

Introduction: Power Grab or Institutional Bargain?

In early 1964, a mere fifteen months after the resolution of the Cuban Missile Crisis, President Lyndon Johnson sought to build a bridge to the Eastern Bloc by negotiating the first formal, bilateral treaty between the United States and the Soviet Union since the beginning of the Cold War. In Moscow on June 1, 1964, President Johnson and Secretary Khrushchev signed the pact, which would lead to the establishment of consulates in both countries. Johnson submitted this agreement as a treaty to the U.S. Senate for advice and consent, as required by Article II of the U.S. Constitution. Nearly three years later, after committee consideration and reconsideration, intensive lobbying campaigns on both sides, and eight days of final floor debate, the Senate finally approved the treaty by just three votes more than the required two-thirds supermajority.

Four decades later, on July 18, 2005, President George W. Bush and Indian prime minister Manmohan Singh announced a bilateral agreement that would allow for full civil nuclear cooperation between the two nations, whereby the United States would provide nuclear fuel and know-how to India. This agreement was followed up by a second, allowing international inspectors access, for the first time, to India's nuclear facilities. The agreements significantly improved relations between the world's two largest democracies but were controversial because India had not signed the Nuclear Non-Proliferation Treaty. While the president was free to complete the agreement as a treaty or executive agreement, he chose the latter. His decision, seemingly contrary to constitutional requirements, caused barely a ripple in the American press or in the U.S. Senate.

Different from what the framers of the U.S. Constitution intended, ex-

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Executive agreements are completed unilaterally by presidents. They do not require two-thirds support from the Senate as do treaties, yet they are considered interchangeable with treaties in the legal sense, both domestically and internationally (see *United States v. Pink*, 315 U.S. 203 [1942]).¹ Article II, Section 2, of the U.S. Constitution states 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.” No other form of international agreement is mentioned in the Constitution, other than confederations and alliances, which states are prohibited from entering (Article I, Section 10).

Despite the Constitution’s silence in regard to international agreements other than treaties (what practitioners in the State Department call “executive agreements”), “no objective distinction exists,” in the words of James Lindsay (1994: 82), between what is a treaty and what is an executive agreement, other than that treaties require Senate consent. Arthur Schlesinger (1973: 104) recounts one humorous exchange on the topic: “When Senator Gillette of Iowa asked the State Department in 1954 to make everything perfectly clear [on the distinction between treaties and executive agreements], the Department . . . replied ‘that a treaty was something they had to send to the Senate to get approval by two-thirds vote. An executive agreement was something they did not have to send to the Senate.’”²

The approach used by President Bush in the agreements with India exemplifies the dominant trend in the way modern presidents decide to formalize relations with other nations. Use of the classic Article II process, as followed by President Johnson on the U.S.-Soviet Consular Treaty, has become relatively rare. The modern era has seen presidents utilize executive agreements rather than submitting treaties to the U.S. Senate for advice and consent. Of the 15,894 international agreements completed by the United States between 1946 and 1999, only 912, or just 5.7 percent, were formal Article II treaties. From 1930 to 1945, the percentage of treaties was much greater, as 176 of 641 (27.5 percent) of international agreements were treaties. The year 1937 marks the last year that the number of treaties surpassed the number of executive agreements (Fisher 2001: 39, table II-2). The trend has continued into the twenty-first century. Through the first six years of the George W. Bush presidency (2001–6), the United States completed 1,172 international agreements. Only 73 (6.2 percent) were treaties transmitted to the Senate for advice and consent.³

Political observers in Washington and academia point to the rise of executive agreements as one of the most fundamental changes in the foreign policy process of the twentieth century. Some even argue that executive

agreements have pushed Article II treaties into the dustbin of history. Hyperbole aside, executive agreements have been used time and again to complete consequential international agreements, including such significant agreements as the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade; agreements on U.S. membership in the World Monetary Fund and World Bank; the Paris Peace Accords, ending U.S. involvement in the Vietnam War; the Quadripartite Agreement of 1971, which provided a diplomatic framework for dealing with West Berlin; U.S.-Israeli agreements in 1976 and 1979 that have made Israel the largest recipient of direct U.S. foreign aid; and the Kosovo Military Technical Agreement, which ended hostilities between the United States and Serbia in 1999. William Howell (2003: 19) notes that while the vast majority of executive agreements “concern very specific (and often technical) matters, the sheer number issued during the modern era has increased at such an astronomical rate that collectively they now constitute a vital means” by which presidents make foreign policy.

Thomas Franck and Edward Weisband (1979: 135) note, “Of the various foreign relations initiatives open to a country, the most crucial are the making of war and the undertaking of solemn commitments.” Making international agreements lies at the core of foreign policy, as such agreements affect a vast range of American foreign policies, including foreign trade, fishing rights, transportation, monetary policy, foreign aid, nuclear energy, international crime, immigration, terrorism, communication, space travel, environmental policy, human rights, arms proliferation, arms transfers, deployed military personnel, and military interventions. A drastic change in the way foreign commitments are approved, especially one that alters constitutional design and the separation of powers, should be considered major and fundamental.

Despite the topic’s importance, we know little about the rise of executive agreements beyond the basic trend previously identified. Political scientists have yet to deliver a comprehensive theoretical and empirical treatment of the topic and the implications for the domestic politics of international agreements. Political scientists routinely list executive agreements among the modern president’s unilateral powers, yet when doing so, scholars do not address their usage directly in their analyses (Canes-Wrone, Howell, and Lewis 2007; Howell 2003; Moe and Howell 1999; cf. Shull 2006, chap. 6). The paucity of systematic political science research on the domestic politics of international agreements lies in stark contrast with the attention given by scholars to the domestic politics of war and military force (see, e.g., Hess 2001; Howell and Pevehouse 2007). To be sure, a few

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legal and historic treatises on the rise of executive agreements exist (e.g., Ackerman and Golove 1995). Moreover, some recent systematic studies on the politics of the Senate treaty process have begun to emerge in academic journals (e.g., Auerswald and Maltzman 2003; DeLaet and Scott 2006). Yet much of what we know about treaty politics stems from book-length treatments of single cases (e.g., Caldwell 1991a; Moffett 1985).

As we will document shortly, strong conventional views of the domestic politics of international agreements and the institutional change that is the rise of executive agreements have nevertheless developed, despite these limitations. One of our purposes in writing this book is to offer a fresh theoretical account, based on multiple methods of evidence, for why presidents use executive agreements rather than treaties. A second purpose of the book is to describe and systematically explain the U.S. domestic politics of international agreements, including the politics that occur when presidents decide to take their treaties to the Senate.

Explaining the Change: Existing Perspectives

The dominant explanation for the rise in the presidential use of executive agreements over Article II treaties holds that presidents utilize executive agreements strategically to evade the Senate's formal treaty role (Crenson and Ginsberg 2007; Lindsay 1994; Margolis 1986; Nathan and Oliver 1994). This account of the change has been referred to as the "evasion hypothesis" (Martin 2000). Presidents are constrained considerably when using the treaty power, for treaties require supermajority advice and consent in the Senate. Moreover, the Senate often amends treaties in the process. A president thinking strategically might ask, why not therefore complete international agreements without that noisome step by evading the Senate altogether? Such a perspective proceeds from the fact that presidents, according to the U.S. Supreme Court (*Pink*, 351 U.S. 203), may legally use treaties and executive agreements interchangeably when completing their international commitments. Gary King and Lyn Ragsdale (1988: 112) explain, "According to this view, executive agreements enable presidents to enhance their autonomy in international affairs and thereby to promote their ability to act as independent policy makers."

Matthew Crenson and Benjamin Ginsberg (2007: 194–95), in their recent book entitled *Presidential Power: Unchecked and Unbalanced*, write, "The presidency affords broad opportunities to govern without interference. Executive orders, national security findings and directives, executive

agreements, proclamations . . . enable presidents to legislate unilaterally without consulting any legislators . . . In foreign policy, unilateral presidential actions in the form of executive agreements have virtually replaced treaties as the nation's chief foreign policy instruments." Similarly, Nathan and Oliver (1994: 99) contend that presidents employ "the executive agreement to circumvent Senate involvement in international agreements altogether." Underscoring this conventional wisdom is the notion that presidents evade the Senate treaty process due to political considerations. For example, Crenson and Ginsberg (2007: 320) write that decisions to use executive agreements rather than treaties to complete America's international commitments are "largely at the president's discretion and based mainly on political considerations." Lawrence Margolis (1986: 46–47), after examining trends in the use of executive agreements and treaties, finds that presidents' use of executive agreements corresponds with domestic political calculations. He concludes, "Hence, the treaty process, the Constitution's main safeguard against presidential excesses in foreign policy, is no longer much of a constraint." While examples abound of presidents completing major agreements as executive agreements rather than as treaties, research on presidential behavior in this realm has not really tackled the issue that Crenson and Ginsberg, among others, believe to be fairly settled—that modern presidents, with domestic political considerations in mind, routinely circumvent the Senate on their "chief" international agreements. To argue that treaties have been "virtually replaced" belies cases of modern presidents taking their consequential treaties to the Senate, even when they cannot bank on swift Senate consent.

This conventional wisdom of evasion with executive agreements dovetails nicely with recently resurgent unilateral theories of presidential power (P. J. Cooper 2002; Howell 2003; Mayer 2001; Shull 2006) and related discussions about the imperial presidency (Rudalevige 2005). According to the unilateral perspective of presidential power, the U.S. Constitution was designed to provide a general framework. The founders designed separate branches with checks and balances, but they had no way to anticipate what challenges might subsequently be presented to the new nation. Later, as society evolved, issue agendas ebbed and flowed, and crises occurred, the stage was set for additional constitutional context to be filled out.

Unilateral scholars expect that presidents will step into such contexts or power vacuums created by the environmental changes and develop unilateral authority above and beyond the shared power designed in our system. In this way of thinking, the unilateral presidency was and is in-

evitable. Howell (2003: 16) draws theoretical guidance from John Locke's notion of "prerogative powers": "According to Locke, certain public officials ought to enjoy the 'power to act according to discretion, for the publick good, without the prescription of the law and sometimes even against it' . . . These powers are necessary, Locke argued, because the designers of any constitution cannot foresee all future contingencies and therefore must permit certain discretionary allowances . . . In order to meet new expectations, and serve the public when laws cannot, the president may act unilaterally, even when neither the legislature nor the Constitution has mandated appropriate powers" (Howell quotes Locke [1689] 1988, 237).

Although emphasizing the time period since Watergate, Andrew Rudalevige's notion of the new imperial presidency also assumes an executive accumulation of power and similarly takes theoretical guidance from Locke. It is the nature of presidents to "push the limits of their power," argues Rudalevige (2005: ix), who adds that "it is inherent in the office's position in the constitutional framework." Power within a system of shared powers is relative—as presidents push the boundaries of power, it is up to Congress to maintain those boundaries (Rudalevige 2005: 14). When Congress fails to protect its position of power from executive encroachment, an imperial presidency is the natural outcome. The expansion of executive power was especially evident during and immediately following the Franklin Roosevelt presidency and is indicative of the modern presidency. One important component of the modern presidency is the ability of presidents to make use of "formal and informal powers on their own initiative" (Rudalevige 2005: 40). Modern presidents' reliance on unilateral authority is part and parcel to the development of the imperial presidency.

The unfettered use of executive agreements is an important plank of this view of presidential power (Rudalevige 2005: 48–49). Rudalevige (2005: 49) documents President Franklin Roosevelt's use of the method: "He [FDR] also concluded a series of executive agreements, thus evading the Senate ratification needed for treaties. One created provisional governments in Latin America that kept French possessions in the region away from the Vichy government. Another formed a Permanent Joint Board of Defense linking the American and Canadian military staffs. A third, more dramatically, transferred fifty destroyers to Britain in return for eight Caribbean naval bases." The last transaction violated existing statutes that banned the transfer of warships to belligerent nations.⁴ Crenson and Ginsberg (2007: 321) invoke FDR as well, writing that when he

first took office, he “had no intention of allowing a small number of senators to block his foreign policy decisions and initiated the now standard practice of conducting foreign policy via executive agreement rather than Article II treaty.”

Howell (2003) describes the resultant tool chest of such unilateral powers that presidents have assembled over time: executive orders, proclamations, and national security directives. While Howell does not focus at all on executive agreements in his empirical analysis, his tool kit includes executive agreements, which allow presidents “to unilaterally commit the United States to deals involving such issues as international trade, ocean fishing rights, open air space, environmental standards, and immigration patterns” (2003: 19). Executive agreements are typically viewed as holding both characteristics associated with unilateral powers: presidents have “the ability to move first and act alone” (Howell 2003: 15). Additionally, executive agreements were central to three major Supreme Court cases during the FDR administration that bolstered presidential prerogatives to act unilaterally, particularly in regard to external affairs (Howell 2003: 20–21).⁵ Executive agreements, therefore, are a significant part of the president’s unilateral powers. Their increased usage underlies unilateral theories of the modern presidency and, indirectly, claims of executive power aggrandizement; but, heretofore, the rise in executive agreements has been given little systematic empirical treatment by presidential scholars.⁶

That executive agreements are part of the president’s tool kit of unilateral powers is widely understood. However, this understanding overlooks the significant proportion of executive agreements that flow directly from statute or previously ratified treaties or require congressional action in order to take legal effect. Loch Johnson (1984) estimates that 87 percent of executive agreements completed from 1946 to 1972 were of this variety. In some instances, what scholars have lumped together with other unilateral powers (proclamations, national security directives, etc.) may not be entirely unilateral. In other words, presidents must at times act in conjunction with the Congress to complete an international agreement. We contend that the modern use of executive agreements deserves additional empirical scrutiny before scholars offer such broad, sweeping conclusions about how presidents use this important foreign policy power.

Additionally, it is unclear how modern presidents have utilized their authority to complete international agreements and whether or not Congress provides significant institutional constraints that structure presidents’ use of this power. If significant constraints exist, their use may not be as important a blow to the effective workings of a system of shared

power as has been argued. Conventional perspectives on treaty politics indicate presidents will evade the Senate, through their use of executive agreements, to complete agreements that would otherwise be blocked in the Senate. Hence, executive agreements provide a strategic alternative to the Article II treaty when the president faces off against an opposition majority party. It is possible, as unilateral theorists have demonstrated, that presidents may take seriously congressional constraints on their unilateral powers and utilize them most when Congress is least likely to object. For example, Howell (2003; 2005) demonstrates, both formally and empirically, that presidents more commonly employ significant executive orders when their own party controls both chambers of Congress. Similar patterns emerge when the theory of unilateral powers is applied to presidential uses of force. Constraints on presidents' unilateral actions depend, in part, on the discretion Congress affords presidents and the significance of the policies affected (Howell and Pevehouse 2007: 47). In a similar vein, in our theory that we present shortly, we take seriously the constraints placed on a president in a system of shared power.

The political tenor of the presidential use of executive agreements is only part of the picture, however. If presidents are using executive agreements to avoid tough treaty battles in the Senate, the treaty consent process may have become pro forma. Indeed, many observers suggest that it has indeed become a rubber-stamping affair. In summarizing the entire time series of treaties submitted by presidents to the Senate from 1789 to 2002, David M. O'Brien (2003: 73) stated, "While the Senate has ratified over 1,500 treaties, it rejected twenty-one proposed treaties. Of those, fifteen were rejected between 1789 and 1920, when the Senate refused to ratify the Treaty of Versailles, which ended World War I. By comparison, after 1920 just six treaties have failed to receive Senate ratification." Only three treaties were rejected after 1945. Along these lines, Lindsay (1994: 30–31) suggests that presidents may buttress their success rate on treaties by entering into executive agreements instead. Their use, he concludes, has eroded the significance of the treaty power. Crenson and Ginsburg (2007: 355) similarly conclude, "Presidents have all but abandoned the constitutional process by which the Senate ratifies treaties." Moreover, textbooks on American government (e.g., Lowi, Ginsberg, and Shepsle 2004; Tannahill 2004), the Congress (e.g., Davidson and Oleszek 2004), the presidency (e.g., Edwards and Wayne 2006), and American foreign policy (e.g., Hastedt 2000) spread far and wide this conventional wisdom of evasion on executive agreements coupled with a treaty process that is typically pro forma. Professors describe to college and university students

each semester, with clarity and concern, the provocative tale of evasion and the accompanying demise of the treaty consent process and thus of constitutional checks on presidential power.⁷

All in all, the juxtaposed perspective of the rise of executive agreements as presidential evasion and the resulting pro forma Senate treaty consent process provides, it would seem, for a cornerstone of presidential dominance in foreign policy and an important plank of the imperial presidency. With the rise of executive agreements, modern presidents appear to have grabbed the treaty power, intended by the framers to be shared with the Senate, and made it their own, thus diminishing an important check on executive power and thwarting the constitutional principle of shared power. Indeed, scholars conclude (and have not been challenged otherwise) that presidents now use executive agreements and treaties interchangeably as the result of the Senate's surrender of its treaty prerogatives.

Certainly, such provocative conclusions deserve empirical scrutiny. Why would the Senate, known for its collectively large ego and a history for guarding Senate prerogatives, stand idly by as modern presidents routinely stand the Constitution on its head? Given the apparent go-ahead of the Senate's surrender of its treaty prerogative, why do modern presidents submit any of their consequential treaties for Senate consent? If presidents are unconstrained, what is served by taking a treaty to the Senate and suffering the indignity of a high-profile rejection, as occurred to President Clinton with the Comprehensive Nuclear Test Ban Treaty in 1999? In this study, we seek the answers to two empirical questions. First, why has the United States witnessed the rise in use of the executive agreement mechanism by modern presidents? Second, when modern presidents decide to take their international agreements to the Senate as Article II treaties, what does the process entail, and what sort of politics are they likely to find? These two empirical questions are inextricably linked, as how we answer the second question certainly informs our answer to the first. As is typical of social scientists, we look to the vast empirical record for answers, employing both qualitative and quantitative methods. We asked practitioners for their views and delved into congressional archives. We start, of course, with an underlying theory.

Our Theoretical Framework

Our theoretical framework stands in stark contrast to the conventional wisdom that the rise in executive agreements represents a power grab by

an imperial presidency bent on supplanting constitutional practices through unilateral action. At its core, our framework proceeds from the notion that while treaties and executive agreements are, for the most part, legally interchangeable, they are not politically interchangeable. In other words, their use has important political ramifications that presidents are likely to consider. We believe that the juxtaposed logic of executive agreements and treaties found in the conventional understanding of their political use runs counter to a broader theoretical understanding of political incentives, interbranch relations, and institutional evolution. In this book, we recast the critical constitutional relationship between the president and Congress on international agreements. We see the two institutions as interdependent parts of an adaptive system that must together forge and implement internationally binding agreements with a vast array of nations and international organizations, all while maintaining the constitutional and political prerogatives of shared power (Neustadt 1960; M. Peterson 1990).

We see the rise of executive agreements as a rational response by the president and Congress to the challenges faced by the United States during the daunting complexity brought on by the emergence of its international leadership in the twentieth century. To be sure, under a system of shared powers, the framers created what many scholars have referred to as “an invitation to struggle” between the presidency and Congress in foreign affairs, which tends to force the institutions toward consensus in order to effectively make policy (Corwin 1984; Crabb and Holt 1984; Davidson 1988). In their struggle to confront an uncertain and dangerous world, where domestic political consensus is seen as a premium (Melanson 2000), the two political branches, with a supporting role played by the Supreme Court, constituted an institutional bargain grounded in requirements for efficiency that are demanded by modern realities. As is the case with institutional relationships in the U.S. system of shared powers, conflict often arises and is mitigated by the degree to which Congress and presidents are willing to work together. Hence, presidential power in this realm ebbs and flows much like it does in other areas of presidential-congressional relations.

The Framework Elaborated

Presidents do not make decisions on the format of international agreements while working in a vacuum; their relationship with Congress is multifaceted. Were a president to exercise unilateral authority in the diplomatic realm by using executive agreements on every single impor-

tant international agreement, it would have significant and negative repercussions for the president in many other areas of activity in which presidents are reliant on the Congress—including budgeting, confirmations to the executive branch and judiciary, and policy making. Therefore, congressional constraints are to be considered real and significant in a theory that considers mechanisms of shared power.

Moreover, if presidents proceeded in a truly unilateral fashion, with no regard for the Senate or House, the vast majority of such agreements would be codified but essentially hollow, because presidents are, in fact, reliant on the Congress for legislation to implement international agreements. Provisions within executive agreements—such as the nuclear deal between President Bush and Indian prime minister Manmohan Singh, mentioned previously—often must be processed through the House and Senate because they alter existing statutes, require funding, or are a result of Congress having delegated the initial authority to negotiate the agreement to the president while maintaining a two-chamber approval process. When pursuing approval for NAFTA, the Central American Free Trade Agreement (CAFTA), and other recent multilateral and bilateral trade agreements, presidents have had to personally lobby members of Congress. Agreements involving foreign aid require the Congress to appropriate funds. Moreover, formally ratified treaties often require implementation legislation from Congress to provide funding, authorizations, and changes in domestic law.⁸ If the Senate were being subverted on a regular basis by presidential use of executive agreements, we would expect at least one senator to stand up and filibuster the accompanying attempt to pass implementation or funding legislation.

Additionally, what incentives are there for the chair of the Senate Foreign Relations Committee to allow presidents to run roughshod over their constitutional prerogatives? That the Senate does not regularly throw executive agreements back in the president's face suggests two possible scenarios. First, Congress might completely defer to the president on international agreements generally. Given the propensity of the Senate to quibble with the president on the content of submitted treaties (Auerswald and Maltzman 2003) and the wherewithal of some members, such as long-serving senator Robert Byrd (D-WV), to guard their constitutional prerogatives, this scenario is highly unlikely. Evidence from our in-depth interviews around Washington bolsters this unlikelihood. One senior Senate staffer working for the Senate Foreign Relations Committee said, "If there was an end run around the Senate and the Senate was divided on the matter, there would be a backlash." A senior State Department official

working as a Senate liaison concluded, “I’ve never gotten a phone call or my boss hasn’t with someone with Senate Foreign Relations saying, ‘Why is something an executive agreement and not a treaty? What are you guys trying to do to us?’ That just hasn’t happened.”⁹

Second and alternatively, the Senate (and Congress more generally) may, more or less, be a willing party in this trend. We posit that this is indeed the case. We argue that in the area of international agreements, the president and Congress participate in what Richard Neustadt (1960: 26) calls “a government of separated institutions *sharing* power.” Along these lines, Mark Peterson (1990: 2), describing his “tandem institutions” perspective, speaks of “the symbiotic relationship of the president and Congress in the legislative arena and of the elaborate contexts in which the institutional interactions are carried out.” Peterson posits a decision-making system consisting of the White House and Capitol Hill, which together are responsible for collective solutions. Peterson’s framework fits well with Neustadt’s framework built around the power of persuasion. To Neustadt, the Congress is one of several constituencies that the president must seek to influence through persuasion, because formal powers only get a president so far toward their desired outcomes. As the president needs the Congress for implementing and funding the provisions of international agreements, we find this perspective helpful here. Approaching the topic of presidential-congressional relations on international agreements from this perspective leads to a very different interpretation of the rise of executive agreements than the conventional understanding that emphasizes unilateral action at the expense of the Senate in the domestic politics of international agreements.

While Neustadt emphasizes persuasive power and Peterson points to the propensity of the institutions to work in tandem to solve policy problems through the legislative process, the unilateral options provided presidents by the use of executive agreements differs considerably, as presidents are able to make policy outside of the legislative process. Their ability to do so, however, hinges on the degree to which the legislature is willing to grant discretion to the executive. Theories of delegation that emphasize the degree to which Congress grants discretion to the executive therefore allow us to gain traction in explaining why the Senate (and Congress more generally) might allow presidents greater authority when completing international agreements than is set forth in the Constitution. The legislative delegation of power to the executive is a common feature of modern American government. Delegation to the executive branch by Congress hit its stride during the massive expansion of the federal gov-

ernment during the FDR years, at about the same time that executive agreements became the primary mode for completing international agreements. Trade legislation, for example, a delegation of Congress's commerce power, provides important benefits for congressional influence on trade politics while maintaining strict legislative oversight and the need for legislative approval (O'Halloran 1993).

Epstein and O'Halloran, in their book *Delegating Powers*, outline the reasons Congress delegates authority to the executive. The two most obvious reasons, they argue, are that "Congress delegates to reduce its workload and to take advantage of agency expertise" (1999: 48; see also Ripley and Franklin 1984). A less obvious reason still critical to explaining delegation is that Congress delegates to promote political and institutional efficiency. Epstein and O'Halloran (1999: 230) posit that, to promote policy making and political efficiency, Congress will delegate greater authority to the executive when the informational content of an issue is high and complex and where the ratio of political benefits to costs are low. Foreign policy fits both of these conditions quite well, as the executive tends to maintain informational advantages and as the electoral payoffs and district-level benefits for members of Congress are minimized (Canes-Wrone, Howell, and Lewis 2007; Wildavsky 1966). When the legislative benefits of delegation are given full consideration, this mode of policy making fits well the logic of a system of separation of powers, rather than an abdication of power on the part of the legislature. This is especially the case should Congress take its oversight role seriously and maintain checks on the authority it delegates (Epstein and O'Halloran 1999). In the realm of war powers, for example, Fisher (2000: xiv) argues that congressional quiescence has amounted to an abdication of constitutional power rather than delegation, because Congress has failed to maintain significant checks on presidential actions.

Institutional Incentives for System Efficiency

In terms of institutional incentives for the two branches, it is clear that the president benefits from having the ability to forge executive agreements. Such agreements enter into force much more quickly than would occur under the constitutional process. But what is in it for the Congress? Few scholars have considered congressional thought on these developments; most focus almost exclusively on the rise of executive agreements from the president's perspective. How does a balanced, interbranch system produce an extraconstitutional policy tool for one branch (executive agreements for the president) while seemingly slighting the constitutional process of

the other branch (Senate treaty consent)? Is this not the executive power grab that troubles contemporary observers of presidential politics? We contend that it is not and that the Congress is complicit in this policy evolution. This becomes apparent as we begin to explore reasons why the Congress would be willing to allow the rise of executive agreements.

We see the rise of executive agreements as a fundamental, rational response by the president and Congress to the challenges faced by the United States during the daunting complexity brought on by the emergence of its international leadership in the twentieth century. In an increasingly complex world, the Senate is willing to allow presidents and their administrations to deal with the logistical challenge of annually processing hundreds of such agreements. Processing such a workload through the Article II process would grind the presidential-congressional system to a halt, at least in regard to foreign policy, at both ends of Pennsylvania Avenue. To gain the two-thirds majority needed, presidents, their White House staff, and State Department officials would spend constant time coordinating with the Senate Foreign Relations Committee. One high-level and long-serving official in the State Department's Office of the Legal Advisor reflected, "The treaty process is a drain on the president's time. There are issues of economy and efficiency, which is why we have the rise in preauthorized executive agreements."¹⁰

For its part, if all international agreements were completed as Article II treaties, the Senate agenda would be inundated with foreign policy minutiae. Even the Congressional Research Service's Louis Fisher, who, in his many writings, has long disdained the increasing power of the presidency vis-à-vis the Congress, allows for the possibility that the growth of executive agreements can be accounted for by "the sheer increase in volume of the amount of business and contacts between the United States and other countries"; he adds, "Many observers believe it would be impractical to submit every international agreement the United States enters to the Senate as a treaty" (2001: 40). It is striking that, when asked about the issue, key legislative staffers and executive bureaucrats in the process focus on executive agreements as a mechanism of efficiency rather than strategic evasion. One staffer in the State Department's Office of the Assistant Legal Adviser for Treaty Affairs stated, "No one's looking to evade; they're looking to streamline the process." A senior staffer on the Senate Foreign Relations Committee concluded, "It's just an efficiency matter. The reality is, as the Senate's plate gets fuller and fuller, the process is cumbersome . . . [and] delay can be substantial." The staffer maintained that executive agreements are "a quicker way of doing things."¹¹

If all international agreements were sent to the Senate for advice and consent, the Senate Foreign Relations Committee would become primarily a treaty processing plant. Given the goals senators pursue, which include reelection, effective policy making, and institutional prestige (Fenno 1973), it is difficult to imagine that much would be gained in service of those goals if the committee's primary job was to rubber-stamp the president's treaties. Furthermore, if the committee were to faithfully exercise its institutional responsibility of vetting the agreements, it would get nothing else done. The likely outcome is that treaties would be given consent en masse, as committee members leaned on the diplomatic expertise of the executive branch and those that initially negotiated the agreements. The treaty approval process would become a farce. A more practical solution for the Senate would be to delegate much of the treaty-making power to the president, by allowing for executive agreements for the vast majority of cases, while maintaining the Article II consent process for the truly significant commitments and those agreements that alter domestic law (e.g., tax treaties).

In addition to practitioners, a few scholars have also suggested that executive agreements provide an efficient mechanism to get things done in a busy international system. In examining two centuries' worth of aggregated time series data, King and Ragsdale (1988: 113) speculated that this may be the case: "Presidents and a growing executive branch engage generally in more activities to keep up with the constant expansion of foreign policy. In their attempts to supervise foreign policy, presidents use executive agreements as convenient devices that accommodate the intricacies and details of the foreign policy environment rather than as political devices to circumvent the Senate." Edward Corwin's conclusions (1984: 243) are similar: "It is evident that if an executive agreement is a convenient instrument for carrying out a conceded executive power or if an executive agreement, in the broader sense of the term, is a convenient instrument for effectuating a power of Congress, or merged powers of President and Congress, then the employment of this method of reaching an understanding with another government cannot be warrantably characterized as an 'evasion' of the treaty-making power in which the Senate participates." Our theory, then, rests on the reduced costs incurred by senators when they allow executive discretion by delegating authority on international agreements.

In addition to eschewing the evasion hypothesis and thus the conventional understanding that executive agreements are part and parcel to the imperial presidency, our logic leads to a very different view of the Senate

treaty consent process. In exchange for allowing the president some leeway in utilizing executive agreements, we expect that the most important international agreements will be submitted as treaties per the original process designed in the Constitution. Executive agreements do not replace the Article II treaty process altogether, especially when significant international commitments are considered. The Senate is a willing partner in the policy innovation of the executive agreement, provided that the Senate still processes the most salient international agreement issues of the day as treaties.

The exception to this institutional bargain on treaties occurs when the Congress gives its formal consent, through legislation, for presidents to enter into a certain type of international agreement as an executive agreement, rather than as a treaty. When Congress delegates to the president its constitutional prerogative to regulate foreign commerce, for example, it does so by requiring that presidents submit their trade agreements to the Congress (not just the Senate) for approval. An example of such legislation includes the Omnibus Trade and Competitiveness Act of 1988, which requires bicameral approval of trade agreements. Hence, whereas the Senate stands to benefit from this bargain in terms of institutional efficiency, the House of Representatives also stands to benefit from the use of executive agreements, as it becomes a full partner in giving consent (or delegating authority) on international agreements. If, for instance, we find a very active House as a result of the executive agreement innovation, then that chamber, specifically, has gained from this important institutional change.

If, in order to maintain this bargain, presidents submit consequential and controversial international agreements as treaties, the remaining treaty process should be highly political, not *pro forma*, because it provides the political theater and struggle we would expect of shared power. In addition to explaining the rise of executive agreements, a second main purpose of this book is to take the reader inside the politics of treaty advice and consent in the U.S. Senate. As we will show, politics abound in the treaty consent process.

We by no means intend to argue that this bargain between branches is sustained without conflict. A strong element of self-institutional interest is certainly present, as we would expect to see in all vibrant democratic political systems. Individual presidents, for example, often elevate their executive agreements through public statements in pursuit of their foreign policy agendas (Caruson and Farrar-Myers 2007). Moreover, battles can occur between the branches on international agreements, particularly when boundaries are pushed and players believe the bargain struck either is a poor one or is being abused. At two key junctures in the post-World

War II era, presidents became too aggressive in their use of executive agreements, and in both cases, Congress responded strongly to reel in presidents who were pushing the proverbial envelope. As we describe in some detail in chapter 1, the proposal of the Bricker Amendment, pursued as an amendment to the U.S. Constitution during the 1950s, was a reaction to the overuse of executive agreements by Presidents Roosevelt and Truman, and Congress's Case-Zablocki Act in the 1970s lodged a statutory protest of presidential overuse of executive agreements, particularly secret agreements. In both cases, presidents obliged, and the institutional bargain was maintained.

Presidents, of course, are not the only plausible abusers of the international agreement process. At other times, Congress has pushed the envelope, making it difficult for presidents to maintain a modicum of foreign policy rationality. Such congressional recklessness provided the impetus for the rise of executive agreements on the part of internationalists in both the legislative and executive branches prior to World War II (see Ackerman and Golove 1995). During the late nineteenth and early twentieth centuries, the Senate would routinely reject significant treaties after years of U.S. negotiation, prompting critics to look for an alternative, which President Franklin Roosevelt found in the executive agreement mechanism. In the modern era, on occasion, the rules of the Senate have been exploited to block consideration of a treaty that has widespread support and to delay or reject ratification, placing the United States in an untenable diplomatic position. As we profile in chapter 4, this was the case with the Genocide Convention in the 1980s and the Comprehensive Nuclear Test Ban Treaty in the 1990s. However, both branches have an incentive to work things out. As long as the branches work in conjunction and maintain boundaries, this interbranch adaptation to a changing environment will work well as a self-correcting system.

Constitutional Construction

Some scholars have been critical of the Article II treaty process. James Sundquist (1992), for example, laments the two-thirds requirement, which effectively killed a number of majority-supported pacts between World Wars I and II. Among these failures was the Treaty of Versailles, which ended World War I, and the League of Nations. We acknowledge that the Article II treaty power was not as clearly conceived as it could have been and that practitioners of foreign policy recognized this problem following the foreign policy failures of the late nineteenth and early twentieth centuries. However, such criticism is only useful to a degree and not

especially productive given the barriers to constitutional amendment. The founders had only a handful of countries in mind when they wrote the rigorous treaty process of Article II; they did not envision the vast international system in which the United States now participates. The executive agreement serves as a tool to provide flexibility in the Constitution where a strict interpretation finds none.

Tying the discussion back to unilateral theory and the imperial presidency, this institutional change and constitutional evolution of executive agreements appears intellectually consistent with at least the front end of both Howell's (2003) and Rudalevige's (2005) frameworks. Both scholars set up their theories with the governing context having outgrown the general framework provided by the Constitution. Indeed, that occurred in the case of international agreements. It would be virtually impossible, as we discussed earlier, to process through the Senate treaty process the hundreds of international agreements that presidents pursue each year. Hence, the need for a policy tool like the executive agreement is not that far off from theoretical assumptions of unilateral scholars. The executive agreement mechanism also permits the president to act unilaterally at times—without the Congress joining in—through so-called sole executive agreements (though these are a small minority of all executive agreements), which derive not from congressional delegation but from the president's Article II powers. Moreover, executive agreements (and treaties, for that matter) provide the president with a first-mover advantage and antecedent power when congressional approval is not required. This is an important characteristic of unilateral powers generally (Howell 2003).

The key difference between the institutional change in the rise of executive agreements and the assumptions of unilateral theory and the imperial presidency is that the president and Congress shared in and benefited from crafting systemic responses to environmental changes that could not be dealt with by original design. The president did not simply step into a vacuum and engage in a power grab, leaving the Congress (and the separation of powers) waving in the wind. In the face of uncertainty about constitutional processes, the branches together formed a new constitutional process in order to adapt the system to a changing international environment, which had outgrown the original document. The difference is that the separation of powers, not just the president, framed the institutional change. Louis Fisher's insights on constitutional dialogues and constitutional development are helpful here: "What is 'final' at one stage of our political development, may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Court doctrines. Through

this never-ending dialogue, all three branches are able to expose weaknesses, hold excess in check, and gradually forge a consensus on constitutional issues” (1988: 275).

The type of institutional evolution exhibited by the rise of executive agreements fits especially well with Keith Whittington’s (1999) theory in *Constitutional Construction: Divided Powers and Constitutional Meaning*. Whittington posits that the Constitution has a dual nature. The first and best-known dimension is constitutional interpretation, or the extent to which the Constitution acts as a binding set of rules enforced by the courts against government actors. However, Whittington argues that the Constitution also permeates the political arena, to guide and constrain political actors in the public policy process. In so doing, the Constitution also depends on political actors, “both to formulate authoritative constitutional requirements and to enforce those fundamental settlements in the future” (Whittington 1999: 1). Whittington characterizes this process, by which constitutional meaning is shaped within politics at the same time that politics is shaped by the Constitution, as one of construction, rather than interpretation. He further argues that constitutional ambiguities and changes in the political situation push political actors to construct their own constitutional understanding. Hence, the U.S. Constitution constrains institutional behavior while at the same time empowering officials, through political practice, to alter its practical meaning. According to Whittington’s framework, the U.S. Constitution both binds and empowers government officials.

This framework works quite well with the interbranch nature of the rise of executive agreements. The Article II process had created significant ambiguities as the international environment faced by the American national government changed fundamentally in the twentieth century. This context set the stage for constitutional construction—in this case, a new process for international agreements. Still, Whittington writes about the binding nature of the Constitution. In the case of the rise of executive agreements, the separation of powers constrained what was possible and required a presidential-congressional adaptation (or bargain, to use our language from earlier), not a unilateral construction by the president.

Theoretical Implications

In summary, presidents increasingly utilize executive agreements rather than submitting treaties for ratification by the Senate. Political observers

in Washington and academia point to the rise of executive agreements as one of the most important changes in the way foreign policy is constructed in the modern presidency era. According to these observers, the rise in the use of executive agreements, supplanting Article II treaties, is a cornerstone of presidential dominance in foreign policy and the imperial presidency more generally, and executive agreements are often cited as a unilateral power of the president. They cite the power of presidents, seemingly at will, to complete their international agreements as executive agreements rather than treaties, thus evading the constitutional requirements of a formal treaty. To continue the conventional wisdom, with politically controversial matters accomplished via executive agreements, it is easy to understand why floor defeats of treaties over the last half century can be counted on one hand. Treaty consent in the Senate becomes pro forma.

Our theoretical framework of the rise of executive agreements views the change and the presidential-congressional relationship in a very different light. While treaties and executive agreements are, for the most part, legally interchangeable, they are not politically interchangeable. Hence, we argue that in the arena of international agreements, the president and Congress participate in a system of separated institutions sharing power (Neustadt 1960). While a strong element of self-institutional interest is certainly present and while battles can occur, the president and Congress need one another to accomplish their diplomatic and policy goals (M. Peterson 1990). In the face of uncertainty about constitutional processes, the branches have formed a type of self-correcting system via the executive agreement so that they may adapt to a changing international environment.

As is the case for empirical work addressing the politics of shared power, the theoretical argument of this book has important normative implications. The undertone of the literature on imperial presidency is that presidents have usurped the separation of powers—or at least that Congress has not effectively curtailed presidents' aggrandizement of power. While it is quite apparent that presidential powers in foreign affairs have increased during the modern era, what remains unclear is whether or not the change in how the treaty power is applied in practice is outside the boundaries of theories of constitutional change. Our theory suggests that the change is well within the system of shared powers. The rise in executive agreements has afforded the U.S. political system, in the making of international commitments, an opportunity to respond rationally to a volatile international system. Furthermore, if Congress has been complicit in the rise of executive agreements and if presidents are attuned to con-

gressional constraints, their use may not be as problematic as is assumed by the concerns voiced throughout much of the literature.

Plan of the Book

The interview evidence, case studies, and quantitative analysis in the chapters of this book significantly bolster our theoretical perspective. In chapter 1, we trace the historical change in how presidents complete international agreements and seek congressional consent. Readers will see that the treaty process has changed remarkably since the early days of the republic. 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. We discuss at length the treaty process and its evolution, in terms of both constitutional construction and practical politics. We also emphasize describing the rise of executive agreements as an alternative to traditional treaties, as well as the legal and political arguments underpinning this important innovation.

In chapter 2, we ponder and test several specific research questions regarding the rise of executive agreements. What factors contribute to the explosion of executive agreements vis-à-vis treaties? Do presidents increasingly turn to executive agreements because the political environment has become tougher in the last few decades, making it harder to get treaties through, or do presidents increasingly turn to them (and Congresses allow them) for efficiency reasons related to the increasingly complex international environment? In chapter 2, we develop more explicitly the theoretical framework outlined in this introduction. In doing so, we derive several testable hypotheses and attempt to assess how well the competing perspectives explain the rise of the use of executive agreements in the modern era. Our across-time analysis suggests that partisan political concerns are not as important as conventional wisdom suggests and that factors relevant to the Senate Foreign Relations Committee and the international environment are of primary importance. In the analysis, we examine all international agreements from 1948 to 1998, as well as the subset of major international agreements. Consistent with our theoretical framework, the evasion hypothesis, which emphasizes partisan and strategic explanations, receives next to no support. The analysis supports our theoretical claim that efficiency drives the process, but it also suggests that for the most significant treaties, political strategy may play a role, though

in ways different from the standard partisan theories of separation of powers. Instead, ideological considerations matter most in structuring interbranch relations on this topic.

Chapter 3 engages directly the topic of presidential decision making by exploring the choices that presidents face in determining the form their international agreements will take in terms of domestic law. Presidents are unconstrained legally in their choice. However, clear political constraints remain. We discuss how strategic politics and our efficiency perspective might play a role in the process, and we add to this familiar discussion the important role of international politics. Building on the work of Lisa Martin (2000), we argue that agreement partners are also interested in the president's choice; hence, their decisions have international ramifications. Through a combination of quantitative evidence and interviews with Washington practitioners, we find that the process of agreement classification is institutionalized in the State Department on all but major international agreements. On the major ones, we still find little evidence of the evasion hypothesis, while institutional efficiency considerations continue to be robust in their significance. This dovetails with interview evidence that suggests that congressional leaders are willing to allow presidents to use executive agreements in many cases so that their agendas remain uncluttered.

We next turn to the treaty consent process in the Senate. Our theoretical framework would suggest that presidents would still send many major items through as treaties. These major items should not be expected to be entirely pro forma, as the strategic implications of presidential evasion suggest. Indeed, we expect that there should be some element of politics on major items sent through as treaties. In chapter 4, we present case studies of the U.S.-Soviet Consular Treaty, the Panama Canal Treaties, the Genocide Convention, and the Comprehensive Nuclear Test Ban Treaty. Our primary and secondary evidence is based in part on work in congressional archives and is suggestive of the costly politics and significant delay that can arise when presidents send their important international agreements to the Senate for formal consent.

Moving beyond case studies, we next turn to a more comprehensive examination of treaty politics and the delay that commonly occurs as presidents battle for their treaties. Our purpose in chapter 5 is to explain the delay or speed of treaty consideration and to explain why some treaties falter in the consent process. We examine all treaties before the Senate from 1949 to 2000 and test whether treaties stall due to strategic-political reasons or if gridlock in the Senate treaty process is due to other institu-

tional considerations. We reveal some environmental and treaty-specific factors that make passing treaties difficult, that support a shared powers framework, and that are explained by interesting political considerations, which are primarily ideological rather than partisan. In the final analysis, we do find that politics are significant in the Senate treaty process, as the framers intended. The process, rather than being pro forma, is indeed political and presents difficult problems for modern presidents when they seek Senate approval of their international agreements.

We move to the other side of Capitol Hill in chapter 6. Naturally, most analyses of international agreements focus on the Senate-president relationship, as the House of Representatives is explicitly excluded from the treaty process by the Constitution. The rise of executive agreements, however, has altered the original constitutional landscape and provided for a significant role for the House. Our theory provides that the House stands to gain significant benefits as it legislates on executive agreements and exercises its institutional role of oversight. Typically, scholars point to the requirement of appropriations and implementation of treaties—roles the House has traditionally played. We find, however, through examination of congressional hearings on international agreements since the 1970s, that the House is fundamentally interested in the many facets of the international agreement process. For example, the House, when compared to the Senate, is especially significant in the oversight of international agreements. Hence, the rise of executive agreements, the most common variety being the congressional-executive agreement, has altered the bicameral relationship in foreign policy, allowing for direct involvement by the House of Representatives, which a strict reading of Article II of the Constitution does not afford. The House, not just the Senate, has something to gain through presidential use of executive agreements. The lower chamber is not so forgotten after all.

We begin the conclusion of this book by highlighting the answers to our core research questions, which on balance provide a wide sweep of support for our theoretical argument. In so doing, we incorporate two of President George W. Bush's agenda items involving international agreements: the Law of the Sea Treaty and the recent twenty-billion-dollar arms pact with Saudi Arabia and its neighbors. We then contemplate what our theoretical argument and these answers mean for theories of presidential power and presidential-congressional relations and for models of institutional change. We finish the conclusion and the book with a discussion of the key normative implications of our findings.