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International Law and Agreements: Their Effect upon U.S. Law

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Summary

International law is derived from two primary sources—international agreements and customary practice. Under the U.S. legal system, international agreements can be entered into by means of a treaty or an executive agreement. The Constitution allocates primary responsibility for entering into such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Secondly, Congress may authorize congressional-executive agreements. Thirdly, many treaties and executive agreements are not self-executing, meaning that implementing legislation is required to render the agreement's provisions judicially enforceable in the United States.

The status of an international agreement within the United States depends on a variety of factors. Self-executing treaties have a status equal to federal statute, superior to U.S. state law, and inferior to the Constitution. Depending upon the nature of executive agreements, they may or may not have a status equal to federal statute. In any case, self-executing executive agreements have a status that is superior to U.S. state law and inferior to the Constitution. Courts generally have understood treaties and executive agreements that are not self-executing generally to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling.

In addition to legally binding agreements, the executive branch also regularly makes nonlegal agreements (sometimes described as "political agreements") with foreign entities. The formality, specificity, and intended duration of such commitments may vary considerably, but they do not modify existing legal authorities or obligations, which remain controlling under both U.S. domestic and international law. Nonetheless, such commitments may carry significant moral and political weight for the United States and other parties. Unlike in the case of legal agreements, current federal law does not provide any general applicable requirements that the executive branch notify Congress when it enters a political agreement on behalf of the United States.

The effects of the second source of international law, customary international practice, upon the United States are more ambiguous. While there is some Supreme Court jurisprudence finding that customary international law is "part of" U.S. law, domestic statutes that conflict with customary rules remain controlling, and scholars debate whether the Supreme Court's international law jurisprudence still applies in the modern era. Some domestic U.S. statutes directly incorporate customary international law, and therefore invite courts to interpret and apply customary international law in the domestic legal system. The Alien Tort Statute, for example, which establishes federal court jurisdiction over certain tort claims brought by aliens for violations of "the law of nations."

Although the United States has long understood international legal commitments to be binding both internationally and domestically, the relationship between international law and the U.S. legal system implicates complex legal dynamics. Because the legislative branch possesses important powers to shape and define the United States' international obligations, Congress is likely to continue to play a critical role in shaping the role of international law in the U.S. legal system in the future.

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Introduction

International law consists of "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[1] While the United States has long understood international legal commitments to be binding upon it both internationally and domestically since its inception,[2] the role of international law in the U.S. legal system often implicates complex legal principles.[3]

The United States assumes international obligations most frequently when it makes agreements with other nations or international bodies that are intended to be legally binding upon the parties involved.[4] Such legal agreements are made through treaty or executive agreement.[5] The U.S. Constitution allocates primary responsibility for such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.[6] Secondly, Congress may authorize executive agreements.[7] Thirdly, the provisions of many treaties and executive agreements may require implementing legislation in order to be judicial enforceable in U.S. courts.[8]

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[1] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 101 (1987) [hereinafter THIRD RESTATEMENT]. Recorded international law dates back to agreements between Mesopotamian rulers five thousand years ago, but international law as it now commonly understood began with the Roman Empire, whose scholars formulated a *jus gentium* (law of nations) they believed universally derivable through reason. *See generally* DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (2001). Although originally governing nation-to-nation relations, the scope of international law has grown, beginning in the latter half of the 20th century with the emerging fields of human rights law and international criminal law, to regulate the treatment and conduct of individuals in certain circumstances. *See, e.g.*, Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, UN Doc. A/6316 (1948); Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200A (XXI) (1966). *See also* U.S. State Dept. Pub. No. 3080, REPORT OF ROBERT H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (1949) (arguing that crimes against humanity were "implicitly" in violation of international law even before the Nuremberg military trials of Nazi leadership for such offenses following World War II).

[2] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations."); Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Minister (June 5, 1793), https://founders.archives.gov/documents/Jefferson/01-26-02-0189 (describing the law of nations as an "integral part" of domestic law). *See also infra* notes 231-233 (citing statements by the judicial and executive branch concerning the application of international law into domestic law).

[3] *See infra* § Effects of International Agreements on U.S. Law.

[4] *See infra* § Forms of International Agreements.

[5] *See id.*

[6] U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

[7] *See infra* § Executive Agreements.

[8] *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1828) (Marshall, C.J.) ("[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the [agreement] addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."), *overruled on other grounds by* United States v. Percheman, 32 (7 Pet.) U.S. 51 (1833). CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS, S. REP. 106-97, at 4 (Comm. Print 2001)

The effects of customary international law upon the United States are more ambiguous and difficult to decipher.[9] While there is some Supreme Court jurisprudence finding that customary international law is incorporated into domestic law, this incorporation is only to the extent that "there is no treaty, and no controlling executive or legislative act or judicial decision" in conflict.[10] This report provides an introduction to the role that international law and agreements play in the United States.

Forms of International Agreements

For purposes of U.S. law and practice, pacts[11] between the United States and foreign nations may take the form of treaties, executive agreements, or nonlegal agreements, which involve the making of so-called "political commitments."[12] In this regard, it is important to distinguish "treaty" in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements,[13] and "treaty" in the context of domestic American law, in which "treaty" may more narrowly refer to a particular subcategory of binding international agreements that receive the Senate's advice and consent.[14]

[hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS]; THIRD RESTATEMENT, *supra* note 1, § 111(3).

[9] *See infra* § Customary International Law.

[10] The Paquete Habana, 175 U.S. 677, 700 (1900). *See also, e.g.*, Galo-Garcia v. Immigration and Naturalization Service, 86 F.3d 916 (9th Cir. 1996) ("[W]here a controlling executive or legislative act . . . exist[s], customary international law is inapplicable.") (citation omitted).

[11] As used in this report, the term "pact" is a generic term intended to encompass non-binding commitments between nations and legally binding international agreements.

[12] For further detail of various types of international commitments and their relationship with U.S. law, see TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 43-97; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1207-09 (2018).

[13] Vienna Convention on the Law of Treaties, art. 2, *signed by the United States* Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Although the United States has not ratified the Vienna Convention, courts and the executive branch generally regard it as reflecting customary international law on many matters. *See, e.g.*, De Los Santos Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices." (quoting Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 80 n.8 (2d Cir. 2005))); Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 433 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an 'authoritative guide to the customary international law of treaties.'" (quoting Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000))). *But see* THIRD RESTATEMENT, *supra* note 1, § 208 reporters' n.4 ("[T]he [Vienna] Convention has not been ratified by the United States and, while purporting to be a codification of preexisting customary law, it is not in all respects in accord with the understanding and the practice of the United States and of some other states."); *The Administration's Proposal for a UN Resolution on the Comprehensive Nuclear Test-Ban Treaty: Hearing Before the Sen. Comm. on Foreign Relations*, 114th Cong. (2016) (written Statement of Stephen G. Rademaker), https://www.foreign.senate.gov/download/090716_rademaker_testimony [hereinafter Rademaker Statement] ("[T]he more correct statement with respect to the Vienna Convention would be that in the opinion of the Executive branch it generally reflects customary international law, but, in the opinion of the Senate, in important respects it does not.").

[14] The term "treaty" is not always interpreted under U.S. law to refer only to those agreements described in Article II, § 2 of the Constitution. *See* Weinberger v. Rossi, 456 U.S. 25, 31-32 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (construing the term "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

Forms of International Pacts

International Agreement: A blanket term used to refer to any agreement between the United States and a foreign state or body that is legally binding under international law.[15]

Treaty: An international agreement that receives the advice and consent of the Senate and is ratified by the President.[16]

Executive Agreement: An international agreement that is binding, but which the President enters into without receiving the advice and consent of the Senate.[17]

Nonlegal Agreement: A pact (or a provision within a pact) between the United States and a foreign entity that is not intended to be binding under international law, but may carry nonlegal incentives for compliance.[18]

Treaties

Under U.S. law, a treaty is an agreement negotiated and signed by a member of the executive branch that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President.[19] In modern practice, treaties generally require parties to exchange or deposit instruments of ratification in order for them to enter into force.[20] A chart depicting the steps necessary for the United States to enter a treaty is in the **Appendix**.

The Treaty Clause—Article II, Section 2, Clause 2 of the Constitution—vests the power to make treaties in the President, acting with the "advice and consent" of the Senate.[21] Many scholars have concluded that the Framers intended "advice" and "consent" to be separate aspects of the treaty-making process.[22] According to this interpretation, the "advice" element required the President to consult with the Senate during treaty negotiations before seeking the Senate's final "consent."[23] President George Washington appears to have understood that the Senate had such a consultative role,[24] but he and other early Presidents soon declined to seek the Senate's input

[15] THIRD RESTATEMENT, *supra* note 1, § 301(1);

[16] *See id*. For more on variations of the definition of the term "treaty," see *supra* notes 13-14.

[17] *See infra* § Executive Agreements.

[18] *See infra* § Nonlegal Agreements.

[19] *See* THIRD RESTATEMENT, *supra* note 1, § 301(1); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES, Tentative Draft No. 1, § 101 cmt. a (Mar. 21, 2016) [hereinafter Fourth Restatement: Draft 1].

[20] *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007) ("Under modern practice . . . consent is manifested through a subsequent act of ratification – the deposit of an instrument of ratification or accession with a treaty depositary in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties."); THIRD RESTATEMENT, *supra* note 1, § 312 cmt. c ("A state can be bound upon signature, but that has now become unusual as regards important formal agreements.").

[21] *See supra* note 6 (citing the Treaty Clause).

[22] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 177 (2d ed. 1996) ("As originally conceived, no doubt, the Senate was to be a kind of Presidential council, affording him advice throughout the treaty-making process and on all aspects of it . . . ."); Arthur Bestor, *"Advice" from the Very Beginning, "Consent" When the End Is Achieved*, 83 AM. J. INT'L L. 718, 726 (1989) ("[T]he use of the phrase 'advice and consent' to describe the relationship between the two partners clearly indicated that the Framers' conception was of a council-like body in direct and continuous consultation with the Executive on matters of foreign policy.").

[23] *See supra* note 22.

[24] On an occasion that has been described as the first and last time the President personally visited the Senate chamber to receive the Senate's advice on a treaty, President Washington went to the Senate in August 1789 to consult about proposed treaties with the Southern Indians. *See* 1 ANNALS OF CONG. 65-71 (1789). But observers reported that he was so frustrated with the experience that he vowed never to appear in person to discuss a treaty again. *See, e.g.*, William Maclay, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED Sates 122-24 (George W. Harris ed. 1880) (record

during the negotiation process.[25] In modern treaty-making practice, the executive branch generally assumes responsibility for negotiations, and the Supreme Court stated in dicta that the President's power to conduct treaty negotiations is exclusive.[26]

Although Presidents generally do not consult with the Senate during treaty negotiations, the Senate maintains an aspect of its "advice" function through its conditional consent authority.[27] In considering a treaty, the Senate may condition its consent on reservations,[28] declarations,[29] understandings,[30] and provisos[31] concerning the treaty's application. Under established U.S. practice, the President cannot ratify a treaty unless the President accepts the Senate's conditions.[32] If accepted by the President, these conditions may modify or define U.S. rights and obligations under the treaty.[33] The Senate also may propose to amend the text of the treaty itself, and the other nations that are parties to the treaty must consent to the changes in order for them to take effect.[34]

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of the President's visit by Senator William Maclay of Pennsylvania); RALSTON HAYDEN, THE SENATE AND TREATIES, 1789-1817, at 21-26 (1920) (providing a historical account of Washington's visit to the Senate).

[25] *See* MEMOIRS OF JOHN QUINCY ADAMS 427 (Charles Francis Adams ed., 1875) ("[E]ver since [President Washington's first visit to the Senate to seek its advice], treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate.").

[26] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President has the sole power to negotiate treaties, . . . and the Senate may not conclude or ratify a treaty without Presidential action."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The President . . . makes treaties with the advice and consent of the Senate; but he alone negotiates.").

[27] *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) ("The exercise of the conditional consent power has been in part a response by the Senate to its loss of any substantial 'advice' role in the treaty process."); SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 81 (2d ed. 1916) ("Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments.").

[28] As a general matter, "[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party." *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 11. *Accord* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES, Tentative Draft No. 2, § 105 reporters' n.2 [Fourth Restatement: Draft 2] ("Although the Senate has not been entirely consistent in its use of the labels, in general the label . . . . 'reservation' [has been used] when seeking to limit the effect of the existing text for the United States . . . .").

[29] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 11. *See also* Fourth Restatement: Draft 2, *supra* note 28, § 105 reporters' n.5.E ("The Senate sometimes uses 'declarations' to express views on matters of policy.").

[30] Understandings are "interpretive statements that clarify or elaborate provisions but do not alter them." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 11. *Accord* Fourth Restatement: Draft 2, *supra* note 28, § 105 reporters' n.5.C ("The Senate has regularly used 'understandings' to set forth the U.S. interpretation of particular treaty provisions.").

[31] Provisos concern "issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 11. *See also* Fourth Restatement: Draft 2, *supra* note 28, § 105 reporters' n.5.D (discussing the usage of provisos).

[32] *See* Fourth Restatement: Draft 2, *supra* note 28, § 105 reporters' n.3. *See also* United States v. Stuart, 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) ("[The Senate] may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States . . . .").

[33] For discussion of historical examples of conditions attached by the Senate to treaties, see Fourth Restatement: Draft 2, *supra* note 28, § 105 reporters' n.5.

[34] For example, in giving its advice and consent to the first treaty that was to be ratified by the United States after the adoption of the Constitution—dubbed the Jay Treaty because it was negotiated by the first Chief Supreme Court Justice of the United States, John Jay, who was appointed a special envoy to Great Britain despite his role in the judicial

Some international law scholars occasionally have criticized the Senate's use of certain reservations, understandings, and declarations (RUDs).[35] For example, some critics have argued RUDs that conflict with the "object and purpose" of a treaty violate principles of international law.[36] And scholars debate whether RUDs specifying that some or all provisions in a treaty are non-self-executing (meaning they require implementing legislation to be given judicially enforceable domestic legal effect) are constitutionally permissible.[37]

However much debate RUDs may have engendered among academics, they have produced little detailed discussion in courts. The Supreme Court has accepted the Senate's general authority to attach conditions to its advice and consent.[38] And U.S. courts frequently interpret U.S. treaty obligations in light of any RUDs attached to the instrument of ratification.[39] Where a treaty is ratified with a declaration that it is not self-executing, a court will not give its provisions judicially enforceable domestic legal effect.[40]

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branch—the Senate insisted on suspending an article allowing Great Britain to restrict U.S. trade in the British West Indies. SENATE EXEC. JOURNAL, 4th Cong., Special Sess., June 24, 1795, at 186. The Jay Treaty was ratified by Great Britain without objection to Senate's changes. *See* HAYDEN, *supra* note 24 at 86-88.

[35] *See, e.g.*, CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 36-39 (2d ed. 2015) (discussing scholarly debate over RUDs).

[36] *See, e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343-44 (1995) (arguing that RUDs that aver that the United States is able to fully comply with its obligations under certain human rights treaties through existing domestic law render the treaties futile and are incompatible with their object and purpose); Fourth Restatement: Draft 2, *supra* note 28, § 105 cmt. 3 ("[R]eservations are more generally disallowed under international law if they are 'incompatible with the object and purpose of the treaty.'" (quoting Vienna Convention, *supra* note 13, art. 19(c))).

[37] *Compare, e.g.*, Henkin, *supra* note 36, at 346 (describing non-self-execution RUDs as "against the spirit of the Constitution" because "[t]he Framers intended that a treaty should become law *ipso facto*, when the treaty is made; it should not require legislative implementation to convert it into United States law"); *and* Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration In the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SECURITY L. & POL'Y 89, 95 (2005) ("[A] declaration that a treaty (or treaty provision) that by its terms would be self-executing is not self-executing, is inconsistent with the language, history, and purpose of Article VI of the U.S. Constitution.") *with* Bradley & Goldsmith, *supra* note 27, at 446 (arguing that the Constitution does not prohibit the Senate from defining the domestic scope and applicability of a treaty through the use of non-self-execution RUDs).

[38] *See* Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869) (noting that "the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it, as was done with the treaty under consideration").

[39] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (reasoning that the International Covenant on Civil and Political Rights (ICCPR) could not form the basis for a claim because it was ratified "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"); Oxygene v. Lynch, 813 F.3d 541, 546 (4th Cir. 2016) (interpreting a Senate understanding attached to its resolution of advice and consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and stating the that understanding "reflects the intent of the United States to influence how executive and judicial bodies later interpret the treaty on both the international and domestic level"); Pierre v. Gonzales, 502 F.3d 109, 115 (2d Cir. 2007) ("The definition of torture under domestic immigration law, and the scope of an individual's entitlement to CAT relief, is therefore governed by the text of the CAT *subject to* the terms of the Senate ratification resolution."); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001) (rejecting petitioner's claim that Ohio's death penalty violates international law in part by noting U.S. reservations to relevant treaties).

[40] *See Sosa*, 542 U.S. at 735 (discussing the application of the Senate's understanding that the ICCPR is non-self-executing as stated in its instrument of ratification); *see also* Renkel v. United States, 456 F.3d 640, 644 (6th Cir. 2006) (giving effect to declaration stating that certain articles of the CAT are non-self-executing); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 137 (2d Cir. 2005) ("Th[e declaration that the ICCPR is not self-executing] means that the provisions of the ICCPR do not create a private right of action or separate form of relief enforceable in United States courts."); United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) (noting that the "ICCPR does not create judicially-enforceable individual rights" because of the U.S. reservation to the treaty declaring that Articles 1-27 are non-self-executing); United States *ex rel*. Perez v. Warden, 286 F.3d 1059, 1063 (8th Cir. 2002) ("[T]he ICCPR does

Executive Agreements

The great majority of international agreements that the United States enters into are not treaties, but executive agreements—agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent.[41] Federal law requires the executive branch to notify Congress upon entry of such an agreement.[42] Executive agreements are not specifically discussed in the Constitution, but they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical practice.[43] Although the United States has entered international compacts by way of executive agreement since the earliest days of the Republic,[44] executive agreements have been employed much more frequently since the World War II era.[45] Commentators estimate that more than 90% of international legal agreements concluded by the United States have taken the form of an executive agreement.[46]

Types of Executive Agreements

Executive agreements can be organized into three categories based on the source of the President's authority to conclude the agreement. In the case of *congressional-executive agreements*, the domestic authority is derived from an existing or subsequently enacted statute.[47] The President also enters into *executive agreements made pursuant to a treaty* based upon

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not bind federal courts because the treaty is not self-executing and Congress has yet to enact implementing legislation.").

[41] *See infra* notes 44-46 (discussijng historical usage of executive agreements and related judicial opinions).

[42] The Case-Zablocki Act of 1972, Pub. L. No. 92-403, 86 Stat. 619, requires that all "international agreements" other than treaties be transmitted to Congress within 60 days of their entry into force for the United States. 1 U.S.C. § 112b. The act does not define what sort of arrangements constitute "international agreements," though the legislative history suggests that Congress "did not want to be inundated with trivia . . . [but wished] to have transmitted all agreements of any significance." H.R. REP. NO. 92-1301(1972). Implementing State Department regulations establish criteria for assessing when a compact constitutes an "international agreement" that must be reported under the Case-Zablocki Act. These regulations provide that "[m]inor or trivial undertakings, even if couched in legal language and form," are not considered to fall under the purview of the act's reporting requirements. 22 C.F.R. § 181.2(a). Similarly, although federal law generally requires the State Department publish all international agreements to which the United States is a party, an exception is made which affords the Secretary of State discretion to decline to publish some executive agreements when "public interest in such agreements is insufficient to justify their publication." 1 U.S.C. § 112a(b).

[43] *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate . . . this power having been exercised since the early years of the Republic."); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) (recognizing presidential power to settle claims of U.S. nationals and concluding "that Congress has implicitly approved the practice of claim settlement by executive agreement"); United States v. Belmont, 301 U.S. 324, 330 (1937) ("[A]n international compact . . . is not always a treaty which requires the participation of the Senate.").

[44] *See, e.g.*, *Garamendi*, 539 U.S. at 415 (discussing "executive agreements to settle claims of American nationals against foreign governments" dating back to "as early as 1799"); Act of Feb. 20, 1792, § 26, 1 Stat. 239 (act passed by the Second Congress authorizing postal-related executive agreements).

[45] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 38; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1288 (2008); Bradley & Goldsmith, *supra* note 12, at 1210.

[46] Bradley & Goldsmith, *supra* note 12, at 1213. *See also* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 40.

[47] *See, e.g.*, CLOUD Act, Pub. L. No. 115-141, div. V, § 105 (codified at 18 U.S.C. § 2523) (authorizing data-sharing executive agreements with certain foreign nations); Foreign Assistance Act of 1961, Pub. Law No. 87-195 (codified as amended at 22 U.S.C. §§ 2151-2431k) (authorizing the President to furnish assistance to foreign nations "on such terms and conditions as he may determine, to any friendly country").

authority created in prior Senate-approved, ratified treaties.[48] In other cases, the President enters into *sole executive agreements* based upon a claim of independent presidential power in the Constitution.[49] A chart describing the steps in the making of an executive agreement is in the **Appendix**.

The constitutionality of *congressional-executive agreements* is well-settled.[50] Unlike in the case of treaties, where only the Senate plays a role in approving the agreement, both houses of Congress are involved in the authorizing process for congressional-executive agreements.[51] Congressional authorization takes the form of a statute which must pass both houses of Congress. Historically, congressional-executive agreements have been made for a wide variety of topics, ranging from postal conventions to bilateral trade to military assistance.[52] The North American Free Trade Agreement[53] and the General Agreement on Tariffs and Trade[54] are notable examples of congressional-executive agreements.

Agreements made pursuant to treaties are also well established as constitutional,[55] though controversy occasionally arises as to whether a particular treaty actually authorizes the Executive to conclude an agreement in question.[56] Because the Supremacy Clause includes treaties among the sources of the "supreme Law of the Land,"[57] the power to enter into an agreement required or contemplated by the treaty lies within the President's executive function.[58]

Sole executive agreements rely on neither treaty nor congressional authority to provide their legal basis.[59] The Constitution may confer limited authority upon the President to promulgate such agreements on the basis of his foreign affairs power.[60] For example, the Supreme Court has recognized the power of the President to conclude sole executive agreements in the context of settling claims with foreign nations.[61] If the President enters into an executive agreement

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[48] *See* THIRD RESTATEMENT, *supra* note 1, § 303(3); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 86.

[49] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 88. *See also supra* note 43 (citing Supreme Court case law recognizing the validity of sole executive agreements).

[50] *See* THIRD RESTATEMENT, *supra* note 1, § 303(2); HENKIN, *supra* note 22, at 217; Bradley & Goldsmith, *supra* note 12, at 1208.

[51] *See supra* note 47 (citing examples of congressional-executive agreements).

[52] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 5.

[53] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (entered into force Jan. 1, 1994).

[54] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

[55] *See* THIRD RESTATEMENT, *supra* note 1, § 303(3) & cmt. f; Bradley & Goldsmith, *supra* note 12, at 1208; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 86. *See also* Wilson v. Girard, 354 U.S. 524, 528-29 (1957) (giving effect to an executive agreement defining jurisdiction over U.S. forces in Japan that was concluded pursuant to a treaty).

[56] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 86-87 & n.117 (discussing examples in which Members of the Senate contended that certain executive agreements did fall within the purview of an existing treaty and required Senate approval).

[57] U.S. CONST. art. VI, § 2 ("[T]he laws of the United States . . . [and] all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[58] *See supra* note 55.

[59] *See supra* notes 43 & 49.

[60] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 5 (citing U.S. CONST. arts. II, § 1 (executive power), § 2 (commander in chief power, treaty power), § 3 (receiving ambassadors)).

[61] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

addressing an area where he has clear, exclusive constitutional authority—such as an agreement to recognize a particular foreign government for diplomatic purposes—the agreement may be legally permissible regardless of congressional disagreement.[62]

If, however, the President enters into an agreement and his constitutional authority over the agreement's subject matter is unclear, a reviewing court may consider Congress's position in determining whether the agreement is legitimate.[63] If Congress has given its implicit approval to the President entering the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid.[64] When Congress opposes the agreement and the President's constitutional authority to enter the agreement is ambiguous, it is unclear if or when such an agreement would be given effect. Examples of sole executive agreements include the Litvinov Assignment, under which the Soviet Union purported to assign to the United States claims to American assets in Russia that had previously been nationalized by the Soviet Union, and the 1973 Vietnam Peace Agreement ending the United States' participation in the war in Vietnam.[65]

Standard Categories of Executive Agreements

Congressional-Executive Agreement: An executive agreement for which domestic legal authority derives from a preexisting or subsequently enacted statute.[66]

Executive Agreement Made Pursuant to a Treaty: An executive agreement based on the President's authority in a treaty that was previously approved by the Senate.[67]

Sole Executive Agreement: An executive agreement based on the President's constitutional powers.[68]

Mixed Sources of Authority for Executive Agreements

Recently, some foreign relations scholars have argued that the international agreement-making practice has evolved such that some modern executive agreements no longer fit in the three generally recognized categories of executive agreements.[69] These scholars contend that certain

[62] *See* THIRD RESTATEMENT, *supra* note 1, § 303 (4). *See also* Zivotofsky v. Kerry, 135 S.Ct. 2076, 2084-96 (2015) (recognizing that the Constitution confers the President with exclusive authority to recognize foreign states and their territorial bounds, and striking down a statute that impermissibly interfered with the exercise of such authority).

[63] *See* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of agreements); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum . . . . Congressional inertia, indifference or quiescence may . . . invite, measures of independent Presidential responsibility . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). *But see* Medellín v. Texas, 552 U.S. 491, 531-32 (2008) (suggesting that *Dames & Moore* analysis regarding significance of congressional acquiescence might be relevant only to a "narrow set of circumstances," where presidential action is supported by a "particularly longstanding practice" of congressional acquiescence).

[64] *See supra* note 63.

[65] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 88. *See also* United States v. Belmont, 301 U.S. 324, 330 (1937) (recognizing constitutional authority for the Litvinov Assignment); United States v. Pink, 315 U.S. 203, 229 (1942) (confirming the holding in *Belmont*).

[66] *See supra* notes 47, 50-54.

[67] *See supra* notes 48, 55-58.

[68] *See supra* notes 60-65.

[69] *See* Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 Yale L.J. Forum 338, 345 (2017); Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J.

recent executive agreements are not premised on a defined source of presidential authority, such as an individual statute or stand-alone claim of constitutional authority.[70] Nevertheless, advocates for a new form of executive agreement contend that identification of a specific authorizing statute or constitutional power is not necessary if the President already possesses the domestic authority to implement the executive agreement; the agreement requires no changes to domestic law; and Congress has not expressly opposed it.[71] Opponents of this proposed new paradigm of executive agreement argue that it is not consistent with separation of powers principles, which they contend require the President's conclusion of international agreements be authorized either by the Constitution, a ratified treaty, or an act of Congress.[72] Whether executive agreements with mixed or uncertain sources of authority become prominent may depend on future executive practice and the congressional responses.

Choosing Between a Treaty and an Executive Agreement

There has been long-standing scholarly debate over whether certain types of international agreements may only be entered as treaties, subject to the advice and consent of the Senate, or whether a congressional-executive agreement may always serve as a constitutionally permissible alternative to a treaty.[73] A central legal question in this debate concerns whether the U.S. federal government, acting pursuant to a treaty, may regulate matters that could not be reached by a statute enacted by Congress pursuant to its enumerated powers under Article I of the

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TRANSNAT'L L. 885, 887 (2016).

[70] For example, the Obama Administration described the Paris Agreement on climate change as an executive agreement, and commentators discussed multiple possible sources of executive authority on which to conclude the Agreement, but the executive branch did not publicly articulate the precise sources of executive authority on which President relied in entering into the Paris Agreement. *See* CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Stephen P. Mulligan, at 18 & n. 146-149. *See also* Bodansky & Spiro, *supra* note 69, at 908-914 (citing the Anti-Counterfeiting Trade Agreement, Minamata Convention on Mercury, and inter-governmental agreements related to reporting of foreign income as executive agreements that did not have a specific, identifiable source of statutory or constitutional authority, but that were concluded as a new form of executive agreement during the Obama Administration).

[71] *See* Bodansky & Spiro, *supra* note 69, at 927; Koh, *supra* note 69, at 345-48.

[72] *See* Bradley & Goldsmith, *supra* note 12, at 1263.

[73] *Compare* Bradford C. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1661 (2007) (arguing that the text and drafting history of the Constitution support the position that treaties and executive agreements are not interchangeable, and also arguing that the Supremacy Clause should be read to generally preclude sole executive agreements from overriding existing law); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249-67 (1995) (arguing that the Treaty Clause is the exclusive means for Congress to approve significant international agreements); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 852 (2001) (arguing that treaties are the constitutionally required form for congressional approval of an international agreement concerning action lying outside of Congress's constitutional powers, including matters with respect to human rights, political/military alliances, and arms control, but are not required for agreements concerning action falling within Congress's powers under Art. I of the Constitution, such as agreements concerning international commerce); *with* THIRD RESTATEMENT, *supra* note 1, § 303 n.8 ("At one time it was argued that some agreements can be made only as treaties, by the procedure designated in the Constitution . . . . Scholarly opinion has rejected that view."); HENKIN, *supra* note 22, at 217 ("Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty . . . ."); Hathaway, *supra* note 45, at 1244 (claiming that "weight of scholarly opinion" since the 1940s has been in favor of the view that treaties and congressional-executive agreements are interchangeable); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 861-96 (1995) (arguing that developments in the World War II era altered historical understanding of the Constitution's allocation of power between government branches so as to make congressional-executive agreement a complete alternative to a treaty).

Constitution.[74] Adjudication of the propriety of congressional-executive agreements has been rare, in significant part because plaintiffs often cannot demonstrate that they have suffered a redressable injury giving them standing,[75] or fail to make a justiciable claim.[76] As a matter of historical practice, some types of international agreements have traditionally been entered as treaties in all or many instances, including compacts concerning mutual defense,[77] extradition and

[74] *Compare* Yoo, *supra* note 73, at 821 ("Treaties . . . remain the required instrument of national policy when the federal government reaches international agreements on matters outside of Article I, Section 8, or over which the President and Congress possess concurrent and potentially conflicting powers."); *with* Hathaway, *supra* note 45, at 1270-71 (disagreeing with delineation argued by Yoo, *supra*, and arguing that "areas of law in which Article II treaties are used extensively, including human rights, dispute resolution, arms control, aviation, the environment, labor, consular relations, taxation, and telecommunications almost never extend beyond Congress's Article I powers").

[75] THIRD RESTATEMENT, *supra* note 1, § 302, n. 5; *see also* Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258, 265-66 (D.C. Cir. 1980) (finding that plaintiffs lacked standing to challenge the propriety of the form taken by an international agreement between the United States and United Kingdom). Executive agreements dealing with matters having no direct impact upon private interests in the United States (e.g., agreements concerning military matters or foreign relations) are rarely the subject of domestic litigation, in part because persons typically cannot demonstrate that they have suffered an actual, redressable injury and therefore lack standing to challenge such agreements. THIRD RESTATEMENT, *supra* note 1, § 303, n. 11.

[76] *See* Made in the USA Found. v. United States, 242 F.3d 1300, 1310-19 (11th Cir. 2001) (assessment of whether the North American Free Trade Agreement was properly entered as a congressional-executive agreement rather than a treaty was a non-justiciable political question), *cert. denied by* United Steelworkers of America, AFL-CIO, CLC v. United States, 534 U.S. 1039 (2001).

[77] *See* Inter-American Treaty of Reciprocal Assistance, *entered into force* Dec. 3, 1948, 62 Stat. 1681; North Atlantic Treaty, *entered into force* Aug. 24, 1949, 63 Stat. 2241; Security Treaty Between Australia, New Zealand and the United States of America, *entered into force* April 29, 1952, 3 U.S.T. 3420; Mutual Defense Treaty Between the United States of America and the Republic of the Philippines, U.S.-Phil., *entered into force* Aug. 27, 1952, 3 U.S.T. 3947; Mutual Defense Treaty Between the United States of America and the Republic of Korea, U.S.-Kor., *entered into force* Nov. 17, 1954, 5 U.S.T. 2368; Southeast Asia Collective Defense Treaty, *entered into force* Feb. 19, 1955, 6 U.S.T. 81; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, U.S.-Japan, *entered into force* June 23, 1960 11 U.S.T. 1632, (replacing Security Treaty Between the United States of America and Japan, U.S.-Japan, *entered into force* Apr. 28, 1952, 3 U.S.T. 3329).

mutual legal assistance,[78] human rights,[79] arms control and reduction,[80] taxation,[81] and the final resolution of boundary disputes.[82]

State Department regulations prescribing the process for coordination and approval of international agreements (commonly known as the "Circular 175 procedure")[83] include criteria for determining whether an international agreement should take the form of a treaty or an executive agreement. Congressional preference is one of several factors (identified in the text box below) considered when determining the form that an international agreement should take. In addition, the Circular 175 procedure provides that "the utmost care" should be exercised to "avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole."[84]

In 1978, the Senate passed a resolution expressing its sense that the President seek the advice of the Senate Committee on Foreign Relations in determining whether an international agreement

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[78] See generally CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Contemporary Treaties*, by Michael John Garcia and Charles Doyle, at Appendix A (listing bilateral extradition treaties to which the United States is a party). Congress enacted statutes that permitted in certain circumstances the extradition of non-citizens to foreign countries even in the absence of a treaty, Pub. L. No. 104-132, § 443(a) (1996), as well as the surrender of U.S. citizens to face prosecution before the International Tribunals for Rwanda and Yugoslavia, Pub. L. No. 104-106, § 1342 (1996). The U.S. Court of Appeals for the Fifth Circuit upheld the legality of the latter statute, and held that extradition may be effectuated either pursuant to a treaty or authorizing statute. Ntakirutimana v. Reno, 184 F.3d 419, 425 (5th Cir. 1999).

[79] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *entered into force for the United States* Feb. 23, 1989, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, *entered into force for the United States* Sep. 8, 1992, S. EXEC. DOC. E, 95th Cong., 2nd. Sess., 99 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force for the United States* Nov. 20, 1994, S. TREATY DOC. NO. 95-2, 1465 U.N.T.S. 85.

[80] *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, *entered into force* Mar. 5, 1970, 21 U.S.T. 483; Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., *entered into force* Oct. 3, 1972, 23 U.S.T. 3435; Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *entered into force* April 29, 1997 S. TREATY DOC. NO. 103-21. *But see* 22 U.S.C. § 2573 (provision of Arms Control and Disarmament Act of 1961, as amended, generally barring acts that oblige the United States to limit forces or armaments in a "military significant manner" unless done pursuant to a treaty or further affirmative legislation by Congress); Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, United States-Soviet Union, *entered into force* Oct. 3, 1972, 23 U.S.T. 3462, (Strategic Arms Limitation Talks (SALT I) Interim Agreement which was entered as a congressional-executive agreement pursuant to Pub. L. No. 92-448, 86 Stat. 746, and was intended as a stop-gap, five-year measure while the parties negotiated a permanent agreement).

[81] For a list of tax treaties to which the United States is a party, see IRS, *United States Income Tax Treaties - A to Z*, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last updated June 19, 2018).

[82] *See, e.g.*, Treaty Concerning the Canadian International Boundary, U.S.-U.K., *entered into force* June 4, 1908, 35 Stat. 2003; Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between the United States and Mexico, with Maps, U.S.-Mex., *entered into force* Apr. 18, 1972, 23 U.S.T. 371. The executive branch has regularly entered agreements to "provisionally" set boundaries pending ratification of a treaty intended to permanently resolve a boundary dispute. While some of these provisional agreements have been for a short duration, others have remained in effect for many years on account of the lack of a ratified final agreement. For example, by way of a series of two-year executive agreements, the executive branch has continued to provisionally apply a proposed U.S.-Cuba maritime boundary agreement that was submitted to the Senate in 1978. *See* SEN. EXEC. DOC. H, 96th Cong.

[83] Circular 175 initially referred to a 1955 Department of State Circular which established a process for the coordination and approval of international agreements. These procedures, as modified, are now found in 22 C.F.R. Part 181 and 11 Foreign Affairs Manual (F.A.M.) chapter 720.

[84] 11 F.A.M. § 723.3.

should be submitted as a treaty.[85] The State Department subsequently modified the Circular 175 procedure to provide for consultation with appropriate congressional leaders and committees concerning significant international agreements.[86] Consultations are to be held "as appropriate."[87]

Factors to Distinguish Treaties from Executive Agreements

In determining whether a particular international agreement should be concluded as a treaty or an executive agreement, the State Department requires consideration to be given to the following factors:

(1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;

(2) Whether the agreement is intended to affect state laws;

(3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

(4) Past U.S. practice as to similar agreements;

(5) The preference of the Congress as to a particular type of agreement;

(6) The degree of formality desired for an agreement;

(7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

(8) The general international practice as to similar agreements.[88]

Nonlegal Agreements

Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally binding international agreement.[89] In some cases, the United States makes "political commitments" with foreign States,[90] also called "soft law" pacts.[91] Although these pacts do not modify existing legal authorities or obligations, which remain controlling under both U.S. domestic and international law, such commitments may nonetheless carry significant moral and political weight.[92] In some instances, a nonlegal agreement between States may serve as a stopgap measure until such time as the parties may conclude a permanent legal settlement.[93] In other

[85] S. RES. 536, 95th Cong. (1977).

[86] 11 F.A.M. § 723.4(b)-(c).

[87] *Id.* § 723.4(c).

[88] 11 F.A.M. § 723.3.

[89] *See generally* Duncan B. Hollis and Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507 (2009) (discussing the origins and constitutional implications of the practice of making political commitments).

[90] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at at 58-64 (discussing various types of nonlegal agreements and their status under domestic and international law).

[91] BRADLEY, *supra* note 35, at 96.

[92] *See* THIRD RESTATEMENT, *supra* note 1, § 301 reporters' n. 2 ("[T]he political inducements to comply with such [nonbinding] agreements may be strong and the consequences of noncompliance serious.").

[93] Temporary arrangements intended to avoid dispute pending the conclusion of a permanent legal agreement are sometimes referred to as *modi vivendi* arrangements, and can potentially be either legal or nonlegal in nature. For further discussion of U.S. historical practice with respect to *modi vivendi* agreements, see William Hays Simpson, *Use of Modi Vivendi in Settlement of International Disputes*, 11 ROCKY MNTN. L. REV. 89 (1938); W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT'L L. 729 (2002).

instances, a nonlegal agreement may itself be intended to have a lasting impact upon the parties' relationship.

The executive branch has long claimed the authority to enter such pacts on behalf of the United States without congressional authorization, asserting that the entering of political commitments by the Executive is not subject to the same constitutional constraints as the entering of legally binding international agreements.[94] An example of a nonlegal agreement is the 1975 Helsinki Accords, a Cold War agreement signed by 35 nations, which contains provisions concerning territorial integrity, human rights, scientific and economic cooperation, peaceful settlement of disputes, and the implementation of confidence-building measures.[95]

Under State Department regulations, an international agreement is generally presumed to be legally binding in the absence of an express provision indicating its nonlegal nature.[96] State Department regulations recognize that this presumption may be overcome when there is "clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system."[97] Other factors that may be relevant in determining whether an agreement is nonlegal in nature include the form of the agreement and the specificity of its provisions.[98]

The Executive's authority to enter such arrangements—particularly when those arrangements contemplate the possibility of U.S. military action—has been the subject of long-standing dispute between Congress and the Executive.[99] In 1969, the Senate passed the National Commitments Resolution, stating the sense of the Senate that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty [or legislative enactment] . . . specifically providing for such commitment."[100] The Resolution defined a "national commitment" as including "the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country . . . by the use of armed forces . . . either immediately or upon the happening of certain events."[101]

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[94] *See generally* Memorandum from Robert E. Dalton, Asst. Legal Adviser for Treaty Affairs, U.S. Dep't of State 1-5 (Mar. 18, 1994), http://www.state.gov/documents/organization/65728.pdf (discussing U.S. and international practice with respect to nonlegal, political agreements); Hollis & Newcomer, *supra* note 89 (discussing U.S. political commitments made to foreign States and the constitutional implications of the practice).

[95] Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T STATE BULL. 323 (1975) [hereinafter Helsinki Accords].

[96] 22 C.F.R. § 181.2(a)(1) ("In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law."). *See also* Hollis & Newcomer, *supra* note 89, at 525 ("To date, most (but not all) international lawyers favor a presumption of treaty making in lieu of creating political commitments.").

[97] 22 C.F.R. § 181.2(a)(1).

[98] *Id. See also* State Department Office of the Legal Adviser, *Guidance on Non-Binding Documents*, at http://www.state.gov/s/l/treaty/guidance/.

[99] *See, e.g.*, S. REP. NO. 91-129 (1969) (Senate Committee on Foreign Relations report in favor of the National Commitments Resolution, S. Res. 85, 91st Cong. (1969), criticizing the undertaking of "national commitments" by the Executive, either through international agreements or unilateral pledges to other countries, without congressional involvement).

[100] S. Res. 85, 91st Cong. (1969).

[101] *Id*. According to the committee report accompanying the Resolution, the Resolution arose from concern over the growing development of "constitutional imbalance" in matters of foreign relations, with Presidents frequently making significant foreign commitments on behalf of the United States without congressional action. Among other things, the report criticized a practice it described as "commitment by accretion," by which a "sense of binding commitment arises out of a series of executive declarations, no one of which in itself would be thought of as constituting a binding obligation. Simply repeating something often enough with regard to our relations with some particular country, we come to support that our honor is involved in an engagement no less solemn than a duly ratified treaty." S. REP. NO. 91-

The National Commitments Resolution took the form of a sense of the Senate resolution, and accordingly had no legal effect.[102] Although Congress has occasionally considered legislation that would bar the adoption of significant military commitments without congressional action,[103] no such measure has been enacted.

Unlike in the case of legally binding international agreements, there is no statutory requirement that the executive branch notify Congress of every nonlegal agreement it enters on behalf of the United States.[104] State Department regulations, including the Circular 175 procedure, also do not provide clear guidance for when or whether Congress will be consulted when determining whether to enter a nonlegal arrangement in lieu of a legally binding treaty or executive agreement.[105] Congress normally exercises oversight over such non-binding arrangements through its appropriations power or via other statutory enactments, by which it may limit or condition actions the United States may take in furtherance of the arrangement.[106]

The Iran Nuclear Agreement Review Act of 2015 is a notable exception where Congress opted to condition U.S. implementation of a political commitment upon congressional notification and an opportunity to review the compact.[107] The act was passed during negotiations that culminated in the Joint Comprehensive Plan of Action (JCPOA) between Iran, and six nations (the United States, the United Kingdom, France, Russia, China, and Germany—collectively known as the P5+1).[108] Under the terms of the plan of action, Iran pledged to refrain from taking certain activities related to the production of nuclear weapons, while the P5+1 agreed to ease or suspend sanctions that had been imposed in response to Iran's nuclear program.[109] Because the JCPOA was not signed by any party and purported rely on a series of "voluntary measures," the Obama Administration considered it a political commitment that did not alter domestic or international legal obligations.[110] Despite the JCPOA's nonbinding status, the Iran Nuclear Agreement Review

129 (1969).

[102] *See, e.g.*, Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) ("'Sense of the Congress' provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law."). For additional background on "sense of" provisions, see CRS Report 98-825, *"Sense of" Resolutions and Provisions*, by Christopher M. Davis, "Sense of" Resolutions and Provisions, by Christopher M. Davis.

[103] *See, e.g.*, Executive Agreements Review Act, H.R. 4438, 94th Cong. (1975) (proposing to establish legislative veto over executive agreements involving national commitments); Treaty Powers Resolution, S. Res. 24, 95th Cong. (1977) (proposing that it would not be in order for the Senate to consider any legislation authorizing funds to implement any international agreement which the Senate has found to constitute a treaty, unless the Senate has given its advice and consent to treaty ratification).

[104] *See supra* note 42 (discussing statutory notification requirements for treaties and executive agreements).

[105] *See* State Dep't, Office of the Legal Adviser, *Circular 175 Procedure*, http://www.state.gov/s/l/treaty/c175/ ("The Circular 175 procedure does not apply to documents that are not binding under international law. Thus, statements of intent or documents of a political nature not intended to be legally binding are not covered by the Circular 175 procedure.").

[106] For discussion of Congress's power to influence international agreements, international law, and U.S. foreign relations through its political political powers, such as powers of oversight and appropriations, see HENKIN, *supra* note 22, at 81-82.

[107] Pub. L. No. 114-17, 129 Stat. 201 (2015) (codified in 42 U.S.C. § 2011 note and *id.* § 2160e).

[108] Joint Comprehensive Plan of Action, July 14, 2015, http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/ [hereinafter JCPOA]. For additional background on the JCPOA and the United States' withdrawal from the plan of action under the Trump Administration, see CRS Legal Sidebar LSB10134, *Withdrawal from the Iran Nuclear Deal: Legal Authorities and Implications*, by Stephen P. Mulligan.

[109] *See* JCPOA, *supra* note 108, at 6.

[110] *See* OFFICE OF LEGAL ADVISER, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2015, at 123 (Sally J. Cummins & David P. Stewart eds., 2002). Some argue that, although the JCPOA was originally nonbinding under international law, its provisions became binding when it was incorporated into a U.N. Security

Act provided a mechanism for congressional consideration of the JCPOA prior to the Executive being able to exercise any existing authority to relax sanctions to implement the agreement's terms.[111]

Effects of International Agreements on U.S. Law

The effects that international legal agreements entered into by the United States have upon U.S. domestic law are dependent upon the nature of the agreement; namely, whether the agreement (or a provision within an agreement) is self-executing or non-self-executing, and possibly whether the commitment was made pursuant to a treaty or an executive agreement.[112]

Self-Executing vs. Non-Self-Executing Agreements

Some provisions of international treaties or executive agreements are considered "self-executing," meaning that they have the force of domestic law without the need for subsequent congressional action.[113] Provisions that are not considered self-executing are understood to require implementing legislation to provide U.S. agencies with legal authority to carry out the functions and obligations contemplated by the agreement or to make them enforceable in court.[114] The Supreme Court has deemed a provision non-self-executing when the text manifests an intent that the provision not be directly enforceable in U.S. courts[115] or when the Senate conditions its advice and consent on the understanding that the provision is non-self-executing.[116]

Although the Supreme Court has not addressed the issue directly, many courts and commentators agree that provisions in international agreements that would require the United States to exercise authority that the Constitution assigns to Congress exclusively must be deemed non-self-

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Council Resolution. For more discussion on the legal status of the JCPOA, see CRS Legal Sidebar LSB10134 *supra* note 108 and CRS Report R44761, *supra* note 70, at 23-24.

[111] For a detailed description of the Iran Nuclear Agreement Review Act, including the temporal scope and effect of the framework for congressional review contained within the act, see CRS Report R44085, *Procedures for Congressional Action in Relation to a Nuclear Agreement with Iran: In Brief*, by Valerie Heitshusen and Richard S. Beth.

[112] *See infra* § Self-Executing vs. Non-Self-Executing Agreements.

[113] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Foster v. Neilson, 27 (2 Pet.) U.S. 253, 254 (1829) (Marshall, C.J.) (describing a treaty as "equivalent to an act of the legislature" when it "operates of itself without the aid of any legislative provision"), *overruled on other grounds by* United States v. Percheman, 32 (7 Pet.) U.S. 51 (1833)).

[114] *E.g.*, *Medellín*, 552 U.S. at 511-12 ("In sum, while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (internal citations and quotations omitted); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject.").

[115] *See, e.g.*, *Medellín*, 552 U.S. at 507-08 (holding that Article 94 of the U.N. Charter, which states that each member of the U.N. "undertakes to comply" with the decisions of the International Court of Justice (ICJ) did not render an ICJ decision self-executing in the sense that it overrode contradictory state law); *Foster*, 27 U.S. at 254 (concluding that a provision in a treaty between United States and Spain that purported to preserve prior Spanish lands grants was non-self-executing).

[116] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) ("[T]he United States ratified the ICCPR on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

executing, and implementing legislation is required to give such provisions domestic legal effect.[117] Lower courts have concluded that, because Congress controls the power of the purse, a treaty provision that requires expenditure of funds must be treated as non-self-executing.[118] Other lower courts have suggested that treaty provisions that purport to create criminal liability[119] or raise revenue[120] must be deemed non-self-executing because those powers are the exclusive prerogative of Congress.

Until implementing legislation is enacted, existing domestic law concerning a matter covered by a non-self-executing provision remains unchanged and controlling law in the United States.[121] While it is clear that non-self-executing provisions in international agreements do not displace existing state or federal law, there is significant scholarly debate regarding the distinction between self-executing and non-self-executing provisions, including the ability of U.S. courts to apply and enforce them.[122] Some scholars argue that, although non-self-executing provisions lack a private right of action, litigants can still invoke non-self-executive provisions defensively in criminal proceedings or when another source for a cause of action is available.[123] Other courts and commentators contend that non-self-executing provisions do not create any judicially enforceable

[117] *See, e.g.*, Fourth Restatement: Draft 2, *supra* note 28, § 110(3) & cmt. c. *See also* 5 ANNALS OF CONGRESS 771 (1796) (resolution from the House of Representatives stating that "when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress ").

[118] *See* Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) ("[E]xpenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable."), *cert. denied*, 436 U.S. 907 (1978); The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925) ("All treaties requiring payments of money have been followed by acts of Congress appropriating the amount. The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); Turner v. Am. Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) ("[M]oney cannot be appropriated by the treaty-making power. This results from the limitations of our government.").

[119] *See* Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals . . . require domestic legislation before they are given any effect."); United States v. Postal, 589 F.2d 862, 877 (5th Cir. 1979) (noting that constitutional restrictions on the use of a self-executing treaty to withdraw money from the treasury would also "be the case with respect to criminal sanctions"), *cert. denied*, 444 U.S. 832 (1979).

[120] *See Edwards*, 580 F.2d at 1058 ("[T]he constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,' . . . appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes . . . .") (quoting U.S. CONST., art. I, § 7, cl. 1); Swearingen v. United States, 565 F. Supp. 1019, 1022 (D. Colo. 1983) ("[A] treaty which created an exemption from the taxation of income of United States citizens . . . would be in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenues.").

[121] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 503-04 (2008) (concluding that because an ICJ judgment was not binding on domestic courts, state law concerning procedural limitations on successive filings of petitions for habeas corpus applied).

[122] *See, e.g.*, United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979) ("The self-execution question is perhaps one of the most confounding in treaty law."), *cert. denied*, 44 U.S. 832 (1979); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 51-52 (2012) (describing the self-execution doctrine as "[o]ne of the great challenges for scholars, judges, and practitioners alike").

[123] *See, e.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 197-216 (1999).

rights, or that that they lack any status whatsoever in domestic law.[124] At present, the precise status of non-self-executing treaties in domestic law remains unresolved.[125]

Despite the complexities of the self-execution doctrine in domestic, treaties and other international agreements operate in dual international and domestic law contexts.[126] In the international context, international agreements traditionally constitute binding compacts between sovereign nations, and they create rights and obligations that nations owe to one another under international law.[127] But international law generally allows each individual nation to decide how to implement its treaty commitments into its own domestic legal system.[128] The self-execution doctrine concerns how a treaty provision is implemented in U.S. domestic law, but it does not affect the United States' obligation to comply with the provision under international law.[129] When a treaty is ratified or an executive agreement concluded, the United States acquires obligations under international regardless of self-execution, and it may be in default of the obligations unless implementing legislation is enacted.[130]

Congressional Implementation of International Agreements

When an international agreement requires implementing legislation or appropriation of funds to carry out the United States' obligations, the task of providing that legislation falls to Congress.[131] In the early years of constitutional practice, debate arose over whether Congress was obligated—rather than simply empowered—to enact legislation implementing non-self-executing provisions

[124] *Compare, e.g.*, Auguste v. Ridge, 395 F.3d 123, 133 (3d Cir. 2005) ("Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation."); *with* ITC Ltd. v. Punchgini, Inc., 482 F.3d 161 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."); *and* Renkel v. United States, 456 F.3d 640, 643 (6th Cir. 2006) ("'[N]on-self-executing' treaties do require domestic legislation to have the force of law.").

[125] *See* BRADLEY, *supra* note 35, at 44 (summarizing the debate of the domestic status of non-self-executing treaties).

[126] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 504-06 (2008) (discussing the distinction between the binding effect of treaties under international law versus domestic law).

[127] *See id*. at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations . . . . But a treaty may also contain provisions which . . . partake of the nature of municipal law . . . .").

[128] *See Head Money Cases*, 112 U.S. at 598 ("[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."); Fourth Restatement: Draft 2, *supra* note 28, § 110 cmt. c ("It is ordinarily up to each nation to decide how to implement domestically its international obligations.").

[129] *See Medellín*, 552 U.S. at 522-23 (explaining that, although an ICJ judgment did "not of its own force constitute binding federal law[,]" the judgment "create[d] an international law obligation" for the United States); Fourth Restatement: Draft 2, *supra* note 28, § 110(1) ("Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law.").

[130] *See* THIRD RESTATEMENT, *supra* footnote 1, §111, cmt. h.

[131] *See* HENKIN, *supra* note 22, at 204. *See also supra* § Self-Executing vs. Non-Self-Executing Agreements (discussing Congress's role in implementing non-self-executing treaties).

into domestic law.[132] But the issue has not been resolved in any definitive way as it has not been addressed in a judicial opinion and continues to be the subject of debate occasionally.[133]

By contrast, the Supreme Court has addressed the scope of Congress's power to enact legislation implementing non-self-executing treaty provisions. In a 1920 case, *Missouri v. Holland*,[134] the Supreme Court addressed a constitutional challenge to a federal statute that implemented a treaty prohibiting the killing, capturing, or selling of certain birds that traveled between the United States and Canada.[135] In the preceding decade, two federal district courts had held that similar statutes enacted prior to the treaty violated the Tenth Amendment because they infringed on the reserved powers of the states to control natural resources within their borders.[136] But the *Holland* Court concluded that, even if those district court decisions were correct, their reasoning no longer applied once the United States concluded a valid migratory bird treaty.[137] In an opinion authored by Justice Holmes, the *Holland* Court concluded that the treaty power can be used to regulate matters that the Tenth Amendment otherwise might reserve to the states.[138] And if the treaty itself is constitutional, the *Holland* Court held, Congress has the power under the Necessary and Proper Clause[139] to enact legislation implementing the treaty into the domestic law of the United States without restraint by the Tenth Amendment.[140]

Commentators and jurists have called some aspects of the Justice Holmes's reasoning in *Holland* into question,[141] and some scholars have argued that the opinion does not apply to executive

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[132] Whereas Alexander Hamilton argued that the House of Representatives was obligated to appropriate funds for the Jay Treaty, *supra* note 34, James Madison, then a Member of the House, and others disagreed. *Compare* Enclosure to Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *in* PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett ed., 1974) ("[T]he house of representatives have no moral power to refuse the execution of a treaty, which is not contrary to the constitution, because it pledges the public faith, and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority."), *with* 5 ANNALS OF CONG. 493-94 (1796) (statement of Rep. Madison) ("[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation. If it must carry all Treaties into effect, . . . it would be the mere instrument of the will of another department, and would have no will of its own."); 5 ANNALS OF CONG. 771 (1796) (proposed resolution of Rep. Blount) ("[W]hen a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect . . . .").

[133] *See* HENKIN, *supra* note 22, at 205.

[134] 252 U.S. 416 (1920).

[135] *See* Migratory Bird Treaty Act, 40 Stat. 755 (1918); Convention for the Protection of Migratory Birds, Aug. 16, 1916, art. VIII, U.S.-Gr. Brit., 39 Stat. 1702.

[136] United States v. McCullagh, 221 F. 288, 295-96 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914).

[137] *See* Missouri v. Holland, 252 U.S. 416, 433 (1920).

[138] *See Holland*, 252 U.S. at 433-34 (concluding that the "treaty in question does not contravene any prohibitory words to be found in the Constitution" and is not "forbidden by some invisible radiation from the general terms of the Tenth Amendment").

[139] *See* U.S. CONST., art. I, § 8.

[140] *See Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."). *Accord* Neely v. Henkel, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper . . . includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.").

[141] *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957) (plurality opinion) (responding to *dicta* in *Holland* by clarifying that the treaty power is subject to certain constitutional constraints); Bond v. United States, 134 S. Ct. 2077, 2098 (2014) (Scalia, J. concurring in the judgment) (joined by Thomas, J.) (describing *Holland*'s interpretation of the Necessary and

agreements.[142] But the Supreme Court has not overturned *Holland*'s holding related to Congress's power to implement treaties.[143] Nevertheless, principles of federalism embodied in the Tenth Amendment continue to impact constitutional challenges to U.S. treaties and their implementing statutes, including in the 2014 Supreme Court decision, *Bond v. United States*.[144]

Bond concerned a criminal prosecution arising from a case of "romantic jealously" when a jilted spouse spread toxic chemicals on the mailbox of a woman with whom her husband had an affair.[145] Although the victim only suffered a "minor thumb burn," the United States brought criminal charges under the Chemical Weapons Convention Act of 1998—a federal statute that implemented a multilateral treaty prohibiting the use of chemical weapons.[146] The accused asserted that the Tenth Amendment reserved the power to prosecute her "purely local" crime to the states, and she asked the Court to overturn or limit *Holland*'s holding on the relationship between treaties and the Tenth Amendment.[147]

Although a majority in *Bond* declined to revisit *Holland*'s interpretation of the Tenth Amendment,[148] the *Bond* Court ruled in the accused's favor based on principles of statutory interpretation.[149] When construing a statute interpreting a treaty, *Bond* explained, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity . . . ."[150] Applying these principles through a presumption that Congress did not intend to intrude on areas of traditional state authority, the *Bond* Court concluded that the Chemical Weapons Convention Act did not apply to the jilted spouse's actions.[151] In other words, the majority in *Bond* did not disturb *Holland*'s conclusion that the Tenth Amendment does not limit Congress's power to enact legislation implementing treaties, but *Bond* did hold that principles of

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Proper Clause as consisting of an "unreasoned and citation-less sentence" that is unsupported by the Constitution's text or structure); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005) (arguing the *Holland*'s interpretation of the Necessary and Proper Clause "is wrong and the case should be overturned"). In the 1950s, there was an effort, led by Senator John Bricker of Ohio, to limit the scope of the treaty power as described in *Holland* through a constitutional amendment. One version of the proposed amendment, which became known as the "Bricker Amendment," would have provided that a "treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." *See* S. COMM. ON THE JUDICIARY, 83RD CONG., PROPOSALS TO AMEND THE TREATY-MAKING PROVISIONS OF THE CONSTITUTION: VIEWS OF DEANS AND PROFESSORS OF LAW 3 (1953). No version of the Bricker Amendment was ever adopted.

[142] BRADLEY, *supra* note 35, at 86.

[143] *See* United States v. Lara, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)); Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.").

[144] 134 S. Ct. 2077 (2014).

[145] *See id*. at 2090-91.

[146] Chemical Weapons Convention Act of 1998, Pub. L. No. 105-277, div. I, tit. II, § 201(a), 112 Stat. 2681, 2681-866 (codified in 18 U.S.C. §§ 229-229f); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, art. 1, *entered into force* Apr. 29, 1997, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317.

[147] *Bond*, 134 S. Ct. at 2086-87.

[148] *See id.* at 2087. Justice Scalia and Justice Thomas criticized *Holland* and argued that the Supreme Court should depart from its interpretation of congressional power to enact legislation that is necessary and proper to implement treaties. *See id*. at 2102 (Scalia, J., concurring in the judgment) (joined by Thomas, J.).

[149] *See id*. at 2089-90.

[150] *Id.* at 2090.

[151] *See id*. at 2089-90.

federalism reflected in the Tenth Amendment may dictate how courts interpret such implementing statutes.[152]

Conflict with Existing Laws

Sometimes, a treaty or executive agreement will conflict with one of the three main tiers of domestic law—U.S. state law, federal law, or the Constitution. For domestic purposes, a ratified, self-executing treaty is the law of the land equal to federal law[153] and superior to U.S. state law,[154] but inferior to the Constitution.[155] A self-executing executive agreement is likely superior to U.S. state law,[156] but sole executive agreements may be inferior to conflicting federal law in certain circumstances (congressional-executive agreements or executive agreements pursuant to treaties are equivalent to federal law),[157] and all executive agreements are inferior to the Constitution.[158] In cases where ratified treaties or certain executive agreements are equivalent to federal law, the "last-in-time" rule establishes that a more recent federal statute will prevail over an earlier,

[152] *Accord* William S. Dodge, *Bond v. United States and Congress's Role in Implementing Treaties*, 108 AJIL UNBOUND 86, 87 (2015) ("The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism.").

[153] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

[154] *See* U.S. CONST., art. VI, § 2 ("the laws of the United States. . . [and] all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land"); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) ("[L]aws of any of the States, contrary to a treaty, shall be disregarded").

[155] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416-17 & n.9 (2003) (stating that the power of a treaty to preempt state law is "[s]ubject . . . to the Constitution's guarantees of individual rights"); Boos v. Barry, 485 U.S. 312, 324 (1988) ("It is well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'" (quoting Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality op.))); *Reid* 354 U.S. at 17 (plurality op.) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights-let alone alien to our entire constitutional history and tradition-to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) ("The treaty-making power of the United States . . . does not extend 'so far as to authorize what the Constitution forbids . . . .'" (quoting De Geofroy v. Riggs, 133 U.S. 258, 267 (1890))); Doe v. Braden, 57 U.S. 635, 657 (1853) ("The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.").

[156] *See* United States v. Belmont, 301 U.S. 324, 330 (1937) (holding that sole executive agreement concerning settlement of U.S.-Soviet claims provided federal government with authority to recover claims held in New York banks, despite existence of state laws that would generally bar their recovery); United States v. Pink, 315 U.S. 203, 229 (1942) (confirming *Belmont*).

[157] Courts have deemed executive agreements inferior to conflicting federal law when the agreements concern matters expressly within the constitutional authority of Congress. *See, e.g.*, United States v. Guy W. Capps, Inc., 204 F.2d 655, 660-61 (4th Cir. 1953) (ruling that executive agreement contravening provisions of import statute was unenforceable); THIRD RESTATEMENT, *supra* note 1, § 115 reporters' n.5. However, a self-executing executive agreement has the potential to prevail over pre-existing federal law if the agreement concerns an enumerated or inherent executive power under the Constitution, or if Congress has historically acquiesced to the President entering agreements in the relevant area. *See Pink*, 315 U.S. at 230 ("All Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . . ." (quoting THE FEDERALIST NO. 64 (John Jay))); *Dames & Moore*, 453 U.S. at 654 (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of agreements).

[158] *See generally* THIRD RESTATEMENT, *supra* note 1, § 115.

inconsistent international agreement, while a more recent self-executing agreement will prevail over an earlier, inconsistent federal statute.[159]

Treaties and executive agreements that are not self-executing, on the other hand, have generally been understood not to displace existing state or federal law in the absence of implementing legislation.[160] "The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[161] Accordingly, it appears unlikely that a non-self-executing agreement could be converted into judicially enforceable domestic law absent legislative action through the bicameral process.[162]

Interpreting International Agreements

When analyzing an international agreement for purposes of its domestic application, U.S. courts have final authority to interpret the agreement's meaning.[163] As a general matter, the Supreme Court has stated that its goal in interpreting an agreement is to discern the intent of the nations that are parties to it.[164] The interpretation process begins by examining "the text of the [agreement] and the context in which the written words are used."[165] When an agreement provides that it is to be concluded in multiple languages, the Supreme Court has analyzed foreign language versions to assist in understanding the agreement's terms.[166] The Court also considers

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[159] *See, e.g.*, Cook v. United States, 288 U.S. 102, 118-19 (1933); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870).

[160] There has been some disagreement as to the domestic legal effect of a non-self-executing treaty following the enactment of implementing legislation. The weight of scholarly and judicial opinion arguably supports the view that it is only the implementing legislation, and not the underlying non-self-executing agreement, which has domestic legal effect. *See, e.g.*, Stephens v. American Intern. Ins. Co., 66 F.3d 41, 45 (2d. Cir. 1995) (stating that legislation implementing non-self-executing agreement informed analysis as to whether state law was preempted, rather than the agreement itself); Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 744 (5th Cir. 2009) (Elrod, J., dissenting) (citing Supreme Court and appellate court decisions and scholarly writings to support view that only the legislation implementing a non-self-executing agreement is domestically enforceable, but not the agreement itself); Sloss, *supra* note 123, at 149 ("[T]o the best of the author's knowledge, no U.S. court has ever held a treaty provision to be non-self-executing and then applied it directly to decide a case.");. However, at least one federal appellate court has recognized that a non-self-executing treaty itself becomes the "Law of the Land" under the Supremacy Clause upon the enactment of implementing legislation. *Safety Nat. Cas. Corp.*, 587 F.3d at 714 (en banc) (also disputing dissent's claims that judicial and scholarly opinion supports a contrary view), *cert. denied*, La Safety Ass'n of Timbermen—Self Insurers Fund v. Certain Underwriters at Lloyd's, London, 562 U.S. 827 (2010).

[161] Medellín v. Texas, 552 U.S. 491, 525-26 (2008).

[162] *Id.* (holding that presidential memorandum ordering a U.S. state court to give effect to non-self-executing- treaty requirement did not constitute federal law preempting the state's procedural default rules).

[163] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department . . . .'" (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803))).

[164] *See, e.g.*, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014); Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1232 (2014); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 183 (1982); Wright v. Henkel, 190 U.S. 40, 57 (1903).

[165] Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1509 (2017) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 534 (1987); Air France v. Saks, 470 U.S. 392, 397 (1985).

[166] *See, e.g.*, *Water Splash, Inc*., 137 S. Ct. at 1511; *Schlunk*, 486 U.S. at 699. In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. *Compare* Foster v. Neilson, 27 (2 Pet.) U.S. 253, 314-15 (1829) (construing English language version of 1819 treaty between the United States and Spain and deeming a provision stating that certain land grants "shall *be* ratified and confirmed" to be non-self-executing) (emphasis added), *with* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833) (concluding that the land grant provision at issue was

the broader "object and purpose" of an international agreement.[167] In some cases, the Supreme Court has examined extratextual materials, such as drafting history,[168] the views of other state parties,[169] and the post-ratification practices of other nations.[170] But the Court has cautioned that consulting sources outside the agreement's text may not be appropriate when the text is unambiguous.[171]

The executive branch frequently is responsible for interpreting international agreements outside the context of domestic litigation.[172] While the Supreme Court has final authority to interpret an agreement for purposes of applying it as domestic law in the United States, some questions of interpretation may involve exercise of presidential discretion or otherwise may be deemed "political questions" more appropriately resolved in the political branches. In *Charlton v. Kelly*, for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President "elected to waive any right" to respond to the breach by voiding the treaty.[173] Moreover, the executive branch often is well-positioned to interpret an agreement's terms given its leading role in negotiating agreements and its understanding of other nations' post-ratification practices.[174] Thus, even when a question of interpretation is to be resolved by the judicial branch, the Supreme Court has stated that the executive branch's views are entitled to "great weight"[175]—although the Court has not adopted the executive branch's interpretation in every case.[176]

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self-executing after interpreting the Spanish language version, which was translated to state that the land grants "shall *remain* ratified and confirmed") (emphasis added).

[167] *See*, *e.g.*, Abbott v. Abbott, 560 U.S. 1, 20 (2010); *Sanchez-Llamas*, 548 U.S. at 347; *Société Nationale Industrielle Aerospatiale*, 482 U.S. at 530; E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).

[168] *See*, *e.g.*, *Water Splash, Inc*., 137 S. Ct. at 1511; *Medellín*, 552 U.S. at 507; *Air France*, 470 U.S. at 400; *Schlunk*, 486 U.S. at 700.

[169] *See*, *e.g.*, *Water Splash, Inc*., 137 S. Ct. at 1511-12; *Abbott*, 560 U.S. at 16; Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1233 (2014); *Air France*, 470 U.S. at 404.

[170] *See*, *e.g.*, *Medellín*, 552 U.S. at 507; TWA v. Franklin Mint Corp., 466 U.S. 243, 259 (1984).

[171] *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) ("We must thus be governed by the text-solemnly adopted by the governments of many separate nations-whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous . . . . But where the text is clear, as it is here, we have no power to insert an amendment.").

[172] *See* Relevance of Senate Ratification History to Treaty Interpretation, 11 U.S. Op. Off. Legal Counsel 28, 30 (1987) ("[T]he President is responsible for enforcing and executing international agreements, a responsibility that necessarily 'involves also the obligation and authority to interpret what the treaty requires.'" (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1st ed. 1972))). Fourth Restatement: Draft 2, *supra* note 28, § 106 cmt. g ("Execution of a treaty requires interpretation, and the President often determines what a treaty means in the first instance . . . .").

[173] *See* 229 U.S. 447, 475 (1913).

[174] *See* Fourth Restatement: Draft 2, *supra* note 28, § 106 cmt. g & reporters' n.10 (discussing the executive branch's unique access to information related to treaty interpretation). *Accord* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (giving deference to the Department of State's interpretation of a treaty because it is the agency "charged with [the treaty's] negotiation and enforcement").

[175] *See* Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1512 (2017) (quoting Abbott v. Abbott, 560 U.S. 1, 15 (2010)); *Medellín*, 552 U.S. at 513; Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[176] *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014) (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding "[w]e do not accept the Solicitor General's view as applied to the treaty before us"); Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006) (declining to adopt the executive branch's interpretation of Common Article 3 of the 1949 Geneva Conventions).

Congress also possesses power to interpret international agreements by virtue of its power to pass implementing or other related legislation.[177] And because the Constitution expressly divides the treaty-making power between the Senate and the President, the Supreme Court has examined sources that reflect these entities' shared understanding of a treaty at the time of ratification.[178] The Senate's ability to influence treaty interpretation directly, however, may be limited to its role in the advice and consent process.[179] The Senate may, and frequently does, condition its consent on a requirement that the United States interpret a treaty in a particular fashion.[180] But after the Senate provides its consent and the President ratifies a treaty, resolutions passed by the Senate that purport to interpret the treaty are "without legal significance" according to the Supreme Court.[181]

Withdrawal from International Agreements

The Constitution sets forth a definite procedure whereby the President has the power to make treaties with the advice and consent of the Senate,[182] but it is silent as to how to terminate them.[183] Although the Supreme Court has recognized directly the President's power to conclude certain executive agreements,[184] it has not addressed presidential power to terminate those agreements. The following section discusses historical practice and jurisprudence related to the withdrawal from and termination of international agreements.[185]

Withdrawal from Executive Agreements and Political Commitments

In the case of executive agreements, it appears generally accepted that, when the President has independent authority to enter into an executive agreement, the President may also independently

[177] *See* HENKIN, *supra* note 22, at 206 ("Congress, too, has occasion to interpret a treaty when it considers enacting implementing legislation, or other legislation to which the treaty might be relevant.").

[178] *See* United States v. Stuart, 489 U.S. 353, 365-68 (1989) (considering, but deeming inconclusive, a treaty's ratification history); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 531 (1987) (discussing Secretary of State's analysis of the purposes of a treaty that was provided to the Senate).

[179] *See* Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901) (declining to give legal weight to a Senate resolution attempting to clarify a ratified treaty because the "meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.").

[180] For example, the Senate frequently has conditioned its advice and consent to treaties on what has become known as the "Byrd-Biden condition," which provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification . . . ." 134 CONG. REC. 12849 (1988). *See also* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 129-30 (providing a history of the Byrd-Biden condition and examples of its use).

[181] *See Fourteen Diamond Rings*, 183 U.S. at 180 (describing a Senate resolution purporting to interpret an earlier, Senate-approved treaty as "absolutely without legal significance").

[182] *See supra* note 6.

[183] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (plurality opinion) ("[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty."); HENKIN, *supra* note 22, at 211 ("[T]he Constitution tells us only who can make treaties for the United States; it does not tell us who can unmake them.").

[184] *See supra* § Executive Agreements.

[185] For more detailed analysis of international and domestic legal principles related to withdrawal from international agreements, see CRS Report R44761, *supra* note 70.

terminate the agreement without congressional or senatorial approval.[186] Thus, observers appear to agree that, when the Constitution affords the President authority to enter into sole executive agreements, the President also may unilaterally terminate those agreements.[187] This same principle would apply to political commitments: to the extent the President has the authority to make nonbinding commitments without the assent of the Senate or Congress, the President also may withdraw unilaterally from those commitments.[188]

For congressional-executive agreements and executive agreements made pursuant to treaties, the mode of termination may be dictated by the underlying treaty or statute on which the agreement is based.[189] For example, in the case of executive agreements made pursuant to a treaty, the Senate may condition its consent to the underlying treaty on a requirement that the President not enter into or terminate executive agreements under the authority of the treaty without senatorial or congressional approval.[190] And for congressional-executive agreements, Congress may dictate how termination occurs in the statute authorizing or implementing the agreement.[191]

Congress also has asserted the authority to direct the President to terminate congressional-executive agreements. For example, in the Comprehensive Anti-Apartheid Act of 1986, which was passed over President Reagan's veto, Congress instructed the Secretary of State to terminate an air services agreement with South Africa.[192] And in the Trade Agreements Extension Act of 1951, Congress directed the President to "take such action as is necessary to suspend, withdraw or prevent the application of" trade concessions contained in prior trade agreements regulating

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[186] *See* Bradley & Goldsmith, *supra* note 12, at 1225; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8 at 172; THIRD RESTATEMENT, *supra* note 1, § 339 reporters' n. 2.

[187] *See* Bradley & Goldsmith, *supra* note 12, at 1225 ("Presidents clearly have the authority to terminate sole executive agreements and political commitments, since those agreements by Presidents based on their own constitutional authority."); THIRD RESTATEMENT, *supra* note 1, § 339 reporters' n. 2 ("No one has questioned the President's authority to terminate sole executive agreements.").

[188] *See, e.g.*, Julian Ku, *President Rubio/Walker/Trump/Whomever Can Indeed Terminate the Iran Deal on "Day One,"* OPINIO JURIS (Sep. 10, 2015), https://tinyurl.com/ydfodbbo (arguing that, because the JCPOA is a nonbinding political commitment, the President can unilaterally terminate the arrangement); Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1226 (2016) ("A political commitment also provides the executive branch with the ability to terminate the agreement unilaterally or to deviate from it without consequences.").

[189] *See* THIRD RESTATEMENT, *supra* note 1, § 339 cmt. a; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 174, 208; Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 926 (1986). *See also* Hathaway, *supra* note 45, at 1362 n.268 ("The President may withdraw from . . . a congressional-executive agreement unilaterally unless Congress has expressly limited the President's power to withdraw through . . . authorizing legislation . . . .").

[190] *See* THIRD RESTATEMENT, supra note 1, § 339 cmt. a.

[191] *See id.* For example, Section 125 of the Free Trade Act of 1974, which authorizes a fast-track process for consideration of legislation implementing free trade agreements, states: "Duties or other import restrictions required or appropriate to carry out any trade agreement entered into pursuant to this chapter . . . shall not be affected by any termination, in whole or in part, of such agreement or by the withdrawal of the United States from such agreement and shall remain in effect after the date of such termination or withdrawal for 1 year, unless" certain exceptions apply. 19 U.S.C. § 2135(e).

[192] Pub. L. No. 99-440, § 306(b)(1), 313, 100 Stat. 1086, 1100 (1986) ("The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between their Respective Territories . . . ."), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505. The Reagan Administration complied and provided the requisite notice of termination. *See* South African Airways v. Dole, 817 F.2d 119, 121 (D.C. Cir. 1987), *cert denied*, 484 U.S. 896 (1987).

imports from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."[193]

Presidents also have asserted the authority to withdraw unilaterally from congressional-executive agreements, but there is an emerging scholarly debate over the extent to which the Constitution permits the President to act without the approval of the legislative branch in such circumstances. Some scholars assert that the President has the power to withdraw unilaterally from congressional-executive agreements, although he may not terminate the domestic effect of an agreements implementing legislation.[194] But others argue that Congress must approve termination of executive agreements that implicate exclusive congressional powers, such as the power over international commerce, and that received congressional approval after they were concluded by the executive branch.[195] Although this debate is still developing, unilateral termination of congressional-executive agreements by the President has not been the subject of a high volume of litigation, and prior studies have concluded that such termination has not generated large-scale opposition from the legislative branch.[196]

Withdrawal from Treaties

Unlike the process of terminating executive agreements, which historically has not generated extensive opposition from Congress, the constitutional requirements for the termination of Senate-approved, ratified treaties have been the subject of occasional debate between the legislative and executive branches. Some commentators have argued that the termination of treaties is analogous to the termination of federal statutes.[197] Because domestic statutes may be terminated only through the same process in which they were enacted[198]—i.e., through a majority vote in both houses and with the signature of the President or a veto override—these commentators contend that treaties likewise must be terminated through a procedure that resembles their making and that includes the legislative branch.[199]

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[193] *See* Pub. L. No. 82-50, § 5, 65 Stat. 72, 73 (1951). The Truman Administration relied on this law in terminating certain congressional-executive agreements with the Soviet Union and several Soviet satellite countries. DEP'T OF STATE, OFFICE OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1951, EUROPE: POLITICAL AND ECONOMIC DEVELOPMENTS, VOLUME IV, PART 2, https://history.state.gov/historicaldocuments/frus1951v04p2/d169.

[194] *See* Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1627-40 (2018); Michael Ramsey, *Could President Trump Unilaterally Withdraw the U.S. from its International Agreements?*, ORIGINALISM BLOG (Sep. 29, 2016), https://tinyurl.com/yc26cfdr.

[195] *See* Julian Ku & John Yoo, *Trump Might be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016) (arguing that Congress's Commerce Clause authority bars the President from terminating the NAFTA without congressional authorization); Joel P. Trachtman, *Trump Can't Withdraw from NAFTA Without a 'Yes' from Congress*, THE HILL (Aug. 16, 2017), https://tinyurl.com/y9byuyed ("If the president, acting alone, were to terminate U.S. participation in NAFTA, he would be imposing regulation on commerce, without congressional participation. This would be an unconstitutional usurpation of the powers granted to Congress.").

[196] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 208 ("[T]he President's authority to terminate executive agreements . . . has not been seriously questioned in the past"); Bradley, *supra* note 194, at 1639 ("Congress has not indicated that it views congressional-executive agreements as special with respect to the issue of presidential termination authority.").

[197] *See, e.g.*, Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 199-200 (1979).

[198] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); INS v. Chadha, 462 U.S. 919, 954 (1983) ("[R]epeal of statutes, no less than enactment, must conform with Art. I.").

[199] *See, e.g.*, DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 89-110 (1986).

On the other hand, treaties do not share every feature of federal statutes. Whereas statutes can be enacted over the president's veto, treaties can never be concluded without the Senate's advice and consent. Moreover, whereas an enacted federal statute can only be rescinded by a subsequent act of Congress, some argue that, just as the President has some unilateral authority to remove executive officers who were appointed with senatorial consent, the President may unilaterally terminate treaties made with the Senate's advice and consent.[200]

The United States terminated a treaty under the Constitution for the first time in 1798. On the eve of possible hostilities with France, Congress passed, and President Adams signed, legislation stating that four U.S. treaties with France "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[201] Thomas Jefferson referred to the episode as support for the notion that only an "act of the legislature" can terminate a treaty.[202] But commentators since have come to view the 1798 statute as a historical anomaly because it is the only instance in which Congress purported to terminate a treaty directly through legislation without relying on the President to provide a notice of termination to the foreign government.[203] Moreover, because the 1798 statute was part of a series of congressional measures authorizing limited hostilities against the French Republic, some view the statute as an exercise of Congress's war powers rather than precedent for a permanent congressional power to terminate treaties.[204]

During the 19th century, government practice treated the power to terminate treaties as shared between the legislative and executive branches.[205] Congress often authorized[206] or instructed[207] the President to provide notice of treaty termination to foreign governments during this time. On rare occasions, the Senate alone passed a resolution authorizing the President to terminate a

[200] *See, e.g., id.* at 94.

[201] An Act To Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States, 1 Stat. 578 (1798).

[202] *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 51 (Samuel Harrison Smith ed., 1801) ("Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.").

[203] *See, e.g.* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789 (2014); Fourth Restatement: Draft 2, *supra* note 28, § 113, reporters' n.2; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 207.

[204] *See* S. REP. NO. 34-97, at 5 (1856) (Senate Foreign Relations Committee describing the 1798 treaty abrogation statute as a "rightful exercise of the war power, without viewing it in any manner as a precedent establishing in Congress alone, and under any circumstances, the power to annul a treaty."). *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) (treating the 1798 statute as one in a bundle of congressional acts declaring a limited "public war" on the French Republic).

[205] For analysis of 19th century understanding and practice related to treaty termination, see Bradley, *supra* note 203, at 788-801; CRANDALL, *supra* note 27, at 423-66.

[206] *See, e.g.*, Joint Resolution Concerning the Oregon Territory, 9 Stat. 109 (1846) (providing that the President "is hereby authorized, at his discretion, to give to the government of Great Britain the notice required by" a convention allowing for joint occupancy of parts of the Oregon Territory); Joint Resolution of June 17, 1874, 18 Stat. 287 (authorizing the President to give notice of termination of a Treaty of Commerce with Belgium).

[207] *See, e.g.*, Joint Resolution of Jan. 18, 1865, 13 Stat. 566 ("Resolved . . . That notice be given of the termination of the Reciprocity Treaty . . . and the President of the United States is hereby charged with the communication of such notice to the government of the United Kingdom . . . ."); Joint Resolution of Mar. 3, 1883, 22 Stat. 641 ("[T]he President . . . hereby is directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate . . . on the expiration of two years next after the time of giving such notice.").

treaty.[208] Presidents regularly complied with the legislative branch's authorization or direction.[209] On other occasions, Congress or the Senate approved the President's termination after-the-fact, when the executive branch had already provided notice of termination to the foreign government.[210]

At the turn of the 20th century, government practice began to change, and a new form of treaty termination emerged: unilateral termination by the President without approval by the legislative branch. During the Franklin Roosevelt Administration and World War II, unilateral presidential termination increased markedly.[211] Although Congress occasionally enacted legislation authorizing or instructing the President to terminate treaties during the 20th century,[212] unilateral presidential termination became the norm.[213]

The president's exercise of treaty termination authority did not generate opposition from the legislative branch in most cases, but there have been occasions in which Members of Congress sought to block unilateral presidential action. In 1978, a group of Members filed suit in *Goldwater v. Carter*[214] seeking to prevent President Carter from terminating a mutual defense treaty with the government of Taiwan[215] as part of the United States' recognition of the government of mainland China.[216] A divided Supreme Court ultimately ruled that the litigation should be dismissed, but it did so without reaching the merits of the constitutional question and with no majority opinion.[217] Citing a lack of clear guidance in the Constitution's text and a reluctance "to settle a dispute between coequal branches of our Government each of which has

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[208] *See, e.g.*, Franklin Pierce, Third Annual Message (Dec. 31, 1855), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2860, 2867 (James D. Richardson ed., 1897) ("In pursuance of the authority conferred by a resolution of the Senate of the United States passed on the 3d of March last, notice was given to Denmark" that the United States would "terminate the [treaty] at the expiration of one year from the date of notice for that purpose.").

[209] For example, after Congress enacted a joint resolution calling for the termination of the Oregon Territory Treaty, *supra* note 206, the Secretary of State informed the U.S. Ambassador to Great Britain that "Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President's) and your duty to conform." S. DOC. 29-489, at 15 (1846). As required by the Joint Resolution of January 18, 1865, *supra* note 207, the Andrew Johnson Administration terminated an 1854 treaty with Great Britain concerning trade with Canada. Letter from William H. Seward, U.S. Sec'y of State, to Charles Francis Adams, Minister to the U.K. (Jan. 18, 1865), *in* PAPERS RELATING TO FOREIGN AFFAIRS, pt. 1, at 93 (1866).

[210] *See, e.g.*, Joint Resolution to Terminate the Treaty of 1817 Regulating the Naval Force on the Lakes, 13 Stat. 568 (1865) ("[T]he notice given by the President of the United States to [the] government of Great Britain and Ireland to terminate the treaty . . . is hereby adopted and ratified as if the same had been authorized by Congress."); Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (1911) (stating that President Taft's notice of termination of a treaty with Russia was "adopted and ratified").

[211] *See* Bradley, *supra* note 203, at 807-09.

[212] *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 313, 100 Stat. 1086, 1104 (mandating that "[t]he Secretary of State shall terminate immediately" a tax treaty and protocol with South Africa), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505; Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 340-41 (authorizing the Secretary of State to renegotiate certain fishing treaties and expressing the "sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment").

[213] *See* Bradley, *supra* note 203, at 807-15.

[214] 444 U.S. 996 (1979).

[215] Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433.

[216] For background on *Goldwater v. Carter*, see VICTORIA MARIE KRAFT, THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY 1-52 (1991).

[217] *See Goldwater*, 444 U.S. at 996 (vacating with instructions to dismiss with no majority opinion).

resources available to protect and assert its interests[,]" four Justices concluded that the case presented a nonjusticiable political question.[218] This four-Justice opinion, written by Justice Rehnquist, has proven influential since *Goldwater*, and federal district courts have invoked the political question doctrine as a basis to dismiss challenges to unilateral treaty terminations by President Reagan[219] and President George W. Bush.[220]

Customary International Law

Customary international law is defined as resulting from "a general and consistent practice of States followed by them from a sense of legal obligation."[221] This means that all, or nearly all, nations consistently follow the practice in question and they must do so because they believe themselves legally bound, a concept often referred to as *opinio juris sive necitatis* (*opinio juris*).[222] If nations generally follow a particular practice but do not feel bound by it, it does not constitute customary international law.[223] Further, there are ways for nations to avoid being subject to customary international law. First, a nation that is a persistent objector to a particular requirement of customary international law is exempt from it.[224] Second, under American law, the United States can exempt itself from customary international law requirements by passing a contradictory statute under the "last-in-time" rule.[225] As a result, the impact of customary international law that conflicts with other domestic law appears limited.

In examining nations' behavior to determine whether *opinio juris* is present, courts might look to a variety of sources, including, *inter alia,* relevant treaties, unanimous or near-unanimous declarations by the United Nations General Assembly concerning international law,[226] and

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[218] *See id.* 1002-05 (Rehnquist, J., concurring) (joined by Justices Stewart and Stevens and Chief Justice Burger). Justice Powell also voted for dismissal, but did so based on the ground that the case was not ripe for judicial review until the Senate passed a resolution disapproving of the President's termination. *See id.* at 998 (Powell, J., concurring). Justice Brennan would have held that President Carter possessed the power to terminate the Mutual Defense Treaty with Taiwan, but his opinion centered on the President's power over recognition over foreign governments, and not because he believed the President possessed a general, constitutional power to terminate treaties. *See id*. at 1006-07 (Brennan, J., dissenting).

[219] In 1986, a federal district court dismissed a group of private plaintiffs' suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua. *See* Beacon Products Corp. v. Reagan, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

[220] In 2002, the United States District Court for the District of Columbia dismissed as nonjusticable a challenge brought by 32 Members of Congress to President George W. Bush's termination of the Anti-Ballistic Missile Treaty with Russia. *See* Kucinish v. Bush, 236 F. Supp. 2d 1, 14-17 (D.D.C. 2002).

[221] THIRD RESTATEMENT, *supra* note 1, § 102(2).

[222] *Id.* § 102 cmt. c.

[223] *Id.*

[224] *Id.* § 102, reporters' n. 2. The philosophy underlying the consistent objector exemption is that States are bound by customary international law because they have at least tacitly consented to it. Binding them to abide to customary practices despite their explicit rejection of these norms would violate their sovereign rights—though States are likely still bound in the case of peremptory, *jus cogens* norms which are thought to permit no State derogation, such as the international prohibition against genocide or slavery. *See* Colom v. Peru, 1950 I.C.J. 266 (Nov. 20); U.K. v. Norway, 1951 I.C.J. 116 (Dec.18).

[225] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When . . . [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."). *See also supra* § Conflict with Existing Laws (discussing the "last-in-time rule").

[226] THIRD RESTATEMENT, *supra* note 1, §102 (2) cmt. c. For a discussion of potential difficulties in relying U.N. General

whether noncompliance with an espoused universal rule is treated as a breach of that rule.[227] Uncertainties and debate frequently arise concerning how customary international law is defined and how firmly established a particular norm must be in order to become binding.[228]

Some particularly prevalent rules of customary international law can acquire the status of *jus cogens* norms—peremptory rules which permit no derogation, such as the international prohibition against slavery or genocide.[229] For a particular area of customary international law to constitute a *jus cogens* norm, State practice must be extensive and virtually uniform.[230]

Relationship Between Customary International Law and Domestic Law

For much of the history of the United States, courts[231] and U.S. officials[232] understood customary international law to be binding U.S. domestic law in the absence of a controlling executive or legislative act. By 1900, the Supreme Court stated in *The Paquete Habana* that international law is "part of our law[.]"[233] Although this description seems straightforward, twentieth century developments complicate the relationship between customary international law and domestic law.

In a landmark 1938 decision, *Erie Railroad Co. v. Tompkins*, the Supreme Court rejected the then-longstanding notion that there was a "transcendental body of law" known as the general common law, which federal courts are permitted to identify and describe in the absence of a conflicting statute.[234] *Erie* held that the "law in the sense in which courts speak of it today does not exist without some definite authority behind it" in the form of a state or federal statute or constitutional

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Assembly Resolutions as evidence of customary international law, see Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 REC. DES COURS 111-121 (1982-V).

[227] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (declining to apply protections espoused by the Universal Declaration of Human Rights because it "does not of its own force impose obligations as a matter of international law").

[228] *See*, *e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124-28 (2005) (discussing uncertainties associated with customary international law). *See also* Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012) (Kavanaugh, J.) ("It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm."), *overruled on unrelated grounds by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[229] THIRD RESTATEMENT, *supra* note 1, § 702, cmt. n.

[230] Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001) (citing Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); THIRD RESTATEMENT, *supra* note 1, § 102 (2) cmt. k. & reporters' n. 6).

[231] *See* The Nereide, 13 U.S. 388, 423, 3 L. Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land.); Respublica v. De Longchamps, 1 U.S. 111, 116 (Pa. O. & T. 1784) (describing a "crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State."). *See also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) ("[T]he law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.").

[232] *See*, *e.g.*, 1 Op. Atty Gen. 26, 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially the law of the land."); 1 Op. Att'y Gen. 69, 69 (1797) ("[T]he common law has adopted the law of nations in its full extent, made it a part of the law of the land.); 5 Op. Att'y Gen. 691, 692 (1802) ("[T]he law of nations is considered as part of the municipal law of each State.").

[233] 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

[234] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (describing the "assumption that there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" as a fallacy) (internal quotations omitted).

provision.[235] Some jurists and commentators have argued that, because judicial application of customary international law requires courts to rely on the same processes used in discerning and applying the general common law, *Erie* should be interpreted to foreclose application of customary international law in U.S. courts.[236] Many commentators, however, disagree with this view.[237] Although the Supreme Court has not passed directly on the issue, in 1964, it discussed with approval a law review article in which then-professor and later judge of the International Court of Justice Philip C. Jessup argued that it would be "unsound" and "unwise" to interpret *Erie* to bar federal courts' application of customary international law.[238] And in a 2004 case, the High Court rejected the view that federal courts have lost "all capacity" to recognize enforceable customary international norms as a result of *Erie*.[239] Consequently, at present, the precise status of customary international law in the U.S. legal system remains the subject of debate. [240]

While there is some uncertainty concerning the customary international law's role in domestic law, the debate has largely focused on circumstances in which customary international law does not conflict with an existing federal statute. When a federal statute does conflict with customary international law, lower courts consistently have concluded that the statute prevails.[241] And there do not appear to be any cases in which a court has struck down a federal statute on the ground that it violates customary international law.[242] Further, the Supreme Court's pre-*Erie* jurisprudence could be read to support the view that federal statutes prevail over customary international law. In *The Paquete Habana*, the Court explained that customary international law may be incorporated into domestic law, but only to the extent that "there is no treaty, and no controlling executive or legislative act or judicial decision" in conflict.[243]

While it appears that federal statutes will generally prevail over conflicting custom-based international law, customary international law can potentially affect how courts construe domestic law. Under the canon of statutory construction known as the *Charming Betsy* canon, when two constructions of an ambiguous statute are possible, one of which is consistent with international

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[235] *Id.*

[236] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 745-46 (2004) (Scalia, J., concurring) (arguing that customary international law would have been considered part of the "general common law" abolished by *Erie*); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-55 (1997) ("'After *Erie* . . . a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so, as it could under the regime of general common law.").

[237] *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, § 111 reporters' n. 3 ("[T]he modern view is that customary international law in the United States is federal law . . . ."); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998) ("[F]ederal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law."); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397 (1997) ("[T]he suggestion that *Erie* tossed the law of nations out of federal court along with the general common law rests on several misconceptions.").

[238] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (discussing Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM.J.INT'L L. 740 (1939)).

[239] *See Sosa*, 542 U.S. at 730 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.").

[240] For an overview of competing positions on the issue, see BRADLEY, *supra* note 35, at 140-58.

[241] *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties.").

[242] *Accord* BRADLEY, *supra* note 35, at 153.

[243] The Paquete Habana, 175 U.S. 677, 700 (1900).

legal obligations and one of which is not, courts will often construe the statute so as not to violate international law, presuming such a statutory reading is reasonable.[244]

Statutory Incorporation of Customary International and the Alien Tort Statute

Customary international law plays a direct role in the U.S. legal system when Congress incorporates it into federal law via legislation. Some statutes expressly reference customary international law, and thereby permit courts to interpret its requirements and contours.[245] For example, federal law prohibits "the crime of piracy as defined by the law of nations . . . ."[246] And the Foreign Sovereign Immunities Act removes the protections from lawsuits afforded to foreign sovereign nations in certain classes of cases in which property rights are "taken in violation of international law . . . ."[247]

Perhaps the clearest example of U.S. law incorporating customary international law is the Alien Tort Statute (ATS).[248] The ATS originated as part of the Judiciary Act of 1789, and establishes federal court jurisdiction over tort claims brought by aliens for violations of either a treaty of the United States or "the law of nations."[249] Until 1980, this statute was rarely used, but in *Filártiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit relied upon it to award a civil judgment against a former Paraguayan police official who had allegedly tortured the plaintiffs while still in Paraguay. In doing so, the *Filártiga* Court concluded that torture constitutes a violation of the law of nations and gives rise to a cognizable claim under the ATS.[250]

Filártiga was a highly influential decision that caused the ATS to "skyrocket" into prominence as a vehicle for asserting civil claims in U.S. federal courts for human rights violations even when the events underlying the claims occurred outside the United States.[251] But the expansion of the

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[244] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."). *But see* Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1151-54 (7th Cir. 2001) (suggesting that given the "present uncertainty about the precise domestic role of customary international law," application of this canon of construction to resolve differences between ambiguous congressional statutes and customary international law should be used sparingly); Al-Bihani v. Obama, 619 F.3d 1, 32–36, 42 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (arguing against the application of the *Charming Betsy* canon).

[245] *See infra* notes 246-248.

[246] 16 U.S.C. § 1651 ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.");

[247] 28 U.S.C. § 1605(a)(3) (providing an exception to foreign sovereign immunity in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state");

[248] 28 U.S.C. § 1350.

[249] For more in-depth treatment of the ATS, see CRS Report R44947, *The Alien Tort Statute (ATS): A Primer*, by Stephen P. Mulligan.

[250] 630 F.2d 876 (2nd Cir. 1980).

[251] *See* Anthony D'Amato, *Preface in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY vii (1999). *See also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013) ("Since [*Filártiga*], the ATS has given rise to an abundance of litigation in U.S. district courts."); Balintulo v. Daimler AG, 727 F.3d 174, 179 (2d Cir. 2013) (describing the ATS as "a statute, passed in 1789, that was rediscovered and revitalized by the courts in recent decades to permit aliens to sue for alleged serious violations of human rights 'occurring abroad."); Ingrid Wuerth, Kiobel v. Royal Dutch *Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) ("Since the 1980 court of appeals decision in *Filártiga v. Peña-Irala* permitting a wide of range human rights cases to go forward under the statute's auspices, the ATS has garnered

claims grounded in the ATS was not long-lived. Beginning with a 2004 decision, *Sosa v. Alvarez-Machain*, the Supreme Court began to place outer limits on the statute's application.[252] *Sosa* held that not all violations of international norms are actionable under the ATS—only those that "rest on a norm of international character accepted by the civilized world" and are defined with sufficient clarity and particularity.[253] And even when a claim meets these standards, *Sosa* explained that federal courts must exercise "great caution" before deeming a claim actionable.[254]

Nine years later, in *Kiobel v. Royal Dutch Petroleum Co*., the Supreme Court further limited the ATS's reach by holding that courts should apply the canon of construction known as the presumption against extraterritoriality to the statute.[255] Under *Kiobel,* foreign plaintiffs cannot sue foreign defendants in ATS suits when the relevant conduct occurred overseas.[256] And in *Jesner v. Arab Bank, PLC*, a 2018 decision, the High Court concluded that foreign corporations are not subject to the liability under the ATS.[257] Although the ATS remains a clear example of a U.S. statute incorporating customary international law, the Supreme Court's narrowing of ATS jurisdiction in *Sosa*, *Kiobel*, and *Jesner* has caused some commentators to question its continued relevance.[258]

Conclusion

Although the United States has long understood international legal commitments to be binding both internationally and domestically, the relationship between international law and the U.S. legal system implicates complex legal dynamics. In some areas, courts have established settled rules. For example, courts clearly have recognized that the Constitution permits the United States to make binding international commitments through both treaties and executive agreements.[259] And the Supreme Court has held that only self-executing international agreements have the status of judicially enforceable domestic law.[260] But other issues concerning the status of international law in the U.S. legal system have never been fully resolved.[261] The scope of presidential power to make executive agreements, the role of non-self-executing agreements and customary international law, and the division of power to withdraw from international agreements—like many international-law-related issues—have long been the subject of debate. Because the legislative branch possesses significant powers to shape and define the United States' international obligations, Congress is likely to continue to play a critical role in dictating the outcome of these debates in the future.

worldwide attention and has become the main engine for transnational human rights litigation in the United States.").

[252] 542 U.S. 692 (2004).

[253] *Id.* at 725.

[254] *Id.* at 728.

[255] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

[256] *See id*.

[257] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

[258] *See, e.g.*, Chimène Keitner, *ATS, RIP?*, LAWFARE (Apr. 25, 2018), https://lawfareblog.com/ats-rip.

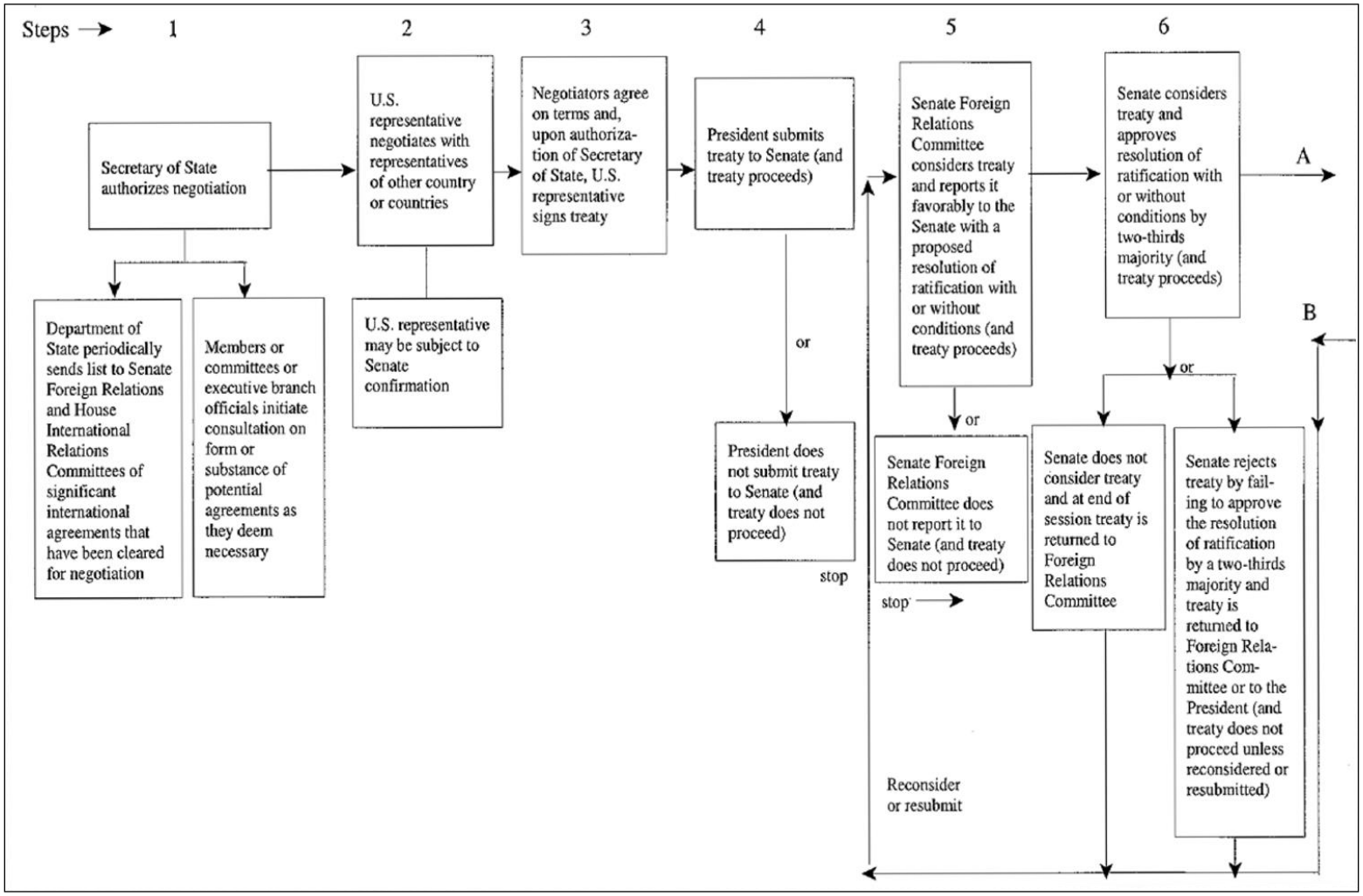
[259] *See supra* § Forms of International Agreements.

[260] *See* § Self-Executing vs. Non-Self-Executing Agreements.

[261] *See* BRADLEY, *supra* note 35, at 335.

Appendix. Steps in the Making of a Treaty and in the Making of an Executive Agreement

Figure A-1. Steps in the Making of a Treaty



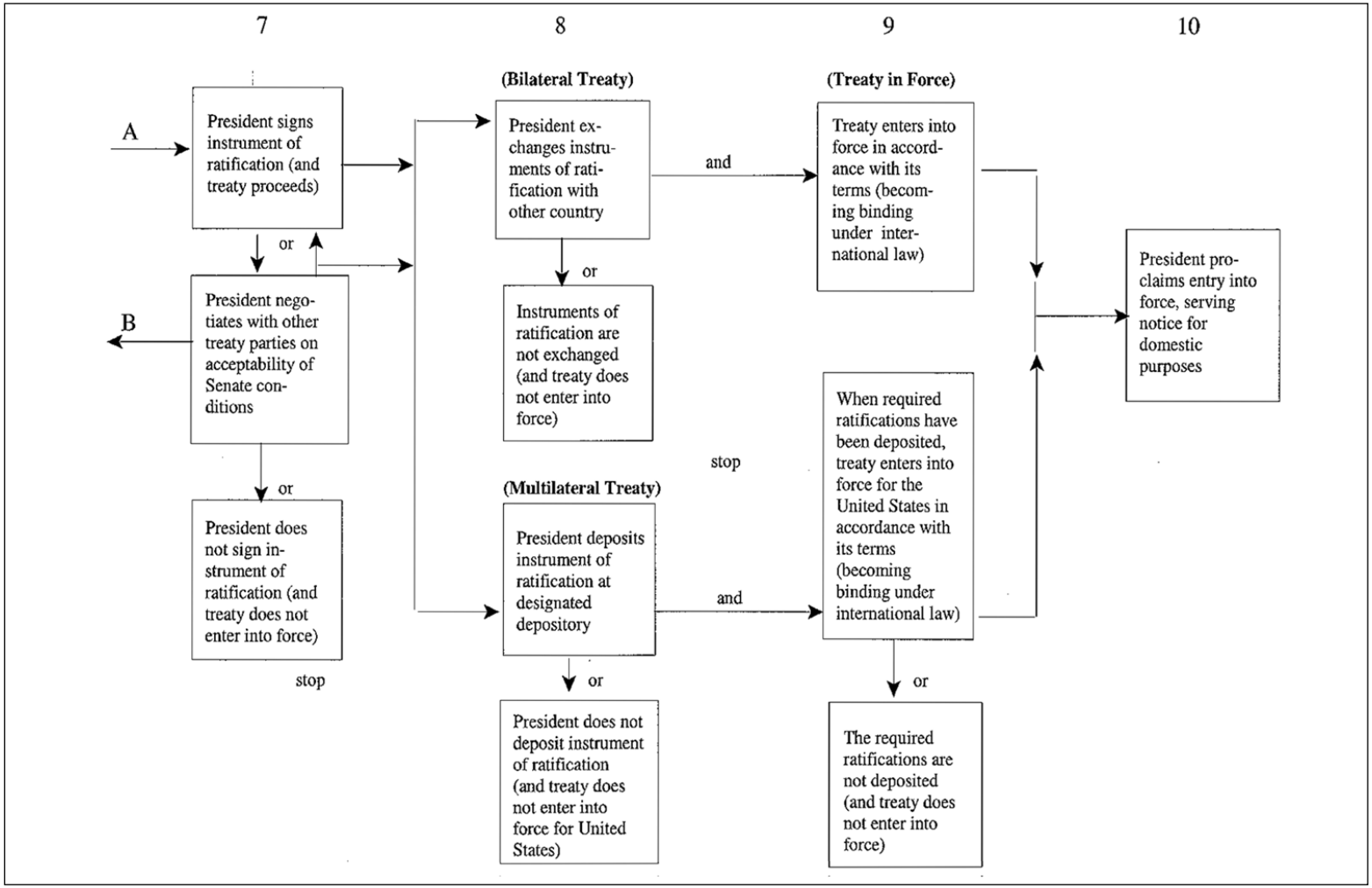


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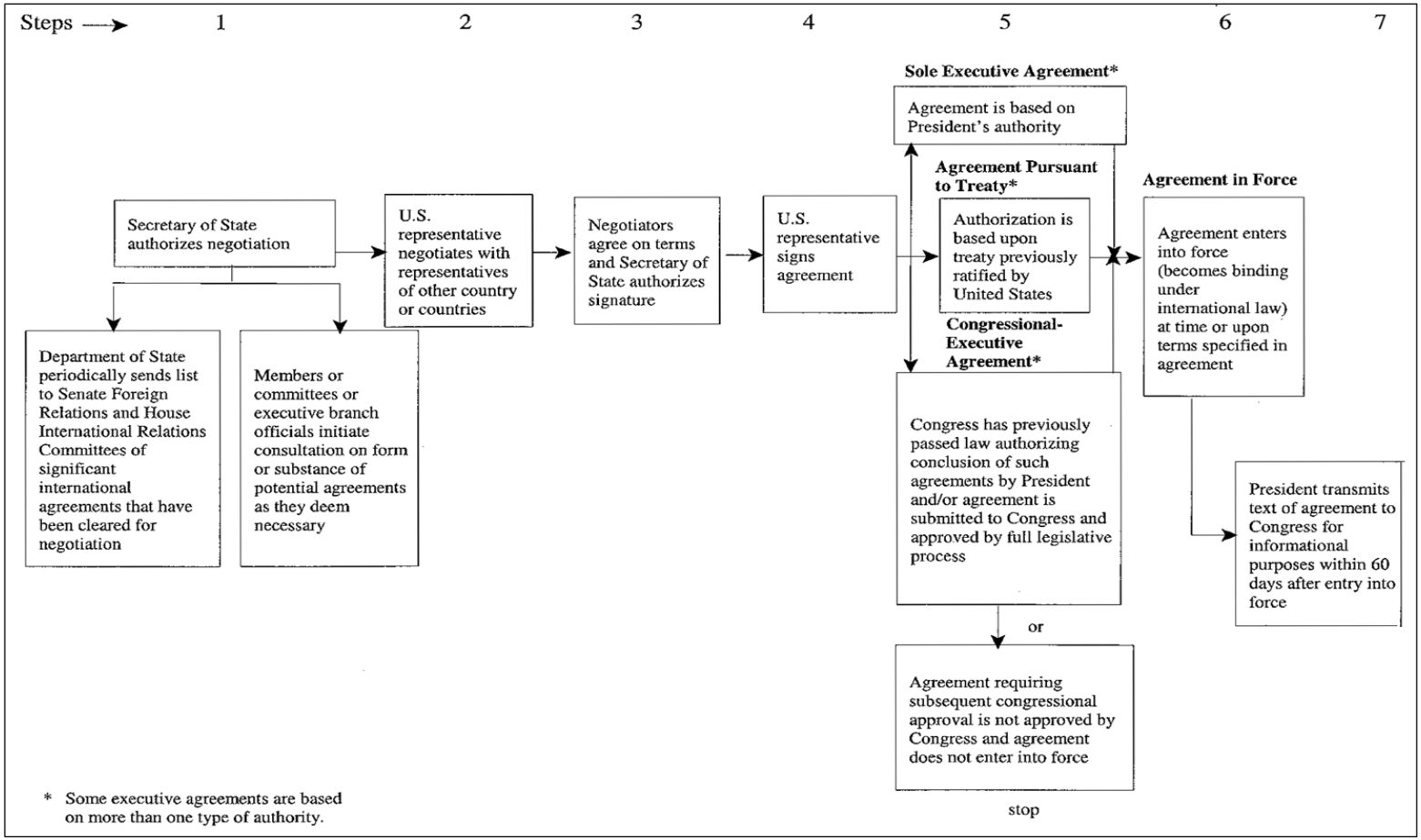
Figure A-2. Steps in the Making of an Executive Agreement



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Author Information

Stephen P. Mulligan
Legislative Attorney

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