

## 1 | Treaties and Executive Agreements: A History

The power to enter into international agreements is a fundamentally important power of the American presidency. Historically, international agreements have played a prominent policy role—from the creation of important alliances and the ending of major wars to the emergence of critical international organizations and global trade structures. As discussed in the introduction, a new policy innovation emerged during the twentieth century that enabled the president and Congress to effectively deal with the increased diplomatic demands of America’s new leadership role: the executive agreement. Executive agreements do not require supermajority support in the Senate as do formal Article II treaties. Since the 1940s, the vast majority of international agreements have been completed by presidents as executive agreements rather than as treaties. This major policy evolution occurred without changes to the Constitution, though Supreme Court decisions and practice by the political branches have validated the change. This has led some scholars to conclude that the treaty power “has become effectively a Presidential monopoly” (Franck and Weisband 1979: 135; see also Corwin 1984).

This important innovation has created a conundrum for practitioners of foreign policy and students of separation of powers. Has the presidency usurped power and made unilateral what was intended by the framers to be shared? Are presidents routinely evading the Senate (and the Constitution’s supermajority requirement for treaty consent) and completing consequential agreements as executive agreements rather than as treaties, while sending the less controversial agreements to the Senate as treaties? Or is the emergence of executive agreements a natural response to the complexities

of the twentieth century by the American system of separate institutions sharing power, with the Congress complicit by allowing the evolution of the executive agreement as a policy tool? The framework we developed in the introduction clearly points to the latter conclusion. As the reader will come to see, historical practice also supports the latter conclusion. However, to make a strong case challenging the received wisdom of a presidential monopoly in treaty making, we must first provide some historical context.

In this chapter, we trace the change in how presidents complete agreements with other countries and seek congressional consent. Recent treatments of the politics of international agreements often lack this historical perspective and proceed from a set of unfounded assumptions. Readers will see that the treaty process has changed remarkably since the early days of the republic and America's first consequential treaty, the Jay Treaty, completed with Britain in 1794. In addition to discussing the evolution of the treaty power, we introduce many important concepts and processes, providing important grounding for the specific case studies and analyses that come later in the book.

## The Treaty Power in Constitutional Perspective

We begin at the most logical place: the U.S. Constitution. It is clear that the authors of the Constitution intended that the president share the treaty power with the Senate. They wrote into Article II, Section 2, that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." While this passage in Article II is most important regarding our interest in the separation of powers, the Constitution also mentions treaties elsewhere. In Article I, Section 10, the Constitution provides that the treaty power is clearly in the domain of the national government, by prohibiting states from entering into treaties: "No state shall enter into any treaty, alliance, or confederation . . ." The Constitution provides a role for the judiciary when it states, in Article III, Section 2, that "judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority." Finally, the Constitution clearly states, in Article VI, that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land," further eroding any claim to states' rights in regard to treaty compliance and firmly establishing the legal significance of treaties (Dalton 1999).

Under the Articles of Confederation, America's first constitution, all treaty powers were vested in the Congress and the various states. Article VI states, "No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State." Other restrictions on states' entry into international agreements were peppered throughout the Articles of Confederation (e.g., Articles VI and IX provide restrictions but do not completely disallow states from entering into international agreements). That states could enter into international agreements, with the consent of Congress, was disconcerting to the framers. One goal of the Constitutional Convention was to centralize the treaty-making process and, more broadly, control over diplomacy and commerce, in the new national government (O'Brien 2003: 71).

Originally, the founders placed the treaty power squarely in the hands of the Senate. This is unsurprising given the lack of an executive in the Articles of Confederation and the Constitutional Convention's early lack of clarity about how the executive would be shaped (Milkis and Nelson 1999). However, late in the convention, the framers agreed to include the president in the process. Excluding the House from the process was defended by Alexander Hamilton and John Jay in the *Federalist Papers* (Nos. 64, 69, and 75). Though controversial, it was argued that the Senate's smaller size and lengthier terms would facilitate secrecy, which was considered valuable in the exercise of diplomacy, and that the supermajority requirement would protect minority interests (Ackerman and Golove 1995: 10; Franck and Weisband 1979: 135; Lindsay 1994: 78; Spitzer 1993: 195).

The language of Article II and the historical record are clear that the intent of the framers was to share the treaty power between the president and Senate. The authors of the *Federalist Papers* wrote extensively about the dangers of executive prerogative in making international agreements. Alexander Hamilton, an advocate for broad interpretation of executive power, expressed in *Federalist No. 75* his belief that the legislature should be included in making international agreements. Moreover, in *Federalist No. 69*, Hamilton cites several versions of treaties and "every other species of convention usual among nations," which require joint action by the president and two-thirds of the Senate. In *Federalist No. 64*, John Jay argued against delegating the treaty power to the president; and as Michael Glennon notes, James Madison "considered treaty making more of a legislative function" (Glennon 1990: 181–82).

It was not long, however, before the extent of executive power granted in Article II served as a subject of dispute. In his arguments on behalf of

President Washington's Neutrality Proclamation, Alexander Hamilton reasoned that the executive vesting clause, which states that "the executive Power shall be vested in a President," was a much broader grant of power than what was subsequently enumerated in Article II (see Corwin 1984: 208–10). The treaty-negotiating power is an executive monopoly, given the president's role as chief diplomat, with the Senate playing a veto role. This is the argument used by proponents of executive power in the international realm, such as Hamilton, and furthered by future jurists, such as Justice Sutherland, who wrote that the president "alone negotiates" (quoted in Corwin 1984: 488). Under this view, presidents negotiate treaties and then receive advice and consent once the treaty has been made. Corwin (1984: 210) explains, "Ordinarily this means that the *initiative* in the foreign field rests with [the president]. . . . He is consequently able to confront the other departments . . . with *faits accomplis* at will. On the other hand, Congress is under no *constitutional* obligation to back up such *faits accomplis*."

The other view is that the framers expected the Senate to be involved in the treaty-negotiating process from the beginning, providing advice and then consent to the final treaty. The Senate would then play an important role in advising presidents regarding their diplomatic initiatives (Franck and Weisband 1979: 135). James Madison disputed Hamilton's claim for additional executive prerogatives stemming from the vagueness of the executive vesting clause, arguing that the president's diplomatic powers were limited in their range of discretion (Corwin 1984: 210). To be sure, the famous exchange between Hamilton and Madison over the extent of executive power involved primarily the war power, rather than the treaty power, but their argument set the stage for a century and a half of debate, of which the treaty power was a central bone of contention.

While the view of the treaty power as a presidential monopoly has clearly won out in terms of constitutional practice, Louis Fisher (1985: 253–58; 1998: 182–84) persuasively argues that the view providing for direct Senate involvement is much closer to the intent of the framers. While the framers clearly delineated a two-step process for advice and consent on executive branch appointments, which has been verified through historical practice (Sollenberger 2006), Fisher (1998: 183) notes that "no such two-step division of labor . . . exists for treaties." Rather, Senate advice is appropriate throughout the process, according to this line of argument. It is not uncommon and is politically wise, as Fisher demonstrates, for presidents to include members of the Senate in the treaty-negotiating process; however, they are not required to do so. The greatest treaty failure

of all time, the Treaty of Versailles, may be explained by Senate opposition as a result of President Wilson's exclusion of senators from the negotiating process, presenting the Senate with a *fait accompli*, which it rejected.<sup>1</sup> Fisher (1985: 256–57) cites several cases where legislators were part of the negotiation team on significant international agreements during the twentieth century. However, Franck and Weisband (1979: 136), in their pointed critique of the modern treaty process in practice, point out how, as early as the Jay Treaty of 1794, presidents began to skirt senatorial advice during the negotiation stage.

Why the presidential monopoly view dominates legal thinking remains an interesting question for scholars. However, it is beyond our task here to enter into the debate. It is instructive that such a view continues to dominate at both ends of Pennsylvania Avenue.<sup>2</sup> Some scholars argue that the early exclusion of the Senate in the negotiating process was a sign of things to come—the exclusion of the Senate from the process in its entirety, through executive “cooption and circumvention” of the Senate's role, most notably in the form of the rise of the modern executive agreement (Franck and Weisband 1979: chap. 6; see also L. Johnson 1984; Margolis 1986). Corwin (1984) and Ackerman and Golove (1995) do not see the rise of executive agreements as quite so problematic; rather, they see it as a process that has evolved with the general consent of Congress (see also Spiro 2001). Later in this chapter, we turn to the rise in the use of executive agreements, but we first address the classic process of treaty ratification that presidents must traverse today.

### The Classic Ratification Process

For purposes of theoretical clarity, we adopt the view that there is a presidential monopoly on treaty negotiation, the first stage of the treaty process. We assume presidents are unitary actors when negotiating and signing international agreements. The Senate's own documents clearly point to the first stage of the process as an executive prerogative. The second stage includes formal consideration by the Senate, which may or may not include amendments, reservations, understandings, or declarations.<sup>3</sup> The final stage includes ratification of the final treaty document by the president.<sup>4</sup> In the first stage, the executive branch initiates negotiations; the president appoints negotiators (appointments that may be subject to advice and consent by the Senate if the appointees are not already ambassadors or officers in foreign service), delegates powers to negotiate on behalf of the United States, and concludes the treaty through signing the document.

Maintaining the initiative, presidents also begin the second phase, when they formally transmit treaty documents to the Senate.<sup>5</sup> Treaties, once transmitted, are automatically referred to the Senate Foreign Relations Committee in accordance with Senate Rule XXV. The committee must act on a resolution of ratification—with conditions, if applicable—before the full Senate can take up the treaty for advice and consent.<sup>6</sup> According to Rule XXX, should the committee fail to report a treaty before the end of a Congress, the treaty remains on the calendar during the next Congress.

Once the committee reports a treaty, the full Senate can act. A two-thirds vote of those present is required for the Senate to give its advice and consent to ratification of a treaty. Amendment and reservations require only majority approval. A treaty that fails to receive the necessary support in the Senate is returned to the committee, where it sits on the committee calendar indefinitely until the committee reports it to the full Senate again or until the treaty is returned to the president by simple resolution. According to Rule XXX, should the full Senate fail to act on a reported treaty, the treaty is recommitted to committee, and the committee must report it again before the full Senate can give its advice and consent (see Rundquist and Bach 2003).

Should the Senate give its consent to a treaty, the treaty then awaits final presidential action (ratification). It is a widely held misperception that the Senate ratifies treaties. Rather, the Senate consents to the treaty, as amended, and ratification awaits presidential action (Crabb, Antizzo, and Sareddine 2000: 196–97). Again, the president retains the initiative; he is free to decide whether or not to formally ratify the treaty, as amended, by signing the instrument of ratification. If, for example, the conditions placed on the resolution of ratification by the full Senate are too onerous for the president (or U.S. treaty partners), the president may decide not to ratify the treaty. Finally, the instruments of ratification are exchanged between treaty partners, thus entering the treaty into force for U.S. law.

### A Role for the House of Representatives

While many treaties are self-executing, should the treaty require implementing legislation or obligate the United States to spend sums of money, then the House of Representatives also plays a role after ratification (Vasquez 1995).<sup>7</sup> Through normal legislative channels, Congress must appropriate the funds necessary for carrying forth the treaty's provisions. Moreover, if the treaty involves commercial interests or the disposition of territory (as did, e.g., the treaty purchasing Alaska from Russia in 1867),

the House has retained the right to act jointly with the Senate, requiring the passage of legislation (Fisher 1998: 186–87). To be fully implemented, treaties often require appropriations—a fundamental power of the House (Corwin 1984: 243; O’Brien 2003: 71). Following ratification of the Jay Treaty in 1794, the House asserted its constitutional prerogatives in carrying forth duly ratified treaties (see Fisher 1998: 185–86). More recently, once Senate consent to the Panama Canal Treaties was won by the Carter administration, the tense legislative battle over implementing and funding the provisions of the treaties moved to the House. The House only narrowly approved the implementing legislation required to put the treaties into effect (Public Law 96-70).

The House is also involved in the process of legislative approval for congressional-executive agreements, which often require congressional approval. Examples of such agreements include most agreements involving major trade (e.g., NAFTA), nuclear cooperation, and fisheries. Finally, the modern House of Representatives has shown a keen interest in the treaty process through oversight and investigatory hearings, as we demonstrate in chapter 6.

### The Executive Agreement Process

The formal treaty process is indeed cumbersome, is often politically untenable due to the supermajority requirement in the Senate, and can ultimately require involvement by the House. As a result, modern presidents have more often opted for the more efficient policy alternative of executive agreements. A comparison of the modern executive agreement process with the formal treaty process previously outlined clearly shows the attractiveness of the former to the executive branch: in the case of executive agreements, the second and third phases are cut from the process, as many such agreements enter into force upon signature of executive branch negotiators. However, to focus on this benefit alone would be a gross oversimplification. In most cases, an executive agreement is pursuant to a statutory grant of power to the president or requires *ex post* congressional approval (through joint resolution) before the agreement enters into force. Executive agreements of this sort are typically referred to as “congressional-executive agreements,” whereas the rarer executive agreements that rely entirely on the executive’s plenary powers in foreign policy are referred to as “sole executive agreements” (Klarevas 2003: 394). Moreover, if the executive agreement requires budgetary outlays (as would, e.g., a military assistance agreement), Congress remains involved through its control of the purse strings.

### Other Presidential Treaty Powers

Presidents maintain two other important treaty powers beyond their negotiation and choice of form: treaty interpretation and treaty termination. Presidents do not appear to be constrained legally in their decision to terminate treaties.<sup>8</sup> To be sure, the unilateral termination of a treaty by a president is uncommon in practice and raises serious domestic and international political questions;<sup>9</sup> however, the Supreme Court has concluded that treaty termination is a power of the executive, which can be checked by the legislature through statute (*Goldwater v. Carter* 444 U.S. 996 [1979]; see O'Brien 2003), something congressional opponents have been unable or unwilling to do (Rudalevige 2005: 208).

The law is also murky when it comes to treaty interpretation. The constitutional text is unclear about which branch is responsible for interpreting a treaty once it is ratified. Presumably, the executive maintains this authority when a treaty provision is unclear, but that does not necessarily mean that presidents are free to reinterpret treaties in force (Kennedy 1986). The constitutional matter remains largely unsettled, however, allowing presidents and proponents of executive power to argue that interpretation is largely an executive prerogative (see, e.g., Yoo 2001), though the recent decision in *Hamdan v. Rumsfeld* (126 U.S. 2749 [2006]) is a blow to this school of thought. Finding, in that case, that the military tribunals set up through executive order by the Bush administration violated the Geneva Conventions, the Court suggested that the executive and legislative branches together interpret the meaning of treaties.<sup>10</sup>

### The Treaty Power in Practice: A Brief Political History

In the wake of the Constitutional Convention, it was clearly understood that the treaty power was shared between the president and Senate. Most convention delegates agreed with Pierce Butler of South Carolina that treaties should “be gone over, clause by clause, by the President and Senate together” (Franck and Weisband 1979: 136). This is evidenced by President Washington’s famous dealings before the Senate regarding a treaty negotiated with the Creek Indians in August 1789. In a situation that proved embarrassing to both Washington and the Senate, the president sent the Senate thirteen questions for guidance during treaty negotiations and appeared in person on the Senate floor but was faced with significant delay, as the Senate was reluctant to discuss the treaty with him. Washington felt insulted enough to vow that “he would be damned if he ever went

there again” (quoted in Milkis and Nelson 1999: 75). While Washington continued to seek the written advice of the Senate on future treaties, he set the stage for the elimination of the advice portion of the process of advice and consent (Edwards and Wayne 2006: 477–78; Lindsay 1994: 78).

Following Washington’s experience, presidents were inclined to complete negotiations of their treaties prior to seeking the advice and consent of the Senate, effectively shutting the Senate out of its shared role in treaty negotiation. The first such case where a treaty was negotiated without prior advice was the Jay Treaty of 1794. According to Franck and Weisband (1979: 136), a new practice gained steam: presidents would negotiate treaties, only rarely would Senate advice be sought in any meaningful way during negotiations, and then the president would submit the treaties to the Senate for an up or down vote, essentially limiting the Senate’s role of advice and consent to simply consent.

Naturally, in a system of shared powers, the Senate did not stand idly by and allow the president to unilaterally usurp its advice role. Instead, the Senate retaliated through the amendment phase of the treaty process. In some cases, this proved disastrous for U.S. foreign policy, as presidents would negotiate treaties only to have significant changes made in the Senate, prompting treaty partners to reject the eventual treaty as amended. Examples include the King-Hawkesbury Convention of 1803 and the Hay-Pauncefote Treaty of 1900, which proposed a canal through Panama (Franck and Weisband 1979: 136). Between 1789 and 1992, forty-three treaties given consent by the Senate were rejected by the president or U.S. treaty partners as a result of changes made by the Senate. The practice of significantly amending treaties in the Senate increased following the Civil War, when the Senate changed its rules to ditch the two-thirds requirement to amend treaties, instead going with a simple majority vote, which it retains today (Lindsay 1994: 79–81). The Senate was protecting its treaty power with its only available tool. Senator Lodge (R-MA) famously stated “that a treaty sent to the Senate is not properly a treaty but merely a project” (Holt 1933: 179). The practice was so onerous for presidents and their advisors that it led Richard Olney, secretary of state, to conclude that defeat of the president’s treaties was preferable to allowing wholesale changes by the Senate (Franck and Weisband 1979: 137).

In fact, defeat on the floor of the Senate became commonplace in the late decades of the nineteenth century and early decades of the twentieth. While the most notable treaty defeat was the Treaty of Versailles (the peace treaty ending World War I), it should not have been a surprise to observers of the time that the treaty failed in the Senate. The Senate had failed to give

its consent to every significant treaty between 1869 and 1898 (Holt 1933; Lindsay 1994: 15). Of the twenty-one outright Senate rejections of proposed treaties (indeed a rare occurrence over the scope of history), fourteen occurred between 1860 and 1935 (O'Brien 2003: 74, table 4.1). Teddy Roosevelt once complained, "individual Senators evidently consider the prerogatives of the Senate as far more important than the welfare of the country" (quoted in Holt 1933: 178). President McKinley placed three senators on the negotiation team of the peace treaty formally ending the Spanish-American War. The treaty made it through the Senate in 1898—the first major treaty victory for a president in thirty years (Lindsay 1994: 15–16). Both of these presidents served when their party controlled the majority of seats in the Senate.

Why were presidents' treaties so endangered in the Senate during this period of U.S. history? Early studies of the treaty process suggest that presidents faced problems inherent in a system of shared powers. The Senate jealously guarded its role of advice and consent, and senators firmly believed they had an important role to play in shaping American diplomacy, no matter the complaints of the executive branch or foreign powers. One reason treaties were so endangered, then, is the fact that the Senate was prodded to defend its foreign policy prerogatives through the only real means available to it, since presidents had so often excluded the Senate from the first phase of the treaty process.

Moreover, fights over treaties during this period were marked with partisanship (Dangerfield 1933; Holt 1933; Fleming 1930), especially during periods of partisan polarization, where a large gulf existed between the median ideologies of Senate Republicans and Democrats. Senate polarization scores derived from Poole and Rosenthal's NOMINATE data and party voting scores clearly show that the two political parties were highly polarized during the 1880s through the early 1900s (Aldrich, Berger, and Rohde 2002; Poole and Rosenthal 1997). Such high levels of polarization and partisanship exacerbate any effects that separate partisan control of the presidency and Senate may have had on interbranch relations.<sup>11</sup> Since treaties require a supermajority for consent in the Senate, it is not surprising that early twentieth-century presidents had difficulty with their treaties. Holt's (1933) analysis of the Treaty of Versailles clearly shows that the battle in the Senate was primarily based along party lines, as President Wilson, a Democrat, faced off against the Republican Senate.

The Treaty of Versailles was not just a major political defeat for President Wilson but a significant setback for an internationalist foreign policy. A major part of the treaty included Wilson's brainchild the League of Na-

tions, a world organization designed in the wake of World War I to prevent the calamity of another world war. That the United States was not a member of the league limited the organization's claim to legitimacy (Bennett and Oliver 2002: 44; Jentleson 2000: 101, 222). Prominent isolationists in Congress learned a different lesson from the experience of World War I than did the internationalists: America could avoid world war by keeping the internationalist tendencies of the executive in check. While the United States participated widely in armament and financial accords during the interwar years (e.g., the Kellogg-Briand Pact of 1928 and the Washington Naval Conference of 1921–22), the domestic popularity of isolationism contributed to protectionist trade policies (e.g., the 1929 Smoot-Hawley Tariff) and, in 1935, to the defeat of the World Court treaty. The last floor defeat of a treaty during this era occurred despite the fact that both political parties had endorsed the World Court treaty in their 1932 platforms (Lindsay 1994: 16–17).

### Treaties in the Modern Era

Since 1935, the Senate has only formally rejected three treaties, prompting many scholars to refer to the modern process of treaty consent as *pro forma* and to the Senate as “a most compliant partner” (Hastedt 2000: 162).<sup>12</sup> Most accounts focusing on floor failures fail to mention treaties ignored by committee or blocked procedurally on the floor (e.g., the Genocide Convention),<sup>13</sup> those withdrawn from consideration by the president for political reasons (e.g., the Strategic Arms Limitation Talks [SALT] II in 1980), or other obvious treaty consent failures. Other scholars, drawing from case studies, paint the modern process as a tangled web of domestic and international politics rife with partisan and ideological conflict. Examples include studies on the Nuclear Test Ban (Divine 1978), SALT II (Caldwell 1991a; Talbot 1979), the Panama Canal Treaties (Furlong and Scranton 1984; Jorden 1984; Moffett 1985), the Chemical Weapons Convention (Evans and Oleszek 2003; Hersman 2000), and the Comprehensive Nuclear Test Ban Treaty (Evans and Oleszek 2003).

Which is it? Is the process *pro forma* or rife with political conflict? In chapters 4 and 5, we are able to demonstrate that politics play an important role in the defeat of treaties, as well as contributing to significant delay to Senate consent to treaties in the modern era. The process is not *pro forma*, especially in regard to the most significant treaties. For example, 7.4 percent of the treaties transmitted by the president to the Senate from 1949 to 2000 failed to ever receive Senate consent.<sup>14</sup> Those treaties that received consent often faced significant delay. Among the treaties that made

it through, the median number of days from the date when the president transmitted the treaty to the date of Senate consent is 216, or seven months.<sup>15</sup>

These statistics notwithstanding, most treaties sail through the process rather smoothly, albeit with some delay. It is clear that the Franklin Roosevelt administration witnessed a sea change in the treaty consent process. Subsequent presidents no longer faced the high degree of uncertainty attributed to the treaty process in the earlier period. To be sure, on some treaties, attaining consent requires the expenditure of a great deal of political capital, but not to the degree faced by Roosevelt's predecessors. In addition, the Senate appears to have reduced its practice using reservations to provide its advice during the consent phase, as only one in five treaties given Senate consent between 1947 and 2000 had reservations or amendments attached (Auerswald and Maltzman 2003: 1102).

The obvious explanation for this shift in treaty politics since Roosevelt is the marked rise in the use of executive agreements, rather than formal Article II treaties. Rather than submit their treaties to the Senate for consent, modern presidents have the option available to treat their international agreements as executive agreements. What contributed to this important policy evolution? Was it a result of executive overreach and unilateralism, or did the branches accommodate to more effectively pursue American foreign policy?

### Treaty Termination and Interpretation

Treaty termination and interpretation also involve unsettled constitutional issues and represent areas of treaty practice where presidents have seized the initiative. Modern presidents maintain the prerogative to terminate and interpret treaties. In 1978, President Carter announced that the United States would withdraw from the 1954 Mutual Defense Treaty with Taiwan in order to facilitate full diplomatic recognition of the People's Republic of China. Carter was sued in federal court by several senators, led by Barry Goldwater. Senator Goldwater claimed that the unilateral termination represented "a dangerous precedent for executive usurpation of Congress's historically and constitutionally based powers" (Rudalevige 2005: 206–7). Goldwater won in district court, but that decision was reversed by the D.C. Circuit. On appeal to the Supreme Court, Goldwater's case was dismissed as a political question (Adler 2004; O'Brien 2003). If Congress opposed the president's action, concluded the Court, they were within their power to legislate (*Goldwater*, 444 U.S. 996).

More recently, President George W. Bush unilaterally withdrew the

United States from the Anti-Ballistic Missile (ABM) Treaty of 1972. Again, members of Congress brought suit, only to have their case dismissed in district court as a political question (*Kucinich v. Bush*, 236 F. Supp. 2d 1 [D.D.C. 2002]). However specious and unsatisfying these decisions are to some (see, e.g., Adler 2004), they represent the sum total of court rulings on the topic.<sup>16</sup>

Until very recently, the Court has left unsolved the thorny legal issues around treaty interpretation, leaving an opening for the claim of executive prerogative. Two high-profile cases of treaty interpretation have emerged in recent decades. The first instance dealt with the Reagan administration's reinterpretation of the ABM Treaty in 1985 to allow for development of Reagan's Strategic Defense Initiative (SDI)—a clear violation of the treaty as originally interpreted. The matter became a political football, as proponents of SDI and, in later administrations, national missile defense argued for reinterpretation of the treaty, while opponents argued that reinterpreting it would require the assent of the Senate (see Kennedy 1986). The Senate responded by including language, known as the "Biden Condition," prohibiting such unilateral reinterpretations in the ratification documents attached to the Intermediate-Range Nuclear Forces Treaty. Legally, this condition, part of the treaty ratified by President Reagan, became part of the treaty and therefore is binding on the executive (Glennon 1990: 138–44). Further language was added to the Flank Document Agreement to the Conventional Armed Forces in Europe Treaty in 1997, conditioning ratification on the president submitting amendments to the ABM Treaty for Senate approval (Auerswald 2006: 83). Events (i.e., the collapse of the Soviet Union) eventually overtook the controversy, and President George W. Bush withdrew from the treaty in 2001.

More recently, President George W. Bush has claimed to hold inherent war powers, as commander in chief, that allow him to hold enemy combatants indefinitely, set up military tribunals, and participate in "extraordinary rendition," whereby U.S. officials deliver terrorist suspects to third-party nations for interrogation (Weaver and Pollitto 2006). A question emerged as to whether or not the president's military tribunals were prohibited by the Geneva Conventions. In 2006, in *Hamdan v. Rumsfeld* (548 U.S. 507), the majority, absent statutory authorization from Congress, applied the Geneva Conventions to the tribunals, demonstrating the Court's preparedness to defend treaties against unilateral presidential action in interpreting treaties. Later that year, Congress enacted the Military Commissions Act of 2006 (Public Law 109-366), providing legislative guidance to the executive in the use of tribunals to try "unlawful enemy combat-

ants” and declaring that the Geneva Conventions are not a source of rights for detainees.<sup>17</sup> Additionally, the Bush administration has been assailed for narrowly interpreting the Convention against Torture in its prosecution of the War on Terror (see Nowak 2006). When the president signed into law a defense appropriations measure that had an antitorture provision attached to it, he used a signing statement to reassert his authority to interpret treaties as a power inherent to the commander in chief (Savage 2006).<sup>18</sup>

## The Rise of Executive Agreements

As internationalist foreign policies dominated post–World War II Washington, foreign policy makers looked to executive agreements as an efficient means to complete important diplomatic ends. In their treatise on behalf of the constitutionality of executive agreements, Ackerman and Golove (1995) look to the historic moment provided by World War II as an explanation for this significant constitutional change. According to their story line, it is during such moments of American history that significant constitutional evolutions occur, including broader interpretations of executive power (Ackerman 1991). Their argument hinges on the notion that as a result of political practice, consent by the legislature, and popular support, the Constitution was effectively amended to allow for alternatives to the formal Article II treaty. That the increase in the use of executive agreements preceded World War II (Ackerman and Golove’s “constitutional moment”) complicates their constitutional story considerably. It is clear, however, that the use of executive agreements became the dominant method for completing international agreements during the 1940s.

Many looked to the Senate and its obstruction in the treaty process as a serious problem facing American foreign policy. Such obstruction, they argued, led to the U.S. rejection of the League of Nations, undermining the organization’s ability to check war and contributing to the rise of fascism. Even public opinion had turned against the Senate’s treaty power. By 1944, the Gallup Poll reported that 60 percent of the public favored a major change in the treaty consent procedure, preferring to give it to majorities in both the House and Senate. Even so, public support for executive unilateralism remained scant. In 1945, the House approved a constitutional amendment that would have made the treaty consent procedure the prerogative of both chambers, but unsurprisingly, the Senate never took up the amendment (Ackerman and Golove 1995: 63–65).

Contemporary scholars and members of the foreign policy establishment sympathetic to this argument of Senate obstruction began to look for alternative methods by which to complete international agreements (Ackerman and Golove 1995: 66–73). They asked how the United States could enter into an international accord as long as America’s treaty partners did not know whether the United States would keep its word. They believed that the system of separated institutions sharing the treaty power in the manner that had developed, where presidents would submit their treaties to the Senate for them to be considerably altered and possibly vetoed, had proven dysfunctional. How, they asked, could the system adjust to the requirements of emerging international realities and remain within the confines of the Constitution? The “constitutional moment” needed for such a major reinterpretation of the Constitution was provided by the violence of World War II and the triumph of internationalism among the American political elite (Ackerman and Golove 1995). Spiro (2001) doubts the significance of Ackerman and Golove’s “constitutional moment,” instead arguing that the executive agreement emerged incrementally as a viable option for completing international agreements over a period of several decades. According to Spiro, the executive agreement mechanism is a natural response to a more complex global environment by political institutions that shared the treaty power.

The solution championed by some academics (see, e.g., McClure 1941) and adopted by President Franklin Roosevelt was the modern executive agreement. The constitutional support came in the form of several Supreme Court decisions that dealt with foreign affairs and favored the executive over Congress, opening the door to the exponential rise in executive agreement usage. Executive agreements were not new to presidents, as they had been an alternative in use since the earliest days of the republic.<sup>19</sup> The use of executive agreements had risen considerably during the early decades of the twentieth century, however, when the United States entered into a greater number of trade agreements as it industrialized (see Spiro 2001).

Many of the first major executive agreements during the industrialization period consisted of reciprocal trade agreements negotiated by the president as a result of congressional delegation of power (e.g., the McKinley Tariff Act of 1890 and the Reciprocal Trade Agreements Act of 1934). Many of these early executive agreements, then, were derived “immediately from a delegation of power by Congress to the President” (Corwin 1984: 245).<sup>20</sup> Such delegations of the commerce power were found constitutional in *Field v. Clark* (143 U.S. 649 [1892]). Indeed, President Roosevelt held an

expansive view of powers delegated to the president by Congress, particularly in the area of trade. He completed the 1933 Silver Agreement and Wheat Agreement without submitting them to the Senate as formal treaties, even though they involved issues that are legislative in nature rather than solely executive. Roosevelt looked to the Agricultural Adjustment Act of 1933 for justification and later used the Gold Reserve Act of 1934, on tenuous grounds, to enter into a series of agreements for currency stabilization. Congress did not effectively resist Roosevelt's expansive view regarding international economic agreements, probably because the New Deal Democrats had overwhelming control of both the Senate and the House (Ackerman and Golove 1995: 46–50).<sup>21</sup> Nor did Roosevelt bother submitting the agreements to Congress for approval by joint resolution (Spiro 2001), as is common practice today for such agreements.<sup>22</sup>

The judicial nod given in *Field* in favor of executive agreements led presidents to pursue this avenue in a variety of areas, including military and diplomatic, well beyond any clear delegation of authority by Congress (Margolis 1986: 55; O'Brien 2003: 73).<sup>23</sup> However, the more expansive view adopted by Roosevelt toward the end of the 1930s was met with significant resistance in the legislature. For example, the Congress passed the Neutrality Acts (1935–40), which imposed arms embargoes on nations at war. International events overtook congressional resistance, however. As the Roosevelt administration mobilized for war, the justification for the interchangeable use of executive agreements and treaties in matters other than trade gained steam. Despite congressional resistance (Paul 1998), Roosevelt completed one of “the most controversial sole executive agreements ever concluded,” the Destroyers for Bases Agreement of 1940 (Ackerman and Golove 1995: 52–56, especially n. 251), which, along with subsequent executive agreements with Britain and Denmark, “virtually assured” America’s “later entry into the war” (Spiro 2001: 985). The bases agreement “violated a 1917 statute prohibiting the transfer of warships to a belligerent nation and also the 1940 Neutrality Act” (Rudalevige 2005: 49).

The U.S.-British agreement exchanging destroyers for bases is often cited as an example of President Roosevelt running roughshod over congressional prerogatives (Crenson and Ginsberg 2007; Paul 1998; Rudalevige 2005; Spiro 2001). Arthur Schlesinger’s account (1973: 105–8) of the internal White House debate on the agreement indicates that Roosevelt wrestled mightily with the decision, because he initially believed he was prohibited from completing the agreement without congressional assent. In responding to the initial plea of Britain’s prime minister, Winston Churchill, for the destroyers, Roosevelt wrote, “A step of that kind could

not be taken except with the specific authorization of the Congress, and I am not certain that it would be wise for that suggestion to be made to the Congress at this moment” (quoted in Schlesinger 1973: 105). It was clear that the Senate would reject a treaty, given the high hurdle required for consent. A month after this initial request, in June 1940, the Senate amended a naval appropriations bill denying the president authority to transfer war matériel to a foreign nation unless the chief of staff or chief of naval operations first certified that it was essential for the defense of the United States (Schlesinger 1973: 106).

Schlesinger writes, “Contrary to the latter-day view that a strong President is one who acts without consultation and without notice, Roosevelt proceeded with careful concern for the process of consent. He consulted with his cabinet. He consulted with congressional leaders. He consulted through intermediaries with the Republican candidates for President and Vice President. For some time Roosevelt’s view remained that he could not send destroyers to Britain without legislation” (1973: 106). The impasse ended when Republican senators, most notably the Republican candidate for vice president, Charles McNary (R-OR), indicated that while they could not support such a deal publicly through a vote in the Senate, they would not move to block it should Roosevelt complete the deal as an executive agreement, provided sufficient justification were made on the grounds of national security requirements. Roosevelt’s attorney general, Robert H. Jackson, in writing a memo supporting the president’s action, looked to tenuous statutory grounds rather than resting his case entirely on the plenary constitutional powers of the executive. Indeed, the situation for Britain was dire, and fast action was necessary in order to avert disaster (Schlesinger 1973: 106–8).

In concluding his discussion of Roosevelt’s decision, Schlesinger (1973: 108) writes, “Roosevelt paid due respect to the written checks of the Constitution and displayed an unusual concern for the unwritten checks on presidential initiative. Though the transaction was unilateral in form, it was accompanied by extensive and vigilant consultation . . . To have tried to get destroyers to Britain by treaty route was an alternative only for those who did not want Britain to get destroyers at all.” The more expansive use of the executive agreement in areas not clearly related to congressional statute proved a significant challenge to the separation of powers in terms of treaty making. The prevailing view among scholars is that President Roosevelt essentially interpreted the executive power to allow him to enter into binding international agreements and to complete those agreements without the required two-thirds consent of the Senate and, in many

instances, where presidential power was plenary (based in Article II), without any interference from the legislature. After all, the destroyers deal was just the tip of the iceberg. As the situation in Europe deteriorated, Roosevelt completed executive agreements with Denmark that allowed American forces to occupy Greenland and defend Iceland. This move put the U.S. Navy in direct conflict with German U-boats and resulted in several clashes in the Atlantic, prompting Roosevelt to order the navy to sink Axis submarines—all several months prior to the Japanese attack on Pearl Harbor in December 1941 (Rudalevige 2005: 49).

Such an expansive view of the president's powers in foreign policy is consistent with the Supreme Court's majority opinion in *United States v. Curtiss-Wright Export Corporation* (299 U.S. 304 [1936]), where Justice Sutherland concluded that the president's powers in the international realm were "plenary and exclusive."<sup>24</sup> Although *Curtiss-Wright* did not address executive agreements directly, the opinion allowed for vast delegations of power from Congress to the executive in the international realm (Ackerman and Golove 1995: 58). Moreover, where Congress was silent, presidents were essentially authorized to complete executive agreements (see Glennon 1990: 178–79). It did not take long, however, before the Court gave executive agreements the same legal weight as formal Article II treaties. In two cases involving settlement disputes flowing from the Litvinov Agreement of 1933, a sole executive agreement where President Roosevelt officially recognized the government of the Soviet Union (O'Brien 2003: 79), the Court addressed the issue more directly. In *United States v. Belmont* (301 U.S. 324 [1937]) and *United States v. Pink* (315 U.S. 203 [1942]) the Court's opinion essentially elevated the legal status of executive agreements to treaties consented to by the Senate.<sup>25</sup> Margolis (1986: 61) summarizes, "Like its more formal counterpart, the executive agreement was now the law of the land."

The complete overhaul of the Senate's treaty role in terms of ex post consent would not be solidified until the 1940s, when the American people began to doubt the wisdom of keeping such an important power in the hands of such a small minority (it only takes a small minority in the Senate to kill a popular treaty). As a result of historic changes in the wake of World War II, executive agreements became the normal method in completing most international agreements. Figure 1 charts the use of executive agreements as a percentage of all international agreements completed by U.S. presidents through 1989. The data are clear: in the modern era, the vast majority of agreements (nearly 95 percent) are completed as executive agreements rather than as treaties.<sup>26</sup>

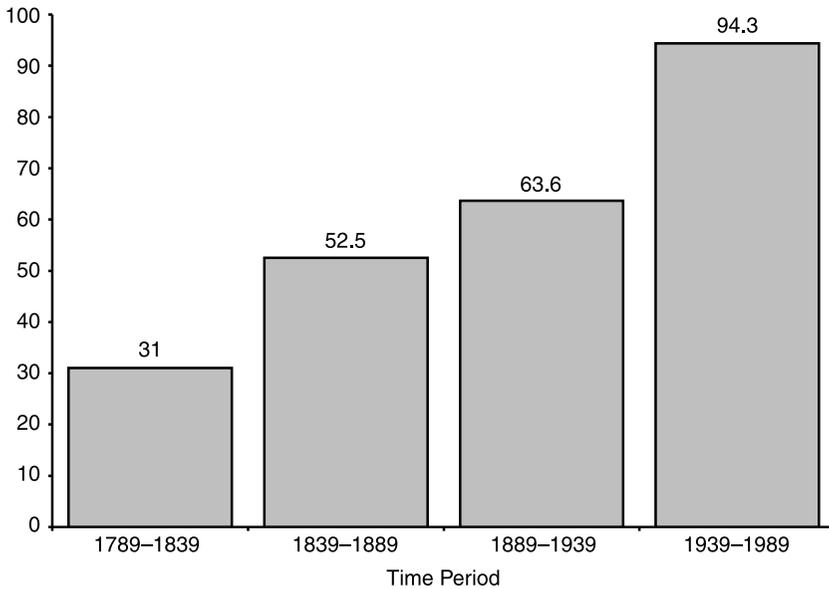


FIG. 1. Executive agreements as a percentage of all international agreements, 1789-1989. Executive agreements refer to all international agreements other than treaties. (Data from Fisher 2001: 39 [table II-1].)

### Types of Executive Agreements

Modern executive agreements come in several types. The State Department's Office of the Assistant Legal Adviser for Treaty Affairs categorizes Article II treaties as formal treaties and all other international agreements as "agreements other than treaties." The Legal Office further divides these "other agreements," which we call "executive agreements," into three sub-categories that have important distinctions bearing on our discussion here: (1) congressional-executive agreements, which are pursuant to a previous act of Congress and sometimes require congressional approval (usually through a joint resolution of approval);<sup>27</sup> (2) agreements pursuant to a treaty; and (3) presidential agreements concluded pursuant to an Article II power of the president (J. Grimm 2001: 78-95), often termed "sole executive agreements."

Most political scientists do not distinguish between the types of executive agreements (see, e.g., Margolis 1986; Martin 2000, 2005).<sup>28</sup> Among political scientists, only Loch Johnson (1984) makes distinctions between

these forms of executive agreements, noting that a large percentage (87 percent) are what he terms “statutory agreements,” fitting with the first category just mentioned. Those who point to executive agreements as an example of a unilateral presidential power (see, e.g., Howell 2003; Rudalvige 2005) fail to note that a large percentage of executive agreements involve congressional delegations of authority to the president, often with strings attached or ex post congressional approval by joint resolution (Epstein and O’Halloran 1999).

Modern examples of congressionally authorized executive agreements (including both ex ante and ex post authorization) include trade, arms control, and fishery agreements (Fisher 1991: 242–43). For example, the 1961 law establishing the Arms Control and Disarmament Agency also “states that any agreement to limit U.S. armed forces or armaments must be approved by legislation or treaty” (*CQ Almanac* 1992: 622). We discuss these types of agreements in greater detail in chapter 6. Executive agreements pursuant to U.S. treaty obligations are rarely controversial and are generally considered well within the domain of the executive as chief diplomat (J. Grimmett 2001). Presidential agreements, or sole executive agreements, however, have met with some degree of controversy in the modern era, as many secret military and intelligence agreements fit into this category (L. Johnson 1984).

## Treaties and Executive Agreements in the Modern Era

The policy evolution whereby executive agreements became the dominant form of international agreement reached its high point immediately following World War II. Several consequential agreements were completed as congressional-executive agreements rather than as treaties, including the agreement considered the foundation of international economic policy: the Bretton Woods Agreement of 1945, committing the United States to the World Bank and International Monetary Fund (Spiro 2001). Despite this available option, presidents did not abandon the treaty altogether, even for their controversial international agreements. This fact suggests that presidential choices over the form of an international agreement are political rather than legal. Given the strength of isolationists in the Senate following World War II, it is not surprising that President Truman would tread delicately when deciding how to handle such critical international agreements as the UN Charter, which the president submitted as a treaty.<sup>29</sup>

### The Bricker Revolt

Soon after Truman left office, a pitched institutional battle between the president and Senate over the treaty power emerged, the outcome of which could have curtailed the constitutional use of executive agreements in place of Article II treaties. Conservative senators threatened the use of executive agreements by proposing the so-called Bricker Amendment, an amendment to the Constitution that would have eliminated or limited (depending on the version of amendment) the use of executive agreements. In their attempt, conservatives retained the support of the American Bar Association and a public lobbying effort that led to lopsided congressional mail in favor of the amendment (Tananbaum 1988).<sup>30</sup> Congressional foreign policy historian Robert Johnson (2006: 61) cites the Bricker revolt as the greatest opportunity to alter the treaty power as set forth in the Constitution. The compromise version (the George Amendment) failed by just a single vote in the Senate in February 1954.<sup>31</sup>

The Bricker Amendment, named for Senator John Bricker (R-OH), originally stated that “executive agreements shall not be made in lieu of treaties” (Tananbaum 1988: 221). However, this provision was later dropped in order to retain Republican support as the amendment faced vigorous opposition from President Eisenhower. The president was “unalterably opposed” to the Bricker Amendment, even after several attempted compromises (R. Johnson 2006: 60). In several letters to his brother, Edgar Newton Eisenhower, the president indicated his unabashed opposition to the amendment. In one letter, the president stated, “Never have I in my life been so weary of any one subject or proposition.” At one point during the controversy, President Eisenhower mused, “If it’s true that when you die the things that bothered you most are engraved on your skull, I am sure I’ll have there the mud and dirt of France during invasion and the name of Senator Bricker” (Galambos and van Ee 1996: doc. 707).<sup>32</sup>

Various versions of the amendment sought to restrict the breadth of the treaty power under the Constitution and to require direct congressional input on executive agreements. The George Amendment, which substituted for the Bricker Amendment during the Senate debate in January 1954, stated, “An international agreement other than a treaty shall become effective as internal law in the United States only by an act of Congress” (Tananbaum 1988: 225).<sup>33</sup> President Eisenhower, however, was unwilling to accept this compromise, as it altered the Constitution to erode presidential power vis-à-vis executive agreements. President Eisenhower was well aware of the advantages provided for in using executive

agreements, and his intransigence in the face of opposition from his own party led to the eventual defeat of the Bricker revolt (Tananbaum 1988: 166).

Conservatives, led by Senator Bricker, assailed the treaty power, arguing, “American sovereignty and the American Constitution are threatened by treaty law” (quoted in R. Johnson 2006: 58). This was particularly the case when it came to human rights agreements, as conservatives feared that such treaties as the UN Universal Declaration of Human Rights might require states to alter social and economic programs (R. Johnson 2006: 58). Senator Bricker sought to “close ‘a loophole in our Constitution’ through which the American people could be subjected to ‘a tyrannical world government and a Marxist covenant on human rights’” (Tananbaum 1988: 157).<sup>34</sup> Subsequent renditions of the amendment focused on other aspects of the treaty power that conservatives found problematic. For instance, conservatives found fault with the supremacy of treaties in domestic law and included a provision that would require valid legislation before ratified treaties or signed executive agreements could go into effect. Others were inclined to seek limitations on presidential use of executive agreements, as they viewed their use as a usurpation of congressional power in foreign affairs.

While Senate coalitions for and against the Bricker Amendment and its various relatives were fluid in early 1954 (see Tananbaum 1988: chap. 5), the sixty votes in favor of the George Amendment was but a single vote shy of the Senate going on record as formally endorsing a constitutional amendment restricting the president’s use of executive agreements. What is more, given that the revised amendment would have formalized a role for the House of Representatives in international agreements, it is likely that it would have received the support necessary in the House to send it to the states for ratification. Indeed, the Bricker revolt was a significant broadside on the president’s use of executive agreements and put the White House on notice that the Senate clearly preferred formal Article II treaties when completing significant international agreements. It is also important to consider that the fight over the Bricker Amendment was not a partisan one but, rather, institutional. Most of the thirty-one senators that sided with President Eisenhower against the George Amendment were liberal Democrats, with the remainder being Republicans that shifted their original positions as a result of pressure from the president (Tananbaum 1988: chap. 5).

The underlying suspicions inherent in the Bricker revolt were main-

tained decades after the amendment's defeat. For example, more recent Senate opposition to various human rights accords was based on arguments similar to those made by Senator Bricker regarding the sovereignty of domestic and state law in regard to personal rights (Henkin 1995; Kaufman 1990; Kaufman and Whiteman 1988). The Brickerites were suspicious not only of international entanglements but also of unbridled executive and federal power, which they believed were best exhibited by the transformation of the treaty power (L. Johnson 1984: 108; Tananbaum 1988: 47–48). We see these oppositional themes continued throughout the modern era of treaty politics, as we demonstrate in our analysis of treaty politics in chapters 4 and 5. Despite this loss by conservatives, the closeness of the Bricker defeat sent a clear message to the executive: the Senate wanted its say when it came time to enter into significant international agreements, especially those that may trump congressional statute and the rights of the various states.

### The Case-Zablocki Act

Over time, the total number of international agreements (both executive agreements and treaties) entered into by the United States continued to increase, and presidents continued to use executive agreements much more than they did treaties. Accounting for the number of executive agreements vis-à-vis treaties became problematic, as the executive failed to keep an accurate accounting of international agreements other than treaties. During the 1960s, as the Vietnam War dragged on, congressional mistrust of the executive in foreign policy increased. Presidents Johnson and Nixon completed several secret executive agreements, committing the United States to significant security requirements without even the knowledge of the legislature (Edwards and Wayne 2006: 479–80; Fisher 2000; L. Johnson 1984; Shull 2006). Senator Henry Jackson (D-WA) characterized the Nixon-Kissinger strategy of back-channel diplomacy as “obsessive secrecy,” as these agreements constituted significant commitments on the part of the United States (Rudalevige 2005: 125). A new revolt emerged as a result, but this time it was among internationalists, such as Senator Fulbright (D-AR), who shared the Brickerites' suspicion of unilateral executive power in the realm of international security commitments (L. Johnson 1984; R. Johnson 2006).

The legislative product of this more recent opposition to presidential unilateralism in the field of international agreements was the Case-Zablocki Act of 1972 (Public Law 92-403). The Congress used this act to

broadcast to the executive branch that they wanted to be more involved in this area. A forerunner to the ultimate act was passed by the U.S. Senate in 1969 and expressed the sense of the Senate through resolutions in two respects. First, the Senate stated its opinion that the making of national commitments involving military obligations should involve joint action by the legislative and executive branches (S. Res. 85, 91st Cong., 1st sess. [1969]; see Fisher 2000: 58–62). A more specific resolution in 1972 (S. Res. 214, 92d Cong., 2d sess.) stated that agreements regarding military bases should take the form of treaties (Glennon 1990: 180–81).<sup>35</sup> Members of the Senate Foreign Relations Committee continued to press the Nixon White House to submit basing agreements as treaties. Senator Frank Church (D-ID) remarked that it was time for the Senate to “reassert itself in the treaty making area” (quoted in Finney 1972). The Senate stopped short of requiring a direct legislative role in executive agreements, though two pieces of more restrictive legislation were considered. One of the bills would have required Senate confirmation of executive agreements (S 3475, 92d Cong., 2d sess. [1972]), while the other bill (S 3637, 92d Cong., 2d sess. [1972]) would have disallowed funding for basing agreements that did not have the consent of the Senate.

In its final form, the Case-Zablocki Act requires that all international agreements other than treaties be reported to the foreign affairs committees of both the House and Senate within sixty days of their entering into force (McCormick 2005). As a result of lax implementation of the original act, it was further amended in 1977 and 1978 to require executive departments to transmit to the State Department the text of any new executive agreement, including oral agreements, so the agreements could be expeditiously reported to Congress (L. Johnson 1984). There were several additional attempts in the Senate during the 1970s to further limit the executive agreement option (Rudalevige 2005: 125). Several bills introduced in the mid-1970s for an Executive Agreements Review Act (e.g., S. Res. 24, 95th Cong., 1st sess. [1977]; see Glennon 1990: 181) would have provided “for congressional review of executive agreements by requiring they be transmitted to Congress, to become effective sixty days after transmittal unless disapproved by congressional resolution.” Hearings were held in both the Senate Judiciary Committee and the House Foreign Affairs Committee.<sup>36</sup>

In summary, with the Case-Zablocki efforts (the 1969 Senate resolutions, the 1972 statute, and the 1977 and 1978 amendments), the Congress went on record as wanting to see more treaties rather than executive agreements and as wanting to know more generally about what was hap-

pening on U.S. international commitments. Despite these efforts to reign in the president, executive agreements vastly outnumber treaties and remain the dominant form of international agreement. During the 1980s and 1990s, for example, the United States completed 6,796 international agreements, of which only 415, or 6.1 percent, were treaties submitted to the Senate for advice and consent. Additionally, the State Department has been lax in reporting executive agreements. It is not uncommon for there to be significant delays in the reporting of new agreements (Caruson 2002; L. Johnson 1984; Shull 2006). Additionally, when justifying an executive agreement, the links made by presidents to statutes for ex ante legislative authority to complete agreements are often decades old, precluding much legislative involvement (Caruson 2002; Rudalevige 2005: 206). Presidents persist in completing major agreements outside of the formal treaty process. For instance, most important trade agreements today are completed as congressional-executive agreements, including NAFTA, the General Agreement on Tariffs and Trade, and the Central American Free Trade Agreement.

### The Practical Effects of Bricker and Case

While Senator Bricker's efforts to amend the Constitution were repelled and while the Case-Zablocki Act is largely procedural, the two events have contributed to the way recent presidents account for how the Senate might respond when they consider the form their significant international agreements will take. Presidents often consider treating major agreements as executive agreements rather than as treaties; however, evidence suggests that presidents consider domestic and foreign politics when doing so (see Martin 2005). This is especially the case when precedent points to the use of a treaty rather than an executive agreement, as is the case with international agreements dealing with arms control, alliances, and human rights. For example, in 1990, President George H. W. Bush openly discussed treating an agreement with the Soviet Union on chemical weapons reduction as an executive agreement instead of a treaty, prompting a written rebuke by the Senate Foreign Relations Committee. Despite their mistreatment by the Senate historically, human rights agreements have always been submitted to the Senate as treaties. Presidents simply do not challenge the Senate's role in these cases, even though the Senate has routinely turned aside or eviscerated human rights conventions signed and submitted by presidents (Kaufman 1990; Spiro 2001: 1000–1001). We explore the alternative use of executive agreements and treaties systematically in chapters 2 and 3.

## Conclusion

The fact that presidents consider the likely opposition in the Senate prior to deciding whether to submit an international agreement as a treaty or to treat it as an executive agreement lends credence to the evasion hypothesis, an important plank of the received scholarly wisdom that presidential use of executive agreements is strategic (Margolis 1986; Lindsay 1994) and is evidence in support of the imperial presidency (Crenson and Ginsberg 2007; Rudalevidge 2005). For example, Lindsay (1994: 81–82) writes, “Presidents facing strong opposition in the Senate have an incentive to negotiate a treaty that reflects senatorial views . . . But presidents need not always heed their critics. Presidents can skirt a truculent Senate through the use of executive agreements.” Lindsay explains that even when agreements require congressional approval, “presidents prefer it to a treaty because they usually find it far easier to round up majority support in both chambers than a supermajority in the Senate.”

Why have legislators allowed for this shift in power, with the president now committing the United States to significant binding international agreements, sometimes without legislative consent and rarely through the standard treaty process? Our response to this question rests on the benefits provided to both the executive and legislature under the current treaty-making regime: efficiency and international faith in agreements signed by U.S. presidents. The benefits for the executive are obvious: their agreements are completed more quickly and with less interference from the legislature. Congress stands to gain in two general ways through the use of executive agreements. First, the Senate’s agenda remains uncluttered with the hundreds of agreements completed outside of the formal treaty process. This allows members to focus on the more significant diplomatic issues and those foreign policy issues more likely to provide direct personal and electoral benefits. Second, executive agreements provide an important role for the House of Representatives in diplomacy. By excluding the House from a formal role in the treaty process, the framers significantly diminished the influence of the lower chamber in diplomacy and foreign policy more broadly. Executive agreements, therefore, have increased the foreign policy influence of the House significantly, as we document systematically in chapter 6.

Hence, while much of the conflict that results over the treaty-making power points to the conclusion that presidents have usurped this power and routinely “evade” the Senate, our reading of history leads to a very different conclusion. While much of its early expansion may be rooted in

evading an isolationist legislature, the modern executive agreement has emerged as an efficient policy-making tool that has largely replaced the untenable treaty process on most routine matters and in some areas of significant policy. This significant change evolved as a result of constitutional construction through political practice. The political branches, encouraged by a complex policy context and unrestrained by the Supreme Court, altered the practical meaning of the Constitution to allow for international agreements other than treaties.

Informal boundaries exist, however, which serve to constrain presidential actions on international agreements. When presidents overstep their prerogatives on international agreements, Congress responds with attempts to reign in the executive, as exemplified by the Bricker revolt and the Case-Zablocki Act. Outside of these two high-profile instances of congressional opposition, the legislature has largely allowed—and in many cases encouraged—the policy evolution of executive agreements. While the responses of Congress to increased presidential power on treaties are limited in scope when they succeed, they send clear signals to the executive regarding what could happen should presidents continue to push the envelope of executive power. This logic suggests that presidents behave in a manner that will preserve this policy tool. Additionally, this logic suggests that Congress will be more inclined to allow greater discretion on international agreements when the majority's policy preferences coincide with the president's. In chapters 2 and 3, we examine the historical record of treaties and executive agreements more systematically, through quantitative analysis, and find substantial support for the logic of institutional efficiency and only limited support for strategically evasive behavior on the part of the presidency.