Rethinking the Costs of International Delegations

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Based upon these two examples, it is unclear which species of delegation, domestic or international, creates greater democratic accountability problems for Congress and the President. It is worth considering whether delegations of authority to international institutions such as the United Nations indeed create what are called greater “agency costs” than domestic delegations of authority to bodies such as the Federal Reserve. The conventional wisdom, which is critical of international delegations, mistakenly suggests that the answer is obvious: international delegations almost always create higher agency costs than domestic delegations. According to critics, for domestic delegations US congressional, executive, and judicial oversight mechanisms are present to monitor the agency to try to ensure accountability and democratic legitimacy. Here, agency costs are low. But for international delegations of binding authority to international institutions, critics contend that the US oversight mechanisms are absent, leaving the US unable to ensure that the international institution will act within the bounds of its delegated authority. Moreover, international institutions are neither representative of US interests nor accountable to the American public. Therefore, agency costs are high for international delegations and binding international delegations should either be disfavored or avoided.

To examine the merits of the agency costs claim, this Article focuses on two important questions: First, are the oversight tools to manage international delegations and domestic delegations systematically different in efficacy? Second, is the balance of costs and benefits for international delegations systematically different from that of domestic delegations? The answer to both questions is no.

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I. Delegations: Domestic and International

In the US, domestic delegations were tools born out of the increasingly complex and technical regulatory apparatus of the modern administrative state. Congress, lacking the necessary expertise and resources to address the new regulatory demands, began to delegate broad authority to executive agencies to issue rules, directives, and regulations in their specified issues areas. The benefit is twofold: Congress can take advantage of agency expertise, producing socially desirable outcomes, and Congress can focus its resources on issues for which it is better suited to legislate.

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Despite the potential benefits, delegations create a principal-agent problem, namely, that Congress and the President could not perfectly control their agent, the domestic agencies exercising delegated authority. Scholars have proposed various monitoring and oversight mechanisms to constrain agencies and more closely align them with the interests of Congress. One common tool for Congress and the President is the appointment process. Since the President and Congress act together to nominate and confirm potential appointees, they can coordinate and find appointees who share their consensus view and might therefore be less likely to deviate from their interests, presumably reducing agency costs and increasing accountability.

Another tool to constrain agents is through ex ante procedural controls. The President and Congress can force agencies to adopt specific decision-making processes, use certain methodologies, or engage in agenda setting to narrow agency authority. They can also consider the institutional design of agencies to reduce agency costs by creating institutional structures that shape the way the agencies operate and provide greater transparency and limit agency discretion.

Ex post tools are also available to ensure that the agencies continue to function within their delegated authority. Judicial review is one option, but it is unlikely to reduce agency costs. But on an ongoing basis, Congress can use “police patrols,” empower congressional committees to directly monitor agencies, or authorize individuals, corporations, or other parties subject to agency rule making to act as “fire alarms” and report agency misbehavior back to Congress. In theory, once the Congress observes bureaucratic drift or other problems, they could threaten to cut agency funding or conduct oversight hearings to question and embarrass agency heads. The President can issue directives by executive order regarding the breadth or agency authority in a particular area, engage in intraexecutive review of agency actions, and even informally appropriate authority over agency function. The President could threaten to terminate or otherwise pressure agency heads to act within their delegated authority.

Despite the fact that no mechanism can fully eliminate agency costs, domestic delegations are generally uncontroversial because, in theory, politically accountable actors selected through the democratic process can generally review, monitor, or invalidate agency decisions. Congress, acting with the President, delegates decision-making authority to an agency; the President nominates the people to staff the agency; the Senate confirms or rejects the nominee; and the courts are open for judicial review of agency action. In theory, each actor is representative of and responsive to the American public and the process is generally consistent with the Constitution’s formal requirements and structural limitations. For domestic delegations, the benefits of agency expertise come with agency costs, reduced by formal and informal review mechanisms.

With the significant exception of the international component, international delegations are conceptually identical to domestic delegations. Consider the following modified example of a delegation of adjudicative authority drawn from North American Free Trade Agreement (NAFTA). The US, Canada, and Mexico want to create a free-trade zone encompassing each country and sign a treaty to that effect. Under the terms of the treaty, the states create an adjudicative body or appeals panel to hear potential claims regarding the treatment of companies operating within the free-trade zone. Nonbinding international delegations are generally not the source of the most serious constitutional concerns because some political branch action is necessary before any decision, judgment, or
regulation becomes binding in the US. Presumably, the constitutional problems are minimal and the agency costs are low, or at least similar to domestic delegations.

But what if the NAFTA appeals panel could hear claims and its decisions would be immediately enforceable in the US? After the appeals panel issued its judgment, Congress and the President would not have the option of noncompliance by refusing to act—the judgment would have immediate legal effect. For this reason, critics argue that binding international delegations are constitutionally problematic and exacerbate agency costs.

Binding international delegations of legislative authority may also conflict with Article I procedural requirements for lawmaking and appointments. Typically, binding international delegations are part of Article II treaties or congressional-executive agreements that, by their terms, create an international body. Imagine that the US signs and ratifies a multilateral treaty through the Article II treaty process. The treaty creates an international body that has binding authority to set minimum capital requirements for banks. Subsequently, the body acts and determines that all parties to the treaty must set the capital requirements for their domestic banks at 10 percent. Thus, the US has a binding obligation to comply with the new capital requirements.

For critics, this binding international delegation of legislative authority permits the international body to create new “law” with respect to capital requirements in violation of the Constitution’s bicameralism and presentment requirements. The international body’s “legislation” would be automatically enforceable as US law without further political branch action, circumventing the House of Representatives, Senate, and President.

Similarly, a binding international delegation to an international agency would implicate the Constitution’s Appointments Clause and potentially Article II requirements for treaties. For example, let us assume that the US joins a multilateral treaty that creates an international agency with the authority to set binding regulations for the permissible amount of carbon emissions for each state party to the treaty. The international agency’s director and staff, who are not appointed by the US President or Congress, would have the authority to regulate the amount of carbon emissions in the US and their determination would have immediate legal effect in the US. This would seemingly violate the Appointments Clause. Moreover, since the international agency can make ongoing binding determinations regarding its area of regulatory authority, such determinations could be interpreted as creating a new international obligation for the US. And if it is a new international obligation for the US, it might require a new treaty in conformance with the Treaty Clause.

Perhaps the area of greatest concern for critics is binding delegations of adjudicative authority to international judicial bodies. The treaties creating the UN, NAFTA, and the World Trade Organization (WTO), among others, each include a quasi-judicial body to hear claims arising under each treaty. Beyond formal constitutional requirements, binding international delegations implicate general federalism and separation of powers concerns. Even if the President can represent US interests at the international institutions, the transfer of decision-making authority away from Congress and the states to the President encourages a consolidation of power in the executive branch.

The failure to conform to formal and structural constitutional limitations produces a second and perhaps larger problem with binding international delegations: a lack of democratic legitimacy and political accountability for those entities exercising delegated authority. In the domestic context, at least Congress, the President, and the courts can proscribe delegations to administrative agencies and monitor their behavior. In the international context, this oversight structure cannot be replicated. Whatever agency costs problems exist in the domestic context, they pale in comparison to the costs created by delegating binding authority to an international institution.

II. Critiquing Proposals to Limit International Delegations

The combination of formal constitutional concerns and high agency costs has motivated proposals to make binding international delegations more difficult and, as a consequence, infrequent. One proposal suggests that courts should adopt a default rule of non self-execution for all international delegations that purport to create a commitment or obligation for the US. Thus, if the US wants to create a binding legal obligation, Congress and the President must specifically indicate an intent to bind the US in the congressional-executive agreement or treaty that purports to make the international delegation. A similar proposal suggests that the US adopt a “super-strong clear statement rule,” requiring Congress and the President to explicitly state their intent to bind the US through an international delegation of adjudicatory authority. In the absence of a “super-strong” clear statement, courts would
treat judgments of international legal tribunals as non-self executing and would not create any binding legal obligation in the US. This proposal is designed to make binding international delegations of adjudicative authority significantly more difficult and limit the binding effect of judgments from international judicial tribunals.

A third option proposes to raise the costs of enacting binding international delegations by requiring that such delegations be made only through the Article II treaty process. The Treaty Clause’s supermajority requirement would have the effect of prohibiting binding international delegations through congressional-executive agreements, which, like domestic legislation, go through both houses of Congress and are signed by the President, and through presidential-executive agreements, negotiated and signed by the President without congressional involvement. These proposals are concerned with a lack of formal adherence to constitutional limitations and structural requirements, combined with the high agency costs from poor accountability and legitimacy.

The key justification for limits on international delegations is the presence of high agency costs. However, the lack of specificity in the claim regarding agency costs and lack of clarity regarding assumptions about the incentives of international institutions create doubt about the need for limits on binding international delegations. First, critics are not always clear about what constitutes high agency costs. Agency costs should vary according to the nature of the international delegation (legislative, judicial, or regulatory); the organizational structure of the body exercising decision-making authority; the issue over which the organization has authority; and the scope of domestic interference. But we would expect the same thing in domestic delegations as well.

Second, it is not clear why agency costs are necessarily higher in international delegations than domestic delegations. Consider this simple example. The US signs a multilateral treaty with three small countries creating limits on the expropriation of foreign property. The treaty creates an eleven-judge “International Expropriation Court” (“IEC”) with binding adjudicative authority to hear claims and issue final judgments; it is a binding international delegation by the US to the IEC through a treaty. Agency costs, in theory, might be high since the US cannot control the International Expropriation Court’s judgments, as they would be automatically enforceable in US courts. However, let us assume further that the treaty requires that the IEC operate by majority vote for all decisions but permits the US to appoint six of the eleven judges. Here, agency costs are low because the IEC’s voting structure ensures that it would reflect US interests. Third, critics do not explain why they think that international institutions would be more vulnerable than domestic agencies to higher agency costs stemming from agency drift, coalition drift, or interest group capture than domestic agencies.

A few assumptions about the operation of international institutions seem to motivate the criticism of international delegations. One clear assumption is that international institutions are staffed with cosmopolitan foreign elites who are either dismissive of or openly hostile to American interests. Since these foreign elites exercise binding decision-making authority, the agency costs of international delegations are high. A variant of this assumption is that international institutions (and international law) are tools to constrain American power, making them unlikely to represent American interests. If the US transfers binding authority to international institutions that operate as tools for weaker states to constrain the US, the agency costs are likely to be high.

While it is certainly true that international institutions will not perfectly reflect US interests and that weaker states might try and use them to constrain the US, it also clear that the US has been the leading force in the conception, creation, and use of international institutions across a number of issue areas. The most salient international institutions in world affairs, the UN and the WTO, are both the results of US efforts to shape the world consistent with US interests. Rather than being constrained by international institutions, the US is generally delegating to international institutions that it created and over which it exercises disproportionate influence.

Critics of binding international delegations focus almost exclusively on the agency costs problem but do not weigh those costs against the benefits of international delegations. It is uncontroversial to suggest that there are challenges of global concern requiring international cooperation to address and that international delegations may be one way to exploit the organizational advantages of centralized international institutions. Similar to domestic agencies, international institutions can take advantage of the aggregation of human expertise, broader access to data, greater legitimacy, and the accumulation of institutional knowledge built up over time to address the issues of global concern. International institutions with standing
committees, bodies, or executive structures can act more rapidly to address global issues as they occur, rather than waiting for states to coordinate or act independently in a crisis. Much of this can be done at a lower cost through an international institution with decision-making authority rather than by state coordination on a bilateral or multilateral basis; on an issue-by-issue basis; or in a reactive, ad hoc manner. Limits on the national government’s ability to delegate binding authority might make it harder for the US to enjoy the gains of international cooperation in the situation where the gains outweigh the potential agency costs.

III. Tools from Domestic Delegations Available for International Delegations

Many of the oversight tools for domestic delegations are available and used in the international context, a point frequently ignored by critics of international delegations. Ex ante domestic oversight mechanisms include the appointments process and institutional design. Ex post tools include the appropriations power, judicial review, and executive narrowing of agency discretion through explicit directives, intra-executive supervision, and the assumption of responsibility for agency actions. All of these tools permit the principal to reduce agency slack and limit shirking and self-dealing by the agent.

Many of these ex ante and ex post tools are present, in slightly different forms, in the international context. Of course, international oversight tools do not perfectly mimic those in the domestic context, making agency costs exactly the same. But any claim that agency costs are sufficiently high to warrant constitutional redress fails without a closer examination of the various tools that the US uses to influence international institutions.

International institutions are generally conceived, designed, and operated by powerful states to allow them to coordinate and achieve shared goals. At the same time, rational constitutional design dictates structuring international institutions to meet certain goals, increase flexibility, and potentially shape state interests. If such options exist, the claim that the difference in agency costs between international and domestic delegations, by itself, justifies disparate constitutional treatment is less convincing. In the end, the capacity of the US to influence the international institution will depend on the nature of the delegation; the decision-making procedures of the institution; the substantive area; and the precision of the rule adopted.

The most effective ex ante tools center on institutional design and procedures, namely, agenda setting, attenuated delegation, voting rules, appointments, and funding. The US has been the founder and key member of the most
significant international institutions in the world today including the United Nations, the International Monetary Fund (IMF), the World Bank, the General Agreement on Tariffs and Trade (GATT) and the WTO, among others. Given the US's prominence in world affairs, the US has been able to design the international institution with its interests in mind, making them more accountable to its wishes.

For many international institutions, the US has created “majority rule” decision-making processes on some issues, while reserving the most important issues to smaller entities within the institution. In essence, the US has delegated general authority to the international institution and, within the institution, it has ensured that specific authority has been delegated to a smaller subgroup that exercises true decision-making authority. For example, the United Nations has 192 members and each has one vote at the UN General Assembly (UNGA). But for the most important issues regarding the “maintenance of international peace and security,” the UNGA, in effect, delegates decision-making authority to the United Nations Security Council (UNSC). The UNSC has only fifteen members at any given time, five of which are permanent and possess a veto: the United States, China, Great Britain, China, and Russia. With the veto power, the US can block any potential UNSC resolution that conflicts with US interests or those of its allies, The agency costs, such as they are, will likely be reduced in this structure.

The US's outsized influence through attenuated delegations in the UN, the IMF, and WTO is exacerbated by their voting rules. For example, at the IMF, the US has an approximately 16 percent weighted vote at an institution that requires a consensus of 85 percent for major decisions and amendments, and virtually the same structure exists at the World Bank. In fact, the biggest criticism of both the World Bank and the IMF is the effective veto that the US has over any major decisions.

The US also has influence over the appointment and termination of top officials at many international institutions. In agency cost terms, the US has tried to ensure that agency heads are not too far removed from American interests. If a state knows that the US is likely to look unfavorably on a potential nominee, that state will be less willing to nominate the person in the first place. And at the World Bank, the US not only has an effective veto power over major decisions but also unilaterally names the President of the World Bank, inevitably an American who will likely shape the direction of the international institution to pursue US interests.

The US's predominance in international politics also allows it to use a set of ex post tools that are conceptually similar to those available in the domestic context. They range from funding international institutions, side payments to states, and conditions on foreign aid to provisional participation, withdrawal, and the creation of new international institutions. While they might be more costly for the US—withdrawal from an international institution or the creation of a new one is not easy—these tools are available to the US and it has, on occasion, utilized them. But, if the US's participation in the international institution is key for its efficacy, the very availability of these tools and the prospect of their use also shapes the operation of international institutions and keeps them generally aligned with US interests.

Perhaps most obvious, just like Congress can threaten or formally limit the agency budget, designate the funding for specific purposes, and condition increases on the achievement of certain goals, the US has done so with some international institutions. This tool is uniquely available to the US because it is often the single biggest financial supporter of international institutions. The US is the largest contributor to the IMF and World Bank, and it contributes almost 22 percent of the UN’s operating budget. Further, when the UNSC authorizes the use of force, it relies on the contribution of the member states for enforcement. The US is by some distance the biggest supplier of troops, funding, and materiel to UN “coalition” forces.

Similarly, the US uses side payments and attaches conditions on foreign aid to influence (or lobby) states to support US initiatives both within and outside of international institutions. When the US expressed concern that the International Criminal Court (ICC) might gain custody over Americans abroad, the US conditioned the receipt of foreign aid to some countries on their willingness to refuse to turn over Americans to the ICC. The US has tools to influence the product of international institutions by shaping the preferences of the member states.

Another tool that the US has used to maintain influence over international institutions is simply creating a new one when, for whatever reason, the old institution has been ineffective or unresponsive to US interests. In the negotiations to form the WTO, the US and other large economic powers withdrew from the GATT and forced the developing countries to either join the new WTO in a single undertaking or remain outside the new international trade system. The US and others forced the developing countries
to join on their terms or lose access to the world’s largest economic markets.

The US can also refuse to join international institutions, withdraw, or only provisionally participate in international institutions that have acted or are likely to act consistently against US interests. For example, the US refused to join the League of Nations in the early twentieth century, likely condemning it to failure at its inception. More recently, the US signed but eventually indicated its intent not to become a party to the Rome Treaty creating the ICC. Since the US was particularly concerned with the ICC’s potential to create liability for both parties and non-parties to the treaty, the US simply passed domestic legislation and signed agreements with state parties to the ICC to ensure that Americans would not fall under its jurisdiction.

The US’s asymmetric power advantage does not mean that the US can influence international institutions in all situations; rather, the US can stop initiatives that it does not like but it cannot always push through institutional objectives that it prefers. For example, the US’s veto on the UNSC means the US can stop the UNSC from acting contrary to US interests, but it does not mean that the US can always force the UN to act consistently with US preferences. Of course, the US has other tools to encourage other states to align themselves with US preferences, but the US cannot guarantee that the international institution will always act in a certain way.

This dynamic suggests that the international institutions have a status quo bias, one that favors the state or states that have designed, funded, and retained operational control of international institutions: in most instances, the US and its allies. Since the international institutions generally cannot act without US consent, they cannot hurt the US; in principal-agent terms, the agent cannot act without the principal’s approval. There is no accountability issue with international institutions since the US can block the initiatives it opposes and generally push through those that it supports. Thus, the acts and omissions of international institutions are unlikely to generate the kind of agency costs that warrant a formal limit on international delegations.

Finally, the argument outlined here focuses on the US’s asymmetric power advantage in creating international institutions and ensuring some operational control through ex ante and ex post mechanisms. But the US will not maintain this power forever, and sooner or later its influence over international institutions will begin to wane. If the US is only one of two or three dominant countries in the world, then the US’s ability to control the international institution diminishes, creating more significant principal-agent concerns.

But even in a world in which the US is no longer dominant, it is unclear why limits on international delegations are necessary when Congress and the President will be able to assess the US’s ability to influence an international institution before delegating decision-making authority. Congress and the President are well placed to analyze the costs and benefits of a specific delegation to an international institution and are already fully incentivized to internalize the costs of international delegations and ensure that the international institutions with delegated authority are accountable to US interests.

IV. Conclusion

Similar accountability issues are present in both domestic and international delegations, and a similar range of oversight tools are available to the US. The mistaken presumption that agency costs are high in the international delegations leads to erroneous arguments in favor of constraints being necessary to ensure accountability. Such constraints are unnecessary. It is unlikely that the political branches would need such constraints to force them to internalize the costs of delegating binding authority to an international institution; the political branches are well aware of the costs and benefits of international delegations. Given the US’s role in the conception, design, and operation of many of the world’s most important international organizations, it is hard to imagine the US delegating binding authority to an international institution that would act consistently against American interests or impose net costs on the US. Given the prominence of international governance in the American political discourse, Congress and the President need no additional incentives to consider carefully the wisdom of both binding and non-binding international delegations; therefore, national constitutional design limits are unnecessary.

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