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Understanding the "Other" International Agreements

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I. INTRODUCTION

On November 6, 2013, the United States deposited an "instrument of acceptance" with the United Nations to indicate its consent to be bound to the Minamata Convention, a treaty "to protect human health and the environment from the adverse effects of mercury."[1] The instrument of acceptance never passed through the Senate's chambers for advice and consent because the executive branch insisted it could "implement Convention obligations under existing legislative and regulatory authority."[2] In other words, the Convention was negotiated, signed, and ratified outside of the purview of the Treaty Clause in Article II of the U.S. Constitution.[3] Similarly, the Office of the United States Trade Representative has repeatedly announced that the Anti-Counterfeiting Trade Agreement ("ACTA") is consistent with existing U.S. law and is ready for implementation in the United States.[4] The executive branch believes it has

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[1] Minamata Convention on Mercury, Jan. 19, 2013, available at http://www.mercuryconvention.org/Convention/tabid/3426/Default.aspx (last visited February 24, 2015).

[2] Media Note, Office of the Spokesperson, U.S. Department of State, United States Joins Minamata Convention on Mercury, November 6, 2013, available at http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm (last visited February 24, 2015).

[3] 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).

[4] "As noted, the ACTA is consistent with existing U.S. law and does not require the enactment of implementing legislation. The United States may therefore enter into and carry out the requirements of the Agreement under existing legal authority, just as it has done with other trade agreements." Fact Sheet, ACTA: Meeting U.S. Objectives, October

the authority to implement the Act without congressional action, although no academic commentators have agreed.[5] Assuming the President has the authority to conclude these agreements, two questions arise: where is this authority and is the President required to demonstrate it before binding the nation under international law?

Even researchers who are aware of the sphere of international agreement-making outside of the Article II process might be unaware of the distinctions in the forms of agreements that are concluded, and also might be unaware of legal requirements that exist for the creation of each form of agreement. Nomenclature such as "executive agreements" and "congressional-executive agreements" only furthers to muddy the waters because there are actually several types of executive agreements, and the distinctions are critical to understanding their legal legitimacy. There are "executive agreements" that the President is entitled to conclude from his constitutional powers. These are otherwise known as "sole executive

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1, 2011, available at https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/september/acta-meeting-us-objectives (last visited February 24, 2015).

[5] *E.g.*, Eddan Katzdl and Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INTL. L. ONLINE 24 (2009); Christina Eckes, Elaine Fahey, & Machiko Kanetake, *International, European, and U.S. Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)*, 16 CURRENTS: INT'L TRADE L.J. 20 (2012); Sean Flynn, *ACTA's Constitutional Problem: The Treaty Is Not A Treaty*, 26 AM. U. INT'L L. REV. 903 (2011); Joseph P. Johnson, *The Anti-Counterfeiting Trade Agreement and Its Constitutional Dilemma*, 67 CONSUMER FIN. L.Q. REP. 441 (2013).

agreements." Then there are congressional-executive agreements: agreements concluded by the president with congressional authorization. However, there are two types of congressional-executive agreements and they operate fundamentally differently. Similar to "sole executive agreements" are "ex ante" agreements. The agreements are similar because the President operates pursuant to pre-existing authority. With ex ante agreements, the congressional branch passes an authorizing statute that the President signs into law. The President subsequently uses that authority to negotiate and conclude an international agreement. "Ex post" congressional-executive agreements, on the other hand, refer to agreements that the President elects not to submit to the Senate for advice and consent pursuant to the treaty ratification process that appears in Article II of the U.S. Constitution. Instead, the President submits these agreements to both branches of Congress; the approval process is akin to the approval of ordinary domestic legislation pursuant to the Presentment Clause.[6] Despite the similarity in nomenclature, the processes for forming the two types of congressional-executive agreements are dramatically different. Consequently, the legitimacy of each agreement requires an investigation into the source and authority for the agreement's approval.

An even less understood and studied category of international

[6] U.S. CONST. art. I, § 7, cl. 2.

commitments are negotiated and concluded by the executive branch with absolutely no input from Congress. Rather than provide legally enforceable rights and obligations, "political commitments" provide "moral and political guidance" towards how a state should act.[7] By creating political commitments in lieu of treaties, the states do not intend for the agreements to be legally binding. Agreements that are not intended to be legally binding do not constitute treaties under international law,[8] and will therefore not be governed by international law.[9]

This paper begins by describing various forms of international agreements and Congress's level of participation in their creation. Section III describes the standards used to create international agreements and to differentiate among them. It also describes the Case Act and its shortcomings; the Case Act is the law that requires international agreements to be reported to Congress. Section IV provides guidance for the researcher

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[7] Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507 (2009). More information on the terminology and definition appear in Section IID.

[8] The Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The United States is not a party to the Vienna Convention, but it has long recognized its precedence under customary international law. *See* Hollis & Newcomer, *supra* note 7, at 519 n.40.

[9] International law is dependent upon nation-states' willingness to bind themselves to the text of an agreement. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 296 (1977).

on identifying authority for concluding or implementing international agreements, because the President rarely makes this authority explicit.

II. AN OVERVIEW OF "OTHER" INTERNATIONAL AGREEMENTS

The Treaty Clause has earned its critics. The required two-thirds' concurrence of the Senate enabled thirty-five senators to hold up ratification of the Treaty of Versailles, a treaty endorsed by their forty-nine remaining peers.[10] Human rights treaties in particular have been held hostage, leading to the Senate's popular nickname as the "graveyard of treaties."[11] Perhaps as a result of the complicated treaty approval process, various forms of international agreements have emerged that provide the executive with greater flexibility when concluding agreements with foreign states.[12] In

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

[11] Jean Galbraith suggests reading *The Graveyard of Good Treaties*, *in* NATION, Mar. 15, 1900, at 199, for a history of that phrase in her article *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 308 (2012).

[12] One lucid explanation of challenges of Article II treaty ratification can be found in Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1310 (2008). In particular, she uses the ideological positions of the 67th Senator (versus the 51st) to demonstrate the polarized extremes of politics: "If we array the senators in the 109th Congress from most liberal to most conservative according to a widely used measure of ideological position, we see that in the 109th Congress the sixty-seventh senator was just over twice as conservative as the fifty-first senator.220 In the reverse dimension, the sixty-seventh senator was also just over twice as liberal as the fifty-first. In other words, the supermajority requirement means treaties must gain the support of senators that are twice as conservative or liberal as the so-

fact, far more often than not, the President creates agreements with foreign nations by sole executive action or by permission from Congress.[13] These agreement forms themselves have a troubled history; there have been many instances in which reliance upon these forms of agreements have been questioned, most recently for lack of transparency and accountability in negotiations in the context of the ACTA.[14]

In an attempt to demystify the international agreement making process in the United States, this article will be specific about the type of agreements being discussed. It will not discuss the well documented and widely understood Article II treaty process in this section, in order to focus on the *other* international agreements and their histories, which are less frequently discussed. The article also reorders the classification of the three types of agreements. The agreement forms can be understood by situating them in their historical context, but the legitimacy of their authorization also

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called median voter in the Senate." *Id.* at 1310-11.

[13] According to the Congressional Research Services, most international agreements are not concluded pursuant to the procedure outlined in Article II. In the first fifty years after its founding the nation concluded two times as many treaties as other international agreements. Congressional Research Services, Library of Congress, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 15 (Comm. Print 1993). From the period from the Second World War to 1993, the executive branch presented Article II treaties in only about ten percent of its total international agreement making. *Id.* That percentage has likely decreased since the report was created in 1993. Since May 2005 (a date chosen to represent a ten year period from this article's publication), for example, only 70 treaties have been presented to the Senate for its advice and consent.

[14] See *supra* note 5.

provides a useful descriptive device. This section of the article discusses, in turn: A) ex post congressional-executive agreements, which receive explicit endorsement by two branches of the government; B) sole executive agreements, which have constitutional support; C) ex ante congressional-executive agreements, which ostensibly have congressional permission; and D) political commitments, which have none of these elements.

A. Both Houses of Congress Are Necessary to Approve Ex Post Congressional-Executive Agreements

The United States has long observed an alternative method of creating binding international agreements which involves participation of the House of Representatives and requires only a majority of the Senate rather than the concurrence of "two thirds of the Senators present."[15] Much like the creation of an Article II treaty, "ex post congressional-executive agreements" are concluded by the President without any specific constitutional or statutory authorization in advance of the negotiations.[16]

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[15] U.S. CONST. art. II, § 2, cl. 2.

[16] The history of the ex post agreement can be found in Bruce Ackerman and David Golove's fascinating article, *Is NAFTA Constitutional*, where the authors trace the creation of the agreement form to the 1920s, culminating in actions during the New Deal. [16] Ackerman & Golove, *supra*, note 9 at 861. Ackerman and Golove coined the term "ex post" congressional-executive agreements in their seminal article on the process. The authors present the story of President Taft hoping to win a tariff reduction with Canada. He had not been authorized by congress to make such an agreement, so he coaxed the language to contain a promise to coax Congress to enact statutes to authorize the deal upon his return. *Id.* Not all scholars agree with the Ackerman and Golove's historical account. See e.g. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 988 (2001) ("treaties and non-treaty agreements emerged near-equivalents in two important respects long before the alleged watershed of 1944-1946").

These agreements become law after they pass through Congress as ordinary legislation or joint resolutions and are signed by the President pursuant to the Presentment Clause.[17]

It would be misguided to attribute the success of congressional-executive agreements solely to their ability to serve as an end run around the cumbersome requirements in the Treaty Clause. In fact, one can make an argument in favor of congressional-executive agreements because they involve the House of Representatives, and are thus more responsive to American citizens.[18] Oona Hathaway writes that the Senate today is even less representative of its constituency today than it was during the Founding, noting that "Senators representing only about eight percent of the country's population can halt a treaty."[19]

One argument in favor of relying on ex post congressional-executive agreements would be to bypass the problem of non self-executing treaties.[20]

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[17] U.S. CONST. art. I, § 7, cl. 2. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."

[18] "Surely majority action by both Houses is more "democratic." ROBERT A. DAHL, CONGRESS AND FOREIGN POLICY 24 (1950).

[19] Hathaway, *supra* note 12, at 1310.

[20] "At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative 'implementation.'" Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties,* 89 AM. J. INT'L L. 695, 695 (1995).

Under U.S. law, the advice and consent of the Senate is not enough to create domestic obligations for treaties; although a properly ratified treaty becomes the Supreme Law of the Land,[21] it does not always follow that each treaty can operate as federal law. Treaties that cannot "self-execute" require implementing legislation to give them effect.[22] If a treaty is not self-executing, something absurd results: the United States can be bound by the terms of a treaty internationally but the treaty does not create domestic obligations until Congress has created implementing legislation.[23] This principle was most recently illustrated in Medellín v. Texas, where the Supreme Court determined that the Constitution does not require state courts to honor treaty obligations without domestic legislation

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[21] U.S. CONST. art. VI, cl. 2.

[22] See Vazquez, *supra* note 19, at 700-01 (discussing the introduction of this distinction into U.S. jurisprudence in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829): "The Court's holding in Foster recognizes that the general rule established by the Supremacy Clause, under which treaties are enforceable in the courts without prior legislative action, is one that may be altered by the parties to the treaty through the treaty itself. Treaties do not require legislative implementation in the United States "by their nature," but they may require legislative implementation through affirmative agreement of the parties. If the parties to the treaty agreed that the rights and liabilities of the individuals before the court were to be affected only through future lawmaking acts of the states parties—if they "stipulated for some future legislative act"—then the treaty does not "operate of itself" and accordingly cannot be enforced by the courts without prior legislation.")

[23] *See* Medellín v. Texas, 552 U.S. 491 (2008). An International Court of Justice opinion, *In the Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.)*, 2004 I.C.J. 12 (*Avena*), would have provided relief for petitioner Medellín to file a habeas application challenging his conviction and sentence on the grounds that he has not been informed of his rights under the Vienna Convention on Consular Relations. The Court found that the *Avena* judgment created an international obligation that did not become domestically binding law because none of the treaty sources created binding federal law without the existence of implementing legislation, and no such legislation had been enacted.

implementing the terms of the treaty.[24]

As a result, many treaties effectively require not only two-thirds of the Senate to approve the terms, but also require the House and Senate to pass implementing legislation—in effect giving the House an opportunity to hold a properly ratified treaty hostage if it does not approve of the terms. Ex post congressional-executive agreements require the House to be involved during the approval process, and implementing legislation can be created during the process by which the agreement is approved. Unlike a treaty, which requires an inquiry into whether it is self-executing, a congressional-executive agreement raises no question of its domestic legal status, because it has received the blessing of both houses of Congress and the President.[25]

Some scholarly debate remains as to whether congressional-executive agreements are a class of agreements that can be substituted with Article II treaties, or whether the treaty clause is exclusive to certain categories of agreements.[26] After all, the argument goes, if agreements concluded outside the purview of the Treaty Clause are perfectly valid, why is there a

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[24] *Id.*

[25] Indeed the entire focus of Oona Hathaways' article Treaties' End, which is heavily relied upon for this piece, is that congressional-executive agreements offer so many advantages to Article II treaties that they should be used more predominantly. Hathaway, *supra* note 12, at 1310.

[26] *E.g.* Professor Laurence Tribe examined the text, history, and structure of the Constitution and concluded that "the Article II treaty making procedure is exclusive." Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1226 (1995).

heightened approval process for treaties?[27] Nonetheless, the Restatement of Foreign Relations endorses the position that the congressional-executive agreement can be used interchangeably with the treaty form.[28] The procedure for passing an agreement requires deliberation by both houses, which requires debate in parallel tracks. For ordinary legislation, variations in approved versions of a bill are reconciled in a joint session between the House and the Senate. The reconciled bill, once approved by both chambers, is then presented to the President for his signature. Congressional-executive agreements vary from ordinary legislation because the President does not have the final say. The executive branch must take the altered agreement back to the original negotiating state for approval again.[29] The time and involvement is much greater in this instance than for domestic legislation. Nonetheless, the result of this process is a transparent,

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[27] "[T]here must be a substantive component to treaties that is more threatening (or, more precisely, militates for greater caution) than the substance of nontreaty agreements ." Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 194 (1998). Even Hathaway makes the case that certain types of agreements, should remain "treaties" under the Article II process, because the subject for a congressional-executive agreement cannot exceed "the bounds placed by the Constitution on congressional authority" enumerated in Article I. Hathaway, *supra* note 12, at 1339.

[28] REST. 3D, FOREIGN RELATIONS § 303 cmt. e. (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.").

[29] Of course, the Senate might require amendments when it is presented with a treaty pursuant to Article II, § 2, cl. 2, requiring the Executive to return to the negotiating table with a foreign state, but the process of reconciliation is at least eliminated.

democratically representative, reliable agreement that involves both houses of Congress and the Executive.

B. The Constitution Permits the Creation of a Class of Executive Agreements Without Congressional Involvement

The President concludes a sole executive agreement without any formal action by the House or the Senate, but rather pursuant to the President's own constitutional authority as Commander-in-Chief.[30] Despite the fact that this implicit authority provides the President with the ability to create binding law without congressional participation, scholars and courts have long supported it.[31] Because of the constitutional restraints on the

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[30] Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking,* 54 UCLA L. REV. 309, 369 (2006) (arguing that the constitutional designation of the President as commander-in-chief of the armed forces enables the president to "make legally binding decisions—such as the disposition of armed forces personnel--without the involvement of Congress").

[31] *See, e.g.*, REST. 3D, FOREIGN RELATIONS §303(4) (1987) ("The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."). For example, Louis Henkin claimed "The President can . . . make many [international] agreements on his own authority, including, surely, those related to establishing and maintaining diplomatic relations, agreements settling international claims, and military agreements within the Presidential authority as Commander in Chief. There are doubtless many other 'sole' agreements within the President's foreign affairs powers, but which they are is hardly agreed." LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 229 (1996). The presumptive authority is not without debate, however. Michael Ramsey, for example, argues that the framers intended for the power to conclude executive agreements only to extend to minor and temporary matters. Ramsey, *supra* note 27, at 133. Regardless of the Constitutional authority for these agreements, there is judicial authority and precedent for them and they are part of the international agreement framework. *See, e.g.*, United States v. Curtiss-Wright Export Co 299 U.S. 304, 318 (1936); United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942); and Dames & Moore v. Regan, 453 U.S. 654 (1981). "The Constitution provides precise procedures to govern the adoption of each source of law recognized by the Clause. Significantly, none of these procedures permits the President--acting alone--to adopt, amend, or repeal supreme federal law. Bradford R. Clark, *Domesticating Sole Executive Agreements,* 93 VA. L. REV. 1573,

presidential authority to enter into sole executive agreements, they did not account for a significant portion of international agreements concluded by the United States until recently.[32] The reality of those limitations has been upended, in part on reliance upon a handful of Supreme Court decisions, with claims of 15,000 sole executive agreements in the past half-century.[33]

The limits of the Commander-in-Chief power to conclude international agreements were widely tested throughout the twentieth century. The extent to which the President may conclude *peacetime* agreements under this power, specifically, remains an open question. President Monroe famously submitted to the Senate an agreement with Great Britain to limit the number of naval forces on the Great Lakes, inquiring at the time whether it was "such an agreement as the Executive is competent to enter into by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate, and in the latter case for its

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1575 (2007).

[32] According to a study done in 1984, only seven percent of all international agreements were solely based on enumerated powers of the president, and of that seven percent, military agreements composed the majority. LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 14 (1984). In 1967, the Assistant Legal Adviser for Treaty Affairs for the Department of State estimated "that over 97% of the executive agreements that have been concluded by the United States during the past several decades are directly based upon and authorized by legislation enacted by Congress."

[33] Van Alstine cites to 15,000 sole executive agreements in the last fifty years. Van Alstine, *supra* note 30, at 319. The fuller history of the Supreme Court doctrine can be found in Ramsey, *supra* note 27, at 145.

advice and consent, should it be approved."[34] Presumably, President Monroe wanted to add the Senate as a party to remove any doubt the British government might have about the binding character of the agreement.[35] Ackerman and Golove remark that, whatever the reason, the incident "suggests how narrowly early Presidents construed their leeway under the Treaty Clause."[36] Later presidents would test the boundaries of their Article II powers without Senate endorsement.

Despite their constitutional legitimacy, sole executive agreements are less reliable than congressional-executive agreements. Just as a President may issue an Executive Order that ignores or rescinds a previous Executive Order, so can a subsequent President, through actions or statements, overturn an antecedent sole executive agreement.[37] Ackerman and Golove highlight President Theodore Roosevelt's concern regarding an agreement to place Santo Domingo under American receivership. The Senate rejected the treaty but the President put the agreement into effect anyway, citing his *modus vivendi* authority to conclude international agreements.[38] According

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[34] S. EXEC. DOC. NO. 9, 52 Cong. 2d Sess. (1892).

[35] James F. Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 YALE L.J. 63, 72 (1905).

[36] Ackerman & Golove, *supra* note 9, at 816-17.

[37] *Id.* at 820, n.70 (describing the literature pertaining to arguments for and against the president's sole ability to make binding obligations).

[38] The Commander-in-Chief authority is just one of several categories under which

to Theodore Roosevelt, the Constitution did not forbid him from temporarily entering the agreement pending senate reconsideration, but "it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office."[39] Executive agreements that do not receive congressional endorsement thus face a question of permanence.

C. Ex Ante Congressional-Executive Agreements Authorize the President to Conclude an Agreement

The United States enters into the vast majority of international agreements not as treaties, sole executive agreements, or ex post congressional-executive agreements, but rather *ex ante* congressional-executive agreements.[40] Despite the similarity in nomenclature with ex post

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presidents claim to have the authority to conclude international agreements. Another substantial category is referred to as "modus vivendi," which refer to agreements of a temporary nature, which are normally put into effect pending further action. In the Santo Domingo instance, President Roosevelt declared the agreement was put into effective pending Senate *reconsideration* (emphasis added). See PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 360 (1905).

[39] THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 510 (taken from Ackerman & Golove, *supra* note 9, at 819).

[40] The study of agreements concluded between 1946 and 1973 found that almost eighty-seven percent of all international agreements were executive agreements entered by the President under statutory authority granted by Congress. JOHNSON, *supra* note 31, at 12-13. A second famous, but also dated, study found that "the overwhelming proportion of international agreements are based at least partly upon statutory authority (88.3 percent of agreements reached between 1946 and 1972), followed by treaties (6.2 percent) and agreements based solely on executive authority and action (5.5 percent)." R. ROGER MAJAK, 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE

congressional-executive agreements, ex ante agreements share many commonalities with sole executive agreements. First and foremost, their legitimacy hinges upon preexisting authority to conclude an agreement. To form an ex ante agreement, the President does not rely upon his own presidential powers to conclude an agreement, but rather on statutory authority bestowed upon him by Congress and signed into law by the President.[41]

The terms and specificity of statutory authorization will vary. In some instances, the language authorizes someone in the executive branch (the President may be named, but others, such as the Secretary of Defense may be as well) to act in a very specific manner. For example, the Mapping Intelligence Authorization Act for Fiscal 1987 provided that "The Secretary of Defense may authorize the Defense Mapping Agency to exchange or furnish mapping, charting, and geodetic data, supplies and services to a foreign country or international organization pursuant to an agreement for

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REGULATIONS AND PRACTICES 22 (Comm. Print 1977). These studies make no distinction between ex ante and ex post statutory approval, but see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 150 (2009) (finding that only nine of the three thousand executive agreements concluded between 1980-2000 were ex post congressional-executive agreements).

[41] Normally, authorization acts that the President signs into law do not expire, meaning they provide authority for any subsequent president, not just the one signing the bill into law, to enter into an ex ante agreement. In fact, authorization acts have been used to provide a basis for international agreements decades after they were signed into law. *Id.* at 214.

the production or exchange of such data."[42] While the actions were specified in the authorization, the foreign countries and international organizations were not, giving broad discretion to the executive branch to determine with whom to conclude the agreements. In other authorization acts, such as the Mutual Education and Cultural Exchange Act of 1961, the executive was granted even broader range to conclude "agreements with foreign governments and international organizations, in furtherance of the purposes of this Act."[43]

The authorization will likely not even stipulate provisions for congressional oversight after the agreement in concluded. The Fishery Conservation and Management Act of 1976, for example, requires an agreement's transmittal to congress sixty days before the agreement enters into force.[44] However, the text of the Act does not require congressional approval ex post of the agreement. The Act instead provides that the agreement shall enter into force if Congress does *not* act.[45] The vast majority of authorization acts do not require ex post approval, which means

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[42] Pub. L. No. 99-569, § 601(a), 100 Stat. 3190, 3202 (1986) (codified as amended at 10 U.S.C. § 454).

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

[44] Pub. L. No. 94-265, § 203, 90 Stat. 331, 342 (codified as amended at 16 U.S.C. § 1823).

[45] *Id.* emphasis added. The Act does, however, provide the ability for Congress to disapprove of the agreement through a joint resolution. *Id.*

that not only does the executive have tremendous leeway when concluding an agreement, but Congress also has no recourse if it disagrees with any of the agreement's terms.[46] Even more troubling is that the authorization acts often have no expiration to them, meaning that a president today might conclude an agreement pursuant to authorization that was granted decades earlier, in a completely different political reality and climate.[47]

Benefits of the ex ante congressional-executive agreement are plain to see. These agreements rely not solely upon the constitutional authority of the President, but upon interbranch coordination with the Congress.[48] Ex ante congressional-executive agreements have the status of domestic legislation, having gone through both houses and the President, which means they provide greater legitimacy to foreign states.[49] When the

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[46] Hathaway, *supra* note 40, at 167 ("And if Congress were to object to an agreement, it would have no recourse short of a majority vote in each house, subject to veto by the President, to undo an international commitment made using its delegated authority. Even then, Congress would only be able to render the agreement unenforceable under U.S. domestic law--the binding international commitment would remain").

[47] *Id.* at 214. "Many agreements today are concluded under broad ex ante authority granted to the President by Congress four or five decades earlier in a vastly different context."

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

[49] Similar to the argument espoused above, even a treaty that negotiators believe will be ratified domestically still requires implementing legislation. Ex ante congressional-executive agreements have greater domestic legal status than treaties, which provides more reliable commitments. Hathaway, *supra* note 12, at 1316.

Constitution does not empower a president to make agreements that bind the nation, advance congressional authority provides flexibility during negotiations and a guarantee to the foreign state that the commitment will be honored.[50] Indeed, a foreign state is certain to prefer ex ante congressional-executive agreements as they are more secure, reliable and faster to create.

Of course, the appearance of congressional participation is misleading. In reality, the lack of congressional involvement during the process, which makes negotiating and concluding an agreement so much easier for the executive, shows how little interbranch coordination truly exists.[51] The process described above represents a dramatic change from the level of oversight that Congress previously conducted with international agreements, which provided "none of the broad, open-ended, time unlimited grants of authority from Congress to the president that we find today."[52]

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[50] Ackerman and Golove detail an interesting story of the United States backing out of a trade agreement with Brazil because it relied upon an executive agreement that could not bind the United States without the Senate's consent. Ackerman & Golove, *supra* note 9, at 822-23.

[51] As referenced earlier, many of the agreements are concluded under broad authority granted to the President. Professor Hathaway furthers this point by stating that "Even though the agreements have been 'approved' by Congress in the narrow legal sense, there is little genuine cooperation between the President and Congress in the process of creating the agreements." Hathaway, *supra* note 40, at 214.

[52] *Id.* at 173.

D. Political Commitments Are Being Concluded With No Congressional Involvement

Political commitments provide yet another vehicle for the United States to enter into agreements with foreign states.[53] Hollis and Newcomer define a political commitment as "a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature."[54] Their definition not only inquires into whether the instrument provides a legally binding constraint, but also into its focus on their "political or moral" nature, which provides a useful mechanism to distinguish political commitments from other low-grade international agreements, such as contracts for sales.

Neither Congress nor the Executive has regarded political commitments as falling under the purview of the Treaty Clause.[55] And because the

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[53] The nomenclature for this form of agreement has changed over time. The original nomenclature "gentlemen's agreement" has fallen out of favor and the Restatement currently uses the terminology "nonbinding agreements." REST. 3D, FOREIGN RELATIONS § 301, Comment e. Hollis and Newcomer's terminology captures all of the forms of informal agreements, including de facto agreements, political texts, extralegal agreements, nonlegal agreements, and international understandings. Hollis & Newcomer, *supra* note 7 at 516, n.30. Confusingly, the phrase is not endorsed unanimously, see the recent article by Jean Galbraith & David Zaring, *Soft Law As Foreign Relations Law*, 99 CORNELL L. REV. 735, 794 (2014) ("We have chosen to use the term 'soft law' to refer to nonbinding transnational agreements between executive branch actors because the term is both convenient and frequently used in this context."). However, "soft law" is also a term of art referring to "international declarations, comments, interpretations, decisions, and pronouncements." David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 834 (2012). "Political commitment" captures the concept of an agreement more than a unilateral pronouncement.

[54] Hollis & Newcomer, *supra* note 7, at 517.

[55] Hollis & Newcomer, *supra* note 7, at 549.

commitments are not legal instruments, their formation is not governed by the language in the Presentment Clause.[56] Consequently, very little attention has been paid to whether or how the President can conclude political commitments.[57] Unsurprisingly, no court has determined that the Constitution regulates them. Instead courts treat them as nonjusticiable political questions to be "redressed outside the courtroom."[58] Of course, there is no opportunity to redress these issues because the Executive operates under the impression that no law or practice obligates him to inform Congress of the creation of a political commitment. The agreements are not submitted to the Senate as Article II Treaties and they are not currently reported to Congress under the Case Act, leaving a large body of foreign policy and agreement making to go unchecked and potentially unnoticed.

It is not possible to identify the number of political commitments that have been concluded in the past fifty years, because, as this article will demonstrate, they are not required to be reported. We do know that the

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[56] U.S. CONST. art. I, § 7, cl. 2 refers only to bills that become laws.

[57] Hollis & Newcomer, *supra* note 7, at 513 ("The question of whether and how the United States can enter into political commitments with other nations has received virtually no attention").

[58] *Id.* at 555, n.203 (citing to Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 376 (7th Cir. 1985) and Natural Res. Def. Council v. EPA, 464 F.3d 1, 8-9 (D.C. Cir. 2006) (holding political commitments not cognizable by U.S. courts)).

United States increasingly relies on "non-legal understandings" in foreign policy.[59] Harold Koh gave several examples during his speech on non-legal understandings, including the "Arctic Council," which emerged as a group of eight states to facilitate sustainable development and cooperation in the Arctic.[60] The use of these agreements has become widespread, particularly since the 1970s.[61] The content and form vary widely, having "a significant impact on matters including security, arms control, nuclear proliferation, monetary exchange, financial capital, sovereign debt, trade, health, conservation, environmental preservation, pollution, development, and human rights."[62]

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

[60] *Id.*, at 14 ("Again, the text is not legally binding, but it includes significant undertakings, and states have already made significant progress in fulfilling their pledges and improving nuclear security"). The Arctic Council is even more interesting as it "layered on top of a legal backdrop of the Law of the Sea Convention, and the customary international law it reflects, which answer important questions about sovereign rights and jurisdiction in the Arctic. Now notice that the Council is not a formal international organization; it was not set up by an international agreement, and the majority of its work is not legally binding." *Id.*

[61] Hollis & Newcomer, *supra* note 7, at 565. The authors list an array of political commitments after the Ford Administration including the Sinai Accords, the Bonn Declaration and the London Guidelines on Nuclear Exports and Chemical Trade, the Algiers Accords, commitments to reflag Kuwaiti oil tankers, the 1992 Charter for Partnership and Friendship with the new Russian Federation, the Rio Declaration, and the G8 Climate Change Declaration. *Id.*

[62] *Id.* at 529.

A political commitment might take the shape of an oral agreement or a memorandum of understanding among mid-level government officials. It might also be a formal document that shares all of the characteristics of a treaty, except for a disclaimer stating that the compact is politically, not legally, binding. As with ex ante congressional-executive agreements and sole executive agreements, political commitments do not require post-hoc congressional approval, which offers the executive branch a great deal of flexibility in negotiations.[63] A political commitment also provides the executive branch with the ability to terminate the agreement unilaterally or to deviate from it without legal consequences.[64]

III. STANDARDS AND REQUIREMENTS FOR THE CREATION OF "OTHER INTERNATIONAL AGREEMENTS"

The previous section explained how various international agreement forms are concluded. The question of when agreements are concluded and

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

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

which forms are adopted appears not to be driven by content but rather by politics. After the greatest empirical inquiry into the agreement forms, Oona Hathaway discovered that "the decision to pursue an agreement through one or the other of the two major international lawmaking processes is driven principally by historical happenstance and political considerations."[65] Although the evidence indicates the decision is a "happenstance," there is some guidance on the formation in the State Departments' "Circular 175."[66] There is also an applicable federal law; the law does not govern the form of the agreements, but instead requires that international agreements not concluded pursuant to the Treaty Clause be reported to Congress.[67] This section is intended to help the reader understand the extent of the legal requirements.

A. Circular 175

The Department of State makes the decision to conclude an international agreement as a treaty or as one of the other agreement forms. This decision is guided, in part, by an internal document known as the

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[65] Hathaway, *supra* note 12, at 1249 (referring to the debate between executive agreements and treaties).

[66] Circular 175. The standards used to identify the procedure for creating international agreements have been in place since 1953 and appear in their codified version in the Foreign Affairs Manual Objective 1 from FAM. 11 FOREIGN AFFAIRS MANUAL 720 (also available at the State Department website http://www.state.gov/s/l/treaty/c175/ (last visited February 23, 2015)).

[67] Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b).

Circular 175.[68] The Circular outlines eight factors to consider when selecting the agreement form: 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 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.[69] Although the criteria may appear determinative at first glance, Hathaway argues that only the fourth and the fifth factors "have any significant bearing on the choice between the Article II and congressional-executive agreements processes."[70]

The Circular also provides guidance on constitutional requirements that follow from the pursuit of one agreement form over another. The primary objective of the Circular is to differentiate between executive and

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[68] Circular 175, *supra* note 66.

[69] *Id.* at 4-5.

[70] Hathaway, *supra* note 12, at 1251-52 (arguing that the factors leave a wide range of discretion: the fourth is relevant because past practices become entrenched in U.S. policy making and fifth is relevant because the executive branch is likely to be influenced by congressional preferences).

congressional powers in the formation and conclusion of international agreements.[71]

B. Limited Reporting Requirements of the Case Act

The Circular also provides guidance on compliance with the Case-Zablocki Act (the "Case Act").[72] The Case Act is a reporting requirement for international agreements, inspired by the difficulty of tracking congressional-executive agreements.[73] These agreements evade the Senate's exercise of advice and consent, which previously was the means by which Congress had been made aware of international agreements.[74] The Act was therefore not created to wrest foreign affairs away from the President, but to notify Congress of international agreements that are not concluded pursuant to Article II.[75] It requires the Secretary of State to transmit the text of any international agreement to Congress within sixty days after the agreement

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[71] Circular 175, *supra* note 66, at 1.

[72] *Id.* at 17.

[73] Case-Zablocki Act, *supra* note 67.

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

[75] "The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claims or simple use of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy." H.R. Rep. No. 92-1301 (1972), reprinted in 1972 U.S.C.C.A.N. 3067, 3068.

has entered into force.[76] Agreements reported under the Case Act are public unless, in the opinion of the President, their disclosure would be harmful to national security.[77]

Critically, the Case Act does not require the Executive to publish the authority for the agreement. As a consequence, despite the internal decision making process governed by Circular 175, it is nearly impossible for the researcher to discover whether the Executive exceeded his statutory authority for any given agreement or whether the agreement had statutory authority at all.[78] Thus when the Obama administration claimed it had the authority to put the Anti-Counterfeiting Trade Agreement into effect without congressional approval, it relied on either its sole executive authority, or on an unspecified pre-existing enabling statute. However, the executive branch did not produce "any extensive, publicly available explanation of why it considers that the President can constitutionally ratify the ACTA as a sole executive agreement."[79] Sole executive authority was impossible, given that so much of the ACTA provided regulations for each

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[76] 1 U.S.C. § 112b(a).

[77] *Id.*

[78] Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, http://www.state.gov/s/l/treaty/c175/ (last visited February 24, 2015). More information about the Circular 175 procedure follows in the next section.

[79] Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1040 (2013).

negotiating state, and nothing in the Constitution provides that the President can implement regulations without congressional authority.[80] The President might have relied upon the Trade Promotion Authority, had the terms of that particular act not expired in 2007.[81] The statute that the President ultimately pointed to instead, the Trade Act of 1974, did not grant the Executive the authority to bind the United States without congressional approval.[82] It is therefore entirely likely that the United States is bound to many international agreements that the President did not have Congress's permission to ratify, but the authorization statutes were never fully investigated.

Finally, the Case Act has another limitation: it only applies to binding international agreements. Congress has no input on that determination, which is made solely by the Office of Treaty Affairs at the U.S. Department of State.[83] The guidelines for determining whether an

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[80] "The majority of ACTA is composed of specific provisions on intellectual property remedies that the legislation of each country must adhere to. This cannot be justified as an implementation of mere executive power." Flynn, *supra* note 5, at 918.

[81] Katzdl & Hinze, *supra* note 5.

[82] Flynn, *supra* note 77. Of some concern is the President's ability to rely upon an enabling statute from 1974 at all.

[83] 22 C.F.R. § 181.3 ("Whether any undertaking, document, or set of documents constitutes or would constitute an international agreement within the meaning of the Act or of 1 U.S.C. 112a shall be determined by the Legal Adviser of the Department of State, a Deputy Legal Adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate").

agreement requires reporting have been codified and appear in the *Code of Federal Regulations*. The gist of these guidelines is: 1) The parties to an agreement must intend to be bound under international law; 2) The agreement must be of international significance and not deal with trivial matters; 3) The obligations undertaken must be clearly specified and be objectively enforceable; 4) The agreement must have two or more parties; and 5) The agreement will preferably use a customary form.[84] Of the aforementioned criteria, intent is the question upon which most of the analysis will turn. States may indicate their intention not to be legally bound by expressly writing it into the agreement or by disclaiming any intention to create a legally binding instrument.[85]

IV. FINDING "OTHER INTERNATIONAL AGREEMENTS"

This section describes where to locate the text of an agreement and how to find its authorization. Marci Hoffman recently published an excellent bibliography of sources, including general treaty collections, treaty indexes, and diplomatic documents, for U.S. law.[86] This section attempts not to

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[84] 22 C.F.R. § 181.2.

[85] Hollis and Newcomer identify several agreements with accompanying language: NATO-Russia Founding Act's preamble references its "political commitments," while the preamble to the 1987 Stockholm Disarmament Declaration describes the agreement as "politically binding." Hollis & Newcomer, *supra* note 7, at 523-24.

[86] Marci Hoffman, United States *in* SOURCES OF STATE PRACTICE IN INTERNATIONAL LAW (Gaebler and Shea, eds., 2d ed. 2014).

replicate that work, but to enhance it by focusing on the ways one can locate authorizations for international agreements. Ex post congressional-executive agreements will require identifying enabling statutes, and ex ante congressional-executive agreements will require the identification of preexisting authorization. Sole executive agreements, because they rely on the President's constitutional authority, will not have any authorization acts, nor will they have any enabling statutes. Political commitments will be particularly problematic to retrieve, because they are not required to be reported.

Non-classified congressional-executive agreements should be found in *Treaties and Other International Acts Series*.[87] If the text cannot be found there, a researcher can submit an inquiry to the Office of the Assistant Legal Adviser for Treaty Affairs to receive a copy of U.S. treaties and international agreements.[88] Previously, the U.S. Department of State sponsored a website that listed all of the international agreements that were reported to Congress under the Case Act.[89] At the time of this article, one can still retrieve international agreements from 2006-2013 but the page is

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[87] TREATIES AND OTHER INTERNATIONAL AGREEMENTS SERIES (TIAS) (1946- present).

[88] Circular 175, *supra* note 67, at 12 ("Unclassified international agreements that have entered into force generally will be released upon request.").

[89] Reporting International Agreements to Congress under Case Act, available at http://www.state.gov/s/l/treaty/caseact/ (last visited February 24, 2015).

no longer updated.[90] Researchers are instead advised to consult the *T.I.A.S.* page, where they can find agreements from 1996 to present.[91]

A. Ex Post Congressional-Executive Agreements and Their Approval Acts

As one might imagine, locating ex post congressional-executive agreements will not be as simple as locating treaties.[92] An international agreement that is submitted for approval from both houses will simply receive a bill number. As with all domestic legislation, numerous bills can be introduced that eventually do not become law. To take one example, Congress approved the United States-Peru Trade Promotion Agreement as an ex post congressional-executive agreement.[93] Senator Baucus introduced the bill that would approve the agreement in the Senate,[94] but it was Representative Hoyer's bill that eventually became Public Law No. 110-138.[95]

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[90] *Id.*

[91] Texts of International Agreements to which the US is a Party (TIAS), available at http://www.state.gov/s/l/treaty/tias/index.htm (last visited February 24, 2015).

[92] The President formally submits treaties to the Senate; they are considered by the Committee on Foreign Relations and receive a Senate Treaty Document number, which enables researchers to track progress and identify Senate reports that consider the treaty. Greater specificity can be found in Erwin C. Surrency, *How the United States Perfects an International Agreement*, 85 LAW LIBR. J. 343, 346 (1993).

[93] An Act to Implement the United States-Peru Trade Promotion Agreement, Pub. L. 110-138, 121 Stat. 144 (2007) (codified as amended at 19 U.S.C. § 3805).

[94] United States-Peru Trade Promotion Agreement Implementation Act, S. 2113, 110th. Cong. (1997).

[95] United States-Peru Trade Promotion Agreement Implementation Act, H.R. 3688,

One can find enabling statutes by simply searching for the agreement names in the *Statutes at Large*, which is how one can identify the United States-Peru Trade Promotion Agreement. The *Statutes at Large*, and *Public Laws*, are arranged chronologically and are therefore permanently archived. If a researcher were to search the *United States Code* directly for the title of an agreement, he or she would miss the enabling statute if the *U.S. Code* provision had been amended or rescinded.[96] In the famous NAFTA example, one can easily identify find the enabling statute by searching the *Statutes at Large* for "North American Free Trade Agreement."[97] Section 101 of Public Law No. 103-182 provides that "the Congress approves—(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993."[98]

110th. Cong. (1997) (enacted).

[96] Certain classes of agreements, like bilateral trade agreements and repatriation agreements, tend to have sunset provisions. *See* Part IVD for an example of a sunset provision in the repatriation agreement with Vietnam.

[97] North American Free Trade Agreement Implementation Act, Pub. L.. No. 103–182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. § 3301).

[98] North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat 2057 (1993). Interestingly, the text also imposes conditions upon the President during its approval. *See* § 101(b). One benefit of the ex post model, in contrast to the ex ante model described *infra*, is that the Congress retains the ability to approve the agreement with oversight or with conditions.

Both of these examples used the name of the agreement in the authorization act. This might not always be the case, particularly when the researcher needs to locate not just enabling statutes, but also further implementing legislation. Implementing legislation need not name the agreement to give it legal efficacy. Before venturing into the world of researching ex post congressional-executive agreements authorization acts, consult the 2008 article, *Treaties' End*.[99] Oona Hathaway already conducted the most comprehensive search of ex post congressional-executive agreements, finding agreements on fisheries, trade, atomic energy, investment, education, and the environment.[100] This list should be a first stop on every investigation into enabling acts, in case the legislation has already been found.

B. Sole Executive Agreements

Ostensibly, it should be simple to locate sole executive agreements. The indexes that are available for treaties can also be used to locate executive agreements.[101] Executive agreements receive a T.I.A.S. designation and are

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[99] Hathaway, *supra* note 12.

[100] *Id.* at 1256. Hathaway details the difficulty in exhaustively searching for these agreements: "Though as far as I am aware this is the most comprehensive listing of ex post congressional-executive agreements during this period, it is almost certainly true that this list misses several congressional-executive agreements." *Id.* at 1256, n.49.

[101] *E.g.*, IGOR I. KAVASS & ADOLF SPRUDZS, UST CUMULATIVE INDEX 1950-1970: CUMULATIVE INDEX TO UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS 1950-1970 (1973); PETER H. ROHN, WORLD TREATY INDEX (1974).

cumulatively published in the *Treaties and Other International Acts Series*, which has been in existence since 1946.[102] If a President entered into a sole executive agreement between 1929-1945, the text can be located in the *Executive Agreement Series*.[103] Previously, the agreements could have been found in the *Treaty Series*, which began publication in 1908.[104] Executive agreements that predate the publication of the *Treaty Series* are more challenging to locate, but the most comprehensive modern collection of international agreements can be found in *Treaties and Other International Agreements of the United States of America* 1776-1949, popularly referred to as Bevans.[105]

As the text of this article makes clear, the President rarely provides the public with the authorization for an executive agreement. If the State Department believes the President has the authority to conclude a given agreement pursuant to the Commander-in-Chief power, there will be no authorizing statute or implementing legislation to seek. Consequently, one must carefully read the text of an agreement to verify whether the content exceeds the President's constitutional authority.

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[102] TREATIES AND OTHER INTERNATIONAL ACTS SERIES (TIAS) (1946 – Present).

[103] EXECUTIVE AGREEMENT SERIES (1929-1946).

[104] TREATY SERIES (1908-1946).

[105] TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949 (CHARLES I. BEVANS ED., 1968-76).

Earlier this article discussed the reaction to the executive branch's claims that it has the authority to sign and implement the ACTA.[106] More recently, the United States signed the Minamata Convention on Mercury and deposited an instrument of acceptance with the United Nations without ever presenting the Convention for ratification or approval. Again the release is silent as to what the authority is that the Convention relies upon. However, the Minamata Convention provides, in part, that "Each Party shall not allow, by taking appropriate measures, the manufacture, import or export of mercury-added products listed in Part I of Annex A..."[107] This Article clearly implicates the Commerce Clause,[108] which means the Convention cannot have been ratified pursuant to the President's own constitutional authority.

C. Authorizations for Ex Ante Congressional-Executive Agreements

Although the President did not have the ability to ratify the Minamata Convention under his sole executive powers, he might have ratified it pursuant to a preauthorization act. Again, the Case Act does not require the executive branch to publish the authorization but the State Department's press release indicates that there is authority in place:

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[106] *See supra* note 5, and accompanying text.

[107] Minamata Convention, *supra* note 1.

[108] U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes").

> The Minamata Convention represents a global step forward to reduce exposure to mercury, a toxic chemical with significant health effects on the brain and nervous system. The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minamata Convention complements domestic measures by addressing the transnational nature of the problem.[109]

The researcher must next both identify an enabling statute and verify that the text gives the executive branch the authority it claims. The most recent public law on the topic is the Mercury Export Ban Act of 2008.[110] According to the Act, "the long-term solution to mercury pollution is to minimize global mercury,"[111] which might be the authorization to which the State Department refers, but that language does not explicitly grant the executive the authority to participate in a legally binding international regime without further congressional approval. The Executive's action in depositing the instrument of acceptance is troubling, because it binds the United States under international law even though the executive branch

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[109] Media Note, *supra* note 2.

[110] Pub. L.. No. 110-414, 122 Stat. 4341 (2008) (codified as amended at 15 U.S.C. § 3601) (finding that a ban on "exports of elemental mercury from the United States will have a notable effect on the market availability of elemental mercury and switching to affordable mercury alternatives in the developing world.").

[111] *Id.*

likely does not have the authority to do so.

However, there might be another enabling statute. The Act that the State Department believes authorizes the Minamata Convention might not even contain the word "mercury" at all. Perhaps it refers instead to "toxic substances." As one might glean, identifying preexisting authority will be fraught with guesswork. The executive branch's willingness to test the limits of its authority means it may read a statute more permissively than the public would.

Nonetheless, using this method in 2008, Oona Hathaway located authorizing legislation for nearly every subject matter imaginable.[112] For example, to locate authorization acts for agreements on agriculture, she and her assistants searched the entire *Statutes at Large* for "agricultural commodities" or "agriculture" in the same sentence as "agreement."[113] They identified 167 executive agreements on agriculture during the period, most of which were negotiated pursuant to authority in the Agricultural Trade Development and Assistance Act of 1954.[114] Table X–3 of the Congressional Research Services report also provides a non-exhaustive list

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[112] Hathaway, *supra* note 12 (finding authorization acts for subjects from agriculture to space cooperation).

[113] *Id.* at n.52.

[114] Pub. L. No. 83-480, §§101-109, 68 Stat. 454, 455-57. See id. §101 (providing the President "authoriz[ation] to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies"). Hathaway, *supra* note 12, at 1268, n.76.

of statutory requirements, including whether approval is required for an agreement to enter into force.[115] These would both be excellent places to begin research.

D. Political Commitments

This article was inspired by a series of requests for repatriation agreements, which provide a lucid example of the interchangeability between political commitments and congressional-executive agreements. They also offer some insight into how political commitments can affect legal rights and obligations in U.S. courts. In 2001, the Ninth Circuit affirmed the release of Kim Ho Ma, a man born in Cambodia in 1977.[116] In light of a conviction of aggravated felony, Ma had been ordered removed from the United States.[117] However, the district court had found that there was "no realistic chance that [he] be deported" because of the absence of a repatriation treaty between the United States and Cambodia.[118] The Supreme Court remanded in *Zadvydas v. Davis*, requiring the Ninth Circuit to look not only at whether there was an expatriation agreement in place at

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[115] TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, *supra* note 13.

[116] Ma v. Reno, 208 F.3d 815 (9th Cir. 2001).

[117] *Id.* at 818.

[118] Binh Phan v. Reno, 56 F.Supp.2d 1149, 1156 (1999). The Ninth Circuit wrote that "There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries." Ma v. Reno, 208 F.3d at 818, n.1.

the time but also at the likelihood of successful future negotiations.[119]

Afterwards, the United States and the Royal Government of Cambodia concluded a Memorandum to "act in spirit of mutual cooperation in determining the nationality of an individual and in all matters pertaining to repatriation."[120] It continues: "The United States and Cambodia are committed to the primary objective of effecting the return of each other's nationals to their home State, taking into account the humanitarian and compassionate aspects of each case and the principles of internationally recognized human rights."[121] Should there be any questions as to the legal status of this instrument, it specifies that "Nothing in the document imposes, or should be constructed to impose, any legal or financial obligations on either State."[122] This Memorandum of Understanding would have satisfied the preliminary standard set forth in *Zadvydas* by enabling the Immigration Department to proceed with removal proceedings until the conclusion of the six-month period and possibly further. Regardless of its nonlegal status, the

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[119] Zadvydas v. Davis, 533 U.S. 678, 681 (2001).

[120] Memorandum Between the Government of the United States and the Royal Government of Cambodia for the Establishment and Operation of a United States-Cambodia Joint Commission on Repatriation, available at http://www.searac.org/sites/default/files/Cambodia%20and%20US%20MOU.pdf (last viewed February 23, 2015). The author notes the unreliability of the website, but needs to cite to it to demonstrate how texts either cannot be found, or are located on unreliable hosts.

[121] *Id.*

[122] *Id.*

political commitment effectively diminishes the plaintiff's legal rights by unilaterally allowing the executive branch (in this case, a defendant) to conclude an agreement that it can enter into and exit from without any delay or debate.

The United States does not always conclude repatriation agreements by political commitments. For example, in 2008, the United States entered into a bilateral congressional-executive repatriation agreement with Vietnam.[123] Exact numbers for political commitments regarding repatriation are difficult to locate—the political commitment with Cambodia evaded publication in the *Treaties and Other International Acts Series*, and it does not appear on the now defunct U.S. Department of State's website, which listed international agreements reported to Congress under the Case Act. However, it is clear that the formation of repatriation agreements operates on parallel tracks: one track requires congressional participation and the other excludes Congress entirely.

As we discovered in Section III, the Case Act does not apply to

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[123] Repatriation Agreement Between the United States of America and Vietnam, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 08-322 http://www.state.gov/documents/organization/108921.pdf. This agreement, unlike the political commitment between the United States and Cambodia, contains a sunset date and specifies terms for exiting early. Article 6, Entry into Force and Duration, provides "1. This Agreement will enter into force sixty (60) days from the date of signature by both Governments. 2: Upon entry into force, this Agreement will be valid for five years. The Agreement will be extended automatically for terms of three years thereafter unless written notice not to extend is given by one Government to the other at least six months prior to the expiration date of the Agreement."

nonlegally binding international agreements. Therefore, unless the executive branch chooses to publish them, no formal and publicly accessible documentation will be made available, either on the establishment of these agreements or on the actions or decisions made during negotiations with foreign states. Texts either cannot be found, or are located on unreliable hosts, yet it is possible that legal consequences can arise from political commitments that are neither public nor subject to any standardized rulemaking.

Kavass does publish an annual list of non-binding international agreements as part of the *Guide to the United States Treaties in Force.*[124] Many of the agreements in Kavass were previously published in locations such as *International Legal Materials* and *American Foreign Policy Current Documents*. There are few post-1990 agreements listed in Kavass, however. The latest, as of the 2013 *Guide*, were agreements from 1997, including the Joint Statement on Parameters on Future Reductions in Nuclear Forces with the Russian Federation, and the Joint Declaration on Security for the 21stt Century with Japan, both of which were published in International Legal Materials.[125]

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[124] KAVASS'S GUIDE TO THE UNITED STATES TREATIES IN FORCE, PART I. (2009 – Present) (replacing A Guide to the United States Treaties in Force (1982-2008)).

[125] 36 I.L.M. 1036 (1997).

V. CONCLUSION

While many researchers are familiar with the treaty-making process in the United States, treaties concluded pursuant to Article II only comprise a very small percentage of the international agreements that the United States enters into. Far more common are sole executive agreements; ex post congressional-executive agreements; and ex ante congressional-executive agreements. Finding documentation for these agreements is more challenging because it is more complicated to track the authorization than the agreement. However, events from the past two years, including the reaction to the Minamata Convention and ATCA, have shown us that Congress and the public are interested in what the executive branch is doing and in finding the authority for these agreements. Challenging the President's claimed authority results in greater interbranch coordination and democratic participation.

Political commitments are even more difficult to locate because they currently operate solely within the province of the Executive. Unlike treaties and congressional-executive agreements, which require consultation and agreement by at least one party of Congress, political commitments are negotiated, concluded, and observed without any congressional participation. And unlike sole executive agreements, the authority for which is ostensibly grounded in the text of the Constitution, there is no such

authority for the Executive to conclude political agreements, much less authority to conclude these agreements solely on his own volition. The result is that without congressional action or public outcry, many of these agreements will remain murky or secret.