Treaties Unchained: Restoring Checks and Balances to Executive Agreement-Making in the U.N. Security Council

Mohammad Reza Kameli*

Abstract

This Comment uses the controversial Iran Nuclear Deal that was negotiated under the auspices of the United Nations Security Council (UNSC) as a case study. Specifically, it discusses the implications of unilateral Executive agreement-making in this international body for constitutional separation of powers and the legitimacy of the UNSC itself. In doing so, it analyzes the historical development of the UNSC, the Supreme Court decision in *Medellin*, and UNSC Resolutions. It finally presents three solutions that can promote checks and balances in this area, especially as it relates to executive power to enter into treaty-like agreements via the UNSC without Congressional approval.

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* J.D. Candidate, 2022, William & Mary Law School; B.Eng, 2019, The City College of New York. Thank you to the tireless staff of the UCLA Journal of International Law and Foreign Affairs for helping to bring this Comment to publication. Special thanks to my teachers and mentors who continuously encouraged me to nurture my passion for foreign affairs. To my friends and family, I am eternally grateful for your unwavering support along the way.

Introduction

Over the past few decades, constitutional law scholars have studied extensively the President's power over the conduct of foreign affairs.[1] During the twentieth century, executive power in this area expanded considerably, while congressional direction of the United States government's international engagements declined, particularly in the post-Cold War era.[2] As a result, this expansion of executive power presents constitutional separation of power concerns that have been the subject of much scholarly literature. Principal to this concept of separation of powers is the idea that no branch may encroach on the powers reserved for another.[3] However, for an effective system of checks and

1. *See generally* Harold J. Krent, Presidential Powers (2005); Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 Yale L.J. 140 (2009).

2. *See* Krent, *supra* note 1, at 85–132 (noting that the "twentieth century has witnessed increasing power exercised by the [P]resident"); Tommy Ross, *At A Crossroads, Part III: Reasserting Congress' Oversight Role in Foreign Policy*, War on the Rocks (Jun. 19, 2018), https://warontherocks.com/2018/06/at-a-crossroads-part-iii-reasserting-congress-oversight-role-in-foreign-policy/ [https://perma.cc/WW8U-XFRL] ("[T]he 1980s and 90s saw the beginning of a dramatic decline in congressional engagement—and effectiveness—in conducting foreign policy oversight.").

3. *See* James Wallner, *A Dynamic Relationship: How Congress and the President*

balances, there must be a "co-mingling of powers" that enables one branch to successfully check the other.[4] This dynamic largely depends on the willingness of one branch to leverage its powers to respond to foreign policy-related issues vis-à-vis the other branch along institutional rather than political party lines. Key to that institutional safeguard is the presumption that Congress and the Executive would necessarily rely on each other in the foreign policymaking process.[5]

With today's partisan political climate, however, domestic politics risks harming long-term US interests on the world stage, casting serious doubts as to whether the above presumption remains workable.[6] While it is true that, by default, the United States' constitutional structure of checks and balances "almost invites political conflict, even in the conduct of foreign affairs," it is also the case that the founders of the Constitution were particularly concerned about debates over foreign policy.[7] Yet, they were optimistic in that they thought "in a large republic, the great range and diversity of factions would encourage *moderation*, as rival interests resisted each other's claims."[8] However, as Professor Jeremy Rabkin notes, this delicate balance could be interrupted if any one party draws "special support" from foreign nations.[9] In no other place is this phenomenon more pronounced than in the United Nations Security Council (UNSC).[10]

The UNSC has the authority to make resolutions in response to threats to international peace and security that are binding under international law.[11] Under the United Nations Participation Act (UNPA), the United States ambassador to the U.N. is confirmed by the Senate, but is nominated by and reports directly to the President.[12] She represents the US government in the UNSC and is authorized to exercise the veto power to prevent UNSC resolutions that are contrary to US law

Shape Foreign Policy, R St. Pol'y Study No. 186 (Oct. 2019), https://www.rstreet.org/wp-content/uploads/2019/10/186-1.pdf [https://perma.cc/AR4F-7D7W].

4. *Id.* at 3.

5. *Id.*

6. *See* Gyung-Ho Jeong & Paul J. Quirk, *Division at the Water's Edge: The Polarization of Foreign Policy*, 47 Am. Pol. Rsch. 58, 60–64 (2019).

7. *See* Jeremy A. Rabkin, Law Without Nations?: Why Constitutional Government Requires Sovereign States 101–03 (2005).

8. *Id.* at 102 (emphasis added).

9. *Id.* at 102–03 ("The United States therefore needed to be particularly cautious about international commitments.").

10. *See, e.g.*, Wallner, *supra* note 3, at 8 ("After World War II, the [P]resident cited United Nations resolutions and international treaties to authorize the use of military force without congressional approval.").

11. *See infra* notes 49–53 and accompanying text.

12. *See infra* note 68 and accompanying text.

or foreign policy from going into effect.[13] This fact has been understood by the Supreme Court and Congress as an important check on the United Nations' ability to legally bind the United States without its consent.[14] In part due to the foregoing understanding, close scrutiny of the constitutionality, executability, and long-term foreign relations effects of such resolutions has been missing from modern literature.[15]

The Iran Nuclear Deal is used throughout this Comment as a clear example of the ramifications for the United States' long-term interests in Congress continuing to give the executive branch nearly unlimited power in engaging with the UNSC. Dubbed by some scholars as "a significant constitutional innovation,"[16] this deal is not the worst-case scenario of how the United States could be bound under international law to abide by the terms of a UNSC-endorsed agreement.[17] Nonetheless, it highlights the absence of any meaningful guardrails that would limit the Executive's ability to unilaterally create long-term legal obligations for the US government and persons via this international body.[18]

In Part I, this Comment focuses on the ability of the President under US law to bind the United States to international agreements that go beyond their tenure through the UNSC. Part II examines the consequences that would follow if a President refused to exercise their veto power or chose to vote affirmatively in relation to a binding UNSC Resolution that creates long-term commitments for the United States. Finally, Part III presents three possible avenues whereby Congress, the courts, and the Executive could each promote oversight of international agreement-making in the UNSC.

Congress, for one, has a bipartisan interest in stopping the President, regardless of the Executive's political party, from using the UNSC to circumvent constitutional checks and balances. It also has

13. *See infra* note 68 and accompanying text.

14. *See* Julian G. Ku & John Yoo, *Globalization and Sovereignty*, 31 Berkeley J. Int'l L. 210, 229–30 (2013); Daniel Abebe, *Rethinking the Costs of International Delegations*, 34 U. Pa. J. Int'l L. 491, 529–30 (2013) ("With the veto power, the United States can block any potential Security Council resolution that conflicts with U.S. interests or those of its allies.").

15. *See* Ku & Yoo, *supra* note 14, at 229–30; Abebe, *supra* note 14, at 529–30.

16. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 Harv. L. Rev. 1201, 1219 (2018).

17. *See, e.g.*, Jamil N. Jaffer, *Elements of Its Own Demise: Key Flaws in the Obama Administration's Domestic Approach to the Iran Nuclear Agreement*, 51 Case W. Rsrv. J. Int'l L. 77, 90 (2019); David S. Jonas & Dyllan M. Taxman, *JCP-No-Way: A Critique of the Iran Nuclear Deal as a Non-Legally-Binding Political Commitment*, 9 J. Nat'l Sec. L. & Pol'y 589, 590 (2018); Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. Chi. L. Rev. 1675, 1678–79 (2017).

18. *See* Galbraith, *supra* note 17, at 1721–22 (noting the possibility that the Iran Deal could have been made "as an agreement that was binding under international law").

an institutional duty to uphold its role in foreign policymaking. Thus, Congress can amend the UNPA to narrow the Executive's power within the UNSC. Moreover, the courts can actively encourage domestic debate by taking a more constricted approach to using the political question doctrine. Lastly, the Executive can take initiative in establishing procedural rules within the UNSC that make endorsement of a binding international agreement contingent upon legislative approval under the members' domestic legal systems.

I. Presidential Power over International Agreements

This Part provides an overview of the President's power under the Constitution to enter and terminate international agreements. It also discusses an increasingly popular executive tool, political commitments, and the ways their use can influence US and international law.

A. The Power to Enter into and Pull Out of Various Types of International Agreements

Treaties are the only form of international agreement that the US Constitution requires the President to submit to Congress for approval.[19] Up until the early twentieth century, they were the primary means by which states entered into international agreements.[20] However, over the past eighty years, the number of treaties entered into by US Presidents has sharply decreased from 69 percent to 6 percent of all US international lawmaking.[21] Instead, the Executive has been using other tools to make binding and non-binding commitments vis-à-vis other countries.[22] Those include congressional-executive agreements, "sole" executive agreements, and political agreements.[23] What primarily sets these methods of agreement making apart from treaties is that, unlike treaties, they do not require the "Advice and Consent" of Congress.[24]

In fact, under US law, as it currently stands, and thanks to the aforementioned tools, "the decisions to make, to continue, and to

19. U.S. Const. art. II, § 2, cl. 2 (Treaties are entered into by the United States under the power vested in the President and with the "Advice and Consent" of two-thirds of the Senate).

20. *See* Bradley & Goldsmith, *supra* note 16, at 1209–14.

21. *Id.* at 1210–11 (noting that over the past eighty years only around 6 percent of US international lawmaking took the form of treaties with an especially acute drop-off during the Obama Administration).

22. *See id.* at 1206–08.

23. *Id.*

24. U.S. Const. art. II, § 2, cl. 2; *see* Bradley & Goldsmith, *supra* note 16, at 1206 ("The basic story is that presidential power over international agreements has grown to the point of near-complete control.").

terminate" international agreements[25] lies with the President alone.[26] This "remarkable development" in US law over the past century has prompted some scholars to critically review presidential power over international law, the underlying reasons behind presidential unilateral agreement making, and the boundaries of those powers.[27] The importance of the development of international law to US interests explains the recent interest in checking the President's power in this area.

Moreover, just as a President has broad powers to make international agreements, subsequent Presidents have the ability under the Constitution to withdraw the United States from those agreements.[28] The Trump administration's actions in pulling out of multiple multilateral agreements engendered a debate among scholars. One side argues that unilateral presidential withdrawal from international agreements is an established practice, while the other contends that the power to direct foreign affairs is constitutionally shared between Congress and the Executive.[29] However, in practice, "no serious question exists as to the President's authority to terminate" executive and political agreements and even treaties.[30]

Short of a full withdrawal, the President can modify prior administrations' commitments through his power to interpret international law.[31] This is derived from the "largely discretionary power" of the President to apply the tenets of international law "as he thinks most proper" in accordance with his Article II and Commander-in-Chief powers.[32]

25. It is worth noting that under international law, any written agreement concluded between parties and subject to international law constitutes a treaty. *See* Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 331.

26. Bradley & Goldsmith, *supra* note 16, at 1204. The authors add that "[t]hrough the accumulation of these and other pathways of control, Presidents (and the executive branch more generally) have come to dominate the creation, alteration, and termination of international law for the United States." *Id.*

27. *Id.*; *see also* Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 Yale L.J.F. 432, 435–36 (2018) (proposing a "mirror principle" according to which presidential ability to withdraw from international agreements should be constrained corresponding with the level of congressional participation that was required before entering the agreement); Adam B. Korn, *Expanding the Executive Branch's Foreign Relations Power: An Analysis of the Iran Nuclear Agreement*, 50 Suffolk U. L. Rev. 157, 158–59 (2017).

28. *See* Restatement (Third) of the Foreign Rels. L. of the U.S. § 339 (Am. L. Inst. 1987) [hereinafter Third Restatement].

29. *Compare* Koh, *supra* note 27, at 450, *with* Bradley & Goldsmith, *supra* note 16, at 1227, 1244.

30. Robert E. Dalton, *National Treaty Law and Practice: United States*, *in* National Treaty Law And Practice 765, 792 (Duncan B. Hollis, Benjamin Ederington & Merritt R. Blakeslee eds., 2005).

31. Bradley & Goldsmith, *supra* note 16, at 1245.

32. Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*,

Relying on those powers, President Trump withdrew the United States from, among other things, the Iran Nuclear Deal with little to no legal challenge.[33] In doing so, the President did not have to do anything but declare that he no longer was committed to the previous administration's political agreement.[34]

B. Political Commitments as an Increasingly Popular Form of Structuring International Agreements

One form of international lawmaking by the executive branch that is of particular interest stems from political commitments. The United States, especially during the Obama administration, largely relied on "non-legal understandings" as a tool to drive its foreign policy agenda.[35] Political commitments are not binding under international law, meaning that they impose no obligations on the state in the event of discontinuance, nor do they grant any legally enforceable rights to states, citizens, and entities.[36] Presidents have asserted full executive authority to make political commitments to other nations without congressional oversight; the Iran Nuclear Deal is but one example.[37] Notably, this deal was neither signed by the involved parties nor submitted to the U.N. for registration and publication, which runs contrary to the common practice for agreements reached under the auspices of U.N. specialized bodies.[38]

On their face, political agreements merely "provide moral and political guidance" and are not governed by international law.[39]

118 Yale L.J. 1762, 1812 (2009).

33. *See* Zachary B. Wolf & JoElla Carman, *Here Are All the Treaties and Agreements Trump Has Abandoned*, CNN (Feb. 1, 2019, 11:50 AM), https://www.cnn.com/2019/02/01/politics/nuclear-treaty-trump/index.html [https://perma.cc/ZYA4-RCYP].

34. Jack Goldsmith, *The Trump Administration Reaps What the Obama Administration Sowed in the Iran Deal*, Lawfare (May 9, 2018, 9:29 AM), https://www.lawfareblog.com/trump-administration-reaps-what-obama-administration-sowed-iran-deal [https://perma.cc/F7P6-SS7M].

35. Ryan Harrington, *Understanding the "Other" International Agreements*, 108 L. Libr. J. 343, 349 (2016); *see also* Bradley & Goldsmith, *supra* note 16, at 1218–20.

36. *See* Bradley & Goldsmith, *supra* note 16, at 1217–30. Professors Bradley and Goldsmith add that "[t]he constitutional basis for a political commitment is unclear, but it appears to be closely related to the President's power to conduct diplomacy." *Id.* at 1218.

37. *See id.*

38. See Jaffer, *supra* note 17, at 78; *see also* Dalton, *supra* note 30, at 787 ("The United States recognizes its obligation to submit treaties and other international agreements for registration and publication in accordance with Article 102 of the United Nations Charter.").

39. Harrington, *supra* note 35, at 346. "International law depends on nation-states' willingness to bind themselves to the text of an agreement." *Id.* at n.18 (citing Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 Am. J. Int'l L. 296, 296 (1977)).

However, seeing as they are a formal exercise of diplomacy by the executive branch, they can have a "leading role" in establishing state practice of the United States when it comes to Customary International Law (CIL).[40] Political agreements can also be used in conjunction with the Executive's activities in International Organizations (IOs).[41] Accordingly, even though they are legally non-binding, political agreements can have consequences for the United States that go beyond the tenure of any one President, especially in terms of its dealings with the community of nations.

For example, as part of the Iran Nuclear Deal, the United States undertook specific long-term commitments. For example, in accordance with a fifteen-year timetable, subsequent US administrations would have to waive the Iran sanctions every three to four months as long as Iran was in compliance.[42] Practically speaking, the agreement would be perceived by future presidents as "an attempt to bind" them to its terms.[43]

Over the years, Congress has played a significant role in empowering the President to direct foreign relations uninhibited.[44] While there have been isolated attempts by Congress to rein in those broad powers on particular foreign policy issues given their perceived importance, such efforts have fallen short of effectuating any meaningful limitations.[45] Consequently, many scholars have written on their "concern for

40. *See* Bradley & Goldsmith, *supra* note 16, at 1228–29.

41. *See* Part II.C.

42. *See* Jaffer, *supra* note 17, at 91.

43. *Id.*; *see also* Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, but Doesn't Scrap It*, N.Y. Times (Oct. 13, 2017), https://nyti.ms/2z4fOYC [https://perma.cc/67RU-SZAW] (outlining the Trump administration's struggle to implement its foreign policy with regard to Iran in light of the political commitment made by his predecessor).

44. *See, e.g.*, Jaffer, *supra* note 17, at 80 ("[T]he President did not intend to seek additional authority from Congress to remove the statutory and other sanctions imposed on Iran, but rather that he intended to use his existing statutory waiver authority to implement any sanction relief necessary under the agreement."); Andrew Boyle, Brennan Ctr. for Just., Checking the President's Sanction Powers 3 (2021) ("[The International Emergency Economic Powers Act], which became law in 1977, gives the president sweeping powers to impose economic sanctions upon persons and entities . . . .").

45. *See* Jaffer, *supra* note 17, at 81–82 ("Under [the Iran Nuclear Agreement Review Act of 2015], the President was . . . required to wait for a period of time to allow Congress to consider and vote on resolutions of approval or disapproval on the deal before he could implement any waivers of existing statutory sanctions."); *see, e.g.*, Nancy J. Murray, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 Sw. L.J. 729, 729–30 (1979). Presidents have withdrawn from a relatively considerable number of treaties since *Goldwater*. *See generally* Goldwater v. Carter, 444 U.S. 996 (1979).

'American representative democracy'" as it relates to international law and presidential power over it.[46]

In particular, the Executive's broad discretion in committing the United States to UNSC-endorsed agreements may create long-term legal obligations which can affect US interests, businesses, and citizens. To illustrate the implications, Part II discusses the evolving role of the UNSC under international law and the interaction of UNSC resolutions with US domestic law.

II. The United Nations Security Council

As a relatively novel institution, the UNSC has evolved into a legislative, judicial, and executive international body hybrid. The United States has been at the forefront in leading this evolution. Under US law, the Executive has almost unbridled power in representing the United States in the UNSC.[47] However, as this Comment argues, this mandate, which includes the unilateral power to commit the United States to legally binding resolutions, can at times encroach on the powers reserved to the legislative branch, namely setting US domestic laws. Furthermore, it can undermine the US Constitution's system of representative democracy by locking future administrations in a set foreign policy.

US courts have yet to directly address whether UNSC resolutions are self-executing; however, recent precedent indicates that a UNSC resolution that is not vetoed by the government could automatically become law in the United States.[48] Such a holding could equally apply to international agreements endorsed by the UNSC. Therefore, by joining an international agreement made binding by a UNSC resolution, the Executive opens the United States to international lawsuits. That could also create legal obligations for US citizens and businesses which could be enforced in US courts.

46. Helmut Philipp Aust, *The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective*, *in* The Double-Facing Constitution 345, 355 (Jacco Bomhoff, David Dyzenhaus & Thomas Poole eds., 2020).

47. *See infra* notes 68–69.

48. *See* Part II. .

A. The Evolution of the Security Council and the Role of the United States in It

1. The Legal Mandate of the Security Council

The U.N. was founded with the principal mission to maintain international peace and security.[49] Coming out of World War II, the major Allied powers, along with many other countries, reached a consensus on establishing a "system of collective security" that could suppress and deter future acts of aggression.[50] Article 24 of the U.N. Charter established the UNSC and vested in the Council the "primary responsibility" to maintain peace around the world.[51] The UNSC has the broadest discretion among U.N. bodies to determine, and subsequently act on, what it constitutes to be threats to international peace and security.[52] In particular, Article 25 provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[53]

Therefore, decisions of the UNSC[54] included in its resolutions are generally understood to be binding on all member states.[55] Proponents of this collective security system argue that it facilitates effective and timely responses to urgent threats when it would otherwise "take many years to negotiate a multilateral treaty" on the subject.[56] Legal scholars have pointed out that the UNSC has taken that mandate further and has assumed the role of a "global legislator," setting international law for all nations to abide by.[57] Alternatively, some commentators have advocat-

49. *See* U.N. Charter art. 1, ¶ 1.

50. Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 Yale L.J. 258, 269 (1951).

51. *See* U.N. Charter art. 24.

52. *See id.* arts. 24–26.

53. *Id.* art. 25.

54. The Security Council includes the five Permanent Members, namely the United States, United Kingdom, France, China, and Russia, and six non-permanent members who are elected for two-year terms by the General Assembly. *See* U.N. Charter art. 23.

55. *See* Markus G. Puder, *Guidance and Control Mechanisms for the Construction of UN-System Law—Sung and Unsung From the Coalition of the Willing, or Not*, 121 Penn St. L. Rev. 143, 146 (2016); *cf.* Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 Eur. J. Int'l L. 879, 880. The term 'resolution' as used in U.N. practice has a generic sense, including recommendations and decisions. *See* Öberg, *supra.*

56. Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 Fordham Int'l L.J. 542, 551 (2005); *see also* S.C. Res. 1373 (Sep. 28, 2001) [hereinafter Resolution 1373] (mandating states to not only freeze the assets of terrorists and their supporters but also take a number of other measures, including tightening their border controls).

57. Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. Ill. L. Rev. 71, 81 (2007).

ed for "a time-limited, case-based" approach whereby the UNSC acts in response to specific threats without legislating "on a global basis."[58]

The debate as to the nature of the UNSC continues to date with one major question being whether the UNSC is a legislative body or an executive one. One scholar argues that "[w]hile the Security Council is first and foremost an executive body whose principal function is crisis management, no evident legal rule prohibits it from acting in a legislative or quasi-judicial manner."[59] In the same vein, former Secretary of State, John Dulles, was of the opinion that "[t]he Security Council is not a body that merely enforces [international law] . . . it can decide in accordance with what it thinks is expedient."[60]

This broad reading of the UNSC's powers has given rise to several criticisms. One argument is that because UNSC resolutions suffer from a "deliberative deficit," they can lack legitimacy.[61] Proponents of this argument have suggested that this problem can be remedied by amending the UNSC's membership composition or voting procedures.[62] Others point out that global legislation by this U.N. body can undermine the legislative authority within states.[63] Instead, they advocate for a narrow construction of the UNSC's authority according to which "the General Assembly [is] the organ of deliberation and the Council an organ of action."[64] While susceptible to criticisms such as inefficiency, this view stems from concerns that the UNSC circumvents a historically well-established and widely-accepted form of international lawmaking: *the multilateral treaty*.[65]

2. US Law and UNSC Mandate: How the Two Have Shaped Each Other

As a Permanent Member of the Security Council, the United States has had a unique relationship with this body. Similar to the other four Permanent Members, the United States enjoys a veto right which recognizes its status as a geopolitical superpower and is meant to grant

58. Rosand, *supra* note 56, at 545.

59. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 Am. J. Int'l L. 275, 299 (2008).

60. Vik Kanwar, *Two Crises of Confidence: Securing Non-Proliferation and the Rule of Law Through Security Council Resolutions*, 35 Ohio N.U. L. Rev. 171, 185 (2009) (quoting John Foster Dulles, War or Peace, 194–95 (1950)).

61. Johnstone, *supra* note 59, at 275.

62. *Id.*

63. Rosand, *supra* note 56, at 559–60.

64. Leland M. Goodrich et al., Charter Of The United Nations: Commentary And Documents 11 (3d ed. 1969).

65. Rosand, *supra* note 56, at 574.

it influence proportional to that status.[66] Through the UNPA, Congress has authorized the President to appoint an ambassador who "shall represent the United States in the Security Council of the United Nations . . . and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may . . . direct."[67] Thus, through her ambassador, the President may oversee the selection of issues on which the United States will focus and potentially vote for in various U.N. sessions as well as the exercise of the veto power in the UNSC.

Since the establishment of the UNSC, subsequent US administrations have relied on the foregoing congressional mandate to partake in wide-ranging activities which include:

> [M]aking statements about U.S. positions relating to international law, voting on resolutions that concern the content of preexisting international obligations or create new obligations, [and] approving modifications to treaty obligations through streamlined consent procedures that do not involve legislative approval.[68]

As the above list suggests, through practice and over the years, the Executive has allowed international law to shape domestic law,[69] which in some areas gives rise to renewed tensions between the US Supremacy Clause and the doctrine of separation of powers. That is especially the case when it comes to presidential international agreement-making.[70] An example that can shed light on the problem would be a binding UNSC resolution requiring that members, including the United States, consult this body before acting on an issue; this "could be construed to violate the Supremacy Clause."[71]

66. *See* Maury D. Shenk, *The United Nations Security Council Consultation Act: A Proposal for Multilateral Resolution of International Conflict*, 28 Stan. J. Int'l L. 247, 250 (1991).

67. 22 U.S.C. § 287(a).

68. Bradley & Goldsmith, *supra* note 16, at 1241.

69. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 Va. L. Rev. 987, 1008 (2013) (finding "that international law has influenced the constitutional separation of powers in ways that go beyond simply serving as an input for other principles of interpretation").

70. For a discussion of interpretations of US law vis-à-vis international law, *see* D. A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law*, *in* Basic Concepts of Public International Law: Monism and Dualism (Marko Novakovic ed., forthcoming 2013). In this article, the author discusses the original understanding of US law as monistic and how recent Supreme Court interpretation of the US Constitution in *Medellin v. Texas* is pushing US law towards a more dualistic system that may not be reconcilable with the Supremacy Clause. *See id.* (manuscript at 5).

71. Shenk, *supra* note 66, at 266–67.

In addition to involving a final vote, decisions in the UNSC are often subject to intense diplomatic negotiations beforehand, with efforts to consider previously established UNSC resolutions and other norms of international law.[72] However, this does not mean that the UNSC was set up to be a democratic institution.[73] The UNSC has served as a forum wherein member states have engaged in bargaining and conflict resolution. And the United States has benefitted extensively from this U.N. body because of its position as a Permanent Member.[74]

Most notably, previous US administrations have used their influence in the UNSC to obtain resolutions that they later used to solicit specific actions from Congress.[75] The Gulf War of 1991 that was first authorized by the UNSC is one example. United Nations Resolution 678 granted U.N. member states authority under international law to use "all necessary means" against Iraq as it was invading Kuwait. The Executive subsequently used this international mandate to seek an authorization to use military force from Congress. Senator Joe Lieberman's statements on the Senate floor in support of congressional authorization for the war shed light on the interplay between UNSC Resolutions and legislative actions by Congress: "through international agencies and alliances, over the years we have attempted to establish some norm of international order . . . . [T]his is a moment of extraordinary opportunity for the United Nations and the rule of law in the world. The nations of the world have spoken clearly."[76] Notably, it was not just the US Congress that authorized the use of military force, but several other countries also relied on the U.N. Resolution to authorize their countries' joining the multinational effort against Iraq.

Conversely, the United States has used the UNSC to "export" its own laws to the global community.[77] For instance, in the aftermath of the 9/11 attacks, the United States fiercely pursued the adoption of an anti-terrorism resolution.[78] The United States succeeded when the UNSC adopted Resolution 1373, which allowed the country to

72. *See* Puder, *supra* note 55, at 180; U.N. Charter art. 27 (distinguishing between procedural and non-procedural matters in Council decision-making).

73. *See* Johnstone, *supra* note 59, at 277.

74. *See* Shenk, *supra* note 66, at 252–53.

75. *See id.* at 261; *see also* Letter to Congressional Leaders on the Persian Gulf Crisis, 1 Pub. Papers 13–14 (Jan. 8, 1991) ("I therefore request that the House of Representative and the Senate adopt a Resolution stating that Congress supports the use of all necessary means to implement UN Security Council Resolution 678.").

76. 137 Cong. Rec. S991 (daily ed. Jan. 12, 1991) (statement of Sen. Lieberman in debate on S.J. Res. 2, approving use of U.S. forces against Iraq).

77. Helfer, *supra* note 57, at 110–11.

78. *See id.*

"globally export US counterterrorism legislation, particularly the U.S. Patriot Act."[79]

Under the leadership of the United States, the UNSC has expanded its mandate to "law-making, law-enforcing, [and] law-determining measures."[80] This broader mandate was promulgated on the premise that the Council would restrict its actions to short-term preliminary measures that would leave "a definitive settlement of the conflict to the parties."[81] However, in the multipolar partisan world of today, it is hard to imagine how the UNSC will be capable of exercising such restraint without limits effectuating it both procedurally within the UNSC and domestically inside the member states' legal systems.[82] The Iran Nuclear Deal is a prime example of the UNSC's failure to exercise restraint which created concerns both constitutionally and, as has most recently been observed, for the credibility of this important U.N. body.[83]

B. How Does the Security Council Endorse an Agreement?

There are several ways an international agreement can be reached, namely through negotiations between the Permanent Members of the UNSC and other parties, as was the case with the Iran Nuclear Deal, or through another U.N. body or international organization. Regardless of how an international agreement is reached, once members of the UNSC decide that an agreement is the only solution, or part thereof, to resolving a threat to international peace and security, they can pass an endorsing resolution with a majority, absent any vetoes.[84]

Notably, when it comes to UNSC resolutions, the language used therein can alter its legal effect.[85] The resolutions, or parts of them, that

79. *Id.*

80. Rosand, *supra* note 56, at 557; *see also* Johnstone, *supra* note 59, at 294 (noting that the UNSC has evolved to play the role of a quasi-judicial body over the past three decades).

81. Rosand, *supra* note 56, at 557.

82. *See* Federico Germani, *The Post-Pandemic Era: A Transition to a Multipolar World Order*, Mod. Dipl. (Jun. 12, 2020), https://moderndiplomacy.eu/2020/06/12/the-post-pandemic-era-a-transition-to-a-multipolar-world-order/ [https://perma.cc/JD5C-S2PZ]; Jeong & Quirk, *supra* note 6, at 81–83.

83. *See* Katrina Manson & Michael Peel, *Iran Sanctions Dispute Poses New Challenge for the UN*, Fin. Times (Sept. 1, 2020), https://www.ft.com/content/63f364d3–050f-484a-829d-a44236a191d0 [https://perma.cc/EX3K-PC7V].

84. *See, e.g.*, S.C. Res. 2231 (July 20, 2015); S.C. Res. 2310 (Sept. 23, 2016); *see also* Öberg, *supra* note 55, at 885 ("[J]ust about any significant international event or situation can be characterized as a threat to peace and security."); U.N. Charter art. 27 ("Decisions of the Security Council . . . shall be made by an affirmative vote of nine members.").

85. *See* Öberg, *supra* note 55, at 879–80; Jack Goldsmith, *How a U.N. Security Council Resolution Transforms a Non-Binding Agreement With Iran Into a Binding Obligation Under International Law (Without Any New Senatorial or Congressional Vote)*, LAWFARE

contain decisions of the UNSC are distinguished from those containing recommendations that are non-binding.[86] The Iran Nuclear Deal contained language that scholars agree was binding in part, and language that some believe was either not binding or intentionally left ambiguous in other parts.[87] Therefore, regardless of the content of the proposed agreement or treaty, its status as a binding agreement depends on two things: (1) ratification by the UNSC and (2) the intention of the UNSC to make it binding.[88]

The Iran Nuclear Deal was a political commitment that was negotiated and agreed to by parties outside the UNSC framework.[89] However, this agreement was attached to Resolution 2231 which "*[e]ndorses* the [Joint Comprehensive Plan of Action][90], and *urges* its full implementation on the timetable established in the JCPOA" in accordance with Member States' obligations under Article 25 of the Charter of the U.N.[91] In a similar action but with a far narrower scope, in 2013, the United States advocated for the use of the "political agreement followed by [a] binding [UNSC] resolution" mechanism to address the Syrian chemical weapons stockpile and ongoing civil unrest.[92] This novel agreement-making mechanism circumvented traditional multilateral treaty-making procedures, namely the advice and consent of the Senate. It also created challenges to constitutional checks and balances and could give rise to legal obligations for the United States, which this Comment discusses in the next section.

(Mar. 12, 2015, 8:37 AM), https://www.lawfareblog.com/how-un-security-council-resolution-transforms-non-binding-agreement-iran-binding-obligation-under [https://perma.cc/YC85-YD58] ("It is impossible to know what the ultimate legal effect of . . . a Security Council resolution would be without knowing the precise terms of the resolution.").

86. *See* Öberg, *supra* note 55, at 880.

87. *See* Jaffer, *supra* note 17, at 83–84 (calling the agreement "ostensibly binding"). *Compare* S.C. Res. 2231, *supra* note 84, ¶¶ 7–9, 11–12, *with id.* ¶¶ 2, 10, 13–14.

88. Öberg, *supra* note 55, at 885 ("Whether a specific [Security Council] resolution is binding is determined by the language used in it, the discussions leading to it, the Charter provisions invoked, etc., all with the purpose of establishing the *intent* of the SC.").

89. *See* Jaffer, *supra* note 17, at 79 ("The negotiations nominally took place under the aegis of the P5+1 through 2015; in reality, however, the principal negotiations were being conducted directly between the United States and Iran.").

90. The Iran Nuclear Deal is formally entitled Joint Comprehensive Plan of Action. *See* Joint Comprehensive Plan of Action, July 14, 2015, 55 I.L.M. 103, 108 [hereinafter JCPOA].

91. *See* S.C. Res. 2231, *supra* note 84, ¶ 1; *supra* note 53 and accompanying text.

92. *See* Goldsmith, *supra* note 85; S.C. Res. 2118 (Sept. 27, 2013) (endorsing "fully" the Geneva Communique of June 30, 2012, which was a roadmap for political transition in Syria); *see also* Bradley & Goldsmith, *supra* note 16, at 1245–46 (explaining that in 2016 the United States initially sought a legally binding Security Council resolution endorsing the Comprehensive Nuclear-Test-Ban Treaty which later culminated into a non-binding resolution).

C. What Does It Mean for the United States When the Security Council Endorses an Agreement?

As previously mentioned, the delegation of the power to ratify international agreements to the UNSC with potentially binding effects under international law creates both domestic and international concerns. According to critics, the UNSC's ability to create legal rights and obligations for states weakens the capacity of member nations to pursue their own national interests.[93] By shifting the center of legislative and enforcement capacity to international organizations, "[g]lobal governance" interferes with the relationship that people have with their governments.[94] Accordingly, the outsourcing of legislative powers to the UNSC can not only create conflicts with the bicameralism and presentment requirements of the Constitution,[95] but also lead to the consolidation of power in the executive branch and away from Congress and the states.[96]

However, proponents of international delegation argue that the need for coordinated, swift responses to foreign affairs issues pertaining to war, defense of partners, and other national security matters trump the above constitutional concerns.[97] It follows from their argument that the Executive is best suited to address those needs and can do so through any mechanisms necessary, including international agreements.[98] In fact, former Secretary of State, John Kerry, told the House Foreign Affairs Committee that he sought the political-agreement-followed-by-Security-Council-resolution mechanism for the Iran Nuclear

93. *See* Rabkin, *supra* note 7, at 18–44.

94. *Id.*

95. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch."); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 Tex. Int'l L.J. 527, 529 (2003) ("[S]upranational lawmaking operates outside [the] systems of checks and balances and accountability[] [and] risks undermining our Constitution's institutional strategy.").

96. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum. L. Rev. 1492, 1539–40 (2004) (noting that even though the United States has veto power in the Security Council, "Congress still loses control" as that power is held solely by the executive branch officials); Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557, 1587 (2003) (arguing that transfers of power to the executive branch to represent the United States in international organizations increases the relative power of the Executive because those powers often belong to other branches).

97. *See* Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 Sup. Ct. Rev. 233, 233–34.

98. *Id.* at 244.

Deal specifically because he thought it was "physically impossible" to pass it as a treaty through Congress.[99]

1. UNSC-endorsed Agreement Binds the United States Under International Law

That being said, the ultimate result of the above approach is that once a binding UNSC-endorsed agreement goes into effect, future US administrations will be legally obligated to ensure the United States complies with its terms.[100] Therefore, regardless of the type of the underlying agreement—a treaty, congressional-executive, sole executive, or political agreement—the United States will automatically violate a UNSC resolution if a future President chooses to withdraw from that agreement.

The legal significance of a US violation of a UNSC resolution can partly be understood in terms of its implications in the International Court of Justice (ICJ). The ICJ has found "that [UNSC] decisions have an overriding normative power capable of pre-empting obligations flowing from traditional sources of international law."[101] Thus, the United States can be subject to lawsuits at the international level for breaching a UNSC-endorsed agreement, as a source of international law. For example, Iran sued the United States at the ICJ for withdrawing from the Iran Nuclear Deal in 2018 in a case that is still ongoing.[102] That case primarily relies on the 1955 Treaty of Amity, Economic Relations, and Consular Rights[103] between the two countries. However, that did not stop Iran from arguing before the ICJ that the UNSC's endorsement of the Iran Nuclear Deal "was deemed ample guarantee" that the United States would abide by the terms of the agreement.[104]

Furthermore, even if Congress decided to act retroactively and, through subsequent legislation, nullify the effects of said international agreement entered into by the Executive, the international legal effects

99. *See Iran Nuclear Agreement: The Administration's Case, Hearing Before H. Comm. on Foreign Affs.*, 114th Cong. 83 (2015) (statement of John Kerry, Secretary of State).

100. *See* JCPOA, *supra* note 90, ¶¶ 21–23.

101. Öberg, *supra* note 55, at 884.

102. *See* Rick Gladstone, *Iran Takes US to Court Over Nuclear Deal and Reimposed Sanctions*, N.Y. Times (July 17, 2018), https://www.nytimes.com/2018/07/17/world/middleeast/iran-sues-us-over-sanctions.html [https://perma.cc/NYD7-BHT7].

103. Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899.

104. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Rep. of Iran v. U.S.), Verbatim Record, ¶ 13 (Aug. 27, 2018, 10:00 AM), https://www.icj-cij.org/public/files/case-related/175/175-20180827-ORA-01-00-BI.pdf [https://perma.cc/83G2-N5HP].

of withdrawal would persist.[105] US domestic law will not "relieve the United States of its international obligation or of the consequences of a violation of that obligation."[106] This holds true especially for obligations created under binding UNSC-endorsed agreements because of their authoritative status under international law.[107]

2. The Impact of A Legally Binding UNSC-Endorsed Agreement on Future Administrations' Ability to Pursue Their Foreign Policy Agenda And the Legitimacy of the UNSC

In addition, a long-term UNSC-endorsed agreement locks the United States in a set foreign policy on the issue it addresses and ties the hands of future Presidents diplomatically. Because such an agreement must necessarily escape the veto of the Permanent Members in order to come into fruition, it carries high expectations of full compliance by all parties, as each of those members gains stakes in that agreement.[108] Moreover, the United States has an ongoing interest in maintaining the legitimacy of the UNSC to further its foreign policy interests. That entails keeping close ties with the other Permanent Members on UNSC-related matters. In fact, when the Obama administration decided to use military force against Libya following a UNSC resolution, the Office of the Legal Counsel argued that past practice and the "important" US interest in "preserving the credibility and effectiveness of the United Nations Security Council" justified that executive decision.[109]

In an ironic turn of events, the credibility and, even more so, the effectiveness of the UNSC was seriously jeopardized by the Trump administration's decision to invoke the so-called snapback provision of the Iran Nuclear Deal.[110] This provision, which was introduced by the

105. *See* Third Restatement, *supra* note 28, § 115 (describing the later-in-time rule and how "an [A]ct of Congress supersedes an earlier rule of international law or a provision of an international agreement" if the Act's purpose is clearly to have such an effect).

106. *Id.*

107. *See* Edwin F. Feo, *Self-Execution of United Nations Security Council Resolutions Under United States Law*, 24 UCLA. L. Rev. 387, 405 n.91 (1976) (noting that because the United States has the power to pass on Security Council resolutions, those that it does vote for are considered as executive agreements with binding force).

108. *See* Melody Fahimirad, *The Iran Deal: How the Legal Implementation of the Deal Puts the United States at a Disadvantage Both Economically and in Influencing the Future of Iran's Business Transactions*, 37 Nw. J. Int'l L. & Bus. 301, 310–11 (2017).

109. *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 27 (2011).

110. *See* Manson & Peel, *supra* note 83; *US Seeks to Trigger UN 'Snapback' Sanctions on Iran*, DW (Aug. 20, 2020), https://www.dw.com/en/us-seeks-to-trigger-un-snapback-sanctions-on-iran/a-54628614 [https://perma.cc/2N9H-DBHN]; *The Battle over Snapback Sanctions*, Wall St. J. (Aug. 21, 2020), https://www.wsj.com/articles/

French delegation during the negotiations and agreed to by the Obama administration, allowed for the reimposition of sanctions upon the request of a complaining participant of the deal.[111] It is unclear what effects the administration's snapback ever had as its closest diplomatic allies explicitly rejected this US action.[112] However, it is clear that the United States' interests in the UNSC, including its veto power, are imperiled through the sole and unchecked executive action in entering and exiting UNSC-endorsed agreements.[113]

Just as all public institutions need to maintain legitimacy to remain effective, so does the UNSC. However, recent polls are concerning in terms of the US public's perception of the United Nations. The partisan gap with regard to U.N. favorability is at its highest where only 36 percent of Republicans polled expressed favorable views of this body—an all-time low.[114] It is high time to consider interbranch legal initiatives that can constrain unchecked Executive agreement-making through the UNSC so as to eliminate the separation of powers, bicameralism and presentment, and representative democracy concerns. Such limitations will also protect the United States' long-term interest in upholding the credibility of the UNSC. But before getting to proposed solutions, this Comment reviews how US courts have treated UNSC resolutions.

D. The Courts and the Security Council

Courts in the United States have kept a safe distance from the question of whether a binding UNSC resolution can create enforceable legal rights and obligations under US domestic law. In *Diggs v.*

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the-battle-over-snapback-sanctions-11598050871 [https://perma.cc/U6VK-M5E9].

111. *See* Mark Leon Goldberg, *Why the "Snap Back" Provision Is the Most Brilliant Part of the Iran Deal*, U.N. Dispatch (July 14, 2015), undispatch.com/why-the-snap-back-provision-is-the-most-brilliant-part-of-the-iran-deal [https://perma.cc/MYX2-B9DX]; Gerard Araud (@GerardAraud), Twitter (June 19, 2020, 3:54 PM), https://twitter.com/GerardAraud/status/1274067999687872513 [https://perma.cc/XD5N-ZDDN] (remarks from the former French ambassador to the U.S.).

112. As of this writing, in yet another reversal, the new Biden administration formally rescinded its predecessor's invocation of the snapback provision. *See* Edith M. Lederer, *Biden Withdraws Trump's Restoration of UN Sanctions on Iran*, AP News (Feb. 18, 2021), https://apnews.com/article/joe-biden-donald-trump-iran-united-states-united-nations-aa8f38fa3bf7de3c09a469ec91664a3c [https://perma.cc/DM9G-5ZLS].

113. *See* John Bolton, Opinion, *Iran 'Snapback' Isn't Worth the Risk*, Wall St. J. (Aug. 16, 2020), https://www.wsj.com/articles/iran-snapback-isnt-worth-the-risk-11597595060 [https://perma.cc/GK7J-JGR6].

114. Moira Fagan & Christine Huang, *United Nations Gets Mostly Positive Marks From People Around the World*, Pew Rsch. Ctr. (Sept. 23, 2019), https://www.pewresearch.org/fact-tank/2019/09/23/united-nations-gets-mostly-positive-marks-from-people-around-the-world [https://perma.cc/RY9P-BTUY] (noting a significant increase since 2013 in the partisan gap in the United States with regard to the public's perception of the U.N.).

Richardson,[115] the Court of Appeals for the District of Columbia was presented with this question in relation to a UNSC resolution, Resolution 301, that forbade countries from establishing economic ties with South Africa.[116] The court held that Resolution 301 was not self-executing.[117] However, Judge Leventhal carefully limited his decision to the facts of that case and refrained from making a general statement as to the non-self-executing nature of UNSC resolutions.[118]

Accordingly, the door remains open for litigants in American courts to argue that UNSC resolutions constitute self-executing treaties. Wary of the separation of powers implications of making such a general declaration, courts have relied on other theories such as the political question doctrine and the self-executing treaty doctrine to decide arising cases.[119]

Approximately three decades after *Diggs*, in *Medellin v. Texas*, the Supreme Court was presented with the question of whether the President could create domestic law through the powers vested in him by Congress under 22 U.S.C. § 287.[120] In other words, seeing ICJ as the judicial arm of the United Nations, could the President use his foreign relations power to accept a ruling of the ICJ and make it binding inside the United States? The Supreme Court rejected that notion, specifically noting that the President's power "to represent the United States before the United Nations, the ICJ, and the Security Council" spoke only to his "*international responsibilities*," and he could not unilaterally create laws within the country.[121]

Article 94(2) of the U.N. Charter provides that in the event of non-compliance with an ICJ ruling, an aggrieved party is entitled to refer the

115. 555 F.2d 848 (D.C. Cir. 1976).

116. *See* S.C. Res. 301 (Oct. 20, 1971).

117. *See Diggs*, 555 F.2d at 850–51.

118. *Id.* at 850 n.9 ("In holding that the U.N. Security Council Resolution involved here is not self-executing, we avoid the larger questions raised by this case: under what circumstances a Security Council resolution can create a binding international obligation of the United States.").

119. *See* Turner v. Am. Baptist Missionary Union, 24 F. Cas. 344, 345–46 (D. Mich. 1852) (No. 14,251) (treaty requiring appropriations held non-self-executing because art. I, § 8, cl. 1 of the Constitution reserves the origination of appropriations bills to the House of Representatives); Baker v. Carr, 369 U.S. 186 (1962) (describing the political question doctrine as serving to insulate the courts from rendering decisions on cases that implicate issues best resolved by the political branches).

120. *See* Medellin v. Texas, 552 U.S. 491 (2008). For a discussion on the cited statute, also known as the United Nations Participation Act, see *supra* notes 68–69 and accompanying text.

121. *Medellin*, 552 U.S. at 529–30.

matter to the UNSC.[122] In its reasoning as to why ICJ rulings are not self-executing, the Court stated, "[n]oncompliance with an ICJ judgment through the exercise of *the Security Council veto*" was "always regarded as an option by the Executive and ratifying senate during and after consideration of the U.N. Charter" in 1945.[123] While *Medellin* assuaged concerns about the expansion of the Executive's lawmaking powers, the ruling leaves an important question unanswered: Would an ICJ ruling become US domestic law if the UNSC voted in its favor and the Executive did not exercise its veto power? By considering the veto power as the ultimate check, the Supreme Court seems to signal that a resolution of the UNSC, which survives the veto power of the Executive, could be enforceable under US law.[124]

If a UNSC-endorsed ICJ judgment could be rendered enforceable under US law, there is no reason why the courts wouldn't grant the same status to a UNSC-endorsed international agreement. Therefore, it is of utmost importance that Congress and the courts exercise their constitutional powers to address this possibility preemptively. This will prevent further spillage of US internal politics onto its foreign affairs and maintain, among others, the separation of powers that the Constitution seeks to provide. The next Part lays out possible measures that the three branches of the US government can take to effectively safeguard the above interests.

III. Checking the Executive's Agreement-Making Powers in the Security Council

The problems discussed in Part II, which result from the Executive's broad mandate in representing the United States in the UNSC, can be addressed through the following measures, individually or in conjunction with one another. First, since Congress gave the Executive the power to represent the United States in the UNSC, Congress can limit that power by amending the United Nations Participation Act (UNPA).[125] Second, the courts have a responsibility to ensure that the system of checks and balances remains unscathed. Courts should abstain from the frequent use of the political question doctrine and ensure Congress maintains its role as the legislature and co-director

122. U.N. Charter art. 94, ¶ 2.

123. *Medellin*, 552 U.S. at 510 (emphasis added).

124. *See id.* at 509–10 ("[A]s the President and Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, the United States retained the unqualified right to exercise its veto of any Security Council resolution. This was the understanding of the Executive Branch when the President agreed to the U.N. Charter.").

125. *See* Part III.

of US foreign policy.[126] Finally, the Executive can advocate putting in place rules in the UNSC that promote legislative advice and consent before passing binding resolutions that endorse long-term international agreements.[127]

A. Amending the United Nations Participation Act

The first proposal to check the Executive's unilateral agreement-making powers in the context of the UNSC is to amend the source of that power: the UNPA. As explained in Part II, Congress granted broad powers to the Executive to represent the US Government in the United Nations, including in the UNSC.[128] Congress can amend that source of authority via new legislation. Doing so would accomplish two objectives. It would limit the Executive's ability to enter into binding long-term international agreements without the approval of Congress and ensure the predictability and stability of the United States' international undertakings vis-à-vis other nations.[129]

More specifically, the UNPA should be amended such that the broad power to "represent the United States in the Security Council" is restricted to those activities that will not directly create long-term legal rights and obligations for the United States.[130] By so doing, Congress could promote the multilateral treaty-making mechanism as the appropriate tool for legally binding the US Government in the long run.[131]

A particular criticism of the Iran Nuclear Deal is that it was an arms control agreement at its core. Yet, contrary to the traditional practice of forming a treaty or an executive agreement, it was structured as a political commitment endorsed by a UNSC resolution.[132] Thus, it was not subject to the scrutiny that the former types of agreements typically undergo.[133] The amended UNPA could be directed to agreements that

126. *See* Part III.

127. *See* Part III.

128. *See supra* notes 67–68 and accompanying text.

129. *See* Aust, *supra* note 46, 372–75; Kanwar, *supra* note 60, at 178 ("[A]ll international actors must have confidence . . . that their obligations will be treated in a predictable, consistent and law-governed manner.").

130. 22 U.S.C. § 287(a).

131. *Cf.* Helfer, *supra* note 57, at 81 (noting that the Security Council "both circumvented and bolstered the decades-old effort to use multilateral treaties to combat transnational terrorism").

132. *See* Jonas & Taxman, *supra* note 17, at 590.

133. *Id.* at 590, 594–95 (noting that historically consequential arms control and nonproliferation agreements have been negotiated as Article II treaties and thus subjected to the rigorous Congressional oversight). In the past, there have also been less significant arms control agreements which have been conducted as executive agreements; however, they have almost always relied on existing legislative or treaty authority unless they were

are qualitatively made as treaties or congressional-executive agreements despite being termed "political commitments." This would grant the President leeway to make temporary or short-term political commitments in his dealings with other nations.

There are potentially two challenges to this proposal, the first being the political consensus necessary to bring it about.[134] But there is also the possibility of constitutional challenges brought in court for encroaching upon the Vesting Clause of Article II.[135] As to the former, either political party in charge of the Executive is naturally inclined to take full advantage of their unilateral powers in the UNSC to shape or constrain the policy agendas of subsequent administrations—as demonstrated by the Iran Nuclear Deal. Thus, Congress has an incentive to act in this area with a strong majority. This proposal will also enable Congress to reinsert itself into foreign policymaking.[136]

However, the more important challenge would stem from the fact that such an amendment to the UNPA would potentially interfere with the sphere of Executive authority. As discussed in Part I, the President has broad authority to sign executive agreements and conduct foreign affairs.[137] Furthermore, under Article II, the President has the power to "Appoint Ambassadors" and "Receive Ambassadors" which can be construed as giving the President sole power to enter into negotiations with foreign states.[138] However, the proposed amendment to the UNPA would not encroach upon this constitutional authority.[139] The President would remain unencumbered to choose and direct his delegates according to the Constitution to represent the United States in any future negotiations in the UNSC.[140]

The Supreme Court held in *Curtiss-Wright* that the President has "plenary and exclusive power . . . in the field of international

mere political declarations that did not rely on or produce any legal document—unlike the Iran Nuclear Deal. *Id.*

134. For a discussion of challenges posed to the legislative process at times of intense political division, see Tyler Hughes & Deven Carlson, *How Party Polarization Makes the Legislative Process Even Slower When Government Is Divided*, LSE US Ctr. (May 19, 2015), https://blogs.lse.ac.uk/usappblog/2015/05/19/how-party-polarization-makes-the-legislative-process-even-slower-when-government-is-divided/ [https://perma.cc/26F3-9C4P].

135. U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

136. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (holding that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative . . . departments").

137. *See supra* notes 19–30 and accompanying text.

138. Shenk, *supra* note 66, at 268–71.

139. *Id.*

140. *Id.*

relations."[141] That power potentially includes that of choosing to negotiate an international agreement in the UNSC. However, as Justice Jackson noted in his concurrence in *Youngstown*, the Court in *Curtiss-Wright* addressed "not the question of the President's power to act without congressional authority, but the question of his right to act under and in *accord* with an Act of Congress."[142] If we accept that the ability of the President to commit the United States to international agreements through the UNSC derives from the UNPA, then only Congress can amend the UNPA to restrict that implicit unilateral agreement-making authority.

Justice Jackson's interpretation of *Curtiss-Wright* notwithstanding, the Supreme Court has consistently affirmed the broad power of the President in conducting foreign affairs, sometimes reservedly,[143] and other times more resoundingly.[144] That being said, even absent consistent judicial enforcement, the proposed amendment to the UNPA would have "significant hortatory effect[s]."[145] Through the amendment process, Congress will have conveyed its expectations as clearly and persuasively as possible. The Executive thus will be incentivized to engage Congress before committing to binding long-term UNSC-endorsed agreements, regardless of its fear of being haled into court for violating the law.

B. Taking a Step Back from the Political Question Doctrine

The judiciary can play a more active role in deciding the legality of the Executive's conduct in foreign affairs by adopting a narrower interpretation of the political question doctrine. Traditionally, courts have resorted to the political question doctrine to protect the "single-voiced statement of the Government's views."[146] The doctrine, as generally applied, leaves room for the President to supersede its constitutional authority while escaping judicial scrutiny due to courts' desire to avoid adjudicating foreign affairs-related matters.[147] Consequently,

141. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

142. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring) (emphasis added).

143. Dames & Moore v. Regan, 453 U.S. 654, 687–88 (1981) (noting that its decision was a narrow one which did not grant the President plenary power in foreign affairs-related matters).

144. Zivotofsky *ex rel*. Zivotofsky v. Kerry, 576 U.S. 1, 13–18 (2015).

145. Shenk, *supra* note 66, at 274.

146. Baker v. Carr, 369 U.S. 186, 211 (1962).

147. *See* Abebe, *supra* note 97, at 234.

the political question doctrine "sweeps too broadly", lacking a clearly delineated framework within which it is applied.[148]

In *Zivotofsky II*, the Court took the political question doctrine one step further and held that the Executive's power over the recognition of foreign states was exclusive and unreviewable—not even by Congress.[149] For Professor Jack Goldsmith, the political question doctrine has become "a discretionary tool" that courts, based on their own independent analysis of US foreign relations, rely on to refuse to adjudicate cases.[150] Objecting to the "guise of judicial modesty" adopted by the courts, Professor Goldsmith argues for a "new formalism," the two pillars of which are reduced judicial discretion and limited use of the political question doctrine.[151]

On the other hand, proponents of the political question doctrine argue "that it reduces the likelihood of constitutional impasses over key [foreign affairs] issues" by making one governmental entity—the Executive—accountable to the voting public.[152] Others argue that because the President is seen by the public as the "dominant actor" in foreign affairs, there is little incentive by other branches, including the judiciary, to intervene "until it becomes clear that the policies have failed."[153] However, neither of these views in favor of the political question doctrine adequately responds to concerns about the dangers of unilateral executive reign over foreign affairs.[154]

Another often cited reason for the courts' invocation of the political question doctrine in the foreign affairs realm is that the Constitution does not contain any criteria for judicially resolving such controversies.[155] However, for "a court frequently able to fully dress a textually nude equal protection or substantive due process clause," that is hardly a sufficient reason to adopt a hands-off approach to important legal

148. *Id.* at 236.

149. *See Zivotofsky*, 576 U.S. at 1. Other courts have similarly taken certain issues beyond political debate using arguments such as the need for "one voice" or the importance of finality. *See, e.g.*, Made in the U.S.A. Found. v. United States, 242 F.3d 1300, 1317–18 (11th Cir. 2001).

150. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1402 (1999).

151. *Id.* at 1396–97.

152. Abebe, *supra* note 97, at 244.

153. *Id.* at 246–47.

154. *See, e.g.*, Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? 8 (1992). Franck famously noted that "[a] foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law." *Id.*

155. *See* Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 Hofstra L. Rev. 215, 217 (1985).

questions related to foreign affairs.[156] The Court's potential finding that a congressional act, like the UNPA, merits judicial deference on a certain issue is distinct from a finding that it should refrain altogether from considering such questions.[157] The latter approach leaves too much discretion to individual judges in resorting to this doctrine and, as Franck poignantly warns, could lead to "jurisprudential incoherence."[158]

In contrast, the Court has interpreted treaties' domestic effects[159] and, at times, their bearing on international issues.[160] As indicated in Part I, treaties have become less desirable, and other tools, including the political-commitment-endorsed-by-UNSC-resolution model, have become more popular. However, seeing as they can create the same, if not more, substantial legal obligations for the United States, the Court should grant similar treatment to suits challenging the legality of the Executive's unilateral entering into such long-term agreements and consider them on the merits.

As critics of the political question doctrine have noted and this Comment has tried to demonstrate throughout Part I, "the Court should be aware that a hands-off policy is not cost-free, particularly in separation of powers claims."[161] A principal justification for using the doctrine is that it promotes predictability and order.[162] However, abstaining from the resolution of a controversy over international agreement-making powers, which is presumably a constitutionally governed issue (Treaty Clause), leads to increased disorder and decreased legitimacy.

In response to the foregoing concerns, scholars have proposed various revisions to the political question doctrine.[163] One proposal ties the use of the political question doctrine to the "position of the US in international politics."[164] The proposal hinges on assessing the complexity of the negotiations that the Executive has been involved in, with particular attention to the parties involved, in deciding whether to employ the

156. *Id.*

157. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1505 (2005).

158. Franck, *supra* note 154, at 9.

159. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229–30 (1986).

160. *See, e.g.*, Perkins v. Elg, 307 U.S. 325 (1939); United States v. Rauscher, 119 U.S. 407 (1886).

161. Champlin & Schwarz, *supra* note 155, at 217.

162. *See* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 507 (2017) ("When a single legal judgment affects many people, having one voice speak first and conclusively is of great value.").

163. *See, e.g.*, Abebe, *supra* note 97; Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 Ariz. St. L.J. 1, 5–10 (2017); Goldsmith, *supra* note 150, at 1424–38.

164. Abebe, *supra* note 97, at 237.

political question doctrine.[165] However, this proposal will fall short of what is necessary to effectuate meaningful judicial review of executive actions in the foreign affairs realm because, in the UNSC, the United States is inevitably dealing with other world powers on matters of great consequence.

A better solution is the "politics-reinforcing political question doctrine" which aims at promoting robust inter-branch debate.[166] This constrained construction of the political question doctrine makes the doctrine least applicable under circumstances where the debate has broken down.[167] Although broad delegations to the Executive are a modern reality, courts must refuse to abstain in situations where, through judicial review, they can lay the groundwork for more political debate on controversial matters.[168]

No matter the manner and undergirding theories for putting limitations on the political question doctrine, the legal and political ramifications of the Iran Nuclear Deal discussed above serve as a warning that should prompt courts to be more judicious in its application. The judiciary's power to apply judicial review to the Executive's foreign policy activities is essential to maintaining a robust system of checks and balances wherein debate of contentious political issues is not foreclosed by unilateral executive actions.

C. Modifying the Security Council Procedural Rules

As the key founder of the United Nations and a Permanent Member of the Security Council, the United States has the ability to take advantage of tools that center on institutional design and procedures to set norms. "The most effective *ex ante* tools . . . [are] agenda setting, attenuated delegation, voting rules . . ., appointments, and funding."[169] However, the UNSC has yet to use these tools to clearly define the circumstances and conditions under which the Council must meet before making decisions.[170]

This Comment proposes that the UNSC adopt a duty to consult, whereby, prior to committing to a binding international agreement via a resolution, Members would have to consult with their national authority that would normally approve such treaty-like agreements. The purpose

165. *See id.* at 237–38.

166. *See* Cohen, *supra* note 163, at 9.

167. *See id.*

168. *See id.* at 25 n.148.

169. Abebe, *supra* note 14, at 528.

170. *See* Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 Harv. Nat'l Sec. J. 320, 324 (2013).

of this duty is to preempt UNSC agreements that do not have adequate domestic support in the Members' countries. Consultation with domestic authorities is a means of ensuring stability, predictability, and legitimacy of UNSC decisions while promoting a UNSC that respects its members' internal systems of checks and balances.[171] Moreover, the legal certainty that will follow from the adoption of the foregoing duty will "improve the accountability of the UNSC as a whole and of its members."[172]

The UNSC can adopt the duty to consult in three different ways, namely through amending the UN Charter, amending the Provisional Rules of Procedure (PRoP), and through an informal change of practice.[173] In light of previous unsuccessful attempts to amend the UN Charter, the chances of the adoption of the duty to consult through that channel are slim.[174]

On the other hand, procedural matters, including amending the PRoP, need nine positive votes to pass and could not be blocked by a veto of one of the Permanent Members.[175] Therefore, the United States can diplomatically garner the necessary support to push the amendment describing this duty through the UNSC even if other Permanent Members oppose it.[176]

Chapter VI of the PRoP entitled "Conduct of Business" is especially well suited for accommodating a duty to consult.[177] This duty could be encapsulated under a new Rule. The UNSC would be obligated to appoint a committee or rapporteur to prepare a report confirming that all parties have obtained the approval of their domestic legislature on entering the international agreement at issue. Only then would UNSC members be permitted to proceed with voting on an endorsing resolution.

Finally, Members could consensually change their practice. A great deal of recent changes to UNSC working methods have been through informal mutual agreements amongst UNSC Members.[178] The

171. *See id.* at 355.

172. Daniel Moeckli & Raffael N. Fasel, *A Duty to Give Reasons in the Security Council*, 14 Int'l Orgs. L. Rev. 13, 15 (2017).

173. *See id.* at 73.

174. *See id.*

175. *See* U.N. Charter art. 27, ¶ 2.

176. *See* Spain, *supra* note 170, at 362.

177. *See Repertoire of the Practice of the Security Council*, U.N. Security Council, https://www.un.org/securitycouncil/content/repertoire/structure [https://perma.cc/SSA9-J8ZQ].

178. *See* Michael C. Wood, *Security Council Working Methods and Procedure: Recent Developments*, 45 Int'l & Compar. L.Q. 151, 159 (1996).

President of the UNSC can later "formalize" these agreements through Statements or Notes.[179]

That being said, both the US Executive and other countries have long benefitted from the politically motivated decision-making process of the Council and may not have the incentive to restrict their own authority in pursuing their own national interests.[180] Adopting this proposal would increase long-term certainty and decrease the flexibility of the Permanent Members in pulling back from any potential commitments they make under a Resolution. Therefore, those members would resist, at least initially, the adoption of a duty to consult, for it could reduce their influence on the implementation of a UNSC-endorsed agreement.[181]

On the other hand, there is growing pressure among the U.N. Members on the UNSC to reform its procedural rules to increase predictability and transparency.[182] The adoption of a duty to consult would decrease the asymmetries inherent in the structure of the UNSC.[183] It will assure parties that entering into a UNSC-endorsed agreement will not merely impose legal obligations on them but will also come with the certainty generally associated with multilateral treaties.

At the same time, UNSC Members, especially the five Permanent Members, have a vested interest in maintaining the legitimacy and credibility of the Council given the great power they hold over this body. Permanent Members should make it a priority to stop the repeat of another stalemate within the UNSC similar to the one that occurred over the Iran Nuclear Deal. Therefore, it is important that the United States, in partnership with the other members, undertakes the modification of UNSC's procedural rules to adopt the proposed duty to consult.

Conclusion

Executive power to conduct foreign policy is broad.[184] However, Congress is another branch of government constitutionally entrusted with coordinating US foreign policy.[185] In addition, constitutional checks and balances necessitate both judicial and congressional

179. *See* Moeckli & Fasel, *supra* note 172, at 75.
180. *See* Spain, *supra* note 170, at 362.
181. *See id.*
182. *See id.*
183. *See* Moeckli & Fasel, *supra* note 172, at 61–62.
184. *See supra* Part I.
185. *See supra* notes 1–5 and accompanying text.

oversight in this area, especially where executive action can lead to long-term binding international commitments.[186]

The Iran Nuclear Deal was an international political commitment endorsed by the UNSC.[187] The agreement, which was subject to fierce criticism by a majority of Congress, was nonetheless entered into unilaterally by the executive branch.[188] The aftermath of this agreement, namely the US withdrawal, the ensuing stalemate in the UNSC, and the United States' subsequent attempts at rejoining the agreement demonstrates the costs to long-term US foreign relation interests of such unilateral actions.[189] More importantly, if the President were to enter the United States into a legally binding UNSC-endorsed agreement, it could give rise to enforceable legal obligations and consequences for US persons and the government.[190] Therefore, it is important that such agreements are made subject to interbranch scrutiny. To that end, this Comment puts forth three proposals to limit unilateral Executive agreement-making powers in the UNSC, either of which would be a step in the right direction to ensuring that future administrations do not step into the legislative realm.

186. *Id.*
187. *See supra* notes 35–38.
188. *See generally* Bradley & Goldsmith, *supra* note 16.
189. *See supra* Parts II(C), (D).
190. *See supra* Part II(D).