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Presidential Power over International Law: Restoring the Balance

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THE YALE LAW JOURNAL

OONA A. HATHAWAY

Presidential Power over International Law: Restoring the Balance

ABSTRACT. The vast majority of U.S. international agreements today are made by the President acting alone. Little noticed and rarely discussed, the agreements are concluded in a process almost completely hidden from outside view. This state of affairs is the result of a long-term transformation. Over the course of more than a century, Congress gradually yielded power to the President to make international agreements. Each individual delegation of authority relinquished only a small measure of power, while freeing members of Congress to focus on matters that were more likely to improve their reelection prospects. But the cumulative effect over time left Congress with little power over international lawmaking. As a result, the President is now able to make law over an immense array of issues—including issues with significant domestic ramifications—by concluding binding international agreements on his own. This imbalance of power violates democratic principles and may even lead to less effective international agreements.

To correct this imbalance, this Article proposes a comprehensive reform statute that would normalize U.S. international lawmaking by reorganizing it around two separate tracks. International agreements that are now made by the President alone would proceed on an administrative track and would be subject to what might be called the "Administrative Procedure Act for International Law." This new process would offer greater openness, public participation, and transparency, but not overburden lawmaking. A legislative track would include two existing methods for concluding international agreements: Senate-approved Article II treaties and congressional-executive agreements expressly approved by both houses of Congress. In addition, it would include an expanded "fast track" process that would permit streamlined congressional approval of agreements. Together, these proposals promise to create a more balanced, more democratic, and more effective system for international lawmaking in the United States.

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INTRODUCTION

Each year, the United States enters hundreds of international agreements on everything from cooperation in the prevention of illicit trafficking in nuclear and other radioactive material with Latvia,[1] to the safety of food and feed imported from China,[2] to international air transport with Georgia,[3] to the suppression of the illicit traffic in narcotic drugs with Malta.[4] But very few of

1. Agreement for Cooperation in the Prevention of Illicit Trafficking in Nuclear and Other Radioactive Material, U.S.-Lat., Dec. 3, 2007, Temp. State Dep't No. 08-35, 2007 U.S.T. LEXIS 69.

2. Agreement on the Safety of Food and Feed, U.S.-P.R.C., June 21, 2007, Temp. State Dep't No. 08-12, 2007 U.S.T. LEXIS 54.

3. Air Transport Agreement, U.S.-Geor., Dec. 6, 2007, Temp. State Dep't No. 08-06, 2007 U.S.T. LEXIS 50.

4. Agreement Concerning Cooperation To Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, U.S.-Malta, June 16, 2004, Temp. State Dep't No. 08-24, 2004 U.S.T. LEXIS 166. Another notable sole executive agreement is the recent security agreement between the United States and Iraq. Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2009, *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf. That agreement, unlike the others mentioned here, clearly exceeded the President's constitutional authority to conclude an international agreement on his own. Unlike the vast majority of sole executive agreements—which pass almost entirely unnoticed—the agreement with Iraq met with much resistance and prompted a year-long debate. *See, e.g.*, Press Release, Robert P. Casey, Jr., Robert Byrd, Ted Kennedy, Carl Levin, Hillary Clinton & Jim Webb, Senators, U.S. Senate, Senators Warn President Bush Against Making Long-Term Security Commitments to Iraq Without Congressional Consent (Dec. 6, 2007), *available at* http://casey.senate.gov/newsroom/press (enter "December" and "2007" under "Press Releases By Date"; jump to page 2 of 2; follow "Senators warn President Bush . . ."). I have participated in some of this debate. *See Renewing the United Nations Mandate for Iraq: Plans and Prospects: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 11-20 (2008) (statement of Oona A. Hathaway, Esq., Professor of Law, Berkeley Law, University of California, Berkeley), *available at* http://foreignaffairs.house.gov/110/45417.pdf; *Declaration and Principles: Future U.S. Commitments to Iraq: J. Hearing Before the Subcomm. on the Middle East and South Asia and the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 40-44 (2008) (statement of Oona A. Hathaway, Esq., Associate Professor of Law, Yale Law School); *The November 26 Declaration of Principles: Implications for U.N. Resolutions on Iraq and for Congressional Oversight*: *Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs,* 110th Cong. 14-19 (2008) (statement of Oona A. Hathaway, Esq., Associate Professor of Law, Yale Law School); Bruce Ackerman & Oona Hathaway, *An Agreement Without Agreement*, WASH. POST, Feb. 15, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021502539.html; Bruce Ackerman & Oona A. Hathaway, *Bush's Final Illusion*, SLATE, Oct. 21, 2008, http://www.slate.com/id/2202771;

these agreements are reported in the news or discussed in the halls of Congress. That is because most of them are made by the President alone and are quietly revealed to Congress and the public months after they have already entered into force.

These agreements are the product of a little noticed transformation during the last half-century in the way international law is made in the United States. Once a duty shared by Congress and the President, the task of concluding international agreements has come to be borne almost entirely by the President alone. Today, the vast majority of binding international agreements entered into by the United States are concluded by the President through what are referred to as "executive agreements."[5] During the past decade, the U.S. Department of State has reported an average of between two and three hundred executive agreements to Congress each year, touching on nearly every subject of international law—at times with substantial effect.[6] By comparison, the United States has ratified roughly twenty treaties annually during the same decade.[7]

The President has not always had the power to make so much international law on his own. Indeed, executive agreements were a relative rarity before the mid-twentieth century. Beginning in the post-World War II era, however, Congress began granting extensive power to the President to make international agreements on his own. The statutes that initially granted

Bruce Ackerman & Oona Hathaway, Op-Ed., *Into No-Man's Land*, L.A. TIMES, July 25, 2008, at A21; Bruce Ackerman & Oona Hathaway, Op-Ed., *The War's Expiration Date*, WASH. POST, Apr. 5, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/04/AR2008040402581.html; Bruce Ackerman & Oona Hathaway, *What Bush Will Surrender in Iraq*, TIME, Sept. 11, 2008, http://www.time.com/time/nation/article/0,8599,1840274,00.html; Bill Delahunt & Oona Hathaway, Op-Ed., *Bush Should Include Congress*, BOSTON GLOBE, Nov. 26, 2008, at A15; Oona A. Hathaway, Congressional Briefing on U.S.-Iraqi Relations and the Bush-Maliki Agreement (Nov. 8, 2008) (on file with author).

5. When used without any modifier, the term "executive agreements" encompasses "sole executive agreements"—agreements made by the President without any congressional involvement; "ex ante congressional-executive agreements"—agreements made by the President using authority granted to him in advance by Congress, usually by statute; and "ex post congressional-executive agreements"—agreements made by the President and then approved by both houses of Congress through the normal legislative process.

6. *See infra* text accompanying notes 17-24.

7. The Library of Congress, Treaties, THOMAS, http://thomas.loc.gov/home/treaties/treaties.html (last visited Feb. 13, 2009) [hereinafter Thomas Treaties Database]. An exception is 2008, the final year of the Bush presidency, during which the President sought and received Senate advice and consent to ratify eighty-two treaties. Email from Attorney, U.S. Dep't of State, Office of the Legal Adviser, to author (Aug. 3, 2009) (on file with author).

authority were narrow and carefully constrained. Over time, however, many of the grants of authority became increasingly vague and open-ended, allowing the President to negotiate agreements and put them into force without any further congressional approval. The agreements that the President negotiates under this advance authority are often referred to as "ex ante" congressional-executive agreements.

In principle, Congress has the power to revoke these grants of authority by passing subsequent statutes. In practice, however, the authority to make such international agreements has proven to be nearly impossible to revoke once granted—not least because any effort to revoke or even amend a delegation can be vetoed by the President. Moreover, Congress retains strikingly meager power to oversee the agreements that are made. After authorizing the President to make binding international agreements on behalf of the United States, Congress typically does little to police the exercise of that authority. The courts, reluctant to weigh in on foreign affairs matters, have done nothing to correct the imbalance. They have instead granted substantial deference to the President as to both the substance and the form of international lawmaking. As a result, ex ante congressional-executive agreements—which today make up roughly eighty percent of all U.S. international legal commitments—are made by an almost entirely unfettered President.

This Article traces the key moments since the Founding that have brought us to this imbalanced moment. It shows that during the first hundred years after the Founding, the President played a highly constrained role in international lawmaking. It was extremely rare for the President to make agreements without express congressional approval. That began to change in the 1890s, when Congress started to give the President independent power to conclude bilateral trade agreements within strict constraints. The decision in the 1890s to give the President power to conclude trade agreements set the legal and political stage for a broader transformation in international lawmaking during the next century. That potential was realized in the period following World War II. Unilateral presidential power over international law grew exponentially from then onward, driven first by the passage of an expansive and unprecedented foreign assistance program, and later by the Supreme Court's decision to prohibit the use of legislative vetoes. That decision, and Congress's response to it, eliminated much of the limited power Congress had until then retained.

Why did Congress delegate so much of its power over international law to the President? After all, the pattern I describe defies the common expectation that Congress will jealously guard its already limited prerogatives. In this Article, I show that Congress acted as it did because of a combination of institutional myopia and political incentives. Congress gave away its power slowly over time. Each individual delegation of authority relinquished only a

small measure of power to the President, while freeing members of Congress to dedicate themselves to matters that were more likely to improve their prospects for reelection. The costs of these decisions for Congress's institutional power took decades to be realized. Not only did the effect of each individual delegation grow over time, but the cumulative effect of multiple delegations also became more significant with each additional delegation. Because these effects were slow to be realized, few of the individual members of Congress who voted to approve the delegations would still be in office when the cumulative effects of the delegations came to be felt. At that point, Congress found itself unable to reclaim what it had lost, in part because of the difficulty of mobilizing members of Congress around issues of international law that already had been ceded to the executive branch.

That Congress never intended to give up so much power does not necessarily mean that it should reclaim the basic authority over international lawmaking it once shared more fully with the executive branch. It would be possible to conclude that Congress's decision to give power over to the President was a good one, even if unintentional. But that would be a mistake. The imbalance of power over international lawmaking that has emerged over the past two centuries is, I argue, inconsistent with basic democratic principles and can lead to less favorable agreements.

The President should be a leading actor in international lawmaking—but not the *sole* actor. The absence of genuine cooperation among the branches is inconsistent with the principle of separation of powers on which our government relies: a single branch of government should not be able to unilaterally make law over an immense array of issues simply by concluding binding international agreements. In fact, the law already recognizes this. Strict legal limits govern the kinds of agreements that presidents may enter into under their constitutional authority through so-called sole executive agreements. And yet such limits are not applied to ex ante congressional-executive agreements, on the grounds that such agreements inherently embody interbranch cooperation. As this Article shows, however, ex ante congressional-executive agreements rarely involve the true sharing of power. Indeed, the very label applied to such an agreement—"ex ante congressional-executive agreement"—is misleading, since it suggests a level of cooperation in making the agreement that rarely exists. In reality, once Congress delegates authority to the President to make the agreement, it usually plays no further role—contrary to what the separation of powers requires.

In an era in which international lawmaking increasingly overlaps with domestic lawmaking, ex ante congressional-executive agreements provide a means for presidents to bypass the other branches of government in pursuing core policy aims. This is troubling not merely as an abstract constitutional matter. It also raises real concerns about the quality of governance and

representation—concerns that helped prompt the emphasis on a separation of powers in our lawmaking process at the Founding. One of the key justifications for the separation of powers among three branches of government is that it encourages accountability and discourages misbehavior by pitting "ambition against ambition." Ex ante congressional-executive agreements frustrate this process by placing most of the power to conclude international agreements in the hands of a single actor. From a democratic standpoint, this raises a particular concern because both senators and representatives have a strong competing claim to carry out the wishes of U.S. citizens. Moreover, because presidents cannot be reelected more than once, as much as half of their time in office involves no direct electoral accountability whatsoever.

The argument in favor of unilateral presidential lawmaking rests in part on a mistaken assumption that less democratic international lawmaking is more effective international lawmaking. But there is good reason to question this claim. Effective international lawmaking requires not just an unfettered negotiator but also widespread political support for the deal the negotiator strikes. When an agreement is concluded behind closed doors, with little or no input from Congress or the public at large, it can be difficult to build political support for the agreement that results.

What is more, an unconstrained negotiator may sometimes be weaker, not stronger, when it comes to negotiating favorable agreements. Thomas Schelling observed decades ago that "[i]f the executive branch is free to negotiate the best arrangement it can, it may be unable to make any position stick and may end by conceding controversial points because its partners know, or believe obstinately, that the United States would rather concede than terminate the negotiations."[8] If, however, those negotiating on behalf of the United States can demonstrate to their negotiating partners that they are constrained by the need to obtain congressional approval, they may be able to refuse to make concessions that they would otherwise need to make to secure a deal. At the same time, a more open lawmaking process can give negotiators a better understanding of the needs and concerns of those who will be directly affected by the agreement.

For all these reasons, it is time to rethink the way international law is made in the United States. Below, I outline a comprehensive reform statute that would normalize U.S. international lawmaking by reorganizing it around two separate tracks—administrative and legislative. The proposal for a new administrative track is patterned after the notice and comment model that currently applies to rulemaking in the domestic context: it is effectively a call

8. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 28 (1980).

for an Administrative Procedure Act for international law. Bringing agreements that are regulatory in nature into this new administrative system would serve to make them both more effective and more legitimate—for example, by making them available to Congress and the public *before*, rather than after, they become law. The process would offer greater openness, more public participation, and better transparency. Agreements would be eligible for this administrative track if they were authorized under an express delegation of authority to the President by Congress in prior legislation, or if they fall within the President's own constitutional powers.

All other agreements would be subject to a heightened legislative approval process. The legislative track would include two existing methods for concluding international agreements: Senate-approved Article II treaties and ex post congressional-executive agreements approved by both houses of Congress. In addition, I propose an expanded "fast track" process that would permit streamlined congressional approval of agreements. By making the process of obtaining congressional approval less cumbersome, the expansion of existing fast track procedures would make it more attractive for the President to submit international agreements for the approval of both houses of Congress.

This Article begins in Part I by describing the process of international lawmaking in the United States today. It focuses, in particular, on how much of international law is made by the President acting alone, using authority delegated to him by Congress. Part II shows how this process came to be. It traces ex ante congressional-executive agreements back to their origins and shows how long-term trends, as well as several crucial events, combined as Congress became complicit in the loss of much of its power over international lawmaking to the President. Part III turns to a discussion of the roles the President and Congress ought to play in international lawmaking and argues for a more balanced role for each. Finally, Part IV lays out a concrete proposal for reform.

I. THE POWER OF THE PRESIDENT TO MAKE UNILATERAL INTERNATIONAL LAW

International law in the United States today takes many different forms. There are, of course, classic Article II treaties—made by the President and approved by two-thirds of the Senate. In addition, there are what are often called "ex post congressional-executive agreements"—agreements like the

North American Free Trade Agreement[9]—that are negotiated by the President and then submitted to both houses of Congress for a vote up or down.[10] There are, moreover, "sole" executive agreements entered by the President using the inherent constitutional authority of the office.

Together these three best-known types of international agreements make up only a small fraction of the international agreements concluded by the United States every year. Much more common—and almost completely ignored outside of foreign policy circles—are executive agreements negotiated by the President using authority delegated in advance by Congress. Such agreements are not subject to approval by Congress after they are concluded, but instead may enter into force immediately upon the signature of the President or his representative. Such agreements—often referred to as "ex ante congressional-executive agreements"—make up the vast majority of international agreements in force for the United States today. They are used in nearly every area of international law, from fisheries to atomic energy to agriculture to economic cooperation.[11]

My examination proceeds in two stages. I begin by describing the legal authority under which the President makes most of the United States's international agreements and the nature and scope of the agreements concluded under this authority. I show that the vast majority of executive agreements are concluded under the authority of a congressional statute delegating authority to the President. Next, I turn to examining the nature of these grants of authority by Congress. I show that Congress has handed over unilateral power to the President to make most of our international law. And it has done so without maintaining any significant ongoing congressional oversight of the agreements created pursuant to that delegated power. As a result, there exists today a deep imbalance of power over international lawmaking in the United States.

A. The Scope and Legal Foundation of Executive Agreements

In 2008, the State Department reported that the United States had entered over two hundred executive agreements with foreign countries and

9. U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

10. North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473 (2006)).

11. Only two out of over a hundred areas of international law—human rights and extradition of accused criminals to foreign countries—have been entirely insulated from this transformation. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1261 (2008).

organizations.[12] These agreements cover nearly every area of international law, from defense to employment to education. In both number and scope, they far overshadow every other form of international agreement entered by the United States.

In addition to their prevalence, ex ante congressional-executive agreements and sole executive agreements—which I will refer to here collectively as "executive agreements"—are distinguished from other types of international agreements by the unilateral way in which they are created.[13] Unlike Article II treaties or ex post congressional-executive agreements, most ex ante and sole executive agreements are not submitted to Congress for approval. They are instead negotiated by representatives of the President and enter into force upon signature by the legal representatives of the state parties. Indeed, few outside the executive branch even know of their existence until after they have become binding on the United States. The text of most of these executive agreements is made public only after they enter into force (indeed, sometimes long after).

In part because they are so easy to create, executive agreements have become the primary instrument of international lawmaking in the United States. They far surpass Article II treaties and ex post congressional-executive agreements in number. Together, there were more than three thousand executive agreements in total during the two decades between 1980 and 2000.[14] By contrast, there were 375 Article II treaties[15]—about ten percent of the number of executive agreements—and a small handful of ex post congressional-executive agreements.[16]

12. Office of the Legal Adviser, U.S. Dep't of State, International Agreements Other than Treaties Transmitted in Accordance with the Provisions of 1 U.S.C. 112(b), as Amended, http://www.state.gov/s/l/treaty/caseact/2008/index.htm (last visited Sept. 14, 2009) (listing 236 executive agreements). The list includes all executive agreements—both sole executive agreements and ex ante congressional-executive agreements—reported to Congress in 2008. It includes some agreements that entered into force in earlier years and excludes some agreements that were made in 2008 but not reported to Congress until after the end of the year. It does not include classified executive agreements, which by some reports constitute roughly ten to fifteen percent of the total number of executive agreements.

13. In this Article, the term "executive agreement(s)" without a modifier refers to sole executive agreements and ex ante congressional-executive agreements collectively. Although ex post congressional-executive agreements are also formally "executive agreements," they are not meant to be included.

14. Hathaway, *supra* note 11, at 1264-69.

15. Author's calculations from Thomas Treaties Database, *supra* note 7.

16. I have been able to identify only nine such agreements between 1980 and 2000. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 19 U.S.C. (2006)); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C.

Executive agreements are extensive in scope as well as in number. Between 1980 and 2000, there were over one hundred separate recorded subject areas in which executive agreements were concluded.[17] Table 1 lists the subject areas in which executive agreements were most commonly concluded between 1980 and 2000. The five most common subjects of agreements range widely: defense

§§ 3301-3473); United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-499, 102 Stat. 1851 (codified as amended at 19 U.S.C. § 2112); United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified as amended at 19 U.S.C. § 2112); Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, 120 Stat. 2726 (codified as amended in scattered sections of 22 U.S.C.); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298 (codified as amended in scattered sections of 22 U.S.C.) (removing trade restrictions and liberalizing foreign investment between the United States, Poland, and Hungary); South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, 107 Stat. 1503 (codified as amended in scattered sections of 22 and 26 U.S.C.) (lifting antiapartheid sanctions and encouraging U.S. private sector investment in and trade with South Africa); Act of Dec. 16, 1985, Pub. L. No. 99-183, 99 Stat. 1174 (codified as amended at 42 U.S.C. § 2158) (approving the Agreement for Cooperation Between the Government of the United States of America and the government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy); Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 201(a), 110 Stat. 26, 34 (1996) (approving the Global Learning and Observations To Benefit the Environment (GLOBE) agreement and appropriating funds to the Commerce, Justice, and State Departments and to the judiciary). This list was compiled through a search of the titles of the agreements in the Statutes at Large database and an examination of the legislation for language indicating that the act constituted not simply implementing legislation, but rather formal approval of the agreement. Though as far as I am aware this is the most comprehensive listing of ex post congressional-executive agreements during this period, it is almost certainly true that this list misses several congressional-executive agreements, either because the agreement was not listed in the Treaties and International Agreements Online (Oceana) database of executive agreements on which the searches are based or because my assistants and I failed to catch the agreement in our search of the Statutes at Large. *See* Treaties and International Agreements Online, http://www.oceanalaw.com (last visited Sept. 14, 2009) [hereinafter Oceana Database].

17. Author's calculations from Oceana Database. *See* Oceana Database, *supra* note 16. The database includes treaties, sole executive agreements, and congressional-executive agreements. It appears to include about half of the international agreements entered by the United States in the last century. To calculate the numbers of international agreements noted here, I dropped all agreements that appeared likely to be sole executive agreements based on their title (including terms Memorandum of Understanding or Memorandum of Agreement, Understanding(s), Declaration(s), Agreed Minute(s), Agreed Record, Statement, Letter, Exchange of Notes, Joint Communique, Acceptance of the Report, Administrative Agreement, Administrative Arrangement, Agreement Interpreting, Arrangement, Implementing Arrangement, and Implementing Procedures) and those that appeared to be simply amendments or extensions (including terms Amendment, Extension to Agreement, Agreement Amending, Adjustments, Agreement Modifying, Agreement Extending, Supplemental, and Supplementary).

(fourteen percent of all executive agreements during this period), trade (nine percent), scientific cooperation (six percent), postal matters (six percent), and debts (six percent).

Table 1.

INTERNATIONAL AGREEMENTS ENTERED BY THE PRESIDENT ACTING ALONE, TOP THIRTY AREAS, 1980-2000[18]

SUBJECT	NUMBER OF AGREEMENTS	PERCENTAGE OF TOTAL
Defense	543	14%
Trade	359	9%
Scientific Cooperation	247	6%
Postal Matters	240	6%
Debts	227	6%
Agriculture	210	5%
Aviation	206	5%
Atomic Energy	167	4%
Economic Cooperation	158	4%
Taxation	88	2%
Employment	87	2%
Investment	81	2%
Telecommunication	75	2%
Narcotic Drugs	74	2%
Education	72	2%
Finance	70	2%
Mapping	59	2%
Energy	53	1%
Environmental Cooperation	47	1%
Peace Corps	46	1%

18. The table was compiled by calculating the number of agreements between 1980 and 2000 in each major subject matter category. It includes ex ante congressional-executive agreements, sole executive agreements, and amendments that are separately reported. To the extent possible, it excludes Article II treaties and ex post congressional-executive agreements. Data are drawn from the Oceana Database, *supra* note 16, with corrections based on other available data sources.

Space Cooperation	42	1%
Fisheries	39	1%
Judicial Assistance	37	< 1%
Maritime Matters	34	< 1%
Health	32	< 1%
Customs	26	< 1%
Social Security	25	< 1%
Arms Limitation	24	< 1%
Satellites	24	< 1%
Nuclear Safety	22	< 1%
Other	462	11.92%
Total	3876	100%

Many of these agreements involve mundane topics. In 2008, for example, the President reported an agreement on "energy-efficiency labeling programs for office equipment,"[19] an air transport agreement,[20] and a Memorandum of Understanding with Panama on the Fulbright Exchange Program.[21] But many address issues that are significant to large numbers of Americans and might have been the subject of close congressional scrutiny had they been made public before they entered into force. Alongside the more routine agreements reported in the most recent year were an agreement with China on the safety of drugs and medical devices,[22] an agreement with Vietnam on the return of Vietnamese citizens,[23] an agreement to provide up to $150 million in cash grants to the Palestinian Authority[24] (which was twice what the United States

19. Agreement on the Coordination of Energy-Efficiency Labeling Programs for Office Equipment, U.S.-EU, Dec. 20, 2006, Temp. State. Dep't No. 08-10, 2006 U.S.T. LEXIS 109. This agreement, along with all of the nonsecret agreements reported to Congress in 2008, is available at http://www.state.gov/s/l/treaty/caseact/2008/index.htm.

20. Air Transport Agreement, U.S.-Geor., June 21, 2007, Temp. State Dep't No. 08-06, 2007 U.S.T. LEXIS 50.

21. Memorandum of Understanding on the Fulbright Exchange Program, U.S.-Pan., Dec. 10, 2008, Temp. State Dep't No. 08-235, *available at* http://www.state.gov/documents/organization/121137.pdf.

22. Agreement on the Safety of Drugs and Medical Devices, U.S.-P.R.C., Dec. 11, 2007, Temp. State Dep't No. 08-13, 2007 U.S.T. LEXIS 55.

23. Agreement on the Acceptance of the Return of Vietnamese Citizens, U.S.-Vietnam, Jan. 22, 2008, Temp. State Dep't No. 08-43, 2008 U.S.T. LEXIS 10.

24. Cash Transfer Grant Agreement, U.S.-Palestinian Authority, Mar. 19, 2008, Temp. State Dep't No. 08-66, 2008 U.S.T. LEXIS 26.

had provided the prior year), and an agreement that provides for the "transfer of technical knowledge, advice, skills and resources from [the] United States to the Kingdom of Saudi Arabia in the areas of critical infrastructure protection and public security, including border protection, civil defense capabilities, and coast guard and maritime capabilities."[25]

The President entered each of the agreements mentioned above and outlined in Table 1 without express congressional approval. In each case, the President relied on one of three distinct sources of legal authority.[26] The first source is a preexisting Article II treaty. Treaties frequently outline the broad scope of an agreement between states but leave the details to be worked out in later, usually less formal, agreements between their executives. The second source is the President's sole or "inherent" constitutional authority—often his power as Commander-in-Chief of the armed forces. This is, for example, the source of authority for many of the status of forces agreements that the President has negotiated around the world. The third source—and by far the most commonly used—is a statute passed by Congress delegating to the President authority to conclude certain kinds of international agreements.[27]

There has been significant attention given in the legal literature to the second category of executive agreements—"sole executive agreements" entered by the President on his own inherent constitutional authority.[28] And yet,

25. Technical Cooperation Agreement, U.S.-Saudi Arabia, May 16, 2008, Temp. State Dep't No. 08-107, *available at* http://www.state.gov/documents/organization/109344.pdf.

26. The form of each international agreement—and the legal basis for that agreement—is usually determined in the first instance by the Office of the Legal Adviser at the U.S. Department of State. The Department is guided by what has become known as the Circular 175 Procedure. U.S. Dep't of State, Circular 175 Procedure, http://www.state.gov/s/l/treaty/c175 (last visited Sept. 14, 2009). The Circular 175 was a 1955 Department of State circular that prescribed a process for coordination of approval of treaties and other international agreements. Though still referred to as the "Circular 175 Procedure," the requirements now appear at 22 C.F.R. § 181.4 (1999), and in 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 720 (2006). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters' note 8 (1987) ("The criteria generally used by the Executive Branch in selecting the form by which an international agreement should be approved, and the procedures for consulting with Congress as to the choice made, are set forth in Circular 175 . . . ."). I discuss the Circular 175 procedure—and the great discretion it grants to the Department of State—in Hathaway, *supra* note 11, at 1249-52.

27. Agreements concluded pursuant to a statute are generally referred to as ex ante congressional-executive agreements. The first two types of agreements are generally referred to as "executive agreements" and "sole executive agreements," respectively. All three types of agreements are sometimes referred to as "executive agreements" and all three are made by the executive acting alone.

28. *See, e.g.*, Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the*

agreements concluded on the President's own constitutional authority make up only a small fraction of the executive agreements concluded every year. Between 1990 and 2000, for example, approximately twenty percent of all executive agreements were sole executive agreements.[29] The remaining eighty percent were congressional-executive agreements.

The majority of the eighty percent of international agreements, in turn, fell into the third category outlined above. These agreements—which are the central focus of this Article—are often referred to as "ex ante congressional-executive agreements," in part to indicate the interbranch cooperation required to create the agreements. The appellation is arguably a misnomer. It is true that the President has the power to enter into the agreements only because Congress has delegated it to him. Yet, as I show in the next Section, the cooperation typically ends there.

B. Ex Ante Congressional-Executive Agreements

Congressional-executive agreements made by the President on the basis of authority granted in advance by Congress are the centerpiece of U.S. international lawmaking. And yet they are little studied and poorly understood. This Section aims to demystify these agreements, showing when and how they are created. What emerges from this simple description is a troubling reality: Congress has given the President unilateral power to make most of the country's modern international legal commitments. It has done so without retaining any significant power to oversee the exercise of that delegated power. Indeed, Congress has little power to reject agreements currently negotiated in

President, 44 HARV. INT'L L.J. 1 (2003). Whether an agreement falls within these bounds turns on the constitutional allocation of powers between Congress and the President. *See infra* Part III.A.2. for a discussion of the limits on the President's inherent constitutional powers.

29. This is necessarily a rough calculation, as there is no authoritative source that indicates the authority under which executive agreements are concluded that is available to the public. The figure here was determined by calculating the total number of agreements with designations indicating that they are likely to be sole executive agreements (including the terms Memorandum of Understanding or Memorandum of Agreement, Understanding(s), Declaration(s), Agreed Minute(s), Agreed Record, Statement, Letter, Exchange of Notes, Joint Communiqué, Acceptance of the Report, Administrative Agreement, Administrative Arrangement, Agreement Interpreting, Arrangement, Implementing Arrangement, and Implementing Procedures) concluded between 1990 and 2000 (375), and dividing it by the total number of agreements during this same period (1747). The sources of data are the Oceana Database, *supra* note 16 (with corrections). Other estimates suggest the percentage of sole executive agreements is even smaller. *See infra* note 125.

its name and faces significant impediments to reclaiming the power it once heedlessly abandoned.

The basic legal foundation for each "ex ante" congressional-executive agreement is quite simple: Congress passes a statute granting the President the authority to enter into agreements with other nations, usually on a particular topic or for a particular purpose. The President may then use this authority to enter into executive agreements that, in most cases, he would otherwise be unable to enter.

The agreements are generally negotiated by officials in executive agencies working with their counterparts in other countries. For example, an official in the Department of Defense, acting on the basis of a statute granting authority in advance, might negotiate a cross-servicing agreement with her counterpart in Mexico. Such agreements become binding once signed by an appropriate representative of each state party. Though the agency officials involved in conceiving and negotiating the agreement might choose to consult with Congress, they usually are not required to do so.

The statutes that grant authority to the President to conclude executive agreements vary a great deal in their specifics but are similar in their basic structure. Some specifically authorize the President to "negotiate and carry out agreements with friendly nations or organizations of friendly nations."[30] Many offer more general language that might be read to encompass authority to enter an international agreement—stating, for example, that the President is "authorized to furnish . . . assistance, on such terms and conditions as he may determine."[31]

To demonstrate how these statutes function, it is helpful to delve more deeply into a couple of specific subject areas. Let us start with defense, which Table 1 shows is the most common subject of ex ante congressional-executive agreements. This broad category encompasses a large range of different types of agreements: "cross-servicing" agreements; "mutual logistic support" agreements; agreements "regarding military assistance under the Foreign Assistance Act of 1961;" agreements "regarding the status of United States military personnel;" "military training" agreements; "security agreements" for

30. Agriculture Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, § 101, 68 Stat. 454, 455. The above-quoted text has since been amended. The current text authorizes the President "to provide for the sale of agricultural commodities to developing countries and private entities for dollars on credit terms, or for local currencies (including for local currencies on credit terms)." 7 U.S.C. § 1701 (2006). As a result, agricultural commodities agreements are now concluded as contracts, rather than as executive agreements.

31. Foreign Assistance Act of 1973, Pub. L. No. 93-189, sec. 12(b)(1), § 503(a), 87 Stat. 714, 720 (codified at 22 U.S.C. § 2311(a)).

the "protection of classified information;" agreements regarding the "exchange of research and development information;" and "mutual defense" agreements. Despite their immense variety, nearly all of these agreements were authorized by the Foreign Assistance Act of 1961, which has since been amended in subsequent bills and various provisions of National Defense Authorization Acts.[32]

Some of the statutes provide very general authorization. For example, a provision of the Act for International Development of 1961 provides: "The President is authorized to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization . . . by . . . acquiring from any source and providing (by loan, lease, sale, exchange, grant, or any other means) any defense article or defense service."[33] Others are more specific, such as the authorization to engage in cooperative research and development agreements: "The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more countries or organizations . . . for the purpose of conducting cooperative research and development projects on defense equipment and munitions."[34] This authorization further specifies the countries with which the agreement may be entered, as well as a reporting requirement and other substantive restrictions.[35]

32. Authority to enter mutual "military assistance," "statuses of military personnel," and "mutual defense" agreements originates in the Act for International Development of 1961 (Foreign Assistance Act of 1961), Pub. L. No. 87-195, § 503, 75 Stat. 424, 435 (codified as amended at 22 U.S.C. § 2311). Authority to enter "military education and training" agreements is more fully outlined in the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 106(a), 90 Stat. 729, 732-34 (codified as amended at 22 U.S.C. §§ 2347, 2347a-b). "Cross servicing agreements" and "research and development exchange" agreements and other agreements involving weaponry have authority in several different sources. *See, e.g.*, National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 931(a)(2), 103 Stat. 1352, 1531 (1989) (codified as amended at 10 U.S.C. § 2350a) (authorizing research and development memoranda of understanding, with "major allies" or "any other friendly foreign country"); *id.* § 931(c), 103 Stat. at 1534 (codified at 10 U.S.C. § 2350d) (authorizing cooperative logistic support agreements); Foreign Military Sales Act, Pub. L. No. 90-629, § 3, 82 Stat. 1320, 1322-23 (1968) (codified as amended at 22 U.S.C. § 2753) (authorizing the President to make sales of military articles under certain conditions); International Security Assistance Act of 1979, Pub. L. No. 96-92, § 15, 93 Stat. 701, 706-08 (originally authorizing "cooperative projects" for research and development with NATO allies and later expanded to non-NATO members by the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1103(a)(1)(D), 100 Stat. 3816, 3962 (codified at 22 U.S.C. § 2767(j)(1))).

33. Pub. L. No. 87-195, § 503, 75 Stat. 424, 435 (codified as amended at 22 U.S.C. § 2311).

34. 10 U.S.C. § 2350a(a).

35. *Id.* § 2350a.

The authorizing statutes on agriculture are also fairly typical of ex ante congressional authorizations to the President. Most executive agreements on agriculture are authorized by the Agriculture Trade Development and Assistance Act of 1954, as updated and amended by subsequent statutes.[36] The Act gives the President "authoriz[ation] to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies."[37] It further permits the President to enter into agreements for various uses of currencies earned under commodity arrangements.[38] The Act provides for only very limited congressional oversight over agreements that are negotiated pursuant to its grants of authority. The President is required to "make a report to Congress with respect to the activities carried on under this Act at least once each six months and at such other times as may be appropriate."[39] These statutes are far from alone. Table 2 lists several others.[40]

36. Pub. L. No. 83-480, §§ 101-109, 68 Stat. 454, 455-57 (codified as amended at 7 U.S.C. §§ 1691-1715). Agricultural commodities agreements may also be authorized under the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 4203, 102 Stat. 1107, 1392 (codified at 7 U.S.C. § 5213) ("The President may enter into an agreement with any country that has a positive trade balance with the United States under which that country would purchase United States agricultural commodities or products for use in agreed-on development activities in developing countries.").

37. § 101, 68 Stat. at 455.

38. *Id.* § 104, 68 Stat. at 456.

39. *Id.* § 108, 68 Stat. at 457. Originally, these sections were authorized for only three years. *Id.* § 109, 68 Stat. at 457. Today, the basic authorizations are similar, but there is no longer a time limit on authorization. The current reporting requirements, first enacted by the Act To Extend the Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 85-128, § 5, 71 Stat. 345, 345 (1957) (codified at 7 U.S.C. § 1704a), provide that "[w]ithin sixty days after any agreement is entered into for the use of any foreign currencies, a full report thereon shall be made to the Senate and the House of Representatives of the United States and to the Committees on Agriculture and Appropriations thereof."

40. This table is merely illustrative and is far from exhaustive.

Table 2.

SELECTED AUTHORIZING STATUTES FOR EX ANTE CONGRESSIONAL-EXECUTIVE AGREEMENTS

PRIMARY AUTHORIZING ACTS	KEY AUTHORIZATION
Defense	
Mutual Defense Assistance Act of 1949[41]	"The President shall, prior to the furnishing of assistance to any eligible nation, conclude agreements with such nation, or group of such nations, which agreements, in addition to such other provisions as the President deems necessary to effectuate the policies and purposes of this Act and to safeguard the interests of the United States . . . ."
Mutual Security Act of 1954[42]	No assistance will be supplied to any nation under the Act unless such nation "shall have agreed to" a variety of conditions.
Act for International Development of 1961 (Foreign Assistance Act of 1961)[43]	"The President is authorized to furnish military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance . . . ."
Foreign Military Sales Act of 1968[44]	Requires an agreement not to transfer defense articles as a condition of certain military sales.
International Security Assistance and Arms Export Control Act of 1976[45]	"The President is authorized to furnish, on such terms and conditions consistent with this Act as the President may determine (but whenever feasible on a reimbursable basis), military education and training to military and related civilian personnel of foreign countries."
International Security Assistance Act of 1979[46]	Amends the Arms Export Control Act to establish conditions for "cooperative projects," defined as "a project described in an

41. Pub. L. No. 81-329, § 402, 63 Stat. 714, 717 (repealed 1954).
42. Pub. L. No. 83-665, §§ 141, 142, 68 Stat. 832, 839-40 (repealed 1961).
43. Pub. L. No. 87-195, § 503, 75 Stat. 424, 435 (codified as amended at 22 U.S.C. § 2311(a)).
44. Pub. L. No. 90-629, § 3, 82 Stat. 1320, 1322 (codified as amended at 22 U.S.C. § 2753).
45. Pub. L. No. 94-329, sec. 106, § 541, 90 Stat. 729, 732 (codified as amended at 22 U.S.C. § 2347(a)).
46. Pub. L. No. 96-92, § 15, 93 Stat. 701, 706-08 (codified as amended at 22 U.S.C. § 2767). The International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 115(a), 99 Stat. 190, 199 (codified as amended at 22 U.S.C. § 2767), displaced these

	agreement" with members of NATO.
National Defense Authorization Act for Fiscal Year 1987[47]	"The Secretary of Defense may enter into bilateral or multilateral Weapon System Partnership Agreements . . . with one or more governments of other member countries of the North Atlantic Treaty Organization (NATO) for the purpose of providing cooperative logistics support for the armed forces of the countries which are parties to the agreements."
National Defense Authorization Act for Fiscal Years 1990 and 1991[48]	"The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more major allies of the United States for the purpose of conducting cooperative research and development projects on defense equipment and munitions" and may enter into bilateral or multilateral agreements known as Weapon System Partnership Agreements with one or more governments of other member countries of [NATO] . . . . Any such agreement shall be for the purpose of providing cooperative logistics support for the armed forces of the countries which are parties to the agreement."
Trade	
The McKinley Tariff Act of 1890[49]	Authorizes the President to negotiate reciprocal trade agreements with foreign nations.
Reciprocal Trade Agreements Act[50]	Authorizes the President to negotiate reciprocal trade agreements with foreign nations.

provisions with similar provisions permitting the President to enter "a cooperative project agreement with [NATO] or with one or more member countries." The National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1103(a), 100 Stat. 3816, 3962 (1986) (codified as amended at 22 U.S.C. § 2767), further amended this section by extending it to non-NATO members.

47. Pub. L. No. 99-661, § 1102(a), 100 Stat. 3816, 3961 (1986) (codified at 10 U.S.C. § 2350(d)). A few years later, this provision was struck and replaced by similar previsions. *See infra* note 48 and accompanying text.

48. Pub. L. No. 101-189, § 931(a)(2), 103 Stat. 1352, 1531, 1534 (1989) (codified as amended at 10 U.S.C. § 2350a(a)).

49. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 567, 612.

50. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351). The authority has been revised, extended, and expanded numerous times, including in the Trade Agreements Extension Act of 1951, ch. 141, § 3(a), 65 Stat. 72, 72 (codified as amended at 19 U.S.C. § 1351); and the Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, §§ 2-3, 5, 69 Stat. 162, 162-65, 166 (codified as amended at 19 U.S.C. § 1351), which further extended the President's power to enter into trade agreements under section 350 of the Tariff Act of 1930, ch. 497, 46 Stat. 590.

Trade Act of 1974[51]	Creates, among other things, the so-called "fast track" negotiating authority.
Debts	
Act for International Development of 1961 (Foreign Assistance Act of 1961)[52]	"Whenever the President determines that it is important to the advancement of United States interests and necessary in order to further the purposes of this title, . . . he is authorized to enter into agreements committing . . . funds authorized to be appropriated under this title . . . ."
International Development and Food Assistance Act of 1978[53]	Addresses debt-relief agreements.
Jobs Through Exports Act of 1992[54]	"The Secretary of State is authorized, in consultation with other appropriate Government officials, to enter into an Americas Framework Agreement with any eligible country concerning the operation and use of the Americas Fund for that country."
Tropical Forest Conservation Act of 1998[55]	Grants the President authority to reduce the amount of debt owed the United States, to engage in debt-for-nature swaps and debt buybacks, and to enter into tropical forest agreements with eligible countries.

51. Pub. L. No. 93-618, §§ 101-103, 105, 151-154, 88 Stat. 1978, 1982, 1984, 2001-08 (1975) (codified as amended in scattered sections of 19 U.S.C.). The authority under this act was extended, among other times, in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 307(a), 98 Stat. 2948, 3012, which expanded "the term 'international trade'" to include "(A) trade in both goods and services, and (B) foreign direct investment by United States persons, especially if such investment has implications for trade in goods and services;" and the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1101, 93 Stat. 144, 307. The Trade Act of 2002 extended and conditioned the fast track authority. Pub. L. No. 107-210, §§ 2103-2105, 116 Stat. 933, 1004-16 (codified as amended at 19 U.S.C. §§ 3803-3805).

52. Pub. L. No. 87-195, § 202(b), 75 Stat. 424, 426-27 (repealed 1978).

53. Pub. L. No. 95-424, § 603(a)(2), 92 Stat. 937, 960-61 (codified as amended at 22 U.S.C. § 2395a(2)). Portions of the Act were repealed by the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 734(a), 95 Stat. 1519, 1560, but section 603(a)(2) remains unchanged at 22 U.S.C. § 2395a(2).

54. Pub. L. No. 102-549, § 602(a), 106 Stat. 3651, 3667 (codified as amended at 22 U.S.C. §§ 2430-2430i).

55. Pub. L. No. 105-214, § 1, 112 Stat. 885, 887-93 (1998) (codified as amended at 22 U.S.C. §§ 2431-2431k).

Postal Matters	
Postal Reorganization Act[56]	"The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries."
Agriculture	
Agriculture Trade Development and Assistance Act of 1954[57]	Provides the President with authority to, among other things, "negotiate and carry out agreements with friendly nations . . . for the sale of surplus agricultural commodities."
Omnibus Trade and Competitiveness Act of 1988[58]	"The President may enter into an agreement with any country that has a positive trade balance with the United States under which that country would purchase United States agricultural commodities or products for use in agreed-on development activities in developing countries."
Atomic Energy	
Atomic Energy Act of 1954[59]	Authorizes the President to recommend international atomic energy agreements, which would enter into force thirty days after the President submits the agreement to Congress.
Economic Cooperation	
Act for International Development of 1961 (Foreign Assistance Act of 1961)[60]	"The President is authorized to furnish assistance on such terms and conditions as he may determine in order to promote the economic development of less developed friendly countries and areas . . . ."

56. Pub. L. No. 91-375, § 2, 84 Stat. 719, 724 (1970) (codified as amended at 39 U.S.C. § 407). This Act was amended in 1998 and 2006 to add details to the delegation of authority and shift negotiating authority to the Secretary of State.

57. Pub. L. No. 83-480, §§ 101-109, 68 Stat. 454, 455-57 (codified as amended at 7 U.S.C. §§ 1701-1715).

58. Pub. L. No. 100-418, § 4203(b), 102 Stat. 1107, 1392 (codified as amended at 7 U.S.C. § 5213).

59. Pub. L. No. 83-703, § 123, 68 Stat. 919, 940 (codified as amended at 42 U.S.C. § 2153). Amendments in 1958, 1964, 1974, 1978, and 1985 altered, among other things, the reporting requirements. The regulations now provide for a waiting period of sixty days during which Congress may adopt a joint resolution of disapproval. 42 U.S.C. § 2153(d).

60. Pub. L. No. 87-195, § 211(a), 75 Stat. 424, 427-28 (codified as amended at 22 U.S.C. § 2151t).

Employment	
Act for International Development of 1961 (Foreign Assistance Act of 1961)[61]	"Arrangements may be made by the President with other countries for reimbursement to the United States Government or other sharing of the cost of performing such functions."
Investment	
Act for International Development of 1961 (Foreign Assistance Act of 1961)[62]	"The President shall make suitable arrangements for protecting the interests of the United States Government in connection with any guaranty issued under section 221(b), including arrangements with respect to the ownership, use, and disposition of the currency, credits, assets, or investment on account of which payment under such guaranty is to be made, and any right, title, claim, or cause of action existing in connection therewith."
Education	
Mutual Educational and Cultural Exchange Act of 1961[63]	"The President is authorized to enter into agreements with foreign governments and international organizations, in furtherance of the purposes of this Act."
Balanced Budget Downpayment Act[64]	Authorizes funding for the Global Learning and Observations To Benefit the Environment (GLOBE) program.
Narcotic Drugs	
Foreign Relations Authorization Act of 1972[65]	"[T]he President is authorized to conclude agreements with other countries to facilitate control of the production, processing, transportation, and distribution of narcotic analgesics . . . ."

61. Pub. L. No. 87-195, § 625(h), 75 Stat. 424, 451 (codified at 22 U.S.C. § 2385).

62. Pub. L. No. 87-195, § 221, 75 Stat 424, 430. These provisions were omitted by the revisions of these sections in the Foreign Assistance Act of 1969, Pub. L. No. 91-175, § 105, 83 Stat. 805, 807-18, *repealed by* Internal Development and Food Assistance Act of 1978, Pub. L. No. 95-424, 92 Stat. 937, which created the Overseas Private Investment Corporation, which was in turn granted authority to make arrangements with foreign governments relating to insurance for investments abroad. This authority was amended and extended several times.

63. Pub. L. No. 87-256, § 103, 75 Stat. 527, 529 (codified as amended at 22 U.S.C. § 2453).

64. Pub. L. No. 104-99, § 201(a), 110 Stat. 26, 34-35 (1996) (codified as amended in scattered sections of 19 U.S.C.). This Act provides authorization for the GLOBE program, but the agreements themselves appear to be authorized through the Mutual Educational and Cultural Exchange Act of 1961, § 103, 75 Stat. at 529.

65. Pub. L. No. 92-352, § 503, 86 Stat. 489, 496 (codified as amended at 22 U.S.C. § 2291(a)(2)).

Peace Corps	
Peace Corps Act[66]	Authorizes the President to "enter into, perform, and modify contracts and agreements and otherwise cooperate with any agency of the United States Government or of any State or any subdivision thereof, other governments and departments and agencies thereof."
Mapping	
Intelligence Authorization Act for Fiscal 1987[67]	"The 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."
Environment	
International Development and Food Assistance Act of 1977[68]	"The President is authorized to furnish assistance under this part for developing and strengthening the capacity of less developed countries to protect and manage their environment and natural resources."
Special Foreign Assistance Act of 1986[69]	"The Administrator of the Agency for International Development shall . . . whenever possible, enter into long-term agreements in which the recipient country agrees to protect ecosystems or other wildlife habitats recommended for protection by relevant governmental or nongovernmental organizations . . . ."
Fisheries	
Fishery Conservation and Management Act of 1976[70]	Authorizes and outlining process for concluding "international fishery agreements"
Judicial Assistance	
International Security and Development Cooperation	"The President may furnish assistance . . . to countries and organizations, including national and regional institutions, in

66. Pub. L. No. 87-293, § 10(a), 75 Stat. 612, 617 (1961) (codified as amended at 22 U.S.C. § 2509(a)).
67. Pub. L. No. 99-569, § 601(a), 100 Stat. 3190, 3202 (1986) (codified as amended at 10 U.S.C. § 454).
68. Pub. L. No. 95-88, § 113(a), 91 Stat. 533, 538 (codified as amended at 22 U.S.C. § 2151p(b)).
69. Pub. L. No. 99-529, § 302, 100 Stat. 3010, 3018 (codified as amended at 22 U.S.C. § 2151q(g)). In addition, the agreements entered under the GLOBE, a science and education program, might be considered environmental agreements. *See supra* note 64.
70. Pub. L. No. 94-265, §§ 202-203, 90 Stat. 331, 339-42 (codified as amended at 16 U.S.C. §§ 1822, 1823).

Act of 1985[71]	order to strengthen the administration of justice in countries in Latin America and the Caribbean."
International Anti-Corruption and Good Governance Act of 2000[72]	"The President is authorized to establish programs that combat corruption, improve transparency and accountability, and promote other forms of good governance in countries [eligible to receive aid]."
Customs	
Anti-Drug Abuse Act of 1986[73]	"The Secretary may by regulation authorize customs officers to exchange information or documents with foreign customs and law enforcement agencies if the Secretary reasonably believes the exchange of information is necessary [for particular listed purposes]."
Maritime Matters	
Port and Tanker Safety Act of 1978[74]	"The President is authorized and encouraged to . . . enter into negotiations and conclude and execute agreements with neighboring nations [regarding international vessel traffic and services]."
Space Cooperation	
National Aeronautics and Space Act of 1958[75]	"The Administration, under the foreign policy guidance of the President, may engage in a program of international cooperation in work done pursuant to this Act . . . ."
Energy	
International Development and Food Assistance Act of 1975[76]	"The President is authorized to furnish assistance, on such terms and conditions as he may determine, for [certain technical assistance, energy, research, reconstruction, and selected development programs]."

The delegations of authority by Congress to the President to create ex ante executive agreements vary significantly.[77] Yet there are a few common elements

71. Pub. L. No. 99-83, § 712, 99 Stat. 190, 244 (codified as amended at 22 U.S.C 2346c).
72. Pub. L. No. 106-309, § 205(a), 114 Stat. 1078, 1092 (codified as amended at 22 U.S.C. § 2152c).
73. Pub. L. No. 99-570, § 3127, 100 Stat. 3207, 3207-89 (codified as amended at 19 U.S.C. § 1628).
74. Pub. L. No. 95-474, § 2, 92 Stat. 1471, 1477 (codified as amended at 33 U.S.C. § 1230).
75. Pub. L. No. 85-568, § 205, 72 Stat. 426, 432 (codified as amended at 42 U.S.C. § 2475).
76. Pub. L. No. 94-161, § 306(2), 89 Stat. 849, 858-59 (codified as amended at 22 U.S.C. § 2151(d)).

worth noting. First, the authorizations are often extremely broad and usually contain no time limits. This is in part due to the nature of the enterprise: the statutes are intended to authorize agreements that have not yet been created and hence are understandably kept broad to give negotiators flexibility. As a result, many of the authorizations provide relatively few specific substantive limits. Moreover, few contain any time limit or "sunset" provision. As long as the statute remains in effect, so too does the delegation of authority to the President.

Second, the authorizations generally provide for little ongoing congressional oversight over the agreements that result. The statutes rarely require anything more than a report from the President to Congress containing the text of an agreement after it has gone into effect. There is a blanket reporting requirement under a 1972 law known as the Case-Zablocki Act,[78] which was expressly aimed to "restor[e] a proper working relationship between the Congress and the executive branch in the field of foreign affairs."[79] The Act requires that all international agreements that are not submitted to the Senate for advice and consent be submitted to Congress no later than sixty days after they enter into force.[80] Unfortunately, this requirement provides Congress with little real power over ex ante congressional-executive agreements. The sixty-day reporting deadline is regularly violated without consequence, primarily because agencies that initiate agreements fail to report them to the State Department in sufficient time. Indeed, roughly one-third of the agreements reported in 2007 were reported late.[81] Even if they are reported

77. There are, of course, exceptions to the generalizations I make below. There are some areas in which Congress closely confines the international lawmaking authority it grants to the President. Where Congress does so, its power may even be as significant as it is in cases where it retains the power to approve agreements after the fact.

78. Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b); *see also Executive Agreements*, 28 CONG. Q. ALMANAC 619, 619-21 (1972) (discussing Case-Zablocki Act and its purposes); *Executive Agreements: A Growing Issue in 1972*, 28 CONG. Q. ALMANAC 158, 158-60 (1972) (same). Congress was concerned in particular about secret arrangements for military bases in Spain at the time it passed it passed Case-Zablocki.

79. *Executive Agreements*, *supra* note 78, at 621 (quoting H.R. REP. NO. 92-1301 (1972)).

80. 1 U.S.C. § 112b(a).

81. The list of agreements reported to Congress in 2007 under the Case-Zablocki Act is listed on the website of the Office of the Legal Adviser of the U.S. Department of State. Reporting International Agreements to Congress Under the Case Act (texts of Agreements), http://www.state.gov/s/l/treaty/caseact/2007 (last visited Oct. 10, 2009) [hereinafter Reporting International Agreements]. The list includes notations regarding agreements reported after the reporting deadline.

on time, agreements are not reported until after they have already entered into force.[82]

Finally, Congress generally has no power—short of passing a law or, occasionally, a joint resolution—to reject the agreements that are reported to it. Even if opponents of an agreement were to muster majority votes in both houses of Congress to overturn an agreement, the result of their efforts would likely meet with a presidential veto.

In short, for quite some time, Congress has been in the business of giving away power to the President to create international agreements. Its grants of authority vary in their specificity but are commonly quite broad. Congress generally learns of the specifics of the agreements created using its delegated authority only after the agreements have entered into force. 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 would only be able to render the agreement unenforceable under U.S. domestic law—the binding international commitment would remain.

All of this raises a deep puzzle about U.S. international lawmaking: why is power over international lawmaking so imbalanced? Why, in particular, has Congress relinquished so much power to the President to make nearly all of the United States's international commitments, unfettered by effective congressional oversight? To answer these questions, the next Part traces the growth of executive power over international lawmaking in the United States during the course of two centuries.

II. LOOKING BACK: THE HISTORY OF THE PRESIDENT'S POWER OVER INTERNATIONAL LAWMAKING IN THE UNITED STATES

The imbalance in international lawmaking just described has not always existed. It is not an essential or necessary feature of the American legal and political landscape. The President need not—and did not until recently—exercise extensive unilateral control over international lawmaking in the United States. To understand why today's international lawmaking is so imbalanced, it is, therefore, necessary to understand how and why it has changed over the more than two hundred years since the country's founding.[83]

82. As executive agreements, the agreements generally enter into force upon the signature of the legal representatives of the parties to the agreement.

83. For another perspective on this history, focusing in particular on the evolution of what he calls the "National Security Constitution" and the interactions among the branches of

Examining history shows us that the prevalence of executive agreements is a relatively new phenomenon in U.S. international lawmaking. In the 1940s, the President began making unilateral international law on a scale never before seen. The collapse of Europe, the creation of the United Nations, and the newfound leadership of the United States in the world community generated increased demand for international lawmaking by the United States. In response, Congress began delegating more and more authority to the President to make international agreements. Although some in Congress made efforts to rein in the President's power, those efforts proved to be too little, too late, and were unable to stem the tide.

The transformation in U.S. international lawmaking may appear to have taken place over a relatively short period following the Second World War. But the stage was set decades earlier. This Part shows that over the course of more than two centuries, Congress incrementally handed over unilateral power to the President to make most of our international law, while paying little or no attention to the long-term consequences of its decisions. Individual members of Congress would have been unlikely to detect the effect of these decisions on the authority of the institution. Indeed, each decision to cede power had relatively little impact on its own. And yet the collective effect over the course of more than two centuries was to erode congressional oversight of international agreements.

The Supreme Court, moreover, did nothing to halt the slide toward presidential unilateralism. At every opportunity, it gave the green light to congressional delegations of authority to the President. Its decision in the early 1980s to prohibit the use of the legislative veto deprived Congress of the one formal mechanism it still possessed for limiting presidential power over international lawmaking. That decision, together with Congress's resigned response to it, sealed the transformation that had begun in the 1890s and gave us the imbalance of power in international lawmaking that exists in the United States today.

government that made the Iran-Contra affair possible, see HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

A. *The Founding Era Through the New Deal: Setting the Legal and Political Stage for Transformation*

The New Deal period is often cited as a transformative moment in domestic law.[84] Less well understood is the transformation of U.S. international lawmaking during this same period. As others have shown, ex post congressional-executive agreements are largely an invention of the New Deal period.[85] Even more important, however, is the less noticed emergence of ex ante congressional-executive agreements as the centerpiece of U.S. international lawmaking during this period.

To understand how and why the New Deal period changed the way international law was made in the United States, this Section examines international law practice leading up to the New Deal. This examination reveals that during the first one hundred years of the country's existence, the President's role in international lawmaking was heavily constrained. With very few exceptions, unilateral international lawmaking by the President was unheard of. The structural changes that took place during the 1930s and early 1940s made possible the President-centered process of international lawmaking that we have today. But the transformation did not happen without warning: the stage was set many decades earlier.

An examination of the early period of U.S. international lawmaking reveals three key points. First, the way the United States makes international law today looks nothing like the way it was made in the first one hundred years of the country's existence. Most of the Founders would have almost certainly been aghast at the unilateral power wielded by the President today. Second, although the numbers of ex ante congressional-executive agreements remained very small up until the New Deal, the legal and political foundation for the explosive growth in such agreements is found much earlier. Third, Congress and the Supreme Court are at least as responsible for the growth of unilateral presidential power as is the President. Congress began the process by delegating authority to the President to make some limited international agreements on his own, and the Supreme Court repeatedly rejected challenges to the delegation. Together, these decisions made possible an expansion of

84. Most notable is Bruce Ackerman's work, especially 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); and, in the area of international lawmaking (in particular, the emergence of ex post congressional-executive agreements), BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995).

85. ACKERMAN & GOLOVE, *supra* note 84, at 61-96.

presidential lawmaking authority in the international arena almost half a century later.

From the Founding of the country through the New Deal period of the early 1930s, executive agreements were used in only very limited circumstances. The forms of executive agreement that exist today—agreements entered under the President's sole executive authority, authorized by treaty, or authorized by statute—existed during this earliest period, but they were in each case radically more circumscribed than they are today. Used infrequently, and in only very limited circumstances, the executive agreement in all its forms was a minor feature of international lawmaking in the United States. The President was able to use international agreements outside the Article II treaty process, but the mechanism for doing so was limited and controlled. As a result, Congress remained a full and equal player in the international lawmaking process even when such agreements were used.

An early exchange between Congress and the President over the President's authority to conclude international agreements on his own authority is telling. In 1818, President James Monroe concluded an agreement through an exchange of notes with Great Britain limiting the naval forces that would be maintained on the Great Lakes. The two countries had exchanged notes agreeing to the arrangement, but the President had not formally consulted Congress or obtained its approval of the agreement. Congress had three years earlier passed a statute allowing the President to remove all "armed vessels" from the lakes.[86] On the basis of that statutory authority, the President treated the agreement as immediately effective and not requiring congressional consent. Recognizing that his authority to conclude the agreement without the consent of Congress was tenuous, however, the President shortly thereafter submitted a copy of the correspondence to the Senate with a note requesting the consideration of "whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution"[87] or whether he instead ought to submit the arrangement to the Senate under the Article II treaty clause. The Senate responded with a resolution consenting to the arrangement ("two-thirds of the Senators present concurring"), and recommended "that the same be carried into effect by the President."[88] In this way, Congress

86. Act of Feb. 27, 1815, ch. 62, § 4, 3 Stat. 217, 217 ("[T]he President . . . is authorized to cause all the armed vessels thereof on the lakes . . . to be sold or laid up, as he may judge most conducive to the public interest . . . .").

87. Letter from James Monroe, President of the United States, to the United States Senate, *reprinted in* 3 SENATE EXECUTIVE J. 132 (Apr. 6, 1818).

88. The exchange is detailed in SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 85-86 (1904). It is also discussed in detail, and appears with accompanying

responded to this early attempt by the President to create an executive agreement by reasserting Congress's power and authority to expressly consent to such agreements.

Up through the early 1900s, constitutional experts widely agreed that the President had the power to enter international agreements without the approval of the Senate under only three limited circumstances[89]: (1) where the agreement rested on his power as Chief Executive and Commander-in-Chief of the army and navy,[90] (2) where the power was delegated to him by the Senate through an Article II treaty,[91] and (3) where the power was granted him by

documents, in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 645-54 (Hunter Miller ed., 1931) [hereinafter TREATIES AND OTHER INTERNATIONAL ACTS].

89. HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 437-38 (1936); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 467-68 (1910).

90. There were two types of agreements concluded by the President on his own authority during this period: claims settlements and provisional or temporary agreements. The first—agreements settling particular claims or cases by the United States or a U.S. citizen against a foreign government or foreign citizen—were the most numerous. There were more than one hundred such agreements. *See* 1-9 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88; Hathaway, *supra* note 11, at 1290. Notably, sole executive agreements were used for claims settlements only when the United States or a U.S. citizen was the *recipient* of foreign funds. Agreements in which United States might have to pay money were almost universally concluded as Article II treaties. *See, e.g.*, Treaty for Final Settlement of Claims of Hudson's Bay Company and Puget's Sound Agricultural Company, U.S.-Gr. Brit., July 1, 1863, *in* 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 949, 951 (providing that sums of money awarded "shall be paid by the one Government to the other" and concluded as an Article II treaty). The second type of agreement concluded by the President on his own authority during this period was an agreement that created explicitly provisional or temporary international obligations. There were only two such agreements: (1) Cartel for the Exchange of Prisoners of War, U.S.-Gr. Brit., May 12, 1813, *in* 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 557 (ratified by Secretary of State James Monroe on May 14, 1813), a "provisional agreement" that was not submitted to Congress for ratification but was superseded a year and a half later by the Treaty of Ghent, Treaty of Ghent, U.S.-Gr. Brit., Dec. 24, 1814, *in* 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 574; and (2) Joint Occupation of San Juan Island, U.S.-Gr. Brit., Oct. 25, 1859-Mar. 23, 1860, *in* 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 281, which involved an exchange of letters between representatives of the United States and Great Britain over a temporary settlement of the question of occupation of San Juan Island. There were several unsuccessful subsequent attempts at a more permanent agreement. The arrangement finally came to an end in 1872, when the British withdrew the remaining troops in accordance with the Treaty of Washington.

91. Between 1789 and 1863, there were six such executive agreements. Adjustment of the Dillon Case, U.S.-Fr., Aug. 3 and 7, 1855, *in* 7 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 147 (relating to adjustment made to address a dispute that arose out of different interpretations of an earlier consular convention between the two countries); Declaration of

statute (including, most notably, agreements on postal matters[92] and agreements with island nations surrounding the United States[93]). These

Accession to the Stipulations Contained in the Convention with Russia of July 22, 1854, U.S.-Nicar., June 9, 1855, *in* 7 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 139; Declaration of Accession to the Stipulations and Provisions of the Treaty with Hanover of June 10, 1846, U.S.-Germanic Confederation, Mar. 10, 1847, *in* 5 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 161; Declaration of the Commissioners Under Article 6 of the Treaty of Ghent, U.S.-Gr. Brit., June 18, 1822, *in* 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 65; Decision of the Commissioners Under Article 4 of the Treaty of Ghent, U.S.-Gr. Brit., Nov. 24, 1817, *in* 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 655 (specifying borders); Declaration of the Commissioners Under Article 5 of the Jay Treaty, U.S.-Gr. Brit., Oct. 25, 1798, *in* 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 430 (locating the St. Croix River).

92. Such agreements were primarily used to manage international mail carriage. The first authorizing legislation, passed by Congress in 1792, provided that "the Postmaster General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices." Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239. This provision remained the foundation of U.S. international law on postal matters until the Treaty of Berne rendered bilateral postal agreements almost unnecessary. There appears, moreover, to have been little or no controversy about this provision, largely because it was regarded as sui generis. In 1890, for example, then-Solicitor General William Howard Taft wrote in response to a question about the legality of such an agreement that,

> [f]rom the foundation of the Government to the present day . . . the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster-General power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails.

19 Op. Att'y Gen. 513, 520 (1890).

93. Agreement Made by the Sultan of Sulu at Sooung (Jolo), U.S.-Sulu, Feb. 5, 1842, *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 349 ("for the purpose of encouraging trade"); Commercial Regulations, U.S.-Fiji, June 10, 1840, *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 275; Commercial Regulations, U.S.-Samoa, Nov. 5, 1839, *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 241, 244 ("In any technical sense it would perhaps not be possible to say that these regulations, signed by the chiefs of the Samoan Islands, were an international act, although at the time Samoa was not at all subject to any extrinsic authority . . . . Strict consistency perhaps would not permit the inclusion of such a document in this collection; but the historical interest of the paper is sufficient to warrant the exception, if it be an exception."); Articles of Arrangement with the King of the Sandwich Islands (Hawaii), U.S.-Haw., Dec. 23, 1826, *in* 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 269; Articles Agreed on with the King, Council, and Head Men of Tahiti, U.S.-Tahiti, Sept. 6, 1826, *in* 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 249, 250 ("promoting the commercial intercourse and friendship subsisting between the respective nations"). These agreements were generally regarded as morally but not legally binding. *See, e.g.*, Articles of Arrangement with the King of the Sandwich Islands (Hawaii), *supra* at 274 (quoting a report noting that

powers were, moreover, used exceedingly sparingly, perhaps in part because it was understood that they would "bind only the President and those with whose approval they were made and not the United States as a whole."[94]

There were none of the broad, open-ended, time unlimited grants of authority from Congress to the President that we find today. Indeed, there was an almost complete absence of legislation delegating authority to the President to conclude such agreements. The only statutes authorizing the President to negotiate agreements were those authorizing postal agreements, naval expeditions to neighboring island nations, the annexation of Texas, and the resettlement of persons delivered from on board interdicted slave ships.[95] As a result, Article II treaties—which required the formal consent of two-thirds of the Senate—remained the primary method of international lawmaking by the United States. The President was unable to make law without the full and equal participation of Congress. But as the country entered the twentieth century, that would all begin to change.

The transformation of international lawmaking has its origins in the McKinley Tariff Act of 1890,[96] which was seen by many as a protectionist measure because it raised tariffs on dutiable imports by just over seven percent.[97] Little noticed, however, was a new provision that allowed the President to negotiate reciprocal agreements with foreign nations. That new provision would become the seed of change in U.S. international lawmaking. The McKinley Act granted the President a license to negotiate agreements with foreign countries to reduce tariffs without seeking congressional approval of the agreements.[98] A slew of agreements followed, as did a challenge to the Act

"although it was never ratified by this Government, certain of its stipulations . . . were considered morally binding by both parties"). There were only two other congressional-executive agreements during the period before 1863. Colonization Agreement, U.S.-Den., July 19, 1862, *in* 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 833 (authorized by Act of July 17, 1862, ch. 197, 12 Stat. 592, which was later reissued in The Slave-Trade tit. 7, 1 Rev. Stat. 1082 §§ 5568-69 (1875), providing for resettlement on St. Croix of persons seized in the slave trade); Annexation of Texas, U.S.-Tex., Mar. 1-Dec. 29, 1845, *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 88, at 689 (approved by a joint resolution of Congress on March 1, 1845).

94. WILLIS, *supra* note 89, at 438. As a consequence, "there was no breach of faith on the part of the United States when a succeeding President or a secretary of state canceled such agreements." *Id.*

95. These statutes are cited *supra* notes 92-93.

96. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

97. The bill raised tariffs on dutiable imports from "an average of 45.1 to 48.4 percent," for a 7.3% increase. DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939, at 100 (1988).

98. *Id.* at 100-01.

in court. The challenge eventually reached the Supreme Court, which gave the Act—and the agreements that stemmed from it—its blessing. The Court agreed that it was "vital to the integrity and maintenance of the system of government ordained by the Constitution" that Congress not "delegate legislative power to the President."[99] Yet it disagreed that the McKinley Act did so. "It does not," the Court held, "in any real sense, invest the President with the power of legislation."[100] Rather, the McKinley Act simply required the President to ascertain the existence of relevant facts and to declare the event upon which Congress's will would take effect.[101] On these questionable grounds, the Court concluded that "[n]othing involving the expediency or the just operation of [the Act] was left to the determination of the President."[102]

The reciprocity provision—which now had the Supreme Court's blessing—reappeared again and again in trade legislation.[103] In 1934, following the collapse of world trade, the policy of reciprocity became the new centerpiece of American foreign trade policy. The 1934 Reciprocal Trade Agreements Act (RTAA) built on the principle of reciprocity established in the McKinley Act of 1890 but it granted far greater authority. Unlike earlier legislation, the RTAA

99. Field v. Clark, 143 U.S. 649, 692 (1892).

100. *Id.*

101. Statutes requiring presidential fact-finding had a long history. In 1815, for example, Congress passed a statute requiring the President to determine whether foreign nations had in place duties that discriminated against the United States. When the President found no discriminatory duties from a foreign nation, he was to issue a proclamation repealing U.S. duties against vessels from that nation and the products they carried. Act of Mar. 3, 1815, ch. 77, 3 Stat. 224; *see* CRANDALL, *supra* note 88, at 88-89. This Act and its successors were cited by the Court as direct precedent for the McKinley Tariff Act of 1890. *Field*, 143 U.S. at 685-92.

102. *Field*, 143 U.S. at 693. The dissenters, Justice Lamar and Chief Justice Fuller, were less sanguine. They concluded that "the section in question does delegate legislative power to the executive department, and also commits to that department matters belonging to the treaty-making power, in violation of . . . the Constitution." *Id.* at 697 (Lamar, J., dissenting). The majority's reasoning in *Field v. Clark* echoes in the Court's opinion in *Whitman v. American Trucking Ass'ns*, which involved a challenge to a delegation of power to the Environmental Protection Agency to promulgate air quality standards. There the Court stated that the "text [of Article I] permits no delegation of [legislative] powers." 531 U.S. 457, 472 (2001). On this view, when Congress delegates authority to the executive, it does not delegate "legislative power" at all; it simply "'lay[s] down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

103. Most notably, the Dingley Act of 1897, which also survived a challenge in the Supreme Court. *See* B. Altman & Co. v. United States, 224 U.S. 583 (1912).

was not limited to a small set of goods.[104] It authorized President Franklin Delano Roosevelt to negotiate executive agreements to reduce tariffs by up to fifty percent on a wide array of goods—a charge he eagerly took up. By the time the authority was up for renewal three years later, the country had already concluded agreements with sixteen countries.[105]

From the area of trade, the principle of congressionally authorized executive agreements slowly expanded into other areas of law, beginning with copyrights and trademark. In the following decades, there emerged statutes permitting the creation of ex ante congressional-executive agreements on not only tariffs, but postal matters, copyrights, and trademarks as well.[106] Although sole executive agreements and Article II treaties continued to be made, they were both increasingly eclipsed by ex ante congressional-executive agreements.[107]

Viewed from the perspective of the early 1930s, Congress's decision to relinquish immense discretionary power over international trade to the President is easy to understand. In the immediately preceding years, the country had fallen into a spiral of increasingly protectionist policies

104. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)). Notably, there were some important limits on the President in the Act. There were, to begin with, opportunities for public comment: "[F]ull opportunity is given the business community and the general public to present their views, either orally or in writing, to a special interdepartmental committee established for that specific purpose . . . . All interested persons have opportunity to be heard." Lynn R. Edminster, Chief Econ. Analyst, Div. of Trade Agreements, The Trade-Agreements Program and Our Foreign Trade, Address at the Good Neighbor League (July 20, 1936), *in* 15 DEP'T ST. PRESS RELEASES 49, 50-51 (1936) (describing grant of authority).

105. Lynn R. Edminster, Chief Econ. Analyst, Div. of Trade Agreements, The Trade-Agreements Program in Retrospect and Prospect, Address at the Second Institute on International Problems (Mar. 13, 1937), *in* 16 DEP'T ST. PRESS RELEASES 142, 143 (1937). The authority was subsequently renewed again in 1937, 1940, and 1943.

106. These three areas are cited in WILLIS, *supra* note 89, at 438; and WILLOUGHBY, *supra* note 89, at 477.

107. Sole executive agreements were used in cases where the agreement was within the President's sole executive power and in cases where the agreement would be temporary. In addition, sole executive agreements that laid out the terms of future agreement negotiations became common. *See* CRANDALL, *supra* note 88, at 87-88. It appears that sole executive agreements continued to be regarded as binding only on the Presidents who made them. As late as 1920, President Theodore Roosevelt wrote that a treaty was preferable to an executive agreement created "merely by a direction of the Chief Executive, which would lapse when that particular executive left office." ACKERMAN & GOLOVE, *supra* note 84, at 19 (emphasis omitted) (quoting Theodore Roosevelt). This may help explain the apparent preference for ex ante congressional-executive agreements, which have always been regarded as continuing in effect past the conclusion of an individual presidency, during this period.

culminating in the now-notorious Smoot-Hawley Act of 1930—an Act that raised tariffs on imported goods to record levels and in the process likely deepened the Great Depression that followed.[108] The RTAA was a repudiation of the congressional logrolling that had led to Smoot-Hawley. Congress would tie itself to the mast by handing relatively unfettered control over international trade agreements to the President, who was regarded as more insulated from the protectionist interests that held sway in Congress.[109] Apparently, little thought was given to the broader long-term effects that the grant of authority could have on the power of Congress to influence international lawmaking beyond trade agreements.

The grant of authority from Congress to the President in the RTAA coincided, moreover, with a broader growth of executive power during the 1930s and increasing delegation of authority from Congress to the President. This broader trend initially met resistance in the courts, which developed what is often referred to as the nondelegation doctrine. Twice in 1935—the year after the passage of the RTAA—the Supreme Court struck down a statute as an unconstitutional delegation.[110] The first of the two cases involved a delegation of authority to the President not so different from that found in the RTAA.[111]

108. Tariff Act of 1930, ch. 497, 46 Stat. 590.

109. Proponents emphasized the special features of the Act to justify the unprecedented delegation of international lawmaking authority to the President: "In enacting the Trade Agreements Act the presumption is that Congress was . . . mindful of the log-rolling process which makes it almost impossible for Congress itself to revise the tariff in any direction except upward." Edminster, *supra* note 104, at 51-52.

110. Both involved the National Industrial Recovery Act of 1933 (NIRA), passed as part of President Roosevelt's famous first one hundred days in office, and the first of the two involved a delegation of authority over foreign policymaking. The Act permitted representatives of labor and management to design codes of "fair competition" in order to stabilize wages and prices and thereby restore confidence in the economy. Act of 1933, Pub. L. No. 73-67, 48 Stat. 195, 196-97.

111. The second—and more famous—case invalidating a statute as an unconstitutional delegation came only a few months after the first. *A.L.A. Schechter Poultry Corp. v. United States*, involved a challenge to the "Live Poultry Code," which had been approved by the President under authority granted to him in the NIRA to approve "codes of fair competition." 295 U.S. 495, 521-22 (1935). *Schechter Poultry* challenged the Act on the ground that it impermissibly delegated authority. The Court agreed, holding that the delegation to the President of authority to approve the codes was an unconstitutional delegation of legislative power: "Instead of prescribing rules of conduct," it explained, the statute "authorizes the making of codes to prescribe them." *Id.* at 541. In the process, "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered." *Id.* at 542.

In *Panama Refining Co. v. Ryan*,[112] the Court invalidated a provision of the National Industrial Recovery Act that authorized the President to prohibit "the transportation in interstate and foreign commerce of petroleum . . . produced . . . in excess of the amount permitted to be produced . . . by any state law,"[113] because it allowed the President to make law outside the constitutional process.[114]

Almost as soon as it emerged, however, the nondelegation doctrine began to fall into disuse, a casualty of the New Deal transformation brought about by President Roosevelt. A 1937 challenge to the use of executive agreements in place of Article II treaties as an unconstitutional delegation of congressional authority reached a newly unsympathetic Supreme Court in the immediate aftermath of the famous "switch in time that saved nine."[115] The case, *United States v. Belmont*,[116] involved a challenge to an executive agreement between the United States and the Soviet Union that assigned to the U.S. government all claims against U.S. nationals as if it were a treaty. The Court answered the challenge to the agreement by giving its blessing to the agreement. The Court

112. 293 U.S. 388 (1935).

113. *Id.* at 406 (quoting National Industrial Recovery Act, § 9, 48 Stat. at 200).

114. Plaintiffs argued that this portion of the Act constituted an unconstitutional delegation of legislative power, because it purported to "authorize the President to pass a prohibitory law." *Id.* at 414. The Court held that the delegation established "no criterion to govern the President's course" and "declares no policy as to the transportation of the excess production." *Id.* at 415. It continued, "[s]o far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* Hence it was not simply the delegation of authority to the President to permit or prohibit the transportation of petroleum that the Court found inconsistent with the Constitution; it was that the exercise of that delegated authority was entirely unconstrained and unguided by Congress. In the process of striking down the delegation as unconstitutional, the Court was careful to distinguish *Field v. Clark* on the grounds that the act at issue in that case had severely constrained the authority delegated to the President. The Court noted that although it had upheld the delegation of authority to the President in that case, it had "emphatically declared that the principle that 'Congress cannot delegate legislative power to the President' is 'universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.'" *Id.* at 425-26 (quoting Field v. Clark, 143 U.S. 649, 692 (1892)). The Act provided that the suspension of duty-free importation of certain goods "'was absolutely required when the President ascertained the existence of a particular fact.'" *Id.* at 426 (quoting *Field*, 143 U.S. at 693). As such, the President did not have legislative authority; he instead was as the Court said in *Field v. Clark*, "'the mere agent of the law-making department.'" *Id.* (quoting *Field*, 143 U.S. at 693).

115. The "switch in time that saved nine" is often used to refer to the shift by Justice Owen J. Roberts in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), to uphold a minimum wage law in the wake of President Roosevelt's announcement of a court-packing bill.

116. 301 U.S. 324 (1937).

pointed out that it had earlier upheld the Tariff Act of 1897, which had authorized the President to conclude commercial agreements with foreign countries.[117] The decision in *Belmont*, together with a similar decision a few years later in *United States v. Pink*,[118] was read as giving the Court's stamp of approval to the extensive use of executive agreements.[119] Their legal foundation firmly in place, executive agreements were poised to become the centerpiece of international law in the United States.[120]

With the support of a Democratic Congress, President Roosevelt took advantage of this new and growing authority.[121] The 1941 Lend-Lease Act

117. *Id.* at 331 (citing B. Altman & Co. v. United States, 224 U.S. 583 (1912)). The Court interestingly failed to note an exceedingly important difference between the two cases. The agreement at issue in *Altman* had been entered into by the President with the express advance consent of Congress, whereas the agreement at issue in *Belmont* was a "sole" executive agreement entered by the President on his own constitutional authority without *any* congressional involvement. The backlash against the nondelegation doctrine is also strikingly evident in a case decided in 1936, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), where the Supreme Court held that a joint resolution of Congress authorizing the President to determine whether to place an embargo on the sale of arms and munitions to belligerents in Bolivia was not an unconstitutional delegation of legislative power to the President. That case, however, did not involve any international agreements.

118. 315 U.S. 203 (1942).

119. *See* Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 680-83 (1944) (criticizing the use of these decisions to justify the broad use of executive agreements).

120. The general acceptance of ex ante congressional-executive agreements by the late 1930s is evident from a discussion of the agreements in the 1937 American Society of International Law Annual Meeting, where Charles Cheney Hyde explained that "[o]n frequent occasions the action of the Congress has smoothed the way for the Executive, by enabling him to enter into arrangements contemplating reciprocal concessions in particular fields." Charles Cheney Hyde, *Constitutional Procedures for International Agreement by the United States*, 31 AM. SOC'Y INT'L L. PROC. 45, 49 (1937). He went on to discuss these fields, including trade, copyright, and loans. Such agreements were not universally believed constitutional. *See, e.g.*, Henry S. Fraser, *The Constitutionality of the Trade Agreements Act of 1934*, 31 AM. SOC'Y INT'L L. PROC. 55 (1937) (arguing that the RTAA is unconstitutional).

121. Roosevelt not only expanded the use of ex ante congressional-executive agreements. He also entered into executive agreements that did not have advance congressional approval, including perhaps most notably the "Destroyers for Bases Agreement" between the United States and the United Kingdom, entered on September 2, 1940, which transferred fifty destroyers from the United States in exchange for bases. *See* AMY M. GILBERT, EXECUTIVE AGREEMENTS AND TREATIES, 1946-1973: FRAMEWORK OF THE FOREIGN POLICY OF THE PERIOD 13 (1973); Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680 (1940). Moreover, Roosevelt entered many significant international agreements using ex post congressional-executive agreements—executive agreements expressly approved by Congress through majority votes in both houses. For example, Congress authorized the President to accede to the International Labor Organization using an ex post congressional-

authorized the President to provide aid to allied nations, specifying that "[t]he terms and conditions upon which any such foreign government receives any aid . . . shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory."[122] A series of bilateral executive agreements followed.[123] The Lend-Lease Act was important not only because it expanded the use of ex ante congressional-executive agreements far beyond their traditional scope in ways Congress did not at the time acknowledge and probably did not recognize. It also set the pattern that Congress would follow in the large number of foreign aid acts that came after it. As I show in the next Section, the structure—even the specific language—of the post-war aid acts was drawn directly from the Lend-Lease Act.[124]

The numbers alone give stark evidence of the transformation of international law in the years that followed. Over the first fifty years of the country's existence, there were a total of only twenty-seven executive agreements. Over the next fifty years (between 1839 and 1889), the numbers were larger, but still small in comparison with the present, with a total of 238 agreements (nearly the same as the 215 Article II treaties over the same period). The numbers continued to grow as the country entered its second century, with 917 executive agreements between 1889 and 1939. But it was not until the early 1940s that the number of executive agreements—most of them ex ante congressional-executive agreements[125]—began to grow exponentially,

executive agreement. *See* Joint Resolution of June 19, 1934, ch. 676, 48 Stat. 1182; Hathaway, *supra* note 11, at 1300 & n.184.

122. An Act to Promote the Defense of the United States (Lend-Lease Act), Pub. L. No. 77-11, § 3(b), 55 Stat. 31, 32 (1941).

123. GILBERT, *supra* note 121, at 14.

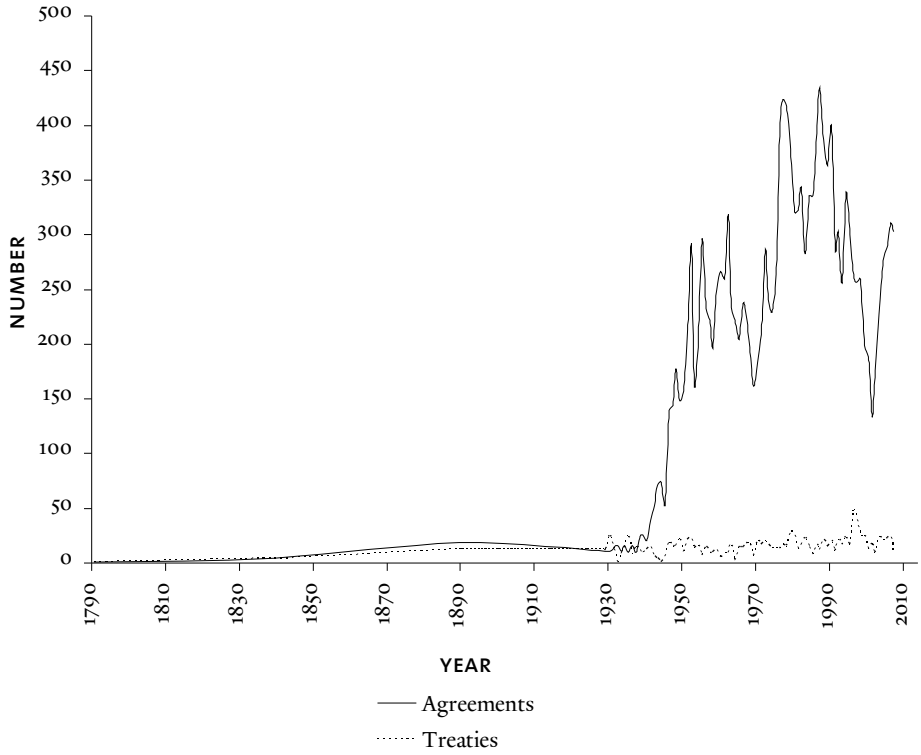
124. EDWARD S. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 45 (1944) ("[T]he Lend-Lease Act of March 11, 1941, is the fountainhead of the numerous Mutual Aid agreements under which our government has to date furnished our allies in the present war some fifteen billions worth of munitions of war and other supplies."); GILBERT, *supra* note 121, at 13 ("[T]he famous Lend-Lease Act . . . was the forerunner of all of the Aid Acts of the United States from that time to the present.").

125. A study of agreements concluded between 1946 and 1973 found that almost eighty-seven percent of all international agreements were executive agreements entered by the President under statutory authority granted by Congress, compared to seven percent sole executive agreements and six percent Article II treaties. LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 12-13 (1984). The study found that "the overwhelming proportion of international agreements are based at least partly upon statutory authority (88.3 percent of agreements reached between 1946 and 1972), followed by treaties (6.2 percent) and agreements based solely on executive authority

eventually reaching over three hundred per year. During the same period, the number of Article II treaties remained flat at between five and twenty per year. Figure 1 illustrates these trends.

Figure 1.

EXECUTIVE AGREEMENTS AND TREATIES, 1790-2007[126]



and action (5.5 percent)." R. ROGER MAJAK, 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22 (Comm. Print 1977).

126. The data for 1790 to 1930 are based on aggregate data for fifty year periods, provided in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 tbl.II-1 (2001) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS], which used the average number of agreements per year during each period for the first year of each period and then connecting those point estimates with a line-smoothing function. The data for the number of executive agreements and treaties from 1930 to 1999 are from TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra*, at 39 tbl.II-2. Data for the number of executive agreements from 2000 to 2006 are from Memorandum from U.S. Dep't of State Legal Adviser, Office of Treaty Affairs, to author (Jan. 15, 2007) (on file with author). The number of agreements from 2007 is drawn from the executive agreements reported under the Case-Zablocki Act for 2007. *See* Reporting International Agreements, *supra* note 81.

As the New Deal came to a close, the country was poised for a stark transformation in the way international law would be made. Executive agreements were on the brink of a period of exponential growth. The move toward extensive executive unilateralism in international law was well underway.

B. The Aftermath of World War II: Growing Presidential Unilateralism

In the years following World War II, the transition whose seeds were first sown more than fifty years earlier began to flower. Pressing this transition forward was a complex interplay of legal, political, and geopolitical forces. Each branch had a role to play in the process of change. The President, responsible for a newly dominant world power engaged in a Cold War standoff, sought to cement the country's global ties through an increasingly complex web of international agreements and a generous worldwide foreign aid program. The Supreme Court, which had in the 1890s and early 1900s opened the door to greater reliance on executive agreements by repeatedly ruling them constitutional, in the 1980s forced Congress to choose (perhaps unwittingly) between much stronger or much weaker oversight of the authority it had granted to the President. And Congress, faced with complex international responsibilities as well as a growing wealth of domestic programs, chose to delegate the power to make international agreements to the President in a series of small incremental steps, until it found itself with almost no power over international lawmaking and no easy means of reclaiming what it had lost.

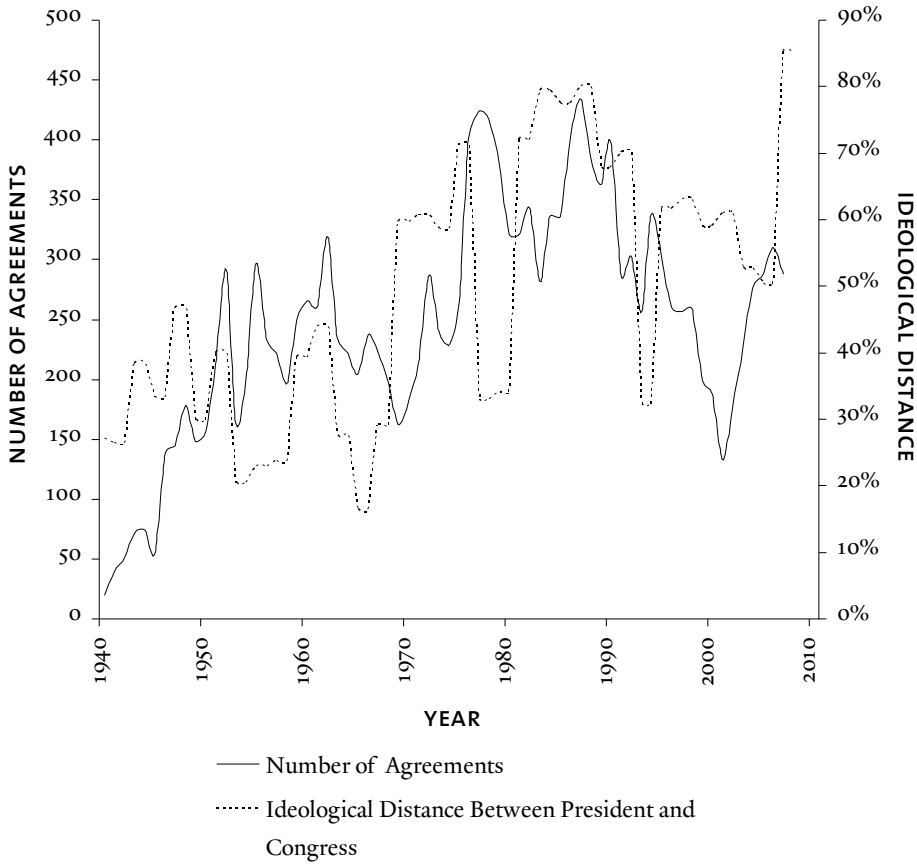
The interplay between the President and Congress during the postwar era is of particular interest here. As documented in the last Section, the Supreme Court played an important role in eliminating the legal barriers to changing the way international law was made in the United States and would, as the next Section shows, accelerate that change almost one hundred years later. The Court thus opened the door to change, but it was Congress and the President that walked through.

The President's motivation for expanding the use of executive agreements is perhaps the easiest to explain. An executive agreement concluded using authority granted in advance by Congress has the weight of congressional consent behind it (unlike a sole executive agreement). Yet because consent is granted in advance, it is not necessary for the President to obtain congressional approval for each individual agreement. The ex ante congressional-executive agreement process thus allows the President to enjoy the legitimacy of congressional approval without the hassle. This combination may have become even more attractive to the President as the differences between Congress and the President have grown over the postwar period.

Figures 2 and 3 show that as political differences have grown between the President and Congress, so too has the number of executive agreements. Figure 2 compares the number of executive agreements reported by the Department of State to the ideological distance between the President and the median member of Congress (calculated using the Common Space DW-Nominate Database). Figure 3 compares the number of executive agreements to the percentage of the members of each house of Congress that are not of the President's party. In both cases, the numbers have trended upward since 1940. Although there is no direct correlation between the number of agreements concluded and the measures of ideological or political distance between the President and Congress, there is notable overlap.[127] It is logical that it would be so: a President faced by a Congress that agrees with him less would naturally look for ways of obtaining policy goals that do not require additional congressional approval.

127. The agreements listed in Figures 2 and 3 are those reported by the Department of State. The figures do not include agreements that are classified, have not been reduced to writing, or that are nonbinding or otherwise insignificant. Some of the specific ups-and-downs in reported numbers might be due in part to changes in levels of reporting rather than in the actual number of agreements. For example, the jump in the number of agreements reported in the 1950s is likely due in part to increased congressional demands for reporting of executive agreements in the wake of the Bricker Amendment debate, and the uptick in reported agreements in the late 1970s is likely due to better reporting. *See, e.g.*, JOHNSON, *supra* note 125, at 128 (noting that a notice went from the Department of State to agency heads in 1976 requesting better reporting of agreements). Beginning around 1990, many of the agreements concluded under the Agricultural Trade Development and Assistance Act of 1954, ch. 469, 68 Stat. 454, were reformulated as contracts, which are not subject to reporting. Interview with Attorney, U.S. Dep't of State, Office of the Legal Adviser, in Washington, D.C. (Apr. 10, 2008). This might partially explain the decline in the number of agreements reported between 1990 and early 2000.

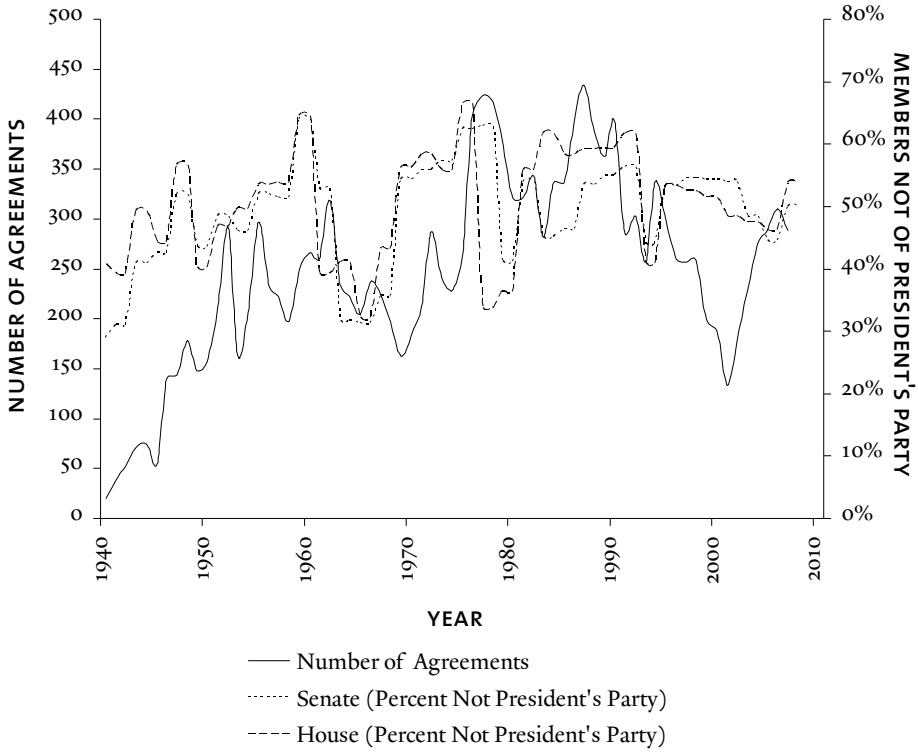
Figure 2.
EXECUTIVE AGREEMENTS AND IDEOLOGICAL DISTANCE[128]



128. Data for the number of executive agreements from 1940 to 1999 are from TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 126, at 39 tbl.II-2. Data for the number of executive agreements from 2000 to 2006 are from U.S. Dep't of State, Office of Treaty Affairs, Treaties and Other International Agreements Concluded During the Year (2007) (on file with author). The number of agreements from 2007 is drawn from the executive agreements reported under the Case-Zablocki Act for 2007. *See* Reporting International Agreements, *supra* note 81. The ideological distance between the President and Congress was determined for each year by calculating the distance between the DW-Nominate score for the sitting President and the median member of Congress (including all members of the House and Senate) using Voteview. Royce Caroll et al., "Common Space" DW-Nominate Scores with Bootstrapped Standard Errors (Joint House and Senate Scaling), http://www.voteview.com/dwnomin_joint_house_and_senate.htm (last visited Sept. 5, 2009).

Figure 3.

EXECUTIVE AGREEMENTS AND THE PRESIDENT'S PARTY IN CONGRESS[129]



It may be logical that the President would seize the opportunity to make international agreements without the approval of Congress, but why would Congress make this possible by delegating such sweeping authority to the President? The answer is a combination of institutional myopia and the political incentives facing members of Congress. Congress did not give away all of its power at once. Instead, it gave it away one step at a time. At each turn, the choice by Congress to delegate authority was perfectly rational for those taking part. In many cases, Congress made decisions to delegate authority to

129. Data on executive agreements are from sources described *supra* note 128. The author calculated the data for "Senate (Percent Not President's Party)" and "House (Percent Not President's Party)" as the percent of the members of each house of Congress with a "Party Code" different from that of the sitting President using the "Common Space" DW-NOMINATE Database, http://www.voteview.com/dwnomin_joint_house_and_senate.htm (last visited Sept. 5, 2009) [hereinafter Nominate-DW database].

presidents that held quite similar values and shared party affiliation with the large majority of members—presidents they trusted to conclude agreements that largely reflected Congress's views. Those delegations freed members of Congress to spend their time and energy on matters that were of greater importance to their constituents. They likely did not fully anticipate that these same delegations would be used decades later by presidents in a very different political context to avoid congresses with which they disagreed. At the same time, each individual delegation on its own diminished Congress's institutional authority by a small amount—at least at first. The impact of those delegations grew over time as the need for international agreements increased. Because the effect of the delegations increased over time, the congresses that delegated were not the ones that felt the full effects of diminished power—it was the power of congresses twenty, thirty, and fifty years later that was sacrificed. Individual members of Congress who approved the delegations either did not know or did not care that the cumulative effect of the delegations would, over the course of several decades, leave Congress with little power over international lawmaking. By the time Congress realized what had happened and began to react, it had no easy way to reclaim what it had lost. In the end, its response proved to be too little, too late.

It all begins with the end of the Second World War, and the changes it brought to the role of the United States in the world, and specifically to the U.S. foreign aid program. During the immediate post-war period, Congress incrementally granted authority to the President in order to enable a robust program aimed at European recovery. Determined to rebuild its allies in Europe, the United States gave unprecedented amounts of foreign aid. In the months immediately after the end of the war, the United States sent billions in aid to Europe.[130]

The aid program helped stem worsening economic conditions in Europe, but it was frequently criticized for being unfocused and ineffective.[131] In response to these concerns, Secretary of State George Marshall formed a plan to revise the way the United States gave foreign aid. In a commencement address at Harvard University he declared, "[i]t would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically . . . . The role of this country should consist of friendly aid in the drafting of a European program and of

130. JOHN KILLICK, THE UNITED STATES AND EUROPEAN RECONSTRUCTION 1945-1960, at 45-54 (1997).

131. MICHAEL HOGAN, THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952, at 32-35 (1987); KILLICK, *supra* note 130, at 65-77.

later support of such a program so far as it may be practical for us to do so."[132] The result of this call to action would later be called the "Marshall Plan," and it offered emergency assistance to the countries of Europe that had been devastated by war. The plan was put into effect through the passage of the Economic Cooperation Act in the spring of 1948.[133]

Largely unnoticed by commentators then or since was a major delegation of authority in the Act to the Secretary of State, one patterned on a similar delegation in the earlier Lend-Lease Act discussed above.[134] The Economic Cooperation Act gave the Secretary the power to conclude executive agreements to assist in carrying out the aims of the legislation.[135] The agreements would outline the terms under which the aid would be provided to recipient states and would be signed by donor and recipient alike.[136] By the time the plan ended in mid-1951, the United States had sent more than thirteen billion dollars in aid, the economies of all of the participating states except Germany had exceeded pre-war levels, and the United States had entered into executive agreements with every country receiving aid in Europe.[137]

With the end of the Marshall Plan in sight, Congress passed a series of acts that expanded the U.S. foreign aid program beyond Europe to include much of the rest of the world. Beginning in 1949, legislation passed by Congress offered extensive foreign aid aimed at providing economic, political, and social assistance in Europe, Africa, Asia, and the Americas.[138] Like the Lend-Lease Act and the Economic Cooperation Act before them, the acts included expansive grants of authority to the President to conclude executive agreements. The first, the Mutual Defense Assistance Act of 1949, not only permitted, but

132. George C. Marshall, Sec'y of State, Commencement Address at Harvard University, June 5, 1947, http://www.usaid.gov/multimedia/video/marshall/marshallspeech.html.

133. Economic Cooperation Act of 1948, ch. 169, 62 Stat. 137.

134. *See supra* text accompanying notes 121-124.

135. "The Secretary of State, after consultation with the Administrator, is authorized to conclude, with individual participating countries or any number of such countries or with an organization representing any such countries, agreements in furtherance of the purposes of this title." § 115(a), 62 Stat. at 150.

136. *See, e.g.*, Economic Cooperation Agreement, U.S.-Austria, Feb. 20, 1950, 1 U.S.T. 145; Economic Cooperation Agreement, U.S.-Turk., July 4, 1948, 62 Stat. 2566; Economic Cooperation Agreement, U.S.-Fr., June 28, 1948, 62 Stat. 2223.

137. Some of this history is told in GILBERT, *supra* note 121, at 18-26; and USAID, USAID History, http://www.usaid.gov/about_usaid/usaidhist.html (last visited Sept. 5, 2009).

138. Pub. L. No. 82-165, 65 Stat. 373. The Mutual Security Act of 1954 introduced development assistance, security assistance, private investment guarantees, and food aid, among other things. Pub. L. No. 83-665, 68 Stat. 832. The Mutual Security Act of 1957 led to the creation of the Development Loan Fund. Pub. L. No. 85-141, § 6, 71 Stat. 355, 357 (repealed 1961).

required, the President to enter into executive agreements to "effectuate the policies and purposes" of the Act.[139]

This seemed to offer an ideal arrangement. Although the foreign aid acts of the late 1940s and 1950s included broad grants of authority to the President to conclude international agreements, they also included strict sunset provisions. This limited the delegation of international lawmaking authority from Congress to the President.[140] Congress, in short, retained control of the programs because it had to reauthorize them every few years. The President, for his part, was able to use the authority granted to obtain assurances from aid recipients about the use of aid without committing the United States to any long-term obligations. By 1960, the United States had entered such executive agreements on military assistance, defense support, technical cooperation, and other special assistance with more than forty countries.[141]

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139. Pub. L. No. 81-329, § 402, 63 Stat. 714, 717 ("The President shall, prior to the furnishing of assistance to any eligible nation, conclude agreements with such nation, or group of such nations, which agreements, in addition to such other provisions as the President deems necessary to effectuate the policies and purposes of this Act and to safeguard the interests of the United States . . . ."). A few legislators seem to have been concerned about the extent of the authority granted by Congress to the President. In a Senate Foreign Relations hearing in 1953, for example, Senators Hickenlooper, Taft, Humphrey, and Knowland all expressed concern about the legal force of executive agreements. 5 EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE 175-99 (1977). For example, Senator Hickenlooper noted in a colloquy with Secretary of State Dulles,

> Now, that is the one thing that concerns me about this, whether this language can be—where we admit that these people were representatives of the United States and then we say that certain agreements or understandings were entered into—whether that can be successfully interpreted, from a legal standpoint as a ratification of everything that was done by any representative of the United States where agreements or understandings were entered into with regard to the final disposition of the country or its people, or with the final disposition of their political liberties or political situations. That worries me.

Id. at 176.

140. For example, the Mutual Security Act of 1951 provided, "After June 30, 1954, or after the date of the passage of a concurrent resolution by the two houses of Congress before such date, none of the authority conferred by this Act or by the Mutual Defense Assistance Act of 1949, as amended . . . may be exercised." § 530, 65 Stat. at 386.

141. GILBERT, *supra* note 121, at 44-45. For a comprehensive set of agreements entered in the 1950s, see 1-11 U.S. DEP'T OF STATE, UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS (TIAS) (1951-1960). For a more extesnsive discussion of the postwar debate over international law, including the Bricker Amendment, see Hathaway, *supra* note 11, at 1302-06. *See also* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003) (discussing the relationship between the Civil Rights struggle in the United States and debates over international law).

But the arrangement created structural difficulties as well. In arguing for revising the system of foreign aid, President John Kennedy explained that because the legislative authority for the program and for funding was short-term, aid was generally granted in short bursts rather than through long-term programs.[142] Successful development programs, he argued, generally require longer-term commitments. As he put it, "Money spent to meet crisis situations or short-term political objectives while helping to maintain national integrity and independence has rarely moved the recipient nation toward greater economic stability."[143]

In the election of 1960, President Kennedy made clear that creation of a new foreign assistance program would be a top priority for his new administration. And once elected, he made good on that promise. The 1961 Foreign Assistance Act provided for a large scale reorganization of U.S. foreign aid programs. The bill aimed, a Senate report explained, to "give vigor, purpose, and new direction to the foreign aid program."[144] It would provide more continuity to programs by allowing funds to be used until expended, rather than requiring that unused funds be returned to the Treasury and new funds be appropriated each year. It also shifted programs to a five-year borrowing authority, which allowed for longer-term planning among aid agencies.[145] Moreover, the program reflected a shift from a focus on Western Europe toward the Southern Hemisphere—particularly Latin America.[146]

142. Special Message to the Congress on Foreign Aid, 1961 PUB. PAPERS 204 (Mar. 22, 1961) ("[U]neven and undependable short-term financing has weakened the incentive for the long-term planning and self-help by the recipient nations which are essential to serious economic development."). For an example of such practices see, Mutual Security Act of 1951, § 530, 65 Stat. at 386-87, which provided for shorter-term commitments than the 1961 Foreign Assistance Act.

143. Special Message to the Congress on Foreign Aid, *supra* note 142.

144. S. REP. NO. 87-612, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2472, 2473.

145. *Id.* at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2474 (explaining that funds were to remain available until expended "to discourage the practice of hastily obligating funds near the end of the fiscal year in order to place aid administrators in a stronger position to seek further appropriations").

146. *Id.* at 4, *reprinted in* 1961 U.S.C.C.A.N. at 2475-76. The nations of Western Europe had by this point gone from being recipients of aid to being contributors. The same year the U.S. foreign assistance program was reorganized, the Organisation for Economic Co-Operation and Development (OECD) was founded to help member countries "achieve sustainable economic growth and employment and to raise the standard of living in member countries while maintaining financial stability—all this in order to contribute to the development of the world economy." Organisation for Economic Co-Operation and Development, History, http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (last visited Sept. 14, 2009). It, too, had originally been founded in the aftermath of World War II to

The new program was not motivated purely by a generous spirit of giving. It was, indeed, viewed as an integral part of the Cold War and the fight against communism. A Senate Report explained that the program was "dictated by the hard logic of the cold war and by a moral responsibility resulting from poverty, hunger, disease, ignorance, feudalism, strife, revolution, chronic instability and life without hope."[147] Foreign aid was a tool that could be used as a weapon to win the hearts and minds of the rest of the world.

Whatever the motivation, the new foreign aid program had clear results. It created the largest and arguably most successful foreign aid program in the world. Yet in solving the earlier problem of using short-term funding to address long-term problems, the new foreign aid act also succeeded in ceding unprecedented power to the President. In omitting strict sunset provisions from earlier bills but retaining the broad grants of authority, the legislation handed immense power to the President to conclude unilateral international agreements. This power was tempered only by a legislative veto embedded in the legislation that permitted Congress to terminate assistance under any provision of the Act by concurrent resolution.[148]

The shift of authority did not generate significant concern or debate in Congress. Both houses of Congress and the presidency were firmly under Democratic control, with sixty percent of the House and sixty-four percent of the Senate in Democratic hands. A few members of the minority party expressed concern, however, about the transfer of authority to the President. In a report of "Additional Views" following the House Foreign Affairs Committee Report on the 1961 legislation, two Republican members of the committee sounded a cautionary note:

> Year after year Congress has continued to delegate to the executive branch more and more authority to spend ever-increasing amounts of money. This year the increased delegation of power to the Executive is

administer American and Canadian aid under the Marshall Plan for the reconstruction of Europe. *Id.* The reformed OECD aimed instead to "coordinate the assistance programs of the Western Powers and Japan." S. REP. NO. 87-612, at 4, *reprinted in* 1961 U.S.C.C.A.N. 2472, 2476.

147. S. REP. NO. 87-612, at 14, *reprinted in* 1961 U.S.C.C.A.N. at 2475. In addition, the report discusses the Soviet foreign aid effort in justifying the change in borrowing authority under the act. *Id.* at 11, *reprinted in* 1961 U.S.C.C.A.N. at 2483.

148. Act for International Development of 1961 (Foreign Assistance Act of 1961), Pub. L. No. 87-195, § 617, 75 Stat. 424, 444 (codified as amended at 22 U.S.C. 2367 (2006)) ("Assistance under any provision of this Act may, unless sooner terminated by the President, be terminated by concurrent resolution."). As detailed in Section II.C. below, that limitation would prove fleeting.

> greater than ever before and goes far beyond what is necessary . . . In this bill there are 51 grants of discretionary power to the President and 18 authorizations to disregard other laws which apply to foreign aid. While many of these grants of power have been in previous foreign aid legislation, in one form or another, it must be taken into consideration that heretofore the authorization has been limited to 1 year.
>
> . . . .
>
> . . . [A]lthough the defects of the bill are many, transcending all others is the relinquishment of congressional control over the program. The trend in the past has been for the executive branch to request, and to receive, ever greater flexibility; but now the Congress is requested abjectly to abdicate its powers and to grant a blank check to be cashed wherever, by whomever, and in whatever amounts as are designated by those in charge of the foreign aid program.[149]

There is no evidence that Democratic members of Congress were moved by such objections. They appear to have felt that the legislative veto, combined with Congress's continued control over annual appropriations, would be sufficient to retain the necessary congressional oversight. A conference committee report noted, for example, that "[t]he Executive has authority to enter into agreements committing the United States to participate in development programs of foreign nations for a period of up to 5 years," and that "such commitments" were "subject only to the regular annual or supplemental appropriations of funds."[150] That continuing power over funds, along with a requirement that the agreements be reported to the relevant committees in Congress would, the report explained, assure that Congress would "be kept currently informed and have an opportunity to revise and adjust the program in the light of future developments through the normal legislative procedures."[151]

By the late 1960s, however, confidence in the power of the appropriations process to control unilateral lawmaking by the President had waned. Senator J. William Fulbright, then-chairman of the Senate Committee on Foreign

149. STAFF OF H.R. COMM. ON FOREIGN AFFAIRS, MUTUAL SECURITY ACT OF 1961: REPORT OF THE COMMITTEE ON FOREIGN AFFAIRS ON H.R. 8400, H.R. REP. NO. 87-851, at 108-09 (1961).

150. H.R. REP. NO. 87-1088, at 48 (1961) (Conf. Rep.), *reprinted in* 1961 U.S.C.C.A.N. at 2530. There was some debate over this matter, with some advocating five-year treasury financing. The result was a compromise: the administration could make long-term commitments, but each year's appropriations would come before Congress. Congressman Morris K. Udall, The Foreign Assistance Act of 1961: A Special Report 6 (1961), http://www.library.arizona.edu/exhibits/udall/special/foreign.html.

151. H.R. REP. NO. 87-1088, at 48, *reprinted in* 1961 U.S.C.C.A.N. at 2530.

Relations, began to reflect on "institutional problems" created by the 1964 Gulf of Tonkin resolution and the U.S. intervention in Vietnam in 1965.[152] In 1967, he proposed a resolution stating that a U.S. national commitment should result "from affirmative action taken by the executive and legislative branches of the U.S. Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."[153] In introducing the resolution, Senator Fulbright explained, "The authority of Congress in foreign policy has been eroding steadily since 1940, the year of America's emergence as a major and permanent participant in world affairs, and the erosion has created a significant constitutional imbalance."[154] He continued, "New devices have been invented which have the appearance but not the reality of Congressional participation in the making of foreign policy."[155] The resolution he proposed was meant to address this imbalance by requiring greater congressional participation in the making of international legal commitments. The resolution met with a chorus of favorable reviews in the major papers of the time.[156]

Fulbright's proposal did not gain traction, however, until 1969, when an eight-year period of unified Democratic control over government came to an end and President Richard Nixon entered office. The Vietnam War was entering its fourth year with combat troops on the ground, and the new Republican President found himself increasingly at odds with the Democratic Congress. The Senate issued a resolution based on those proposed by Fulbright two years earlier.[157] Two related resolutions followed.[158]

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152. *U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the S. Comm. on Foreign Relations*, 90th Cong. 1 (1967) (statement of Sen. J.W. Fulbright, Chairman, S. Comm. on Foreign Relations).

153. S. Res. 151, 90th Cong., 113 CONG. REC. 20,702 (1967).

154. 113 CONG. REC. 20,702-03 (statement of Sen. Fulbright) (discussing S. Res. 151). The remainder of Senator Fulbright's statement offers extensive support for the arguments offered here. *See id.* Senator Fulbright made a similar argument in J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961).

155. 113 CONG. REC. 20,703.

156. *United States Commitments to Foreign Powers: Hearing on S. 151 Before the S. Comm. on Foreign Relations*, 90th Cong. 4-8 (1967) (reprinting newspaper statements). Senate Resolution 151 was later reintroduced in modified form as Senate Resolution 187. A Senate report on the modified resolution was published later that same year. *See* J. WILLIAM FULBRIGHT, NATIONAL COMMITMENTS, S. REP. NO. 90-797 (1967).

157. S. Res. 85, 91st Cong., 115 CONG. REC. 17,241 (1969); *see* LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 86-87 (1986). For an interesting assessment of the issues surrounding Senate Resolution 85, see Ellen C. Collier, The

These resolutions failed to stem the tide of executive agreements, prompting Congress to enact the Case-Zablocki Act of 1972.[159] The Act was expressly aimed at "restoring a proper working relationship between the Congress and the executive branch in the field of foreign affairs."[160] It required that international agreements not submitted to the Senate for advice and consent be submitted to Congress no later than sixty days after they entered into force.[161] A subsequent Senate resolution added the requirement that "in determining whether a particular international agreement should be submitted as a treaty, the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established with the Secretary of State."[162] Though the Case-Zablocki Act did lead to better reporting of international agreements to Congress, it was quickly apparent that significant

National Commitments Resolution of 1969: Background and Issues, Cong. Research Serv. Report No. 70-112 (1970).

158. Those were S. Res. 469, 91st Cong., 116 CONG. REC. 32,990 (1970), which expressed the Senate's opinion that nothing in an executive agreement with Spain was to be deemed a national commitment by the United States, and S. Res. 214, 92d Cong., 118 CONG. REC. 6870 (1972), which stated that any agreement with Portugal or Bahrain for "military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent." *See* MARGOLIS, *supra* note 157, at 87.

159. Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b (2006)); *see Executive Agreements*, *supra* note 78, at 619-21; *Executive Agreements: A Growing Issue in 1972*, *supra* note 78, at 158-60.

160. *House Committee Backs Senate on Foreign Agreements*, 30 CONG. Q. 2009 (1972) (quoting House Report).

161. 1 U.S.C. § 112b(a) ("The Secretary of State shall transmit to the Congress the text of any international agreement . . . other than a treaty . . . 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."). The Act requires both the House and the Senate be informed of international agreements other than treaties. *See* 22 C.F.R. § 181.7(a) (2008) ("International agreements other than treaties shall be transmitted . . . to the President of the Senate and the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter."). This Act was the latest event in a long chain of events that began with the Supreme Court's determination in *United States v. Belmont*, that the President's power to conclude international agreements without the Senate's approval "may not be doubted." 301 U.S. 324, 330 (1937). This decision was reaffirmed in *United States v. Pink*, which upheld an executive agreement entered into by the President without congressional consent. 315 U.S. 203, 222-26 (1942).

162. International Agreements Consultation Resolution, S. Res. 536, 95th Cong. (1978); *see* S. REP. No. 95-1171, at 2-3 (1978) (accompanying S. Res. 536). This resolution formalized an agreement entered earlier that year in which Congress and the State Department agreed that the State Department would furnish the House Committee on Foreign Relations and Senate Foreign Relations Committees with a periodic list of significant international agreements that have been cleared for negotiation, accompanied by an explanation of the expected form the agreement would take. S. REP. No. 95-1171, at 2-3.

oversight problems remained. On the one hand, the agreements submitted to Congress by the State Department went largely unnoticed. As one frustrated State Department staff member put it a few years after the Act went into effect, "They just get filed away in drawers."[163] At the same time, 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."[164] Moreover, the "sketchy background statements accompanying the agreements" proved to be "practically useless for someone trying to figure out the anticipated effect of the commitments."[165]

When President Jimmy Carter entered office at the start of 1977 (thus briefly restoring unified Democratic Party control over government), he took aim at the explosive growth in executive agreements. He issued an unprecedented memorandum demanding more accountability. It required that "[a]ll proposals beyond or in addition to approved budgets to foreign governments or international organizations . . . be submitted to me [the President] for approval . . . before any commitment, formal or informal, is made."[166] Moreover, in 1978, Congress further strengthened the reporting rules by requiring oral agreements to be reduced to writing and reported, the President to explain the reasons for the late transmittal of agreements reported to Congress, and agencies to consult with the Secretary of State before concluding an international agreement.[167]

This resistance to the growth of executive lawmaking would prove to be short-lived. The election of President Ronald Reagan in a strong victory over President Carter, and the capture of the Senate by Republicans for the first time in twenty-five years, put an end to debates about the grant of excessive authority over international lawmaking to the President.

This examination of the New Deal and the several decades following shows how the seeds first planted in the 1890s began to flower. During the New Deal, the President, with the blessing of the Supreme Court, took the new form of international agreement from the 1890 Trade Act and expanded it across the

163. Loch Johnson & James M. McCormick, *Foreign Policy by Executive Fiat*, 28 FOREIGN POL'Y 117, 125 (1977) (quoting State Department official).

164. *Id.* (quoting Senate staff aide). Another study by a Senate staff aide found that thirty-nine percent of the agreements reported in 1976 were reported late. *See* JOHNSON, *supra* note 125, at 123. For more nearly contemporary critiques of the Case-Zablocki Act, see Johnson & McCormick, *supra* note 163, at 125-28.

165. Johnson & McCormick, *supra* note 163, at 125 (quoting Senate staff aide).

166. JOHNSON, *supra* note 125, at 129 (quoting memorandum).

167. Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 708(b)-(c), 92 Stat. 963, 993 (1978).

international legal arena. As the United States became more engaged in the world in the years following the Second World War, this new form of agreement stood ready to meet pressing needs. It allowed a rapid expansion of international commitments without the cumbersome political process of Article II treaties. This process of transformation in the way the country made its international commitments changed even more after the Foreign Affairs Act of 1961, passed in order to ease foreign aid and foreign relations, unwittingly set the stage for increasing delegation of authority to the President over new international agreements. At the same time, growing polarization between the President and Congress made unilateral lawmaking by the President more attractive. As we shall see in the next Section, a 1983 Supreme Court decision—and Congress's response to it—would soon seal this transition to unilateral international lawmaking.

C. *The Revolution of* INS v. Chadha*: The Triumph of Presidential Unilateralism*

In the early 1980s, what weak oversight Congress still had was undermined by the Supreme Court. The Court began by expanding the permissible scope of congressional delegation of international lawmaking authority to the President, holding in *Dames & Moore v. Regan* that even implicit congressional approval was sufficient.[168] Shortly afterwards, the Court eliminated the legislative veto in *INS v. Chadha*.[169] That decision is not usually cited for its effect on foreign affairs, but it was immensely consequential. In eliminating the legislative veto, the Court eliminated the single most significant control over ex ante congressional-executive agreements that Congress possessed. This forced Congress to choose between examining and approving each agreement individually or instead delegating even more unprecedented authority to the President (which it now could do thanks to the Court's decision in *Dames & Moore*).[170] As we shall see, it chose the latter.

168. 453 U.S. 654 (1981). In the case, the Supreme Court upheld the authority of the President to nullify judicial attachments, transfer frozen assets, and suspend private commercial claims in a sole executive agreement. As Harold Koh puts it, in this case and others on issues of foreign policy, "the Supreme Court has intervened consistently across the spectrum of United States foreign policy interests to tip the balance of foreign-policy-making power in favor of the president." KOH, *supra* note 83, at 134.

169. 462 U.S. 919 (1983).

170. Harold Koh was one of the first to make this connection. He noted that, together with *Dames & Moore*, *Chadha* played an important role in reducing the restrictions on executive power. KOH, *supra* note 83, at 138-44.

The stage for the revolution of *INS v. Chadha* was set on the very day that President Reagan took office in early 1981. On that day, President Reagan announced that an airplane carrying the fifty-two Americans that had been held hostage at the Iranian embassy for 444 days was on its way back to the United States.[171] The deal that had brought the crisis to an end was concluded in an executive agreement between the United States and Iran. The agreement became the subject of a lawsuit that made its way to the U.S. Supreme Court in the spring of 1981. In the suit, Dames & Moore, a multinational engineering and construction company, claimed that it was owed approximately $3.5 million for services it had performed before the Ayatollah Khomeini renounced all contracts with American companies—a claim that it argued was wrongfully nullified by the executive agreement.[172]

The Supreme Court upheld the executive agreement against this challenge in *Dames & Moore v. Regan*. In doing so, it placed significant emphasis on the prior implicit approval of Congress. It acknowledged that it could not conclude that prior legislation "directly authorizes" the President's suspension of claims in the executive agreement, but it concluded that the circumstances showed that the President was acting "with the acceptance of Congress."[173] It was enough, the Court concluded, that Congress had enacted "legislation closely related to the question of the President's authority . . . which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'"[174] As long as "there is no contrary indication of legislative intent" and there is "a history of congressional acquiescence in conduct of the sort engaged in by the President," the Court would defer.[175] If the point was not clear, the Court emphasized, "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best

171. *See Dames & Moore*, 453 U.S. at 664-65 (providing factual background for the dispute before the Court); *Reagan Takes Oath as 40th President; Promises an 'Era of National Renewal'—Minutes Later, 52 Hostages in Iran Fly to Freedom After 444-Day Ordeal*, N.Y. TIMES, Jan. 21, 1981, at A1.

172. 453 U.S. at 664-65.

173. *Id.* at 678.

174. *Id.* at 678 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

175. *Id.* at 678-79. It is worth noting that the type of agreement at issue in *Dames & Moore*—an agreement settling individual claims—is one of only two types of agreements in which there is a nearly two-hundred-year-long history of sole executive agreements. This suggests that the Court might have meant implicit congressional authorization to be applied much more narrowly than is commonly assumed.

demonstrated by Congress' enactment of the International Claims Settlement Act of 1949 . . . ."[176]

This decision expanded the scope of congressional delegation of authority to the President to conclude executive agreements, thus expanding the permissible scope of ex ante congressional-executive agreements. The Court made clear that as long as there is "closely related" legislation, coupled with "a history of congressional acquiescence," then the President would be permitted to conclude executive agreements that went beyond his own independent powers.[177]

Two years after *Dames & Moore* loosened Congress's ex ante control over unilateral presidential international lawmaking, *INS v. Chadha* almost entirely eliminated Congress's ex post control. At issue in *INS v. Chadha* was the legality of the "legislative veto"—a procedure that allows one or both houses of Congress to nullify (or "veto") an administrative regulation or action.[178] The specific provision at issue in *Chadha* allowed either house of Congress to veto the Attorney General's decision to suspend deportation of an alien in cases where "deportation would . . . result in exceptional and extremely unusual hardship."[179] The House had exercised this veto power to reject the Attorney General's suspension of deportation for Jagdish Rai Chadha, who had overstayed his student visa.

The Court held that the one-house veto of executive actions violated the separation of powers. The legislative power, the Court explained, is vested in the "Senate *and* House of Representatives."[180] The presidential veto is an essential check on this legislative power.[181] It assures that a national perspective will be "grafted on the legislative process,"[182] because the President—who is elected by all the people—is "rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide."[183] That power, however, is in turn checked by the power of two-thirds of both houses of Congress to overrule a veto, "thereby

176. *Id.* at 680. For a nice discussion of the import of the *Dames & Moore* decision, see KOH, *supra* note 83, at 138-40.

177. 453 U.S. at 678.

178. *See* INS v. Chadha, 462 U.S. 919, 923 (1983).

179. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a)(1), 66 Stat. 163, 214 (1952) (repealed 1996).

180. 462 U.S. at 945 (quoting U.S. CONST. art. I, § 1).

181. *Id.* at 947-48.

182. *Id.* at 948.

183. *Id.* (quoting Myers v. United States, 272 U.S. 52, 123 (1926)).

precluding final arbitrary action of one person."[184] Together, the Court explained, these interlocking powers represent a "single, finely wrought and exhaustively considered, procedure."[185] The one-house legislative veto—which does away with both bicameralism and with presentment—upsets this delicate balance.

Congress, the Court pointed out, "made a deliberate choice to delegate to the Executive branch . . . the authority to allow deportable aliens to remain in this country in certain specified circumstances."[186] Such a delegation can only be made through Article I legislation. Moreover, once it has made that decision, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[187] Individual determinations of policy—such as the decision to deport Chadha—are just as much subject to the constitutional requirements of bicameral passage followed by presentment to the President as is the original decision to delegate authority to the President.

The Court's decision in *Chadha* upended foreign relations law in the United States to an extent rarely appreciated. Justice White's dissent in *Chadha* noted fifty-six separate legislative veto provisions across fifteen major foreign affairs laws.[188] Among them were several legislative authorizations to the

184. *Id.* at 951.

185. *Id.*

186. *Id.* at 954.

187. *Id.* at 955.

188. *Id.* at 1003-13 (White, J., dissenting) (reprinting statutes from the Brief for the United States Senate). Those laws included the following: Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended in scattered volumes of U.S.C. (2006)); Act for International Development of 1961 (Foreign Assistance Act of 1961), Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered volumes of U.S.C.); Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, 87 Stat. 605 (1973) (codified as amended in scattered sections of 5, 10, 42, and 50 U.S.C.); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, 89 Stat. 849 (codified as amended in scattered sections of 7, 12, 22, and 33 U.S.C.); Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 7, 19, 26, 42, and 45 U.S.C.); Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, 88 Stat. 399 (1974) (codified as amended in scattered sections of 10 U.S.C. and 50 U.S.C. app.); Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, 88 Stat. 2333 (1975) (codified as amended at 12 U.S.C. §§ 635d-635g); International Security Assistance Act of 1977, Pub. L. No. 95-92, 91 Stat. 614 (codified as amended in scattered sections of 22 U.S.C.); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended in scattered sections of 22 U.S.C.); Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified as amended in scattered sections of 22 and 42 U.S.C.); International Navigational Rules Act of 1977, Pub. L. No. 95-75, 91 Stat. 308 (codified as amended at 33 U.S.C. §§ 1601-1608); National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered

President to enter into international agreements. Yet this list of fifty-six provisions just scratched the surface. A recent search of the United States Code Annotated revealed ninety-nine separate provisions that are expressly flagged as containing or having once contained legislative veto provisions similar to those found unconstitutional in *Chadha*.[189] Forty-two of these ninety-nine have some foreign or international aspect.[190]

At the time it was ruled unconstitutional, the legislative veto had only rarely been exercised. Between 1932 and 1984, the veto had been exercised only 125 times.[191] In only thirty-five instances did Congress veto an agency regulation, project, or decision. Nonetheless, those who have examined the veto have concluded that "the threat of a veto as well as the application of veto reviews by Congress have had a potent influence on policy decisions."[192]

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sections of 50 U.S.C.); Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended in scattered sections of 50 U.S.C. and 50 U.S.C. app.); and War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548).

189. Author performed search of Westlaw's "U.S.C.A." database for the phrases "Unconstitutionality of Legislative Veto Provisions" and "See similar provisions." This search, performed on August 25, 2008, turned up ninety-nine separate entries. An example is 16 U.S.C.A. § 1823 (West 2006), which includes a note entitled "UNCONSTITUTIONALITY OF LEGISLATIVE VETO PROVISIONS" stating:

> The provisions of former section 1254(c)(2) of Title 8, which authorized a House of Congress, by resolution, to invalidate an action of the Executive Branch, were declared unconstitutional in Immigration and Naturalization Service v. Chadha, 1983, 103 S.Ct. 2764, 457 U.S. 830, 73 L.Ed.2d 418. See similar provisions in this section.

190. This was determined by altering the search described above, *supra* note 189, to include "and (foreign or international)." Even this may underestimate the number of congressional vetoes that were invalidated. An article examining the impact of *Chadha* estimates that the decision invalidated "virtually every variety of more than 200 congressional vetoes enacted over the span of 50 years." Robert S. Gilmour & Barbara Hinkson Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. POL'Y ANALYSIS & MGMT. 373, 373 (1984).

191. Gilmour & Craig, *supra* note 190, at 374. E. Donald Elliott comes to the same conclusion. He writes:

> The true significance of the legislative veto cannot be measured by the infrequency with which it has been used. The legislative veto creates the most effective kind of power, the kind that does not have to be used to be effective. It is no exaggeration to say that "the main benefit of the congressional veto is that it exists. Its very existence will sensitize the bureaucracy and make it more responsive."

E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 152 (quoting 129 CONG. REC. H933 (daily ed. Mar. 8, 1983) (statement of Rep. Levitas)).

192. Gilmour & Craig, *supra* note 190, at 374.

Indeed, the mere fact that the veto was not regularly exercised does not indicate it has little impact. The presidential veto, too, is only rarely exercised. President George W. Bush, for example, went the first five-and-a-half years of his presidency without once exercising the presidential veto. Yet it would be unreasonable to say that the veto had no effect on the lawmaking process during this time.[193]

To see the impact of the legislative veto on the policy process, it is necessary instead to examine whether policy decisions were demonstrably altered as a result of the possibility of veto. Study after study of the legislative veto suggests that they have. To take just one example, the veto provision over arms sales was never used to reject proposed sales. Instead, the threat of the veto led the President "to make proposals more acceptable [to Congress] by adjusting numbers, eliminating components, or attaching stipulations on use of the weapons."[194] The veto thus helped to foster a "consultation and negotiations process between the president and Congress."[195]

The elimination of the legislative veto had a significant and direct effect on executive agreements. The legislative veto and executive agreement have always been deeply intertwined. They emerged onto the American legal and political scene at roughly the same time. The first legislative veto provision was enacted into law in the Legislative Appropriations Act of 1932[196]—at nearly the same time executive agreements began to emerge as a major tool of international lawmaking. It did not become commonly used, however, until World War II, when it was used to provide some limitation on the delegation of broad emergency powers to the executive branch.[197] This was precisely the same point at which executive agreements began their exponential rise. Indeed, the Lend-Lease Act described above—on which much of the legislation delegating the power to make executive agreements was patterned—was among the most prominent of these laws. It granted significant authority to the

193. I make a similar argument in Hathaway, *supra* note 11, at 1314, noting: "Strategic actors look ahead, and when they see an insurmountable hurdle, they are not likely to continue on their present path."

194. Gilmour & Craig, *supra* note 190, at 375.

195. *Id.*; *see also* Elliott, *supra* note 191, at 158 ("The real significance of the legislative veto, however, is found less in the instances in which it is invoked than in the way that its existence alters the working relationship between agency and subcommittee staff . . . . The threat of congressional review by means other than legislative veto is less likely to produce the advance negotiations between agencies and congressional committee staffs that are the hallmark of legislative vetoes.").

196. Act of June 30, 1932, Pub. L. No. 72-212, § 407, 47 Stat. 382, 414.

197. *See* H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1089-90 (1975).

President to provide military supplies to U.S. allies, but allowed Congress to repeal the delegation by a concurrent resolution.[198] That Act helped launch both the legislative veto and the executive agreement into the forefront of American foreign policymaking.

Many experts anticipated that Congress would respond to *Chadha* by placing the President on a "short leash," granting him legislative authorization only on a case-by-case basis.[199] Quite the opposite happened. In many cases where Congress revised statutory authorizations in response to *Chadha*, it did so by expanding, not contracting, the authority granted. Faced with a choice between the overwhelming prospect of rewriting perhaps as many as one hundred laws to provide for greater case-by-case oversight or delegating even greater authority to the President, Congress chose to delegate.

One common way in which it did so was by replacing provisions that provided that Congress could reject a negotiated agreement through a concurrent resolution with a provision that permitted rejection through a joint resolution. This change seems minor on the surface—and, indeed, most members likely did not see any practical difference, given how infrequently they had used the legislative veto—but it has profound consequences for the balance of power between the branches. That is because a concurrent resolution requires merely a majority vote in each house of Congress, whereas a joint resolution requires majority votes in both houses *and* presentment to the President for signature or veto (which may, in turn, be overridden by two-thirds votes in both houses of Congress). Switching from a concurrent resolution to a joint resolution thus expands presidential power, as the President gains the right to veto congressional action. In nearly every case, this change had the effect of increasing the President's power and decreasing Congress's power. In the many cases in which the concurrent resolution was the only tool retained by Congress to control authority granted to the President to enter into unilateral international lawmaking, the change turned out to be the difference between Congress retaining control and not retaining control.

The Foreign Assistance Act of 1961, for example, contained a broad legislative veto provision that effectively permitted Congress to repeal any

198. An Act To Promote the Defense of the United States, ch. 11, § 3(c), 55 Stat. 31, 32 (1941) ("After . . . the passage of a concurrent resolution by the two Houses . . . which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a) . . . .").

199. *See* Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the* Chadha *Case*, 79 AM. J. INT'L L. 912, 912 (1985).

provision of the Act by concurrent resolution.[200] This placed an important limitation on the extensive authority granted to the President in the Act to conclude executive agreements on a wide array of topics. That limitation, however, was wiped away by the Court's decision in *Chadha*. As Thomas Franck and Clifford A. Bob noted shortly after the *Chadha* decision was issued, the statute fell "squarely within the prohibitions established by the *Chadha* opinion."[201]

The Foreign Assistance Act was far from alone. In statute after statute, a legislative veto provision that was put in place to constrain lawmaking authority granted to the President fell to the new prohibition on legislative vetoes. Congress responded in most cases either by eliminating the veto provision altogether, as it had in the case of the Foreign Assistance Act of 1961, or by rewriting it to require the full legislative process in place of the veto. Consider, for example, the Trade Act of 1974. It contained a provision allowing Congress to overturn, by concurrent resolution, the President's decision not to provide import relief pursuant to a recommendation of the International Trade Commission in cases of "serious injury, or the threat thereof, to a domestic industry."[202] The President is granted authority to provide relief, including authority to "negotiate, conclude, and carry out agreements with foreign countries limiting the export from foreign countries and the import into the United States of such article."[203] In 1984, in response to *Chadha,* Congress amended the provision allowing Congress to override the President's decision to not provide import relief. Now the President's decision could be overridden only by enactment of a joint resolution.[204] By making the congressional

200. The Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 617, 75 Stat. 424, 444 (codified as amended in scattered sections of 22 U.S.C. (2006)) ("Assistance under any provision of this Act may, unless sooner terminated by the President, be terminated by concurrent resolution."); *see* Franck & Bob, *supra* note 199, at 921 (noting in 1985 that the Act's legislative veto provision "effectively allows the repeal of any and all provisions of that very extensive law by concurrent resolution of both Houses").

201. Franck & Bob, *supra* note 199, at 924. It took Congress until 2000 to formally eliminate the legislative veto provision, though it fell into disuse well before then, perhaps in recognition of its legal vulnerability. The legislative veto provision was replaced with new language relating to termination of expenses. *See* Global AIDS and Tuberculosis Relief Act of 2000, Pub. L. No. 106-264, § 302, 114 Stat. 748, 760 (codified at 22 U.S.C. § 2367).

202. 19 U.S.C. § 2253(a)(1)(A).

203. *Id.* § 2253(a)(3)(E).

204. *Id.* § 2253(c)(2). The Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 248, 98 Stat. 2948, 2998 (codified as amended at 19 U.S.C. §§ 2251, 2252), substituted a provision that the action recommended by the Commission would take effect upon enactment of a joint resolution described in 19 U.S.C. § 2192(a)(1)(A) for a provision that the action recommended by the Commission would take effect upon the adoption by both houses of

override subject to the President's veto, this small change in wording effectively eliminated Congress's ability to override the President.

Similar changes were made to the Arms Export Control Act. The Act authorizes the President to enter agreements to provide defense articles to foreign countries or international organizations.[205] The Act originally permitted Congress to reject an agreement proposed by the President by passing a concurrent resolution objecting to it. In 1986, however, the congressional override was changed to require a joint resolution.[206] As a result, an effort by Congress to reject an agreement negotiated by the President under authority granted in the Act is now subject to presentment to the President. As a result, it must either receive the President's signature—which is highly unlikely, given that the agreement would have been recently negotiated and proposed by the President—or Congress must muster enough votes to override a veto from the President—which is, needless to say, unlikely as well.

In these latter two cases—as in many just like them—the change from requiring a concurrent resolution to reject presidential action to requiring a joint resolution instead not only makes congressional oversight more difficult. It also renders the express oversight provisions largely irrelevant. A provision that allows Congress to undo an executive agreement through a joint resolution gives Congress no more power than it already possesses. Any time that a President has entered a binding executive agreement with another nation, the last-in-time rule applies so that a conflicting law enacted by Congress (with majority votes in both houses, followed by presentment to the

Congress, by an affirmative vote of a majority of the Members of each house present and voting under the procedures set forth in section 2192, of a concurrent resolution disapproving the action taken by the President or his determination not to provide import relief under 19 U.S.C. § 2252(a)(1)(A).

205. 22 U.S.C. § 2311(a) ("The President is authorized to furnish military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance . . . .").

206. Act of Feb. 12, 1986, Pub. L. No. 99-247, § (d)(1), 100 Stat. 9, 9, substituted "enacts a joint resolution prohibiting" for "adopts a concurrent resolution stating that it objects to" in 22 U.S.C. § 2796b(a)(1). It now reads: "[I]n the case of any agreement involving the lease under this subchapter, or the loan under chapter 2 of part II of the Foreign Assistance Act of 1961, to any foreign country or international organization for a period of one year or longer of any defense articles . . . , the agreement may not be entered into or renewed if the Congress, within the 15-day or 30-day period specified in section 2796a(c)(1) or (2) of this title, as the case may be, enacts a joint resolution prohibiting the proposed lease or loan." 22 U.S.C. § 2796b(a)(1) (citation omitted).

President) after the conclusion of the agreement renders the agreement invalid under domestic law.

What makes the *Chadha* case so important to international lawmaking, however, is not simply that it makes oversight by Congress much more difficult or that it renders express oversight provisions redundant. What makes it so important is that it upset long-standing expectations about the kind of continuing oversight Congress could exercise. Congress delegated significant authority to the President to engage in a variety of international lawmaking and foreign policymaking decisions on the understanding that it could retain some power to oversee and control the exercise of that delegated authority through legislative veto provisions.[207] When *Chadha* upset that expectation, it fundamentally changed the calculus Congress faced when it decided to delegate.[208]

Congress bears significant responsibility, however, for the diminution of its own power after *Chadha*. It could have responded to the decision by placing the President on the proverbial "short leash," which, as already noted, many expected. Instead, Congress frequently chose to alter the oversight provision of the statute to conform with *Chadha* without shortening the leash on the President's delegation. Congress retained the broad delegations originally granted in a world in which it could use the legislative veto to control the exercise of that delegation. But it eliminated the legislative veto on which that original delegation was in part premised. Moreover, by significantly diluting Congress's formal oversight powers, the decision and legislative changes made in response to the decision led to less informal oversight as well. With Congress less likely to object to a decision or an agreement, the executive branch was less likely to seek informal feedback and input from Congress than it might have otherwise.

Why did Congress respond as it did? Despite their importance for international law, the changes detailed above appear to have been almost entirely uncontroversial and received little focused attention from members of Congress. Perhaps the most plausible explanation for Congress's response, therefore, is that the issue simply slipped below the radar screen of members of

207. *See, e.g.*, Elliott, *supra* note 191, at 154 ("A second set of objections, in its simplest form, is that the legislative veto encourages Congress to make broad delegations of power to administrative decisionmakers.").

208. It is worth noting that while *Chadha* had a significant impact on ex ante congressional-executive agreements, significantly diluting Congress's oversight capacity, it did not affect ex post congressional-executive agreements—agreements approved by Congress *after*, not before, they are negotiated. That is because ex post congressional-executive agreements are approved by both houses of Congress and are subject to presentment to the President.

Congress, who approved in piecemeal form what they believed were minor changes to preexisting legislation necessitated by the Supreme Court's decision in *Chadha* without fully recognizing the consequences of the wholesale shift in power these "minor" changes—when added together—would bring about. Moreover, the legislative veto had not been used very frequently. Failing to recognize that the presence of the veto changed the type of agreements negotiated by the President and the informal consultation he engaged in before concluding agreements, members of Congress may have assumed eliminating the veto would make relatively little difference.

To the extent members of Congress noticed the issue, their choice to delegate authority was a predictable response to what appeared to be a limited set of options.[209] The *Chadha* case presented Congress with a stark choice: stop delegating authority to the President and retain power over individual agreements, or keep delegating authority and relinquish nearly all power to oversee individual agreements. At the time, the country was concluding executive agreements at a rate of almost one per day.[210] The House was in Republican hands (with fifty-six percent of the seats) while the Senate was in Democratic hands (with over sixty percent of the seats).[211] Treaties (which require cooperation between the President and two-thirds of the Senate) were being approved in small numbers, hovering around twenty per year.[212] With this degree of division within Congress, it was impossible for Congress to approve nearly three hundred separate agreements per year even if it were to treat them as congressional-executive agreements rather than as Article II treaties. As a consequence, those members of Congress for whom international law was important must have realized that requiring individual congressional approval of executive agreements would have effectively halted U.S. participation in the international legal community and hence would have supported the elimination of the legislative veto without any shortening of the leash of delegation. Those for whom international law was unimportant, on the other hand, would likely have been happy to place full responsibility for the agreements in the President's hands.[213]

209. I say appeared to be, because other less obvious options were and are available, as described in Part III of this Article.

210. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 126, at 39 tbl.II-1.

211. Calculated by author from Nominate-DW database, *supra* note 129.

212. There were twenty-three treaties concluded in 1983, fifteen in 1984, and eight in 1985. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 126, at 39 tbl.II-2.

213. A Senate statement about executive agreements supports this view. It states:

> The difficulty in obtaining a two-thirds vote was one of the motivating forces behind the vast increase in executive agreements after World War II . . . . The

The final step toward presidential unilateralism in international lawmaking came about as the result of a decision that many believed would do just the opposite. Rather than restore the balance in power between the branches by encouraging Congress to engage in greater oversight over international lawmaking, the decision led Congress to relinquish the one lever it had left—the legislative veto—without any compensating changes in the delegation the veto was meant to control. Hence presidential unilateralism came to dominate U.S. international lawmaking, but not through a presidential power grab. Perhaps ironically, it took all three branches, working in concert (intentionally or, more likely, not), to give rise to the unilateral system that now governs.

The twentieth century saw the emergence and eventual triumph of presidential unilateralism over international lawmaking. The question facing the United States as it begins the twenty-first century is whether this unilateralism should continue. The next Part grapples with this question.

III. THE PROPER ROLE OF THE PRESIDENT IN INTERNATIONAL LAWMAKING

Today nearly all of U.S. international law is made by the President acting alone with little oversight by Congress or the U.S. public. The previous Part of this Article demonstrated that such unfettered presidential power has not always been a feature of the American legal landscape. It is, instead, of relatively recent vintage and forged in response to specific historical events and challenges. The question thus emerges whether this relatively new development is a good one. Should the President exercise such broad unilateral power or should he not?

In an effort to begin to answer this question, this Part examines the power of the President over international lawmaking from expressly legal and normative perspectives. It argues that reform is necessary for at least three reasons. First, the President is a necessary actor in international lawmaking, but is only rarely sufficient under our constitutional system. Second, the current process of international lawmaking has undermined democratic

> growth in executive agreements is also attributable to the sheer volume of business and contacts between the United States and other countries, coupled with the already heavy workload of the Senate. Many international agreements are of relatively minor importance and would needlessly overburden the Senate if they were submitted to it as treaties for advice and consent.

U.S. Senate, Origins & Development, Powers & Procedures, Treaties, http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm (last visited Sept. 14, 2009).

accountability. And third, there is no necessary tradeoff between democratic accountability and desirable policy outcomes: more democratic international lawmaking can lead to *more* effective international law.

In arguing for more oversight of presidential international lawmaking by Congress and the U.S. public, I do not mean to sentimentalize Congress or suggest that it is without flaws. Quite the contrary. The story I have told indicates just how dysfunctional and myopic Congress can be.[214] What I intend to argue instead, is that these two imperfect institutions—Congress and the presidency—can produce together law that is better in a variety of respects than that which either would produce alone. At the same time, greater transparency can make possible informal oversight that can be as powerful and effective as more formal systems of approval.

A. *The President Is a Necessary but Rarely Sufficient Actor in International Lawmaking*

The President plays a distinctive role in foreign affairs in the United States. The President is the voice of the nation on the international stage as well as Commander-in-Chief of the armed forces. As a result, the President is an essential player in international lawmaking. Without the President's support, new law cannot be created. Yet the basic principles that underlie the American constitutional order are not suspended in foreign affairs. While the President is necessary to making international law, his unilateral support is not sufficient except in limited circumstances. Here I pause to outline the distinctive powers of the President in international lawmaking and the limits on those powers. I conclude by showing how ex ante congressional-executive agreements sometimes test and perhaps even stretch beyond these limits.

1. *The President Is the Sole Voice of the United States on the International Stage*

The President is the sole actor charged with representing the United States on the international stage. This important and distinctive role has been read on

214. For more on the flaws of Congress, see, for example, JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005), which examines the failure of the American political system—including Congress—to accurately reflect the interests and preferences of the public; and THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006), which examines how and why "Congress is failing America."

occasion to mean that the President has extensive unilateral power in foreign affairs.[215] This reading is overbroad. The President's role as the sole legal representative of the United States makes him an essential player in the international lawmaking process. But it does not make him the only player. Instead, the Constitution makes clear that even the President's power to communicate on behalf of the nation is limited by the constitutional rights and responsibilities of the other branches of government.

The President possesses unilateral power to negotiate an agreement with a foreign party. This has been true from the earliest days of the United States. The Constitution provides that the Senate must offer "advice and consent" to an Article II treaty. Yet as early as the presidency of George Washington, the "advice and consent" of the Senate was effectively reduced to "consent."[216]

The unique presidential role does not end with negotiations, however. It extends to the entire process of communicating with foreign nations. Indeed, throughout U.S. history, presidents of all political persuasions have defended the institution's role as the sole means of communication with foreign nations. While serving as Secretary of State, Jefferson informed the French Minister to the United States that the President is "the only channel of communication between this country and foreign nations."[217] In 1877, Congress passed two joint resolutions congratulating the Argentine Republic and Republic of Pretoria on having established a republican form of government and directing the Secretary of State to communicate with the two countries. The President vetoed both resolutions.[218] In 1920, President Wilson refused to give notice of

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215. This view appears most strikingly in *United States v. Curtiss-Wright Export Corp.*: "[T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. 304, 319 (1936). For further discussion of this issue, see Hathaway, *supra* note 11, at 1330 n.278.

216. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 177 (2d ed. 1996).

217. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 53 (2002). A more complete quote is as follows: "[The President] being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation . . . ." Letter from Thomas Jefferson to Edmond C. Genet (Nov. 22, 1793), *reprinted in* 6 THE WRITINGS OF THOMAS JEFFERSON 451 (Paul Leicester Ford ed., 1895).

218. 1 WILLOUGHBY, *supra* note 89, § 199 (1910). Twenty years later, a congressional committee echoed the presidential view: in 1897, the Committee on Foreign Relations concluded that "[t]he executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties." EDWARD S. CORWIN, 1787-1984, at 219 (1984) (quoting the Committee on Foreign Relations).

the termination of treaties despite being "authorized and directed" to do so by Congress. He responded that the direction was not "an exercise of any constitutional power possessed by Congress."[219]

The principle of executive control over communication with foreign governments was further entrenched with the Supreme Court's holding in 1936 in *United States v. Curtiss-Wright Export Corp.* that "the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[220] The Court repeated the oft-cited statement by John Marshall in the House of Representatives on March 7, 1800, that, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[221] This sweeping language has since then been frequently cited to support claims of executive power to act without congressional authorization in foreign affairs.

Yet to say that the President has the "power to speak or listen as a representative of the nation" or that he is the "sole organ" of the federal government in international relations does not mean that the President has exclusive authority over the nation's foreign affairs. The power to communicate does not of necessity imply a unilateral power to make foreign policy.[222] Instead, it means something quite a bit more limited: the President is empowered to act as the formal legal representative of the United States and is therefore uniquely empowered to speak with foreign entities on behalf of the United States.

It is important, moreover, to note not simply the powers the Constitution grants to the President alone, but also those it does *not*. Although the President has the power to communicate on behalf of the nation, even this power is not entirely unfettered. While the President may receive ambassadors from foreign states on his own, he may not *appoint* ambassadors to represent the United States abroad without first obtaining the consent of the Senate. This constraint

219. CORWIN, *supra* note 218, at 220.

220. 299 U.S. at 319.

221. *Id.* (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).

222. As Louis Henkin points out, the quote from Marshall supports the more limited reading: "Marshall was justifying an extradition to Great Britain of Jonathan Robbins, assumed to be a U.S. citizen . . . ." Because a request for extradition involved a "national demand made upon the nation," it could only be made by the President because he was the sole channel of communication. HENKIN, *supra* note 216, at 339-40 n.19 (quoting Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990)). Indeed, Jefferson's letter to the French Minister reflects this view. Letter from Thomas Jefferson, *supra* note 217.

was quite intentional and serves as one of several indications that the Founders did not intend to give the President the authority over foreign affairs then possessed by the English King (who could both receive and appoint ambassadors without the assent of Parliament).[223]

Nonetheless, the sole power to communicate on behalf of the nation on the international stage is not to be underestimated. It is, indeed, extremely important. It carries with it an absolute veto power over international lawmaking. If the President is the sole means of communication on the international stage, then the President and only the President can communicate the country's consent to an international agreement. Hence, even if Congress fully supports an international agreement, that agreement cannot be made unless and until the President communicates the country's assent. Congress cannot force an unwilling President to consent to an agreement.[224] The President may refuse to negotiate with a foreign country, decline to submit an Article II treaty to the Senate for its "advice and consent," or even refuse to ratify a treaty after the Senate has approved it.[225] The power to communicate on behalf of the United States arguably also entails the sole power to withdraw from international agreements.[226]

But the proposition that the President is solely empowered to speak on behalf of the United States in foreign affairs does not require the conclusion that the President is the *only* relevant actor in foreign affairs. It simply means that the power to represent the nation is granted exclusively to the President. Even that power of communication, however, is constrained in important ways by the Constitution and, through it, by the actions of the other political

223. There are three other important instances in which the Founders gave Congress powers that were unfettered executive prerogatives of the English King. First, although the President is Commander-in-Chief of the army, it is Congress that has the power to declare war. Second, the Constitution grants Congress the power to issue letters of marque and reprisal. Third, the President must obtain the consent of two-thirds of the Senate in order to make a treaty. In each case, the Founders intentionally departed from English precedent that had granted unilateral power to the King. *See* Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 530-34 (1974).

224. *See* CORWIN, *supra* note 218, at 219-23; 1 WILLOUGHBY, *supra* note 89, at 468 ("[I]t is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President."); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 546-49 (1999) (discussing the President's role as the "Constitutional Representative" of the United States abroad).

225. For similar points, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 192 (2005).

226. *See* Hathaway, *supra* note 11, at 1323-38.

branches. What may be communicated, and when, is at least in part dictated by the allocation of powers outlined in the Constitution. For example, it is widely agreed that the President may not bind the United States to an Article II treaty unless two-thirds of the Senate consents to it. Had President George W. Bush, for example, "communicated" the United States's ratification of the Law of the Sea Convention (which has been submitted to the Senate as an Article II treaty but has not been approved), that action would have been universally viewed as patently unconstitutional and hence invalid both as a matter of international and domestic law.[227] Similarly, were the President to conclude an executive agreement with another nation to jointly abolish the countries' judiciaries, that agreement would be unquestionably unconstitutional and hence invalid.

These extreme examples may not be plausible (one hopes), but they serve to make an important point: the President has a unilateral, *but not unconstrained*, power to communicate with foreign nations. The question is not whether there are limits on the President's power to communicate and hence to make international legal commitments, but what they are. The answer must come from a close examination of the allocation of powers among the President, Congress, and the courts. The next Subsection begins this inquiry by examining constitutional limits on the President's unilateral international lawmaking power.

2. *The President's Unilateral International Lawmaking Powers and Its Limits*

The President has the power to make international agreements entirely on his own inherent constitutional authority. Yet that power is not unlimited. The limits are supplied not by international law—which has nothing to say about the internal process nations use to determine whether to consent to international legal commitments—but by domestic law. In the United States,

227. It would be invalid as a matter of domestic law because the agreement would not meet the requirements necessary to make the agreement a "treaty" that must be treated as the "Supreme law of the land." U.S. CONST. arts. II, VI. It would be invalid as a matter of international law because the violation of U.S. internal law would be "manifest" under the Vienna Convention of the Law of Treaties, which provides that a State may "invoke the fact that its consent to be bound by a treaty . . . has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent" to a treaty if "that violation was manifest and concerned a rule of its internal law of fundamental importance." Vienna Convention on the Law of Treaties art. 46, § 1, May 23, 1969, 1155 U.N.T.S. 331. The treaty further defines a "manifest" violation as follows: "A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." *Id.* art. 46, § 2.

the central source to which we must turn is the U.S. Constitution, which is the source of both the President's unilateral international lawmaking authority and the limits thereon.

As detailed above, the President is an absolutely necessary and essential actor in international lawmaking. Yet the fact that the President's approval is *necessary* to create international legal commitments does not mean that his approval is *sufficient* to create international legal commitments. In fact, the President's approval is only sufficient, by itself, in those limited cases in which the President acts within his own constitutional authority.[228] As Justice Jackson explained in *Youngstown*, when the President "acts in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers."[229] In other words, any time the President acts beyond his own independent powers (including when he concludes ex ante congressional-executive agreements), genuine collaboration between Congress and the President is necessary.

The term "sole executive agreement" is used in many different contexts. For the moment, I wish to focus on just one: where the President concludes an agreement without any prior approval by Congress or the Senate through prior legislation or a prior treaty obligation. Such agreements rest entirely on the President's sole constitutional powers and are limited to the bounds of that authority. As the *Restatement* puts it, "the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."[230] The question that has to be asked in determining whether an agreement may be rightfully concluded as a sole executive agreement, therefore, is whether the agreement may properly rest on that authority alone. That, in turn, depends on the allocation of powers between the President and Congress in the U.S. Constitution.

To see why the President's power to make sole executive agreements is limited to commitments that are within the President's own constitutional powers, consider a sole executive agreement that commits the United States to spend money. Such an agreement would require the appropriation of money in order for the United States to comply. Yet the power to appropriate money belongs not to the President alone but first and foremost to Congress, which possesses the unique constitutional "spending power."[231] The President may

228. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(4) (1987).

229. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

230. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(4).

231. The Constitution provides that "Congress shall have power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defence and general

propose budgets and may veto proposed appropriations (a veto that may be overridden), but the President may not commit funds without Congress's participation and approval. To take another example, the President may not conclude a sole executive agreement that commits the United States to go to war. Once again, that is because although the President is Commander-in-Chief, it is Congress, not the President, who has the constitutional power "to declare war."[232]

Another way to put the limitation is as follows: the President may not commit the United States to an international agreement on his own if he would be unable to carry out the obligations created by the agreement on his own in the absence of an agreement. Hence, the President cannot enter an agreement that requires the appropriation of funds or declares war without congressional approval of the agreement, because the President cannot take these actions in the absence of an agreement. The President may not use a sole executive agreement with another nation, in other words, to expand his powers beyond those granted to him in the Constitution.

In part as a result of these strict limitations, there have been relatively few sole executive agreements over the past twenty years. It appears that fewer than ten percent of international agreements by the United States were concluded on the President's sole constitutional authority.[233] The vast majority of agreements were instead concluded as ex ante congressional-executive agreements. As I shall argue in the next Subsection, these agreements may satisfy the formal requirement of interbranch cooperation but they fall short of satisfying the spirit of, or rationale for, the requirement.

3. *Ex Ante Congressional-Executive Agreements Satisfy the Form, but Not the Function, of Interbranch Cooperation*

As shown in Part I above, most executive agreements are not concluded on the President's constitutional authority alone, but are instead ex ante congressional-executive agreements—agreements entered by the President pursuant to prior congressional statutory authorization. These agreements, therefore, rely upon the shared constitutional authority of Congress and the

welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Indeed, spending bills must originate in the House. *See id.* art. I, § 7, cl. 1 ("All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.").

232. *Id.* art. I, § 8, cl. 11.

233. Author's calculations from Oceana Database. My findings are roughly similar to those of a study prepared for the Senate Committee on Foreign Relations. *See supra* note 125.

President, and are not limited to the bounds that constrain sole executive agreements. Although the agreements rely on the two branches' joint authority, most ex ante congressional-executive agreements involve very little true interbranch cooperation. Once Congress grants authority to the President to conclude an agreement, it has little or no involvement in the agreement-making process. Congressional-executive agreements possess the form of congressional-executive cooperation without the true collaboration that it implies.

As noted above, when the President acts alone (as, for example, when he concludes a sole executive agreement), he is limited to the actions that are within his own independent powers. Yet "[w]hen 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."[234] Hence, the President's authority is markedly strengthened when his or her actions have the approval of Congress.[235] A sole executive agreement—particularly a controversial one relating to an issue of intense domestic political debate—does not carry the same force.

Congressional-executive agreements also have much greater preemptive power than do sole executive agreements. Sole executive agreements, which are concluded by the President alone, carry force only so long as they are not inconsistent with a federal statute. In a clash between ordinary federal legislation and a sole executive agreement, the legislation is given primacy unless the sole executive agreement was expressly intended to effect a treaty obligation, in which case the last-in-time rule is applied.[236] Moreover, a sole executive agreement that exceeds the President's own constitutional authority is also likely to be found unenforceable in domestic court. It is as yet not entirely settled whether an ex ante congressional-executive agreement that conflicts with an earlier statute is similarly unenforceable. Many, however, argue that ex ante congressional-executive agreements have the force of federal

234. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

235. Jackson wrote: "In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty." *Id.* at 635-36.

236. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (finding that an executive agreement contravening provisions of import statute was unenforceable), *aff'd on other grounds*, 348 U.S. 296 (1955); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 & cmt. c (1987) ("[A]n executive agreement pursuant to a treaty derives its authority from that treaty and has the same effect as the treaty to supersede an earlier inconsistent federal statute (or an earlier United States agreement) in United States law." (internal cross-references omitted)).

law.[237] That means that if such an agreement conflicts with an earlier statute, the later-in-time agreement will likely take precedence.

When Congress authorizes the President in advance to conclude an executive agreement, that authorization expands the permissible scope and the legal force of the agreement. And yet, as we have seen, true congressional participation is minimal. 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. Indeed, the label given to the agreements—"congressional-executive agreements"—suggests a collaboration in making the agreement that does not really exist. Even 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.

As a result, most ex ante congressional-executive agreements, while narrowly legal, are inconsistent with the basic underlying principles of the U.S. constitutional order. At a minimum, they evade the central purpose of the constitutional separation of powers among the branches. The separation of powers requires interbranch cooperation to govern and allows each branch to "check and balance" the others. Most significant acts of governance require the separate branches to work together. In this way, the Constitution facilitates a degree of specialization, provides for government policy that reflects a variety of constituencies, and protects the public from a single bad decision or wayward institution.[238] Congressional-executive agreements upset this delicate balance. When Congress gives away very broad international lawmaking

237. There are conflicting views on the issue. On the one hand, David Golove writes, "The longstanding majority view, and the settled practice, is that treaties and congressional-executive agreements, whether ex ante or ex post, are wholly interchangeable." David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1799 (1998). Yet the sources cited in support of this proposition focus on ex post congressional-executive agreements, rather than ex ante congressional-executive agreements. The *Restatement* offers a somewhat more qualified view: "A Congressional-Executive agreement draws its authority from the joint powers of the President and Congress and supersedes any prior inconsistent federal legislation (or United States agreement). However, Congressional authorization to make an executive agreement that would supersede federal law is not to be inferred lightly." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 cmt. c (1987) (internal cross-references omitted). Louis Henkin, for his part, acknowledges that a congressional-executive agreement approved by a simple majority of both houses is equivalent to a treaty and hence can supersede an earlier treaty or statute, HENKIN, *supra* note 216, at 215-18, but he is not clear about the relative legal status of a congressional-executive agreement authorized by Congress *in advance*.

238. *See* 1 ACKERMAN, *supra* note 84, at 230-322; AMAR, *supra* note 225, at 64; Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

authority to the President, the agreements that result are rarely a product of interbranch cooperation. Once it has given away the power to conclude agreements on a given topic, Congress generally has no involvement in shaping the agreements and is nearly powerless to prevent an agreement with which it disagrees from becoming law.

The absence of genuine cooperation between the branches of government in creating the agreements is not simply inconsistent with abstract constitutional principles. It also gives rise to two concrete problems. The first is the absence of democratic accountability that results when law on a wide range of issues—some bearing on important issues of national interest—is made by a single branch of government. The second is that the agreements that result from this lopsided process may in fact serve the national interest less well than they would were Congress more involved in the international lawmaking process. I turn now to outlining each of these concerns in more detail.

B. Unilateral Presidential Power Threatens Democratic Accountability

This Article has aimed to demonstrate that the President currently exercises unilateral power over most international lawmaking in the United States. The previous Section argued that this unilateralism is contrary to the system established by the U.S. Constitution. The Constitution grants the President a distinctive, indeed central, role in international lawmaking, but not an unlimited one. Ex ante congressional-executive agreements test and even stretch beyond these constitutional limits.

It is well established that these limits exist. However, little attention has been paid to the reasons for these limits—and hence what is lost when they are exceeded. Why are there limits on the President's authority over international lawmaking? One answer that I examine in this Section is that limits on presidential unilateralism in international lawmaking promote democratic accountability. I also explain why this is not a challenge to the modern administrative state—why, that is, delegations of authority over international lawmaking raise concerns that have been largely addressed in the context of domestic delegations. Finally, I argue that congressional control over appropriations is not, by itself, a sufficient check on presidential power over international lawmaking.

1. In Defense of Democratic Accountability in International Lawmaking

The separation of powers among the branches of government is often cited as the unique genius of the U.S. Constitution. In James Madison's vision, "the interior structure of the government" would be "so contriv[ed] . . . as that its

several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[239] The system of government created by the Constitution would rely on competition between the executive, legislative, and judicial branches to police the institutional boundaries of each and thereby prevent tyranny by any. This system of "balances and checks"[240] would harness "[a]mbition . . . to counteract ambition."[241]

As many have pointed out in recent years, the system never worked precisely as intended.[242] The rise of political parties, in particular, was not anticipated by the Founders and did not fit well with the system they had designed.[243] Cross-branch alliances between members of the same party served to dampen the interbranch competition that was to drive the system. Particularly in times of unified government, Congress has shown itself much less likely to hold the President accountable, and the President has been less likely to challenge the actions of Congress by, for example, vetoing its decisions.

And yet there remains an important function for the existence of rivalrous branches of government with incentives to monitor one another's behavior. The division of governing power into two separate institutions creates, as Levinson and Pildes once put it, a form of "*intragovernmental*" accountability that "allows government officials not just to report each other's bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers."[244] Thus even critics of the Founding vision seem largely to agree that the separation of powers among the branches serves to encourage government accountability and discourage misbehavior.[245]

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239. THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

240. THE FEDERALIST No. 9, at 72 (Alexander Hamilton).

241. THE FEDERALIST No. 51, *supra* note 239, at 322.

242. *E.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

243. *Id.* Levinson and Pildes not only claim that the Founders failed to anticipate the rise of parties, they argue that "[a]s competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running." *Id.* at 2313. The history traced in Part II largely supports this claim and even deepens it by adding an inter-temporal feature: power delegated by Congress to the President during times of unified government can undermine Congress's ability to check the exercise of presidential power even in subsequent periods of divided power.

244. *Id.* at 2343.

245. To be sure, the Constitution has been criticized as insufficiently democratic more than once. *See, e.g.*, ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION

Ex ante congressional-executive agreements frustrate this process by placing most of the power to conclude international agreements in a single, unmonitored branch of government. Congress, having granted authority to the President to conclude agreements for more than one hundred different topics (usually during periods of unified government when suspicion of the President was low), now finds itself entirely disempowered. Even its last tool for encouraging some degree of cooperation—the legislative veto—is no longer available to it. Only by passing a new law may Congress reject an agreement or undo a grant of lawmaking authority. But even then the President holds the upper hand, as he possesses the power to veto these changes.

Some would argue that this is appropriate in the field of international law, that checks and balances only apply to governmental actions insofar as they have domestic effects. John Yoo, for example, has argued that the Constitution grants the President "the leading role in foreign affairs."[246] As a result, he has argued, the separation of powers that applies in the domestic context does not apply to the same extent when the President makes or enforces international legal obligations.[247]

There is little support for this view in the law. As noted above, the President has the unilateral power to communicate with foreign governments, but this power does not require or imply unilateral power over all foreign affairs. Indeed, the Supreme Court decisively rejected the claim that the *Youngstown* framework does not apply to matters involving international law in its decision in *Medellín v. Texas*.[248] Writing for the Court, Chief Justice Roberts applied the separation of powers framework first outlined in *Youngstown* to the international law issues before it. The Court concluded that while the foreign

GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006). My claim is simply that the system as it currently operates is much more successful at securing democratic accountability in the domestic context than in the international one.

246. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 102-03 (2006); *see also* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 874-75 (2001) (reviewing FRANCES FITZGERALD, WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR (2000)) [hereinafter Yoo, *Politics as Law*] (discussing "the President's constitutional and structural superiority in conducting foreign affairs," and the "overwhelming executive dominance in foreign affairs"). Supporters of this view generally turn to the Supreme Court's decisions in *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1963), which recognizes "the President as the sole organ of the federal government in the field of international relations," and *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981), to support their view. In so doing, they usually pointedly ignore *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

247. Yoo, *Politics as Law*, *supra* note 246, at 868-76.

248. 128 S. Ct. 1346 (2008).

policy interests of the President were "plainly compelling," they "do not allow us to set aside first principles."[249] Instead, it explained, "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."[250] Applying this framework, the Court concluded that the President had exceeded his constitutional power.[251]

The claim that separation of powers over international law is somehow unimportant is not only wrong as a matter of law. It also reflects an understanding of international lawmaking that is rooted in the past, in a time when international law and domestic law could be more easily disentangled. Those days are quickly receding. Today the line between international and domestic law is increasingly blurry. For example, in 2008, the United States concluded an agreement with Mexico on cooperation in science and technology for homeland security matters. In it, the two countries agreed to establish a framework to encourage cooperative activity for the "prevention and detection of homeland security threats," "the forensics and attribution of terrorist threats," "the protection of critical infrastructure," and "crisis response and consequence management and mitigation for high consequence events."[252] Around the same time, the United States entered an agreement with France for

249. *Id.* at 1368. The more complete quote is as follows:

> The United States maintains that the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an [International Court of Justice] decision and "to do so expeditiously." . . . In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.
>
> Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself."
>
> Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted framework for evaluating executive action in this area.

Id. at 1367-68 (citing *Youngstown*, 342 U.S. at 585) (some internal citations omitted).

250. *Id.* at 1368.

251. The restrictions on presidential power over international law far predate *Medellín*. In 1974, Arthur Bestor persuasively argued that the Founders prescribed "[a] system of checks and balances . . . as explicitly for the conduct of foreign relations as for the handling of domestic matters, even though the precise allocations of power are different in detail." Bestor, *supra* note 223, at 531.

252. Agreement on Cooperation in Science and Technology for Homeland Security Matters, U.S.-Mex., Apr. 21, 2008, Temp. State Dep't No. 08-141, 2008 U.S.T. LEXIS 67.

the exchange of engineers and scientists.[253] These are just two typical examples of the many agreements entered in 2008 in which it is difficult, if not impossible, to separate the domestic and international effects. Hence concerns about democratic accountability cannot simply be dismissed as inapplicable to international law.

I have argued here that limits on presidential unilateralism in international lawmaking can promote democratic accountability. A natural question follows: if limits on presidential unilateralism are needed in the context of international lawmaking, then are these same limits necessary for domestic lawmaking? In other words, is this simply the familiar critique of the modern administrative state, applied this time to international law? In the next Subsection, I explain why it is not—why international delegations and domestic delegations are different and why, therefore, the call offered here for new limits on presidential power over international law does not require (or preclude) new limits on presidential power over lawmaking and rulemaking that is primarily domestic in character.

2. *International Delegation and Domestic Delegation Compared*

A close observer of the debates over democratic accountability in U.S. administrative law during the past half-century will undoubtedly detect echoes of that debate in the foregoing discussion. Many complaints similar to those made above have been made regarding the modern administrative state. In part in response to such concerns, the period since the New Deal has seen the emergence of a wealth of both formal and informal administrative mechanisms that aim to secure accountability in the domestic context. While far from perfect, they have succeeded to a significant extent. But few of these mechanisms for maintaining accountability exist in the international lawmaking context. In short, delegations in the domestic and international context raise similar accountability issues, yet those issues have been at least partly addressed in the domestic context while almost entirely ignored in the international context.

Richard Stewart famously struggled with the effort to "reconcile the discretionary power enjoyed by agencies with the basic premise of the liberal state that the only legitimate intrusions into private liberty and property

253. Agreement Regarding the Exchange of Engineers and Scientists, U.S.-Fr., Jan. 29, 2008, Temp. State Dep't No. 08-45, 2008 U.S.T. LEXIS 11.

interests are those consented to through the legislative process."[254] Theodore Lowi, too, criticized the "conversion of delegation from necessity to virtue,"[255] documenting the growth during the period after World War II of government through delegation to administrative agencies captured by interest groups.[256] The concerns that Stewart, Lowi and others before and after them have raised regarding delegation in the domestic context have served as grist for several generations of administrative law scholars. Yet as real as these concerns may remain, they have been addressed at least to a degree through the development of both formal and informal mechanisms of oversight.[257]

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254. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975).

255. THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 145 (1969); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 12 (1938) (arguing that when government seeks to regulate business it "vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization"); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (arguing that delegation of rulemaking authority to agencies is antithetical to democratic accountability); Robert G. Dixon, Jr., *Congress, Shared Administration, and Executive Privilege*, *in* CONGRESS AGAINST THE PRESIDENT 125, 125 (Harvey C. Mansfield, Sr. ed., 1975) ("The history of legislative-executive relationships has been marked by a steady pressure from Congress to adopt measures and procedures conceptually closer to a regime of shared powers than to the separation the framers envisaged. The executive has lately responded with theories of absolute discretion."); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1134 (1954) ("Much of what the agencies do is the expectable consequence of their broad and ill-defined regulatory power."). *But see* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 392 (1987) (critiquing Lowi's call to resurrect the nondelegation doctrine); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 783-90 (1999) (responding to Schoenbrod by examining ways in which agencies are held democratically accountable).

256. Lowi's work was immensely influential and led a generation of political scientists to examine the relationship between administrative agencies and interest groups. In recent years, however, some scholars have turned Lowi's observations on their head, examining how interest groups can play a role in monitoring agency actions and hence improve governance and accountability. Some of this work is discussed below. *See infra* text accompanying notes 266-269.

257. There is an extensive and ongoing debate over whether agencies are sufficiently accountable to Congress. *Compare* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 481-82 (1989) (concluding that Congress "can provide effective control over agency decisions" by placing ex ante procedural constraints on them), *with* Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 327-29 (John E. Chubb & Paul E. Peterson eds., 1989) (arguing that agencies have been largely successful at resisting congressional efforts to assert control over them). I do not

Chief among the formal mechanisms is the Administrative Procedure Act of 1946[258] (APA), sometimes referred to as the "bill of rights for the new regulatory state."[259] The APA requires that administrative agencies follow set procedures for giving public notice of and opportunity to comment on proposed regulations. The APA requires publication of a notice of proposed rulemaking in the Federal Register. The notice must include "(1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[260] The Act also sets out a process for federal courts to review directly agency decisions. This judicial review of agency decisions serves to ensure compliance with agency rules and operates as a check on the exercise of agency discretion and unilateral power.[261] Courts may find, for example, that rules extend beyond the statutory authority granted to the agency by Congress. Together, these provisions are meant to ensure that the public remains informed of the procedures and rules that govern agency action, the public is afforded an opportunity to participate in the rulemaking process, there are uniform standards for formal rulemaking and adjudication, and the scope of judicial review of agency decisions is well defined.

The APA applies extensively to nearly every agency decision, but it expressly exempts foreign affairs.[262] Hence, international agreements are not subject to the same notice and comment rulemaking procedures that apply to nearly every other administrative rule and regulation issued by the U.S. government.[263] Moreover, no alternative oversight mechanism stands in its place. As a result, the public is neither well informed about the executive

attempt to resolve that here. My argument is simply that there are mechanisms that have had some measure of success at securing accountability—and that these mechanisms do not extend to international lawmaking.

258. 5 U.S.C. § 500 (2006).

259. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996).

260. 5 U.S.C. § 553(b).

261. *See* Stewart, *supra* note 254, at 1674-76 (noting that in the traditional model of administrative law (which he questions), judicial review operates to ensure agency compliance with decisional procedures and with rules set out by the legislature).

262. 5 U.S.C. § 553(a)(1) (stating that the rulemaking requirements do not apply to "a military or foreign affairs function of the United States").

263. 5 U.S.C. § 551(1) defines an "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with the exception of several enumerated authorities, including the U.S. Congress, U.S. courts, and governments of territories or possessions of the United States.

agreements that are concluded, nor does the public have an opportunity to participate in the process of making the agreements. Indeed, most agreements are usually not made public until well after they have been concluded and entered into effect. Until fairly recently, the text of many executive agreements was not available until at least a year after they were concluded. Moreover, the courts frequently defer to the President over questions involving international lawmaking.[264] This lies in contrast with direct review of domestic agency decisions under the APA. Indeed, in the international arena, judicial review rarely operates as a check on the exercise of presidential authority, because courts have proven extremely wary of questioning executive exercise of discretion in the foreign affairs context.

In addition to the formal rules of the APA, there are a variety of ex ante and ex post controls available to Congress to oversee agencies' exercise of delegated authority. Congress can exert ex ante control by enacting statutory language that narrowly circumscribes the scope of agency authority and discretion. Congress can then exercise ex post control through oversight by congressional committees. The effectiveness of these mechanisms in the domestic context is a matter of intense debate.[265] Regardless of their effectiveness or lack thereof in the domestic context, however, it is clear that they have been largely ineffective in the international context. As we have seen, statutory grants of authority to negotiate executive agreements tend to be extremely broad, providing few substantive constraints on the agreements the President may negotiate. At the same time, congressional committee oversight has been negligible, in large part because the committees generally become aware of agreements only after they have already entered into effect and because Congress is effectively unable to reject or modify agreements with which it disagrees.

In addition to the more formal mechanisms for monitoring agency decisions in the domestic context, there are extensive informal mechanisms as well. Ian Ayres and John Braithwaite, for example, identified what they called "tripartism"—empowering public interest groups to participate in monitoring—as a mechanism for addressing the problem of capture and corruption in government regulation of business.[266] Abram Chayes, Charles

264. See *Field v. Clark*, 143 U.S. 649, 692 (1892), and its progeny.

265. For a discussion of the debate and a critique of these ex ante and ex post oversight mechanisms, see J.R. DeShazo & Jody Freeman, *The Congressional Competition To Control Delegated Power*, 81 TEX. L. REV. 1443, 1444 (2003), which notes that Congress relies on statutory language limiting agency discretion and on oversight by congressional committees to control its grant of delegated power—both of which the authors maintain are a gamble.

266. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 54-100 (1992).

Sabel, and William Simon have emphasized "public law litigation"—public interest advocacy that serves as an instrument of democratic accountability.[267] And Jody Freeman has explored the essential role of private actors in securing the legitimacy and accountability of institutions of public governance.[268] They and others have argued that monitoring by affected interests provides an important limitation on the exercise of authority delegated to agencies in the domestic context.[269] As the Circuit Court for the District of Columbia once put it, "the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support."[270]

Once again, however, the informal mechanisms do not operate in the same way in the international context. The informal oversight by private actors and public interest groups depends in significant part on the advance disclosure requirements established by the APA.[271] In the international context, affected

267. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288-89 (1976) (arguing that the application of rule-of-law principles to the modern welfare state had produced a new form of litigation he called "public law litigation"); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004) (introducing the concept of "destabilization rights," which are "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability").

268. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (arguing that private actors may be regulatory resources, capable of producing greater accountability of public institutions).

269. *See, e.g.*, Stewart, *supra* note 254, at 1760-70. The "civic republican" defense of the regulatory state similarly depends on interest groups organized around private interests to monitor the state. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541 (1992); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000); Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401 (1994). Others have argued for a collaborative or cooperative approach to administrative governance, one that sees private regulated actors not as adversaries, but as partners in the administrative process. *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535 (1996). For more on various forms of oversight of agencies in the domestic context, see, for example, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 88 (1990), which details numerous ways in which Congress keeps track of the executive branch's activities, including by reading newspapers and magazines, holding hearings, entertaining complaints and criticisms about an agency, and reviewing information from other sources.

270. Office of Commc'n of the United Church of Christ v. FCC, 465 F.2d 519, 527 (D.C. Cir. 1972).

271. *See supra* text accompanying notes 266-270.

interests have neither the information nor the access necessary to monitor international lawmaking. As noted earlier, agreements are usually not made public until after they have been concluded and entered into effect. At the same time, the interests that are affected are often diffuse (for example, an agreement to engage in cooperative activities on atomic energy may affect the long-term national security of the entire country). Not only are those in the public who might be affected not informed about pending agreements and often not well organized, but they also have no opportunity to express their views to those responsible for making the agreements. There is no notice and comment process for congressional-executive agreements or any other similar official means by which interested actors can influence the decisionmaking process. And the courts have proven uniformly inhospitable to challenges to presidential action in foreign affairs. Hence, even if affected groups knew of an agreement before it was concluded and were sufficiently well organized to be able to intervene in the international lawmaking process, there would be no way in which they could do so effectively.

One might argue that this problem is solved by the accountability of the President himself. The existence of broad delegations from Congress to the President to enter into executive agreements might be justified on democratic grounds, "as a device for facilitating responsiveness to voter preferences expressed in presidential elections."[272] In theory, if the voters do not like the agreements the President concludes, they will vote him out office and those agreements will change as a consequence. The central problem with this defense, however, is that it assumes that voters know what agreements are concluded. Because the agreements are not publicized, that assumption is unlikely to be accurate. Even if the electorate were informed about executive agreements, however, a presidential election is an extremely blunt tool for accountability. The voters may disagree with the international lawmaking of a President, but vote for him because they approve of his handling of, say, the economy—an issue on which they hold more intense preferences.

Another common response to the concerns raised here is that Congress retains sufficient control over the lawmaking process even where it has delegated substantial control because it retains power over appropriations. I turn next to a brief consideration of this claim.

272. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-96 (1985).

3. *Congressional Control over Appropriations Is Not a Sufficient Check on Presidential Power*

The Constitution grants Congress the power of the purse: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[273] This power is generally regarded as one of Congress's most potent powers, for it means that the federal government may not spend money to achieve its goals without Congress's blessing. As potent as it may be, however, Congress's power to appropriate funds does not render direct congressional approval superfluous. This is all the more true in the context of international lawmaking.

Some have argued that the spending power is so strong that it is sufficient, by itself, to protect congressional prerogatives when the President acts unilaterally.[274] This argument has been made frequently in the context of military action. Some have argued that the Constitution grants the President the power to initiate war, allowing Congress to express its opposition by exercising its powers over funding and impeachment.[275] Congress "has total control over funding and the size and equipment of the military. If it does not agree with a war or a strategy, it can cut off funds, reduce the size of units, or refuse to provide material for it."[276] Similarly, the Office of Legal Counsel

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273. U.S. CONST. art. I, § 9, cl. 7.

274. For an excellent discussion of the congressional spending power, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

275. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996). The argument goes as follows: the President has been granted all foreign affairs powers not expressly granted to Congress by virtue of the Vesting Clause. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). Though it may appear that the "Declare War Clause," *id.* art. I, § 8, cl. 11, gives Congress the power to initiate war, in fact it does not. Because the power to initiate war has not been expressly assigned to Congress, it must rest with the President (by virtue of the Vesting Clause). Congress therefore retains a check on warmaking only through its spending and impeachment powers. *See* Yoo, *supra*. For a similar account, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-54 (2001). *But see* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (critiquing this argument as based on uncertain textual interpretation and faulty historical assumptions about the political theory of the Founders).

276. Glenn Sulmasy & John Yoo, Katz *and the War on Terrorism*, 41 U.C. DAVIS L. REV. 1219, 1253 (2008) (internal citations omitted). There are several scholars who do not share this view of executive power and yet agree that statutes, including defense appropriation acts, can serve as the basis for the constitutional commitment of U.S. forces. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 30-37 (1993); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility:

under President Clinton claimed that congressional appropriations for military operations constituted sufficient authorization for continuing hostilities after the expiration of the sixty day period specified in the War Powers Resolution.[277] Both argue that congressional appropriations render unnecessary any direct congressional approval of presidential action.

Using similar reasoning, one might argue that unilateral international lawmaking by the President is not a serious concern. Congress can, after all, refuse to fund the agreements and thereby exercise some measure of control over the agreement. There are several flaws in this argument. To begin with, the broader claim on which it relies—that congressional appropriations may substitute for direct congressional approval—is incorrect. The Supreme Court has held that substantive enactments and appropriations measures are not interchangeable.[278] It has acknowledged that "both are 'Acts of Congress,'" but has explained that "the latter have the limited and specific purpose of providing funds for authorized programs."[279] It has further explained:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant

Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1392 (1994) ("One consequence of this analysis is that statutes—defense appropriation acts, defense authorizations—can serve as the basis on which the President may validly commit U.S. forces without further returning to Congress for fresh mandates beyond those given by statute."). There is extensive back-and-forth between scholars over whether Congress or the President possesses the power to make war—and hence to what degree any use of the military abroad must be approved by Congress. There is also debate over the further question of whether appropriations statutes are sufficient to signal congressional approval. The weight of authority rests with those who argue it is not sufficient. *Compare* KOH, *supra* note 83, at 75 (explaining that the Framers granted "*Congress*, not the president, . . . the dominant role" in foreign affairs, including "all manner of powers regarding raising, supporting, maintaining, and regulating the army, navy, and militia, which could be exercised both domestically and abroad"), 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4-6, at 662-65 (3d ed. 2000) (arguing that "the Constitution mandates a major role for Congress in supervising executive military operations" on the grounds that the Framers "tied the military power to Congress' control of the public purse" and that the Constitution "gives Congress a host of other military-related powers"), *and* ELY, *supra*, *with* Yoo, *supra* note 275.

277. *See* Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, to the Attorney Gen. (Dec. 19, 2000), *available at* http://www.usdoj.gov/olc/final.htm.

278. The Court held that "repeals by implication are not favored" and, therefore, "the intention of the legislature to repeal must be clear and manifest." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189 (1978) (quoting Morton v. Mancari, 417 U.S. 535, 549 (1974)).

279. *Id.* at 190.

> with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.[280]

Though the issue before the Supreme Court when it penned these words was not whether appropriations constitute congressional approval of unilateral executive agreements—the Court instead focused on whether later-in-time appropriations effectively amended earlier statutes—the reasoning and conclusion of that case are nonetheless instructive. The Court made clear that, in its view, appropriations measures are not intended to stand in for legislative enactments. It is inappropriate to regard appropriations measures as a substitute for direct and explicit congressional approval—or as an adequate means of correcting policy decisions after the fact.

Not only are appropriations measures not interchangeable with substantive enactments as a matter of law, they are also not interchangeable as a matter of practical effect. The congressional spending power is an extremely blunt—and sometimes entirely ineffective—tool for guiding public policy. An exhaustive study of the history of Congress's spending power from the Founding period through the New Deal concluded that "Congress has not now, and has never had, any practical means of ascertaining after the event whether its financial authority has been respected or infringed."[281] This is true, the study maintains, both of efforts to control spending in advance[282] and after the fact.[283] In other

280. *Id.* at 190-92 ("No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order." (quoting House Rule XXI(2))). The Court held that the Endangered Species Act prohibited placing into operation a dam that threatened an endangered species of fish, despite the fact that Congress had made appropriations for the dam project after enacting the Endangered Species Act. In so doing, it strengthened a canon of statutory interpretation disfavoring implied repeals in appropriations bills. The Court explained, "In practical terms, this 'cardinal rule' [that repeals by implication are not favored] means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *Id.* at 190 (alterations in original) (citation omitted).

281. LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 307 (2d ed. 1971).

282. Wilmerding writes:

words, there is ample evidence that any effort to control public policy through narrow limits on appropriations—for example, denying funds to carry out a particular executive agreement—is very likely destined to fail.[284]

Presidents, moreover, have been much more aggressive in recent years in pressing back against congressional efforts to condition appropriations. The Bush Administration made well-publicized use of signing statements to reject congressional conditions on the use of funds.[285] It argued that the President possesses the right not to execute elements of the law that he believes to be

> Step by step [the foregoing chapters] trace the increasing specification of appropriations . . . . Step by step they trace the accompanying development, inside and outside the law, of those compensatory devices which give the Executive in practice a latitude which Congress would deny it in theory. The whole story leads to the conclusion that the multiplication of appropriations, far from securing to Congress that completeness of financial control which is, so to speak, its constitutional birthright, has served only to make the law less certain and to satisfy Congress with the name, rather than the substance, of power.

Id. at 195.

283. The study concludes that "the attempts of Congress to arm itself with the machinery of retrospective control [through limits on appropriations] have altogether miscarried. Congress has not yet succeeded in devising a system of procedure stringent enough to render efficacious its unquestioned right to control the public expenditure." *Id.* at 308.

284. There are legal questions about whether Congress may use the spending power to guide—some might say micromanage—the affairs of government. There are questions in particular about whether Congress may defund minor elements in a broader package or impose conditions on the use of appropriated funds. In my view, to the extent Congress may choose not to appropriate any funds at all, it almost always possesses the lesser-included power to fund some activities and not others. Congress may also impose significant conditions on the use of those funds. However, this view is likely not without its critics. Whatever the legal merits of micromanaging policy through appropriations, it is difficult if not impossible to do so given modern governance structures. Under the framework established by the Budget and Accounting Act of 1921, ch. 21, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C. (2006)), the President authors the first draft of the federal budget and thus sets the template for what follows. Individual appropriations bills, moreover, generally bundle multiple appropriations into a single deal that must then be approved or rejected by Congress and signed by the President in order to enter into effect. This makes it close to impossible to achieve narrow policy objectives—such as defunding a particular executive agreement—through the appropriations process.

285. *See The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* http://www.fas.org/irp/congress/2006_hr/signing.pdf; AM. BAR ASSOC., TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE RECOMMENDATION (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.; Anthony M. Bottenfield, *Congressional Creativity: The Post-*Chadha *Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 PENN ST. L. REV. 1125, 1158-59 (2008).

unconstitutional. Presidential resistance to the exercise of congressional control through the spending power was not new to President Bush, nor did it stop when he left office.[286] Presidents have long objected to efforts by Congress to condition the granting of funds, particularly in cases involving military actions.[287] Although he has used signing statements less frequently than his predecessor, President Obama has continued to use them.[288]

Whatever merits there may be to the argument that the spending power is an adequate check on presidential power in domestic law, the merits are significantly weaker when it comes to international legal commitments. That is because requiring Congress to rely on the spending power to check an exercise of unilateral presidential lawmaking puts it in an untenable position. When faced with an agreement it does not support, Congress must choose between two unacceptable options: (1) it may exercise its constitutional power over spending and refuse to fund the executive agreement, thereby placing the United States in violation of an international legal obligation; or (2) it may honor the international legal obligation of the United States by providing funding to carry out the executive agreement, but in the process relinquish its constitutional power to exercise an independent judgment over spending.[289]

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286. Indeed, Bush's predecessor defended the practice. Under President Bill Clinton, Walter Dellinger wrote: "[W]e do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision." Memorandum from Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, to the Honorable Abner J. Mikva, Counsel to the President, Presidential Authority To Decline To Execute Unconstitutional Statutes (Nov. 2, 1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm.

287. Consider two examples: President Nixon signed a 1971 military authorization bill, but objected to a provision in it (the Mansfield Amendment), which set a final date for the withdrawal of U.S. Forces from Indochina, as being "without binding force or effect." Statement on Signing the Military Appropriations Authorization Bill, 360 PUB. PAPERS 1114 (Nov. 17, 1971). Similarly, President Ford signed the Defense Appropriation in 1976, but objected to a provision that restricted the President's ability to obligate funds for certain purposes without first obtaining approval from congressional committees. He stated that he could not "concur in this legislative encroachment," and that he would treat the restriction "as a complete nullity." Statement on Signing the Department of Defense Appropriation Act, 1976, 1 PUB. PAPERS 241, 242 (Feb. 10, 1976).

288. Charlie Savage, *Obama Looks To Limit Impact of Tactic Bush Used To Sidestep New Laws*, N.Y. TIMES, Mar. 9, 2009, at A12, *available at* http://www.nytimes.com/2009/03/10/us/politics/10signing.html.

289. It is just this kind of untenable conflict that led to the development of the longstanding custom that funding required to carry out an Article II treaty must receive approval from both houses of Congress before the treaty is presented to the Senate for consent (or,

For these reasons, relying on Congress's power of the purse to control unilateral international lawmaking by the President is neither legally nor practically sufficient.

In this Section, I have argued that Congress's delegation of unilateral power over international lawmaking to the President has undermined democratic accountability. I have further claimed that while delegations in the domestic and international context raise similar accountability issues, those issues have been largely addressed in the domestic context while almost entirely ignored in the international context. And, finally, I have argued that congressional control over appropriations is not a sufficient control. Those seeking to defend the current system might respond to these charges in one of two ways. First, they might dispute the system's accuracy. Second, they might respond by arguing that the deficit can be justified by reference to other goals. A democratic deficit is justified, one might argue, if it produces more efficient and effective policy outcomes. The next Section examines this second response, and shows that it is premised on a false tradeoff between democratic accountability and effective lawmaking. More balanced international lawmaking can in fact lead to better international agreements. And in those few instances where there is a true tradeoff between democratic accountability and effective international lawmaking, it is possible to achieve a better balance between the two goals than under the present system.

C. *The False Choice Between Democratic Accountability and Effective International Lawmaking*

There are many who believe that international lawmaking is best left to the President alone. Congress, they argue, is not well suited to the business of making international legal commitments. The country needs strong, consistent leadership in foreign affairs, and continuity in foreign policy. The person representing the United States at the negotiating table must have the experience and respect of those across the table, and must have the power to negotiate an agreement that will not be amended and second-guessed. Indeed, unilateral presidential power over international lawmaking is best for the national interest. For these reasons, the President should be granted supremacy in the field of foreign affairs and especially in international law.[290]

alternatively, the Senate's vote of consent is made conditional on the subsequent passage of implementing legislation).

290. ROBERT A. DAHL, CONGRESS AND FOREIGN POLICY 97-99 (1950) (discussing the "case for presidential supremacy"). One might also argue that the President is a better representative of the national interest in foreign affairs than Congress because the President has a national

This argument claims too much and ignores contravening pressures that may moderate or even sometimes overcome the presumed advantages of President-led international lawmaking. First, it fails to recognize that effective international law requires not simply an effective negotiator, but sufficient political support to carry out the international commitments that have been made. Second, it ignores basic rules of diplomatic strategy that tell us that an unconstrained negotiator can at times be weaker, not stronger, when it comes to negotiating an agreement that is in the nation's best interests. Third, and finally, it fails to recognize that executive actors negotiating in secret may not have all of the information they need in order to conclude agreements that best satisfy the interests of those back home.

1. *Widespread Political Support Can Lead to More Effective International Law*

Those who claim unilateral presidential power is the key to effective international lawmaking tend to have a myopic focus on the process of negotiating international law. The President, the argument goes, will be much more effective at concluding an international agreement if he is unencumbered by the need to obtain the consent of Congress. This claim is clearly true in one respect: the President will indeed find it easier to conclude an international agreement if he does not have to persuade Congress to support the results. But, such an agreement may also be less likely to be observed and enforced.

The process for creating a sole executive agreement or an ex ante congressional-executive agreement is relatively simple. The State Department or an agency must follow internal rules and processes (most notably the so-called Circular 175 Procedure and attendant regulations).[291] Once these internal

constituency and is better able to pursue long-term goals than, in particular, the House of Representatives, whose members have small constituencies and two-year terms. A full assessment of this argument is beyond the scope of this Article. It is important to bear in mind, however, that the comparative advantages of Congress and the President vary across issue areas. What is true of trade may not be true of food safety, for example. Moreover, because the President may only be reelected once, the President spends, at most, one term with direct electoral accountability.

291. 22 C.F.R. § 181.4 (1999). As part of the Circular 175 process, the State Department may consult with Congress and interested agencies. The extent to which this occurs is difficult to assess from the outside. Not surprisingly, I have received differing reports from staff members in Congress and the Department of State regarding the extent of such informal consultations. If the State Department consults informally with Congress more thoroughly in cases where congressional support is required for implementation of the agreement—as would seem rational—then some of the enforcement concerns noted below would be addressed, at least in part. Nonetheless, to the extent informal consultation of this type is

processes are satisfied, the agency may negotiate, and an authorized representative may sign, an agreement with a foreign representative without consulting or seeking the approval of any member of another branch of government. The agreement generally goes into effect upon the signature of both parties to the agreement. Though the agreement must be reported to Congress under the Case-Zablocki Act, Congress has no power to reject the agreement short of passing a joint resolution or statute (subject to presidential veto). Unless implementing legislation is required to carry out the agreement, there is little incentive even for informal consultation with members of Congress.

The process for creating an ex post congressional-executive agreement or Article II treaty is much more cumbersome. It requires seeking the approval of both houses of Congress or a supermajority of the Senate. Such a process is time-consuming, burdensome, and can be exceedingly difficult. Moreover, there is no guarantee that the agreement—even once negotiated—will be approved, for the President cannot always gain support for the agreements he proposes.

The result of this more cumbersome process is an agreement that has widespread political support and is, therefore, more likely to be observed. By contrast, an agreement concluded without congressional approval (either a sole executive agreement or an ex ante congressional-executive agreement) enjoys much weaker political support and may therefore be less likely to be observed. It is less likely to be followed, for example, by a subsequent administration. A President that did not make the agreement himself will likely feel less compunction about abandoning an agreement created by a predecessor who acted entirely on his own. If an agreement was made with congressional consent, however, a succeeding President is likely to be more cautious about withdrawing from or failing to observe the agreement.

Moreover, an international agreement that requires the cooperation of Congress to carry out is much more likely to be honored if Congress played a role in creating that agreement. If Congress has approved an agreement, it is likely to regard itself as responsible for taking the actions necessary to carry it out. (Indeed, ex post congressional-executive agreements are usually approved by Congress through statutes that also contain any necessary implementing legislation.) If, however, Congress had little or no role in making the agreement (or its role was limited to authorizing the agreement's creation several decades earlier), Congress is less likely to regard itself as bound to take

neither required nor as extensive as a more formal process would likely be, these concerns remain. Moreover, because informal consultation does not require Congress to take a public position, congressional support may be less reliable than if the process were more formal.

part in meeting the obligations the agreement creates. Congress, after all, has had no opportunity to express its dissatisfaction with the agreement and hence might regard the agreement as an improper infringement on the exercise of its constitutional rights and responsibilities.

Strong and effective international agreements require widespread political support. Though an agreement negotiated by the President alone is easier to conclude, it can be more difficult to honor. When we focus attention not simply on the negotiating stage of international law but also at what comes after, we see that international law that is more difficult to make can in fact be much more effective—precisely because it requires more widespread political support to be made.

An advocate of presidential unilateralism in international lawmaking might concede that international law that has congressional support is more likely to be observed than international law created by the President alone. Yet he might argue that the necessity of obtaining congressional support weakens the hand of the negotiator sitting at the table. Why would our partners deal with us if they cannot be sure that we will sign the agreement we negotiate?

The answer should be obvious. No one is more interested in creating an agreement that the United States will live up to than the other parties to the agreement. Creating an agreement from which a new President will withdraw or an agreement that does not have sufficient public support to be observed by the United States does not serve the interests of our international law partners. Nor does it serve the United States's own broader interests in a well-functioning international legal system.

2. *An Unconstrained Negotiator Can Be Weaker, Not Stronger*

An assumption often made by advocates of unilateral presidential power in international lawmaking is that the stronger the President is at home, the stronger he will be at the negotiating table. Yet that assumption ignores basic diplomatic dynamics. An unconstrained negotiator may be weaker, not stronger, when it comes to negotiating an agreement that achieves the best outcome for the nation.

In what has become known as the "Schelling conjecture," Thomas Schelling observed in 1960 that "the power of a negotiator often rests on a manifest inability to make concessions and to meet demands."[292] In particular, he noted, "[i]f the executive branch is free to negotiate the best arrangement it can, it may be unable to make any position stick and may end by conceding

292. SCHELLING, *supra* note 8, at 19.

controversial points because its partners know, or believe obstinately, that the United States would rather concede than terminate the negotiations."[293] If, however, the executive is constrained by Congress, "then the executive branch has a firm position that is visible to its negotiating partners."[294]

Robert Putnam built on Schelling's observations in his seminal work on diplomacy and domestic politics. Putnam imagined the relationship between international and domestic politics as a "two-level game."[295] At the national level, domestic groups pursue their interests by pressuring the government to adopt their favored policies, and politicians seek power and influence by constructing coalitions among these groups. At the international level, governments aim to maximize their ability to satisfy domestic pressures, while at the same time seeking to avoid adverse foreign developments.[296] These two worlds meet at the negotiating table. A negotiator constrained by the need to obtain the support of Congress may be able to achieve a better outcome in negotiations—by reducing the "win set" and thereby achieving a more favorable outcome. As Putnam put it: "[t]he difficulties of winning congressional ratification are often exploited by American negotiators."[297] During negotiations over the Panama Canal Treaty, for example, President Carter wrote a letter to Torrijos warning that "further concessions by the United States would seriously threaten chances for Senate ratification."[298]

If they are right, the implications of Schelling's and Putnam's work for international law are clear. When the President is unconstrained by other domestic players—because he is negotiating an agreement as a sole executive agreement or an ex ante congressional-executive agreement—the actors on the other side of the negotiating table know (or believe) that there is little preventing the President from making concessions. Those negotiating on

293. *Id.* at 28.

294. *Id.*

295. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); *see also* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993) (building on the two-level game insight in a variety of contexts).

296. Putnam quotes a negotiator for the United States during the Tokyo Round GATT trade negotiations saying: "'I spent as much time negotiating with domestic constituents (both industry and labor) and members of the U.S. Congress as I did negotiating with our foreign trading partners.'" Putnam, *supra* note 295, at 433 (quoting Robert S. Strauss, *Foreword* to JOAN E. TWIGGS, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: A CASE STUDY IN BUILDING DOMESTIC SUPPORT FOR DIPLOMACY , at vii (1987)).

297. *Id.* at 440.

298. *Id.* (quoting W. MARK HABEEB & I. WILLIAM ZARTMAN, THE PANAMA CANAL NEGOTIATIONS 40, 42 (1986)).

behalf of the President are unable to point to the need to obtain congressional support as a reason for insisting on a better deal for the United States, because everyone involved knows that Congress is unable to reject even a disadvantageous deal. If the other party is informed and rational, therefore, it will insist on making the agreement that is most advantageous to it (and least advantageous to the United States) that will not lead the President to walk away from the agreement (or retaliate in other ways). This leads to the perhaps counterintuitive proposition with which this Subsection began: an unconstrained negotiator may be weaker, not stronger, when it comes to negotiating an agreement that is best for the nation.

This work thus indicates that in order to negotiate more advantageous agreements, the President should sometimes be more, not less, constrained. The exact shape the constraints on the President should take will be addressed in more detail in the next Part. I will simply note here that there are two possible types of constraints: the President's authority could be limited in advance, through narrower delegations of negotiating authority, or it could be limited after the fact. The ex post constraints may, in turn, take two forms: Congress may be required to approve the agreement or there may be some form of administrative review after an agreement is negotiated. Advance constraints can provide hard limits to the type of agreement that can be negotiated. They give a clear signal to the other party that the President cannot make concessions outside certain limits. Ex post constraints offer more flexibility but can make the outcome less predictable. For a skilled negotiator, ex post constraints might allow negotiation of an even more favorable agreement. But if the negotiator misjudges the ex post constraints, the agreement may never enter into effect.

This suggests an important consequence of imposing greater constraints on the President's power to make international agreements. Constraining the set of agreements that are acceptable to the United States by, for example, requiring congressional approval of an agreement (reducing the United States's "win set," as Putnam would put it) might result in fewer agreements. It is possible that an agreement that would satisfy the U.S. Congress would not be acceptable to the United States's negotiating partner. This is not necessarily a negative consequence of requiring congressional approval. Rather, it can sometimes be yet another argument in its favor. If an agreement fails because negotiators were unable to conclude an agreement that has the support of Congress, then that agreement might be best left unmade. Not only may it be worse for the country as a whole than no agreement at all, it may be destined to go unenforced. An agreement that cannot muster political support at the approval stage might fail to garner that support when it comes time to enforce the agreement. This would lead to what Putnam calls "involuntary defection," which is, he rightly notes, "just as fatal to prospects for cooperation as

voluntary defection."[299] It can also undermine the United States's reputation as a country that can be trusted to follow through on its international law commitments.

This is not to say that more constraints on the President are always better. An entirely unconstrained President is unlikely to negotiate the best possible international agreements. But an excessively constrained President will be just as unable to pursue the national interest at the negotiating table. A President who, for example, has little power to deliver an agreement will quickly find other countries unwilling to enter into negotiations, for they will not wish to waste time negotiating an agreement that will not be approved. It is also possible that placing constraints on the President will slow the negotiation process and thereby frustrate some efforts to create agreements even where there are congruent preferences between the parties. Finally, the positive effect of domestic constraints can be squandered by an uninformed executive. There is evidence, for example, that a constrained negotiator who does not know the other party's constraints (even though the other party knows both parties' constraints) will, perhaps unsurprisingly, do worse in negotiations.[300]

The central proposition remains that a President who has unconstrained unilateral power to conclude international agreements may find himself in a weaker negotiating position than if he faced limited, but real, constraints. The claim that a President whose actions are not subject to any oversight by Congress is always better able to pursue the national interest on the international stage is therefore incorrect. Within limits, the presence of constraints on a President has the potential to make him stronger, not weaker, at the bargaining table—and better able to strike the best deal for U.S. national interests.

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299. *Id.* at 439.

300. Political scientists have taken some tentative steps toward better understanding the Schelling conjecture. Helen Milner, for example, has modeled the ratification process and argues that it shows that in situations of asymmetric information, more divided government (that is, greater distance between the "ideal points" of Congress and the President) does not always lead to better outcomes for the President (that is, a result closer to the President's ideal point)—a result she interprets as casting some doubt on the Schelling conjecture. HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 92-93 (1997); *see also* Helen V. Milner & B. Peter Rosendorff, *Democratic Politics and International Trade Negotiations: Elections and Divided Government as Constraints on Trade Liberalization*, 41 J. CONFLICT RESOL. 117, 141 (1997) (considering the Schelling conjecture in cases of divided government); Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. CONFLICT RESOL. 320 (2001) (examining the Schelling conjecture in a situation in which both negotiators are constrained and finding that asymmetric information sometimes eliminates the advantage that otherwise comes from having a constrained negotiator).

3. *Executive Branch Negotiators May Not Have All Relevant Information*

Those who advocate unilateral presidential power over international lawmaking assume that the executive possesses all the information necessary to conclude the best agreement. And yet there are cases in which information may not be made available to the President and his representatives that could be helpful in the negotiation process because those with relevant information are not informed about the pending agreement—or may know of the agreement but may have no opportunity to communicate relevant information to those engaged in negotiations.

For example, the United States recently negotiated an Agreement on the Safety of Food and Feed.[301] The agreement provided for collaboration between the U.S. Department of Health and Human Services and China's General Administration of Quality Supervision, Inspection and Quarantine regarding the safety of food and feed exported from one country to the other (though phrased as a two-way arrangement, the intent was clearly to address U.S. consumer fears regarding the safety of food imported from China to the United States). The agreement set out a plan for regulatory cooperation and set up a structure for ongoing collaboration on issues relating to food safety.

The Agreement became public on the day it was signed by the parties and entered into force. The Institute for Agriculture and Trade Policy later assessed the terms of the agreement and questioned the capacity for enforcing the agreement both in the United States and in China.[302] It noted that consumer organizations had criticized the agreement for excluding products like apple juice that had a history of food safety violations.[303] It also pointed out that the on-site inspection of food processing export establishments provided for in the agreement was likely to be insufficient.[304] Moreover, the Institute noted that while products may be refused entry due to inspection or testing results, the Agreement does not indicate whether information on the rate of refusal or inspection and testing data will be made public. It commented, "[t]his review will apparently involve only government officials with no opportunity for non-governmental comment or reporting."[305]

301. Agreement on the Safety of Food and Feed, U.S.-P.R.C., Dec. 11, 2007, Temp. State Dep't No. 08-12, 2007 U.S.T. LEXIS 54.

302. *See* STEVE SUPPAN, INST. FOR AGRIC. AND TRADE POLICY, U.S.-CHINA AGREEMENT ON FOOD SAFETY: TERMS AND ENFORCEMENT CAPACITY (2008).

303. *Id.* at 4.

304. *Id.* at 6.

305. *Id.* at 7.

Whether or not these critiques are well founded, there is no doubt that the current system for making international agreements does not provide a forum in which such criticisms may be heard by policymakers during the drafting process. This stands in stark contrast to the domestic process for issuing agency rules and regulations. If these commitments had been made by the Department of Health and Human Services (HHS) through domestic regulations instead of an international agreement, they would have been subject to the Administrative Procedure Act's notice and comment procedures. This process would have allowed interested parties to be informed of the pending arrangement and to make comments that would have informed those in a position to change the agreement. Because the commitments were made in an international agreement, however, there was no such process for soliciting responses from the public. The agreement was therefore drafted without any formal opportunity for public input.

One might object that in foreign affairs, quick and flexible decisionmaking is necessary. The cumbersome process of obtaining congressional support so slows decisions that it is ultimately self-defeating, even if it does produce more information. But this argument ignores several important points. First, the subject of this discussion is international agreements. These agreements do not as a rule require the rapid decisionmaking sometimes involved in military actions or pressing international crises. Second, it has long been recognized that presidents may enter into temporary or interim agreements in cases of pressing need where it is not possible to consult Congress. Once the immediate crisis has passed, however, the rationale for unilateral action passes with it. Finally, individual congressional approval of every international agreement is not necessary to correct the imbalance identified here. As I discuss in Part IV below, there are several measures that would maintain flexibility and yet significantly improve oversight and accountability—and the ability of negotiators to obtain information relevant to the agreement—in the international lawmaking process.

This Part has argued that the case for unilateral international lawmaking power for the President rests on normative and positive claims that threaten to crumble upon closer inspection. First, while it is true that the President is an essential actor in the process of U.S. international lawmaking, presidential support is only rarely sufficient as a matter of U.S. constitutional law. Second, the delegation of power by Congress to the President to make international law has led to weak democratic accountability. Third, and finally, international agreements made by the President on his own are not only not necessarily better, they may sometimes even be worse.

The argument for unilateral presidential power over international law rests on a false proposition about the necessary relationship between democratic accountability and effectiveness in international lawmaking. The twin aims of

democracy and effectiveness can lie in tension, but they can also be mutually reinforcing. Restoring balance to the lawmaking process by allowing Congress and the public greater influence can, as noted above, give the President more broad-based political support to carry out international agreements, a stronger negotiating position, and better access to information that will allow more informed agreements. But it is important to be aware, as well, that there is a lurking danger of overcorrection. Some reforms that would make the international lawmaking process more democratic could also cause it to become overburdened to the point of collapse. Any reform that undermines the ability of the system to operate effectively and efficiently will ultimately be harmful, not helpful.

In the next Part, I propose a two-track system for international lawmaking that offers a way to more effectively balance these aims. This reform promises to restore a role for Congress and the American people in the process of making international law while at the same time making even more effective international lawmaking possible.

IV. RESTORING THE BALANCE

The balance of power over international law has been eroding for more than two centuries. That gradual process of erosion—which gathered steam in the post-World War II era—has led to a system of lawmaking in which presidential unilateralism is deeply entrenched. Restoring balance to U.S. international lawmaking will therefore require a fundamental reorganization of the system.

Here I propose reorganizing international lawmaking into two separate tracks: administrative and legislative. This would make explicit what is already implicit—that there are two kinds of international law which require different levels of congressional involvement and which in turn should be given different legal status. It also promises to normalize international lawmaking, bringing it within familiar structures of administrative rulemaking and legislation. Doing so will not only make it easier to integrate international U.S. legal commitments into domestic law, but also allow lawmakers and administrators to harness knowledge gained in the domestic context to strengthen and improve the international lawmaking process. And it will allow informal mechanisms of oversight that operate in the domestic arena to play a more significant role in the international arena as well.

One might reasonably ask whether a proposal of this kind is realistic, given the repeated failure of Congress to assert authority over the international lawmaking process, as documented extensively in Part II of this Article. There are several reasons to believe that the proposal can, indeed, succeed. First,

Congress has failed to act in the past in part because its loss of power has been incremental and largely hidden. It is my hope that by revealing the extent of the problem, this Article will help create an impetus for reform that might otherwise not exist.[306] Moreover, the plan offered here allows Congress to address the entire problem in one step; rather than requiring Congress to reverse each individual delegation of authority in each individual statute, this proposal allows Congress to put in place an overarching system of oversight that applies to every instance in which Congress has delegated international lawmaking authority to the President.

A second reason to think that this reform proposal can be enacted is that it offers Congress an option not previously on the table. Up until now, Congress has been reluctant to address the imbalance of power in international lawmaking in part because the only apparent alternatives were a full vote in both the House and Senate or a two-thirds vote in the Senate alone. Obtaining that level of support is impractical—if not impossible—for the more than three-hundred executive agreements entered by the United States each year. The administrative track proposed here gives Congress an intermediate option, allowing it to exercise more effective oversight that is not excessively burdensome.

Finally, many of the proposed reforms offered here can be put in place even in the absence of legislation. The State Department's Office of the Legal Adviser has the power to make significant changes in the way international law is made on its own—for example, it could provide much greater transparency in the lawmaking process even if Congress does not require it. In the discussion below, I outline the unilateral steps that the Office of the Legal Adviser could take to begin to restore the balance of power in the process of international lawmaking.

The remainder of this Part is devoted to detailing the two tracks more thoroughly. The first Section outlines a new administrative track. I argue that most of the current sole executive agreements and ex ante congressional-executive agreements should be approved under this track, which should be patterned in part on the notice and comment model that applies to legislative rulemaking in the domestic context under the Administrative Procedure Act. The proposal for this new system is founded on the basic principle that Congress and the American people should be informed about international agreements before—not after—they become law. And they should have an opportunity to offer feedback on proposed agreements. This formalization of

306. Congress has shown that it can and will act when faced with evidence of excessive presidential unilateralism in international lawmaking, as it did in passing the important Case-Zablocki Act in the early 1970s. *See supra* text accompanying note 159.

administrative international lawmaking should be coupled, I argue, with narrower statutory grants of international lawmaking authority and more frequent use of sunset provisions in any new delegations.

The second Section details the proposed legislative track of international lawmaking. The Article II Senate-approved treaty and the ex post congressional-executive agreement would remain legislative options. Indeed, I have argued elsewhere that ex post congressional-executive agreements hold many advantages over all the alternative modes of international lawmaking and that they should be used much more extensively than they are at present.[307] I argue here for expanding the menu of available legislative options by offering a streamlined process for congressional approval of executive agreements patterned on the "fast track" process for trade agreements. Such a process will allow for greater involvement by Congress while not overburdening the system or unduly slowing the process of approval.

These proposals are necessarily broad outlines. They point the way toward greater transparency and opportunity for public and congressional participation in order to enhance the democratic legitimacy of the lawmaking system. But they also seek to account for the need to maintain—and even enhance—an effective negotiating process not overly burdened by the presence of too many voices or excessive revisions to proposed agreements. This discussion thus aims to offer ways to think about reform, to introduce new ideas that can improve the international lawmaking process, and above all, to begin a conversation about how best to achieve the multiple and sometimes conflicting goals of the international lawmaking system.

A. A New Model of Administrative International Lawmaking

International lawmaking escaped the administrative law revolution of the 1940s.[308] All foreign affairs matters—including the process of making

307. *See* Hathaway, *supra* note 11, at 1307-57.

308. Absent the exemption, it is clear that executive agreements and ex ante congressional-executive agreements would be considered "rules" subject to the strictures of the APA. *See* 5 U.S.C. § 551(4) (2006) (defining "rule"). In particular, they would be considered "legislative rules"—that is rules that have the same binding legal effect as a statute. They would therefore be subject to the notice and comment rulemaking requirements that apply to all such rules. For more on the distinction between legislative and nonlegislative rules, see, for example, William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023 (2004); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN L. REV. 659 (2002); and John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 914-27 (2004). For more on "interpretive rules," see Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy*

international law—were exempted from the Administrative Procedure Act, which was the linchpin of the modern regulatory state that emerged after World War II.[309] Yet the same demands for expanded regulatory authority were as present for foreign affairs as for other areas of executive authority during the post-World War II era. As a result, there was an exponential increase in international agreements, most of them regulatory in nature. But unlike in the domestic arena, there has never been any system in place to allow effective external oversight.

It is time for that to change. A system built on the basic insights of the legislative rulemaking process outlined in the APA can and should be put in place.[310] The reforms proposed here thus begin with a new model of administrative international lawmaking patterned in part on the domestic rulemaking process. International agreements currently approved as executive agreements under the President's sole constitutional authority or under authority delegated to the President by Congress would be approved instead through this new administrative process.[311] This reform would bring greater transparency to the international lawmaking process and an opportunity for the public and Congress to play a more significant role in shaping the agreements. At the same time, it would allow for efficient and effective lawmaking that is not subject to excess delays and endless revisions.

Below, I begin by outlining the proposal for an administrative international lawmaking process patterned on the Administrative Procedure Act's domestic rulemaking process. Next, I argue that the creation of a new administrative track should be coupled with more careful delegations of international lawmaking authority to the President. Finally, I outline the standards that will determine which international agreements are eligible for approval through the administrative track and which must instead be approved through the more formal legislative process.

1. *An "APA" for International Law*

The administrative track for international lawmaking proposed here is self-consciously patterned on the Administrative Procedure Act, which is generally considered the linchpin of the modern regulatory state. The APA's basic insight

Statements, 75 MICH. L. REV. 520, 542 (1977); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705 (2007); and Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 352.

309. 5 U.S.C. §§ 552 (b)(1)(A), 553 (a)(1), 554(a)(4).

310. I focus here in particular on the rules that apply to "notice and comment" rulemaking.

311. I say more in Subsection IV.A.3. about when the administrative track is appropriate.

is simple but powerful: Congress cannot manage the regulatory demands of the modern state on its own. Yet executive agencies must not exercise unfettered control over rules that have the force of law. The APA offers a compromise that allows Congress to delegate the authority to make binding rules to executive agencies. At the same time, the APA retains a check on the exercise of that delegated authority through notice and comment rulemaking, which is in turn monitored through judicial review.

Before discussing the outline of the modified rules that I argue should apply to international agreements, let me first explain why I do not advocate what may initially appear to be the simplest solution: removing the exemption of foreign affairs from the APA and subjecting foreign affairs to the full strictures of "notice and comment rulemaking" that apply in the domestic context. There is at least one key structural difference between the domestic and international rulemaking context that leads to necessary differences in the way comments can be solicited, received, addressed, and reviewed: an executive agreement, unlike a domestic regulation, involves a foreign party.[312] This means that changes to proposed agreements cannot be made without the consent of the other party to the agreement. In fact, extensive revisions to the text may lead the other party to abandon the agreement altogether. Furthermore, a cumbersome and time-consuming process for concluding executive agreements may serve as a disincentive to enter into negotiations with the United States in the first place. For these reasons, I recommend a reform based on the central insights of the domestic rulemaking process, but modified in significant ways to fit the particular needs of the international context.

Instead of simply subjecting international agreements to the APA, a new administrative system based on the APA should be put in place. This system should involve first and foremost a modified "notice and comment" procedure for executive agreements. In particular, the single most essential reform would

312. Another key difference, as noted earlier and addressed in more detail below, is that judicial review does not function in the same way in the field of foreign affairs as it does in domestic law. None of these reasons were explicitly discussed on the record during the debate over the APA at the time of its original passage. Indeed, the exemption of foreign affairs received little attention. It was at several points referred to simply as "self-explanatory." *See, e.g.*, STAFF OF S. COMM. ON THE JUDICIARY, 79th Cong. (Comm. Print 1945), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG., 1944-46, at 15, 17 (1946). A more complete explanation of the exemption appears in the congressional record of the House proceedings: "The exemption of military and naval functions needs no explanation here. The exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is ordinarily not directly concerned." 92 CONG. REC. 5650 (1946) (statement of Mr. Walter).

be to increase the transparency of the international lawmaking process through earlier and more effective "notice" of international lawmaking. As it currently stands, Congress and the public are unable to learn much, if anything, about executive agreements until well after they have already entered into effect. As a result, they are unable to perform any checking function or even provide information that might prove helpful in the process of creating the agreements. The introduction of greater transparency into the process will serve as a necessary precursor to opening the international lawmaking process up for broader political debate.

The first step toward reform would be a simple revision to the Case-Zablocki Act. Instead of requiring agreements to be reported to Congress within sixty days after entering into effect, it would make reporting of an agreement to Congress a *prerequisite* for an agreement to enter into effect. Specifically, the amendment could provide that no executive agreement may go into effect until thirty or sixty days after the agreement is reported to Congress.[313] This modest revision alone has the potential to increase congressional oversight by permitting Congress to examine agreements *before* they become law. This would, by itself, play an important role in improving the transparency of the lawmaking process and give Congress an opportunity to raise objections to an ill-conceived agreement before it becomes a fait accompli. It would also likely lead to significant improvements in communication between agencies within the executive branch. At present, executive agencies frequently enter into agreements with other nations but fail to report the agreements to the Legal Advisor to the Department of State. As a result, the agreements are often reported to Congress after—sometimes far after—the sixty-day deadline established by the Act.

There are a few further steps that would improve transparency even further. First, the Case-Zablocki Act reports should be made public at the same time that they are provided to Congress. In other words, when an agreement is

313. A much more limited revision to the Case-Zablocki Act was in place in 2005, 2006, and 2007 (the revision lapsed in 2008). It provided that

> [i]f any international agreement, whose text is required to be transmitted to the Congress pursuant to the . . . 'Case-Zablocki Act' . . . is not so transmitted within the 60-day period specified in that [Act], then no funds authorized to be appropriated by this or any other Act shall be available after the end of that 60-day period to implement that agreement until the text of that agreement has been so transmitted.

Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. 100-204, § 139(a), 101 Stat. 1331, 1347 (1987) (codified at 1 U.S.C. § 112b).

reported to Congress, it should also be reported to the public.[314] The Office of the Legal Adviser at the Department of State has recently taken steps in this direction, for which it deserves much credit. In recent years, the Legal Adviser has been posting agreements that it has reported to Congress under the Case-Zablocki Act on its website. It is therefore possible for members of the public to read the agreement text and learn what agreements have recently been concluded. That practice of rapid and accessible publication of executive agreements should be continued.[315] Once again, however, the practice should also be expanded and moved earlier in the process. It would be an important step, in particular, to make agreements available to the public before they enter into effect. This would allow public input into the process of international lawmaking.[316]

Second, there should be much more specific information made available about the legal authority for the executive agreements—and it should be made available to both Congress and the public at large. The Case-Zablocki Act reports to Congress presently include brief background statements that indicate the legal authority on which the President relies in making the agreement. These statements, which are currently only informal and voluntary, should be formalized as a statutory or regulatory requirement. They ought to be significantly more detailed as well. At present, the statements of legal authority in background statements are extremely rudimentary (for example, "The United States Constitution Article II; and the Foreign Assistance Act of 1961, as amended.").[317] This would not be an onerous obligation, as the required information already exists in internal Circular 175 memos that the Office of the Legal Adviser prepares on each international agreement. The change would cure a fundamental problem in the present system: no one

314. As noted below, there should remain an exception for secret or classified agreements.

315. Since 2004, such publication has been required by law. *See* 1 U.S.C. § 112a(d). In the last two years, however, the information was reorganized to make it much more readily accessible to the public. Even more could be done—for example, creating a searchable database.

316. Some other reforms would make the web interface more user-friendly and therefore more useful. In particular, the addition of a search function would be an extremely useful addition. A possible model is the web interface for the Thomas treaties database. In addition, both databases would also very much profit from the addition of more past agreements (the Case-Zablocki Act reports currently go back only a couple of years, and the Thomas database only extends reliably to the 1980s).

317. Letter from Laura Svat Rundlet, U.S. Dep't of State, to Joseph R. Biden, Jr., Comm. on Foreign Relations Chair, U.S. Senate, 08-03 (Jan. 3, 2008) (on file with author) (containing a background statement concerning the Agreement Amending the Strategic Objective Grant Agreement for Basic Education of September 30, 2002, U.S.-Egypt, Sept. 30, 2007).

outside of the Office of the Legal Adviser at the State Department knows the precise legal basis under which most executive agreements exist. Making this information available to Congress and the public would allow outside observers to more accurately assess whether an agreement in fact falls within the legal authority that is claimed. It would also allow Congress to better assess how the legal authorities it has granted are being used by the President.[318]

Taking the first steps outlined above to improve notice to the public and Congress about international lawmaking will open up proposed international agreements to public scrutiny. Even without any further reforms, opening up the process in this way will generate a public response that will enhance the legitimacy of executive agreements and provide a greater base of information on which government officials may draw. And, notably, many of the reforms outlined above could be carried out by the Office of the Legal Adviser in the absence of any new legislation. But the equation will not be complete without the second half of the "notice and comment" process—that is, the opportunity for public comment. Permitting public commentary on proposed legal rules is just as important in international lawmaking as it is in domestic rulemaking for ensuring transparency, securing the democratic legitimacy of the system, and collecting information from members of the public who may be affected. Rather than relying on informal feedback and outbursts of public attention, there could be a much more careful and potentially useful system for soliciting public feedback on proposed international agreements.

For reasons already mentioned, the process for receiving comments will likely have to be highly modified in the international lawmaking process. It is possible that it would be wise to collect commentary in the early stages of negotiations with foreign partners, rather than after a text has been agreed upon by the parties. Ideally, guidelines will be designed that will permit public input in ways that can be helpful to negotiators—identifying issues that should be considered, potential problems that may arise, or domestic interests that may be affected.[319] Moreover, substantive judicial review of the adequacy of

318. Making this information public would not impose an undue burden on the Office of the Legal Adviser. The Department is already required to include an extensive discussion of the legal basis for any agreement in the Circular 175 memo on that agreement. That discussion may serve as the basis for the public statement of the legal foundation of the agreement.

319. One issue that will need to be resolved is the extent to which nonbinding agreements will be subject to the new notice and comment procedures. Under the APA, nonbinding statements are generally not subject to notice and comment. They must simply be published in the Federal Register. *See* 5 U.S.C. § 552(a)(1)(D). Nonbinding agreements are also not subject to reporting under the Case-Zablocki Act. *See* 22 C.F.R. § 181.2(a)(1) (2009) ("The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally

notice and comment may be more limited in the international context—both because of time constraints and because of the international sensitivity of the issues involved.

An important advantage of a modified system of notice and comment for securing the legitimacy of the U.S. international lawmaking system is that it is largely self-regulating. Those agreements that are more controversial or more important to larger numbers of people will receive greater attention. When such agreements are proposed to the public, actors in the political system that oppose or support them will express their positions. This can lead to greater scrutiny for those agreements that matter most to domestic constituencies. Those agreements that are entirely uncontroversial or that are of little significance, however, will likely receive less attention and hence less scrutiny. In other words, the enhanced transparency of the system will enable a series of informal monitoring mechanisms of the kind that currently operate in the domestic realm to become more active in the international law arena.[320] A self-regulating system in which Congress and the public decide which agreements

binding, are not international agreements."). The danger of exempting nonbinding agreements is that the exemption can create incentives to classify an agreement as nonbinding in order to evade notice and comment procedures. That is a particular danger if it is difficult to determine whether an agreement is, in fact, properly considered nonbinding. Currently, the relevant regulations focus on the intention of the parties, which can be extremely difficult to objectively discern. *See id*. If the current Case-Zablocki Act exemption for nonbinding agreements is extended to the new notice and comment procedures, it will be extremely important to establish much clearer guidelines for which agreements are nonbinding and which are not—and those guidelines must be transparent and obvious to the foreign party. The factors to be considered might include, among other things, clear wording establishing that an agreement is nonbinding, such as "the title of the instrument; the avoidance of mandatory language; the omission of treaty-type final clauses," ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 31 (2000), and, ideally, a clear statement of intent of the parties to conclude a nonbinding agreement.

320. *See supra* text accompanying notes 266-270. To borrow McCubbins and Schwartz's famous phrasing, it will allow "fire alarms" to be pulled by the public when a congressional response is needed. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). In this way, the self-regulating notice and comment process not only allows for public oversight, but it also enhances informal congressional oversight. If there is significant controversy over a particular executive agreement during the notice and comment process, Congress is likely to take a second look to ensure that its delegation of authority is functioning as it intended. In this way, the notice and comment process—and the judicial enforcement of its procedures—allows Congress to harness the power of private actors to enhance its oversight capacity. *See* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 399-408 (2006) (discussing the "administrative accountability paradigm"); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1770 (2007) ("[C]ourts force agencies to comply with the procedures that facilitate fire-alarm oversight.").

get closer attention is much more desirable than a system in which an executive agency tries to determine in advance which agreements should receive more process and which should receive less.

An additional benefit of the creation of a new administrative track is that it would make explicit what is now implicit: that the bulk of executive agreements are administrative in nature. This will, in turn, make it possible to resolve issues of uncertain legal authority. As noted earlier,[321] sole executive agreements carry force only so long as they are not inconsistent with a federal statute, unless they are intended to effect a treaty, in which case they have the status of federal law. At the same time, a sole executive agreement that exceeds the President's own constitutional authority is likely to be unenforceable. And it is unsettled whether an ex ante congressional-executive agreement that conflicts with an earlier statute is similarly enforceable.

If these agreements are instead treated as equivalent to federal regulations, all ambiguities disappear.[322] The relative legal status of regulatory rules is well established. They receive less individualized scrutiny from Congress and enjoy legal standing commensurate with that less formal process. Rules made in accordance with applicable statutory procedures and within the scope of authority delegated by Congress have been held by the Supreme Court to have force and effect of federal law.[323] As a consequence, such rules have been held to

321. *See supra* text accompanying notes 236-237.

322. It is not strictly necessary to include sole executive agreements within the scope of the APA for international law. By definition, these agreements are concluded on the President's own constitutional authority and hence do not require the same form of legislative oversight that I argue should apply to agreements concluded using authority delegated to the President by Congress. I nonetheless recommend that they be included within the new proposed system for two reasons. First, the line between sole executive agreements and ex ante congressional executive agreements has been blurred to the point that the differences between the two are difficult, and sometimes impossible, to discern. Any system that exempts sole executive agreements will therefore have to put in place a careful process for evaluating whether a proposed agreement is truly within the President's own constitutional authority (and hence exempt from the system) or not. If that line is not strictly policed, sole executive agreements could provide an end-run around the approval process. Second, placing sole executive agreements within the APA-like system would eliminate the legal ambiguity that can attach to some sole executive agreements whose legal foundation is unclear. Any agreement that receives approval through the new APA-like system could be relied upon by both parties to the agreement. If sole executive agreements were exempted from the notice and comment procedures, it would be still advisable to require them to adhere to the enhanced reporting requirements outlined above.

323. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 695-96 (1974) ("So long as this regulation is extant it has the force of law . . . . So long as the regulation remains in force the Executive branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.").

preempt inconsistent state law and are binding on federal agencies.[324] Yet they cannot preempt a prior statute. Under *Chevron U.S.A. Inc. v. National Resources Defense Council*,[325] if a statute conflicts with a regulation—even a regulation enacted after the statute—the regulation will be struck down. Indeed, a central purpose of judicial review of agency action is to ensure that the agency is carrying out its duties in accordance with the will of Congress. If an agency acts in accordance with an interpretation of relevant law that a court finds to be erroneous—even though made in good faith—then the court will disregard the agency's view and strike down any inconsistent rules.

Just like regulatory rules that undergo the process of notice and comment, executive agreements that are approved through the administrative track will have the status of federal law and hence will supersede inconsistent state law. Yet, unlike agreements that proceed on the legislative track, they will not supersede prior inconsistent legislation.[326] Given the absence of express congressional approval for the agreements, this is an appropriate result. It will mean that it is necessary for presidents to proceed through the legislative track if they intend to conclude an agreement that is inconsistent with a federal statute—a result that will discourage presidents from using ex ante congressional-executive agreements and sole executive agreements to make an inappropriate end-run around Congress.

As with the domestic APA, judicial review will serve to ensure compliance with the international APA. In particular, judicial review plays two important roles in the international APA. First, it ensures that the executive branch

324. *See, e.g.*, United States v. Locke, 529 U.S. 89, 112-16 (2000) (holding that a legislative rule can preempt state law); Hines v. United States, 60 F.3d 1442, 1449-50 (9th Cir. 1995) (holding that the post office is bound by rules, a holding that has been read to apply to federal agencies more broadly), *rev'd on other grounds by* United States v. Olson, 546 U.S. 43 (2005). For more on the question of preemption—and debates surrounding it—see Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); and Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

325. 467 U.S. 837 (1984).

326. This is consistent with current case law on sole executive agreements. *See* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (finding that an executive agreement contravening provisions of import statute was unenforceable), *aff'd on other grounds*, 348 U.S. 296 (1955); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 cmt. c (1987). This approach would resolve some remaining ambiguity about the proper legal standing of ex ante congressional-executive agreements. Agreements approved through the legislative process would, by contrast, continue to supersede earlier inconsistent statutes in what is generally referred to as the "last-in-time rule."

complies with the notice and comment requirements established in the new statute for both sole executive agreements and ex ante congressional-executive agreements. If, for example, the executive were to conclude an agreement without providing prior notice and opportunity for comment, the courts could invalidate the agreement until the notice and comment procedures are met.[327] Second, for ex ante congressional-executive agreements, it serves to ensure that the President acts within the scope of the authority delegated by Congress. The traditional *Chevron* analysis would apply in this context.[328] Under *Chevron*, a court reviewing an agency's interpretation of a statute must engage in a two-part analysis of agency action—which in this case would be an ex ante congressional-executive agreement. In this context, the court will begin by examining whether the statute granting authority to the President to conclude an ex ante congressional-executive agreement is clear and unambiguous. If it is unambiguous, and the agency interpretation runs contrary to the statute (if, for example, the agreement concluded clearly exceeds the authority granted in the statute), the statute will prevail and the agreement declared invalid. If the

327. At a minimum, this would simply involve judicial review of whether the formal rules regarding notice and comment have been observed—thus providing a more limited process-focused review than in the domestic context. Whether the courts would engage in a more detailed analysis of the adequacy of notice and comment depends on the specific rules regarding notice and comment adopted under the APA for international law. The proposal offered in this Article does not provide specific guidance on this question, leaving it to Congress to determine in consultation with the President and relevant agencies, including the Department of State. Depending on the notice and comment procedure adopted in the statute, substantive review of notice and comment procedures may be appropriate. It is likely, however, that more limited substantive review will be found to be appropriate in the international context. For domestic law cases engaging in substantive review of the notice and comment procedures, see, for example, *NRDC v. EPA*, 279 F.3d 1180 (9th Cir. 2002), which discusses how different the final rule may be from its initial state, after comments are taken into account; *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977), which requires the agency to adequately disclose the basis of its final regulation in response to comments; and *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985), which discusses what constitutes sufficient notice. If such challenges are permitted, it would at a minimum be appropriate to adopt a strict deadline for them to be filed, to reduce the possibility that international agreements might be declared invalid after they have already entered into force.

328. This does not mean that *Chevron*-style deference would necessarily apply in other foreign relations contexts, as advocated by Eric Posner and Cass Sunstein. *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); *cf.* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (arguing that *Chevron*-style deference is inappropriate for executive-constraining foreign relations law).

statute is ambiguous, the court will examine whether the agency's interpretation of the statutory language is "permissible."[329]

The courts' traditional reluctance to intervene in cases involving questions of presidential authority over international agreements is unlikely to pose an impediment to judicial review under the APA for international law. The APA for international law patterns the process of judicial review on a familiar domestic law process and allows the courts to draw on existing and familiar judicial doctrines, such as *Chevron*. This makes effective judicial review much easier to achieve than it has been in the occasional, extraordinary cases in which courts have been asked to rule on questions of presidential authority over international lawmaking.[330]

The central remaining concerns likely to be raised to the proposal made here are as follows. First, the introduction of a modified notice and comment procedure may lead to a longer process for creating agreements.[331] This will make the system less nimble and may lead other countries to be more reluctant to embark on the process for making agreements with the United States. Second, it may cause the United States to seek changes in or even to reconsider an agreement that has been negotiated and signed by both parties. This would be frustrating to the other party to the agreement and may, again, lead that party to withdraw or to refuse to embark on the negotiating process in the first place—and potentially even harm diplomatic relations. Third, some may worry that greater public participation could have adverse effects on international lawmaking, thanks to agency capture by interest groups or domination of the new public conversation by those representing narrow interests that do not reflect the public good.

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329. *Chevron*, 467 U.S. at 843.

330. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring); *see also, e.g.*, Goldwater v. Carter, 617 F.2d 697, 709 (D.C. Cir. 1979), *rev'd*, 444 U.S. 996 (plurality opinion) (dismissing the case because the issue presented was a nonjusticiable political question); Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (dismissing on the grounds that the members of the House lacked standing because "plaintiffs have alleged only an institutional injury to Congress, not injuries that are personal and particularized to themselves," and that the "issue raised by these congressmen is a nonjusticiable political question").

331. This is a version of the concern in the domestic rulemaking context about "ossification," a term coined by E. Donald Elliott. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (citing E. Donald Elliott, Remarks at the Symposium: Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics at Duke University School of Law (Nov. 15, 1990)); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997).

These are real concerns, but they can be alleviated by careful design. The concerns about an overburdened and ossified administrative system can be addressed by modifying the APA rules to provide for a curtailed comment period, by soliciting congressional and public feedback earlier in the negotiation process, and by making careful judgments about which portions of a proposed agreement are subject to revision and which are so important to the negotiating partner that any effort to revise them would spell an end to the agreement. The worries about narrow interest group dominance in the public discussion can be addressed by reducing the cost of participation in the process.[332] It is important to remember that well-financed interest groups already have access (albeit limited) to the international lawmaking process. Making the agreements more readily available to the public and allowing public comment on them is likely to expand, not contract, the variety of views heard by those involved in negotiating those agreements. Just as in domestic regulatory affairs, however, those involved in designing the notice and comment system for international lawmaking must be cognizant of the dangers of agency capture and interest group politics and should seek to design the system in ways that most effectively minimize these concerns.

The drawbacks just discussed will likely be offset by the benefits of a reformed process that allows for broader participation. The United States will benefit from a more open process because that process will lead to agreements that are more legitimate, more consistent with American constitutional ideals, and better tailored to the needs and interests of the American public. Moreover, the inclusion of outside actors in the negotiating process can strengthen the United States's position at the negotiating table. And both parties to the agreement will benefit from the broader base of support that an agreement will have at the end of such a process: the agreement that results from a more open process is much more likely to endure than if the agreement were made by the President acting alone in secret.

There may remain agreements that cannot be made public due to security concerns. Between five and fifteen percent of current executive agreements are classified as secret.[333] Those agreements are subject to the Case-Zablocki Act

332. Mariano-Florentino Cuéllar has shown that, contrary to conventional wisdom, comments from the lay public make up a substantial proportion of total comments about some regulations. He argues for a redesign of the notice and comment process that can better involve the public in regulatory decisions and thereby further enhance the democratic credentials of regulatory rules. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414-17 (2005).

333. Interview with members of the Senate Foreign Relations Comm. staff, in Washington, D.C. (Jan. 13, 2009).

reporting requirements but are not published.[334] The process for rendering executive agreements secret should be examined to ensure that it is not overinclusive. Assuming it is not, however, it would be appropriate to continue the current practice of reporting the agreements to Congress alone. Such agreements would not be subject to the enhanced notice and comment process. They should, however, receive close inspection by the congressional committees that receive them—on the understanding that these agreements will not receive the public attention that most of the rest do.[335] It may also be wise to include an exception for agreements that must be concluded quickly—for example, a temporary status of forces agreement that would allow the United States to provide immediate emergency assistance to another country in the case of a natural disaster. Again, this exception should be clearly and narrowly defined.

The administrative review process proposed here is intended to generate closer scrutiny of executive agreements by Congress and the public at large. The initial source of the problem identified in this Article nonetheless remains: excessively broad delegations of authority from Congress to the President. It is even possible that the stronger system of review advocated here could have a perverse effect. If agreements concluded under delegated authority are subject to greater scrutiny than they are now, members of Congress might conclude that they could delegate away even more lawmaking power. That would, however, defeat the intent of this proposal and expand, rather than contract, the legitimacy concerns described here. To protect against this possibility, therefore, I turn next to making the case for more limited delegations of international lawmaking authority to the President.

2. *Rethinking Delegations of Lawmaking Authority to the President*

The new administrative framework discussed above governs agreements that are concluded by the President under his own constitutional authority or under authority delegated to him by Congress. In reforming the system, it is not only important to develop a better process for overseeing the agreements that the President concludes using this authority. It is also important to

334. 1 U.S.C. § 112b(a) (2006); 22 C.F.R. § 181.7(b) (2006).

335. In interviews with congressional staff, I learned that for more than one year, the State Department failed to report secret agreements to Congress as required under the Case-Zablocki Act. It was not until an agreement was leaked and reported in the press that the omission (which all parties I interviewed agreed was not intentional) was discovered. Much closer oversight by the relevant congressional committees is clearly in order. Interview with members of the Senate Foreign Relations Comm. staff, *supra* note 333.

examine the statutes that delegate authority from Congress to the President—thereby giving rise to the current imbalance of power over international lawmaking. As described above, the broad statutory grants of authority from Congress to the President are the end result of a long process of gradual—and sometimes unintended—movement away from very narrow delegations. The addition of a more effective oversight mechanism for executive agreements does not obviate the need to reassess existing delegations, many of which have been in place for decades.

As outlined in Part II, tracing the history of congressional-executive agreements reveals that statutory delegations of authority to the President evolved over the course of more than two hundred years from extremely narrow to quite broad. What began with just a small trickle of narrow, highly constrained agreements during the first century of the country's existence became a steady flow in the late 1890s, and finally became a gush of agreements in the wake of the New Deal. And yet even then, Congress continued to exercise some measure of oversight authority through the use of the legislative veto. Indeed, the presence of legislative vetoes encouraged broad delegations of authority, for Congress knew that it could reject agreements it disliked.[336] With its decision in *INS v. Chadha*, the Supreme Court pulled away this last strand of congressional power over ex ante congressional-executive agreements, leaving behind only the now-unsupervised broad delegations of power from Congress to the President. Many of the statutory grants of authority that currently empower the President to enter into executive agreements were created in a pre-*Chadha* world. When Congress responded to *Chadha* by simply removing the legislative vetoes, it left in place broad delegations that Congress never intended to leave unsupervised.

Revisiting these broad delegations is an important step toward addressing the imbalance of power in the international lawmaking system. Revising such statutes, however, will take not only willpower on the part of Congress but also cooperation from the President whose power would likely be curtailed by the revisions. Hence it may be advisable to focus attention primarily on ensuring that new delegations of power do not repeat the mistakes of the past. Any new advance grants of authority to the President to conclude executive agreements with foreign nations ought to be crafted with much greater attention to

336. Indeed, one of the critiques of the legislative veto offered to the Court was that it "encourage[d] Congress to avoid the difficult task of devising clear standards and provide[d] little guidance to an agency seeking to fulfill its statutory mandate." Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1259 (1983) (describing an argument made in the ABA amicus brief to the Court in the *Chadha* case).

detail.[337] What precisely this will mean will necessarily vary from case to case. The central point, however, does not: no delegation should be made without a clear vision of the full range of agreements that may result from it.

Recognizing that each area of international law will require differently tailored statutes, it is still possible to offer a general proposal for changing the way Congress delegates authority to the President to conclude international agreements: Congress can and should include sunset provisions for any new grants of authority. As Table 2 shows, most of the currently active statutes that grant authority to the President were enacted decades ago—several as early as the 1950s. We remain governed, for example, by a grant of authority to conclude agreements on atomic energy made in 1954.[338] It should go without saying that the context has changed immensely since then. Locking Congress into long-term delegations threatens to lock the country into decades-old modes of thinking.

Moreover, the time-unlimited grants of authority undermine the legitimacy of the delegations. It is one thing to say that it is legitimate for Congress to grant some of its authority to the President in order to take advantage of administrative expertise and flexibility. It is quite another to say that Congress may bargain away not only its own power but the power of every Congress to follow. Indeed, to return to the Atomic Energy Act example, not a single member who served in Congress when it was enacted still serves today.[339] Allowing a delegation to reach into the indefinite future is especially problematic because, once given, the authority is extraordinarily difficult to

337. It is interesting to note that Germany's Basic Law allows legislative powers to be delegated to the executive, but the authorization must be narrowly tailored and specifically determined in content, purpose, and extent. *See* Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 80(1), *translated in* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 74 (Christian Tomuschat & David P. Curry trans., 1998) ("The Federal Government, a Federal Minister, or the Land governments may be authorized by a law to issue statutory instruments. The content, purpose, and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.").

338. 42 U.S.C. § 2011.

339. At the time of this writing, the longest-serving member of Congress is Representative John Dingell of Michigan, who has served in the House of Representatives since 1955. Congressman John D. Dingell, http://www.house.gov/dingell/bio.shtml (last visited May 1, 2009). The longest-serving member of the Senate at present is Robert C. Byrd (D-WV), who first joined the Senate in 1959. *See* U.S. Senate: Reference Home, http://www.senate.gov/senators/Biographical/longest_serving.htm (last visited May 1, 2009).

reclaim: any effort to curtail or revise the delegation in a way that contracts the power given to the President is likely to meet with a presidential veto.

A sunset provision is a blunt but effective tool for alleviating these problems. If a delegation of authority comes to an end in a definite period of time (say five or even ten years), then Congress has the opportunity to reconsider the delegation in light of changed circumstances. It may choose to reauthorize the delegation as is, amend it, or allow it to lapse. The President may still veto an amended delegation, of course, but the consequence of doing so will be that he loses the delegated authority altogether. The sunset provision thus changes the balance of power between the President and Congress, making the consequences of inaction (or a presidential veto of a revised delegation) fall on the President rather than on Congress.[340]

3. *Eligibility for the Administrative Track*

A key question remains: which agreements should be concluded through the administrative track for international lawmaking?[341] It is essential that the

340. A possible objection to the proposal here for more limited delegations of authority is suggested by the expansive literature about statutory delegations in the domestic context. Scholars have repeatedly pointed out the downsides of requiring specificity in statutory delegations. There is a large literature describing many reasons to favor broad delegations (and hence broad statutory grants of authority to the President), including managerial efficiency, necessary expertise, political responsibility, electoral responsiveness, and stability. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION (3d ed. 1976); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-37 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102-03 (1994); Mashaw, *supra* note 272, at 81-82; Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887). Others have argued, in the spirit of *Field v. Clark*, 143 U.S. 649 (1892), that the broad statutes are not delegations at all but simply invitations to the exercise of executive power. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). Though these arguments offer reason for caution, it is worth recalling that the most robust defenses of broad delegation to administrative agencies rest on assumptions about the administrative rulemaking process that simply do not exist in the context of congressional-executive agreements. Only if international delegations were to enjoy the host of informal controls will such objections give pause to efforts to constrain future delegations.

341. At present, the decision to conclude an international agreement as a treaty, a congressional-executive agreement, or a sole executive agreement is made by the Office of the Legal Adviser in the U.S. Department of State. It is guided by rules and regulations known as the Circular 175 Procedure. *See supra* note 26. The procedure requires that a request for

criteria be clearly specified to prevent the use of the more limited administrative process to enact agreements that should instead be enacted as ex post congressional-executive agreements or Article II treaties.

Agreements eligible for the administrative law track must fall into one of two categories: (1) agreements authorized by an express delegation of authority to the President by Congress in prior legislation, or (2) agreements that fall within the President's own constitutional powers.[342] The first category is largely self-explanatory. It may be determined by reading and interpreting the text of legislation granting authority to the President to conclude relevant international agreements.[343] The second category, however, will likely prove more complex, requiring as it does a theory of the constitutional power of the President. Outlining the details of those limits is beyond the scope of this paper.[344] Yet there are some clear limits that are nearly universally agreed upon. For example, a President may not conclude an executive agreement that creates a legal obligation to provide funds without congressional approval, because the power of appropriation is not the President's alone. A President also may not enter a binding international agreement to come to the military aid of another country without congressional approval.[345]

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authorization to negotiate or sign a treaty or other international agreement take the form of an action memorandum that includes a discussion of the basis for the type of agreement recommended—and it includes eight factors that are to be considered. As I have discussed elsewhere, the existing criteria offer murky guidance, at best, and are affirmatively misguided at worst. *See* Hathaway, *supra* note 11, at 1249-52. The criteria outlined here should be specified in the legislation enacting the new administrative track and they should be reflected, as well, in a revised Circular 175 process and its attendant regulations.

342. As noted above, including sole executive agreements in the administrative track may not be necessary but is advisable. *See supra* note 322.

343. It is important to ensure that the agreements do not exceed the authority granted. Moreover, even if a President is authorized to conclude an agreement by virtue of legislation delegating authority to him, such an agreement should not be concluded through the administrative track if the President is unable to meet the obligations it creates in the absence of further legislative action.

344. For more on this question, see Oona A. Hathaway, Constitutional International Law (Sept. 30, 2009) (unpublished manuscript) (on file with author). Current regulations allow expansive scope for agreements concluded pursuant to the President's own constitutional authority. *See* U.S. DEP'T OF STATE, *supra* note 26, § 723.2-2(c) ("Agreements Pursuant to the Constitutional Authority of the President"). The regulation appears to adopt a much more expansive use of the President's constitutional international lawmaking power than is supported by the Constitution. This issue, however, remains unresolved.

345. *See* Memorandum from Louis Fisher, Specialist in Constitutional Law, to William D. Delahunt, U.S. House of Representatives 2 (Nov. 10, 2008) (on file with author) ("Previous administrations have understood that the President has no constitutional authority to unilaterally make financial and military commitments with other nations. Such agreements

Where the constitutional power of a President to conclude an agreement on his own authority is uncertain or based on controversial theories of executive prerogative, the best course of action is to submit the agreement for congressional approval as an ex post congressional-executive agreement. Doing so is more legally and democratically legitimate, for gaining the consent of Congress where it is not necessary is far better than failing to gain the consent of Congress where it is necessary. It is also likely to lead to a more effective agreement. If a President concludes an executive agreement that arguably falls outside his constitutional authority, he may be unable to ensure compliance with that agreement.[346] That uncertainty, in turn, is likely to lead foreign parties to be more reluctant to enter into executive agreements and thereby undermine the President's international lawmaking authority.

Agreements that fall outside the two categories outlined above must be approved through the legislative international lawmaking process discussed in the next Section. In addition, there are several prudential factors that, if present, point toward conclusion of an agreement as an ex post congressional-executive agreement or Article II treaty. These factors strongly counsel against the administrative international law track and in favor of the legislative track. They are as follows: (1) the agreement must be enacted through legislation in order to take effect; (2) the agreement does not expressly permit withdrawal by the United States with a notice period of less than one year; or (3) a significant number of members of either house of Congress has expressed a desire that the agreement be concluded as a legislative international agreement.

The first factor—the agreement must be enacted through legislation in order to take effect—requires that the agreement be concluded through the legislative track. The President should not conclude an executive agreement that cannot be carried out in the absence of subsequent legislation. That is because doing so places Congress in an unacceptable position: if it refuses to pass the necessary legislation, the United States is placed in violation of international law. But if it passes the legislation to avoid placing the country into violation of international law, it abdicates its constitutional authority over the legislative process.[347]

are binding and effective only to the extent that Congress provides support through treaties or statutes.").

346. The agreement between the United States and Iraq that went into effect on January 1, 2009, is a recent example of this problem. *See supra* note 4 (citing critiques of and congressional hearings on the U.S.-Iraq agreement).

347. This factor is largely a restatement of the two categories noted above. An agreement that is not authorized by an express delegation of authority to the President by Congress and that falls outside the President's own constitutional authority must necessarily be enacted through legislation.

The second factor—the agreement does not expressly permit withdrawal by the United States with a notice period of less than one year—is not decisive but it is instructive. If an agreement creates a long-term commitment, such an agreement ought to be subjected to more thorough review before being made. This is especially true for international agreements that create commitments that cannot easily be revoked. For even though a subsequent statute by Congress could undo the commitment as a matter of domestic law, the commitment will remain binding as a matter of international law and the country may suffer sanctions from the international community as a consequence of its failure to continue to abide by the agreement's terms.

The third factor—a significant number of members of either house of Congress has expressed a desire that the agreement be concluded as a legislative international agreement—is again instructive. As a matter of convention and law, the decision as to the form that an international agreement will take belongs to the President and his legal advisers (though they must, of course, work within applicable legal constraints). Yet the President should allow himself to be guided in this decision by the expressed will of Congress. Even if an agreement may legally be concluded as an executive agreement through the administrative track, if Congress objects, it might undermine both the willingness and ability of the country to meet its commitments under that agreement. International commitments, after all, create an obligation for the entire country. If a substantial contingent in Congress expresses a view about the proper way to make that commitment, those voices should be heard even though they need not be obeyed.

Agreements that are not authorized by an express delegation of authority to the President by Congress in prior legislation or that do not fall within the President's own constitutional powers are not eligible for the administrative track outlined in this Section. Moreover, agreements that must be enacted through legislation cannot be concluded thorough the legislative track. Finally, agreements that do not permit withdrawal by the United States in less than one year, or for which a significant number of members of Congress has expressed an interest in being involved in the approval process, should not be concluded on the administrative track. They may instead proceed on the "legislative track" for making international agreements. That track is the subject of the next Section.

B. An Expanded Model of Legislative International Lawmaking

The legislative track of international lawmaking includes three separate types of agreements that require congressional approval. First and most obvious, there is the Article II process for creating treaties through the "advice and consent" of two-thirds of the Senate. Second is the Article I process for

creating ex post congressional-executive agreements through the approval of negotiated agreements by both houses of Congress. To this existing list, I add a third: an expanded "fast track" process that would offer a streamlined system for congressional approval of international agreements. This addition, which is the central focus of this Section, promises to make legislative approval of international agreements both more efficient and more effective.

1. *Article II Treaties*

Article II treaties—that is, international agreements concluded by the President and approved by a two-thirds supermajority in the Senate—remain a viable means of concluding international agreements. I have discussed Article II treaties extensively elsewhere and will not repeat that analysis here.[348] Suffice it to say that Article II treaties may be concluded on any topic as long as the agreement is consented to by the United States and a foreign nation, is the subject of genuine mutual interest by the parties, and is not concluded for the sole purpose of allowing one or both parties to circumvent domestic legal rules.[349] Such treaties are subject to the constitutional limits that apply to all exercises of federal power—most notably, the prohibitions in the Bill of Rights.[350] They may, however, exceed the powers of the federal government enumerated in Article I of the Constitution. Indeed, Article II treaties are the exclusive means for making such agreements—including agreements to cede territory of the United States and extradite U.S. citizens.[351] For all other agreements, an available—and, I have argued, preferable—alternative is the ex post congressional-executive agreement.[352]

2. *Ex Post Congressional-Executive Agreements*

Ex post congressional-executive agreements are negotiated by the President in precisely the same way as Article II treaties. But they are approved by majority votes in both houses of Congress. Unlike ex ante congressional-executive agreements, ex post congressional-executive agreements must receive

348. *See generally* Hathaway, *supra* note 11 (discussing the origins and historical use of the Article II treaty clause and arguing that Article II treaties are less desirable than ex post congressional-executive agreements in most cases).

349. *See id.* at 1344-45.

350. *See* Geofroy v. Riggs, 133 U.S. 258, 267 (1889); HENKIN, *supra* note 216, at 185.

351. *See* Hathaway, *supra* note 11, at 1344-49.

352. For more on the reasons for favoring ex post congressional-executive agreements over Article II treaties, see *id.* at 1307-38.

the approval of Congress *after* the agreement is negotiated.[353] I have argued elsewhere that such agreements may be used in almost any area of international law.[354] Indeed, nearly all agreements that are currently concluded as Article II treaties and *all* agreements currently concluded as an ex ante congressional-executive agreements may be concluded as ex post congressional-executive agreements instead.

Not only is it legally permissible to conclude most international agreements as ex post congressional-executive agreements, it is also often preferable. Such agreements have many advantages over both Article II treaties and ex ante congressional-executive agreements. First and foremost, ex post congressional-executive agreements are more democratically legitimate than either Article II treaties or ex ante congressional-executive agreements. Article II treaties exclude the House of Representatives from the lawmaking process and allow a small and unrepresentative minority in the Senate to veto international agreements.[355] Ex ante congressional-executive agreements also fall short. They satisfy the form, but not the function, of interbranch cooperation: because Congress relinquishes its international law power in advance, it has little or no ongoing involvement in the actual process of creating the international commitments. Ex post congressional-executive agreements, by contrast, require true cooperation between Congress and the President. Rather than

353. This proposal bears some similarities to requirements that apply to agency rulemaking in the domestic context, but is different in one especially significant respect. The Congressional Review Act of 1996, passed in the wake of the Republican Revolution, is expressly aimed at "wresting back power from the agencies and the executive branch." Cindy Skrzycki, *Reform's Knockout Act, Kept out of the Ring*, WASH. POST, Apr. 18, 2006, at D1. The Act requires that before a new rule goes into effect, the issuing agency must submit a report on the rule to each house of Congress and the Comptroller General. 5 U.S.C. § 801(a)(1)(A) (2006). No "major rule" can go into effect until at least sixty days after submission of the report. *Id.* § 801(a)(3)(A). Finally, there is an expedited review process for rules: Congress may pass a joint resolution preventing a rule from taking effect. The resolution must be introduced within sixty days after the agency submits its report to Congress and is considered under special procedures meant to speed consideration. *See id.* § 802(c)-(d). The provisions for legislative oversight have been successfully utilized only once. There have been thirty-seven joint resolutions of disapproval (out of more than 41,000 nonmajor rules and 610 major rules reported), but only one has become law. Skrzycki, *supra*. This is likely due at least in part to the fact that the President retains veto power over the joint resolutions of disapproval that the Act authorizes. The proposal outlined above takes a distinctive approach, providing not for a joint resolution of disapproval, but instead a joint resolution of *approval*.

354. The only agreements that must be concluded as Article II treaties are those that provide for the extradition of U.S. citizens, that cede territory of the United States, or that address disabilities of aliens. *See* Hathaway, *supra* note 11, at 1344-48.

355. For more on the democratic advantages of ex post congressional-executive agreements over Article II treaties, see Hathaway, *supra* note 11, at 1308-12.

delegate its authority to approve international agreements to the President in advance, Congress retains the power to approve or deny an international agreement. As a result, the President is more likely to involve Congress in shaping the agreement from the very start and to take concerns raised by Congress into account during the negotiation process.

Second, ex post congressional-executive agreements create much more reliable commitments than either Article II treaties or executive agreements not expressly approved by Congress. The Supreme Court's recent decision in *Medellín* v. *Texas*[356] declared longstanding core Article II treaty commitments of the United States to be unenforceable in federal court because they were not self-executing. As a result, there is now a great deal of uncertainty about the reliability of the United States's Article II treaty commitments. Similarly, executive agreements not expressly approved by Congress enjoy tenuous legal standing. As noted earlier,[357] sole executive agreements carry force only so long as they are not inconsistent with a federal statute. It is as yet not entirely settled whether an ex ante congressional-executive agreement that conflicts with an earlier statute is similarly unenforceable.

By contrast, ex post congressional-executive agreements are unambiguously directly and automatically enforceable as a matter of federal law. Congress's approval of the agreement places the full weight of the federal government behind it. This, in turn, is likely to make such agreements more attractive to foreign partners. The transformation of sole executive agreements and ex ante congressional-executive agreements into ex post congressional-executive agreements thus not only holds the promise to improve democratic accountability and interbranch cooperation in U.S. international lawmaking, but can also lead to stronger, more reliable international legal commitments.[358]

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356. 128 S. Ct. 1346 (2008). Indeed, it appears that some countries are concerned about the fragility of U.S. international commitments. Libya recently insisted that an agreement between it and the United States be approved by Congress through enactment of a statute, rather than being concluded as a sole executive agreement or Article II treaty. *See* Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008). For an outstanding discussion of the judicial enforcement of treaties that presents a somewhat more hopeful view of *Medellín*, see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

357. *See supra* text accompanying notes 236-237.

358. Any statute that tightens the rules for executive agreements must consider three additional issues. First, it may be necessary to make express allowances for temporary or provisional agreements between executives in cases where they are necessary—for example, for military alliances in the course of active hostilities. Second, it is important that rules be crafted in such a way that they are not evaded by an expansion of so-called nonbinding or insignificant agreements. At the present, only significant, binding agreements need be reported to Congress under the Case-Zablocki Act and attendant regulations. *See supra* note 159. Those

There are a few obvious objections to the proposal to subject more executive agreements to the express consent of both houses of Congress. First, one might worry that the process would be more cumbersome, time-consuming, and inefficient. Instead of simply negotiating an agreement and signing it to put it into effect, the President would have to submit the agreement to Congress and receive its approval before the agreement enters into effect. Second, a procedure that allows Congress to request or demand revisions after an agreement has been negotiated by the President might pose daunting negotiation difficulties. The President, having negotiated a text that is acceptable to him and to the foreign party or parties, may be unable to obtain congressional approval of an agreement that is the result of long and difficult negotiations with foreign partners unless he demands—and wins—further revisions to address concerns raised by Congress. These back-end difficulties are also likely to cause problems on the front end. Negotiating partners, recognizing that the process will take longer and that the President and his representatives cannot definitively negotiate the terms of the agreement, may prove more intransigent in negotiations in order to retain some bargaining power or may even be discouraged from entering negotiations in the first place.

These are real and legitimate concerns. It is worth noting, however, that the benefits of congressional consent to an international agreement—that is, a democratic and reliable agreement—will frequently outweigh the costs of a more cumbersome process for concluding the agreement. Moreover, the costs can be alleviated by the creation of a new "fast track" mechanism for congressional-executive agreements—a proposal to which I now turn.

3. *An Expanded "Fast Track"*

The so-called fast track procedure has been used extensively for trade agreements,[359] and in that context has allowed Congress to approve agreements

categories are ill-defined, however, and may have led to failure to report agreements. There would be much greater incentive to define agreements to fall outside the Case-Zablocki Act requirements if the proposal suggested here were adopted. Third, and finally, there would need to be a separate procedure put in place for the approval of classified agreements. Classified agreements must be reported to Congress under the Case-Zablocki Act, but they are not made public. Once again, it would be important that the requirements of the statute not be evaded by an expanded use of classified agreements.

359. "Fast track" authority is also called trade promotion authority. The laws that created fast track appear in the Trade Act of 1974, Pub. L. No. 93-618, §§ 151-154, 88 Stat. 1978, 2001-08 (codified as amended at 19 U.S.C. §§ 2191-2194 (2006)). The Trade Act of 2002 extended and conditioned their application. Pub. L. No. 107-210, §§ 2103-2105, 116 Stat. 933, 1004-16 (codified as amended at 19 U.S.C. §§ 3803-3805 (Supp. 2006)).

negotiated by the President through a streamlined process. Here, I propose expansion of the fast track model beyond the trade area.

To begin with, it is worth exploring what fast track entails. Fast track authority was first enacted through the Trade Act of 1974.[360] Under the fast track process, which has since expired, the leaders of the House and Senate were required to introduce any trade legislation proposed to Congress by the President "on the day on which a trade agreement or extension" was submitted or, if a house was not in session, then "on the first day thereafter."[361] The legislation could not be amended,[362] and the committees in each house were required to report an implementing bill or approval resolution no later than "the close of the 45th day after its introduction."[363] A full house vote was required "on or before the close of the 15th day" after the bill or resolution was reported out of committee.[364] Debate on the legislation was limited to "not more than 20 hours" in each house.[365] Filibusters were not permitted in the Senate, and the legislation was subject to passage by a simple majority vote in each house.[366]

Although fast track was developed to ease the process of approval for trade agreements, there is no legal reason why it must remain limited to this narrow area of international law. The Senate and House could adopt simplified procedural rules to speed the process of approval of international agreements in any area of international law. Because "fast track" simply involves the modification of House and Senate procedural rules, it can be done by

360. 19 U.S.C. § 2101-2476 (2006). For a discussion of the role of fast track in U.S. trade policy, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992). Koh effectively responds to what he calls the "democracy objection" to fast track authority. *Id.* at 161. That objection carries less force in this context, where the central aim is to move agreements away from the less democratic ex ante congressional-executive agreement process toward a more democratic process that involves congressional approval—albeit with streamlined fast track procedures. Nonetheless, Koh's discussion of the issue is instructive.

361. 19 U.S.C. § 2191(c)(1).

362. *Id.* § 2191(d).

363. *Id.* § 2191(e)(1).

364. *Id.* If the bill involved revenue (for example, if it provided for a raising or lowering tariffs, which is quite common in a bill relating to trade), the legislation was to originate in the House of Representatives. *Id.* § 2191(e)(2). Once the bill was passed in the House, it would continue to the Senate, which was required to act quickly (usually, the assigned committee was required to act within fifteen days, and the full Senate to vote fifteen days after the bill or resolution was reported out of committee, for a total of no more than thirty days in the Senate). *Id.*

365. *Id.* § 2191(f)-(g).

366. *Id.*

legislation and does not require constitutional amendment. The simplified rules would likely include, at a minimum, tight reporting deadlines, restrictions on floor debate, and a prohibition on the use of the filibuster in the Senate. The fast track procedure could be adopted on a narrow substantive basis (for example, for all agreements regarding nuclear materials) or more broadly (for all international agreements proposed during a given year).

The adoption of a fast track process, however broad or narrow, might on first glance appear disadvantageous to Congress. It does, after all, limit Congress's ability to amend and debate an agreement. Yet to the extent a more streamlined approval process encourages presidents to bring international agreements to Congress that might have otherwise been concluded without affirmative congressional assent, it will result in an expansion of congressional power over international law rather than a reduction. Moreover, if Congress authorizes fast track authority on a periodic basis, it could better ensure that the authority is not abused. A President who uses the authority in ways that are regarded by Congress as abusive would see the authority disappear shortly thereafter. That would provide an incentive for the President to communicate effectively with Congress and to use the fast track authority in a responsible and judicious manner.

There are other possible modifications to the current fast track process that could be considered. For example, a procedure could be put in place for permitting agreements to be voted through Congress in groups, rather than individually. At present, agreements are reported by the State Department to Congress in batches. As an alternative to the administrative track outlined above, Congress could approve uncontroversial regulatory agreements in the same manner—voting them through in batches rather than individually. If such a "batch" method of approval were adopted, there could be a simple procedure for removing an agreement from the batch before the batch is put forward for approval. Specifically, an agreement might be removed pursuant to a majority vote in both houses (and would *not* be subject to approval by the President).[367] While these procedures would limit congressional power to revise agreements once negotiated, they would ensure significantly more congressional input and influence than presently exists with ex ante congressional-executive agreements.

367. The removal of an agreement from the set of agreements to be put up for approval by Congress is not a legislative veto. A legislative veto exists only when either or both houses of Congress can modify or block an action by the executive branch that would, in the absence of the veto, take effect. For discussions of other possible modifications to fast track rules, see, for example, Koh, *supra* note 360; and Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L. J. 471 (1990).

The proposal outlined here for comprehensive reform of the international lawmaking system around two tracks of international lawmaking—one administrative and one legislative—offers a path toward more effective, efficient, and democratic international lawmaking in the United States. By bringing international lawmaking within the bounds of more familiar domestic law structures, the proposal offers the prospect of a more seamless and effective integration of the United States's international legal commitments into domestic law. In doing so, the reform responds to criticisms of international law as out of step with the U.S. democratic political process, while at the same time rendering the country's new international legal commitments more reliable and effective.

CONCLUSION

In 1967, Senator William J. Fulbright rose in the Senate to raise the alarm about the "constitutional imbalance" in the making of national commitments to foreign nations. Pointing to a gradual but inexorable erosion of congressional power over the making of international agreements since World War II, Fulbright concluded that the President's power to make agreements was not effectively checked by Congress. He encouraged his fellow Senators to reassert the power of Congress—and especially the Senate—to take up their constitutional responsibility to participate in making commitments to other nations.

Although Fulbright eventually succeeded in obtaining the Senate Resolution he sought, the problems to which he pointed remain just as pressing today as they were in 1967. Indeed, the intervening decades have if anything seen continuing erosion of congressional power over the process of making international law. Today, the vast bulk of international lawmaking is done through executive agreements negotiated by the President using authority that was delegated to him by Congress many years—and in some cases many decades—earlier. These ex ante congressional-executive agreements are used to make international commitments on everything from defense matters to trade to telecommunication to energy and are not subject to formal approval by Congress. Congress, in fact, typically does not even learn of the agreements until months after they have entered into effect.

The international lawmaking process of today would have been entirely unfamiliar to the Founding generation. International law, as they knew it, was made almost entirely through Article II treaties negotiated by the President and consented to by two-thirds of the Senate. There were occasional executive agreements, but they were confined to very limited subjects. Ex ante

congressional-executive agreements were then used almost exclusively to manage international mail carriage.

This Article has traced how and why the process of international lawmaking has changed over the centuries since the Founding. It shows that the growth of unilateral presidential power was gradual and was driven by a complex interaction of legal, political, and geopolitical forces. The United States, which was at the time of its creation a small and relatively insignificant entity in world politics, was by the 1940s a dominant economic, military, and political force. This generated significant demands on the country to embed itself in a web of international agreements. In the face of these pressures, the President sought ever-growing flexibility to create international commitments. Congress responded by delegating authority to the President to make a wide array of international agreements. It did so in small incremental steps, none of which was significant by itself, but which together amounted to a major transfer of lawmaking authority from the legislative to the executive branch.

The Supreme Court, for its part, simply stood above the fray, refusing to intervene to stop the transfer of authority between the political branches. In the rare instances in which it did weigh in, it simply affirmed the agreements created under the new rubric. In doing so, it opened the door to ever-greater transfers of authority. It also, perhaps unwittingly, put the nail in the coffin of congressional oversight of international lawmaking by prohibiting the use of the legislative veto in the 1980s, which was at that point the only significant lever to which Congress had held fast.

The imbalance of power that has resulted from the gradual shift toward presidential unilateralism in international lawmaking is more worrisome today than ever before. In a world that grows "flatter" by the day, the line between domestic and international law is increasingly blurry. Taxes, telecommunications, environmental regulations, employment, fisheries—international agreements on these topics and many others necessarily constrain domestic policy choices. The transfer to the President of unfettered power over international lawmaking therefore means that the President increasingly has unilateral power over issues that affect the day-to-day lives of ordinary Americans.

The problems are not simple and the solution will not be easy. Reforming an international lawmaking system first designed for the eighteenth century to meet the challenges of the twenty-first will require comprehensive and broad-based changes in the way the country makes its international legal commitments. Today—unlike during the Founding—there are two very different kinds of international agreements. There are now hundreds of agreements that look a great deal like agency-issued regulations alongside numerous agreements that create new commitments of a more legislative character. The international lawmaking system must accommodate this new

reality and provide a system for making international agreements that recognizes these differences. And it should do so in a way that allows international law to be more seamlessly integrated into domestic law. These reforms promise to improve the democratic legitimacy, efficiency, and reliability of the international lawmaking system and allow the United States to more successfully meet the global challenges it faces as a new century dawns.