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The Powers of War and Peace

THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11

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PREFACE

As I was finishing the manuscript for this book, controversy arose over the Bush administration's legal approach to the September 11, 2001, attacks. The legal issues raised by the war on terrorism are novel, complex, and unprecedented. They range from the use of force, to targeting, to the detention and interrogation of enemy combatants who do not fight on behalf of a nation; this is a conflict that knows no borders. As a deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice from 2001 to 2003, I participated in developing the Bush administration's legal policies in the war on terrorism. This book, however, does not attempt to mount a specific defense of those policies; in fact, I conceived of the book and began work on it well before I left for Washington, D.C. Rather, my purpose here is to explore the constitutional framework that gave rise to the policies. This is an important step of analysis that must occur before undertaking discussion of the substance of the war on terrorism. We cannot begin to evaluate the Bush administration's legal approach to that war without first understanding the Constitution's distribution of the foreign affairs power among the branches of government.

Nor can we discuss the legality of the Afghanistan or Iraq invasions without first identifying the scope of the president's commander-in-chief power to use force unilaterally and the tools at Congress's disposal to restrain him. Similarly, arguing over whether the Geneva Conventions apply to terrorists may prove fruitless without first unpacking the Constitution's allocation of the power to interpret treaties among the president, Senate, Congress, and the courts. To debate these issues without understanding

their constitutional context would be akin to arguing about government policy toward speech without knowing the standards established by the First Amendment.

This book proposes a constitutional theory of the foreign affairs power that differs, at times sharply, from the conventional academic wisdom but that describes more accurately the actual practice of the three branches of government. More than a decade has passed since major legal works about the war and treaty powers appeared: John Hart Ely's *War and Responsibility* (1993), Thomas Franck's *Political Questions/Judicial Answers* (1992), Michael Glennon's *Constitutional Diplomacy* (1990), and Harold Koh's *National Security Constitution* (1990). They adopted similar constitutional frameworks and responded to the same geopolitical environment. Arguing that all uses of force abroad, except those in self-defense, must be pre-approved by Congress, these scholars, some of the leading lights of the American legal academy, criticized U.S. military interventions during and in the immediate aftermath of the Cold War. They posited a similar partnership of equals between the president and Congress with regard to most other foreign affairs functions, such as making, breaking, and interpreting treaties. They also argued for an intrusive judicial role in overseeing this legalistic arrangement to keep the presidency within its restricted bounds.

I argue that the constitutional text, structure, and history lead to a different approach. Chapters 2–4 reconstruct the historical understanding of the constitutional text and structure held by the Framers by exploring the Constitution's eighteenth-century British roots, the first state constitutions and the Articles of Confederation, and the drafting and ratification of the Constitution in 1787 and 1788. These chapters conclude that the Constitution depends less on fixed legal processes for decisionmaking and more on the political interaction of the executive and legislative branches. It allocates different powers to the president, Senate, and Congress that allow them to shape different processes depending on the contemporary demands of the international system and their relative political position. The Constitution does not require a single, correct method for making war or peace, for making international agreements or breaking them, or for interpreting and enforcing international law. Rather, it allows the branches to cooperate or compete in the foreign affairs field by relying on their unique constitutional powers. Chapter 5 develops this approach in the context of

the war power, while chapters 6 and 7 apply it to the making and breaking of peace through the Constitution's handling of treaties. Chapter 8 explores the relationship between lawmaking and treatymaking. Chapter 9 concludes with some thoughts about the future. These latter chapters show in more specific contexts how a flexible decisionmaking system allows the political branches of government to shape more flexible policies for the international political system of their time.

At the time such leading scholarly works as those mentioned above were written, the nature of war continued to be thought of as occurring solely between nation-states. The Persian Gulf War had just witnessed an American-led coalition's defeat of Iraq's grab for Kuwait—a traditional war over territory fought by the regular armed forces of nation-states. Nation-states were presumed to be both rational and susceptible to various levels of coercion, with force often being used only as a last resort. Warfare, if it were to come, would take predictable forms with clearly identified armed forces seeking to take control over territory and civilian populations. In 1993, the military strength and economic size of the United States had begun to so outdistance its nearest competitors that American thinkers may well have assumed that there were no significant military threats on the horizon. The Soviet Union's dissolution seemed to render hypothetical what had been the most compelling case against a requirement of ex ante congressional approval for military hostilities: the need for swift presidential action to respond to a Soviet nuclear first strike. The disappearance of the threat of a war that could directly harm American national security allowed policymakers and intellectuals the luxury to envision a future in which they could reduce the overall level of international armed conflict. In such an environment, a constitutional model that required the approval of multiple institutions before the United States could use force may have made some sense.

The world after September 11, 2001, however, is very different. It is no longer clear that the United States must seek to reduce the amount of warfare, and it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force. Rather than disappearing from the world, the threat of war may well be increasing. Threats now come from at least three primary sources: the easy availability of the knowledge and technology to create weapons of mass destruction (WMD); the emergence of rogue nations; and the rise of international

terrorism of the kind represented by the al Qaeda terrorist organization. Because of these developments, the United States may no longer have the luxury of assuming that military conflict is a thing of the past, and the need to use force may actually be dramatically higher than before. In particular, the emergence of direct threats to the United States that are more difficult to detect and prevent may demand that the United States undertake preemptive military action to prevent these threats from coming to fruition. The costs of inaction, for example, by allowing the vetoes of multiple decisionmakers to block warmaking, could entail much higher costs than scholars in the 1990s had envisioned. At the time of the Cold War, the costs to American national security of refraining from the use of force in places like Haiti, Somalia, or Kosovo would have appeared negligible. The September 11, 2001, terrorist attacks, however, demonstrate that the costs of inaction can be extremely high—the possibility of a direct attack on the United States and the deaths of thousands of civilians.

These new threats to American national security, driven by changes in the international environment, should change the way we think about the relationship between the process and substance of the warmaking system. The scholarly consensus of the 1990s might have been more appropriate at the end of the Cold War, when conventional warfare between nation-states remained the chief focus of concern and few threats seemed to challenge American national security. The international system allowed the United States to choose a warmaking system that placed a premium on consensus, time for deliberation, and the approval of multiple institutions.

If, however, the nature and the level of threats are increasing, and military force unfortunately remains the most effective means for responding to those threats, then it makes little sense to commit our political system to a single method for making war. At the very least it seems clear that we should not adopt a warmaking process that contains a built-in presumption against using force abroad. Earlier scholarly approaches assumed that in the absence of government action peace would generally be the default state. The events of September 11 strongly suggest that this assumption is no longer realistic. The United States must have the option to use force earlier and more quickly than in the past. This book proposes that we understand our Constitution's allocation of the foreign affairs power to permit a flexible decisionmaking system that can respond

to such sweeping changes in the international system and in America's national security posture.

I have accumulated a number of debts over the years in completing this project. Akhil Amar first taught me constitutional history, Harold Koh sparked my interest in foreign affairs and the Constitution, and Peter Schuck showed me the importance of understanding politics for understanding law. Laurence Silberman showed me how the worlds of law and national security work in practice. My colleagues David Caron, Jesse Choper, Andrew Guzman, Sandy Kadish, Laurent Mayali, Paul Mishkin, and Howard Shelanski have been tireless readers and advisers on different ideas and portions of the manuscript. A wide group of colleagues and friends at other institutions have commented on different chapters in the guise of drafts of articles. In particular, I would like to thank Curt Bradley, Brad Clark, Viet Dinh, Bill Eskridge, Jack Goldsmith, John Manning, Sai Prakash, and Adrian Vermeule for all their suggestions and criticisms. My colleagues near and far may not have all agreed with me, but they all helped make this work better.

I have been lucky to have had the research assistance of some fine students at Boalt Hall: Jason Beutler, Nick Ganjei, David Kaye, Jin Kim, Eric Lai, Will Trachman, and Michael Zara. I also thank the editors of the following law reviews, which gave me the chance to try out some ideas in a tentative form: the *California Law Review* (chapters 4 and 6),[1] the *Chicago Law Review* (chapter 5),[2] the *Columbia Law Review* (chapter 7),[3] the *Michigan Law Review* (chapter 8),[4] and the *Pennsylvania Law Review* (chapter 9).[5] I have also learned a great deal from other foreign affairs scholars who have written comments or responses to these articles, including Lou Fisher, Marty Flaherty, Mike Ramsey, Bill Treanor, Michael Van Alstine, and Carlos Vázquez.

I also owe important debts to the institutions that contributed time and place for the book's writing. The law school at the George Washington University and the John M. Olin Foundation provided a sabbatical to start this book. The American Enterprise Institute and its president, Chris DeMuth, and the Rockefeller Foundation and its wonderful research center at Bellagio, Italy, provided me a place to finish it. My two years working with the outstanding attorneys of the Office of Legal Counsel at the Department of Justice helped me think through the practical implications of

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1

Introduction

The end of the millennium neither brought a halt to history nor ushered in millennial peace. Terrorism, genocide, major human rights violations, and the proliferation of weapons of mass destruction (WMD) are among the urgent new threats that have arisen over the past ten years. The United States has become militarily assertive, using force in Kuwait and the Persian Gulf, Somalia, Haiti, Bosnia, Serbia—and in Afghanistan and Iraq, where even "regime change" has been imposed.

Apart from the making of war, the United States has also actively re-aligned its international commitments. Once the cornerstone of international arms control, the Anti-Ballistic Missile (ABM) Treaty has been terminated. The U.S. signature, proffered by the Clinton administration, was recently withdrawn from the Statute of Rome that established the International Criminal Court, as well as from the Kyoto Accords on global warming. In 1999, the Senate rejected the Comprehensive Test Ban Treaty—the first rejection of a treaty by the Senate since the failed Treaty of Versailles in 1919. America has also avoided multilateralism by staying out of new entangling alliances, such as our 1997 refusal to join the convention banning the use of anti-personnel land mines, and by giving other countries notice that we will not participate in a new protocol to regulate biological weapons and small arms.

Complaints that we have gone completely unilateral in our approach to international affairs, however, are not quite true. The United States has formed ad hoc coalitions of allies for its most significant conflicts. It has worked with its North American Treaty Organization (NATO) allies in Kosovo, and with a broad international alliance to remove the

Taliban militia in Afghanistan; a smaller "coalition of the willing" has fought alongside U.S. forces in Iraq. The United States has invoked the Non-Proliferation Treaty and asked the International Atomic Energy Agency to address Iran's and North Korea's suspected development of nuclear weapons. In 2002, we ratified international conventions to suppress terrorist bombings and terrorist financing, instruments that created uniform international criminal standards and obligations for cooperation with other nations. In matters of trade, moreover, the United States entered into the World Trade Organization (WTO) in 1993 and led the current Doha round of negotiations to expand free trade in agriculture, intellectual property, and services. It also negotiated bilateral free trade agreements with Chile, Singapore, and Jordan.

In short, we are living through a time of remarkable change in the international system, characterized by globalization, the disappearance of the Soviet Union, the emergence of international regulation, the appearance of terrorism and rogue states, and the proliferation of technology. This has placed new focus, interest, and energy in the area of American law that directly touches on these developments—namely, foreign relations law. Indeed, many of these developments in America's relationship with the world have been questioned not just on policy grounds, but on claims that they are inconsistent with the U.S. Constitution. Leading constitutional scholars, for example, have contended that several recent wars with other nations were illegal under the Constitution, under international law, or both. John Hart Ely asserts that the post–World War II era has witnessed nothing less than "the disappearance of the separation of powers, the system of checks and balances, as it applies to decisions to go to war."[1] Thomas Franck, perhaps the leading American scholar of international law, has also accused presidents of waging unconstitutional wars. Congress has shirked its constitutional responsibilities, he says, and the courts' refusal to intervene carries a "powerful whiff of hypocrisy."[2] Members of Congress have attempted to stop recent wars in Kosovo and Iraq, and when their legislative efforts have failed have even gone to federal court claiming that the wars were unconstitutional.[3]

War is not the only bone of contention. Legal questions dog the heels of American activity in foreign affairs, including President George W. Bush's decision to terminate the ABM Treaty and President Clinton's decision, with Congress's approval, to join the WTO. Lawsuits seeking to over-

turn the judgment of the executive branch and/or Congress were filed against both. Two of our leading constitutional scholars, Laurence Tribe and Bruce Ackerman, sparred in a sharp debate before the Senate Committee on Foreign Relations over the constitutionality of the American entry into the North American Free Trade Agreement (NAFTA) and the WTO.[4] The ongoing war on terrorism, spurred by the September 11, 2001 attacks on the World Trade Center and the Pentagon, has raised further questions. In January 2002, for example, President Bush interpreted the Geneva Conventions as not applying to members of the al Qaeda terrorist network, a decision that some claim exceeds the president's power to interpret treaties.[5]

The questions raised by these events, however, are not new ones but in fact have been unresolved since the birth of the Republic. Struggle between executives and legislatures over the means of making war had been a persistent feature of British history leading up to the framing of the Constitution. Indeed, one can understand the break between Great Britain and the colonies as a dispute over whether the colonies could exercise a check over military affairs through its control over funding. Presidents and Congress have long since quarreled over the authority to initiate military hostilities, and several have argued in the past that only a congressional declaration of war may begin military conflict. Yet, as shown by the 1798 Quasi-War with France (no declaration of war) and the War of 1812 with Great Britain (declaration of war), the federal government from its very beginnings has used different constitutional methods for going to war.

President, Senate, and Congress similarly have never settled on the nature of treaties within our domestic constitutional system. A requirement that Congress implement treaties, rather than allowing the executive branch as composed by the president and the Senate for the purpose of making treaties, has been heatedly debated ever since the United States entered its first treaty under the Constitution—the 1796 Jay Treaty with Great Britain.[6] Chief Justice John Marshall found in 1829 that some types of treaties could not take legal effect within the United States without the approval of Congress.[7] Ever since, treaties at times have been thought to take direct effect in American domestic law, even though they are made by the president and two-thirds of the Senate, without the participation of the House of Representatives.[8] At other times, however, courts have

considered treaties to only represent obligations between nations under international law, and have refused to give them effect in suits brought by individuals.[9] Can the President and Senate, acting alone, create obligations that have a direct effect on domestic affairs without requiring the consent of the full Congress? If they cannot, what is the point of the Treaty Clause and that part of the Supremacy Clause that makes treaties the "supreme law of the land"? And what are we to make of treaties, typically human rights agreements, to which the president and Senate attach declarations specifically denying that the treaties have any legal effect?[10]

A related long-standing question concerns the relationship between treaties and statutes. The Constitution appears to contain only one method, the Treaty Clause, for making international agreements, which creates a supermajority process requiring approval by two-thirds of the Senate. Yet, at least since the late nineteenth century, the nation has regularly entered into international agreements without going through the treaty process, and since World War II, the use of statutes to make international agreements has far outpaced the use of the Treaty Clause. The United States entered into two of its most significant international agreements, the NAFTA and WTO agreements, through this process rather than making a treaty. At the same time, however, statutes have not simply replaced treaties. Treaties still remain in use in other areas, such as reaching arms control pacts and making political or military alliances, where they are virtually exclusive. Perhaps statutes are necessary to implement the domestic aspects of our international agreements, as when Congress enacts a criminal law that fulfills an obligation established by treaty to punish certain conduct. Statutes have also been used in the past to supercede the obligations created by international agreements or have been used to terminate treaties. But it is unclear whether statutes can simply replace treaties as a form of making international agreements. The question of the self-executing nature of treaties and that of congressional-executive agreements are really different aspects of the same problematic relationship between treaties and statutes.

A third area of recurring controversy is the president's authority to interpret treaties. While the president has a limited authority to interpret domestic statutes, particularly those that delegate rulemaking authority to administrative agencies, we are accustomed to thinking that the predominant role in defining the meaning of a law rests with the other branches.

Congress gives meaning to a statute both by the words it chooses to use and the legislative history it creates in committee reports and floor debates. The federal courts interpret law in the context of deciding cases or controversies that arise within their jurisdiction over the meaning of a federal regulation, statute, or constitutional provision. With regard to treaties, however, presidents have exercised in practice much greater sway over interpretation, with often significant results. President Bush's interpretation of the Geneva Conventions, for example, determined whether al Qaeda and Taliban fighters would receive prisoner of war status, while President Clinton's reading of the ABM Treaty governed the U.S. research and development into a national missile defense.[11]

Again, however, this was not a new issue, but one that has its origins in the earliest years of the Republic. The very first international agreement signed by the independent colonies was the 1778 Treaty of Alliance with France, without which the new nation would likely not have prevailed in the war with Great Britain. When revolutionary France declared war on Great Britain and Holland in February 1793, the Washington administration had to decide whether the treaty's mutual defense clause required it to come to France's aid.[12] After heated debate between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson, Washington issued the Neutrality Proclamation, which interpreted the treaty as not requiring American entry into the Napoleonic Wars. Washington's interpretation, and its implications for U.S.-French relations, sparked vigorous resistance from Jefferson and Madison and contributed to the beginning of partisan politics in the United States by encouraging the formation of the Democratic Party.[13] Our constitutional system has yet to settle the question of the allocation of power over the interpretation of treaties, now more than two hundred years old.

This book seeks to answer these long-running questions by carefully examining the text, structure, and ratification history of the Constitution. For the past fifteen years, American foreign relations law has been dominated by a paradigm developed in three books: Louis Henkin's 1975 *Foreign Affairs and the U.S. Constitution* (updated in 1996), Harold Koh's 1990 *National Security Constitution,* and Michael Glennon's 1990 *Constitutional Diplomacy.*[14] Their approach argues in favor of national power against any role for the states in foreign affairs and maintains that the Constitution requires the equal participation of Congress and the federal

judiciary in national security decisionmaking. They draw support primarily from precedent, particularly the 1952 *Steel Seizure Case,* in which the Supreme Court blocked President Truman's order to take over striking steel mills during the Korean War.[15] In particular, they draw on the three-part framework set forth by Justice Robert Jackson's concurrence in that case, which argued that: (i) In cases where the president acted pursuant to congressional authorization, "his authority is at its maximum." (ii) When the president acts in the absence of any authorization in an area concurrently regulated by Congress, "there is a zone of twilight" where the outcome is uncertain. In the zone of twilight, where there is no explicit congressional authorization, the "actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." (iii) When the president acts contrary to congressional wishes, "his power is at its lowest ebb."[16] Jackson's *Youngstown* concurrence hinged the legality of presidential power on explicit congressional authorization.

Following this approach, authors such as Henkin, Koh, and Glennon generally criticize unilateral presidential actions in foreign affairs that do not meet with legislative approval. They disapprove, for example, of executive branch warmaking that does not at least receive legislative authorization if not a declaration of war. They believe that Congress should grant approval of presidential actions such as interpreting or terminating treaties, but they also counsel deference when the executive and legislative branches agree, such as with the congressional-executive agreement. These authors generally reject the idea that judges should stay out of foreign affairs, and instead believe that issues involving war and peace are no more difficult than other constitutional questions addressed by the Supreme Court. Other important works, such as John Hart Ely's 1993 *War and Responsibility* and Thomas Franck's 1992 *Political Questions/Judicial Answers* agree on the basic framework: that the Constitution requires that the president and Congress share authority in foreign affairs and that the federal courts adjudicate disputes between the branches to enforce that principle.[17] Importantly, they share the assumption that the Constitution establishes defined processes for the regulation of foreign relations that makes them capable of judicial enforcement, much as the Constitution does for domestic affairs.

No prominent monographs in foreign relations law have appeared

since the publication of these foundational works. In the intervening period, dramatic changes have swept the international system. While the end of the Cold War produced a decline in superpower tensions and the possibility of nuclear war, new threats emerged, including destabilizing humanitarian disasters, rogue nations, the proliferation of WMD, and now international terrorism. At the same time, new opportunities for international cooperation presented themselves, perhaps most notably the expansion of free trade via NAFTA and the WTO and the renewed relevance of international human rights. It should come as no surprise that this same period witnessed profound change in the field of foreign relations law. A new generation of scholars, including Curtis Bradley, Jack Goldsmith, Sai Prakash, and Michael Ramsey, among others, has questioned the dominant intellectual paradigm established earlier.[18] Sometimes labeled "revisionists," they generally seek to subject foreign relations questions to the same methodological approaches and arguments that apply in other areas of constitutional law, are reluctant to provide special constitutional treatment to foreign affairs, and are more amicable to analysis based in constitutional text, structure, and original understanding. They have been engaged by yet another group of young scholars, including Sarah Cleveland, Martin Flaherty, David Golove, Peter Spiro, William Treanor, and Carlos Vázquez, among others, who have defended, modified, and refined the arguments of the earlier generation of foreign affairs scholars.[19]

This book, which no doubt will be counted as a contribution to the revisionist side, cannot do justice to the many interesting arguments and nuances raised in these different debates. It can, however, propose answers to what might be considered the most important questions in foreign relations law—those involving war and peace. First, it will address war powers, and in particular the question whether the Constitution requires congressional approval of war or whether the president has the discretion to initiate military hostilities. Second, it will examine the methods by which the United States engages in peaceful relations with other nations, in particular the different methods for making international agreements. Third, it will discuss the enforcement of international agreements, with particular attention to their interpretation and termination.

Two distinguishing features, I believe, account for this book's different examination of these issues compared with earlier efforts. First, it argues that the Constitution generally does not establish a fixed process

for foreign relations decisionmaking. Rather, it allocates different powers to the president, Senate, and Congress, which allows them to shape different processes depending on the contemporary demands of the international system at the time and the relative political position of the different branches. This stands in sharp contrast to the process for enacting legislation, which must be approved by both Houses of Congress and signed by the president as required by Article I, Section 7 of the Constitution, and whose subjects are carefully limited to those enumerated in Article I, Section 8. The Constitution draws a sharp distinction between the executive and legislative powers, which can be used by the president and Congress to cooperate, but which can also be used to pursue independent and conflicting foreign policies. This approach, I argue, makes better sense of the constitutional text and structure, which provide the political branches with far more flexibility in managing foreign relations than is commonly assumed.

Second, this book concentrates less on judicial precedent and more on constitutional text, structure, and history. It begins by telling the story of the place of foreign affairs in the development of the American constitutional system during the late eighteenth century. It describes how the founding generation understood the foreign affairs power, both as subjects of the British Empire and revolutionaries, and then as writers and ratifiers of a new Constitution. They conceived of the executive and legislative branches of government as distinct functions occupying different spheres in foreign affairs. While the bulk of the foreign affairs power was vested in the executive, the legislature retained control over the domestic effects of these decisions through its control over legislation and funding. Courts did not play a significant role. This was a flexible system for making foreign policy in which the political branches could opt to cooperate or compete. The Constitution did not intend to institute a fixed, legalistic process for the making of war or treaties.

On the question of war, flexibility means there is no one constitutionally correct method for waging war. The president need not receive a declaration of war before engaging the U.S. armed forces in hostilities. Rather, the Constitution provides Congress with enough tools through its control over funding to promote or block presidential war initiatives. As to treaties, the president, not Congress or the courts, has the primary initiative to make, interpret, and terminate international agreements under

the Constitution. Nonetheless, Congress's authority over funding and lawmaking is a powerful tool that can easily frustrate unilateral executive policies. Should it so choose, Congress can force the United States to comply with international agreements that the president no longer wishes to obey. Similarly, Congress has ample power to check the making of treaties by the president and the Senate. Treaties may not automatically regulate matters within the authority of the Congress or the states under our constitutional framework. New forms of international agreements have arisen to resolve this problem and to give the missing legislative sanction to treaties. Such tools as the congressional-executive agreement, as applied to subjects under Congress's exclusive constitutional authority, tend to preserve Congress's role in regulating those areas, rather than ceding them to the executive branch.

It is the project of the remainder of this book to explain why our constitutional system does not dictate a single process for developing foreign policy. Rather, the Constitution allocates different powers to the president and Congress and allows their interaction to determine the framework for reaching foreign affairs decisions. Practice as it has developed over the last few decades generally falls within the range of permissible outcomes allowed by the Constitution. While the central focus of the book concerns the original understanding of the foreign affairs power and its application to questions of war and peace, it may be helpful here to make a few points about methodology.

First, it is important to be clear about the place of the framing history in the evaluation of practice. By "practice," I mean the existing processes and relationships developed by the three branches of government for reaching decisions on foreign policy. Practice is important for several reasons. Its role in understanding the constitutional text is heightened in the foreign affairs and national security areas, where there is an absence of judicial precedent.[20] As the Supreme Court itself has noted in a case concerning presidential power in foreign affairs, "the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases."[21] Without much judicial guidance, we should look for authority to the long history of interbranch interpretation and interaction. "Practice" also represents the reading that government leaders throughout American history have given to the constitutional text and structure in the foreign affairs area. It shows the ways that the political branches

have adapted some of the Constitution's vague provision to real-world demands. Justice Frankfurter may have made this point best in the *Steel Seizure Case:* "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."[22] Both the Supreme Court and the political branches have often recognized that governmental practice represents a significant factor in establishing the contours of the constitutional separation of powers.[23]

Several prominent scholars argue that government practice in foreign affairs departs from the original understanding of the Constitution. Thus, on the question of war powers, both critics and defenders of the current system, in which the president has often waged war without congressional authorization, maintain that the Framers intended Congress to approve all wars with a declaration or authorization of war first. Critics such as Henkin, Koh, and Glennon argue that the presidents must obey the original understanding, while executive branch defenders such as Eugene Rostow respond that the Constitution's original design cannot govern in the world of modern warfare.[24] As we will see, critics of practice usually base their arguments in the original understanding of the war or treaty power.

It is true, as we will see, that modern practice has established a working system of the foreign affairs power in such areas as war and the making, interpretation, and termination of treaties that runs inconsistent with prevailing academic theories that demand congressional approval and consent. In all of these areas, initiative has been concentrated in the presidency, with Congress usually playing an *ex post* role of approval through the power of funding or implementing legislation. Part of this book describes the framework established by government practice. My approach, however, is not to immediately challenge this framework as inconsistent with the Framers' original understanding of the Constitution. Rather, the book first asks whether modern practice falls within the bounds set by the constitutional text and structure. Generally, it finds that the constitutional text and structure provide far more flexibility to the president and Congress than has been commonly understood.

This book then turns to the constitutional history to determine whether it so clearly dictates a certain result that overrides ambiguity in the con-

stitutional text or flexibility in the constitutional structure. I expand the scope of investigation to include not only the standard sources such as the *Federalist Papers* or the reports of the Philadelphia Convention, but also British, colonial, and early state practice, eighteenth-century constitutional thought, and the overall development of attitudes toward the executive power during the ratification of the Constitution. Following that methodology leads to the conclusion that the constitutional history often does not yield a clear and decisive command as to how the government must operate in foreign affairs. Rather, the original understanding suggests that the Constitution provides both president and Congress with sufficient tools of their own to check the actions of the other. This book views the historical evidence from the original understanding as important and perhaps decisive, but not as the sole avenue of analysis. It responds to those who have concluded that current government practices violate the original intent of the Framers by arguing that the history suggests that the Constitution is far more open-ended in the structure required for foreign affairs.

The Lessons of Practice

The approach just outlined helps explain several dilemmas that have plagued the study of the law of American foreign relations. It clarifies why the basic questions of American foreign relations law have remained open. As noted before, there has been no definitive settlement of the power to make war or the place of treaties in our constitutional system. In essence, previous scholars have sought to articulate a legal order of fixed rules to rectify the disorder of foreign affairs, usually by adopting the template set by our domestic lawmaking system—that is, Congress legislating, the president executing, and the judiciary adjudicating. According to this book's theory, however, the unsettled nature of foreign affairs does not arise from a systematic defect in the constitutional regime. The conflict among the branches of government over foreign affairs, I contend, is not a flaw in the constitutional design, but is instead its conscious product. In the area of foreign affairs, the Constitution does not establish a strict, legalized process for decisionmaking. Instead, it establishes a flexible system permitting a variety of procedures. This not only gives the nation more flexibility in reaching foreign affairs decisions, it gives each of the three

branches of government the ability to check the initiatives of the others in foreign affairs. The deepest questions of American foreign relations law remain open because the Constitution wants it that way.

This approach helps explain practice better than competing theories, which have generally criticized practice as inconsistent with the Constitution. Variations in the different institutional arrangements over time, or between issues, can be explained by the wide discretion provided to the political branches, under my approach, to shape decisionmaking in foreign affairs as they wish. Take war powers, for example. World Wars I and II might have lead to the assumption that a congressional declaration of war is needed to trigger the president's powers as commander in chief. Formal declarations of war, however, have constituted the exception rather than the rule. The United States has declared war only five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and the two World Wars. Yet, the United States has committed military forces into hostilities abroad at least 125 times in the Constitution's 207-year history, although many of these were small-scale actions to protect American property, citizens, or honor abroad that had little risk of significant combat.[25] In some cases, such as the Quasi-War with France in 1798, the Vietnam War, the Persian Gulf War, and most recently the conflicts in Afghanistan and Iraq, Congress has "authorized" the president to engage in military operations, but more often it has not. When President Truman sent American troops into Korea in 1950, he did not seek congressional approval, relying instead on his inherent executive and commander-in-chief powers.[26] In the Vietnam conflict, President Johnson never obtained a declaration of war nor unambiguous congressional authorization, although the Gulf of Tonkin Resolution expressed some level of congressional support for military intervention.[27] American actions in Grenada, Panama, Somalia, and Kosovo, to name a few, received no express congressional authorization.

Statutory efforts to control presidential warmaking have met with little success. In 1973, Congress enacted the War Powers Resolution (WPR), which prohibits the president from introducing the American military into hostilities, whether actual or imminent, without either a declaration of war, specific statutory authorization, or an attack on the United States or its forces.[28] The WPR requires that the president "consult with Congress" before sending the armed forces into hostilities and to report to Congress

within forty-eight hours of sending the military into hostilities. Sixty days after the report, the president must terminate the intervention. Presidents have never acknowledged the WPR's constitutionality, and their recent actions have ignored its terms.[29] Congress could have stopped these wars, had it possessed the political will to do so, merely by *refusing* to appropriate the funds to keep the military operations going. In these conflicts, Congress chose instead to allow the president to take the initiative in war-making but also to suffer the political consequences alone.

These examples suggest that the branches of government have established a stable, working system of war powers. The president has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and by appropriations. At the same time, courts have invoked the political question doctrine to avoid interfering in war powers questions. Put less charitably, we have a system that Harold Koh describes as one of "executive initiative, congressional acquiescence, and judicial tolerance."[30]

In contrast to the single, straightforward struggle between the president and Congress over the initiation of military hostilities, practice with regard to the treaty power has emerged in several different dimensions. First, there is the question of the relative roles of the president and Senate in the treatymaking process, and whether the Senate's advice and consent function is reduced only to a limited review of treaties that have already been negotiated and signed by the executive branch. Second, there is the question whether treaties are "self-executing," and third, the issue of "interchangeability": are treaties the sole constitutional mechanism to make international agreements, or can the political branches use a statutory method instead? In each of these areas, practice has permitted the president to capture a large measure of independent initiative in setting and carrying out American foreign policy, while reserving to Congress significant ability to constrain the executive using its plenary powers over legislation and funding.

The first question arises when presidents argue that senators ought to defer to executive branch judgments on the value of entering an international agreement. Presidents, for example, make similar claims with regard to the appointment of executive branch officials and judges, which

are regulated in the same clause of the Constitution. This deference argument, it seems, has never held much sway. From as early as the Jay Treaty to important agreements such as the Treaty of Versailles, which ended World War I, to the more recent Comprehensive Test Ban Treaty (CTBT), which seeks to ban the testing of nuclear weapons, the Senate has exercised its own judgment on important international agreements. Thus in 1794 the Senate made its consent to the Jay Treaty conditional on changes in the treaty's text, a practice now known as "attaching reservations," because it did not adequately favor American commerce in the Caribbean.[31] In 1919, the Senate went farther in rejecting the Treaty of Versailles, which President Wilson had negotiated with the leaders of the other great powers, because of suspicions toward fully joining the League of Nations. In 1999, the Senate rejected the CTBT because it believed that the United States, as the sole world superpower, ought to have the option to test and improve the effectiveness of its nuclear stockpile.[32] Questions about whether the Senate can exercise its own independent judgment on treaties seem to have been long settled by the political system.

The issue of the relative roles of the president and Senate with regard to treaties arises with more frequency, but with the same significance, in the interpretation and termination of international agreements. If the Constitution requires that the Senate be present for the birth of a treaty, it does not speak directly to its role during the course of the treaty's life and death. The latter issue, that of treaty termination, has long been the subject of interbranch dispute, but appears to have been settled in favor of unilateral presidential authority. Treaty termination has been fairly rare in U.S. diplomatic history, and no single method of termination has been consistently used. Nonetheless, at least as early as the Lincoln administration, the executive branch has terminated treaties without the consent of the Senate or Congress. President Carter terminated the Mutual Defense Treaty with Taiwan, and more recently President George W. Bush terminated the ABM Treaty and withdrew the signature of the United States from the Statute of Rome, which established the International Criminal Court.[33] Two studies have found that of the few treaties the United States has terminated, ranging in number from eighteen to twenty-six depending on who is counting, half were terminated by the president acting alone.[34] In the other half of cases, Congress has sometimes forced the termination by enacting legislation inconsistent with the international obligation, and

on a few occasions the president and Senate acting together have terminated treaties.[35] Nonetheless, Congress does not appear to have ever prevented a president from terminating a treaty, and the courts have never intervened to reverse a presidential decision to withdraw from an international agreement.[36]

With regard to the power of interpretation, presidential control has proven controversial, but enduring. I already alluded to President Washington's interpretation of the 1778 Treaty of Alliance in the Neutrality Proclamation.[37] More recent examples include the Senate's efforts from 1985 to 1988 to prevent reinterpretation of the ABM Treaty to permit research and deployment of new, "exotic" forms of antimissile defense, and President Clinton's decision to continue U.S. compliance with the agreement, even after the other state party, the Soviet Union, had ceased to exist.[38] Aside from such high-profile conflicts, executive dominance of treaty interpretation has become a fact of life. Whether by constitutional intention or by its functional superiority in acting swiftly, secretly, and with unity, the executive branch controls the day-to-day operation of American foreign policy. The president and his subordinate officers develop the nation's foreign policy, communicate with foreign nations, negotiate international agreements of all kinds, and command U.S. officers abroad to take action. In the course of managing relations with the world, the executive branch must interpret treaties, and international law for that matter, on a daily basis.[39] Congress cannot monitor or participate in the many ways that the executive branch interprets treaties in forming and executing foreign policy, and it does not have any formal constitutional authority to issue binding interpretations on its own. It can, however, make its cooperation in foreign policy contingent on the executive's agreement with its views on treaties, such as by withholding funding from executive foreign policy.

Even on the difficult question of the domestic legal effect of treaties, the branches have developed a settled practice that emphasizes flexibility. Sometimes treaties are thought to take direct effect in American domestic law, even though they are created by the president and two-thirds of the Senate without the participation of the House.[40] At other times, however, courts consider treaties to be obligations between nations under international law, and refuse to give them effect in suits brought by individuals.[41] The political branches also pursue a course of non-self-execution,

particularly when it comes to human rights treaties such as the International Covenant on Civil and Political Rights, the Genocide Convention, or the Torture Convention, by rendering them nullities as a matter of domestic law. In ratifying a treaty, for example, the president and Senate often attach reservations, understandings, or declarations that preclude treaty provisions from taking effect as domestic law and prevent the courts from enforcing them. The political branches attach such reservations to prevent treaty provisions from intruding into areas that are subject to congressional regulation or the reserved powers of the states.[42] Non-self-execution, however, is not so much a denial of the Supremacy Clause as a vital means whereby the Congress can check the executive branch.[43] By preventing the nation from carrying out the legislative elements of its international obligations, Congress can check efforts by the executive branch to achieve a certain treaty-based foreign policy.

The exclusivity of the treaty power itself is a last area where practice has given the political branches more discretion than that initially suggested by the constitutional text. In the early period of the nation's history, the treaty process held a virtual monopoly on the making of agreements.[44] In recent years, however, the federal government has used simple statutes—known as congressional-executive agreements—to enter into some of our most significant international obligations. Several recent agreements of significance, such as the U.S.-Canada Free Trade Agreement, NAFTA, and the WTO agreement, have undergone this statutory process, as have America's earlier entry into important elements of the global financial system, such as the International Monetary Fund and the World Bank. While in its first fifty years the nation concluded twice as many treaties as nontreaty agreements, since World War II the United States has concluded more than 90 percent of its international agreements through a nontreaty mechanism.[45] Under international law, either mechanism is sufficient to enter into an international agreement, but under domestic constitutional law this practice seems to run counter to the Treaty Clause. While some prominent scholars, such as Laurence Tribe,[46] suggest this represents an end-around the Treaty Clause, congressional-executive agreements also preserve Congress's control over the subjects that fall within its domestic competence. Hence, congressional-executive agreements, as we will see, usually are used in areas where implementing legislation would normally be necessary to execute the international obligation.

Constitutional Text, Structure, and History

These results might initially appear inconsistent with the plain meaning of the constitutional text. Congress, for example, has the power to declare war. Shouldn't that provision require Congress's pre-approval for military hostilities? The Senate gives its advice and consent to the making of treaties. Should that not give the Senate an equal say with the president as to making, interpreting, and terminating treaties? The Supremacy Clause makes treaties the laws of the land. Why shouldn't all treaties take immediate effect as domestic law? The Treaty Clause provides the only explicit means for making international agreements. Should it not be the exclusive method for entering into binding obligations with foreign nations? Doesn't practice, in other words, run directly counter to the Constitution?

In the chapters that follow, I explore in detail the textual and structural provisions related to these issues. At this point, it is worth making some broader observations about the general allocation of the foreign affairs power among the president, Senate, and Congress. My argument is that the Constitution, in particular the dynamic manner in which it balances the executive against the legislative branches, can be read to permit existing practice. Subsequent chapters are devoted to reconstructing the framing history of the foreign affairs power, with special attention paid to the original understanding of the distribution of the war and treaty powers. They show that rather than foreclose the reading of the constitutional text and structure proposed here, historical evidence tends to support a more dynamic and open struggle between the executive and legislative powers over foreign affairs.

As Saikrishna Prakash and Michael Ramsey have observed, many of the leading theories about foreign affairs assume that the Constitution's text is incomplete.[47] Many significant foreign affairs powers, such as the authority to develop foreign policy, to communicate with foreign nations, to make nontreaty international agreements, and to break international agreements, are not specifically enumerated in the constitutional text. The Constitution "seems a strange, laconic document," says Professor Henkin, characterized by "troubling lacunae" that leaves "many powers of government . . . not mentioned."[48] The Constitution's silence has led many commentators to fall back on extraconstitutional sources, practice, or

inferences from the Constitution's structure to support their preferred system for managing foreign affairs. Because of the "astonishing brevity regarding the allocation of foreign affairs authority," Professor Koh concludes that a "normative vision of the foreign policy making process," implicit in the constitutional structure, must govern. Analogizing to the constitutional structure governing domestic affairs, he argues that Congress must authorize policy and that the president simply implements it.[49] Professor Henkin believes that due to the Constitution's gaps, the management of foreign affairs should be determined in accordance with "the facts of national life [and] the realities and exigencies of international relations."[50]

Rather than reading the Constitution to suffer from such significant oversights, it is more fruitful to take a closer look at the text and structure to discern its deeper patterns. As many have observed since the time of Hamilton's *Pacificus* essays, the Constitution provides a general grant of executive power to the president. Article II, Section 1 provides that "[t]he executive power shall be vested in a President of the United States." As Justice Scalia has written, this "does not mean *some of* the executive power, but *all of* the executive power."[51] By contrast, Article I, Section 1 gives to Congress only those legislative powers "herein granted." In order to give every word in the Constitution meaning, we must construe "herein granted" as limiting Congress only to those powers enumerated in Article I, Section 8. Article II's Vesting Clause, by contrast, grants to the president an unenumerated executive authority. By analogy, Article III vests an unspecified "judicial power" of the United States in the Supreme Court and inferior federal courts, which some have read to give the judiciary certain core judicial powers.[52]

If we assume that the foreign affairs power is an executive one, Article II effectively grants to the president any unenumerated foreign affairs powers not given elsewhere to the other branches. This understanding is further reinforced by the structure of Article II, which in Section 2 grants the president the power of commander in chief as well as the power to make treaties with the Senate's advice and consent. These powers were specifically included in Article II, rather than subsumed into the general Vesting Clause, because parts of these once plenary executive powers have been transferred to other branches or have been altered by participation of the Senate. While the Constitution does not embody a pure separation

of powers in which each branch solely exercises all functions peculiar to it, the Senate's participation in treatymaking and appointments reflects an effort to dilute the unitary nature of the executive branch, rather than to transform these functions into legislative powers. When the Constitution, for example, grants the executive a power that is legislative in nature, such as the veto power, it does so in Article I, not in Article II. Participation of the Senate in treatymaking does not transform treaties into legislative acts, just as its role in appointments does not make the appointment of officers legislative in nature.

There are two sources of support for reading Article II as vesting the bulk of the foreign affairs power in the President. First, as we will see in subsequent chapters, the executive power was understood at the time of the Constitution's framing to include the war, treaty, and other general foreign affairs powers. Both political theory, as primarily developed by thinkers such as Locke, Montesquieu, and Blackstone, and shared Anglo-American constitutional history from the seventeenth century to the time of the framing, established that foreign affairs was the province of the executive branch of government. Thus, when the Framers ratified the Constitution, they would have understood that Article II, Section 1 continued the Anglo-American constitutional tradition of locating the foreign affairs power generally in the executive branch.

Second, we might classify the conduct and control of foreign policy as inherently "executive" in nature due to practice and function. In terms of early practice, presidents from the very beginning of the Republic have exercised a general foreign affairs power, and the executive power has been understood to grant the president control over the conduct of foreign relations. As Thomas Jefferson, then the secretary of state, observed during the first Washington administration, "[t]he constitution has divided the powers of government into three branches [and] has declared that 'the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the senate." Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly."[53] In defending President Washington's authority to issue the Neutrality Proclamation of 1793, Alexander Hamilton came to the same conclusion regarding the president's foreign affairs powers. As

Pacificus, Hamilton argued that Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power . . . ." Hamilton further contended that the president was "[t]he constitutional organ of intercourse between the UStates [*sic*] & foreign Nations . . . ."[54] As future Chief Justice John Marshall famously declared a few years later: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation . . . ."[55] Rather than a congressional ministry of foreign affairs, the president and his subordinates have exercised primary responsibility for the direction of foreign policy. A general glance through any standard diplomatic history text will show that presidents have historically played the leading role in setting foreign policy, while congressional influence has waxed and waned.

A functional analysis of the conduct of foreign affairs should also lead to the classification of foreign affairs as an executive power. If we assume, as many scholars do, that the international system is governed by anarchy in which nations seek to maximize their security and power (realism), or even that nations can cooperate in various ways to escape a prisoner's dilemma (institutionalism), then the demands of the international system promote vesting the management of foreign affairs in a unitary, rational actor. The rational actor can identify threats, develop responses, evaluate costs and benefits, and seek to achieve national strategic goals through value-maximizing policies and actions. Only a limited set of institutional designs will lead to the most effective exercise of national power necessary to achieve these foreign policy objectives. As Thomas Schelling has written, a nation-state would want "to have a communications system in good order, to have complete information, or to be in full command of one's own actions or of one's own assets."[56] While bureaucratic or political imperatives may distort policy, or domestic interest groups may at times overcome the national interest, a unitary rational actor remains an ideal to guide foreign policy. It seems obvious that the presidency best meets the requirements for taking rational action on behalf of the nation in the modern world. As Edward Corwin observed, the executive's advantage in foreign affairs include "the unity of office, its capacity for secrecy and dispatch, and its superior sources of information, to which should be added

the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time."[57]

One can see the influence of this ideal in the American legal system even before its formal expression in modern political science. Federalists defended the centralization of the executive power in the president precisely in order to enable the federal government to respond to the unknowable threats of a dangerous world. As Hamilton noted in *The Federalist* No. 70, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."[58] This point applies perhaps most directly in war than in any other context. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand," Hamilton wrote in *The Federalist* No. 74.[59] "The direction of war implies the direction of the common strength," wrote Hamilton, "and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." It was for this reason, Hamilton argued, that the Constitution vested executive authority in one person, rather than the multimember executives of the Continental Congress and the states. Again, in *The Federalist* No. 70, he wrote: "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[60]

Supreme Court opinions have followed this line of thought beyond the context of war. In *Curtiss-Wright,* for example, the Supreme Court famously observed: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[61] Quoting from a Senate report, Justice Sutherland further explained that "[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch."[62] Because of the unitary executive's perceived superiority to other approaches for addressing the dangers of the international world, the Framers maintained the executive's commander-in-chief power, its power to make (with the advice and consent of the Senate) treaties, and its power to conduct diplomatic relations. As Professor Koh describes it, "[h]is decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."[63] As a result, both the

structural advantages of the executive branch and the functional exigencies of international politics have led to the centralization of foreign affairs power in the president. The history of American foreign relations has been the story of the expansion of the executive's power thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner.[64]

All of this is not to say that the president controls all aspects of foreign affairs. Clearly the Constitution rejected the British constitutional system of a complete monopoly for the executive branch over the conduct of international relations. Of course, the Constitution grants to the Congress and the Senate significant powers in respect to war, treaties, and international commerce. Some of these powers, most significantly the power to declare war, the Constitution reclassifies as legislative and transfers to Congress in Article I. Others, such as the treaty power, remain executive, but the unity of the executive branch is disrupted by the inclusion of the Senate as an advisory council of state. Still others, like the power to regulate international commerce, the Constitution gives to Congress alone for the first time and preempts state activity in the field. Thus, the executive branch cannot wage a total war without Congress's declaration of war, it cannot make treaties without the Senate, and it cannot regulate international trade without Congress. In these fields, the president cannot conduct a complete foreign policy without the approval and cooperation of other branches of government.

Congress's other constitutional powers, those that are not specific to foreign affairs, generate even more meaningful checks on the president. The Constitution clearly vests in Congress plenary control over all funding and the enactment of legislation. *Simply by refusing to do anything,* by not affirmatively acting to vote funds or to enact legislation, Congress may block presidential initiatives in our international relations. Without funding for the armed forces, for example, presidents will lack the weapons for war. Thus, the appropriations power and the power to raise the military give Congress a sufficient check on presidential warmaking. Even with today's modern conflicts, waged by America's large standing militaries, the great expense in conducting war requires the president to seek supplemental appropriations from Congress. In the course of approving these measures, Congress can consider fully the merits of war, and it can easily forestall hostilities simply by refusing to appropriate a single dollar.[65]

Congressional control over legislation also gives it a significant check on the treatymaking power. While Article II grants all of the executive power to the president, it grants him no legislative powers. Aside from the president's conditional veto, granted in Article I, the Constitution reserves the legislative power delegated by the people to the federal government to Congress alone. As Henry Monaghan has concluded, the constitutional text resists the notion that an "independent, free-standing presidential law-making authority exists insofar as the rights of American citizens are concerned."[66] Congress can refuse to grant the funding or enact the legislation necessary to live up to a treaty commitment made by the executive branch. It can effectively terminate a treaty by enacting legislation that causes the United States to violate its international obligations. This division of authority also indicates that the president and Senate cannot use their treatymaking authority, an Article II executive authority, to engage in domestic regulation that falls within the preserve of Congress's Article I, Section 8 authority. Just as the president could not issue an order under his inherent executive authority seizing steel mills during World War II,[67] which the Supreme Court concluded was a federal action that could only be undertaken by Congress's legislative authority, so too the executive branch cannot use the treaty power to issue domestic regulation on subjects within Article I, Section 8. As the Court said in blocking President Truman's order during the height of the Korean War, "[t]he Constitution limits [the president's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[68] Maintaining a separation between treaties and lawmaking preserves not just the executive branch's role in foreign affairs, but that of Congress as well.

Funding and legislation further combine to potentially restrict the president's other, unenumerated powers in foreign affairs. The president may wish to exercise the nation's vote in the United Nations or its interests in the World Bank or the International Monetary Fund, but Congress can respond by refusing to appropriate funds to any of those international institutions. The president may decide to terminate the ABM Treaty and begin construction of a national missile defense system, but Congress can refuse to fund research and development and prohibit further work on the project. The president may wish to expand free trade by lowering tariffs or agreeing to international standards for intellectual property, but Congress

can refuse to change American laws to bring them into harmony with the executive's commitments. The president may be empowered to set foreign policy, to communicate with foreign nations, and to marshal the resources of the administrative state to meet his goals. But he has no immediate right to funds necessary to carry out his policies or legislation to directly regulate private people and their property within the United States, which can only be provided by Congress.

History: The Why and How

The history of the framing of the Constitution provides the context for exploring the mix of practice, constitutional text, and structure. It may seem odd to study the most cutting-edge questions in constitutional law by turning the clock back two hundred years. What can framing-era debates reveal about peacekeeping missions and preemptive war, the global economy, and multilateral treaties? Americans drafted and ratified their Constitution at a time when it took several days for written letters to travel from Boston to Charleston and several weeks for news from Europe to reach America, when people and goods moved by horse and by sail, and when the most dangerous weapons were the front-loaded cannon and the musket.

While the political branches over time have developed a system to regulate foreign affairs, practice alone cannot provide the answer to its own constitutional legitimacy. And judicial precedent has been noticeably absent in the foreign affairs area. This is precisely why the history surrounding the drafting and ratification of the Constitution is of critical importance. At the same time, foreign affairs cannot be characterized as one of those areas that the Constitution's drafters and ratifiers had never thought about. America's relations with the outside world were the driving force behind efforts to reform the Articles of Confederation and replace it with a new federal government. According to historian Walter LaFeber, "nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy."[69] At the same time, the exact operation of important aspects of the foreign affairs power was left undefined by the Constitution. Consulting the historical materials allows us to better understand how, for example,

the commander in chief and the power to declare war were expected to interact. History may provide a clue as to whether treaties were expected to take effect immediately as federal law or were to await subsequent implementation by Congress.

There are several other reasons why, as G. Edward White has observed, we have witnessed a "turn to history" in foreign affairs scholarship and constitutional studies generally.[70] The Supreme Court has turned to the original understanding of the Constitution in a line of recent separation of powers cases.[71] Cases on the balance of authority between the national government and the states have also drawn from the thinking of those who drafted and ratified the Constitution.[72] Other decisions by the Court indicate that a majority at least believe history to be relevant, if not decisive, on questions of constitutional structure and constitutional rights.[73] Some justices of the Supreme Court, such as Justices Scalia and Thomas, would make historical evidence dispositive on questions of constitutional interpretation.[74] Of course, other justices, most famously Justice Brennan, rejected historical investigation in favor of a "living Constitution" whose meaning changed as it adapted to new circumstances. This difference of opinion is mirrored in academia, particularly in the scholarship on the structure of the Constitution. Nonetheless, the debate over the nature of the unitary executive continues to rely heavily on the original understanding.[75] Most recent scholarship about renascent federalism has focused on the original intent of the Commerce Clause and the Tenth Amendment.[76] Both the Supreme Court and leading academics have come to accept that evidence of the original understanding of the Constitution is relevant to any discussion of the document's meaning. The difference among academics, for the most part, has been over how much deference to provide the Framers, not whether to provide any deference at all.

More importantly, many prominent scholars of foreign relations law anchor their arguments on the original understanding. On the question of war powers, for example, Professor Ely has written that "the 'original understanding' of the document's framers and ratifiers can be obscure to the point of inscrutability"; but "in this case," Ely says bluntly, "it isn't." He goes on to say that the inescapable conclusion is that "all wars, big or small, 'declared' in so many words or not . . . had to be legislatively authorized."[77] Professor Glennon, too, turns to history to show that the Framers intended the president's warmaking power to be "narrowly

circumscribed" and that the Commander in Chief Clause conferred "minimal policy-making authority" except in the case of sudden attacks.[78] Professor Koh also believes that practice is inconsistent with the original understanding. "Although the Constitution's drafters had assigned Congress the dominant role in foreign affairs, the president's functional superiority in responding to external events enabled him to seize the preeminent role in the foreign policy process, while Congress accepted a reactive, consultative role."[79]

Regardless of the conclusions reached by these and other scholars, then, all rely heavily on the Framers' intent. Non-self-execution of treaties, Professor Henkin concludes, is "not what the Constitution provides or what the Framers intended."[80] The most thorough writer on the subject, Carlos Vázquez, says that the reason all treaties must be judicially enforceable is because the Framers thought so. "The Convention and ratification debates, and contemporaneous statements, show clearly that the Framers were concerned about treaty violations," he argues. "To prevent or remedy treaty violations before they produced these consequences, they declared treaties to be the 'supreme Law of the Land.' By so doing," he concludes, "the Framers intended to make treaties operative on individuals and enforceable in the courts in cases between individuals."[81] Recently, lawyer-historians such as William Treanor and Martin Flaherty have brought more sophisticated historical methodology to the study of foreign affairs questions while continuing to agree with these outcomes.[82]

Critics of historical approaches to constitutional interpretation, such as Jesse Choper or Paul Brest, argue that historical intent is impossible to determine, that one can always counter the quoted words of some of the Framers on a given issue with quotations from those on the other side.[83] This might be true, for example, in cases where the Framers simply did not think about a certain issue or engaged in a confusing and inconclusive debate about a constitutional provision. Foreign affairs, however, did not suffer from such neglect. Federalists and Anti-Federalists conducted an extensive, sophisticated debate (of which *The Federalist* is the most famous example) over the organization of the federal government, the separation of powers, and foreign affairs. Indeed, it may not be an overstatement to say that the Constitutional Convention was called not just to form a nation out of a collection of autonomous states, but to organize

a government to respond to foreign affairs crises urgently besetting the new nation.

How did the Framers actually see the foreign affairs power? The three chapters that follow pursue a comprehensive approach to historical sources. I review legal texts and set them in the political and institutional context of their times. Of course, the Constitution is a legal document, and the phrases and clauses in its precursors, which were proposed but discarded or extended, can provide vital clues for interpreting the final phrasing of the document. An example may illustrate this approach. In interpreting the meaning of the Declare War Clause, we should not look exclusively at what a particularly influential Framer said about the provision at the Federal Convention. To better understand the historical context, we should look to the British constitution in the seventeenth and eighteenth centuries, state constitutions, and the Articles of Confederation. We should attempt to reconstruct what the British believed a declaration of war to be, and how this power was to be exercised; the Framers, after all, had been citizens of the British Empire for most of their lives. Examples of British warmaking suggest the processes, institutional relationships, and patterns of activity that the Framers understood would be created by adopting—or rejecting—British constitutional models. State constitutions can provide similar context concerning the meaning of constitutional texts and the governmental conduct that these phrases were expected to permit. Finally, the ratification debates record the formal expression of approval for the Constitution.

Approaching constitutional interpretation in this way has several benefits. First, focusing on the text employs history at an effective level of generality. It avoids the dangers of allowing pure intellectual history to scatter our analysis. Although we can use historical works about systems of belief widely held by Americans at the time of the Constitution's framing, such views are relevant only to the extent that they appear in the constitutional text. The Constitution distilled the abstract political theories and beliefs of the time into a workable system of government, but it was these concrete texts, and the political institutions and relationships to which they gave rise, that defined the foreign affairs power.

Second, this book focuses on the Framers' beliefs and actions in the ratification process because the Constitution was the result of a democratic

political process. Ratification by popularly elected conventions gave the Constitution its political legitimacy.[84] What those who ratified the Constitution believed the meaning of the text to mean is therefore more important than the intentions of those who drafted it. It is the original *understanding* of the document held by its ratifiers that matters, not the original *intentions* of its drafters. On this point, I am following the distinction made by several scholars of the framing, among them Leonard Levy, Jack Rakove, and Charles Lofgren.[85] These scholars distinguish between "original intent," which refers to the purposes and decisions of the Constitution's authors, and "original understanding," which includes the impressions and interpretations of the Constitution held by its "original readers—the citizens, polemicists, and convention delegates who participated in one way or another in ratification."[86] If we are looking at history from the ratification simply to inform a contemporary decision regarding the Constitution's meaning, then all sorts of material, including the Philadelphia Convention debates and postratification interpretations of the Constitution, are relevant. For that matter, history well after the ratification could prove just as useful as a sign of consistent practice. If we begin, however, at the normative starting point that the Constitution's legitimacy derives from its popular ratification, a narrower set of sources becomes authoritative. Because the approval of the state ratifying conventions gave the Constitution its life, the understanding of those who participated in the ratification should guide our interpretation of the text. Speeches, pamphlets, and debates during the ratification will indicate what those convention delegates believed the text and structure of the Constitution to mean. My effort is to reconstruct the understandings of the delegates who participated in the ratification process of the state conventions and the leaders who debated the proposed Constitution in the press, rather than the intentions of those who drafted the Constitution but were not politically authorized to adopt it.

Conventional foreign affairs scholarship has not brought a systematic methodology to the study of the framing. Focusing on the views of famous Framers at the Philadelphia Convention cannot fully recreate the legal and political world of the ratifiers. In fact, such an approach may yield a decidedly distorted view of the Constitution. To understand the political, legal, and constitutional world of the late-eighteenth-century American, we can benefit from the outpouring of excellent primary and secondary

sources on the American Revolution and founding periods that make such historical reconstruction possible and worthy of effort. The *Documentary History of the Ratification of the Constitution* collects, and continues to collect, into one place almost all of the extant speeches, debates, and pamphlets of the ratification period.[87] Over the last fifty years, historians have produced a rich trove of works on the intellectual origins of the Revolution and the Constitution, including Bernard Bailyn's *Ideological Origins of the American Revolution*, Gordon Wood's *The Creation of the American Republic, 1776–1787,* Forrest McDonald's *Novus Ordo Seclorum: The Intellectual Origins of the Constitution,* and Jack Rakove's *Original Meanings.*[88] In this respect, this book seeks to be sensitive to the broader intellectual context of the founding generation and the secondary works that attempt to recreate it.[89]

My exploration focuses on important historical factors that have hitherto been virtually ignored. Among these are British constitutional theory and practice in foreign affairs; the experiences of the states; changes made by the Articles of Confederation; and the arguments put forward in state ratifying conventions. I use sources that have not been systematically examined, such as the wider body of Federalist and Anti-Federalist writing, and attempt to show how the foreign affairs power fit into the larger intellectual and constitutional world of the Framers. This analysis finds that the Framers were part of a political world that viewed the power to fund (or defund) and to legislate as a critical check on executive powers in foreign affairs, a power that had been won after decades of struggle, first between the king and Parliament, and then between Parliament and the colonial assemblies. Failed state experiments in legislative supremacy led to a Thermidorean reaction that restored power to the unitary executive.[90] This yields a picture of the foreign affairs power very different than the image of a legalistic process in which both president and Congress must participate in certain constitutionally established ways at constitutionally required times. Rather, in foreign affairs the Constitution gave birth to a dynamic process in which each branch was given certain powers and was expected to use those powers, either in cooperation or in competition, to shape foreign policy.