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Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements

Michael D. Ramsey*

The U.S. Constitution states that the President can make treaties with the advice and consent of the Senate, “provided two thirds of the Senators present concur.”¹ This high threshold for consent reflects the framers’ concern that treaties not be too easy to make. It represented a radical departure from the British system most familiar to the framers—in which the monarch alone made treaties²—and an endorsement of the treaty-making provisions of the Articles of Confederation, which required a supermajority of states to approve a treaty.³ In particular, the Constitution’s treaty-making clause appears to endorse the outcome of the failed Jay-Gardoqui Treaty of 1785–86, which would have given up U.S. rights to navigation of the Mississippi River (crucial to states with western lands, such as Virginia) in return for concessions benefitting the Northern states, and which was blocked by a minority of states under the Articles.⁴

Indeed, during most of the Convention, the draft Constitution did not involve the President in treaty making at all, giving the power entirely to the Senate. Although the delegates added the President to the treaty-making process toward the end of the Convention, in large part as a check on the state-oriented Senate and as a practical necessity for unified negotiations, they did not see adding the President as superseding the Senate’s role in approval. Discussion on the Senate’s role focused chiefly on whether the threshold for approval should be higher (for added protection against unwise treaties) or lower in specific areas (such as peace treaties) where an

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¹ U.S. CONST. art. II, § 2.

² 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242–50 (1765).

³ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6.

⁴ See Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 825–90 (1934); Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSPECTIVES IN AMERICAN HISTORY (NEW SERIES) 233, 272–74 (1984); Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117 (1991); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1174–77 & nn.171–74 (2000).

agreement might be especially valuable.⁵ Similar debates carried over into the ratification process, where the Constitution's defenders emphasized the shared power and high threshold for treaty making, and opponents argued that there was not enough protection against bad treaties.⁶ No one said the President alone could make treaties; many emphasized the contrary. James Wilson, for example, declared that "[n]either the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people";⁷ Hamilton made similar observations in *The Federalist*.⁸

In modern times, however, Presidents on their own authority have made international agreements that look much like treaties. 2015 provides two examples. First, the President negotiated an agreement with Iran, China, France, Germany, Russia, Britain, and the European Union regarding Iran's nuclear development. Known as the Joint Comprehensive Plan of Action (JCPOA) and announced in July 2015, its principal goal was to limit Iran to non-military nuclear development in return for lifting U.S. and international economic sanctions on Iran.⁹ Second, the President joined with leaders of over 150 nations to produce the Paris Agreement on climate change, with a final version announced in December 2015.¹⁰ The Agreement attempted to promote and coordinate controls on carbon emissions in response to concerns over human-caused global warming. Both agreements appear to involve substantial commitments by the United States, but neither will require approval by the Senate (or Congress).

⁵ See Rakove, *supra* note 4.

⁶ E.g., Warren, *supra* note 4, at 297 (discussing importance of the issue in Virginia); *Editor's Note: The Debate in the Virginia Convention on the Navigation of the Mississippi River, 12–13 June 1788*, in 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1493 (John P. Kaminski et al. eds., 1993) [hereinafter DOCUMENTARY HISTORY]; Swaine, *supra* note 4, at 1175 & n.169.

⁷ 2 DOCUMENTARY HISTORY, *supra* note 6, at 563 (Dec. 11, 1787).

⁸ THE FEDERALIST NO. 66, at 402–03 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The Senate, it is observed, is to have concurrent authority with the executive in the formation of treaties and in the appointment to offices . . ."); THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (In respect to treaty making, "there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature."); see also, e.g., 10 DOCUMENTARY HISTORY, *supra* note 6, at 1391–92 (statement of Francis Corbin at Virginia ratifying convention) ("[The treaty power] is . . . given to the President and the Senate (who represent the states in their individual capacities) conjointly. . . . It steers with admirable dexterity between the two extremes,—neither leaving it to the executive, as in most other governments, nor to the legislative, which would too much retard such negotiation.").

⁹ Joint Comprehensive Plan of Action, July 14, 2015, <https://assets.documentcloud.org/documents/2165399/full-text-of-the-iran-nuclear-deal.pdf> [hereinafter JCPOA].

¹⁰ See U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, Annex, <https://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf> [hereinafter Paris Agreement] (setting forth text of agreement).

The President contends that these agreements are nonbinding under international law and so can be made on the President's independent constitutional authority. This essay assesses that claim. It generally agrees with the President's basic proposition but raises concerns about the application of that proposition to the Iran and Paris agreements. It concludes that without adequate safeguards these approaches can provide the President with substantial ability to evade the constitutional checks on the treaty-making power. Part I discusses "pure" nonbinding agreements such as the JCPOA, while Part II considers nonbinding commitments embedded within binding instruments, as illustrated by the Paris Agreement.¹¹

I. NONBINDING AGREEMENTS

A. Constitutional Considerations in General

The word "treaty" in the Constitution indicates a binding agreement under international law. Vattel, the leading international law writer of the eighteenth century, wrote: "He who violates his treaties, violates at the same time the law of nations; for, he disregards the faith of treaties,—that

¹¹ The taxonomy is not entirely settled in this area. This essay uses the relevant terms as follows:

(1) A *treaty* is an agreement that is binding under international law and requires consent of two thirds of the Senate under U.S. domestic law.

(2) A *congressional-executive agreement* is an agreement that is binding under international law and is made with either the advance authorization (ex ante) or the after-the-fact approval (ex post) of a majority of Congress.

(3) An *executive agreement* is an agreement that is binding in international law and made under the sole authority of the President without any approval by the Senate or Congress.

(4) A *non-binding agreement* is, as the name indicates, an agreement that—unlike the other three types—is not binding in international law. In U.S. practice, nonbinding agreements are typically made by the President alone, although they may sometimes claim ex ante congressional approval as well.

The constitutional validity of congressional-executive agreements is disputed. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 135–54, 197–217 (2007); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). The U.S. executive branch does not appear to claim congressional approval for the JCPOA or the Paris Agreement; the ensuing discussion thus does not consider the extent to which they might be argued to have congressional approval nor the extent to which congressional-executive agreements are a valid alternative to the Article II, Section 2 treaty. Cf. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515 (2015) (arguing that broad congressional legislation in the environmental area could be read to authorize binding international commitments on carbon emissions).

faith which the law of nations declares sacred.”¹² Americans of the founding era were concerned that treaty violations would impugn the nation’s honor (an important consideration at the time) and more practically would give cause for war at a time when the United States was a weak nation militarily.¹³ In discussing the importance of treaties, members of the founding generation consistently referred to treaties’ binding nature.¹⁴ For constitutional purposes, therefore, an essential element of a treaty is that it is binding as a matter of international law.

Nonbinding agreements are necessarily not treaties, because (by definition) they lack the essential characteristic of bindingness and therefore lack the corresponding implications for preserving honor and not giving offense.¹⁵ A nonbinding agreement is in effect a statement of policy (or rather multiple parallel statements of policy) which the relevant parties understand can be changed unilaterally in any party’s discretion. Because a nonbinding agreement is not a treaty and does not implicate the concerns of a binding commitment, the treaty-making clause is not relevant to its constitutional status. Put precisely, the treaty-making clause does not preclude the President from making nonbinding agreements.

Of course, the President must point to an affirmative source of the power to make nonbinding agreements, and since the Constitution does not mention them expressly, that must be found in some other source of power. Two approaches are possible. First, one might say that the President can make nonbinding agreements in areas of express presidential power—most obviously, regarding military matters pursuant to the commander-in-chief power, and perhaps also in connection with recognizing foreign governments (a power said to be implied by the reception-of-ambassadors clause).

More broadly, the theory of executive foreign affairs power holds that the vesting of “executive Power” with the President in Article II, Section 1, includes foreign affairs powers not specifically granted to other entities by the Constitution.¹⁶ Under this approach, diplomacy and the management of foreign affairs are powers of the President, and those powers would likely

¹² EMER DE VATTEL, *THE LAW OF NATIONS* bk. II, sec. 221 (Bela Kapossy & Richard Whatmore eds., 2008) (1758).

¹³ *E.g.*, THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁴ *E.g.*, THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961).

¹⁵ On the constitutionality of nonbinding agreements, see Duncan Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507, 563–66 (2009). On the diplomatic aspects of nonbinding agreements, see Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005).

¹⁶ Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); RAMSEY, *supra* note 11, at 51–90.

include a general constitutional power to make nonbinding agreements.¹⁷

Nonbinding agreements also appear to have some analogues in the founding era. While it is not clear if formal nonbinding agreements existed in the founding era, in the post-ratification period Presidents made statements of nonbinding foreign policy. For example, in the Monroe Doctrine, the President announced a U.S. policy of opposing further colonization or re-colonization of the Western Hemisphere by European powers.¹⁸ Earlier, President Washington announced a policy of neutrality in the conflict between Britain and France in 1793.¹⁹ And if Presidents had these foreign policy-making powers, there seems no objection to Presidents formulating and announcing their policies in parallel with other nations, as in a nonbinding agreement.²⁰

While the Constitution's text and practice thus appear to allow Presidents to make nonbinding agreements, we should consider whether nonbinding agreements nonetheless threaten to erode the protections of the treaty-making clause. At least three constitutional limitations on nonbinding agreements, if appropriately understood and observed, should substantially ensure that they do not.

(1) First, nonbinding agreements are not part of the "supreme Law of the Land" defined in the Constitution's Article VI, and thus should have no domestic legal effect in U.S. courts nor impose any legal obligations on U.S. domestic entities. Treaties, of course, are included in the Article VI definition,²¹ but nonbinding agreements are necessarily not treaties. The framers included treaties in Article VI to assure compliance with *binding* obligations.²² The exclusion of nonbinding agreements from Article VI makes sense because their nonbinding nature obviates concerns about violations. Thus if a President wants to make international commitments that require domestic legal implementation, the President must either make them in a binding treaty with legislative approval or seek a separate legislative implementation.

¹⁷ One might also argue that nonbinding agreements have been approved by practice and congressional acquiescence even if not authorized by the original Constitution. They have been used by U.S. Presidents at least since the early twentieth century, see Hollis & Newcomer, *supra* note 15, at 516–17, and although some particular agreements have been controversial, the general practice does not seem to have generated sustained objections.

¹⁸ See 41 ANNALS OF CONGRESS 22–23 (1823) (statement of President Monroe announcing policy).

¹⁹ See Prakash & Ramsey, *supra* note 16, at 327–39. Of course, this proclamation was somewhat controversial at the time.

²⁰ Indeed, the Monroe Doctrine was formulated in cooperation with Britain and could have been stated as a nonbinding agreement. See JOHN SEXTON, *THE MONROE DOCTRINE: EMPIRE AND NATION IN NINETEENTH-CENTURY AMERICA* (2011).

²¹ U.S. CONST. art VI.

²² See THE FEDERALIST NO. 22, *supra* note 13, at 150–51.

(2) Second, the President has a constitutional obligation to assure that a purportedly nonbinding agreement is clearly and unequivocally nonbinding under international law. Otherwise, there is risk that other parties to the agreement will regard it as binding—and perhaps that it will in fact become binding under international law. In either case, departing from it may carry the equivalent reputational and other sanctions associated with violating a binding treaty. The central point of the treaty-making clause is that the United States must not undertake this level of commitment without the Senate's consent. As a result, an agreement that is only ambiguously nonbinding amounts to an evasion of the treaty-making clause.

(3) Third, a nonbinding agreement does not constrain future Presidents (even informally). It has no greater status than a unilateral statement of policy. Because it is essentially an open-ended statement of policy, a nonbinding agreement—like a policy statement—must be capable of being reversed at a later time by a new President (or indeed even by the same President, if that President decides the policy no longer serves U.S. interests). A President has no power to limit successors' policymaking authority. Thus, a nonbinding agreement cannot be understood as imposing constraints on policymakers within the U.S. domestic legal or political system and it cannot be represented to foreign parties as imposing any constraints on U.S. policymakers in the international legal or political system.²³

Observing these three limitations may be sufficient to assure that nonbinding agreements do not threaten an end run around the protections of the treaty-making clause. One further limitation is worth considering, however. It may be especially troubling if a purportedly nonbinding agreement makes a specific commitment on behalf of the United States which the current U.S. President cannot fulfill. This might arise if the President made a commitment to do something that could be done only by another branch of government (for example, declaring that certain legal activity would be prohibited or that certain illegal activity would be allowed). It might also arise if the President declared that the United States would take a specific action on a specific date in the future beyond the current President's term. Consider, for example, a hypothetical agreement between the current President and Cuba, promising to return the Guantanamo naval base to Cuba on January 1, 2020. The current President (in 2016) has no ability to fulfill this promise and no ability to bind the

²³ Of course, other nations may alter their nonbinding policies in response to a U.S. shift in nonbinding policy. The practical dynamics may or may not roughly correspond to violations of binding agreements. See generally Raustiala, *supra* note 15 (discussing the role of binding and nonbinding agreements in international relations).

future President to it (or even to commit the future President to a policy in this regard). Even if the agreement is unequivocally nonbinding in other respects, the President's commitment to a specific outcome in the distant (but specific) future might create expectations and reliance by the other party, and thus implicate the policies of the treaty-making clause.²⁴

B. A Constitutional Assessment of the JCPOA

To illustrate these parameters, consider the JCPOA with Iran.²⁵ The JCPOA was arguably the most significant international agreement concluded by the United States in 2015. By its terms, Iran agreed to specified limits on its nuclear development program purportedly assuring its non-military character for fifteen years. In return, the United States, the EU and the other permanent members of the U.N. Security Council (Britain, France, Russia, and China) agreed to lift a broad range of economic sanctions against Iran (specified in detail in the JCPOA), including those imposed unilaterally by the United States and those imposed through the U.N.²⁶ Because some of the sanctions involved freezes of Iranian assets, implementation of the agreement allowed Iran access to substantial financial resources as well as future business opportunities. The parties also agreed not to re-impose sanctions so long as Iran followed the course of action outlined in the JCPOA.²⁷

An essential aspect of the deal, from the U.S. constitutional perspective, was that the President had statutory authority to accomplish the actions promised in the JCPOA. The principal U.S. undertaking was to lift sanctions related to Iran's nuclear program, including both unilateral U.S.

²⁴ Most nonbinding agreements do announce continuing actions that extend into the indefinite future. See Hollis & Newcomer, *supra* note 15, at 516–17 (giving examples of important nonbinding agreements). The difference emphasized here is where a specific action is promised at a specific date in the future.

²⁵ JCPOA, *supra* note 9. The JCPOA was highly controversial in Congress, which took ultimately unsuccessful action to block it. As the negotiations were proceeding, Congress passed the Iran Nuclear Review Act, which required the President to submit any agreement with Iran to Congress, delayed implementation of any agreement for sixty days so Congress could consider it, and provided Congress with an opportunity to vote its disapproval. Pub. L. No. 114–17, 129 Stat. 201 (2015). Once the agreement was concluded, the President submitted it to Congress as required, but Congress was unable to take action due to a filibuster by the Democratic minority in the Senate. The President then put the agreement into effect without Congress' approval but also without its formal disapproval. See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AM. J. INT'L L. 873, 874–78 (2015). Various commentators, including some in Congress, argued that the JCPOA was an unconstitutional infringement of the treaty power. See, e.g., David Rivkin & Lee Casey, *The Lawless Underpinnings of the Iran Nuclear Deal*, WALL ST. J. (July 26, 2015), www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928. There was no judicial avenue for testing those claims.

²⁶ JCPOA, *supra* note 9, arts. 1–17 (Iran's obligations); *id.* arts. 18–31 (U.S. and other nations' obligations).

²⁷ *Id.* art. 26.

sanctions and international sanctions imposed through the United Nations. The President undoubtedly had authority to take both actions. The U.S. sanctions statutes expressly gave the President authority to suspend sanctions.²⁸ With respect to U.N. sanctions, the United States acts at the U.N. through its U.N. ambassador, who in turn acts at the direction of the President. Thus the President could use his statutory authority to lift unilateral sanctions and could use his constitutional diplomatic authority to direct the U.N. ambassador to vote in favor of lifting U.N. sanctions. Crucially, the JCPOA did nothing to alter the President's authority in these regards; he could have taken both actions merely on the basis of an informal private understanding with Iran or even in the absence of any understanding with Iran at all.

A more substantial concern is whether the JCPOA is unequivocally nonbinding. In many respects it has the character of a nonbinding agreement. First, its preface states that the parties "will take the following voluntary measures,"²⁹ and all of the specific obligations are stated (like the introductory clause) as things the parties "will" do rather than things the parties "shall" do.³⁰ Second, it did not employ the usual formalities of a binding agreement: it was apparently not signed by the parties' representatives; it does not recite that the parties intended to be bound; it did not have procedures for ratification.³¹ Third, its title—"plan of action" rather than "accord" or "convention"—indicates a nonbinding arrangement. Fourth, at least in domestic communications, the U.S. State Department generally described it in terms consistent with a nonbinding rather than a binding commitment, although this was more clear after the agreement was concluded than before.³² In sum, it is plausible to view the JCPOA as describing ongoing reciprocal policies—that is, Iran plans to do "x" as long

²⁸ DIANNE E. RENNACK, CONG. RESEARCH SERV., R43311, IRAN: U.S. ECONOMIC SANCTIONS AND THE AUTHORITY TO LIFT RESTRICTIONS (2014), <https://news.usni.org/2014/12/30/document-congressional-report-u-s-sanctions-iran>; Marty Lederman, *Congress Hasn't Ceded Any Constitutional Authority with Respect to the Iran JCPOA*, BALKINIZATION (Aug. 8, 2015), <http://balkin.blogspot.com/2015/08/congress-hasnt-ceded-any-constitutional.html>.

²⁹ JCPOA, *supra* note 9, preface.

³⁰ See *id.* arts. 1–34. As discussed *infra* in connection with the Paris Agreement, modern diplomatic practice generally understands "will" or "should" to indicate nonbinding obligations and "shall" to indicate binding obligations.

³¹ It may be regarded as especially significant that Iran did not insist on a signed document or a recitation of that the parties intended to be bound, given that (as discussed below) doubts about the agreement's ability to bind future Presidents were raised during the negotiations.

³² Letter from Julia Frifield, Assistant Secretary, Legislative Affairs, U.S. Dep't of State, to Congressman Mike Pompeo (Nov. 19, 2015), http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf (describing the agreement as "not a treaty or an executive agreement" and as reflecting "political commitments"); Transcript of U.S. Dep't of State Daily Press Briefing, Mar. 10, 2015, <http://iipdigital.usembassy.gov/st/english/texttrans/2015/03/20150310313990.html?CP.rss=true#ixzz3U4WoiX7D> (describing pending agreement as a "political commitment").

as the United States is doing “y,” and vice versa—rather than describing legal obligations.

Nonetheless, substantial doubts may remain. The JCPOA’s text in some respects suggests a binding commitment. It is very specific with respect to the sanctions relief the United States undertakes to provide and very specific as to the timetable (that is, it is much more than a vague statement of policy that sanctions will be lifted at some point in the future).³³ It also has a detailed dispute resolution mechanism³⁴—an unusual and perhaps unprecedented feature if the agreement is nonbinding. In addition, it is uncertain whether the U.S. negotiators made clear to the other parties that the agreement was nonbinding. Some statements by Iranian officials indicate the contrary.³⁵

Relatedly, when members of the U.S. Senate publicly argued that the agreement would not bind future Presidents, the U.S. executive branch did not clearly endorse that position and in some respects seemed to undermine it. While the negotiations were proceeding, and after the President had made clear that he would not submit the agreement for the Senate’s approval, Republican Senator Tom Cotton posted on his website an open letter to the Iranian government from himself and forty-six other Senators, setting forth their view that an agreement not approved by the Senate would not be binding on future Presidents.³⁶ The Iranian foreign minister reportedly responded with his understanding that the agreement would be binding under international law.³⁷ Without directly addressing the letter’s substance, the U.S. executive branch strongly objected to the Senators’ letter as unconstitutionally interfering with the President’s diplomatic powers by purporting to communicate directly with Iran. While there may have been merit to the President’s constitutional argument as a procedural matter,³⁸ the President should have recognized a constitutional obligation to

³³ See, e.g., JCPOA, *supra* note 9, art. 21 & Annex II (listing U.S. sanctions); *id.* art. 34 (setting forth specific schedule including “milestones”).

³⁴ JCPOA, *supra* note 9, arts. 36–37.

³⁵ See Jake Miller, *Iran: GOP Letter on Nuclear Negotiations a “Propaganda Ploy”*, CBS NEWS (Mar. 9, 2015), www.cbsnews.com/news/iran-gop-letter-on-nuclear-negotiations-a-propaganda-ploy (quoting Iran foreign minister’s comment that future departures from the agreement would be a “blatant violation of international law”).

³⁶ Senator Tom Cotton, et al., *An Open Letter to the Leaders of the Islamic Republic of Iran* (Mar. 9, 2015), www.cotton.senate.gov/sites/default/files/150309%20Cotton%20Open%20Letter%20to%20Iranian%20Leaders.pdf (letter on behalf of himself and forty-six Republican Senators asserting that future presidents would not be bound by Obama Administration’s deal with Iran); see also Tom Cotton, *Why We Wrote the Letter to Iran*, USA TODAY (Mar. 10, 2015), www.usatoday.com/story/opinion/2015/03/10/iran-nuclear-talks-letter-47-senators-sen-tom-cotton-editorials-debates/24721971 (calling agreement “non-binding” if not approved by the Senate).

³⁷ See Miller, *supra* note 35.

³⁸ See Prakash & Ramsey, *supra* note 16, at 317–24 (discussing President Washington’s exclusive control over diplomatic communications).

confirm the letter's essential point.³⁹ A nonbinding agreement such as the JCPOA necessarily does not bind future Presidents, and full candor in the negotiations required that Iran be fully aware of this.

Finally, the foregoing point is important because the JCPOA contains continuing commitments by the United States that extend beyond the current President's term. In particular, the United States undertakes not to re-impose the sanctions lifted pursuant to the agreement for fifteen years, so long as Iran abides by its commitments.⁴⁰ As noted, a dispute resolution process is established if there is doubt whether Iran is abiding by its commitments, so in effect the United States undertakes—for a term extending far into future Presidents' terms—not to re-impose sanctions without a favorable outcome from the dispute resolution process.

Whether this commitment is sufficiently specific in content and date to raise the concerns noted above may be debated. Arguably it can be understood simply as a statement of policy. Thus by the agreement, one might say, the current U.S. President agrees not to re-impose sanctions without approval of the dispute resolution process, and future U.S. Presidents are free to either adopt or reject that policy; Iran, in turn, merely has agreed to adopt the policy of complying with the parameters of the JCPOA so long as the U.S. does not re-impose sanctions (a policy that Iran can unilaterally abandon).⁴¹ Put this way, the JCPOA appears merely to represent parallel statements of policy subject to ongoing unilateral reevaluation. Under that description, the constitutional basis of the JCPOA seems secure. However, there are reasons to doubt that this is how all the parties understand JCPOA, including the agreement's specificity as to future commitments and the U.S. negotiators' failure (at least publicly) to clearly endorse the conclusions of the Cotton letter.

In sum, the main potential constitutional problem with the JCPOA is that its nonbindingness is not entirely clear. Lack of clarity in its status

³⁹ As noted, the State Department subsequently confirmed in a letter to Congress that it viewed the agreement as nonbinding. *See supra* note 32. Although the Administration has not issued a formal explanation of the constitutional basis of the JCPOA, presumably it thought the JCPOA's nonbinding character allowed the President to dispense with legislative approval.

⁴⁰ JCPOA, *supra* note 9, art. 26.

⁴¹ Regarding U.S. obligations not to re-impose sanctions, Article 26 states:

The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from re-introducing or re-imposing the sanctions specified in Annex II that it has ceased applying under this JCPOA, without prejudice to the dispute resolution process provided for under this JCPOA. The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions.

Id. The JCPOA goes on to state that if the United States does re-impose sanctions, "Iran has stated that it will treat such a re-introduction or re-imposition of the sanctions specified in Annex II, or such an imposition of new nuclear-related sanctions, as grounds to cease performing its commitments under this JCPOA in whole or in part." *Id.*

raises concerns that the President may be attempting an end run of the treaty-making clause by committing the United States to what other parties to the agreement may regard as binding promises. If the process were entirely clear—so that other parties knew exactly what they were getting and not getting—it would appear that the constitutional concerns would largely be resolved and the President’s ability to accomplish major commitments through nonbinding arrangements would be substantially constrained.⁴²

II. NONBINDING PROVISIONS IN BINDING AGREEMENTS

A. Constitutional Considerations in General

The Paris Agreement⁴³ creates a different set of constitutional concerns. Unlike the JCPOA, it (as discussed below) appears to be a binding agreement under international law. The President’s argument is not that the agreement as a whole is nonbinding; instead, it appears to be that the Agreement’s main provisions—relating to emissions targets—are nonbinding. Although some parts of the agreement are binding, those binding commitments are (it is said) immaterial, unimportant ones that the President can undertake on his own authority.⁴⁴

As with the President’s power over purely nonbinding agreements, the basic constitutional principle underlying this claim seems to be correct. The Constitution acknowledges a difference between “treaties” and “other agreements” in Article I, Section 10, which says that states may not make treaties but that states may make agreements with the approval of Congress.⁴⁵ Consistent with this distinction, Vattel and other eighteenth-

⁴² In contrast, another nonbinding deal reached in 2015 seems to avoid constitutional objections. In September 2015, the President announced an agreement with China regarding cybersecurity. See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AM. J. INT’L L. 873, 878–82 (2015). This agreement is evidently nonbinding on numerous grounds. It appears not to be in any written form and was announced in a “fact sheet” accompanying a news conference during President Obama’s visit to China. *Id.* at 878 & n.1. It is described as containing only commitments at high levels of generality for indefinite periods of time. *Id.* at 878–79. And accompanying commentary indicates that the United States regards it as nonbinding, subject to China’s unilateral determination of its policy objectives, which may or may not comport with the agreement. See *id.* at 881–82. Under the perspective developed in this essay, the cybersecurity agreement appears constitutional; in contrast, under the view that all “agreements” of whatever nature must be approved by the Senate, the agreement could not be reached on the President’s sole authority.

⁴³ See Paris Agreement, *supra* note 10.

⁴⁴ See Daniel Bodansky, *The Legal Character of the Paris Agreement*, REV. OF EUR., COMP. & INT’L ENVTL. L. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735252; see also David A. Wirth, *Cracking the American Climate Negotiators’ Hidden Code: United States Law and the Paris Agreement*, 6 CLIMATE L. 152 (2016).

⁴⁵ U.S. CONST. art. I, § 10 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”); *id.* (“No state shall, “without the Consent of Congress . . . enter into any

century international law writers recognized a distinction between treaties and other agreements.⁴⁶ These other agreements were also binding under international law, Vattel and others wrote,⁴⁷ but they did not have the status of treaties because they involved short-term, one-time, or unimportant commitments.⁴⁸

If the Constitution and eighteenth-century international law terminology recognized a category of binding international agreements that were not “treaties,” it should follow that (as with nonbinding agreements) the treaty-making clause has nothing to say about them; the clause concerns only the way to “make Treaties.” That is consistent with the framers’ concerns about having extra protection against unwise treaty entanglements; those concerns would be less weighty for short-term or minor agreements. And like nonbinding agreements, binding nontreaty agreements arguably fall within the President’s executive foreign affairs power.⁴⁹

This conclusion is supported by post-ratification practice. Starting in 1799, when the Adams Administration settled a claim against the Netherlands for wrongful seizure of a U.S. ship, the executive branch settled minor international claims and made other short-term commitments, without approval of the Senate or Congress, through binding international agreements.⁵⁰ This practice continued and expanded through the nineteenth century without material constitutional objection.⁵¹ In the twentieth century, the vast expansion of U.S. diplomatic activity led to a huge increase in international agreements not approved through Article II, Section 2; these agreements have now become routine and dominate, at least numerically, the relatively small number of agreements approved as treaties.⁵²

Agreement or Compact with another State, or with a foreign Power”); see Abraham Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 454–56 (1936); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). Article 6 of the Articles of Confederation had a similar distinction: states could not enter into “any conference, agreement, alliance, or treaty” with a foreign nation without Congress’ consent, and states could not enter into “any treaty confederation, or alliance” among themselves without Congress’ consent (thus apparently “agreements” among states were permitted). See RAMSEY, *supra* note 11, at 180.

⁴⁶ VATTEL, *supra* note 12 bk. II, sec. 152–53; CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, sec. 464 (J.B. Scott ed., 1983) (1749) (“Nations and their rulers can enter into agreements which are distinguishable from treaties.”); see Ramsey, *supra* note 45, at 165–71 (discussing these sources).

⁴⁷ VATTEL, *supra* note 12 bk. II, sec. 206; see also WOLFF, *supra* note 45, sec. 376; see Ramsey, *supra* note 45, at 189–90 (discussing these sources).

⁴⁸ See Ramsey, *supra* note 45, at 197–99 (noting that the eighteenth-century international law sources are not fully clear or consistent in identifying the line between treaties and other agreements); Weinfeld, *supra* note 45, at 459–60 & n.30 (same).

⁴⁹ See *supra* nn.16–20; Ramsey, *supra* note 45, at 206–18.

⁵⁰ Ramsey, *supra* note 45, at 175.

⁵¹ *Id.* at 175–83 (listing and describing agreements).

⁵² See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International*

Thus executive agreements may seem on strong constitutional footing. Like nonbinding agreements, executive agreements may nonetheless threaten to infringe the treaty-making power if several key constitutional safeguards are not recognized. In particular:

(1) Like nonbinding agreements, executive agreements should as a general matter not be part of the supreme law of the land.⁵³ They are not included in Article VI's definition of supreme law, and there are strong textual and structural reasons for thinking that omission was deliberate. If the framers distinguished between treaties and other international agreements (as Vattel's account and Article I, Section 10 indicate), Article VI could easily have been written to make "treaties and other international agreements" part of supreme law. However, the framers emphasized that making treaties part of supreme law was not problematic because the Senate—a part of the legislative branch—participated in their approval. Since that is not true for other agreements—made by the President alone—those agreements are rightfully not included as supreme law; to do so would make the President a lawmaker, in direct contravention of basic principles of separation of powers.⁵⁴ Omitting executive agreements from supreme

Lawmaking in the United States, 117 YALE L.J. 1236, 1257–60 (2008) (collecting 1980–2000 statistics). It is, however, somewhat difficult to assess which of these agreements are sole executive agreements and which are ex ante congressional-executive agreements (that is, agreements concluded by the President pursuant to an open-ended advance authorization by Congress); the executive branch does not state the authority for most agreements it concludes. See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155 (2009) (estimating that approximately twenty percent of agreements between 1990 and 2000 were sole executive agreements, with the remainder claiming some sort of congressional or treaty-based authorization).

⁵³ For an expanded argument, see Ramsey, *supra* note 45, at 218–35.

⁵⁴ See *Medellin v. Texas*, 552 U.S. 491, 526–28 (2008) (discussing constitutional rule that President cannot make laws); Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT'L & COMP. L. REV. 19 (2010) (emphasizing this aspect of *Medellin*). The proposition that executive agreements should not be supreme law, although a seemingly straightforward reading of Article VI, is not fully consistent with the Supreme Court's approach to executive agreements. See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007) (describing and criticizing Supreme Court cases on executive agreements). The Court has approved executive agreements directly in four cases, and indirectly in several others. In the *Belmont* and *Pink* cases, the Court in broad language approved a settlement agreement between the United States and the USSR in connection with U.S. recognition of the Soviet government. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). The Court also found the agreement preempted state law, and the Court purported to see no difference between treaties and executive agreements for this purpose. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court approved an agreement between the United States and Iran resolving the 1979–1980 hostage crisis and establishing the U.S.-Iran Claims Tribunal to settle private claims; it again treated the agreement as part of domestic U.S. law without much explanation. Finally, in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the Court implicitly approved executive agreements between the United States and Germany and Austria relating to settlement of Holocaust-era insurance claims and found that the policy reflected in those agreements preempted state law. How broadly to read these cases remains disputed. *Pink* and *Belmont* did not indicate boundaries on the President's power, although they arose in an area of specific presidential power (recognition). In *Dames & Moore*, the Court strongly emphasized both the claims

law assures that (as elsewhere) the legislature (or at least a part of it) retains authority over law making.

(2) Sole executive agreements should have only a limited scope. While it may be difficult to establish a clear line between treaties and executive agreements, in general executive agreements should cover only minor or short-term undertakings. Otherwise, they would likely be called treaties in eighteenth-century terminology and so would be governed by the treaty-making clause.⁵⁵

In sum, the President can make binding international agreements that do not purport to change U.S. domestic law and entail only minor or short-term agreements. It is a further step to say that the President can make binding agreements addressing important long-term matters, so long as the long-term commitments within the agreement are themselves nonbinding. It does not appear that there is any precedent for such arrangements in the post-ratification era. However, arguably it is a permissible combination of the President's power to make nonbinding commitments on important matters and the President's power to make binding commitments on unimportant matters.

B. A Constitutional Assessment of the Paris Agreement

This section considers whether the 2015 Paris Agreement is constitutional under the approach described in the prior section. It tentatively concludes that it is not.

To begin, it seems clear (though some have argued otherwise) that the agreement as a whole is binding under international law. It has all the forms of a binding agreement, including signature, ratification procedures, time for withdrawal, etc.⁵⁶ Moreover, with respect to some of its obligations, it uses the phrase "shall," which in modern international law is generally understood to indicate a binding obligation.⁵⁷ In addition, it has not been

settlement context (which, it noted, had a long history of presidential authority) and the fact that Congress had "acquiesced" in presidential claims settlement by not objecting and by passing facilitating legislation. *Garamendi* also arose in the settlement context but had no strong limiting language. Only a few years later, however, the Court in *Medellin* described *Garamendi* and *Dames & Moore* very narrowly as limited to settlement agreements. See *Medellin*, 552 U.S. at 531–32.

⁵⁵ Practice and precedent indicate that settlement agreements are uniquely a focus of executive agreements. Areas of particular presidential authority, such as military matters and recognition, potentially admit a broader scope to executive agreements. And congressional acquiescence in the use of executive agreements in particular areas may be an important factor under *Dames & Moore*. In sum, textual, historical and practical considerations suggest a fairly limited scope for executive agreements, although within that scope they may be, in modern practice, very numerous.

⁵⁶ Paris Agreement, *supra* note 10, art. 20 (signature and ratification), art. 21 (entry into force), arts. 22–23 (amendments), art. 24 (dispute resolution), art. 27 (reservations), art. 28 (withdrawal), art. 29 (authentic texts).

⁵⁷ *E.g.*, *id.* arts. 4.2, 4.3, 4.8, 4.13, 13.7 (prefaced by "shall"). See Bodansky, *supra* note 44, at 8

described as nonbinding by the United States or any other party.⁵⁸ As a result, bypassing Senate consent cannot be justified on the ground that it is (like the JCPOA) a nonbinding agreement.

However, it is also true that the Agreement's most important commitments—those with respect to emissions targets—appear to be nonbinding. Here the agreement deliberately uses the word “should” rather than “shall”⁵⁹—and it has been reported that the U.S. negotiators specifically demanded this phrasing to assure that the targets were nonbinding.⁶⁰ Notably, however, this argument goes only to certain key provisions, but not to all provisions, of the agreement. Some provisions applicable to the United States retain the “shall” phrasing in the final draft. The existence of some nonbinding provisions within an otherwise binding instrument does not make the instrument as a whole nonbinding. Thus the President's argument regarding the Paris Agreement is necessarily distinct from the argument defending the JCPOA. The Paris Agreement is arguably not a treaty, not because it is nonbinding but because it does not impose material binding obligations on the United States. In the terminology described above, it is an executive agreement (that is, a binding nontreaty agreement).

It is not clear that this characterization solves the constitutional problem, however. That is so for two reasons. First, it is not clear that the Agreement's specific binding provisions are sufficiently minor to justify the use of an executive agreement rather than a treaty. For example, Article 4.2 states that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions.” Thus the United States must identify target emissions goals (“nationally determined contributions”) and must take some (unspecified) mitigation measures (even though the emissions goals themselves are nonbinding). If a future President or Congress decides the target goals process is not worthwhile, the process cannot be discontinued without violating a binding obligation (and the United States must remain a party to the Agreement for at least three years, per Article 28).⁶¹

(discussing significance of verb choice); *id.* at 10–12 (describing articles imposing binding obligations).

⁵⁸ See Bodansky, *supra* note 44, at 15–17.

⁵⁹ E.g., Paris Agreement, *supra* note 10, art. 4.4 (emissions targets); see Bodansky, *supra* note 44, at 11 (noting nonbinding provisions).

⁶⁰ See Marty Lederman, *The Constitutionally Critical, Last-Minute Correction to the Paris Climate Change Accord*, BALKINIZATION (Dec. 13, 2015), <http://balkin.blogspot.com/2015/12/the-last-minute-correction-to-paris.html> (recounting how U.S. negotiators required the agreement to use the word “should” rather than “shall” to maintain its nonbinding character).

⁶¹ In an important forthcoming assessment of the Paris Agreement, Professor Bodansky argues

Second, irrespective of the specific binding commitments, the agreement binds the United States to a general goal of reduced carbon emissions for an extended time, even though the implementation of that goal is left nonbinding. For the future, the United States is not committed to any specific level of emissions, but it is committed to the general policy of reducing emissions.⁶² Unlike truly nonbinding agreements, a future President cannot change that policy without violating international law.⁶³ If a new President thinks global warming is overstated as a threat, or that

that all of the binding aspects of the Agreement are within the President's independent power because (a) they are "procedural"; (b) they repeat obligations undertaken in prior treaties approved by the Senate; or (c) they are consistent with existing U.S. law. Bodansky, *supra* note 44, at 18. None of these points seems to definitively establish the Agreement's constitutionality, however. First, there is no authority that "procedural" obligations categorically can be undertaken by the President alone. Some procedures may be ongoing and burdensome, meeting the eighteenth-century definition of treaty. While a required procedure can often be implemented by the President on independent authority, this is a different proposition; the next President would also be bound to continue the procedure if it is incorporated into a binding international agreement, and this might be a substantial constraint on future U.S. policy. Second, consistency with existing U.S. law should not be a justification for unilateral presidential agreement making (and again there is no precedent that it is). If the agreement's obligations are consistent with existing law, no legislative action is needed. However, embedding them in an international agreement fundamentally changes their character. Ordinary U.S. law can be repealed without an international law violation. Once the provisions become part of a binding international agreement, they cannot be repealed without violating international law (although as a matter of U.S. law, they can be repealed under the later-in-time rule). It is precisely the difference between ordinary legislation and international obligations that underlies the two-thirds requirement of the treaty-making clause. To say that something can be enacted as law by majority vote, and that it then can become an international obligation without further legislative approval, wholly subverts the limitations on treaty making. See Sean M. Flynn, *ACTA's Constitutional Problems: The Treaty Is Not a Treaty*, 26 AM. U. L. REV. 903, 903-04 (2011) (discussing this argument in the context of the proposed Anti-Counterfeiting Trade Agreement). As to the third ground, it seems plausible that a new treaty obligation that exactly tracks an existing Senate-approved treaty obligation would not require Senate approval. The argument is not that the obligation is so immaterial to bring it within the President's independent power; rather, it is that the Senate has already assented to the obligation. (It also may be true that undertaking a further obligation contemplated by a prior treaty is defensible on similar grounds: the Senate may give ex ante consent via a delegation.) It is possible that all of the binding obligations of the Paris Agreement fall within this category (the likely prior treaty is the U.N. Framework Convention on Climate Change), although that proposition is somewhat belied by the importance the parties seemed to attach to the Agreement. In any event, Professor Bodansky does not explain which of the binding commitments in the Paris Agreement, if any, precisely mirror (or are approved by) a prior treaty.

⁶² E.g., Paris Agreement, *supra* note 10, art. 2 (setting forth goal of "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and . . . pursu[ing] efforts to limit the temperature increase to 1.5°C above pre-industrial levels."); *id.* art. 4.1 ("Parties aim to reach global peaking of greenhouse gas emissions as soon as possible . . .").

⁶³ In contrast, assuming that Part I. B. *supra* is correct in concluding that the JCPOA is nonbinding, a future President could abandon the entire project of reaching an amicable arrangement with the current Iranian government without violating international law. To be clear, the Paris Agreement is constitutionally doubtful on this ground only if the commitments described here are new undertakings; as discussed, *supra* note 61, if they track undertakings in a prior Senate-approved treaty such as the U.N. Framework Convention on Climate Change, they would arguably not require renewed Senate consent. See Bodansky, *supra* note 44, at 18; Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993).

emissions reductions will not materially mitigate the threat, the President is not free to articulate or act on that view.

This seems to be a material commitment on the part of the United States. To be sure, the line between treaties and executive agreements is ill defined—and is probably not capable of precise definition given the ambiguity of the original sources. However, it is not clear that a commitment of this magnitude has previously been made as an executive agreement (rather than as a treaty, a congressional-executive agreement, or a nonbinding agreement) in the past.

CONCLUSION

In sum, neither nonbinding agreements nor binding executive agreements pose a constitutional problem in theory. Because neither are “treaties” in the eighteenth-century meaning of that word, their use is not precluded by the treaty-making clause’s requirement of Senate supermajority consent to “make Treaties.” Moreover, the President’s executive power over foreign affairs and diplomacy likely provides a constitutional basis for taking such diplomatic actions so long as they are not precluded by other constitutional provisions. But in their modern versions, as reflected in the JCPOA and the Paris Agreement, the President is pushing them in directions that threaten to undermine the treaty-making clause by making their bindingness uncertain or taking on more substantial commitments. This aggressive approach threatens to evade the limitations on the President imposed by the treaty making power.