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Before the Senate Foreign Relations Committee

**The President, Congress, and Shared
Authority Over International Accords**

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My remarks will be focused on the need for more oversight and involvement by the Senate, and the full Congress, in how the United States makes and withdraws from international agreements. I want to emphasize at the outset that my remarks are intended to be non-partisan. My focus is on Congress's institutional role relating to international agreements and how this role has diminished over time, not on particular policy disputes.

The only process specified in the Constitution for making international legal obligations for the United States is the one set forth in Article II, pursuant to which presidents must obtain the advice and consent of two-thirds of the Senate in order to make treaties.¹ Part of the idea behind requiring legislative involvement in that process was that international commitments can have important and long-term consequences for the United States and thus should not be determined by the President alone.² Instead, the Constitution requires collaborative international lawmaking involving both the executive and legislative branches.

For a variety of reasons, the Article II process is no longer the process used for the vast majority of international agreements entered into by the United States. In fact, well over 90% of all binding international agreements concluded by the United States since the 1930s have been concluded without senatorial advice and consent. One reason is practical: the number of international agreements rose dramatically during the twentieth century, and more efficient processes for concluding international agreements were needed.

International agreements made with the authorization or approval of the full Congress rather than two-thirds of the Senate are referred to as "congressional-executive agreements." Some of these agreements involve genuine collaboration between the legislative and executive branches—in particular those agreements approved by Congress after they are negotiated. This is the process, for example, typically used for modern trade agreements. In

¹ See U.S. CONST. art. II, § 2.

² Alexander Hamilton emphasized this point in *The Federalist Papers*, despite otherwise being a strong supporter of executive authority. See THE FEDERALIST PAPERS, No. 70 (explaining that the treaty power belongs "neither to the legislative nor to the executive" and that whereas the Executive Branch "is the most fit agent" for negotiation, "the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them"); No. 75 (explaining that it would be unwise "to commit interests of so delicate and momentous a kind, as those which concern [this country's] intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States").

those instances, Congress can review the content of the agreement and decide whether it is genuinely in U.S. interests. But such “ex post” agreements represent only a tiny fraction of the congressional-executive agreements. Most congressional-executive agreements involve merely an “ex ante” delegation of authority from Congress that is then used by presidents to make agreements that Congress does not review, often many years or even decades after the authorization.³

It is also generally accepted that the President has some ability to conclude “sole executive agreements” without congressional authorization or approval.⁴ But this is supposed to be a narrow authority, applicable when an agreement relates to an independent constitutional power of the President. It has been thought, for example, that the President’s role as the principal organ of diplomatic communications for the United States gives the President some authority to conclude sole executive agreements that settle claims with foreign nations.⁵

As Professor Jack Goldsmith and I discuss in a forthcoming law review article, presidents in recent years have sometimes been concluding binding international agreements outside of their independent constitutional authority, such as in the areas of environmental law or intellectual property law, when they also lack anything that could genuinely be called congressional authorization.⁶ They have done so based on the mere claim that the agreement will, in their view, promote the policies in existing U.S. law. This theory of presidential authority is highly problematic from the perspective of the separation of powers. Among other things, such agreements potentially restrict the options of Congress by forcing it to violate an agreement if it wants to modify preexisting law.

Another development is that presidents increasingly have been entering into so-called “political commitments” and combining them with preexisting statutory authority to create arrangements that in the past would have required either senatorial or congressional approval. Recent examples include the Iran nuclear deal and portions of the Paris agreement on climate change. Administrative agencies also often make political commitments with their counterparts in other countries on a range of issues. Even if these commitments are technically not binding under international law—which in fact is often less clear than the Executive Branch suggests—they can entail consequential promises by the United States that can be difficult to undo later.

³ See Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) (“The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”).

⁵ See *Medellín v. Texas*, 552 U.S. 491, 532 (2008); *Dames & Moore v. Regan*, 453 U.S. 664, 681 (1981).

⁶ See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. (forthcoming 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074833.

The increased Executive Branch unilateralism in the making of agreements has been paralleled by Executive Branch unilateralism in the termination of such agreements. Even though the Constitution does not specifically identify how the United States is to terminate agreements, it was generally assumed during the nineteenth century that presidents needed to work with Congress when doing so.⁷ But that has generally not been the practice since then. Instead, for almost all treaty terminations since the 1930s, presidents have simply acted alone. The State Department's current internal regulations relating to treaty termination do not even require *consultation* with the Senate or Congress, let alone approval.⁸

I worked in the Executive Branch, and I am sensitive to the particular needs and responsibilities of that department of government in the area of foreign affairs. But, in my view, there should at least be more transparency in connection with the Executive Branch's management of this country's international legal obligations. Only with transparency can Congress and the public determine whether the Executive Branch is acting lawfully and making good policy decisions. More transparency would also help in evaluating whether additional regulatory reforms should be adopted.

Congress has focused at times on the need for more transparency in this area, most notably in the 1972 Case Act (also known as the "Case-Zablocki Act"), and in subsequent amendments to that Act.⁹ As the Senate Report on the bill that became the Case Act stated, "if Congress is to meet its responsibilities in the formulation of foreign policy, no information is more crucial than the fact and content of agreements with foreign nations."¹⁰ But there are still significant deficiencies in the transparency of Executive Branch actions relating to international law, which could be remedied through congressional action. These deficiencies include:

First, although the Executive Branch provides Congress in its Case Act filings with a citation of its purported legal authority for concluding the various agreements without the Senate's advice and consent,¹¹ it does not disclose these claims of legal authority to the public.

⁷ See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014).

⁸ See U.S. Dep't of State, FOREIGN AFFAIRS MANUAL, 11 FAM § 724.8 (requiring approval of the Secretary of State "or an officer specifically authorized by the Secretary for that purpose" and preparation of a Circular 175 memorandum "that takes into account the views of the relevant government agencies and interested bureaus within the [State] Department"), at <https://fam.state.gov/Fam/FAM.aspx>.

⁹ See 1 U.S.C. § 112b. The Act was amended in 2004 in response to serious deficiencies in reporting. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 7121, 118 Stat. 3638 (2004); see also 150 Cong. Rec. H10994-04, H11026 (noting that in 2004, "the House Committee on International Relations learned that, due to numerous management failures within the Department of State, over 600 classified and unclassified international agreements dating back to 1997, had not been transmitted to Congress, as required by the Case-Zablocki Act").

¹⁰ S. Rept. No. 92-591, *Transmittal of Executive Agreements to Congress*, 92d Cong., 2d Sess. (Jan. 19, 1972).

¹¹ State Department regulations, in place since 1981, require the Department to provide Congress with "background information" for each agreement reported under the Case Act, including a "precise citation of legal authority." 22 C.F.R. § 181.7(c). The regulations describe such background information as "an integral part of the reporting requirement." *Id.*

In other words, the public has no ability to know about the asserted legal authority for more than 90% of the binding international agreements made by the United States.¹² This lack of public disclosure stands in sharp contrast to what is required for Executive Branch actions relating to domestic law, where the legal basis of rules, regulations, and other actions must be published in the Federal Register. If the Executive Branch's claims of legal authority for international agreements were disclosed to the public, interested third parties could review them, and then alert Congress when the claims seemed legally problematic.¹³

Second, reporting under the Act to Congress is still often incomplete or untimely. Part of the problem here is that departments of the Executive Branch other than the State Department sometimes conclude agreements, and the State Department is not always made aware of them in a timely way. I understand that there is a provision in a current Senate bill that would add an amendment to the Case Act to try to increase agency accountability for reporting agreements to the State Department,¹⁴ and I think that would be a good first step.

Third, there is no systematic reporting to Congress or the public of the many political commitments made by the Executive Branch, even though some of them are very consequential. While it might not make sense for Congress to require reporting on all of them, it might well make sense for it to require reporting on some subset of the most significant ones.

Fourth, there is currently no mandated reporting of presidential decisions to suspend, terminate, or withdraw from treaties, and there is no readily accessible catalogue of terminated agreements. The Department voluntarily reports on some of these actions in its *Digests of United States Practice in International Law*,¹⁵ but it is not required to do so, and the *Digests* often are published long after the events that they describe. In addition to mandating the reporting of such actions, Congress could also consider requiring the Executive Branch to articulate the reasons for its decisions to suspend, terminate, or withdraw from treaties, which would allow for greater oversight and accountability.¹⁶

¹² This problem is compounded by the fact that the State Department currently publishes international agreements on its website without indicating whether they are Article II treaties or executive agreements, and, if the latter, what type. See U.S. Dep't of State, TEXTS OF INTERNATIONAL AGREEMENTS TO WHICH THE US IS A PARTY (TIAS), at <https://www.state.gov/s/l/treaty/tias/>.

¹³ See Ryan Harrington, *Understanding the "Other" International Agreements*, 108 LAW LIB. J. 343, 352 (2016) (noting that "it is nearly impossible for the researcher to discover whether the Executive exceeded his statutory authority for any given agreement," and adding that, "in fact, it can be a challenge to determine whether the agreement had statutory authority at all").

¹⁴ See Department of State Authorities Act, Fiscal Year 2018, S. 1631, 115th Cong. § 802.

¹⁵ See U.S. Dep't of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at <https://www.state.gov/s/l/c8183.htm>.

¹⁶ The Executive Branch has sometimes voluntarily provided such an explanation. See, e.g., White House, *ABM Treaty Fact Sheet* (Dec. 13, 2001) (explaining how "the circumstances affecting U.S. national security have changed fundamentally since the signing of the ABM Treaty in 1972"), at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/12/20011213-2.html>.

These transparency measures would require only fairly modest changes in the law, and I do not think they would raise any serious constitutional issues. If Congress wanted to go beyond enhancing transparency and do more to limit presidential unilateralism concerning international law, it very likely has the constitutional authority to do so. Occasionally the Senate and Congress have in fact done more, without constitutional controversy. For example, leadership of both parties in the Senate have joined together on a number of occasions in pushing back when presidents have suggested that they might bypass the Article II process in concluding major arms control agreements.¹⁷ In 1999, Congress took a more assertive action and made clear in a binding statute that, if the United States ever joins the International Criminal Court treaty, it can only do so by going through the process specified in Article II of the Constitution.¹⁸

In terms of additional actions to consider, Congress could, for example, conduct a comprehensive review of the various “ex ante” grants of authority to make agreements that have accumulated over the years, many of which are quite dated, and see how the Executive Branch has been using those statutes. Such a study might suggest the need for narrowing, updating, or repealing some of the statutes.

In addition, I believe that the Senate, when giving its advice and consent to a treaty, could validly include a condition in its resolution of advice and consent limiting the circumstances under which a President could invoke the treaty’s withdrawal clause, and I believe that Congress could include a similar provision when authorizing or approving a congressional-executive agreement.¹⁹ As a policy matter, I am not sure that the Senate or Congress would want to include such limitations across the board, because they might reduce U.S. flexibility too much, but Congress might consider doing so for particular agreements.

As a final point, it is important to keep in mind that the preservation of Congress’s institutional authority ultimately depends on congressional action. The courts do not typically play a significant role in sorting out the distribution of authority between Congress and the Executive Branch over issues like the ones I have discussed. As a result, this distribution often must, as a practical matter, be worked out over time through interactions between the governmental branches themselves.²⁰ This means that if Congress allows instances of

¹⁷ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 395-96, 400-01 (6th ed. 2017).

¹⁸ See 22 U.S.C. § 7401(a).

¹⁹ See Bradley, *supra* note 7, at 824-25. See also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES, Tentative Draft No. 2, § 113, reporters’ note 6 (Mar. 20, 2017) (“Although historical practice supports a unilateral presidential power to suspend, terminate, or withdraw the United States from treaties, it does not establish that this is an exclusive presidential power.”); Cong. Res. Serv., 106th Cong., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 208 (Comm. Print 2001) (“To the extent that the agreement in question is authorized by statute or treaty, its mode of termination likely could be regulated by appropriate language in the authorizing statute or treaty.”).

²⁰ When courts do consider issues relating to the separation of powers, they often give substantial weight to longstanding patterns of governmental practice. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

Executive Branch unilateralism to build up with respect to control over international law, there is a danger that Congress may, in effect, be ceding away some of its own institutional authority through inaction. This is a reason for the Senate, and the full Congress, to be vigilant about protecting its institutional prerogatives even in situations in which it does not happen to disagree as a policy matter with what the President is doing on a particular issue. As I noted at the outset of my remarks, such vigilance does not need to be a partisan issue.