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### Presidential Control over International Law

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# HARVARD LAW REVIEW

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## ARTICLES

### PRESIDENTIAL CONTROL OVER INTERNATIONAL LAW

*Curtis A. Bradley & Jack L. Goldsmith*

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# PRESIDENTIAL CONTROL OVER INTERNATIONAL LAW

Curtis A. Bradley\* & Jack L. Goldsmith\*\*

*Presidents have come to dominate the making, interpretation, and termination of international law for the United States. Often without specific congressional concurrence, and sometimes even when it is likely that Congress would disagree, Presidents assert the authority to (a) make a vast array of international obligations for the United States, through both written agreements and the development of customary international law; (b) make increasingly consequential political commitments for the United States on practically any topic; (c) interpret these obligations and commitments; and (d) terminate or withdraw from these obligations and commitments. While others have examined pieces of this picture, no one has considered the picture as a whole. For this and other reasons, commentators have failed to appreciate the overall extent of presidential unilateralism in this area, as well as the extent to which Presidents are able to shift between different pathways of authority in order to circumvent potential restraints. This trend, moreover, has become more pronounced in recent years.*

*In many ways, the growth of this vast executive control over international law resembles the rise of presidential power in other modern contexts ranging from administrative law to covert action. Unlike in those other contexts, however, there is no systematic regulatory apparatus to guide or review the exercise of presidential control over international law. After presenting a descriptive account of the rise of such control, the Article turns to normative issues about the legality and broader legitimacy of this practice. It concludes that much of the modern practice has a plausible legal foundation but that some recent presidential actions and arguments relating to international agreements are questionable under generally accepted separation of powers principles. It also explains that the broader legitimacy question is difficult to assess because it turns on contested issues about the aims of presidential control, its efficacy in practice, and the costs and benefits of possible accountability mechanisms. After mapping out these and related considerations, the Article argues for one general accountability reform: significantly heightened transparency of executive branch actions and their legal bases. The Article then assesses the costs and benefits of additional accountability reforms that might become appropriate as more information about presidential control comes to light.*

## INTRODUCTION

Two of President Barack Obama's most important foreign policy accomplishments were the Paris Agreement on Climate Change, which aims to lower greenhouse gas emissions, and the Iran Nuclear Agreement, which lifted international and domestic sanctions against

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For helpful comments and suggestions, we thank Matt Adler, John Bellinger, Sue Biniaz, Gabby Blum, Jamie Boyle, Kathryn Bradley, Ashley Deeks, Tara Grove, Monica Hakimi, Duncan Hollis, Aziz Huq, Maximo Langer, Maggie Lemos, Daryl Levinson, Michael Mattler, Julian Mortenson, Andy Olson, Eric Posner, David Pozen, Michael Ramsey, Daphna Renan, Shalev Roisman, Neil Siegel, Ganesh Sitaraman, Paul Stephan, Matthew Stephenson, Cass Sunstein, Adrian Vermeule, Ed Williamson, Andrew Woods, and participants at faculty workshops at Duke Law School and Harvard Law School and at the annual International Law in Domestic Courts interest group workshop. For excellent research assistance, we thank Brad Barber, Zac Copeland, Cary Glynn, Maxwell Gottschall, Dennis Howe, Lisa Jing, Kevin Keller, Michelle Melton, Shannon Togawa Mercer, Asher Perez, Ken Notter, and Cody Poplin.

Iran in exchange for Iran's dismantling of its nuclear weapons development program. President Obama made both agreements unilaterally without seeking congressional approval. His successor, President Donald Trump, came into office as a critic of the agreements. He, too, acted unilaterally — this time moving to withdraw the United States from the Paris Agreement. He has also claimed the authority to unilaterally terminate the Iran deal, but to date he has not done so, in part because President Obama's alteration of the status quo makes it difficult to terminate the deal without harming U.S. interests.

The Paris Agreement and the Iran deal have had significant impacts on U.S. foreign relations, on U.S. domestic law, and on the rights and duties of U.S. firms and persons. Whatever one thinks about the merits of these two agreements, it is a remarkable development in U.S. constitutional law that the decisions to make, to continue, and to terminate them, and to generate these impacts, can be made by the President alone.

The Paris Agreement and the Iran deal are but two recent instances in what has been a long accretion of presidential control over international law since the constitutional Founding. The only provision in the Constitution that specifically addresses how the United States can make international law is Article II, section 2, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>1</sup> But the U.S. government has long assumed international obligations through several mechanisms other than the Article II process. In addition, Presidents have long interpreted U.S. treaties and customary international law, and engaged in related diplomatic communications, in a manner that seeks to expand or narrow U.S. obligations under those laws. They have also made and interpreted international law in international organizations, where the President's agents represent the nation. And they have long asserted the authority as well to unilaterally withdraw the United States from international agreements.

Through the accumulation of these and other pathways of control, Presidents (and the executive branch more generally) have come to dominate the creation, alteration, and termination of international law for the United States.<sup>2</sup> Many presidential acts of control over international

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>2</sup> For ease of exposition, we generally use the terms "presidential control" and "executive branch control" interchangeably in this Article, even though power accrued by executive branch departments and agencies will not always benefit or be exercisable by the President directly. Our main emphasis in this Article is on the lack of meaningful legislative collaboration in the making, interpretation, and termination of international law, so the distinction between the President and the executive branch, while important in other contexts, is not central to our analysis. In any event, as we note below, the White House in recent years has sought to exercise greater control over non-binding international commitments made by the executive branch. See *infra* note 62; see also Jean

law are authorized or approved in some fashion by Congress, although some of the most important congressional authorizations are quite general and were conferred decades ago when the domestic and international consequences of the authorizations were different and much less significant. Many other elements of presidential control are not authorized by Congress, or congressional authorization is contested. Scholars have focused on presidential control over international law in discrete contexts, but no one has considered the President's collective array of powers. Piecemeal consideration of these presidential powers misses both the overall extent of presidential control and the degree to which the various options for control have become interchangeable in ways that reduce constraints on presidential action. It also misses how the very multiplicity and complexity of the various powers, combined with a lack of transparency, make it difficult to evaluate when Presidents have exceeded their authority.

Presidential control over international law matters for the United States much more than is commonly appreciated.<sup>3</sup> Courts apply international law directly as domestic law or indirectly when interpreting statutes or regulations in accordance with the *Charming Betsy* canon,<sup>4</sup> and in both contexts often give presidential interpretations of international law substantial deference. More importantly, the international law that reaches courts is a tiny fraction of the international law that the President controls via lawmaking, interpretation, and termination. This vast array of international law can raise the hurdles to domestic lawmaking by Congress and have significant effects on the actions of U.S. states and private actors. In addition, this law can have important effects on the decisionmaking options of future Presidents. To be sure, future Presidents have discretion under domestic constitutional law to alter the international law obligations made by prior Presidents through interpretation and termination, as we shall show. But the political costs of doing so are often high, both in the domestic realm and especially in international relations, where the United States typically has a strong interest in compliance with its international obligations, in part so that it can expect compliance or cooperation from other nations.

The growth of presidential control over international law resembles the rise of executive power in other modern contexts ranging from administrative law to covert action. As with these other developments,

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Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675 (2017). In addition, pursuant to both statutory directive and administrative regulation, the conclusion of binding international agreements is supposed to be centrally coordinated with the State Department. See 1 U.S.C. § 112b(c) (2012); 22 C.F.R. § 181.4(a) (2017).

<sup>3</sup> See *infra* Part III, pp. 1245–57.

<sup>4</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

much presidential control over international law is the result of broad delegations of authority from Congress and accretions of executive branch practice in the face of congressional inaction. In all of these realms, moreover, there are strong functional arguments for executive branch leadership and discretion given the scale and complexity of modern government. But there is a large difference between the other elements of presidential power and the President's control over international law: there have been extensive efforts over the decades to oversee and regulate executive power in these other contexts, but no such comprehensive accountability regime applies to presidential control over international law, in part because Congress has never focused on the overall picture.

This Article describes, analyzes, and proposes reforms for presidential control over international law. Part I describes presidential control over international agreements. Part II describes presidential control over other forms of international law. Part III shows how the various pathways of control can be substituted or combined to further increase presidential power, and it explains the many ways that presidential control over international law matters for domestic actors and institutions. The next two Parts turn to normative issues. Part IV considers the extent to which there is legal authority for presidential control over international law and outlines a framework for discerning implicit congressional authorization. Part V assesses the adequacy of existing accountability constraints on presidential control over international law, an especially challenging task because the normative framework for assessing presidential control over international law is contested and because many factual elements of the practice are unknown. For these reasons, our proposals for reform are relatively modest and focus on transparency, although we also outline the costs and benefits of more ambitious reform options.

## I. PRESIDENTIAL CONTROL OVER INTERNATIONAL AGREEMENTS

This Part describes the reality of presidential control over the making, interpretation, and termination of international agreements for the United States. The basic story is that presidential power over international agreements has grown to the point of near-complete control.

### *A. Unilateral Presidential Power to Make Binding International Agreements*

The Constitution expressly identifies only one mechanism for making international agreements. Article II provides that the President "shall have Power, by and with the Advice and Consent of the Senate,

to make Treaties, provided two thirds of the Senators present concur.”<sup>5</sup> A principal reason for requiring legislative involvement in that process was that international commitments can have important and long-term consequences for the United States and thus should not be determined by the President alone.<sup>6</sup>

There is no evidence that the Founders discussed the possibility that the U.S. government would make international agreements through any process other than the treaty process.<sup>7</sup> Nonetheless, beginning in the 1790s, the U.S. government began to make some international agreements through mechanisms other than the one described in Article II, although for a long time Article II treaties were still the dominant mode of agreement making.<sup>8</sup> This section explains the rise and significance of these alternate mechanisms, and shows how the President has come to use them to make the vast majority of international agreements for the United States without meaningful input from Congress or the Senate.

*I. Forms of International Agreement Making.* — Under modern practice, there are five recognized mechanisms through which the United States can make an international agreement with another nation that is binding under international law: (1) a treaty made by the President with the advice and consent of two-thirds of the Senate; (2) an ex ante congressional-executive agreement in which Congress authorizes the President by statute to make and conclude an international agreement; (3) an ex post congressional-executive agreement, in which Congress by statute approves an international agreement previously negotiated by the President; (4) an executive agreement pursuant to treaty,

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<sup>5</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>6</sup> Alexander Hamilton emphasized this point in the *Federalist Papers*, despite otherwise being a strong supporter of executive authority. See THE FEDERALIST NO. 75, at 448–53 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (explaining that the treaty power belongs “neither to the legislative nor to the executive” and that whereas the executive branch is “the most fit agent” for negotiation, “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them,” *id.* at 449); see also *id.* at 450 (explaining that it would be unwise “to commit interests of so delicate and momentous a kind, as those which concern [this country’s] intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States”).

<sup>7</sup> On the lack of discussion about congressional-executive agreements at the Founding, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808–13 (1995). The leading originalist accounts of sole executive agreements do not cite evidence of the Founders having discussed such a power. See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

<sup>8</sup> See, e.g., Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239 (authorizing the Postmaster General by statute to conclude international agreements concerning the exchange of mail); 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075, 1078–79 (Hunter Miller ed., 1937) (describing a 1799 executive agreement concluded unilaterally by President John Adams to settle claims by U.S. citizens against the Dutch government for lost cargo when Dutch privateers captured the schooner *Wilmington Packet*).



which is made by the President based on an authorization from an existing treaty; and (5) a “sole” executive agreement made by the President on his or her own constitutional authority.<sup>9</sup>

The constitutional legitimacy of these mechanisms for international lawmaking is settled in practice, and some of these mechanisms have specifically been upheld by the Supreme Court. The generally accepted scope of these agreement-making powers is as follows: Presidents may conclude treaties with the advice and consent of the Senate on just about any subject, and such treaties, if self-executing, can regulate domestic matters without any enumerated power limitation.<sup>10</sup> Congressional-executive agreements (both *ex ante* and *ex post*) are interchangeable with treaties, at least to the extent that they find support in an Article I enumerated power.<sup>11</sup> Executive agreements pursuant to treaty are valid if they are expressly or implicitly authorized by a treaty.<sup>12</sup> A sole executive agreement must be grounded in Article II, although there is uncertainty about the scope of the President’s power in this context.<sup>13</sup>

Before describing how Presidents have come to deploy these mechanisms as founts for unilateral international lawmaking, we must note a major hurdle to analysis of this issue. In stark contrast to domestic law, it is remarkably difficult for anyone outside the State Department to

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<sup>9</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (AM. LAW INST. 1987) [hereinafter RESTATEMENT (THIRD)].

<sup>10</sup> See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 112 (AM. LAW INST., Tentative Draft No. 2, 2017) [hereinafter RESTATEMENT (FOURTH), Tentative Draft No. 2]; see also *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>11</sup> See RESTATEMENT (THIRD), *supra* note 9, § 303(2); Ackerman & Golove, *supra* note 7; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

<sup>12</sup> See, e.g., *Wilson v. Girard*, 354 U.S. 524, 528–29 (1957); see also CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 86 (Comm. Print 2001) [hereinafter CRS STUDY] (“Numerous agreements pursuant to treaties have been concluded by the Executive, particularly of an administrative nature, to implement in detail generally worded treaty obligations.”).

<sup>13</sup> The Supreme Court has upheld the validity and domestic application of a number of sole executive agreements in the context of settling claims, although it more recently described the power as “narrow and strictly limited,” *Medellín v. Texas*, 552 U.S. 491, 532 (2008). For decisions upholding or acknowledging the validity and domestic application of sole executive agreements, see *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003), which acknowledged the validity of “executive agreements to settle claims of American nationals”; *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981), which acknowledged presidential power to settle claims of U.S. nationals and concluded “that Congress has implicitly approved the practice of claim settlement by executive agreement”; *United States v. Pink*, 315 U.S. 203 (1942), which upheld a sole executive agreement settling claims with the Soviet Union in the context of a recognition decision; and *United States v. Belmont*, 301 U.S. 324 (1937), which did the same. We return to the issue of the scope of sole executive agreements in section IV.A, pp. 1257–59.

figure out the range of and legal bases for many U.S. international agreements.<sup>14</sup> Article II treaties are easy to understand because they all go to the Senate labeled as such and are approved and ratified in a public manner. But the other four forms of agreement are much less transparent and thus much harder to analyze in terms of their numbers, how they should be categorized, and their legal bases.<sup>15</sup> For reasons we explain in detail in Part V, the executive branch does not publicize the international agreements it makes in a comprehensive or organized fashion, and it only very rarely explains to the public (including elements of the public who might serve as watchdogs) the legal bases for these agreements.<sup>16</sup> As will become apparent, this remarkable uncertainty about the legal bases for many international agreements facilitates presidential unilateralism in this context.

2. *Decline of Treaties.* — Article II treaties are the paradigm case of collaborative (as opposed to unilateral) presidential international law-making because the President must secure the consent of two-thirds of the Senate for the agreement he negotiated before he can make the agreement binding on the United States. As the following chart shows, over the course of American history, the U.S. government in making binding international obligations has come to rely much more heavily on executive agreements — a category that for present purposes includes *ex ante* and *ex post* congressional-executive agreements, executive agreements pursuant to treaty, and sole executive agreements — than on treaties.<sup>17</sup>

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<sup>14</sup> As noted below, *see infra* notes 338–46 and accompanying text, sometimes even the State Department is unaware of international agreements entered into by various agencies.

<sup>15</sup> For an excellent overview of the difficulties facing researchers interested in executive agreements, see Ryan Harrington, *Understanding the “Other” International Agreements*, 108 LAW LIBR. J. 343 (2016).

<sup>16</sup> The State Department has an internal process, known as the Circular 175 procedure, for deciding on the domestic pathway to be used in concluding an international agreement, and the Department’s lawyers prepare memoranda in this process discussing the legal basis for a proposed agreement. *See Circular 175 Procedure*, U.S. DEP’T ST., <https://www.state.gov/s//treaty/c175/> [<https://perma.cc/B8EL-MMS2>]. But this process has been established entirely by the executive branch and contains highly discretionary criteria, and, more importantly, the legal memoranda are not shared with Congress or the public.

<sup>17</sup> The first four rows come from CRS STUDY, *supra* note 12, at 39. The fifth row derives from Hathaway, *supra* note 11, at 1287 (years 1990–2000); and Jeffrey S. Peake, *Obama, Unilateral Diplomacy, and Iran: Treaties, Executive Agreements, and Political Commitments*, in *PRESIDENTIAL LEADERSHIP AND NATIONAL SECURITY: THE OBAMA LEGACY AND TRUMP TRAJECTORY* (Richard S. Conley ed., 2018) (years 2000–2012).

TABLE 1  
U.S. INTERNATIONAL AGREEMENTS BY TYPE, 1789–2012

Period	Treaties	Executive Agreements	Percent Treaties
1789–1839 (50 yrs.)	60	27	69.0%
1839–1889 (50 yrs.)	215	238	47.0%
1889–1939 (50 yrs.)	524	917	36.0%
1939–1989 (50 yrs.)	702	11,698	5.6%
1990–2012 (22 yrs.)	366	5491	6.2%

Several factors explain the steady and ultimately sharp rise in the number and relative frequency of executive agreements and in their dominant role in U.S. agreement making.<sup>18</sup> On the political level, the rise is a response to the growth over time in the number of nations, the density of international relations, and the number of topics regulated by international law. These factors led to a spike in new agreements, especially after World War II. That spike in turn created a demand for processes that would be more efficient than senatorial advice and consent. Those more efficient processes were supplied primarily by the ex ante congressional-executive agreement process, which (as we explain below) required only the lightest touch of congressional statutory approval to authorize the President to make multiple agreements, and which is the method used to make the largest percentage of U.S. international agreements. As this political demand for more efficient agreement making grew, political actors mostly (but not always) acquiesced in the changing allocation of international agreement making.<sup>19</sup> Over time, the Supreme Court upheld the legality of particular executive agreements and thus seemed to place its imprimatur on the shift away from treaty making.<sup>20</sup>

The relatively low average percentage of treaties during the last eighty years (6% or so) masks a historical drop-off in the use of treaties during the Obama Administration. President Obama transmitted to the Senate only thirty-eight treaties during his eight years in office (2009–

<sup>18</sup> This paragraph is drawn primarily from CRS STUDY, *supra* note 12, at 39; and Hathaway, *supra* note 11.

<sup>19</sup> See Ackerman & Golove, *supra* note 7, at 861–96.

<sup>20</sup> See cases cited *supra* note 13.

2017) and received Senate consent for only fifteen of those treaties.<sup>21</sup> Both the average number of treaties transmitted per presidential year during his Administration (4.75) and the percentage of treaties receiving Senate consent (39%) are by far the smallest in the modern period measured since President Truman, and far below the historical averages during this period (which are 15.3 treaties per year and 92%, respectively).<sup>22</sup> This recent decline probably resulted from both political and structural factors. The Republicans in the Senate opposed President Obama's initiatives generally, and President Obama might have anticipated that intransigence as a reason to reduce treaty submissions.<sup>23</sup> The decline might also be explained by a reduction internationally in the number of multilateral treaties and the possibility that some forms of bilateral treaties — on topics like tax and extradition — are in less demand because the United States has completed such treaties with most nations.<sup>24</sup> Such

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<sup>21</sup> We derive these figures from the Library of Congress database of every treaty document submitted to the Senate, which notes whether the Senate has given its consent. See *Treaty Documents*, CONGRESS.GOV [hereinafter Treaty Documents Database], <https://www.congress.gov/search?q=%7B%22source%22:%5B%22treaties%22%5D%7D> [<https://perma.cc/HFQ7-JD5Y>].

<sup>22</sup> See Peake, *supra* note 17. Professor Jeffrey Peake uses the Treaty Documents Database, *see supra* note 21, to calculate these historical averages. However, he appears not to have accounted for a quirk in the process by which the Treaty Documents Database lists treaties. Presidents transmit a treaty to the Senate for its approval by sending to the Senate a “treaty document” that contains a copy of the treaty and a “letter of transmittal” that summarizes the treaty and recommends that the Senate give its advice and consent to ratification. However, Presidents sometimes submit multiple treaties in a single treaty document, which the Treaty Documents Database then lists (and Peake counts) as one treaty. For example, in 2006, President Bush sent the Senate in a single treaty document “[the] Agreement on Mutual Legal Assistance between the United States of America and the European Union . . . together with twenty-five bilateral instruments which subsequently were signed between the United States and each European Union Member State.” Mutual Legal Assistance Agreement, E.U.-U.S., Sept. 28, 2006, S. TREATY DOC. NO. 109-13. While the treaty document makes clear that the treaty with the EU and the bilateral instruments are twenty-six distinct treaties, the Treaty Documents Database listed (and Peake counted) these twenty-six treaties as one treaty. This means that he undercounted the number of treaties submitted by Presidents before President Obama and understated the proportion of treaties submitted by pre-Obama Presidents to which the Senate has consented. (This quirk never arose during the Obama presidency.) For two reasons, however, this undercounting does not affect our basic point about the decline in submitted and approved treaties. First, the submission of several treaties within a single treaty document appears to have occurred just a few times, and thus only slightly skews Peake's large and otherwise very useful database. Second, to the extent that Peake's data are inaccurate, they understate the number of treaties past Presidents submitted to the Senate and the proportion of those treaties to which the Senate consented, which means that, if anything, the disparity between President Obama and his predecessors is almost certainly greater than Peake's data might suggest.

<sup>23</sup> However, the drop-off in the number of treaties submitted during the Obama Administration began in President Obama's first year in office, when his party controlled the Senate.

<sup>24</sup> Cf. Duncan Hollis, *Comparing Obama and Bush's Treaty Priorities*, OPINIO JURIS (June 4, 2009, 3:08 PM), <http://opiniojuris.org/2009/06/04/comparing-obama-and-bushs-treaty-priorities/> [<https://perma.cc/N93B-6HC9>] (attributing large drop-off in treaties pending in the Senate to “the Senate Foreign Relations Committee's push last fall to move non-controversial treaties through the Article 2 process, resulting in dozens of treaties receiving Senate advice and consent, most notably the 40-plus treaties with the EU and its member states on extradition and mutual legal assistance”). See generally Cindy Galway Buys, *An Empirical Look at U.S. Treaty Practice: Some Preliminary*

a structural explanation is supported by the fact that, although President George W. Bush submitted and received Senate consent for many more treaties than did President Obama, his numbers were lower than President Clinton's and those of his father, President George H.W. Bush.<sup>25</sup>

3. *Decline of Congressional Participation in Nontreaty Agreements.* — The relative decline of treaties and the relative increase in executive agreements do not by themselves tell us much about the frequency of unilateral executive lawmaking. To see the extent of presidential unilateralism and the decline of collaborative international lawmaking, we must break down the approximately 94% of U.S. international agreements made in the last several decades that are not treaties. One category of agreement, the ex post congressional-executive agreement, is akin to the treaty in terms of interbranch collaboration because Congress (as opposed to the Senate) can review the deal made by the President and decide whether or not to approve it. But the United States very rarely makes this form of agreement; based on our review, it has averaged no more than about one per year of these agreements in recent decades, having almost no effect on the percentages.<sup>26</sup>

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*Conclusions*, 108 AJIL UNBOUND 57 (2014) (speculating about decline in multilateral treaty ratification).

<sup>25</sup> See Peake, *supra* note 17, at 35.

<sup>26</sup> We have discovered only nineteen such agreements since 1980. See Act of Dec. 16, 2016, Pub. L. No. 114-320, 130 Stat. 1621 (approving nuclear agreement with Norway); Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 303, 127 Stat. 1165, 1181 (to be codified at 43 U.S.C. § 1356b note) (approving hydrocarbon agreement with Mexico); United States-Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, 125 Stat. 497 (2011) (codified at 19 U.S.C. § 3805 note (2012)); United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 (2011) (codified at 19 U.S.C. § 3805 note); United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011) (codified as amended at 19 U.S.C. § 3805 note); United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, Pub. L. No. 110-369, 122 Stat. 4028 (2008) (codified at 22 U.S.C. § 8001 note (2012)); United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007) (codified at 19 U.S.C. § 3805 note); United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, 120 Stat. 1191 (2006) (codified at 19 U.S.C. § 3805 note); United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581 (2006) (codified at 19 U.S.C. § 3805 note); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005) (codified in scattered sections of 19 U.S.C.) (approving free trade agreement between the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua); United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (2004) (codified at 19 U.S.C. § 3805 note); United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, 118 Stat. 919 (2004) (codified at 19 U.S.C. § 3805 note); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003) (codified at 19 U.S.C. § 3805 note); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003) (codified as amended at 19 U.S.C. § 3805 note); United States-Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, 115 Stat. 243 (2001) (codified at 19 U.S.C. § 2112 note); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of the U.S. Code); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as

As a result, close to 94% of binding international agreements made by the United States are made without meaningful interbranch deliberation and are thus vehicles for unilateral presidential lawmaking.

The largest category of U.S. international agreements, approximately 80–85% of the total, consists of ex ante congressional-executive agreements.<sup>27</sup> As Professor Oona Hathaway has shown in her foundational work in this area, such agreements generally involve little if any meaningful congressional input.<sup>28</sup> In contrast to treaties and ex post congressional-executive agreements, the President does not bring a negotiated ex ante agreement with specific terms to Congress for its debate and approval (or rejection). Instead, Congress provides the President with general advance authorization to make an agreement (or many agreements) that the President in his or her broad discretion can negotiate, conclude, and ratify without ever returning to Congress for its review, much less approval. Moreover, the purported authorization for most ex ante congressional-executive agreements is vague and enacted many years before the agreement.

For example, one prominent basis for ex ante congressional-executive agreements is the Mutual Defense Assistance Act of 1949.<sup>29</sup> It states that the President shall “conclude agreements . . . to effectuate the policies and purposes of this Act,”<sup>30</sup> which include providing various forms of military assistance to support “individual and collective self-defense” in order to maintain “peace and security.”<sup>31</sup> This statute gives

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amended in scattered sections of 17, 19, and 22 U.S.C.); United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified as amended at 19 U.S.C. § 2112 note); United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified as amended at 19 U.S.C. § 2112 note).

<sup>27</sup> It is impossible to know precisely what percentage of U.S. agreements are ex ante agreements because not all agreements are reported, and because the legal basis for many agreements, and thus the type of agreement it is, is unclear. We use the number 80–85% as a rough guess for the following reasons: The most comprehensive study of ex ante congressional-executive agreements concludes, although without much explanation, that they are “roughly eighty percent of all U.S. international legal commitments.” Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 145 (2009). An earlier study found that between 1946 and 1972, 88.3% of U.S. international agreements “were based at least partly on statutory authority.” CRS STUDY, *supra* note 12, at 41 (citing CONG. RESEARCH SERV., 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22 (Comm. Print 1977)). For present purposes, the uncertainty in the precise percentage of ex ante congressional-executive agreements is immaterial.

<sup>28</sup> See Hathaway, *supra* note 27, at 155–67. Hathaway’s article is an especially important contribution to the topic of presidential control over international law because of its deep empirical analysis of modern executive agreements, especially ex ante congressional-executive agreements, and its demonstration of the extraordinary extent to which Presidents make executive agreements without genuine congressional collaboration. While we are indebted to Hathaway’s empirical and analytical work, we take issue with some of her prescriptions. See *infra* section V.A, pp. 1271–87.

<sup>29</sup> Ch. 626, 63 Stat. 714.

<sup>30</sup> *Id.* § 402, 63 Stat. at 717.

<sup>31</sup> *Id.* § 1, 63 Stat. at 714.

the President essentially unfettered discretion to make agreements, with any nation, in accordance with his or her conception of what the national defense requires, without ever returning to Congress. Similarly, the Omnibus Trade and Competitiveness Act of 1988<sup>32</sup> states without further guidance that “[t]he President may enter into an agreement with any country that has a positive trade balance with the United States under which that country would purchase United States agricultural commodities or products for use in agreed-on development activities in developing countries.”<sup>33</sup> Most statutory authorizations for ex ante congressional-executive agreements are similarly open-ended in their guidance to the President. They give the President significant discretion to conclude and make agreements that bind the United States under international law, usually without further congressional review or even notice. This is why Hathaway concludes, correctly in our view, that ex ante congressional-executive agreements “possess the form of congressional-executive cooperation without the true collaboration.”<sup>34</sup>

We can now see why the sharp decline in the percentage of treaties and the rise in executive agreements indicate a sharp drop in meaningful interbranch collaboration and a rise in presidential unilateralism in the making of international agreements. Genuine interbranch collaboration via Article II treaties or ex post congressional-executive agreements occurs for approximately 6–7% of binding U.S. international agreements. Approximately 80–85% of U.S. international agreements are ex ante congressional-executive agreements that involve no meaningful interbranch collaboration.<sup>35</sup> Executive agreements pursuant to treaties, which we estimate make up approximately 1–3% of U.S. agreements, involve no more meaningful interbranch collaboration than ex ante congressional-executive agreements, and basically for the same reason.<sup>36</sup> And about 5–10% of U.S. agreements are sole executive agreements,

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<sup>32</sup> Pub. L. No. 100-418, 102 Stat. 1107.

<sup>33</sup> *Id.* § 4203(b), 102 Stat. at 1392 (codified at 7 U.S.C. § 5213 (2012)). To take another example, the Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §§ 2451–2464 (2012), authorizes the Secretary of State “to enter into agreements with foreign governments and international organizations,” *id.* § 2453, to further the statutory purposes of (among other things) “increas[ing] mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange” and “promot[ing] international cooperation for educational and cultural advancement,” *id.* § 2451.

<sup>34</sup> Hathaway, *supra* note 27, at 213.

<sup>35</sup> See *supra* note 27 and accompanying text.

<sup>36</sup> This is a rough estimate based on subtracting from the percentages for other types of agreements. The number is admittedly speculative. As discussed further below, see *infra* text accompanying note 342, the domestic legal bases for nontreaty agreements are often unclear, making it difficult to categorize them.

which Presidents make unilaterally on their own constitutional authority.<sup>37</sup> While it is impossible to tell precisely the percentage allocation of these three instruments, one can say with confidence that they together make up close to 94% of all binding U.S. agreements.

In her 2009 study of congressional-executive agreements, Hathaway concludes that the task of making international agreements “has come to be borne almost entirely by the President alone.”<sup>38</sup> The President’s unilateral powers have only increased since that time with the precipitous decline in the use of treaties under President Obama. Two other developments, to which we now turn, have left the President in an even more dominant position when it comes to making international agreements for the United States.

4. *Rise of “Executive Agreements+”*. — Hathaway’s study notes that the statutory authorizations for ex ante congressional-executive agreements “are often extremely broad.”<sup>39</sup> We believe that this understates the extent of presidential unilateralism in this area, even on the evidence that Hathaway presents. Many of the purported statutory authorizations relied upon by Presidents to make executive agreements have not obviously authorized the making of international agreements at all, even in broad terms. For example, some have authorized the President to provide assistance to foreign nations without specifying that the form of assistance should (or could) come through an international agreement.<sup>40</sup> Others simply have authorized the President to establish a program without specifying that he or she should do so via an international agreement.<sup>41</sup> In some and perhaps many cases it is unclear whether Congress

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<sup>37</sup> Like ex ante congressional-executive agreements, and for the same reason, the number of sole executive agreements is elusive. We base the 5–10% number on studies that found (during different periods) that they constitute 5.9% of all agreements, CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 28, 2002, S. DOC. NO. 108-17, at 517 & n.394 (2004) (citing C.H. McLaughlin, *The Scope of the Treaty Power in the United States II*, 43 MINN. L. REV. 651, 721 tbl.3 (1959)); 5.5% of all agreements, *id.* (citing CONG. RESEARCH SERV., *supra* note 27, at 22); and 7% of all agreements, Harrington, *supra* note 15, at 348. Hathaway finds that between 1990 and 2000, approximately 20% of all executive agreements (as opposed to all agreements) were sole executive agreements, though she notes her “rough calculation” and she appears to include some nonbinding political commitments in her calculation. Hathaway, *supra* note 27, at 155 & n.29.

<sup>38</sup> Hathaway, *supra* note 27, at 144.

<sup>39</sup> *Id.* at 166.

<sup>40</sup> See, e.g., *id.* at 156–57 (noting variety of agreements based on the authority conferred by the Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 503, 75 Stat. 424, 435 (codified as amended at 22 U.S.C. § 2311 (2012)), which merely states that “[t]he President is authorized to furnish military assistance on such terms and conditions as he may determine,” *id.*).

<sup>41</sup> See, e.g., *id.* at 165 (noting that, as authority to conclude agreements, the executive branch has relied on the International Anti-Corruption and Good Governance Act of 2000, 22 U.S.C. § 2152c, which merely states that “[t]he President is authorized to establish programs that combat corruption, improve transparency and accountability, and promote other forms of good governance in [eligible] countries,” § 2152c(a)(1)).



even intended to delegate international agreement-making power to the President.

In recent years, the purported statutory bases for some executive agreements have grown so tenuous as to be nonexistent. A much-discussed example is the Minamata Convention on Mercury, a comprehensive international agreement concerning the production, use, and disposal of the chemical, which was concluded in 2013.<sup>42</sup> The Obama Administration never claimed that the Convention fell within the authority of the President to conclude sole executive agreements. Nor did the Administration claim that Congress actually authorized the Convention. Instead, it merely observed that the Convention “complements domestic measures by addressing the transnational nature of the problem” and noted that the United States “can implement Convention obligations under existing legislative and regulatory authority.”<sup>43</sup>

Professors Dan Bodansky and Peter Spiro invoke the Minamata Convention as one of several examples of a new form of international agreement that they call the “Executive Agreement+.”<sup>44</sup> An Executive Agreement+ is not authorized by Congress, for then it would be a congressional-executive agreement.<sup>45</sup> Rather, it is an agreement that is merely “consistent with” existing federal law.<sup>46</sup> Bodansky and Spiro identify only two limits on the Executive Agreements+ power: it cannot be used to change existing law or extend the executive branch’s domestic authority, and it is “appropriate only as a complement to existing domestic measures, in order to address the transnational aspects of a problem.”<sup>47</sup>

The Executive Agreements+ example highlights how opaque the process is for making international agreements without congressional

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<sup>42</sup> Minamata Convention on Mercury, *adopted* Oct. 10, 2013, T.I.A.S. No. 17-816.

<sup>43</sup> Press Release, U.S. Dep’t of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), <https://2009-2017.state.gov/r/pa/prs/ps/2013/11/217295.htm> [<https://perma.cc/BE9S-225S>]; see also Duncan Hollis, *Doesn't the U.S. Senate Care About Mercury?*, OPINIO JURIS (Nov. 12, 2013, 11:02 PM), <http://opiniojuris.org/2013/11/12/doesnt-u-s-senate-care-mercury/> [<https://perma.cc/TDT6-DVYE>].

<sup>44</sup> See Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. 885, 910–11 (2016). The other recent examples they cite are the Anti-Counterfeiting Trade Agreement, a series of agreements relating to tax offshoring, and the Paris Climate Change Agreement. *Id.* at 908–19.

<sup>45</sup> *Id.* at 897 (noting that Executive Agreements+ are not “congressional-executive agreements, since they lack congressional authorization or approval”).

<sup>46</sup> *Id.* at 929; see also *id.* at 887–88, 919 (same).

<sup>47</sup> *Id.* at 915. In identifying a new form of international agreement that need not be authorized by Congress, the authors draw on arguments made by Professor Harold Koh while he was the Obama Administration’s State Department Legal Adviser. *Id.* at 909. Koh has expanded on these ideas since leaving the government. See Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J.F. 338 (2017). We address Koh’s arguments below in section IV.B.

input. The Obama Administration concluded the Minamata Convention without offering any clear public explanation of the precise legal basis for the agreement.<sup>48</sup> Such uncertainty also was evident in connection with the Obama Administration's conclusion of the Anti-Counterfeiting Trade Agreement (ACTA),<sup>49</sup> a multinational treaty designed to bolster intellectual property enforcement that never came into force. The Administration negotiated the agreement in secret, and many observers assumed that the Administration was planning to conclude it without reference to congressional authorization.<sup>50</sup> The Administration ultimately grounded the ACTA in the Prioritizing Resources and Organization for Intellectual Property Act of 2008,<sup>51</sup> which directed the executive branch to develop a "strategic plan" against counterfeiting and infringement that included as an objective "to 'work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.'"<sup>52</sup> This statutory basis for the ACTA was controversial,<sup>53</sup> leading some commentators to conclude that the ACTA was an early example in the direction of Executive Agreements+.<sup>54</sup>

Given the nontransparency surrounding the making of international agreements, and the uncertain and nonpublic legal bases for them, there may be many other examples of Executive Agreements+ beyond the handful of recent examples that Bodansky and Spiro identify.

5. *Nonbinding Political Commitments.* — The discussion of unilateral presidential international agreement making has thus far focused on agreements that are binding under international law. But there is another large category of international agreements called "political commitments" that further underscores presidential dominance in

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<sup>48</sup> See Bodansky & Spiro, *supra* note 44, at 911 ("The opacity of the State Department announcement left commentators wondering how to classify the Minamata Convention — as a sole executive agreement, an *ex ante* congressional-executive agreement, or something else."); cf. Hollis, *supra* note 43 ("[I]f there's no statutory authority to join the Minamata Convention, doesn't that mean it must be a sole executive agreement?").

<sup>49</sup> Anti-Counterfeiting Trade Agreement, Oct. 1, 2011, [http://www.mofa.go.jp/policy/economy/i\\_property/pdfs/acta1105\\_en.pdf](http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf) [<https://perma.cc/7YGW-EVAE>].

<sup>50</sup> See, e.g., Letter from Senator Ron Wyden to President Barack Obama (Oct. 12, 2011), <https://www.wyden.senate.gov/download/?id=f20e3fd3-f2f1-4fc2-a387-570a575700d6&download=1> [<https://perma.cc/FM24-KWTV>].

<sup>51</sup> Pub. L. No. 110-403, 122 Stat. 4256 (codified in scattered sections of 15, 18, and 42 U.S.C.).

<sup>52</sup> See Letter from Harold Hongju Koh, State Dep't Legal Adviser, to Senator Ron Wyden (Mar. 6, 2012), <http://www.state.gov/documents/organization/211889.pdf> [<https://perma.cc/4GY7-ALK4>] (alteration in original) (quoting Prioritizing Resources and Organization for Intellectual Property Act of 2008 § 303 (codified at 15 U.S.C. § 8113(a)(6) (2012))).

<sup>53</sup> See Letter from Legal Academics to Members of the U.S. Senate Committee on Finance (May 16, 2012), <http://infojustice.org/wp-content/uploads/2012/05/Law-Professor-Letter-to-Senate-Finance-Committee-May-16-2012.pdf> [<https://perma.cc/ZE8F-UXRK>].

<sup>54</sup> See Bodansky & Spiro, *supra* note 44, at 908–09.

international agreement making, and that has become especially important in recent years.

A political commitment is an agreement, usually written, between the President or one of the President's subordinates and a foreign nation or foreign agency. Its defining characteristic is that it imposes no obligation under international law and a nation incurs no state responsibility for its violation.<sup>55</sup> As a result, a successor President is not bound by a previous President's political commitment under either domestic or international law and can thus legally disregard it at will. The constitutional basis for a political commitment is unclear, but it appears to be closely related to the President's power to conduct diplomacy, since at bottom a political commitment is like diplomatic speech backed by a personal pledge of the executive official who made it.<sup>56</sup> In practice Presidents have asserted the authority to make a political commitment on practically any topic without authorization from Congress or the Senate and without any obligation to even inform Congress about the commitment, as long as the commitment does not violate extant federal law.

Prominent twentieth-century examples of political commitments include the 1941 Atlantic Charter, in which Roosevelt and Churchill announced their principles and aims for World War II, and the Helsinki Accords of 1975, a Cold War agreement between Western and Soviet Bloc nations that included commitments to respect human rights, to pursue peaceful dispute resolution, and to avoid interfering in the internal affairs of other nations.<sup>57</sup> Executive branch officials in the last few decades have increasingly used political commitments to effectuate broader and deeper regulatory cooperation between U.S. government agencies and their foreign counterparts on a wide range of regulatory topics. The Federal Reserve Board uses political commitments to coordinate capital requirements and other banking rules in the United States with foreign bank regulators.<sup>58</sup> The Federal Trade Commission concludes them on issues ranging from bilateral antitrust cooperation to multilateral commitments to fight email spam.<sup>59</sup> The Food and Drug

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<sup>55</sup> See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 28–53 (3d ed. 2013).

<sup>56</sup> See Jack Goldsmith, Essay, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455, 465 (2016). See generally Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507, 554–75 (2009) (analyzing other possible constitutional bases for political commitments).

<sup>57</sup> See Atlantic Charter, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603; Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, reprinted in 73 DEP'T ST. BULL. 323 (1975).

<sup>58</sup> See David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 80 (2013).

<sup>59</sup> See, e.g., Memorandum of Understanding on Antitrust Cooperation, India-U.S., Sept. 27, 2012, <https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer->

Administration makes political commitments on matters ranging from the safety of medical products to the opening of new markets to U.S. food manufacturers.<sup>60</sup> The Federal Aviation Administration uses them to promote the development of civil aviation in less-developed nations, to cooperate in alternative aviation fuels, and for many other purposes.<sup>61</sup> There are scores of other examples.<sup>62</sup> Taken together, political commitments have an enormous impact on the everyday activities of U.S. firms and persons. But not only are they not subject to any of the requirements of the Administrative Procedure Act (APA),<sup>63</sup> they are not even published systematically or reported to Congress.

In a significant constitutional innovation, the Obama Administration established a new form of unilateral international lawmaking when it married international political commitments with preexisting statutory delegations to forge deep international cooperation without the approval or even involvement of Congress. The Administration did this, for example, in the nuclear deal with Iran known as the Joint Comprehensive Plan of Action (JCPOA).<sup>64</sup> In the JCPOA, the United States and five other nations agreed to lift international and domestic sanctions against Iran in exchange for Iran's dismantling of its nuclear weapons development program.<sup>65</sup> Majorities in the Senate and the House appeared to oppose the deal.<sup>66</sup> But President Obama was able to reach the very

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protection-cooperation-agreements/1209indiamou.pdf [https://perma.cc/TB3B-J52X]; Memorandum of Understanding on Mutual Enforcement Assistance in Commercial Email Matters, Austl.-U.K.-U.S., June 30, 2004, <https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/04063ospammoutext.pdf> [https://perma.cc/ES5Z-CCEX].

<sup>60</sup> See, e.g., Statement of Intent on Co-operation in the Field of Medical Products, India-U.S., Feb. 10, 2014, <https://www.fda.gov/downloads/InternationalPrograms/Agreements/MemorandaofUnderstanding/UCM385494.pdf> [https://perma.cc/M9EX-J5LS]; Memorandum of Understanding Regarding Registration of U.S. Food Manufacturers Exporting to China, China-U.S., June 15, 2017, <https://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm563361.htm> [https://perma.cc/2GYE-LAX8].

<sup>61</sup> See, e.g., Aviation: Memorandum of Cooperation, Chile-U.S., July 11, 1997, <https://www.state.gov/documents/organization/101687.pdf> [https://perma.cc/79MK-NYWU]; Press Release, FAA, FAA and Spain Cooperate in Alternative Aviation Fuels (Feb. 11, 2013), <https://www.faa.gov/news/updates/?newsId=70956> [https://perma.cc/JKH3-4WCU].

<sup>62</sup> In 2012, President Obama issued an executive order designed to increase international regulatory cooperation by administrative agencies, including through the use of political commitments, and to centralize White House coordination of such cooperation. See Exec. Order No. 13,609, 3 C.F.R. § 255 (2012).

<sup>63</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>64</sup> Joint Comprehensive Plan of Action, July 14, 2015, <http://www.state.gov/documents/organization/245317.pdf> [https://perma.cc/U7WT-9VQ7].

<sup>65</sup> See *id.*

<sup>66</sup> Majorities in both houses of Congress voted against its approval. See Cristina Marcos, *House Rejects Obama's Iran Deal*, THE HILL (Sept. 11, 2015, 12:34 PM), <http://thehill.com/blogs/floor-action/house/253370-house-rejects-iran-deal> [https://perma.cc/BY2C-QQT4]; Jennifer Steinhauer, *Democrats Hand Victory to Obama on Pact with Iran*, N.Y. TIMES, Sept. 11, 2015, at A1.

consequential agreement without the consent of the legislative branch by treating it as a mere political commitment. He was then able to follow through on his important pledge by exercising domestic authority that Congress had separately conferred on him: first, to waive sanctions against Iran for up to a year at a time on the domestic stage, and second, to vote in the U.N. Security Council, which the Obama Administration did to lift the international sanctions.<sup>67</sup> This use of political commitments, like Executive Agreements+, vastly expands the President's power to make and implement international agreements (albeit non-binding ones).

### B. *Interpreting International Agreements*

Like statutes, international agreements contain gaps and ambiguities, and their proper construction in many contexts is uncertain. The power to interpret agreements is crucial in determining an agreement's meaning, and thus in determining the nature and scope of U.S. rights and obligations under the agreement. The President dominates the interpretation of international agreements for the United States just as the President dominates the making of such agreements.

The President's power to interpret treaties has been apparent since at least the famous Neutrality Controversy in 1793.<sup>68</sup> In the early stages of the war between France and Great Britain growing out of the French Revolution, the Washington Administration interpreted two treaties with France and one with Great Britain, in light of customary international law, to determine and proclaim that the United States would remain neutral in the conflict.<sup>69</sup> There was significant dispute at the time over whether Washington had the authority to issue the Neutrality Proclamation of 1793.<sup>70</sup> But no one doubted that the President possessed the authority to interpret treaties for the United States in the course of conducting foreign relations and exercising his responsibility under Article II of the Constitution to "take Care that the Laws be faithfully executed."<sup>71</sup>

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<sup>67</sup> The waiver authorities are collected and analyzed in KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 19 (2017). The President's authority to vote on behalf of the United States in the United Nations is found in 22 U.S.C. §§ 287–287a (2012). See *infra* section II.C, pp. 1241–44.

<sup>68</sup> The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

<sup>69</sup> *Id.* See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 12–25 (6th ed. 2017).

<sup>70</sup> For the famous debate on this question between Hamilton and Madison, see generally ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794 (Morton J. Frisch ed., 2007).

<sup>71</sup> U.S. CONST. art. II, § 3.

It is now settled that the President has substantial interpretive authority over treaties and other international agreements, although the precise constitutional source of that authority has never been resolved.<sup>72</sup> The scope of this interpretive authority is extraordinarily broad and, in many contexts, nearly exclusive. The vast majority of U.S. actions related to or that implicate binding U.S. agreements are conducted by executive branch officials. In carrying out such actions, the executive branch must often interpret the agreement to ensure that U.S. actions are consistent with it. As Professor Eugene Rostow observed, “[t]he phenomenon of presidential interpretation and reinterpretation of treaties . . . occurs daily in every nook and cranny of the law.”<sup>73</sup>

The executive branch has enormous leeway in these day-to-day interpretations of agreements. It is of course constrained to some degree by its sense of the requirements of law and of U.S. interests, by domestic and international politics, and by the aims and interests of its agreement partners. But it has significant discretion, in the face of these constraints, to interpret U.S. agreements in ways that it deems appropriate. For example, in 2014 the Obama Administration altered the U.S. interpretation of Articles 2 and 16 of the Convention Against Torture to apply extraterritorially in limited circumstances, although it declined to apply them to U.S. military operations, which it insisted remained governed by the more specific laws of war.<sup>74</sup> This interpretation, made without congressional input, brought the United States closer (but not all the way) to the international consensus on the scope of the Torture Convention.<sup>75</sup> There are countless other examples of a President

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<sup>72</sup> See RESTATEMENT (THIRD), *supra* note 9, § 326(1), § 326 cmt. a (contending that the President has authority to interpret treaties “since he is the country’s ‘sole organ’ in its international relations and is responsible for carrying out agreements with other nations,” *id.* § 326 cmt. a (citing *id.* § 1 reporters’ note 2)); see also Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1766 (2009) (“The President interprets and applies international law for purposes of exercising the Article II executive power to conduct the nation’s foreign relations and the constitutional powers of the President as the nation’s military Commander in Chief.”); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 869–74 (2001) (book review) (grounding interpretive power in “plenary authority over the conduct of international relations,” *id.* at 874, the Vesting Clause, and the Treaty Clause).

<sup>73</sup> Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451, 1457 (1989).

<sup>74</sup> See Mary E. McLeod, Acting Legal Adviser, U.S. Dep’t of State, Opening Remarks to the U.N. Committee Against Torture (Nov. 12, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/> [https://perma.cc/CLA4-EZJ7].

<sup>75</sup> See Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014), <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> [https://perma.cc/EUJ4-PCK7].

interpreting agreements in ways that depart from other countries' interpretations of those agreements.<sup>76</sup>

With narrow exceptions, the other branches of government rarely constrain Presidents in their interpretation of international agreements. The vast majority of the President's interpretations cannot as a practical matter be changed by Congress due to the high hurdles posed by bicameralism and the presidential veto. Only occasionally has Congress overcome these hurdles to enact a statute that adopts or implies an interpretation of an international agreement that contradicts the President's prior interpretive position.<sup>77</sup> And it has been very rare for the Senate to bring political pressure to bear on the President to prevent him from reinterpreting a treaty in a fashion it did not like.<sup>78</sup> This interpretive authority gives Presidents substantial ability in practice to affect or alter U.S. obligations in ways that deviate from what the legislature would likely approve if asked.

Similarly, most of the President's interpretations of international agreements fall outside of judicial review.<sup>79</sup> In part this is because many agreements are non-self-executing and thus cannot be applied as a source of law by the courts.<sup>80</sup> And in part this is because very few treaties contemplate causes of action for suit and courts presume that they should not create such causes of action absent express language in the

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<sup>76</sup> See, e.g., Olivier Corten, *The "Unwilling or Unable" Test: Has It Been, or Could It Be, Accepted?*, 29 LEIDEN J. INT'L L. 777, 778–89, 795–97 (2016) (criticizing the U.S. interpretation of the Charter to permit uses of force against states "unwilling or unable" to check terrorist attacks); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (describing the U.S. interpretation of the U.N. Charter in 2003 to authorize war in Iraq); see also *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 529–39 (1987) (outlining the executive branch departures, deferred to by the Supreme Court, from standard international interpretation of the Hague Evidence Convention).

<sup>77</sup> See, e.g., Detainee Treatment Act of 2005 § 1003(a), 42 U.S.C. 2000dd(a) (2012) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

<sup>78</sup> The most well-known episode is when the Senate resisted President Reagan's attempt to reinterpret the Anti-Ballistic Missile Treaty to allow his Strategic Defense Initiative. See BRADLEY & GOLDSMITH, *supra* note 69, at 364–69; David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1353–80 (1989).

<sup>79</sup> Just as with agreement making, the President's control over agreement interpretation was much less pronounced at the Founding vis-à-vis the courts. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

<sup>80</sup> For limitations on treaty self-execution, see *Medellín v. Texas*, 552 U.S. 491 (2008). The *Charming Betsy* canon, pursuant to which statutes will be interpreted if possible to avoid conflicts with international law, allows for some judicial consideration of (and thus interpretation of) non-self-executing treaties. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 109(1) (AM. LAW INST., Tentative Draft No. 1, 2016) ("Where fairly possible, courts will construe federal statutes to avoid a conflict with a treaty provision.").

treaty.<sup>81</sup> Moreover, for the relatively few treaties that are subject to judicial review, courts typically give substantial (“great weight”) deference to the President’s interpretation, somewhat akin to the *Chevron* deference that courts give to certain agency interpretations of regulatory statutes.<sup>82</sup> Such judicial deference to executive branch treaty interpretations was not practiced at the Founding or in the nineteenth century, but rather is a modern phenomenon that has (along with other related trends) grown during the last sixty years.<sup>83</sup> To be sure, there are high-profile counterexamples of lack of deference, especially in recent years.<sup>84</sup> But these counterexamples are rare exceptions to the general practice — exceptions that are even less significant than they appear because only a tiny fraction of treaties are subject to interpretation by courts in the first place.

### C. Terminating International Agreements

The President cannot unilaterally terminate a statute. Only Congress, through bicameralism and presentment or a veto override, can do that.<sup>85</sup> Moreover, although Congress can delegate to the President discretion over how to apply a statute, it cannot delegate the power to terminate a statute to the President.<sup>86</sup>

Under international law, a nation can terminate a treaty either in accordance with the terms of a withdrawal clause in the treaty (which might require a period of notice), when termination is implicitly allowed by the treaty, or as the result of various circumstances such as a material

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<sup>81</sup> See *Medellin*, 552 U.S. at 506 n.3.

<sup>82</sup> See, e.g., *id.* at 513 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)). See generally Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701–07 (2000).

<sup>83</sup> On the Founding, see Sloss, *supra* note 79, at 505–23. On the more recent trend toward deference, see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994); and Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1725–26 (2007).

<sup>84</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (interpreting Geneva Convention Common Article 3 contrary to the Bush Administration’s interpretation).

<sup>85</sup> See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”).

<sup>86</sup> See *id.* at 445–46 (holding the Line Item Veto Act unconstitutional because it bypassed the constitutional requirements of bicameralism and presentment, and noting that “[t]he fact that Congress intended such a result is of no moment”); *cf.* *INS v. Chadha*, 462 U.S. 919, 956–59 (1983) (invalidating the legislative veto provision for similar constitutional reasons). Although Congress cannot delegate to the President the power to terminate statutes, it has sometimes authorized or directed the President to terminate congressional-executive agreements based on statutes. See, e.g., *Tariff of 1909 (Payne-Aldrich Act)*, ch. 6, § 4, 36 Stat. 11, 83 (instructing the President to terminate all agreements that had been entered pursuant to section 3 of the *Tariff of 1897 (Dingley Act)*, ch. 11, § 3, 30 Stat. 151, 203).



breach of the treaty by another party.<sup>87</sup> The text of the U.S. Constitution does not specifically address which actors in the United States have the authority to act on behalf of the United States in terminating a treaty. Treaty termination since the Founding has been effectuated by statute, by subsequent treaty, by presidential action along with the Senate, or by unilateral presidential action. Since the early twentieth century, however, Presidents have come to dominate treaty termination just as they have the making and interpretation of treaties.

Unilateral presidential termination of treaties has been common since at least the 1930s.<sup>88</sup> With a few notable exceptions such as President Carter's termination of a mutual defense treaty with Taiwan in 1978, these terminations have not generated domestic controversy.<sup>89</sup> Since the dispute over the Taiwan matter, Presidents have terminated a few dozen treaties on their own authority.<sup>90</sup> The executive branch has repeatedly maintained that Presidents have unilateral termination authority, and this proposition has been endorsed by the *Restatement (Third) of Foreign Relations Law*, and again recently by the *Restatement (Fourth)*.<sup>91</sup>

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<sup>87</sup> See Vienna Convention on the Law of Treaties art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 346 [hereinafter VCLT]. The Vienna Convention addresses issues relating to, among other things, the formation, interpretation, and termination of treaties. Although it has not ratified the Convention, the United States (through the executive branch) treats the Convention as reflecting generally accepted rules of treaty practice. See, e.g., Letter of Submittal from William P. Rogers, U.S. Sec'y of State, to President Richard M. Nixon (Oct. 18, 1971), *in* Message from the President of the United States Transmitting the Vienna Convention on the Law of Treaties, S. TREATY DOC. NO. 92-12, at 1 (Nov. 22, 1971) (noting that "[t]he Convention sets forth a generally agreed body of rules" and that even before it was in force the Convention was "generally recognized as the authoritative guide to current treaty law and practice").

<sup>88</sup> See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788-801 (2014).

<sup>89</sup> See *id.* at 810-15 (describing the controversy surrounding the Taiwan treaty, *id.* at 810-14, and observing a lack of controversy since, *id.* at 815).

<sup>90</sup> See *id.* at 814-15; INT'L LAW INST., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 202-06 (Sally J. Cummins & David P. Stewart eds., 2003) (listing thirty treaties "terminated by the President since 1980," *id.* at 202); see also, e.g., Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi A. Annan, U.N. Secretary-General (Mar. 7, 2005) [hereinafter Letter from Sec'y of State Condoleezza Rice], <https://www.state.gov/documents/organization/87288.pdf> [<https://perma.cc/63Z7-S45B>] (withdrawing United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes); Press Release, U.S. Dep't of State, Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and Ukraine (Dec. 14, 2001), <https://2001-2009.state.gov/r/pa/prs/ps/2001/6859.htm> [<https://perma.cc/8EKE-PTJM>] (withdrawing United States from Anti-Ballistic Missile Systems Treaty); Telegram from the Department of State to the Embassy in the Republic of China (Dec. 23, 1978), <https://history.state.gov/historicaldocuments/frus1977-80v13/d180> [<https://perma.cc/M4DH-M4L4>] (containing notification of Acting Secretary of State Warren Christopher to Republic of China of U.S. withdrawal from Mutual Defense Treaty).

<sup>91</sup> See RESTATEMENT (THIRD), *supra* note 9, § 339; RESTATEMENT (FOURTH), Tentative Draft No. 2, *supra* note 10, § 113. One of us (Curtis Bradley) served as a Reporter for the *Restatement (Fourth)*.

Although examples are sparse, the practice of Presidents terminating non–Article II agreements is consistent with a dominant presidential role. Presidents clearly have the authority to terminate sole executive agreements and political commitments, since those agreements are made by Presidents based on their own constitutional authority.<sup>92</sup> Presidents have also, without controversy, terminated ex ante congressional-executive agreements (often but not always with the consent of the treaty partner).<sup>93</sup> President Trump recently announced that he would terminate the Paris Agreement, which President Obama had concluded unilaterally and probably in part as an executive agreement pursuant to treaty.<sup>94</sup> There was significant controversy about the policy wisdom of this decision, but no one questioned the President’s legal authority to terminate in this context. Presidential authority to terminate ex post congressional-executive agreements is less clear, in part because these agreements tend to have extensive domestic implementing legislation that Presidents lack the unilateral authority to terminate.<sup>95</sup> But the executive branch almost certainly will contend that it has the authority to

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<sup>92</sup> See, e.g., CRS STUDY, *supra* note 12, at 208 (“[T]he President’s authority to terminate executive agreements, in particular sole executive agreements, has not been seriously questioned in the past.”).

<sup>93</sup> For example, in 1951, the Truman Administration agreed with Costa Rica (without seeking congressional approval) to terminate a 1936 ex ante congressional-executive agreement dealing with reciprocal trade. See Reciprocal Trade, Costa Rica-U.S., Apr. 3, 1951, T.I.A.S. No. 2237 (terminating Reciprocal Trade, Costa Rica-U.S., Nov. 28, 1936, 50 Stat. 1582). In 1955, the Eisenhower Administration terminated a trade agreement with Ecuador, without obtaining either Ecuador’s agreement or congressional approval. See Proclamation No. 3111, 20 Fed. Reg. 6485 (Sept. 2, 1955). In 2012, the Obama Administration agreed with Mexico to terminate a 1972 ex ante congressional-executive agreement concerning the regulation of screwworms. See Agreement Between the United States and Mexico, Mex.-U.S., Sept. 24–25, 2012, T.I.A.S. No. 12-925.1 (terminating Screwworm Eradication Program, Mex.-U.S., Aug. 28, 1972, 23 U.S.T. 2465).

<sup>94</sup> See *infra* section III.A.3, pp. 1248–52. The Trump Administration made the announcement in early June 2017, and then formally notified the United Nations of the decision in early August 2017. See Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://nyti.ms/2rvtLhu> [<https://perma.cc/4LHB-UL7B>]; see also Lisa Friedman, *U.S. to Join Climate Talks Despite Planned Withdrawal from Paris Accord*, N.Y. TIMES (Aug. 4, 2017), <https://nyti.ms/2hvzG2Y> [<https://perma.cc/YZY9-Z7R3>].

<sup>95</sup> President Trump’s threat to terminate or withdraw from the North American Free Trade Agreement (NAFTA), which was made as an ex post congressional-executive agreement, has provoked a debate about his authority to do so. See, e.g., Julian Ku & John Yoo, Op-Ed, *Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html> [<https://perma.cc/VX6H-VL9T>] (contending that Congress’s Commerce Clause authority bars the President from terminating or even renegotiating NAFTA without first receiving congressional approval); Michael Ramsey, *Could President Trump Unilaterally Withdraw the U.S. from Its International Agreements?*, ORIGINALISM BLOG (Sept. 29, 2016, 6:30 AM), <http://originalismblog.typepad.com/the-originalism-blog/2016/09/julian-ku-on-president-trump-withdrawing-from-international-agreementsmichael-ramsey.html> [<https://perma.cc/LBF5-5BPX>] (arguing that the President can withdraw from NAFTA but cannot terminate the implementing legislation); see also Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. (forthcoming 2018) (arguing that there is no persuasive reason to distinguish between

terminate even these agreements and, indeed, President Trump has already suggested this with respect to the North American Free Trade Agreement (NAFTA), which is an ex post congressional-executive agreement.<sup>96</sup> In any event, as discussed above, such ex post agreements are a very small fraction of U.S. international agreements.

## II. PRESIDENTIAL CONTROL OVER OTHER FORMS OF INTERNATIONAL LAW

This Part considers presidential control over other forms of international law. We first consider presidential control over customary international law (CIL). We then consider presidential control over the international law that can emerge, as a matter of CIL, from the negotiation of international agreements before the United States has ratified them (and thus before either the Senate or Congress as a whole has approved them), as well as the international law that emanates from international institutions. As with international agreements, the President has substantial control over the formation, interpretation, and termination of these other forms of international law, and this control has grown over time.

### A. Customary International Law

In addition to international agreements, the other principal source of international law is CIL. This law forms not by express agreement among nations but rather from their practices and understandings over time. According to most accounts, in order for an international norm to become binding as a matter of CIL, it must be supported by consistent state practice and that practice must be followed out of a sense of legal obligation.<sup>97</sup> The sense of legal obligation element of CIL is referred to as *opinio juris*. Once it forms, a CIL rule has the same legal status on the international plane as a binding agreement — it is equally obligatory and can supersede an earlier-in-time agreement.

Before the twentieth century, CIL was the principal form of international law, regulating matters such as the conduct of war, rights at sea, and diplomatic immunity. Its importance has declined somewhat since

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presidential authority to terminate congressional-executive agreements and presidential authority to terminate Article II treaties).

<sup>96</sup> See Ana Swanson, *Trump's Tough Talk on NAFTA Raises Prospects of Pact's Demise*, N.Y. TIMES (Oct. 11, 2017), <https://nyti.ms/2z0emXb> [<https://perma.cc/2KTZ-SUV8>].

<sup>97</sup> See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, at 76, U.N. Doc. A/71/10 (2016) ("Conclusion 2 . . . : To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."); RESTATEMENT (THIRD), *supra* note 9, § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

that time as a result of a substantial increase in the number and types of treaties. But some important areas of international law, such as prescriptive jurisdiction and the immunity of foreign officials, are still primarily regulated by CIL rather than by treaty, and CIL also continues to play an important role in filling in gaps in treaty coverage and in addressing emerging issues that are not yet addressed by treaty.

In contrast to Article II treaties, but like other forms of international agreements, the Constitution says nothing specific about how the United States is to contribute to the development of CIL.<sup>98</sup> The executive branch, however, has long dominated the formation of, interpretation of, and withdrawal from CIL for the United States, although in a different fashion than with agreements. Moreover, presidential control over CIL has grown over time, as the courts have come to play less of a role in interpreting and applying it.

*I. CIL Formation.* — CIL differs from international agreements in ways that tend to give the President even more control — relative to other U.S. actors — over its formation. CIL is based on the practices and perceptions of nations over time, so its content tends to be less certain than the content of international agreements. Moreover, unlike for international agreements, there are basic and unresolved questions about how CIL rules form and change.<sup>99</sup>

Because the executive branch controls U.S. diplomacy and practice on the international stage, it plays a leading role in developing the state practice for the United States relating to CIL. Moreover, because the executive branch dominates communications with foreign nations and representations of the U.S. position on the international stage, it provides most of the input for U.S. expressions of *opinio juris*. Every hour of every day, through its many diplomatic and other administrative channels at home and abroad, the executive branch is acting in accordance with its view of CIL, establishing state practice and often articulating *opinio juris* for the United States. This executive-centered U.S. contribution to the creation of CIL does not itself create CIL. As a formal matter, a CIL rule's existence depends on the practice of the community of nations, not simply the practice of the United States. Nonetheless, because the President almost always decides the U.S. view on CIL, and because the United States often has a significant influence on the content of CIL, the President is able to affect CIL both through

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<sup>98</sup> CIL was referred to as part of the “law of nations” when the Constitution was drafted. The only reference in the Constitution to the law of nations is in Article I, Section 8, which provides that Congress has the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.

<sup>99</sup> See Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 34, 37–38 (Curtis A. Bradley ed., 2016).

affirmative actions and statements and through decisions about whether to acquiesce in the practices and statements of other nations.

The executive branch does not have a monopoly over the state practice of the United States.<sup>100</sup> Statutes enacted by Congress and even U.S. judicial decisions can potentially constitute relevant state practice.<sup>101</sup> Congress might, for example, enact a statute that purports to define and punish an offense against CIL,<sup>102</sup> or a court might interpret the scope of immunity that foreign officials are entitled to under CIL in domestic litigation.<sup>103</sup> Nevertheless, the vast majority of relevant practice for CIL ends up being executive practice. In its recent study of CIL, the U.N. International Law Commission noted that relevant practice includes:

[D]iplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.<sup>104</sup>

All but the last two of these categories involve primarily executive conduct.<sup>105</sup>

Moreover, in its role as the chief spokesperson for the United States in international diplomacy, the executive branch not only interprets international law to guide its actions but also advocates particular legal

<sup>100</sup> Nor does it have a monopoly over expressions of *opinio juris* by the United States. Congress in a statute can take a position on which particular practices are permissible or obligatory under CIL. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“[S]uch acts [of terrorism] render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad . . .”). And courts can do the same when deciding whether to recognize particular CIL norms in litigation. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733–38 (2004) (declining to recognize a customary international claim under the Alien Tort Statute for short-term arbitrary detention). Here, as elsewhere, congressional and judicial involvement are the exceptions to executive branch dominance.

<sup>101</sup> See Int’l Law Comm’n, *supra* note 97, at 76 (“Conclusion 5 . . . : State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.”).

<sup>102</sup> An example is the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2012), in which Congress created a cause of action for instances of torture and “extrajudicial killing” committed under color of foreign law and defined these offenses.

<sup>103</sup> See, e.g., *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012) (“[A]s a matter of international and domestic law, *jus cogens* violations [of international law] are, by definition, acts that are not officially authorized by the Sovereign.”).

<sup>104</sup> Int’l Law Comm’n, *supra* note 97, at 77 (Conclusion 6).

<sup>105</sup> See Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1254 (1988) (“Most of the activities of the United States that can amount to state practice are under the control of the President, as a matter of American law.”); see also Int’l Law Comm’n, *supra* note 97, at 93 (Commentary on Conclusion 7) (“[T]he practice of the executive branch is often the most relevant on the international plane . . .”).

positions. As the Supreme Court noted in *Banco Nacional de Cuba v. Sabbatino*<sup>106</sup>:

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.<sup>107</sup>

As advocate for the United States, the executive branch develops, refines, and alters CIL rules that govern the rights and duties of the United States.

There are many examples of this executive branch role in articulating U.S. positions relating to CIL. In 1945, President Truman unilaterally proclaimed, by means of an executive order, that under CIL the United States had the right to exploit the resources in the continental shelf in the sea off its coast.<sup>108</sup> This announcement quickly led to the formation of a CIL rule consistent with the U.S. position.<sup>109</sup> In 1952, the executive branch announced that, consistent with the practice of certain other nations, the United States would henceforth follow a “restrictive” approach to foreign sovereign immunity that would decline to accord immunity for private, commercial acts, and courts deferred to this position.<sup>110</sup> More recently, the executive branch in both the George W. Bush and Obama Administrations maintained that there was a CIL right, which was also relevant to U.S. treaty obligations, to use force in self-defense against terrorist groups operating from within other nations if those nations were “unable or unwilling” to address the threats from those groups.<sup>111</sup> Although this claim is controversial, a number of other nations have now endorsed it.<sup>112</sup> To take yet another example, the executive branch in recent years has also been developing the U.S. position

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<sup>106</sup> 376 U.S. 398 (1964).

<sup>107</sup> *Id.* at 432–33.

<sup>108</sup> See Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

<sup>109</sup> See MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE 113–19 (2013).

<sup>110</sup> See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), reprinted in 26 DEP’T ST. BULL. 984 (1952); see also, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

<sup>111</sup> See Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 729–31 (2016).

<sup>112</sup> See Elena Chachko & Ashley Deeks, *Who Is on Board with “Unwilling or Unable”?*, LAWFARE (Oct. 10, 2016, 1:55 PM), <https://www.lawfareblog.com/who-board-unwilling-or-unable> [<https://perma.cc/7YYY-C32A>].

concerning the legality, under both treaties and CIL, of cyber operations, without any formal participation by Congress or the courts.<sup>113</sup>

2. *CIL Interpretation.* — The President has at least as much control over the interpretation of CIL as over agreements, and probably more, since CIL is not typically recorded in an agreed-upon text. Determining whether there is sufficient state practice to support a CIL rule, the appropriate level of generality at which to describe the practice, and whether the practice is being followed out of a sense of legal obligation all present difficult interpretive challenges that leave substantial room for presidential discretion.<sup>114</sup> Moreover, in some instances treaty provisions may reflect principles of CIL that apply even to nations that are not parties to the treaty, and lack of clarity about when this is the case<sup>115</sup> expands the possibilities for presidential interpretation.

As with treaties, the constitutional source of this power is not entirely clear but probably derives from a combination of the President's power to take care to faithfully execute the law, which presupposes interpretive authority, as well as the President's role as chief spokesperson for the United States on the international stage. These powers, plus control over diplomacy, have meant that "the executive branch has emerged as the institution most responsible for administering, interpreting, and applying CIL."<sup>116</sup> In addition, because the content of CIL is often uncertain and debatable, the executive branch's role in interpreting CIL enhances its ability to influence the creation of what are in effect new CIL rules.

Once again, Presidents do not have a monopoly over the interpretation of CIL. The other branches interpret CIL in the course of exercising their constitutional responsibilities. Congress sometimes makes a judgment about CIL in the course of enacting statutes related to CIL — for example, a statute creating an exception to sovereign immunity. Similarly, courts interpret CIL when it is relevant to cases within their jurisdiction. There is relatively little case law addressing the extent to which courts should defer to executive branch positions concerning CIL,

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<sup>113</sup> See, e.g., Michael Schmitt, *US Transparency Regarding International Law in Cyberspace*, JUST SECURITY (Nov. 15, 2016), <https://www.justsecurity.org/34465/transparency-international-law-cyberspace/> [https://perma.cc/KN99-4JSJ]. In June 2017, a bill was introduced in Congress that, if enacted, would require the executive branch to report any cyber operations conducted outside of war zones. See Travis J. Tritten, *Bill Requires Pentagon to Report Cyber Operations Outside of War Zones*, WASH. EXAMINER (June 8, 2017, 3:23 PM), <http://www.washingtonexaminer.com/bill-requires-pentagon-to-report-cyber-operations-outside-of-war-zones/article/2625385> [https://perma.cc/CF94-HQ29].

<sup>114</sup> See generally Bradley, *supra* note 99, at 35 (describing the evidentiary uncertainties associated with CIL).

<sup>115</sup> See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 213 (2010).

<sup>116</sup> Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 862 (2005).

but there are reasons to think that courts will typically give such positions substantial deference. The content and relevant source materials for CIL are less clear and more fluid than those for treaties, providing even more potential justifications for deference to executive expertise.<sup>117</sup> The *Restatement (Third) of Foreign Relations Law* observed that courts give “particular weight” to the views of the executive branch about the content of international law, including CIL, “because it is deemed desirable that so far as possible the United States speak with one voice on such matters.”<sup>118</sup>

There is nothing new about executive branch influence on the U.S. interpretation of CIL. What has become more prominent in recent years is the use by the executive branch of its authority relating to CIL to commit the United States to obligations that Congress would be unlikely to agree to, including obligations reflected in treaties that the United States has not ratified.<sup>119</sup> Executive branch positions concerning the Law of the Sea Convention,<sup>120</sup> which was finalized in 1982 and came into force in 1994, but which the United States has not joined because of opposition in the Senate, provide an example.

In 1983, President Reagan issued a policy statement accepting much of the content of the Convention, despite making clear that he would not seek its ratification because of its provisions governing mining of the deep seabed.<sup>121</sup> He also declared by presidential proclamation that “international law recognizes” the Exclusive Economic Zone rights set forth in the Convention and that the United States would exercise those rights.<sup>122</sup> In doing so, President Reagan referred generally to “the authority vested in me as President by the Constitution and laws of the United States of America,” and he said that the United States would exercise its rights “in accordance with the rules of international law.”<sup>123</sup> The *Restatement (Third) of Foreign Relations Law* subsequently concluded that, “by express or tacit agreement accompanied by consistent

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<sup>117</sup> As noted above, at the time of the constitutional Founding, CIL was referred to as part of the “law of nations.” It was understood even then that the precise content of the unwritten law of nations might often be uncertain, which is why Congress was given the authority to “define” as well as “punish” offenses against the law of nations. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., 1911) (statement of Gouverneur Morris) (“The word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule.”).

<sup>118</sup> RESTATEMENT (THIRD), *supra* note 9, § 112 cmt. c; see also Bradley, *supra* note 82, at 707 (noting that “[t]he conventional view is that deference to the executive branch concerning the meaning of customary international law is covered by essentially the same rule governing treaties”).

<sup>119</sup> See generally Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate’s Advice and Consent*, 2015 B.Y.U. L. REV. 1525.

<sup>120</sup> Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>121</sup> See Statement on United States Oceans Policy, 1 PUB. PAPERS 378–79 (Mar. 10, 1983).

<sup>122</sup> See Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

<sup>123</sup> *Id.*



practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.”<sup>124</sup>

In 1988, President Reagan issued another proclamation stating that the United States was extending the breadth of the territorial sea over which it claimed jurisdiction from three miles off its coast to twelve miles, something that he contended was now allowed under CIL “as reflected in” the unratified Law of the Sea Convention.<sup>125</sup> It may be that Congress would have agreed with this interpretation of CIL and President Reagan’s use of it to extend U.S. jurisdiction, but, importantly, President Reagan did not wait to find out.<sup>126</sup> In support of the legality of this unilateral action, the Justice Department’s Office of Legal Counsel (OLC), relying primarily on historical practice, stated that “the President may extend the territorial sea by virtue of his constitutional role as the representative of the United States in foreign relations.”<sup>127</sup> It cited the initial determination in 1793 by George Washington’s Administration of a three-mile territorial sea, as well as the Truman Proclamation and another proclamation by President Truman concerning fishery conservation zones in certain areas of the high seas contiguous to the United States.<sup>128</sup> OLC acknowledged that the President’s ability to acquire new maritime territory for the United States (as opposed merely to a claim of authority to regulate in that territory) presented a harder issue, given that most acquisitions of territory by the United States have been accomplished by treaty. It concluded, however, that “[b]ecause of several venerable, and unchallenged, historical examples of such acquisitions, we believe that he can, even though the practice may be subject to some constitutional question.”<sup>129</sup>

A more recent example concerns Article 75 of the Additional Protocol I to the Geneva Conventions, which sets forth certain standards to ensure the humane treatment of detainees during an armed conflict. Although the United States has not joined the Protocol, the Obama Administration announced in 2011 that it would “choose out of a sense

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<sup>124</sup> RESTATEMENT (THIRD), *supra* note 9, pt. V, Introductory Note, at 5.

<sup>125</sup> Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

<sup>126</sup> See Harry N. Scheiber & Chris Carr, *Constitutionalism and the Territorial Sea: An Historical Study*, 2 TERRITORIAL SEA J. 67, 89 (1992) (“President Reagan’s abrupt and startling announcement of the twelve-mile territorial sea — while Congress had under consideration a bill that would have provided for such an extension by statute — must be understood as a trumpet call reasserting the powers of the Executive, and not only the resolution of the U.S. posture with regard to territorial waters and their status.” (footnote omitted)).

<sup>127</sup> Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 238–39 (1988).

<sup>128</sup> See *supra* notes 108–09 and accompanying text.

<sup>129</sup> Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. at 248.

of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.”<sup>130</sup> Although ambiguous, this announcement seems to treat Article 75 as reflecting binding CIL.<sup>131</sup> In these and other instances, the executive branch is able to adopt contestable positions concerning the CIL rights and obligations of the United States, without seeking Senate or congressional approval.

3. *CIL Avoidance and Violation.* — As a matter of formal doctrine, nations are not allowed to withdraw unilaterally from rules of CIL.<sup>132</sup> But nations can avoid being bound by CIL if they have “persistently objected” to a CIL rule while it is developing,<sup>133</sup> and the executive branch as the chief diplomatic organ of the nation is the actor most likely to be involved in articulating such objection. The Reagan Administration, for example, made the United States a persistent objector to any emerging CIL norm requiring a sharing of deep seabed resources.<sup>134</sup> In addition, the executive branch has tried to persistently object on behalf of the United States to any emerging CIL norm restricting the death penalty.<sup>135</sup>

Claims of persistent objection are rare, however. Much more commonly, the executive branch uses its power to interpret CIL, as discussed above, in order to claim that a CIL rule is inapplicable to a particular situation or has changed. Since there is rarely any international adjudication to review executive branch interpretations of CIL, the executive branch has substantial ability through interpretation to avoid CIL rules

<sup>130</sup> Press Release, Office of the Press Sec’y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> [<https://perma.cc/VE6B-6ATY>]. Because the Administration’s acceptance of Article 75 was limited to “international armed conflict,” it does not apply to the conflict against al Qaeda and associated groups, which is considered a non-international armed conflict. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–32 (2006).

<sup>131</sup> In answering questions from Senator Lugar, however, the Obama Administration stopped short of claiming that Article 75 was binding as a matter of CIL and instead noted that the United States was obligated under “overlapping requirements in U.S. law” to act in accordance with Article 75. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 57 (2011) (responses of Legal Adviser Harold Koh to questions submitted by Sen. Richard G. Lugar).

<sup>132</sup> Cf. Bradley & Gulati, *supra* note 115 (arguing that CIL would be improved if withdrawal were allowed under certain circumstances).

<sup>133</sup> Int’l Law Comm’n, *supra* note 97, at 79 (Conclusion 15); see also RESTATEMENT (THIRD), *supra* note 9, § 102 reporters’ note 2.

<sup>134</sup> See David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986) (“It is clear that more than a majority of States maintain that deep seabed mining may only occur under the structure envisioned by the 1982 Law of the Sea convention (LOS Convention). The United States and a few other States disagree and assert their right to engage in deep seabed mining outside the LOS Convention.” (footnote omitted)).

<sup>135</sup> See, e.g., Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 525–35 (2002) (documenting various U.S. objections to an international law restriction on the juvenile death penalty, most of which involve statements by the executive branch).

with which it disagrees, without the need for a formal withdrawal.<sup>136</sup> Moreover, it is well settled that, except for a small number of special *jus cogens* norms of international law, CIL may be overridden by agreement.<sup>137</sup> As a result, another option for the executive branch is to enter into agreements, including agreements that have little or no legislative involvement, to override CIL rules as between the parties to the agreement.

When such interpretive avoidance or override by agreement is not feasible, the executive branch likely has another option: violating CIL. There is substantial debate about the status of CIL in the U.S. legal system,<sup>138</sup> but the Supreme Court's *Paquete Habana* decision has been read by many (including the executive branch) to disable U.S. courts from applying CIL to override a "controlling executive . . . act."<sup>139</sup> Consistent with that conclusion, lower courts have rejected challenges to executive branch action based on alleged violations of CIL — for example, challenges relating to immigration detention that is alleged to violate CIL norms.<sup>140</sup> Perhaps more significantly, most executive branch actions that implicate CIL are never reviewed by the courts at all, in which case they are dispositive unless overturned by Congress, which is extremely rare.

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<sup>136</sup> Relatedly, the executive branch may be able to claim that the CIL rule has disappeared through a lack of sufficient state practice or *opinio juris*. See generally Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005).

<sup>137</sup> See RESTATEMENT (THIRD), *supra* note 9, § 102 cmt. j ("Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law. However, an agreement will not supersede a prior rule of customary law that is a peremptory norm of international law . . ."). A *jus cogens* norm, also referred to as a "peremptory norm," is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." VCLT, *supra* note 87, art. 53, 1155 U.N.T.S. at 344.

<sup>138</sup> See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 246 (2d ed. 1996) ("Unlike treaties which have developed their part in the constitutional life of the United States, customary international law remains full of constitutional uncertainties.").

<sup>139</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ."). The executive branch has expressed this view in, for example, Auth. of the FBI to Override Int'l Law in Extraterritorial Law Enf't Activities, 13 Op. O.L.C. 163 (1989). For debate over this issue, see Jonathan I. Charney, Michael J. Glennon & Louis Henkin, Essays, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); Frederic L. Kirgis, Jr., Anthony D'Amato & Jordan J. Paust, Essays, *Agora: May the President Violate Customary International Law? (Cont'd)*, 81 AM. J. INT'L L. 371 (1987).

<sup>140</sup> See, e.g., *Barrera-Echavarría v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993); *García-Mir v. Meese*, 788 F.2d 1446, 1454–55 (11th Cir. 1986). The theory behind CIL envisions that some violations are actually necessary in order for it to continue evolving. See, e.g., Anthony D'Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT'L L. 375, 377 (1987) ("Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself.").

To take one of countless examples, since the September 11, 2001 terrorist attacks, the executive branch has developed the U.S. position concerning the legality of targeted killing outside of traditional battlefields under both CIL and treaty law. It has done so without either specific statutory guidance or judicial review, even though the U.S. position is highly controversial internationally and is alleged by critics to involve violations of international law.<sup>141</sup> In September 2017, the Trump Administration was reported to be considering adopting a more permissive approach to such targeted killing, again without seeking congressional authorization or approval.<sup>142</sup>

### *B. Interim Treaty Obligations and Provisional Application*

International obligations can also be created — as a matter of CIL — through the negotiation of international agreements before they are ratified, and thus before either the Senate or Congress has approved them. This section addresses two situations in which this may occur: first, when a nation incurs interim obligations based on its signature of a treaty, and, second, when a nation agrees, either through signature or otherwise, to have some or all of the treaty apply provisionally prior to ratification.

*I. Interim Obligations.* — Nations often sign treaties prior to ratifying them.<sup>143</sup> For the United States, the executive branch carries out this act of signature.<sup>144</sup> Although signing a treaty in these circumstances does not bind the nation to the treaty, it may generate certain interim obligations. In particular, Article 18 of the Vienna Convention on the Law of Treaties provides that a nation that signs a treaty is bound not to take actions that “would defeat the object and purpose of a treaty” until “it shall have made its intention clear not to become a party to the treaty.”<sup>145</sup> Although the United States has not ratified the Vienna Convention, the executive branch — in another unilateral practice — has indicated on various occasions that it accepts that the object and

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<sup>141</sup> See KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW* (2015) (collecting Obama Administration legal speeches on these issues); see also *bin Ali Jaber v. United States*, 861 F.3d 241, 245–47, 250 (D.C. Cir.), *cert. denied*, 138 S. Ct. 480 (2017) (holding that suit challenging drone attack in Yemen by the U.S. military presented a nonjusticiable political question).

<sup>142</sup> See Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://nyti.ms/2jRoPSa> [<https://perma.cc/7D9J-KAL2>].

<sup>143</sup> See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 307 (2007).

<sup>144</sup> *Id.* at 308.

<sup>145</sup> VCLT, *supra* note 87, art. 18, 1155 U.N.T.S. at 336.

purpose obligation set forth in Article 18 is binding on the United States as a matter of CIL.<sup>146</sup>

The Clinton Administration arguably triggered such interim obligations when it signed the treaty for the International Criminal Court in 1999, despite substantial opposition to that treaty in Congress.<sup>147</sup> Even when the Bush Administration made clear in 2002 that the United States did not intend to ratify the treaty, it did not deny the possibility that the Clinton Administration had triggered an interim obligation under the treaty. Indeed, one reason it “unsigned” the treaty was to eliminate any such obligation.<sup>148</sup>

Because the executive branch is responsible for U.S. signature of treaties, it has the ability to trigger interim signing obligations under CIL without the agreement of the Senate or Congress.<sup>149</sup> At times, the Senate has pushed back against such authority. For example, when the Law of the Sea Convention was being negotiated during the 1970s, fourteen senators sent a letter to the Carter Administration’s representative to the treaty conference expressing concerns about potential obligations that could be triggered by U.S. signature of the Convention.<sup>150</sup> The senators insisted that such signature “will not bind [the Senate] from

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<sup>146</sup> See, e.g., INT’L LAW INST., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2001, at 212–13 (Sally J. Cummins & David P. Stewart eds., 2002) (reprinting answer by Secretary of State Colin Powell to question for the record by Senator Jesse Helms reaffirming the State Department’s view that Article 18 of the Vienna Convention reflects CIL); MARIAN LLOYD NASH, OFFICE OF THE LEGAL ADVISER, DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1979, at 692–93 (1983) (reprinting statement by Ambassador Elliott Richardson endorsing the view that the object and purpose test of Article 18 represents CIL); Letter of Submittal from William P. Rogers, U.S. Sec’y of State, to President Richard M. Nixon, *supra* note 87, at 2 (acknowledging interim obligation test of Article 18 as CIL).

<sup>147</sup> See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Signing of the Statute of the International Criminal Court*, 95 AM. J. INT’L L. 397, 397–400 (2001); Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-to-ratify-international-criminal-court-treaty> [<https://perma.cc/9JUK-9BSU>].

<sup>148</sup> See Letter from John R. Bolton, U.S. Under Sec’y of State for Arms Control and Int’l Sec., to Kofi Annan, U.N. Secretary-General (May 6, 2002) [hereinafter Letter from John R. Bolton], <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/6S69-55SQ>] (noting that, because of its announcement, “the United States has no legal obligations arising from its signature”).

<sup>149</sup> For an argument that it is constitutionally problematic for the President to unilaterally trigger signing obligations for the United States, see generally David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 UCLA L. REV. 598 (2012). The ability of a subsequent President to “unsigned” an agreement, as happened with the International Criminal Court treaty, is another unilateral presidential power relating to international law. The extent of presidential discretion over this issue is nicely illustrated by the Bush Administration’s decision to pursue a somewhat different approach to disavowing the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which had been signed by the Clinton Administration. Although the Bush Administration made clear that it opposed the Kyoto Protocol, it chose not to send an official “unsigned” letter to the United Nations, while at the same time insisting that its opposition to the Protocol was “clear and unambiguous.” See Bradley, *supra* note 143, at 312–13.

<sup>150</sup> NASH, *supra* note 146, at 690–93.

taking any action which anyone claims would defeat the object or purpose of the treaty.”<sup>151</sup> Ultimately, the United States did not sign the Convention.<sup>152</sup>

Controversy about this issue also arose in connection with the Strategic Arms Limitations Talks (SALT) II Treaty negotiated with the Soviet Union, which the Carter Administration signed in 1979.<sup>153</sup> The next year, after the Carter Administration asked the Senate to delay its consideration of the treaty, the State Department stated that “[t]he U.S. and the Soviet Union share the view that under international law a state should refrain from taking action which would defeat the object and the purpose of a treaty it has signed subject to ratification,” and that “[w]e therefore expect that the United States and the Soviet Union will refrain from acts which would defeat the object and the purpose of the SALT II Treaty before it is ratified and enters into force.”<sup>154</sup> In 1981, the Reagan Administration made clear to the Soviet Union that the United States had no intention of ratifying the treaty.<sup>155</sup> Two senators subsequently sent a letter to President Reagan objecting to what they described as President Carter’s position that the Defense Department “comply fully and precisely with all the provisions of the unratified SALT II treaty,” and to President Reagan’s apparent acceptance that, until the United States made clear its intent not to ratify the treaty, it was obligated to refrain from actions that would defeat SALT II’s object and purpose.<sup>156</sup>

One reason that the President’s ability to trigger interim signing obligations has not generated even more controversy is that the object and purpose obligation may not be very significant for most treaties. In describing this obligation, the executive branch has observed that nations are “expected to avoid actions which could render impossible the entry into force and implementation of the [agreement], or defeat its basic purpose and value to the other party or parties.”<sup>157</sup> This narrow interpretation of Article 18 is defensible in light of both its text and drafting history, despite some academic claims about a broader scope of

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<sup>151</sup> *Id.* at 691.

<sup>152</sup> Roncevert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/> [https://perma.cc/EPA6-23KF].

<sup>153</sup> *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II)*, U.S. DEP’T ST., <https://www.state.gov/t/isn/5195.htm> [https://perma.cc/ZJ8A-JHKK].

<sup>154</sup> MARIAN NASH LEICH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, at 398 (1986).

<sup>155</sup> 131 CONG. REC. 3449 (1985) (letter from Sens. Steve Symms and John East).

<sup>156</sup> *Id.* at 3452.

<sup>157</sup> Memorandum from Roberts B. Owen, U.S. Dep’t of State Legal Adviser (Feb. 21, 1980), reprinted in S. EXEC. REP. NO. 96-33, at 47 (1980) [hereinafter Memorandum from Roberts B. Owen].

the obligation.<sup>158</sup> While even this narrow conception of the object and purpose obligation may have significance for certain treaties that have a single core obligation, for other treaties there are not likely to be many actions that the United States could take that would “render impossible the entry into force and implementation of the [agreement], or defeat its basic purpose and value to the other party or parties.”<sup>159</sup> But even this is simply a matter of executive branch interpretation.

2. *Provisional Application.* — Nations can agree to have a treaty apply provisionally even before they have ratified it — for example, based on a provision in the treaty that is triggered by signature, or in a separate agreement. As stated in Article 25 of the Vienna Convention, “[a] treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) The treaty itself so provides; or (b) The negotiating States have in some other manner so agreed.”<sup>160</sup> This provisional effect will normally terminate, according to Article 25, if a signatory state “notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”<sup>161</sup> Unlike an interim signing obligation, provisional application of a treaty can bind a nation to all or part of a treaty, not just to an obligation not to defeat its object and purpose. It is therefore a much more significant obligation, and therefore a potentially more significant pathway around legislative consent to a treaty.<sup>162</sup>

The executive branch has often agreed to the provisional application of treaties.<sup>163</sup> It has defended the practice based on its power to make executive agreements when authorized by a ratified treaty or a statute,

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<sup>158</sup> Bradley, *supra* note 143, at 308; *see also* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2078 (2003) (“Some commentators regard compliance with article 18 as turning on the observance of major or indispensable treaty provisions . . . . But the interim obligation is more commonly understood to safeguard against acts that would disable the mere signatory (or others) from complying with the treaty once it entered into force — in an attempt to maintain, as relevant, the status quo ante.”).

<sup>159</sup> Memorandum from Roberts B. Owen, *supra* note 157, at 47. For the treaty establishing the International Criminal Court, it was arguable that the U.S. effort to conclude “Article 98 agreements” with countries — whereby the countries would not extradite U.S. citizens to the Court — was incompatible with the object and purpose of the treaty, which may be part of the reason the Bush Administration made clear that the United States had no intention of ratifying the treaty.

<sup>160</sup> VCLT, *supra* note 87, art. 25(1), 1155 U.N.T.S. 338.

<sup>161</sup> *Id.* art. 25(2), 1155 U.N.T.S. 339.

<sup>162</sup> *See* René Lefeber, *The Provisional Application of Treaties*, in *ESSAYS ON THE LAW OF TREATIES* 81, 82 (Jan Klabbbers & René Lefeber eds., 1998) (noting danger that provisional application will be used by the executive branch in some countries to evade a requirement of parliamentary approval of treaties).

<sup>163</sup> *See* CRS STUDY, *supra* note 12, at 113–16.

or (when the agreement falls within the President's independent constitutional authority) based on its sole executive agreement power.<sup>164</sup> Presidential action triggering interim obligations might also find support in a President's potentially greater authority to enter into sole executive agreements for minor or temporary commitments.<sup>165</sup>

As with executive agreements, the executive branch frequently invokes legislative bases for provisional application.<sup>166</sup> It did so, for example, for the provisional application of the General Agreement on Tariffs and Trade (GATT), which lasted from 1947 to 1995.<sup>167</sup> Sometimes, provisional application is specifically limited by its terms to obligations not inconsistent with each country's domestic law. That was true for GATT: the agreement on provisional application applied "to the fullest extent not inconsistent with existing legislation."<sup>168</sup> Similarly, in 1998, provisional application of a mutual legal assistance treaty with Ukraine was accepted "to the extent possible under [the] respective domestic laws of the United States . . . and Ukraine."<sup>169</sup>

Members of the Senate have recently expressed concern that the executive branch will use provisional application to bypass the need for legislative approval of an international agreement. For example, in 2013, the Obama Administration signed the Arms Trade Treaty,<sup>170</sup>

<sup>164</sup> See, e.g., S. REP. NO. 96-49, 19, 26-27 (1980) (Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba) (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State, to questions submitted by Sen. Jacob K. Javits). The executive branch has disclaimed authority, however, to use provisional application of a treaty to change existing domestic law. See *id.* at 27.

<sup>165</sup> See, e.g., Ramsey, *supra* note 7, at 198-200; Ingrid Wuerth, *Iran Nuclear Agreement as a Modus Vivendi*, LAWFARE (Nov. 25, 2013, 7:26 AM), <https://www.lawfareblog.com/iran-nuclear-agreement-modus-vivendi> [<https://perma.cc/5TF9-XS9W>].

<sup>166</sup> See CONG. RESEARCH SERV., LAW OF THE SEA TREATY: ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION 2 (Comm. Print 1974); see also Martin A. Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 ME. L. REV. 29, 63 (1987) ("[T]he President has generally obtained some form of congressional approval of, or at least acquiescence in, provisional agreements binding the United States to international obligations.").

<sup>167</sup> In 1947, the Truman Administration signed the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, art. 1, 55 U.N.T.S. 308.

<sup>168</sup> *Id.*

<sup>169</sup> Letter from Madeleine Albright, U.S. Sec'y of State, to Ambassador Anton Buteiko, Ambassador for Ukr. to the U.S. (Sept. 30, 1999), *reprinted in* Message from the President of the United States Transmitting Treaty Between United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters, S. TREATY DOC. NO. 106-16, at 21 (Nov. 10, 1999). In subsequently explaining this agreement to the Senate Foreign Relations Committee, executive branch lawyers noted that it was "an interim executive agreement" and that it was "limited to what can be done under existing legal authority." *Consideration of Pending Treaties: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 34-35 (2000) (responses submitted by Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, Department of State, and Bruce C. Swartz, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice, to additional questions submitted by Sen. Joseph R. Biden, Jr.).

<sup>170</sup> Final U.N. Conference on the Arms Trade Treaty: Draft Decision, art. 1, Mar. 27, 2013, U.N. Doc. A/CONF.217/2013.L.3. On April 2, 2013, the U.N. General Assembly passed a resolution



which regulates international trade in conventional arms, despite substantial opposition to it in the Senate. Senator Corker, then the Ranking Member of the Senate Foreign Relations Committee, sent a letter to President Obama insisting that the President not agree to provisional application of the treaty.<sup>171</sup> Corker contended in his letter that “[a]ny act to implement this treaty, provisionally or otherwise, before the Congress provides its advice and consent would be fundamentally inconsistent with the U.S. Constitution, law, and practice.”<sup>172</sup> (Even without provisional application, the signing of the treaty itself may carry with it some international legal obligations, as noted above.)

The executive branch also controls the *termination* of both interim signing obligations and provisional application. Under the Vienna Convention, both types of obligations are terminated if a nation makes clear its intent not to become a party to the treaty.<sup>173</sup> With its control over diplomacy, it is the executive branch that issues such a notice. This was evident, for example, in connection with the treaty establishing the International Criminal Court. After the Clinton Administration had signed that treaty and potentially triggered interim obligations for the United States, the subsequent Bush Administration sent a letter to the Secretary-General of the United Nations making clear that it would not become a party to the treaty and that “[a]ccordingly, the United States has no legal obligations arising from its signature.”<sup>174</sup> Although there was significant debate over the policy wisdom of this announcement, there was little dispute that the President had the authority to make it. As an illustration of the breadth of presidential power in this area, the Obama Administration partially reversed course again, both by making efforts to reengage with the International Criminal Court and by stating that it “is explicitly not the policy of this administration” “to frustrate the object and purpose” of the treaty.<sup>175</sup>

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adopting the treaty as contained in the annex to the draft decision and recommending that nations join the treaty. G.A. Res. 67/234, Arms Trade Treaty (Apr. 2, 2013).

<sup>171</sup> Press Release, U.S. Senate Comm. on Foreign Relations, Corker Warns Obama Administration Against Any Action to Implement U.N. Arms Trade Treaty Without Senate Advice and Consent (Sept. 24, 2013), <https://www.foreign.senate.gov/press/ranking/release/corker-warns-obama-administration-against-any-action-to-implement-un-arms-trade-treaty-without-senate-advice-and-consent> [<https://perma.cc/A32T-EMD3>]. The treaty provides that “[a]ny State may at the time of signature or the deposit of instrument of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.” Final U.N. Conference on the Arms Trade Treaty: Draft Decision, *supra* note 170, art. 23.

<sup>172</sup> Press Release, U.S. Senate Comm. on Foreign Relations, *supra* note 171.

<sup>173</sup> See VCLT, *supra* note 87, arts. 18, 25, 1155 U.N.T.S. 336, 338–39.

<sup>174</sup> See Letter from John R. Bolton, *supra* note 148.

<sup>175</sup> Harold Hongju Koh, Legal Adviser, Dep’t of State, The Challenges and Future of International Justice (Oct. 27, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/150497.htm> [<https://perma.cc/8MPC-JM53>].

### C. *The Executive Branch and International Organizations*

Another way that the executive branch can affect the content of international law without obtaining specific congressional approval is by its actions in international institutions. The executive branch represents the United States in such institutions, and in doing so it engages in a wide range of actions, including: making statements about U.S. positions relating to international law, voting on resolutions that concern the content of preexisting international obligations or create new obligations, approving modifications to treaty obligations through streamlined consent procedures that do not involve legislative approval, and articulating the position of the United States in international adjudication or arbitration. In addition to these overt actions, the executive branch can work behind the scenes with other nations to encourage them to take actions in international institutions that can affect the United States' rights and duties under international law.<sup>176</sup>

Consider, for example, executive branch participation in the U.N. Security Council. Congress has expressly authorized the executive branch to represent the United States in the United Nations, including in the Security Council. The U.N. Participation Act states that the President shall appoint an ambassador to the United Nations and that this ambassador “shall represent the United States in the Security Council of the United Nations . . . and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.”<sup>177</sup> It also provides that U.S. representatives in the United Nations “shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President.”<sup>178</sup>

Under the U.N. Charter, the Council has the authority to issue binding pronouncements concerning international legal obligations, as long as they concern the maintenance of peace and security.<sup>179</sup> The United States is one of five countries that have a permanent seat on the Council and the ability to veto its resolutions. But it has only one of the fifteen votes on the Council, which requires at least nine favorable votes — and no negative votes from any of the other four veto countries — to pass a

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<sup>176</sup> See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 688 (1996–1997) (“[E]xecutives may act more or less secretly within the international body to shape the rule adopted, and then carry out the international mandate, either directly or by lobbying its domestic legislature, while disavowing responsibility for the rule’s content.”).

<sup>177</sup> 22 U.S.C. § 287(a) (2012).

<sup>178</sup> *Id.* § 287a.

<sup>179</sup> See U.N. Charter arts. 25, 39, 41, 42.

resolution. Nevertheless, there are times when it is easier for the executive branch to convince the Council to create an international legal obligation than to convince Congress to agree to such an obligation.

Concerns about presidential use of the Security Council to circumvent Congress arose in connection with the Iran nuclear deal in 2015. As discussed in Part I, the Obama Administration decided to conclude that deal as a nonbinding political agreement, which did not require congressional approval. One tradeoff of doing so was that the agreement would not be legally binding on Iran. As a way of avoiding this limitation, there was speculation that the Administration might attempt to have the Security Council issue a resolution making the terms of the deal binding.<sup>180</sup> The Administration had already followed such a route two years earlier in having the Security Council convert a nonbinding agreement with Syria concerning chemical weapons into binding obligations.<sup>181</sup> If applied to the Iran deal, it would make it much stickier, not only with respect to Iran, but also with respect to the United States, because it could mean that if a subsequent President attempted to reimpose U.S. sanctions on Iran he or she would be violating international law. Ultimately, the Council issued a resolution providing for the termination only of U.N. sanctions on Iran, without mandating that the United States end its sanctions.<sup>182</sup> Nevertheless, the Security Council action in support of the Obama Administration's Iran agreement is a key component of that agreement and something that makes it much harder for a subsequent administration to undo.<sup>183</sup>

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<sup>180</sup> See Jack Goldsmith, *How a U.N. Security Council Resolution Transforms a Non-Binding Agreement with Iran into a Binding Obligation Under International Law (Without Any New Senatorial or Congressional Vote)*, LAWFARE (Mar. 12, 2015, 8:37 AM), <https://www.lawfareblog.com/how-un-security-council-resolution-transforms-non-binding-agreement-iran-binding-obligation-under> [<https://perma.cc/MNA6-BBX2>]; Colum Lynch & John Hudson, *Obama Turns to U.N. to Outmaneuver Congress*, FOREIGN POL'Y (July 15, 2015, 7:18 PM), <http://foreignpolicy.com/2015/07/15/obama-turns-to-u-n-to-outmaneuver-congress-iran-nuclear-deal/> [<https://perma.cc/78PU-CGNH>].

<sup>181</sup> See S.C. Res. 2118 (Sept. 27, 2013).

<sup>182</sup> S.C. Res. 2231 (July 20, 2015); see also John Bellinger, *The New UNSCR on Iran: Does It Bind the United States (and Future Presidents)?*, LAWFARE (July 18, 2015, 4:58 PM), <https://www.lawfareblog.com/new-unscr-iran-does-it-bind-united-states-and-future-presidents> [<https://perma.cc/K2HE-LNNZ>]; Somini Sengupta, *U.N. Moves to Lift Iran Sanctions After Nuclear Deal, Setting Up a Clash in Congress*, N.Y. TIMES (July 20, 2015), <https://nyti.ms/2qtA8iy> [<https://perma.cc/TM5U-5JEN>].

<sup>183</sup> The Security Council resolution includes a “snapback” provision, however, that potentially could allow the President to “trigger the re-imposition of . . . sanctions on Iran” without a new approval by the Council. Jean Galbraith, *If President Trump Ends the Iran Deal, Can He Trigger the Security Council Snapback?*, OPINIO JURIS (Sept. 20, 2017, 8:48 PM), <https://opiniojuris.org/2017/09/20/if-president-trump-ends-the-iran-deal-can-he-trigger-the-security-council-snapback/> [<https://perma.cc/5PLJ-F5DG>]; see also Somini Sengupta, *“Snapback” Is an Easy Way to Reimpose Iran Penalties*, N.Y. TIMES (July 16, 2015), <https://nyti.ms/2lmsvub> [<https://perma.cc/745U-P875>].

The executive branch can also use its role in the Security Council to alter the international legal obligations of *other countries*. In December 2016, for example, the Security Council approved a resolution stating that Israel's construction of housing settlements in occupied Palestinian territory "constitutes a flagrant violation under international law."<sup>184</sup> The Obama Administration decided to abstain on the vote rather than exercise its veto authority, thereby letting the resolution take effect, even though it is highly unlikely that Congress would have approved such action.<sup>185</sup> Depending on how it is construed, the resolution may alter Israel's obligations under international law.<sup>186</sup> Importantly, when Presidents vote in ways that result in new international law obligations for other nations, they at the same time establish those obligations for the United States.

There are many other ways the executive branch can use its role in international institutions to influence the development of international law. For many multilateral treaty regimes, modifications to the treaties can be accomplished through informal "tacit" amendment procedures or consensus resolutions of the parties that do not require new acts of ratification by the members.<sup>187</sup> When embodied in treaties to which the Senate has given its advice and consent, the Senate can be said to have "given its consent in advance to the modifications adopted pursuant to those processes."<sup>188</sup> In effect, the international organizations or conferences that administer the agreements have been delegated administrative regulatory authority that is somewhat akin to the authority exercised by administrative agencies in the United States.<sup>189</sup> In order for the tacit amendments to become binding, often the only thing that is required is a lack of objection by the parties, and the executive branch decides whether the United States objects.<sup>190</sup>

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<sup>184</sup> S.C. Res. 2334, ¶ 1 (Dec. 23, 2016).

<sup>185</sup> See Somini Sengupta & Rick Gladstone, *Rebuffing Israel, U.S. Allows Censure over Settlements*, N.Y. TIMES (Dec. 23, 2016), <https://nyti.ms/2kgo7pL> [<https://perma.cc/CJU8-2EUA>].

<sup>186</sup> See Recent Resolution, S.C. Res. 2334 (Dec. 23, 2016), 130 HARV. L. REV. 2267, 2269–71 (2017).

<sup>187</sup> See, e.g., OONA A. HATHAWAY, HALEY NIX, SAURABH SANGHVI & SARA SOLOW, TACIT AMENDMENTS 3 (2011), <https://law.yale.edu/system/files/documents/pdf/cglc/TacitAmendments.pdf> [<https://perma.cc/M3EG-KUGP>]; David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1035–44 (1992).

<sup>188</sup> CRS STUDY, *supra* note 12, at 183.

<sup>189</sup> See, e.g., Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494–95 (2004) ("The practice of delegating to international institutions — vesting them with the authority to develop binding rules — sometimes looks like the next New Deal." (footnote omitted)).

<sup>190</sup> For example, under the Chemical Weapons Convention, which the United States joined in 1997, the toxic chemicals that are subject to the Convention's verification measures are set forth in schedules contained in an annex to the Convention, and the Convention provides for tacit amendments to these schedules "if proposed changes are related only to matters of an administrative or

The executive branch also plays a lead role in deciding whether the United States withdraws from international organizations. These organizations are typically created through international agreements, and, as discussed in Part I, the executive branch as a matter of practice exercises a unilateral authority to withdraw from agreements. To take one example, in 2005, the Bush Administration unilaterally withdrew the United States from the Optional Protocol to the Vienna Convention on Consular Relations after the country lost several cases brought pursuant to the Protocol in the International Court of Justice.<sup>191</sup> More recently, the Trump Administration withdrew the United States from UNESCO and has threatened to withdraw the United States from the U.N. Human Rights Council.<sup>192</sup> Not all of these actions are ones that Congress would likely object to; the key point is that they are handled unilaterally by the executive branch without any significant congressional input.<sup>193</sup>

To be sure, in some instances Congress may be able to use its funding authority and other powers to influence executive branch action in international institutions.<sup>194</sup> In general, though, Congress's authority is at best reactive, and exercises of this authority depend on being fully aware of the positions that the executive branch has taken, which will often not be the case. Moreover, even if Congress can react to executive branch action, it is constrained by the fact that, unlike its ability to overturn the decisions and actions of domestic administrative agencies, it has no direct ability to overturn the decisions and actions of international institutions, which would often require an amendment to the underlying agreement.<sup>195</sup>

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technical nature." Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, art. XV(4), *opened for signature* Jan. 13, 1992, 1997 U.N.T.S. 317 (entered into force on Apr. 29, 1997). A proposed change takes effect if recommended by the Executive Council (which consists of 41 states parties with rotating membership) and "no State Party objects to it within 90 days after receipt of the recommendation." *Id.* art. XV(5)(d), 1997 U.N.T.S. 352. The executive branch represents the United States on the Executive Council.

<sup>191</sup> See Letter from Sec'y of State Condoleezza Rice, *supra* note 90.

<sup>192</sup> See Gardiner Harris & Steven Erlanger, *U.S. Will Withdraw from UNESCO, Citing Its "Anti-Israel Bias"*, N.Y. TIMES (Oct. 12, 2017), <https://nyti.ms/2kJdd7> [<https://perma.cc/YER4-LZ5P>]; Merrit Kennedy, *Trump Administration Warns that U.S. May Pull Out of U.N. Human Rights Council*, NPR (June 6, 2017, 2:50 PM), <http://www.npr.org/sections/thetwo-way/2017/06/06/531752892/trump-administration-warns-that-u-s-may-pull-out-of-u-n-human-rights-council> [<https://perma.cc/CG9X-H6TW>].

<sup>193</sup> More generally, the executive branch has substantial ability to influence the agenda of international institutions, which can in turn affect the international legal issues on which the United States, guided by the executive branch, will feel compelled to take a position, as well as, in some instances, the development of CIL.

<sup>194</sup> See, e.g., Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517, 519 (2013) ("Over the past forty years, Congress has undertaken persistent and often successful efforts to shape day-to-day U.S. participation in the [World] Bank, a key international organization.").

<sup>195</sup> See Stephan, *supra* note 176, at 687.

### III. WHY PRESIDENTIAL CONTROL MATTERS

Parts I and II described ten pathways of presidential control over making, interpreting, and terminating international law:

- ◆ Article II treaties
- ◆ Ex ante congressional-executive agreements
- ◆ Ex post congressional-executive agreements
- ◆ Executive agreements made pursuant to a treaty
- ◆ Sole executive agreements
- ◆ Executive Agreements+
- ◆ Political commitments
- ◆ Customary international law
- ◆ Interim and provisional application of agreements
- ◆ Lawmaking in international institutions

The pathways of presidential control have expanded in number and depth over time, in part because of executive branch assertiveness and creativity, but also because of broad statutory delegations of authority combined with congressional inattention and passivity.

This Part explains further why the rise of presidential control over international law matters in practice. Section A recounts several high-profile examples of how recent Presidents (both Democratic and Republican) have been able to combine or substitute the various pathways of control to further enhance their unilateral authority. Section B then explains how presidential control over international law extends beyond its impact on U.S. foreign relations and has significant consequences domestically for U.S. institutions and actors.

#### *A. Combining and Substituting Unilateral Power*

Parts I and II described the tools of presidential unilateralism piecemeal for analytical purposes. This section provides several examples showing how recent Presidents have substituted or combined these authorities to extend the reach of presidential unilateralism.

1. *Comprehensive Nuclear-Test-Ban Treaty*. — Presidential action relating to the Comprehensive Nuclear-Test-Ban Treaty (CTBT)<sup>196</sup> illustrates how the pathways discussed in Part II can sometimes be used when the pathways discussed in Part I are foreclosed or restricted. This treaty, which has not yet entered into force, would ban all explosive testing of nuclear weapons.<sup>197</sup> The Clinton Administration signed the treaty in 1996 and subsequently submitted it to the Senate for advice

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<sup>196</sup> Comprehensive Nuclear-Test-Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439.

<sup>197</sup> *Id.*

and consent.<sup>198</sup> In a major foreign policy defeat for the Administration, however, the Senate voted it down in 1999.<sup>199</sup>

The Clinton Administration responded by invoking the CIL pathway associated with “interim” signing obligations. In particular, the Administration maintained that, under CIL, because the executive branch had signed the treaty, the United States still had an obligation to avoid testing nuclear weapons.<sup>200</sup> Years later, in 2013, the Obama Administration similarly joined the other permanent members of the Security Council in a statement that cited Article 18 of the Vienna Convention and called on all nations “to uphold their national moratoria on nuclear weapons—test explosions or any other nuclear explosions, and to refrain from acts that would defeat the object and purpose of the [CTBT] pending its entry into force.”<sup>201</sup> In both instances, it is highly unlikely that either the Senate or the full Congress would have approved such a commitment.

Subsequently, in 2016, the Obama Administration decided to seek a U.N. Security Council resolution urging nations not to test nuclear weapons and to support the CTBT’s objectives.<sup>202</sup> It is unclear whether the Administration’s original plan contemplated a resolution that would be binding under international law, but Senator Corker, the Chairman of the Senate Foreign Relations Committee, perceived that this was the Administration’s intention.<sup>203</sup> Senator Corker responded by writing a letter to President Obama expressing “strong opposition to efforts by your administration to circumvent the U.S. Congress and the Senate’s constitutional role by promoting ratification of the [CTBT] at the United Nations” and insisting that “[t]he U.S. Constitution clearly provides the

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<sup>198</sup> Message from the President of the United States Transmitting Comprehensive Nuclear Test-Ban Treaty, S. TREATY DOC. NO. 105-28, at III (1997).

<sup>199</sup> Senate Republicans worried that it would be difficult to verify other nations’ compliance with the treaty and also that, if the United States were bound by the treaty, it would be too difficult for it to maintain the viability of its nuclear weapons. See Helen Dewar, *Senate Rejects Test Ban Treaty*, WASH. POST (Oct. 14, 1999), <http://wapo.st/2mlLQul> [<https://perma.cc/H4X9-NLCN>].

<sup>200</sup> See Bill Gertz, *Albright Says U.S. Bound by Nuke Pact*, WASH. TIMES, Nov. 2, 1999, at A1 (quoting letter, from Secretary of State Madeleine Albright to foreign ministers, referring to the United States’ “obligations as a signatory under international law”); The President’s News Conference, 35 WEEKLY COMP. PRES. DOC. 2035, 2039 (Oct. 14, 1999) (remarks of President Clinton) (“I signed that treaty. It still binds us unless I go, in effect, and erase our name. Unless the President does that and takes our name off, we are bound by it.”).

<sup>201</sup> OFFICE OF THE LEGAL ADVISER, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2013, at 648 (CarrieLyn D. Guymon ed., 2014) (excerpting joint statement following fourth conference).

<sup>202</sup> See Josh Rogin, *Obama Will Bypass Congress, Seek U.N. Resolution on Nuclear Testing*, WASH. POST (Aug. 4, 2016), <http://wapo.st/2aTwjic> [<https://perma.cc/DK4B-35ES>].

<sup>203</sup> *Id.* (quoting Senator Corker as contending that the Obama plan would “allow countries like Russia and China to be able to bind the United States over our nuclear deterrent capability without the scrutiny of Congress,” and would keep Congress “from weighing in on an important agreement that’s going to limit our ability to ensure our nuclear deterrent is in place”).

Senate — not the United Nations — the right to the provision of advice and consent for the ratification of any treaty, including the ability to identify when a treaty or the application of the provisions contained in a treaty is not in the U.S. interest.”<sup>204</sup>

Although Senator Corker accurately described the Senate’s role in the treaty process, it is also the case, as discussed in Part II, that Congress has given the President unqualified authority to vote in the U.N. Security Council, an authority that the President has often used to support binding international obligations.<sup>205</sup> In the end, the Administration did not pursue a binding resolution concerning nuclear testing, but rather obtained a resolution from the Council that merely “calls upon” states to refrain from testing rather than disallowing them from doing so.<sup>206</sup>

2. *Security Agreement with Iraq.* — The war that Congress authorized against Iraq in 2002 became embedded in an international law framework when the U.N. Security Council passed Resolutions 1483 and 1511, which together recognized a Coalition Provisional Authority and authorized a “multinational force” to maintain security and stability in Iraq.<sup>207</sup> These and subsequent elements of the U.N. mandate in Iraq were set to expire on December 31, 2008.<sup>208</sup> In November 2007, President Bush, without consulting Congress, signed a political commitment with Iraq in which the two countries pledged to work toward a binding bilateral accord to replace the U.N. mandate and set the terms for the U.S. military presence in Iraq going forward.<sup>209</sup> Many in Congress objected when the Bush Administration made clear that it

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<sup>204</sup> Letter from Senator Bob Corker, Chairman, Senate Comm. on Foreign Relations, to President Barack Obama (Aug. 12, 2016), [http://www.corker.senate.gov/public/\\_cache/files/3224510d-18c7-467d-aabb-a6ca7d4cdf31/Senator%20Corker%20letter%20on%20CTBT%208-12-16.pdf](http://www.corker.senate.gov/public/_cache/files/3224510d-18c7-467d-aabb-a6ca7d4cdf31/Senator%20Corker%20letter%20on%20CTBT%208-12-16.pdf) [https://perma.cc/U279-7LAV]. A group of thirty-three congressional Republicans also wrote a letter to President Obama threatening to withhold funding for an international monitoring system for nuclear tests if the Administration sought to use the Council to obtain binding obligations disallowing testing. See Paul Sonne, *Senate GOP Protests Obama’s Planned Nuclear Test Ban Push*, WALL ST. J. (Sept. 8, 2016, 5:59 PM), <http://on.wsj.com/2Exrshb> [https://perma.cc/HB9B-MUEY].

<sup>205</sup> See *supra* section II.C, pp. 1241–44.

<sup>206</sup> S.C. Res. 2310, ¶ 4 (Sept. 23, 2016). Another option that was apparently considered by the executive branch was to have the five permanent members of the Council interpret the “object and purpose” of the CTBT as prohibiting nuclear testing. See *The Administration’s Proposal for a U.N. Resolution on the Comprehensive Nuclear Test-Ban Treaty: Hearing Before the S. Comm. on Foreign Relations*, 114th Cong. 3 (2016) (statement of Stephen G. Rademaker).

<sup>207</sup> S.C. Res. 1511, ¶ 13 (Oct. 16, 2003); see also S.C. Res. 1483, pmb. (May 22, 2003).

<sup>208</sup> Press Release, Security Council, Security Council, Acting on Iraq’s Request, Extends ‘For Last Time’ Mandate of Multinational Force, U.N. Press Release SC/9207 (Dec. 18, 2007), <https://www.un.org/press/en/2007/sc9207.doc.htm> [https://perma.cc/H4NF-H5J9].

<sup>209</sup> See Press Release, Office of the Press Sec’y, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America (Nov. 26, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html> [https://perma.cc/9BND-GHD6].



would negotiate this binding agreement unilaterally.<sup>210</sup> Over the next year, the Administration refused to respond to bipartisan congressional requests to see the texts of the agreements being negotiated.<sup>211</sup>

After the 2008 presidential election but while President Bush was still in office, the United States signed two executive agreements with Iraq: one a “Strategic Framework” for friendship and cooperation, and the other an agreement, akin to a Status of Forces Agreement, concerning the presence and eventual withdrawal from Iraq of U.S. forces.<sup>212</sup> These were important and controversial agreements that would define the terms of the American military presence in Iraq for the first three years of the Obama Administration. They were negotiated in secret by the Bush Administration without the input or approval of Congress or the incoming Obama Administration, were announced as faits accomplis during the transition period, and came into force on January 1, 2009. The potential legal bases for agreements of this sort can be prior statutes or treaties or independent Article II power.<sup>213</sup> The Bush Administration chose the Commander in Chief Clause to justify what thus became sole executive agreements.<sup>214</sup>

In sum, at the end of his presidency, President Bush used a political commitment and then the sole executive agreement power to cut out Congress entirely from the process of establishing an internationally binding three-year military and political relationship with Iraq that his successor, who came into office pledging to pull the U.S. military out of Iraq, inherited.

3. *Paris Agreement.* — The Paris Agreement, mentioned in the introduction to this Article, illustrates how the President can combine agreement-making power with political commitments and domestic regulations to enter into extraordinarily consequential international agreements unilaterally, even if Congress opposes the deal. The Agreement

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<sup>210</sup> See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 467–68 (2011).

<sup>211</sup> *Id.* at 470.

<sup>212</sup> Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States and the Republic of Iraq, Iraq-U.S., Nov. 17, 2008, T.I.A.S. No. 09-101.1; Agreement Between the United States of America and Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Iraq-U.S., Nov. 17, 2008, <https://www.state.gov/documents/organization/122074.pdf> [<https://perma.cc/5JME-P68S>].

<sup>213</sup> See MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL34362, CONGRESSIONAL OVERSIGHT AND RELATED ISSUES CONCERNING THE PROSPECTIVE SECURITY AGREEMENT BETWEEN THE UNITED STATES AND IRAQ 13 & n.56 (2008), <https://fas.org/sgp/crs/mideast/RL34362.pdf> [<https://perma.cc/V4X3-ZQG4>].

<sup>214</sup> See *Negotiating a Long-Term Relationship with Iraq: Hearing on U.S.-Iraq Long-Term Security Agreement Before the S. Comm. on Foreign Relations*, 110th Cong. 4 (2008) (statement of Hon. David Satterfield, Senior Adviser to the Secretary of State and Coordinator for Iraq) (citing Commander in Chief Clause as basis for concluding 2008 Iraq Agreements).

requires states parties to prepare, submit, and maintain pledges, called “nationally determined contributions,” to limit greenhouse gases.<sup>215</sup> Most elements of the Agreement are legally binding under international law. We know this because most of the Agreement’s terms use the language of a binding instrument, the Administration and other nations view it as binding, and President Obama deposited an instrument of acceptance to the Agreement with the U.N. Secretary General.<sup>216</sup> Because the Administration did not clearly explain its authority under domestic law to make this agreement, and because the answer is not obvious, scholars and commentators have debated what *type* of agreement it was. Some maintained that it was a sole executive agreement.<sup>217</sup> Some said it was an executive agreement without specifying the type.<sup>218</sup> Some said it was an Executive Agreement+, at least in part.<sup>219</sup> Others said it was an executive agreement pursuant to a treaty — the United Nations Framework Convention on Climate Change (UNFCCC) — to which the Senate gave its consent and the President ratified in 1992.<sup>220</sup> Yet others have said it rested on a number of statutory, treaty, and constitutional bases.<sup>221</sup> This uncertainty about the legal basis for such a consequential international agreement — much less the validity of that basis — is a remarkable testament to the extent of presidential unilateralism in this area.

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<sup>215</sup> U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement]. The Paris Agreement also contains obligations to help developing countries facilitate emission reductions, such as climate finance and technology transfer provisions. *See, e.g., id.* arts. 9–10.

<sup>216</sup> *See* Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE: BLOG (Sept. 3, 2016, 10:41 AM), <https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement> [<https://perma.cc/4A6S-QP78>]. As of February 2018, 174 nations had deposited instruments of ratification for the Agreement. *See Paris Agreement — Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) [<https://perma.cc/PN9R-FU2Y>].

<sup>217</sup> STEVEN GROVES, HERITAGE FOUND., *THE PARIS AGREEMENT IS A TREATY AND SHOULD BE SUBMITTED TO THE SENATE* 11 (2016), <http://www.heritage.org/environment/report/the-paris-agreement-treaty-and-should-be-submitted-the-senate> [<https://perma.cc/XZ7A-7NXB>] (contending that the Obama Administration treated the Paris Agreement as a sole executive agreement).

<sup>218</sup> Noah Feldman, *The Paris Accord and the Reality of Presidential Power*, BLOOMBERG VIEW (June 2, 2017, 1:00 PM), <https://bloom.bg/2vX6eFk> [<https://perma.cc/HU6C-3Q6X>].

<sup>219</sup> Bodansky & Spiro, *supra* note 44, at 916–19.

<sup>220</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; *see* Goldsmith, *supra* note 56, at 466 (arguing that most of the Paris Agreement was an executive agreement pursuant to a treaty). As we explain in more detail, *infra* pp. 1268–69, this appears to be the most persuasive justification.

<sup>221</sup> David A. Wirth, *Cracking the American Climate Negotiators’ Hidden Code: United States Law and the Paris Agreement*, 6 CLIMATE L. 152, 166–70 (2016).

We have obtained a copy of the Obama Administration's confidential submission to Congress concerning the Agreement, but it does not clarify the legal basis for the Agreement very much.<sup>222</sup> The submission cites five bases of "legal authority": First, Article II of the U.S. Constitution. Second, § 2656 of Title 22, which authorizes the Secretary of State to perform the foreign affairs duties directed by the President, including "negotiations with public ministers from foreign states."<sup>223</sup> Third, the UNFCCC. Fourth, the National Environmental Policy Act of 1969, in which Congress directed all federal agencies to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."<sup>224</sup> Fifth, the Global Climate Protection Act of 1987, which found (among other things) that the global nature of climate change required "vigorous efforts to achieve international cooperation" that would be "enhanced by United States leadership," and stated that U.S. policy should seek to "work toward multilateral agreements" in this area.<sup>225</sup>

This "kitchen sink" statement of legal authorities illustrates why it is so hard to categorize or even assess the legality of many nontreaty legally binding agreements, even in the rare case in which the bases for the agreements are made public. It also illustrates how elusive the authorizations are for many executive agreements. Article II is likely cited because the President negotiated the treaty, and perhaps some elements of it — requirements to submit reports and participate in international review — are in fact commitments that the President could make on his own authority.<sup>226</sup> The three statutory bases seem like very weak reeds on which to rest any elements of the binding international obligation as a congressional-executive agreement, but perhaps they are thrown in to bolster an alternative Executive Agreements+ argument.<sup>227</sup> The UNFCCC is a more plausible basis for at least some elements of the Agreement, since the Agreement was expressly negotiated under and

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<sup>222</sup> Letter from Michael Mattler, Assistant Legal Adviser, Office of Treaty Affairs, U.S. Dep't of State, to Senator Bob Corker, Chairman of the Senate Comm. on Foreign Relations (Dec. 22, 2016) (on file with authors) (Statement Regarding the Paris Agreement, Done at Paris on December 12, 2015, Signed by the United States on April 22, 2016, Entered into Force November 4, 2016). The submission was made to Congress as part of the executive branch's reporting obligation under the Case Act, 1 U.S.C. § 112b (2012). See *infra* notes 336–37.

<sup>223</sup> 22 U.S.C. § 2656 (2012).

<sup>224</sup> 42 U.S.C. § 4332(2)(F) (2012).

<sup>225</sup> 15 U.S.C. § 2901 note (2012) (Global Climate Protection).

<sup>226</sup> See Bodansky & Spiro, *supra* note 44, at 918.

<sup>227</sup> Bodansky and Spiro rely on some of these statutes to support their claim that the Paris Agreement is in part an Executive Agreement+. See *id.* at 918–19.

pursuant to that prior treaty, furthers that treaty's objectives, and contains provisions contemplated by that treaty.<sup>228</sup>

Whatever the domestic legal basis and justification for making the Paris Agreement legally binding without contemporary congressional consent, it is clear that the Agreement's core and most controversial mitigation provision — Article 4.4's requirement that developed countries undertake economy-wide, absolute emission reduction targets — is a nonbinding political commitment.<sup>229</sup> This is clear because Article 4.4 states that this commitment “should” rather than “shall” be carried out, and because the Obama Administration stated that the Agreement's mitigation provisions were a nonbinding political commitment, both publicly and in confidential documents.<sup>230</sup> One reason to make the achievement of mitigation targets nonbinding was to attract participation by those nations, including the United States, that might have balked at a binding obligation on this point.<sup>231</sup> The Obama Administration also believed that it could avoid the need for Senate or congressional consent by making achievement of any emission target nonbinding.<sup>232</sup>

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<sup>228</sup> See *infra* text accompanying notes 317–23.

<sup>229</sup> See Paris Agreement, *supra* note 215, art. 4.4.

<sup>230</sup> See, e.g., Letter from Julia Frifield, Assistant Sec'y for Legislative Affairs, to Senator Bob Corker, Chairman, Senate Comm. on Foreign Relations (Mar. 16, 2016) (on file with authors) (noting that even after ratification, the U.S. emissions reduction contribution “will not, by the terms of the Agreement, be legally binding,” since “[n]either Article 4, which addresses emissions mitigation efforts, nor any other provision of the Agreement obligates a Party to achieve its contribution”); Press Release, U.S. Dep't of State, Special Briefing by Senior Administration Officials, Background Briefing on the Paris Climate Agreement (Dec. 12, 2015) [hereinafter Senior Administration Briefing], <https://2009-2017.state.gov/r/pa/prs/ps/2015/12/250592.htm> [<https://perma.cc/HH4G-BF7N>] (“[T]he notion of the targets not being binding was really a fundamental part of our approach from early on . . . . The targets are not binding; the elements that are binding are consistent with already approved previous agreements.”).

<sup>231</sup> See, e.g., Senior Administration Briefing, *supra* note 230 (noting that “[t]here are many countries — the most vocal outside of us probably India — but the reality is there would be many developing countries who would balk at having to do legally binding targets for themselves”); Jeff McMahon, *Paris: How a Voluntary Climate Agreement Can Be Legally Binding*, FORBES (Dec. 2, 2015, 12:09 PM), <https://www.forbes.com/sites/jeffmcmahon/2015/12/02/paris-how-a-voluntary-climate-agreement-can-be-legally-binding/> [<https://perma.cc/PB8B-H6C7>] (“Negotiations stalled in Copenhagen because of the unwillingness of many nations — notably China, India, Brazil and South Africa — to accept an externally imposed limit on carbon emissions that could limit economic development. The U.S., too, had signaled unwillingness to accept an imposed target . . . .”).

<sup>232</sup> See Senior Administration Briefing, *supra* note 230 (“[T]his agreement does not require submission to the Senate because of the way it is structured.”); Joshua Keating, *The One Word that Almost Scuttled the Climate Deal*, SLATE (Dec. 14, 2015, 12:00 PM), [http://www.slate.com/blogs/the\\_slatest/2015/12/14/climate\\_deal\\_came\\_down\\_to\\_the\\_difference\\_between\\_shall\\_and\\_should.html](http://www.slate.com/blogs/the_slatest/2015/12/14/climate_deal_came_down_to_the_difference_between_shall_and_should.html) [<https://perma.cc/T83L-T7GE>] (“The U.S. had insisted throughout the negotiating process that the deal not include any legally binding language that would have required the White House to submit it to the Senate for approval.”). The Administration may have been influenced, politically if not legally, by the Senate Foreign Relations Committee's report on the resolution of ratification of the 1992 UNFCCC, which expressed the expectation that future actions on legally binding emission reductions would require the Senate's advice and consent. See S. EXEC. REP. NO. 102-55, at 14 (1992).

But the Administration was nevertheless able to give this political commitment legal teeth under domestic law. In a move parallel to its exercise of domestic waiver authorities for the Iran deal, the Administration relied on regulations under the Clean Air Act<sup>233</sup> and other domestic statutes to reduce greenhouse emissions and meet the political pledge on the international plane.<sup>234</sup>

The Paris Agreement illustrates how the President can use the tools at his or her disposal to make an extraordinarily consequential international agreement without the need for congressional consent, and indeed in the face of congressional opposition.<sup>235</sup> The Agreement itself was based in an uncertain way on an assortment of older sources that were not explained to the public, and none of them except perhaps the UNFCCC remotely contemplated an agreement of this sort. Then the core emissions-reduction pledge, which likely could not have been made binding under any domestic authority, was crafted as a nonbinding political commitment and subsequently implemented, in effect, via domestic regulations grounded in old statutes not enacted for these international ends.

### *B. The Impact of Presidential Control*

One intuition that might seem to support unilateral presidential control over international law is that, unlike domestic law, it has consequences only (or mostly) outside the United States, beyond U.S. institutions and actors. To the extent that this is true, some might believe that the executive branch should have more authority in this area than in domestic law. This intuition might draw support from the idea —

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<sup>233</sup> 42 U.S.C. §§ 7401–7671q (2012).

<sup>234</sup> The highest-profile regulation under the Clean Air Act is the Clean Power Plan, which regulates greenhouse gases from existing power plants. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663–64 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The Supreme Court stayed the implementation of this regulation. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.). And as noted above, see *supra* text accompanying note 94, President Trump has indicated his intention to withdraw from the Paris Agreement (although the United States will not be able to formally do so until 2020), and the EPA has proposed to repeal the Clean Power Plan, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,036 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60), along with several other regulations aimed at fulfilling the nationally determined contribution. Other domestic regulations supporting the pledge made in Paris include fuel economy rules under the Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of the U.S. Code), and energy efficiency rules under 42 U.S.C. § 6295. For an overview of the domestic regulations that support the political commitment in the Paris Agreement, see generally Cass R. Sunstein, *Changing Climate Change, 2009–2016*, HARV. ENV'T'L L. REV. (forthcoming).

<sup>235</sup> Cf. David M. Herszenhorn, *Votes in Congress Move to Undercut Climate Pledge*, N.Y. TIMES (Dec. 1, 2015), <https://nyti.ms/2E8aTbz> [<https://perma.cc/7A4G-BF2M>] (“Hours after President Obama pledged Tuesday in Paris that the United States would be in the vanguard of nations seeking a global response to climate change, Congress approved two measures aimed at undercutting him.”).

associated most famously with the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*<sup>236</sup> — that separation of powers constraints are weaker in the realm of external affairs.<sup>237</sup> Many observers, as well as the Supreme Court itself, have questioned the continuing viability of the principle, and the internal/external distinction on which it rests.<sup>238</sup> And as we show in Part IV, even if separation of powers constraints are weaker in some respects, they are still robust in ways that matter to presidential control of international law.

In any event, this underlying intuition about impacts on U.S. actors and institutions is not accurate. Unilateral presidential international lawmaking has significant consequences domestically and for U.S. institutions and actors along at least six dimensions.

1. *Consequences for the United States.* — When the President makes, interprets, and terminates international agreements and CIL for the United States, he or she prescribes rules that the United States is obliged by international law to follow in its interactions with other nations, often on very important matters. Whether one believes that compliance is determined by the gravitational pull of international law, through some instrumental logic relating to national power and interests, or in accord with some other theory,<sup>239</sup> the fact is that the United States, as Professor Louis Henkin famously argued, follows “almost all principles of international law and almost all of [its] obligations almost all of the time.”<sup>240</sup> When the President acts alone with respect to international law, therefore, he or she alone prescribes rules for the United States in its interactions with other nations and for how the executive branch will act toward other nations over many matters ranging from commerce to diplomacy to war. The same consequences follow as a practical matter for political commitments made by the President, at least for the duration of his or her administration and often much longer.

2. *Consequences for Later Presidents.* — Presidents' broad power to change international law obligations through interpretation and termination, and plenary power to alter political commitments, mean that in theory a later President can change the international law course set by an earlier President. In practice, however, the actions of an earlier

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<sup>236</sup> 299 U.S. 304 (1936).

<sup>237</sup> See *id.*

<sup>238</sup> See Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (“The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”); see also Hathaway, *supra* note 27, at 217–19 (arguing that there is “little support” for the view that “the separation of powers that applies in the domestic context does not apply to the same extent when the President makes or enforces international legal obligations,” *id.* at 217). For an analysis of cases in the last few decades that support this proposition, see generally Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

<sup>239</sup> For a description of various theories of why nations comply with international law, see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 476–86 (2005).

<sup>240</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

President affect and narrow the options of a later President. For legal obligations, in addition to the usual status quo bias and bureaucratic inertia, the later President might not want to incur whatever costs result from any potential violation of international law entailed in termination or reinterpretation. And for legal obligations and political commitments alike, as the Iran deal shows, the state of the world may have changed significantly as a result of the first President's actions in ways that make it harder for the later President to change course. Although President Trump came into office as an opponent of the Iran deal, by the time he was President, the lifting of domestic and international sanctions against Iran for its nuclear weapons program had induced deep global cooperation to reintegrate Iran into the global economy. Unilateral reimposition of the U.S. sanctions against Iran would thus primarily hurt U.S. firms. In the face of this reality, President Trump has reluctantly continued the U.S. waivers of sanctions against Iran,<sup>241</sup> while indicating a desire to renegotiate the deal.<sup>242</sup>

3. *Consequences for Congress.* — When the President makes an international agreement or political commitment, or when he or she interprets CIL or declares the United States bound by an extant CIL rule, Congress can in theory act within its Article I authorities to abrogate the effect of the presidential action.<sup>243</sup> Congress faces two practical hurdles, however. First are the usual inertia and collective action barriers to enacting legislation contrary to the President's wishes, as well as a potential presidential veto. The second is that Congress may not want to violate international law, and in some contexts the prospect of bringing the United States into violation of international law will persuade Congress to soften or kill legislation.<sup>244</sup> To the extent that this is the

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<sup>241</sup> See Peter Baker, *Trump Recertifies Iran Nuclear Deal, but Only Reluctantly*, N.Y. TIMES (July 17, 2017), <https://nyti.ms/2utCOBz> [<https://perma.cc/XYL4-QLES>]; Gardiner Harris & David E. Sanger, *Iran Nuclear Deal Will Remain for Now, White House Signals*, N.Y. TIMES (May 17, 2017), <https://nyti.ms/2rruaOU> [<https://perma.cc/EB7C-GTY7>].

<sup>242</sup> See Peter Baker & Rick Gladstone, *Trump Pushes to Revisit Iran Nuclear Deal, and Asks Allies to Help*, N.Y. TIMES (Sept. 20, 2017), <https://nyti.ms/2jLJab8> [<https://perma.cc/NK8R-JYQT>]. In October 2017, President Trump declined to certify that a continued waiver of sanctions against Iran was appropriate, but he stopped short of terminating the deal. See Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, but Doesn't Scrap It*, N.Y. TIMES (Oct. 13, 2017), <https://nyti.ms/2z4fOYC> [<https://perma.cc/RP3P-4YHV>]; see also Mark Landler, *Trump Is Expected to Stop Short of Reimposing Strict Sanctions on Iran*, N.Y. TIMES (Jan. 11, 2018), <https://nyti.ms/2FulTkQ> [<https://perma.cc/8Q8D-U9YG>].

<sup>243</sup> Congress has the clear constitutional authority to enact a statute that violates international law. See, e.g., *Head Money Cases*, 112 U.S. 580, 599 (1884) (“[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.”).

<sup>244</sup> See Ashley Deeks, *Statutory International Law*, 57 VA. J. INT'L L. (forthcoming 2018) (arguing that Congress frequently is attentive to international law compliance). To take a recent context in which a desire to comply with international law influenced at least some important members of Congress, consider the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222,

case, the President's unilateral alteration of international law for the United States can make it yet harder for Congress to overcome the action.

The other elements of presidential control (agreement interpretation and termination, interim obligations, provisional application, and actions in international organizations) are, as a practical matter, even more difficult to unwind.

4. *Consequences in Courts.* — Presidential control over international law can influence courts in many ways. First, the Supreme Court has recognized that sole executive agreements can have direct domestic effect.<sup>245</sup> The same is presumably true for ex ante congressional-executive agreements and executive agreements pursuant to treaty.<sup>246</sup> If self-executing, international agreements “have the force and effect of a legislative enactment.”<sup>247</sup> This means that they can preempt state law to the contrary and, at least for agreements based on congressional authorization or with two-thirds senatorial consent, can in theory supersede prior inconsistent statutes.<sup>248</sup> Second, the international law made or recognized by the President can influence the construction of ambiguous statutes under the *Charming Betsy* canon.<sup>249</sup> Third, courts give substantial deference to the President's interpretations of both agreements and CIL.<sup>250</sup>

5. *Consequences for States.* — As just noted, self-executing agreements made by the President can preempt conflicting state law. Also, executive agreements can create national foreign relations policies that

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130 Stat. 852 (2016) (to be codified in scattered sections of 18 and 28 U.S.C.), which narrowed sovereign immunity from suit in the context of terrorist acts causing injury inside the United States. *See id.* The Senate version of the bill that was eventually enacted stripped some of the more controversial elements of the earlier-passed House bill. 162 CONG. REC. S2845 (daily ed. May 17, 2016) (statement of Sen. John Cornyn). Senator John Cornyn, the Republican coauthor of the revised bill that passed, noted Senators Lindsey Graham's and Jeff Sessions's concerns “that earlier versions of this legislation might be interpreted to derogate too far from traditional [international law] principles of foreign sovereign immunity and put the United States at risk of being sued for our operations abroad.” *Id.* Senator Chuck Schumer, the Democratic coauthor, also emphasized at multiple points that the new version of the bill is designed “to strike the right balance” between victims' rights and the international law of sovereign immunity. *Id.*

<sup>245</sup> *See* cases cited *supra* note 13.

<sup>246</sup> *See* *Weinberger v. Rossi*, 456 U.S. 25, 26–27, 29–30, 30 n.6 (1982) (“Even though [congressional-executive] agreements are not treaties under the Treaty Clause of the Constitution, they may in appropriate circumstances have an effect similar to treaties in some areas of domestic law.” *Id.* at 30 n.6.).

<sup>247</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also* *Medellín v. Texas*, 552 U.S. 491, 505–06 (2008) (quoting *Whitney*, 124 U.S. at 194).

<sup>248</sup> *See, e.g.,* *Cook v. United States*, 288 U.S. 102, 118–19 (1933) (“The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by § 581 upon officers of the Coast Guard to board, search and seize beyond our territorial waters.”).

<sup>249</sup> *See supra* note 80.

<sup>250</sup> *See supra* text accompanying notes 82–84, 117–18.



in some circumstances can be the bases for preemption of state law.<sup>251</sup> Under some accounts, moreover, CIL — including presidentially influenced CIL — can also preempt conflicting state law.<sup>252</sup> Presidential termination or disavowal of international obligations might also negatively impact states. For example, the Trump Administration's effort to pull back from commitments made by the Obama Administration to address climate change could have long-term economic and other effects on U.S. states, especially along the coastlines.<sup>253</sup>

6. *Consequences for Individuals and Private Firms.* — The President's unilateral international lawmaking power has a deep and underappreciated impact on individuals and firms who do business or operate in various ways abroad. The President or the President's subordinates often enter into agreements and political commitments that set international regulatory standards that U.S. persons and firms must abide by in their international transactions.<sup>254</sup> Moreover, domestic regulatory rules that are altered even in part to coordinate with foreign nations or international standards agreed to by the President unilaterally in an international agreement or political commitment affect the U.S. persons and firms subject to those rules. In addition, ex ante congressional-executive agreements are mechanisms for awarding billions of dollars in grants to American contractors for operations abroad, and for opening up markets abroad or providing favored status to American contractors in various ways.<sup>255</sup> The President's power over interpretation and termination of these obligations only enhances his or her potential power to change the legal regimes for individuals and firms. To take just one example, if President Trump unilaterally withdraws the United States from NAFTA (as he has sometimes threatened to do), his action could have substantial effects on U.S. importers and exporters, who would likely face higher tariffs and duties.<sup>256</sup>

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<sup>251</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405–06, 435 (2003) (“The express federal policy [reflected in a sole executive agreement] and the clear conflict raised by the state statute are alone enough to require state law to yield.” *Id.* at 425.).

<sup>252</sup> See RESTATEMENT (THIRD), *supra* note 9, §§ 111(1), 115 cmt. e. But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–69 (1997) (questioning this proposition).

<sup>253</sup> Cf. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (“EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))).

<sup>254</sup> See generally Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014).

<sup>255</sup> See, e.g., Hathaway, *supra* note 27, at 188–205.

<sup>256</sup> See, e.g., Chad P. Brown, *What Is NAFTA, and What Would Happen to U.S. Trade Without It?*, WASH. POST (May 18, 2017), <http://wapo.st/2lNHWZ4> [<https://perma.cc/G3PQ-H3JK>] (“New U.S. tariffs on imports from Canada and Mexico could increase to an average of 3.5 percent. For new trade barriers facing U.S. exporters, Canada’s import tariffs would increase to 4.2 percent and Mexico’s would increase to 7.5 percent.”).

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Up to this point, we have provided a descriptive account of the President's broad control over international law for the United States. In the next two Parts, we move from descriptive to normative analysis.

#### IV. LEGAL AUTHORITY

This Part considers the extent to which the President's exercise of control over international law, as described in Parts I–III, is lawful. We begin by explaining why, under established separation of powers doctrine, such control is valid only if it stems either from the President's independent constitutional authority or has been authorized or approved by Congress. Applying this principle, we conclude that most of the practices described in Parts I–III are grounded in at least plausible legal authority, in large part because Congress has delegated a tremendous amount of discretionary foreign affairs authority to the President. We critique, however, the Executive Agreements+ theory and related claims, pursuant to which the President would be able to make binding international agreements without congressional authorization as long as they ostensibly promoted the policies reflected in existing domestic law. We also outline several considerations that are relevant to addressing the underanalyzed question of whether the President, when exercising control over international law, is acting with implicit congressional authorization.

##### *A. The Frequent Need for Congressional Authorization or Approval*

A foundational tenet of American separation of powers is that all presidential action must be authorized by the Constitution or an act of Congress. The Supreme Court has repeatedly emphasized this tenet, even in the context of foreign affairs.<sup>257</sup> It is also central to Justice Jackson's canonical three-tiered framework in *Youngstown* for evaluating presidential power,<sup>258</sup> and it is a foundational element of administrative law.<sup>259</sup>

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<sup>257</sup> See *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (“The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (citing this proposition with approval).

<sup>258</sup> As Justice Jackson noted, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>259</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (noting that “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is *limited to the authority delegated by Congress*” (emphasis added)); see also, e.g., Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 489 (2002) (“In our system of separation of powers, it has always been assumed that the

Of course, Article II of the Constitution confers various foreign affairs powers on the President, such as the Commander in Chief power, the power to conclude treaties with the advice and consent of two-thirds of the Senate, the power to appoint U.S. ambassadors with the consent of a majority of the Senate, and the power to receive foreign ambassadors. Moreover, these powers have been construed to imply additional powers. The content and scope of these express and implied powers have been further developed over time as a result of governmental practices. For example, Presidents are understood to be the official organ of the United States in diplomacy, a role implied from their specific powers over treaty negotiation and the sending and receiving of diplomats, their general structural role as the executive arm of the U.S. government, and historical practice.<sup>260</sup> Based on similar considerations, the Supreme Court has recognized that the President has an exclusive power to determine which foreign governments the United States formally recognizes.<sup>261</sup>

The President's constitutional powers provide plausible legal authority for many exercises of control discussed in Parts I–III. The courts and Congress have long accepted that Presidents have some authority to make binding sole executive agreements relating to their Article II powers.<sup>262</sup> The President almost certainly has some authority to make nonbinding political commitments, which relate to the conduct of diplomacy.<sup>263</sup> Presidents have from the beginning exercised the authority to interpret U.S. treaties. Although somewhat more controversial, it is also generally accepted — in large part because of historical practice — that Presidents have considerable unilateral authority to terminate or withdraw the United States from treaties.<sup>264</sup> In addition, it has long been accepted that, as the official organ of communication between the United States and foreign nations, the President can make statements and take actions that affect the obligations of the United States under CIL.<sup>265</sup> This authority likely includes some ability to trigger interim or provisional treaty obligations as well. At least in the absence of congressional restriction, moreover, the President's diplomatic authority presumably includes the authority to take positions on behalf of the

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President, members of the executive branch, and federal administrative agencies have no inherent power to make law. By the late nineteenth century, courts had recognized a corollary to this principle: administrative agencies cannot make legislative rules absent a delegation of this power from Congress." (footnote omitted)).

<sup>260</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>261</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084–87 (2015).

<sup>262</sup> See *supra* note 13.

<sup>263</sup> See *supra* section I.A.5, pp. 1218–20.

<sup>264</sup> See *supra* text accompanying notes 88–91.

<sup>265</sup> See *supra* sections II.A.1–2, pp. 1227–33.

United States in international institutions, and, in any event, Congress has almost always specifically authorized the President to do so.<sup>266</sup>

Nevertheless, the President's constitutional powers cannot support all aspects of presidential control over international law, especially with respect to the conclusion of international agreements. Although the scope of the President's sole executive agreement power is somewhat uncertain, it is generally considered to be a narrow exception to the usual constitutional requirement of joint collaboration in lawmaking. It extends least controversially to agreements with foreign nations involving claims settlements.<sup>267</sup> It also extends to some agreements relating to other presidential powers,<sup>268</sup> such as the Commander in Chief power and the recognition power, and potentially to other minor or temporary agreements.<sup>269</sup>

Beyond these limited contexts, however, the President must have authorization from Congress or the Senate to conclude the vast majority of binding international agreements. Indeed, the existence of congressional authorization is what is generally thought to legitimate the modern rise of congressional-executive agreements as an alternative to Article II treaties.<sup>270</sup> Authorization is also the basis for concluding agreements pursuant to existing Article II treaties (and also some "tacit amendments" to such treaties), albeit authorization from the Senate rather than from the full Congress. Although the executive branch has not seriously contested the need for congressional or senatorial authorization for the vast majority of international agreements, the Executive is often extremely vague, or even silent, about the legal bases for its conclusion of international agreements. If it were more specific and public, it would open itself up to more evaluation about whether congressional authorization is needed, and, if so, whether it exists.

### *B. International Agreements Without Congressional Authorization*

Professor Harold Koh has challenged the claim that congressional authorization is required for agreements that extend beyond the

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<sup>266</sup> See *supra* text accompanying notes 176–78.

<sup>267</sup> *Medellín v. Texas*, 552 U.S. 491, 531–32 (2008).

<sup>268</sup> See RESTATEMENT (THIRD), *supra* note 9, § 303(4) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”).

<sup>269</sup> For the view, expressed by several ranking members of the Senate Foreign Relations Committee, that the President should not use the sole executive agreement power to conclude an agreement if it is labeled as a “treaty,” while accepting such an action by President Obama for an agreement that did not impose material obligations on the United States, see Duncan Hollis, *Can the Executive Join the 1976 ASEAN Treaty Without Senate Advice and Consent?*, OPINIO JURIS (July 25, 2009, 4:49 PM), <http://opiniojuris.org/2009/07/25/can-the-executive-join-the-1976-asean-treaty-without-senate-advice-and-consent/> [<https://perma.cc/V43E-K5JJ>].

<sup>270</sup> See generally Ackerman & Golove, *supra* note 7; Hathaway, *supra* note 11.

President's limited power to make sole executive agreements. Koh has argued that requiring such authorization "fetishize[s]" an old-fashioned "trptych" of Article II treaties, congressional-executive agreements, and sole executive agreements.<sup>271</sup> He has suggested that Presidents can make agreements on the basis of mere congressional "receptivity" to the agreements as "evidenced by other related congressional actions in the subject-matter field."<sup>272</sup> Koh suggests that scholars should embrace this development and avoid "unnuanced pigeonholing."<sup>273</sup> This claim is similar to the Executive Agreements+ claim made by Bodansky and Spiro,<sup>274</sup> who describe with approval international agreements that are merely "consistent with and can be implemented on the basis of existing legal and regulatory authorities," and that "complement[] existing law."<sup>275</sup>

There are a number of problems with the idea that Presidents can conclude binding international agreements based merely on the claim that existing law seems receptive to or would be complemented by such agreements. One problem is that it is not obvious whether or when congressional statutes designed for domestic matters are receptive to, or complement, international agreements.<sup>276</sup> The very fact that Congress has authorized many international agreements, but not ones in the areas said to complement or be receptive to international agreements, more

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<sup>271</sup> See Koh, *supra* note 47, at 341. Standard accounts of presidential agreement-making authority actually involve four or five categories, not three. In particular: Article II treaties, ex ante congressional-executive agreements, ex post congressional-executive agreements, executive agreements made pursuant to a treaty, and sole executive agreements. See *supra* section I.A.1, pp. 1208–09.

<sup>272</sup> Koh, *supra* note 47, at 341. Koh contends that agreement making based on alleged congressional "receptivity" reflects the reality of modern presidential practice, but he does not show empirically whether and to what extent this is actually true and instead relies on just a few examples from recent years. It is possible that his descriptive claim is accurate: as noted above, the executive branch rarely explains the legal bases for its agreements and often relies on a multiplicity of sources whose relative weights are unclear. But the very lack of transparency and clarity on the legal bases for most agreements makes Koh's claims difficult to assess.

<sup>273</sup> *Id.* at 342. This argument bears some resemblance to the idea that, in the face of congressional gridlock, administrative agencies should use their regulatory authority to update statutes in order to address new policy problems. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014). One important difference, however, is that such updating by agencies would generally be subject to judicial review, see *id.* at 81 ("[T]he threat of judicial review alone performs a disciplinary function . . ."), whereas this is often not the case for presidential control over international law.

<sup>274</sup> See Bodansky & Spiro, *supra* note 44, at 887–88.

<sup>275</sup> *Id.* at 919. While Koh is talking about essentially the same phenomenon as Bodansky and Spiro, he does not believe that the "new pigeonhole[]" of Executive Agreements+, Koh, *supra* note 47, at 345, adequately captures the phenomenon of agreements that he sees as falling along a spectrum. See *id.* at 345–47 & n.29.

<sup>276</sup> Bodansky and Spiro, in their discussion of Executive Agreements+, acknowledge that "the adoption of domestic measures by Congress does not imply that Congress supports the conclusion of an international agreement." Bodansky & Spiro, *supra* note 44, at 926–27.

likely suggests that Congress is not “receptive” to such agreements. This is especially so given that any agreements the President makes on the basis of receptivity or complementarity will restrict the options of a future Congress.

More fundamentally, it is difficult to reconcile an approach based on purported “receptivity” and “complementarity” with the separation of powers principles discussed above in section A, which require actual congressional authorization of international agreements, not something short of that. For case law support for their approach, Koh, Bodansky, and Spiro rely heavily on *Dames & Moore v. Regan*.<sup>277</sup> But the analysis in this decision is much more limited than they suggest. In *Dames & Moore*, the Supreme Court held that the President had the authority to suspend billions of dollars in American claims against Iran as part of an executive agreement with Iran resolving the Iranian hostage crisis.<sup>278</sup> Referring to Justice Jackson’s concurrence in *Youngstown*, the Court observed that “it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”<sup>279</sup> Applying that idea, the Court found that, although Congress had not specifically authorized presidential suspension of claims in this situation, it had enacted statutes that “in the looser sense [indicate] congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case.”<sup>280</sup> The Court also emphasized that there was a long history of executive branch settlement of claims against foreign nations and that in legislating in the area, Congress had shown its “continuing acceptance of the President’s claim settlement authority.”<sup>281</sup> The Court concluded: “In light of the fact that Congress may be considered to have consented to the President’s action in suspending claims, we cannot say that action exceeded the President’s powers.”<sup>282</sup>

Koh contends that “*Dames & Moore* seems to have recognized a modern truth: that Congress cannot and does not pass judgment on each and every act undertaken by the Executive that has external effects.”<sup>283</sup>

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<sup>277</sup> 453 U.S. 654 (1981). Koh previously criticized *Dames & Moore* for having “championed unguided executive activism and congressional acquiescence in foreign affairs over the constitutional principle of balanced institutional participation,” and argued that it should be limited to its facts. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 140 (1990). In now relying on the decision in this context, he explains that “after thirty-five years, the Court’s language has not been so narrowly construed, and this and other Supreme Court opinions following this reasoning remain on the books.” Koh, *supra* note 47, at 344.

<sup>278</sup> 453 U.S. at 686.

<sup>279</sup> *Id.* at 669.

<sup>280</sup> *Id.* at 677.

<sup>281</sup> *Id.* at 681.

<sup>282</sup> *Id.* at 686.

<sup>283</sup> Koh, *supra* note 47, at 345.

In defending the Obama Administration's conclusion of ACTA<sup>284</sup> without seeking congressional approval, Koh suggests that *Dames & Moore* supports an executive branch authority to conclude binding agreements on any subject matter if the Executive "determine[s] that the negotiated agreement fit[s] within the fabric of existing law, [is] fully consistent with existing law, and [does] not require any further legislation to implement."<sup>285</sup> Bodansky and Spiro similarly suggest that *Dames & Moore* supports the idea of Executive Agreements+.<sup>286</sup>

The actual reasoning in *Dames & Moore*, however, does not go this far. The Court's analysis depended heavily on both the longstanding historical practice of executive settlement of claims, which Congress had specifically facilitated in the International Claims Settlement Act,<sup>287</sup> as well as the President's independent constitutional authority relating to diplomacy, and the Court "re-emphasize[d] the narrowness of [its] decision."<sup>288</sup> The considerations that were important there — historical practice and independent presidential authority — do not hold for executive regulation of many other subjects, such as intellectual property or the environment.<sup>289</sup> Importantly, when these considerations have been

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<sup>284</sup> See *supra* p. 1217.

<sup>285</sup> Koh, *supra* note 47, at 343.

<sup>286</sup> See Bodansky & Spiro, *supra* note 44, at 897, 904–05. They are, however, more guarded than Koh in their conclusions. See, e.g., *id.* at 921 (noting that "the constitutional legitimacy of [Executive Agreements+] remains provisional").

<sup>287</sup> 22 U.S.C. §§ 1621–1645 (2012).

<sup>288</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); see *id.* at 680–83.

<sup>289</sup> Koh can be read in places to limit his arguments to the circumstances where, as in *Dames & Moore*, there is both independent presidential authority and longstanding historical practice acquiesced in by Congress. In particular, Koh's two-dimensional grid for analyzing the constitutionality of agreements depends on the degree of congressional approval and the degree of presidential authority. See Koh, *supra* note 47, at 347 fig.1. To the extent that Koh's proposal for new forms of presidential agreement-making power is limited to contexts where there is independent presidential authority and longstanding historical practice, it presents fewer normative concerns than we have suggested in the text. But in that circumstance, it also does not have a significant scope, and certainly it does not extend to two of the examples Koh mentions as lawful agreements — ACTA and the Minamata Convention. Another confounding uncertainty in Koh's argument is how his two-dimensional test that seems to be based in part on *Dames & Moore* fits with what he in other places describes as a three-part test for congressional approval for agreements, also derived from *Dames & Moore*, which turns on "general preauthorization, consistent executive practice, and legal landscape." *Id.* at 349. We do not understand the difference between general congressional "preauthorization," and the more traditional demand for congressional "authorization," although the former term can potentially mean something far less than what is normally thought of as authorization. See *id.* at 343 (citing as an example of a "general preauthorization" that "while Congress did not expressly pre-authorize [ACTA], it did pass legislation calling on the Executive to 'work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights'" (second alteration in original)). The bottom line, however, is this: *Dames & Moore* does not support the legality of an executive agreement, beyond the recognized bases for a sole executive agreement, unless the agreement both falls within an area in which the President has at least some independent constitutional authority, and Congress has acquiesced

absent, the Court has been much more skeptical about executive branch lawmaking efforts, including in foreign affairs. In *Medellín v. Texas*,<sup>290</sup> for example, the Court rejected an executive branch effort to preempt state law relating to criminal procedure that was impeding compliance with an international obligation, emphasizing that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,”<sup>291</sup> and describing the executive branch’s authority to settle claims by means of a sole executive agreement as “narrow and strictly limited.”<sup>292</sup> The conception of presidential power to make international agreements suggested by Koh, Bodansky, and Spiro is difficult to reconcile with *Medellín*’s approach to presidential power.<sup>293</sup>

In sum, whether labeled as Executive Agreements+ or something else, the notion that Presidents can conclude binding international agreements based merely on the claim that existing domestic law is receptive to or would be complemented by the agreements is not consistent with the fundamental separation of powers principle that executive branch actions must be authorized either by the Constitution or Congress. Purported congressional “receptivity” does not by itself satisfy that principle. And a vague “spectrum analysis” muddies the legal waters in ways that obfuscate the lack of an underlying authorization for some agreements.

### C. *The Limits of Implied Authorization*

Congress often has specifically authorized acts of presidential control over international law. It has done so, for example, for many ex ante congressional-executive agreements, and for presidential actions (including lawmaking votes) in international organizations. But some congressional-executive agreements, and many other types of presidential control over international law, rest on claims of *implied* authorization from Congress. There has been little scholarly analysis, however,

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in a longstanding practice. To the extent that Koh’s argument goes beyond this understanding, it cannot find support in *Dames & Moore*.

<sup>290</sup> 552 U.S. 491 (2008).

<sup>291</sup> *Id.* at 526–27 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

<sup>292</sup> *Id.* at 532.

<sup>293</sup> In *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221 (1986), the Court observed that, in entering into an executive agreement with Japan to address its whaling activities, the executive branch had “furthered [Congress’s] objective” in sanctions legislation, *id.* at 241, even though that legislation did not specifically call for the conclusion of international agreements. The Court there did not purport to discern the scope of the executive branch’s authority to conclude agreements; rather, it merely determined whether the executive branch’s decision not to sanction Japan involved a reasonable construction of the legislation. *See id.* at 240. Moreover, the agreement there was related not merely to legislation but also to U.S. participation in a treaty — the International Convention for the Regulation of Whaling — to which the Senate had given its advice and consent. *Id.* at 228.



of the proper legal framework for assessing such claims of implied authorization in the international lawmaking context.

Three basic principles emerge from the relevant case law, all of which are helpful to claims of presidential authority, but only to a point. First, decisions beginning with *United States v. Curtiss-Wright Export Corp.* stand for the proposition that nondelegation concerns are reduced in the foreign affairs area because, as Congress has often recognized, the President needs particular flexibility when acting in the international arena.<sup>294</sup> This proposition has little direct relevance today because the Court does not actively enforce the constitutional nondelegation doctrine.<sup>295</sup> It may have indirect relevance, however, in that the Court does sometimes take delegation concerns into account in how broadly it construes statutory delegations.<sup>296</sup>

A second principle that emerges from the case law is that courts are more willing to find implicit statutory authorization in areas in which the President has independent constitutional authority. In *Loving v. United States*,<sup>297</sup> for example, the Court found that the President had statutory authority to regulate the aggravating factors that can warrant the imposition of the death penalty in court-martial proceedings.<sup>298</sup> The relevant statutes did not provide much guidance about the exercise of this authority, and the Court acknowledged that “[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President,” the “argument that Congress failed to provide guiding principles to the President might have more weight.”<sup>299</sup> But the Court concluded that “it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority” over courts-martial.<sup>300</sup>

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<sup>294</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”).

<sup>295</sup> See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (noting that the Supreme Court has not struck down an act of Congress on nondelegation grounds since 1935).

<sup>296</sup> See, e.g., *id.* at 316 (“Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”); *cf.* *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 9 (D.C. Cir. 2006) (“A holding that the Parties’ post-ratification side agreements were ‘law’ would raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers.”).

<sup>297</sup> 517 U.S. 748 (1996).

<sup>298</sup> *Id.* at 773–74.

<sup>299</sup> *Id.* at 772.

<sup>300</sup> *Id.* at 768.

A third principle supported by the case law is that courts are more willing to find implicit statutory authorization for presidential actions that are supported by longstanding executive branch practice of which Congress was aware when it regulated in the area. An example is *Haig v. Agee*.<sup>301</sup> There, the Court upheld the State Department's authority to revoke a passport on national security or foreign policy grounds, even though such authority was not specifically mentioned in the relevant statute delegating authority over passports to the executive branch. The Court noted that "[t]he history of passport controls since the earliest days of the Republic shows congressional recognition of executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy"<sup>302</sup> and that "[t]here is no evidence of any intent [by Congress] to repudiate the longstanding administrative construction."<sup>303</sup> The Court also emphasized that Congress had made amendments to the passport laws, in the face of the consistent executive branch practice, without in any way indicating its disapproval of it, and that the executive branch interpretation of its statutory authority "was repeatedly communicated to Congress."<sup>304</sup>

These general principles have somewhat different implications for executive agreements that purport to rest on an act of Congress, executive agreements that purport to rest on a prior treaty, and political commitments.

1. *Congressional-Executive Agreements and Executive Agreements*+. — These principles suggest that when Congress has expressly delegated authority over international law to the President — such as the authority to conclude certain types of agreements — this authority should be construed expansively. They thus support the notion that Congress can authorize international agreements on very general terms, as discussed in section I.A.3.<sup>305</sup> This is especially so given that the practice of generally authorizing the President to make international agreements on certain subjects is supported by longstanding practice.

The case law also suggests that when Congress has regulated presidential action in an area relating to international law without expressly endorsing a particular type of lawmaking, the executive branch has a stronger claim of implied authorization if either (a) the subject of the statute overlaps with independent presidential authority, or (b) there is longstanding executive branch practice of engaging in the action, of which Congress was aware when it regulated. That was the situation in *Haig*, for example, with respect to executive branch authority over

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<sup>301</sup> 453 U.S. 280 (1981).

<sup>302</sup> *Id.* at 293.

<sup>303</sup> *Id.* at 297.

<sup>304</sup> *Id.* at 299.

<sup>305</sup> See *supra* pp. 1212–15.

passports.<sup>306</sup> It takes a further step, however, to base a congressional-executive agreement on a congressional authorization for the President to merely furnish “assistance,” or establish a “program,” without an express mention that he or she can do so through “agreements.”<sup>307</sup> These authorizations constitute the outer bounds of what might be justified by the “authorization” case law. Many of these agreements do not overlap with an independent Article II power, although it may be that in certain subject areas there is sufficient historical practice of basing agreements on such statutes, coupled with relevant congressional acquiescence in such practice, that the statutes can be viewed as sufficient authorization.

These principles do not, however, support the theory of Executive Agreements+ and related claims. Those claims contend that the President can make international agreements in areas outside of independent presidential authority (such as over intellectual property or environmental regulation) and without congressional authorization or longstanding practice as long as the agreements promote the policies reflected in existing statutes. Nothing in the case law on implicit statutory authorization in foreign affairs supports this idea. Agreements made under the Executive Agreements+ rationale would be fully binding under international law. They would thus have the effect of preventing Congress from exercising its legislative power to narrow the scope of the underlying federal statutory law without violating the international law that the President adopted for the United States “consistent with” that law but without congressional authorization. Such a presidential authority would be a crucial step beyond the outer bounds of *ex ante* congressional-executive agreements. As Bodansky and Spiro note, “[u]nder the [Executive Agreements+] approach, presidents would be enabled to enter into agreements in furtherance of any congressionally-validated policy, at least where the agreements do not require a change in U.S. law.”<sup>308</sup> It is difficult to overstate the breadth of this purported authority, since it might justify any agreement that (to use Bodansky and Spiro’s language) “complements” any of the vast array of extant federal statutory law.<sup>309</sup> Indeed, under this approach the terrain for presidential action would be even broader than the executive branch’s

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<sup>306</sup> *Haig*, 453 U.S. at 301–02.

<sup>307</sup> See *supra* notes 40–41 and accompanying text.

<sup>308</sup> Bodansky & Spiro, *supra* note 44, at 915. *But cf.* David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. TRANS-NAT’L L. 741 (2017) (contending that this is not a new phenomenon).

<sup>309</sup> Bodansky & Spiro, *supra* note 44, at 915 (noting that the Executive Agreements+ approach “could dramatically expand the subject areas addressed by international agreements adopted without express legislative approval”).

authority as part of the modern administrative state, which requires some actual domestic statutory authorization.<sup>310</sup>

Again, the picture might look different if, within a particular subject area, there were a longstanding executive branch practice of making agreements, and Congress was aware of that practice when it regulated that area. But this is not currently the case, at least in the areas in which the claim of Executive Agreements+ would obviously matter. The very theory of Executive Agreements+ is new, even if one might find past instances of executive branch action that might now be characterized as supporting it. Moreover, in part because of a lack of executive branch transparency, especially about the legal bases for its agreements, Congress often has not been aware that the executive branch has been exercising such authority. To take one recent example, as Bodansky and Spiro note, the executive branch's unilateral ratification of the Minamata Convention occurred without an explanation of its legal basis "during the government shutdown in fall 2013 [and] received little attention."<sup>311</sup> Other recent examples in which it appeared that the executive branch might be exercising this authority — such as with ACTA — prompted substantial objections in Congress and never took effect.<sup>312</sup> Whatever practice there is that might support this form of presidential authority is, as Bodansky and Spiro acknowledge, "not yet constitutionally entrenched."<sup>313</sup>

2. *Executive Agreements Pursuant to Treaty.* — Executive agreements made pursuant to treaties also depend on authorization — that is, authorization from the underlying treaty. As the Congressional Research Service has noted, "[a]greements in this category comprise those which are expressly authorized by the text of an existing treaty or whose making may be reasonably inferred from the provisions of a prior treaty."<sup>314</sup> In the one Supreme Court decision addressing this category of executive agreements, the Court looked to see whether the Senate in approving the underlying treaty had "authorized" the making of the executive agreement.<sup>315</sup> This category of executive agreements has only

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<sup>310</sup> While in theory Congress could try to override an agreement if it disagreed with it, it would have to overcome the usual inertia and collective action barriers, and a potential presidential veto, as well as the prospect of putting the United States into breach of international obligations. In some of its delegations of agreement authority to the President, Congress has included "legislative veto" provisions that would allow a majority of either a house of Congress or the full Congress to override presidential agreements. See Hathaway, *supra* note 27, at 196–98. Such legislative veto provisions would presumably be deemed unconstitutional today in light of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983). See Hathaway, *supra* note 27, at 196–98.

<sup>311</sup> Bodansky & Spiro, *supra* note 44, at 921; see also *supra* section I.A.4, pp. 1215–17.

<sup>312</sup> Bodansky & Spiro, *supra* note 44, at 910.

<sup>313</sup> *Id.* at 890.

<sup>314</sup> CRS STUDY, *supra* note 12, at 86; see also RESTATEMENT (THIRD), *supra* note 9, § 303 cmt. f (noting that these agreements are valid when they "can fairly be seen as implementing the treaty").

<sup>315</sup> *Wilson v. Girard*, 354 U.S. 524, 528 (1957).

rarely generated controversy, in part because the executive branch has not been very transparent about when it relies on this authority. For that reason, among others, it has not been extensively studied by scholars.

While it is hard to know for sure, since executive agreements pursuant to treaties are so obscure, they appear to present fewer authorization concerns than arise with *ex ante* congressional-executive agreements and especially Executive Agreements+. Because executive agreements pursuant to treaties are tied to a particular treaty arrangement, they tend not to present a problem that bedevils many *ex ante* congressional-executive agreements — that is, old authorizations being used much later in different contexts. Furthermore, many executive agreements made pursuant to treaties are of a minor, administrative nature that the Senate and the full Congress would probably prefer the executive branch to handle. Indeed, such agreements appear to be analogous to administrative regulations adopted by an agency charged with implementing a statute.<sup>316</sup>

With this understanding of the authorization requirement, the binding portions of the Paris Agreement appear to qualify as a lawful executive agreement pursuant to treaty. The underlying treaty is the 1992 UNFCCC, which the Senate consented to and President George H.W. Bush ratified.<sup>317</sup> The UNFCCC created an international framework for assessing and responding to climate change.<sup>318</sup> It imposed various commitments to develop, promulgate, and update information related to greenhouse gas emissions reduction, and it established a framework and institutional support for future negotiations and agreements.<sup>319</sup> The Senate Foreign Relations Committee report on the UNFCCC expressed the expectation that future agreements that would require legally binding emissions reductions (as opposed to the procedural rules contained in the UNFCCC) would require the Senate's advice and consent.<sup>320</sup> The Committee thus appeared to contemplate that there might be future agreements related to the UNFCCC and insisted on a return to the Senate for ones that imposed binding, new substantive emissions limits.

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<sup>316</sup> Cf. CRS STUDY, *supra* note 12, at 86 (“Numerous agreements pursuant to treaties have been concluded by the Executive, particularly of an administrative nature, to implement in detail generally worded treaty obligations.”).

<sup>317</sup> See *supra* text accompanying note 220; see also 138 CONG. REC. 33,527 (1992) (Senate resolution of advice and consent to the UNFCCC).

<sup>318</sup> S. EXEC. REP. NO. 102-55, at 1 (1992).

<sup>319</sup> See UNFCCC, *supra* note 220, art. 4. The Convention created a Conference of Parties, which includes the United States, and which is charged with reviewing and implementing the Convention “and any related legal instruments that the Conference of the Parties may adopt.” *Id.* art. 7.

<sup>320</sup> See S. EXEC. REP. NO. 102-55, *supra* note 318, at 14.

The Paris Agreement aims to “enhanc[e]” the implementation of the UNFCCC.<sup>321</sup> The vast majority of its provisions appear to have been contemplated by the UNFCCC.<sup>322</sup> The central new substantive undertaking in the Paris Agreement related to mitigation that would have been a controversial expansion of the UNFCCC was the commitment for developed countries to undertake “economy-wide emission reduction targets” in Article 4.4. That commitment was made nonbinding.<sup>323</sup> The agreement is thus an executive agreement pursuant to a treaty that contains a nonbinding provision that the President pledged on his own authority under Article II.

3. *Consequential Political Commitments.* — Political commitments of the novel sort involved in the Iran deal and part of the Paris Agreement present a different form of authorization issue. These agreements may seem to present no authorization problem: If political commitments are merely a form of diplomacy, then the President would seem to have constitutional authority to conclude them on essentially any subject relating to the conduct of U.S. foreign relations.<sup>324</sup> And, when the agreements are being given domestic effect, it is pursuant to authority previously delegated by Congress.<sup>325</sup>

The problem is that the President has been using preexisting domestic delegations in the service of deeply consequential international commitments that Congress did not remotely contemplate when it delegated the authority to the President, and that Congress cannot easily unwind.

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<sup>321</sup> Paris Agreement, *supra* note 215, art. 4.4.

<sup>322</sup> To take a few relevant examples, the Paris Agreement’s obligations in Article 9 (finance), Article 10 (technology transfer), and Article 11 (capacity building), correspond to those same obligations in Articles 4(3), 4(4), and 4(5), respectively, of the UNFCCC. Also of note, the Agreement’s apparently binding obligation in Article 4.2 to “pursue domestic mitigation measures” is no different in substance from, and indeed corresponds to, the UNFCCC’s obligation found in Articles 4.1 and 4.2.

<sup>323</sup> See *supra* text accompanying notes 229–34; see also David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?*, LAWFARE (Aug. 29, 2016, 12:37 PM), <https://www.lawfareblog.com/paris-agreement-climate-change-legitimate-exercise-executive-agreement-power> [<https://perma.cc/M7R3-DV2C>].

<sup>324</sup> There is some debate among scholars about this point. Compare, for example, Hollis & Newcomer, *supra* note 56, at 514, which contends that, although “the executive can invoke customary and structural rationales to provide a constitutional foundation for the president’s authority to conclude these commitments on behalf of the United States[,] . . . neither these rationales nor prudence generally favors a plenary executive power over political commitments,” with Michael D. Ramsey, *Evading the Treaty Power? The Constitutionality of Nonbinding Agreements*, 11 FLA. INT’L U. L. REV. 371, 375 (2016), which contends that “the Constitution’s text and practice . . . appear to allow Presidents to make nonbinding agreements.”

<sup>325</sup> This assumes, of course, that the commitments are genuinely nonbinding. Cf. Michael Ramsey, *Declaring the Paris Climate Accord Unconstitutional*, ORIGINALISM BLOG (June 1, 2017, 6:49 AM), <http://originalismblog.typepad.com/the-originalism-blog/2017/06/declaring-the-paris-climate-accord-unconstitutionalmichael-ramsey.html> [<https://perma.cc/RA4L-NUKH>] (arguing that the Paris Agreement must be submitted to the Senate because “it imposes material binding long-term commitments on the United States”).

Some commentators have raised concerns about the constitutionality of these presidential actions.<sup>326</sup>

Although this new use of the political-commitment authority raises important policy issues, it is difficult to see why it is unlawful. Both the President's power over political commitments and the President's power to exercise power delegated from Congress in the domestic realm are well established. Without significantly more argumentation, it is not clear why two presidential authorities that separately are not legally controversial are unconstitutional when combined. The real issue here is that Congress has delegated extraordinarily broad domestic authority to the President that the Obama Administration figured out how to use in ways that helped to implement political commitments. If that is a problem, it is one that only Congress can fix, either by taking the unlikely step of pulling back on extant delegations, or (more likely) clarifying going forward that particular domestic delegations cannot be used as a basis to implement international commitments.

## V. INSTITUTIONAL REFORM

This Part shifts the normative analysis from the specific question of what counts as proper legal authorization for presidential action related to international law to the more general question of whether the rise and extraordinary breadth of unilateral presidential control over international law is legitimate in the sense of "justified, appropriate, or otherwise deserving of support."<sup>327</sup> Should we be sanguine about such presidential power as currently practiced in this context? Or should we worry about it and seek to reform it — and if so, to what degree and how?

Intuitions vary widely about the right answer to these questions.<sup>328</sup> A complete answer would depend on a variety of factors, including the aims of presidential control over international law, its efficacy and legality in practice, and the costs and benefits of possible accountability mechanisms. Because these factors are hard to assess and often contested, our aims in this Part are relatively modest. Section A notes some reasons to think that the relatively weak accountability constraints on the President in this context are probably not adequate, and it then analyzes what one would need to understand to determine whether and

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<sup>326</sup> See, e.g., David B. Rivkin Jr. & Lee A. Casey, Commentary, *The Lawless Underpinnings of the Iran Nuclear Deal*, WALL ST. J. (July 26, 2015, 6:32 PM), <https://www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928> [<https://perma.cc/ZX4Y-ZCWW>] (contending that the Iran deal "features commitments that President Obama could not lawfully make").

<sup>327</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005). Under Professor Fallon's categorization, we are talking about sociological legitimacy in the strong sense. See *id.*

<sup>328</sup> Compare, e.g., Hathaway, *supra* note 27 (arguing that presidential practice related to international agreements raises serious legitimacy concerns and requires major reform), with Galbraith, *supra* note 2 (arguing that current practice presents few concerns and requires little reform).

how presidential accountability in this context should be reformed. Against that background, section B assesses possible reforms. It argues that, at a minimum, presidential control over international law should be subject to a comprehensive regime of ex post transparency. Beyond such transparency, there are too many factual uncertainties and too much normative contestation to reach firm conclusions about further reforms, especially without more information that only greater transparency can provide. We nonetheless consider some additional reforms that might be appropriate should Congress wish to go further, and we describe some of their potential costs and benefits.

#### A. *Are Existing Accountability Constraints Adequate?*

Accountability is a standard framework for assessing the legitimacy of presidential power and potential constraints on such power.<sup>329</sup> By accountability, we mean “the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”<sup>330</sup> Accountability is a broad concept. In the context of the presidency, it can serve many goals, including helping to ensure that the President acts lawfully and in accordance with congressional or popular wishes, does not make serious policy mistakes, and takes into account the views of relevant stakeholders. Many different mechanisms, both between and within the branches of government, can promote these goals, including reporting and consultation requirements, administrative process, oversight hearings and censure, funding withdrawals, inspector general review, judicial review, elections, and impeachment.<sup>331</sup>

In what follows, we explain some reasons to believe that presidential control over international law lacks adequate accountability, and we then analyze the additional factors relevant to deciding what reforms might be appropriate.

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<sup>329</sup> For very different analyses of presidential power that place accountability at the core of the analysis, see JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, *passim* (2012); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 310 (2006); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); and Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001). See generally Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186 (2014) (explaining that “‘accountability’ is one of the workhorse concepts of public law”).

<sup>330</sup> Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005).

<sup>331</sup> On accountability between branches, see *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the Court noted that the separation of powers is designed in part to “make Government accountable,” *id.* at 742. See also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954–55 (2015) (Roberts, C.J., dissenting) (similar). On intraexecutive separation of powers, see GOLDSMITH, *supra* note 329, at 83–160, 205–43; and Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).



I. *Reasons to Worry About Presidential Accountability Related to International Law.* — As Parts I–III showed, the President’s control over international lawmaking, law interpretation, and law termination arose piecemeal, over a long period of time, against the backdrop of many changed conditions. These changes often occurred outside of public view, and without any systematic regulatory focus. The accountability mechanisms for such presidential control are, not coincidentally, just as fragmentary.

Presidential action related to international law is, with rare exceptions noted in Parts I–III, not subject to administrative process or judicial review.<sup>332</sup> Since its enactment in 1946, the APA has contained an exception to its rulemaking and adjudication requirements “to the extent that there is involved . . . a military or foreign affairs function of the United States.”<sup>333</sup> As a result, the only forms of general statutory accountability for presidential action related to international law are transparency and reporting requirements for certain international agreements. First, the State Department has a duty to publish “United States Treaties and Other International Agreements” (UST), a compilation that must include treaties “and all international agreements other than treaties to which the United States is a party,” subject to some categorical

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<sup>332</sup> Professor Jean Galbraith suggests that administrative law is an important constraint on presidential control over international law. See Galbraith, *supra* note 2, at 1691–97. She makes much of the fact that the Paris Agreement was supported domestically by regulations under the Clean Air Act that are subject to APA processes and judicial review. That support is indeed a genuine check on the *domestic implementation* of the Paris Agreement’s political commitment. But even if the domestic regulations were deemed unlawful, the international side of the deal, in both its binding and nonbinding aspects, would persist. (This is why the Trump Administration, when it wanted to kill the Paris Agreement, declared an intention to both reverse the Clean Air Act regulations *and* terminate the international agreement. The former alone would not affect the latter.) Moreover, the Paris Agreement is unusual among political commitments in having even an indirect domestic process check. The vast majority of political commitments made by agencies are not subject to the processes of the APA, and other international agreements and forms of presidential international lawmaking are not subject to the APA. And even when a political commitment is tied to domestic delegations of power, it will not always (or even usually) be subject to the APA. The Iran deal, for example, was implemented domestically via exercises of delegated waiver authority to the President that do not implicate the APA. See *supra* notes 64–67 and accompanying text. For these reasons, administrative law is only occasionally a constraint on political commitments and is practically no constraint on binding international agreements.

<sup>333</sup> 5 U.S.C. § 553(a)(1) (2012); see also *id.* § 554(a)(4). Relatedly, the Freedom of Information Act, 5 U.S.C. § 552, includes an exemption from its disclosure requirements for “matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . in fact properly classified pursuant to such Executive order,” *id.* § 552(b)(1)(A).

exceptions.<sup>334</sup> Second, under the Case Act<sup>335</sup> (also known as the Case-Zablocki Act), the Department must report to Congress nontreaty agreements within sixty days of their entry into force.<sup>336</sup> As noted in the legislative history of the Case Act, Congress believed that this basic reporting duty was, “from a constitutional standpoint, crucial and indispensable” because “[i]f Congress is to meet its responsibilities in the formulation of foreign policy, no information is more crucial than the fact and content of agreements with foreign nations.”<sup>337</sup>

Both of these duties are often honored in the breach. The executive branch has not organized itself internally to ensure that all agreements are deposited in a central location in the State Department.<sup>338</sup> Even though the Case Act requires that administrative agencies transmit the international agreements that they conclude to the State Department within twenty days,<sup>339</sup> they often take much longer to do so.<sup>340</sup> Even

<sup>334</sup> 1 U.S.C. § 112a (2012). The Secretary need not publish a nontreaty agreement if he or she determines (among other things) that the agreement does not implicate the public interest or does not create private rights or duties or standards concerning government treatment of private individuals, or that the publication would harm the national interest. *See id.* § 112a(b). The categories of exclusion from publication are listed at 22 C.F.R. § 181.8 (2017).

<sup>335</sup> 1 U.S.C. § 112b.

<sup>336</sup> *Id.* § 112b(a). Under the Act, if the President concludes that “the immediate public disclosure of [an agreement] would . . . be prejudicial to the national security of the United States,” the agreement need not be transmitted to Congress “but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.” *Id.* One scholar recently estimated that “the United States is probably party to approximately 1000–1800 secret agreements.” Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 713, 724 (2017). For additional discussion of the phenomenon of secret treaties, see Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AM. J. INT’L L. 575 (2017).

<sup>337</sup> S. REP. NO. 92-591, at 3 (1972). The Nixon Administration opposed the bill that became the Case Act on the ground that executive branch reporting of non–Article II agreements should be made pursuant to nonbinding “practical arrangements” with Congress rather than pursuant to binding legislation. *See* H. REP. NO. 92-1301, at 2 (1972). Congress concluded, however, that such nonbinding arrangements would be insufficient because they “would still leave with the executive branch the discretion to disclose or not to disclose as it saw fit.” *Id.* It also rejected the State Department’s claim that in some instances Congress would not have a “legitimate interest” in knowing about executive agreements, explaining that “[i]f the contention of the Department of State is accepted, the Congress, in effect, would agree that the President has the right to bind it, and the rest of the Nation, to agreements in perpetuity with foreign nations about which the Congress has no right to know.” *Id.* at 4.

<sup>338</sup> One reason for this is that since its enactment in 1935, the Federal Register Act, ch. 417, 49 Stat. 500 (codified as amended at 44 U.S.C. §§ 1501–1511 (2012)), has excluded “treaties . . . and other international agreements” from the executive branch’s general duties to collect and publish specified executive branch documents in the *Federal Register* and codify them in the *Code of Federal Regulations*. *See id.* § 12, 49 Stat. at 503.

<sup>339</sup> 1 U.S.C. § 112b(a).

<sup>340</sup> For example, the United States Agency for International Development did not forward an agreement concluded with Ethiopia in October of 2007 until 2010. *See Reporting International Agreements to Congress Under Case Act, 2010*, U.S. DEP’T ST., <https://www.state.gov/s/l/treaty/caseact/c34684.htm> [<https://perma.cc/8VB2-KWVH>]; *see also* Agreement Concerning the Program

after the agreements arrive, the Department has a backlog of agreements to be organized and published.<sup>341</sup> Although the State Department publishes international agreements on its website, it mixes together Article II treaties and the various types of non–Article II agreements without distinction, making it difficult if not impossible to discern how often it is engaging in the different types of agreement making.<sup>342</sup>

In addition to these internal organization and publication difficulties, and in large part as a result of them, the State Department’s reporting of non–Article II agreements to Congress is often late and is perpetually incomplete.<sup>343</sup> Congress amended the Case Act in 2004 because it was “concerned about not being fully informed regarding international agreements entered into by the Executive [B]ranch.”<sup>344</sup> But noncompli-

of the Peace Corps in Ethiopia, Eth.-U.S., Oct. 2, 2007, T.I.A.S. No. 07-1002. To take another example, an agreement with Colombia entered into force on September 30, 2007, but “was received late from post abroad” in 2010. *Reporting International Agreements to Congress Under Case Act, supra*; see also Agreement Amending the Agreement of 2000, Colom.-U.S., Sept. 28, 2007, Temp. State Dep’t No. 2010-0113, <https://www.state.gov/documents/organization/147076.pdf> [<https://perma.cc/A35Y-VUKA>]. See generally KAVASS’S GUIDE TO THE UNITED STATES TREATIES IN FORCE 935–45 (2016) (documenting deficiencies in reporting from agencies to State Department).

<sup>341</sup> The Department has acknowledged the problem, which it attributes in part to funding deficiencies. See *Publication of TIAS*, U.S. DEP’T ST., <https://www.state.gov/s//treaty/tias/pubtias/> [<https://perma.cc/Z38K-VDK5>] (noting “that funding to continue producing UST has been problematic in recent years”).

<sup>342</sup> See *2017 Treaties and Agreements*, U.S. DEP’T ST., <https://www.state.gov/s//treaty/tias/2017/index.htm> [<https://perma.cc/7HG5-BF2V>].

<sup>343</sup> See Harrington, *supra* note 15, at 352–53 (describing the shortcomings of Case Act reporting); MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5 n.28 (2015); see also 150 CONG. REC. H11026 (daily ed. Dec. 7, 2004) (noting that in 2004, “the House Committee on International Relations learned that, due to numerous management failures within the Department of State, over 600 classified and unclassified international agreements dating back to 1997, had not been transmitted to Congress, as required by the Case-Zablocki Act”).

<sup>344</sup> See 150 CONG. REC. H11026. Section 7121 of The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) amended the Case Act in three material ways. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7121, 118 Stat. 3638, 3807–08. First, IRTPA requires the Secretary of State to publish on the Department’s website “each treaty or international agreement” that it intends to publish “in the compilation entitled ‘United States Treaties and Other International Agreements’ not later than 180 days after the date on which the treaty or agreement enters into force.” 1 U.S.C. § 112b(d)(1). For reasons stated above, these online collections remain incomplete, and the State Department acknowledges that “much work needs to be done.” See *Publication of TIAS, supra* note 341. Second, IRTPA requires the Secretary of State to submit an annual report to Congress containing an index of all signed or proclaimed international agreements made that year that are not published “in the compilation entitled ‘United States Treaties and Other International Agreements.’” § 112b(d)(1). We have found references to these reports in the *Congressional Record*, see, e.g., 162 CONG. REC. H2212 (daily ed. May 10, 2016) (referencing a report sent by the State Department “pursuant to 1 U.S.C. 112b(d)(1)”), but they appear to be submitted to Congress in classified form, as contemplated by § 112b(d)(2). Third, IRTPA revived a funding restriction from the 1980s that had the effect for three years (2005–2007) of withholding funding to implement any agreement that the executive branch did not transmit to Congress within

ance persists, and the result in practice is that Congress lacks a full picture of U.S. agreements, and the public (including those in the public who have the incentive and ability to monitor the government) has highly selective access to these agreements and little ability to perceive the overall agreement practices of the executive branch.<sup>345</sup> The confusion about international agreements is so pervasive that in some instances, “different parts of *the U.S. government* disagree about whether agreements exist with a particular nation, whether agreements are still in force, and what their terms are.”<sup>346</sup>

In sum, the main forms of accountability for presidential control over international law are congressional and public scrutiny of international agreements made by the executive branch, a task made harder by the fact that the executive branch has not entirely complied with its publication and reporting duties concerning these agreements. Beyond these relatively weak accountability mechanisms for agreements, there is no formal review in the domestic legal system at all for presidential interpretations or terminations of international law, or for political commitments.<sup>347</sup>

There are at least two reasons to question the adequacy of this limited, piecemeal accountability scheme. First, the absence of a deliberative system of review for presidential control over international law

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sixty days, as required by § 112b(a). In 2013, Congress additionally required the Defense Department to submit to the Armed Services Committees a report on all Defense Department–related agreements reported to the Foreign Relations Committees under the Case Act. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1249, 127 Stat. 672, 925–26 (2013).

<sup>345</sup> As the JAG Corps put it, “[d]etermining the existence of an international agreement is more challenging than one might think.” THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 122 (2015); see also Harrington, *supra* note 15 at 353–59 (describing the labyrinthine and often futile process of trying to find international agreements); GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: IMPROVEMENTS NEEDED TO TRACK AND ARCHIVE TRADE AGREEMENTS 4 (1999), <http://www.gao.gov/assets/230/228531.pdf> [<https://perma.cc/RKX4-QG4U>] (noting in 1999 that “[t]he number of trade agreements to which the United States is currently a party is uncertain” and that “key agencies were unable to provide a definitive count of all U.S. trade agreements that are currently in force”).

<sup>346</sup> INT’L SEC. ADVISORY BD., REPORT ON STATUS OF FORCES AGREEMENTS 39 (2015) (emphasis added), <https://www.state.gov/documents/organization/236456.pdf> [<https://perma.cc/BT47-VDRY>]. The U.S. Department of Defense, for example, operates with “a surprising degree of uncertainty about what status [of forces] agreements are in force and their terms.” *Id.*

<sup>347</sup> Galbraith argues that international law, and in particular the need for consensus with other nations or international organizations, should be credited as imposing additional constraints on presidential power in this context. See Galbraith, *supra* note 2, at 1688–91. Such constraints are difficult to generalize about with any confidence. There are also significant accountability issues at the international level. See generally Stephan, *supra* note 176; Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695 (2005). In any event, because the international constraints do not concern accountability to Congress or the American people, there is no reason to think that they will ensure compliance with domestic law or policy or lead to a decision that serves U.S. interests. If anything, the constraints of international law may pull in the opposite direction on average.

stands in contrast to other contexts in which there have been accretions of presidential power, where Congress has imposed extensive procedural rules and constraints to ensure presidential accountability. Consider administrative law. Beginning in the late nineteenth century and accelerating during the New Deal, Congress delegated substantial domestic rulemaking and adjudicative authority to executive branch agencies to address complex problems generated by modern capitalism.<sup>348</sup> To alleviate the constitutional and legitimacy concerns raised by these delegations, and to better ensure that agencies would act in accordance with their delegated authority, Congress in 1946 enacted the APA.<sup>349</sup> The APA imposed procedural requirements (with some exceptions) for agency issuance of substantive legislative rules, and it generally provided that agency action would be subject to judicial review.<sup>350</sup> It also added to the transparency rules that already existed by virtue of the Federal Register Act.<sup>351</sup> The two statutes in combination require specified agency proposals and actions, as well as specified executive actions and orders, to be published in the *Federal Register* and, when appropriate, the *Code of Federal Regulations*.<sup>352</sup>

An analogous transformation occurred beginning in 1991 in the very different context of covert action. A covert action is “an activity . . . to influence political, economic, or military conditions abroad, where it is intended that the role of the U.S. government will not be apparent or acknowledged publicly.”<sup>353</sup> Covert action became controversial after the

<sup>348</sup> See Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440–41 (2003).

<sup>349</sup> See *id.*

<sup>350</sup> See 5 U.S.C. §§ 551–559, 701–706 (2012). See generally KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS* 458–596 (2d ed. 2014). As noted above, APA rulemaking procedures do not apply “to the extent that there is involved — (1) a military or foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1).

<sup>351</sup> Ch. 417, 49 Stat. 500 (1935) (codified as amended at 44 U.S.C. §§ 1501–1511 (2012)).

<sup>352</sup> Under the APA, notices of proposed rulemaking, substantive rules and interpretations of general applicability, statements of general policy, rules of practice and procedure, descriptions of agency forms, rules of organization, descriptions of an agency’s central and field organization, and amendments or revisions to the foregoing are now also required to be published in the *Federal Register*. See 5 U.S.C. § 552(a)(1). The Federal Register Act requires the executive branch to collect specified executive branch documents, file them with the National Archives’ Office of the Federal Register, make them available for public inspection, and publish them in the *Federal Register*. See 44 U.S.C. §§ 1501–1505. The documents that must be published in the *Federal Register* include presidential proclamations and executive orders, notices, and documents that the President or Congress requires to be published. *Id.* § 1505. Since its 1935 enactment, the Federal Register Act has excluded “treaties and other agreements.” See § 12, 49 Stat. at 503 (“Nothing in this Act shall be construed to apply to treaties, conventions, protocols, and other international agreements, or proclamations thereof by the President.”). Today the exclusion is codified at 44 U.S.C. § 1511.

<sup>353</sup> 50 U.S.C. § 3093(e) (Supp. II 2015). See generally WILLIAM J. DAUGHERTY, *EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY* (2004). Before 1991, covert actions were primarily based on Article II of the Constitution and the National Security Act of 1947. See National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(5), 61 Stat. 495, 498 (codified as amended

intelligence scandals of the 1970s, which revealed plans for assassinations and other shocking CIA covert actions, and the Iran-Contra scandal of the 1980s, which showed continued indifference by the national security bureaucracy to legal constraints on covert actions.<sup>354</sup> In 1991, Congress — in this most sensitive of contexts — increased presidential accountability for covert action to better ensure that it was lawful and prudent.<sup>355</sup> In particular, Congress ended plausible deniability by requiring the President to make a finding for each covert action that describes the action, identifies the agencies involved, and determines that the action does not violate the Constitution or a statute.<sup>356</sup> It also established duties to report the finding to congressional intelligence committees, to keep them “fully and currently informed of all covert actions,” and to respond to committee queries about such actions.<sup>357</sup> These committees lack formal veto power but they can influence covert actions, and sometimes even cause them to be terminated, through leaks, spending restrictions, and appeals to the President.<sup>358</sup> The reporting mechanisms also trigger significant internal executive branch processes of review that often result in termination or alteration of planned covert actions.<sup>359</sup>

Congress (and in some instances courts) concluded that these accountability regimes were necessary to redress the “pathologies of unaccountable bureaucratic [action],”<sup>360</sup> including executive branch law defiance, interest group capture, and imprudent or corrupt presidential action. Presidential control over international law is sprawling and impacts domestic actors, like in administrative law, as well as U.S. foreign relations, like in covert action. There is no particular reason to think

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at 50 U.S.C. § 3035 (Supp. III 2015)) (providing that it is the “duty of the [Central Intelligence] Agency . . . to perform such other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct”). Congress further authorized covert action in the Hughes-Ryan Amendment of 1974 and the Intelligence Oversight Act of 1980. See BRADLEY & GOLDSMITH, *supra* note 69, at 690–91.

<sup>354</sup> See BRADLEY & GOLDSMITH, *supra* note 69, at 691.

<sup>355</sup> See Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429 (codified as amended in scattered sections of 10 and 50 U.S.C.).

<sup>356</sup> See 50 U.S.C. § 3093(a) (2012).

<sup>357</sup> See *id.* § 3093(b).

<sup>358</sup> For examples, see GOLDSMITH, *supra* note 329, at 90–91. The accountability regime for covert action is but one piece of a larger accountability regime that Congress imposed on presidential intelligence operations more generally. For other elements, see, for example, 50 U.S.C. § 3517 (Supp. II 2015) (inspector general for CIA); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885c); and Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. §§ 402–442b) (creating the Director of National Intelligence and other post-9/11 reforms).

<sup>359</sup> See GOLDSMITH, *supra* note 329, at 89 (noting that “[m]ost proposed covert actions never make it through the [executive branch] process, frequently because they do not pass legal muster”).

<sup>360</sup> Christopher R. Berry & Jacob E. Gersen, Essay, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1010 (2017).

that the dangers of illegality, agency costs, and misguided action are less prevalent in the context of international law. The haphazard nature of the review that has developed for presidential control over international law, and the existence of more considered forms of review for other areas of presidential power, are at least suggestive that additional accountability is appropriate in this context.<sup>361</sup>

The second and more concrete reason to think that current accountability constraints on presidential control over international law are suboptimal is that there are indications that the executive branch has been acting unlawfully in some respects related to international law. For example, the executive branch is clearly not complying fully with its duties under the Case Act to report international agreements to Congress. In addition, as we noted in Parts I and IV, it appears that the President may in some instances be making binding congressional-executive agreements that lack plausible authorization. Relatedly, the executive branch's possible reliance in recent years on a theory of Executive Agreements+ raises serious legal concerns.

These potentially unlawful executive branch actions are especially worrisome because of the extraordinary opacity of the legal bases for executive actions related to international law, and especially for international agreements. In the domestic realm, the legal bases for regulations, rules, and various other executive actions must be made public in the *Federal Register*.<sup>362</sup> By contrast, the public has no access to the legal bases for the greater than ninety percent of binding international agreements that are not treaties but that are reported under the Case Act.<sup>363</sup>

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<sup>361</sup> The fact that other constitutional democracies, faced with a proliferation of international agreements and political commitments, appear to be making efforts to rein in executive unilateralism in this area (including countries like the United Kingdom that have a long tradition of executive control over foreign relations), see *infra* notes 407, 409, might also be suggestive. See also THE KNESSET — RESEARCH & INFO. CTR., THE ROLE OF THE PARLIAMENT IN THE RATIFICATION OF INTERNATIONAL TREATIES AND AGREEMENTS 3 (2003), <https://www.knesset.gov.il/mmm/data/pdf/meo0647.pdf> [<https://perma.cc/77CY-G5Q2>] (“The issue of the role of parliament in the approval of international agreements and treaties, is on the agendas of many parliaments around the world, especially in this period, in which many public matters are settled by means of international law, and the status of international bodies is becoming progressively stronger.”).

<sup>362</sup> See, e.g., 1 C.F.R. § 19.1(b) (2017) (requiring citation of legal authority for executive orders and proclamations); *id.* § 21.40 (requiring citation of legal authority for documents “subject to codification,” which include any general document that has general applicability and effect such as rules and regulations); *id.* § 22.2 (requiring citation of legal authority for notices); *id.* § 22.5(b) (requiring citation of legal authority for proposed rules); see also 5 U.S.C. § 553(b)(2) (2012) (requiring citation of legal authority for notices of proposed rulemaking).

<sup>363</sup> Pursuant to a regulatory directive, the transmittals to Congress include a citation of legal authority. See 22 C.F.R. § 181.7 (2017) (requiring Assistant Legal Adviser for Treaty Affairs to transmit to the President of the Senate and Speaker of the House “background information to accompany each agreement reported under the Act . . . [including] a precise citation of legal authority”). But the public is not currently given access to this citation. Along with Professor Hathaway,

This makes it very hard and often impossible for the public (including private groups that monitor the government) to determine the category of agreement — that is, whether it is a sole executive agreement, ex ante congressional-executive agreement, executive agreement pursuant to treaty, Executive Agreement+, or something else.<sup>364</sup> But if one cannot determine the legal basis for an agreement, one cannot assess whether that legal basis is valid and thus whether the agreement is lawful. Nor can one ascertain the scale of potentially illegal executive action — for example, how often the executive branch relies on an Executive Agreements+ theory, or whether and how often the executive branch relies on inappropriate or misplaced authorizations to make agreements.

The reasons for concern about the legitimacy of presidential control over international law — the piecemeal and understudied manner in which the control has developed and expanded, the lack of a considered accountability scheme compared to other areas of presidential power, and specific worries over possibly unlawful action — suggest that accountability in this context may be inadequate. But these reasons are only suggestive. We now move to discuss what additional information one would need to know to determine whether more accountability is appropriate, and, if so, how much and in what forms.

2. *Additional Factors Relevant to Accountability Assessment.* — In this section, we discuss the main additional factors that one would need to consider in order to assess whether the current accountability constraints on presidential control over international law are adequate or should be reformed. Many of these factors are difficult to pin down with precision and even harder to evaluate in the aggregate, which is why normative judgments in this context are so difficult.

(a) *The Quality of Executive Outputs.* — Perhaps the most significant uncertainty with respect to broad unilateral presidential control over international law is whether it results in good foreign policy outcomes for the United States. How well is presidential control working in terms of the quality and quantity of the President's decisions related to international law? Do the agreements that the President makes, the President's interpretations of international law, and the President's agreement terminations, serve the nation well? How does this output compare with what would occur if the President were subject to more constraints?

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we are seeking to obtain, through the Freedom of Information Act, records of the State Department's citations of legal authority in Case Act transmissions to Congress dating back to January 20, 1989 (the beginning of President George H.W. Bush's first term as President).

<sup>364</sup> Harrington, *supra* note 15, at 352 (noting that "it is nearly impossible for the researcher to discover whether the Executive exceeded his statutory authority for any given agreement," and adding that "[i]n fact, it can be a challenge to determine whether the agreement had statutory authority at all"). Ex post congressional-executive agreements are not collected or identified as such but are relatively easy to spot because they are specifically approved by Congress after negotiation.



These questions are difficult to answer because there is so much contestation about the proper goals of U.S. foreign policy and about how to assess policy outcomes. One can perhaps infer from Congress's persistent, extensive, and broad delegations in this context that both the President and Congress believe that presidential control generally serves U.S. foreign policy well compared to the alternatives. Yet the desirability of current levels of presidential control likely still depends on one's views about the contested fruits of presidential control. For example, one who thinks that the Paris Agreement and the Iran deal are historic successes for U.S. foreign policy that would not have been possible with more robust forms of accountability may be sanguine about presidential control. On the other hand, one who thinks that these agreements harm U.S. interests may be more likely to insist on reduced presidential authority, increased congressional involvement and guidance, narrower delegations of power to the President, and the like. There is no easy way to sort this issue out in order to assess, from this perspective, whether the current levels of presidential power and constraint should be altered.<sup>365</sup>

(b) *The Quality of Informational Inputs.* — Among the reasons why Congress delegates authority to the executive branch in the domestic context is that the executive branch possesses both relative expertise and relatively superior information related to the matter being delegated.<sup>366</sup> These traditional rationales for delegations apply with greater force in the context of international law. The executive branch is thought to have much better information than Congress because of its vast intelligence and diplomatic services and the persistent expertise of its large bureaucracies.<sup>367</sup> And, because it is hierarchical and unitary, it is thought to be able to act on this superior information faster and with

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<sup>365</sup> Principal-agent theory, which is often used to analyze the quality of executive branch outputs, is not much help here. The issue about the quality of those outputs can perhaps be stated as whether the President is a faithful agent of Congress (the principal) in making (or interpreting or breaking) agreements. Reform of the current set of delegations and accountability constraints might be less warranted to the extent that the executive branch is a faithful agent and more warranted to the extent that it is not. But the President's powers related to international law do not always depend on congressional delegation, and rarely depend on delegation from the current Congress. When the source of the President's power to act is uncertain or mixed, the principal-agent analysis becomes so complex as to be unhelpful. Should the principal be Congress, in which case the test is whether the President is carrying out Congress's wishes? Or should it be the American people who elected the President, in which case the issue may be whether the President is making policy that serves the national interest (or preferences of the electorate)? This uncertainty is a particular stumbling block to analysis when Presidents do things (such as the Iran deal) that rest on both constitutional and statutory authorities, and that they believe serve the national interest, but that the current Congress opposes. Without a specification of the proper principal, which is contested, we cannot sort out how well the President is acting as agent.

<sup>366</sup> For further explanation, see Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016).

<sup>367</sup> See *id.* at 1608–09.

greater flexibility, and to better maintain the secrecy that is often vital to international negotiations and diplomacy.<sup>368</sup> The executive branch's superior information and expertise are the main reasons why Congress has delegated so much power so open-endedly to the President in this context, and why the President possesses some international lawmaking power and related foreign relations powers under Article II that would be unthinkable in a purely domestic context.

In the administrative law context, despite the executive branch's superior information and expertise in domestic administrative law, Congress, courts, and sometimes even the executive branch have worried about the quality of agency decisionmaking. The worries, in a nutshell, have been that federal agencies had too much discretion and were not responsive to democratic wishes, or were captured by special interests, or did not adequately rest their decisions on inputs from affected groups.<sup>369</sup> Beginning in the 1960s, agencies responded to these concerns by shifting to an "interest representation" model that involved greater use of notice-and-comment rulemaking (as opposed to adjudication), and judges imposed more robust forms of judicial review and allowed an expanded array of plaintiffs to contest agency action.<sup>370</sup> In part in response to the perceived excesses of the interest representation model, the executive branch in 1981 began to require agencies to perform cost-benefit analyses to constrain agency action.<sup>371</sup> In short, over time agency decisionmaking was constrained, beyond the original APA and bare congressional delegations, by reforms designed to enhance informational inputs and judicial review, and by imposition of cost-benefit analysis supervised by centralized executive branch control.

Should analogous reforms be applied to presidential control over international law? Hathaway has argued that the making of both sole executive agreements and ex ante congressional-executive agreements should be brought under a "new administrative process" akin to the APA.<sup>372</sup> Among other things, she proposes a modified public "notice-and-comment" procedure for such agreements and judicial review.<sup>373</sup>

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<sup>368</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) ("Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'" (quoting THE FEDERALIST NO. 70, *supra* note 6, at 423 (Alexander Hamilton))).

<sup>369</sup> See Stewart, *supra* note 348, at 441-42.

<sup>370</sup> See *id.* at 441-43.

<sup>371</sup> See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988). This order was superseded by Exec. Order No. 12,866, 3 C.F.R. 638 (1994). For a general analysis, see Kagan, *supra* note 329, at 2277-81.

<sup>372</sup> Hathaway, *supra* note 27, at 242.

<sup>373</sup> *Id.* at 242-53.

Such a process would “allow public input into the process of international lawmaking”<sup>374</sup> and allow Congress and the public to “provide information that might prove helpful in the process of creating the agreements.”<sup>375</sup>

Setting aside the significant costs of this proposal for presidential international lawmaking, to which we return in a moment, Hathaway does not make the affirmative case for a need for additional informational inputs in the context of international agreements, and, indeed, provides only one concrete but inconclusive example of where more information or public input would have improved an agreement.<sup>376</sup> Her arguments for bringing the APA structure to international agreements depend primarily on concerns about restoring the “balance” of congressional and democratic participation in the making of international agreements.<sup>377</sup> But she does not criticize the overall quality of the agreements made by the President. Nor does she argue that the agreement-making process is bedeviled by informational deficits or captured by interests that do not serve the public. We do not deny that such problems may exist — we just do not know. While we have suggested that there may be reasons to worry by analogy to the types of accountability measures that have been brought to bear on other areas of law, those analogies alone do not make the case for reform in this different context. This is especially so in light of the President’s acknowledged expertise in this context, the general confidence Congress appears to have displayed in the executive branch with its extensive, broad delegations, and longstanding practice in support of many of the executive branch actions. The simple point is that before knowing whether or how to reform presidential control over international law, one needs to know what the actual problems are (if any) with that control.

(c) *Issues Related to Lawful Action.* — One of the most important goals for any accountability scheme is to ensure that the President or his subordinates act lawfully. A traditional aim of administrative law, and especially of public judicial review of certain forms of agency action, is to ensure that administrative agencies act within their delegated authority.<sup>378</sup> In other contexts, especially where there is an imperative for secrecy, or where executive branch action rests in part on inherent authority, or where the action involves national security, mechanisms short of

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<sup>374</sup> *Id.* at 245.

<sup>375</sup> *Id.* at 244.

<sup>376</sup> *See id.* at 215–39. Hathaway contends that a more open process “will lead to agreements that are more legitimate, more consistent with American constitutional ideals, and better tailored to the needs and interests of the American public.” *Id.* at 252.

<sup>377</sup> *Id.* at 215–30.

<sup>378</sup> *See* Stewart, *supra* note 348, at 439–40; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–76 (1975).

public judicial review are sometimes deemed sufficient to ensure lawful action by the President.<sup>379</sup>

In contrast to the absence of affirmative evidence of problems concerning the informational bases on which the executive branch makes its international law decisions, there are concrete reasons, explained above, to think that Presidents are sometimes exceeding their authority in connection with their control over international law. But that fact alone does not tell us much about whether or what types of accountability reforms are appropriate. One would also need to know the scale of the illegality problem under the current accountability scheme. This question matters because the optimal rate of illegal action by the President is not zero. Accountability schemes are rarely if ever designed to ensure perfect legality, because the costs to presidential practice of ensuring perfect legality are too high.<sup>380</sup> Judicial review almost certainly improves the overall legality of presidential action. But judges sometimes make mistakes about the law.<sup>381</sup> And judicial review imposes many costs on presidential action that are sometimes in the aggregate prohibitive.<sup>382</sup> These costs in the context of presidential control over international law include dampening presidential initiative, slowing negotiations, foreign relations problems resulting from changes to or termination of agreements already made, reduced presidential credibility during negotiations or amidst assertions of U.S. positions relating to customary international law, and the like.<sup>383</sup> Costs such as these are one reason why Congress excluded “a military or foreign affairs function” from the procedural and judicial review requirements for agency rulemaking.<sup>384</sup> They also explain, more generally, why robust public

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<sup>379</sup> For example, for covert action, a presidential certification combined with strict reporting to the congressional intelligence committees is deemed to suffice. See 50 U.S.C. § 3093(a)–(c) (2012). Another example is section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, which authorizes the Foreign Intelligence Surveillance Court to review and approve, in secret, programmatic executive branch “targeting” and “minimization” procedures for certain forms of foreign intelligence electronic surveillance to ensure compliance with statutory commands and the Fourth Amendment. See Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438–48 (2008) (codified as amended at 50 U.S.C. § 1881a).

<sup>380</sup> See Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673 (2015).

<sup>381</sup> Cf. *id.* at 677 (“[E]liminating abuses requires setting up enforcement machinery that is itself a source of possible abuses.”).

<sup>382</sup> See *id.* (“[T]he costs necessary to produce full enforcement of constitutional rules might simply not be worth paying, in light of other possible uses for those resources.”).

<sup>383</sup> Some of these costs are discussed in Hathaway, *supra* note 27, at 251.

<sup>384</sup> See 5 U.S.C. § 553(a)(1) (2012). The Senate Report to the original APA explained that the “foreign affairs functions” exclusion included “those ‘affairs’ which so affect relations with other governments that, for example, public rule making provisions would *clearly provoke definitely undesirable international consequences*.” S. REP. NO. 79-752, at 13 (1945) (emphasis added). Undesirable international consequences are the primary criteria for exclusion of executive branch action under this exception to the APA, see, e.g., *Yassini v. Crosland*, 618 F.2d 1356, 1360 & n.4 (9th Cir. 1980), though some courts go further and exempt rules whose “subject matter is clearly and directly

judicial review of presidential action related to foreign affairs and national security remains relatively rare.<sup>385</sup>

To assess whether the costs of judicial review or other robust forms of review of presidential action related to international law are justified, therefore, one must have a sense of the rate of unlawful presidential action in this context. If Presidents are not exceeding their legal authority very much under the current scheme of minimal review, the costs of full-blown public judicial review may be hard to justify. These costs are more warranted and easier to justify if the President frequently exceeds his or her authority related to international law and if other, less costly forms of accountability review do not suffice to rein in the President.

(d) *Congressional Oversight*. — An important factor in any assessment of the need for more accountability in this context is the quality and quantity of the main accountability constraint on the President — congressional oversight.

Congress does not engage in a great deal of “police patrol” oversight of the President related to control over international law.<sup>386</sup> The foreign relations committees in Congress do not conduct active, persistent oversight in the form of hearings and other studies to examine the President’s actions related to international law.<sup>387</sup> That does not mean that Congress’s oversight is inadequate, however, because Congress might sufficiently rely on “fire alarms” set off by the press, organized groups, and citizens who monitor the executive branch and bring its untoward actions to the attention of Congress.<sup>388</sup> Consistent with this view, Congress has shown an awareness of and an ability to engage with Presidents when it thinks they are acting improperly or otherwise in ways that demand more scrutiny and constraint. It has shown itself capable of imposing ex post consultation or consent requirements in certain contexts.<sup>389</sup> It has amended the Case Act to require more robust

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involved’ in a ‘foreign affairs function,’” *Mast Indus., Inc. v. Regan*, 596 F. Supp. 1567, 1582 (Ct. Int’l Trade 1984) (quoting H.R. REP. 79-1980, at 23 (1946)). For a recent effort to integrate these tests, see *City of New York v. Permanent Mission of India to U.N.*, 618 F.3d 172, 202 (2d Cir. 2010).

<sup>385</sup> See generally BRADLEY & GOLDSMITH, *supra* note 69, at 45–133 (reviewing doctrines limiting judicial review in these contexts).

<sup>386</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–67 (1984).

<sup>387</sup> Recently, however, the Senate Foreign Relations Committee held a hearing related to some of the issues discussed in this Article, and one of us (Curtis Bradley) testified at that hearing. See *The President, Congress, and Shared Authority over International Accords: Hearing Before the S. Comm. on Foreign Relations*, 115th Cong. (2017), <https://www.foreign.senate.gov/hearings/the-president-congress-and-shared-authority-over-the-international-accords-120517> [<https://perma.cc/U2XL-8S7K>].

<sup>388</sup> McCubbins & Schwartz, *supra* note 386, at 166.

<sup>389</sup> See *supra* note 26 (listing ex post congressional-executive agreements in recent decades); Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114–17, 129 Stat. 201 (codified at 42 U.S.C. § 2160e (Supp. IV 2016)) (requiring the President to disclose to Congress the text and details about

reporting of agreements, although not with complete success.<sup>390</sup> And, at least in high-profile examples, it often learns about and responds to threatened exercises of presidential unilateralism related to international law, sometimes leading the President to back down.<sup>391</sup>

Despite these signals of congressional engagement, there are many hurdles to assessing their adequacy and some reasons to think they are inadequate. The fire alarm theory cannot work unless the public and journalists and interested groups can examine presidential behavior and thus trigger the fire alarms. To the extent that presidential practice or the legal basis for that practice is concealed from the public, confidence in fire alarm mechanisms is reduced. Moreover, even if there were perfect transparency and occasional reactions to fire alarms, it is difficult to tell whether such oversight would be optimal. Perhaps Congress should react more to fire alarms but it lacks the electoral incentives or institutional interest or resources to do so. One indicator beyond general concerns of transparency that congressional oversight is inadequate is that the President appears to be engaged in at least marginally unlawful action related to international agreements, in response to which Congress has done very little. Another indicator is that the executive branch has not been fully complying with the Case Act and Congress has done nothing since its 2004 amendments to redress the problem. Does congressional nonaction in these contexts reflect ignorance, indifference, or resource constraints? Or does Congress think the legality concerns are marginal and thus not worth worrying about? One needs more information about these questions to make an assessment of presidential accountability in this context.

(e) *The Costs, Benefits, and Tradeoffs of Accountability Mechanisms.* — The discussion above underscores that there are significant tradeoffs associated with imposing more accountability constraints on the President. Additional congressional checks on presidential agreement making might adversely affect the quantity or quality of the agreements the President makes. Judicial review might improve legal compliance, but at the possible cost of significantly slowing the agreement-making process, reducing the number of agreements, alienating negotiation partners, creating uncertainty about the United States' international obligations, introducing harmful interest group competition, and

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the political commitment with Iran after signature but before ratification, giving Congress sixty days to stop the deal).

<sup>390</sup> See *supra* note 344.

<sup>391</sup> See, e.g., text accompanying notes 150–52 (Law of the Sea Convention obligations); text accompanying notes 170–72 (provisional application of Arms Trade Treaty); text accompanying notes 202–06 (United Nations vote on nuclear testing ban).

undermining presidential flexibility and credibility.<sup>392</sup> Reporting and publicity requirements, depending on their timing, could have similar effects.<sup>393</sup>

These examples show that we need more than additional information to figure out which accountability mechanisms might be appropriate. We also need to understand the costs of those mechanisms, and assess whether their benefits (in terms of better, more lawful, more informed, more responsive, or higher-quality decisionmaking) are worth the costs that the accountability constraints impose.<sup>394</sup> Another way to understand this issue is in terms of the balance of decision costs and error costs. Additional accountability constraints increase the decision costs of presidential action. The aim of these constraints is to lower the rate of “erroneous” decisions, which can include any of the problematic presidential actions we have described. One way of looking at the tradeoff is that accountability constraints should minimize the sum of decision and error costs. By itself, that abstract formulation tells us little, because decision and error costs are hard to assign with precision. But it does provide a framework for assessing reforms. For example, if the error cost of illegality under the current system is relatively small, then the known high decision costs of judicial review would probably not be warranted, and a lower-decision-cost reform, such as public transparency, might suffice.

(f) *Concluding Observations.* — We conclude this section with five general observations relating to any assessment of proper reforms in this area. First, it is especially challenging to theorize accountability strategies across the entire range of international law pathways, and even across the entire range of international agreements. One can do better in assessing the informational and cost-benefit factors the narrower one’s focus gets. Second, the more dimensions along which one alters current accountability constraints, the greater the likelihood of systemic effects in various directions, including second- and third-order consequences that are hard to fathom and might be self-defeating.<sup>395</sup> Put slightly differently, the more ambitious the proposal, the more difficult it is to assess how the costs and benefits tally up. Third, even with perfect knowledge of the facts and much more consensus than we now

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<sup>392</sup> Hathaway acknowledges these costs, see Hathaway, *supra* note 27, at 251–52, and she proposes a variety of possible benefits that she contends will outweigh or ameliorate these costs, see *id.* at 252.

<sup>393</sup> On the potential downsides of excessive transparency, see Gersen & Stephenson, *supra* note 329, at 212–13, 219–20; and David E. Pozen, Transparency’s Ideological Drift (unpublished manuscript).

<sup>394</sup> For further elaboration of this point, see Vermeule, *supra* note 380; and Gersen & Stephenson, *supra* note 329.

<sup>395</sup> See generally Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

have on normative issues, there would still likely be many different plausible approaches to reform.

Fourth, despite these reasons for caution, it does not make sense to require perfect information or complete normative consensus before engaging in reform. Such conditions would almost never be realized and thus would lead to regulatory paralysis. Important prior reform efforts relating to executive branch action, including efforts in the areas of administrative law and covert action, were not preceded by either perfect information or complete normative consensus. Fifth, and finally, precisely because no one has perfect information and there are disputes about normative principles, real-world answers to accountability for presidential control over international law will be filtered through politics and compromise and ultimately will come through reform experimentation.<sup>396</sup>

### B. Reform Proposals

This final section considers reform. Our main prescriptive suggestion is that presidential control of international law should be subject to a comprehensive regime of ex post transparency. After making the case for why such a transparency reform is appropriate in light of the principles articulated in section A, we consider other plausible accountability reforms.

I. *Transparency*. — As noted above, federal law requires the publication of regulations and related executive instruments, and their legal bases. By contrast, Congress and the public, both under the law and in practice, are given much less information about the international laws and commitments that govern the United States, about the legal bases for these instruments, and about when such instruments are terminated, than they are given about domestic law and regulations. However, transparency on these basic matters is foundational to presidential accountability.<sup>397</sup> If Congress and the people do not know about presidential action or its legal basis, they cannot review it and thus checks and balances cannot operate. More broadly, the publicity of law is widely viewed as a minimal presumptive requirement of the rule of law,

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<sup>396</sup> The accountability mechanisms associated with both the APA and covert action evolved over time in response to changes in the world and learning about how these mechanisms operated. On the former, see Martin Shapiro, *A Golden Anniversary?*, REGULATION, no. 3, 1996, at 40, 42. On the latter, see GOLDSMITH, *supra* note 329, at 86–90.

<sup>397</sup> Cf. Kagan, *supra* note 329, at 2332 (noting that a “fundamental precondition of accountability in administration” is the “degree to which the public can understand the sources and levers of bureaucratic action” and that, because bureaucratic action is “impervious to full public understanding . . . the need for transparency, as an aid to holding governmental decisionmakers to account, here reaches its apex”). See generally AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 95–97 (1996) (describing theoretical links between transparency and accountability); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 285–86 (2010) (similar).



so that institutions and citizens can know their legal duties and conform their behavior accordingly.<sup>398</sup> Finally, greater transparency will not only serve accountability and rule of law values, but will also provide information that will enable more informed judgments about whether additional accountability constraints are needed.

Our main transparency proposal in this section is simply that the executive branch make public the international agreements that it concludes, and the legal bases for them, as well as the agreements that it terminates, *after* such action has been taken. Such ex post transparency would serve the aims of accountability by publicizing the law and allowing scrutiny and redress of presidential action, without interfering in the President's prerogatives — some constitutional, some delegated by Congress — to negotiate and decide these matters.

(a) *Agreement Making.* — The asymmetry between the publication regime for U.S. domestic law and regulations and that for U.S. commitments relating to international law reflects the assumptions of a different era of international agreements. The modern *Federal Register* document collection and publication system that was created for the administrative state in 1935 excluded international agreements at a time when they were much less frequent and much less consequential. The exclusion of agreements from the otherwise extensive executive branch duty to publish the legal basis for executive branch action is also traceable to the 1946 “foreign and military affairs” exception to the APA that, at least with respect to ex post transparency, is also difficult to justify today. There is now dramatically more international law than in the 1930s and 1940s, and much of it can be just as consequential for U.S. firms and citizens as domestic law. Absent special circumstances, these agreements and their legal bases should be as readily accessible to the public as domestic law.

International agreements should thus move toward a system of collection and publication, after the agreements are made, similar to the system for domestic statutes and regulations. First, there needs to be a better system for ensuring (as is already required by the Case Act) that the State Department is promptly made aware of international agreements concluded by the various executive branch agencies.<sup>399</sup>

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<sup>398</sup> See LON L. FULLER, *THE MORALITY OF LAW* 39 (1964); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 214–18 (1979).

<sup>399</sup> Senator Corker recently introduced a bill that would amend the Case Act to require any executive department or agency that enters into an international agreement to designate a “Chief International Agreements Officer” with a statutory duty to transmit international agreements to the State Department within twenty days after signature. See S. 1631, 115th Cong. § 802 (as reported by S. Comm. on Foreign Relations, Sept. 6, 2017).

Second, the State Department needs to establish a better and more efficient system for organizing and publishing these agreements pursuant to its statutory duties. The current system of congressionally authorized regulatory exclusions to publication seems to be a reasonable way of drawing the line on what agreements get published.<sup>400</sup> But the Department needs to do a better job of publishing and organizing U.S. agreements. Indeed, Congress should insist on a system — analogous to the *Code of Federal Regulations* — that constitutes an organized and easily searchable database for international agreements.<sup>401</sup>

Third, the executive branch should make available to the public the legal bases for its agreements, just as it does for domestic regulations. Especially in a context in which judicial review plays a very small role, public scrutiny of the legal bases for agreements is vital to ensure that the President is acting lawfully. As we explained above, the fire alarm theory of congressional oversight of executive branch legality can only work if scholars, journalists, and other citizens can examine those legal bases and elevate problematic legal rationales into the public realm where Congress can, should it wish, act.<sup>402</sup> Such scrutiny would require the executive branch to think more carefully before relying on controversial legal authorities. This form of transparency is especially important since the executive branch in recent years has appeared to assert ever broader and more controversial authorities to make agreements.<sup>403</sup> Such transparency will not always clarify the legal bases for all international agreements since the State Department will likely continue to rely on underexplained, overlapping authorities (although Congress could consider requiring more explanation from the Department about its legal claims). But even minimal public transparency on the legal bases for agreements would materially enhance accountability.<sup>404</sup>

Such ex post transparency for international agreements and their legal bases is unlikely to impose unwarranted costs on the President. It might adversely affect presidential discretion to the extent that it exposes bad agreements, or agreements based on inappropriate or poor information, or agreements that are unlawful or close to being so. But these are features of transparency in this context, not bugs. The trans-

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<sup>400</sup> See 22 C.F.R. § 181.8 (2017).

<sup>401</sup> If the State Department needs additional funding, as it suggests, Congress should provide it.

<sup>402</sup> See *supra* pp. 1284–85; see also Hathaway, *supra* note 27, at 245 (“[T]here should be much more specific information made available about the legal authority for the executive agreements — and it should be made available to both Congress and the public at large.”).

<sup>403</sup> See *supra* section I.A, pp. 1206–20.

<sup>404</sup> We are not proposing disclosure of the State Department’s internal legal memoranda prepared as part of that Department’s Circular 175 procedure, which is used to decide on the domestic pathway for concluding an international agreement. See *supra* note 16. Among other things, such disclosure might run into issues relating to attorney-client privilege and executive privilege.

parency regime will demand additional resources, but the system of publication for domestic rules shows that there is no fundamental resource hurdle to publication of agreements and their legal bases. Moreover, the demand for ex post transparency gives Presidents leeway (should they want it) to avoid public scrutiny during the negotiation and completion of agreements. This is consistent with the special need for confidentiality in negotiation that is part of the reason why the Founders made the President the chief negotiator for treaties, why Congress has delegated so much open-ended international lawmaking power to the President, and why the Supreme Court has suggested that the negotiation power is exclusively the President's.<sup>405</sup>

The Constitution does not, of course, rule out earlier presidential transparency about the content of a legal agreement under negotiation, or its legal basis. Congress could require the agreements and their legal bases to be disclosed after negotiation but before ratification, or possibly even during negotiation. Both versions of an ex ante publication requirement would allow the public and Congress to know about and weigh in on agreements informally even if they could not stop them absent extraordinary action by Congress. If the publicity requirement were imposed during negotiation and before signature, however, it would make it significantly more difficult for the executive branch to negotiate, since it would be engaged simultaneously in two different processes, one international and one domestic.

A publicity requirement after negotiation but before ratification would avoid this concern, while still bringing significantly more scrutiny to the content of executive agreements.<sup>406</sup> But it might also impose significant costs that, unlike a less invasive ex post approach, might adversely affect the quality of U.S. agreements. In the abstract it is practically impossible to say whether that extra scrutiny would be useful or harmful on balance. It might slow or stop untoward presidential action, but it might also interfere with useful negotiations and allow powerful interest groups to slow or stop an agreement that should be made. Congress sometimes requires a short period of notice after a congressional-executive agreement is signed, during which it can enact a joint resolution to stop the deal.<sup>407</sup> It almost certainly possesses the authority to

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<sup>405</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“The President has the sole power to negotiate treaties . . .”).

<sup>406</sup> For a proposal along these lines, see Hathaway, *supra* note 27, at 244.

<sup>407</sup> See, e.g., Arms Export Control Act § 63, 22 U.S.C. § 2796b (2012) (prohibiting the President from entering into lease or loan agreement made under the Act if Congress, within a specified fifteen-day or thirty-day period, enacts a joint resolution barring the lease or loan). In Great Britain and certain other Commonwealth countries, although parliamentary approval is not required in order for the executive to conclude a treaty, there is a constitutional custom whereby the executive will lay a treaty before the Parliament for a certain period of time (such as twenty-one days) before ratifying it. In Great Britain, this convention, which is referred to as the “Ponsonby Rule,” was

impose an ex ante notice requirement in connection with any particular presidential negotiation.<sup>408</sup> Congress has imposed such an ex ante notice requirement relatively rarely, just as it has rarely required the President to return to Congress for ex post approval of a negotiated agreement. These patterns suggest that, for the vast majority of congressionally approved agreements, Congress has generally been satisfied with the President's performance and with notice of the agreement after the fact. They also show that Congress can impose earlier transparency rules when it sees fit to do so. We have proposed making the ex post transparency duty more regularized and robust for all agreements, but extending that duty to ex ante transparency across the board would impose substantial new burdens and delays on the President that, at least based on the current evidence, seem difficult to justify.

Finally, there is the question of what the transparency rules should be for political commitments. Such commitments are not systematically collected and reported anywhere.<sup>409</sup> Prominent ones like the Paris Agreement are of course publicly known, and different agencies sometimes publish their important political commitments.<sup>410</sup> But the bulk of political commitments are neither collected centrally nor published in a systematic way. We believe that it would be imprudent to apply the Case Act wholesale to political commitments, as one commentator<sup>411</sup>

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converted into a statutory requirement in 2010. See ARABELLA LANG, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER: PARLIAMENT'S ROLE IN RATIFYING TREATIES 10 (2017), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855> [<https://perma.cc/8PKT-96NR>]. For the custom in Australia, see *Treaty Making Process*, AUSTRALIAN GOV'T, DEP'T FOREIGN AFF. & TRADE, <http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx> [<https://perma.cc/AHM6-23JZ>] ("Although the Constitution does not confer on the Parliament any formal role in treaty making, all treaties (except those the Government decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken.")

<sup>408</sup> This is what Congress did in the Iran Nuclear Agreement Review Act of 2015 (INARA), Pub. L. No. 114-17, 129 Stat. 201, which concerned a political commitment rather than a congressional-executive agreement. That Act required the President to disclose to Congress the text and details about political commitments with Iran after signature but before ratification, giving Congress sixty days to stop the deal. *Id.* § 135(b)(2); see also *infra* notes 423-26 and accompanying text.

<sup>409</sup> Political commitments are excluded from Case Act reporting. See 22 C.F.R. § 181.2(a) (2017) (exempting from Case Act reporting "[d]ocuments intended to have political or moral weight, but not intended to be legally binding," *id.* § 182.2(a)(1)). The United States is not the only country confronted with this issue. For discussion of recent legislation in Spain that is designed in part to increase the transparency of political commitments, see Carlos Esposito, *Three Points on the Spanish Treaties and Other International Agreements Act*, ACQUIESCENCIA (Aug. 4, 2015), <https://aquiencia.net/tag/spanish-treaties-and-other-international-agreements-act/> [<https://perma.cc/Z8BT-AUKJ>].

<sup>410</sup> See, e.g., Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Regulated Entities, H.K.-U.S., Jan. 18, 2017, [https://www.sec.gov/about/offices/oia/oia\\_bilateral/hongkong-011817.pdf](https://www.sec.gov/about/offices/oia/oia_bilateral/hongkong-011817.pdf) [<https://perma.cc/NT32-EAE9>].

<sup>411</sup> Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1236-41 (2016).

has suggested. There are too many types of political commitments, and the distinctions between political commitments and ordinary diplomatic speech and cooperation are too uncertain, to demand that the executive branch report all political commitments to Congress.<sup>412</sup> At the same time, reporting to Congress alone is not enough. Political commitments, especially in the regulatory context, can have large impacts on domestic actors just as domestic regulations do. The public should thus have access to political commitments in an organized and searchable fashion as well. A presidential duty to make public such commitments would not hinder the negotiation of the commitments in any material way.

Taking these factors into account, we think the proper solution is for Congress to impose *Federal Register*-like duties of centralized organization and publication for political commitments, but only for the most important ones. We are agnostic about how the category of important political commitments should be defined. One possibility is to describe a list of types of commitments — such as ones that foster regulatory cooperation — that must be centrally collected and published. Another possibility is to create a statutory duty to collect and publish all political commitments meeting a general standard, such as “significant” or “important.” Such an open-ended standard might sound too vague to be manageable, but such a standard works reasonably well in other reporting contexts by putting the burden on the agencies to figure out what counts as important, subject to informal sanctions by Congress and the public should they get the calculation wrong.<sup>413</sup>

(b) *Interpretation.* — The executive branch’s everyday interpretations of U.S. international agreements and pertinent CIL can modify U.S. international obligations in ways that are sometimes hard for Congress and the public to discern. The State Department’s Office of the Legal Adviser publishes an annual *Digest of United States Practice in International Law* “to provide the public with a historical record of the views and practice of the Government of the United States in public and private international law.”<sup>414</sup> The *Digest* is a good compendium of major U.S. actions under international law and of the U.S. government’s interpretations of international law related to those actions. It has at least two limitations, however. First, the executive branch has no affirmative duty to publish the *Digest*, and at times it has stopped doing so (for

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<sup>412</sup> This is especially so because, as discussed, the State Department cannot even, at the moment, manage to satisfy its Case Act duties as applied to agreements. See *supra* notes 338–46 and accompanying text.

<sup>413</sup> See, e.g., 50 U.S.C. § 3092 (2012) (requiring the executive branch to keep “intelligence committees fully and currently informed” of other U.S. intelligence activities, including “significant anticipated intelligence activity” (emphasis added)).

<sup>414</sup> *Digest of United States Practice in International Law*, U.S. DEP’T ST., <https://www.state.gov/s/l/c8183.htm> [<https://perma.cc/7LFS-YYD8>].

example, from 1989–1999).<sup>415</sup> Second, the public in general has no way of knowing whether the *Digest* is reasonably complete.

Considered alone, these problems might argue for imposing a statutory duty on the executive branch to publish all “major” or “significant” interpretations of international law for the United States in the *Digest*, and a related duty to notify Congress whenever the executive branch adopts a substantial new interpretation of international law.<sup>416</sup> However, the executive branch does not publish the vast majority of its internal legal interpretations of domestic law that support executive branch enforcement or executive action pursuant to law, and access to such interpretations under the Freedom of Information Act is limited. And, in the context of international law, and especially CIL, additional transparency can impose appreciable costs. CIL is more fluid than agreements, and the United States (like every nation) will often find itself making arguments about the contours of CIL in very different factual and political situations for which it might want to maintain flexibility. A rule requiring publication of “major” legal opinions might jeopardize this flexibility by ruling out or weakening certain arguments in new contexts. For these reasons, additional transparency beyond the *Digest* in this context is probably unwarranted.<sup>417</sup>

(c) *Termination*. — Under U.S. domestic law, there is currently no mandated reporting process for presidential decisions to suspend, terminate, or withdraw from treaties, and no readily accessible catalogue of terminated agreements.<sup>418</sup> We can see no affirmative justification for this state of affairs, which makes it difficult and sometimes impossible for the public, Congress, and even members of the executive branch to know what the law is at any particular moment. Since knowledge of the law is necessary to conform to it, the President should be required to publish all treaty terminations once they become effective in a manner consonant with the *Federal Register* process described above.<sup>419</sup>

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<sup>415</sup> The State Department took a hiatus from publishing the *Digest* from 1989–1999, and then later published a two-volume set covering 1991–1999 and a volume for 1989–1990. *See id.*

<sup>416</sup> The executive branch has a similar obligation in discrete domestic law contexts. For example, under 28 U.S.C. § 530D (2012), the Justice Department has an obligation to report to Congress any new policy to refrain from enforcing federal law, or a determination to contest or not enforce federal law on the ground that it is unconstitutional.

<sup>417</sup> Congress might, however, have an institutional interest in imposing a reporting duty on the executive branch for situations in which the executive branch accepts (or decides not to oppose) international resolutions, tacit treaty amendments, and similar developments if they materially affect U.S. obligations under international law. If public transparency proves too costly, such reports could be classified.

<sup>418</sup> For trade agreements, however, Congress has addressed other issues relating to termination. *See, e.g.,* 19 U.S.C. § 2135 (2012) (mandating that trade agreements entered into by the United States be subject to termination after a certain period, regulating the continuing effect of duties and other import restrictions in the event of a termination, and mandating notice and a public hearing before presidential withdrawal of proclamations implementing such agreements).

<sup>419</sup> At the moment, there is no comprehensive compendium of terminated U.S. agreements, and finding such terminations is haphazard and involves guesswork.

Congress might further require the executive branch to explain the reasons for its action and why it is permitted under international law to take the action. Congress could go further and require that it and the public learn of the potential termination earlier, when the executive branch notifies other parties to an agreement (either directly or through the central depository for the agreement) that the United States is suspending, terminating, or withdrawing from a treaty. At least for situations in which the executive branch is invoking a withdrawal clause in a treaty that requires advance notice, such a report would give Congress a chance to express its views before the termination takes effect. Such earlier notice might make it politically more difficult for the executive branch to terminate agreements within its authority. Whether and when those extra political hurdles are appropriate is a decision for Congress that is difficult to speculate about in general terms.

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In sum, we propose four reforms to enhance ex post transparency of presidential control over international law: (1) the State Department should create a centralized and comprehensive publication of all legally binding agreements, akin to the *Code of Federal Regulations*; (2) the executive branch should be required to state the domestic legal authority that it is relying on in order to make an agreement binding; (3) it should be required to collect and publish important nonbinding political agreements; and (4) it should be required to publish all treaty terminations once they become effective (or perhaps earlier when invoking withdrawal clauses).

2. *Other Reform Possibilities.* — As noted above, one virtue of our transparency proposals is that they will, with few creditable costs to the executive branch, generate much more information about the quality of executive branch control over international law. Such information might well reveal the need for additional reforms. Given the current state of knowledge, we think the following reforms beyond greater transparency are worth considering.

If Congress has additional residual concerns about the legality of presidential agreements, it could impose a duty on the Secretary of State to make a finding that every agreement submitted under the Case Act is lawful. In theory, this would require no more work than the internal reporting procedures that currently support most if not all agreements. But if the Secretary of State, or another senior official in the Department, were required to certify legality, the lawyers would have to take their jobs more seriously, and cases of marginal illegality might be reduced. Congress has used such certification requirements to enhance accountability related to legality in numerous international relations

contexts ranging from covert action, to programmatic Foreign Intelligence Surveillance Act applications, to actions related to chemical and biological weapon activities.<sup>420</sup>

Congress also has several options should it wish to more closely monitor the content and quality (as opposed to legality) of presidential control over international law, although we reiterate that it is unclear whether members of Congress have incentives or interests to do so. First, as it did in 2005–2007, it could prohibit all expenditures in connection with any international agreement until the executive branch discloses the agreement to Congress.<sup>421</sup> If foreign affairs committee resources are a hurdle, Congress could establish a subcommittee structure with specialized staffs that closely monitor and push back against presidential initiatives in both formal and informal ways.<sup>422</sup> In the extreme, Congress could in select instances insist on ex post approval for particular agreements or classes of agreements.

Congress could also, for important classes of agreements, institute deliberation-forcing mechanisms short of ex post approval. The Iran Nuclear Agreement Review Act of 2015 (INARA)<sup>423</sup> provides a model. President Obama had the relevant legal authority (based on his political commitment power plus his delegated discretion over sanctions) to make the Iran deal, but Congress intervened with INARA to slow the process. In relevant part the law required the President to send the text of the signed Iran agreement and related documents and assessments to Congress, and established a sixty-day review period during which presidential authority to complete the deal was frozen while Congress considered how to narrow or eliminate that authority.<sup>424</sup> Republicans tried to use

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<sup>420</sup> See 50 U.S.C. § 3093(a) (2012) (prohibiting the President from engaging in covert action without a finding by the President that contains many factors, including that “[a] finding may not authorize any action that would violate the Constitution or any statute of the United States,” *id.* § 3093(a)(5)); 50 U.S.C. § 1881a(g) (requiring Attorney General and Director of National Intelligence to certify to Foreign Intelligence Surveillance Court under oath various facts designed to ensure that search and minimization procedures comply with Fourth Amendment and other privacy concerns); 50 U.S.C. § 1513(2) (prohibiting expenditure of funds if Secretary of State “determines that such testing, development, transportation, storage, or disposal [of chemical or biological weapons agents] will violate international law”).

<sup>421</sup> See *supra* note 344.

<sup>422</sup> Such a subcommittee could be modeled on the United States Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence that were created in the 1970s to devote focused attention to the largely secretive and esoteric presidential intelligence practices (including covert action). See GOLDSMITH, *supra* note 329, at 86–92. While the success of the intelligence committees has been uneven over the years, the intensive reporting to and review and hearings by the committees (especially staffers) have had a significant disciplining impact overall on presidential behavior. See *id.* at 92.

<sup>423</sup> Pub. L. No. 114-17, 129 Stat. 201.

<sup>424</sup> *Id.* § 135(b). INARA also established various reporting requirements about Iranian compliance with the deal, *id.* § 135(d), and created a mechanism for quick congressional action to reimpose sanctions should Iran violate the deal, *id.* § 135(e).



INARA to stop President Obama from making the deal, but could not do so because they lacked the votes to override his threatened veto of such an effort.<sup>425</sup> INARA was nonetheless successful at bringing to light the relevant Iran deal documents and sparking an extensive national debate on the deal that forced the Obama Administration to explain and justify it like it had not before, and that required members of Congress in a vote to take a position on the deal for which they can be held accountable.<sup>426</sup>

In addition, Congress might want to conduct a comprehensive review of its many statutory delegations of authority to make agreements that have accumulated over the years, many of which are quite dated, and see how the executive branch has been using those statutes. Such a study might suggest the need for narrowing, updating, or repealing some of the statutes. Relatedly, Congress may wish to start including sunset provisions in some of these delegations of authority.<sup>427</sup>

Finally, Congress could consider reforming the process whereby Presidents make consequential political commitments, which have been so controversial in recent years.<sup>428</sup> One concern Congress might have is that these commitments take advantage of delegations to the President that did not contemplate international agreements as a basis for fostering deep international cooperation that Congress might oppose. Another concern may be that, as the Iran deal illustrates, consequential political commitments of this form, which lack meaningful interbranch collaboration, may be less stable and thus disruptive to U.S. foreign relations because they can be made without the broad domestic support needed for long-term compliance. As noted above, some observers believe that the instability inherent in this form of presidential unilateralism is an acceptable cost for important agreements like the Iran deal that could not have otherwise been reached. We do not take a position on this dispute. But should Congress think there is a problem here, it has many options to rein in the President, ranging from discrete deliberation-forcing mechanisms like INARA, to spending restrictions for agreements it does not approve of, to a global statute that makes clear that domestic regulatory authority that does not itself authorize a political commitment cannot be the basis for one by the President.

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<sup>425</sup> Jack Goldsmith, *The Iran Deal Is on the President (and Those Who Supported It in Congress)*, LAWFARE (Nov. 6, 2015, 1:45 PM), <https://www.lawfareblog.com/iran-deal-president-and-those-who-supported-it-congress> [<https://perma.cc/6F5D-SKCD>].

<sup>426</sup> See *id.*

<sup>427</sup> See Hathaway, *supra* note 27, at 255–56.

<sup>428</sup> As explained in Part IV, we believe that the Iran deal and Paris Agreement are lawful. Here we discuss reforms concerning their wisdom and execution in practice.

## CONCLUSION

Aspects of presidential control over international law have been studied before, but there has not previously been any comprehensive effort — by scholars, the public, or Congress — to examine the overall picture and consider its normative attractiveness. As we have shown, the pathways of presidential control over international law have evolved and expanded over time and increasingly overlap in ways that tend to reduce constraints on presidential action. This growth in presidential power has not been accompanied by the development of mechanisms of accountability comparable to those that apply to exercises of domestic authority. In sketching some suggestions for reform, this Article seeks to initiate a long-overdue consideration of this important development in American public law.