extent it is inconsistent. In *Dames & Moore* . . . [t]he Supreme Court

483. In this respect, the Court's opinion in *Dames & Moore* contradicted the Court's prior opinion in *I.N.S. v. Chadha*, 462 U.S. 919, 952-58 (1983). In *Chadha*, the Court struck down a one-house legislative veto on the ground that it violated the rule that Congress can only legislate through the bicameral process and presentment to the President. In other words, *Chadha* stood for the principle that Congress could only speak through the legislative process constructed in Article I of the Constitution. By contrast, in *Dames & Moore*, the Court treated congressional silence as equivalent to a legislative enactment without bicameral process or presentment.

484. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 524-29 (1982) (discussing the interpretation and implications of congressional silence).

485. *Youngstown*, 343 U.S. at 637.

ruled that the President's action "effected a change in the substantive law." . . . [I]t upheld the President's authority to unilaterally change domestic law by executive agreement with a foreign state. . . .⁴⁸⁶

Kozinski acknowledged that the Constitution limited the President's power "unilaterally [to] dislocate domestic law." However, reasoning from *Dames & Moore*, he concluded that in the absence of an expression of congressional disapproval, the executive agreement "repeals prior conflicting [federal] laws."⁴⁸⁷

In *Dames v. Moore*, the Court had reasoned that the Algiers Declarations must be given effect in domestic law because of the geopolitical circumstances of the hostage crisis. Nevertheless, the principle that executive agreements could supersede domestic law has been applied where no special circumstances were alleged.⁴⁸⁸ Just as some courts and scholars argued that GATT was an exceptional form of executive agreement that operated like a treaty, the exceptional case has become the new norm. Expediency discourse eroded explicit constitutional grants of authority to Congress to regulate foreign commerce, tax, and appropriations. As the President acquired new powers, foreign trade and commercial policy drifted farther from the reach of Congress. Congress could not be held accountable for executive agreements that affected domestic jobs and economic conditions.

B. After the Cold War

If expediency discourse derived from the circumstances of the Cold War, then we might expect that after the Cold War, the courts would restore the pre-existing balance of power between Congress and the executive. The Lockean dichotomy assumes that emergency powers

486. *Coplin*, 6 Cl. Ct. at 122 (upholding a sole executive agreement with Panama that exempted from U.S. tax the income of U.S. nationals employed by the Canal Commission) (citations omitted).

487. *Id.* at 124. Arguably, Kozinski construed executive power as co-extensive with the power of Congress to tax and appropriate. An exemption of income from taxation constitutes a form of *tax expenditure*, which has the same net revenue effect as an appropriation. In effect, then, by *expending* tax revenue, the President used the executive agreement in conflict with the power of Congress to appropriate under Article I, § 9. Ironically, in upholding the executive agreement, the court rejected the executive branch's own concession that the agreement was ineffective. The court did not have to reach the issue of whether the President could change the Internal Revenue Code by sole executive agreement. The Code provided that gross income did not include income excluded "by any treaty obligation of the United States." 26 U.S.C. § 894(a) (1982). Precedent supported an interpretation of the term "treaty obligation" to include executive agreements. *See* B. Altman & Co. v. United States, 224 U.S. 583 (1921). Alternatively, the court might have relied upon the fact that the Implementation Agreement was disclosed to the Senate at the time it approved the Panama Canal Treaty, suggesting that the income exemption was an implied term. Rather than relying upon the narrowest ground for his decision, Judge Kozinski chose this occasion to expound on and expand the principle of *Dames & Moore*.

488. *See, e.g., Coplin*, 6 Cl. Ct. at 122 (upholding a sole executive agreement with Panama that exempted from U.S. tax the income of U.S. nationals employed by the Canal Commission).

did not change the rule of law and that after the emergency, the rule of law would resume unaffected. But, as we have seen, presidential powers have not in fact retracted to their original form. The music has stopped, but the melody lingers.

Now that the Cold War has ended, will the powers of the President retract to the *status quo ante*? A decade after the Cold War, neither Congress nor the courts seem prepared to challenge presidential control over foreign relations. Congress barely challenged the President's decisions to intervene in the Persian Gulf, Somalia, Bosnia, and Haiti. Perhaps the length of the Cold War, and the way in which the discourse operated to normalize the emergency, had the effect of erasing any institutional memory of a different arrangement between the branches of government. But it remains possible that after a time the President's power over foreign relations may wane as courts consider new cases challenging presidential power and as Congress reasserts its constitutional prerogatives. Historically, presidential power has expanded during war time and gradually contracted during peace time.⁴⁸⁹ We are not necessarily locked into the current power arrangement among the federal branches.

Does the principle of *stare decisis* favor preserving the judicial decisions of the Cold War that expanded executive power? In general, the argument for *stare decisis* is weaker for constitutional interpretations than for statutory interpretations. The reason generally given for this preference is that legislative action can easily erase errors in statutory interpretation, but that only a constitutional amendment, which is more difficult and much slower to accomplish, can repair an error in constitutional interpretation. Thus, courts are less bound by their own constitutional interpretations, unless individuals may have relied on a constitutional interpretation to their detriment.⁴⁹⁰

489. After the Civil War, for example, both Congress and the executive exercised emergency powers over civilians, courts, and state governments. The federal government retained some emergency powers as late as the Posse Comitatus Act of 1878, which prevented the military from exercising control over civilians without specific congressional authorization. See Act of June 18, 1878, 20 Stat. 145, 152 (1878). See generally Jill E. Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 1 (1996). Similarly, after the Armistice, President Wilson continued to issue emergency orders, which, among other things, caused the seizure of railroads and telegraph lines to discourage strikes, censored press reports, controlled prices, prohibited the sale of alcoholic beverages, and imposed the first rent control regulation on the District of Columbia. See CHRISTOPHER N. MAY, *IN THE NAME OF WAR* (1989).

490. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (holding, *inter alia*, that the Court was bound by its prior decision in *Roe v. Wade*, 410 U.S. 113 (1973), recognizing a woman's right to an abortion). The majority pointed out that

for two decades of economic and social developments, [people] have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

In its strongest form, *stare decisis* derives from a social preference for preserving settled expectations.⁴⁹¹ In contract, tort or property law, this preference for protecting expectations may lower transactional costs and allow individuals to arrange their lives and businesses with some confidence in the future. That argument seems less compelling in the context of protecting the expectations of executive power. Who, besides the executive and foreign governments, relies upon the fact that the President can order troops overseas without Congress' authorization? Though there may be good reasons for keeping our commitments to our allies, that does not argue for preserving a particular internal decision-making structure.

C. Interpreting Foreign Relations Powers

Foreign relations powers have not retracted to the pre-Cold War boundaries between Congress and the executive, but the rule of *stare decisis* need not lock the Constitution into a permanent state of emergency. My critique suggests that it is possible to interpret the executive's foreign relations powers in the contemporary context without relying upon expediency discourse. What I am proposing is neither novel nor untested. To imagine an alternative way of reading constitutional powers, I will posit two circumstances correlating to the traditional Lockean dichotomy. In the first case, the court determines that the President is acting in normal circumstances under the ordinary rule of law. In the second case, the court determines that the President is acting in emergency circumstances that leave no opportunity for congressional participation in policy-making.

When analyzing a case implicating foreign relations, a court must first inquire whether circumstances require emergency powers. Since our Constitution was designed to operate in good and bad times, only the most extreme circumstances could justify an extra-constitutional exercise of power. So long as Congress could gather and participate in the decision, then the executive must confer with Congress to the extent envisioned by the Constitution. Unless the court finds that it is temporally impossible for Congress to deliberate on the question, the court should not legitimate the executive's extra-constitutional actions, even at the risk of embarrassing the President or contradicting a policy he has implemented already. Otherwise, presidents could always use the risk of embarrassment as a shield to defend extra-constitutional acts. Moreover, even after the President acts, his actions should be subject to a congressional override. If Congress disapproves the executive's actions—

Id. at 835. No such individual interests have relied upon the present reach of the executive's foreign relations power.

491. *Id.*

sending troops, authorizing funds, signing agreements—courts should defer to the will of Congress and nullify any acts he undertook. Clearly, not all executive acts are defeasible; once a military operation is started, it may be impractical to cease actions immediately. But there is no reason to doubt that Congress would exercise self-restraint in overriding executive actions taken in the heat of the moment, and that the courts could find practical solutions to wind down executive actions superseded by Congress. I will illustrate my point with two hypotheticals:

A financial crisis sweeps southeast Asia. The Thai stock market crashes, and the Thai baht loses 50% of its value. Thai consumers are now unable to afford U.S. imports. Thai imports to the United States, now priced 50% less, threaten American competitors. U.S. companies in Thailand have lost millions of dollars, and the flow of capital to Thailand is cut off by nervous investors. The Thai government falls, and an election is called. Some observers fear that the opposition socialist party may gain power. Indonesia, Hong Kong, and Singapore may be the next to be pulled down by the crisis. The Treasury Secretary recommends that the United States provide one billion dollars of financial aid to bolster the baht. It may be difficult to obtain congressional approval for such aid, so the President decides to take money from other sources in the Treasury and State Department budgets. He argues that there is no time to debate the issue, and that he has plenary authority to act. In the past, other presidents have used Treasury funds to support foreign currency, and Congress has not objected. Members of Congress challenge the President's action in a federal district court. They argue that their right to vote on appropriations as members of Congress has been denied by the President's unilateral decision.⁴⁹²

In this instance, Congress has time to deliberate, although debate may last for a few weeks or even months. Delay might hurt Thailand, and might even aggravate the situation internationally, but delay will not cause direct, immediate, and grave damage to the national security of the United States. Ultimately, if the Congress fails to act, there might be long-term damage to our trading situation or a recession, but no immediate danger looms and none likely to damage our national security.

Arguably, Congress is insensitive to foreign financial crises. Congress may be too parochial, uninformed, or incompetent to respond appropriately. The executive may be better qualified to evaluate the seriousness of a foreign devaluation and to react quickly and effectively.

492. This hypothetical is not so farfetched. For a good discussion of the legal issues concerning the U.S. rescue plan to stabilize the Mexican peso, see Russell D. Covey, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311 (1996). See also James D. Humphrey, II, *Foreign Affairs and "The First Crisis of the 21st Century": Congressional vs. Executive Authority and the Stabilization Plan for Mexico*, 17 MICH. J. INT'L L. 181 (1995).

These might be good reasons why Congress should delegate greater authority to the executive to handle foreign financial crises. Perhaps the Constitution should be amended to give the executive power to appropriate funds in financial crises. But courts have no place deciding whether Congress is competent to exercise its appropriation power. Unless Congress has appropriated funds to rescue Thailand's currency, the executive has no inherent authority to do so, regardless of the wisdom of our financial intervention. In the worst case, Congress may fail to act, and the financial crisis may spread. If Congress makes the wrong choice, let the voters hold Congress accountable. Nothing in the Constitution empowers courts to save us from Congress' bad judgment.

The court should interpret the President's constitutional authority according to Justice Jackson's classic formulation in *Youngstown*.⁴⁹³ Jackson characterized presidential power as a function of congressional power. The relevant inquiry for a court is whether the President is acting with congressional support, on his own, or against congressional opposition. In either case, the court should look to the specific provisions of the Constitution to determine the President's own powers. As Justice Black wrote for the majority in *Youngstown*, the President's authority "must stem either from an act of Congress or from the Constitution itself."⁴⁹⁴ In the absence of congressional legislation, the President has only those specific powers explicitly granted to him by the Constitution.

The Constitution clearly vests all of the appropriation power in Congress, and Congress has not given the President any authority to deal with this financial crisis. The fact that Congress may have appropriated funds in other crises or that Congress did not object to the President's prior interventions, is hardly the constitutional equivalent of an appropriation. No one would argue that because Congress appropriated funds last year for the National Endowment for the Arts, the President can appropriate funds this year for the same purpose without Congress' approval.

A second case posits a different result: A group of terrorists threaten to disperse a biological weapon in New York unless all of their comrades are released from U.S. prisons within seventy-two hours. The President learns that the biological agent is located somewhere in Manhattan's West Village, and his advisers recommend a massive search of this area. In order to carry out such a search, it would be necessary to use trained military personnel, and there would be no time to obtain warrants. A military search and seizure would contravene both federal

493. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 636-38 (Jackson, J., concurring).

494. *Id.* at 585.

law⁴⁹⁵ and the Fourth Amendment,⁴⁹⁶ but there is no alternative, and so the executive orders federal troops to conduct the search. West Village residents seek a court injunction to prevent the search operation.

In this situation, it would be temporally impossible for Congress to meet to amend federal law or the Constitution without posing a serious threat of direct, immediate, and substantial injury and death to millions of New Yorkers. This situation requires the executive to act outside the Constitution. Should the court deny the injunction and uphold the right of the executive to use federal troops to conduct a warrantless search? A court should hesitate to establish a precedent that, as Justice Jackson warned, "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."⁴⁹⁷ While the emergency exists, the court could easily avoid rendering a judgment or could declare the question nonjusticiable. As a practical matter, the court is unlikely to reach a judgment while the search is being conducted. Once the emergency ends, the court may still reaffirm the rule of law by declaring the action unconstitutional. In this way the court acknowledges both the duty of the executive to safeguard society in emergencies and upholds the Constitution.

What distinguishes these two hypotheticals is temporal impossibility. The courts possess the exclusive power to decide whether in extreme circumstances temporal impossibility bars the ordinary constitutional processes. As a historical matter, there may be only a few rare examples of temporal impossibility: the Civil War is the only clear case that comes readily to mind where Congress, then adjourned, might not have met in time to save the nation had President Lincoln hesitated to act. Perhaps there are other examples, but it is striking to recall that even when our nation was invaded by foreign powers during the War of 1812 and the attack on Pearl Harbor, Congress still met to authorize the President's actions and to declare war. In judging whether there is time for Congress to deliberate, courts should not be swayed by the executive's characterization of a crisis. The executive has shown itself to be far too anxious to invoke the talisman of crisis when it lacked the patience for constitutional government. The courts can and should read the Constitution in the context of our times without relying upon the executive's optic.

495. "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1385.

496. The Fourth Amendment requires that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

497. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

CONCLUSION

From the beginning of the Cold War, liberals responded to Republican congressional criticism of President Truman's foreign policy by arguing that the President alone could meet the threat posed by world communism. Exigent circumstances justified the expansion of executive power. As tensions with the Soviet Union persisted, the President's emergency powers became an accepted constitutional norm. Normalizing the emergency in this way undermined the distinction between constitutional actions in normal times and extra-constitutional actions in emergencies.

The discourse of executive expediency transformed presidential powers relative to Congress. Less visibly, the discourse changed the relationship between the judiciary and the political branches. The expediency principle justified an extraordinary degree of deference to the executive. Courts deferred to the executive in the exercise of their jurisdiction over foreign entities and foreign acts of state. Courts allowed the President to send military forces abroad even in the face of congressional opposition. And courts acknowledged the President's inherent control over information, civilian and military personnel, and foreign travel, all in the name of national security. As courts used expediency discourse even in situations where there was no actual threat to U.S. national security, the expediency principle became de-contextualized. The discourse even transformed the doctrine of executive agreements. No threat of nuclear catastrophe or communist subversion justified the President's authority to make sole executive agreements like GATT. Nevertheless, judges invoked the expediency principle to accept executive agreements as the functional equivalent of Article II treaties approved by the Senate.

A less powerful executive would not weaken U.S. foreign policy. Public scrutiny of the deliberative process and an independent judiciary have been a source of political stability and vitality in our system of government. The advantages of the President acting with the support of a strong consensus are evident. A congressional authorization to use force overseas sends a serious message to a foreign adversary that the nation is united. Congressional debate can educate the public about the nature of a foreign situation and consolidate public support for foreign assistance. Compelling members of Congress to take a public position in favor of a policy makes it less likely that they will abandon the policy when the going gets tough.

For a generation the executive has told us how to imagine the world beyond our borders. Our collective fear displaced reason as we deferred to the President's greater wisdom. As a consequence, the people no longer hold Congress accountable for the failures and excesses of U.S.

foreign policy. We cannot afford to ignore global forces that are reshaping our economy and our politics. Foreign and domestic issues have converged. Accordingly, we must reassert some measure of democracy in the formulation of foreign policy. Holding our government accountable for foreign policy requires the vigilance of the courts no less than Congress.

