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# The Constitution and United States Foreign Policy: An Interpretation

Walter LaFeber

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Perhaps the best single sentence defining the Constitution was, appropriately, penned by the “father” of the document in 1792. In such “charters of liberty” as the Constitution, James Madison wrote, “every word . . . decides a question between power and liberty.” He hoped that “being republicans,” Americans would be “anxious to establish the efficacy of popular charters, in defending liberty against power, and power against licentiousness.” Some one hundred eighty years later, while writing one of the few extended analyses of the relationship between the Constitution and foreign policy, Louis Henkin noted that in one critical area Madison’s insight had been tragically neglected. No greater power existed than the American, and specifically the president’s, ability to destroy all civilization, but books “that deal with the Constitution say little about American foreign relations,” Henkin lamented, and those dealing with foreign policy have “roundly ignored” the “controlling relevance of the Constitution.”<sup>1</sup>

In truth, the neglect of the connection between foreign affairs and constitutional principles is relatively new. From the time of the *Federalist*, whose opening essays stressed the foreign policy problems that threatened the new nation’s liberties and security, and of the 1792–1793 Hamilton-Madison debate over the president’s powers in the global arena, through the bitter “imperialist” versus “anti-imperialist” confrontations of 1898–1900, Americans argued over appropriate foreign policy while keeping the Constitution closely in view, and they fought over constitutional principles with acute awareness of their effect on international affairs. By World War II, however, the debate had dramatically changed. Scholars led by Edward S. Corwin repeatedly raised the danger of conducting foreign policy without due regard for constitutional restraints, but Congress, the courts, and, above all, the executive ignored the warnings. In the top secret National Security Council document NSC 68 of April 1950, which became the blueprint for United States policy thereafter, the Truman administration argued that “the integrity of our system will not be

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<sup>1</sup> Gaillard Hunt, ed., *The Writings of James Madison* (9 vols., New York, 1906), VI, 83–85; Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y., 1972), vii.

jeopardized by any measures, covert or overt, violent or non-violent, which serve the purposes of frustrating the Kremlin design." That prophecy turned out to be mistaken within a generation, but after a brief flurry of concern about the Cold War's effect on "the integrity of our system" during the 1970s, the debate and the politics reverted to the assumptions of 1950.<sup>2</sup> Nor to this point has the Reagan administration's Iran-Contra scandal shown many signs of expanding—as it should—into a national debate over the relationship between foreign policy, on the one hand, and accountable power and the preservation of constitutional rights, on the other.

The turn from Madison's sensitivity for the delicate balance between power and liberty to NSC 68's assumption that foreign policy ends justify the means occurred not in the early days of the Cold War but between 1890 and 1920. Supreme Court Justice George S. Sutherland uttered the most famous blessing on that turn in 1936 when he wrote the majority opinion in *United States v. Curtiss-Wright Export Corporation*.<sup>3</sup> But Sutherland's decision had been shaped two decades before, and, resembling most such blessings, it only affirmed behavior that had long been practiced. Imperial presidencies, weak congresses, and cautious courts, which have been endemic to modern United States foreign policy formulation, appeared at the turn of the century. At the same time, the nation's foreign relations became global rather than continental; they were driven more by corporate than by agrarian interests, and they were tracked by telegraphs and airplanes instead of by couriers and stage coaches. Those changes radically challenged the constitutional forms that had governed the continental foreign policy for a century. Presidents and the courts met the challenge simply and directly: they largely severed foreign policy from traditional constitutional restraints by declaring that international and domestic relations could be dealt with separately. Actions in the world arena were not unduly to affect liberties at home.

The framers of the Constitution believed such a separation between foreign and domestic realms to be both artificial and perilous. In their view, the inability of individual states to cooperate in foreign policy produced continual crises in the 1780s. The effect was also reciprocal: The inability to control overseas trade, which could bring badly needed specie into the country, and to protect the western settlements had produced explosive internal unrest. The Shays uprising in western Massachusetts and the threat of western settlements leaving the confederation to join adjacent British or Spanish empires dramatized the dangers. An equal peril, of course, was that in establishing a central government capable of dealing with European powers, a monster would be created that could also suppress individuals and states. That possible connection between foreign and domestic affairs had to be dealt with. Madison, for one, had closely studied the links. During 1786 and 1787

<sup>2</sup> *Foreign Relations of the United States, 1950* (7 vols., Washington, 1977), I, 235–92, esp. 244. Throughout, NSC 68 is concerned about the difficulty a democracy faces in fighting a cold war against a totalitarian state, but then it resolves the question as quoted above. See *ibid.*, 242–44, 252–56, and 291–92.

<sup>3</sup> *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

in "Vices of the Political System of the United States," (a paper that later became Federalist Nos. 18, 19, and 20), the Virginian attacked the states for their encroachment on "federal authority" and for their "trespasses . . . on the rights of each other." In nearly every example he provided of such "transgressions," foreign policy issues such as the Atlantic trade or imperial competition over western lands were involved. 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.<sup>4</sup>

But Madison also later warned that "perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." In the South Carolina legislature's debate on the new Constitution, Pierce Butler, who had participated in the Philadelphia meetings, outlined the extensive discussion that had occurred on the war-making powers. Butler indicated the debates had little to do with efficiency and much to do with accountability and with the maintenance of checks and balances in a republican system. The president did not receive exclusive power to make peace or war because it would have meant "throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction." Butler had reached that conclusion the hard way; he had been the delegate who wanted to vest all war powers in the president. His kind of thinking had led Madison and Elbridge Gerry to move that Congress have the power to "declare" war. The motion was followed by Gerry's acid remark that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."<sup>5</sup>

Madison had earlier explained his view to the delegates: "Constant apprehension of war has the . . . tendency to render the head too large for the body. A standing military force, with an overgrown Executive will not long be safe companions to liberty." In giving his version of the giddy-minds-and-foreign-quarrels theme, Madison believed "the means of defense against foreign danger have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people." Alexander Hamilton emphasized that point in Federalist No. 8. "Safety from external dangers is the most powerful director of national conduct," he wrote. "Even the most ardent love of liberty will, after a time, give way to its dictates." He shrewdly noted the irony: "to be more safe, [citizens] at length become willing to run the risk of being less free."<sup>6</sup>

Hamilton and Madison argued that the Constitution's provisions could protect

<sup>4</sup> Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Baton Rouge, 1973), esp. 96–166; Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781–1789* (New York, 1950), 171; Robert A. Rutland, ed., *The Papers of James Madison* (15 vols., Charlottesville, 1962–), IX, 345–58; Jack N. Rakove, "Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study," *Perspectives in American History*, I (1984), 268.

<sup>5</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston, 1973), ix; Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols., New Haven, 1966), II, 318, III, 250.

<sup>6</sup> Rutland, ed., *Papers of James Madison*, X, 86–87; Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, intro. by Clinton Rossiter (New York, 1961), 67.

liberty at home while they also safeguarded United States interests abroad. That belief later produced divisions between Federalists and Antifederalists. At no time, however, did either side disconnect foreign and domestic policies. Both groups agreed on the proper priority to be given to those policies: liberty and order at home led to effective overseas policy. Madison stated the postulate in the Virginia Ratifying Convention while debating Patrick Henry. "Does [Henry] distinguish between what will render us secure and happy at home, and what will render us respectable abroad?" he asked. "If we be free and happy at home, we shall be respectable abroad."<sup>7</sup>

The argument over the proper balance between extending power abroad and maintaining liberty at home shaped much of the political debate during the quarter century that followed the Constitution's ratification. When George Washington issued his neutrality proclamation as the Anglo-French war erupted in early 1793, Madison and Hamilton clashed over the president's right to make such policy. Both focused on the effect the proclamation would have on separation of powers and, as Hamilton termed it, on "republican propriety and modesty." Madison's "Helvidius" letters constituted one sustained attack on the dire effects of Washington's act, which "seem[ed] to violate the forms and spirit of the Constitution" by exalting executive powers in foreign affairs. By the end of the decade, even leading Federalists were reluctant to claim too much for executive power. In 1795 James Kent argued that "war only can be commenced by an act or resolution of Congress." During the Undeclared War with France three years later, Hamilton himself admitted that President John Adams could repel attacks, but not order reprisals, without congressional approval.<sup>8</sup>

Federalists used the crisis with France to pass the Alien and Sedition Acts in an attempt to silence political opponents. Thomas Jefferson and Madison responded with the Kentucky and Virginia resolutions. The two men attacked what they perceived to be the attempt by the national government to use a foreign policy crisis to violate the constitutional rights of individuals and states. Assuming that the federal government's powers resulted "from the compact to which the states are parties," the Virginia legislature's resolutions sought to prevent the Adams administration from using foreign policy crises to justify a witch hunt.<sup>9</sup>

In his distinguished study of the rapid expansion of presidential power between 1789 and 1820, Abraham D. Sofaer concluded that the Founders established modern presidential practices in those years "with a high degree of awareness as to

<sup>7</sup> Hunt, ed., *Writings of James Madison*, V, 146. In the Virginia Ratifying Convention, Antifederalist George Mason agreed on this point with James Madison (after misrepresenting Madison's views). See Robert A. Rutland, ed., *The Papers of George Mason, 1725-1792* (3 vols., Chapel Hill, 1970), III, 1065.

<sup>8</sup> Harold C. Syrett and Jacob Cooke, eds., *The Papers of Alexander Hamilton* (15 vols., New York, 1961-1969), XV, 33-43, 135; Irving Brant, *James Madison* (6 vols., Indianapolis, 1941-1961), III, 375, 382; Hunt, ed., *Writings of James Madison*, VI, 138-88; Charles Lofgren, "War-Making under the Constitution, the Original Understanding," *Yale Law Journal*, 81 (March 1972), 672-97, 700.

<sup>9</sup> Henry Steele Commager, ed., *Documents of American History* (2 vols., New York, 1963), I, 178-84. Madison's view in Federalist No. 39 anticipates assumptions of the Virginia Resolution. Rutland, ed., *Papers of James Madison*, X, 379-80.

the potential consequences." The practices included John Adams leading Americans into their first major post-1783 war without a formal declaration, Jefferson's loose construction of his executive powers in order to purchase and govern Louisiana, and "the earliest analogue to the Gulf of Tonkin Resolution" when Madison extracted from Congress vague powers which he used to subvert and then to seize West Florida. But Sofaer next asked "whether anything has changed since those early times." He believed "the answer is definitely yes. . . . Our first Presidents were overtly deferential to Congress," whereas more recent chief executives were not. The first presidents, moreover, never made two claims often heard after 1940: that the executive "may use whatever raw power he had—monetary, diplomatic and military—in the national interest"; and that he held inherent powers as chief executive and as commander in chief that "are beyond legislative control. No early President suggested that Congress was significantly limited in the control it potentially had over assigned executive powers."<sup>10</sup>

The nature of United States foreign policy interests until the Civil War helps explain such presidential deference. Those interests usually had two characteristics. First, they touched large numbers of Americans in ways that cut across various economic interests and involved entire regions of the country. Second, they were not to be located on the other side of the globe or in secret military installations but across the next river or mountain range where lands and ports claimed by Indians, Mexicans, Canadians, or Europeans were coveted. Those characteristics not only closely linked foreign policy with the immediate, individual rights of Americans but also made large numbers of citizens aware of the link. They believed they were able to shape the nation's foreign affairs. That link and that belief appeared in many forms. Jefferson, for example, explicitly connected expansion with domestic happiness when he stated, "I am persuaded no constitution was ever before so well calculated as ours for extensive empire and self-government."<sup>11</sup>

Other Americans, especially New Englanders, vigorously disagreed with such reasoning. After the foreign policy *coup* by Jefferson in Louisiana, Federalist Fisher Ames of Massachusetts lamented, "Our country is too big for union, too sordid for patriotism, too democratic for liberty." A Federalist leader in Congress, Josiah Quincy, despised the "extensive territory" created by the Louisiana Purchase and warned that it could turn "liberty" into "licentiousness." The Constitution, Quincy declared in debate on whether to admit Louisiana as a state, "was never constructed to form a covering for the inhabitants of the Missouri and the Red River country," for the "wild men on the Missouri," and for the "mixed, though more respectable, race of the Anglo-Hispano-Americans who bask on the sands in the mouth of the Mississippi." Give Louisiana statehood, Quincy warned, and "the bonds of this Union are virtually dissolved."<sup>12</sup>

<sup>10</sup> Abraham D. Sofaer, "The Presidency, War, and Foreign Affairs: Practice under the Framers," *Law and Contemporary Problems*, 60 (Spring 1976), 36–37. The essay and conclusions are based on his longer work, Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Cambridge, Mass., 1976), esp. 56, 377–78.

<sup>11</sup> Alexander DeConde, *This Affair of Louisiana* (New York, 1976), 254.

<sup>12</sup> Julian P. Boyd, "Thomas Jefferson's 'Empire of Liberty,'" *Virginia Quarterly Review*, 24 (Autumn 1948), 553;



In 1829, having survived both Quincy's challenge and the War of 1812, an aged Madison turned Quincy's reasoning on its head to make an ominous prophecy about the constitutional system. He feared that expansion would stop and that "in 100 years" the rapidly growing American population would outstrip the available land. Society would then polarize between the wealthy and the "indigent laborers." The "institutions and laws of the country" would be put to the ultimate test. Such pessimism was not new; it can be traced to Madison's belief during the 1780s that the high rate of population increase, which he accurately calculated, and the turn from farming to "manufacturers" could create a political crisis.<sup>13</sup> Unlike his earlier warnings, which implied that the new Constitution could help cushion the society against the effects of radical social change, Madison's warnings of the 1820s assumed that the Constitution itself, and the liberties it helped guarantee, rested on an expansionism that, when exhausted, would force a rethinking of the entire system.

President James K. Polk apparently did not know of Madison's forebodings. In any case, Polk's mind did not run to the theoretical or concern itself with the consequences of possible limits of American growth. To appease the political factions that had elevated him from a failed Tennessee gubernatorial candidate to the presidency, and to satisfy his own understanding of American manifest destiny, Polk increased the nation's territory by nearly 50 percent. He instigated a war with Mexico by making territorial demands and, when the demands went unanswered, by sending United States forces into a disputed area and forcing a response from Mexican troops. Alleging that American blood had been spilled on American soil, Polk pried a war declaration from Congress. Abraham Lincoln, then a young Whig congressman who disliked most of Polk's Democratic program, warned that if the president succeeded with his scheme to have a war by invading a neighboring nation, "see if you can fix any limit to his power in this respect." In Lincoln's view, Polk, by taking away Congress's right to the proper and informed exercise of its power to declare war, had committed "the most oppressive of all Kingly oppressions" feared by the Constitutional Convention.<sup>14</sup>

The war against Mexico for land in the Southwest and for ports on the Pacific launched the most frenetic fifteen-year period in United States diplomatic history until the Cold War. The years from 1846 to 1861 were frenetic precisely because so many Americans believed the survival of their liberty and property interests at home depended on following certain foreign policies. Polk first discovered that dangerous relationship when he asked for funds to buy peace with Mexico. The House of Representatives responded with the Wilmot Proviso, which prohibited slavery in any territory taken by a treaty with Mexico. The president, through ignorance or willful-

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Edmund Quincy, *Life of Josiah Quincy of Massachusetts* (Boston, 1868), 216–17; Josiah Quincy, "Speech on the Admission of Louisiana as a State," in *Speeches Delivered in Congress of the United States by Josiah Quincy*, ed. Edmund Quincy (Boston, 1874), 196, 216.

<sup>13</sup> Hunt, ed., *Writings of James Madison*, IX, 358–60, V, 1970; Rutland, ed., *Papers of James Madison*, IX 76–77.

<sup>14</sup> Richard N. Current, ed., *The Political Thought of Abraham Lincoln* (Indianapolis, 1967), 43–44.

ness, refused to see the link. "What connection slavery had with making peace with Mexico," he wrote, "it is difficult to conceive." Both for slaveholders, who needed fresh territory with its increased congressional representation, and for free soil interests, however, the "connection" meant everything. As Arthur Bestor has observed, "territorial expansion drastically changed the character of the dispute over slavery by entangling it with the constitutional problem of devising forms of government for the rapidly settling west." Foreign policy sharpened the already thorny question of congressional authority in the newly acquired territories.<sup>15</sup>

That the United States took no more adjacent continental territory after 1854 is irrelevant. Given southern filibusterers, the All-Mexico Movement, Young America, a drive for Cuban annexation led by both northeastern and southern factions, new involvements in Central America, and the application of the Monroe Doctrine's principles to Hawaii, the question between 1846 and 1861 was not whether but when, where, and how American expansion would strike next. The corollary question was whose interest that expansion would benefit. The answer to those questions would decide who could determine the most critical constitutional issues far into the future. In that context, the *Dred Scott* decision was a powder keg. If Roger B. Taney's decision held, then (as Lincoln and others argued) American expansion anywhere would automatically carry with it the expansion of the slave state interests. On that issue, Stephen A. Douglas, who was determined not to allow his policy of rampant expansionism to be politically corrupted by the *Dred Scott* decision, took a position that split the Democratic party. Into the breach moved Lincoln and the Republicans. They were committed in the long run to overturning *Dred Scott* by making fresh appointments to the Supreme Court and in the short run to containing the slave states by denying them the annexation of Cuba.<sup>16</sup>

In late 1860, Lincoln slashed the knot tied in the 1780s by Madison and the other founders. The newly elected (but not yet inaugurated) president refused to allow expansion to be used to maintain a constitutional balance. The result was civil war. Lincoln had to face that ultimate issue when Sen. John J. Crittenden of Kentucky pieced together a compromise that protected slavery where it existed. In its pivotal provision, the compromise prohibited slavery north of the old Missouri Compromise line of 36°30'N but protected slave interests in all other territory "now held, or hereafter acquired." Warning that the South would attempt to bring Cuba into the Union as slave territory within a year if the compromise passed, Lincoln declared that only one solution could settle the issue—"a prohibition against acquiring any more territory."<sup>17</sup> The Crittenden Compromise was killed. And so, during the next four and a half years, were six hundred thousand Americans.

The nation that emerged from civil war had lost interest in landed expansion.

<sup>15</sup> Milo M. Quaife, ed., *The Diary of James K. Polk during His Presidency, 1845 to 1849* (4 vols., Chicago, 1910), II, 75; Arthur Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review*, 69 (Jan. 1964), 338.

<sup>16</sup> David M. Potter, *The Impending Crisis 1848-1861* (New York, 1976), 279-90, 329-38, 349-52.

<sup>17</sup> David M. Potter, *Lincoln and His Party in the Secession Crisis* (New Haven, 1942), 223.



William Seward's success in maneuvering the Senate into purchasing Alaska from Russia was accompanied by a congressional resolution opposing any further acquisition of territory. By 1890 the official United States census concluded that the line separating the frontier from more settled areas had ceased to exist. Although a continued high birthrate and record numbers of immigrants were filling the country, no important push for further annexation of territory appeared. As the first century of United States foreign policy had been characterized by landed expansion that involved many Americans and occurred largely on contiguous territory, so the next century's foreign policy was to be dominated by economic and military interests that involved relatively few Americans and was often carried out far from the North American continent. In the 1895 edition of his classic *The American Commonwealth*, James Bryce concluded, somewhat mistakenly, that since the 1840s "external relations have very rarely . . . affected internal political strife." Nor did they "occupy the public mind. . . . I mention them now as the traveller did the snakes in Iceland, only to note their absence."<sup>18</sup>

Just three years after Bryce published those words, foreign policy again dominated the public mind. The questions now, however, were radically different from the "external relations" of pre-1861. Since the Civil War, Americans had been simultaneously blessed and damned by their new industrial and mechanized agricultural complexes—blessed in that the United States suddenly acquired wealth that made it the world's greatest economic power by the early twentieth century; damned in that the domestic market became so glutted with goods that prices fell and unemployment rose. Out of that domestic crisis, which became dangerously acute during the long economic depression of 1873 through 1897, arose new American interests in Asian, Latin American, and African markets, as well as the military power needed to protect the developing overseas lifelines.<sup>19</sup> The Spanish-American War and President William McKinley's dispatch of United States troops to the mainland of China in 1900 brought home to many Americans the possibility that a constitution written in the age of horses and muskets might need altering to fit an era of transoceanic cables and machine guns.

The alteration was already underway. In 1890 the Supreme Court decided *In re Neagle*. The justices actually were ruling on the president's power to provide them with personal bodyguards, a question about which they were hardly disinterested. Declaring that the president could provide such protection, the Court by a 6-to-2 vote argued that presidential duties were not limited to carrying out treaties and congressional acts according to their express terms but rested on broad implied powers: "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." With that decision, the Court recognized im-

<sup>18</sup> James Bryce, *The American Commonwealth* (2 vols., New York, 1895), II, 521–22.

<sup>19</sup> The best succinct analyses of those changes and of their effect on the new foreign policy are Thomas McCormick, *China Market: America's Quest for Informal Empire, 1893–1901* (Chicago, 1967); and Charles S. Campbell, *The Transformation of American Foreign Relations, 1865–1900* (New York, 1976), 84–121, 140–60, 296–318.

mense and indefinite presidential power. Bryce might have had the decision in mind five years later when he noted that in foreign affairs, which require “promptitude and secrecy,” the president “is independent of the House, while the Senate, though it can prevent his settling anything, cannot keep him from unsettling everything.” He can “embroil the country abroad or excite passion at home.”<sup>20</sup>

Bryce nevertheless believed that the constitutional system remained “singularly unfitted” to rule the overseas dependencies needed for the new foreign policy. That system only provided for bringing in the areas as self-governing states, he argued. Another problem also existed for the Constitution if further territorial expansion occurred: “Eight millions of recently enfranchised negroes (not to speak of recent immigrants from Europe) are a heavy enough load for the Anglo-Americans to carry on their shoulders without the ignorance and semi-barbarism of the mixed races of the tropics.”<sup>21</sup>

No one worried more over the constitutional crisis developing out of the new foreign policy than Capt. Alfred Thayer Mahan. The nation’s most influential military strategist, the intellectual godfather of the new United States Navy, a widely read publicist who argued for overseas economic and military expansion, a celebrity in the most powerful European circles, and a close adviser of such powerful figures as presidents William McKinley and Theodore Roosevelt, Mahan struck the core of the problem in an 1897 essay. He bitterly complained that “any project of extending the sphere of the United States, by annexation or otherwise, is met by the constitutional lion in the path, which the unwilling or the apprehensive is ever sure to find.” A remarkable part of his onslaught was Mahan’s use (without attribution) of Madison’s famous statement from Federalist No. 10: “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.” Madison had argued that under the Constitution dangerous factions were to be controlled by extending the sphere within which they had to operate. Mahan was updating Madison’s classic rationale for landed expansion to apply to the overseas expansion of the 1890s. But even more remarkable was the naval officer’s attack on the constitutional restraints that, as Bryce had noted, inhibited a great rush overseas. “Law is the servant of equity,” the captain argued. “While the world is in its present stage of development equity which cannot be had by law must be had by force, upon which ultimately law rests, not for its sanction, but for its efficacy.” Getting down to cases, Mahan privately voiced his concern to Theodore Roosevelt about the “insoluble political problem” that prevented the annexation of the Hawaiian Islands. He then advised the assistant secretary of the navy, “Do nothing unrighteous; but as regards the problem, take them first and solve afterwards.”<sup>22</sup>

<sup>20</sup> *In re Neagle*, 135 U.S. 64 (1890); Bryce, *American Commonwealth*, I, 54.

<sup>21</sup> Bryce, *American Commonwealth*, II, 531.

<sup>22</sup> A. T. Mahan, *The Interest of America in Sea Power, Present and Future* (Boston, 1898), 227–28, 256–57, 268; Hamilton, Madison, and Jay, *Federalist Papers*, intro. by Rossiter, 77–84; Robert Seager II and Doris D.

Mahan's "lion" was effectively removed from the path of American expansion by the Spanish-American War and by the ingenuity of President McKinley, who first raised "the hidden-hand presidency" to a political art form. McKinley stretched the constitutional restraints on his power until they assumed an entirely new shape. During 1897 and 1898 he stopped several congressional attempts to "declare" war on Spain; then in April 1898 he led the way to war himself and destroyed the Senate's attempt to bind his hands with a resolution attached to the declaration of war that automatically recognized the Cuban revolutionary regime. At no time did McKinley wish to have to deal with revolutionaries. Six weeks into the war, United States territorial holdings suddenly moved thousands of miles across an ocean when McKinley, uncertain that he could obtain the necessary two-thirds Senate vote to pass a treaty of annexation for Hawaii, obtained the islands with a joint resolution requiring a mere majority of both houses. The president unilaterally committed American forces and prestige to the distant Philippines, then moved to neutralize native Filipino forces until those forces fired on United States troops.<sup>23</sup>

McKinley used the outbreak of fighting to push the Philippine annexation treaty through a rebellious Senate by one vote. In the Caribbean he treated newly conquered Puerto Rico as neither a state nor a full-fledged colony; for the first time in American history, a treaty acquiring territory held out no promise of future citizenship. Cuba became a protectorate through the Platt Amendment, which allowed Cubans to have the problems of day-to-day governing but left the American government holding the right of military and economic intervention whenever Washington officials desired. In 1900 the president landed five thousand troops in China not only—as had past presidents—to protect American lives and property abroad but also to join an international contingent in Peking that directly intervened in Chinese internal affairs. Peking officials responded by declaring war on the United States. Theirs was a considerably more fitting response than Congress's, which was to say nothing to McKinley about the spectacle of United States troops fighting in the capital of China.<sup>24</sup>

A small group of "anti-imperialists" did oppose the president's policies between 1898 and 1900, especially his attempt to control the Philippines. The anti-imperialists expressed many objections, but their concern about the Constitution was primary. They did not believe that the document's powers could be stretched so far and used so broadly by the president without snapping fundamental constitutional restraints and transforming the republic into a centralized colonial empire. As E. L. Godkin, editor of the *Nation*, warned, "Unquestionably, our present Con-

Maguire, eds., *Letters and Papers of Alfred Thayer Mahan* (3 vols., Annapolis, 1975), II, 506. Mahan never lost his impatience with legal restrictions and lawyers. See *ibid.*, III, 411.

<sup>23</sup> The phrase "hidden-hand presidency" is from Fred I. Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader* (New York, 1982). On William McKinley's policies, see Campbell, *Transformation of American Foreign Relations, 1865–1900*, 274–77, 287–308; and Lewis L. Gould, "William McKinley and the Expansion of Presidential Power," *Ohio History*, 87 (Winter 1978), 5–21.

<sup>24</sup> Graham H. Stuart and James L. Tigner, *Latin America and the United States* (Englewood Cliffs, 1975), 340–42, 389–409; and Schlesinger, *Imperial Presidency*, 85–88.

stitution was not intended for a conquering nation with several different classes of citizens." Moorfield Storey prophesied that if McKinley and the Republican party could justify "conquest and despotic methods in the Philippines and Porto Rico" on the grounds that the inhabitants were racially and morally unfit for self-government, "it is only to be expected that the same doctrine will be applied at home." Storey was accurate in arguing that the Constitution overseas could not be easily separated from the Constitution at home. As states disfranchised millions of black voters, Roosevelt, Albert J. Beveridge, Henry Cabot Lodge, and others argued bluntly that, in Beveridge's words, "there are people in the world who do not understand any form of government . . . [and] must be governed. . . . And so the authors of the Declaration [of Independence] themselves governed the Indian without his consent."<sup>25</sup>

The Supreme Court ignored Storey's warning and instead ratified the imperialists's view of the Constitution's malleability in the Insular Cases, a series of decisions handed down beginning in 1901. By slim majorities the Court held that the Constitution did not apply to the countries seized from Spain in 1898 until Congress "incorporated" them into the Union. Meanwhile the government in the "unincorporated" territories could be whatever Congress wanted it to be. The Court declared that some "fundamental" constitutional rights might exist in "unincorporated" territories, but they seemed few and were largely unspecified. In a brief opposing the McKinley policy, the anti-imperialists argued unsuccessfully that "the real question is not whether the Constitution extends over the island of Porto Rico . . . but whether it extends over the Executive and Congress when they are engaged in enacting laws" for Puerto Ricans. The anti-imperialists also insisted that "the Constitution follows the flag," but after the Insular Cases, Secretary of War Elihu Root quipped, "Ye-es, as near as I can make out the Constitution follows the flag—but doesn't quite catch up with it."<sup>26</sup>

Concern for reconciling foreign policy actions with constitutional powers became so slight that in 1903, when Roosevelt took a ten-mile strip for an isthmian canal in Panama and controlled it through a treaty duly ratified by the Senate, neither the nature of the United States ownership nor the legal status of the region's inhabitants was determined in any detail. Secretary of State John Hay justified American control of the Canal Zone by claiming "titular sovereignty," a claim so vague that it allowed the Panamanians to turn it against the United States and, after a long and sometimes bloody struggle, finally to acquire full sovereignty for themselves in 1978.<sup>27</sup>

<sup>25</sup> Robert Beisner, *Twelve against Empire: The Anti-Imperialists, 1898–1900* (Chicago, 1985), 216; William B. Hixson, Jr., "Moorfield Storey and the Struggle for Equality," *Journal of American History*, 55 (Dec. 1968), 539; Walter L. Williams, "United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism," *Journal of American History*, 66 (March 1980), 819–20.

<sup>26</sup> Henkin, *Foreign Affairs and the Constitution*, 268–69; Beisner, *Twelve against Empire*, 216; James Edward Kerr, *The Insular Cases: The Role of the Judiciary in American Expansionism* (Port Washington, N.Y., 1982), 40–41.

<sup>27</sup> James Bryce, *The American Commonwealth* (2 vols., New York, 1910), II, 580; Walter LaFeber, *The Panama Canal: The Crisis in Historical Perspective* (New York, 1979).



UNCLE SAM: "Now I can do what I please with 'em."

—*The Detroit Journal*.

The Supreme Court's decisions in the Insular Cases freed the United States to deal with its new colonial possessions without constitutional restraints, according to this cartoon.

Reproduced from *Detroit Journal*, May, 1898.

In the fast-changing realm of the United States foreign affairs, the Constitution was undergoing its own far-reaching transformation between 1890 and 1905. One transformation could be described as a centrifugal-centripetal effect: as American military and economic power moved outward, political power consolidated at home. The expansion of American power abroad has historically had such a centripetal political effect, but with the possible exception of the early Cold War years, never was it as striking as during the 1890 to 1905 era that ushered in modern American foreign policy. Not only did McKinley and Roosevelt master Congress but, using the new telegraphic networks and exploiting their power as commanders in chief to the full, the chief executives also pulled power into their own hands by minutely supervising the movements of their military commands and by controlling information made available to the public. Louisville newspaper editor (and ardent Democrat)



Henry Watterson perfectly, if over dramatically, captured how the economic and political crises of 1873 to 1897 had led to foreign expansion—and then to “Caesarism”:

We escape the menace and peril of socialism and agrarianism, as England escaped them, by a policy of colonization and conquest. . . . It is true that we exchange domestic dangers for foreign dangers; but in every direction we multiply the opportunities of the people. We risk Caesarism, certainly; but even Caesarism is preferable to anarchism. . . . In short, anything is better than the pace we were going before these present forces [of 1898] were started into life.<sup>28</sup>

The second historic transformation was a direct cause of Watterson’s “Caesarism.” That change resolved the terrible tension emerging between the new foreign policy and the traditional Constitution by separating the two. Mahan’s “lion in the path” was reduced not merely to a watchdog but to a chained kitten. *In re Neagle* forged the first link in that chain by accepting the theory of inherent presidential power in international affairs. The Insular Cases created another link by ratifying McKinley’s conquests and by allowing the United States government to rule the conquests as it saw fit. Theodore Roosevelt further severed presidential powers from constitutional restraints when during 1904 and 1905 he ordered the United States Navy to protect American interests in Santo Domingo by stopping an internal revolution. Roosevelt justified his action by referring to unspecified “police” powers. He then signed a treaty giving his officers control of Santo Domingo’s main revenue source, the customs houses. When the Senate rejected the treaty on the ground that it wanted no part of a de facto Rooseveltian protectorate, the president circumvented the Senate’s constitutional powers by negotiating an executive agreement. He justified that and other presidential actions with a “stewardship” theory: his “insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers.”<sup>29</sup>

Neither the stewardship theory nor the making of executive agreements was new. The view of implied presidential powers held by Hamilton (whom Roosevelt and his friend Henry Cabot Lodge highly praised in their own writings on American history), anticipated Roosevelt’s assertion that a president could act without specific authorization. Executive agreements were important in foreign policy at least as early as the 1817 Rush-Bagot pact that demilitarized the United States–Canadian border. New, however, was the claim made by post-1897 presidents that the stewardship theory allowed extraordinary enlargement of the powers of commander in chief overseas. New also was the extensive use of executive agreements. Roosevelt alone used the device in 1904 in Santo Domingo, in 1907 to deal with a dangerous immigration dispute with Japan, and in 1905 and 1908 to resolve a growing United States–Japanese confrontation in Asia. The Senate’s ability to control presidential

<sup>28</sup> Robert Beisner, *From the Old Diplomacy to the New, 1865–1900* (Arlington Heights, Ill., 1985), 88, 138–39; Richard Hofstadter, *The Paranoid Style in American Politics and Other Essays* (New York, 1965), 180–81.

<sup>29</sup> Henkin, *Foreign Affairs and the Constitution*, 371–72.



power through its right to participate in treaty making was being systematically undercut.<sup>30</sup>

The historic transformation in the relationship between the Constitution and foreign policy was well analyzed by the widely known political scientist and university president, Woodrow Wilson, in 1908. In his *Constitutional Government in the United States*, Wilson argued that between 1865 and 1898 domestic questions, and thus congressional power, were at the front of the nation's politics. But the 1898 war "changed the balance of the parts," for diplomatic questions became paramount and "in them the President was of necessity leader." Wilson spelled out the constitutional implications: "The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely." The Constitution's theories might be traced back to Isaac Newton's and Montesquieu's ideas that politics could be "turned into mechanics," but Wilson disagreed. Government, he wrote, "is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life." The environment had radically altered in the 1890s, and, as Darwinian thought decreed, the new presidential functions necessarily evolved. Henceforth the president alone "must . . . be one of the great powers of the world," and, therefore, must not be of "ordinary physique and discretion," but be chosen "from among wise and prudent athletes—a small class." With considerable insight, Wilson guessed that the changes would occur "not by any reconstruction of the system," but by modification in "our national consciousness" that would allow the power to be quietly relocated.<sup>31</sup>

As Wilson's writing exemplified, a strong doubt about the ability of the traditional constitutional system to deal with global issues was acting as an acid to eat away the system's checks and balances. Alexis de Tocqueville had declared seventy-five years earlier that "especially in the conduct of their foreign relations . . . democracies appear to me decidedly inferior to other governments." He had wondered about the consequences when United States diplomacy would one day have to do more "acting" and less "abstaining." Now that the "acting" had become global, the concern grew. In 1891 Wilson tried to deal with the emerging problem by bluntly stating in public lectures that it must be that the president "*exercises the power, and we obey.*" In 1913 the passage of the Seventeenth Amendment requiring senators to be elected directly by the people instead of by state legislatures increased the concern. In Federalist No. 64 John Jay had justified the Senate's treaty powers by claiming that the members would be carefully chosen by the states' "select assemblies," and that the body would be small enough to preserve secrecy and promote wisdom. By World War I neither the source nor the size of the Senate's membership fit Jay's argument.<sup>32</sup>

<sup>30</sup> Lawrence Margolis, *Executive Agreements and Presidential Power in Foreign Policy* (New York, 1986), 9–11.

<sup>31</sup> Woodrow Wilson, *Constitutional Government in the United States* (New York, 1908), 48–49, 56–59, 77–80. An excellent context for Woodrow Wilson's point is given in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York, 1986), 18–20.

<sup>32</sup> Alexis de Tocqueville, *Democracy in America* (2 vols., New York, 1948), I, 234; Hamilton, Madison, and

But perhaps nothing more discredited the role of democracies, representative assemblies, and constitutional restraints on foreign policy than the world war itself. On the eve of United States entry into the conflict, Wilson gave a soon-to-be famous interview in which he warned that once Americans became involved in fighting “they’ll forget there ever was such a thing as tolerance.” The president thought that “the Constitution would not survive it; that free speech and the right of assembly would go.” Historians have held Wilson personally responsible to some extent for the wartime intolerance and postwar Red Scare that wracked American society. But later presidents, their advisers, and widely read journalists saw both the Red Scare and the Senate’s defeat of the League of Nations Covenant as the tragic results of a war effort corrupted by an ill-formed and unrestrained democracy. One of Wilson’s young advisers, Walter Lippmann, looked back on the shattering experience and concluded that before the war the international system had been at peace because strong leaders had kept their nation’s democratic impulses under control. By 1917, however, the demands of total war allowed the growth of those impulses until they broke “the institutional frameworks of the established governments.” The executives in the western nations “lost control of the war.” Lippmann believed “the consequences were disastrous and revolutionary.” War could no longer be waged “for rational ends.” He lamented that “the people have acquired power which they are incapable of exercising. . . . A mass cannot govern.”<sup>33</sup>

There were to be dissenting views. Edward S. Corwin asked in 1947 why Americans had once lived under a “Constitution of right” but now endured a “*Constitution of Powers*, one that exhibits a growing concentration of power” in fewer, and especially in presidential, hands. He answered that it was largely the “*Constitution of World War I*” now “*adapted to peacetime uses in an era whose primary demand upon government is no longer the protection of rights but the assurance of security.*”<sup>34</sup> Unlike Lippmann, who viewed the period 1917 to 1920 as crucial because it proved that “the people” were incapable of shaping rational foreign policy, Corwin believed that era was seminal because during those years a dangerously centralized security state had been created. Corwin’s argument was powerful, but Lippmann’s proved persuasive, especially in the post-World War I era.

During the 1920s, United States officials privately carried out a foreign policy well away from the raucous political arena in which Congress had passed Espionage and Sedition Acts and in which the Senate killed Wilson’s dream of a League of Nations. The important business was accomplished not by negotiating treaties on which the Senate could act but by quiet arrangements made by private bankers in New York, London, Berlin, and Tokyo. The plans for rebuilding war-devastated Western Europe and for saving the German economy were formulated during a 1924 conference

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Jay, *Federalist Papers*, intro. by Rossiter, 390–96; Arthur Link, ed., *The Papers of Woodrow Wilson* (56 vols., Princeton, 1966–), VII, 352. Italics in original.

<sup>33</sup> Arthur S. Link, “That Cobb Interview,” *Journal of American History*, 72 (June 1985), 11–12; Harry N. Scheiber, *The Wilson Administration and Civil Liberties, 1917–1921* (Ithaca, 1960), 27; Walter Lippmann, *Essays in the Public Philosophy* (New York, 1955), 14–18.

<sup>34</sup> Edward S. Corwin, *Total War and the Constitution* (New York, 1947), 172. Italics in original.

at which the United States government had only an observer, although behind the scenes State, Commerce, and Treasury department officials worked intimately with the private financiers.<sup>35</sup>

In 1929 the private money markets that buttressed formal diplomatic arrangements, such as the 1924 Dawes Plan for rebuilding Europe and the treaty system of 1921–1922 for the Far East, collapsed and pulled down the diplomatic superstructure with them. In the 1930s the United States turned inward; the “domestic questions,” as Wilson had termed them in 1908, again became paramount. Congressional power came to the forefront. The Senate’s defeat of President Franklin D. Roosevelt’s plan to join the World Court, the Neutrality Acts that restricted the executive’s foreign policy alternatives between 1935 and 1939, and the president’s delicate handling of foreign economic initiatives illustrated the turn that had occurred in the chief executive’s treaty powers, war powers, and powers as commander in chief. But it was a short-lived turn. By 1940, as the spreading war threatened the United States, Roosevelt began recentralizing power in the White House. Sometimes, as in the Lend-Lease legislation of 1941, he showed deference to Congress. More often, as when he executed the destroyers-for-bases deal in 1940 or when he secretly ordered United States convoys for British ships in 1941 and apparently even angled for German attacks on American vessels that would force the nation into war, Roosevelt acted with little deference to congressional restraints.<sup>36</sup> The centrifugal-centripetal effect again appeared, and this time it was to have a long life.

Ironically, during the short-lived resurgence of congressional influence the Supreme Court handed down in 1936 the landmark decision that justified expansive presidential power in foreign affairs. In *United States v. Curtiss-Wright Export Corporation et al.*, the Court upheld the president’s right to prohibit the sale of arms and munitions to specific belligerents in Latin America, especially because Roosevelt had done so pursuant to congressional authorization. But Justice George S. Sutherland, speaking for the majority, went well beyond those specific facts. He finished the process that had been initiated by actions such as *In re Neagle*, Mahan’s advice, and the McKinley, Theodore Roosevelt, and Wilson initiatives by explicitly separating the Constitution’s relationship to domestic policy from its relationship to foreign relations. He accomplished that judicial legerdemain with three short and highly questionable statements: that the federal government’s “powers of external sovereignty” antedated the Constitution and came from the British king in the Revolution; that therefore “federal power over external affairs [is] in origin and essential character different from that over internal affairs”; and that “in this vast

<sup>35</sup> For useful accounts of 1920s foreign policy, see Carl Parrini, *Heir to Empire: United States Economic Diplomacy, 1916–1923* (Pittsburgh, 1969); Michael Hogan, *Informal Entente: The Private Structure of Cooperation in Anglo-American Economic Diplomacy, 1918–1928* (Columbia, 1977); Melvyn Leffler, *The Elusive Quest: America’s Pursuit of European Stability and French Security, 1919–1933* (Chapel Hill, 1979); and Frank Costigliola, *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919–1933* (Ithaca, 1985).

<sup>36</sup> Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* (New York, 1979), 259–63, 285–89; Warren F. Kimball, ed., *Churchill and Roosevelt: The Complete Correspondence* (3 vols., Princeton, 1985), I, 229–30.

external realm . . . the President alone has the power to speak or listen as a representative of the nation.” To emphasize the last point Sutherland declared that there is “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” The justice did think that this “exclusive power” had to be “exercised in subordination to the applicable provisions of the Constitution.” What those provisions might be he did not mention.<sup>37</sup>

In 1937 Sutherland also wrote the majority opinion in *United States v. Belmont*, which held that an executive agreement was the equivalent of a treaty and that in certain cases a president’s will could replace state law. In those two cases, Sutherland allowed presidential power in foreign affairs to float as freely from its constitutional moorings as was possible short of doing away with the moorings altogether. It was, Louis Henkin reflected, “a singular constitutional theory: the powers of the United States to conduct relations with other nations do not derive from the Constitution!”<sup>38</sup>

Other aspects of the decisions are of special importance. Sutherland, it should be stressed, had advanced similar arguments years earlier. A United States senator and a member of the Foreign Relations Committee before he was appointed to the Court, Sutherland had written an article in 1910 and a book in 1919 in which he rigidly distinguished between “our *internal* and our *external* relations.” An ardent conservative, he attacked those who would interfere in affairs he thought best left to individual states (such as a state’s right to pass or, as Sutherland preferred, not to pass child labor laws), but argued that in “external matters” the states had “no residuary powers.”<sup>39</sup> Sutherland thus solved the key problem facing conservatives who were also ardent nationalists and who somehow wanted strong national powers in foreign affairs but protection for certain states’ rights in domestic affairs. Reconciliation of that dual wish was perhaps the central problem challenging the Constitution as the United States became a global power between the 1890s and 1920. Sutherland demonstrated how to solve it.

But his solution also trapped him and others who assumed that the two arenas of foreign and domestic affairs could be so neatly separated. The trap began to close

<sup>37</sup> *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 305, 318, 319, 320. For a good brief discussion of George S. Sutherland’s earlier views, see Kammen, *Machine That Would Go of Itself*, 257.

<sup>38</sup> *United States v. Belmont*, 301 U.S. 330–31 (1937); Henkin, *Foreign Affairs and the Constitution*, 19. Later scholars have effectively challenged Sutherland’s unique interpretation of history, including his belief that the central government’s sovereignty in foreign affairs was fully formed at the moment of American independence. See, for example, Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, *Yale Law Journal*, 83 (Nov. 1973), 1–32; Louis Fisher, “Evolution of Presidential and Congressional Powers in Foreign Affairs,” unpublished manuscript (1984), 5 (in Walter LaFeber’s possession); Louis Fisher, *Constitutional Conflicts between Congress and the President* (Princeton, 1985), 109–10; and Harry N. Scheiber, “Federalism and the Constitution: The Original Understanding,” in *American Law and the Constitutional Order: Historical Perspectives*, ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, Mass., 1978), 86.

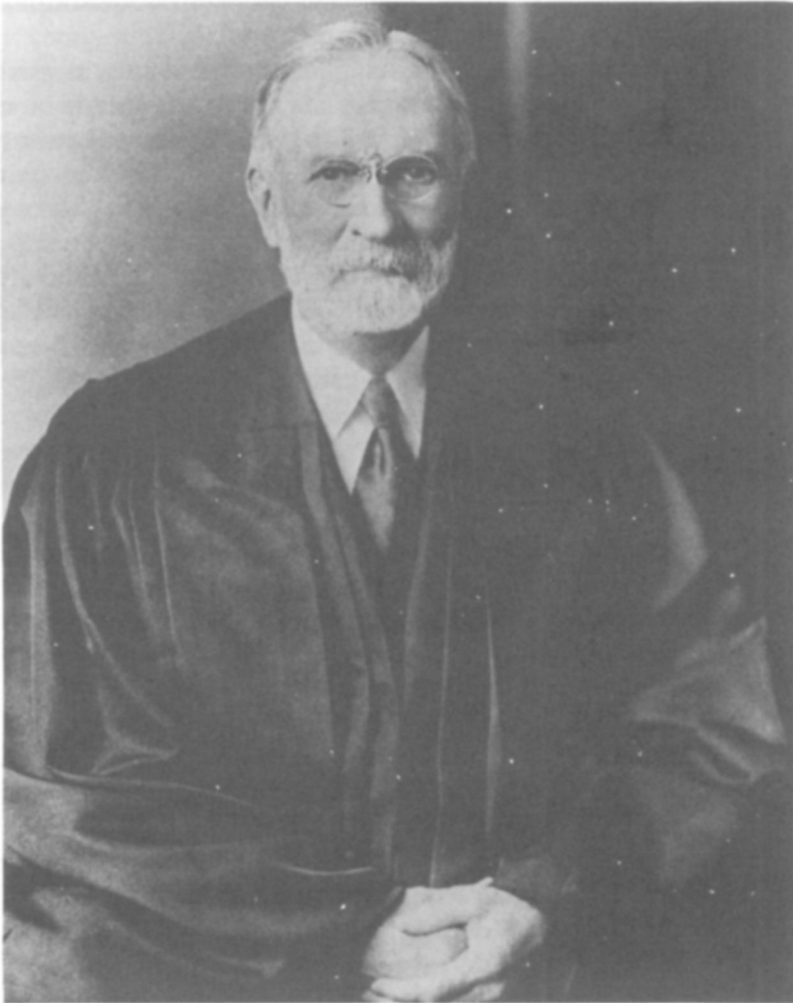
<sup>39</sup> U.S. Congress, Senate, George Sutherland, *The Internal and External Powers of the National Government*, 61 Cong., 2 sess., March 8, 1910, pp. 1, 12; George Sutherland, *Constitutional Power and World Affairs* (New York, 1919).



The Warrior: Captain Alfred Thayer Mahan characterized the Constitution as the “lion in the path” of American overseas expansion. Frontispiece reproduced from William Puleston, *Mahan* (New Haven, 1939).

in his 1910 article when Sutherland had to argue that if the government was to carry out the Constitution’s admonition to “provide for the Common Defense,” whatever means were needed to realize the charge could not be denied. “Always the end is more important than the means,” he asserted. The argument that the end justifies the means opened Sutherland to later charges of advocating “Executive totalitarianism,” and raised questions about the course of American conservatism. It also left hanging the most important question: What would be the outcome if his belief that foreign and domestic affairs could be neatly separated turned out to be mis-





The Judge: Supreme Court Justice George Sutherland wrote decisions that helped remove the constitutional “lion” from the path of American expansion. Frontispiece reproduced from Joel F. Paschal, *Mr. Justice Sutherland* (Princeton, 1951).

taken? The trap continued to close on Sutherland when, between 1914 and 1920 he gave vent both to a vigorous patriotic nationalism and to his longtime belief in personal rights while simultaneously working for United States entry into the war and attacking slackers who were “compromised by a hyphen” in their Americanism. He came to despise Wilson and was especially critical of the president’s foreign economic policy, which included a low tariff that hurt the beet sugar industry in Sutherland’s home state of Utah. But how Wilson was supposed to conduct a strong foreign policy without also controlling overseas economic policy the Utah senator did not



discuss. Sutherland's view of "external relations" was narrow, oversimplified, and based on a false separation of foreign and domestic affairs.<sup>40</sup>

That view, however, has ever since been dominant. The popular slogan "politics stops at the water's edge" encapsulated the hope that diplomacy could be separated from domestic politics. Bipartisanship in foreign policy peaked between 1947 and 1950 when the process helped produce the Marshall Plan and United States membership in the North Atlantic Treaty Organization. But even during those years the separation could not be total. The most graphic example occurred in 1947 when President Harry S. Truman, bucking strong political opposition, brilliantly formulated the Truman Doctrine, which has ever after solved the central question of how a president can obtain a domestic consensus for his foreign policy. Truman rode the crest of the resulting consensus until stalemate in the Korean War, the possibility of a long inconclusive struggle with China, and the Soviets' explosion of their first atomic bomb opened the administration to virulent attack. Diplomacy could not be separated from domestic politics: An emergency abroad could not be stopped at the water's edge.<sup>41</sup>

One result was a search for Communists in government that turned into the McCarthyite witch hunt. Secretary of State Dean Acheson fought back with a blunt statement that would probably have surprised most of the founders: "Not only has the President the authority to use the armed forces of the United States in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution." Louis Hartz provided the proper perspective on what was occurring when he wrote, "the issue is deeper than foreign policy, for the world involvement has also brought to the surface of American life great new domestic forces. . . . It has redefined, as communism shows, the issue of our internal freedom in terms of our external life."<sup>42</sup> That link between domestic and foreign affairs held, despite Mahan's, Sutherland's, and Acheson's attempts to smash it.

Presidential power was briefly curtailed in 1952 when the Supreme Court ruled in the steel seizure case that Truman had gone beyond his authority by moving to take over strike-bound steel mills to ensure the steady production of war material. The commander-in-chief provision, Justice Robert Jackson declared, did not endow the president with "power to do anything anywhere, that can be done with an army or navy." The validity of Jackson's assertion, however, was tested within a decade. The Cuban missile crisis of 1962 edged the world towards a final catastrophe. In the words of one distinguished scholar, the crisis dramatized how "technology has modified the Constitution: the President, perforce, becomes the only man in the

<sup>40</sup> Sutherland, *Internal and External Powers of the National Government*, 5; Joel Francis Paschal, *Mr. Justice Sutherland: A Man against the State* (Princeton, 1951), 62, 217–20, 226–30.

<sup>41</sup> Richard M. Freeland, *The Truman Doctrine and the Origins of McCarthyism: Foreign Policy, Domestic Politics and Internal Security, 1946–1948* (New York, 1972).

<sup>42</sup> Henkin, *Foreign Affairs and the Constitution*, 307; Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York, 1955), 5.

system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time." The combination of available technology, presidential decisiveness, and a general consensus on the need to contain communism anywhere on the globe appeared most dramatically when President Lyndon B. Johnson ordered five hundred fifty thousand troops to Vietnam in 1967 and 1968. When Congress finally resisted Johnson's policy, it was told by a top administration official that "to declare war," as the term was used in the Constitution, was "an out-moded phraseology" in the present international arena.<sup>43</sup>

Another measure of presidential power was revealed when investigation showed that in 1930 the United States had made twenty-five treaties and nine executive agreements, but by 1972 it had signed 947 treaties and 4,359 executive agreements. *Curtiss-Wright* reappeared to provide precedent. In the early 1970s, a 1941 Treasury Department memorandum surfaced that concluded the Sutherland decision had raised "a serious question whether the Congress can constitutionally limit the President's powers" in foreign relations. Acheson testified in 1971 that the 1936 case allowed the president to withhold any information from Congress if he believed that it affected national security interests. Others argued that it allowed withholding information deemed important by the executive to national security, even if the information was obtained without warrant through electronic surveillance of defendants whose rights might be affected.<sup>44</sup>

As the Vietnam experience demonstrated, Congress had difficulty controlling presidential actions once troops were committed to distant alliances and battlefields. To remedy that weakness, Congress passed the War Powers Act in 1973. The act limited and made more accountable the president's powers as commander in chief. By then the Vietnam War had come home to the United States through rioting, inflation, and political polarization. Congress responded with a flurry of activity that tried to limit executive initiatives at home as well as overseas. Secretary of State Henry Kissinger declared, "The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that the Congress is a coequal branch of government is the dominant fact of national politics today." The Supreme Court seemed less certain. Even though it allowed the publication of the Pentagon Papers and ordered President Richard M. Nixon to release his White House tapes, the Court based its rulings on such narrow grounds that it remained possible for future presidents to avoid such disclosure if they could only make a better case for withholding information for national security reasons.<sup>45</sup>

In 1983 the Supreme Court struck down the power of Congress to control certain

<sup>43</sup> Maeva Marcus, *Truman and the Steel Seizure* (New York, 1977); Henkin, *Foreign Affairs and the Constitution*, 307; Richard Neustadt, *Presidential Power: The Politics of Leadership* (New York, 1968), 212–14; *Congressional Record*, 90 Cong., 1 sess., Aug. 21, 1967, pp. 23390–91.

<sup>44</sup> George W. Ball, *Diplomacy for a Crowded World: An American Foreign Policy* (Boston, 1976), 208–9; Lofgren, "United States v. Curtiss-Wright Export Corporation," 4.

<sup>45</sup> "Address by Henry Kissinger to the American Society of Newspaper Editors, 'U.S. Foreign Policy: Finding Strength through Adversity,'" *Department of State Bulletin*, May 5, 1975, p. 562; Henkin, *Foreign Affairs and the Constitution*, 254, 487.

presidential actions through the so-called legislative veto. If applied to the War Powers Act, the Court's decision would remove perhaps the most important congressional restraint on the president's power to dispatch and keep troops abroad. As executive authority in foreign policy surged, President Ronald Reagan refused to recognize the War Powers Act provisions explicitly, although he by and large abided by them. Political scientists worried that presidents' dependence on public opinion poll support and the knowledge that historically such support increased during foreign policy crises had created a "plebiscitary presidency" that unilaterally acted in foreign policy, regardless of constitutional provisions, whenever a "fix" was needed for higher ratings in the polls.<sup>46</sup>

The rise of international terrorism in the 1980s led many Americans, including congressional leaders, to give the president the plenary powers justified by Sutherland. Republican Senate Majority Leader Robert Dole of Kansas urged repealing the War Powers Act because terrorism outdated it. Arguing a kind of situational politics, Dole wanted the president to have automatic support to fight terrorism "as the Constitution prescribes and as the situation demands." Dole's view of the constitutional restraints seemed quite different, however, from the beliefs that had shaped the 1973 act or the pre-1890 debates and decisions about the interconnectedness of foreign and domestic policies. Theodore J. Lowi, on the other hand, noted how the Reagan administration made a number of decisions to increase mail, electronic, and physical surveillance, as well as how it justified breaking and entering to find evidence, in the name of ending terrorism. Lowi believed Sutherland's line between the domestic and foreign powers had become dangerously, but inevitably, blurred.<sup>47</sup>

A number of questions regarding the rapid growth of presidential power demand scholarly investigation (and in some instances, political action). Three areas for future research seem especially important. The first is how and why conservatives and many liberals have attempted to separate foreign and domestic policies when such a separation has increasingly become artificial and dangerous. Conservatives have often sought the separation to justify a weak central government at home and strong executive power abroad, whereas some liberals have reversed those priorities. Both sides have ignored, for example, how military budgets ranging from \$50 billion to \$300 billion have made such distinctions unreal in the post-1945 era. A second area for study is how the president and his supporters have been able not only to blunt attempts to curb executive power but also in pivotal instances actually to use those attempts to increase executive power. Eisenhower's handling of the Bricker Amendment movement during 1953 and 1954 and recent presidents' handling of the War Powers Act come to mind in that context. A third research area, requiring a merging of social and diplomatic history, is why Americans, with their supposed love affair for the Constitution and especially for its protection of individual liberties, have

<sup>46</sup> Fisher, "Evolution of Presidential and Congressional Powers in Foreign Affairs," 1-2, 4; *Dames & Moore v. Regan*, 453 U.S. 661, 668 (1981); Margolis, *Executive Agreements and Presidential Power in Foreign Policy*, 62; Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca, 1985), 175.

<sup>47</sup> *Washington Post*, April 23, 1986, sec. A, p. 23; Lowi, *Personal President*, 174.

been so willing to drop the affair for involvements overseas. Perhaps one reason for such willingness is the irrelevance of public opinion and, often, of congressional opinion, in the making of foreign policy. The presidency has usually shaped foreign policy opinions, not vice versa, and we need more systematic studies to explain how and why that has occurred.

Nearly two centuries ago Madison worried that liberty at home might be lost because of danger, "real or pretended," abroad. The founders had given the president flexibility to conduct foreign policy, but also provided, through other branches of the government, checks on executive power and extended guarantees to individual rights. Madison reaffirmed the importance of those checks when he wrote as "Helvidius" in his debate with Hamilton. Since the 1890s, no equally effective "Helvidius" has appeared. That is strange, because since that time there has been a steady, consistent accretion of authority by the president in foreign affairs. The accretion became most notable between 1890 and 1920 when the United States emerged as a great world power.<sup>48</sup> Imaginative presidents, agreeable courts, compliant Congresses, and cooperative scholars have removed and chained Mahan's "lion."<sup>49</sup> Sutherland, drawing on arguments formulated between 1890 and 1920, provided the most important historical and judicial justification for taking the critical step of separating foreign and domestic affairs. The acceleration of centralized, and often unchecked, foreign policy powers in the 1960s, 1970s, and 1980s makes that separation, and especially its effect on individual liberties, questionable and dangerous. Historical perspective also demonstrates that those recent decades must be understood in the context of post-1890 American foreign policy and not merely in the context of the Cold War. Madison had hoped to use expansion to prevent the establishment of irresponsible centralized power. But in the late twentieth century, after a century of American overseas expansionism, the extension of United States power has created the centralization Madison feared.

<sup>48</sup> In his useful analysis of 1890 to 1920, John E. Semonche asserts, "The Supreme Court's special task was to determine whether a fundamental law, fashioned in a much simpler time, could accommodate these new exertions of governmental power." John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, 1978), ix.

<sup>49</sup> See, for example, Henkin, *Foreign Affairs and the Constitution*, 6-7; Fisher, "Evolution of Presidential and Congressional Powers in Foreign Affairs," 24; and *Dellums et al. v. Smith*, 797 F. 2d 817 (9th Cir, 1986). In the *Dellums* decision, the court refused to question the president's support of the Nicaraguan Contras. The author wishes to thank Max Miller for a copy of the *Dellums* and related opinions and for advice on this and other points in the essay.