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## A Remedy for Congressional Exclusion from Contemporary International Agreement Making

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**A REMEDY FOR CONGRESSIONAL EXCLUSION FROM  
CONTEMPORARY INTERNATIONAL AGREEMENT MAKING**

*Ryan Harrington\**

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I. INTRODUCTION

When Harold Koh, as Legal Advisor to the U.S. Department of State, recently gave an address on 21st-century international lawmaking, he spoke

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about using much more than treaties and executive agreements to achieve policy goals.<sup>1</sup> He also gave several examples of “memorializing arrangements or understandings that we have on paper without creating binding legal agreements with all the consequences that entails.”<sup>2</sup> One example of a nonlegally binding agreement, or “political commitment,” is the Copenhagen Accord. The Accord secured commitments on emissions reductions from 141 countries around the world.<sup>3</sup> Pursuant to the Accord, the United States voluntarily submitted its intention to reduce domestic greenhouse gas emissions by 17% in 2020.<sup>4</sup> The executive branch, however, has not presented the Copenhagen Accord to the Senate because it believes that political commitments do not require advice and consent. Instead, the executive branch submitted a letter directly to the United Nations Framework Convention on Climate Change indicating that the United States “associates itself” with the agreement.<sup>5</sup>

Several constitutional questions arise from this single example of an international agreement. First, where is the authority for the President to conclude this agreement, and was the executive branch required to demonstrate such authority before “associating” the United States with the Accord? Second, how can the executive branch, acting solely, *effect* a commitment to an emissions reduction target? Would it not require congressional approval and legislation? Finally, assuming the executive branch alone could not effect its commitment, would international law require Congress to implement domestic legislation? The ramifications of forming political commitments in lieu of treaties have seldom been studied.<sup>6</sup> Congress itself seems unclear about the

<sup>1</sup> Harold Hongju Koh, *Address: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. ONLINE 1, 13 (2012) (“Twenty-first century international legal engagement is hardly limited to these conventional tools of treaties and executive agreements and customary international law. Much of what my office does is to help policy clients advance their interests outside this familiar framework, oftentimes by fostering cooperation with various partners in innovative ways. This can take the form of what I call ‘diplomatic law talk,’ involving fluid conversations on legal norms.”).

<sup>2</sup> *Id.* at 13–14 (describing several examples, including a Memorandum of Understanding with the Arab League, the Copenhagen Accord, and the 2010 Communiqué of the Washington Nuclear Security Summit (NSS), which aims to improve nuclear security and reduce the threat of nuclear terrorism).

<sup>3</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, 5, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) (including the Copenhagen Accord).

<sup>4</sup> The emissions reduction target is based on the 2005 level. Letter from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Exec. Sec’y of the United Nations Framework Convention on Climate Change (Jan. 28, 2010), [https://unfccc.int/files/meetings/cop\\_15/copenhagen\\_accord/application/pdf/unitedstatescphaccord\\_app.1.pdf](https://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescphaccord_app.1.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> The most comprehensive study of this phenomenon can be found in Duncan B. Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507, 513

legality of such agreements and its own responsibilities, as evidenced by the report on the Climate Change agreements.<sup>7</sup> The report provides answers to these fundamental questions, but raises broader questions about the constitutional foundation of the Executive's practice of adopting political commitments.<sup>8</sup>

A brief response is that political commitments such as the Copenhagen Accord provide moral and political guidance on how a state should act.<sup>9</sup> By creating political commitments in lieu of treaties, the states do not intend for the agreements to be legally binding or to create legally enforceable rights and obligations. Agreements that are not intended to be legally binding will not satisfy the test for determining whether they constitute treaties under international law and will therefore not be governed by international law.<sup>10</sup> Some political agreements specify whether the states intend for the agreement to be nonlegally binding; others employ aspirational language considered too nebulous to create legally enforceable obligations.<sup>11</sup>

Without the auspices of international law to govern the terms of an agreement, standard legal remedies will not apply for noncompliance.<sup>12</sup> A state can, however, pursue political remedies as a consequence of breaching a political commitment, provided that response does not violate international law.<sup>13</sup> The political remedy may be sufficient to sway compliance, suggesting that political commitments may be as helpful as legally binding treaties in

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(2009) (providing the first "sustained constitutional inquiry of the U.S. political commitments practice").

<sup>7</sup> See EMILY C. BARBOUR, CONG. RESEARCH SERV., R41175, INTERNATIONAL AGREEMENTS ON CLIMATE CHANGE: SELECTED LEGAL QUESTIONS 7–15 (2010), <http://fpc.state.gov/documents/organization/142749.pdf> (describing the differences between the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Copenhagen Accord).

<sup>8</sup> See *id.* at 17–18.

<sup>9</sup> Hollis & Newcomer, *supra* note 6, at 517. For further discussion on Hollis and Newcomer's definition of a political commitment, see *infra* Part II.D.

<sup>10</sup> International law is dependent upon nation-states' willingness to bind themselves to the text of an agreement. See Oscar Schachter, Editorial Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 296 (1977).

<sup>11</sup> *Id.* at 297. Hollis and Newcomer identify several agreements with accompanying language: "The NATO-Russia Founding Act's preamble references its 'political commitments,' while the preamble to the 1987 Stockholm Disarmament Declaration describes the agreement as 'politically binding.'" Hollis & Newcomer, *supra* note 6, at 523–24.

<sup>12</sup> Fritz Münch, *Non-Binding Agreements*, 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 11 (1977) (arguing that legal reprisals can only originate from the breach of a legal obligation).

<sup>13</sup> *Id.* (discussing how a political action that does not violate international law would be permissible even though a legal sanction would not be).

anticipating the actions of other parties. Evidence, in fact, indicates they have the same compliance rates.<sup>14</sup>

For the United States specifically, political remedies might be preferable to legal ones, given that the United States can use any nonlegal weapon in its arsenal, including economic sanctions, to retaliate for the breach of an agreement.<sup>15</sup> Without the need to resort to a world court or general principles of international law to enforce a breach, the United States has the freedom to pursue whichever form of an agreement it can adopt most efficiently. In my view, the executive branch will increasingly rely upon political commitments precisely because, for all intents and purposes, political commitments can be used interchangeably with treaties and congressional-executive agreements.<sup>16</sup> The executive branch can also operate clandestinely because no congressional approval is required to give the agreements effect. These two factors, taken together, will result in a dangerous usurpation of power by the executive branch.

In the most thorough discussion of political commitments to date, Duncan Hollis and Joshua Newcomer made the case for defining a constitutional space for them within the purview of the executive branch, albeit not with plenary jurisdiction.<sup>17</sup> They argue that “the executive power to make international political commitments is subject to legislative checks, even if distinct from—and lesser than—those that operate in the treaty context.”<sup>18</sup> Nonetheless, they leave unanswered the question of how Congress can insert itself into the political commitment making process, considering that the agreements can be forged without congressional knowledge.<sup>19</sup>

This Article poses a solution to that dilemma, which is to use existing law to force the executive branch to report nonlegally binding international agreements to Congress. Applying existing law to political commitments is an important step in rebalancing the distribution of power in the government by providing Congress with information about the nation’s foreign affairs. Indeed, the imbalance of information between the two branches is not a new problem.

<sup>14</sup> See Gérardine Meishan Goh, *Softly, Softly Catchee Monkey: Informalism and the Quiet Development of International Space Law*, 87 NEB. L. REV. 725, 734–35 (2009) (“Treaty and non-treaty agreements have historically enjoyed largely the same compliance rates.”).

<sup>15</sup> See Münch, *supra* note 12, at 11.

<sup>16</sup> For discussion on this debate and its application to political commitments, see *infra* Part III.B.

<sup>17</sup> Hollis & Newcomer, *supra* note 6, at 571–72 (investigating which branch should exercise the political commitment authority, provided it exists, and determining that congressional involvement is best suited to instances when immediate action and secrecy are not necessary factors).

<sup>18</sup> *Id.* at 514.

<sup>19</sup> *Id.* Hollis and Newcomer do, however, provide an excellent framework for when Congress ought to act, focusing on questions of form, substance, organization, and autonomy. *Id.* at 527–28.

In the last century, the lack of executive accountability and responsibility in concluding non-treaty agreements led to the creation of the Case-Zablocki Act (“Case Act”), which attempts to control the volume of executive agreements and to retain some level of congressional participation.<sup>20</sup> The Case Act arose from Congress’s desire to be made aware of international agreements that were not concluded pursuant to the Treaty Clause.<sup>21</sup> The law allows Congress to monitor and oversee international agreements that are not concluded as treaties by requiring the Secretary of State to transmit the text of any international agreement to Congress within 60 days after the agreement has entered into force.<sup>22</sup>

This Article begins by providing an overview of the many forms that the United States uses to conclude international agreements—particularly focusing on congressional involvement in each form. Although we can identify a degradation in congressional participation over the last century in international agreement making, its complete absence from the formation of political commitments is particularly worrisome. Part III uses examples of political commitments to highlight the domestic legal consequences of their formation, illustrating how the lack of interbranch coordination is more than a theoretical imbalance of power, and thereby making the case for congressional notification. Finally, Part IV argues in favor of applying the terms of the Case Act to political commitments to provide Congress with more oversight over foreign affairs. Neither the text nor the history of the Case Act indicates that political commitments should be immune from the requirements. The result will be the creation of international agreements that are more democratic, more transparent, and more incontrovertible.

## II. CONGRESSIONAL INVOLVEMENT IN INTERNATIONAL AGREEMENT MAKING

The Treaty Clause has earned its critics.<sup>23</sup> The required two-thirds concurrence of the Senate enabled 35 Senators to hold up ratification of the

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<sup>20</sup> Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b (2014)).

<sup>21</sup> *International Executive Agreements: Hearing Before the Subcomm. on Nat’l Sec. Policy & Sci. Devs. of the H. Comm. on Foreign Affairs*, 92nd Cong. 2 (1972) [hereinafter *International Executive Agreements Hearing*]. “It is those agreements that you are so reluctant to share with Congress which we think this legislation should make available to us.” *Id.* at 16 (statement of Rep. Clement J. Zablocki, Chairman, Subcomm. on Nat’l Sec. Policy & Sci. Devs.).

<sup>22</sup> 1 U.S.C. § 112b(a) (“The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter.”).

<sup>23</sup> The Treaty Clause 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.”

Treaty of Versailles, a treaty endorsed by their 49 remaining peers.<sup>24</sup> Human rights treaties in particular have been held hostage, leading to the Senate's popular nickname as the "graveyard of treaties."<sup>25</sup> Perhaps as a result of the complicated treaty approval process, various forms of international agreements have emerged that provide the Executive with greater flexibility when concluding agreements with foreign states.<sup>26</sup> In fact, far more often than not, the President creates agreements with foreign nations by sole executive action or by permission from Congress.<sup>27</sup> In an attempt to demystify the international agreement making process in the United States and to address the confusion in nomenclature, this Article will be specific about the types of agreements being discussed. I have elected not to discuss the well documented and widely

U.S. CONST. art. II, § 2, cl. 2. Its location within Article II of the United States Constitution results in the designation "Article II treaty," which will be used throughout this Article in contrast to the other forms of international agreements.

<sup>24</sup> Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 861 (1995) (citing 59 CONG. REC. 4599 (1920) ("When war struck, the Senate's rejection of the League of Nations became a symbol of isolationist irresponsibility.")). John Yoo, however, claims that there has only been one other significant treaty defeat, namely President Bill Clinton's Nuclear Test-Ban Treaty. John C. Yoo, *Laws As Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 758 (2001).

<sup>25</sup> See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 248 (2012); see also *The Graveyard of Good Treaties*, NATION, Mar. 15, 1900, at 199 (discussing the history of the phrase "graveyard of treaties").

<sup>26</sup> One lucid explanation of challenges of Article II treaty ratification can be found in Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1310 (2008). In particular, Hathaway uses the ideological positions of the 67th Senator (versus the 51st) to demonstrate the polarized extremes of politics:

If we array the senators in the 109th Congress from most liberal to most conservative according to a widely used measure of ideological position, we see that in the 109th Congress the sixty-seventh senator was just over twice as conservative as the fifty-first senator. In the reverse dimension, the sixty-seventh senator was also just over twice as liberal as the fifty-first. In other words, the supermajority requirement means treaties must gain the support of senators that are twice as conservative or liberal as the so-called median voter in the Senate.

*Id.* at 1310–11.

<sup>27</sup> According to the Congressional Research Service, most international agreements are not concluded pursuant to the procedure outlined in Article II. In the first 50 years after its founding, the nation concluded two times as many treaties as other international agreements. CONG. RESEARCH SERV., LIBRARY OF CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 15 (Comm. Print 1993). From the period from the Second World War to 1993, the executive branch presented Article II treaties in only about 10% of its total international agreement making. *Id.* That percentage has likely decreased since the report was created in 1993. Since May 2005 (a date chosen to represent an approximately 10-year period from this Article's publication), for example, only 70 treaties have been presented to the Senate for its advice and consent. See *Congressional Documents*, U.S. GOV'T PUB. OFF., <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC> (last visited Mar. 30, 2016).

understood Article II treaty process in this section, in order to focus on the *other* international agreements and their histories. I have also reordered the typical classification of the four types of agreements. The agreement forms can be understood by situating them in their historical context, but the legitimacy of their authorization also provides a useful descriptive device. This section of the Article discusses, in turn: 1) *ex post* congressional-executive agreements, which receive explicit endorsement by two branches of the government; 2) sole executive agreements, which have constitutional support, but do not require congressional approval; 3) *ex ante* congressional-executive agreements, which ostensibly have congressional permission; and 4) political commitments, which have none of these elements.

*A. Ex Post Congressional-Executive Agreements—Approval Requirement of Both Houses of Congress*

The first of the four types of agreements is the *ex post* congressional-executive agreement, which the United States has long observed as an alternative method of creating binding international agreements. The *ex post* congressional-executive agreement involves participation of the House of Representatives and requires only a majority of the Senate, rather than the concurrence of “two thirds of the Senators present” required by the Treaty Clause.<sup>28</sup> Much like the creation of an Article II treaty, “*ex post* congressional-executive agreements” are concluded by the President without any specific constitutional or statutory authorization in advance of the negotiations. These agreements become law after they pass through Congress as ordinary legislation or joint resolutions and are signed by the President pursuant to the Presentment Clause.<sup>29</sup>

Some scholarly debate remains as to whether congressional-executive agreements are a class of agreements that can be substituted with Article II treaties, or whether the treaty clause is exclusive to certain categories of

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<sup>28</sup> U.S. CONST. art. II, § 2, cl. 2. The history of the *ex post* agreement can be found in Bruce Ackerman and David Golove’s fascinating article, *Is NAFTA Constitutional?*, where the authors trace the creation of the agreement form to the 1920s, culminating in actions during the New Deal. See Ackerman & Golove, *supra* note 24, at 827–28. The authors present the story of President William Howard Taft hoping to win a tariff reduction with Canada. Taft had not been authorized by Congress to make such an agreement, so he finessed the language to contain a promise to coax Congress to enact statutes to authorize the deal upon his return. *Id.* Not all scholars agree with Ackerman and Golove’s historical account, however. See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 988 (2001) (arguing that “treaties and non-treaty agreements emerged near-equivalents in two important respects long before the alleged watershed of 1944–1946”).

<sup>29</sup> U.S. CONST. art. I, § 7, cl. 2. (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”).



agreements.<sup>30</sup> After all, the argument goes, if agreements concluded outside the purview of the Treaty Clause are perfectly valid, why is there a heightened approval process for treaties?<sup>31</sup> Nonetheless, the *Restatement (Third) of the Foreign Relations Law of the United States* endorses the position that the congressional-executive agreement can be used interchangeably with the treaty form.<sup>32</sup>

It would be misguided to attribute the frequent employment of ex post congressional-executive agreements solely to their ability to serve as an end run around the cumbersome requirements in the Treaty Clause. One argument in favor of relying on ex post congressional-executive agreements would be to bypass the problem of non self-executing treaties.<sup>33</sup> Under U.S. law, the advice and consent of the Senate is not enough to create domestic obligations for treaties; the treaty must be categorized as either self-executing or not.<sup>34</sup> This means the United States can be bound by the terms of a treaty internationally, but the treaty cannot be enforced domestically until Congress has created

<sup>30</sup> See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1226 (1995) (examining the text, history, and structure of the Constitution and concluding that “the Article II treaty making procedure is exclusive”).

<sup>31</sup> Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 194 (1998) (“[T]here must be a substantive component to treaties that is more threatening (or, more precisely, militates for greater caution) than the substance of nontreaty agreements.”). Even Hathaway makes the case that certain types of agreements should remain “treaties” under the Article II process because the subject for a congressional-executive agreement cannot exceed “the bounds placed by the Constitution on congressional authority” enumerated in Article I. Hathaway, *supra* note 26, at 1339.

<sup>32</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e. (AM. LAW INST. 1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.”).

<sup>33</sup> Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) (“At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’”).

<sup>34</sup> See *id.* at 702 (discussing the introduction of this distinction into U.S. jurisprudence in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829): “The Court’s holding in *Foster* recognizes that the general rule established by the Supremacy Clause, under which treaties are enforceable in the courts without prior legislative action, is one that may be altered by the parties to the treaty through the treaty itself. Treaties do not require legislative implementation in the United States ‘by their nature,’ but they may require legislative implementation through affirmative agreement of the parties. If the parties to the treaty agreed that the rights and liabilities of the individuals before the court were to be affected only through future lawmaking acts of the states parties—if they ‘stipulated for some future legislative act’—then the treaty does not ‘operate of itself’ and accordingly cannot be enforced by the courts without prior legislation.”).

implementing legislation.<sup>35</sup> As a result, many treaties effectively require not only two-thirds of the Senators present to approve the terms, but also require the House and Senate to pass implementing legislation—in effect giving the House an opportunity to hold a properly ratified treaty hostage if it does not approve of the terms. Ex post congressional-executive agreements require the House to be involved during the approval process, and implementing legislation can be created during the process by which the agreement is approved. One can even persuasively argue that because congressional-executive agreements involve the House of Representatives, they are more democratic than agreements made pursuant to the Treaty Clause.<sup>36</sup> An ex post congressional-executive agreement has received the blessing of both branches of Congress and the President. The result is a transparent, democratically representative, reliable process that involves both houses of Congress and the Executive.

#### B. *Sole Executive Agreements—Creation Without Congressional Involvement*

Alternatively, the second type of agreement, the sole executive agreement, allows the President to conclude an agreement without any formal action by the House or the Senate, but rather pursuant to the President's own constitutional authority as Commander-in-Chief.<sup>37</sup> Despite the fact that this implicit authority provides the President with the ability to create binding law without congressional participation, scholars and courts have long supported

<sup>35</sup> This principle was most recently put into effect in *Medellin v. Texas*, 552 U.S. 491, 503–06 (2008) (holding that the Constitution does not require state courts to honor treaty obligations without domestic legislation implementing the terms of the treaty). An International Court of Justice opinion, *Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, 2004 I.C.J. Rep. 12 (Mar. 31), would have provided relief for petitioner Medellín to file a habeas application challenging his conviction and sentence on the grounds that he has not been informed of his rights under the Vienna Convention on Consular Relations. *Medellin*, 552 U.S. at 503. The Court found that the *Avena* judgment created an international obligation that did not become domestically binding law because none of the treaty sources created binding federal law without the existence of implementing legislation, and no such legislation had been enacted. *Id.* at 503–06.

<sup>36</sup> See, e.g., Robert A. Dahl, *Congress and Foreign Policy* 24 (Yale Inst. of Int'l Studies, Working Paper No. 1949) (“Surely majority action by both Houses is more ‘democratic.’”). Hathaway notes that the Senate is even less representative of its constituency today than it was during the founding, noting that “Senators representing only about eight percent of the country’s population can halt a treaty.” Hathaway, *supra* note 26, at 1310.

<sup>37</sup> Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 369 (2006) (arguing that the constitutional designation of the President as Commander-in-Chief of the Armed Forces enables the President to “make legally binding decisions—such as the disposition of armed forces personnel—without the involvement of Congress”).

it.<sup>38</sup> Because of the constitutional restraints on the presidential authority to enter into sole executive agreements, they did not account for a significant portion of international agreements concluded by the United States until recently.<sup>39</sup> The reality of those limitations has been upended, in part on reliance upon a handful of Supreme Court decisions, with claims of 15,000 sole executive agreements in the past half-century.<sup>40</sup>

The limits of the Commander-in-Chief power to conclude international agreements were widely tested throughout the 20th century. The extent to which the President may conclude *peacetime* agreements under this power, specifically, remains an open question. President James Monroe famously submitted to the Senate an agreement with Great Britain to limit the number of naval forces on the Great Lakes, inquiring at the time whether it was “such an agreement as the Executive is competent to enter into by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate, and in the latter case for its advice and consent, should it be approved.”<sup>41</sup> Presumably, President Monroe wanted to add the Senate as a party

<sup>38</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (AM. LAW INST. 1987) (“[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.”); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 229 (2d ed. 1996) (“The President can . . . make many [international] agreements on his own authority, including, surely, those related to establishing and maintaining diplomatic relations, agreements settling international claims, and military agreements within the Presidential authority as Commander in Chief. There are doubtless many other ‘sole’ agreements within the President’s foreign affairs powers, but which they are is hardly agreed.”). The presumptive authority is not without debate, however. Michael Ramsey, for example, argues that the Framers intended for the power to conclude executive agreements only to extend to minor and temporary matters. See Ramsey, *supra* note 31, at 133. Regardless of the Constitutional authority for these agreements, there is judicial authority and precedent for them, and they are part of the international agreement framework. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). “The Constitution provides precise procedures to govern the adoption of each source of law recognized by the Clause. Significantly, none of these procedures permits the President—acting alone—to adopt, amend, or repeal supreme federal law.” Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575 (2007).

<sup>39</sup> According to a study conducted in 1984, only seven percent of all international agreements were solely based on enumerated powers of the President, and of that seven percent, military agreements composed the majority. LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 12–18 (1984). Additionally, the study estimated that over 87% of the executive agreements that have been concluded by the United States during the past several decades are directly based upon and authorized by legislation enacted by Congress. *Id.* at 12.

<sup>40</sup> Van Alstine cites to 15,000 sole executive agreements in the last 50 years. Van Alstine, *supra* note 37, at 319. The fuller history of the Supreme Court doctrine can be found in Ramsey, *supra* note 31, at 145.

<sup>41</sup> Ackerman & Golove, *supra* note 24, at 816–17 (citing S. EXEC. DOC. NO. 9, 52 Cong. 2d Sess. (1892)).

to remove any doubt the British government might have about the binding character of the agreement.<sup>42</sup> Ackerman and Golove remark that, whatever the reason, the incident “suggests how narrowly early Presidents construed their leeway under the Treaty Clause.”<sup>43</sup> Later Presidents would test the boundaries of their Article II powers without Senate endorsement.

Despite their constitutional legitimacy, sole executive agreements are less reliable than congressional-executive agreements. Just as a President may issue an Executive Order that ignores or rescinds a previous Executive Order, so can a subsequent President, through actions or statements, overturn an antecedent sole executive agreement.<sup>44</sup> Ackerman and Golove highlight President Theodore Roosevelt’s concern regarding an agreement to place Santo Domingo under American receivership. The Senate rejected the treaty, but the President put the agreement into effect anyway, citing his *modus vivendi* authority to conclude international agreements.<sup>45</sup> According to President Theodore Roosevelt, the Constitution did not forbid him from temporarily entering the agreement pending senate reconsideration, but “it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office.”<sup>46</sup> Sole executive agreements that do not receive congressional endorsement thus face a question of permanence. Although the agreement form stands on firm constitutional footing, it is not democratically endorsed, and is therefore not as strong of a commitment as the congressional-executive agreements.

### C. *Ex Ante Congressional-Executive Agreements—Prior Congressional Authorization for Executive Action*

The United States enters into the vast majority of international agreements not as treaties, sole executive agreements, or ex post congressional-

<sup>42</sup> James F. Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 YALE L.J. 63, 72 (1905).

<sup>43</sup> Ackerman & Golove, *supra* note 24, at 816.

<sup>44</sup> *Id.* at 820 n.70 (describing the literature pertaining to arguments for and against the President’s sole ability to make binding obligations).

<sup>45</sup> The Commander-in-Chief authority is just one of several categories under which Presidents claim to have the authority to conclude international agreements. Another substantial category is referred to as “*modus vivendi*,” which refers to agreements of a temporary nature that are normally put into effect pending further action. *Modus vivendi*, BLACK’S LAW DICTIONARY (10th ed. 2014). In the Santo Domingo instance, President Roosevelt declared that the agreement was put into effective pending Senate *reconsideration*. See U.S. DEP’T OF STATE, ARTICLES RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 360–61 (1905) (emphasis added).

<sup>46</sup> Ackerman & Golove, *supra* note 24, at 819 (citing THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 510 (1920)).

executive agreements, but rather as *ex ante* congressional-executive agreements.<sup>47</sup> Despite the similarity in nomenclature with *ex post* congressional-executive agreements, *ex ante* agreements share many commonalities with sole executive agreements. First and foremost, their legitimacy hinges upon preexisting authority to conclude an agreement. To form an *ex ante* agreement, the President does not rely upon his own presidential powers to conclude an agreement, but rather on statutory authority bestowed upon him by Congress and signed into law by the President.<sup>48</sup>

The terms and specificity of statutory authorization will vary. In some instances, the language authorizes someone in the executive branch (the President may be named but others may be as well) to act in a very specific manner. For example, the Intelligence Authorization Act for Fiscal Year 1987 provided that “[t]he Secretary of Defense may authorize the Defense Mapping Agency to exchange or furnish mapping, charting, and geodetic data, supplies and services to a foreign country or international organization pursuant to an agreement for the production or exchange of such data.”<sup>49</sup> While the actions were specified in the authorization, the foreign countries and international organizations were not, giving broad discretion to the executive branch to determine with whom to conclude the agreements. The vast majority of authorization acts do not require *ex post* approval, which means that not only does the Executive have tremendous leeway when concluding an agreement, but also Congress has no recourse if it disagrees with any of the agreement’s terms.<sup>50</sup> Even more troubling is that the authorization acts often have no

<sup>47</sup> The study of agreements concluded between 1946 and 1973 found that almost 87% of all international agreements were executive agreements entered by the President under statutory authority granted by Congress. JOHNSON, *supra* note 39, at 12. A second famous, but also dated, study found that “the overwhelming proportion of international agreements are based at least partly upon statutory authority (88.3% of agreements reached between 1946 and 1972), followed by treaties (6.2%) and agreements based solely on executive authority and action (5.5%).” R. ROGER MAJAK, 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22 (Comm. Print 1977). These studies make no distinction between *ex ante* and *ex post* statutory approval. *But see* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 150 n.16 (2009) (finding that only 9 of the 3,000 executive agreements concluded between 1980 and 2000 were *ex post* congressional-executive agreements).

<sup>48</sup> Normally, authorization acts that the President signs into law do not expire, meaning they provide authority for any subsequent President, not just the one signing the bill into law, to enter into an *ex ante* agreement. In fact, authorization acts have been used to provide a basis for international agreements decades after they were signed into law. *See* Hathaway, *supra* note 47, at 214.

<sup>49</sup> Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 601(a), 100 Stat. 3190, 3202 (1986) (codified as amended at 10 U.S.C. § 454 (2011)).

<sup>50</sup> Hathaway, *supra* note 47, at 167 (“And if Congress were to object to an agreement, it would have no recourse short of a majority vote in each house, subject to veto by the President, to undo an international commitment made using its delegated authority. Even then, Congress

expiration to them, meaning that a President today might conclude an agreement pursuant to authorization that was granted decades earlier, in a completely different political reality and climate.<sup>51</sup>

Benefits of the *ex ante* congressional-executive agreement are plain to see. These agreements rely not solely upon the constitutional authority of the President, but rather upon interbranch coordination with Congress.<sup>52</sup> Having gone through both houses and the President, *ex ante* congressional-executive agreements have the status of domestic legislation, which means they provide greater legitimacy to foreign states.<sup>53</sup> When the Constitution does not empower a President to make agreements that bind the nation, advance congressional authority provides flexibility during negotiations and a guarantee to the foreign state that the commitment will be honored.<sup>54</sup> Indeed, a foreign state is certain to prefer *ex ante* congressional-executive agreements as they are more secure, reliable and faster to create.

Of course, the appearance of congressional participation is misleading. In reality, the lack of congressional involvement during the process, which makes negotiating and concluding an agreement so much easier for the Executive, shows how little interbranch coordination truly exists.<sup>55</sup> The process described above represents a dramatic change from the level of oversight that Congress previously conducted with international agreements, which provided “none of the broad, open-ended, time unlimited grants of authority from Congress to the president that we find today.”<sup>56</sup>

would only be able to render the agreement unenforceable under U.S. domestic law—the binding international commitment would remain.”)

<sup>51</sup> *Id.* at 214 (“Many agreements today are concluded under broad *ex ante* authority granted to the President by Congress four or five decades earlier in a vastly different context.”).

<sup>52</sup> To quote Justice Robert H. Jackson, “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). In contrast, Justice Jackson argues the President acts in the “twilight zone” when he relies on his sole authority and Congress is silent. *Id.* at 636.

<sup>53</sup> Similar to the argument espoused above, even a treaty that negotiators believe will be ratified domestically still requires implementing legislation. *Ex ante* congressional-executive agreements have greater domestic legal status than treaties, which provides for more reliable commitments. See Hathaway, *supra* note 26, at 1316.

<sup>54</sup> Ackerman and Golove detail an interesting story of the United States backing out of a trade agreement with Brazil because it relied upon an executive agreement that could not bind the United States without the Senate’s consent. See Ackerman & Golove, *supra* note 24, at 822–23.

<sup>55</sup> As I referenced earlier, many of the agreements are concluded under broad authority granted to the President. Hathaway furthers this point by stating that “[e]ven though the agreements have been ‘approved’ by Congress in the narrow legal sense, there is little genuine cooperation between the President and Congress in the process of creating the agreements.” Hathaway, *supra* note 47, at 214.

<sup>56</sup> *Id.* at 173.

The difficulty of tracking *ex ante* congressional-executive agreements was no small matter to Congress because these agreements evaded the Senate's exercise of advice and consent, which previously was how Congress had been made aware of international agreements.<sup>57</sup> The problem of secrecy led to the creation of the Case-Zablocki Act in 1972.<sup>58</sup> The Case Act requires the Secretary of State to transmit the text of any international agreement to Congress within 60 days after the agreement has entered into force.<sup>59</sup> Agreements reported under the Case Act are public unless, in the opinion of the President, their disclosure would be harmful to national security.<sup>60</sup> The purpose of the Case Act is not to wrest foreign affairs away from the President, but to notify Congress of international agreements that are not concluded pursuant to Article II.<sup>61</sup> Although the rationale for congressional delegation of international agreement making may be strong, the difficulty of tracking *ex ante* congressional-executive agreements, and their enabling statutes, make them democratically problematic for Congress and the public at large.

*D. Political Commitments—Agreements With No Congressional Involvement*

Political commitments provide yet another vehicle for the United States to enter into agreements with foreign states.<sup>62</sup> Hollis and Newcomer define a

<sup>57</sup> E.g., *Executive Agreements*, 28 CONG. Q. ALMANAC 619, 619–21 (1972) (discussing the Case Act and its purposes). The report references the increased use of executive agreements since World War II and the shift in subject matter to include “issues formally considered important enough to require Senate ratification by treaty.” *Id.* The report specifically mentions military base and joint defense agreements. *Id.* at 620.

<sup>58</sup> See Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b (2014)). See *infra* Part IV for more complete information surrounding the creation of the Case Act.

<sup>59</sup> 1 U.S.C. § 112b(a).

<sup>60</sup> *Id.*

<sup>61</sup> S. REP. NO. 92-591, at 3 (1972) (“The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy.”).

<sup>62</sup> The nomenclature for this form of agreement has changed over time. The original nomenclature “gentlemen’s agreement” has fallen out of favor and the Restatement currently uses the terminology “nonbinding agreements.” RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS IN THE UNITED STATES § 301 cmt. e. (AM. LAW INST. 1987). I have taken the approach adopted by Hollis and Newcomer in naming them political commitments because I believe the term captures all of the forms of informal agreements, including *de facto* agreements, political texts, extralegal agreements, nonlegal agreements, and international understandings. See Hollis & Newcomer, *supra* note 6, at 516 n.30. Confusingly, the phrase is not endorsed unanimously. See, e.g., Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV.

political commitment as “a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature.”<sup>63</sup> I adopt their definition not only for the inquiry into whether the instrument provides a legally binding constraint, but also for its focus on their “political or moral” nature, which provides a useful mechanism to distinguish political commitments from other low-grade international agreements, such as contracts for sales.

The Copenhagen Accord on Climate Change is a recent example of a political commitment. During his speech on nonlegal understandings, Harold Koh gave several other examples, including the “Arctic Council,” which emerged as a group of eight states to facilitate sustainable development and cooperation in the Arctic.<sup>64</sup> The use of political agreements has become widespread, particularly since the 1970s.<sup>65</sup> The content and form vary widely, having “a significant impact on matters including security, arms control, nuclear proliferation, monetary exchange, financial capital, sovereign debt, trade, health, conservation, environmental preservation, pollution, development, and human rights.”<sup>66</sup> A political commitment might take the shape of an oral agreement or a memorandum of understanding among mid-level government officials. It might also be a formal document that shares all of the characteristics of a treaty, except for a disclaimer stating that the compact is politically, not legally, binding. As with *ex ante* congressional-executive agreements and sole executive agreements, political commitments do not

735, 740 n.20 (2014) (“We have chosen to use the term ‘soft law’ to refer to nonbinding transnational agreements between executive branch actors because the term is both convenient and frequently used in this context.”). However, “soft law” is also a term of art referring to “international declarations, comments, interpretations, decisions, and pronouncements.” David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 834 (2012). I prefer “political commitment” because it captures the concept of an agreement more than a unilateral pronouncement.

<sup>63</sup> Hollis & Newcomer, *supra* note 6, at 517.

<sup>64</sup> Koh, *supra* note 1, at 14 (“Again, the text is not legally binding, but it includes significant undertakings, and states have already made significant progress in fulfilling their pledges and improving nuclear security.”). The Arctic Council is even more interesting as it is

layered on top of a legal backdrop of the Law of the Sea Convention, and the customary international law it reflects, which answer important questions about sovereign rights and jurisdiction in the Arctic. Now notice that the Council is not a formal international organization; it was not set up by an international agreement, and the majority of its work is not legally binding.

*Id.*

<sup>65</sup> Hollis & Newcomer, *supra* note 6, at 565. The authors list an array of political commitments after the Ford Administration including the Sinai Peace Accords, the Bonn Declaration, the London Guidelines on Nuclear Exports and Chemical Trade, the Algiers Accords, commitments to reflag Kuwaiti oil tankers, the 1992 Charter for Partnership and Friendship with the new Russian Federation, the Rio Declaration, and the G8 Declaration on Climate Change. *Id.* at 565–66.

<sup>66</sup> *Id.* at 529.



require post-hoc congressional approval, which offers the executive branch a great deal of flexibility in negotiations.<sup>67</sup> A political commitment also provides the executive branch with the ability to terminate the agreement unilaterally or to deviate from it without legal consequences.<sup>68</sup>

For the United States, the most important feature of a political commitment may be its interchangeability with treaties in terms of enforcement.<sup>69</sup> Although a legal remedy will not be available in cases of breach, states nonetheless will often pass on the opportunity to pursue a legal remedy when one is available, opting instead to employ other tools. Thus far, the repercussions for Russia's 2014 actions in Crimea, for example, have been economic rather than legal.<sup>70</sup> The United States, working with the European Union, decided to pursue waves upon waves of economic sanctions, targeting the state's financial, energy, and arms sectors, which were controlled by specific individuals in Russia.<sup>71</sup> In terms of expediency and focus, the sanctions provided the United States and the European Union with more control, illustrating the ascendancy of economic sanctions over legal remedies. A political commitment therefore can accomplish the same U.S. foreign policy objectives as a multilateral treaty or a congressional-executive agreement. A political commitment, however, excludes Congress, whereas no other agreement form will have effect without congressional approval. As a result, too much power lies in the hands of one political branch.

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<sup>67</sup> *Id.* at 526. In addition to flexibility, the authors identify three other rationales for the proliferation of political commitments in lieu of treaties and executive agreements: credibility, confidentiality, and domestic law. In terms of credibility, they argue that political commitments “communicate less strong or less intense expectations of future behavior than do treaties.” *Id.* Political commitments can be confidential and certainly have less public visibility than treaties. They require no public debate or hearings, which can result in little public pressure to act. *Id.* Finally, as reiterated throughout this Article, domestic law “controls treaty making but not the formation of political commitments.” *Id.*

<sup>68</sup> The ability to withdraw from a fully ratified treaty is more complicated than from a political commitment, although exit provisions in the text of a treaty are not uncommon. *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1588–89 (2005) (describing how states can lawfully denounce treaties provided that they follow the specified conditions).

<sup>69</sup> *See* Hollis & Newcomer, *supra* note 6, at 543 (arguing that international law may allow the United States to claim a legal violation, but if the United States wants to respond to a breach, it employs political responses).

<sup>70</sup> This Article is hardly the first to imply that Russia's actions constituted an act of aggression in violation of the U.N. Charter. *See, e.g.,* Cynthia Barmore & Chris Miller, *Dumping Debt and Seizing Assets: Ukrainian Countermeasures for Russian Aggression*, 67 STAN. L. REV. ONLINE 67, 70 (2014); Scott Appleton, *Fighting for a Better Future*, 68 IBA GLOBAL INSIGHT 12 (June 6, 2014), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5d13ab36-1f50-4885-89f4-e53d95379648>.

<sup>71</sup> Kate Beioley, *Russia: Look the Other Way*, LAWYER, Nov. 24, 2014, at 1.

### III. THE DOMESTIC LEGAL CONSEQUENCES OF POLITICAL COMMITMENTS

To prevent this imbalance of power within the political branches, the Case Act should be applied to political commitments as it is applied to other forms of international agreements, thereby providing Congress with more oversight over foreign affairs. As described above, the executive branch unilaterally concludes political commitments. There is no explicit constitutional permission for the creation of political commitments, although the authors Hollis and Newcomer have done an admirable job of explaining why the power should not be a plenary executive one.<sup>72</sup> Until we agree upon a framework to understand what the President can conclude as a political commitment, no subject matter is off the table. These commitments have the potential to be contentious, unpopular, and even illegal. This part of the Article will illustrate how political commitments affect domestic law in order to demonstrate why congressional oversight is an important complement to the executive branch's international agreement making.

#### A. *SALT II and Political Commitments' Conflicts with the Treaty Clause*

Some believe that political commitments function as "treaties in disguise" and should trigger the treaty making process.<sup>73</sup> Political commitments have certainly been used as a vehicle to bypass the restrictive Advice and Consent provisions of the Treaty Clause. The clearest example of such an end run was the SALT II Treaty, which arose from two rounds of negotiations between the United States and the Soviet Union beginning in 1972.<sup>74</sup> The purpose of the SALT II Treaty was to complete the limitations on strategic offense systems that began with SALT I, the first fully ratified treaty that resulted from the negotiations.<sup>75</sup> On June 18, 1979, President Jimmy Carter and Soviet General Secretary Leonid Brezhnev reached an agreement to limit strategic launchers, an agreement that was formally submitted to the Senate for advice and consent four days later.<sup>76</sup>

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<sup>72</sup> Hollis & Newcomer, *supra* note 6, at 556–58 (finding multiple forms of international agreement making in the text of the Constitution and describing the legislative role in each of the agreement forms).

<sup>73</sup> *Id.* at 538 (describing the domestic debates over the U.S.-Iraqi Declaration of Principles, which may have influenced the executive branch's decisions to conclude the agreement not as a political commitment, but instead as a treaty).

<sup>74</sup> THOMAS GRAHAM, JR., *DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW* 50 (2d ed. 2012). SALT II is the common acronym for the second round of the Strategic Arms Limitation Talks.

<sup>75</sup> *Id.* The purposes of SALT II are outside the scope of the Article but can be found in many publications. *See, e.g., id.* at 50–102.

<sup>76</sup> *Id.* at 93.

As with all international agreements, the domestic political climate greatly influences how arrangements are negotiated and whether they will be ratified. The SALT II Treaty faced ratification problems for many reasons, including the Carter Administration's prior difficulty with the Panama Canal treaties, which provided "ample reason for the administration to expect a rough reception for any SALT treaty, which, by its nature, will entail far more complex and controversial issues than those which arose over the canal."<sup>77</sup> The SALT II ratification process took place during a presidential election season, a time we would expect Congressmembers to be less willing to take controversial stands. Negotiations with the Soviets at that time were certainly controversial because of external Soviet actions during the previous decade. There was "a venting of generalized anger at the Soviets for the intervention in Angola and Ethiopia a few years before and for their efforts to exploit the more recent, more spectacular American setback in Iran."<sup>78</sup> Many wanted to see SALT II fail, not because the Soviets had more to lose than the United States, but from a desire to punish them for their actions throughout the globe.<sup>79</sup> Additional obstacles emerged after the introduction of the SALT II Treaty to the Committee on Foreign Relations. In September 1979, the United States discovered that a Soviet combat brigade was stationed in Cuba.<sup>80</sup> The brigade situation resulted in the delay of hearings and the Foreign Relations Committee's report, which was originally scheduled to be filed by September 25, 1979.<sup>81</sup> The delay proved critical for the Carter Administration, as the Soviet military would expand its presence in Afghanistan in November 1979.<sup>82</sup> Nonetheless, Senate Majority Leader Robert C. Byrd pressed on, believing that

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<sup>77</sup> Maxwell D. Taylor, *What if SALT II Fails?*, 2 AEI DEF. REV. 15, 15 (1978). "First, our negotiators should never initial a draft treaty in Geneva that does not have a high probability of Senate approval." *Id.* at 16.

<sup>78</sup> STROBE TALBOTT, *ENDGAME: THE INSIDE STORY OF SALT II* 283 (1980).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 284–85 ("After having assured the Senate that Soviet military personnel in Cuba were not there in a combat role, the administration belatedly discovered that some 2,600 Soviet troops in Cuba (approximately one third of the total Soviet contingent there) had in fact been organized into a combat brigade for a number of years; their mission involved maneuvers on their own rather than the training of Cubans."); see also DAN CALDWELL, *THE DYNAMICS OF DOMESTIC POLITICS AND ARMS CONTROL: THE SALT II TREATY RATIFICATION DEBATE* 167 (1991) ("Opponents of the SALT II Treaty asked, 'If the United States cannot even keep track of a few thousand Soviet soldiers, how can it possibly keep track of thousands of Soviet missiles?'").

<sup>81</sup> CALDWELL, *supra* note 80, at 168.

<sup>82</sup> TALBOTT, *supra* note 78, at 288. Talbott does note that as dramatic as the invasion and subsequent retaliation appeared, the crisis had "been building for a long time." *Id.*

the United States Senate would not vote down a major treaty even after the beginning of the Iranian military hostage crisis.<sup>83</sup>

President Carter, in light of these developments, disagreed with Senator Byrd's assessment and sent a letter to the Majority Leader requesting that SALT II not be considered by the Senate.<sup>84</sup> Neither President Carter, nor the subsequent President, Ronald Reagan, formally requested that the Senate return the treaty, which would also have required a majority of the Senate.<sup>85</sup> Instead

the first step was taken towards agreeing with the Soviets informally to observe SALT—it was proposed by President Reagan in a statement in the spring and agreed to by Haig and Andrei Gromyko in the fall—and to begin to reconstitute the SALT negotiations, renamed START, in early 1982.<sup>86</sup>

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<sup>83</sup> “The United States Senate in the twentieth century had never voted down a major treaty that the president wanted (and didn't until 1999), if forced to vote; the tactic always used by those opposed to a treaty was to prevent a vote.” GRAHAM, *supra* note 74, at 98. “The Senate did not like to be seen as formally rejecting a major foreign policy initiative.” *Id.* Graham argues that Senator Samuel Nunn, then uncommitted, could have been persuaded to announce his support for SALT II, which likely would have resulted in the treaty being ratified. *Id.* at 98–99. The only major treaty to have been rejected by the Senate at that time was the Treaty of Versailles. Yoo, *supra* note 24, at 758.

<sup>84</sup> Letter from President Carter to Senator Byrd, Senate Majority Leader, Requesting a Delay in Senate Consideration of the Treaty (Jan. 3, 1980), in 16 WEEKLY COMP. PRES. DOC. 12 (Jan. 7, 1980). President Carter wrote as follows:

In light of the Soviet invasion of Afghanistan, I request that you delay consideration of the SALT II Treaty on the Senate Floor. The purpose of this request is not to withdraw the Treaty from consideration, but to defer the debate so that the Congress and I as President can assess Soviet actions and intentions, and devote our primary attention to the legislative and other measures required to respond to this crisis. As you know, I continue to share your view that the SALT II Treaty is in the national security interest of the United States and the entire world, and that it should be taken up by the Senate as soon as these more urgent issues have been addressed. Sincerely, Jimmy Carter.

*Id.*

<sup>85</sup> GRAHAM, *supra* note 74, at 102. The treaty was not formally returned until 2000, when a Senate resolution directed the return of 19 treaties to the President. S. Res. 267, 106th Cong. (2000).

<sup>86</sup> GRAHAM, *supra* note 74, at 103. “I hastily said, ‘what I meant was the United States would have been obligated to do this if SALT II had entered into force.’” *Id.* at 105; *see also* JERALD A. COMBS, THE HISTORY OF AMERICAN FOREIGN POLICY FROM 1895, at 389 (2012) (“Reagan held all arms control negotiations in limbo for the first sixteen months of his administration, but he promised to abide informally by the ‘fatally flawed’ SALT II Treaty so long as the Soviets did likewise.”).

In other words, the treaty was neither approved nor withdrawn from Senate consideration, effectually stopping the Senate from making a decision.<sup>87</sup> The terms of the agreement, however, were honored by both the Soviet Union and the United States until 1986 when the Reagan Administration withdrew from SALT II.<sup>88</sup>

This episode helps identify several problems with political commitments. First, the actions render the Treaty Clause, with its heightened approval process, moot. The Senate stands to have meager influence in the treaty making process when the President can strip it of its opportunity to provide or deny Consent. If a substantive agreement such as SALT II can be concluded and followed with no congressional approval at all, the executive branch's incentive to include Congress in its agreement making process will be reduced.

Secondly, President Carter's actions stand in stark contrast to President Roosevelt's actions after his Santo Domingo defeat.<sup>89</sup> Roosevelt's fears of a subsequent President invalidating a political commitment came true in the SALT II context when President Reagan unilaterally withdrew from the agreement only a few years later. The Executive has the ability to place a subsequent administration in a precarious position by instituting nonlegally binding obligations that can have disastrous consequences if abandoned. A nuclear disarmament treaty that could not be ratified by the Senate stands as the preeminent example of an agreement that is unlikely to be honored once the President who made the commitment leaves office.

Finally, a political commitment has the potential to violate domestic law. The SALT II agreement appears to contravene the Arms Control and Disarmament Act, which provides:

No action shall be taken pursuant to this chapter or any other Act that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution or unless authorized by the enactment of

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<sup>87</sup> There are some references to President Carter withdrawing the treaty. *See, e.g.*, AMY F. WOOLF ET AL., CONG. RESEARCH SERV., RL33865, ARMS CONTROL AND NONPROLIFERATION: A CATALOG OF TREATIES AND AGREEMENTS 5–6 (2016), <https://fas.org/sgp/crs/nuke/RL33865.pdf> (describing that SALT II was completed in June 1979 but withdrawn by President Carter from Senate consideration when the Soviet Union invaded Afghanistan in December 1979). But it is important to note that it would have required a majority vote of the Senate to return the treaty, which did not occur until 2000. *See* S. Res. 267, 106th Cong. (2000).

<sup>88</sup> GRAHAM, *supra* note 74, at 100.

<sup>89</sup> For discussion, see *supra* note 45 and accompanying text.

further affirmative legislation by the Congress of the United States.<sup>90</sup>

This act, signed into law by President John F. Kennedy, runs counter to the notion that the President, as Commander-in-Chief, might have been lawfully able to make a commitment with the Soviet Union not to test or use certain weapons. Even a sole executive agreement cannot have domestic legal effect if it is contrary to federal law.<sup>91</sup> The legality of SALT II likely evaded inquiry because the agreement was never formalized.

### B. *Political Commitments and the Interchangeability Debate*

Another potential problem with political commitments lies in their interchangeability with executive agreements. The relationship between treaties and executive agreements has been debated for decades, with some believing that treaties and executive agreements can be substituted for one another in all cases and others believing there are classes of agreements that must be concluded pursuant to the Treaty Clause.<sup>92</sup> Language found in the Department of State's internal guidelines gives credence to the idea that some agreements must be concluded as treaties, but there is little guidance for determining the type(s) of agreement to which that principle applies.<sup>93</sup> The most comprehensive

<sup>90</sup> Arms Control and Disarmament Act § 303, 22 U.S.C. § 2573 (2014). Note that the language of the Act clearly contemplates *ex ante* congressional-executive agreements, which seem properly suited to arms control agreements:

No action shall be taken . . . that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President . . . or unless authorized by the enactment of further affirmative legislation by the Congress of the United States.

*Id.* (emphasis added). Indeed, Caldwell writes that “[p]artially because of the difficulty of obtaining a two-thirds vote of approval from the Senate, President Carter and his advisers considered concluding SALT II as an executive agreement rather than a treaty.” CALDWELL, *supra* note 80, at 194 (citing a phone interview with President Carter). History would have shown this to be a valuable avenue for the President and his advisors as it might have resulted in approval of the agreement.

<sup>91</sup> Hathaway, *supra* note 47, at 213 (arguing that sole executive agreements cannot have domestic legal effect if they are contrary to federal law concluded pursuant to Congress and executive action). This Article does not seek to place political commitments into one of the zones of authority that call to mind Justice Jackson's infamous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which articulated the extent to which the Executive had control over foreign affairs. *Id.* at 635–38. Instead, I highlight an instance in which Congress and the Executive worked together to pass a law that minimized sole executive power.

<sup>92</sup> For a concise overview of the debate, see Hathaway, *supra* note 26, at 1244–48.

<sup>93</sup> *Circular 175 Procedure*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/c175/> (last visited Apr. 19, 2016) [hereinafter *Circular 175*] (codified at 22 C.F.R. § 181.4 (2015)). The criteria are discussed at further length *infra* Part IV.B.

and persuasive account of the international agreement making process demonstrates that the two forms (treaties and executive agreements) are neither treated as “fully interchangeable nor used in ways that reflect relevant legal differences.”<sup>94</sup> How and when agreements are concluded appears not to be driven by substance and content but instead by politics: “[T]he decision to pursue an agreement through one or the other of the two major international lawmaking processes is driven principally by historical happenstance and political considerations.”<sup>95</sup> So too is the case with political commitments.

Repatriation agreements provide a lucid example of the interchangeability between political commitments and congressional-executive agreements. They also offer some insight into how political commitments can affect legal rights and obligations in U.S. courts. In 2001, the Ninth Circuit affirmed the release of Kim Ho Ma, a man born in Cambodia in 1977.<sup>96</sup> In light of a conviction of aggravated felony, Ma had been ordered removed from the United States.<sup>97</sup> However, the district court had found that there was no “realistic chance that [he] be deported” because of the absence of a repatriation treaty between the United States and Cambodia.<sup>98</sup> The Supreme Court remanded in *Zadvydas v. Davis*, requiring the Ninth Circuit to look not only at whether there was an expatriation agreement in place at the time but also at the likelihood of successful future negotiations.<sup>99</sup>

Afterwards, the United States and Royal Government of Cambodia concluded a Memorandum to “act in spirit of mutual cooperation in determining the nationality of an individual and in all matters pertaining to repatriation.”<sup>100</sup> It continues: “The United States and Cambodia are committed to the primary objective of effecting the return of each other’s nationals to their home State, taking into account the humanitarian and compassionate aspects of

<sup>94</sup> Hathaway, *supra* note 26, at 1271 (using an empirical analysis of congressional-executive agreements to trace their authorizations and approvals in comparison to treaties).

<sup>95</sup> *Id.* at 1249.

<sup>96</sup> *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *vacated sub nom.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001), *modified and reinstated sub nom.*, *Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

<sup>97</sup> *Id.* at 818.

<sup>98</sup> *Phan v. Reno*, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999). In *Ma*, the Ninth Circuit wrote, “There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.” *Ma*, 208 F.3d at 818 n.1.

<sup>99</sup> *Zadvydas v. Davis*, 533 U.S. 678, 681 (2001).

<sup>100</sup> Memorandum Between the Government of the United States and the Royal Government of Cambodia for the Establishment and Operation of a United States-Cambodia Joint Commission on Repatriation, Cambodia-U.S., Apr. 27, 2000, <http://www.searac.org/sites/default/files/Cambodia%20and%20US%20MOU.pdf>. The Author notes the unreliability of the website, but cites to it as an example of how these texts either cannot be found, or are located on unreliable hosts. It is possible that legal consequences can arise from such political commitments that are neither public nor subject to any standardized rulemaking.

each case and the principles of internationally recognized human rights.”<sup>101</sup> Should there be any questions as to the legal status of this instrument, it specifies, “Nothing in the document imposes, or should be constructed to impose, any legal or financial obligations on either State.”<sup>102</sup> This Memorandum of Understanding would have satisfied the preliminary standard set forth in *Zadvydas* by enabling immigration officials to proceed with removal proceedings until the six-month period and possibly further. Regardless of its nonlegal status, the political commitment effectively diminishes the plaintiff’s legal rights by unilaterally allowing the executive branch (in this case, a defendant) to conclude an agreement that it can enter into and exit from without any delay or debate.

The United States does not always conclude repatriation agreements by political commitments. For example, in 2008, the United States entered into a bilateral congressional-executive repatriation agreement with Vietnam.<sup>103</sup> Exact numbers for political commitments regarding repatriation are difficult to locate—the political commitment with Cambodia evaded publication in the *Treaties and Other International Acts Series*, and it does not appear on the now defunct U.S. Department of State’s website that listed international agreements reported to Congress under the Case Act. However, it is clear that the formation of repatriation agreements operates on parallel tracks: one track requires congressional participation and the other excludes Congress entirely. The decision to choose one over the other most likely mirrors Hathaway’s findings regarding treaties and congressional-executive agreements: political expediency is the primary factor. More troubling is not whether an agreement involves a supermajority of the Senate or a majority of both houses, but rather whether an agreement involves Congress at all.

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<sup>101</sup> *Id.* at 1.

<sup>102</sup> *Id.*

<sup>103</sup> Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam on the Acceptance of the Return of Vietnamese Citizens, U.S.-Viet., Jan. 22, 2008, T.I.A.S. No. 08-322, <http://www.state.gov/documents/organization/108921.pdf> (last visited Mar. 30, 2016). This agreement, unlike the political commitment between the United States and Cambodia, contains a sunset date and specifies terms for exiting early. Article 6, Entry into Force and Duration, provides:

1. This Agreement will enter into force sixty (60) days from the date of signature by both Governments.

2. Upon entry into force, this Agreement will be valid for five years. The Agreement will be extended automatically for terms of three years thereafter unless written notice not to extend is given by one Government to the other at least six months prior to the expiration date of the Agreement.

*Id.* at 5.



### C. *The Problem of Excluding Congress*

Thus far I have discussed how Congressmembers are excluded from the formation of a political commitment. Many Congressmembers, however, might very well prefer an Executive that manages foreign affairs so they can instead focus on issues more closely related to their constituents.<sup>104</sup> Furthermore, the quantity, level of commitment, and presumably the importance of the content in a political agreement might lead Congress to prefer to remain uninvolved. This view ignores the realities of the impact of international agreement making today on domestic policy and law, which can no longer be separated into two spheres.<sup>105</sup> Moreover, for recalcitrant Congressmembers who prefer to remain uninvolved, notification of political commitments via the Case Act would not require them to act, but would provide them with an opportunity they currently lack.

A natural objection to a notification requirement will be legitimate concerns about national security, including exigent circumstances that require swift and decisive action. Moreover, one can imagine classes of agreements that would likely *only* be concluded under a blanket of secrecy, including status of force agreements situating military personnel in foreign countries. It would be disastrous and illogical for these agreements to be made publically available. However, this does not automatically lead to the conclusion that only the executive branch need be aware of these agreements. Currently, a legally binding sole executive agreement must be reported under the Case Act, which has provisions that account for the reality of secrecy in modern international agreement making.<sup>106</sup> The provision allows for the President, unilaterally, to identify agreements prejudicial to the national security of the United States. Those agreements are not made publicly available or even reported to all Congressmembers; instead they are transmitted to the Senate Committee on Foreign Relations and the House Committee on International Relations.<sup>107</sup> By using the Case Act to require the Executive to pass along agreements to

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<sup>104</sup> Hathaway, *supra* note 47, at 185 (detailing the evolution of the Executive's foreign power and Congress's willingness to abdicate responsibility).

<sup>105</sup> *Id.* at 218 ("Today the line between international and domestic law is increasingly blurry.")

<sup>106</sup> The full text provides that

any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be transmitted to the Congress but that 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.

1 U.S.C. § 112b(a) (2014).

<sup>107</sup> *Id.*

Congress, this Article does not pose onerous or problematic obligations, because the system is already in place to mitigate security concerns.

More importantly, the secrecy objection frames the argument in terms of the ability of the Executive to withhold information from Congress. The proper inquiry is not into whether Congress has a right to learn of a political commitment, but rather into what right the executive has to withhold it.<sup>108</sup> To any extent an executive privilege exists, the Constitution is best read to favor “shallow and politically checkable secrecy.”<sup>109</sup> The history of the past 50 years is fraught with executive abuse, from Watergate to warrantless surveillance.<sup>110</sup> The response, after abuse has been identified, is often a push towards transparency and open access to information.<sup>111</sup> This Article simply suggests moving towards a notice requirement earlier rather than later.

Another potential objection might question how important congressional involvement is at all, considering that political commitments create no legally binding law or obligations. If implementing legislation were required for a political commitment to have domestic effect, Congress will clearly be provided with notice of the agreement. Assuming resources, such as funding or personnel, would need to be shifted from another priority, Congress has an opportunity to act in a meaningful way.<sup>112</sup> While we might criticize the executive branch for “associating” the United States with a contentious climate change arrangement, Congress has the opportunity to refuse to pass any implementing legislation, essentially nullifying the agreement.

However, not all agreements will require domestic legislation, and although we can describe many agreements as having no legal effect, we

<sup>108</sup> As Raoul Berger asked in 1965, what does the role of the President as Commander-in-Chief add to his right to withhold information? See generally Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044 (1965).

<sup>109</sup> Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 514–15 (2007) (using historical sources to argue the Constitution disfavors privilege claims over Congress). For expansion on this theory, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

<sup>110</sup> Pozen, *supra* note 109, at 259.

<sup>111</sup> The Case Act itself stems from frustration about executive secrecy. In fact, the rationale used in the creation of the Case Act remains current today:

[The Case Act] does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim or simple use of executive authority to enter into binding agreements with foreign countries without the consent of Congress. [It] undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy.

S. REP. NO. 92-591, at 3 (1972). Pozen notes other laws that shifted away from presidential secrecy in the 1970s, including the 1974 Freedom of Information Act (FOIA) amendments, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (2014)), and Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–62 (2014)). Pozen, *supra* note 109, at 312.

<sup>112</sup> Hollis & Newcomer, *supra* note 6, at 546.

should question the importance of that distinction when the stakes of the agreements themselves are so high. Hollis and Newcomer give the example of an agreement between Vice President Al Gore and Russia's Prime Minister Viktor Chernomyrdin, which effectively exempted Russia from U.S. sanctions in return for a phase out of Russian arms sales to Iran. "Congress's hearings on the topic featured executive insistence that the aide mémoire had no legal effect, with skeptical Senators disputing how much the nonlegal nature of the agreement mattered given the substance of the instrument itself."<sup>113</sup> Because, as indicated earlier, sanctions are the preferred enforcement mechanism that the United States uses to achieve its objectives, the legal effect argument is rendered moot.

Finally, it is a mistake to view the limited options available to Congress and conclude that it should have none. Congress does, in fact, have a few tools for oversight. It can express disapproval with joint resolutions and work to enact legislation to ensure U.S. performance or non-compliance.<sup>114</sup> In the case of the Helsinki Accords,<sup>3</sup> for example, Congress was successful in carrying out vigorous oversight through the Commission on Security and Cooperation in Europe.<sup>115</sup> Another tool is the pulpit: in 2002, Congress, through public demands and complaints, pressured the Bush administration to present any new nuclear arms reductions agreements with Russia to the Senate as a formal treaty.<sup>116</sup> To exercise any of its options, Congress, at a minimum, must be made aware of the commitments when they arise.

#### IV. APPLYING THE CASE ACT TO POLITICAL COMMITMENTS

I discussed two examples of political commitments *supra*: the first was an Article II Treaty that did not receive Advice and Consent, the terms of

<sup>113</sup> *Id.* at 568–69.

<sup>114</sup> *Id.* at 567 (providing examples of congressional action, including the possibility of curtailing the President's authority to comply with a North Korean political commitment on denuclearization).

<sup>115</sup> The human rights agreements that arose from the Helsinki Conference talks between the United States and the Soviet Union are some of the most high profile political commitments and were understood, at the time, to not be legally binding. In fact, the negotiations that created the Final Act of the Conference on Security and Cooperation in Europe were said not to be eligible for registration under Article 102 of the Charter of the United Nations, because it was not a treaty. Schachter, *supra* note 10, at 296. Schachter claims there was no evidence that any signatory states disagreed with the understanding that the Act did not entail a legally binding commitment. *Id.* Nonetheless, Congress did establish a Commission to monitor compliance. *See* Act of June 3, 1976, Pub. L. No. 94-304, 90 Stat. 661 (codified as amended at 22 U.S.C. §§ 3001–09 (2014)).

<sup>116</sup> Thom Shanker, *Senators Insist on Role in Nuclear Arms Deals*, N.Y. TIMES, Mar. 17, 2002, at 16 ("At his Wednesday news conference, Mr. Bush said he agreed with Mr. Putin 'that there needs to be a document that outlives both of us,' adding, 'And what form that comes in we will discuss.'").

which were nonetheless honored; and the second was an agreement that is effectively identical to an executive agreement, the text of which was never published or reported.<sup>117</sup> These examples highlight the problem with modern international agreement making: the Executive pursues and concludes agreements in whichever way he deems most expedient. Congress operates without input or knowledge of the decision making process because the common understanding is that no domestic law governs the creation of or compliance with political agreements. Neither Congress nor the Executive has regarded political commitments as falling under the purview of the Treaty Clause.<sup>118</sup> And because the commitments are not legal instruments, their formation is not governed by the language in the Presentment Clause.<sup>119</sup> Consequently, very little attention has been paid to whether or how the President can conclude political commitments.<sup>120</sup> Unsurprisingly, no court has determined that the Constitution regulates them. Instead courts treat them as nonjusticiable political questions to be “redressed outside the courtroom.”<sup>121</sup> Of course, there is no opportunity to redress these issues because the Executive operates under the impression that no law or practice obligates him to inform Congress of the creation of a political commitment. The agreements are not submitted to the Senate as Article II Treaties and they are not currently reported

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<sup>117</sup> One could make the argument that the United States had an obligation to honor the terms of SALT II because it had signed the treaty. It is true that the United States has the obligation to not defeat the purpose of the treaty, pending its ratification. This view comes from the Article 18 of the Vienna Convention which states, “A State is obliged to refrain from acts which 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.” Vienna Convention on the Law of Treaties arts. 2(1)(b), 11-17, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Note that although the United States is not party to the Vienna Convention, the executive branch has made many references to being bound to its provisions under customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987). Were this argument accurate, it would place far too much power in the hands of the Executive. Mere introduction of an agreement into the Senate would create binding status. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 315 (2007) (“If the United States is bound by international law not to defeat the object and purpose of treaties that it has signed but not ratified, then the unilateral signature of the president or his agent can bind the United States to certain international legal obligations.”). As we have seen with SALT II, introduction to the Senate does not imply a vote. Congressmembers and Senators who were ambivalent or opposed to the ratification of the treaty are now bound without having the opportunity for input or a vote.

<sup>118</sup> Hollis & Newcomer, *supra* note 6, at 549.

<sup>119</sup> U.S. CONST. art. I, § 7, cl. 2, refers only to bills that become laws.

<sup>120</sup> Hollis & Newcomer, *supra* note 6, at 512 (“The question of whether and how the United States can enter into political commitments with other nations has received virtually no attention.”).

<sup>121</sup> *Id.* at 555 n.203 (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376 (7th Cir. 1985)); see also *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 8–9 (D.C. Cir. 2006) (holding political commitments not cognizable by U.S. courts).

to Congress under the Case Act, leaving a large body of foreign policy and agreement making to go unchecked and potentially unnoticed. As I have demonstrated, this oversight can result in the Executive exceeding any presumptive authority, potentially violating lawfully created domestic legislation. This harm can be reversed by simply applying the Case Act to political commitments.

*A. History of the Case Act Permits Requiring Reporting of Political Commitments*

The Case Act specifically uses the phrase “international agreement” to capture a category of agreements other than treaties, which were already submitted to the Senate for advice and consent.<sup>122</sup> A cursory reading of the Case Act would indicate that the Secretary of State must transmit to Congress the text of any political commitment because the language of the Act provides for “the text of any international agreement.”<sup>123</sup> An international agreement, after all, is not a subset of a treaty. The Vienna Convention on the Law of Treaties (VCLT) defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>124</sup> A treaty is governed by international law: the intention to be governed defines a treaty in contrast to other international agreements.<sup>125</sup> A political commitment is therefore one form of an international agreement that can be differentiated from treaties by its non-legally binding nature.

One could argue that the phrase “international agreement” had a more specific meaning in the United States at the time of the legislation. The Department of State, in its Circular 175, clearly classifies international agreements other than treaties as agreements made by the Executive 1)

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<sup>122</sup> 1 U.S.C. § 112b (2014).

<sup>123</sup> § 112b(a).

<sup>124</sup> Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>125</sup> The Travaux Préparatoires of the VCLT points to this understanding: “The present Rapporteur, while agreeing with much that is contained in the first report of Lauterpacht, feels that while it may be possible to have certain agreements between States that are not governed by international law, it is not possible to have, or admit of, a case of a treaty (even using that term in its widest sense) that would not be so governed. Hence, this should be explicitly stated. Not all international agreements are governed by international law, but, if they are not, or to the extent that they are not, they are not treaties within the meaning of the present Code.” G.G. Fitzmaurice, *Report on the Law of Treaties to the International Law Commission*, U.N. Doc. A/CN.4/101 (1956), reprinted in 2 Y.B. Int’l L. Comm’n 104, 117, [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1956\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf) (last visited Mar. 30, 2016). More investigation of the Travaux can be found in Schachter, *supra* note 10, at 301 n.19.

pursuant to existing legislation or treaties, 2) subject to congressional approval, or 3) in accordance with the President's constitutional power.<sup>126</sup> A review of the legislative record, however, indicates that this understanding was neither universal nor dispositive. In fact, the legislative record is peppered with references to international agreements other than what the Executive might classify as sole or congressional-executive agreements. During committee hearings a State Department spokesman, Mr. John Stevenson, specifically raised the question of what kind of arrangements would constitute international agreements, indicating there would be types of international agreements that did not warrant reporting within the meaning of the legislation.<sup>127</sup> Mr. Stevenson might well have been inquiring about political commitments, but the House Report write up reveals that the Congressmembers understood him to be inquiring about trivialities such as "administrative working details for carrying out a treaty or agreement" or agreements "in the nature of commercial contracts relating to sales of equipment and commodities."<sup>128</sup> Congress was looking to avoid being "inundated with [such] trivia."<sup>129</sup> The record also reflects repeatedly that no one voted with the understanding that some agreements would be excepted.<sup>130</sup>

Congressmembers were quite motivated to discover any international agreement other than treaties.<sup>131</sup> "As the committee has discovered, there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown to Congress and to the people."<sup>132</sup> As one such example, Senator Case quoted Henry Kissinger, "When I visited Pakistan in January 1962, I was

<sup>126</sup> *Circular 175, supra* note 93.

<sup>127</sup> H.R. REP. NO. 92-1301, at cmt. 1 (1972), as reprinted in 1972 U.S.C.C.A.N. 3067, 3068 (statement of John Stevenson, Legal Advisor, U.S. Dep't of State).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* This, of course, can be accomplished by creating a threshold standard, such as "international significance," for an agreement to be passed on to Congress.

<sup>130</sup> See *International Executive Agreements Hearing, supra* note 21, at 7 ("I think the obligation is complete. It is intended in my judgment to be a complete obligation.") (statement of Sen. Case). See also the exchange between Congressman Zablocki and Senator Case:

MR. ZABLOCKI: Senator, for the purpose of legislative history, when your bill passed the Senate by a vote of 81 to 0, did any of the Senators . . . vote with the understanding that some executive agreements might be exempted from the requirements of the bill by unilateral action of the President?

SENATOR CASE: So far as I know, Mr. Chairman, nobody did.

*Id.* at 8.

<sup>131</sup> See, e.g., *id.* at 16 (Mr. Zablocki: "I might very clearly say any agreement—that is any agreement other than a treaty—is what we are interested in. Whatever treaties are published you don't have to bother with, we will find them, we have access to them.")

<sup>132</sup> H.R. REP. NO. 92-1301.

briefed on a secret document or oral understanding about contingencies arising in other than the SEATO context. Perhaps it was a Presidential letter. This was a special interpretation of the March 1959 bilateral agreement.”<sup>133</sup> Senator Case continued:

Whether in fact such a “special interpretation” existed which could have directly involved the United States in the Indian-Pakistan war, this is an example of how an annex of mere “military” significance, although perhaps concluded in a time of relative tranquility when its application seemed remote, can have an overriding importance to this country’s foreign policy.<sup>134</sup>

The legislative history of the bill does not concern itself with “legally binding” international agreements and makes only a differentiation between treaties and other international agreements. Moreover, the concept of a non-legally binding agreement was not foreign to Congress at the time. Although one of the clearest examples of a nonbinding international agreement is the Final Act of the Helsinki Conference in 1975, other historically famous agreements include the Atlantic Charter of 1941 and the Potomac Charter of 1954.<sup>135</sup>

Additionally, the Case Act was the second introduction of this demand for information, coming some 20 years after the first bill was introduced by Senators Ferguson and Knowland.<sup>136</sup> The Congressmembers were motivated to provide a check on the President’s exercise of power, if necessary.<sup>137</sup> The

<sup>133</sup> See *International Executive Agreements Hearing*, *supra* note 21, at 16.

<sup>134</sup> *Id.*

<sup>135</sup> See also ARNOLD MCNAIR, *THE LAW OF TREATIES* 6 (1961) (“[I]t would be a mistake to assume that every agreement between States which adopts the form and language of a treaty creates or is intended to create international legal obligations and is therefore strictly entitled to be classified as a treaty. Frequently heads of States or duly empowered ministers concur in making declarations of policy which they regard as morally and politically binding but which do not create legal obligations between their States.”).

<sup>136</sup> *Transmittal of Executive Agreements to Congress: Hearings Before the S. Comm. on Foreign Relations*, 92nd Cong. 1 (1971) (statement of Sen. J.W. Fulbright, Chairman, S. Comm. on Foreign Relations). The legislative history of the Case Act does also address some technical changes that emanated from the failure of the previous bill, S. 3067 of the 83rd Congress. For example, the previous bill required a 30-day notice, which would be mechanically difficult for the Department of State. *Id.* at 11 (citing Letter from Thurston Morton, Assistant Sec’y for the Sec’y of States to Hon. Alexander Wiley, Chairman, Committee on Foreign Relations (March 16, 1954)).

<sup>137</sup> Senator Case’s statement included the following:

To the extent that knowledge of their terms would have provided an independent legislative check upon the obligations assumed by the executive branch in our gradual involvement in Southeast Asia, the U.S. role in this war might have been moderated or at least have been better understood in the

Chairman went so far as to chastise Senators from a previous era for abdicating their responsibilities to the nation<sup>138</sup>:

Since that time, through costly experience, we have discovered that the President does not always know best, and that, indeed, the country would be far better off today if Congress had been more assertive in the exercise of its constitutional role, a role which consists at least as much in assertion and criticism as it does in subservience.<sup>139</sup>

What are we to make of the fact that political commitments have not been reported to Congress under the Case Act? Does this indicate that political commitments were never intended to be reported? Does it, at a minimum, indicate that Congress has acquiesced to the Executive's understanding of the Act as excluding political commitments? My response is twofold: first, it must be noted that the very next political commitment of "international significance" after the Case Act was enacted would be the Final Act of the Helsinki Conference, which was in fact widely published and disseminated.<sup>140</sup> Furthermore, Congress, as already discussed, acted upon the information available to it in the Helsinki Accord and immediately established the Commission on Security and Cooperation in Europe to monitor compliance.<sup>141</sup> If there is an established executive practice of not reporting political agreements to Congress, it did not begin immediately after this bill became law. Secondly, the secrecy of the agreements themselves is precisely what Congress sought to remedy with the Case Act. It cannot therefore be penalized for not objecting to the publication of further secret agreements. Put more succinctly, "Constitutional custom requires that Congress must acquiesce to the president's acts of which it has actual knowledge."<sup>142</sup>

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Congress. Had this legislation been passed in 1956, the phrase 'credibility gap' might never have entered the language.

*Id.* at 6.

<sup>138</sup> "At that time all but a few Senators were caught up in what we must now recognize as the shortsighted cult of presidential predominance in foreign policy." *Id.* at 2.

<sup>139</sup> *Id.* at 3.

<sup>140</sup> The Final Act of the Conference on Security and Co-operation in Europe (CSCE) appears in both *International Legal Materials* and in the *Department of State Bulletin*. See *Conference on Security and Co-operation in Europe: Final Act*, 14 INT'L LEGAL MATERIALS 1292 (1975); *Conference on Security and Co-operation in Europe: Final Act*, 73 DEP'T ST. BULL. 323 (1975).

<sup>141</sup> Act of June 3, 1976, Pub. L. No. 94-304, 90 Stat. 661. The text of the Helsinki Accord was published on September 1, 1975 and the bill that resulted in Public Law 94-304 was introduced into the Senate on November 17, 1975. S. 2679, 94th Cong. (1975).

<sup>142</sup> Hollis & Newcomer, *supra* note 6, at 568.



*B. The Case Act Does Not Require Modification, the Code of Federal Regulations Does*

Although there is no law that governs political commitments, there is a governing standard that relates to international agreements. At a minimum, someone in Treaty Affairs at the U.S. Department of State makes a determination regarding whether an agreement constitutes an “international agreement” and requires reporting to Congress.<sup>143</sup> The Department of State has compiled internal guidelines for determining the elements of a legally binding international agreement.<sup>144</sup> The gist of these guidelines is as follows: 1) the parties to an agreement must intend to be bound under international law; 2) the agreement must be of international significance and not deal with trivial matters; 3) the obligations undertaken must be clearly specified and be objectively enforceable; 4) the agreement must have two or more parties; and 5) the agreement will preferably use a customary form.<sup>145</sup>

Nonetheless, the executive branch conducts this review without any participation from Congress. More importantly, it created its own standards of review. The Case Act does not specify “[d]ocuments intended to have political or moral weight, but not intended to be legally binding, are not international agreements”; this is language from the *Code of Federal Regulations*.<sup>146</sup> The Case Act is a reporting requirement for the executive branch, but the *C.F.R.* provisions were actually drafted to help the Executive comply with constitutional requirements that result from various international agreement forms. Specifically these standards used to ensure compliance originated from a procedure known as the Circular 175, which actually pre-existed the Case Act, and were created to ensure that “the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits.”<sup>147</sup> While the criteria used by of the Office of Treaty Affairs

<sup>143</sup> 22 C.F.R. § 181.3 (2015).

Whether any undertaking, document, or set of documents constitutes or would constitute an international agreement within the meaning of the Act or of 1 U.S.C. 112a shall be determined by the Legal Adviser of the Department of State, a Deputy Legal Adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate.

*Id.*

<sup>144</sup> *Circular 175*, *supra* note 93 (codified at 22 C.F.R. § 181.4 (2015)).

<sup>145</sup> 22 C.F.R. § 181.2 (2015).

<sup>146</sup> *Id.*

<sup>147</sup> *Circular 175*, *supra* note 93 (codified at 22 C.F.R. § 181.4 (2015)). The standards used to identify the procedure for creating international agreements have been in place since 1953 and appear in their codified version in the Foreign Affairs Manual Objective 1 from FAM. 11 FOREIGN AFFAIRS MANUAL 720, <https://fam.state.gov/FAM/11FAM/11FAM0720.html> (last visited Mar. 31, 2016). Circular 175 clearly originates as an administrative internal document, with the purpose of having appropriate persons authorizing various documents and negotiations.

are the same criteria generally used for determining the binding force of agreements under international law, it does not follow that these must be the standards used for determining whether an agreement is passed along to Congress. For Congress, the issues regarding agreement forms and whether they are legally binding are less relevant than the significance of the arrangement, as we saw in the Gore example.<sup>148</sup> There is no constitutional reason why Congress could not require reports on political commitments irrespective of whether they constitute legal obligations.<sup>149</sup> There is no reason why, textually, the Case Act should not apply to political commitments, which would require modification of the *C.F.R.* provisions, not of the *U.S. Code*. The language regarding “international significance,” as I argue, provides a useful mechanism by which political commitments can be identified and transmitted to Congress without the deluge of information that it so clearly wanted to avoid during the deliberation of the Case Act in 1971.<sup>150</sup>

What do we make of the fact the political commitments have been explicitly excluded from the *C.F.R.* provisions? Does it, at a minimum, indicate that Congress has acquiesced to the Executive’s understanding of the term “international agreement”? The proposed regulations received no comments on proposed sections 181.1 or 181.2 after being published in the *Federal Register*.<sup>151</sup> Furthermore, Congress has had over 30 years to object to the

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It outlines procedures for transmission and the preparation of copies for certification. It could be argued that all international agreements contemplated by the Circular refer to congressional-executive agreements or sole executive agreements, but that is also simply because no constitutional limit law applies to the formation of political commitments, and therefore no internal procedure was necessary for their lawful creation or execution. The 1955 version and 1969 version, which are what Case Act deliberators would have seen, are both available in *Congressional Oversight of Executive Agreements: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92nd Cong. 289, 303 (1972).

<sup>148</sup> The criteria specify, in part,

[m]inor or trivial undertakings, even if couched in legal language and form, are not considered international agreements within the meaning of the Act or of 1 U.S.C. 112a. In deciding what level of significance must be reached before a particular arrangement becomes an international agreement, the entire context of the transaction and the expectations and intent of the parties must be taken into account.

22 C.F.R. § 181.2 (2015).

<sup>149</sup> Schachter, *supra* note 10, at 302 (suggesting that it “would not be unreasonable to do so in the light of the significance accorded to such agreements in international relations”).

<sup>150</sup> The natural objection to this requirement will be that most agreements will go, and should go, unnoticed. Hathaway, *supra* note 47, at 163, also notes “congressional staff complained that reports were filed so late that they had ‘to rely on contacts and leaks in the executive branch to find out when really important negotiations are underway.’”

<sup>151</sup> Coordination and Reporting of International Agreements, 45 Fed. Reg. 75687 (Nov. 17, 1980); *see also* Coordination and Reporting of International Agreements, 46 Fed. Reg. 35917-02 (July 13, 1981) (“There were several comments from interested government agencies, and after consultations, certain amendments to the proposed rules were made. The most important change

regulations and the State Department's interpretation. The best response to this powerful argument is that political commitments have received little public attention, including from academics. The Hollis and Newcomer article, so heavily relied upon in this piece, was not published until 2009, nearly 30 years after the *C.F.R.*'s promulgation. Secondly, only recently has the reliance upon these nonlegal understandings increased and has the political commitment become interchangeable with the congressional-executive agreement.

## V. CONCLUSION

Unlike treaties and congressional-executive agreements, which require consultation and agreement by at least one party of Congress and the President, the executive branch exercises its own prerogative to negotiate, conclude, and observe political commitments without any congressional participation. Moreover, unlike sole executive agreements, the authority for which is ostensibly grounded in the text of the Constitution, there is no such implicit authority for the Executive to conclude political agreements solely on his own volition. The absence of interbranch cooperation is inconsistent with the principle of separation of powers on which our government relies: a single branch of government, even the one entrusted with the greatest scope of foreign affairs duties, should not be able to act unilaterally.

More troubling still is the complete absence of a responsibility of the Executive to even report to Congress the creation or conclusion of a political commitment. The secrecy of political commitments is so unbalanced in favor of the Executive that it excludes congressional participation entirely. By acting clandestinely, regardless of intent, the President offers Congress no opportunity to act, comment, or investigate whether the political commitment exceeded the President's province of authority, including instances when a political commitment violates a lawfully enacted piece of domestic legislation. Unless the executive branch chooses to report the agreements, no documentation will be made available. The current process and lack of oversight leads to the same challenges that exist with regard to any executive agreement. This need not be so because the provisions of the Case Act can apply equally to political agreements as they do with congressional-executive agreements. The same rationale that led to the creation of the Case Act to restore "a proper working relationship between Congress and the executive branch in the field of foreign affairs" applies to political commitments.<sup>152</sup>

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is the addition of language at § 181.4(d) providing that if unusual circumstances prevent an agency from consulting with the Department of State on a proposed agreement at least 50 days prior to the anticipated date for concluding such agreement, the agency is to use its best efforts to consult as early as possible prior to the conclusion of the agreement.").

<sup>152</sup> H.R. REP. NO. 92-1301 (1972), as reprinted in 1972 U.S.C.C.A.N. 3067, 3068.

Transparency and access to information are vital to a well-balanced, functioning democracy. The Case Act's mere requirement of notice and transmittal to Congress has had a positive effect of rebalancing the power of international law making because it has made the Executive accountable for the international agreements it makes. It also gives Congress the opportunity and foundation to provide whatever check or demand on the Executive's exercise of authority that it decides is appropriate. As I have illustrated, political commitments are currently being used interchangeably with treaties and congressional-executive agreements. Before the realm of political commitments grows even larger, I would simply advise Congress to declare that the Case Act, without modification, applies equally to political commitments of "international significance" as it does to legally binding international agreements.

